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Freedom and Sociability

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I. Introduction

If you want to explicate the moral force of human rights, you could do worse than to focus on the value of freedom. On the one hand, freedom does a good job of justifying human rights law; and on the other, it seems to have a good fit with its key features. For one thing, specific rights, such as the rights to religion and privacy, can be understood (at least partly) as emanations of that more general value. When these rights are guaranteed, you can exercise whichever religion you want and shape your private life however you want (within the boundaries of those rights). Plausibly, having the freedom to do so goes a long way towards accounting for the fact that we care so deeply about the relevant rights. Freedom, though, is a contested idea, and although some of our philosophical disagreements about it leave our practices largely unaffected, others might have important practical ramifications. Depending on which conception of freedom one adopts, one might evaluate differently our beliefs and actions, judging that they do or do not comply with freedom, properly understood.

As an integral element of contemporary human rights law,¹ proportionality seems to be an appropriate target of such freedom judgments. In Stavros Tsakyrakis' well-known critique of proportionality, these freedom judgments came to occupy centre stage. Tsakyrakis advances two claims about the relationship between freedom and proportionality. He contends, first, that proportionality, as commonly understood and practised, subscribes to or advances a certain understanding of freedom and, second, that this understanding is morally deficient. In this chapter, I will not engage with the first exegetical claim; it raises intricate questions about how we attribute a moral conception to legal doctrine, which I cannot address here.² Instead, I will focus on the second more philosophical claim. Specifically, I will explore an idea that lies at the heart of that

* I am grateful to Damian Cueni for written comments on an earlier draft.

¹ Not everywhere, of course, but in many jurisdictions.

² See 'Introduction' to this volume, section I.A.

claim, namely, that the problem with proportionality is that it construes freedom in unduly individualistic terms in so far as it defines the *prima facie* scope of rights overly generously, as the freedom to do as one pleases.

The aforementioned diagnosis connects freedom with another moral concern, also central to human rights law, that of a ‘fair balance between the individual and society’. How can we best conceptualise this balance at the philosophical level? As is well known, the orthodox doctrine of proportionality tries to do so at the limitation stage, when it assesses the justifiability of rights-interfering measures advancing the public interest. Tsakyrakis, though, thinks that this comes too late. First and foremost, we ought to revise the moral account of freedom that animates the doctrine. For Tsakyrakis, the freedom to do as one pleases is not worth protecting, even *prima facie*. Rather, freedom must be situated from the outset within a framework of social interaction. What emerges from that is a vision of ‘liberal sociability’, which champions ‘a notion of individuality that derives from and relates to a notion of fair sociability’.³

In this chapter I will defend liberal sociability. Picking up some threads from Tsakyrakis’ rich and suggestive reflections, I will propose an interpretation of liberal sociability that makes it immune from two persistent objections and thereby also sharpens it as an account of the value of freedom capable of guiding human rights law. Specifically, I will argue that liberal sociability does not collapse into communitarianism because it does not presuppose an ethically thick social context or promote togetherness. Rather, its central insight is that what we do in social interaction unavoidably affects others in morally significant ways, and so it would be morally obtuse – indifferent to those morally significant effects – to insist on being free to do whatever we want, even *prima facie*. Hence, the claims we can properly press against others ought to be worked out from a moralised understanding of various forms of social interaction; such an understanding primarily serves to (i) identify the morally relevant interests, as these are implicated in social interaction, and (ii) in light of those interests, prescribe a system of organising social interaction that is compatible with the human dignity of all participants. I will call this interpretation of liberal sociability *austere*.

The argument of this chapter is divided into three main sections. Section II presents the main tenets of liberal sociability, as these emerge from Tsakyrakis’ work. Section III introduces two objections: one objection states that liberal sociability privileges the gregarious over the eccentric and the recluse; while the other objection is that it holds personal life hostage to community visions of the good life. In section IV, I will claim that, once liberal sociability is construed along the lines of the austere interpretation I favour, it has the resources to address these objections. Liberal sociability is antithetical to communitarianism in so far as the latter negates human dignity, properly understood; in turn, it offers protection to the eccentric and the recluse, in so far as social interaction has limits beyond

³ Tsakyrakis, ch 1 of this volume, section II.

which others cannot have a say in what individuals do. Based on these findings, I will then go on to draw out some practical implications of adopting the framework of liberal sociability.

II. Individuality and Sociability

A. From Social Practices to Individual Rights

It is well known that the doctrine of proportionality, as standardly understood and practised, directs us to start a human rights inquiry by asking whether a human right has been ‘engaged’ or ‘interfered with’, typically by a government action or omission. An affirmative answer to this question does not in any way foreclose the all-things-considered judgement whether the right has been violated. The government action may still be found to have been justified. However, for some proponents of proportionality, even the notion of an interference with a human right tracks an important moral concern, one that partly explains and justifies why proportionality has the structure it does. These theorists contend that this concern is underpinned by the moral value of freedom. For example, Kai Möller construes that value to encompass a *prima facie* moral right to everything that advances our self-conception.⁴ If there is a moral ‘right to everything’ then, arguably, it makes moral sense to demand that interferences with it trigger a human rights inquiry and only be allowed to stand if they are suitable, necessary and proportionate. By so limiting the scope of permissible government action, the claim goes, we optimise the enjoyment of a morally valuable freedom.

Tsakyrakis criticises the conception of the moral value of freedom sketched in the previous paragraphs, which he calls ‘total freedom’.⁵ This conception prescribes that people in society only sacrifice the amount of freedom ‘necessary to secure the mutual enjoyment of the remaining portion of their freedom under the auspices of a commonwealth’.⁶ In committing to total freedom, says Tsakyrakis,

⁴K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012). I have criticised Möller’s account, with special emphasis on his understanding of freedom, in D Kyritsis, ‘Whatever Works: Proportionality as a Constitutional Doctrine’ (2014) 34 *OJLS* 395.

⁵Tsakyrakis adapts a term used by Ronald Dworkin in *Justice for Hedgehogs*. There ‘total freedom’ denotes a conception of freedom which Dworkin defines as one’s ‘power to act in whatever way he might wish, unimpeded by constraints or threats imposed by others or by a political community’: R Dworkin, *Justice for Hedgehogs* (Cambridge, MA, Harvard University Press, 2011) 366. He then associates with Berlin the position that restrictions of total freedom, thus understood, are, as such, losses of value, even if they are, all things considered, justified by another moral value, say, the value of equality. Dworkin rejects this position. His rejection is to a great extent animated by general considerations about the nature of moral value, in particular its holistic and integrated character. See relatedly F Michelman, ‘Foxy Freedom’ (2010) 90(2) *Boston University Law Review* 949. In contrast, Tsakyrakis’ opposition is primarily substantive: total freedom distorts a crucial dimension of moral worth.

⁶Tsakyrakis, ch 1 of this volume, section II.

proportionality reflects an 'individualistic bias'.⁷ It assumes that the demands of a valuable freedom (a freedom that we are enjoined to optimise) can be worked out from the perspective of the isolated individual, attending only to her conception of the good life, independently of other people. But this, Tsakyrakis claims, gets freedom wrong.

I am not going to examine whether Tsakyrakis is right in his diagnosis of the philosophical underpinnings of proportionality.⁸ Nor do I have much to say about the merits and demerits of total freedom. I want to focus on the conception of freedom that he holds up as his preferred alternative to it. In the work he published before his untimely death he presents that alternative only in outline.⁹ But what he does say there is both intriguing and controversial. At the heart of his framework is the idea of sociability, which he credits to Aristotle, whereby 'practices of sharing and accomplishing things with others are prior to the individual pursuing her self-interest'.¹⁰ To get a clearer sense of how Tsakyrakis understands the priority of such practices (henceforth also social practices), it might be helpful to take a closer look at the typology he offers. He distinguishes three types of social practices.¹¹ First, Tsakyrakis speaks of practices that are taking place in a context that reduces transaction costs and thus facilitates large-scale interaction.¹² These practices aim at mutual advantage, where each participating individual has her own ends but advancing them requires cooperating with other individuals seeking their own ends. Second, Tsakyrakis speaks of intimate relationships, for example between spouses. In these practices, participants also aim at their personal good, but their nature is such that they are singular or very difficult to replicate. Third, there is political society, which is constituted by individuals pursuing 'a common end, namely the collective achievement of justice'.¹³

It is noteworthy that Tsakyrakis defines all the aforementioned practices in terms of the good of individuals rather than the good of a distinct collective entity. Of course, it makes sense to say that my family had a pleasant walk or an orchestra performed well, but there is no collective that has thereby benefited over and above the members of my family and the orchestra (and possibly the people who attended the orchestra's performance). The key point, however, is that the good of one member is bound up with that of the others, which is why social practices like a family walk or an orchestra performance involve the sharing of things among

⁷ *ibid* section I.

⁸ For an argument that the legal doctrine of proportionality is not committed to total freedom, see Cueni, ch 8 of this volume.

⁹ Apart from 'Disproportionate Individualism', elements of that alternative are also contained in S Tsakyrakis, 'Is There a General Right of Non-Disclosure?' in D Spielmann, M Tsirli and P Vogiatzis (eds), *The European Convention on Human Rights, a Living Instrument: Essays in Honour of Christos L Rozakis* (Brussels, Bruylant, 2011) 653.

¹⁰ Tsakyrakis, ch 1 of this volume, section II.

¹¹ It is not clear whether Tsakyrakis means these three types to be exhaustive of the possibilities or he mentions them because they illustrate the features of sociability that he focuses on.

¹² Tsakyrakis, 'Is There a General right of Non-Disclosure' (n 9) 657.

¹³ *ibid*.

those who participate in them. Note that rejecting the existence of a community good is not the same as affirming an instrumental conception of social interaction. It is perfectly compatible with Tsakyrakis' position to say that the good of individual members can include the good of being part of a community such as a family or an orchestra, or, as John Rawls puts it, that 'human beings have in fact shared final ends and they value their common institutions and activities as good in themselves'.¹⁴

The priority of social practices, as outlined above, has for Tsakyrakis important moral implications. Social practices typically generate benefits and burdens and, given that the benefits and burdens often fall on different individuals, raise questions of justice. Thus, it becomes imperative to regulate them so as to make the allocation of benefits and burdens among participants fair. Moral rights are downstream from this basic idea. They are rules that give effect to a fair allocation of benefits and burdens among participants. For example, it may be that, when my family goes out for a long walk in the forest, my toddler son has a moral right to be carried by his parents (perhaps after a certain point). Recognition of such a right ensures that the family outing is not unduly burdensome on him.

Notice the difference with total freedom. In the framework of total freedom, we have seen, the *prima facie* rights are understood expansively, based solely on what each individual wishes to do.¹⁵ The goal is then to maximise satisfaction of these rights for everyone, resorting to balancing in order to adjudicate the inevitable conflicts among individual demands. By contrast, in Tsakyrakis' framework, '[t]he maximisation of liberty is not valuable in itself but only in so far as it is supported by this notion of fair sociability'.¹⁶ We ought to have all and only those liberties and other rights without which it would be unfair to be expected to carry on participating in a particular social practice. In this picture, other people enter the determination of our liberties and other rights from the get-go because their reasonable interests are parameters of the requirements of fairness.¹⁷

Apart from its metaphysical role in grounding rights in the notion of fair social cooperation, the framework of sociability also plays a very important epistemic role. For Tsakyrakis, 'the content of [individual rights] will be determined by a notion of fairness in different social contexts'.¹⁸ Therefore, it is likely to 'vary from one social context to the other'.¹⁹ In order to specify what rights we have, then, we

¹⁴ J Rawls, *A Theory of Justice* (Cambridge, MA, Belknap Press, 1971) 522.

¹⁵ In his earlier work, Tsakyrakis refers to this feature of the proportionality assessment as its 'definitional generosity'. See S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468.

¹⁶ Tsakyrakis, ch 1 of this volume, section II.

¹⁷ In this sense Tsakyrakis' framework shifts away from liberty understood as a general value from which more specific rights emanate. Of course, even if the notion of total freedom is misguided, this move might still involve a conceptual loss: it could be the case that we need a general concept of liberty to perform other moral purposes. See relatedly D Cueni, 'Constructing liberty and equality – political, not juridical' *Jurisprudence* (21 February 2024) doi: 10.1080/20403313.2023.2296816.

¹⁸ Tsakyrakis, ch 1 of this volume, section II.

¹⁹ *ibid.*

ought to take into account the form of social interaction in which they are implicated and assess what distribution of burdens and benefits is required by fairness.

The way Tsakyrakis situates rights within sociability can be seen in his critique of a putative general right of non-disclosure of personal information, namely a *prima facie* right of the individual to resist disclosure of any personal information. For Tsakyrakis, this putative right is animated by the spirit of total freedom and reproduces the latter's distortions. By invoking it, he writes, 'state employees have claimed that their salaries should be concealed, students that grades in high school or university should not be made public, even drivers, who have infringed the traffic code, have claimed that it is forbidden to have the plates of their cars photographed'.²⁰ But no such right exists because '[t]he sharing of information is an inevitable and necessary feature of sociability and, indeed, a constitutive element of the collective achievement of justice and of cooperation for mutual advantage'.²¹ This feature is at odds with the recognition of 'a general individual interest not to be "seen", which competes with an opposite societal interest to "see"'.²² Tsakyrakis maintains that, rather than presuppose that the sharing of information is always morally questionable, at least *prima facie*, we should instead accept that the disclosure of some personal data inheres in our participation in social interaction. Starting from this premise, we should turn our attention to determining what more specific information could reasonably be withheld or required in this or that social practice and craft a more limited and tailored right to non-disclosure. Religious convictions are confidential in the context of most hiring processes, but they may not be if you are applying for a position that includes religious instruction.

B. Sociability in Politics

How can this account help us make sense of our membership in a political society and the rights that we may properly demand from our government? Recall, members of a political society have a shared end, namely, to attain justice. This is a most important aim, because 'only just public institutions allow everyone to realize his or her more particular aims'.²³ So, it would seem that the same reasons that militate against making total freedom the starting point of our interpersonal morality would also apply to the political community. As Tsakyrakis puts it, '[i]t would be rather paradoxical to think that ... the less [individuals] share the better a society becomes'.²⁴ But despite its importance, participation in political society

²⁰ See Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 660.

²¹ *ibid* 654.

²² *ibid*.

²³ *ibid* 657. In addition, it may also be important because participating in political society is a good in itself. For an account of the good of political society that is congruous with Tsakyrakis' framework, see Rawls (n 14) 527 ff.

²⁴ Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 655.

is not an all-encompassing goal, subordinating all other aspects of our lives or demanding that we sacrifice our 'more particular aims' to the pursuit of the collective achievement of justice. Quite the opposite, its success is in large part measured by the room it affords for those more particular aims. Individual rights are essential to this task. For Tsakyrakis, 'they are indispensable social arrangements that enable all persons to conduct the plan of life that they deem valuable'²⁵ by guaranteeing for them spheres of freedom against collective demands. They thereby alleviate the burdens of social cooperation for the attainment of justice. According to Tsakyrakis, a society's yardstick for what rights to recognise and enforce is human dignity, which prescribes that we treat each individual with equal respect and concern.²⁶ When a political society lives up to human dignity, it realises or exhibits what he calls *liberal sociability*. Liberal sociability 'reconciles the affirmation of individual rights with the primacy of social life'.²⁷

To illustrate the place of the individual and the community in liberal sociability, let me briefly contrast it to the vision of political society that underpins the so-called common good constitutionalism of Adrian Vermeule.²⁸ Admittedly, there are some superficial similarities between the two. Common good constitutionalists have mounted a critique of proportionality that is structurally similar to Tsakyrakis'.²⁹ More pertinent for present purposes, for Vermeule 'human flourishing, including the flourishing of individuals, is itself essentially, not merely contingently, dependent upon the flourishing of the political communities'.³⁰ This seems to come close to Tsakyrakis' claim that just political institutions are necessary for individuals to be able to pursue their aims. However, the two claims should not be confused. In fact, their philosophical starting points and understanding of the moral point of government are very different, so it is crucial to demonstrate how liberal sociability steers a middle course between total freedom and the conception of freedom espoused by common good constitutionalism.

First, as we have seen, Tsakyrakis' framework does not presuppose that communities have their own good other than in the sense that they may succeed or fail in the aim they are meant to fulfil. The same applies to political society. Recall that liberal sociability defines the purpose of a political society in terms of the attainment of justice rather than a more substantive notion of collective flourishing. The contrast becomes stark when we consider how thick Vermeule's understanding is of the flourishing of political communities. For example, he

²⁵ Tsakyrakis, ch 1 of this volume, section II.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ A Vermeule, *Common Good Constitutionalism* (Cambridge, Polity Press, 2022). My goal here is not to argue the merits of Vermeule's theory but merely to juxtapose it to liberal sociability so as to sharpen some of the latter's key features.

²⁹ See, for instance, C Casey and A Vermeule, 'Myths of Common Good Constitutionalism' (2022) 45 *Harvard Journal of Law and Public Policy* 103, 142 ff.

³⁰ Vermeule (n 28) 29.

is prepared to include in that notion a putative ‘moral well-being of the political community’.³¹ Whereas liberal sociability need not deny that everyone has an interest in living in a social environment congenial to her ethical outlook, which is set back by the public availability of speech and behaviour that clashes with it, or that it may be appropriate to seek to promote this interest to some extent through political action, this is a far cry from saying that the political community, over and above the individuals making it up, is made better or worse off depending on what material is publicly available. This is a proposition to which liberal sociability is not committed.

Second, and relatedly, liberal sociability rejects the general ordering between common goods and the good of individuals proposed by Vermeule. He writes that ‘common goods are real as such and are themselves the highest goods for individuals’.³² If common goods are distinct from and weightier than the particular good of individuals, then one should expect that the latter must yield whenever it clashes with the former. In light of this it may well be – though Vermeule is not explicit about this – that individuals should not have a right to promote their particular good at the expense of the common good(s). By contrast, for liberal sociability, the scope and content of our rights are delimited not by a supposed overriding fealty to the common good but by the requirements of fairness towards its other members. And fairness in the political context prescribes – consistently with human dignity – that all members are secured adequate space of freedom to pursue *their own particular life plans* rather than that they adhere to a certain vision of the good life that, say, prioritises civic participation.

III. Too Sociable, not Liberal Enough

In section II, I outlined the main tenets of liberal sociability. Liberal sociability regards our participation in various forms of social interaction as a key dimension of individual good. Rejecting the coherence and moral appeal of a ‘right to everything’, whose content is figured out pre-socially from the standpoint of the isolated individual, it takes liberties and other rights to flow from the requirements of fairness within social interaction. In the case of political communities, liberal sociability insists that they are organised such that they allow individuals sufficient room to pursue their particular aims in accordance with equal concern and respect. However, it resists the idea that communities have their own good, which competes with and overrides the good of individuals.

Can liberal sociability achieve its professed aim of reconciling social practices and human dignity? It is impossible to offer a comprehensive defence against all

³¹ *ibid* 171. His example is child pornography. Needless to say, there are other bases for making child pornography impermissible apart from the protection of a supposed ‘moral well-being of the political community’.

³² *ibid*.

possible objections, so in this section I will focus on two that have the same thrust: liberal sociability cannot help but prioritise the community at the expense of the individual and consequently allows that the individual may have to make (what on the best understanding of freedom are) excessive sacrifices to the community. The two objections are relevant for present purposes. If sound, they demonstrate the superiority of a 'total-freedom' framework over the framework of liberal sociability. However, as I will explain in the following section, the best understanding of liberal sociability can rebut them.

A. Coercive Sociability

According to the first objection, Tsakyrakis' framework implicitly relies on a particular ordering of conceptions of the good: it expects individuals to be, well, sociable. It thus makes no room for those who insist on being 'left alone', either in the sense that they wish to minimise social interaction ('the recluse') or in the sense that they revolt against social norms ('the eccentric').³³ In so far as being left alone is an anti-social impulse, it would seem that Tsakyrakis' scheme cannot give it decisive weight. Therefore, it must consistently thwart the life plans of the recluse and the eccentric. You may not feel the force of the objection if you adopt a conception of the good that subordinates the individual to the collective. But, of course, this is not Tsakyrakis' stated conception. His aim is to give individuals leeway to pursue their own conceptions of the good. So, if this objection correctly diagnoses the implications of sociability, it is an embarrassment for him. By contrast, total freedom has a straightforwardly liberal explanation for such cases. It affords the life plans of the recluse and the eccentric the same *prima facie* protection as any other life plan. These life plans may have to be restricted by justified interventions in pursuit of legitimate government goals. But so may other life plans. There is nothing in the structure of total freedom that would unduly disadvantage them.

The force of this objection can be illustrated by considering the European Court of Human Rights' (ECtHR's) decision in *SAS v France*. As is well known, the case concerned the compatibility with the Convention of Law no 2010-1192, which banned the wearing of the full-face veil in public spaces. The passing of the law was preceded by a report of a parliamentary commission that had found, amongst other things, that 'the full-face veil represented a denial of fraternity,

³³ Tsakyrakis mentions a more extreme example of an anti-social life plan, that of someone who wants to kill their critics, as an illustration of the impasse of total freedom and the relative advantage of his framework. In his chapter, Mark Tushnet explores this example to argue that total freedom is not incompatible with the fundamental idea animating liberal sociability. See Tushnet, ch 4 of this volume. If total freedom can make moral sense of such an extreme example, then the force of Tsakyrakis' charge is blunted. By contrast, the less extreme examples examined here are more of a sword than a shield for proponents of total freedom. The thought is that, unless Tsakyrakis can guarantee innocuous life plans like those of the recluse and the eccentric, his framework is seriously awry.

constituting the negation of contact with others and a flagrant infringement of the French principle of living together (le “vivre ensemble”).³⁴ This rationale for the ban was affirmed and further spelled out in an explanatory memorandum accompanying the Bill, which stated:

The systematic concealment of the face in public places, contrary to the ideal of fraternity, also falls short of the minimum requirement of civility that is necessary for social interaction.

Moreover, this form of public confinement, even in cases where it is voluntary or accepted, clearly contravenes the principle of respect for the dignity of the person. In addition, it is not only about the dignity of the individual who is confined in this manner, but also the dignity of others who share the same public space and who are thus treated as individuals from whom one must be protected by the refusal of any exchange, even if only visual.³⁵

Arguably, this rationale, which the Grand Chamber largely relied on for deciding that the ban was compatible with the Convention, flows from Tsakyrakis’ framework – or at a minimum, there is nothing in that framework to oppose it.³⁶ In particular, both seem to start from the premise that there is something morally problematic about an individual claiming a right to remove herself from social interaction; thus both place an extra argumentative burden on her that is not faced by other conceptions of the good life. In addition, both seem to attack the existence of such a right on the basis of the interests of others within a certain sphere of social interaction. In this way, they stack the odds against those who wish to be left alone.

B. Communitarianism in Disguise

The objection we have just considered has a rather narrow aim, to show that liberal sociability disparages people who distance themselves from joint pursuits. But the difficulty could be thought to run much deeper. It may be argued that, though avowedly liberal, Tsakyrakis’ account makes a fatal concession to communitarianism. At first blush, liberal sociability includes a robust commitment to individual rights, which ‘enable all persons to conduct the plan of life that they deem valuable’³⁷ and thus to resist the imposition of a collective conception of the

³⁴ *SAS v France* [2015] 60 EHRR 11, para 17. From the extensive academic commentary, see M Hunter-Henin, ‘Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*’ (2015) 4 *Oxford Journal of Law and Religion* 94; I Trispiotis ‘Two Interpretations of “Living Together” in European Human Rights Law’ (2016) 75(3) *Cambridge Law Journal* 580.

³⁵ *SAS v France* (n 34) para 25.

³⁶ I am assuming here that a theory that endorses or allows this rationale of the full-face veil ban is for this reason problematic. But, of course, many scholars agree with this rationale. Some of the things I say below to defend liberal sociability against the first objection also hint at why I think these scholars are mistaken. However, I do not hope to fully resolve this dispute here.

³⁷ Tsakyrakis, ch 1 of this volume, section II.

good. Even so, the objection goes, communitarianism makes its presence felt in Tsakyrakis' scheme more insidiously. Recall that within the framework of liberal sociability individual claims are worked out from an analysis of human interaction in different social contexts. But social contexts are not ethically inert. They often – perhaps typically – embody certain assumptions about the content and worth of various social positions and their distribution among social groups. By giving epistemic value to social contexts, liberal sociability risks allowing these assumptions to contaminate our judgements about what is owed to people. For example, in an environment that rigidly defines gender roles, liberal sociability will arguably take its cues about the interests at stake and the appropriate distribution of social burdens from these rigid definitions. It might assume that assigning caring responsibilities to a woman is less of a burden than to a man, or that it distinctively promotes her well-being as opposed to a man's because this is how family is structured in that environment. As a result, it systematically puts women's rights on the back foot.³⁸

This objection reinforces the previous one, too. Perhaps the reason you do not have a right to wear the full-face veil is that, once you are out in the street in France, you are participating in a social practice that involves being open to engagement with others; hence a right to wear the full-face veil contradicts the very point of the practice.³⁹ And the practice has this point because it is commonly accepted that it does. According to the objection we are considering, liberal sociability cannot but defer to such societal attitudes, because it takes such attitudes to determine the content of social practices. It thereby places the life plans of the eccentric and the recluse in the hands of precisely those to whom those life plans stand opposed, namely, other people.

IV. An Austere Interpretation of Liberal Sociability

In this section, I push back against the aforementioned objections by arguing for what I call an 'austere' understanding of liberal sociability. It is austere in the sense that it construes liberal sociability as not resting, implicitly or explicitly, on ideas

³⁸ The objection replicates the well-known feminist critique of role assignments, especially in the family. See, inter alia, C MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA, Harvard University Press 1987) 36; S Okin, 'Justice and Gender' (1987) 16 *Philosophy and Public Affairs* 42, 67–68.

³⁹ Tellingly, the Belgian Government stated in its intervention in the SAS case that 'codes of clothing which prevailed in our societies were the product of societal consensus and the result of a balanced compromise between our individual freedom and our codes of interaction within society' (*SAS v France* (n 34) para 87). The Court was sympathetic to this position: it stated that '[i]t can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question' (ibid para 122, emphasis added).

about what is good for individuals but only on ideas about what is fair or just. Contrary to the first objection, liberal sociability does not presuppose or advocate that being a recluse or an eccentric is a bad way to lead one's life. Contrary to the second objection, it maintains a sufficient critical distance from prevailing understandings of social practices and of role assignments within them. I then go on to explain that the difference between liberal sociability and total freedom is not merely theoretical but plays out in the way we decide human rights cases using the two frameworks.

A. Sociability without Communitarianism

Let me begin with the second objection. This objection misconstrues the epistemic role of sociability. It is not the case that, in figuring out the demands of fair social cooperation, we are guided by nothing other than collective judgements about the value and purpose of certain social practices. Far from it, such judgements are ultimately assessed against the backdrop of human dignity. With human dignity as its yardstick, liberal sociability does not mirror those judgements but rather seeks to scrutinise and discipline them. For example, it can assess whether the roles that are 'normally' assigned to women in childcare in a particular society or the expectation that one always show one's face in public are in line with the respect that flows from their dignity. Nor does it fall into the opposite trap, of making recourse to social context epistemically idle and getting all its answers from fleshing out the requirements of human dignity in the abstract.

To see why this is so, we need to delve deeper into the operation of Tsakyrakis' framework and outline how liberal sociability combines considerations of fact (social interaction) and value (human dignity). Specifically, appeal to considerations of fact is epistemically non-redundant in liberal sociability because it helps us map the patterns of interaction in which individuals find themselves and in which the demand of fairness arises. To return to a previous example, we may find that different forms of social interaction, say, the interaction between a service provider and a consumer, require a level of sharing of information for their success. In this respect, reliance on social context is key. Without it we do not have a clear idea of the ways in which the good of individuals is enmeshed with that of others. But the same exercise also reveals the benefits and burdens that are being generated from social interaction and the way they are currently being distributed. Thus, we may find that our information-sharing practices unduly invade the lives of consumers by requiring them to disclose sensitive personal information to service providers. It is here that human dignity gives Tsakyrakis' framework a clear normative edge. Liberal sociability will resist unfair distributions of benefits and burdens and seek to redress them by giving participants rights and liberties that block them, for example by requiring service providers to obtain the consumer's consent before obtaining and using certain sensitive information.

How do we know which distribution of benefits and burdens is unfair or which invasion of privacy is undue? In the framework of total freedom, we calculate how much of people's total freedom is restricted by a distribution of benefits and burdens and we seek to protect as much of it as possible with equal regard to all. Arguably, in this way we respect human dignity because we allow individuals to give shape to their conception of the good life. Liberal sociability takes a different tack. Being liberal, it, too, should reserve pride of place for the responsibility of each individual to lead their own life. But, of course, it rejects the baseline of total freedom as a moral non-starter. Instead, it develops an understanding of what is permissible by asking how we can preserve our human dignity in our unavoidably freedom-limiting interaction with others.

Such an understanding begins from the premise that social interaction does not exist for the good of this or that individual but of everyone involved. It engages the moral interests of many people and so its rules must be capable of reconciling those. How can we factor these different moral interests? In 'Disproportionate Individualism' and elsewhere, Tsakyrakis offers one option. He aligns himself with Dworkin's view that it is impermissible to restrict someone else's freedom on the basis of 'external' preferences, namely preferences about what is right or beneficial for her, or discriminatory preferences.⁴⁰ Clearly, this cannot be the whole story about how we ought to treat one another, even if we restrict our attention to politics.⁴¹ Still, Dworkin's view highlights some key characteristics of moral claims in the framework of liberal sociability.⁴² First, it offers a way of cashing out the liberal impulse: the reason external and discriminatory preferences are excluded is because everyone is entitled to decide what is right or beneficial for herself and to equal concern and respect. Second, it cashes out the liberal impulse without assuming that any restriction of freedom is *eo ipso* morally problematic or suspect: restrictions that are not tainted by external or discriminatory preferences are in principle permissible. Third, and importantly for our purposes, it retains liberal sociability's critical distance from collective judgements about the meaning of social practices. Even if others believe that a social practice requires that women have lesser status than men, liberal sociability will discount such beliefs as falling short of human dignity and accordingly modify the rules of the respective social practice. In this sense, the

⁴⁰ R Dworkin, 'Do We have a Right to Pornography?' in R Dworkin, *A Matter of Principle* (Cambridge, MA, Harvard University Press, 1985) 335; Tsakyrakis, ch 1 of this volume, section III.

⁴¹ In the case of the right to non-disclosure, Tsakyrakis adds a further limitation. He says that our obligation to share certain information must be tailored to the promotion of certain purposes only, those that are related to a valuable social practice. If a certain piece of information, say about our sexual preferences, is not related to a hiring process, we should not be expected to disclose it. See Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 661. Could we perhaps generalise from this example to other rights as well? Could we say that, to the extent that a social practice has a more or less stable and widely agreed upon purpose, it would be unfair to limit individuals' restrictions other than in pursuit of that purpose? It is not possible to evaluate this suggestion here.

⁴² Dworkin's view is, of course, the topic of extensive critical debate. It is not relevant for present purposes to enter this debate.

understanding of social interaction that frames our reciprocal moral claims is moralised and may look different from how interaction occurs in a particular society. We could go even further. It is possible that an actual social practice is morally beyond the pale, marred by injustice and prejudice. Again, liberal sociability does not have a default reverence for such practices. If there is no way to retain something of value by severing their morally reprehensible aspects, it will dismiss them wholesale.

With this in mind, it becomes easier to address the first objection as well. This objection mistakes the moral role of sociability in Tsakyrakis' account. Tsakyrakis is not an advocate for togetherness. He is not saying that, as a general matter, individuals are better off being open to interacting with others. Sociability in his scheme is a parameter of (much) human good, but it is not a good in itself.⁴³ Nor is he saying that an individual has a duty to interact with others, as the ECtHR seems to accept in *SAS*. He is merely saying that, where there is valuable social interaction, the reciprocal moral claims of participants must take a certain structure. They are not fixed solely by societal attitudes. Their determination, as previously discussed, is a moralised task. They are worked out from a scheme of rights and duties that allows that a valuable social practice thrives while preserving the human dignity of all participants.

So, in the case of the recluse and the eccentric it is an open question, one that must be resolved by moral argument about the meaning of human dignity, whether their life plan should yield to societal expectations. It may well turn out, as I suspect it will, that there is no political duty to be open to interact with others, in general or just because you are in a public space. Of course, there is value in free and civil interaction with strangers, but this value can still be realised, even if we leave the recluse alone, as long as there are plenty of opportunities for those who do want to interact with others to encounter like-minded individuals. It is even more likely that there is no general political duty to behave in a certain way, just because lots of other people in your society do so, when no valuable social interaction depends on enforcing this kind of uniformity. Note that in making this kind of assessment we do not need to pass judgement on the worth of people's life plans, by reference either to sociability or to some other thick conception of the good life.⁴⁴ It is up to each individual, including the recluse and the eccentric, to forge their life plan as they see fit, using the resources (eg liberties) that they are left with, once they have paid their fair share for the sake of sustaining valuable social interaction.

⁴³ That is not to deny that sociability may also be a good in this or that context, but not in the overarching sense in which Tsakyrakis employs the term.

⁴⁴ In this sense Tushnet is right to criticise Tsakyrakis for claiming that the life plan of feeding birds in the park is 'trivial'. See Tushnet, ch 4 of this volume, section II. But neither is it accurate that 'Tsakyrakis' analysis ... depends centrally on the proposition that some interests are trivial or outrageous' (*ibid*).

B. Much Ado about Nothing?

When comparing how total freedom and liberal sociability frame the right to informational non-disclosure, Tsakyrakis warns that the two approaches might lead to the same results in practice. He writes:

My aim is not necessarily to show that the proposal outlined here furnishes a more satisfactory response to concrete cases. In fact, it may well be that we reach the same conclusion, whether our starting point is a general right to non-disclosure subject to proportionate limitations or the idea of liberal sociability. But this overlap in outcome should not conceal the profound differences of principle.⁴⁵

This statement could be taken to contain a major concession. If the two approaches systematically make no difference in application then their differences in principle are either insignificant or inconsequential; in both cases they can hardly be called 'profound'. At the very least, it would appear tenuous to claim that total freedom is seriously misguided.

This is a tempting position to take. After all, total freedom is only a theory of *prima facie* entitlements. Presumably, the same moral considerations that constrain freedom in the framework of liberal sociability can justify restrictions to those entitlements at the limitation stage of the standard proportionality analysis. Either way, all morally relevant interests are presumably taken into account. Hence, it should come as no surprise if the two approaches converge in application.⁴⁶

Nevertheless, Tsakyrakis' apparent modesty in the aforementioned passage belies the depth of his challenge.⁴⁷ Total freedom is an account of which freedom is morally worthwhile. So, if Tsakyrakis is right that it allows items to go into the balance that lack moral worth, because they are incompatible with a fair scheme of social interaction in a given context, then it will systematically, not just occasionally, skew the proportionality analysis. Of course, as Matthias Klatt claims, when considering many manifestations of total freedom, such as killing one's critics or spitting on the sidewalk, 'a high degree of empirical and normative reliability exists that the competing principle, the public value, will take preference over the general freedom right'.⁴⁸ However, this does not suffice to drive the worry away. The bias may not make a practical difference when the moral odds are clearly stacked against the individual's claim, but this does not mean that it is not there, and it might play out in cases where the odds are more finely balanced. Tsakyrakis writes:

Are we prepared to assign weight to outrageous interests such as [an interest in killing those who criticise me] in the first place? Once we start going down this road, it makes

⁴⁵ Tsakyrakis, 'Is There a General Right of Non-Disclosure?' (n 9) 654.

⁴⁶ For a version of this argument see Klatt, ch 3 of this volume, section IV.

⁴⁷ Kyritsis (n 4) 401.

⁴⁸ Klatt, ch 3 of this volume, section IV.D.

little difference to assign such interests only a slight weight. The damage will already have been done.⁴⁹

It is no good saying in response that it is open to a proponent of proportionality to assign zero weight to a *prima facie* entitlement.⁵⁰ Total freedom has already foreclosed this option, because it does not merely add items to be taken into account in the proportionality analysis, it also assigns them positive moral valence. As Tsakyrakis points out, ‘proponents of proportionality maintain that total freedom is of such value that it ought to be optimised along with the freedom of other individuals and other values.’⁵¹ One cannot hold that total freedom should as a moral matter be optimised and at the same time that it has zero weight.

V. Conclusion

There is undoubted simplicity in the framework of total freedom. It commits minimal moral resources to the determination of *prima facie* rights, which are then added to an overall balance that also includes other rights and collective goals. The framework of liberal sociability asks us to trade that simplicity with a scheme that frontloads many hard moral questions about the place of the individual in society and the claims of fairness that she can properly raise. In this chapter, I have tried to show that the shift ultimately pays off in moral insight. Individuals are situated in various patterns of social interaction. As such, they do not even have a *prima facie* moral right to do as they please – a moral right that human rights law ought to account for and respect. They are morally entitled to be treated in accordance with human dignity as participants of social practices whose freedom is inevitably restricted in manifold ways for the sake of sustaining those practices. In particular, they are entitled to a fair distribution of the benefits and burdens of social interaction. Many of the liberties and other rights that we cherish are meant to give effect to such a distribution. There is, as we have seen, no concession to communitarianism in this position. Liberal sociability does not take social practices at face value. Even while it treats them as a parameter of the demands of human dignity, it passes them through a moral filter. Some social practices may turn out to be too flawed to impose any restrictions on individual freedom.

Of course, this insight needs unpacking. We need to elaborate tests for specifying the demands of human dignity and fairness that will guarantee individuals’ ability to lead their own lives and shape to some extent their interaction with others while at the same time allowing that valuable social interaction does not always depend on their consent. Here I have given only an outline of such tests. In

⁴⁹ Tsakyrakis, ch 1 of this volume, section II.

⁵⁰ Möller allows for this possibility in *The Global Model* (n 4) 183 ff.

⁵¹ Tsakyrakis, ch 1 of this volume, section II.

addition, even if liberal sociability is a superior moral theory to total freedom, it does not follow without further argument that institutional actors must reason in accordance with its precepts in practice.⁵² The added complexity of the framework constitutes a significant practical cost that matters a lot for human rights law and brings with it a host of pressing questions: Which institutions can reliably apply the right tests? What information will they need and how can it be made available to them? How must legal doctrine be structured to assist them in this task? Attending to these important questions must await another occasion. But we cannot hope to do so satisfactorily unless we have settled on the correct theory of rights that our tests, doctrines and institutions must track. By forcing us to confront that more foundational issue, Tsakyrakis has done human rights law a great service.

⁵² I have elaborated this gap between theory and practice and the kinds of institutional and epistemic consideration that can fill it in Kyritsis (n 4) 410 ff.

