The Journal of Political Philosophy: Volume 5, Number 4, 1997, pp. 373–391

Freedom of Association and the Right to Exclude*

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I. INTRODUCTION

Freedom of association is widely seen as one of those basic freedoms which is fundamental to a genuinely free society. With the freedom to associate, however, there comes the freedom to refuse association. When a group of people get together to form an association of some kind (e.g., a religious association, a trade union, a sports club), they will frequently wish to exclude some people from joining their association. What makes it *their* association, serving their purposes, is that they can exercise this 'right to exclude'. However, the practice of exclusion can be a source of considerable and legitimate moral anxiety. Exclusion of individuals from associations on the basis of their race, gender, or sexuality, often strikes observers as especially troubling. Worried as we may be, though, we cannot simply repudiate the right to exclude, for we correctly intuit that this right is, to some degree, an integral and important part of freedom of association, and we most certainly do not want a society in which people lack this freedom.

In the face of this apparent conflict of liberal intuitions, this article attempts to identify the proper contours of the right to exclude by exploring, and outlining a tentative answer to, the following basic question: When is the freedom to exclude essential to meaningful freedom of association and, therefore, something which a state may not legitimately restrict or prohibit; and when may, and should, a state legitimately curtail the freedom to exclude in the interests of securing other important values?

I shall proceed as follows. In section II, I set out one proposed criterion for evaluating the legitimacy of rules of categorical exclusion (that is, blanket exclusion from an association on the basis of characteristics such as race, gender, or religious beliefs). This is the choice principle advanced by Paul Hirst.[1] I argue that this principle, while undoubtedly possessing the merit of simplicity, is nevertheless inadequate to the task of sorting out when, and why, categorical exclusion is legitimate or illegitimate.

*I would like to thank Dario Castiglione, Diana Gardner, Robert Goodin, Andrew Koppelman, Meira Levinson, Pratap Mehta, Andrew Sabl, Marc Stears, and an anonymous referee for comments and discussion of earlier versions of this article. Thanks are also due to Amy Gutmann and George Kateb for prompting me to think about these issues in the first place; and to my students in LIBERTY 17.103, Massachusetts Institute of Technology, for their energetic and constructive criticism.

[1]See Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance* (Oxford: Polity Press, 1994).

In sections III and IV, I then delineate an alternative approach to the problem. Section III argues that in evaluating the proper scope of a disputed freedom, including the freedom to exclude which is the focus of this article, we should consider how the exercise of the disputed freedom damages and/or serves certain basic interests of individuals, most notably what I term their integrity and opportunity interests. The range of legitimate associational purposes—of what people can legitimately associate for—is itself bounded, I argue, by respect for these basic interests.

In section IV, I then set out a framework for evaluating the legitimacy of categorical exclusion rules which builds on this approach. I argue that as a first, though not necessarily sufficient, condition of legitimacy, an exclusion rule must be 'purpose-protecting': it must be necessary to protect the ability of association members to pursue the primary purposes of their association. However, even if purpose-protecting, an exclusion rule is presumptively illegitimate if it damages the opportunity interests of those excluded by the rule—if it is 'opportunity-depriving'. In such a case, one cannot necessarily justify the disputed exclusion rule by reference to the association's purposes because, if the free pursuit of these purposes is sufficiently damaging to the opportunity interests of those excluded by the rule, then these purposes are themselves presumptively illegitimate. Before finally concluding that an exclusion rule is illegitimate, however, we must also consider whether the disputed rule protects integrity interests relating either to freedom of conscience and expression or to the cultivation and enjoyment of intimate attachments. If an exclusion rule is 'integrity-protecting' in either of these ways, then it has an especially strong presumption of legitimacy. Indeed, given the fundamental importance of these integrity interests to the development and expression of the individual's ethical personality, the disputed rule may be legitimate, and will therefore require protection, even if it damages the opportunity interests of excluded parties.[2] However, precisely because integrity-based rights of exclusion have such a strong presumption of legitimacy, we must define their range, their proper circumstances of application, with great care. This raises a number of difficult issues which are discussed in section V. Section VI concludes.

II. THE CHOICE PRINCIPLE AND ITS LIMITATIONS

Categorical exclusion from an association occurs when existing members of an association exclude an individual from membership because he/she belongs to a

[2]This approach has some strong affinities with that adopted by the US Supreme Court in adjudicating a number of recent exclusion controversies. This article can be seen, in part, as an attempt to clarify, and perhaps extend, the political theory underlying the Court's approach, as pioneered by Justice William Brennan. See especially *Roberts v. Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988).

community defined by possession of some shared characteristic such as race, gender, sexuality, or religion. Exclusions from membership of secondary associations need not be categorical in this sense; one might be excluded simply because of the association's resource constraints, or on purely personal grounds. My focus here, however, will be on categorical exclusion. When, and on what grounds, is categorical exclusion permissible, something which the state ought to protect? When, and on what grounds, is categorical exclusion something which the state ought to prohibit?

One possible approach is suggested in Paul Hirst's recent book, *Associative Democracy*. Hirst's first rule of 'associationist ethics' says that '. . . individuals cannot be excluded from associations except on the conditions that they choose to accept or reject'.[3] We may express the essential thought here in terms of a *choice principle* (CP), according to which: A categorical exclusion rule is legitimate if and only if individuals excluded by the rule may reasonably be said to fall under the relevant category of exclusion in virtue of personal choice, rather than in virtue of forces beyond their control ('fate'). To operationalize the CP we then have to supplement it with some propositions as to which kinds of personal characteristics are a matter of choice and which a matter of fate. Hirst asserts that religion is a matter of choice, while gender and race are not: '. . . subscribing to Catholic doctrine is a choice, one may or may not accept the doctrines of the Church, whereas being black or being female is not a choice, one cannot decide to be white or to be male . . .'.[4] Thus it follows from the CP, so elaborated, that it is never permissible to exclude on the basis of race or gender, but always permissible to exclude on the basis of religion.

Now the CP, so elaborated, arguably has some initial plausibility as a criterion for evaluating the legitimacy of categorical exclusion rules. Firstly, if all categorical exclusion rules had to conform to the requirements set by the CP, then, setting other non-categorical kinds of exclusion aside, this would entail that no citizen could ultimately be excluded from membership of an association against his/her will. According to the CP, I can only be legitimately excluded from association A on the basis of categorical characteristic, X, if X is something over which I have control; I must, in principle, then, be able to choose to discard X, and, if I so choose, I will then be eligible to join association A. The unlimited freedom of entry into secondary associations which the CP thus implies seems to cohere with the familiar and intuitively attractive liberal commitment to secure for each citizen the liberty and opportunity to pursue the conception of the good life he/she wishes to pursue (consistent with like liberty and opportunity for others).

Secondly, when we come to apply the CP to evaluate the legitimacy of such rules in some important 'test-cases', the CP appears to give intuitively appealing

[3]Hirst, *Associative Democracy*, p. 58.
[4]Ibid., p. 58.

answers. For example, many people find the idea of a whites- or men-only sports or social club ethically repugnant. Anxieties of this sort motivated opposition to the exclusionary membership policies of the Jaycees in the case of *Roberts v. Jaycees*.[5] And according to Hirst's CP, whites/men-only exclusion rules are indeed illegitimate because race and gender are not personal characteristics which individuals choose. On the other hand, I suspect that few of us would want to claim that members of a given church or political party may not legitimately exclude from church or party membership individuals who hold conflicting religious or political beliefs. And according to the CP, these exclusion rules are indeed perfectly legitimate—so long as we assume, following Hirst, that religious and political beliefs are a matter of choice.

On further examination, however, we rapidly encounter some serious difficulties with the CP as a criterion for evaluating the legitimacy of categorical exclusion rules. Application of the CP to the evaluation of such rules does not always produce results that are consistent with our intuitions; and even in cases like those considered in the previous paragraph, where the CP does appear to produce results which accord with our intuitions, it is by no means clear that it produces the 'right answers' for the right (i.e., morally pertinent) reasons.

A first, and fundamental, problem for the CP is simply that, in some cases, rules excluding individuals from association membership on the basis of unchosen characteristics do not necessarily strike one as morally troublesome. Imagine, for example, a group of women decide to set up a women-only health and fitness club. This club would exclude about half the population from membership on the basis of an essentially unchosen characteristic (being male), and is therefore impermissibly exclusionary according to the CP. But is there really anything morally troublesome about this particular gender-based exclusion rule?

A second problem is that the CP will justify categorical exclusion rules, based on supposedly chosen personal characteristics, that we may in fact have good reason to regard as unjust. For example, if we continue to assume that religious identification is a matter of choice, then it is far from clear that the CP will actually prohibit all forms of morally questionable racist exclusion. While it is clearly illegitimate under the CP for a group of racist whites to bar membership of a trade union to, say, Asians, on the basis of skin-colour, it is not illegitimate

[5]The United States Jaycees (Junior Chamber of Commerce) is a national nonprofit membership organization, historically confined to young men (18 to 35), which engages in various educational, social, and charitable activities. In the 1970s, two Minnesota chapters of the Jaycees began admitting women as full members. The Jaycees national organization responded by threatening the Minnesota chapters with expulsion. The Minnesota chapters filed discrimination charges against the national organization, charging that exclusion of women from full membership violated the Minnesota Human Rights Act. The Jaycees' national organization contended in response that application of the Act to them was a violation of their First Amendment right to freedom of association. The case eventually went to the Supreme Court which found that the Jaycees did not have a constitutionally protected right to exclude women from full membership.

under the CP for them to operate a rule which excludes workers on the basis of holding Hindu, Sikh, or Islamic religious beliefs. In certain social contexts, such as that of contemporary Britain, such a rule would be clearly racist in intent and effect, and potentially very damaging to the economic interests of those excluded by it. And then there are cases like that of *Welsh v. Boy Scouts* where we may think the practice of religious-based exclusion is at least troubling, even if we are not altogether sure, at first sight, that it is unjust.[6]

These are cases where it is not clear that the CP gives us the right answer when we apply it to evaluate the legitimacy of a given categorical exclusion rule. However, even where the CP does give us what intuitively looks like the right answer, it is not clear that it always produces this answer for the right sort of reason. Let us return to the case of religious associations and political parties which exclude those who hold conflicting religious/political beliefs. Why should, say, the Catholic Church be allowed to exclude Protestants and Buddhists from church membership? I suggest that the answer actually has precious little to do with the supposed fact that a person's religious beliefs are a matter of choice. The relevant consideration is simply that the Catholic Church would quickly cease to be the *Catholic* Church if it could not exclude those with conflicting beliefs. Individuals are hardly free to associate in pursuit of some shared set of beliefs about the good life and/or good society unless they are also free to exclude from this specific association those who do not share their distinctive beliefs. The pertinent consideration is that of protecting the integrity of such an association as a community of shared belief (what we may call an 'expressive community'), and not the supposed voluntariness of religious belief.

III. THE BASIS FOR AN ALTERNATIVE APPROACH: PREVENTING HARM TO INTEGRITY AND OPPORTUNITY INTERESTS

If Hirst's choice principle fails to provide a plausible criterion for evaluating the legitimacy of exclusion rules, what is the alternative? Stated most simply, in place of Hirst's choice principle, I propose a 'basic interests approach'. We try to identify those interests which are centrally at stake in exclusion controversies, and we then evaluate the legitimacy of exclusion rules by looking at how these rules affect (damage and/or serve) these basic interests. Though sincere and thoughtful individuals may differ profoundly in their religious and/or philosophical views, these are interests which they have in common, and which, therefore, they can reasonably appeal to for purposes of public discussion

[6]See *Welsh v. Boy Scouts*, 993 F.2d 1267 (1993). Mark Welsh, 7 years of age, was denied admission to his local Illinois branch of the Tiger Cubs because he refused to express a belief in God. His father, Elliot Welsh, filed charges against the Boy Scouts for religious discrimination under the 1964 Civil Rights Act. The local federal court held that the Boy Scouts had the right to exclude Welsh on religious grounds since certain religious beliefs, including belief in a divine being, were clearly a part of the organization's traditional value system.

about the proper boundaries of individual and associational liberty in a pluralist society characterized by deep disagreement over religious and philosophical issues.[7]

Two sets of interests seem especially important. Firstly, there are what we may term *integrity interests*. Integrity interests are related to the individual's physical security, and, more broadly, to his/her freedom to shape and live authentically in accordance with a distinctive ethical personality. By 'ethical personality' I mean the cluster of commitments—philosophical, religious, affective—which represent the individual's personal response to fundamental questions of value and meaning and which thereby give his/her life its basic normative shape and direction. The individual has a profoundly important moral interest in protecting the integrity of these commitments, and the communities which are necessary for their pursuit. Secondly, individuals have what we may term *opportunity interests*. These relate centrally, though not exclusively, to having fair access to income and wealth, and to other goods, like education and employment, which have a clear instrumental value in enabling the individual to realise his/her ethical personality.[8]

In the context of a pluralist society, we may say that a practice is *harmful*, and therefore possibly something we should restrict or regulate, if it damages integrity and/or opportunity interests in a significant way. More precisely, we may say that: *it is always a strong consideration in favour of restricting or regulating a practice, X, that those engaged in X thereby damage the integrity and/or opportunity interests of others in a significant way*.

The fact that doing X damages the integrity and/or opportunity interests of others is offered here, note, only as 'a strong consideration' in favour of restricting or regulating X. It is not put forward as necessarily the only relevant consideration,[9] and certainly not as a necessarily decisive consideration. In all cases, as J. S. Mill would have recognized, the harm caused by X (here understood as significant damage to integrity and/or opportunity interests) has to

[7]Roughly speaking, the 'reasonable' citizen here is one who wishes to find justificatory arguments for important public policies whose force can be acknowledged not only by those who share his/her religious or similarly significant and comprehensive philosophical views, but also by those who have different views but who share this same motivation to find mutually compelling terms of public justification. The possibility of public justification, in this sense, depends on our being able to offer a plausible account of common interests which citizens can focus on and appeal to in debating alternative policies. A similar conception of reasonableness and public justification is, of course, central to John Rawls's *Political Liberalism* (New York: Columbia University Press, 1993). See also Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996); and, for an attempt to identify pertinent common interests for purposes of reasonable public discussion over the limits of freedom of expression, Joshua Cohen, 'Freedom of Expression', *Philosophy and Public Affairs*, 23 (1993), 207–63, especially pp. 223–230.

[8]Note how this opportunity interest is defined in terms of *fair* access to these goods. This means that any account of this interest will rest on a background theory of distributive justice. For purposes of this article, I assume that distributive justice requires at least a moderately egalitarian distribution of access to such goods.

[9]Thus I am not ruling out that restriction of liberty may also be justified in some cases by reference to paternalist, moralist, or offence-based considerations.

be weighed against the harm caused by trying to restrict or regulate X. Perhaps, for example, X violates an important opportunity interest but also serves an important integrity interest so that restriction or regulation of X would damage this integrity interest. Or perhaps the attempt to restrict or regulate X will inevitably lead, due to difficulties in defining X precisely, to the effective suppression of Y, where Y serves integrity and/or opportunity interests in significant ways. In these cases we have to engage in a delicate process of interest balancing in order to determine whether, and to what extent, restriction or regulation of the disputed practice is appropriate.[10]

This requires that we have some view of the relative moral urgency of these potentially conflicting interests. In particular, it is important to have a clear sense of how we should proceed if, as may sometimes occur, a conflict arises between respecting the integrity interests of one party, and advancing the opportunity interests of another party. I shall argue that if this conflict is deep and genuine (and I shall explain in section V.A how sometimes it may not be) then priority ought to be given to upholding the integrity interest unless the threat to the opportunity interest is of an extreme kind.[11] Providing a basic threshold of opportunity has been secured for all, the damage to ethical personality from the infringement of core integrity interests is deeper and more fundamental than that which results from the limitation of opportunity. There is, I think, no way to defend this rather bold assertion, other than to ask the reader to reflect on the profound importance of specific integrity interests, and this I shall do in the course of the discussion below.

I believe that an approach of this sort offers a promising way of framing and trying to settle disputes about the proper scope of various freedoms, and in the next section, I will set out a framework for evaluating the legitimacy of categorical exclusion rules which draws on this approach. As we shall shortly see, however, an evaluation of the legitimacy of an exclusion rule frequently cannot be detached from an evaluation of the relevant association's underlying purposes. Starting with the question of how a given exclusion rule affects integrity and/or opportunity interests, the proposed approach naturally pulls our attention back to the prior question of how the relevant association's purposes themselves affect these interests. The range of legitimate associational purposes is bounded by respect for both sets of interests. It is obviously forbidden to me to associate with like-minded others for violent purposes that directly violate the integrity interests of others (e.g., there can be no British Association of Artful Back-Stabbers). Similarly, while I may associate with others in pursuit of shared economic interests, if the successful realization of our associational purpose entails

[10]For an illustrative account of this process of interest balancing, applied to the debate surrounding the regulation of pornography, see Joshua Cohen, 'Freedom, Equality, Pornography', *Justice and Injustice in Law and Legal Theory*, ed. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1996), pp. 99–137.

[11]There must be a real risk of profound material deprivation, e.g., starvation, or exclusion from a decent minimum of education.

depriving others of fair access to income and wealth, then this associational purpose is presumptively illegitimate precisely because of the way its realization damages these opportunity interests. A consideration of this sort may justify efforts to restrict and regulate practices of cartelization for example.

This is obviously only a thumbnail sketch of how the legitimacy of associational purposes is properly constrained by respect for integrity and opportunity interests. I shall elaborate the sketch, as occasion demands, in sections IV and V.

IV. A FRAMEWORK FOR EVALUATING THE LEGITIMACY OF EXCLUSION RULES

A. An Overview of the Proposed Framework

I suggest that there are essentially three guiding principles which we should apply in evaluating the legitimacy of categorical exclusion rules, each of which supports a specific set of rights for or against exclusion. These principles, and the rights they respectively support, are hierarchically ordered in accordance with the relative urgency of the interests they serve to protect. I will quickly review each principle here before discussing each principle in more detail in sections IV.B–IV.D. I will then briefly address some outstanding issues which arise when we come to operationalize the third principle, and the rights of exclusion which it supports, in section V.

Individuals have a very general interest in being able to form associations with specific purposes related to the pursuit of their views of the good life and/or good society, and, therefore, in being able to exclude people from these associations who would corrupt or undermine pursuit of these purposes. Our first guiding principle says, then, that an exclusion rule is presumptively legitimate if (and, I think, only if) it is *purpose-protecting*. There is, one might say, a baseline right to exclude on purpose-protecting grounds.

However, this first principle begs the crucial question: what associational purposes are legitimate? As suggested in section III, the range of legitimate associational purposes is limited, inter alia, by respect for certain basic opportunity interests which individuals have. Even if purpose-protecting, an exclusion rule is presumptively illegitimate if it, and thus the purpose it serves to protect, infringes these interests—if it is *opportunity-depriving* in this sense. This is our second guiding principle. In accordance with this principle, we can say that individuals have specific rights against categorical exclusion which protect their opportunity interests and limit the scope of the baseline right to exclude on purpose-protecting grounds.

The ability to form certain kinds of association, and to exclude specifically in order to protect their distinctive purposes, is, however, essential to the exercise of the liberties of conscience and expression, or to the individual's ability to form

and enjoy intimate attachments. These interests relating to freedom of conscience, freedom of expression, and intimate association, are, in the language of section III, core integrity interests, each being related in a quite fundamental way to the free development and expression of ethical personality. Our third guiding principle says that an exclusion rule has an especially strong presumption of legitimacy if it is *integrity-protecting*. That is to say: if the formation of a specific association is essential to the individual's ability to exercise properly his/her liberties of conscience and expression, or to his/her ability to form and enjoy intimate attachments, then exclusion rules which are genuinely necessary to protect the association's primary purposes have an especially strong presumption of legitimacy. Indeed, because of their role in protecting the free development and expression of ethical personality, such rules will have a strong claim to legitimacy even if they are also opportunity-depriving (as they could conceivably be).

Let me now try to clarify and develop this proposed framework for the evaluation of categorical exclusion rules.

B. First Guiding Principle: an Exclusion Rule is Presumptively Legitimate if it is Purpose-protecting

Each association may be said to have a primary associative purpose, usually extrinsic to the good of association itself, which individuals form and join the association to pursue. Now associational life would quickly cease to be meaningful, indeed at all possible, if associations could not at least impose those categorical exclusion rules which are necessary to protect their members' ability to pursue their distinctive purposes. If an association, A, has a purpose, P, and a characteristic, C, is incompatible with sincere commitment to P, then, one might say, members of A ought to be free to exclude would-be members who possess C. Thus, as intimated above, expressive associations, such as churches and political parties, must be allowed to exclude those whose beliefs are incompatible with those of association members. Similarly, an association which is committed to advancing the economic interests of its members, such as a trade union, must be allowed to exclude certain groups, such as employers and members of management, in order to protect its capacity to serve as a vehicle for the effective representation of these interests. An exclusion rule is presumptively legitimate if it is purpose-protecting in this sense.

Going a little further, I think we should stipulate that an exclusion rule is *only* legitimate if it is purpose-protecting. Out of concern to protect the opportunity and integrity interests of potentially excluded parties we should always insist that there be at least a 'rational basis' to an exclusion rule, so that individuals are never the victims of exclusion that is arbitrary in a plain and straightforward sense.

However, to say all this is obviously to beg the crucial, and logically prior, question as to what associational purposes are legitimate in the first place. Respect for the physical security and associated basic freedoms of other individuals constitutes one obvious constraint on the range of legitimate associational purposes. However, as intimated in section 3, the restriction on the range of legitimate associational purposes goes somewhat further than this; and this, in turn, has important implications for what exclusion rules are legitimate.

Imagine, for example, a trade union which excludes black workers from membership. Alarmed at the impact this has on their economic situation, black workers take the union to court, arguing that this kind of categorical exclusion is unjustified because unrelated to the union's primary purpose, which, they say, is to advance wage workers' economic interests. The white union members might readily reply, however, that their associative purpose is not 'to advance wage workers' interests', but rather, to advance specifically *white* workers' interests, and that the race-based exclusion rule they operate in their union is relevant to the effective pursuit of this end. If one now says that concern for the economic opportunity of the excluded black workers nevertheless requires the prohibition of this particular exclusion rule, then one is saying, by implication, that this particular associative purpose—'advancing the interests of (only) white wage workers'—is itself not legitimate. One is saying that, as a matter of justice, the range of legitimate associational purposes is limited not only by respect for the physical security and basic freedoms of others, but by respect for certain opportunity interests. The fact that a given exclusion rule serves to protect an association's purposes is not necessarily enough to justify that rule if the pursuit of these purposes violates these opportunity interests. This brings us directly to our second principle for evaluating the justice of exclusion rules.

C. Second Guiding Principle: Nevertheless, an Exclusion Rule is Presumptively Unjust if it is Opportunity-depriving

Individuals have important opportunity interests whose protection requires specific rights against categorical exclusion, even where exclusion is on purpose-protecting grounds. I shall outline three opportunity interests and putative corresponding rights here, all of which have been at stake in recent exclusion controversies. I put this particular set of interests and rights forward in a tentative and provisional spirit, however; the exact content of the set is less important for present purposes than the idea that there is some such set of interests, and corresponding rights, which properly limits the range of legitimate associational purposes and thus the scope of the baseline right to exclude on purpose-protecting grounds.

(A) *Economic opportunity*

Secondary associations often play an important role in mediating access to income and wealth. We may say that an association is *goods-conferring* when it provides its members with a significant and distinctive advantage in acquiring income and wealth. Individuals have an *economic opportunity interest* in not being excluded specifically from these goods-conferring associations. When women or disadvantaged racial and ethnic minorities claim a right of access to associations in which lucrative networking takes place, as in the case of *Roberts v. Jaycees*, or, as in the example above, to trade unions operating discriminatory membership policies, it is this interest which is being appealed to in support of these rights claims. If we think that as a matter of justice people ought to have equal access to goods like income and wealth, then this implies that they ought to have equal opportunity to enter these kinds of associations, and that exclusion rules barring them from membership are thus presumptively unjust. (Note, however, that having a right against categorical exclusion from such associations is not necessarily the same as having a positive right of inclusion in them. In some cases, it will be appropriate to assert this stronger right; in others, not.)[12]

(B) *Community participation*

Some secondary associations have an *implicitly civic or communal character* in the sense that participation in the association is widespread across the community, and consequently an important part of the shared life-experience of community members. Aside from any diminution of economic opportunity that might result, exclusion from such associations is arguably a significant diminution of life opportunities in and of itself. Individuals may thus be said to have a *civic or community participation interest* in not being excluded from these associations. Some would argue that an exclusion rule is presumptively unjust if it damages this interest for some group in the community. When a seven year old boy, like Mark Welsh, protests at being excluded from a membership organization as broadly-based as the Boy Scouts,[13] or New York city's Irish Lesbian and Gay Organization (ILGO) protests at being excluded from the city's annual St. Patrick's Day Parade,[14] it is, I think, this civic or community participation interest which is at stake.[15] Protection of this second

[12]In the case of a trade union it may well be appropriate; in the case of a commercial enterprise, e.g., a large law firm, it will not. A law firm can't plausibly be obliged to hire *all* competent candidates for employment.

[13]See note 6 above.

[14]The Parade is a big event in the city's calendar, drawing around 150,000 participants from across the city's communities. The ILGO has sought entry to the Parade in recent years, but the Ancient Order of Hibernians, as sponsors of the Parade, have refused admission. See *N.Y. City Ancient Order of Hibernians v. Dinkins*, 814 F.Supp 358 (1993), especially p. 361.

[15]I do not mean to imply that this interest was necessarily a decisive consideration against exclusion in either case, merely that, morally speaking, it was in each case an important consideration against exclusion.

opportunity interest arguably requires a second presumptive right against categorical exclusion specifically in relation to associations of an implicitly civic or communal kind. Of course, only some, perhaps only a few, associations will have this character, and are thus likely to fall within the range of application of this right.[16]

(C) *Dignity*

Finally, it is sometimes argued that the mere fact of exclusion from an association on categorical grounds can be an injury to the dignity of the individual—to his/her sense of self-worth, and/or to the wider public perception of his/her intrinsic worth. Injury to self-respect, and/or to wider public perceptions of the respect one is intrinsically due, are arguably bad in themselves, and may also injure the individual's wider economic and social opportunities.[17] It can be argued that individuals therefore have an important *dignity interest* in not being the victims of stigmatizing exclusion rules, and that such rules are therefore presumptively unjust. In the *Robert*s case, the US Supreme Court acknowledged this interest when it spoke of the 'stigmatizing injury' inflicted on women by the Jaycees' membership policies.[18] Protection of this dignity interest arguably requires a third presumptive right against categorical exclusion—a right specifically against categorical exclusion rules that can *reasonably be seen as stigmatizing* to those excluded by them.

If, however, the charge of stigmatization is not to become overly subjective, then the reasonability of such claims has to be tied to the background pattern of status inequality in the community. On this view, only members of groups which are undeniably victims of prejudice in the wider society can reasonably claim that an exclusion rule is stigmatizing if and when exclusion is based on those characteristics which are the focus of this prejudice—or, one should add, on characteristics which are clear proxies for these former characteristics.[19] Thus, in the contemporary US context, women arguably have a presumptive, dignity-based right against categorical exclusion on the basis of gender, while blacks arguably have a similar dignity-based right against exclusion on the basis of race. This is not to concede a presumptive right against any/all gender- or race-based exclusion, however, because, in this particular social context, given the background pattern of status inequality and discrimination, men and whites

[16]Key structural features by which courts might attempt to identify associations of this kind will probably include: large membership size and generally unselective membership policies, producing a membership that is (aside from the excluded group) broadly representative of the community as a whole; a strong public service orientation in associational activities; and an openness and receptivity to non-members in the execution of these activities.

[17]According to Rawls, for instance, self-respect 'provides a secure sense of our own value', without which 'nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them.' See Rawls, *Political Liberalism*, p. 318.

[18]See *Roberts*, p. 625.

[19]For example, as was pointed out in section II, in some contexts where race is a basis for discrimination, religion can serve as an effective proxy for race.

cannot credibly claim symmetrical dignity-based rights against the formation of women-only or blacks-only associations.[20] Note how the legitimacy of an exclusion rule, in this case, becomes dependent on history and context, and how its legitimacy could change overtime as the background patterns of status inequality and discrimination in society change.[21]

D. Third Guiding Principle: an Exclusion Rule has an Especially Strong Presumption of Legitimacy if it is Integrity-protecting

In order to exercise their liberties of conscience and expression fully, or to form and enjoy intimate attachments with others, individuals must be able to form certain kinds of association. In such cases, freedom of association directly serves core integrity interests and, because of this, and because these interests are so important to the development and expression of ethical personality, exclusion rules which are genuinely necessary to protect the association's primary purposes have an especially strong presumption of legitimacy. As Justice Brennan in effect argued in his highly influential opinion in *Roberts v. Jaycees*, our concern to protect each of these integrity interests supports two especially strong rights of categorical exclusion.[22]

(A) *Special right of expressive exclusion*

As ethical agents, individuals form beliefs about fundamental questions of value and meaning, and frame their life-projects in the light of these views. Frequently, they may wish (or need) to associate with like-minded others to explore and advance these views. To be able to associate meaningfully with others who share their beliefs, however, people must be able to exclude from such associations those who hold different beliefs, or who have other characteristics which can reasonably be seen as incompatible with sincere profession of their beliefs (which may sometimes include ascriptive characteristics like race or gender).

Thus, where an association's primary purposes concern the exploration and/or propagation of distinctive religious and/or philosophical beliefs, the right of association members to exclude specifically to protect the association's distinctive beliefs (or what we may term its expressive commitments) has an especially strong presumption of legitimacy. The freedom to associate, and the freedom to exclude as part of the freedom to associate, is in this case a direct extension of other basic

[20]As I suggested in section II, many people find the idea of a men-only (or whites-only) sports club inherently troubling, even if the club in question is not goods-conferring or implicitly civic in character, but do not find the idea of a women-only (or blacks-only) sports club similarly troubling. Appeal to the dignity interest, and to the context-dependent right against stigmatizing exclusion rules which it putatively supports, offers a possible explanation of this asymmetry in moral intuitions.

[21]For a related argument concerning the 'offensiveness' of speech, see Diana Gardner, 'Offensive Speech: Racism, Sexism, and Feinberg's Mediated Offence Principle', paper presented to the Australasian Political Studies Association, University of Melbourne, September 1995.

[22]See *Roberts*, pp. 617–8.

freedoms, notably the freedoms of conscience and expression.[23] Given the fundamental importance of such freedoms to the development and expression of ethical personality, the right to exclude should, in this instance, be regarded as having a strong presumption of legitimacy even if it should come into conflict with other people's opportunity-based rights against categorical exclusion.[24]

(B) *Special right of intimate exclusion*

Imagine now that you are organizing a birthday party for a friend. As it happens, your friend ardently dislikes Christians (she's a recently converted, and militant, atheist) and so you let it be known that no Christian may come to this party. Now, while we might regard this practice of categorical exclusion as distasteful, perhaps even reprehensible, your friend surely has the *right* to exclude Christians from her birthday party if that's what she wants. The party falls within a sphere of intimate association in which it is permissible for people to practice *whatever pattern of exclusion they like*. The basic intuition is clear and forceful—we should all be free to decide and control who our friends and lovers will be (or, more exactly, who they will *not* be). Building on this intuition, it is sometimes argued that at least some kinds of membership organization are analogously intimate in kind to informal associations like the birthday party, and that members of these organizations consequently also have a right to practice whatever pattern of exclusion they like. In short, an exclusion rule is legitimate if it serves to protect freedom of intimate association. And, once again, our interest in freedom of intimate association, so understood, is arguably so basic to the free development and expression of ethical personality that exclusion rules which protect this interest have a strong presumption of legitimacy even if they also damage other people's opportunity interests.

However, precisely because integrity-based rights of exclusion have such strong presumptive force, their contours must be drawn with great care. The next section considers some important questions pertinent to this task.

V. PROTECTING INTEGRITY INTERESTS

A. Protecting Expressive Commitments

I have argued that exclusion rules which protect an association's expressive commitments have an especially strong presumption of legitimacy. I shall now elaborate and, in the process, partially defend and partially qualify this claim.

A first set of questions concern how the *content* of an expressive commitment affects its putatively protected status. Are all systems of belief equally deserving

[23]See Rawls, *Political Liberalism*, p. 313; *Roberts*, p. 618.

[24]This right of exclusion on integrity-protecting grounds has 'strong presumptive force' relative to opportunity-based rights against exclusion in the sense that the latter rights only trump the former right when the opportunity interests at stake are very urgent (on which see note 11 above).

of protection in the area of associational freedom? Do Nazi or other 'hate' associations, for example, enjoy the same right to exclude as, say, environmentalist associations? Obviously, if the association's purposes are not confined merely to the expression of Nazi or other hateful views, but include the planning and performance of acts of violence, then there is no protected right of association (for the range of legitimate associational purposes is limited by respect for integrity interests). But what if the association does confine its activities to the expression of Nazi or similarly hateful beliefs?

At this point the interest-based theory of freedom of association which I have sketched out here becomes dependent upon an underlying theory of freedom of expression. If, according to this theory of freedom of expression, individuals have as much right to express Nazi views as they have, say, to express critical views of economic growth,[25] then one will have a strong reason for thinking that they also have an equal right to associate for the purpose of expressing Nazi views as they do for the purpose of expressing anti-growth views. For the value of the underlying right of expression is significantly diminished (though not altogether negated) if it is not supplemented by, or extended to include, this right of association. As an integral part of this equal right of expressive association, Nazis must then also have the same right as environmentalists to exclude from their association those who have characteristics which are reasonably seen as being incompatible with sincere adherence to their association's distinctive beliefs. There are, perhaps, circumstances of 'supreme emergency',[26] in which the very survival of a liberal democratic constitutional regime is at stake, when it may be excusable to infringe or suspend the rights of association of Nazi-type groups. However, if this doctrine of supreme emergency is not to provide a rationale for the routine and unwarranted suppression of dissident minority groups, the criteria defining a situation of supreme emergency, and when suppression is legitimate in such a situation, must be set out very precisely and strictly adhered to.[27]

Even under the conditions of more stable, and largely 'well-ordered', liberal democratic polity, however, it may be important to distinguish between the right *to form membership organizations*, and the right *to public assembly*. Even if Nazis do have as much right as environmentalists to form a membership organization dedicated to the propagation of their views, it does not necessarily follow from this that the two groups must also have identical rights of assembly.

[25]For a defence of this view, see Ronald Dworkin, 'Pornography and Hate', *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1997), pp. 214–26.

[26]I borrow this concept from Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), pp. 251–68.

[27]At least three conditions must be satisfied, I think, for suppression to be excusable: (a) the illiberal group must have a high probability of capturing state power (e.g., is about to win an election with a large majority); (b) the damage to civil liberties of the group's capture of state power is likely to be very large; and (c) the likely damage to civil liberties of seeking to ban and dissolve the group is not likely to be greater over the long-run than the damage which is likely to result from allowing the group to come to power. Even where (a) and (b) are satisfied, there might be cases where (c) is not; contemporary Algeria, for example, is arguably one such case.

Individuals not only have an important moral interest in being able to communicate deeply-held views to the wider community; they also have an important moral interest in being able to avoid contact with views which they know they will find distressing or which do not acknowledge their dignity, an interest in not being a 'captive audience' for speech which is likely (and often intended) to hurt or degrade.[28] A proper balancing of this interest against the interest in communication of viewpoint will almost certainly require some limitation of Nazi (and other hate groups') freedom of assembly, particularly on the exact location of assembly.[29] Limitations of this kind on the exercise of assembly rights are more likely for Nazi and other hate groups than for, say, environmentalist groups, simply because Nazi and similarly hateful views are more likely to distress and degrade.

A second question concerns the *weight* of an association's expressive commitments in its overall nexus of purposes. Even if we are satisfied that a disputed exclusion rule can reasonably be seen as protecting a specific expressive commitment, in evaluating the legitimacy of the exclusion rule we should also consider whether this expressive commitment itself really is central to the association's purposes as these currently stand. Is the exploration and/or propagation of the relevant values or beliefs central to the activity of the typical association member? Do they feature prominently in the motivation of the typical person joining the association, or in the self-understandings of current members? If not, then it is far from clear that the disputed exclusion rule really is serving an important integrity interest. Consequently, if the rule also frustrates a significant opportunity interest on the part of those excluded by it, we should still consider the rule illegitimate.

An association which defends a disputed exclusion rule by reference to a specific expressive commitment must be required, therefore, to make a reasonable case that this expressive commitment is central to its overall purposes; and this will require showing, I think, how the commitment does enter into the motivation and self-understanding of a large proportion of the association's current membership. Some such requirement simply has to be in place if we are to prevent associations cynically inventing expressive commitments to try to keep people out for reasons that are really indefensible in terms of our second guiding principle.[30]

[28]This is one aspect of the 'offense interest' identified and discussed in Joel Feinberg, *Offense to Others* (Oxford: Oxford University Press, 1985).

[29]Concretely, while the British National Party has the right to assemble in a public place to communicate its views, it may not have the right to do so in the middle of an Asian neighbourhood.

[30]Of course, in many cases it may be unclear how central an expressive commitment is to an association's purposes. In these cases, it is probably right to err on the side of caution and assume that the expressive commitment is substantive enough to justify the disputed exclusion rule. But there may be other cases where the formal character of the expressive commitment is less ambiguous and so cannot serve to justify the exclusion rule—at least when this rule happens to frustrate significant opportunity interests. *Welsh v. Boy Scouts* (see note 6) is arguably one such case.

A further difficulty arises when there is disagreement, not about whether an association has weighty expressive commitments, but about exactly what they are. Consider a recent case in the UK. The Royal Society for the Prevention of Cruelty to Animals (RSPCA) opposes hunting. A few years ago, however, hunting enthusiasts began joining the RSPCA with the declared intent of reversing this policy, arguing that they share the RSPCA's general commitment to preventing cruelty to animals, but merely disagree about one particular policy implication of this general commitment.[31] Many members of the RSPCA feel, however, that unsympathetic outsiders are subverting the fundamental goals of their association, and that these outsiders should therefore be denied membership. Who, in a case such as this, is to judge whether the objectives of the hunting enthusiasts are consistent with the fundamental goals of the RSPCA, and thus, whether they may join the RSPCA? Who, in other words, is appropriately the final judge about what the expressive commitments of an association are?

It is tempting to say: let the majority decide (or, more exactly, in the RSPCA case, a majority of those who were members prior to the moment when the hunting enthusiasts started to join). However, if the majority of an association has the last word on the exact nature and content of the association's expressive commitments, and thus, about who can and cannot be a member, it could use this power to exclude for reasons that are not genuinely, or sensibly, motivated by a concern to protect these commitments. The majority could simply indulge their prejudices, possibly at the expense of the opportunity interests of others. Once again, therefore, the wider community should expect association members to offer at least a reasonable case that its expressive commitments are of such a kind as to require the exclusion rule that is in dispute, and should not allow them merely to assert this (a reasonable case being one that is at least moderately strong when judged by basic standards of logic and evidential reasoning). Sometimes, however, both sides in a dispute about the nature of an association's expressive commitments, and thus, about what exclusion rules it is legitimate for the association to adopt, may have a reasonable case. In this situation, it is surely inappropriate of the wider community to try to settle the intellectual differences between the disputants, e.g., to settle who is right in some potentially schismatic doctrinal dispute amongst members of a given church, and thus it does seem proper to defer to the majority opinion of all original, pre-dispute members, at least in the absence of some other procedure for adjudication, typically internal to the association, whose legitimacy and binding authority is acknowledged by all disputants.

B. Protecting Intimate Attachments

Our second integrity-based right of exclusion is the right to exclude to protect the formation and enjoyment of intimate attachments. What kinds of membership

[31]See John Keeble, 'Blood sports lobby infiltrates RSPCA', *The Observer*, 17 March 1996, p. 3.

organization, if any, can credibly claim to be sufficiently intimate as to justify endowing their members with this enormously expansive right?

I think there are two requirements which a membership organization must satisfy before this intimacy interest can be said to be at stake. Firstly, there must be a strong and mutual familiarity, ordinarily grounded in regular, intensive, 'face to face' interaction, between more or less all organization members; in this sense, the organization must be intimate in *form*. Secondly, the pursuit and enjoyment of intimacy-related goods, such as friendship or love, must be the organization's primary associative purpose; in this sense, the organization must be intimate in *intent*.

It is vital, I think, to insist on both conditions. A local union branch with few members might well satisfy the intimacy of form condition, but, given the opportunity interests at stake, I do not think this should justify allowing existing branch members to exclude new workers whom they dislike from joining the union. On the other hand, a dating agency with thousands of members arguably satisfies the intimacy of intent condition, but, for dignity-related reasons, we might still think it impermissible for the agency to exclude, say, blacks, from its books. In this case, the right of intimate exclusion properly applies at the individual level, with racist whites refusing to accept proposed dates with blacks (and vice versa).

How can we tell whether a given organization satisfies these two demanding requirements? Firstly, we should look at the primary purpose of the association, and consider whether this is extrinsic to the good of association itself. This constitutes a negative test of whether or not the association is intimate in intent. Secondly, we should consider structural features of the association to satisfy ourselves that it is also intimate in form. In a number of recent opinions, US courts have offered a range of criteria which are of relevance here: the association must be small in size; have highly selective membership policies (e.g., not only across racial or gender communities, but within them); exhibit relatively low turnover of members; limit participation in its central activities to members and their personal guests, excluding strangers; and so on.[32] Application of such criteria seems unlikely to give inadequate protection to membership organizations which are genuinely intimate in form and intent.

In some recent cases in the US, courts have upheld the right of small social clubs to exclude by invoking a supposed right of 'private association' as distinct from 'intimate association'.[33] At one level, this is a perfectly understandable shift in language, a way of marking the thought that association in the context of membership organizations, even very small social clubs, is ordinarily not as intimate a form of association as that involved in marriage, family, and sexual relationships. It is highly questionable, however, whether 'private association'

[32]See especially *Roberts* at p. 620.

[33]See, for example, the opinion of Judge Barksdale in *Louisiana Debating Society v. City of New Orlean*s, 42 F.3d 1483 (1995), p. 1493, note 15.

serves a core integrity interest except insofar as it is coterminous with intimate association as defined above. To assert a supposed right of private association which stretches beyond this right of intimate association (i.e., which would provide protection, on non-expressive grounds, for the exclusionary practices of membership organizations which do not satisfy both of the intimacy of form and intent conditions set out above) risks giving insufficient protection to individuals' opportunity interests and their corresponding rights against exclusion, without serving any similarly important moral interest.[34]

VI. CONCLUSION

In this article I have examined when, and on what grounds, members of a secondary association may legitimately engage in categorical exclusion. Having rejected Hirst's choice principle as a criterion for evaluating the legitimacy of categorical exclusion rules, I have proposed an alternative framework in which the legitimacy of such rules is evaluated in terms of three, hierarchically ordered guiding principles and attendant sets of rights. The first principle says that an exclusion rule has a weak presumption of legitimacy if (and only if) it is reasonably seen as being necessary to protect the distinctive purposes of the relevant association. This principle is immediately qualified by the second principle in the hierarchy, however, which says that an exclusion rule is presumptively illegitimate if it, and the purposes which it protects, are incompatible with proper respect for the basic opportunity interests of those individuals who are excluded under the rule (where these arguably include economic opportunity, civic or communal participation, and dignity interests). Finally, a third guiding principle says that an exclusion rule has an especially strong presumption of legitimacy, even in the face of frustrated opportunity interests, if it serves to protect core integrity interests relating to the freedoms of conscience and expression or the formation and enjoyment of intimate attachments. Because of the strong presumption of legitimacy which attaches to this principle, however, we must take great care in operationalizing it and the rights which it supports. This requires that we have a clear understanding of how to assess the weight, and to handle disagreements about the nature of, an association's alleged expressive commitments; and that we have a clear and suitably demanding working definition of when a membership organization is intimate in kind.

[34]Note that nothing I have said here implies that there is a sphere of intimate association which is somehow altogether outside the reach of public authority and intervention. It is easy to imagine contexts—the family with the abusive husband or parent—where the claims of 'intimacy' (or 'privacy') might be used to try to shield aggressors from public control. However, since respect for intimate association is derived here from a more general commitment to respect and protect individuals' integrity interests, and physical security is arguably the most fundamental integrity interest, the approach suggests that the community may and should step in to protect vulnerable parties from abuse.