University College Cork, Ireland
Coláiste na hOllscoile Corcaigh

Freedom of Disassociation: The Forgotten Corollary Right

Author

Stephen Lynch

(115320151)

Programme

LLM (Research)

Institution

University College Cork

Department

College of Business and Law

Head of Department

Ursula Kilkelly

Supervisor

Dr. Maria Cahill

Submitted

November 2021

Word Count

36,394

Table of Contents

Declaration

I, Stephen Lynch, do hereby declare that this thesis, submitted in November of the year 2021 as part of the LLM (research) programme run by the College of Business and Law of University College Cork, is entirely my own work, with due reference given to all authorities cited throughout, and that it has not been submitted, in whole or in part, as part of another degree programme, either in UCC or elsewhere.

Signed:

Date: : Stephen Lynch (Stephen Lynch)
14/11/21

Introduction

Freedom of disassociation, the forgotten right. A wise legal article of the past reborn anew. History, unfortunately, rhyming with the present as often as it repeats, has not left us with a clear articulation of a freedom of disassociation, yet it has brought to us social parallels with the past, from which we may reconstruct one fit for modern legal systems. In broad terms, the freedom to disassociate is exactly what the legal mind would expect it to be; the opposite of the freedom to associate, its corollary, perhaps. It is, in general terms, and for the duration of this piece; the right to be left alone and to withdraw from undesired associations.

I should advise the reader to ponder for a moment upon the implications, positive, negative or otherwise, of such a right. To consider for a moment the plethora of legal fields such a right would touch upon. This has been the chief challenge of this thesis, to condense and discriminate between so many potential avenues of investigation within our limited word count. The relevance of this right in a modern context lies in the aforementioned rhyming with the historical circumstances of its initial iterations. The growth of social heterogeneity (not merely limited to multiculturalism) across the globe[1] serves as the key driving force of this development. New identities which come with certain conditions and principles different from not just the diminishing mainstream, but also from other sub-identities, with each of these identity-groups bringing with them sets of demands as to how they should like to arrange their lives to suit said identity.[2] It is this increasing and observable social friction which a theoretical freedom to disassociate would seek, in a modern context, to alleviate.

The inspiration for this topic came after a discussion of corollary rights early in my undergraduate law degree, after which I pondered why some obvious corollary rights are recognised, while others, equally obvious, remain peripheral to the discourse of rights-theory. In particular, I found the work of David Oderberg, a professor of philosophy in the University of Reading, on the subject to be particularly

---

[1] See generally: Will Kymlicka, *The Global Diffusion of Multiculturalism: Trends, Causes, Consequences*, *Accommodating Cultural Diversity* (Routledge, 2007)
[2] Gowri Ramachandran, *Intersectionality as Catch 22: Why Identity Performance Demands Are Neither Harmless nor Reasonable* (2005) 69 Alb L Rev 299

enlightening[3], and a solid starting ground for anyone wishing to familiarise themselves with the conceptual basics of dissociative freedom.

Oderberg's work faces two limitations however, the first is shared with the present piece, in that the existing literature discussing freedom of disassociation is sparse, to say the least. The overwhelming majority of existing literature mostly discusses a freedom to disassociate in the context of group rights exclusively, and usually in a social science rather than strictly legal context. Which brings us to the second limitation; Professor Oderberg is, by his own admission, a philosopher primarily, and would rather "leave it to experts to think about the ways in which freedom of dissociation could be implemented"[4], which I have taken to mean that the Professor is looking for the more legal implications, rather than the logical, social or ethical ones he focusses on, to be fleshed out and contextualised by someone with the qualification and inclination to do so, to which I present yours truly.

Kimberley Brownlee, Professor of Philosophy at the University of Warwick, in contrast to Professor Oderberg's positive view of freedom of disassociation as a broadly defined claim-right, instead takes the view of freedom of disassociation as being necessarily limited by a plethora of ethical concerns which are inherent to modern liberal ethical reasoning and by the operation of other, competing rights, which she views the freedom of association to be among. [5] Professor Brownlee is also, of course, primarily a philosopher, though when her work touches upon legal topics her legal reasoning remains compelling. Hence to this thesis her work brought to my mind two avenues of exploration; how would a right to disassociate interact with modern liberalism? What clashes could be envisaged, and could they be fatal to the prospect of such a right? Furthermore, the question is also raised of whether the freedom of disassociation is negated by the existence of the freedom to associate, these questions are explored in two distinct sections of the theoretical framework.

---

[3] David Oderberg, *Should there be Freedom of Dissociation?* (2007) Journal of Economic Affairs, 37 (2), see also presentation at <https://www.stmarys.ac.uk/events/2017/05/cbet-dissociation> last accessed 30/10/21

[4] Ibid p179

[5] Kimberley Brownlee, *Freedom of Association: It's Not What You Think* (2015) Oxford journal of legal studies, 35 (2) pp. 267-282

Throughout this Thesis there shall be a handful of terms repeated in my reasoning which may appear conspicuously close to other concepts I would rather they were not confused with, or even terms which, lacking the context I am about to provide, would be taken more literally than intended. The first and perhaps most important to grasp of such terms is that of "social heterogeneity"[6], which I refer to throughout the thesis as being the driving necessity behind the freedom to disassociates forms throughout history and its re-emergence in the present. By this term I am referring, not simply to a multicultural, multi-ethnic or multi-faith society. I use the term to denote all of these more traditional, black and white categories, while also including economic and social class groups, interest groups, political movements and even sub-culture groups. I use such a broad term of necessity really, since in the first chapter, the historical overview, I cover over two millennia of human societies, and a term like "social diversity" is too politicized to convey the more clinical tone I wish to apply. In short, social heterogeneity just refers to different groups occupying the one "social space", which is the next term to define. By social space I do not mean a literal space, instead I am referring to a more conceptual space, a monument may take up ten square meters in real space, but have a colossal presence in the psyche of a single group in a given society, banning or promoting traditional forms of dress and language for a certain group takes up little physical space, but are examples of how a group may carve out distinct conceptual space wherein they may exercise/impose their identities freely, this being the essence behind the freedom to disassociate. This leads us to the next term; "social distancing"[7], this refers to the action of carving out a part of the social space wherein one may exercise the aforementioned identity, yet in the process of doing so, one is necessarily pushing away those who do not belong to the group, an example being a religious school or place of worship. The final term which is necessary to grasp before proceeding is that of "dissociative freedom", which is not to be confused with the freedom to disassociate. The freedom to disassociate is the subject of this thesis, it is a right which this thesis endeavours to articulate and explore the implications of its recognition. "Dissociative freedom" on the other hand, is a broader term, used to

[6] An example of its similar use in a similar fashion is found in Thomas C. Wilson's *Community Population Size and Social Heterogeneity: An Empirical Test* (1986) American Journal of Sociology 91 (5) pp. 1154-1169

[7] While I was using this term prior to the rise of Covid-19, on reflection one could say that the voluntary distancing practiced for reasons of public hygiene does indeed equal an exercise in disassociation.

describe the overall capacity of individuals in a given jurisdiction to act upon their dissociative instincts. The use of this term being necessary given that no jurisdiction, historically or in the present, has had a freedom to disassociate recognised as a fundamental right under that name or any term meaning the same, therefore a term to describe the extent of that type of freedom was necessary to coin.

The need for research in this area, what in most theses would be regarded as the niche between authoritative commentaries, is rather, as I have alluded to, more of a chasm, as scholarship on the subject of freedom of disassociation specifically is nearly non-existent, aside from the aforementioned examples. Instead, what one finds much more of, are works such as "Freedom of Association Is Not the Answer"[8] by Dr. Sarah Fine, senior lecturer in Philosophy at King's College London, in which she refers to freedom of association being used, on a group rather than an individual basis (in this case liberal democratic nation-states vs immigrants) as a tool of exclusion. There is a well-developed corpus of work on the freedom to associate being used in such a manner[9], but almost all of it is written from a philosopher's or social scientist's perspective, with little to no legal commentary per se, and it is this more technical-legal perspective which I feel will fill a gap in the literature.

Moreover, this attempt to articulate a well-defined freedom to disassociate has a further purpose; multiculturalism is state policy in Western countries at the current time.[10] This is likely to move from aspirational policy to concrete reality as the populations of Western countries become increasingly diverse over the coming century due to trends in migration and differential birth-rates in favour of the non-traditional ethno-cultural groups in Western countries.[11] Moreover, regional identity movements and the loss of religious consensus will continue to undermine traditional notions of national unity in modern liberal democracies. Will Kymlicka, Professor of Philosophy at the University of Kingston, Ontario recognises this reality and postulates that:

---

[8] Sarah Fine, *Freedom of Association Is Not the Answer* (2010) Ethics, 120 (2) pp. 338-356
[9] See also Christopher Heath Wellman, *Immigration and Freedom of Association* (2008) Ethics 119 (1) pp. 109–41.
[10] Will Kymlicka, *Multiculturalism and Minority Rights: West and East* (2002) Journal on Ethnopolitics and Minority issues in Europe, 4.
[11] Christopher Prescott, *Changing demographics and cultural heritage in Northern Europe Transforming narratives and identifying obstacles: a case study from Oslo, Norway* Cultural Heritage, Ethics and Contemporary Migrations, 1st Ed. (Routledge 2018) Ch 5

> "…the health and stability of a modern democracy depends, not only on the justice of its institutions, but also on the qualities and attitudes of its citizens: e.g. their sense of identity, and how they view potentially competing forms of national, regional, ethnic or religious identities; their ability to tolerate and work together with others who are different from themselves; their desire to participate in the political process in order to promote the pubic good and hold political authorities accountable; their willingness to show self-restraint and exercise personal responsibility in their economic demands, and in personal choices that affect their health and the environment; and their sense of justice and commitment to a fair distribution of resources. Without citizens who possess these qualities, 'the ability of liberal societies to function successfully progressively diminishes'"[12]

As such then, the requirement for liberal democratic nation-states over the coming century shall be to validate the identities of minorities, without the majority/plurality feeling as though this undermines their own ability to express their identity. The key challenge here being that many of these minority groups will be from traditional groups which have existed in these countries for quite a long time.[13] For example, how to harmonise the social ethics of a country which is one third Catholic, one third Islamic and one third non-denominational, or how to address the status of the traditional language of a given state if the new majority speak an entirely different language and so on. If Liberal democracies are to survive the 21st Century, then a method of harmonising these competing interests within a single state must be found.[14] Of course, if one is willing to abandon Liberalism or democracy altogether, plenty of solutions present themselves which do not require the freedom to disassociate. However, it is the proposition of the author that the freedom to disassociate provides a method of alleviating these tensions by empowering individuals to express the prerogatives of their identities amongst those who share

---

[12]Will Kymlicka and Wayne Norman, *Citizenship in Diverse Societies*, Oxford University Press 2005, p. 6.

[13] Craig, M. A., & Richeson, *On the precipice of a "majority–minority" America: Perceived status threat from the racial demographic shift affects white Americans' political ideology*, 2014, Psychological Science, 6, pp. 210–218.

[14] Nier, J. A., Gaertner, S. L., Dovidio, J. F., Banker, B. S., Ward, C. M., & Rust, M. C., *Changing interracial evaluations and behavior: The effects of a common group identity*, 2001, Group Processes & Intergroup Relations, 4, pp. 299–316.

said prerogatives, in a manner consistent with Liberal principles, without resorting to blunt segregation of groups, or forcing artificial identities upon citizens.[15]

Having established why this area merits further research, the objective of this LLM thesis shall be to establish a sound articulation of freedom of disassociation as a right, since it is such a novel concept, and due to the limited word count, I shall be satisfied to achieve that much. The argument in favour of this proposition shall rest on three principal investigations. Firstly, a historical overview and analysis of the conceptual foundations and components of freedom of disassociation. This shall put forth a set of what I propose to be the essential elements of the freedom to disassociate and chart the development of dissociative freedom in light of those elements from antiquity to the present day. Secondly, building on my findings from the historical analysis, I shall seek to establish a theoretical framework for the freedom to disassociate as being a fully fleshed out right, and test its compatibility with modern liberal democratic legal systems. Thirdly and finally, I shall test these findings by providing a doctrinal analysis of dissociative freedom and how it has manifested in the modern jurisdiction of Canada and compare these manifestations to the criteria we set in the previous chapters and see what lessons can be drawn as to the nature of that type of freedom in practise in the modern period. The key questions I shall be seeking to answer throughout this thesis shall be: what causes dissociative freedom to fluctuate and manifest itself more clearly in certain jurisdictions and at certain times more so than in others? Is the freedom to disassociate truly a corollary of the freedom to associate? Is freedom of disassociation truly compatible with liberalism, more specifically in the context of modern anti-discrimination theory? How can or has the right been operationalised in a modern jurisdiction? Finally, I shall be analysing how a modern jurisdiction dealt with the same pressures which historically led to an expansion in dissociative freedom and why?

To wrap up this introduction, I shall briefly explain the methodology used in this thesis. Firstly, I have eschewed the use of the comparative method for both the historical and contemporary jurisdictions, as, in the case of historical jurisdictions, it would simply be disingenuous to presume a comparison to be comprehensive

[15] Michael J Broyde, 'Freedom of Disassociation and Religious Communities: A Jewish Model for Associational Rights' (2016) Human Rights 10 (2) pp. 67-104

between the legal systems of antiquity and the antebellum or reconstruction era 19th century USA. This is given the vast gulf of context and time between the two, the limited word count and scope of this thesis, and the fact that neither possess a distinct freedom of disassociation to compare. Rather, they illustrate dissociative freedom in an amorphous sense, and carry with them the necessary components of what I am proposing is contained within this right, although certain comparisons will be made when pertinent, it is not to be the principal thrust of the reasoning. Instead, I have opted for a more socio-legal approach, wherein I shall assess the surrounding cultural and political context in which dissociative freedom has manifested itself in that time. In the context of modern jurisdictions, I have similarly rejected the comparative method due to the objective of that analysis being to highlight how similar sociological circumstances are at play in modern times as within the historical overview, and to draw conclusions from these observable reactions of a modern liberal democratic system to the same pressures, about the nature and function of dissociative freedom in the modern era. As far as the theoretical framework is concerned, given the subject matter is as much jurisprudential and hypothetical as it is relying on tangible precedent, I have sought to mix black letter and doctrinal modes of analysis with a more philosophical and ethics-based analysis. The chief danger of this methodology is, of course, since I am dealing with a topic with very little written directly about it, that I shall make immodest proposals and project my cognitive biases in favour of my own proposition onto texts which do not imply what I am taking from them. Should I successfully avoid this pitfall, I believe these methods shall be sufficient to achieve their purpose; to prove that the forgotten legal lessons of dissociative freedom may be learned anew.

In more modest terms, what this thesis seeks to achieve is to create a basis for understanding freedom of disassociation as an independent corollary right of the freedom to associate. This thesis is not intended to be the final word on the subject, and in order for the right to even be understood properly as an independent right will require further research again. Furthermore, it is my intent to provide sufficient detail as to allow others to conduct further research into the details of how the right interacts or would interact with other rights, and to demarcate its limitations and potential contradictions. It is with this in mind that we begin with an inquiry into the historical and conceptual foundations of freedom of disassociation.

Chapter 1

The Historical and Conceptual Foundations of Freedom of Disassociation

Section 1: Ancient Greece

Dissociative freedom is neither an especially novel nor even a particularly recent legal invention, possessing quite a long thread of historical development, as we shall now explore. This chapter shall be concerned with charting its evolution in a chronological manner, for clarity of argument inasmuch as compulsion of narrative. From the beginnings of this thread in Ancient Greece, to its more fleshed out form in the early 20th Century United States and finally to its decline over the latter half of the 20th Century. What must be understood by the reader before beginning, is that the author is not claiming that a well-articulated and clear freedom to disassociate, that is, a right to be left alone and to withdraw from undesired associations, existed in all or even any of these periods. Rather, it I proposed that a general trend towards dissociative freedom can be illustrated in the context of Western civilisation's legal development. It is further proposed that we can extrapolate several essential elements from the development of the freedom which are prerequisite or contributory to its existence. I propose that these essential elements are, firstly, that a sufficient degree of societal heterogeneity exists, this provides, as outlined in the introduction to this thesis, the initial motivation for the development of this right. Secondly, there must be a respect for, and strong protection of private property rights, why exactly this is the case shall be explored in more detail shortly. Thirdly, the notion of negative freedom must be well-articulated within the legal system, and finally, perhaps most crucially, individuals must be recognised as having rights of their own independent of the rights of collectives. The central question this Chapter shall seek to answer then, will not only be where in history do we see this Right develop, but moreover; why did it develop in these particular periods and jurisdictions?

So why begin with Ancient Greece? Or more specifically, Athens, in particular, during the Classical and Hellenistic periods (500BC-146BC). The reasoning is quite simple, on a practical level, Ancient Athens' legal peculiarities are exquisitely well-documented in comparison to many of its contemporaries and predecessors[16], it is simply the first and most secure anchor point for any chronological analysis of Western legal development from antiquity to begin.[17] On the theoretical level, Ancient Athens represents the first point at which two of the four essential elements can first be seen to exist within the one legal system; Societal Heterogeneity and strong private property rights and can tangibly linked in terms of legal development to future jurisdictions which do possess the other two essential elements. From the perspective of narrative, if one were to pick a contemporary or older jurisdiction such as, say, Ancient Ireland, Egypt, Mycenae or Persia, one runs up against not only a lack of clarity of record, and hence legal clarity[18], coupled with the lack of a link to the legal development of the following periods (how could one understand the Middle Ages without Rome, and Rome in turn without the Hellenic world?). Just as, even perhaps more crucially, there would be a deficit of understanding; Ancient Greece is simply more familiar a setting to tangibly understand for the reader and for myself. This leads in turn to a superior clarity of argument than would be present if one were to focus on a more ambiguously understood and potentially less relevant jurisdiction. Before moving on to examining the existence of the first two essential elements in this period, I will first explain why strong private property rights and protections are required as a prerequisite for dissociative freedom.

The most intuitive and straightforward reason for the indispensability of property rights in any framework of dissociative freedom is simply that, in order to exercise any degree of dissociative freedom, one must have somewhere or something to do it on or with in the first place. Further, that those goods, lands, businesses etc which may be the mechanism for such decisions be within the control of the person or persons exercising the freedom and be protected from outside interference. The exercise of the freedom must not result in immediate destitution for the person exercising it. They must have secure and adequate provision for their own needs in

---

[16] Morton Smith, *East Mediterranean Law codes of the early Iron Age* (1995) Religions in the Graeco-Roman World, 130 (1).
[17] Harold J Berman, *The Origins of Western Legal Science* (1977) 90 Harvard Law Review 894.
[18] Sir Henry Sumner Maine, Dante J. Scala, *Ancient law* (Routledge 2017).

the first instance. The only practical means of achieving this is through a robust regime of property rights. Fred Miller, in his discussion on Aristotle and Greek notions of property rights, defines property rights as follows[19];

> "Property rights are legal or moral relationships involving individuals and objects, consisting of aggregates or clusters of different sorts of rights or their correlatives (cp,, Becker 1977, p.'21). For example, the right to an object such as a jar of olives typically involves both a liberty to possess it and to put it to various uses as well as a claim right imposing duties of noninterference on the part of others with its possession or use. This typically implies the right to compensation or restitution if there is interference or harm to the object by others."

This definition highlights the second point in favour of property rights as a firm prerequisite for dissociative freedom is that they necessarily establish a principle of non-interference in the use of said properties. This general principle, as shall be explored later, is extended, and expanded upon with the advent of Liberalism.[20] But what of a society with strong dissociative rights and protections, but no property rights at all? More specifically a Communist, Mazdakite[21] or similarly egalitarian social view to the point of total private property abolition? We can put forth two real social models of this type, namely the theoretical, ideal, anarcho-Communist model of a society free of any state power, or a state-capitalist society such as the USSR or China under which all property is communally (state) owned. In the first example we can plainly say that in such a society a freedom to dissociate would necessarily be stripped of its meaning, even if theoretically protected. This is because in such societies at the barest minimum an individual will rely on the collective goodwill for access to life's essentials, with no capacity for negotiation with the collective, they do not possess the necessary bargaining power (ie property) with which to disassociate themselves from that collective in any meaningful way, save destitution and vagrancy. In the second example, simply put, dissociative freedom is a direct threat to the state's collectivist inclinations. Again, why or how could an individual

---

[19] Fred Miller, *Aristotle on Property Rights* (1986) The Society for Ancient Greek philosophy newsletter, 317, p. 2

[20] See generally *A. A. Long, Stoic Philosophers on Persons, Property-Ownership, and Community* (1997) Bulletin of the Institute of Classical Studies, 68, pp. 13–31

[21] See generally Shaki, Mansour, *The Social Doctrine of Mazdak in the Light of Middle Persian Evidence* (1978) Archív Orientální; Praha 46, pp. 289-306.

distance themselves from a collective which provides them everything they have? On a final note, on the historical record, we simply do not see strong dissociative freedoms, tendencies or protections in Communist countries, past or present, or in Communist theory, past or present.

Our next question then, is how and why the two essential elements of societal heterogeneity and strong private property rights are present in Ancient Athens?[22] Firstly then, we will be asking why did Ancient Athens have such strong private property rights, and what form did they take? Perhaps putting the cart before the horse so to speak, given how we described societal heterogeneity as the primary prerequisite circumstance for dissociative freedoms to develop, yet it is necessary to understand them in this order as Athens' reaction to heterogeneity is primarily reflected within its laws of property ownership[23], as we shall discuss later. Regarding private property rights, it is impossible to grasp why exactly Ancient Athens attached such importance to the concept without first understanding the unique geopolitical position and development of Greece. The geography of ancient Greece incentivised the development of a myriad of smaller, distinct and independent polities (*Poleis*), rather than a larger, more centralised state[24], such as (in the view of Machiavelli[25]) Persia in this period. The disparate farming clans merged into tribes, and hence *Poleis*, most likely for reasons of security, but retained their devotion to the family and the familial property as the bedrock of their society, even dedicating religious significance to the demarcation of property boundaries[26], as property meant agricultural output, which meant financial security and status as well as survival. As a result, later on, in Ancient Athens, citizenship was directly tied with private property ownership and descent, one had to be born Athenian to Athenian citizen parents and possess a certain amount of private property in order to be considered a citizen[27], a clear extension of the blood-linked pastoral origins of the Athenian

---

[22] Finley, *Land, debt, and the man of property in classical Athens* (1953) Political Science Quarterly, 68(2), pp.249-268.
[23] Todd, *The Shape of Athenian Law*, 1st Ed. (Clarendon Press 1995)
[24] Van Der Vliet, *The early state, the polis and state formation in early Greece* (2008) Social Evolution & History, 7 (1)
[25] Niccoló Machiavelli, *The Prince*, Ch. 4 http://www.gutenberg.org/files/1232/1232-h/1232-h.htm accessed 30/10/21
[26] Numa Denis Fustel de Coulanges, *The Ancient City* (Johns Hopkins University Press 1980) [originally published in 1864]), p. 59.
[27] Macdowell, D., *The Oikos in Athenian Law* (1989) The Classical Quarterly, 39 (1), pp. 10-21

state.[28] The result of this unique arrangement for Athenians was the fostering of a culture of civic participation from the landowning middle class, much lauded by Aristotle[29] in *The Politics* as forming the most stable basis for a *Polis;* "[w]here the multitude of middling persons predominates either over both of the extremities together or over one alone, there a lasting polity is capable of existing". These citizen-landowners were obliged to serve in the citizen armies[30] of their city-state, and it could very easily be said that, this group of "middling persons" so dominated the political scene of Athens that they secured for themselves rights of political participation and property the likes of which stood in stark contrast to the collective rights seen in the barbarian Northern and Eastern states, or even among the other Greek peoples themselves, such as in Thrace, Thebes or Sparta.[31] A description of this contrast (spoken with the Spartans in mind) is attributed to none other than the great Athenian statesman Pericles (C.495-429BC) by the historian Thucydides in his account of the Peloponnesian war:

> "The freedom which we enjoy in our government also extends to our ordinary life. There, far from exercising a jealous surveillance over one another, we do not feel called upon to be angry with our neighbour for doing what he likes".[32]

The rules and ownership of private property in Ancient Athens then, given the necessity to possess property in order to be considered a citizen, indelibly links Athenian notions of property ownership to its notions of personal autonomy and identity in contrast with other contemporary societies. But what of the Athenians who weren't citizens, landowners or even Athenian at all who lived in Athens?

This brings us to our second essential element present in Ancient Athens, its societal heterogeneity. One may see clearly the true and tangible importance of property rights in Ancient Athens when one looks at the distinction between Athenian citizens

---

[28] Murley, C., *Plato's Phaedrus and Theocritean pastoral* (1940) The American Philological Association, 71, pp. 281-295.
[29] Who it is worth noting, comes at this towards the end of the Hellenistic period, and lamented the destruction of that middle class shortly after.
[30] Victor Davis Hanson, *The Other Greeks,* 1st Ed. (University of California Press 1995), p. 9. Emphasises that the success of the Ancient Greek *Polis* was due to the farmer-citizen nature of the populace rather than the much lauded "citizen-soldier" one
[31] Osborne, R., *Spartan Law* (1988) The Cambridge Law Journal, 47 (3), pp.507-508.
[32] Thucydides, *History of the Peloponnesian War,* Book II Ch IV, accessed online 30/10/21 <http://www.gutenberg.org/files/7142/7142-h/7142-h.html>

and non-Athenians in Athens, ie immigrants and their offspring, known as Metics. The distinction was strict, but was no mark of disrespect or reflective of any xenophobic sentiments per se, with some of Athens most famed and celebrated philosophers such as Diogenes, Protagoras, and of course, Aristotle the Macedonian to name but a few being of their number. In fact, none other than the philosopher/historian/mercenary Xenophon lauds the presence of the Metics, regarding them as "a self-supporting class of residents conferring large benefits upon the state".[33] Indeed, many of their number provided services viewed as distasteful or menial to citizens, such as the successful banker Pasion, who was in fact a former slave[34], though most filled humbler roles as cooks, gardeners, farmhands, tradesmen and the like. That being said, what was the distinction and why did it exist? The reason for its existence was quite simple; citizenship meant military service. While the Athenians did occasionally hire some Metics as mercenaries.[35] In general, there were reservations against relying on foreigners to fight Athens wars[36], both out of natural distrust and also the fear that a disconnect would arise between warfare and the citizenry (which did eventually happen as the Delian league allowed Athens to offload much of the stress of their wars on their clients), and finally the fact that those with less skin in the game (Metics were barred from owning land, which by contrast was mandatory for citizens) would be more likely to break in battle.[37] Really the principle reason for this, in my view at least, was that Athenian Hoplites were self-armed, and part of the bar to citizenship was the ability to provide for oneself the full panoply of war.[38] The cost of the required arms and armour was simply not accessible to the bulk of Metics, the average wage being 3 obols per day for a labourer, while the cost of the full array cannot be pinned down exactly, it was certainly no less than several hundred silver drachma.[39] This all stands in sharp contrast of course to the serfdom of the Helots under the Spartans, who, unlike the Metics could not participate in the social and cultural life of Sparta. While Metics

---

[33] Xenophon, *On Revenues,* 2. https://www.gutenberg.org/files/1179/1179-h/1179-h.htm accessed 30/10/21.
[34] Read, F., *The Origin, Early History, and Later Development of Bills of Exchange and Certain Other Negotiable Instruments* (1926) Canadian Bar Review, 4, p. 440.
[35] Mathew John Kears, *Metics and identity in Ancient Athens*, 2013, University of Michigan Research Archive, p. 163 http://etheses.bham.ac.uk/5046/1/Kears14PhD.pdf accessed 30/10/21
[36] Trundle, M., *Greek mercenaries: From the late archaic period to Alexander,* 1st Ed. (Routledge 2004)
[37] Supra note 35
[38] Supra note 4.
[39] W. Kendrick Pritchett; Anne Pippin, *The Attic Stelai: Part II*, (1956) Hesperia 25 (3), pp. 178-328

were welcomed to Athens, Helots were confined to Lacadaemonia by force of arms.[40] It should be noted that the Tyrants, in particular in Syracuse, made it their business to grant Citizenship and land to their mercenaries, not to placate them, as by and large the mercenaries had no desire nor use for such land, but instead to legitimise the force by which they upheld their order.[41] The presence of the Metic class of non-citizens most likely cemented the sanctity of private property rights in the Athenian mindset, as, while the city-state experienced huge amounts of immigration due to its sea-based empire building, trade links, colonisation efforts and the slave trade[42], the distinction between Metics and Athenian-born citizens essentially insulated the Athenian polity from the cultural peculiarities and perspectives of alien peoples, and hence the protection of private property rights became a form of cultural and political isolationism/disassociation by proxy.

So having discussed which of the essential elements were in fact present in Ancient Athens, and how they came to be, we must now turn our attention briefly to which of those elements were not present, and the effect this had on the overall picture of Dissociative Freedom in this period. Firstly, while it may be true that in the Athenian Polis "[t]he citizens did have recourse not only to the protection *of* the state, but also and significantly *from* the state"[43] and hence, some degree of negative liberty in certain regards. It could not be said that negative rights as a category of rights held by the individual were recognised as legitimate, at least in the Liberal sense, as reflected by the fact that negative rights were not enforceable on an individual basis against the state, and instead had to be framed essentially as a class action suit.[44] Which brings us to our final missing element; individual rights and a respect for individual preference. The previous quote by Pericles can be regarded somewhat as a noble lie[45], in that as Isiah Berlin noted "[t]here seems to be scarcely any discussion of individual liberty as a conscious political ideal (as opposed to its actual existence)

---

[40] Paul Cartledge, *The Spartans; an Epic History*, 1st Ed. (Pan MacMillan 2003) p. 67
[41] Angelo Segrè, *An essay on the nature of real property in the classical world*, (Cambridge University Press 1943) p.76
[42] Hansen, *Demographic reflections on the number of Athenian citizens 451-309 BC* (1986) American Journal of Ancient History 7 (2), pp. 172-189
[43] Mario Mion, *Athenian Democracy*, (1986) History of political thought, 7 (2), p. 236.
[44] Supra note 4
[45] Plato, *The Republic*, Book 3 (Penguin Classics, 2016) (414BC)

in the ancient world".[46] To understand why these two elements were not, or rather could not have been present in the Ancient Greek Polis is in my view a simple matter; the densely packed political stage of Ancient Greece along with the presence of what were essentially Ancient superpowers such as Persia, and barbarian tribes to the North, required any political body to be absolutely united, like a ship's crew on a stormy sea, and hence most suggestions of limiting the power of the Athenian assembly to, for example, condemn Socrates to death for impiety and corrupting the youth, would have not only been seen as subversive, but also deeply unpatriotic.[47]

In conclusion then, a respect for the sanctity of private property and for the rights of its owners in its use is a prerequisite for any degree of a freedom to disassociate, as to exercise such a freedom one must have somewhere to do it and something to do it with, separate to the wider social space. So great was the respect for private property in Ancient Athens, that its protection was considered the most solemn part of the oath which every Athenian Archon took upon ascending to office.[48] Karstedt notes, the only state power which limited the rights of a property owner on his property was that of the protection of the oil trees.[49] Regarding Ancient Athens' handling of its societal heterogeneity, we can begin to perceive that this 'distancing' if you will, between citizen and non-citizen in the example given, stems from a form of mutual benefit. The actors do not make a pretence of equality or of similarity, the relationship is mutually beneficial, but principally serves to allay the matters which would serve to cause friction between the two groups of individuals occupying the one social space. In this *quid pro quo* arrangement, the Metics gained access to the well-developed, peaceful and prosperous Athens, were not obliged to fight for the state and paid only a token tax, but did not conversely have rights to own land or interfere in the native politics such as would surely have caused friction with the native Athenians even as it would today.[50] These traditions of social distancing for the sake of the commonwealth combined with strong property rights, were, like so many other Greek ideas, exported through her colonies. In particular our attention

---

[46] Isaiah Berlin, *Two Concepts of Liberty, Four Essays On Liberty,* (Oxford University Press 1969), p. 124

[47] Deborah Nails, *The trial and death of Socrates. A Companion to Greek and Roman Political Thought*, (Blackwell Publishing 2009) pp. 321-338.

[48] Supra 16 p. 90

[49] Supra 16 p. 96

[50] Ben Akrigg, *Metics in Athens. Communities and networks in the ancient Greek world* (Oxford University Publishing 2015) pp.155-73.

shall now turn to she who is often regarded as the inheritor of Hellenic civilisation, Rome.

Section 2: The Roman Republic and Pax Romana

Before diving into the meat and bones of this section, we must justify why Ancient Rome is the next historical stepping-stone for dissociative freedom. Simply put, Rome is both a direct inheritor of the Hellenistic social, political, cultural and legal legacies, while simultaneously presenting itself as the progenitor of much of the Medieval and subsequent legal orders.[51] It is of course, as in the previous case, similarly well-documented. More importantly perhaps, we have detailed accounts of its legal development over time, as opposed to simply the fleeting snapshots of the legal system we have for Ancient Athens.[52] Regarding the essential elements of dissociative freedom in Ancient Rome, we see it has inherited, both by process of concurrent evolution and cultural exchange, the strong property rights of the Greeks[53], along with its citizen-soldier-landowner based political system. However, in distinction to the Athenians, these developments occurred in quite a homogenous polity, and it was only over the course of its territorial expansion we see the Roman legal and political system adjust to a growing societal heterogeneity, and the impact this had on individual dissociative freedom. The central question this section shall endeavour to answer shall be: how did the growing heterogeneity of the Roman Republic affect its pre-existing regime of strong property rights, and moreover what was its overall effect on dissociative freedom as a whole?

Our first matter for discussion then, shall be what exactly the property rights of Roman citizens in the Roman Republic were, and how they came to be. As before, we must begin by briefly analysing the geopolitical circumstances in which Rome developed. Rome, as an agrarian society based on tight family connections[54], as opposed to the maritime Athenian one, found itself beset from all sides by enemies.[55] To the north, Gallic tribes constantly raided and invaded. To the east, Latin cities and the Apennine tribes of the Samnites. To the West, lay malarial marshes and the sea, where pirates raided Italian shores. To the south the Etruscans saw Rome as an upstart power threatening to usurp their position of prominence on the peninsula.

---

[51] Harold J. Berman, *The Origins of Western Legal Science* (1976-1977) 90 Harvard Law Review 894
[52] George Mousourakis, *The Historical and Institutional Context of Roman Law,* 1st Ed. (Routledge 2003)
[53] See generally: Levy, *West Roman Vulgar Law: the law of property,* 1st Ed. (Hein publishing 1951)
[54] Crawford, *Early Rome and Italy, The Oxford Illustrated History of the Roman World,* 1st Ed. (Oxford University Press 2001)
[55] ibid

From the beginning then it is clear that Roman society was necessarily one in which military service was seen as vital to the commonwealth.[56] The Romans were forced by their circumstances to develop a citizen-soldier-landowner model almost identical to the Athenian (undoubtedly inspired by the Greek colonies in Southern Italy).[57] The natural result of this was that the Republican ethos of governance "[g]enerally downplayed the [later] Augustinian fear of an inherently wayward people, who require strong leadership if anarchy is to be avoided".[58] This led to the establishment of strong protections for property rights, given the centrality of property ownership to political rights, and to familial status:

> "Ulpian asserts that Roman [property] ownership may be understood as an extension of the mastery of the *Pater Familias* at home. This assertion leads us directly to the conception of a [kind of] property sovereignty because this dominium is extended to a sphere of rights where law, ie, the state, may not interfere but customs and morals can."[59]

This mastery is reflected in the sacrosanct and unlimited nature of a Roman citizen's right to dispose of his property as he saw fit, which has been broken down most excellently by Bonfante into five broad points[60];

1. The real estate of a Roman citizen in ancient times had boundaries traced with the solemn and sacral ceremonial of the *delimitatio*.
2. Roman property in its origins was an absolute ownership, internally illimited.
3. Roman property repelled every influence from outside and had an absorbing power as appears from the rules on its accession.
4. The Roman estate was *immunis* ie free from any public or private tax as [to levy a tax on property was considered an exercise of absolute ownership, as Emperors later claimed].

---

[56] See generally: Claude Nicolet, *Space, Geography, and Politics in the Early Roman Empire*, 1st Ed. (University of Michigan Press 1991)
[57] Sumner, *The Legion and the Centuriate Organization* (1970) Journal of Roman Studies, 60 (1), pp. 67-78.
[58] Philip Pettit, *Republicanism: A Theory of Freedom and Government*, 1st Ed. (Oxford University Press 1997) p. 210
[59] Supra 16 p.103-104
[60] Bonfante, *Scritti in onore di Giuliano Bonfante I / II*, (Paidea 1976) p204

5. Roman property was perpetual, ie, it was not possible to establish a right to property for a certain term of years, after which it reverted to the original seller.

The strength of this system's protection of private property rights indicates the strong social position and political relevance of property owners, who saw the exercise of *Dominium eminens* by the state over their property (payment of taxes on and regulations of use of their property) as impositions tantamount to servitude which would reduce the social standing of their *familia*.[61] In short, the Roman citizen's property was not communal, or even partially shared. It was entirely and absolutely the dominion of the *Pater Familias,* sanctified by religious ceremony, into which none could interfere without his consent. Indeed, his property was so much his own it was even immune from any levy or tax, his title couldn't be diluted, and upon his death would be inherited by his personally appointed successor/s.[62]

This leads us to the question; if such strong property rights developed in a relatively homogenous early Roman society, what was the effect on property rights, and dissociative freedom in general, of the growing heterogeneity which came with territorial expansion? To address the former, the growing heterogeneity of the Empire gradually led to the political irrelevancy and contraction of the *Plebeian* class.[63] As the landowning middle class backbone of the Republic became obsolete with the influx of huge amounts of slaves from Rome's successful conquests, leading to the creation of the larger *Latifundia*.[64] The resulting contraction in the number of those eligible to be *Plebeians* led to the inevitable proletarianisation of the Roman military, which in no small part led to the end of the Republic,[65] as soldiers became loyal to the commanders who paid their wages, rather than to the state, finally making the citizen-soldier-landowner dynamic, which had helped secure such strong property rights, now unviable. The result of this was, predictably, an erosion of Roman citizen's property rights over time, eventually leading to the Emperor Diocletian's abolishment of the legal distinctions between the *Fundi Italici* in the

---

[61] See generally: Jane Gardner, *Family and Familia in Roman Law and Life*, 1st Ed. (Oxford university press 1998).
[62] ibid
[63] Tenney Frank, *The Economic History of Rome to the End of the Republic*, 1st Ed. (Forgotten Books 2012).
[64] White, *Latifundia* (1967) Bulletin of the Institute of Classical Studies 14, pp.62-79.
[65] Richard Edwin Smith, *Service in the Post-Marian Roman Army*, 1st Ed. (Manchester university press 1958)

Roman heartland, and the non-Italian provincial estates, establishing the state's *dominium eminens* over all private property and ending the freedoms of use and from taxation which citizens had previously enjoyed.

While it cannot be said that Roman law had a very strong respect for and codification of individual rights[66], as there was a myriad of differing grades of citizenship, from *Cives Romani* to *Provinciales,* with dozens of qualified grades in between and shifts in importance varying with time and geography. It can however, in my view, be said that a turning point in dissociative freedom had taken place in the development of the Roman *Clientela* relationships, wherein the emphasis began to shift towards the capacity of an individual to exercise dissociative freedoms. In such relationships, the *Cliens* would serve a *Patronus,* always a wealthier, more educated and higher status man than the *Cliens,* dutifully in exchange for protection, whether it be from tax collectors, financial destitution or for representation in court[67]. During the Republican period, this had been used to bind society together and to influence elections. In later times, generals and governors, such as Caesar himself, would be considered *Patronus* to their men, who would fulfil their obligation through direct service.[68] By the late empire, the term had largely come to refer exclusively to a body of protectors, sworn men, a personal warband so to speak. During the *Pax Romana*, this system became the bread and butter of Roman social organisation as; firstly, the stability of the empire allowed legal recourse to be taken for violations of contract, and secondly, this stability facilitated the development of a massive trade network and boom in commerce across the empire. Thirdly, the security lost due to the collapse in property ownership, (especially after the Diocletian reforms) and hence political and social security amongst the (former) Plebes was sought within the protection of powerful patrons, in the system of *Clientela*. The reason this system constitutes such a departure from the past is that it is the first example of a system in which dissociative rights now held by the individual could be litigated over directly with the state, so long as they upheld their duty to their Patron, who in turn had his own patrons with his own duties and rights within the relationship, from the lowest peasant to the Emperor himself.

---

[66] Melleuish, *Europe, Rome and empire: Individualism, social solidarity and decline* (2012) Policy: A Journal of Public Policy and Ideas, 28(1), pp. 38–42.
[67] Cicero performed this function for many of his *Cliens*
[68] Cynthia Damon, *The Mask of the Parasite: A Pathology of Roman Patronage*, 1st Ed. (University of Michigan press 1997)

In conclusion then, Ancient Rome possessed, as before, two of the essential elements of dissociative freedom, strong property rights and societal heterogeneity. However, unlike the Athenians the Roman state's response to a growth in societal heterogeneity was to weaken Property Rights and the exclusivity of citizenship (Caracalla's Edict in 212AD granted all Freemen in the Empire equal citizenship). The Roman private individual's response was to retreat into a system of legally enforceable *quid pro quo* arrangements with their social superiors, in order to obviate the stresses of a loss of political clout which occurred due to the collapse of the citizen-soldier-landowner dynamic. When the Western Empire fell, the *Comes* and other leaders of troops would carve out personal fiefs for themselves using these sworn men[69], a relationship which would continue into the middle ages, with these men becoming known as *Vavasour*[7071], or vassals of vassals (subsequently, upon the collapse of feudalism and rise of Absolutism, the sole sovereign would become *Patronus* to the nation, and the breach of his duties to protect the populace in the Hobbesian sense would in no small part lead to the end of absolutist monarchies).[72] Suffice it to say, the Germanic successors to the Western Empire, with their own oath-based legal systems[73] inserted themselves more snugly into the remnants of Roman society than many would credit, creating, over centuries, societies so homogenous that they exist to this day. Roman jurisprudence making its way into the legal codes of these kingdoms, such as in the *Lex Romana Visigothorum*, *Lex Romana Burgundionum* and the Ostrogothic *Edictum Theoderici.*[74] This Dark Age adoption of Roman law by the nascent Western European kingdoms brings us into the Middle-Ages, in which the Church carried forward much of Roman customs and legal traditions. Needless to say, this fusion of centralised Latin governance with the more individualistic and decentralised Germanic traditions would have important consequences for the development of dissociative freedom.

---

[69] John Michael O'Flynn, *Generalissimos of the Western Roman Empire*, 1st Ed. (University of Alberta press, 1983).
[70] Riley-Smith, *Lords, Lordships and Vavasours. In The Feudal Nobility and The Kingdom of Jerusalem, 1174–1277* (Macmillan 1974) pp. 21-39.
[71] Bloch, M., *Feudal society*, 1st Ed. (Routledge 2014) p. 422.
[72] Balke, F., *"Speaking-For" and the Lack of Representation: Advocacy in Hobbes and Rousseau* (2020) Law & Literature, 32(2), pp.223-236.
[73] Colin F. Wilder, *The Importance of Beginning, Over and Over: The Idea of Primitive Germanic Law*, 1st Ed. (Brill 2012).
[74] Supra 7 p. 133

Section 3: The European Middle Ages to the Reformation

The Middle Ages of Europe (476-1453AD) shall be the next period of analysis, but what makes this period so special in the development of dissociative freedom? On the practical level, it is simply the next period after the fall of Rome when records once more become somewhat reliable and less fragmented.[75] It also provides greater depth of context for understanding the later Reformation and Enlightenment periods. If dissociative freedom is here being analysed as a distinctly Western construction, then no historical analysis of such a construction can, or should be, attempted without first addressing its roots in the Medieval period. On the theoretical level, I have admittedly made a broad-brush stroke by including a myriad of jurisdictions over several centuries. Yet I have not done so without good reason, as all of these jurisdictions share a similar political and religious organisation in this period, the Catholic church being the torchbearer of Roman jurisprudence and hence legal legitimacy during this period.[76] With regards to which of the essential elements of dissociative freedom manifest themselves in this period; the answer appears less cut and dried than it may have in previous chapters. The Medieval period was in many respects a transitionary period between the Ancient and the Modern[77], and for our ends it marks the beginnings of the development of the concepts of individualism, freedom of conscience and hence negative freedom more generally. In concrete terms of course, the Feudal societies of this period had strongly protected property rights[78], given the centrality of agriculture to the economic and social order, but what of the presence or lack of social heterogeneity? The narrative of analysis for this Section shall be how the Medieval legal and social system reacted to growing frictions in a rigid class structure coupled with the growth of dissident philosophical and religious factions.[79]

So, could Medieval societies be said to have been socially Heterogenous? While it would certainly be ahistorical to describe most Medieval societies as “homogenous”

---

[75] Theodore E. Mommsen, *Petrarch's Conception of the 'Dark Ages'*, (1942) Speculum, 17 (2)
[76] Thomas Woods Jr., *How the Catholic Church Built Western Civilization*, 1st Ed. (Regnery Publishing 2012).
[77] Hence the term “middle” ages
[78] Alexander Volokh, *Property Rights and Contract Form in Medieval Europe*, (2009) American Law and Economics Review, 11 (2), pp. 399–450
[79] Hilaire Belloc, *How the Reformation Happened*, 1st Ed. (TAN books 1992)

in the ethnic, cultural or linguistic sense[80], the fact remains that, following the fall of Rome and the collapse of the Western Empire, the Catholic Church became the primary preserver of the learning of the ancient world[81], much of which was lost in this period, along with becoming the Chief inheritor of its political legitimacy, wielding serious social and political clout across Western and central Europe, a territory which, with few exceptions, shared a single system of political organisation; Feudalism, a system which Jarret describes as;

> "Roman law filtering through barbaric custom, church law that included local decisions in East and West, personal formulations of individual kings or such as required traditional prestige from being linked to a royal name [and yet], Feudalism was neither Roman nor Teutonic, neither ecclesiastical nor royal"[82]

This system was predicated upon the Agrarian nature of the economy following the collapse of industry in Post-Roman Europe[83], leading to land ownership being synonymous with political and social titles. So, it could be said, with a degree of accuracy that in the early Middle Ages, the Catholic European societies shared a similar religious, moral, political, economic and legal organisational dynamic during this period, and so for our purposes can be considered relatively homogenous.

Before proceeding with our discussion of what the Medieval reaction to a growth in social heterogeneity was, the nature of that heterogeneity, and how its growth came to be, it is first necessary to establish the extent and nature of private property rights in this period. This is to prove the existence of at least one well-articulated account of one of the essential elements of dissociative freedom, given the nebulous status of the others in this period. For the sake of clarity, brevity, convenience, and the reader's sanity, I shall only give an account of Feudal English Land Law, so as to illustrate a more or less normative property regime of the period. The Norman invasion brought continental Feudalism to England[84], with the King parcelling out the conquered territory between his Lords as an estate in land, an interest in real

---

[80] Jan Sokol, *Europe Speaks: linguistic diversity and politics*, 1st Ed. (Routledge 2012) pp. 185-193.
[81] Supra note 76.
[82] Bede Jarret, *Social theories of the Middle Ages*, (Ernest Benn Limited, 1926) p. 7.
[83] Peter Heather, *Empires and Barbarians: The Fall of Rome and the Birth of Europe*, 1st Ed. (Oxford University Press 2010).
[84] J. O. Prestwich, *Anglo-Norman Feudalism and the Problem of Continuity, Past & Present*, 1st Ed. (Oxford University press 1963) pp. 39-57.

property which was possessory, but subject to the caveat of *Nulle terre sans seigneur* (service to the King, whether by military service, taxes etc, in exchange for the right to own land), including any real property found upon this land which was privately owned by the King's subjects. These infeudations were further subinfeudated among lesser lords, and again and again until tenure of a particular subdivision was held by an individual subject, with the King acting as Lord Paramount (meaning he did not owe his land to a superior lord) at the top of the pyramid.[85] These landgiver-landuser relations were reminiscent of the Patron-client relationship of the Romans, with customary and common-law rights and obligations binding both parties. While such rights and obligations varied so widely by class, locality and time that it is impossible to be exhaustive here, suffice it to say that it was the flagrant abuse of such obligations by King John which gave cause to his Barons to have him agree in Chapter 39 of the Magna Carta that:

> "No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not send forth against him, nor set against him, unless by the lawful judgment of his pears or by the law of the land"[86]

The key to this system's functioning was the opposite of what its structure would appear to entail; the decentralisation of power over land, as no King could ever hope to practically exercise direct control over more than a handful of personal estates, one is left with the conclusion that the purpose of the King's position at the top of this long hanging chain of derivative ownership is less a despotic imposition on individual property ownership, but rather more a source for divining the "genealogy", and hence the strength of one's personal titles to land. So, rather tidily I think, we can conclude that, although the exact details varied across many jurisdictions, the general thread of the Feudal system was one wherein property rights were, once the correct title to the land was appropriately held, quite strong and well respected for the title bearer.[87]

---

[85] Neilson, G., *Brus versus Balliol, 1291-1292: The Model for Edward I.'s Tribunal* (1918) The Scottish Historical Review, 16 (61), pp.1-14.
[86] Holt, J C. *Magna Carta* (Cambridge University Press, 1992)
[87] Milsom, *The Legal Framework of English Feudalism* (1981) Michigan Law Review 79 (5), pp. 1130-1164

As we mentioned before, after the fall Rome, the Church became the inheritor not just of classical learning, but also a source of legal, social and philosophical legitimacy.[88] As such it behoves us to analyse the primary theological and philosophical development of this period, Scholasticism[89], its effect on the development of legal theory generally, and dissociative freedom specifically. In short, the effect of the Scholastics was to create the idea of a legal individual, capable of independent, rational thought, and in particular, of forming his own valid judgements and even condemnations of positive laws. However, prior to looking into the effects of this development, first we must address what Scholasticism, in particular Thomism is, and how exactly it came to create the legal individual. Scholasticism is, at its simplest, a form of elevated and structured argumentation, in which a question is asked, answers are given, those answers are subjected then to criticisms, and those criticisms responded to in turn, similar to Socratic debate in its dialectical nature.[90] This form of debate became popular in European universities in the 11th and 12th centuries as Ancient Greek philosophy was gradually rediscovered in Western Europe and a return to relative stability in the Church allowed for closer analysis of Church doctrines and scriptural interpretations.[91] This movement culminated in the works of St. Thomas Aquinas, who successfully reconciled Catholic teaching with Aristotelian thought. From Aristotle, Aquinas put forth the proposition that Man is a rational animal, and that his laws must be "an ordinance of reason for the common good, made by him who has care of the community, and promulgated"[92]. Bearing this requirement of reason and common good in mind, Aquinas differentiated between four different species of laws, not just recognising Man-made positive laws, while also giving due recognition to substantive Divine law, which is those parts of the Eternal law revealed by God through scripture (the Eternal law being the unfathomably perfect and complex laws by which the Universe operates), yet he also managed to bridge the gap between these two seemingly disparate bodies of law, by revitalising another Aristotelian concept; Natural Law. At

---

[88] Deanesly, M., *A history of the medieval Church: 590-1500*, 1st Ed. (Routledge 2004)
[89] James Hankins, *Humanism, scholasticism, and Renaissance philosophy, The Cambridge Companion to Renaissance Philosophy*, 1st Ed. (Cambridge University Press 2007) pp. 30-32
[90] Rosenwein, *Emotional communities in the early Middle Ages*, 1st Ed. (Cornell University Press, 2006)
[91] ibid
[92] St. Thomas Aquinas, *Summa Theologica*, Q II-I, Q.90, Art. 4

risk of butchering his own explanation of this concept. I shall quote St. Thomas at length before providing context;

> "Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. Hence the Psalmist after saying (Psalm 4:6): "Offer up the sacrifice of justice," as though someone asked what the works of justice are, adds: "Many say, Who showeth us good things?" in answer to which question he says: "The light of Thy countenance, O Lord, is signed upon us": thus implying that the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law."

So, from this we get the idea that rational individuals are capable, by use of their inherent reason, to discern good from evil of their own accord, and that hence the positive laws should be reflective of this capacity. These ideas bled from the cloisters of the monasteries to the very doorsteps of the Kings, with Bracton capturing the spirit of the times in 1268, announcing that "[t]he King must therefore limit his power by the laws, since nothing better becomes authority than that it should live by the laws"[93] as can be observed by the slew of Charters foisted upon various monarchs across Europe by their nobility, limiting their powers and imposing a crude rule of law, such as the Golden Bull of Hungary (1222), the Danish Great Charter or Handfaestning (1282) and the Aragonese Privileges of Union (1287). Most pertinent of all of these Charters, both to our purposes and Western Legal thought writ large, must of course be the aforementioned Magna Carta (in fact a series of agreements), initially signed in 1215 by the English King John and rebel Barons at Runnymede, it changed forever the landscape of English law and governance by granting inalienable rights and liberties to Freemen, and thereby

[93] Bracton, *De Legibus et de consuetudinibus Angliae* (1268), ed. G. E. Woodbine (Newhaven, 1915) vol. ii. Pp. 19-28.

creating a clear legitimation of the rational individual in the English legal system, satisfying another of the essential elements of dissociative freedom.[94]

The development of individualist thought amongst medieval scholars contributed towards a growth of agitation in favour of increased freedom of conscience, and hence the development of negative liberty, this was to be the formula by which true social heterogeneity would be introduced to the Medieval world-order. Indeed, even before the time of Martin Luther, reformist preachers and scholars such as Jan Hus gathered great followings with their insistence on a more direct and individual man-God relationship, as Rudolf Schussler outlines:

> "The emergence of sceptical arguments in the late Middle Ages is regarded as a sign of an innovative capacity of scholasticism that was not only preserved through the fourteenth century but did survive deep into the modern era"[95]

The thrust of theological (and consequently legal) discussion in this period surrounds the individual Christian's capacity to relate to God on an individual level.[96] Figures such as Desiderius Erasmus pushed an idea of the substance and not the forms being the point of the faith, famously lamenting that; "[u]nfortunately most Christians are superstitious rather than faithful, and except for the name of Christ differ hardly at all from superstitious pagans".[97] Martin Luther took this several steps further when he posited his 99 Theses, in particular the notion that a layman could interpret scripture by himself without a need for the Theological instruction or doctrinal lenses of the Church, to grossly oversimplify his position. Following the tumult of the ensuing Thirty years war over religious disputes, the Treaty of Augsburg was signed in 1555[98] between the Catholic and Protestant powers, S. 28 of which in particular guarantees the right of private citizens to practise their faith in private if it were not the established state church, free from molestation by authorities. This set the tone

---

[94] Painter, S., *Magna Carta* (1947) The American Historical Review, 53(1), pp.42-49.
[95] Schüssler, Rudolf. *Jean Gerson, moral certainty and the Renaissance of ancient Scepticism,* In Harald E. Braun & Edward Vallance (ed.) *The Renaissance Conscience* (Wiley-Blackwell 2011) p. 13.
[96] Lynch, Christopher, *Individualism and Christianity,* 1st Ed. (Routledge 2001)
[97] Cahill, *Thomas, Heretics and Heroes,* 1st Ed. (Double Day, 2013) p. 134.
[98] Though it is worth noting this peace was not honoured, it did pave the way for future agreements

for future agreements and legal developments, beginning the development for the first time in our analysis of negative liberty in a dissociative context.

In conclusion, one might be struck by the fact that all four of the essential elements have been discussed in this section as having existed to some degree at least at one point or another, however, it cannot be said that dissociative freedom in the true sense existed as a well-articulated claim-right throughout this period. Rather, what can be said, is that, over the course of centuries, building on their classical inheritance, the Scholastics opened up a dialogue on the rational nature of the individual. This gave rise to legal Charters such as the Magna Carta which enshrined the individual liberties of Freemen. Consequently, this creation of the Individual opened a further dialogue on the validity of a rational individual's conclusions on religious questions upon the application of his faculties of reason, and that this in turn led to the Reformation and a growth in meaningful social heterogeneity. This forced legal systems, by the 16th and 17th centuries, to begin accommodating a greater diversity of religious convictions, thus birthing negative liberty as we now know it, the fourth of our essential elements. What the period from the Dark Ages to the Reformation achieved in terms of the development of dissociative freedom, was to gather together the primal forms of the necessary essential elements, which would in turn be refined and built upon in our next period, the Enlightenment, as we shall presently explore.

Section 4: The Anglo-American Enlightenment

Having established how the essential elements as concepts came to exist, this section shall be dealing exclusively with the Anglo-American Enlightenment. It was only in America where a "Protestant individualism converged with the interests of a growing middle class of merchants, tradespeople, professionals and artisans"[99], to produce a people schooled in self-governance and independence, with a passion for liberty and a resentment of the absolutism of the Old World[100]. In other words, this was quite fertile ground in which dissociative freedom could blossom, and it was "[b]y pushing and pursuing the principle of Parliamentary Absolutism it was England, and not America who abandoned the ancient traditions of English liberty…from Bracton to Blackstone".[101] As John Adams himself put it "[t]he revolution was affected before the war commenced. The revolution was in the minds and hearts of the People".[102] Suffice it to say, this period is unique in the history of Dissociative Freedom, in that, while the Thirteen Colonies inherited from English law and thinking a long tradition of civil liberty, consequently, upon independence, the American Founding Fathers took it upon themselves to build a new political system from scratch. This system, rather interestingly for our purposes, was the first time a single jurisdiction possessed all four of our essential elements of dissociative freedom. From the English tradition the new state inherited strong private property rights, and as mentioned before, a tradition of individualism. Furthermore, Enlightenment thinkers such as John Locke further developed concepts such as negative liberty and its relationship with the aforementioned elements. The American Founding Fathers were also deeply concerned by the potential evils of what they termed "faction" in their new state, which for our purposes, boils down to essentially recognising the fact that the new state was socially heterogeneous. Given the new state's *laissez faire* ethos towards social, political and religious affairs of individual citizens, they recognised that whatever system they devised would have to accommodate future, unforeseen

---

[99] Kenneth M. Dolbeare and Michael S. Cummings, *American Political Thought*, 6th Ed. (Chatham House 2009) p. 2

[100] Alexis De Tocqueville (translated by Henry Reeve), *Democracy in America*, published online by Penn State University http://seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf accessed 30/10/21 at p 489

[101] Clarence E. Manion, The Natural Law philosophy of the Founding Fathers (1949) Natural Law institute proceedings 3 (16)

[102] John Adams, letter to Hezekiah Niles, 14 Jan 1818

divisions which may arise between Citizens. As such the subject of this sections shall be firstly, how these elements came to be and what they looked like, and secondly their combined effect on dissociative freedom more generally.

So, the first question we must answer in looking at how the essential elements came to manifest themselves in America in particular is that of; where and how the philosophical break between America and its progenitor, England, came to be. I believe that the split stems from the inspiration the American colonies took, in particular by the Founding Fathers, in the work of John Locke, while the English were still operating on the ideas of Thomas Hobbes. In the words of Leo Strauss "[i]f we may call liberalism that political doctrine which regards as the fundamental political fact the rights, as distinguished from the duties of man, and which identifies the state, with the protection of safeguarding these rights, we must say that the founder of liberalism was Hobbes"[103], this liberalism would one day become the "Classical Liberalism" of the Founding Fathers. Hobbes envisioned that man in his state of nature followed his own interests, which drove men into a "war of all against all", and hence for their own protection they, in handing over their freedoms to a state, created an artificial God.[104] This "Leviathan" claimed absolute sovereignty as its right. This transfer of sovereignty was achieved via the social contract, in which the people handed over their rights in exchange for protection. The sovereign in turn claimed its legitimacy from its ability to protect the people and their property.

This absolutist view of sovereignty took root in much of British and Continental thought. Specifically, to our ends; in Parliament's claim of absolute sovereignty to legislate for the colonies despite the protestations of the "free Englishmen" living there. Though it can also be seen in the French revolutionary tradition, for example Rousseau's concept of sovereignty (and authority) was also absolute, despite being vested in an imaginary system of direct democracy. Needless to say, the assorted continental monarchies were hardly hostile to or unfamiliar with the notion of undiluted authority. These views were tempered and built upon by Locke, who "merged Hobbes' premises of nature with Harrington's emphasis on property and

---

[103] Quoted in *Reflections on Ancient and Modern freedom* by Alexander Rosenthal Pubul at p. 2.
[104] "One person, of whose acts a great multitude, by mutuall covenants one with another, have made themselves every one the author" Thomas Hobbes, *Leviathan* (1651) Project Gutenberg <https://www.gutenberg.org/files/3207/3207-h/3207-h.htm> last accessed 30/10/21, ch 17 para 88

formal egalitarianism to form a complete vision of the origins and nature of government, which has dominated American thinking to the present day".[105]

Hobbes believed that the natural rights of men ceased to exist upon their sublimation into a commonwealth.[106] In Locke's eyes, Hobbes was most mistaken in thinking that the good of the commonwealth could only be achieved by the total submission of private will to the collective cause. Rather, Locke saw that those private wills, by promoting property rights, material wellbeing and economic activity were in fact the glue which held together a societal system of interdependent and mutually beneficial relations on a mostly voluntary basis. Consequently the protection of private property rights should be a matter of the upmost concern for a commonwealth.[107] Moreover, Locke took less of a dim view of human nature, and believed that we have the capacity to know the rights, such as "life, liberty and estate", that were ours by the law of nature and our use of "right reason". Liberty of course being somewhat of a euphemism for the two essential elements of dissociative freedom I have termed individualism and negative freedom, as a liberty is something exercised by an individual free from fear of tyrannical intervention by a state. As Manion asserts, the Founding Fathers were very much influenced by the works of John Locke, as;

> "What perhaps engaged Locke's concern the most was establishing a means to protect property, and his solution was to combine making property holders the effective legislative power with limiting the powers of all governments by making them subject to prior natural rights (including property rights) of individuals. The concept of property that Locke held was an inclusive one, starting with the person's body, liberty to use that body, and the fruits of the labour of that body and reaching to the material goods and money ultimately acquired through a person's efforts. Personal liberties and protections for material property were thus integrated in the single concept of 'property."[108]

This line of thinking was visibly reflected in the new state, which enshrined the right to "life, liberty and the pursuit of happiness" in its own declaration of independence. Notably, the early state envisaged a citizen-landowner-soldier dynamic as in the

---

[105] Supra note 3 at p6
[106] Michael P. Zuckert, *Hobbes, Locke and the problem of the rule of law*, published in *Hobbes on law* 1st Ed. (Routledge 2005) p. 525.
[107] ibid at p526
[108] Supra note 3 at p7

classical examples of Rome and Athens, by making property ownership a requirement to vote, and relying initially on local militias rather than a standing professional military force.[109] The true reason for this split, in my view, given England shared many of these essential elements itself and would continue to do so, was the push for increased liberty for individuals and for decentralised government driven by the size and social heterogeneity of the American colonies.

The social heterogeneity in the new state was largely of two kinds; religious and regional, I will ignore for now the question of ethnic differences, as upon its founding, the USA was mostly composed of British descended colonists with a smattering of Dutch, German and French, while Native Americans and African Americans were regarded as politically inert in the operation of the new state, not being citizens for the most part. The single greatest fear of this new state, borne of the fact of its Social Heterogeneity, was the fear of what was commonly referred to as "faction", a fear rooted in the contemporary and traditional critiques of democracies, such as that even if "every Athenian had been Socrates, every Athenian assembly would still have been a mob"[110]. As James Madison outlines;

> "Among the numerous advantages promised by a well-constructed union, none observes to be more accurately developed that its tendency to break and control the violence of faction. The friend of popular government never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice and confusion introduced into the public councils have in truth been the mortal diseases under which popular governments have everywhere perished…[it has been said that] our governments are too unstable; that the public good is disregarded in conflicts of rival parties; and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority…"[111]

---

[109] Adler, W.D. and Polsky, A.J., *Building the new American nation: Economic development, public goods, and the early US army* (2010) Political Science Quarterly, 125(1), pp.87-110.
[110] Federalist 55
[111] Federalist 10

Demotist systems of government can, as Madison does above, be criticised validly as not just enabling, but further incentivising disagreement and disunity.[112] As a matter of fact, even today we often refer to countries with strong consensus on political leadership as "weak democracies" or even "failed" ones.[113] In Europe and the colonies at this time, the term democracy was synonymous with anarchy, chaos and mob rule, entirely open to the whims of demagogues and self-interested merchant oligarchies.[114] So given the nature of this heterogeneity, two steps were taken to limit the potential for "Factions" to develop which would be pernicious to the cohesiveness of the Union. The first step, to account for the religious diversity of Anglicans, Dissenters, Calvinists, Swedenborgians, Catholics, Lutherans and so forth which made up the citizenry, with, it was presumed, more denominations to follow, was to firstly secularise the operation of State, while also allowing the freedom for Citizens to worship as they saw fit, or not at all. The very First Amendment to the US Constitution reads; "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". Concurrent to this, the Founding Fathers also enshrined strong protections for freedom of speech in the very same line "…or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances". The combined result of these two measures was an unprecedented expansion in dissociative freedom for American Citizens, specifically relating to their freedom of conscience. They could now worship as they saw fit and to carve out their own social space for their particular faith without interfering with the operation or unity of the new state, as groups such as the Mormons and Mennonites would do in extreme examples, or in more casual instances one person could sample many denominations before settling on one or none, without a fear of recrimination.

The second step in limiting the potential for "Faction" to develop was in response to the regionalist tendencies of many state representatives, who saw independence as an opportunity to shake off much of the regulation and centralisation the British Government had recently sought to impose[115] and were jealous of any attempt at

---

[112] Amy Gutmann, *The disharmony of democracy* (1993) American Society of Political Legal Philosophy 35

[113] Croissant, A., S*trong presidents, weak democracy? Presidents, parliaments and political parties in South Korea* (2002) Korea Observer, 33 (1), p. 1.

[114] As in the merchant republics of Venice, Genoa and the Hanseatic league

[115] Bradshaw, M.J., *Regions and regionalism in the United States*, 1st Ed. (Macmillan 1988)

limiting their powers. To the problem of faction he outlined above, Madison identified two possible responses; firstly by abolishing liberty, as "Liberty is to faction what air is to fire, an aliment without which it instantly expires"[116] and secondly strip the people of their individual opinions. He concludes both to be impractical, the first unwise, the second impossible. Instead, he counsels that the effects of faction be controlled by means of a representative republic as opposed to direct democracy or dictatorship, with each state governing much of its internal affairs, while national affairs may be decided by a national assembly composed of representatives from all the states. The idea behind this being that individuals may feel represented by having their preferences accommodated at a state level where some or even a majority of others in other states may disagree with those preferences. Where state A may be for example a rural frontier and Catholic State, while State B is an urbanised Anglican one, both of these states have the capacity to express their preferences in domestic affairs while also taking these preferences to the federal level. This system transformed heterogeneity on the federal level into homogeneity on the state level, thus containing much of the potential for friction between groups jockeying for hegemony in a more centralised system, further augmenting the dissociative freedom of the citizenry.

In conclusion then, the American Republic came into being as the result of a complex blend of regional circumstances which necessitated a decentralised system of governance, English property rights and ancient liberties combined with Enlightenment rationalism, individualism, secularism and negative liberty. This new state was set up by necessity with a strong emphasis on the capacity of individuals and groups to express their preferences, without compromising the operation of the central government and minimising the frictions which could lead to dissolution. While it could be said that the United States in this period was governed with an ethos of maximising dissociative freedom, it could not however be properly said that this right was fully and comprehensively articulated just yet. Instead, we must view this period as one in which dissociative elements and principles fed into the construction of a system, while the test of that system and its guiding principles was to come later on. This test was to come barely a century after independence, when

[116] ibid

the Abolitionist movement brought the North-South regionalist divide to a head[117], and it is the effects of this clash on dissociative freedom which shall be the subject of the next section.

[117] See generally: Craven, A.O., *The coming of the civil war*, 1st Ed. (University of Chicago Press 1957)

Section 5: Heights and Decline in the 20th Century

For this period, we will again be focussing in primarily on the United States, for several reasons; firstly, the system possessing all four essential elements which we outlined in the previous section must be tested, and it is a uniquely American system. Secondly, the USA would come to be the global hegemon over the course of the 20th Century, and as such its changes in domestic laws and attitudes would affect international law and the law of countries within its sphere of influence.[118] Finally, it is in the United States where we come closest to seeing a cogent articulation of a fully fleshed out and practicable Freedom to Disassociate. Furthermore, it is also in that jurisdiction where the modern Anti-Discrimination movement first began to push back and curtail, eventually banishing, Freedom of Disassociation from modern legal discourse.[119] In the previous section you may recall that I noted that, in the design of the American system of government by the founding fathers, African American slaves and Native Americans were regarded as politically inert, possessing few, if any, political rights worth speaking of.[120] As such, the nature of the social heterogeneity which had been envisaged was purely to be of a more intellectual bent, being confined to differences of religion, regional interest and ideology. However, the primary development of the late 19th century in this regard was the Abolitionist movement, which after the post-civil war abolition of slavery, introduced African Americans as an increasingly socially and politically self-aware ethnic group into the American social space.[121] The net result of this development was a shift in the nature of American social heterogeneity, with the primary fault lines moving from those based on religion and political ideology towards more tribal, ethnic ones. As such, the central questions this section shall seek to answer will be how the system reacted to this shift in the nature of its social heterogeneity, what occurred between this reaction and the decline of dissociative freedom as a legal tradition, and finally what

---

[118] Ikenberry, G.J., *A world economy restored: expert consensus and the Anglo-American postwar settlement* (1992) International organization, 46(1), pp. 289-321.
[119] Dowdle, M.W., *The descent of antidiscrimination: on the intellectual origins of the current equal protection jurisprudence* (1991) NYUL Review, 66, p. 1165.
[120] Savage, M., *Native Americans and the Constitution: The Original Understanding* (1991) American Indian Law Review, 16(1), pp. 57-118.
[121] Dinnella-Borrego, *The Risen Phoenix: Black Politics in the Post–Civil War South*, 1st Ed. (University of Virginia Press 2016).

conclusions can be drawn from this decline; what it tells us about dissociative freedom more broadly and what lessons can be learned from it.

The first question then which we must answer is how did the American system, or more specifically the American system in the former Confederate States, react to the sudden and massive shift in the nature of its social heterogeneity after the abolition of slavery? It has often been said of the American Civil war that while the North won on the battlefield, the South won the ensuing peace[122], on the field of politics and in the courtrooms of America. This was however, a rather painful process for all concerned, in more ways than one, with American politics from then to now arguably reeling more from the effects of the post war period, known as "reconstruction", than from the actual material destruction of the war.[123] Once Northern determination to improve the conditions of Southern Blacks fizzled out and the South was left to salvage its own status quo with regards to race relations[124], the individual states began to recognise by law what had been social mores and customs enforced by private militias, individual prejudices and micro-economic pressures.[125] This was first done by challenging the Civil rights Act 1875 on the grounds that it, by legislating in the area of preventing segregation in transport, hotels, inns, theatres and other such privately owned but public amenities, intruded on the 10th Amendments position which reserves all powers not given to the national government instead to the States. In the *Civil Rights Cases*[126] (five separate cases condensed into one ruling), the US Supreme Court decided that due to the distinction between public and private acts, the fourteenth amendment did not preclude private discrimination, and hence S.1 and S.2 of the 1875 Act were *ultra vires* as they regulated private conduct outside of the Constitutional purview of Congress. This case laid the foundation for the states to begin devising systems of racial separation based on strengthening private discriminatory rights, and further led to the judgement in *Plessy v Ferguson*[127], in which Mr. Plessy, himself 1/8th black, on behalf of a group of concerned citizens, intentionally boarded a whites-only rail car

---

[122] Langguth, *After Lincoln: How the North Won the Civil War and Lost the Peace* 1st Ed. (Simon and Schuster 2015)
[123] Paulsen, J. and Hambleton, J., *Confederate and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era* (1988) Texas Bar Journal, 51, p. 916.
[124] Kathleen Muldoon, *The Jim Crow Era*, 1st Ed. (Core Library 2014)
[125] Rable GC, *But there was no peace: The role of violence in the politics of Reconstruction*, 1st Ed. (University of Georgia Press 2007).
[126] 109 US 3 (1883)
[127] 163 US 537 (1896)

and had a hired detective arrest him for violating the Withdraw Car Act 1890, in order to sue the state of Louisiana for violating the fourteenth Amendment on the grounds of the Act forcing companies into treating citizens differently on account of race. The Court held that[128];

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."

This case was the beginning of the "separate but equal" doctrine of legally legitimised segregation, with the crux of the reasoning being that differential treatment only constituted discrimination where segregated facilities were not equal in quality. In truth, the Courts decision was likely based on the policy concerns regarding forced "commingling", in a Union which was tired of internal conflict and sought stability and unity above all, by taking the Aristotelian view of human nature previously articulated in the case of *Roberts v City of Boston*[129] that, despite the apparent nobility of legal equality[130];

> "[W]hen this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment, but only that the rights of all, as they are settled and

[128] ibid p163
[129] 59 Mass. 198 (1850)
[130] ibid At 206

> regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

In citing this view, the Court embraced a Paternalistic approach to race relations which, even to this day it would never truly relinquish.[131] Overall, the reaction of the Southern States to the shift in social heterogeneity which occurred after the Reconstruction period could be summed up on the one hand, in the conventional narrative as being an attempt at restoring something of the social status-quo ante-bellum, but for our ends this is simply not detailed enough. In truth, the system of segregation devised in the South was an attempt at establishing in the longer term a more lasting principle; that of combining private property rights with freedom of conscience to produce a more general freedom to order one's personal dealings in order to define a more desirable personal segment of the social space and minimise unwanted associations, about as close to an open articulation of a freedom to disassociate as can be found.

However, this system was not to last, with the natural next question becoming; what led to the collapse of segregation in the US? The system of segregation came under increasing pressure to change for several reasons, the first of which being that, in practise, the races may have been separated, but the facilities and opportunities provided were certainly not equal, nor could they have been practically expected to be. Furthermore, unlike in the case of the Metics in Ancient Athens, African Americans were expected to carry all of the burdens of citizenship; military service, payment of taxes, abiding by the law etc, while the benefits of citizenship were constantly curtailed; quality of education, voting rights, political representation etc. As such, a rising African American middle class began to form organisations such as the NAACP to represent their interests.[132] A second reason for the collapse of the moral and cultural legitimacy of segregation was of course the atrocities of the Second World war, during which some 750,000 copies of a pamphlet called "The

---

[131] Soss, J., Fording, R.C. and Schram, S.F., *Disciplining the poor: Neoliberal paternalism and the persistent power of race*, 1st Ed. (University of Chicago Press 2011)
[132] Klarman quoted by David E. Bernstein and Ilya Somin, *Judicial power and Civil rights reconsidered*, Yale Law Journal, 114 (3), 3, p. 596.

Races of Mankind"[133] were circulated among active-duty soldiers from 1943 onwards, the text held that;[134]

> "With America's great tradition of democracy, the United States should clean its own house and get ready for a better twenty-first century. Then it could stand unashamed before the Nazis and condemn, without confusion, their doctrines of a Master Race. Then it could put its hand to the building of the United Nations, sure of its support from all the yellow and black races where the war is being fought, sure that victory in this war will be in the name, not of one race or of another, but of the Universal human race."

These shifting views were even to be seen in American case-law during the war, where in the case of *Hirabayashi v United States*[135] the US Supreme court, while upholding the challenged curfews on Japanese American citizens on the West coast on the grounds of wartime necessity, admitted it was considered an "odious" measure. The third and final broad reason why segregation became an untenable system for the USA to continue to tolerate or even promulgate came in the decade after the War when the Cold war between the Communist East and Capitalist West began. As the Superpowers began to cast their eyes towards the rapidly decolonising third world, American race relations became a sticking point of Soviet propaganda against Capitalism, as Robert Cushman wrote[136]; "It is unpleasant to have the Russians publicise our continued lynchings, our Jim Crow statutes and customs, our anti-Semitic discrimination, and our witch-hunts; but is it undeserved? Some of the flung mud sticks".

Thus it came to pass that in the case of *Brown v Board of Education of Topeka*[137] when the Court was faced with essentially the same questions as had been posed in *Plessy* and subsequent cases, that segregation in multiple schools on the basis of racial differences violated the equal protection clause of the fourteenth Amendment, it found in favour of the Appellants this time, essentially due to changes in the social and academic understanding of race, quoting Gunner Myrdal's work "An American

---

[133] Gene Weltfish and Ruth Benedict "The Races of Mankind" (1943)
[134] ibid p31
[135] 320 US 81 100
[136] Robert Cushman, "Our Civil rights become a world-issue" *New York Times Magazine* (New York, Jan 4th 1948) p. 12
[137] 347 US 483 (1954)

dilemma: the negro problem and modern democracy"[138] in their reasoning. Rapidly following the desegregation of education came the Civil rights Act 1957, which eliminated barriers to minority voter registration and penalised voter intimidation, but did not prove effective, increasing minority voter registration by only 3%. The following years were the zenith of civil rights activism in the US, culminating in the Civil Rights Act 1967, which comprehensively brought an end to most legal forms of racial discrimination in both public and private spheres. The net result of the moral and legal de-legitimisation and stigmatisation of the system of segregation was to be the rise of anti-discrimination theory as the preferred lexicon for legal understanding of scenarios where previously principles of property and conscience rights may have been applied in order to maximise the capacity of individuals to exercise dissociative freedom, such as those involving linguistic, cultural and religious identity. Now instead such scenarios were to be looked at with regards to principles of universal humanity and aspirational equality, with the weight of moral conviction shifting from the individual attempting to carve out a portion of the social space in which to express their identity, to the other individuals who were to be excluded from this category of persons eligible and intended to enjoy that space. Given the similarity of the USA's position with that of the USSR, the result of this was that in both international law[139] and the legal systems of those countries which fell into the respective spheres of influence of either power, the notion of dissociative freedom as being a valid understanding of how to deal with social heterogeneity in a society gradually fell from any potential legal consideration.

We must ask then, what can be learned about dissociative freedom from all this? I put it to you that two broad principles regarding the application of dissociative freedom can be extracted from the history of racial segregation in America; firstly, that an increase in dissociative freedom must not be made if it would increase the degree of social friction between groups in a socially heterogeneous state, as the understanding with which this author has approached the nature of the Freedom is that it is a tool to be used as a salve to alleviate such frictions, and it would be counter-productive to apply its principles in circumstances where it would worsen

[138] Gunnar Myrdal, *An American dilemma: the negro problem and modern democracy*, 1st Ed. (Harper and Bros. 1944)
[139] See generally the International Convention on the Elimination of All Forms of Racial Discrimination 1969

them. Secondly, and pursuant to the previous point, dissociative freedom must operate on a quid pro quo basis, as without a certain degree of benefit accrued to either party, this may potentially result in a net increase in social friction between groups. In Athens and Rome for example, non-citizens were not obliged to serve in the military or pay certain taxes, observe certain laws etc, or even in the early American Republic, the Federal system allowed the different religious denominations to express their preferences more deeply where they constituted a majority, without infringing upon the ability of other groups to do so. In short, the takeaway lesson is that the application of dissociative freedom within a legal system must be done in a deliberate fashion, with a clear understanding of its potential consequences in increasing or alleviating social friction in a heterogeneous society.

In conclusion to sum up what this chapter has covered, we have established that in Ancient Athens property and citizenship rights developed as a reaction to social heterogeneity. In Ancient Rome similar property and citizenship rights were more clearly codified and promulgated around Europe, which by the Middle Ages had begun to develop ideas of rational individualism and negative liberty. These were further refined during the Reformation and Enlightenment periods, and first put into practise in a cohesive system in the form of the American Republic, which developed a system possessing all four of the essential elements of dissociative freedom. This system was tested to its limits by the Abolitionist and Civil Rights movements, which ultimately prevailed and relegated Dissociative Freedom as a whole to what would appear to be the dustbin of legal history. However, since legal conundrums are generally perennial and rarely novel, the Liberal West appears to have hit somewhat of a brick wall in recent decades, especially in the post 9/11 world, wherein the results of the increasing diversification and macro-dislocation[140] of global society has resulted in a marked increase in ethnic, cultural, religious and even linguistic[141] friction, or more usually, a blend of all these and more. The relative inflexibility (or incapability) of the Liberal Democratic system to respect differences within a heterogeneous population has proven in the author's eyes the need for a revival of this seemingly dusty and outdated legal construction. Indeed, it would appear from recent developments that such a revival is indeed occurring, from

[140] Which is to give a name for the rootlessness felt by growing diaspora groups globally
[141] Such as the conflict in Cameroon over the language rights of its English speaking minority https://www.foreignaffairs.com/articles/cameroon/2018-11-08/whats-driving-conflict-cameroon

the recognition of certain principles of Islamic law to be applied within the Islamic community in certain Western countries[142], to the LGBT student specific Harvey Milk high school in New York city[143], what is clear is that in modern iterations dissociative freedom is far more limited in scope than in the past and extremely context dependent, constantly coming up against hurdles raised by anti-discrimination, which illustrates a need for the two to be properly reconciled, if that is even possible, as shall be explored in the next chapter on the theoretical framework.

[142] Wilson, R., *Challenges and opportunities for Islamic banking and finance in the West: the United Kingdom experience* (1999) Thunderbird International Business Review, 41(4-5), pp. 421-444.
[143] Randy Hedlund, *Segregation by Any Other Name: Harvey Milk High School* (2004) The Journal of Law of Education, 33, p.425.

Chapter 2
Theoretical Framework

Section 1: Why Freedom of Disassociation should be considered a Legal Right

In the previous chapter, we looked at the development of the freedom to disassociate in a historical context. We examined various examples of past societies' expressions of the right. Through those examples synthesising a set of necessary elements for the right to exist; firstly, societal heterogeneity, an extra-legal circumstance which is the primary reason for why this right has appeared where it has. The second element being strong private property rights, as much in the sense of being a societal value as in the legal sense. Finally, a legal system which recognises negative freedoms, allowing for the passive exercise of the right as well as its positive assertion. The object of this chapter shall be to define and explore the freedom to disassociate as a right in the modern context, assess its compatibility with modern liberal democracy, and finally outline potential methods of operationalising the right. To begin then, this section shall endeavour to put forth the position that freedom of disassociation is properly to be understood as a multi-title liberty right in the Hohfeldian sense.[144]

To make this case in a structured and convincing fashion, it will first be necessary to define a set of criteria for what makes a right a right in the general sense. The most comprehensive definition of a legal right in my eyes was articulated by Sir John William Salmond, a former justice of the Supreme Court of New Zealand and inspiration for the later work of Wesley Newcombe Hohfeld, when he stated that a; "[r]ight is an interest recognized and protected by rule of right. It is any interest, respect for which is a duty, and the disregard of which is wrong"[145]. This definition gives us a clear set of criteria to test the freedom to disassociate against; firstly, does it protect or define a specific interest? Secondly, is there a duty to respect this specific interest? Thirdly, would the disregard of this duty constitute an injustice? Finally, is this interest protected by "rule of right"? While this definition is convenient, it remains incomplete; Hohfeld in his seminal work "Fundamental Legal

[144] Husik, I., *Hohfeld's jurisprudence* (1923) University of Pennsylvania Law Review, 72, p. 263.
[145] Sir John William Salmond, Patrick John Fitzgerald, *Salmond on jurisprudence*, 1st Ed. (Sweet & Maxwell, 1966) p. 278.

Conceptions as Applied in Judicial Reasoning"[146] further specifies the differing aspects of the term "right". It will grant us a greater degree of clarity in reasoning if we amend our conception of Salmond's definition to acknowledge freedom of disassociation as a multi-title liberty right. This is to say that person A does not possess a duty to not act to disassociate themselves from or prevent the inception of an undesired association, while person B does not possess a right to prevent them from doing so. we shall return to Hohfeldian analysis later on in the chapter. Now however, before proceeding we must define the right which we are attempting to prove the existence of. As outlined in the introduction to this thesis, the freedom to disassociate can be defined either positively or negatively, in its positive form, it is "the right of an individual to disassociate/distance oneself from a clearly defined portion of the community for reasons of property/conscience/security/personal autonomy" or in its negative formulation it is simply the; "freedom from involuntary associations". David Oderberg, one of the few scholars to deal with the freedom to disassociate directly, holds that; "[t]he passive component is the right to be left alone *ab initio*. The active component is the right to withdraw from associations imposed upon a person or group that do not come under the umbrella of the general civic duties"[147], and I would heartily concur, although I would add that the active component also potentially contains a sub-right to actively create associative arrangements which exclude certain persons or categories of persons.

Thus, having so defined the freedom to disassociate we can now test that definition against our predefined criteria. The first question we must ask is: does the freedom to disassociate protect or define an interest? To answer this question, I would first posit that an interest in the general sense of the word, is something where the possession or acquisition of which would constitute an advantage or benefit, and the lack or loss of it would constitute a disadvantage or detriment. The answer to whether the possession or acquisition of this interest would be beneficial is, in my view; yes. An individual of course naturally possesses a beneficial moral and material interest in minimising or eliminating those relations and associations which are involuntary and conflict with their worldview or constitute circumstances detrimental to their personal interests, whether these are property, autonomy or security related. The

---

[146] Wesley Newcombe Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) The Yale Law Journal, 26 (8), pp. 710-770.
[147] Supra note 3 p. 177.

answer to the second part of the question, being whether the lack or loss of the freedom to disassociate would constitute a detriment or disadvantage, becomes quite clear in light of the first and primary element necessary for the manifestation of the freedom to disassociate; societal heterogeneity. This establishes a legal need, and hence, an interest, for individuals to distance themselves from those unlike themselves within the broader social space. As, if a societal moral imperative/interest exists to respect different cultures and faiths, then infringing upon a person's right to disassociate on such a basis would constitute an unmitigated detriment. Thus, we can conclude that the freedom to disassociate does in fact protect and define a specific interest.

Which brings us to our second test; is there a duty to respect this specific interest? To answer this question, I believe it necessary to first outline what is meant by a duty, which I take from Hohfeld's famous analysis of rights theory[148]; "A single multititle right, or claim, (right *in rem*) correlates with a duty resting on one person alone, not with many duties- (or one duty) resting upon all the members of a very large and indefinite class of persons". This is to say that a specific duty must correlate to a specific right, and that duty must be imposable upon a single, definite individual. For our purposes, having yet to establish whether or not the freedom to disassociate is a right in the first place, we must amend our question to ask instead; could a correlative duty to respect the interest protected by the freedom to disassociate be practically imposed upon a single, definite individual? The first part of this question is whether the duty is correlative to the right. In Hohfeld's analysis[149], a duty is the jural opposite of a privilege, which is the power to do or not to do something specific, meaning a duty, as its opposite, must be where an individual must do or not do something specific. If the freedom to disassociate is the right to be left alone and to withdraw from undesired associations, then the correlative duty which would respect that protected interest would be that; an individual must not compel other individuals against their will to partake in involuntary or undesired associations. The second part of our question is: can that duty be practically imposed upon an individual, or does it rest upon an indefinite class of persons? I believe the above formulation of the duty in question is sufficient to be applied to a specific individual

[148] Supra note 2, p740
[149] ibid p710

or set of individuals. The subject of the duty is not vague in the slightest; once an individual becomes reasonably aware that another individual no longer wishes to be associated with them or their group any longer, or that they do not wish to be in the first instance, that is in my view enough for a *prima facie* duty for that individual to not compel, or cease compelling, another into the involuntary or undesired association in question. There is therefore an interest in respecting this duty, on a macro level, in that in order for it to be infringed, individual freedom as a desirable social objective (in a Liberal Democratic society) must need to be somewhat waived in turn. This is not to say that such circumstances cannot be warranted or could not manifest themselves regularly of course, merely instead to point out that the respect of the aforementioned duty is a part of respecting in the positive sense, the social objective of maximising personal freedom.

The third question we must ask is would the disregard of this duty constitute a wrong? I believe in order to prove or disprove whether or not such a moral duty exists, we must go back to first principles of ethics. The golden rule of ethics[150] holds that; "[a]ll things therefore whatsoever you would that men should do to you, do you also to them"[151] (*quod tibi non vis fieri*). Once applied to this case, given that we have established that an individual would indeed have a moral and legal interest in the existence of this right, then the application of that golden rule should dictate that every individual should respect this interest in others as well as himself. If we accept that this golden rule is suitable as a method of judging the existence of a moral duty in general terms, we can further formulate the rule in this case as being "do not compel others into involuntary and undesired associations, unless you are prepared to be so compelled". The aforementioned duty, then, if broken, would allow for a sound moral framework, in such cases of compelling involuntary associations such as in the case of taxation or conscription, wherein the compeller is likely perfectly willing to be so treated himself. However, the rule would invoke moral wrongs if it were to be in a case such as forced religious conversion, where it is unlikely the compeller would be happy to undergo a similar forced conversion.

---

[150] Gensler, H.J., *Ethics and the golden rule*, 1st Ed. (Routledge 2013).
[151] Douay Rheims Bible, Matthew 7:13.

Now moving from more general terms of ethics to more specific ones, as we touched on in the previous paragraph, the upholding of this duty is justifiable as part of the broader desire for maximising personal freedom in a given society. Furthermore, we noted in the second paragraph of this section that freedom of disassociation belongs to the species of Hohfeldian rights known as multi-title liberty rights. Hence, we can reasonably say that there exists a liberty interest in not compelling or continuing to compel a person into involuntary associations. All that being said, this tells us little of the exact moral wrong being committed should this duty not being respected, as we noted above there may be plenty of circumstances in which one is perfectly willing to be treated themselves in a similar fashion. In the Liberal lexicon of course, the infringement of a liberty interest in itself constitutes sufficient wrong as to satisfy our criteria. However, I find this answer personally both unsatisfying and incomplete, as there is never a lack of justifications for infringing liberties; why can't I build a rocket and fly to the moon? Because the domestic production of ICBM's is sufficiently undesirable by the community as to prevent that. I don't really expect the Liberal-Democratic tension between individual liberty and collective goals to be resolved any time soon. So, what do I see as the moral good which is achieved by freedom of disassociation, which if infringed would constitute a moral wrong?

The answer lies very close to where our historical analysis began; in "The Nicomathean ethics"[152], Aristotle, if he will excuse my oversimplified synopsis, discusses Man's ends and means. He concludes that the purpose of life is happiness, which is only attainable in retrospect at the end of life, having lived well, with living well-meaning living a life of virtue, virtue being the golden mean between extremities, habitually and consistently practised. Now where freedom of disassociation fits into this framework is that in Aristotle's reasoning this golden mean will lie in different places for every individual, one man's choice on a battlefield is a glorious death or life of infamy in cowardly retreat, while his companion's choice is between suicide by fighting a losing battle or returning to his farm to raise his family, in other words, it is not especially prescriptive. Not being so means that in order for a person to live virtuously, they must organise their lives in such a manner as to incentivise virtuous habits. In order to do that may need to

[152] Ameriks, K. and Clarke, D.M., *Aristotle: Nicomachean Ethics*, 7th Ed. (Cambridge University Press 2000)

distance themselves from other individuals, habits, organisations etc. Therefore, I would conclude, that the true moral wrong which would be committed by disregarding the aforementioned duty and violating this individual liberty interest, would be to prevent individuals from living the most virtuous lives attainable for them, and thus preventing their attainment of personal happiness.

Our final question raised in fulfilling the criteria of a right, is simply; is this interest recognised and protected by "rule of right"? In other words, do legal systems actually recognise the existence of this interest, and act to protect it in practise? The answer may surprise many when I submit that most, if not all, Liberal Democratic legal systems do indeed recognise and protect this interest to varying degrees. While the freedom to disassociate is nowhere explicitly recognised as a full right in itself, it exists as a sort of "ghost right", haunting the pantheon of Liberal rights. The interest protected by the freedom to disassociate, that individuals benefit from minimising their undesired associations, and that being compelled into such associations would be detrimental, in fact forms part of the underlying and animating spirit for many well-recognised Liberal rights. I would even go so far as to say a prerequisite for many of them. Examples of such rights include freedom of conscience, as an underlying presumption behind this right is that it is unjust to compel an individual to associate or act in a manner which would conflict with his own conscience. Another example would be freedom of religion, in which similarly it would be unjust to compel a person to associate, act or live in a manner which would conflict with their religious convictions, or indeed to not allow them to express their beliefs in a manner separated from those who do not share those beliefs. The freedom of the press provides another example: as again a prerequisite of a free press is that it is not compelled into agreement with the narratives of a tyrannical government or similarly held to ransom by private interests. The right to privacy similarly requires as a prerequisite that it be recognised and protected that individuals have the right to their own separate personal lives free from public scrutiny, where the public interest is not concerned. The rights of the family carry with them the presumption that the family unit, in general, as the primary sub-unit of society[153], should be as free from outside interference as practically possible, mandating a social distancing which is the hallmark of the freedom to disassociate. The inviolability of the dwelling as a

[153] Article 41 1.1 Bunracht na hEireann

subsidiary property right constitutes the most obvious of all our examples, as it quite literally mandates the exclusion of certain persons from entry to the owner's home. I believe the sum of all these right's containing within them an aspect of the interest protected by the freedom to disassociate would allow us to reasonably conclude that the interest recognised and protected by the freedom to disassociate is in fact recognised and protected by rule of right.

In conclusion, per Salmond's criteria and having applied Hohfeldian terms, we are satisfied that the freedom to disassociate protects and defines a specific interest, that there exists a duty to respect this interest, that disregard of this duty would constitute an injustice, and finally that this interest is recognised and protected by rule of right. As a consequence, I believe it follows that we can say with relative certainty that the freedom to disassociate is properly to be understood theoretically as a legal right. Having established this, the question which naturally follows, having briefly established that the justifications for freedom of disassociation lie in more classical arguments than in Enlightenment principles; is this right compatible with a modern Liberal Democratic framework?

Section 2: Is Freedom of Disassociation compatible with Liberalism?

In attempting to discern whether or not the Freedom to Disassociate is compatible with Liberalism as a political theory, and Liberal Democracy as a system in the more practical sense, we must first of course ask ourselves; what is Liberalism? Academic consensus appears to be that Liberalism has been around long enough to mean many things to many people. That it exists as much as an appropriation of figures and ideas in hindsight and a banner of social convenience and political expediency in the present inasmuch as it represents any coherent ideology.[154] This however, would present far too pessimistic a prospect in my view, and certainly an unworkable one in terms of the present discussion. Therefore, I will be simplifying Liberalism down to its barest and most universally recognisable components, by dividing it into two broad categories; Classical and Modern Liberalism.[155] Liberalism in general is understood best, I believe, as Jeremy Waldron put it, to be "a requirement that all aspects of the social should either be made acceptable or be capable of being made acceptable to every last individual".[156] In other words, what Liberalism does, or does best, which no other ideology does or does as well, is, quite simply put; to focus on the individual as the primary social unit worthy of rights and protections.

Which brings us to the question of the distinction between Classical and Modern Liberalism; Classical Liberalism is generally understood as emphasising the role of property rights in the upholding of personal liberties. Some, such as Hayek, went even further and held that such liberty is impossible without private property rights; "[t]here can be no freedom of press if the instruments of printing are under government control, no freedom of assembly if the needed rooms are so controlled, no freedom of movement if the means of transport are a government monopoly".[157] As such, Classical Liberalism is generally quite rigid with regards to its understanding of rights, treating the toleration of even minor infringements as

---

[154] Gaus, Gerald, Courtland, Shane D. and Schmidtz, David, *Liberalism*, The Stanford Encyclopedia of Philosophy (Spring 2018 Edition), Edward N. Zalta (ed.), <https:/plato.stanford.edu/archives/spr2018/entries/liberalism/> last accessed 18/03/19

[155] Alan Ryan makes a similar distinction in, *The Making of Modern Liberalism*, 1st Ed. (Princeton University Press 2013) pp. 23-28.

[156] Jeremy Waldron, *Theoretical Foundations of Liberalism* (1987) Philosophical Quarterly, 37, p. 131.

[157] F. A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas*, 1st Ed. (University of Chicago Press 2018) p. 149.

opening up a path to tyranny. As a result, it is generally quite sceptical of government intervention in society. Modern Liberalism, by contrast, denies the connection between property and liberty, and further views it as an engine for potentially entrenching social stratification. Furthermore, the attitude towards state intervention is far more positive, giving the state a more Paternalistic role in regulating the market and society in the interests of Social Justice. To illustrate this John Rawls' famous "difference principle" holds that in the ideal Liberal society, inequalities should be arranged so as to benefit the least well off group, provided the society respects equality of opportunity, with Liberalism doing its best to mitigate the effects of human differences in capacities.[158] As Schmidtz wittily surmises; the difference between Classical and Modern Liberalism is simply that where Modern Liberalism's justice is concerned with how the pie is being sliced, Classical Liberalism's is concerned with how the baker is being treated.[159] Freedom of Disassociation in fact promotes the principles of both, as it is irrevocably tied to individual liberty interests as we noted in the previous section.

We turn our attention then, to the question of whether or not the freedom to disassociate is compatible with either of the previously described Liberalisms. We shall begin by outlining which already recognised Liberal rights are augmented by the Freedom to Disassociate. I will be taking the rights both infringed and augmented directly from the list provided within the contents of the Universal Declaration of Human Rights[160], considering that list to be the most universally recognised articulation of Liberal Rights. The following is intended to be an illustrative rather than an exhaustive account of the rights infringed and augmented. To begin then, and to briefly touch on the subject of our next section, the freedom to disassociate, paradoxically, also strengthens the freedom to associate. This is insofar as it allows individuals to associate more freely and more closely with a more strongly delineated group. Think of nuns in convents or monks in monasteries, the gender exclusivity of which being quite important within the Catholic faith, or similarly delineated prayer areas within a Mosque. A similar dynamic exists for a linguistic/religious minority, such as Irish speakers in Ireland, setting up separate

---

[158] John Rawls, *A Theory of Justice*, 1st Ed. (Harvard University Press, 1999) p. 266.
[159] David Schmidtz, *"Ecological Justice" in Philosophy: Environmental Ethics*, 1st Ed. (MacMillan, 2017) p. 231.
[160] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III)

schools and associations exclusively for their linguistic group, demonstrating how the freedom to disassociate can also strengthen the right to education. Building on this, the parents of children may use this freedom to disassociate within an educational context to choose for their children to be educated in a manner consistent with their own faith. The freedom to disassociate then can consequently strengthen both family rights[161] and the freedoms of belief, opinion and religion[162] by allowing individuals to arrange their lives and the lives of those under their care in a manner more consistent with their personal worldview. Thus, we can see how the freedom to disassociate can also come to strengthen the right to participate in the cultural life of the community.[163] It allows communities to define themselves more clearly in the first instance and allows greater breadth of scope for the expression of cultural forms and respect for its mores within that well-defined community. The freedom from state interference[164] is similarly augmented, as it allows individuals and consequently, groups, to withdraw their participation from state sponsored activities and social programmes which may conflict with their values. For example, conscientious objectors to conscription. This in turn leads to a further augmentation of freedom from interference with privacy, personal security and the home.[165] It allows an individual to, within reason, express ones preferred lifestyle on one's own private property, or that of the like-minded, showing how property rights[166] in general are furthered by the freedom to disassociate.

We turn our attention then, to the question of which rights clash with the freedom to disassociate. Among the rights in conflict with the freedom to disassociate, the first concern of many would be its historical assault upon the general right to equality.[167] In *Brown v Board of Education of Topeka*[168], in the context of discussing how the dissociative system of racial segregation affected the right to education[169] of Black children, the Court ruled that this system of segregation, despite *Plessy v Ferguson*[170] declaring the system must maintain "separate but equal" facilities for

[161] ibid Article 16
[162] ibid Articles 18 and 19
[163] ibid Article 27
[164] ibid Article 30
[165] ibid Articles 12 and 3
[166] ibid Article 17
[167] ibid Article 1
[168] Supra note 69
[169] Supra note 7 Article 26
[170] 163 US 537 (1896)

different races, it had in practise resulted in a "resource lockup" in favour of the dominant group in society. This illustrates that, without sufficient regulation of standards, a lopsided dissociative arrangement has potential to slide into cementing social stratification. Pursuant to this, the subsequent right to freedom from discrimination[171] is similarly in conflict with freedom of disassociation, as the freedom to disassociate necessarily contains the proviso; from whom? In other words, in order to operate (as will be discussed in the next section), the freedom to disassociate must discriminate to some extent. This has the subsequent effect of clashing with the consequent right to participate in the cultural life of the community[172], as it clearly acts to delineate separate communities with their own unique social spaces. It must necessarily follow that that delineation stymies the ability of individuals to participate in another group's social space within the same society. Furthermore, the freedom to disassociate has also historically clashed with the right of individuals to marriage[173], both when societies have sought to disassociate racial groups by preventing interracial marriage, as in the case of *Loving v Virginia*[174], or by disassociation from alternative family arrangements by the prohibition on gay marriage, as in the case of *Obergefell v Hodges*[175]. The right to free movement within the country[176] is yet another right clashing with the freedom to disassociate in the past. The case of *Buchanan v Warley*[177] clearly demonstrates this, wherein a Kentucky ordinance prohibited individuals from purchasing property in a neighbourhood wherein the majority was comprised of a different race. Such social separation clearly infringes on both the aforementioned right, and the freedom to own property.[178] The final right which shall be discussed which the freedom to disassociate has infringed is the freedom to associate.[179] While the relationship between the two has been adequately discussed in a previous Section, it bears mentioning that the aforementioned restrictions on the right to marry, participate in the cultural life of the community and the right to education all constitute clear infringements on the ability of individuals to associate freely.

---

[171] Supra note 7 Article 2
[172] ibid Article 27
[173] ibid Article 16
[174] 388 US 1 (1967)
[175] 576 US _ (2015)
[176] Supra note 7 Article 13
[177] 245 US 60 (1917)
[178] Supra note 7 Article 17
[179] ibid Article 20

In conclusion, the rights weakened or infringed by the freedom to disassociate tend to be those which establish and protect the equal treatment of individuals, whom Modern Liberalism regards as essentially fungible. By contrast, the freedom to disassociate, as is well illustrated by its augmentation of rights generally protecting and advancing the ability of individuals to practically express their beliefs, and consequently to be treated and to treat other individuals differently. Furthermore, especially in light of the intimate connection between private property rights and the freedom to disassociate, it is clear that, in its undiluted form, the freedom to disassociate relates better with Classical rather than Modern Liberalism. However, is the freedom to disassociate necessarily incompatible with Modern Liberalism altogether? In this I would find myself in agreement with Oderberg[180] that since; (emphasis in original)

> "…liberalism *itself* offers no higher good to underwrite the obligations of association it seeks to impose. In other words, what exactly *is* it that liberalism can appeal to that, if it existed, would underwrite a *wholly general* obligation to associate in ways the State deemed desirable? Is it 'Progress'? But appeal to progress is either vacuous or question-begging in this context. What progress could it be other than the progress that involves citizens associating in the way the State wants? The same applies to a term such as 'Harmony'. What about 'Getting along'? Again, the risk of begging the question is front and centre. There are various ways of getting along, and one of them might be by *not* getting along – going one's separate way to a large extent. The same goes for 'Peace' – the peace of separation can be as effective as the peace of togetherness, and sometimes the peace of the latter is as illusory as the peace of the former is enticing."

So while Liberalism in the modern sense cannot adequately proscribe the freedom to disassociate entirely, it is clear that some clashes exist, and that these clashes come almost exclusively from the implicit accusation from Modern Liberalism that the freedom to disassociate empowers individuals to discriminate against others unfairly. This is to say that what freedom of disassociation highlights most in its relationship

[180]Supra note 147 p. 178.

with Liberalism is that it sits snugly on the liberty end of the liberty-equality tension inherent to Liberal Democratic systems.[181] In other words, wherever the right appears to push against Liberal principles and boundaries, it is in fact only acting as part of that broader dynamic testing the limits of liberty raised by concerns for equality. That being said, addressing the relationship between the freedom to disassociate and anti-discrimination theory shall be the subject of our next section, with a view towards harmonising the two, in order to consequently harmonise the freedom with Modern Liberalism, which shall prove crucial when the discussion turns towards the operationalisation of the freedom in practise.

[181] Lindsay, T.K., *Liberty, Equality, Power: Aristotle's Critique of the Democratic Presupposition* (1992) American Journal of Political Science, pp. 743-761.

Section 3: The Freedom to Disassociate vs the Freedom to Associate

Having established the legal validity and general nature of the freedom to disassociate, our attention must now turn toward its relationship with its seeming correlative right; the freedom to associate. The key issues that this section shall seek to resolve shall be; whether the freedom to disassociate is truly a corollary of the freedom to associate, and whether or not there is a need for this right at all if the interest it seemingly protects is already protected by and contained within the freedom to associate. This shall be done by first defining what exactly we mean by freedom of association, contrasting its defined protected interest and correlative Hohfeldian duty with that of freedom of disassociation, and seeing where the synergies and clashes arise. We shall then continue to discuss the ramifications of a clash between the two rights and, drawing from those conclusions, decide as best we can whether or not freedom of disassociation is indeed a separate right in need of equal protections, or a corollary of the freedom to associate. If the latter, then we must ask whether we can even be justified in regarding it as a separate concept to begin with.

So, to establish the fundamentals first, what do we mean by the freedom to associate? There appears to be no universally recognised formulation of this right, with most accounts considering it as self-explanatory. These various formulations tend to come in one of two forms; either the term 'association' is meant literally, as in the Irish Constitution; "The State guarantees liberty for the exercise of the following rights, subject to public order and morality- … (iii) The right of citizens to form associations and unions"[182], or it is meant more broadly as describing any interpersonal arrangement, formal or informal, on a theoretical, spiritual or physical level. As John Stuart Mill describes, it is "the right to choose the society most acceptable to us".[183] Indeed, this broader understanding of the freedom to associate predates even the existence of Mills' Liberalism altogether[184];

---

[182] Bunracht na hÉireann, March 2019, Article 40.6.1(iii)
[183] John Stuart Mill, *On Liberty*, (Longman, Roberts & Green, London, 1869; Penguin publishing, London, 2010) Ch. 4 p. 71
[184] Pope Leo XIII, "*Rerum Novarum*", Section 51, quoting St. Thomas Aquinas, "*Contra impugnantes Dei cultum et religionem*", Part 2, ch. 8 (Opera omnia, ed. Vives, Vol. 29, p. 16)

> "…as St. Thomas of Aquinas says, "Men establish relations in common with one another in the setting up of a commonwealth." But societies which are formed in the bosom of the commonwealth are styled private, and rightly so, since their immediate purpose is the private advantage of the associates. "Now, a private society," says St. Thomas again, "is one which is formed for the purpose of carrying out private objects; as when two or three enter into partnership with the view of trading in common." Private societies, then, although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority."

It is in light of this broader and more historically comprehensive sense which we shall use to synthesise our own definition; the freedom to associate is the right to enter into voluntary interpersonal relations. If this appears overly broad and far beyond the generally accepted conception of the right which is usually interpreted to be limited to membership of organisations rather than something like a casual friendship, then this extension is necessary for our analysis, as our conception of a freedom to disassociate has not yet been developed sufficiently to bear the weight of real-world legal limitations as the freedom to associate has. So, the comparison of the two rights in their more abstract form will in my view inform us better as to their true relationship.

Contrast this then with our previously discussed definition of the freedom to disassociate from the last section, which, to reiterate, is the right of an individual to disassociate/distance oneself from a clearly defined portion of the community for reasons of property/conscience/security/personal autonomy, or to bring it more in line with the above, it is the right to cease or avoid involuntary or undesired interpersonal relations. The question then, if we are seeking to find out whether the freedom to disassociate is truly a corollary right of the freedom to associate, is to now describe what we mean by correlative rights in the first instance. While no definition per se exists for correlative rights, we can take a look at the paired examples which are agreed upon; that the freedom of speech naturally entails the right to silence[185], that freedom of religion entails the freedom to not believe

[185] Wooley v. Maynard, 430 U.S. 705 (1977)

anything[186] also, and so on. Now what is important about these pairs is that they share a unity in purpose, which is to say that they both achieve the protection of the same legal and moral interest. To put this in Hohfeldian terms then, as we discussed before, a liberty right for one individual will generally imply a correlative duty to not interfere for another. Thus, if two liberty rights are themselves to be correlative, we should expect that the duty raised by one right should mirror in terms of practical goal and protected interest with the correlative right's and vice versa, we should be able to see a clear similarity and correlation between the two. What I mean by this is quite straightforward; in the above case, the freedom of speech means the right to express and hold a certain viewpoint, where the duty raised by the right to silence would be to not force an individual to "foster... an idea they find morally objectionable"[187], both of which achieve the protection of the interest of free personal expression. Therefore, in order for the freedoms of association and disassociation to be correlative, we should see both rights and duties intersect in order to achieve the protection of their common interest. We can draw this from our discussion of the liberty interest and ability to achieve the good life in the previous chapter as being "the ability to arrange one's associative arrangements in accordance with their will and preferences".

So, in our discussion, we should expect the protected interest of the duty to not prevent free association, to share the same goal as the right to cease or avoid involuntary or undesired associations and vice-versa. Of course, the moral interest protected by the right to disassociate we identified in the previous sections, is in empowering individuals to arrange their interpersonal relations according to their will and preferences. This is achieved by protecting individuals from being compelled into undesired associations against their will. So, does this duty to not prevent free association protect the same interest? I should say it does, as the prevention of free association carries with it the same moral wrong which we discussed in the first section of this chapter. That wrong being the violation of the liberty interest and its consequent moral interest, the ability to live a virtuous life as one sees fit, which illustrates a degree of synchronicity between the right to disassociate and the duty created by the right to associate. To flip the dynamic then,

---

[186] CCPR General Comment 22: 30/07/93 on ICCPR Article 18 pp2
[187] Supra note 37 p430

we shall now contrast the right to associate freely with the duty (raised by the right to dissociate) to not compel undesired or involuntary association. In this case there are two possible readings, either we get what seems to be a redundancy, naturally if one is free to associate then one is free from involuntary compulsion. Alternatively, one can draw the distinction, as the UDHR has in Article 20, that; "(1) Everyone has the right to freedom of… association; (2) No one may be compelled to belong to an association". The purpose of this distinction being that if one were personally free to associate without limitations, one could theoretically associate with someone who doesn't want to associate with yourself (a point which we shall address shortly). To put it in layman's terms, the moral wrong committed by forcing someone into an association against their will and the moral good protected by the right to associate freely share essentially the same moral interest as in the previous example. This interest is in enabling individuals to arrange their lives, via their interpersonal arrangements, according to their will and preferences. It is due to this Janus-faced nature of the two freedoms that I would conclude that they are truly corollary rights of one another.

Which brings us to the meat and bones of the matter; is the freedom to disassociate already adequately contained within the freedom to associate? Which is to ask, is there a need to describe it as a unique concept at all, and if not, does it need to be protected in the same way? In other words, if they are corollary rights protecting the same interest, what is it that freedom of disassociation does as a concept that freedom of association can't or at least doesn't do? Or that a separate concept of dissociative freedom would achieve better in being understood as a distinct right in itself. In this regard, I find the position of Kimberley Brownlee, Professor of Philosophy at the University of Warwick, known for her work in the field of conscience-based rights theory, to be compelling, interesting and thought-provoking, with regard to her argument that any freedom of disassociation could not be conceived of or implemented in the same manner as freedom of association;[188]

> "…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. Both as a permission and as a claim-right, associative freedom is highly constrained and content-sensitive.

[188]Supra note 5 p268

> 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."

To build her argument, Brownlee draws a distinction between "intimate associations", "collective associations" and "mere interactions", and while these appear quite broad, and they are, in the context of Mrs. Brownlee's argument quite fit for purpose, as the focus is solely on intimate associations, defined in contrast to collective associations as not having to "…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".[189] At the risk of oversimplification, Brownlee's argument boils down to the following:[190]

> "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."

The story she tells of miners trapped down a mineshaft by necessity having to develop intimate associations to survive, which she posits invalidates Mills' conception of associative rights as the "right to choose the society most acceptable to us"[191] in my view does not apply here, as such a relation forms without thought of what society the miners should like to live in. At the risk of sounding facetious, in such cases of involuntary association by necessity, I should imagine that all the miners do indeed have a common vision of the society they want to live in; namely, one in which they're still alive. More compelling however, is the second part of this argument:

> "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."

---

[189] ibid p269
[190] ibid p272
[191] Supra note 35

However, while I find her arguments convincing with regards to the nature of dissociative freedom as being fundamentally divorced from the freedom to associate given the odious burdens such a standalone right to disassociate might receive within a Liberal framework, I do not view this as being particularly fatal to the prospects of a freedom to disassociate.

Instead, to conclude, I think it points to exactly what it is that freedom of disassociation could do far better than its corollary has in practise; it encompasses and augments a category of rights within certain contexts and gives a convincing weight to certain interpretations of those rights. Rights such as the freedom of religion when obstacles are put in the way of religious observances, family rights when a family wishes to educate their child at home in accordance with their own moral values rather than those imposed by a state, religious group or corporate entity and so on. In turn, much as the freedom to disassociate may act sufficiently different from freedom of association, so too would it be protected with sufficient difference, as due to the valid objections raised by Mrs. Brownlee, it may (in some jurisdictions) simply be too difficult an issue for a standalone freedom to disassociate to be protected as a fundamental right in the same manner as the freedom to associate generally is. Instead, it may be better protected as a constituent justification for the protection of other rights in certain contexts wherein the moral interest protected by the freedom to disassociate is at risk.

Section 4: Anti-Subordination vs Anti-Differentiation, where does the Freedom to Disassociate fit in?

In general, anti-discrimination perspectives can be divided into two camps, as first outlined by Yale law professor Owen Fiss.[192] The first camp; anti-subordination, or the belief that guarantees of equality fall flat where institutions, cultures or policies conspire to perpetuate inequalities or historical injustices despite what the letter of the law says. The second camp; anti-differentiation/classification, or the belief that the effects of any form of group classification by the legal system based on; race, gender, age, level of education etc will carry with it a host of deleterious social effects.[193] The dichotomy comes from the Constitutional debate in the United States regarding the interpretation and application of the Fourteenth Amendment.[194] More specifically, in light of the Supreme Court's inconsistent stance on the issue during the 1970's. But this provides a convenient spectrum for analysis of the relationship between the freedom to disassociate and conventional anti-discrimination legal theory. The key objective of this section shall be to assess whether or not the freedom to disassociate may be reconciled with the corpus of anti-discrimination theory which has developed since the Second World War, if so, how, if not, then why. This will be vital later in our discussion on whether or not freedom of disassociation is operationally compatible with modern liberal democracy given the ideologically indispensable nature of equality to that system, which may lead to the question of why I am focussing on practical concerns in a chapter focussed on the theoretical; the reason for this is simple, an understanding of the right to disassociate is best developed (given as pointed out in previous sections it is best understood as being descriptive of a category of rights in certain contexts inasmuch as a standalone right) through the exploration of what it cannot be as much as an exploration of what it could be in a vacuum.

In terms of anti-discrimination theory then, the freedom to disassociate has historically offended both camps. Given its overt classification and identification of the self-group to be distinguished, whatever said classification may be based upon,

---

[192] Owen M. Fiss, *Groups and the Equal Protection Clause*, (1976) Philosophy & Public Affairs Journal 107 (5)
[193]ibid p156
[194] Amar, A.R., *The bill of rights and the fourteenth amendment* (1991) Yale Law Journal, 101, p. 1193.

anti-classification theorists would hold its very identification of a self-group in distinction to others to be socially corrosive. Meanwhile, the anti-subordination position holds that even where such distinctions may appear to be facially neutral, if the combined effect of the distinction practised by many would lead to a disparate impact on a particular group or groups, or be to the disproportionate benefit of a single group, then that distinction, regardless of the seeming neutrality of its basis, constitutes harmful discrimination.[195] I would concur with Michelle Adams regarding the underlying motivations and overarching goals of both camps[196];

> "An Anti-Classification view emphasises discrimination, and is primarily concerned with individual vs group rights, and the particular motivations of the government actor in taking the complained of action [against the individual] …On the other hand, the Anti-Subordination view emphasises that [Anti-Discrimination law] protects against government actions which 'helps sustain or reinforce unjust forms of social hierarchy or social subordination'. The Anti-Subordination view emphasises groups rather than individuals, is concerned with social status and [social] hierarchies and argues that [Anti-Discrimination Laws] should be interpreted to prevent an unjust social structure."

Thus, we can see that, on top of the aforementioned clashes visible on the surface, the freedom to disassociate necessarily implies the existence of tangible, classifiable groups. While exercised by individuals the right generally requires an out-group or in-group distinction of some description in order for there to be an interference to be free from. This of course offends against the anti-classification camp, given their insistence that the distinguishing of groups remain outside of legal discourse altogether, and that said discourse be solely concerned with atomised individuals. Conversely, the freedom to disassociate has also offended the anti-subordination camp, for whom said classification is the beginning, rather than the end, of their legal analysis as a person must be a member of a group in the first place in order to be discriminated against implicitly or consequentially by otherwise facially neutral

---

[195] Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?* (2003) 58 University of Miami Law Review 9, p. 5.
[196] Michelle Adams, *Racial inclusion, exclusion and segregation in Constitutional Law* (2012) University of Minnesota Law School, p. 2

laws or acts.[197] The anti-subordination camp is exclusively concerned with group rights and their relations when assessing whether discrimination has taken place, and would take great exception to the use of a freedom to disassociate historically, (as during segregation) and potentially to copper fasten and prop up social hierarchies. The problem with this reasoning is that if a group of people choose to distance themselves from another group, or leave one in favour of another, they are in fact exercising freedom of association on an individual basis as opposed to freedom of disassociation as a group right. There is simply no need for a group-level freedom of disassociation. Moreover, the existence of a freedom to disassociate presupposes the existence of groups in the first instance.

So how to reconcile these two critiques, which have seemingly created an inhospitable crossfire in which the freedom to disassociate has been caught? Really what we are driven to discuss is that the freedom to disassociate is placed in the midst of the greatest internal tension of Liberalism itself; that of liberty versus equality. A tension wherein both are considered desirable social objectives, while at the same time achieving one precludes the other. Liberty in its purest form is chaos, while equality in its purest form is slavery for all. The balance between the two is the essence of liberalism in practice. In light of this consideration, I believe we can place a theoretical freedom to disassociate on the liberty side of this divide, where of course anti-discrimination will rest closer to the equality side. While a clash between the freedom to disassociate and anti-discrimination principles would probably become an inevitable consequence of recognising a freedom to disassociate, this is of course hardly fatal to the prospect, and yet we can still blunt and limit the right in order to render it less distasteful to its opponents. Firstly then, in order to clash less severely with the anti-classification school of thought, the freedom to disassociate could become expressly facially neutral, placing severe restrictions upon the categories of persons eligible to exercise the right against, potentially using the "exceedingly persuasive justification" requirement articulated by the US Supreme court in the *United States v Virginia (VMI)*[198], in the context of deciding when it would be permissible for the State to discriminate on the basis of gender or any other distinction. However, in my view, the vast majority of the time the exercise of the

---

[197] Amy H. Nemko, *Single-Sex Public Education after VMI: The Case for Women's Schools* (1998) Harvard Womens Law Journal 21 (19), p. 33.
[198] 518 US (1996) at 534

freedom to disassociate in this form would be implicit and rather mundane, in the same manner as in *Freeman v Pitts*[199], wherein the court decided that, in the context of demographic balances in schools[200];

> "Where resegregation is a product not of state action but of private choices, it does not have Constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never ending supervision by the courts of school districts simply because they were once De Jure segregated."

Such a scenario would, of course, draw the ire of the anti-subordination theorists, who would quickly point out that they see no distinction between De Jure and De Facto segregation in this case. To mitigate this inevitable outcome of like gravitating towards like, the only two possible legal responses could be to either make such voluntary association illegal altogether, and set precise quotas in every avenue of living which are strictly regulated to monitor their demographic balances, or instead to articulate the freedom to disassociate as being an expressly individual right, and thereby delegitimise and distinguish any use of it by many individuals which may indeed appear to be propping up an unjust or at least imbalanced social hierarchy. It is worth noting at this point that s. 9 of the Irish Equal Status Act 2000 permits registered clubs to discriminate on grounds of gender, civil status, family status, sexual orientation, religious belief, age, disability, nationality, ethnic status and membership of the Traveller community in certain circumstances by denying membership (i.e. exercising a right to dissociate) once such discrimination is deemed "reasonably necessary", a considerably more lenient test than the "exceedingly persuasive justification" requirement. However, this is in fact an exercise in what is already recognised under freedom of association, namely the right to organisational autonomy and the setting of membership criteria.

---

[199] 503 US (1992)
[200] ibid at 495

On the other hand, to invert the previous question; how may anti-discrimination theory be reconciled with the freedom to disassociate in its undiluted form? In short, the anti-classification theorists can recognise that, while they may dislike the law articulating named categories of persons, this does not stop people living their lives recognising their existence privately, so that while the law may remain facially neutral, the exercise of the right need not necessarily be. This is to say that while facially neutral, a freedom of disassociation would still need to be interpreted in conjunction with other rights and that courts would exercise their own value judgments, alongside a principle of proportionality in assessing particular cases. More helpfully, we can agree to distinguish between groups which share characteristics on the one hand, for example races, nationalities, linguistic groups, genders etc, to which membership is not necessarily optional or potentially prohibitively obtrusive or impossible to change, and on the other groups based on a shared vision or objective such as sports teams, clubs, political parties etc. Some groups such as religions are something of an overlap between the two but should be counted in the first for the purposes of avoiding discrimination, and the second for recognition of its real-world practical objectives. The model for this would be the Harvey Milk High School in New York, which was explicitly set up to cater for LGBT students who were facing abuse in other schools so they could finish their education in a friendly and understanding atmosphere, however, while the school prefers students from an LGBT background, it also takes in straight students if places are available.[201] As for anti-subordination theory, a clear distinction must be made between the subconscious and voluntary associations made by many individuals which have not been directed to create imbalanced social hierarchies, and intentional but implicit separations which result in tangible social stratification. While the distinction may often be subtle, the results are not necessarily so, as perfect balancing of competing demographic subgroups among different institutions and industries in a society is simply not a practicable proposition, it must be enough to satisfy the anti-subordination camp for there to be a lack of conspiracy to cement

[201] Rebecca Bethard, *New York's Harvey Milk School: A viable alternative?* (2004) The Journal of Law and Education, 33, p. 417.

social stratification, and for any incidental stratification to be porous and accessible to all parties.

A compelling critique has been put forth by Kristina Brittenham[202] of this form of voluntary disassociation, as providing an incentive and reward for inter-group hostility by validating their separation. To whit I would respond with a twofold answer, firstly, this position misses the voluntary nature of the freedom to disassociate, in other words, the unjust "resource lockup" of segregation discussed in *Brown v Board of Education*[203] cannot exist in the posited scenario given the fact that groups are not prevented from accessing the services and facilities provided for others as they were in *Brown*, and as Thomas J. of the US Supreme Court noted in *Missouri v Jenkins*[204] "[Group] isolation itself is not a harm, only state enforced segregation is". Secondly, Brittenham's critique misses the crucial context at play; namely that in a modern and increasingly diversifying Western society, when many groups attempt to assert themselves in a single and open social space, this breeds competition and thus, friction between the aforementioned groups. The very hostility Brittenham identifies is a result of the free for all cultural melee she herself advocates. In my view, a far more pragmatic response is to equip individuals with the tools to carve out their own corner of the social space, and then for groups to interact with one another from a position of security. This does much to alleviate the siege mentality which often develops when one group perceives itself as losing social capital and inertia to another. Seeing now that we have concretely established several methods by which the freedom to disassociate may be reconciled with anti-discrimination theory, along with the broader social context establishing why such a reconciliation is necessary in an increasingly multicultural West, we may move on to the question of whether or not the freedom to disassociate is operationally compatible with the Liberal Democratic tradition, in the next Section.

---

[202] Kristina Brittenham, *"Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough* (2004) Boston College of Law Review, 45 (869), p. 897.
[203] Supra note 69
[204] 515 US 70, 122 (1995)

Section 5: Operationalisation

Over the previous sections, we have established that the freedom to disassociate is indeed a right which represents a legal and moral interest worth protecting. We have established that it is indeed a corollary of the freedom to associate, while remaining a distinct right due to the nature of how it would best protect that aforementioned legal interest. Furthermore, it is an exploration of how and why this distinction will affect its potential implementation in the liberal democratic jurisdictions within which we have thus far envisaged it, which this section shall be concerned with. I shall do this by putting forth three different potential operationalised forms of the right, analysed in turn according to their theoretical form (how the is right articulated), functioning (what the is right achieving) and execution (the legal mechanism by which this may be brought into reality) and the challenges faced by each approach. It should be noted that the three of these examples are not necessarily mutually exclusive, but each represents something of a departure of intention as to which aspect of the freedom to disassociate should be emphasised; the material, and the personal or broader moral/liberty interests. Moreover, before we continue, the tentative nature of this piece should at this point be acknowledged. It is not the intention of the author to provide the last word on dissociative freedom in general or a freedom of disassociation in particular, nor indeed would that be possible given the dearth of both academic literature and case-law particular to the topic. Rather, it is the more modest intent of the author in this piece and throughout this thesis to instead pave the way for future writing on the subject by attempting to bring together the disparate and currently disconnected pieces of this puzzle, to be finished by others.

So to tackle the bull by the horns in our first example, why not recognise a freedom to disassociate in form as a full fundamental right, emphasising its status as an equal and opposite corollary to the already recognised freedom to associate, which has long been articulated and in turn been interpreted in quite a broad manner, from the right to peaceful political protest[205] to whether or not University student union membership can be made mandatory for the student body[206], allowing the courts

[205] <https://www.irishtimes.com/opinion/where-does-the-right-to-a-peaceful-protest-begin-and-end-1.2010737> Last Accessed 30/10/21
[206] <https://trinitycollegelawreview.org/no-i-in-students-union-the-constitutional-right-to-opt-out/> Last Accessed 30/10/21

system to build its own body of interpretation for this new right in accordance with general principles of reasonableness and balancing it against other rights of contextually greater, equal or lesser status? This would tend to be the position of the more adamant of the freedom to disassociates proponents, such as the philosopher David Oderberg:

> "I want to emphasise that, for all the distaste or aversion many might feel towards the dissociationist proposal, the key idea remains: either there is freedom of association or there is not. If there is, then there must be freedom of dissociation. Either freedom of conscience and freedom of religion are taken seriously, or they are not. If there is no freedom of religion, or no freedom of conscience, or no freedom of dissociation as a broad, general right, then liberalism itself is a myth. To call oneself liberal while resiling from the rights and freedoms liberals should take seriously is to be a liberal in name only."[207]

This very black and white view of rights theory of course seeks to protect as strongly as possible the broader moral/liberty interest which would theoretically be best protected by a recognised and broadly interpreted right to disassociate. In functional terms then, what exactly would this formation of the freedom to disassociate be seeking to achieve? In short, what distinguishes this iteration from the next two examples is that it looks towards the longer term in execution, a freedom to disassociate articulated as a Constitutional right, whether by addition to a given nation's text or by that nation's court's recognition of it as an unenumerated right, would allow best for the interest protected by the right to continue to develop alongside the progress of technological or social developments which may give rise to scenarios which challenge the very limits of, or perhaps even exceed the understanding of what the freedom to disassociate entails which has been proposed in this thesis. Indeed, niches which cannot be foreseen in advance may be found by courts in applying the right to specific cases, shifting the understanding of the right over time, as occurs with other fundamental rights from which arises the principal challenge raised by this method of interpretation; the disturbance caused to the existing legal order or rights with which a fully recognised freedom to disassociate may disrupt the existing balance of. Put simply, such a right could rapidly become

[207] Supra note 3 p. 179.

more a nuisance to rather than a tool for achieving justice if implemented in such a way and would likely lead to legitimate questions as to why a new right is even required, and if the same goal could be achieved less obtrusively by extending the understanding of freedom of association to cover its corollary.

This leads us to our next example, that, rather than a standalone right, using a cluster of rights to protect the same interest by using the freedom to dissociate as a principle through which to interpret and apply those rights, such as freedom of religion, speech, thought, conscience, expression and so on. As we pointed out in section 3 of this chapter, the need for a separate freedom of disassociation lies in its chief strength of augmenting our understanding of other related rights. In form, to be more specific, this means that rather than articulating a broad fundamental right to disassociate, we would instead amend our understanding of other rights which are in certain contexts aligned towards adequately protecting the interest theoretically protected by freedom of disassociation, such as freedom of conscience, religion, property rights, family rights etc to include in such contexts as concern on the aforementioned interest, an understanding of freedom of disassociation as a constituent part and justification of said right applying in that context. However, I believe there to be a more subtle position to be taken between recognising a monolithic, fundamental right to disassociate and an amorphous right only found in the application of other more established rights as we have just outlined. This third position would instead have an independently recognised right, but one which is used to aid in our understanding of the application of other, more established rights as enumerated above.

This may seem at first glance to be more complex than it really is, academic currents of thought often affect how courts interpret rights and the justifiability of their application in given scenarios and to propose that the freedom to disassociate as a concept could have the capacity to do so is no particular stretch. In terms of function this formation of the right would do much to strengthen real dissociative freedom in that these pre-existing rights have much deeper and authoritative statures than any “new” right could have. If it proves to be sufficiently efficient at protecting its legal interest, or is recognised as applying well to certain limited circumstances, the courts may begin to apply a freedom of disassociation in their reasoning without having to refer to a pre-existing right for justification, thus achieving the same end goals of the

first example but by far less obtrusive means, as by such a time the implications of such a right would be well understood by the courts. The principal challenges are twofold, firstly that academic views on the right would differ so widely that so too would judge's understanding and application of the right, with such confusion leading to it falling out of fashion rather quickly, or secondly that it merely devolves into a descriptive rather than a substantive term used to refer to a category of rights rather than in specific contexts wherein the interest protected by the right is at risk.

Furthermore, it must be understood that while we have successfully proven freedom of disassociation to be a valid right under Hohfeldian terms of reference, a right can be a right under such terms, with its interests protected in practice, without ever being enumerated or referred to explicitly. Freedom of Disassociation, as opposed to dissociative freedom generally, needs to be recognised independently as a right in academic terms, in order to fully understand the value of the unique liberty interests which contributed to its creation in the first place. This however is well outside the scope of this thesis; further research is needed in order to ascertain and expand upon the peculiar relationship the right would have with other rights protecting similar liberty interests. In turn, such research will only be possible when further research is done which ameliorates our understanding of the right on its own terms.

One can expect on an intuitive level, that a fully fleshed out freedom to disassociate would be both complementary to a whole host of rights, such as the right to privacy and freedom of religion, while also being contrary to many other interests, such as the potential for discrimination or promotion of dissidence under certain sets of circumstances. This balancing act and further the identification of circumstantial hierarchies among these rights and respective interests must necessarily be left for future research. I shall be satisfied if all this thesis achieves is the identification of the right as a valid and potentially beneficial avenue for future development. This matter shall be further explored in the central thrust of analysis of chapter 3 which shall discuss the scope of the freedom to disassociate as recognised by the Canadian Supreme Court in labour law cases, and the potential for a broader application of the right and of dissociative freedom as a wider concept generally.

The final of the three examples of how the freedom to disassociate may be operationalised in a real-world context, is that which focusses on amending our understanding of contract and commercial law principles in light of a well-articulated freedom of disassociation as a key principle of both in its own right. This is distinct from the previous two examples in that it would not involve recognising a freedom to disassociate as a right per se. Rather in the interpretation of contract and commercial law the courts would be applying a principle of freedom to disassociate under certain limited circumstances. Easily imagined if one considers its operation in the context of membership of a club or subscription service. For example, in the context of social media companies of online content platforms banning users for breaching parts of their terms of service, which may be seen to impose upon the user's freedom of speech or expression in allowing companies to use their desire to disassociate from certain types of content as a justification for their reneging on their contract with a paying subscription member. Regarding the function of this method, what it would achieve in particular would be to allow companies and individuals to actively protect the more material aspects of the protected interest of their own accord. A more decentralised version of the previous methods so to speak. With this empowerment in turn leading to further discussion of such an understanding of contract and commercial laws in the courts leading to its wider application to other spheres over time if it proves workable for the courts. This method provides a clear stream from an individual contract provision to the arguments of counsel using the freedom to disassociate as the justification for said provisions and eventually, if the courts prove receptive, into real judgements. It also skirts over most of the more problematic aspects of a broader freedom to disassociate which we have addressed in the anti-discrimination discussion in the previous section. It does this by limiting the application of such a principle to the realm of commerce and material affairs which are already heavily regulated by anti-discrimination law to the extent that a clear superiority of anti-discrimination principles is established from the outset, avoiding any real clashes. The principal challenge raised by this method of course would be exactly that which makes it more agreeable; it fails to protect the moral/liberty interest we discussed in section 1 as comprehensively or as directly as the previous two methods would, being limited from the outset to one particular area of law, and only protecting said interest in the event of a breakdown of relations, rather than being enforced in a proactive fashion before relations have even been made.

In conclusion then, the cut and thrust of this section lies in its highlighting of the utility in recognising the freedom to disassociate as a separate and unique right to the freedom to associate, and how that may be done within a liberal democratic framework. In proposing methods of operationalisation, it is of course inherent to a conclusion that we should make some deduction from the preceding piece. As such I would conclude that all of these methods theoretically have the capacity to achieve the protection in practise of the moral/liberty interest which the freedom to disassociate seeks to protect in theory. It should be noted however that amendments to our understanding of contract and commercial law principles would likely require legislation, as they would prove quite difficult to implement in a bottom-up fashion in a common law jurisdiction, from businesses and individuals recognising such a principle in their dealings and expecting the courts to uphold such a new and unexplored principal. Of course it makes little difference which sort of jurisdiction we are theorising if the freedom to disassociate is simply recognised as a fundamental right at the constitutional level, which highlights a key point which will become apparent in our next chapter; it is simply a matter of context which of these methods, if any, would or could be used within a given jurisdiction most effectively, and I do not doubt there exist a great many different methods which have escaped my notice. This section has been the exploration really of the question; could a freedom to disassociate exist in practical terms? In summation, I believe so, and yet due to the constraints of the scope of this thesis, I leave deeper consideration of the practicalities and objections to such a right to future works.

This section fits in well at the end of this chapter, in which I have sought to crystallise an understanding of the freedom to disassociate as a liberal right, but whose origins and ethical justifications run far deeper and older than liberalism itself, as indeed do many of the fundamental rights within the liberal pantheon. We began by arguing that, not only was the freedom to disassociate properly understood as a corollary right of the freedom to associate, but that it was also sufficiently distinct as to merit being a separate concept, we then explored its relationship with liberal democratic theory, its potential clashes and concurrences with the freedom to associate, the potentially fatal clashing with anti-discrimination theory, put into context as being part of the ongoing liberty vs equality tension inherent to liberalism, and finally we came to operationalising the right in real terms. Really, while it is nice

to theorise about practicalities, our next object of analysis shall be an appraisal of dissociative freedom, a more general and vague notion than a specified freedom to disassociate, in practical operation in different jurisdictions in recent memory and current practise, from which we shall hopefully draw further conclusions regarding the nature of the right and its implementation.

Chapter 3: Doctrinal Analysis

Introduction

In this Chapter I will aim to provide an understanding of where the freedom to disassociate stands in a modern context and to illustrate that, while dissociative freedom as a concept generally can be explored through multiple lenses, freedom of disassociation specifically can only truly be said, as a narrower category, to exist under the aegis of Labour law, or more particularly the law surrounding collective bargaining. In essence, the distinction between the two is more than just one of the general versus the particular. Dissociative freedom does not require a presupposed association whereas the freedom to disassociate necessarily does in order to be active. In other words, one must have a specifically undesired association in mind in order to speak of a freedom of disassociation in any particular instance. As we mentioned before, while dissociative freedom exists in many jurisdictions and under many headings, we find a more well developed and more clearly articulated example in the law of collective bargaining, and even more specifically do we find this in how the Canadian courts have interpreted collective bargaining principles.

To explore this, I will look to Canada as a jurisdiction in the doctrinal sense, the one in which I believe the right to be currently the most well developed and best articulated. I submit to you that, as outlined in the previous chapter, freedom of disassociation has, up until now, been less of a specifically enumerated right which has been rigorously imposed in a fashion analogous to the right to life or freedom of speech, but has instead had the liberty interest which would be protected by it, instead protected by what we now recognise as several separate individual rights and freedoms, such as freedom of religion, conscience, language rights, family rights, freedom of association itself etc. That is, until the Canadian courts began, as we shall see later on, to recognise and explore the negative element of associative freedom.

This Chapter shall therefore set out to firstly analyse relevant Canadian case law in light of this. This is done with a view towards a thematic analysis of these threads of legal development. Given that the overall purpose of this chapter is to contextualise dissociative freedom within the framework of a modern legal system and in light of

recent legal developments, it is of course necessary to justify my choice of jurisdiction and themes within that broader context.

The two major themes of analysis shall be: firstly, industrial relations in the context of collective bargaining case law, as this is the area which has arguably seen the richest vein of activity in recent decades. It is through this thread of case law that we can link developments in Canada to both trends in international law and also explore the nature and extent of the recognised freedom from compelled association. Secondly then, we shall look at how the Canadian courts have narrowly interpreted the freedom from compelled association and how an expanded definition could benefit its citizens in an increasingly multicultural society. We shall also explore how the Canadian Courts and legislature has sought to harmonise the distinct characteristics and demands of a variety of groups within a common law jurisdiction which by nature seeks to treat individuals without regard to their backgrounds.

While I am focussing on Canada as the caselaw on freedom from compelled association is more developed there, it should here be noted that the ECHR appears to be following a similar path, albeit with its caselaw is less developed. With this in mind, what makes the Canadian *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia [2007] 2 SCR 391* case (which we shall explore in greater detail later) interesting outside of the context of collective bargaining is that it shows the increasing willingness of common law jurisdictions to engage with the interpretations of international human rights law of the same fundamental rights which they have been interpreting for far longer than any international obligations have been present. In terms of freedom of disassociation generally let us look for a brief moment on what these obligations and interpretations may be. Article 20.2 of the Universal Declaration of Human Rights states that "No one may be compelled to belong to an association", while the article is not descriptive of what this entails, as it was an aspirational declaration rather than a substantive legal provision, we may look to the ECHR for more depth[208]. Article 11 of the ECHR is seemingly missing such an explicit recognition of a negative aspect of the freedom to associate, but in the ECHR cases of *Sigurður A. Sigurjónsson v.*

[208] Guide on Article 11 of the European Convention on Human Rights, European Court of Human Rights, p26, <https://www.echr.coe.int/Documents/Guide_Art_11_ENG.pdf> last accessed 30/10/21

Iceland[209] and *Vörður Ólafsson v. Iceland*[210] the Court recognises the negative aspect of associative freedom while *Sørensen and Rasmussen v. Denmark*[211] goes so far as to say that it is a necessary corollary right implied in the text. It is interesting to note that, in spite of this, the EU Charter of Fundamental Rights under Article 12 still does not make any of these rulings explicit. Further to this, the African Charter on Human and People's Rights of 1981 in Article 10.2 also supports a freedom from compelled association. Again, all of these provisions or implied readings refer to reasonability tests or subject the right to a similarly vague exceptions for associations necessary for the functioning of a democratic society. What this tells us about freedom of disassociation in a modern context is that, far from there being a bias against negative associative freedom, the right cases in which a reasonability test or for which the argument that a compelled association is necessary for the function of a democratic society would not be sufficient to displace the breach of the liberty interest involved, have not come along yet, or at least to sufficient prominence or in such numbers as to warrant significant attention.

Before we move on to our first section on collective bargaining, it is worth noting that while Canada is very similar as a jurisdiction to the United States in certain regards, being founded by English colonists and bearing the same common law legal system (with the exception of Quebec), it is distinct in that in recent decades it has taken the opposite tack to the US as regards anti-discrimination theory. Where the US has taken a more Anti-Differentiation/classification-based approach, Canada has instead taken a more Anti-Subordination based one, devolving many state powers to ethnic-enclaves such as Quebec and a variety of indigenous tribes, while simultaneously recognising their languages, customs and faiths within the centralised state, and we shall therefore be taking stock of the effect this position has had on dissociative freedom as a whole in the reasoning of the Canadian Courts. Having now established the legitimacy of both the themes and jurisdictions to be discussed, we shall now move on to our first theme, that of the freedom to disassociate in the context of industrial relations.

---

[209] 1993 § 35
[210] 2021 § 45
[211] 2006 § 54

Section 1: The Freedom to Dissociate within the Boundaries of Labour Law: The Canadian example

When discussing freedom of dissociation in the context of industrial relations, what we are really discussing is the rights of individual employees in relation to trade unions and employers, as individual potential or current employees are somewhat powerless when compared to the often-monolithic power and interests of labour unions and employers keen to keep said unions on good terms. Ultimately, what we shall here be discussing is the changing face of collective bargaining and its impact on individual freedom of association in Canada. The key question then that this section shall seek to answer shall be how Canadian collective bargaining case law has helped to develop the Court's understanding of Associative freedom overall, and what does this tell us about freedom of disassociation in the modern context.

Before we begin it will benefit us to explore the different types of employer-union-employee relationships[212], which are broken down into to what are known as closed shop, union shop or open shop arrangements. A closed shop is essentially an agreement between an employer and a union that they will exclusively hire from the pool of union employees rather than those from potentially other unions or none. This tends to be favoured by industries such as construction whereby tradesmen may not have continuous work with the same employer, but in practicing the same trade for their entire career appreciate the continuity of protection afforded by maintaining membership of the same union. Union shops on the other hand, are similar agreements whereby an employer agrees that, either upon hiring or son after new employee will join a given union, professional sports or similar employment arrangements tend to favour this form of agreement[213]. The final form of agreement we shall be referring to shall be the open shop, which as the name implies is simply where employment is open to non-union members and employees are not obliged to join a union.

---

[212] Zappalà, G., *The closed shop: help or hindrance for the union movement* (1991) Australian Centre for Industrial Relations Research and Teaching.
[213] <https://nflpa.com/about>Last Accessed 30/10/21

Clearly, the interest protected by the freedom to disassociate is here open to violation, which to recap we defined in general terms as being:

> "…a beneficial moral and material interest in minimising or eliminating those relations and associations which are involuntary and conflict with their worldview or constitute circumstances detrimental to their personal interests, whether these are property, autonomy or security related."

This of course would be potentially adversely affected by, for example political speech or positions taken by a union to which they do not agree and would not wish to contribute funds to, or they may prefer not to make contributions on the basis that they are simply struggling financially or do not believe the union organisation itself does much in the way of protecting their interests as a worker.

Having established the legitimacy of the interest protected by dissociative freedom and the forms of union-employer relations which apply to the given scenario, we shall proceed to analyse the position taken by the Canadian courts. The 1945 Ford Motor workers strike resulted in binding arbitration of the dispute by the Supreme court Justice Ivan Rand which decided much of the Canadian position.[214] The United Automobile workers of Canada was a trade union demanding recognition by the Ford company and mandatory union membership for its employees, essentially turning it into a closed shop arrangement. Having agreed to this binding arbitration, Justice Rand took a radically different approach to that which the American courts and legislature would take in the 1947 Taft-Hartley Act.[215] The labour movement was viewed there with great suspicion, due to its historical and contemporary links with Socialist and Communist movements that the Act even went so far as to require Union leaders to file affidavits to the effect that they were not Communists and banned closed shop arrangements outright. In contrast to this, Justice Rand viewed the Labour-Employer relations as synergistic (reminiscent, consciously, or otherwise in his reasoning of the *Rerum Novarum* Papal encyclical which promoted social cooperation over class warfare). To that end the solution he came to was that of what became known as "automatic check off" payments, defined as "a system in which an

---

[214] Wells, D.M., *Origins of Canada's Wagner Model of Industrial Relations: The United Auto Workers in Canada and the Suppression of" Rank and File" Unionism, 1936-1953* (1995) Canadian Journal of Sociology/Cahiers canadiens de sociologie, pp. 193-225.
[215] Clawson, H.J., *The Rand Formula: Subsidiary and Quasi-Legal Aspects* (1946) Canadian Bar Review, 24, p. 879.

employer takes money from a worker's salary to pay for the worker to be a member of a trade union". So, while union membership need not be compulsory, if the employees were to be represented by a labour organisation, then the employer and the bargaining organisation could agree to deduct dues from employees affected by their collective agreements.[216] This is codified in the Canadian Labour Code (R.S.C., 1985, c. L-2):

> "Union dues to be deducted:
>
> 70. (1) Where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union forthwith."

Of course, going back to the beginning of this section, the question remains as to what protections this may afford the interest protected by FOD. As raised in the recent 2018 case of *Janus v. AFSCME*[217] in the USA, would compelling an employee to pay dues to a union which supports political causes to which the employee has their own political and/or religious objections not equal a violation of their religious, political, and associative liberties? The Canadian Labour code has a straightforward and unusually (for common law jurisdictions) pragmatic method of handling this usually thorny issue:

> "Religious objections:
>
> 70. (2) Where the Board is satisfied that an employee, because of their religious conviction or beliefs, objects to joining a trade union or to paying regular union dues to a trade union, the Board may order that the provision in a collective agreement requiring, as a condition of employment, membership in a trade union or requiring the payment of regular union dues to a trade union does not apply to that employee so long as an amount equal to the

[216] Kaplan, W., *How Justice Rand Devised His Famous Formula and Forever Changed the Landscape of Canadian Labour Law* (2011) University of New Brunswick Law Journal, 62, p.73.
[217] No. 16-1466, 585 U.S. (2018)

> amount of the regular union dues is paid by the employee, either directly or by way of deduction from their wages, to a registered charity mutually agreed on by the employee and the trade union."

However, this is not to say that the Canadian system has not had its fair share of disputes and challenges, as ultimately the system derived from the Rand arbitration differs little in function from a closed shop arrangement in all but name, and there are a great many objections an employee may have against compelled association with a politically aggressive union which may not be grounded in or accepted as necessarily religious objections.

Such was the matter at hand in the 1991 case of *Lavigne v Ontario Public Service Employees Union*[218], wherein Mr. Lavigne, a teacher, was not a member of the Ontario Public Services Employees Union but was a member of the Ontario Council of Regents for Colleges. This council had agreed with the union that its members would pay its dues to the union. The union was obliged under its own constitution to use these funds for the advancement of causes beneficial to public sector employees, and in this respect made contributions to a variety of political causes. These included military disarmament, supporting workers strikes abroad, events run by the New Democratic party amongst other similarly contentious causes. Mr. Lavigne dissented from these causes and sought a declaration to the effect that certain articles of the Colleges Collective Bargaining Act violated his rights to under ss. 2(b); freedom of thought, belief, and expression, including freedom of the press and other media of communication, and 2(d); freedom of association, of the Canadian Charter of Rights and Freedoms.

The issues then that the Courts had at hand were threefold:

1. Did the Charter even apply to the facts of this case?
2. If so, was there any violation of either ss. 2(b) or 2(d) of the Charter.
3. If so, was that violation justified under s. 1 of the Charter, which sets "reasonable limits" on the extent of any of the rights contained therein.

[218] [1991] 2 S.C.R. 211

The Court found unanimously that the Charter did indeed apply as the Council of Regents was under ministerial control and thus amounted to an emanation of Government. In the majority decision, Justice La Forest found that:

> "The Rand formula violates s. 2 (d) of the Charter because it interferes with the freedom from compelled association. The essence of the s. 2 (d) guarantee is protection of the individual's interest in self-actualization and fulfilment that can be realized only through combination with others. The protection of this interest and the community interest in sustaining democracy requires that freedom from compelled association be recognized under s. 2 (d). Forced association will stifle the individual's potential for self-fulfilment and realization as surely as voluntary association will develop it, and society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Recognition of the freedom of the individual to refrain from association is a necessary counterpart to meaningful association in keeping with democratic ideals. **Thus, freedom from forced association and freedom to associate should not be viewed in opposition, one "negative" and the other "positive". They are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations.** Full meaning should be given to s. 2 (d), even though some aspects of the freedom may be protected by other provisions of the Charter; individual rights and freedoms are overlapping rather than discrete. Section 2 (d) does not provide protection from all forms of involuntary association, however. It was certainly not intended to protect against the association with others that is a necessary and inevitable part of membership in a modern democratic community."[219]

We see here quite a nuanced understanding of associative/dissociative freedom on the part of Justice La Forest, which shows that at the very least, the freedom to disassociate is seen as having valid purposes and mechanisms, even if differences exist as to the classification or application of the freedom itself. The case of *Lavigne* essentially decided that the public interest found in s.1 of the Charter proportionally outweighed any potential violation of the applicant's associative rights as the

[219] Supra 130 at Para 2

methods used were minimally intrusive and necessary for the proper discharge of the Union's publicly beneficial functions.

It would not be until 2001, in the case of *R. v. Advance Cutting & Coring Ltd.*[220] that the issue of whether a right not to associate existed under s.2 (d) and if it did, what its nature and limitations would be, and could it be said on the facts to have been violated in this case. The relevant facts of this case were that the construction industry in Canada had essentially its own parallel labour code, the Construction Act 1990. Under s.28 of this Act certain unions were listed and only from these could one attain competency certificates to work in the construction industry if one was a member. *Advance Cutting* claimed that this violated the right not to associate by forcing membership of one of these unions in order to work in the construction industry. Following the reasoning in *Lavigne* which had established a right not to associate as being contained within associative freedom. The majority decision notes that, unfortunately, forced associations of all kinds are a fact of life and the liberty interest of the applicant would have to be significantly impacted for this to apply:

> "While the majority of the Court acknowledged in Lavigne that there was a negative right not to associate, it also accepted a democratic rationale for putting internal limits on it. An approach that fails to read in some inner limits and restrictions on a right not to associate would deny the individual the benefits arising from an association. The acknowledgement of a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arises. Some forms of compelled association in the workplace might be compatible with Charter values and the guarantee of freedom of association."

Essentially, this judgement clarifies that yes, while a negative right to not associate exists as a necessary component/corollary of associative freedom, that such a right's exercise would have to be subject to either an exceptional intrusion on an individual's liberty, or their being forced by association into an "ideological conformity" to which they did not subscribe.

Up until this point, the Canadian courts have repeatedly alluded to the existence of stronger associative rights, but in each case found that those rights were not

[220] [2001] 3 SCR 209

sufficiently violated either on the circumstantial facts or for historical policy reasons as to warrant further action. This changed with the 2007 case of *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*[221]. Much to the surprise of all parties, the Supreme Court ruled that, essentially, collective bargaining rights amounted to human rights[222]. We shall now explore the reasoning of this case and attempt to contextualise and analyse the position of the Canadian Courts view of associative freedom.

The facts of this case were that the government of British Columbia had passed the Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2 which significantly impacted the working conditions of healthcare workers, while also limiting their capacity to form and make use of existing collective bargaining organisations and undermining previous collective agreements. The Appellants in this case were a collection of such collective bargaining organisations representing healthcare workers. The Appellants, being both unions and members of unions, claimed that their Charter rights had been violated by the Act, including associative rights under s.2(d), right "to life, liberty, and security of the person" under s. 7 and finally that the Act discriminated against women given the female dominated nature of the professions represented, protected against under s.15. At its core, the issue which the Supreme Court had to consider was whether the Government could, through legislation and without consultation with unions, void previous collective agreements made with legitimate representative organisations. In essence, the question boils down to whether or not any violations of Charter rights had occurred, and if so, could they be justified under s.1 of the Charter, as had happened in *Advance Cutting* and *Lavigne* previously.

The Court held, per McLachlin CJ, that the “Freedom of association guaranteed by s. 2 (d) of the Charter includes a procedural right to collective bargaining… (the Act) interfere(s) with the process of collective bargaining, either by disregarding past processes of collective bargaining, by pre-emptively undermining future processes of collective bargaining, or both.” For context to this decision, Canada had been a

---

[221] [2007] 2 SCR 391

[222] Roy J Adams, *From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining* (2008) Just Labour 12

driving force[223] behind the International Labour Organization's 1998 "Declaration of Fundamental Principles and Rights at Work" which declared collective bargaining rights to be nothing short of a fundamental human right. These international obligations finally came home to roost in the majority judgement, Per McLachlin C.J.:

> "Canada's adherence to international documents recognizing a right to collective bargaining… supports recognition of that right in s.2(d)2… (t)he Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

It can clearly be seen here that the weight given to these provisions of international human rights laws and principles were sufficient to displace the s.1 Charter provision's applicability in this case and bolster the gravity of collective bargaining decisions in the field of Canadian Constitutional law. This decision does much to displace the previous *Alberta Reference* case[224] judgement of 1987 which had held that the right to strike was not contained within s.2(d) as collective bargaining rights were modern rather than fundamental ones. Furthermore, the interpretation of s.2(d) as applying to individuals in their own capacities and not to organisations would empty the provision of most of its meaning and be contradictory to the understanding of the same rights, worded in the same or similar manner, which the Canadian Government recognised under international treaty law.

While the *Health Services* case does not necessarily directly discuss the right to dissociate but, rather, the extent to which freedom of association protects the right to conclude collective agreements, it can be said to be relevant insofar as it is the culmination of this strand of case law, and furthermore insofar as the interpretation of any right affects the perception of its corollary. I refer the reader back to page 78 of this thesis, wherein the various international charters which affirm, at the very least, some form or other or a freedom from compelled association are discussed. The relevance then of the *Health Services* case to Canadian freedom of disassociation lies beyond the immediate rulings or reasoning of the case, and more

---

[223] Burkett, B.W., Craig, J.D. and Gallagher, S.J., *Canada and the ILO: Freedom of Association since 1982* (2003) Canadian Labour & Employment Law Journal 10, p. 231.
[224] Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313

so in the extraction of principles from treaty/Charter commitments to bring domestic reasoning into line with state policy commitments. The groundwork is laid therefore, for the Canadian courts to relate even a loose articulation of the freedom to disassociate in a future ruling, it may simply be a matter of waiting for the right case with the right arguments.

In conclusion, back at the beginning of this section, we raised the question of how Canadian collective bargaining case law has helped to develop the Court's understanding of Associative freedom overall and what this tells us about freedom of disassociation in the modern context. The rulings of the Canadian Supreme Court brought forth several crucial understandings to the discussion. First among these was in the *Lavigne* case wherein the freedom not to associate was recognised as necessarily integral to associative freedom both as a broader concept and fundamental right. Furthermore, both *Lavigne* and *Advance Cutting* recognised that such a right, not just in light of s.1 of the Canadian Charter of rights, but in general, would have to be limited by a reasonability test as we encounter and engage in unwanted, unnecessary and unexpected associations on a regular basis as part of the basic functioning of any society.

Section 2: Dissociative freedom outside of Collective Bargaining

This section shall be concerned with drawing a comparison between the limited, constrained dissociative freedom we see in Canadian caselaw, and what a more broadly applied principle could achieve. We shall seek to establish the breadth and nature of modern dissociative freedom in Canada on the level of how it has been applied to ethnic, religious, linguistic and sub-national groups. This is with a view towards establishing a firmer understanding of the kind of social fabric which produces a need for and develops an understanding of dissociative freedom. In the process of our investigation, we shall discuss how the narrowness of the Canadian Supreme Court's approach to the freedom of disassociation.

So, to begin, the Canadian Charter of Rights and Freedoms[225] under s.15 (2) establishes a unique but progressive model of understanding what defines an individual, acknowledging that people are not atomised but instead are a product and subject to wider trends:

> "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

In other words, this clause is at the core of how the Canadian politico-legal system has attempted to reconcile any negative consequences of the new multicultural society. This Constitutional clause, upon an initial reading, appears to open up the possibility for both collective rights, and positive rights or entitlements in Canadian law, but if this is indeed the case, what does this tell us about the culture of individual rights in Canada? It would appear that, beginning with the recognition of

[225] Act, C., 1982. Part 1: Canadian charter of rights and freedoms.

treaty law between the First Nations people and European settlers[226], the Canadian Government eventually came to officially recognise many of the rights contained therein on a Constitutional level, in Section 35 of the Constitution Act 1982:

> 35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons

So, having established that collective rights do indeed exist in Canada, our question now becomes; whether the mere existence of collective rights necessarily undermines the strength of individual rights, and moreover, would such rights connote positive entitlements/rights and therefore undermine the regime of negative freedom, and by extension any attempts at expanding the freedom to disassociate to cover issues of culture and identity?

The answer, unfortunately for those seeking simple answers, is both yes and no, the key distinction, in my view, rests on whether the Group Right is created and upheld in order to protect the interests of individuals, or whether individuals are granted rights in order to further the interests of a group. By this, I mean to say that there is in my view a distinction between granting a fisherman's right to his groups historical fishing grounds and granting exclusive rights to a group to use certain waters for fishing, the point being that the former enables an individual to preserve and uphold a way of life, whereas the latter strips those outside of the protected group of any right to fish in those waters. I should say the distinction seems subtle to the point of

[226] Borrows, J., With or without you: First Nations law (in Canada) (1995) Mcgill law Journal 41, p. 629.

arbitrariness unless one takes into consideration the line Dwight Newman QC, himself Canadian, draws between Group Moral Rights and Group Legal Rights;[227]

> "It is a contingent matter whether the best legal means of protecting a particular moral right is via legal or even constitutional entrenchment of an analogous legal right, a point easily observed if one were to contemplate a dysfunctional legal system. Aside from this more general issue concerning the connection of moral and legal rights, one could conceive, for instance, of collective moral rights protected through a variety of legal mechanisms, such as the protection of relatively abstract collective moral rights through relatively tangible individual legal rights. For instance, the moral rights of an Aboriginal community to fish certain waters might be best expressed through Aboriginal individuals' legal rights to fish. Various group-based moral rights might actually be best enforced and fulfilled through the granting of legal rights that individual citizens may enforce and exercise. At the same time, certain individual moral rights, such as individual claims to equality, will in certain conditions conceivably be better protected through the granting of legal rights to groups that may be able to exercise the rights where downtrodden individuals could not—or where groups are capable of using different legal rights from individuals, such as to establish certain external protections of a cultural community whose presence assists its individual members in individual ways. The appropriateness of collective legal rights might well depend upon to what degree particular groups have clear identity and effective agency to exercise any legal rights granted to them. As part of the complex range of considerations in whether individual or collective legal rights will be more effective in particular circumstances."

We can see then that, if handled delicately, a legal regime can indeed recognise group entitlements without compromising a legal culture of individual rights, as, if we denied this, then we must also deny that the USA, until the end of segregation, had no such culture of respecting individualism, so we must not conflate a legal culture of individualism with, necessarily, the existence of equal rights for each individual in question, only that those rights be apportioned to individuals, rather than directly to groups. While I do not personally envisage any particular clash

[227] Dwight Newman, *Collective Rights* (2004) Philosophical Books 48 (3), p. 224

between a Freedom of Disassociation and a system which recognises groups as rights-holders, we have established that in order to reconcile freedom of disassociation with a Liberal Democratic framework, that it is necessary to have it apply on a strictly individual basis, as Canada's group and positive rights exist within the relatively unique context of applying mostly to Aboriginal minorities who operate as semi-autonomous and partially sovereign entities with whom treaties were signed to grant those rights, more akin to the 1707 Act of Union between England and Scotland than it would be to ethnicity based rights such as for whites in the case of South African Apartheid[228], aimed at ethno-cultural preservation, or arguably for African-Americans in American affirmative action programmes, aimed at redress of historical wrongs. I would thus conclude that, in light of how limited in practise Canada's granting of group-based rights and entitlements, along with its unique historical context, that it does indeed possess a culture of respecting individual rights and negative freedom.

But is this enough to deal with the issues which arise naturally in a society which contains many identity groups? How can this cater to more recent, less historically grounded immigrant groups such as South Asian Muslims and Chinese groups seeking to express their own unique identities if not with more specific ordnances? Given the general and non-specific nature of groups immigrating to Canada in recent times, such an approach cannot be considered practical in the long run, but is there an alternative? I would say that before tackling this question we must first observe what the relationship between identity and association truly is. A solid starting point for the initial effects of a diversity of identity can be found in Robert Putnam's controversial yet seminal study, Bowling Alone: America's Declining Social Capital:[229]

> "[I]n the short run, immigration and ethnic diversity [tend] to reduce social solidarity and social capital. In ethnically diverse neighborhoods residents of all races tend to 'hunker down'. Diversity does not produce 'bad race relations' or ethnically-defined group hostility, rather, inhabitants of diverse communities tend to withdraw from collective life, to distrust their neighbors,

[228] Egerö, B., *South Africa's bantustans: from dumping grounds to battlefronts* (1991) Nordic Africa Institute 4
[229] Putnam RD, *Bowling Alone: America's Declining Social Capital* (1995) Journal of Democracy 6 (1) pp. 65-78.

> to volunteer less, give less to charity and work on community projects less often, to register to vote less, to agitate for social reform more, but have less faith that they can actually make a difference, and to watch more television. Diversity, at least in the short run, seems to bring out the turtle in all of us."

The solution found by most to association with those unlike them, is to seek association with those more like them, if this were not intuitively true, human history would read a lot differently. So here we have a situation whereby differing identity-groups are seeking to distinguish themselves and seek space in which to express these identities as being the norm. We shall look to how an expansion in the Canadian Court's concept of the freedom to disassociate could aid in alleviating the tensions caused by social heterogeneity, but first we shall look at how Canada has attempted to conceptualise it thus far.

So, we come to the crux of this Section; how exactly Canada has reacted to shifts in social heterogeneity over the years, and how this has in turn affected Dissociative Freedom. Canada's formulation of a legal regime which recognises collective rights stems of course from its socially heterogeneous nature, therefore, any analysis of how Canada views the validity of its constituent group differences would be naturally misdirected without first anchoring itself in an understanding of how Canada appears to define what it means to be Canadian in the first instance. While in 2015 Prime Minister Justin Trudeau declared Canada to be the world's "first post-national state… [with] no core identity, no mainstream"[230], he was trying to sum up what Charles Taylor describes as "deep diversity"[231];

> "To build a country for everyone, Canada would have to allow for second-level or ''deep'' diversity, in which a plurality of ways of belonging would be acknowledged or accepted. Someone of, say, Italian extraction in Toronto or Ukrainian extraction in Edmonton might indeed feel Canadian as a bearer of individual rights in a multicultural mosaic. His or her belonging would not ''pass through'' some other community, although the ethnic identity might be important to him or her in various ways. But this person might nevertheless accept that a Quebecois or a Cree or a Dene might belong in a very different

[230] <https://www.theguardian.com/world/2017/jan/04/the-canada-experiment-is-this-the-worlds-first-postnational-country> Last Accessed 30/10/21
[231] Charles Taylor, *Shared and Divergent Values in Ronald L. Watts and Douglas M. Brown, eds., Options for a New Canada* (University of Toronto Press 2001), pp. 53–76.

> way, that these persons were Canadian through being members of their national communities. Reciprocally, the Quebecois, Cree or Dene would accept the perfect legitimacy of the ‘‘mosaic’’ identity.”

This position, regardless of whether or not it translates into lived experience, appears to represent the dominant viewpoint among the Canadian Academic, Media and Political classes quite well. It does, however, miss something in the way of context, as Kymlicka posits[232], there are two essentially different sources of cultural diversity within a state, firstly, that which “arises from incorporation of previously self-governing, territorially concentrated cultures into a larger state”, examples of which would be the Quebecoise, Metis and First Nations of Canada, all of which possess a clear territorial domain along with a history of unique culture and relative self-administration. The second source of cultural diversity which Kymlicka describes is that of immigrants and their families, who are more inclined to learn the majority language and, over generations, assimilate culturally, Kymlicka contrasts these two sources as either a “multinational” society or a “Multicultural” one respectively. What becomes immediately clear is that Canada’s reaction, in contrast to the USA, towards its constituent groups has been to divide them into these two categories: individuals belonging to groups with special rights, and everyone else. This has largely been driven by the narrow outcome of the Quebec independence referendum in 1995;[233]

> In light of Québécois separatism, Anglo-Canadian elites and the federal government also desperately needed to reinstate a Canadian identity that went beyond bilingualism while avoiding both Anglo-centrism and too many parallels with the American melting pot. Multiculturalism as a collective identity rather than as a group-driven policy lent itself readily to this purpose.

This narrowly dodged bullet of a referendum forced the Canadian state to re-evaluate its policy of multiculturalism, which had made French-Canadians feel as though their identity was merely to be one among many, rather than a core ethnic group of the Canadian nation. The solution ended up being somewhere in the middle, French-Canadians received language rights and expanded autonomy in Quebec, while it was

---

[232] Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, 1st Ed. (Clarendon Press 1995) p. 9.
[233] Elke Winter, *Trajectories of Multiculturalism in Germany, the Netherlands and Canada: In Search of Common Patterns* (2010) Government and Opposition 45 (2) pp. 178-179.

recognised that it was the non-Quebecoise population which had swung the referendum, voting 95% against independence, compared to the Quebecoise who voted 60% in favour, and would thus be crucial in becoming the "glue" which held the divided national identity together.[234] So having established in general terms how Canada has come to view its own identity and its perspective on its social heterogeneity, we must now turn towards exploring the freedom from compelled association as applied to Canadian labour law.

Section 27 of the Charter states that the "Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians". Thus far no case has, in recent times, explicitly gone against this provision, in fact most have, such as *R. v. Big Drug Mart Ltd*[235]. The problem then, is not that the Canadian Courts do not appreciate the gravity and value of interpreting the Charter with due deference to multiculturalism. Rather, they are overlooking, to their own detriment the utility of expanding their application of the freedom from compelled association implied under s.2(d) as recognised in *Lavigne*, to cover a broader range of cases. One could argue that a reason for this reluctance is that promoting citizen's right to separateness is antithetical to multicultural values, but this could not be farther from the truth. A multicultural society can only exist whereby each group has a space in which it can exercise its separateness, within a common political culture. The benefits of what an expanded application of even a basic freedom from compelled association would be to allow citizens to arrange their personal lives to the best of their abilities to reflect their identities and beliefs, and where they feel as though they are being compelled into associations which do not conform to this effort, they and the courts will possess a legal article suitable to protect their liberty interests.

In conclusion then, it has to be said that Canada has been dealing with ethno-cultural differences more harmoniously than other jurisdictions, such as the USA and South Africa, for several reasons, but perhaps the predominant one being that, in general, it has not hesitated to give its constituent groups latitude to self-govern and express their differences, when necessary, while also guaranteeing a significant degree of

---

[234] Charland, M., *Constitutive rhetoric: The case of the Peuple Quebecois* (1987) Quarterly journal of Speech, 73(2), pp.133-150.
[235] [1985] 1 S.C.R. 295

individual liberty (particularly in the form of a freedom from compelled association in collective bargaining, or even more broadly, as we have suggested).[236] Again, the description of there not being a right to isolate means that the Canadian freedom from compelled association is not as strong as a fully fleshed out freedom of disassociation might ideally be. However, what we can perceive here is a blueprint for an increasingly diverse Western world, which while for now stubbornly clings to the notion of the *tabula rasa* and residual notions of a society made up of individuals without defining characteristics and associations.[237] These notions are rooted in the idea of a society possessing a monolithic culture, language, religion and ethnicity which, over the coming decades, will no longer be the lived reality of its citizens. Canada is in this regard ahead of the curve, as given its experience and success in integrating a sub-state and nationality as distinct as that of Quebec, nations such as South Africa, Spain and the UK have every reason over the coming decades to implement similar forms of freedom from compelled association and interference, even if, for now such freedoms fall short of a freedom to disassociate.

[236] Weller, M. and Wolff, S. eds., *Autonomy, self-governance and conflict resolution: Innovative approaches to institutional design in divided societies* (2005) Psychology Press, 33
[237] Dobzhansky, T., *The myths of genetic predestination and of tabula rasa* (1976) Perspectives in Biology and Medicine, 19 (2), pp. 156-170.

Findings

So, what's the takeaway? In the first section we set out to illustrate in this chapter that the freedom to disassociate exists in a modern context almost exclusively in the sphere of collective bargaining case law. In the second I endeavoured to build on the findings of the first section by critiquing the narrowness of the Canadian Court's application of the freedom from compelled association in collective bargaining cases, and furthermore to pose the possibility of its broader application as a tool for better reconciling the competing identities in an increasingly multicultural society.[238]

The primary motivations on the part of the Canadian Courts and legislature in expanding dissociative freedoms have been to avoid civil or territorial disintegration and/or large-scale labour conflicts or pressure to conform to their international treaty obligations, rather than any independently conscious regard being given towards the ability of individuals to disentangle themselves from unwanted associations for its own sake. Overall, then, one of our most vindicating observations is that in Canada, developments in dissociative freedom appear to be increasingly informed by these international obligations or accords, which, as we have discussed in the introduction, point increasingly in the direction of an expanded application of the freedom from compelled association as a corollary of the freedom to associate.

We have seen in the case of Canadian labour law that this has a quantifiable trickle-down effect, from treaty obligations or even lesser agreements into the reasoning and interpretations of Supreme Court rulings. As we briefly touched on, this is even more tangible on the level of the ECHR, which has been interpreted to include a freedom from compelled association and has been recognised by various jurisdictions through legislation (in Ireland through the European Convention on Human Rights Act 2003).[239] While again such a freedom falls short of what we have described a freedom to disassociate as being, it represents a concrete move in the right direction. If the 20th Century was one wherein dissociative freedom was eroded, the 21st certainly looks to be the one in which it is rediscovered and built upon.

---

[238] Mitchell, K., *Multiculturalism, or the united colors of capitalism?* (1993) Antipode, 25(4), pp. 263-294.

[239] Ubillos, J.M.B., *Freedom of Assembly and Association (Art. 11 ECHR): Some Hesitations on a Path of Firm Protection, In Europe of Rights: A Compendium on the European Convention of Human Rights,* 1st Ed. (Brill 2012) pp. 403-437

Regarding the interaction between modern Liberal Democratic systems and values with dissociative freedom in practice, we can see that in all the interaction is far more ambivalent than an initial understanding of both would suggest. The primary driving factor behind the development of the Canadian freedom from compelled association appears initially to have been the fear of the growing political power of disenfranchised organised labour. When the initial fears of working-class revolt receded and the Unions were essentially co-opted into the Canadian system of governance, the attention of the courts turned towards maximising the power of individuals within that system. This in itself is worthy of further study and discussion outside the scope of this thesis. In any case, this would lead me to conclude, on a higher level of analysis, that the reason for the lack of any real friction in practise between Liberalism and dissociative freedom, despite the liberty-equality conflict discussed in the previous chapter, is that the two simply belong to two different worlds. To explain further, Liberalism is a socio-legal concept of what the guiding motivations of law and governance should be, whereas dissociative freedom appears to exist more in the politico-legal sphere, a tool for use under certain political circumstances, regardless of the society's ruling ideology, in summary, dissociative freedom is a tool of statecraft, granted or taken away as circumstances require, rather than an objective of it. The next crisis on the horizon then for which this tool is well-suited then, is managing the competing interests of a multicultural society.

Conclusion

What the shape of this thesis amounts to ultimately turned out to be is a chronologically sensitive assessment of both dissociative freedom generally and a narrower, propositional freedom to disassociate. In the first chapter, on the historical and conceptual foundations of freedom of disassociation, we established a series of essential elements which were prerequisite to the development of associative freedom, and further explored the development of Liberalism as a branch of socio-legal thought and practice. We derived from both the historical and modern accounts of this category of freedom that it tends to develop as a reaction to an increase in social heterogeneity in a given society. In other words, a fracturing of a unifying sense of common identity, with an increase in dissociative freedom being a coping mechanism to this political reality, often, a failure to grant greater freedoms to constituent groups has led, as in the case of Bosnia-Herzegovina and the other Yugoslav successor states, to a de facto fracturing of political authority in turn.[240] This historical analysis began with the Ancient Greeks and ended in the USA in the 20th C. with the rise of the antidiscrimination movement and with it the two distinct strains of thought of anti-subordination and anti-classification, which many previous judgements which promoted dissociative freedom offended against.

In the third chapter we picked up essentially where we left off in the first, with the deepened understanding of the theoretical framework underpinning the freedom of disassociation from the second chapter, but instead shifting our focus to solely encompass the jurisdiction of Canada. We found that a narrow freedom from compelled association was robustly proposed and defended by the Canadian Supreme Court but remained confined to the sphere of collective bargaining caselaw. This vindicated our initial thesis that dissociative freedom is borne of an increase in social heterogeneity and the need to balance competing interests within the one polity. This branch of legal reasoning has its origins in attempts to placate the rise in labour agitation by increasingly organised unions post-WW2, amidst the fear of Communist uprising. Its further development however has been driven more by

[240] Ramet, S.P., *Balkan babel: the disintegration of Yugoslavia from the death of Tito to the fall of Milošević* 1st Ed. (Routledge 2018)

international obligations, which is a matter of great interest and potential future research.

The second chapter aimed to establish a workable theoretical framework for the freedom of disassociation prior to our assessment of it in a modern context in the third chapter. We began by establishing the legitimacy of the freedom to disassociate as a right by first establishing its framework in the context of Hohfeldian rights theory, then by articulating the legal interest that right would uniquely protect which cannot be said to already be covered entirely by an existing right. We find in the third chapter the true answer to this question, that while it is a unique right which is legitimised by practice, this practice is a narrow interpretation and limited to the law of collective bargaining.

Next, we asked if the freedom to disassociate truly was a corollary of the freedom to associate. Yes, the freedom to disassociate satisfies the criteria for what a corollary right of the freedom to associate would be, and it does require such a corollary status from which to derive validity. Yet, the reason we have concluded it is correctly referred to as a separate right and not already adequately contained within a broadly defined freedom of association, is that it protects a unique liberty interest which the freedom of association does not. Furthermore, as a matter of legal taxonomy its separation makes it a clearer concept to define and discuss. Finally, freedom of disassociation as a specific right links into broader dissociative freedom as a concept, which casts its net in many waters separate to what associative freedom as a generalised concept would.

The next, related question was whether or not freedom of disassociation is really compatible with liberalism, more specifically in the context of modern anti-discrimination theory? While I concluded that the freedom to disassociate could indeed be articulated as a liberal right, the origins of what I deemed to be its most compelling ethical justifications ran far older and deeper than Liberalism itself. This stems from Aristotelian virtue ethics rather than primarily a liberal liberty interest, though the two are by no means mutually exclusive. Furthermore, I reasoned that the freedom to disassociate could be limited and chopped and changed in order to offend anti-discrimination theory less, yet the fundamental conflict between the two I identified as stemming from the ever-present internal tension within Liberalism

between liberty and equality, and as such the freedom to disassociate could theoretically fit into that ongoing balancing act without violating any of the fundamentals of liberal democratic society. Next the question of how the right may be operationalised in a modern jurisdiction loomed, to this I proposed three possible solutions, neither mutually exclusive nor exhaustive of all possibilities, but rather given to be illustrative due to the limited word count, these were; firstly, to recognise a constitutional, fundamental right to disassociate equal to the freedom to associate. Secondly, that the right should be recognised as an independent and freestanding corollary right, but that it interacts in important ways with other rights and freedoms, adding to our capacity to engage with complex problems alongside freedom of thought, freedom of conscience, privacy etc. Finally, and similarly a jurisdiction could recognise the freedom to disassociate as an element of contract and commercial law, leaving private litigation to iron out an understanding and emulate the aforementioned process of fleshing out the right organically through constant use.

These results are significant because they chart a clear path forward for future scholarship, having successfully established freedom of association as valid legal right and developed something in the way of a supporting theoretical framework. This is an important development in its own right, as time progresses and more and more points of friction between identities are identified, lawmakers and scholars will have to rediscover, synthesise and invent entirely novel, compelling and agreeable solutions to this new model of society if liberal democracies are to survive the century with their core principles intact. Before I explore potential avenues for future research in the field, I shall take a moment to acknowledge the limitations of this paper so as to forewarn potential future scholars investigating the same field. First of all, the word count of this LLM thesis was the principal factor in limiting the scope and depth of analysis of this paper, it would have been easily possible to spend ten thousand words on the contemporary justifications for segregation in American law, and another ten thousand on what this says about the flexibility of liberalism in the legal sphere. Moreover, aside from the word count, I was limited, I feel, by my personal experience; having studied law at undergraduate level in a common law jurisdiction with English as my only language, making jurisdictions which are not Western liberal democracies such as Iran and China insurmountably difficult to

investigate, while I am certain there are a great many interesting lessons to be drawn on the topic from such jurisdictions. The final limitation I shall point out is that of the existing literature, while most thesis conclusions will generally try to fit the paper into an existing corpus of work, in the case of this paper, when published, will make up a significant proportion of everything written on the freedom to disassociate, as such, this has led to a large portion of the paper having to return to first principles to establish the basics about the right, space which could have been used in understanding the right in greater depth had it been clearly articulated elsewhere prior to the writing of this paper. Of course, the risk has been run throughout, as alluded to in the introduction, of the author projecting his biases onto unrelated literature in order to back up novel arguments made essentially in a vacuum, in such a vacuum in fact, that I have had to resort to inventing my own critiques to answer at several points due to the absence of them in the existing literature.

I shall finish by, as promised, attempting to propose where future research should go from here, presumably building on the content of this paper. The key questions raised or left unanswered by this paper are: as touched upon in the previous paragraph, what are the prospects for the freedom to disassociate in illiberal and non-western contexts? This paper has used case-law primarily from the US in its theoretical framework, and some valid counterpoints and interesting perspectives could be uncovered via this avenue of investigation. Secondly what has led to the Atlantic divide in the understanding of dissociative freedom? Why do jurisdictions in Europe struggle with the notion while courts in the US and Canada seek to empower individuals to be able to live according to the prerogatives prescribed by their identities? Finally, if I have not convincingly articulated the freedom to disassociate as a potentially valid legal right, then what other right or legal artifice could augment existing liberal democratic legal systems to achieve the same ends in protecting the rights of individuals to be free from undesired associations? While all of these avenues are ones which I should dearly have loved to explore, I shall have to leave the reader with this parting line to consider on the nature of identity in a socially heterogeneous society from anti-discrimination activist Jane Elliot[241];

[241] From an interview on the Oprah Winfrey show in 1992, viewable here <https://www.youtube.com/watch?v=l8PicAzrNU0> last accessed 30/10/21

“We don't need a melting pot in this country, folks. We need a salad bowl. In a salad bowl, you put in the different things. You want the vegetables - the lettuce, the cucumbers, the onions, the green peppers - to maintain their identity. You appreciate differences.”

Bibliography

Journal articles:

1. Adams M., *Racial inclusion, exclusion and segregation in Constitutional Law* (2012) University of Minnesota Law School.
2. Adams R., *From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining* (2008) Just Labour 12.
3. Adler W.D. and Polsky A.J., *Building the new American nation: Economic development, public goods, and the early US army* (2010) Political Science Quarterly, 125 (1).
4. Amar A.R., *The bill of rights and the fourteenth amendment* (1991) Yale Law Journal, 101.
5. Balke F., *"Speaking-For" and the Lack of Representation: Advocacy in Hobbes and Rousseau* (2020) Law & Literature, 32 (2).
6. Balkin J. and Siegel R., *The American Civil Rights Tradition: Anticlassification or Antisubordination?* (2003) 58 University of Miami Law Review 9.
7. Berman H., *The Origins of Western Legal Science* (1977) 90 Harvard Law Review 894.
8. Bethard R., *New York's Harvey Milk School: A viable alternative?* (2004) The Journal of Law and Education, 33.
9. Borrows J., With or without you: First Nations law (in Canada) (1995) Mcgill law Journal 41.
10. Brittenham K., *"Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough* (2004) Boston College of Law Review, 45 (869).
11. Brownlee K., *Freedom of Association: It's Not What You Think* (2015) Oxford journal of legal studies, 35 (2).
12. Broyde M., 'Freedom of Disassociation and Religious Communities: A Jewish Model for Associational Rights' (2016) Human Rights 10 (2).
13. Burkett B.W., Craig J.D. and Gallagher S.J., *Canada and the ILO: Freedom of Association since 1982* (2003) Canadian Labour & Employment Law Journal 10.
14. Charland M., *Constitutive rhetoric: The case of the Peuple Quebecois* (1987) Quarterly journal of Speech, 73(2).
15. Clawson H.J., *The Rand Formula: Subsidiary and Quasi-Legal Aspects* (1946) Canadian Bar Review, 24.

16. Craig M. A. & Richeson, *On the precipice of a "majority–minority" America: Perceived status threat from the racial demographic shift affects white Americans' political ideology,* 2014, Psychological Science, 6.
17. Croissant, A., S*trong presidents, weak democracy? Presidents, parliaments and political parties in South Korea* (2002) Korea Observer, 33 (1).
18. Cushman R., "Our Civil rights become a world-issue" *New York Times Magazine* (New York, Jan 4th 1948).
19. Dobzhansky, T., *The myths of genetic predestination and of tabula rasa* (1976) Perspectives in Biology and Medicine, 19 (2).
20. Dowdle, M.W., *The descent of antidiscrimination: on the intellectual origins of the current equal protection jurisprudence* (1991) NYUL Review, 66.
21. Egerö, B., *South Africa's bantustans: from dumping grounds to battlefronts* (1991) Nordic Africa Institute 4.
22. Fine S., *Freedom of Association Is Not the Answer* (2010) Ethics, 120 (2)
23. Finley, *Land, debt, and the man of property in classical Athens* (1953) Political Science Quarterly, 68(2).
24. Fiss O., *Groups and the Equal Protection Clause*, (1976) Philosophy & Public Affairs Journal 107 (5).
25. Gaus, Gerald, Courtland, Shane D. and Schmidtz, David, *Liberalism*, The Stanford Encyclopedia of Philosophy (Spring 2018 Edition), Edward N. Zalta (ed.).
26. Gutmann A., *The disharmony of democracy* (1993) American Society of Political Legal Philosophy 35.
27. Hansen, *Demographic reflections on the number of Athenian citizens 451-309 BC* (1986) American Journal of Ancient History 7 (2).
28. Hedlund R., *Segregation by Any Other Name: Harvey Milk High School* (2004) The Journal of Law of Education, 33.
29. Hohfeld W., *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) The Yale Law Journal, 26 (8).
30. Husik, I., *Hohfeld's jurisprudence* (1923) University of Pennsylvania Law Review, 72.
31. Ikenberry, G.J., *A world economy restored: expert consensus and the Anglo-American postwar settlement* (1992) International organization, 46(1).
32. Kaplan, W., *How Justice Rand Devised His Famous Formula and Forever Changed the Landscape of Canadian Labour Law* (2011) University of New Brunswick Law Journal, 62.
33. Kears M., *Metics and identity in Ancient Athens*, 2013, University of Michigan Research Archive.

34. Klarman quoted by David E. Bernstein and Ilya Somin, *Judicial power and Civil rights reconsidered*, Yale Law Journal, 114 (3), 3.
35. Kymlicka W., *Multiculturalism and Minority Rights: West and East* (2002) Journal on Ethnopolitics and Minority issues in Europe, 4.
36. Lindsay, T.K., *Liberty, Equality, Power: Aristotle's Critique of the Democratic Presupposition* (1992) American Journal of Political Science.
37. Long A.*, Stoic Philosophers on Persons, Property-Ownership, and Community* (1997) Bulletin of the Institute of Classical Studies, 68.
38. Macdowell, D., *The Oikos in Athenian Law* (1989) The Classical Quarterly, 39 (1).
39. Manion C., The Natural Law philosophy of the Founding Fathers (1949) Natural Law institute proceedings 3 (16).
40. Melleuish, *Europe, Rome and empire: Individualism, social solidarity and decline* (2012) Policy: A Journal of Public Policy and Ideas, 28(1).
41. Miller F., *Aristotle on Property Rights* (1986) The Society for Ancient Greek philosophy newsletter, 317.
42. Milsom, *The Legal Framework of English Feudalism* (1981) Michigan Law Review 79 (5).
43. Mion M., *Athenian Democracy*, (1986) History of political thought, 7 (2).
44. Mitchell, K., *Multiculturalism, or the united colors of capitalism?* (1993) Antipode, 25(4).
45. Mommsen T., *Petrarch's Conception of the 'Dark Ages'*, (1942) Speculum, 17 (2).
46. Murley, C., *Plato's Phaedrus and Theocritean pastoral* (1940) The American Philological Association, 71.
47. Neilson, G., *Brus versus Balliol, 1291-1292: The Model for Edward I.'s Tribunal* (1918) The Scottish Historical Review, 16 (61).
48. Nemko A., *Single-Sex Public Education after VMI: The Case for Women's Schools* (1998) Harvard Womens Law Journal 21 (19).
49. Newman D., *Collective Rights* (2004) Philosophical Books 48 (3).
50. Nier, J. A., Gaertner, S. L., Dovidio, J. F., Banker, B. S., Ward, C. M., & Rust, M. C., *Changing interracial evaluations and behavior: The effects of a common group identity*, 2001, Group Processes & Intergroup Relations, 4.
51. Oderberg D., *Should there be Freedom of Dissociation?* (2007) Journal of Economic Affairs, 37 (2).
52. Osborne, R., *Spartan Law* (1988) The Cambridge Law Journal, 47 (3).
53. Painter, S., *Magna Carta* (1947) The American Historical Review, 53(1).

54. Paulsen, J. and Hambleton, J., *Confederate and Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era* (1988) Texas Bar Journal, 51.
55. Pritchett W., Pippin A., *The Attic Stelai: Part II*, (1956) Hesperia 25 (3).
56. Putnam RD, *Bowling Alone: America's Declining Social Capital* (1995) Journal of Democracy 6 (1).
57. Ramachandran G., *Intersectionality as Catch 22: Why Identity Performance Demands Are Neither Harmless nor Reasonable* (2005) 69 Alb L Rev 299.
58. Read, F., *The Origin, Early History, and Later Development of Bills of Exchange and Certain Other Negotiable Instruments* (1926) Canadian Bar Review, 4.
59. Savage, M., *Native Americans and the Constitution: The Original Understanding* (1991) American Indian Law Review, 16 (1).
60. Shaki, Mansour, *The Social Doctrine of Mazdak in the Light of Middle Persian Evidence* (1978) Archív Orientální; Praha 46.
61. Smith M., *East Mediterranean Law codes of the early Iron Age* (1995) Religions in the Graeco-Roman World, 130 (1).
62. Sumner, *The Legion and the Centuriate Organization* (1970) Journal of Roman Studies, 60 (1).
63. Van Der Vliet, *The early state, the polis and state formation in early Greece* (2008) Social Evolution & History, 7 (1).
64. Volokh A., *Property Rights and Contract Form in Medieval Europe*, (2009) American Law and Economics Review, 11 (2).
65. Waldron J., *Theoretical Foundations of Liberalism* (1987) Philosophical Quarterly, 37.
66. Weller, M. and Wolff, S. eds., *Autonomy, self-governance and conflict resolution: Innovative approaches to institutional design in divided societies* (2005) Psychology Press, 33.
67. Wellman C., *Immigration and Freedom of Association* (2008) Ethics 119 (1).
68. White, *Latifundia* (1967) Bulletin of the Institute of Classical Studies 14.
69. Wilson T. *Community Population Size and Social Heterogeneity: An Empirical Test* (1986) American Journal of Sociology 91 (5).
70. Wilson, R., *Challenges and opportunities for Islamic banking and finance in the West: the United Kingdom experience* (1999) Thunderbird International Business Review, 41(4-5).
71. Winter E., *Trajectories of Multiculturalism in Germany, the Netherlands and Canada: In Search of Common Patterns* (2010) Government and Opposition 45 (2).

72. Zappalà, G., *The closed shop: help or hindrance for the union movement* (1991) Australian Centre for Industrial Relations Research and Teaching.

Books:

1. Akrigg B., *Metics in Athens. Communities and networks in the ancient Greek world* (Oxford University Publishing 2015).
2. Alexis De Tocqueville (translated by Henry Reeve), *Democracy in America.*
3. Ameriks, K. and Clarke, D.M., *Aristotle: Nicomachean Ethics*, 7th Ed. (Cambridge University Press 2000).
4. Angelo Segrè, *An essay on the nature of real property in the classical world*, (Cambridge University Press 1943).
5. Bede Jarret, *Social theories of the Middle Ages*, (Ernest Benn Limited, 1926).
6. Bloch, M., *Feudal society*, 1st Ed. (Routledge 2014).
7. Bonfante, *Scritti in onore di Giuliano Bonfante I / II*, (Paidea 1976).
8. Bracton, *De Legibus et de consuetudinibus Angliae* (1268), ed. G. E. Woodbine (Newhaven, 1915) vol. ii.
9. Bradshaw, M.J., *Regions and regionalism in the United States*, 1st Ed. (Macmillan 1988).
10. Cahill T., *Heretics and Heroes*, 1st Ed. (Double Day 2013).
11. Cartledge P., *The Spartans; an Epic History*, 1st Ed. (Pan MacMillan 2003). *Conscience* (Wiley-Blackwell 2011).
12. Craven, A.O., *The coming of the civil war*, 1st Ed. (University of Chicago Press 1957).
13. Crawford, *Early Rome and Italy*, *The Oxford Illustrated History of the Roman World*, 1st Ed. (Oxford University Press 2001).
14. Damon C., *The Mask of the Parasite: A Pathology of Roman Patronage*, 1st Ed. (University of Michigan press 1997).
15. Deanesly, M., *A history of the medieval Church: 590-1500*, 1st Ed. (Routledge 2004).
16. Dinnella-Borrego, *The Risen Phoenix: Black Politics in the Post–Civil War South*, 1st Ed. (University of Virginia Press 2016).
17. Dolbeare K. and Cummings M., *American Political Thought*, 6th Ed. (Chatham House 2009).
18. F. A. Hayek, *New Studies in Philosophy, Politics, Economics, and the History of Ideas*, 1st Ed. (University of Chicago Press 2018).

19. Frank T., *The Economic History of Rome to the End of the Republic*, 1st Ed. (Forgotten Books 2012).
20. Gardner J., *Family and Familia in Roman Law and Life*, 1st Ed. (Oxford university press 1998).
21. Gensler, H.J., *Ethics and the golden rule*, 1st Ed. (Routledge 2013).
22. Hankins J., *Humanism, scholasticism, and Renaissance philosophy*, *The Cambridge Companion to Renaissance Philosophy*, 1st Ed. (Cambridge University Press 2007).
23. Hanson V., *The Other Greeks*, 1st Ed. (University of California Press 1995).
24. Heather P., *Empires and Barbarians: The Fall of Rome and the Birth of Europe*, 1st Ed. (Oxford University Press 2010).
25. Hilaire Belloc, *How the Reformation Happened*, 1st Ed. (TAN books 1992).
26. Holt, J C. *Magna Carta* (Cambridge University Press, 1992).
27. Isaiah Berlin, *Two Concepts of Liberty, Four Essays On Liberty,* (Oxford University Press 1969).
28. John Rawls, *A Theory of Justice*, 1st Ed. (Harvard University Press, 1999).
29. John Stuart Mill, *On Liberty*, (Longman, Roberts & Green, London, 1869; Penguin publishing, London, 2010).
30. Kymlicka W. and Norman W., *Citizenship in Diverse Societies*, Oxford University Press 2005.
31. Kymlicka W., *The Global Diffusion of Multiculturalism: Trends, Causes, Consequences*, Accommodating Cultural Diversity, 1st Ed. (Routledge, 2007).
32. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights,* 1st Ed. (Clarendon Press 1995).
33. Langguth, *After Lincoln: How the North Won the Civil War and Lost the Peace* 1st Ed. (Simon and Schuster 2015).
34. Levy, *West Roman Vulgar Law: the law of property*, 1st Ed. (Hein publishing 1951).
35. Lynch, C., *Individualism and Christianity*, 1st Ed. (Routledge 2001).
36. Mousourakis G., *The Historical and Institutional Context of Roman Law*, 1st Ed. (Routledge 2003).
37. Muldoon K., *The Jim Crow Era*, 1st Ed. (Core Library 2014).
38. Nails D., *The trial and death of Socrates. A Companion to Greek and Roman Political Thought*, (Blackwell Publishing 2009).
39. Niccoló Machiavelli, *The Prince*, Ch. 4.
40. Nicolet C., *Space, Geography, and Politics in the Early Roman Empire*, 1st Ed. (University of Michigan Press 1991).
41. Numa Denis Fustel de Coulanges, *The Ancient City* (Johns Hopkins University Press 1980) [originally published in 1864].

42. O'Flynn J., *Generalissimos of the Western Roman Empire*, 1st Ed. (University of Alberta press, 1983).
43. Pettit P., *Republicanism: A Theory of Freedom and Government*, 1st Ed. (Oxford University Press 1997).
44. Plato, *The Republic*, Book 3 (Penguin Classics, 2016) (414BC)
45. Prescott C., *Changing demographics and cultural heritage in Northern Europe, Transforming narratives and identifying obstacles: a case study from Oslo, Norway Cultural Heritage, Ethics and Contemporary Migrations*, 1st Ed. (Routledge 2018).
46. Prestwich J., *Anglo-Norman Feudalism and the Problem of Continuity, Past & Present*, 1st Ed. (Oxford University press 1963).
47. Rable GC, *But there was no peace: The role of violence in the politics of Reconstruction*, 1st Ed. (University of Georgia Press 2007).
48. Ramet, S.P., *Balkan babel: the disintegration of Yugoslavia from the death of Tito to the fall of Milošević* 1st Ed. (Routledge 2018).
49. Riley-Smith, *Lords, Lordships and Vavasours. In The Feudal Nobility and The Kingdom of Jerusalem, 1174–1277* (Macmillan 1974).
50. Rosenwein, *Emotional communities in the early Middle Ages*, 1st Ed. (Cornell University Press, 2006).
51. Ryan A., *The Making of Modern Liberalism*, 1st Ed. (Princeton University Press 2013).

    Scepticism, In Harald E. Braun & Edward Vallance (ed.) *The Renaissance*
52. Schmidtz D., *"Ecological Justice" in Philosophy: Environmental Ethics*, 1st Ed. (MacMillan, 2017).
53. Schüssler R., Gerson J., *Moral certainty and the Renaissance of ancient*
54. Sir Henry Sumner Maine, Dante J. Scala, *Ancient law* (Routledge 2017).
55. Sir John William Salmond, Patrick John Fitzgerald, *Salmond on jurisprudence*, 1st Ed. (Sweet & Maxwell, 1966).
56. Smith R., *Service in the Post-Marian Roman Army*, 1st Ed. (Manchester university press 1958).
57. Sokol J., *Europe Speaks: linguistic diversity and politics*, 1st Ed. (Routledge 2012).
58. Soss, J., Fording, R.C. and Schram, S.F., *Disciplining the poor: Neoliberal paternalism and the persistent power of race*, 1st Ed. (University of Chicago Press 2011).
59. St. Thomas Aquinas, *Summa Theologica.*
60. Taylor C., *Shared and Divergent Values in Ronald L. Watts and Douglas M. Brown, eds., Options for a New Canada* (University of Toronto Press 2001).
61. Thucydides, *History of the Peloponnesian War*, Book II.

62. Todd, *The Shape of Athenian Law*, 1st Ed. (Clarendon Press 1995).
63. Trundle, M., *Greek mercenaries: From the late archaic period to Alexander,* 1st Ed. (Routledge 2004).
64. Ubillos, J.M.B., *Freedom of Assembly and Association (Art. 11 ECHR): Some Hesitations on a Path of Firm Protection, In Europe of Rights: A Compendium on the European Convention of Human Rights,* 1st Ed. (Brill 2012).
65. Wilder C., *The Importance of Beginning, Over and Over: The Idea of Primitive Germanic Law*, 1st Ed. (Brill 2012).
66. Woods T., *How the Catholic Church Built Western Civilization,* 1st Ed. (Regnery Publishing 2012).
67. Xenophon, *On Revenues,* 2.
68. Zuckert M., *Hobbes, Locke and the problem of the rule of law,* published in *Hobbes on law* 1st Ed. (Routledge 2005).

Cases:

1. Applications nos. 27996/06 and 34836/06 ECHR 2009
2. *Bernard v. Canada* [2014] 1 SCR 227
3. *Brown v Board of Education of Topeka* 347 US 483 (1954)
4. *Buchanan v Warley* 245 US 60 (1917)
5. *Burwell v. Hobby Lobby Stores* 573 US (2014)
6. *Carpenter v. United States* No. 16-402, 585 U.S. (2018)
7. CASE No. CH/96/29, 1999
8. *Civil Rights Cases* 109 US 3 (1883)
9. *Fisher v. University of Texas* 570 US (2013)
10. *Freeman v Pitts* 503 US (1992)
11. *Gratz v. Bollinger* 539 US 244 (2003)
12. *Grutter v. Bollinger* 539 US 306 (2003)
13. *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* [2007] 2 SCR 391
14. *Hirabayashi v United States* 320 US 81 100
15. *Janus v. AFSCME* 16-1466, 585 U.S. (2018)
16. *Katz v. United States* 389 U.S. 347 (1967)
17. *Kelo v. New London* 545 US 469 (2005)
18. *Lavigne v Ontario Public Service Employees Union* [1991] 2 S.C.R. 211
19. *Loving v Virginia* 388 US 1 (1967)
20. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* 584 US _ (2018)

21. *Missouri v Jenkins* 515 US 70, 122 (1995)
22. *Obergefell v Hodges* 576 US _ (2015)
23. *Plessy v Ferguson* 163 US 537 (1896)
24. *R. v. Advance Cutting & Coring Ltd*., [2001] 3 S.C.R. 209
25. *R. v. Big Drug Mart Ltd* [1985] 1 S.C.R. 295
26. Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313
27. *Regents of the University of California v. Bakke* 438 US 265 (1978)
28. *Roberts v City of Boston* 59 Mass. 198 (1850)
29. *Sigurður A. Sigurjónsson v. Iceland* (1993) ECHR 35
30. *Sørensen and Rasmussen v. Denmark* (2006) ECHR 54
31. *United States v Virginia (VMI)* 518 US (1996)
32. *Vörður Ólafsson v. Iceland* (2021) ECHR 45
33. *Wooley v. Maynard*, 430 U.S. 705 (1977)

Online resources:

1. https://trinitycollegelawreview.org/no-i-in-students-union-the-constitutional-right-to-opt-out/
2. https://www.foreignaffairs.com/articles/cameroon/2018-11-08/whats-driving-conflict-cameroon
3. https://www.hrw.org/world-report/2019/country-chapters/bosnia-and-herzegovina
4. https://www.irishtimes.com/opinion/where-does-the-right-to-a-peaceful-protest-begin-and-end-1.2010737
5. https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/
6. https://www.spiegel.de/international/germany/crossing-borders-with-shariah-the-role-of-islamic-law-in-german-courts-a-722477.html
7. https://www.stmarys.ac.uk/events/2017/05/cbet-dissociation
8. https://www.theguardian.com/world/2017/jan/04/the-canada-experiment-is-this-the-worlds-first-postnational-country
9. https://www.youtube.com/watch?v=l8PicAzrNU0
10. Mathew John Kears, Metics and identity in Ancient Athens, http://etheses.bham.ac.uk/5046/1/Kears14PhD.pdf accessed 18/11/18

Miscellaneous:

1. Act, C., 1982. Part 1: Canadian charter of rights and freedoms.
2. Bunracht na hÉireann, March 2019
3. CCPR General Comment 22: 30/07/93 on ICCPR Article 18
4. Gene Weltfish and Ruth Benedict “The Races of Mankind” (1943)

5. International Convention on the Elimination of All Forms of Racial Discrimination 1969
6. John Adams, letter to Hezekiah Niles, 14 Jan 1818
7. Pope Leo XIII, “Rerum Novarum”
8. The Federalist papers
9. UN General Assembly, Universal Declaration of Human Rights, 10 December 1948