

ABSTRACT

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Over the last couple of decades libertarianism has gained a lot of attention and garnered much public support. The movement stands at a critical juncture with a great opportunity before it. It has the option of continuing as it is—as a marginal critique of other mainstream political ideas and institutions, or it can present an alternative, viable individual ideal, together with a positive political and social vision (a new constitutional order or a “good society.”) Assuming such a transformation is appealing to its members, how might a new vision look? This thesis offers one possible vision, and it does so by criticizes existing libertarian visions for their narrow focus on economics and law. David Boaz and Charles Murray have done much to broaden libertarian ideas, but they still fall short of the potential that exists at the heart of libertarianism. Instead, this thesis proposes a richer ideal, one of romantic libertarianism—or individuality--that includes a significant role for culture and self-cultivation. Drawing on the work of Humboldt, J.S. Mill, and the Emersonians, it argues for the self-cultivation of the individual in his most individual—unique—form.

The ideal for the libertarian self is supported by a regime theory, sketching out a

possible libertarian society that might help to foster such an ideal. This includes a political structure, a legal structure, and a vibrant civil society. For any proposal to be genuinely attractive to libertarians it must be practically possible. The conclusion considers the organization of the current libertarian movement and speculates on reasons why these kinds of ideas have been neglected thus far. Finally, it questions whether such ideas are likely to be adopted in future, given current institutional arrangements and political strategies.

LIBERTY FOR INDIVIDUALITY

By

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INTRODUCTION

"The future is unknowable but not unimaginable"

Ludwig Lachmann¹

Why Libertarianism?

Fifteen years ago it would have been difficult to imagine a mainstream press publishing not one, but two books on the subject of libertarianism.² Even after the publication of Nozick's *Anarchy, State, and Utopia* in 1974 libertarians were largely regarded as purveyors of a strange peripheral jeremiad.³ Yet over the past decade or so libertarianism has gained much ground. Indeed, while not (yet?) mainstream,⁴ it is now possible to discuss libertarianism seriously within both the academic and public policy

¹Ludwig M. Lachmann, "From Mises to Shackle: An Essay on Austrian Economics and the Kaleidic Society." *Journal of Economic Literature*, (March 1976), 55.

²David Boaz, *Libertarianism*, and David Boaz (Ed.), *The Libertarian Reader*, (New York: Free Press, 1997).

³In a survey of think-tanks published in 1992, *The Economist* gave the Cato Institute a full five marks (out of a possible five) for "kookiness," with other scores of 4, 1, 3, and 2 respectively for how far they were considered to be clever, connected, canny, and cushy. "The Good Think-Tank Guide, The Joys of Detached Involvement" *The Economist*, December 21, 1991-January 3, 1992, 53.

⁴Whether it is, in fact, possible or desirable for libertarianism (as an ideology and a political and social movement) to become mainstream is an interesting question in itself—for instance, in relation to the structural constraints of the American regime (including its political, legal and economic institutions of check and balances,) the vagaries of politics (which tend to favor compromise, particularly between the two major political parties that dominate the political landscape,) the psychological attitude of those who support libertarianism (who frequently like to characterize themselves as purists and "revolutionaries," and who would not, therefore, consider themselves as participants in any sort of formal governing structure,) and, as Robert Michels famously noted in *Political Parties* (Glencoe, IL: Free Press, 1949), the tendencies of democratic political organizations to become oligarchies—the so called "iron law of oligarchy," thereby giving up its own commitment to democratic principles. More recently James Buchanan and other public choice economists have made similar arguments in connection with the potential for the individuals who fight on behalf of freedom outside the state to become self-interested rent seekers once they enter the realm of political power. In short, the question of the extent to which libertarianism may permit itself and its practitioners to go mainstream (or indeed, may be able to go mainstream)—and therefore become part of the system it was established to fight—is an extremely important one, and it will be addressed throughout this thesis.

worlds. At a minimum, libertarianism as it currently exists has come to be treated as a significant and useful critique. For instance, as mentioned above, within analytic political philosophy Nozick's response to Rawl's *Theory of Justice* has come to receive respect. Further, libertarianism and communitarianism are currently invoked as alternatives to, or at least important critiques of, the prevailing liberal-democratic consensus among those who discuss and implement public policy. In terms of recent visibility, there is evidence that libertarian proposals are receiving discussion and support in some policy areas, including tax policy (the flat tax), term limits, social security reform, and school vouchers. Moreover, some commentators believe that underlying political and economic trends indicate a tendency toward less government, suggesting an opportunity in the long term for libertarianism to gain increasing influence.⁵

Supporters of libertarianism have a chance to gain further power and influence if only they can appeal to a larger audience to gain additional support from the public at large. But this will require a different approach to the issues libertarians typically address from the one they have taken heretofore. Indeed, it may require tackling a different set of issues altogether. The question now is, is libertarianism capable of providing something more than a critique? In theory, is there such a thing as a libertarian vision of a good society, and if so, what is it, or what might it be? In practice, if we venture beyond the critique, to what extent

⁵ See, for instance, E.J. Dionne, *Why Americans Hate Politics*, (New York: Simon and Schuster, 1991), chapter 10, and, more recently, "Lexington: The Charge of the Think-tanks," *The Economist*, (February 15, 2003), 33. David Boaz, "The Coming Libertarian Age," Chapter 1, 1-26 in *Libertarianism, A Primer* (New York: Free Press, 1997).

are libertarianism's substantive policies likely to be adopted as viable public policy and social practice,⁶ and beyond that, as a personal ethical code for living? Indeed, one question that needs to be considered at the outset is does libertarianism require a sort of freedom that "goes all the way down," or only robust *political* freedom? How much may be said about individual lives beyond the state, and remain consistent with libertarianism? Many of its supporters claim that libertarianism is only a *political* theory and therefore has nothing to say about morality and other aspects of life in the voluntary sphere. According to this view there is no such thing as a libertarian good society.⁷ However, the same supporters are all too

6 I introduce the terms, "public policy," and "social practice" here since they connote different but related ideas. "Public policy," as I understand it, refers to a set of actions instituted and financed by the state (or, more properly, the taxpayer). Social practice is a vaguer term that is intended to refer to collective action that occurs within society, but does not involve the state. (Except in so far as the state has secured the political and legal conditions within which people act collectively.) I.e. it refers to collective actions carried out by civil associations rather than public (state) entities. Both concepts will be important to highlight the variations of theory and practice within the libertarian *movement*, which is itself a coalition of purists, pragmatists, economists, philosophers, and policy analysts, etc. Theoretically, libertarian public policy is to some degree incoherent, if the point of libertarianism is to minimize the role of the state. However, in practice it may be considered a legitimate means to an end, so that, for example, the use of (publicly funded) school vouchers to finance the education of less well-off children may be regarded as one step on the way to privatizing all education. The use of "public policy" will tend to highlight libertarianism as it now is--in a stage of criticism, and incrementalism (one might say, "becoming",) whereas the use of "social practice" will be associated with a less pragmatic, more fully realized conception of a libertarian good society.

7 E.g. David Boaz: "Libertarianism is a political philosophy, not a complete guide to life." *Libertarianism, A Primer*, 98. "Libertarianism is not at base a metaphysical theory about the primacy of the individual over the abstract, much less an abstract theory about "abstract individuals."...it is a political theory that emerged in response to the growth of unlimited state power..." Tom G. Palmer, "Myths of Individualism, *Cato Policy Report*, XVIII:5, (September/October 1996), at http://cato.org/pubs/policy_report/cpr-18n5-1.html, 2.

Cf. "Few would dispute the suggestion that an animating principle is central to the whole socialist perspective. But many professing classical liberals have seemed reluctant to acknowledge the existence of what I have called the soul of their position. They seem often to seek exclusive "scientific" cover for advocacy, supplementing it occasionally by reference to enlightened self-interest. They seem somehow to be embarrassed to admit, if indeed they even recognize the presence of, the underlying ideological appeal that classical liberalism as a comprehensive *weltanschauung* can possess. Although this aloof stance may offer some satisfaction to the individuals who qualify as cognoscenti, there is an opportunity loss in public acceptance as

anxious to discuss the virtues of the market as an alternative to the state, thereby suggesting that while they might not self-consciously recognize them, that in fact, if one does want to facilitate the establishment and maintenance of a libertarian life for free individuals, some fairly specific values, institutions, and relevant modes of behavior are to be preferred over others.⁸ Libertarianism is not neutral with respect to the good, nor is it agnostic with respect to individual character, although it is broad enough to encompass many diverse ways of life, or so I shall argue.⁹

In an effort to go beyond the critique, and to present some values, institutions, and modes of behavior that would seem to be consistent with a libertarian ethos in a libertarian good society this thesis will outline what I take to be a distinctively libertarian attitude to

the central principles are promulgated to the nonscientific community.” James M. Buchanan, “The Soul of Classical Liberalism,” *The Independent Review*, V:1, (Summer 2002), 113.

8 Of course, Adam Smith and others from the Scottish Enlightenment School knew this, however discussion of virtue and certain characteristics appropriate to and necessary for market-based societies have been all but ignored ever since by free-market economists with the exception of a few economists including Paul Heyne, James Buchanan, and Diedre McCloskey.

9 In discussing the liberal state William Galston has said “Like every other form of political community, the liberal state is an enterprise association. It’s distinctiveness lies not in the absence but, rather in the content of its public purposes. Nor can the liberal state be properly understood as “neutral” in any of the senses in which that term is currently employed. Like every other political community, it embraces a view of the human good that favors certain ways of life and tilts against others.” *Liberal Purposes*, (Cambridge: Cambridge, 1991), 3. Commenting on the approach of a society that more closely approximates a libertarian society, Richard Flathman says something similar: “A strongly voluntarist liberalism would be the most open and accommodating, the least censorious and restrictive, of any theory or ideology that is political in the sense of countenancing—however ruefully—such as the state, authority, and rule. But such a liberalism is and must be more than “a series of denials.” As with Nietzsche, it is a form of idealism in that it affirms and promotes values such as individuality and plurality. These values can be manifested in and realized by a great diversity of ends and purposes, dispositions and styles, manners and modes of life. But they are somethings, not anythings or nothings. There are arrangements and understandings that are conducive to and supportive of them, others that hinder and thwart them. If liberalism stands for these values, it cannot be antiliberal to stand against thoughts and actions that are antagonistic to them or otherwise incompatible with them.” *Willful Liberalism*, (Ithaca, NY: Cornell, 1992), 208.

life, not simply a libertarian attitude to politics. A vision of an entire life should have more appeal for individuals seriously concerned with individual freedom--and indeed living such a free life is the point of libertarianism--than the bare politics or economics typically associated with theoretical and practical libertarian positions because it helps to show the breadth, complexity, and sheer potential of libertarianism at its best. Put differently, one might characterize this project an attempt to render more explicit that which is sometimes left implicit in arguments for individual freedom insofar as it is an effort to say something about how the facets of a free life might actually look and work together in practice. Moreover, if such a case were made it might have practical payoffs in helping to persuade those who are sympathetic to the critical aspects of libertarianism, but who are unable to commit themselves to it fully as a set of principles and practices because they are unsure about what a libertarian future might bring in the place of the current *status quo*. Only then will libertarians have a chance of seizing the opportunity before them, so that they might have a chance of moving from the margins of critique toward the mainstream of political and social life.

In sum, to the extent that libertarianism has affected public policy through its critique of more conventional policies, together with its own concrete initiatives, it affects the lives of people in the United States now. The old jeremiad has evolved into an influential political and social philosophy, and public policy. Consequently, libertarians and non-libertarians alike need to be clear about the theory and practice of libertarianism. Libertarians should be concerned because they have an opportunity to further shape their world and to gain more support if they can present an attractive case to the public at large. Others should be

concerned because of libertarianism's increasing power and influence. What, then, are the appropriate subjects of future libertarian discussions? What are libertarianism's bounds--its limits and its potentialities?

The Project: A Libertarian Vision-Individuality

This thesis assumes that a sort of mainstream libertarianism is both possible and desirable, and tries to suggest how such a future might look. It is an internal critique of the ideas and practices of the contemporary libertarian movement in the United States. The argument rests upon a sympathetic, but also somewhat dissatisfied commitment to contemporary libertarianism. However, it is a friendly, constructive critique: while the central ideas in this thesis stem from a conviction that thus far libertarianism has not lived up to its promise, the point will be to try to save libertarianism from itself, rather than to give up on it altogether. This is an ambitious project, moving as it does from critique to a constructive vision, and from discussion of libertarian theory, to the libertarian individual, and then the constitution of a libertarian society. Proceeding in this order is consistent with the priorities of the theory itself, since libertarianism cares first and foremost about individual persons, and second about the world—the society or regime such individuals inhabit to preserve and maintain their liberty. Various problems and difficulties having to do with the move from a critique to the positive practical application of libertarian ideas and practices will be discussed throughout, especially as this relates to the particular interpretation of liberty (individuality) proposed here. The concluding chapter will offer some speculations relating to difficulties internal to the libertarian movement in realizing this ideal.

Properly understood, libertarianism denotes a doctrine within which the freedom of the individual is an achievement that rests on both political-economic and personal or individual liberty. However, the contention here is that libertarian freedom is frequently improperly understood--as nothing more than political-economic liberty ("market liberalism") or narrow political-legal freedom ("legalism")--and this has important implications for the theory, libertarian public policies, and most importantly for the individuals libertarians claim to represent. Moreover, it is an impoverishment of the views that are located within its predecessor, the classical liberal tradition. Consequently, the aim is to highlight the excessive attention many contemporary libertarians grant to economic and political liberty, and the corresponding lack of attention given to personal liberty, in the pursuit of individual freedom, both theoretically and practically. I will question why this is so, but then show how libertarian ideas and practices might be reconceived to help libertarians fulfill their ideals and aspirations in maximizing freedom for individuals by retrieving some of the ideas classical liberals espoused in the past. Different interpretations will give varying weight to economic and political freedom and individual or personal (cultural) freedom,¹⁰ but all varieties of libertarianism properly understood would need to include elements of both. Liberty for individuality will give clear weight and emphasis to personal or cultural freedom in an effort to redress the current imbalance favoring political and economic liberty. This is, then, a type of correction that involves the supplementation of

¹⁰ I.e. freedom that takes individual development or self-cultivation (but not self creation, as in the thought of Nietzsche or Ayn Rand) seriously.

political and economic liberty with a sort of romantic ideal of self-cultivation. On this view, freedom is valued not only because it recognizes the individual as being separate or different from all other individuals—all liberal theories do this to some degree in their commitment to individualism of various kinds. But, on the view proposed here, freedom is to be valued for its role in relation to individuals' individuality, which denotes individuals' uniqueness, for individuality is an ideal that celebrates the individual in his *most individual* form.

No doubt those who are familiar with the purely political theory/minimal state and free market varieties of libertarianism will argue that individuality is not central to libertarianism at all. Indeed, the kind of perfectionism that it relies upon might even be argued to be antithetical to the skepticism at the heart of libertarian political theories. However, self-development and self-cultivation are neither new ideas nor foreign imports to libertarianism or its intellectual forbearers within the classical liberal tradition. As we shall see, they exist within the works of figures such as Humboldt, Mill, and the American Transcendentalists, who, if not proto-libertarians themselves, were at least fellow travelers. The hope here is that some of these previously overlooked fragments of classical liberal theory and practice might be retrieved and reintegrated into contemporary libertarianism. The reasons for doing so are not historical, but rather inspirational or expressive and practical. Individuality is an attractive goal for libertarians, but it is also a necessary one since it calls forth the kind of a strenuous character or personality that is needed to make a libertarian regime—one that is based upon individual freedom and responsibility--functional.

The Argument

Essentially, the main argument beyond the critique has two components. It calls for a

revised, more complex conception of the self (a libertarian moral psychology), and a shift in attention to a different set of institutions in society as the site of the realization of individual freedom (a libertarian sociology or regime theory, including a narrowly constrained political theory.) Taken together, I shall argue for the following:

1. a shift in focus away from the value of competition and wealth creation, and
2. toward self discipline, self government and education, together with
3. a move away from the institution of the free market¹¹ in favor of the legal sphere and civil society
4. for the purpose of fostering individuality through self development rather than individualism via political and economic liberty.

So that I am clear about my departure from conventional libertarian theories I should reiterate that typically libertarians do not (consciously) advance beyond negative political rights theories. As noted above, when they do so, they tend to look to the market to lay out their visions of a good society. My alternative view, following, among others, John Stuart Mill and George Kateb's interpretation of the Emersonians' romantic individuality,¹² builds upon, and goes beyond, negative political rights theory to attend to liberty realized in civil society via a type of positive ethical and aesthetic theory. Borrowing from William Galston's characterization of Kant's practical philosophy, one way of conceiving the argument then, is

11 This is a relative not an absolute shift in attention. Economic liberty remains an important goal in my version of libertarianism, but it is not the dominating and decisive factor. Pursuing personal liberty beyond economic wealth is my primary concern.

12 See *The Inner Ocean* (Ithaca: Cornell, 1992).

to think of it as an attempt "to combine an ethics of positive freedom with a politics of negative freedom."¹³ To remain consistent with libertarianism--maximizing political liberty for individuals--the reigning principles and actions in this interpretation of libertarianism will not be political (since politics, conventionally a synonym in libertarianism for statism, or coercion, is the antithesis of freedom¹⁴); rather they will be social, moral and aesthetic (each of which allows for some degree of choice and therefore freedom, but how, and how much, are the crucial and interesting questions that would have to be worked out empirically.) This is precisely why my positive ideal differs from Berlin's notion of positive (political) liberty in "Two Concepts of Liberty." His argument is an argument for a political theory, albeit one that rests upon a moral theory.

The Subject

This thesis will not deal with all libertarian thought, but only that which is closely connected to political and social practice. Consequently, it will not focus on the type of abstract philosophical theory found in the work of John Hospers, Murray Rothbard, and Robert Nozick. However, I expect to draw on their ideas to the extent that they have become influential constituents of the theoretical body of ideas that is analyzed and employed by members of the movement since they are the people I wish to engage. Precisely who and

13 William Galston, "Defending Liberalism," *American Political Science Review* 76, 1982, 622.

14 See, for instance, F.A. Hayek, "Coercion and the State," Chapter 9, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960), 133-161. Later, a more neutral definition of politics will be considered in connection with the construction and maintenance of institutions of a regime through rules, especially the rule of law. Here, since I am appealing to libertarians I start with their conventional terms and rhetoric to situate the argument.

what constitute "the movement" is an important subject. The movement's ideas are not to be identified with pure abstract theory, but rather theory oriented to action. That is, it refers to a collection of individuals and organizations that work at the intersections of theory and practice. This includes some academic theorists at universities, but also, and especially, members of other non-university organizations including think tanks, educational foundations, and other non-profit entities. In particular, I examine some of the ideas presented by David Boaz and Edward Crane of the Cato Institute, as well as those of Charles Murray, from the American Enterprise Institute. My project seeks to examine the relationship between a political theory and its social practice, and to criticize the ideas generated by the movement both for themselves, and for the potential impact that they might, and in fact, do, have on the world, especially the individuals whose freedom it claims to champion. The question I am interested in exploring is the following: *if one were a strong supporter of individual freedom and therefore committed to the political theory that is libertarianism, how might one best conceive a libertarian individual and a society in which she lives?* My project may be regarded as an attempt to save libertarianism from itself--to make it the best that it can be,¹⁵ on its own terms. The intention is not to devastate libertarian theory, to show why it is silly or worthless. Rather, it is to continue developing a body of thought that is currently underdeveloped and inadequate for fulfilling the new tasks before it. Certainly, Boaz and Murray have done much to advance libertarianism beyond the

¹⁵ I borrow this formulation from Karol Soltan and the United States Army.

identification of libertarianism with near-anarchy and narrow self-interested money-making.

But a good deal more can and should be said. To do this I begin with an exploration of individual moral psychology (states of mind or mentalities) and then move on to different domains within an imagined libertarian regime (phenomenology) in an effort to show where I believe greater attention needs to be given in order to realize individuality in theory, and especially in practice.

Methodological Approach

Since the project is an exercise in applied political theory, I shall approach my subject--the ideas and practices of the libertarian movement--with an eye to both theory, including abstract principles, and political and social practices. As I have suggested, I mean to treat libertarianism charitably, to try to make it the best that it can be, on its own terms. The point is not to try to persuade people that they should choose libertarianism over other forms of, say, liberalism. Rather, the argument will proceed from the presumption that those interested in this critique have an initial commitment to libertarianism. The thesis does not contain a fully formed foundational argument; I leave that for others.¹⁶ Indeed, in many respects what I am trying to do is the opposite of foundationalism, since I am positing a good that is the achievement of libertarianism and glancing back from that ideal (what I call individuality--libertarian freedom combining economic liberty with personal liberty, with an emphasis on personal liberty) to ask what it would take (in terms of a disposition of the self,

¹⁶ My reasons for doing this are 1. My concern is at the other end of theory, looking to the ideal, rather than the foundations. 2. Space constraints--the thesis is ambitious enough as it is, without including a

a cultural context, and a set of institutional arrangements) for an individual and the society she lives within to approach such a goal.

Having said that, it is evident that some foundational approaches are clearly better than others. If one is strongly committed to respecting--indeed promoting--the freedom of the individual then it seems obvious that on a theoretical level any kind of consequentialism, including utilitarianism, must be ruled out because it cannot guarantee the sanctity of the individual. By a process of elimination, this would suggest that other ethical theories such as Kantian deontology or a variety of virtue ethics would be preferable, but it seems to me that given the practical orientation of this project that too is not suitable since the burden on individual reason necessary for the kind of robust autonomy Kantianism requires is too great for a broad political theory that applies to all individuals.¹⁷ Instead, if pressed to point to a foundational theory I would probably rely upon a kind of Humean empiricism that blends moral experience with reason for the political-legal framework. (The moral theory in civil society is a separate issue and will be guided by a type of romantic perfectionism.) Consequently this project has a dualist character to it--on the one hand a relatively undemanding procedural framework that establishes a type of negative political-legal liberty, that is linked theoretically and empirically to a self-imposed positive perfectionist moral and aesthetic cultural liberty on the other. But again, since foundations are not the focus of this

foundational theory, which would require an entire thesis on its own.

¹⁷ A point made throughout William Galston's work on liberal pluralism. See especially the discussion of autonomy versus diversity in "Two Concepts of Liberalism," *Ethics* 105, (April 1995), 516-534, and more generally *Liberal Purposes*, (New York, Cambridge University Press, 1991).

project this is as much as I can say about the matter here.

The thesis is arranged in the following manner: Chapter one describes libertarianism as a general theory or approach to politics. Particular varieties of libertarianism, including those espoused by David Boaz and Charles Murray, will be compared and contrasted, highlighting some of the neglected fragments of classical liberal theory that encompass self-cultivation and individuality. The second chapter focuses on the assumptions about individuals within libertarian theory and discusses the mentality or moral psychology consistent with the variety of libertarianism I am proposing. The following three chapters on politics, law, and civil society flesh out the priorities of the regime within which self-cultivation rather than political freedom and economic self-interest and wealth generation is treated as the primary goal. The conclusion discusses some reasons why individuality, in spite of its intellectual heritage among certain theorists who resemble today's contemporary libertarians, has not been popular within the movement thus far, and provides some speculations as to the viability of individuality in future incarnations of libertarianism.

CHAPTER 1: LIBERTARIAN POLITICAL THEORY AND VARIETIES OF LIBERTARIANISM

In their specific ways both the Human Rights School and the utilitarians emphasized the need for liberating man from traditional fetters, from the excesses of the established monarchical and aristocratic forces. Bentham and James Mill regarded men as basically motivated by self-interest, seeking to secure a maximum pleasure and to avoid a maximum pain. Though these thinkers concentrated on freeing the individual from the shackles of an arbitrary and obsolete political and legal order, by a rational method, they were not interested in raising the potential of the individual. Man should be free to follow his own bent, but to improve and to develop his talents and aptitudes was no more than a sideline in their reflections. It was no concern of the elder utilitarians whether people preferred poetry to gin, paintings to beer. They wanted people to obtain a maximum of happiness but they did not inquire into the nature or degrees of this happiness. *They neither wished to develop personality and character, nor did they deplore an imitative behavior.* They were concerned with the desirability, but not with the quality of happiness.¹⁸

What *is* libertarianism? Among libertarians there is continual debate about precisely what constitutes the theory. It is frequently associated with calls for minimal government or even anarchy, which are said to devolve into an extreme form of individualism or atomism.¹⁹ Sometimes libertarianism is considered to be synonymous with free market economics.²⁰ However, neither of these captures an essential truth that defines libertarianism. Rather, they are particular, limited manifestations of it. If we were to define

18 . E.K. Bramsted and K.J. Melhuish, *Western Liberalism*, (London: Longman, 1978), 26 describing the difference between human rights liberals, utilitarian liberals and aesthetic liberals. Emphasis added.

19 For instance, varieties of “anarcho-capitalism” propounded by David Friedman in *The Machinery of Freedom* (La Salle, IL: Open Court, 1995), or Murray Rothbard’s *For a New Liberty*, (San Francisco: Fox & Wilkes, 1996). Also Ayn Rand’s objectivism, in *The Virtue of Selfishness*, (New York: Penguin, 1964)

20 For example, see e.g. Milton Friedman’s *Capitalism and Freedom*, (Chicago: University of Chicago Press, 1962).

it in general terms it would be tempting to say that libertarianism may be best defined negatively (as an ideology that identifies the object that it's followers are *against*: big government), but it is much less clear what libertarians are *for*. (The free market? Strong individual rights? Radical individualism? Free will?) Having said that, there are some core elements that may be identified and these are necessary if not sufficient for all libertarian theories. Particular varieties of libertarianism interpret these elements in different ways. And it is here that there is scope to criticize, revise, and develop aspects of libertarianism. But to understand why we might want to do this, we must first understand what libertarianism is, what it is lacking within certain varieties of it, and then how it might be supplemented and revised.

Libertarian Political Theory

All libertarians agree that libertarianism is, above all else, a *political* theory that defines a relationship between the individual and the state. As its name suggests, it treats liberty or freedom as the foundational principle to which all other principles (such as equality) must be compared and subsumed. As we shall see below, although particular varieties²¹ of libertarianism argue about the precise magnitude of the freedom of the individual and the correlative size and reach of the state, all conceptions agree that the

²¹ Current varieties of libertarian theory include: 1. Neoclassical/Free Market economics (Hayek, Von Mises, Rothbard, Stigler), 2. Law & Economics (Early Posner, Epstein, Siegan), 3. Neo-Lockean Analytic Philosophy (Nozick), 4. Ethical Egoism (Ayn Rand--drawing on Aristotle and Kant), and 5. Classical Liberal tradition (Locke, Smith, Mill, Spencer).

purpose of the theory is to arrange society in order to *maximize the political freedom of the individual*. Indeed, such prioritization of individual political freedom, together with the emphasis on limited government, are precisely what distinguish libertarianism from other varieties of liberalism. This is usually expressed negatively, as it is by Murray Rothbard in his seminal Libertarian manifesto *For a New Liberty*, who says: “The Libertarian creed rests upon one central axiom: that no man or group may aggress against the person or property of anyone else. This may be called the “nonaggression axiom.” “Aggression” is defined as the initiation of the use or threat of physical violence against the person or property of anyone else. Aggression is therefore synonymous with invasion.”²² Similarly, although put slightly more positively perhaps, John Hospers has explained “...it is the use of force against individuals, particularly by government, that is considered the ultimate evil by the proponents of the political philosophy...called libertarianism. As the name implies, it is a philosophy of personal liberty—the liberty of each person to live according to his own choices, provided that he does not attempt to coerce others and thus prevent them from living according to their choices. Libertarians hold this to be an inalienable right of man; thus libertarianism represents a total commitment to the concept of individuals rights.”²³

To start, then, we may think of libertarianism as a political theory that establishes a framework within which the individual is as free as he may be, consistent with the freedom of others, to pursue the life he wishes to pursue. However, this is very abstract and the

22 . Rothbard, 23.

primary concern of this paper is not to engage at this level, but rather at the level of particular interpretations of these ideas as they manifest themselves in a set of institutions and practices.

At this point we are typically introduced to the notions of the rule of law and constitutional government, which limit state power, and thereby help to preserve individual political liberty negatively. The government exists to secure life, liberty, and property, but little more than that. We are told that social interactions within this protected, secured sphere of the state are carried out by individuals who come together voluntarily to pursue projects in civil, as opposed to political, society, especially the free market. The market helps to promote freedom since power is dispersed between competitive individuals and businesses. Order exists, but this is spontaneous, not planned or centrally directed. Markets generate wealth and prosperity, and help to promote peace as conflict is channeled into competitive business relationships rather than physical disputes, conflicts and even wars. Libertarian society limits political power and maximizes economic liberty. This much, it seems, is not controversial among libertarians. Indeed, the (purely) political and economic institutional implications of libertarianism are well-known and well established, but even among existing libertarian theory this does not exhaust the doctrine.

Varieties of Libertarianism

If we take a fairly cursory glance at the range of libertarian discussions ongoing in

23 . John Hospers. *Libertarianism. A Philosophy for Tomorrow*, (Los Angeles: Nash, 1971), 5.

areas among academics we get a sense of the breadth of current libertarian theory. As one would expect, academic theorists with connections to different disciplines (philosophy, politics, and economics, law, and history) have a tendency to give priority to aspects of libertarianism that vary according to the discipline with which they are associated. For instance, philosophers talk about the freedom of the individual being guaranteed by natural or inalienable rights (e.g. Robert Nozick, Douglas Den Uyl and Douglas Rasmussen), political theorists discuss the size and scope of the state (e.g. Chandran Kukathas), while economists champion wealth maximization of the free market, as well as its other benefits such as spontaneous order, efficiency, and competition. (e.g. Friedrich von Hayek, Milton Friedman.) Lawyers, on the other hand, promote private property rights and private systems of law (e.g. Richard Epstein, Randy Barnett), and historians emphasize the continuity of ideas over time, discussing the roots of modern libertarianism within classical liberal theories of the eighteenth century, or even earlier. (E.g. Amy Sturgis, Forrest McDonald, Ralph Raico.)

On the other hand, there are some purists who distinguish themselves from classical liberalism, arguing that libertarianism is a new phenomenon that has developed within the last 30 years or so as a response to the growth of big government. According to such theorists, the size and reach of the government, as well as the legitimate functions of the government is a good deal more circumscribed by libertarians than it is by classical liberals. For instance, Hayek and Friedman are considered to be classical liberals rather than libertarians because they believe there is a legitimate role for the welfare state to play in a free society. Many libertarians would reject this claim, confining the role of the state to the

very narrow functions of protecting against force and fraud, while enforcing voluntary contracts between consenting adults only.²⁴

Relatedly, yet another distinction is made between those who favor a deontic rather than a consequentialist approach to matters, meaning that the former will tend to ground arguments for freedom and limited government in appeals to the duty and obligations of individuals agents rather than general statements about the interests, efficiency, and long-term prosperity of a process (usually the free market) for the greatest number in a society, economy, or some other aggregating entity. On this latter view, individuals are treated indirectly, and rights are considered to be useful or functional, not natural or fundamental, serving to denote, for instance, the bundle of -property rights attaching to different distributions of goods.²⁵

Taken together what all of this suggests is that, apart from the fact that libertarianism is still developing both as an ideology and as a set of practices, parsing the idea of libertarianism is tricky and likely to provoke disagreement even, and perhaps especially, among those who claim to adhere to the doctrine. If this is so, any given interpretation is likely to receive criticism, including one that champions individuality. That said, if self-identified libertarians recognize that politics and economics alone do not exhaust legitimate

24 See, for instance, David Friedman, *The Machinery of Freedom*, as well as the discussion of this matter in Richard Epstein's *Skepticism and Freedom, A Modern Case for Classical Liberalism* (Chicago: University of Chicago Press, 2003), Introduction.

25 See Norman P. Barry, *On Classical Liberalism and Libertarianism*, (New York: St Martin's, 1987), especially chapters 1-3.

areas of concern or subjects appropriate for analysis, why should they object to further extension of it to other areas, including culture? Is it possible to reorient libertarianism so that culture (cultivation of the self and the pursuit of artistic subjects) rather than politics or economics is the core animating reason for establishing a libertarian society? If so, how would this fit with some of the more practically-oriented varieties of libertarianism currently being promoted? An examination of some of the ideas from the classical liberal tradition, together with a comparison with some of the varieties of contemporary libertarianism articulated by David Boaz and Charles Murray will help to begin to answer these questions. Introducing cultural matters into libertarianism might be something of a departure. However, there is precedent for this within the classical liberal tradition, indicating that aesthetic matters and cultivation of the self have been considered to be compatible with views articulating strong commitments to individual freedom in the past.

Individuality within the Classical Liberal Tradition

As with contemporary libertarianism, classical liberalism, its intellectual forbearer, is frequently associated with little more than limited government or laissez faire economics. In this connection Adam Smith's *Wealth of Nations* is often cited as the best-known text that shows how economic self-interest may be aggregated to achieve peace and prosperity within a free society. But, Smith was also concerned with the moral character of individuals, and he wrote another work, *The Theory of Moral Sentiments*, to discuss the education, habituation, and cultivation of it. For Smith, the relationship between freedom and character was something of a precarious one. However, he maintained that only a free people could be virtuous, and this aspect of the tradition is often forgotten. What this means is that classical

liberalism is frequently treated as a doctrine that merely encourages narrow self-interested behavior and looks to utilitarianism for its grounding value theory. Alternately, some classical liberals such as Tom Paine and Richard Overton, who subscribed to a natural rights view of human nature and used this to justify their political theory, are also mentioned. However, there is a strand within the tradition that self-consciously focuses upon the cultivation of individual character and cultivation not merely so that free individuals might be disciplined and productive producers and consumers, or individuals who jealously guard their natural rights,²⁶ but so that they might be beautiful, distinct, unique persons. These ideas, which have been labeled “aesthetic liberalism” by E.K. Bramsted and K.J. Melhuish in their *Western Liberalism* or “romantic liberalism” by Nancy Rosenblum in her *Another Liberalism*, and which this thesis refers to as individuality, may be found in the works of thinkers such as Constant, Godwin, Shelley, Wollstoncraft, de Staël, as well as Humboldt, J.S. Mill, Emerson, Thoreau, and Whitman. Writing in *The New Individualist Review*, Ralph Raico has described the sensibility associated with one theorist who championed individuality, Benjamin Constant. He says,

[A] feature distinguishing Constant from earlier liberals was what he conceived to be the ethical ends of social organization. In this respect, the *philosophes* had anticipated the central idea of Bentham, Constant’s fellow liberal and almost exact contemporary. While the liberalism of writers like Mercier de la Riverie and Du Pont de Nemours, like Bentham’s, was based exclusively on a utilitarian ethic, Constant’s had a vaguer, but, it will appear to many, a more elevated foundation. This ought to be emphasized, since many writers on the history of liberalism—both

²⁶ The concern with natural rights has been emphasized and amplified by contemporary libertarians, as we shall see below.

conservatives and modern left-liberals—often write as if utilitarianism were historically the sole philosophical basis of liberalism. This was not the case with many of the most prominent liberals, including Constant, who emphatically rejected utilitarianism:

... is it so true that happiness—of whatever sort it might be—is the unique end of man? In that case, our road would be quite narrow, and our destination not a very lofty one. There is not one of us, who, if he wished to descend, to restrict his moral faculties, to degrade his desires, to abjure activity, glory and all generous and profound emotions, could not make himself a brute, and a happy one...it is not for happiness alone, it is for self-perfecting that destiny calls us...

Thus, Constant found the ethical ends which he wished to realize through a system of liberty not in the greatest happiness principle, but in the *development and enrichment of personality*. This view was in keeping with the humanism then prevalent in Germany, and was possibly, in the case of Constant, traceable to his study of Kantian philosophy, and to the influence of certain of his many German friends, including Schiller and especially Wilhelm von Humboldt.²⁷

In contrast to those who celebrated the utility of liberalism or the natural or human rights of each individual within liberal society, Bramsted and Melhuish explain that this kind of liberalism is normative not merely functional. Among nineteenth century classical liberals, as we shall see, such a view is most often associated with John Stuart Mill, especially after he experienced his breakdown, causing him to modify his classic utilitarianism substantially with romantic ideals. For while aesthetic liberalism (individuality) certainly seeks to free individuals *from* the bonds of the overly powerful state,

²⁷ Ralph Raico, "Benjamin Constant," citing Constant from his *Cours de Politique Constitutionnelle* vol.2, 599, in the *New Individualist Review* 3:2 (Winter 1964), 501. Emphasis added.

but also from the pressure of public opinion, promoting negative political (and to some degree, social) liberty, it is also concerned with positive moral and aesthetic freedom *to* cultivate oneself. Such a distinction is not altogether lost on contemporary classical liberals and libertarians, some of whom have adopted versions of aesthetic liberalism in their own work, but it has tended to remain at the margins of discussion and among those who engage in academic rather than practical or applied debates. For instance, writing in the first issue of the *Humane Studies Review*, a publication of the Institute for Humane Studies at George Mason University that was designed to help graduate students learn about the intellectual history of classical liberalism and libertarianism in the early nineteenth century, David M. Hart defined a program for work on what he called “Real liberalism,” which he took to be synonymous with “libertarianism or classical liberalism” (Hart does not distinguish the two) in the following manner:

...we are concerned with the dignity, worth and sanctity of the individual. We hold that all *individuals are unique and that their uniqueness and differences are the source from which their various, different values flow*. From this difference in values and interest comes, in turn, the need to engage in exchanges, to trade peacefully, and to form voluntary associations to satisfy the human need for companionship, security and culture.

We also believe that each individual human being is morally autonomous and should be held fully responsible for his or her actions, if and when they impinge upon the rights of others. Only when *human uniqueness and autonomy* are respected (by respecting others’ privacy and tolerating their differences) can the individual *achieve self-actualization and develop his or her potential to the full*.²⁸

28 David M. Hart, “The Humane Studies Review: A Research and Study Guide.” 1:1, (No date), 1. Emphasis added. In the second issue of the *Humane Studies Review* Hart calls attention to various figures in the German Enlightenment, including Goethe, Schiller, Kant, Fichte, and Wilhelm von Humboldt. Humboldt also appears as the subject of an essay by Ralph Raico in the *New Individualist Review*, 1:1, (April 1961), 22-26.

To what degree have these ideals been incorporated into the pragmatic libertarianism of proponents such as David Boaz and Charles Murray? If they have been overlooked, as seems likely, why is this? Is there some chance that individuality might be taken seriously by contemporary libertarians, and what are the practical implications for the doctrine and its practices if it were?

Boaz and Murray

David Boaz and Charles Murray share some similarities with respect to their libertarianism. Both claim to ground their ideas in the classical liberal tradition. Both focus on political and economic concerns, and both try to make a case for libertarianism being practically possible and desirable. However, Boaz's version emphasizes the natural or human rights variety of libertarianism, whereas Murray's approach is more broadly consequentialist. Accordingly, David Boaz defines libertarianism in the following manner:

Libertarianism may be regarded as a political philosophy that applies the ideas of classical liberalism following liberal arguments to conclusions that would limit the role of the government more strictly and protect individual freedom more fully than other classical liberals would.²⁹

For Boaz, classical liberalism refers to a doctrine that includes individualism, individual rights, spontaneous order, the rule of law, limited government, free markets, the virtue of production, natural harmony of interests, and peace. Thus, there is a good deal of continuity in his views with others that stretch back to the seventeenth and eighteenth centuries in the

work of Locke, Smith and Jefferson. But there are also important pro-liberty ideas that he cites in the works of theorists as diverse as Benjamin Constant, Frederick Douglas, Ayn Rand, and Milton Friedman.

Murray's views draw on the Founding Fathers, Burke, Smith, and Aristotle. He says he is less strict about the limits of his libertarianism than some others, and might be better defined as a classical liberal since he wants to retain a significant role for tradition and the "non-rational aspects of human spirit" within his perspective.³⁰ As such, his social and moral theory is more conservative than Boaz's. Still, these are relative tendencies, and might properly be characterized as an amalgam of some of the versions of libertarianism mentioned above. What is significant for this discussion is that they conspicuously fail to mention the ideal of self development and the cultivation of character or personality when they present libertarianism as a desirable and practical ideal. (There are some incidental references to these ideas throughout the *Primer*, but most of Boaz's discussion is concerned with rights-based individualism and institutions. Murray's discussion of cultivation is better described as Aristotelian habituation or Smithian sympathetic imitation and conformity, emulating what he calls Smith's principle of "approbativeness." It has more to do with personal responsibility, than liberty. It is, in this respect, diametrically opposed to the sort of liberation Mill called for in his famous work on individuality—liberation from the strictures of public opinion, in *On Liberty*.)

²⁹ *Libertarianism, A Primer*, 25.

To persuade his audience that libertarianism is an attractive ideal Boaz draws on a mixture of moral intuition in relation to the nature of the individual and empirical claims about the inefficiency and inefficacy of large, powerful government as contrasted with the free market and the rest of civil society. It is both theoretical and practical, and largely political and economic. Thus, his argument draws on ontological claims about the status and nature of individuals (that they have natural individual rights and dignity, that they deserve equal respect from others, that they make choices and pursue projects according to their self interest.³¹) But he also points to the failures of socialism and social democracy in providing e.g. welfare or in distributing goods and services to suggest that less government would be beneficial for society. He, like Murray, shows that socialist and social democratic ways of ordering institutions in society have failed to produce the kind of freedom, prosperity, and peace that a libertarian regime promises. To the extent that civil society is mentioned outside the free market, it is to discuss its benevolent and charitable functions in helping groups of individuals to help themselves, rather than turning to the welfare state. The potential for developing oneself alone or in concert with others is mentioned as a possibility, but it is not treated as a vitally important goal for individuals, and certainly not highlighted as a primary reason for adhering to libertarianism in the first place. The majority of his

30 Murray, *What It Means to Be a Libertarian*, (New York: Broadway, 1997), xii-xiii.

31 .”Because individuals are moral agents, they have a right to be secure in their life, liberty, and property. These rights are not granted by government or by society; they are inherent in the nature of human beings. It is intuitively right that individuals enjoy the security of such rights; the burden of explanation should lie with those who would take rights away.” 16. And “...liberty itself is the right to make choices and to pursue projects of one’s own choosing.” 15.

discussion might be characterized as anti-big government, pro-natural rights style individualism, and strongly supportive of the market in its ordering and supplying functions. There is relatively little mention of character, culture or cultivation.

It would be unfair to claim that for Boaz libertarianism is nothing more than limited government and laissez faire market liberalism. He is not hostile to the notion of self-development. Throughout the *Primer* and within his *Reader* he mentions some of the theorists who are closely associated with theories of individuality, including Benjamin Constant, Wilhelm von Humboldt, Germaine de Staël, as well as Emerson and Thoreau. However, these are mentioned almost in passing. (In the *Primer* Humboldt, Goethe, Schiller, Kant, Constant and de Staël are discussed in about a page or so along with Mill, and Boaz translates Mill's famous cite of Humboldt's ideas concerning individuality in *On Liberty* in which he argued "that the full flourishing of the individual requires not only freedom but a manifold of situations," into "the modern term alternative lifestyles," but that is virtually the only discussion individuality receives. Boaz is open to the idea of liberty for individuality, but it is not one of his priorities.

In Boaz's defense there seem to be a number of good reasons for this. First, any broad work on libertarianism cannot be expected to be totally comprehensive. Selections and choices have to be made, and some thinkers will inevitably take precedence over others, as he himself admits at the beginning of the *Reader*. Still, the reasons for including some thinkers at the expense of others reveal an important sense of priority when the thinkers who share a commitment to political libertarianism diverge on matters of morality, their conceptions of the individual for whom freedom is being sought, and the kind of freedom

one is trying to achieve. Historically, libertarianism has focused on political and economic concerns. It makes sense to try to highlight a doctrine's strengths, especially if one is appealing to a broad mass of people who are potential new supporters. On the other hand, Boaz's program is not primarily historical. Rather, it is self-consciously forward-looking, and even programmatic, so we should expect to be able to go beyond the historical elements of the tradition, and he does try to do this in his discussion of technological changes and the information revolution.

Secondly, libertarianism is concerned with improvement of society (relative to the situation we find ourselves in now), but it is not perfectionistic. As Boaz says, "Libertarianism holds out the goal not of a perfect society but of a better and freer one."³² The lessons of history have taught us to be wary of such theories, especially when they involve the coercive force of the state. Citing Thomas Sowell, Boaz claims that libertarians are skeptical about power, and share an appreciation for the limits of human knowledge. Again, this seems reasonable enough, but the bounds of skepticism and the limits to improvement of individuals by the state should not preclude individual pursuit of improvement for themselves or the families and the groups that they live within in civil society, as Boaz himself admits. However, again, this is not his primary concern, although he mentions it when he discusses civil society.

Boaz notes that as a matter of moral value libertarianism subscribes to moral

³² *Primer*, 26.

pluralism and a robust theory of toleration. It is wedded to a belief in the value of individual choice, and wants to leave the choice about how one lives one's life as open and wide-ranging as possible. He says

Liberal theory accepts that in modern societies there will be irresolvable differences over what the good for human beings is and what their ultimate nature is. Some more Aristotelian liberals argue that human beings do indeed have one nature but that each human has an individual set of talents, needs, circumstances, and ambitions; so the good life for one person may differ from the good for another, despite their common nature. Self-directedness, the ability to choose one's own course in life, is part of the human good.

...libertarians believe the role of government is not to impose a particular morality but to establish a framework of rules that will guarantee each individual the freedom to pursue his own good in his own way—whether individually or in cooperation with others—so long as he does not infringe the freedom of others. Because no modern government can assume that it's citizens share a complete and exhaustive moral code, the obligations imposed on people by force should be minimal. In the libertarian conception, the fundamental rules of the political system should be essentially negative: Don't violate the rights of others to pursue their own good in their own way. If a government tries to allocate resources and assign duties on the basis of a particular moral conception—according to need or moral desert—it will create social and political conflict. This is not to say that there is *no* substantive morality, or that all ways of life are “equally good,” but merely that consensus on the best is unlikely to be reached and that when such matters are placed in the political realm, conflict is inevitable.³³

Does this then mean that libertarians can say nothing about character? Surely not.

All that it says is that government may not direct morality. Certainly, as a matter of judgment about the kind of character that is desirable in itself, but also one that is functional for the kind of society Boaz aspires to live within, something may be said. Indeed, at one

33 Ibid, 105-6

point Boaz gives some hints about the kind of character that he believes a libertarian society would need—a “bourgeois character” that is committed to the virtues of “work, thrift, sobriety, prudence, fidelity, self-reliance, and a concern for one’s reputation...”³⁴ But it is not quite clear where these virtues originate or how they are to be maintained. Citing David Frum, Boaz says that government can do little to foster these traits, but it can do much to undermine those that already exist. Indeed, much of Charles Murray’s early work, which is also cited by Boaz, documented this “crowding out” in his books *Losing Ground* and *In Pursuit of Happiness and Good Government*.

For his part, Charles Murray has a good deal to say about character and personal responsibility. But on this view he is mostly concerned with the kinds of informal institutions within society that help to keep people focused on their private concerns within families, associations, and communities. Certainly he and Boaz agree that libertarianism should not be equated with total liberation of the individual from all constraints either, only “emancipation of the individual from artificial, coercive restraints on his actions.”³⁵ Boaz and Murray stress the importance of individual responsibility to give and discipline individual actions or warn that we will get a society “characterized not by thrift, sobriety, self-reliance, and prudence but by profligacy, intemperance, indolence, dependency, and indifference to consequences.” And yet, in Murray’s case, we get a small gesture towards something resembling the ideal of self development when he says:

³⁴ *Primer*, 146.

Satisfaction in human life consists of exercising our abilities and thereby realizing our potential. The more complex and demanding the exercise of our realized capacities, and the more important the function our effort serves, the greater the satisfaction. The rest is amusement.

The truth of the principle accounts for the towering achievements of human civilization. Great art, literature, science, industry, and statesmanship are the products of individuals who exercised their capacities at the highest levels of complexity. But it is a mistake to think of the principle as applying only to a gifted few; it applies to *human* satisfaction. Millions of people find satisfaction every day in doing something well by their own standards. Only a handful of them are doing something as well as it can be done by anybody. But we all have an internal set of calipers for measuring how we perform against how well we are capable of performing, and to approach our personal potential is satisfying—not because anyone tries to bolster our self-esteem with praise but because the observer within us knows what we have accomplished.

Opportunities to exercise our realized capacities depend on freedom. Actually to *do* the thing itself requires taking personal responsibility. To take responsibility is to infuse freedom with life.³⁶

Still, the vast majority of Murray's argument has to do with criticizing large, powerful government for its inefficiencies and illegitimate usurping of authority, and by implication making his case for deregulating large areas of politicized society. The promise of the kind of ideal set out by the aesthetic classical liberals is not one that, in the end, Murray subscribes to himself. At bottom, the crucial difference between Boaz's and Murray's version of libertarianism and individuality are summed up by Bramsted and Meluish's quotation at the beginning of the chapter. Both stress the reasonableness of their way of looking at the world, and both are keen to appeal to as many people as possible.

35 Ibid.

Connecting their arguments to commitments to individual rights is intuitively attractive to an American audience whose constitutional structure is founded on the belief in such rights. Both are open to including the possibility for self-development within their libertarian societies. But they are certainly not structured around this ideal. As we shall see, treating self-development more seriously within this framework of pragmatic libertarianism requires more than simply adding individual cultivation to the laundry list of benefits to increased individual freedom within a libertarian regime. But to understand how this might be done we have to delve a little more deeply into the respective notions of the self.

36 Murray, 1987, 33.

CHAPTER 2: THE LIBERTARIAN SELF

... from the unquestioned ethical centrality of the person it does not follow that the philosophy of individualism, as we have inherited it from the eighteenth and nineteenth centuries, is equally valid. For individualism is more than an ethic, historically; it is also a psychology and an implied theory of the relation between man and his institutions. And most of our difficulties with the philosophy of individualism at the present time come from our unconscious efforts to make the ethical aspect of individualism remain evocative when we have ceased to hold to the psychological and sociological premises of this philosophy.³⁷

In his most recent book, *What It Means to be a Libertarian*, Charles Murray states that "to choose limited government is to choose once again to do things for ourselves."³⁸ This is the grounding assumption--and motivation--of all libertarian theory. It is the belief in, and hope for, personal autonomy at its most robust. The question I would like to explore in this chapter is what would it take for libertarian individuals *to choose to do*, and then actually *to do* things for themselves? For the realization of liberty is both a theoretical and empirical matter, so a good deal needs to be said about the types of theories and practices that are necessary for the achievement of liberty. As stated in the introduction, overall the thesis is based upon the following question: If one wants to move beyond the critique of the state toward a libertarian vision or good society, what kinds of mentalities, cultures, and institutions are assumed by libertarians to exist, and would need to be developed, for a libertarian individual and the regime that she lives within to maximize individual freedom?

³⁷ Robert A. Nisbet, *Community and Power* (formerly *The Quest for Community*) (New York: Galaxy, 1962), 225.

³⁸ (New York: Broadway, 1997), 59.

Here I shall outline what kind of personality or model of the self libertarianism assumes and requires--and most importantly, the self that might potentially be created through moral imagination within a libertarian order--drawing on the work of Humboldt, Mill, and Emerson, placing emphasis on a libertarian moral psychology or state of mind. First, however, the selves of Boaz' and Murray's libertarianism will be compared and contrasted, to show what is missing from their interpretations, and what needs to be included if individuality were to be treated as an important goal. Subsequent chapters will deal with the manner in which that self, including capacities other than a mentality, is likely to be cultivated and shaped by a political sociology via the cultural and institutional elements of such a regime that would permit and encourage libertarian persons to act for themselves.

Boaz's and Murray's Libertarian Individuals

Typically, when considering the libertarian self we have in mind one of two models. Either we think of an abstract entity that is the bearer of negative political rights (e.g. as in the work of Robert Nozick,) or we envisage rational economic man (e.g. Milton Friedman). Within political theory the negative rights model has been roundly criticized by friends of liberalism for paying insufficient attention to how an individual might live a life supported merely by negative rights (e.g. Rawls' discussion of the need for primary goods in *A Theory of Justice*). Critics of liberalism have argued that all liberal selves are politically and morally unrealistic and undesirable because they are disembodied and rootless (e.g. Sandel's "unencumbered procedural liberal"). The model of economic man, on the other hand, is regarded as rationalistic and frequently criticized for its perpetuation of selfishness to the point of egoism. (E.g. difference feminists, various critics of capitalism, and especially

Marx). From the perspective of a constructive libertarianism, rather than dismissing the political and economic models of the liberal (libertarian) self outright, it seems to me that what is needed is a more complex model that contains both the political and economic aspects, but which is further supplemented and enlarged by cultural considerations, where culture is interpreted both in the anthropologists', but also, and especially, the aesthetes' sense of the term--as informal norms that guide and constrain action, as well as the education, cultivation and development of the self.

In the work of David Boaz and Charles Murray, the political and economic models of the self are joined together to outline political systems based upon limited government that would substitute private provision of goods and services through the competitive free market system for the public provision of goods and services by the state. In a brief discussion of libertarian individuals Charles Murray talks about "*mindful human beings*" who "*require freedom and personal responsibility to live satisfying lives.*" According to Murray

the phrase *mindful human being* refers to nothing more complicated than people who are conscious of living a human life, want to live a good one, and accept their responsibility to try. This is not a demanding standard. It embraces people with all sorts of physical disabilities, mental impairments, and moral shortcomings, as long as they try to figure out what a "good" life means, try to live according to their understanding and accept responsibility for the choices they make. The term *mindful* emphasizes that the possession of a reasoning, self-conscious mind is what separates human beings from all other things.³⁹

In fact, it seems to me that libertarianism does (and must) require a rather more

39 Murray, 1987, 18-19. Italics in the original.

demanding, perhaps even strenuous standard from individuals. This is true for both those who are living a free, but fairly static and undeveloped life, but who do not rely upon government institutions for goods and services beyond the basic provision of peace and security,⁴⁰ but also, and especially for those who pursue the type of ethical ideal that is being proposed here—for those who are concerned with human flourishing and self-cultivation. Murray goes on to claim that "Libertarians assume that, absent physical coercion, everyone's mind is under his own control." Similarly, David Boaz states "the modern concept of liberty . . . emphasizes the right of individuals to live as they choose, to speak and worship freely, to own property, to engage in commerce, to be free from arbitrary arrest or detention--in Constant's words "to come and go without permission, and without having to account for their motives and undertakings."⁴¹ And,

Libertarians see the individual as the basic unit of social analysis. Only individuals make choices and are responsible for their actions. Libertarian thought emphasizes the dignity of each individual, which entails both rights and responsibility. The progressive extension of dignity to more people--to women, to people of different religions and different races--is one of the great libertarian triumphs of the Western world.⁴²

The stress on individual dignity is a way for Boaz to highlight the sanctity of the individual who should be accorded due respect on the basis of the kind of thing he is—an

40 Libertarians can and do make cases for the provisions of security, for example, through the provision of private insurance as a substitute for welfare. See Jonathan Macey, "On the Failure of Libertarianism to Capture the Popular Imagination," *Problems of Market Liberalism*, Ed. Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, (Cambridge: Cambridge University Press, 1998), 372-411.

41 Boaz, *Primer*, 15

42 Ibid, 16

individual who's rights are presumed to take priority over other claims of authority over his life, liberty, and property. These statements would seem to hint at a belief in each individual's fundamental capacity for autonomy or self government, but it is not clear exactly how this ought to be interpreted, and still less clear how these ought to be achieved. For some, Boaz and Murray present the worst of all possible worlds, combining radical free-market economics with vulgar anti-Marxism to produce a self that espouses bourgeois morality and a type of Nietzschean will-to-power mentality.⁴³ Such characterization is probably overstated, yet it calls attention to important deficiencies in contemporary libertarian theory, even and perhaps especially, when libertarianism is judged on its own terms. If libertarians are genuinely concerned to advance the freedom of individuals (who, after all, are more than citizens and consumers or producers) then they should be concerned about the narrowness of the subject matter of libertarian discussion and the attendant impoverishment of their conception of the self. Boaz and Murray have made some gestures in the right direction by mentioning civil society and community in their versions of libertarianism, but these are still deficient, especially when compared to some of the ideas found within the classical liberal tradition. Libertarians must look beyond political and economic liberty to personal or individual liberty--individuality-- developed within civil society. One way to negotiate the limits of market liberalism, but then to go beyond it is to map out a self that relies upon self development for individuality. Thus, my concern is both

⁴³ Ellen Willis, "Our Libertarianism and Theirs," A review of *Libertarianism: A Primer* by David Boaz and *What It Means to Be a Libertarian: A Personal Interpretation* by Charles Murray, *Dissent*, (Fall

with the *broad and diverse scope* of the libertarian self (that extends across political, legal, economic and personal or cultural liberty,) as well as its *dynamic attitude and approach* in thinking about the content of the life lived by the self. Together the broad and diverse scope of an individual life, along with the dynamic attitude and approach to the way that that life is lived form the basis of liberty for individuality.

Within contemporary political theory among advocates, critics and those who we might describe as allies, it is standard practice to identify libertarianism with free market economics, and little more than that. Richard Flathman and Nancy Rosenblum are exponents of theories that have a central place for individuality and an underlying ethos of strong, independent freedom and yet they prefer to call themselves liberals rather than libertarians. At least part of their aversion to libertarianism seems to be due to libertarian's perceived reliance upon economics and the attendant bourgeois (rather than aristocratic) virtues that it promotes. Hence, in discussing the individuality and plurality that he places at the center of his "willful liberalism" Flathman writes:

In these respects willful liberalism has affinities with libertarianism and especially with various strains in romanticism. The notion of liberation from state and others forms of power is reminiscent of libertarianism and even individualistic anarchism, and the notions of self-making, self-enactment, and self-fashioning have manifest affinities with major tendencies in romanticism and expressivism.

These comparisons, however, are seriously misleading. As against libertarianism, especially in recent American and British formulations that identify with so-called classical liberalism and promote *laissez faire* or

1997), 111-118.

market economies, strong voluntarists from Montaigne and Hobbes to Nietzsche, James, and Oakeshott are interested in the *making of lives not in the making of livings*. They find the economic character of much libertarianism dreary and dispiriting.⁴⁴

(The notion of creating a life rather than making a living was also important to Mill who distinguished between "the art of getting on" and the Art of Living.⁴⁵) Rosenblum, on the other hand, explains how the heroic individualism of romanticism she draws upon to supplement liberalism to produce "another liberalism" is a revolt against the regularity and conventional order of law and the "narrow selfishness of commercial types."⁴⁶

What these criticisms point to is the fact that at bottom there is a fundamental divergence in the model of human nature upon which economic and cultural psychologies are based. The economic model rests on a narrow mechanical Hobbesian self whose preferences are given and are (hopefully) satisfied by the market; there is little or no consideration of any change in these preferences, except perhaps over the very long run. Certainly it is not assumed that there is much potential or desirability for the development of an individual's preferences. As Murray said this is "not a very demanding standard." When Hayek distinguishes himself from conservatives at the end of *The Constitution of Liberty*, he does so by pointing to his belief in progress. But this is the progress of a free society, not of

44 Richard Flathman, *Reflections of a Would-Be Anarchist* (Minneapolis: University of Minnesota Press, 1998), 14. Emphasis added. Flathman goes on to distinguish "strong voluntarism" from romanticism because of the latter's want of discipline.

45 See Bernard Semmel "John Stuart Mill's Coleridgean Neoradicalism," in *The Political Science Reviewer* 24 (1995) 158. Also noted in Alan Kahan, *Aristocratic Liberalism*, (New York: Oxford University Press, 1992), 45 citing a passage in Mill's *Principles of Political Economy*. See n.67 at 177.

46 Nancy Rosenblum, *Another Liberalism*, (Cambridge, MA: Harvard University Press, 1987), 19.

single human beings. Hayek, like many classical liberals, is somewhat skeptical about the potential for individuals to change and develop, and like Isaiah Berlin, he notes in particular the dangers to society that have occurred when political power has been used in the service of perfectionism.⁴⁷ These points are well taken. However, I wonder if Hayek is too pessimistic when he says that in practice it is likely that a few great leaders and entrepreneurs will rise and flourish, but the great mass of democratic society will not, and cannot be expected to want to do so.

By contrast, the cultural perspective rests upon a set of natural capacities (such as reason, passion, energy, imagination and creativity), but its emphasis is upon the development of those capacities to create a broader, better educated human being, who has the potential to experience more of life.⁴⁸ It looks to human nature, but also, and especially human action (both internal and external) in connection with living a free life. As Nancy Rosenblum says "The language of economic preferences and maximization is inappropriate to self-cultivation, which entails a different relation to oneself than simply knowing what one's preferences are or when one's desires have been sated."⁴⁹ Indeed, as we shall see, self-

47 F.A. Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960). See Postscript: "Why I Am Not a Conservative," 397-411 and Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969), 118-172.

48 One brief caveat: This discussion of a libertarian self and its moral psychology should be understood as an exploration within moral and social philosophy, not metaphysics. As such, I do not wish to argue for the kind of pure, acontextual, Nietzschean metaphysics of someone like Richard Flathman whose work on individuality provides an inspiring and eloquent critique of some varieties of liberalism, but whose theory is ultimately too radical and, I think, too undemocratic for my friendly reform of libertarianism.

49 Rosenblum, 133.

cultivation requires critical consideration and evaluation of one's preferences which may lead to attempts to change those preferences or to cultivate new ones altogether. To understand this difference more sharply we need to return to the ideas of Humboldt, Mill, and Emerson.

Humboldt, Mill and Emerson and the Theory and Practice of Individuality

Why Wilhelm von Humboldt? When political theorists consider individuality, they usually start with John Stuart Mill. However, Humboldt is the first theorist to extend political consciousness to the previously apolitical concept of individuality.⁵⁰ From a theoretical point of view, his ideas are attractive because he lays out a relatively pure and uncluttered theory of individuality. Furthermore, unlike John Stuart Mill in *On Liberty* and elsewhere, he does not resort to advocating political⁵¹ participation as a means for fostering self-development and individuality. Rather, he recommends participation within civil society--the apolitical domain of society that is secured, but not actively fashioned, by the state. Accordingly, at first glance Humboldt's theory of individuality would certainly seem

⁵⁰ See Gerald N. Izenberg, *Impossible Individuality, Romanticism, Revolution, and the Origins of Modern Selfhood 1787-1802*, (Princeton: Princeton University Press, 1992), Introduction and Chapter 1, 27-35, especially 34. Political theorists who study his work today regard Humboldt as fundamentally apolitical, and sometimes even anti-political, but of course such categorization depends upon one's perspective. Izenberg examines a literary, philosophical, and even theological ideal--individuality--that was made political by Humboldt's discussion of it in relation to the state and the limits he wanted to place upon political authority in order to realize individuality. Political theorists, many of whom share an implicit commitment to, and faith in, the activist state, and who accordingly hold a belief in the virtues of civic (political) participation start with an altogether different set of standards from which to evaluate the nature of Humboldt's theory.

⁵¹ I employ the term "political" to mean that which is associated with the state. Others may prefer that I identify statism more directly since political activity, properly understood encompasses more than simply activity within the state e.g. democrats talk about "political discourse," meaning communication that is public, social, civic (such as voting, etc.) By contrast, the "apolitical" activity to which I refer is that which is public and social but not directly associated with the state, taking place within civil society.

to be more consistent with libertarianism than Mill's. However, Mill's theory is also important because of his critique of cultural constraints, based upon both theoretical and practical considerations, mentioned above and discussed further below. At the same time, Emerson's ideas need to be considered because they are democratic in a way that Humboldt's and Mill's ideas are not, or at least not unambiguously democratic. Furthermore, the kind of libertarianism that I am criticizing is associated with an American political movement and it is likely that it will be easier to persuade people to adopt a "native" political theory rather than a foreign import. Consequently, each theorist has something useful to contribute to the development of a practical libertarian theory of individuality. Therefore the ideals, assumptions, and the necessary means for the achievement of individuality of each theory will be compared and contrasted. In particular, I want to draw on some of Humboldt's, Mill's and Emerson's ideas to sketch out a type of libertarian aspiration that might be used to broaden (mere) political theory and to counterbalance market liberal economism. Returning to my initial questions, what does each of these theorists tell us about what it takes for libertarian individuals to choose to do, and to do things for ourselves (where what we want to do is to develop our individuality)? What kind of self does each assume and then develop, and how is this to be achieved?

The Ideal

Humboldt's ideas are consistent with libertarianism because he places the individual at the center of his theory while also making strong criticisms of state power. Indeed, his best known work--*The Limits of State Action*--is an argument for a minimal state--the classic nightwatchman state of libertarian theory. However, his reasons for doing so differ

markedly from most contemporary libertarian arguments since Humboldt has an explicit commitment to the good life. Freedom is valued, but not intrinsically. Rather, it is used instrumentally along with a theory of cultural pluralism to argue for--or perhaps even assert--the value of self- development or what I shall call individuality.

At bottom, Humboldt's libertarianism is not political, or even moral, but rather aesthetic. He champions liberty because it is beautiful, not because it helps us to lead lives that are happier, more satisfied, or more virtuous.⁵² Instead, his is a romantic vision--a positive ideal that rests on an aspiration to explore one's potential by living creatively and energetically. According to this conception, life is a work of art that needs to be defined, refined, and continually expanded upon. But unlike a work of art, it is never finished.

Mill drew freely on Humboldt's ideas concerning self-development; however he was rather more restrained in his treatment of the ideal than Mill,⁵³ using it to criticize the "despotism of custom" in society, rather than the state. To appreciate Mill's variety of individuality it is necessary to recognize that it grew out of his condemnation of nineteenth century England's social arrangements, and in particular (as he saw it) the social conformity and mediocrity propagated by Calvinism and commercialism. Indeed, for Mill, like Tocqueville, the primary threat to freedom is not the authoritarian state, as it was for

52 Cf. J.S. Mill, who, as we shall see, lays great emphasis on individuality in connection with social progress and the "improvement of mankind" in general.

53 Stephan Collini says that Mill was less interested in the romantic ideal of self-exploration, and more concerned about "the better development of the social part of [the individual's] nature. See "Introduction," in Mill's *On Liberty* (Cambridge, Cambridge University Press, 1989), xvii. See also Ronald Terchek, *Republican Paradoxes and Liberal Anxieties* (Lanham, MD.: Rowman & Littlefield, 1997) chapter 5, and

Humboldt, but rather democratic society.⁵⁴ This is an argument to which libertarians need to pay attention since today, given its proximity the local community may pose more of a threat to liberty than the extensive, but frequently highly inefficient state. Indeed, libertarians should be criticized for ignoring the conformity of mass opinion and focusing only on the oppressive actions of bureaucrats.

So what is Mill's ideal? While still promoting many of the ideas put forward by Humboldt, Mill does so in a rather more practical fashion, and tries to negotiate the limits of both state and society for individuality. Like Humboldt, Mill believes that individuality is the proper goal of human beings--indeed he cites Humboldt's definition of individuality at the beginning of his chapter on individuality in *On Liberty*. Again, in general terms individuality consists of freedom to choose how one lives one's life, which is itself a continual project, using and developing one's faculties. But Mill's individuality is a moral not an aesthetic ideal; it is more concerned with individual *and* social progress through many-sidedness and diversity, as opposed to the development of individual spiritual beauty and harmony. Also, and importantly, it has to do with action that is primarily associated with self-regarding behavior that does not harm the interests of others. So Mill introduces a more complex picture than Humboldt by noting the contestation of boundaries for the self and for the respective domains of society that it inhabits. Mill's individuality is eclectic and

Nancy Rosenblum, *Another Liberalism*, 134.

⁵⁴ See Jon Roper, *Democracy and Its Critics. Anglo-American Democratic Thought in the Nineteenth Century*, (Boston: Unwin Hyman, 1989).

draws on several diverse sources. As he describes it, the ideal contains elements of "pagan self-assertion" as well as "Christian self-denial." It is also influenced by the Greek ideal of self-development (particularly its platonic and stoic varieties), and the Christian notion of self-government. In addition we know that Mill was affected by romanticism after he read Wordsworth's poetry to help him to recover from his nervous breakdown.⁵⁵ Further, the ideas of Coleridge and Carlyle profoundly influenced Mill's thoughts on culture and the masses, while Comte's notion of creating a "religion of humanity" is said to have been adapted by Mill in his own construction of a social theory.⁵⁶ In contrast to Calvinism, which wears people down into uniformity, Mill says that individuality cultivates and calls forth a true individual--to become a human being that is a "noble and beautiful object of contemplation." It calls on individuals to develop their mental and spiritual selves, thereby giving priority to intellectual capacities, but these are by no means the only capacities valued by Mill. Like Humboldt, Mill seems to suggest that, individuality has intrinsic value for the individual, independent of its social value.⁵⁷ Furthermore, this is a democratic standard in

55 J.S. Mill, *Autobiography* (London: Penguin, 1989), 120-122. He was also familiar with Goethe, Fichte, and other German thinkers, 191.

56 See J.S. Mill, *Autobiography*, 162-164. Joseph Hamburger, "Individuality and Moral Reform: The Rhetoric of liberty and the Reality of Restraint in Mill's *On Liberty*," *Political Science Reviewer* 24, 1995, 7-70.

57 See C. L. Ten, "Individuality," in *Mill on Liberty*, (Oxford: Clarendon, 1990), chapter 5, 68-85. Some commentators maintain that Mill is only interested in the social uses of individuality, pointing to the absence of natural rights to guarantee the priority of individuals and their freedom (including individuality) over social happiness. See Collini, xxv, who says that Mill was a liberal, but not a libertarian or a liberationist. Others regard Mill as a true idealist and collectivist in the manner of T.H. Green, and who therefore considers the individual and his individuality as mere instruments to be used for the creation of a perfect society. See, for instance, Michael Oakeshott, *Morality and Politics in Modern Europe*, Ed. Shirley Robin Letwin, (New Haven: Yale University Press, 1993), 78-83. Joseph Hamburger considers Mill in an even more sinister light, saying that *On Liberty* deals with conditions for a transformational society that would lead to a future organic state, and

that, in theory at least, it applies to all. Mill says

... nor is it only persons of decided mental superiority who have a just claim to carry on their lives in their own way. There is no reason that all human existence should be constructed on some one or some small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best itself, but because it is his own mode. Human beings are not like sheep; and even sheep are not undistinguishably alike.⁵⁸

However, unlike Humboldt, Mill also notes the social value of his ideal, in order, he says, to persuade those who are not likely to be persuaded by the intrinsic worth argument.⁵⁹

"In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them."⁶⁰ And, indeed, for Mill they are complimentary, not contradictory sides of the argument, since he is trying to accommodate several theoretical and practical concerns simultaneously, (as, indeed, am I.) in this thesis. The breadth of his vision and consequently the kinds of questions he asks is substantially broader than Humboldt's, which accounts for some of the tensions in his work.

When discussing the social value of individuality, Mill looks to three characteristics:

that therefore Mill's romantic ideals and commitment to individuals were tenuous at best. Cf. Nancy Rosenblum's reading of Mill in *Another Liberalism*, chapter 6.

58 J.S. Mill, 1989, 67.

59 Andrew Valls, "Self Development and the Liberal State: The Cases of John Stuart Mill and Wilhelm von Humboldt," *The Review of Politics*, 61: 2, (Spring 1999), 252.

60 Ibid, 63.

genius, originality and eccentricity, and shows how they may serve social progress, or as he puts it "by making the race infinitely better worth belonging to." In mentioning genius, originality and eccentricity it might be argued that Mill is calling for an aristocratic, or at least an elitist standard, pointing to the possibility and perhaps desirability of individuality being pursued by a few heroic souls only, chosen from a particular class or group in society. Obviously this would contradict the democratic pronouncement mentioned above. However, as described by Mill, genius, originality and eccentricity are illustrative of kinds of personality traits that are consistent with individuality and that were still easily identifiable during the period he was examining. I.e. what they demonstrate is a larger commitment to excellence and freedom of choice.⁶¹ They are not exclusive or exhaustive of all forms of individuality--nor could they be, given Mill's understanding of progress and discovery of new ideas and new experiments in living. In fact they are meant to be examples of a critical and thoughtful approach to life. Drawing on Mill's essay "On Genius," David Spitz notes that Mill says "originality. . . need not be identified with the discovery of new truth; it is enough if the individual discovers truths by himself even if they are truths already known to and accepted by others. Originality, in other words, is a process of discovery, not an attitude of that which is discovered. . . Thinking for himself, the original mind might well arrive in fact at conclusions altogether consistent with those current in his society and thus turn out to be a conformist after all. It cannot be argued that conformity on such terms negates the

⁶¹ See Alan Kahan, *Aristocratic Liberalism*, (Oxford: Oxford University Press, 1992), 4-5.

claims to individuality, for as long as a decision is arrived at through autonomous thought, it meets Mill's notion of individuality."⁶² As such, Millian individuality must be relatively open-ended, inspiring the cultivation of different personalities in different ways and to varying degrees. As Peter Berkowitz says, "Mill's liberalism puts first neither markets nor procedures nor rights. Rather, his liberalism grows out of, and constantly returns to, questions of character and the ends of human life."⁶³

The problem with using Humboldt and Mill for libertarian individuality is that they share an aristocratic bias: Humboldt's ideal is explicitly aristocratic in theory and in practice; Mill's individuality is theoretically democratic, but open to elitist readings in practice. At least, his writings demonstrate a preoccupation with higher minds, the intellect, and the progress of society guided and shaped by the thoughts and actions of "great minds," and in *On Utilitarianism* he champions the "higher pleasures." Little attention is paid to the cultivation of individuality by ordinary people, although he says in passing that it is an ideal that is available to all. Still, the underlying tone is somewhat elitist. In a democratic age this is problematic to say the least; to some it will render individuality wholly unacceptable as a justification for any contemporary political theory. What is needed, then, is a democratic theorist of individuality, and here, as the work of George Kateb has shown, the ideas of

62 "Freedom and Individuality: Mill's *Liberty* in Retrospect." *NOMOS IV, Liberty*, (New York: Atherton, 1962), 203. Mill himself says the value of originality is that it serves to open others eyes. Ibid, 65. Ten says that in mentioning eccentricity Mill did not mean to promote peculiarity and idiosyncrasy. Rather, "eccentricity provokes thought. It shows men that alternative ways of life are possible. It shakes men out of their unthinking complacency, and thereby encourages them to accept or reject custom as an act of conscious choice." J.S. Mill, 1989, 71.

Emerson are relevant. Furthermore, Mill and Humboldt are European, not American theorists. Since the point is to propose reform of the ideas of an American political movement it would seem appropriate to examine the ideas of an American exponent of individuality. This inclusion is important because libertarianism is largely an American political and social movement (and certainly the sector of it with which I am concerned is located in the United States) and there are those who will claim that individuality is based upon a foreign--specifically German--interpretation of freedom. Moreover, some will claim that such idealism runs counter to the essentially pragmatic tenor of much American political and social theory. On the contrary, however, the ideas of the Emersonians demonstrate that individuality is not an alien import and should be acceptable to the theory and practices of American freedom so long as it is combined with other elements, including pragmatism, within a broader liberal pluralism. Furthermore, one might argue, as indeed, George Kateb does, that the very notion of founding--the creation of the First New (Democratic) Nation--itself provides the very idealistic historical and cultural context from which these ideas emerges.⁶⁴ Here I draw on Kateb's reconstruction of Emerson's American democratic

⁶³ Ibid,168.

⁶⁴ George. Kateb, "Democratic Individuality and the Meaning of Rights," in Nancy Rosenblum, Ed. *Liberalism and the Moral Life*, (Cambridge: Harvard University Press, 1989), 186.

individuality for libertarian individuality.

Emerson's individuality finds its influences most notably in Plato's philosophy and Carlyle's social commentary, as well as, and especially, Unitarian religious transcendentalism. Like Mill, much of Emerson's approach to individuality stems from his complaint about the social conformity that he sees in society. On Emerson's view, public opinion in America is preoccupied with moneymaking, so he exhorts individuals to liberate themselves from it, and to think critically for themselves. Politics and the state are also viewed with skepticism since these rest upon conventions (or what we might today call "constructs,") that constrain our vision of the world. In one of his most famous pleas for robust autonomy, "Self Reliance," Emerson says:

Society everywhere is in conspiracy against the manhood of every one of its members. Society is a joint-stock company, in which the members agree, for the better securing of his bread to each shareholder, to surrender the liberty and culture of the eater. The virtue in most request is conformity. Self-reliance is its aversion. It loves not realities and creators, but names and customs.

Whoso would be a man, must be a nonconformist . . . Nothing is at last sacred but the integrity of your own mind.⁶⁵

Such statements have given rise to concern from some communitarian critics who interpret his statement as a kind of manifesto for atomism and Nietzscheanism before

⁶⁵ Ralph Waldo Emerson, "Self Reliance," in *The Portable Emerson* (New York: Viking Penguin, 1981), 141.

Nietzsche.⁶⁶ However, this seems to me to be uncharitable to Emerson, who condemned egoism in an essay titled "Culture," and who noted the individual uses and abuses of society in essays such as "Society and Solitude."

But worse than the harping on one string, nature has secured individualism by giving the private person a high conceit of his weight in the system. The pest of society is egoists. There are dull and bright, sacred and profane, coarse and fine egoists. It is a disease that like influenza falls on all constitutions. In the distemper known to physicians as *chorea*, the patient sometimes turns round and continues to spin slowly on one spot. Is egoism a metaphysical variety of this malady? The man runs round a ring formed by his own talent, falls into an admiration of it, and loses relation to the world. It is a tendency in all minds.⁶⁷

The antidotes against this organic egoism are the range and variety of attractions, as gained by acquaintance with the world, with men of merit, with classes of society, with travel, with eminent persons, and with the high resources of philosophy, art and religion; books, travel, society, solitude.⁶⁸

Instead, the plea for individuality should be seen as an instance of self-assertion and a motivation for self-culture. As Judith Shklar says, "It is not a call to reject the usual bonds of family life but to take them on as one's own discovery."⁶⁹ It is not a casting off of responsibility, but rather an embrace of it. This, in part, is what it means to choose to live a

⁶⁶ See, for instance, Wilfred M. McClay, "Mr. Emerson's Tombstone," comparing Protestant Christian "constrained individuality," with Emersonian "boundlessness", *First Things* 1998, No. 83, (May 1998), 16-22.

⁶⁷ "Culture," in *The Selected Writings of Ralph Waldo Emerson*, Ed. Brooks Atkinson, (New York: Modern Library, 1950), 718.

⁶⁸ Ibid, 721.

⁶⁹ "Emerson and the Inhibitions of Democracy." *Political Theory*, (November 1990), 603.

free life.

Emerson's individuality is both moral and spiritual, and as such it shares some of the attributes of Humboldt's romantic individuality along with Mill's more grounded reformist individuality. Ultimately, in its highest religious and metaphysical form it results in the harmony of the soul with the universe (a kind of perfection in the obliteration, or at least the radical transformation of the self), but in its cultural and social forms it calls for many-sidedness, curiosity and intensity in both thought and behavior. Since I am bracketing metaphysics I only mention the highest form of metaphysical ("impersonal") individuality in passing and concentrate on the moral aspects (negative and positive individuality). Negative individuality has to do with a disposition to disobey bad conventions and unjust laws, whereas positive individuality is closer to autonomy or self-government.

As George Kateb explains it, Emersonian individuality begins with a concern for individual integrity that demands honesty and self-trust.⁷⁰ Like Humboldt before him, Emerson invites individuals to share a vision of life. He calls on them to live life intensely, not merely to exist passively and customarily, but rather to "achieve a new relation to reality." But to do this they must see social conventions as the constructs that they are, and this in turn requires that they approach conventions with "honesty,"

. . . to acceptance of the dangers and opportunities of being self-conscious creatures, able to see ourselves, see through and around ourselves, and this able to reject identification with any role or set of conventions. Individuals

⁷⁰ George Kateb, "Democratic Individuality and the Claims of Politics," *Political Theory*, (August 1984), 335-340.

are detached from even the conventions they accept, and are free to change conventions. Let us not be afraid of self-consciousness, they urge: Democracy will thrive on it. Democracy is, in secular terms, the realization of the grand historical effort to sustain social life without bad faith, and without superstition, mystique, and misdirected religiousness.⁷¹

Such individuality is democratic on a number of levels. It is democratic politically because it rests upon and is made possible by democratic political institutions, especially representative government and rights that recognize the dignity and worth of each individual. Thus, the political is also moral because it respects each human being. But this is also located within a democratic culture, based upon commitment to a set of ideas (ideals) that are expressed most eloquently in the Founding documents, not blood or tradition. This informs the way that we live our day-to-day lives, and our respect for each other.⁷² Further, it indicates a disposition toward independence or self-government that is taken beyond mere self-government to the individual self expression of the unique personality when it is joined by the concept of individuality. As such, potentially democratic libertarian individuality would be attainable by each human being, not just each citizen or entrepreneur, although in practice different people will achieve it and experience it to different degrees.⁷³

71 Ibid, 339.

72 For Emerson this meant joining the movement to abolish slavery. See *Emerson's Antislavery Writings* Ed. Len Gougeon and Joel Myerson, (New Haven: Yale University Press, 1995). See also Nancy Rosenblum's discussion of the democracy of everyday life in *Membership and Morals* (Princeton: Princeton University Press, 1998).

73 Another example of the idea of democratic individuality may be found in a short essay by Ralph Ellison, "The Little Man at Chehaw Station. The Artist and His Audience." The story uses the metaphor of the little man behind the stove in the waiting room at the Chehaw Station to convey the often unexpected glimpses of knowledge and appreciation for art and excellence more broadly, that we sometimes stumble across in

Human Nature: Essence and Its Cultivation

The next question that needs to be considered is what is the source of this individuality? Humboldt asserts

The true end of Man or that which is prescribed by the eternal and immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole.⁷⁴

How do we know this? Humboldt's assertion rests upon an intuitive claim about human nature. For him, human nature contains physical, intellectual, and moral faculties-- natural capacities, or as he puts it, "powers"--that are to be developed according to his notion of *Bildung*, i.e. the inner self- development of capacities and inclinations. Originally, *Bildung* is said to have carried with it a religious connotation. German mystics in the fourteenth century used it to describe the means by which the individual advances towards God.⁷⁵ However, in Humboldt it represents a form of humanism and that is the way I mean to employ it here.⁷⁶ In contrast to the usual rational self-interested individual of liberalism,

American Society. We should always strive to do our best not only for ourselves and the benefit of our particular art, but also and especially because we never quite know who will be watching us performing our art. Ellison says the American artist will do his best not only because of his dedication to his form and craft, but because he realizes that despite an inevitable unevenness of composition, the chances are that any American audience will conceal at least *one* individual whose knowledge and taste will complement or surpass his own. *The Collected Essays of Ralph Ellison*, Ed. John F. Callahan, (New York, Modern Library, 1995), 494.

74 Wilhelm von Humboldt *The Limits of State Action*, (Indianapolis, IN: Liberty Fund, 1969), 10.

75 Of course, this tradition is continued by Emersonian transcendentalism, or what Kateb calls "impersonal individuality," however I prefer to leave individuality more open-ended. See his "Democratic Individuality and the Claims of Politics," *Political Theory* 12:3 (August 1984), 331-360.

76 Steven M. Young, "The Unified Self and the Cultural Community: Romantic Self-Development and the National Ideal in Wilhelm von Humboldt," paper presented to the American Political Science

and particularly neo-classical economics, the self in Humboldt's theory relies upon a combination of natural capacities including energy (vital forces) reason, sensuality (or passion) and imagination. Reason acts as a guide to behavior, while sensuality and imagination provide the motivation and creativity for action. Together these features constitute a self that interacts with the world to forge a unique, multi-faceted, but unified individual.

The philosophy of Leibniz and Kant--specifically the metaphysics of Leibniz, and Kant's moral theory--appear to have been particularly influential in developing these ideas. Paul Sweet says that although Humboldt had read and carefully studied Kant, he was heavily influenced by Leibniz's idea of "individual entities driven by mysterious energy toward higher development and perfection. When he thought of essences, whether of individuals or collectivities, he thought of vital energies. . . ⁷⁷ But Humboldt adapted Leibniz for his own purposes, transforming metaphysics into social and political theory, while retaining the basic idea of harmony that he found in Leibniz.⁷⁸ Rather than splitting personalities into higher and lower selves like Mill, Humboldt thought that personalities could be fashioned into harmonious wholes. In this we see the influences of some of his more romantic tendencies

Association Annual Meeting, Boston, September 3-6, 1998, 6, drawing on Klaus Vordung, "Unity Through Bildung: A German Dream of Perfection," *Independent Journal of Philosophy*, Vol. 516 (1988), 47-55, at 47.

⁷⁷ Paul R. Sweet, Wilhelm von Humboldt's Writings (1798-93) Reconsidered, *Journal of the History of Ideas*, 34:3 (1973), 471.

⁷⁸ David Sorkin, "Wilhelm von Humboldt: The Theory and Practice of Self-Formation (Bildung), 1791-1810." *Journal of the History of Ideas*, 44 (1983), 59-60.

that moved toward aesthetics, but also his reliance upon moral theories. Drawing on Kantian moral theory Humboldt developed a theory of autonomy that is submerged beneath his critique of the state and celebration of the goal of self-development and individuality. Like Kant, he maintained that the grounding for the moral law was the recognition of the dignity and worth of each person according to her capacity to reason for herself. He believed that moral law prescribes duties to others to avoid violating their rights to negative liberty that are enforced by the state.⁷⁹ But the moral law also instructs individuals to develop themselves, applying their own inner resources to a multitude of diverse experiences in the world. Mill and the Emersonians shared a similar belief, maintaining that all individuals have a moral duty to themselves, and to a lesser extent, to others,⁸⁰ to develop themselves according to the dictates of reason, conscience, and imagination. (For Humboldt all experiences are potentially valuable to self-development, and are to be valued accordingly so long as they do not violate others' rights to freedom.) Freedom of choice is vital--he says "whatever does not spring from man's free choice, or is only the result of instruction and guidance, does not enter into his very being, but still remains alien to his true nature; he does not perform it with truly human energies, but merely with mechanical exactness."⁸¹ Yet

⁷⁹ *Limits*, 90.

⁸⁰ At least, Humboldt and Mill seem to recognize this duty to others see below, and 63 *On Liberty* "In proportion to the development of his individuality, each person becomes more valuable to himself and is therefore capable of being more valuable to others." The Emersonians do not. Kateb says that the only duty they recognize is a negative duty not to hinder others' freedom and development. This is particularly true of Thoreau. Kateb, 1984, 343.

⁸¹ *Ibid*, 23.

Humboldt modifies Kant's moral law to include a synthesis of reason with passion to motivate the freely choosing individual to act in the world.⁸²

On this view freedom is not simply an absence of restraints (negative liberty), rather it is potential: it contains "the possibility of a various and indefinite activity." A variety of situations help the individual to experience the world and develop the various facets of her character (and indeed other's characters as she interacts with them in the world, as we shall see in a moment.) As J.S. Burrow explains:

Life lived as it should be, according to Humboldt, consists of an endless endeavor to reconcile a coherent individuality with the utmost receptivity to the most diverse experience, an acceptance of an eternal tension between the need to be uniquely and harmoniously oneself and the duty to assimilate as much as possible of life's emotional and intellectual possibilities.⁸³

To the extent that individuality resembles Aristotle's *telos* it may be regarded as the pursuit of human flourishing. However, it is also different because individuality is a process not an end--it is never fully achieved in the sense of there being an achievable end, a perfection of the self.⁸⁴ Furthermore, there is no single standard by which an individual may judge her life plan. Rather, each must follow her own path according to her own

82 Humboldt says: This individual vigor, then, and manifold diversity combine themselves in originality; and hence, that on which the whole greatness of mankind ultimately depends--towards which every human being must ceaselessly direct his efforts, and of which especially those who wish to influence their fellow-men must never lose sight: individuality of energy and self-development." *ibid*, 11-12.

83 J.S. Burrow, "Introduction to Humboldt's *Limits of State Action*," xxix-xxx.

84 Cf. Kateb, 1984. "...democratic individuality is not an ideal that one can ever be certain has been reached. It is not meant to be so unequivocally defined as to be unambiguously reachable. It is not a permanent state of being, but an indefinite project. It allows degrees, approximations, attenuations. . . the cultural ideal is lived fitfully; *telos* is often avoided," 338.

particularities of character and situation. Consequently, Humboldt's vision is far less constrained than Aristotle's.

In *On Liberty*, in contrast to the neo-classical economists' model of the self, Mill proclaims "Human nature is not a machine to be built after a model and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing."⁸⁵ Again, we see that human nature is constituted by both reason and passions ("desires" and "impulses," including, and especially, energy, as well as discipline to control those impulses.) These are natural or innate, but they must be used frequently since they are like muscle; if they are not exercised, they lose their strength and agility. For Mill, one is not born a human being, but rather becomes one through the frequent use and cultivation of one's capacities. Mill says: "He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties."⁸⁶ In developing a free life Mill says an individual ". . . must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold his deliberate decision. And these qualities he requires and exercises exactly in

85 J.S. Mill, *On Liberty*, 60. But cf. Ronald Terchek's discussion of Mill's interpretation of basic or raw uncultivated human nature which is not so very different from Hobbes'. The difference is that on Mill's view we learn to change and the history of the race is to develop. *Republican Paradoxes and Liberal Anxieties*, chapter 5.

86 J.S. Mill, 59

proportion as the part of his conduct which he determines according to his own judgment and feelings is a large one."⁸⁷ This is what is meant by autonomy or self-government. Individuality has to do with creating an independent *and unique* life of one's own. Elsewhere, in *Utilitarianism*, Mill tells us a little more about the natural capacities when he famously develops the doctrine of the higher and lower pleasures, claiming that no individual who had had experience of the higher pleasures would be likely to choose to live life like a lower animal. He says "A being of higher faculties requires more to make him happy, is capable probably of more acute suffering, and is certainly accessible to it at more points, than one of an inferior type; but in spite of these liabilities, he can never really wish to sink into what he feels to be a lower grade of existence."⁸⁸ He attributes this to pride, the love of liberty and a stoic personal independence, the love of power or excitement, and a sense of dignity. These appear to be innate capacities that are refined through experience, especially education. The final goal that is achieved by the autonomous individual who has developed his individuality--happiness--departs from the romantic conception favored by Novalis and others. It is not "a continuity of highly pleasurable excitement" since that is impossible. Nor is it a kind of "state of exalted pleasure that lasts only moments," but more of a quiet, steady contentment that Mill believes is perfectly possible if cultural conditions are reformed. He says "The present wretched education and wretched social arrangements

87 Ibid, 59.

88 J.S. Mill, "Utilitarianism," in *On Liberty and Utilitarianism* (New York: Bantam, 1993), 147.

are the only real hindrance to its being attainable by almost all,"⁸⁹ suggesting that there is a democratic aspect to Mill. Thus, nurture within a certain type of culture (primarily one that is tolerant and diverse) is at least as important to Mill's theory of individuality as the innate capacities that constitute basic human nature. In *On Liberty* Mill comments ". . . what more or better can be said of any condition of human affairs, than that it brings human beings themselves nearer to the best thing that they can be? Or what worse can be said of any obstruction to the good, than that it prevents this?"⁹⁰

What are the sources of Emersonian individuality? Like the two previous theorists discussed above, part of Emerson's theory relies upon natural capacities or powers that are said to be possessed by all, and he assumes that all human beings are capable of achieving it, at least experiencing it partially and perhaps intermittently. Kateb says that Emerson preaches self-reliance because he thinks that all people already have self-reliant moments and could more successfully become self-reliant if they tried. "Self-reliance is thus not a doctrine of superiority to average humanity. Rather it is a doctrine urging the elevation of democracy to its full height, free of the aristocratic, but also free of the demotic."⁹¹

Institutions

Yet thinking and acting for oneself in such a critical and spontaneous manner do not

⁸⁹ Ibid, 151.

⁹⁰ Ibid, 64.

⁹¹ *Emerson and Self-Reliance*, (Thousand Oaks: Sage, 1995), 18.

simply come naturally, so more still needs to be said. Humboldt is not terribly clear about the details of the development of autonomous individuals, and Emerson is even more vague than Humboldt. In his own writings Emerson is a good deal less concerned with the concrete institutional mechanisms needed to cultivate individuality than Mill, and even Humboldt. Beyond his support for democracy, many of his claims have to be taken on faith. However, he makes the occasional remark about the roles of culture and education. Emerson says:

This individuality is not only not inconsistent with culture, but is the basis of it. Every valuable nature is there in its own right, and the student we speak to must have a mother-wit invincible by his culture--which uses all books, arts, facilities, and elegancies of intercourse, but is never subdued and lost in them. He is only a well-made man who has a good determination. And the end of culture is not to destroy this, God forbid! but to train away all impediment and mixture and leave nothing but pure power. Our student must have a style and determination, and be a master in his own specialty. But having this, he must put it behind him. He must have a catholicity, a power to see with a free and disengaged look every object.⁹²

Self development also requires a new attitude with respect to education:

Let us make our education brave and preventative. Politics is an after-work, a poor patching. We are always a little late. The evil is done, the law is passed, and we begin the uphill agitation for repeal of that which we ought to have prevented the enacting. We shall one day learn to supersede politics by education. What we call our root-and-branch reforms, of slavery, war, gambling, intemperance, is only medicating the symptoms. We must begin higher up, namely in Education.⁹³

In Humboldt's case we know from his discussions concerning the state and education, as well as children's rights, that he believed that schooling was extremely important to the

⁹² Ralph Waldo Emerson, "Culture," in *The Selected Writings of Ralph Waldo Emerson* (New York: Modern Library, 1950), 719.

⁹³ *Ibid.*, 722.

cultivation of a critical inquisitiveness.⁹⁴ State sponsored education is roundly criticized for the same reasons that all state activity is criticized (as we shall see below)--it is overly rational and mechanistic and cannot adapt to the spontaneous flowering of particular individuals. It is, by nature, too rigid and narrow, imposing a special civic form. Instead, parents are charged with the duty of bringing their offspring to full maturity and presumably this includes teaching their children at home, or paying for tutors to instruct their children on their behalf. If they are incapable of fulfilling their duties, the state is to appoint guardians to ensure that the physical and moral well-being of minors is met. However, his discussion of formal education is severely abbreviated--especially when one considers the burdens implied by self-development. This is precisely because for the most part Humboldt's concern is with mature adults who have already learned how to live by the moral and legal laws of a society. He employs self-development (autonomy) at a higher level to help the individual develop himself with others above and beyond meeting the requirements for material necessity and social peace. And to do this he requires two institutional mechanisms: the state and civil society.

The State

Freedom is the first and indispensable condition that the possibility of such a development presupposes; but there is besides another essential--intimately connected with freedom, it is true--a variety of situations. Even the most free and self-

94 Ibid, 48-50; 127-133.

reliant of men is hindered in his development, when set in a monotonous situation.⁹⁵

This statement sets up Humboldt's argument so that he can talk about freedom in relation to the state (i.e. freedom from the state), and voluntary associations in civil society. As I have mentioned above, Humboldt's criticisms of the state are that it is at heart antithetical to individuality beyond securing the conditions of liberty. (I.e. it creates peace between members of civil society.) The state, because it operates through procedures of formal rationality, will always do violence to the complexity and richness of human experience.⁹⁶ Individuality cannot be imposed from above because the state inevitably uses general or universal standards and this violates the essential diversity at the heart of individuality.⁹⁷ Accordingly, participation in the offices of the state--indeed, any form of citizenship is to be kept to a bare minimum. Hence, Humboldt's attitude, like all theorists of individuality, is broadly anti-political and apolitical or social, and therefore tends toward anarchism. However, in practice Humboldt does think that there is a place for the state in securing the basic conditions for liberty, but that is all.

More than that, however, personal struggle is considered to be a crucial part of the process of self-development, so individuals must solve their own problems and work out their own life plans. Even if the state were capable of treating different people differently--

95 *Limits*, 10

96 Ursula Vogel, "Liberty is Beautiful: von Humboldt's Gift to Liberalism," *History of Political Thought* 3:1 (Spring/January, 1982), 77-101.

97 *Limits*, chapter 3. A similar argument has been made more recently by Judith Shklar in *Legalism*,

for example, by instituting various therapeutic programs, this would only make individuals weak, dependent, and feeble. Certainly it would inhibit their ability to govern themselves.⁹⁸ Since Humboldt's first concern is for individuals to develop themselves, it is vitally important that they do as much as they can themselves so that they are self-sufficient. Therefore, even if it were possible for the state to take over individuals' tasks and provide them with everything that they needed to be happy Humboldt says that such citizens would always seem to me a multitude of well-cared-for slaves, rather than a nation of free and independent men.

In fact, as one reads this literature it seems that what is needed above all is not a certain state apparatus, but a state of mind, or mentality. (In *The Limits* Humboldt does not specify which particular political regime would best serve self-development. However, Steven Young says that in later works he favored representative democracy.⁹⁹) In his introduction to *The Limits of State Action*, Burrow highlights this different sensibility well when he distinguishes between a political theory that sets up a system of "traffic-lights" (political liberalism) as compared with a moral exhortation--"an invitation to live life in a

(Oxford: Oxford University Press, 1954), and Nancy Rosenblum in *Another Liberalism*.

⁹⁸ Charles Murray makes this point when he argues for a type of communitarian libertarianism in his *In Pursuit of Happiness and Good Government* (New York: Simon and Schuster, 1988). However, he is less critical than Mill of the kinds of standards particular communities promote. Christopher Lasch is well known for his criticisms of the therapeutic state, and while not a libertarian, he was, in this respect, an anti-statist. See *The Culture of Narcissism* (New York: W.W. Norton, 1978) and *The Minimal Self*, (New York: W.W. Norton, 1984).

⁹⁹ Young, "The Unified Self."

particular way."¹⁰⁰

Civil Society

A State is such a complex and intricate machine that its laws, which must always be few in number, and simple and general in their nature, cannot possibly prove fully adequate here. The greater part is always left to the voluntary and cooperative efforts of the citizens.¹⁰¹

For Humboldt, the bulk of individual development and education takes place within voluntary associations in civil society in groups of one's peers. Again, he is not very specific about the details of the arrangements of civil society, but he anticipates some of the aspects of the current liberal/communitarian debate when he outlines the practices exhibited by individuals who develop themselves together in voluntary organizations. For Humboldt's individuals are neither atomistic individuals nor thickly encumbered citizens, but rather social individuals who act together to develop separate and distinct personalities. Indeed, one of the elements that Humboldt, Mill, and to some degree Emerson share, is the importance of community or what we now call civil society, for developing aesthetic and moral values.¹⁰² Free persons come together to enhance their individuality. However, in so doing they refine themselves and others as individuals; they do not cast off their highly personal identity to transform themselves into a general will or spirit.¹⁰³

100 Burrow, *Limits*, xlix.

101 Ibid, 63.

102 *Limits*, 27.

103 Cf. George Kateb's reading of Whitman's democratic individuality that does in fact appear to end with a kind of Heglian geist as the self is transformed to become part of the impersonal individuality.

Humboldt says:

. . . men are not to unite themselves in order to forgo any portion of their individuality, but only to lessen the exclusiveness of their isolation; it is not the object of such a union to transform one being into another, but to open communication between them. Each is to compare what he is himself with that he receives by contact with others, and, to use the latter to modify but not to suppress his own nature. . . the principle of the true art of social intercourse consists in a ceaseless endeavor to grasp the innermost individuality of another, to avail oneself of it, and, with the deepest respect for it as the individuality of another, to act upon it. Because of this respect one can do this only by, as it were, showing oneself, and offering the other the opportunity of comparison.¹⁰⁴

This rests on a natural sociability, and would seem to call into question the rather rigid use of the idea of self-ownership¹⁰⁵ employed by contemporary libertarians to highlight the sanctity of the self. However, this goes to the point I made in the previous chapter about the underdevelopment of libertarianism. For, it seems to me that self-ownership is used by libertarians to challenge the power of the state, whereas theories of individuality move beyond political theory to social theory. If one is going to advocate a minimal political theory, this makes sense. After all, someone or something needs to carry out the functions of the state once it is rolled back. Moreover, theories of individuality emphasize that freedom is an achievement, not a natural fact, and it is achieved through actions with others in civil, rather than civic, society. Indeed, civil society is critical for individuality. It is the domain within which individuals are neither coerced by the state, nor competing furiously to

104 *Limits*, 27-28.

105 See, for instance, Richard Overton, "An Arrow Against All Tyrants," in *A Libertarian Reader*, Ed. David Boaz, (New York: Free Press, 1997).

generate material wealth. Instead, it is a sphere within which individuals are free to come together with others (or not¹⁰⁶) to join, remain within, or exit, groups, associations, and communities for the purpose of advancing interests and values that they hold in common.

Such engagement with others is not assumed to rest on peaceful exchanges and toleration. Humboldt notes that in free society there will be differences between people, sometimes quite sharp differences. Moreover, these will lead to clashes between personalities and this is valued positively since it serves to expand one's critical abilities and experiences as one struggles with difference and opposition. However, there are implicit limits to such clashes and oppositions in so far as it is understood that according to nature and critical rationality--i.e. his model of the autonomous individual--one is open to change as one develops. Engaging with others in civil society to develop oneself requires individuals to do more than put up with or tolerate other points of view. Rather it requires individuals to give serious attention to others' perspectives--indeed, to invite them--and to appreciate them as such. This is because in experiencing such difference we can learn to value alternative ways of behaving and thinking, and this helps us to think about other plausible ways of living for ourselves, contributing to the modification of one's individual personality.

Indeed, the real value of discussing Humboldt is precisely that he tries to come to grips with the kind of mentality or state of mind that one would need to live a unique,

106 Withdrawal from society is also an important condition of liberty. Emerson, in particular, was ambivalent about his own participation in society. See, "Society and Solitude" in *The Selected Writings of Ralph Waldo Emerson* ed. Brooks Atkinson, (New York: Modern Library, 1950). Nancy Rosenblum discusses this tension at length in *Another Liberalism*.

dynamic life. As Burrow explains in his introduction to *The Limits*, Humboldt's brand of liberalism has less to say about institutions than most theories of liberalism. Rather, it is a sensibility--an invitation to share a view of life, not a draft for a highway code.¹⁰⁷ Similarly, Mill says "I am now convinced, that no great improvements in the lot of mankind are possible, until a great change takes place in the fundamental constitution of their modes of thought."¹⁰⁸

As I have mentioned Mill, following Humboldt, says that two conditions are required for the development of individuality--freedom and a variety of situations. Neither of these are described in much detail in the chapter on individuality where Mill's principal concern seems to be to argue against conformity, and to argue for its opposite--individuality. Most of the chapter is taken up with what one critic calls "eulogies upon individuality,"¹⁰⁹ rather than practical directions for psychological and institutional reform. Still, these may be reconstructed from other chapters in *On Liberty*, as well as Mill's *Autobiography* and other essays.

Freedom

Like Kant in his essay "An Answer to the Question: 'What is Enlightenment?'"¹¹⁰

107 Burrow, xlix.

108 J.S. Mill, *Autobiography* (London: Penguin, 1989), 180.

109 James Fitzjames Stephen, *Liberty, Equality, Fraternity* (Indianapolis, IN: Liberty Fund, 1993), 29.

110 Immanuel Kant, in *Political Writings* Ed. by Hans Reiss, (Cambridge: Cambridge University Press, 1991), 54-60. Kant says that all men have the rational capacity and duty to think for themselves. He blames laziness and cowardice for immaturity and calls for resolution and courage. But Kant calls for the free

One reading of Mill is to interpret him as saying that once free from the constraints of the state and society, the individual will automatically choose to develop himself and move towards individuality (enlightenment). Kant exhorts free individuals to emerge from their "self-incurred immaturity" and toward enlightened maturity. Mill allows for restraints in connection with other-regarding behavior, but he wants purely self-regarding behavior to be free from all restraint so that they may develop their individuality. He says "To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing more valuable, except such force of character as may unfold itself in resisting restraint. If acquiesced in, it dulls and blunts the whole nature."¹¹¹ Considered in isolation, the condition of (mere) freedom for individuality is problematic, as several commentators have pointed out. In her discussion of Humboldt, Ursula Vogel notes the same problem. She says that the notion that withdrawal from the state will provoke a spontaneous association by the people to develop themselves seems to rest upon "mere optimism." There is no necessary causal connection. Vogel cites Robert Paul Wolfe's charge of the "poverty of liberalism" in this connection. Wolff himself questions whether, in fact, the development of individuality might not be better served by

use of public reason. The private use of freedom (Millian individuality?) may be restricted, even quite narrowly.

¹¹¹ Ibid, 63-64.

some "judicious limitations upon the individual."¹¹² An earlier more scathing version of this argument that was directed at Mill's appeared in the work of James Fitzjames Stephen:

The great defect of Mr. Mill's later writings seems to me to be that he has formed too favorable an estimate of human nature. This displays itself . . . by the tacit assumption which pervades every part of it that the removal of restraints usually tends to invigorate character. Surely the very opposite of this is the truth. Habitual exertion is the greatest of all invigorators of character, and restraint and coercion in one form or another is the great stimulus to exertion. If you wish to destroy originality and vigor of character, no way to do so is so sure as to put a high level of comfort easily within the reach of moderate and commonplace exertion. A life made up of danger, vicissitude, and exposure is the sort of life which produces originality and resource . . . Almost every human being requires more or less coercion and restraint as astringents to give him the maximum of power which he is capable of attaining. The maximum attainable in particular cases depends upon something altogether independent of social arrangements--namely, the nature of the human being himself who is subjected to them; and what this is or how it is to be affected are questions which no one has yet answered.¹¹³

The charge with respect to the excessively optimistic assumptions about human nature can only be settled empirically. But it must also be said that Stephen's reading of Mill isn't entirely fair. Mill was referring to a kind of relative freedom--freedom from some institutions, but not total freedom. On the contrary, Mill has a strong sense of moral obligation and duty, particularly in connection with the

112 See Vogel, *ibid*, 80-81, and Robert Paul Wolff, *The Poverty of Liberalism*, (Boston: Beacon, 1968), 26-27.

113 James Fitzjames Stephen, *Liberty, Equality, Fraternity*, 31. Stephen also quotes from an article by his younger brother who goes further still: "The growth of liberty in the sense of democracy tends to diminish, not to increase, originality and individuality. 'Make all men equal so far as laws can make them equal, and what does that mean but that each unit is to be rendered hopelessly feeble in presence of an overwhelming majority?' The existence of such a state of society reduces individuals to impotence, and to tell them to be powerful, original, and independent is to mock them. It is like plucking a bird's feathers in order to put it on a level with beasts, and then telling it to fly," 30.

development of a conscience to guide our actions. In fact, the Millian individual requires considerably more than freedom to develop, as Mill himself acknowledges, especially in his *Autobiography*. In particular, he needs discipline and a good deal of education, including formal schooling to shape his natural capacities, as well as debate with others as they experience life.¹¹⁴

Education and a Variety of Situations

Like Humboldt, Mill relies upon certain innate capacities, but also particular cultural conditions, including freedom and a variety of situations, for the development of man as a unique "progressive being." The latter involves extensive formal education or schooling and the broader education provided by the "experience of life," including political participation and cultivation and development in civil society with ones peers. In the fifth chapter of *On Liberty* Mill states that parents have a duty to provide for their children and the state should require and compel the education of children up to a certain standard.¹¹⁵ Such education will help to strengthen their faculties, exercise their judgment, and give them a basic knowledge of subjects they need to know.¹¹⁶ In the *Autobiography* he details his own highly unusual education but this cannot be taken as a standard to be emulated by other individuals, and judging by Mill's description of his mental breakdown we should not expect that he

114 J.S. Mill, 1989, chapter 2.

115 Ibid, 105. However, the provision of education should be done privately. State provided education will, as Humboldt argues, produce conformity and homogeneity.

116 Ibid, 109.

considered it to be exemplary.

Public Intellectuals

At bottom, the crucial problem as Mill sees it is not in finding the means to the end, but rather public opinion and the indifferent attitude to individuality displayed by large portions of the population. ("The danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences.") He says,

If it were felt that free development of individuality is one of the leading essentials of well-being; that it is not only a coordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things; there would be no danger that liberty should be undervalued, and the adjustment of the boundaries between it and social control would present no extraordinary difficulty.¹¹⁷

If all individuals had the appropriate mentality for developing individuality there would be little difficulty in individuals realizing the value of individuality, both for themselves and for society. But this is precisely the difficulty.¹¹⁸ In fact, being disposed to adopt such a mind-set and then actually adopting it *is* the chief means--a necessary, but not sufficient condition and the component for achieving individuality as an end. Freedom and a variety of situations might be sufficient to cultivate individuality *if one is already committed*

117 Ibid, 57.

118 Jeremy Waldron notes this "collective action problem," pointing out that Mill is charged with elitism because he looks to the educated and intelligent to help to reform public opinion. If Mill had been concerned with political and legal repression instead of social repression, it would be obvious that one should look to an elite, since they are (on Mill's theory of representation) the one's who control the constitutional decision-making. See "Mill as a Critic of Culture," paper presented at the American Political Science Association Meeting, Atlanta, GA, September 1999, n37.

to it as an ideal, but one must first become committed to the ideal. This is what choosing to do things for ourselves means. Presumably Mill thinks that some individuals--those, who like him, have already had extensive education and who recognize their own human capacities--acknowledge the value of individuality and pursue it, but the rest of society needs to be persuaded and exhorted. Mill suggests that part of the solution is for public intellectuals to appeal to society--especially the "intelligent members of the public," and to get them to recognize the value of individuality so that they may help to work on its behalf.

Public intellectuals also play an important role in Emerson's theory of individuality. This should not be surprising since Emerson himself was a prolific essayist and widely-travelled public lecturer. But these are not to act as models of genius or individuality at its most flourishing to be copied or emulated. Rather, their role is to stimulate and inspire others to take responsibility for their lives and to live and to think critically.

On both Mill's and Emerson's views, society has come to resemble Humboldt's state in so far as it shares similar features of force and rigidity. Protestant commercial society cannot take account of difference and individual particularities--indeed it actively promotes conformity rather than diversity--but, unlike the state, this does not have to be the case.¹¹⁹

¹¹⁹ This suggests another important difference between Humboldt and Mill. Humboldt is dealing with universal claims about the state in relation to freedom. Mill's argument is more empirical and particular, having to do with a specific historical moment in a particular society. Mill's historical sense is apparent in his *Autobiography*, when he employs it as one justification for his writing the book. He says, "It has also seemed to me that in an age of transition in opinions, there may be somewhat both of interest and benefit in noting the successive phases of any mind which was always pressing forward, equally to learn and unlearn either from its own thoughts or from those of others," 25. Both types of arguments are important for libertarians who are concerned about the theory and practice of liberty.

Rather, it rests upon the thoughtlessness and laziness of individuals who compose society, but who may, in theory at least, be persuaded and exhorted to act otherwise if the cultural norms of society are reformed. The call for individuality is, then, in a narrow sense, a call for liberation. But it is liberation from a particular kind of society--passive, protestant, conformist democracy. It is decidedly not a universal call for individual liberation from any society or any social ties and standards altogether. Rather, it is a plea for excellence and creativity—self-development, not self making or self-enactment--from within a broad-minded, liberal society. Some social constraints are still necessary (the harm principle backed by the power of the state, and conscience for moral guidance), it is a question of choosing the right ones and getting the balance between constraint, self-discipline and individual self- expression right.

On Liberty is often considered to be a manifesto for individuality, and yet, as I have suggested, Mill's argument is not a straightforward as Humboldt's. Certainly, there is no doubt that Mill is a complicated figure. In *On Liberty* he draws on both utilitarianism and its antithesis--romanticism. He proclaims that freedom means "pursuing our own good in our own way so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it,"¹²⁰ but he clearly favors a particular kind of life--a life lived pursuing individuality (poetry not pushpin) is superior to a life of mere money making. Alan Ryan says that the apparent contradiction here may be explained by the distinction between political (i.e.

120 J.S. Mill, 1989, 16.

coercive power and enforcement of a type of open-ended political (neutral) liberalism by the state, and a moral imperative backed by persuasion and exhortation championed by enlightened individuals in the private sphere. In other words, the argument is an example of the kind of argument that I discussed earlier. It combines negative political theory with an ethics of positive theory.¹²¹ Furthermore, Mill's justification for pursuing individuality is both social and individual--which would seem to suggest that perhaps he has more in common with Murray than would first appear. Consequently, in certain respects, Mill's notion of individuality, and the normative political and social theory that he locates it within are somewhat problematic for theoretical libertarianism. However, his ideas are still useful precisely because he is complex--a true liberal pluralist--and because he points us to some of the theoretical and practical challenges associated with the cultivation of individuality in a free society.

Implications for a Reform of Libertarianism

If libertarianism is going to treat individuals and their freedom seriously, then a good deal needs to be said about the kinds of individuals it assumes already exist and that might be developed within a libertarian regime. Treating individuals and their freedom seriously means that libertarianism relies very heavily on individual character (personality) and action to guide behavior, and rather less (in some cases a good deal less) than other political and

¹²¹ See *The Philosophy of John Stuart Mill*, (Second Ed.) (Atlantic Highland, NJ: Humanities Press, 1987), 233-255.

social theories on social and political institutions.¹²² In short, the burden resting upon the individual is great. Put more positively, however, we might also argue that the potential for individual development and flourishing is comparatively large, and this is where my focus lies. Since I am interested in considering the development of libertarian freedom as individuality and since individuality is largely (but not exclusively) a state of mind, (individuals need to act on their thoughts) the basic mental disposition of an individual is a crucial component here.

What is needed is a broader, pluralist conception of the self, not the substitution of one form of single-mindedness by another. Culture and material wealth are both important for freedom, but first the discussion will focus attention on what is ordinarily neglected within libertarian accounts. Thus, from the perspective of a libertarian vision, the work of theorists such as Robert Nozick and Milton Friedman are important and valuable, but they are also severely limited. Presently I shall point out what is lacking in the reigning theories, before outlining a theory of libertarian individuality more fully, combining a broader model of the self with a particular set of personality traits to produce a free, distinctive, and unique

¹²² However, obviously institutions, particularly law and associations in civil society, will still have some influence, as I shall argue in the subsequent chapters. The free individual who pursues individuality is not a perfectly free existentialist or self-creating Nietzschean God, but rather a situated autonomous individual that develops himself within a social context. See below.

life plan. But first I want to say something about what I mean when I invoke the terms "mentality" and "personality" since these connote important ideas about the manner in which the individual conceives of the self and in turn the kinds of possibilities and opportunities open to the self in relation to living a free life.

In discussing the reconstruction of civil society in Poland, Karol Soltan employs the concept of "mentality" that is apt in this connection.¹²³ Soltan draws upon the work of various culturalist theorists including Harry Eckstein who describes mentalities in terms of "orientations to action." These are "general dispositions of actors to act in certain ways in sets of situations. Such general dispositions pattern actions . . . "Orientations" do the processing (of experience). We may call them, as did Bentley, soul-stuff, or mind-stuff."¹²⁴ Eckstein describes "orientations" as having three components: *cognitive* elements that decode experience (give it meaning); *affective* elements that invest cognition with feelings that "move" actors to act; and *evaluative* elements that provide goals toward which actors are moved to act. A similar approach has been developed by psychologists Hazel Markus and Paula Nurius who discuss the idea of "possible selves."

This type of self-knowledge pertains to how individuals think about their potential and about their future. Possible selves are the ideal selves that we would very much like to become. They are also the selves we could become, and the selves we are afraid of becoming. The possible selves that are hoped

123 Karol Edward Soltan, "Agape, Civil Society and the Task of Social Reconstruction," *Cardozo Journal of International and Comparative Law* 4 (1996), 214-260.

124 Harry Eckstein, "A Culturalist Theory of Political Change," *American Political Science Review* 82:3 (September 1988), 790-791.

for might include the successful self, the creative self, the rich self, the thin self, or the loved and admired self, whereas the dreaded possible selves could be the alone self, the depressed self, the incompetent self, the alcoholic self, the unemployed self, or the bag lady self.¹²⁵

Markus and Nurius explain that future possible selves can be imagined containing representations of potential roles or statuses. These embody various individually significant hopes, fears, and fantasies, and as such are important in providing incentives for future behavior, as well as evaluative and interpretive tools for the current view of the self. This approach seems particularly inviting for libertarianism since it places strong emphasis on free will: Markus and Nurius state that through the selection and construction of possible selves individuals can be viewed as active facilitators of their own development. To what degree are contemporary libertarian theories sympathetic to such views, and to what degree are they agnostic or even perhaps hostile to such views?

Communitarian Libertarianism and Autonomy: An Ambivalent Relationship

Generally, when libertarians think of autonomy they get rather nervous. This is because thus far libertarianism has primarily concerned itself with minimizing the role of the state in society, and autonomy is frequently invoked by those who would like to utilize the state's powers to promote the positive welfare of its citizens using political institutions. This is especially so in the case of economic welfare and redistributive economic policies generally. So, for instance, in a discussion of "self-ownership" or the "right to life"

125 "Possible Selves," *American Psychologist*, 41:9, (September 1986), 954.

(synonyms for autonomy), David Boaz has complained "Other people, mostly on the political left, would argue that the "right to life" means that everyone has a fundamental right to the necessities of life: food, clothing, shelter, medical care, maybe even an eight-hour day and two weeks of vacation. But if the right to life means this, then it means that one person has a right to force other people to give him things, violating their equal (natural) rights¹²⁶ (to be left alone, or "to live your life as you choose so long as you don't infringe on the equal rights of others.")¹²⁷ Such worries have been exacerbated further still with the evolution of the therapeutic culture, particularly as this pervades the practices of administrators and caretakers in the state, causing alarm at intrusions on the most private aspects of the self.¹²⁸

Both kinds of interference are rejected by libertarians on the grounds of moral principle and empirical considerations. According to libertarians a state that attempts to do more than provide security for the individuals who live under it goes beyond the legitimate bounds of its authority. Secondly, empirically other non-political institutions within local communities such as families, churches, and voluntary associations within civil society (including the free market) are said to provide the goods desired by individuals more efficiently and effectively than the impersonal bureaucratic state and help to cultivate a moral sense, including responsibilities to others. Charles Murray has written extensively

126 David Boaz, *Libertarianism, A Primer*, 64.

127 Ibid, 59.

128 This line of argument is continued and refined in James L. Nolan's *The Therapeutic State, Justifying Government at Century's End* (New York: NYU Press, 1998).

about the public policy implications of the welfare state's crowding out of "systems of enablement" in local communities in *Losing Ground* and *In Pursuit (of Happiness and Good Government)*, as well as his recent *What it Means to be a Libertarian*.¹²⁹

Granting these concerns their due, we should nonetheless expect that those who value individual freedom have a central place for a concept like autonomy, so long as it is linked to moral rather than political considerations,¹³⁰ and in fact they do. However, they tend not to refer to the idea using the term "autonomy," preferring instead to invoke claims concerning self ownership, or as we have seen, a "right to one's life." On the other hand, when they occasionally refer to autonomy, it bears little resemblance to the neo-Kantian notions that political theorists tend to discuss when they refer to autonomy and this is because they have neglected personal liberty.

One gets the impression that libertarians believe that once the state is removed we are, or should be, free morally and even perhaps, metaphysically. Individuals are considered to be free as a matter of natural fact, and natural rights, respected by political authorities, signify this. Moreover, the free character rests upon an inherently optimistic conception of human nature *if* it is liberated from the state. To quote Charles Murray again ". . . man acting in his private capacity--*if restrained from the use of force*--is resourceful and benign,

129 See also, David Beito, "Mutual Aid for Social Welfare: The Case of American Fraternal Societies," *Critical Review* 4:4 (Fall 1990), 709-36.

130 Moral constraints rest on persuasion, education and exhortation. Political constraints are coercive and are backed by power and force.

fulfilling his proper destiny; while man acting as a public and political creature is resourceful and dangerous, inherently destructive of the rights and freedoms of his fellow men."¹³¹ Murray goes on to discuss a human capacity to act as an autonomous being, but this relates only to an innate moral sense or something that he calls "approbativeness"--an "ineradicable desire of men to receive approval and to avoid disapproval." Following Adam Smith and A.O. Lovejoy, Murray claims that "approbativeness" is a natural trait that is stimulated by man's move into society--his natural need to secure approbation from fellow members of society. When the moral sense derived from reason and virtue is lacking, approbativeness serves as a replacement "by leading people to behave in ways that are *functional for the society* in which they wish to reside."¹³² Furthermore, he claims that if we observe free societies we can see that approbativeness is an empirical fact.

This account is quite different from most discussions of autonomy, since they draw upon, but also develop and cultivate (or curtail) natural capacities using critical rationality. Murray's account suggests a rather static, underdeveloped, and, for a libertarian, an overly communitarian conception of the self and her autonomous life. It resembles Riesman's other-directed individual, rather than the inner-directed autonomous agent.¹³³ This is hardly

131 Murray, (1994), 127. Emphasis in the original.

132 Ibid, 131. Emphasis added. Cf. Joel Feinberg: "Perhaps we are all self-made . . . except those who have been severely manipulated, indoctrinated, or coerced throughout childhood. But the self we have created in this way for ourselves will not be an authentic self unless the habit of critical self-revision was implanted in us early by parents, educators, or peers, and strengthened by our own constant exercise of it. "Autonomy," in *The Inner Citadel*, Ed. John Christman, (Oxford: Oxford University Press, 1989), Chapter 1, 9.

133 See David Riesman, *The Lonely Crowd* (New Haven: Yale University Press, 1961), and Wilfred

the model of an individual who prizes freedom above all else. Of course, Murray is right to situate the individual within a society or local community since no one--not even the strongest willed, free and most rational libertarian--is completely free in the sense of having no attachments and frames of reference. However, on his view it is difficult to see exactly what kind of role choice will play in the development of the self and calls attention to the kinds of criticisms that J.S. Mill and Emerson made of society in *On Liberty* and "Self Reliance" respectively.

In fact, the autonomous libertarian individual is closer to the individual described by Stephen Macedo: "The autonomous individual is a socially embedded individual, one who understands his intellectual and cultural inheritance but is determined to make that inheritance his own by fashioning an individual character and life plan, and by turning his participation in social practices into performances expressive of his individuality."¹³⁴ Liberal individuals are situated, but they are also--and must be--autonomous in the sense of having some ability to think for themselves and look after themselves.¹³⁵ Within certain

M. McClay, "Fifty Years of the Lonely Crowd," *WQ*, Summer 1998, 1-11.

Cf. J.S. Mill: "In our times, from the highest class of society down to the lowest, every one lives as under the eye of a hostile and dreaded censorship. Not only in what concerns others, but in what concerns only themselves--what do I prefer? Or, what would suit my character and disposition? or, what would allow the best and highest in me to have fair play, and enable it to grow and thrive? They ask themselves, what is suitable to my position? What is usually done by persons of my station and pecuniary circumstances? or (worse still) what is usually done by persons of a station and circumstances superior to mine? I do not mean that they choose what is customary, in preference to what suits their own inclination. It does not occur to them to have any inclination, except for what is customary." *On Liberty*, 61.

¹³⁴ *Liberal Virtues* (Oxford: Clarendon, 1990), 219.

¹³⁵ When I use the term autonomy I am employing it in a rather loose and general sense to point to a

limits they have the capacity to interpret and criticize their own preferences, to choose to change their own life plans and commitments. This must be so if libertarians are to retain their legitimate claim to be liberals who value freedom, rather than conservatives who favor custom, security, and tradition. After all, libertarianism is more than a skeptical rejection of state power and control.

Murray's naturalness account of freedom is unconvincing precisely because freedom is an achievement--both for the individual and the society that she lives within. To the degree that this is so, a concept like autonomy will have quite an important role to play in a libertarian theory.¹³⁶ This is especially true if the theory is oriented to practice, and attempts to go beyond narrow criticism of the state to outline how a libertarian vision or good society might look. In that case, the concept of autonomy can be used to think through the means of achieving libertarian freedom in connection with mentalities and other capacities. Traditionally, this has meant looking to the family, religion, and community. Are these still reliable institutions for fostering libertarian capacities in a post-modern age or do we need to

minimal capacity for independence, reasoning, and judgment. Here I follow Smith, Mill, and Terchek in their moral philosophy, rather than Rawls and other contemporary analytic philosophers. As noted above, I am sympathetic to Galston's preference for diversity over autonomy for a political theory--in terms of what individuals need to participate as citizens within the political domain; however it seems to me that the logic of libertarianism rests upon and requires something more of individuals than Galston's liberal democratic pluralism when the focus shifts to civil society. This is especially true of strong individualists and those who pursue self-development strenuously.

¹³⁶ Ronald Terchek criticizes libertarians' inattention to moral autonomy: "...one wonders about the little attention given to moral autonomy in the libertarian account. The reduction of state intrusion and the protection of robust markets are not sufficient structural requirements for Smithian autonomy, however much he thinks these are important, contributory elements to the good life. Smithian agents must also be able to overcome necessity and insecurity if they are honestly to express their moral sentiments." *Republican Paradoxes*, 194.

look to new institutions? This is a question that Ronald Terchek poses in his article "The Fruits of Success and the Crisis of Liberalism,"¹³⁷ and casts doubt upon liberalism's ability to sustain itself in the face of the decline of the influence of these institutions. If this is correct, then those who wish to argue for a libertarian regime will need to think carefully about two questions: 1. The kinds of institutions desirable for their society to help to foster the psychology and other capacities libertarian individuals will need to achieve their freedom, but also 2. What is practically possible and viable in the light of changes in cultural and institutional norms, values, and expectations. It seems likely that education--both formal schooling and education through experience of life-- will play crucially important roles for the development of mentalities and other capacities.¹³⁸ But in relation to the second question, another possibility is to revise our expectations downwards, and instead of looking to foster or encourage a certain sort of romantic individual as I am trying to do here, or even a moderately rational, deliberative liberal democratic citizen as many contemporary political theories try to do, we might, as Judith Shklar and Nancy Rosenblum suggest, focus our attention first on the containment of the worst aspects of political-social life, and try to provide opportunities for the inclusion of those who are suffering from alienation and anomie, before noting that within the same regime there will be opportunities for other, more

137 See *Liberals on Liberalism* ed. Alfonso J. Damico, (Totowa, NJ: Rowman & Littlefield, 1986).

138 See Richard Flathman's outline of liberal education in his "Liberal versus Civic, Republican, Democratic, and Other Vocational Educations: Liberalism and Institutionalized Education" for the sort of education that would be appropriate for libertarian citizens in his *Reflections of a Would-be Anarchist*, chapter 7.

stable, secure (and fortunate?) individuals to cultivate themselves and each other in free associations within civil society. Nancy Rosenblum tries to answer this question with a discussion of various associations, including illiberal groups such as militia in her *Membership and Morals*. This will be discussed further in chapter 5. Here I mention this to give a sense of the problems entailed in the attempt to realize a libertarian vision.

From Autonomy to Individuality

In his analysis of Mill's individuality, Peter Berkowitz equates individuality with autonomy and self governance.¹³⁹ However, it seems to me that autonomy in the sense that I mean to employ it here--to convey a degree of individual self responsibility and self direction in planning a life as Tocqueville, Mill and other nineteenth century theorists used it (i.e. not a purely rational, deliberative analytic state in the manner of Rawlsian ideal theory) is not quite enough for individuality. Rather, autonomy is a necessary pre-condition for individuality, where the latter means not only independence and responsibility, but also the development, using autonomy, of a unique, distinctive and flourishing personality. Evidently this is an ideal and the degree to which each individual is able to approach the ideal (and chooses to do so) will vary in practice according to differing capacities and tastes. Nonetheless, it seems to me to be an attractive ideal for all, and all individuals should be encouraged to pursuit it to the degree they are able and wish to do so. It is, in short, a democratic ideal in the sense that it (nominally) is open to all.

¹³⁹ See *Virtue and the Making of Modern Liberalism*, (Princeton: Princeton University Press, 1999),

What does this mean for today's libertarian self in practice? As a *general disposition* we would expect a libertarian orientation to be strongly in favor of individual freedom and against authority, to be supportive of individual initiative and against conformity. Beyond this, however, we can expect the orientation to shape *particular attitudes* connected to experience within various spheres of society, such as individuals' attitudes to the state, their work in the market, and interpersonal relations and associations in civil society. According to current libertarian conventional wisdom individuals should be hostile to the state since they are opposed to its authority and coercive means, highly favorable to the commercial market since it is the primary site of voluntary association and exchange producing freedom and wealth, and mildly positive or silent about the function of civil society--another site of freedom through free association, but not one that is considered to create much positive value since it is social rather than economic.

By contrast, as a practical matter a revised libertarianism will encourage individuals to maintain their suspicion with respect to the state, but they should also recognize that so long as it abides by the rule of law, a limited but strong state is necessary and beneficial to a free society--even a society composed of individuals pursuing individuality--to the extent that it secures the basic conditions of liberty by providing the protection of property. The market should be treated with cautious, but not uncritical respect so that it is valued for its promotion of (a certain kind of) freedom (based on consent and contract) and its wealth

creation (both necessary, but far from sufficient conditions for individuality), but its limitations and problems (the tendency to produce homogenization, rationalism, to consider means not ends) must also be recognized and counterbalanced by non-material spiritual elements cultivated in civil society. Indeed, the potential role of civil society in developing free individuals through their associations needs to be given greater emphasis and consideration in libertarian thought since this is where individuals may become truly and uniquely individual, but as Mill warned, the oppressive aspects of culture must also be born in mind. Thus, an important part of a libertarian disposition is its pursuit of freedom and criticism of authority in several different domains of society--not just the state. A free life and the state of mind that accompanies it must be multi-faceted, critical, but above all, well-balanced.

That said, discussing a new libertarian state of mind as an orientation in this way still does not go quite far enough. Considering orientations and attitudes in different domains of society is useful because it helps to highlight the scope--the multiple aspects of the self as citizen, producer, consumer, employee, and member of various associations--but it does not tell us anything about the *manner* in which an individual inhabits each domain or the potential for developing a unique personality. Put differently, the other point I wish to call attention to is the dynamic and strenuous aspect of a libertarian personality. Mill said "It really is of importance, not only what men do, but also the manner of men they are that do it. Among the works of man, which human life is rightly employed in perfecting and

beautifying, the first in importance surely is man himself."¹⁴⁰ Living a free life to its fullest requires strenuousness, discipline, vitality and creativity. For true libertarians freedom is not passively discovered; rather it is a dynamic and perhaps even progressive achievement of the individual struggle for self-development. Further, underlying all of this is a deeper assumption that goes to the heart of the nature of a libertarian self--a self that, to the fullest extent possible, casts off determinism and develops its will freely and strenuously within a particular historical and social context. In this connection Nancy Rosenblum has highlighted one of the crucial underlying assumptions (and problems) of classical liberal (and libertarian) theory:

... classical liberal thought describes an individualism for the strong. This is especially true of Locke and Kant, for whom enlightenment requires "heroic" action, the throwing off of priestly and political authorities and striving for personal independence. Autonomy demands struggle against tyrannies on every front and against ingrained habits and prejudices. Enlightenment is something that can only be done by oneself, not by or for others. Individuals are not simple beneficiaries of liberty, then, but aggressive personalities who need to assert themselves to win it in the first place. And when they do, they are thrown back on themselves.¹⁴¹

The use of the term "personality" (possible self) is significant here and I employ it quite deliberately instead of the more commonly used term, "character." This is because "personality" conveys a degree of freedom and creativity as well as the possibility for development, together with dynamism, distinctiveness, discipline, and uniqueness, that the

140 J.S. Mill, 1989, 59.

141 Rosenblum, *Another Liberalism*, 21.

word "character"--with its aristotelian associations--lacks. Rather, the latter often suggests a collection of traits or characteristics that one is born with and must therefore live within, or the product of the working out of some given nature or *telos*. In either case the individual "character" is, in some sense, pre-determined and settled.¹⁴² As such, there seems to be little, if any, room for imagination and creativity. The problem with the idea of an individual "character" is that such a collection of elements does not bear the mark of choice and self-development in the way that personality--especially as it was used by romantic individualists--appears to do. In contrast to Aristotelian theorists, champions of individuality like Humboldt stress that the identity of the self is never fully arrived at or achieved; free identity is a continuous experiment or journey. Thus, a libertarian self would rest on a plural, and strenuous or vital personality that champions distinctiveness and originality.

With this bare sketch I have started to introduce the kind of self that I believe libertarianism might hold up as its promise--one that could be used to justify a minimal, but strong government. Cultivating the mentality of individuality may be desirable, but is it a viable ideal for all or most people living in the United States today? This is a matter that has to be settled first theoretically, by making an appealing argument, and then empirically by persuading and encouraging public opinion to change. Still, it must be admitted that it is a

142 Although, cf. J.S. Mill, one of the chief modern liberal exponents of individuality who is tremendously concerned with free choice and self-development, does employ the term "character" rather than personality. Mill says "A person whose desires and impulses are his own--are the expression of his own nature, as it has been developed and modified by his own culture--is said to have character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has a character." *On Liberty*, 60-61.

strenuous requirement--undoubtedly one that is more demanding than Murray's "not very demanding standard." Cultivating individuality will create a strain on individuals. But it is worth remembering that, as Kateb points out, conforming with everyone else is also a strain.

CHAPTER 3: POLITICS AND CITIZENSHIP IN A LIBERTARIAN REGIME

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹⁴³

Outlining the mentality of a libertarian individual who pursues individuality as I did in the previous chapter is crucial to my argument since it highlights the essential theoretical and practical¹⁴⁴ component necessary for the cultivation of the libertarian self, where the theoretical justification for re-conceiving libertarianism is that individuality is (or should be) more appealing to libertarians than individualism because it serves to fulfill the promise of libertarianism in promoting a truly free and unique human life. On this view individuality is the (best) end of libertarianism, and a particular state of mind is the key element that

¹⁴³ James Madison, Federalist 51, *The Federalist Papers*, Ed. Clinton Rossiter, (New York: Penguin, 1961), 322.

¹⁴⁴ Thinking the "right way" is insufficient. Thoughts must impel individuals to act to cultivate their individuality. Consequently, mere stoicism or ironic self-detachment is insufficient for individuality.

separates individuality from conventional libertarianism based on narrow individualism.

However, if the account is to be persuasive to libertarians who take pride in their practical, empirically grounded politics and policies, individual psychology must be supplemented by institutional design. i.e., What is needed in addition to a state of mind is an account of the likely state of society--the (pre-) conditions under which it would be possible to transform that aspiration into a reality so that they are free to choose to become active, cultivated members of civil society within a libertarian regime. Mentalities, after all, require cultivation through training and education within particular institutional settings. This is important because to be convincing an alternative account of libertarianism needs to provide a sketch of how the institutions of libertarianism would look, explain how they might help to foster certain capacities, and thereby provide some reasonable hope that the alternative vision would work in practice. Only in a libertarian society can a life truly worthy of flourishing human beings be achieved. To the extent that libertarian individuality is both theoretically appealing *and* practically possible, it should be attractive to those who take individual freedom seriously. To the extent that it is merely an aspiration (i.e. utopian), it is (or should be) irrelevant to libertarians. For libertarianism is a practical political theory in the broadest sense; it is not ideal theory. Hence, there is a need to join individual psychology to practical social institutional analysis, to which I now turn in this chapter and the subsequent chapters. Consideration of the individual will now take second place behind the institutional analysis starting with politics. An outline of citizenship will follow the role of politics within the regime. However, before introducing the particular domains within a revised libertarian regime, a few words need to be said about the overarching meta-

theoretical approach which connects each of the parts to the other.

Constitutionalism

Although the theory that is advanced here--libertarianism conceived as a theory of individuality—would be most fully manifested within a particular sphere of society (civil society) it is not sufficient to focus only on that sphere. Rather, because the point would be to think about how actual individuals and institutions relate and work together to realize freedom in practice, we must think about the manner in which libertarian pluralism is practiced organizationally or structurally through its institutions. This requires us to think constitutionally: "Constitution" in the sense employed here refers to the "shape," "composition," or "establishment" of a people in their political association. The constitution of a regime, then, not only sets out offices and powers, the frame of government. It is more generally an "ordering" by which the organization (order) of something gives it its constitution. A constitution then forms a polity, enabling it to act by giving it form. A theory of political constitution defines the constitutive institutions through which a regime acts.¹⁴⁵ We need to think about the functioning of institutional connections, interconnections, and oppositions as we balance the parts of libertarian lives if we want the political system to function in a certain way (i.e. to protect and advance freedom). Precisely how these will look in practice will depend on specific conditions, but the general point about the recognition of the social relations of individuals and institutions is the crucial one,

¹⁴⁵ Stephen L. Elkin, "How to Think Constitutionally" unpublished manuscript, 4-5.

and one that is typically ignored or forgotten in many of the current debates and single-issue policy prescriptions.

Balancing and Incongruence

Borrowing from constitutional law, one might characterize the interpretive approach employed as balancing. As such, this should be regarded as a relatively friendly and modest proposal for reform--one that seeks to modify and supplement current libertarian psychology and institutional arrangements by adding consideration of aspects of the self that may be in tension with the economic and political aspects of the self.¹⁴⁶ Put differently, it is an exercise in liberal pluralism, and one that does not require what Nancy Rosenblum refers to as congruence-- an identical relationship between the values and norms expressed and cultivated in both civil and political society. So, for instance, in distancing herself from the various political theories of democratic community that do require congruence, Rosenblum says:

The public, constitutive purposes democratic theorists assign social groups . . .

¹⁴⁶ Daniel Bell famously makes a similar point in his *Cultural Contradictions of Capitalism*. But for Bell this results in a theoretical incoherence and series of practical problems. If the contradictions are considered less pejoratively as tensions, then perhaps we can talk more usefully about the strength, complexity, and flexibility of liberal pluralism, and the various psychological aspects of the self. Nancy Rosenblum does this by employing Hirschmann's concept of "shifting involvements." "Shifting involvements serves self-cultivation only if one has a sense of oneself as a personality with a history of error, disappointment, imagination, and change. It depends on tolerating a romantic sense of indeterminacy and possibility," *Membership and Morals*, 135.

In general, the approach here follows Mill: "All that we are in danger of losing we may preserve, all that we have lost we may regain, and bring to a perfection hitherto unknown; but not by slumbering, and leaving things to themselves, no more than by ridiculously trying our strength against their irresistible tendencies: only by establishing counter-tendencies, which may combine with those tendencies, and modify them." J. S. Mill, "Civilization," in *Essays on Politics and Society, Collected Works Volume 18* Ed. J. M.

separates them from liberal pluralists like myself, for whom protecting the internal life of groups and associations from the demands of public culture is crucial for personality and liberty, and does not turn on whether or not they are democratizing.¹⁴⁷

By contrast, a more radical model--one that sought to revise both psychology and structural arrangements completely so that they might coincide in a single political value to create congruence across the domains within a regime, would call for the reform of all psychologies and domains of society including and perhaps especially the economy, to be used directly in the service of promoting a single value through a simplified psychology e.g. by substituting rational self-interest and free market economics which is based upon a hierarchical model, for a more affective democratic community sustaining stakeholder psychology and economy along the lines of say, Alperovitz and Faux in *Rebuilding America*, involving a thorough-going democratic or egalitarian way of seeing the world that goes all the way down.¹⁴⁸ This might appear particularly attractive since it is less burdensome to the individual than liberal pluralism to the extent that it all activities are governed by a single value. On the other hand, to reduce all aspects of the self to such a singular psychology seems to me unnecessarily reductive and to be counter to the humanism inherent in liberal pluralism, and indeed, to libertarianism as interpreted here. Liberal pluralism, balancing and

Robson, (Routledge & Kegan Paul, 1963), 136.

147 Nancy Rosenblum, "Democratic Character and Community: The Logic of Congruence," *The Journal of Political Philosophy*, 2:1 (March 1994), 88.

148 *Rebuilding America*, Gar Alperovitz and Jeff Faux (New York: Random House, 1984).

incongruence between the various domains of society are the only appropriate logics for a libertarian individuality because theoretically they provide as much space and opportunity for the individual to live freely and to be an *individual* (meaning, a unique being with a particular set of characteristics) as possible. Furthermore, as Rosenblum points out extensively in her work, if we want a political theory that has some prospect of being able to function in the real world we need to take account of certain facts about human beings and their lives as they are and as they might be. Liberal pluralism can accommodate a whole range of peoples and lives--from romantic individualists to those suffering from radical anomie and some people's ferocious attachment to groups that do not share, and perhaps do not wish to adopt, the characteristic norms of democratic political culture, much less strong community¹⁴⁹. At the same time, the reason for keeping my proposal relatively modest (as a supplemental reform rather than a call for radical revolution) are concern for my stated project and staying true to my stated aims. I am anxious not to stray into another variety of political theory that is not libertarian, but which might (on some accounts at least) appear to be promoting liberty from within participatory democracy or non-statist socialism, rendering liberty derivative from equality or vice versa. Again, such models require congruence across all psychologies and all domains of society--promoting a single conception of equality (and liberty.) Conversely, this model rests on a type of liberal pluralism that does not require

149 Ibid, 96. See also *Membership and Morals*.

congruence. Indeed, it works hard to promote diversity not singularity.¹⁵⁰ So that I am clear, I would like to echo Wilhelm Roepke's thoughts on this matter: He says "Romanticizing and moralistic contempt of the economy, including contempt of the impulses which move the market economy and the institutions which support it, must be as far from our minds as economism, materialism, and utilitarianism."¹⁵¹

Libertarianism, Politics, Government, and the State

A discussion of politics must come first in the part of the analysis devoted to the

150 The phrasing is borrowed from Richard Flathman. Nevertheless, it is important to note that this is an area of concern and contention for those who recognize the disciplining power of the market, including libertarians such as Richard Cornuelle and classical liberals, including Hayek. Cornuelle has complained:

Working people are far, far freer than slaves or indentured servants, but they are not as free as their bosses and not necessarily as free as they might be. . . In a society that is forever boasting of its dedication to democratic ideals, employees are, however affluent they may become members of a subordinate, unmistakably lower, class. . . The regimentation of work has created a political majority whose attitudes about themselves and their world are heavily conditioned by a lifelong habit of subordination--what Hayek called an "employee mentality." How can people see the value of independence and self-propulsion when they work in a system in which they are dependent and subordinate? There is little in their daily experience that would cause them to conclude that a society is kept alive by a continuous process of adaptation, led by independent, enterprising people. They see society as something static--something to be administered. Employed people can scarcely be expected to revere qualities they have been carefully instructed to repress. Instead, they tend to become what the way of work requires: politicized, unimaginative, petty, security-obsessed, and passive.

Richard Cornuelle, "the Power and Poverty of Libertarian Thought," in *The Libertarian Reader* ed. David Boaz (New York: Free Press, 1997), 369. See also F.A. Hayek, *The Constitution of Liberty*, Chapter 8, "Employment and Independence." The difference between so-called left and right libertarians is that most right libertarians fail to acknowledge the power of the market in shaping and structuring individual freedom. When they do, they either are at a loss as to what should be done (Cornuelle) or accept this as part of the natural order of things (Hayek). Left libertarians (e.g. Ellen Willis) will want to use democratic power to try to mitigate the worst aspects of the problem.

151 A *Humane Economy*, (New York: Regnery/Wilmington, D.E.: I.S.I., 1998), 107.

institutional aspect of any constructive critique of libertarianism. This is partly because it is familiar territory, and the conventional critique which is largely focused on politics or statism may be compared with revised, alternative theories of libertarianism such as libertarian individuality. This is a kind of rhetorical maneuver to try to convince libertarians who already understand the virtues of freedom that individuality is simply an extension of some of their existing (cruder) ideas, not an imposter dressed in libertarian language. But also, and more importantly, politics understood in a more abstract, constitutional form, is central to the creative construction, maintenance, and perpetuation of a regime, not simply the construction of a government. If the appropriate mentality is crucial for the realization of individuality in the self, politics is crucial to the institutional life of the regime within which that self lives their life. This is politics as the Founding Fathers understood it, not the world of hidden agendas, rent-seeking, and administrative regulation typically discussed by libertarians who have adopted the lessons of public choice economics. Both views of politics, the critique of statism and coercion on the one hand, and the constitutional (and constituting) role of politics on the other, are important for libertarianism, but each has its appropriate place. One is inadequate within the other.

Since this is a constructive critique of the libertarian movement, I shall begin again with a brief summary of the principal attitudes of conventional libertarians within the movement toward politics, government, the state, and citizenship. This will help to provide some context and a standard of comparison for the theory that follows in which a politics that is consistent with libertarianism, including one that gives priority to individuality, will be discussed. I shall begin by examining the institutional dimension looking at politics,

government, and the state, and then turn my attention to the individual's political role, status, and psychology as a citizen.

Conventional Wisdom

If anything is widely known about libertarianism it is its great antipathy towards politics, government, and the state. At bottom, these activities and institutions are identified with centralized authority and coercive power, and therefore considered to be in fundamental opposition to the advancement of individual liberty that libertarianism champions. Edward Crane of the Cato Institute likes to present the arrangement of society in terms of a simple dichotomy: political society is governed by coercive power, whereas civil society is arranged voluntarily through the choices of individuals.

At the Cato Institute we prefer to discuss the political battle--that is, the individual's relationship to the state--in terms of civil society versus political society, rather than liberal versus conservative or even libertarian. In a civil society you make the choices about your life--how to spend your money, where to send your children to school, and so forth. In a political society, based as it is on coercion, somebody else--a politician or a bureaucrat--makes those decisions. The goal, it seems to us, should be to minimize the role of political society consistent with protection of our individual liberties.¹⁵²

According to this view, morally government activity is regarded negatively because it encroaches on individuals' sphere of (natural) liberty; practically it is criticized for its

152 "The Future of Liberty," *Cato Policy Report* Vol. XXII No. 1, January/February 2000. Obviously this is tremendously over-simplified and neglects all of the various ways in which customs, norms, and other structures in civil society inhibit individual freedom, as I tried to point out in the previous chapter while discussing Charles Murray's (quite conscious) acknowledgment of this fact. This will be taken up later in chapter 5 on civil society. Here I cite Crane to illustrate the context within which libertarians typically consider politics.

inefficiency (largely due to the knowledge problem identified by Hayek,¹⁵³) and its corresponding displacement and crowding out of private, voluntary relations between individuals and institutions. In addition, there is the problem of its corruption in serving special, privileged interests identified by the public choice school,¹⁵⁴ rather than acting on behalf of all. The following comment from Boaz and Crane is typical. "Citizens increasingly recognize not just that politicians are indebted to special interests and will do anything to be reelected but that politics and government are becoming irrelevant to society's real needs. In our complex world, governments cause far more problems than they will ever solve; in fact, governments themselves cause most of the social problems they are called on to solve."¹⁵⁵ For his part, Charles Murray shares some of the same antipathies, but he recognizes three legitimate uses of government power: police power to protect people

153 F.A. Hayek, "The Use of Knowledge in Society." *The American Economic Review*, Vol. XXXV (September, 1945), No. 4, 519-530. Hayek is describing the problem faced by rational economic planners, but the situation is just as pertinent for political theorists and designers. He says "the peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess. The economic problem of society is thus not merely a problem of how to allocate "given" resources—if "given" is taken to mean given to a single mind which deliberately solves the problem set by these "data." It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know. Or, to put it briefly, it is a problem of the utilization of knowledge not given to anyone in its totality." 519-520.

154 See David Boaz, *Libertarianism, A Primer*, chapter 9, "What Big Government Is All About," 186-209, and, of course, the seminal work by James M Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor: University of Michigan Press, 1962).

155 David Boaz and Edward H. Crane, "Introduction," *Market Liberalism*, (Washington, DC: Cato Institute, 1993), 13-14.

against force and fraud, the enforcement of private contracts, and the provision of a few select public goods.¹⁵⁶ Taken together these points give rise to an apparently anarchistic tendency within libertarianism. Indeed, anti-government pronouncements denote an attitude or disposition that is real within libertarianism. (The first section of Boaz's *Libertarian Reader* is devoted to excerpts discussing skepticism regarding power--meaning skepticism concerning the state.) Following the essentially critical line of argument, libertarianism is said to be an attractive political philosophy because government is bad (coercive/inefficient/too large and exceeding its rightful authority.) Libertarianism is anti-political politics. But this is only one aspect of libertarian politics--at least, it must be only one aspect, rather than the totality of libertarian politics if libertarianism is to move from critique to a vision or regime theory because by itself such a critical attitude provides little guidance as to what should replace the power, coercion and interest of conventional political life. At best, the anti-political libertarian relies too much on hope and reason. Bernard Crick's discussion of the "a-political liberal" captures the problems associated with this outlook well. He explains, the a-political liberal "overestimates the power of reason and the coherence of public opinion; he underestimates the force of political passions and the perversity of men in often not seeming to want what is so obviously good for them." Furthermore, "his claim that society is logically prior to the state begs the entire question of

¹⁵⁶ See Murray, *What It Means to Be a Libertarian*, chapter 1. Murray admits that "stricter" libertarians would not recognize any public goods. But he, like Boaz, begins with a discussion of government as having the monopoly on power, to stress the need for limits.

how politics holds divided societies together without destroying diversity."¹⁵⁷ Boaz, Crane, and Murray employ anarchic arguments, at least in part, for rhetorical effect, and this is important in a political movement since it serves to motivate public opinion against coercive public power. But a good deal more needs to be said if libertarians wish to be more than critics.

From another perspective, however, libertarianism is regarded as an emancipatory politics, helping to secure and further individual liberty in the face of public power, but also to prevent harm from other individuals in society. For libertarianism in its constructive guise is the political philosophy of limited government, not no government at all--the politics of limited, enumerated and dispersed powers that function to secure individual liberty. Consequently, we should not expect it to champion a particularly elaborate and enthusiastic theory of politics or a correspondingly robust theory of citizenship. However, since it is a philosophy of limited government and not anarchy, there is certainly room and indeed a need for a theory of politics if maximally free lives are to be realized. Since the first contract theories of Hobbes and Locke were developed, all liberals, including libertarians, have recognized that a small amount of individual freedom must be given up by each individual to achieve the greatest possible sphere of freedom for individuals living together in a secure and peaceful society. This is what some libertarians refer to as the difference between

¹⁵⁷ See *In Defense of Politics* (Chicago: University of Chicago Press, 1993), 123-130, at 123 and 129 respectively.

(ordered) liberty (and responsibility) on the one hand and license (or anarchy) on the other. Politics, in this sense, is the institutionalization of ordered liberty, anchoring the regime and securing the maintenance of a way of life--libertarianism--through political institutions. Indeed, as I shall explain, politics, properly understood and constitutionally limited, is freedom--or at least one crucial part of it.¹⁵⁸ Thus, in moving beyond the critique of political power it is important to recognize that there still a narrow, strong, but positive functional role for government within a libertarian regime, and indeed both Boaz and Murray recognize this once they move from their initial polemics.¹⁵⁹

At this point libertarians typically introduce the notion of (natural/individual/intrinsic) rights and focus attention on the government's (but not the state's) function in securing those liberty rights. David Boaz is careful to draw a distinction between government and the state. He says "A government is the consensual organization by which we adjudicate disputes, defend our rights, and provide for certain common needs A state, on the other hand, is a coercive organization asserting or enjoying a monopoly over

158 See Stephen Elkin, "Escaping From Politics," *Report from the Institute of Philosophy & Public Policy* 15:2 + 3, (Summer 1995), 16-19, and "Madison and After: the American Model of Political Constitution," *Political Studies* XLIV (1996), 592-604, especially the discussion of the institutionalization of the public interest at 599. As a commercial republican, Elkin's conception of the public interest (what I would call liberty and the life that goes with that) is thicker than any likely to be acceptable to a libertarian. Still, this is a matter of degree, not kind, having to do with the essential components of any regime. The broader point is that politics must pay attention to the creation, use and maintenance of the institutions necessary to enable other aspects of public interest (liberty) to be realized.

159 See, for instance, Boaz, *ibid*, but also "Are Libertarians Anti-Government?" *Cato Policy Report* 4, (July/August 1998), 2, and Charles Murray's more pragmatic account centering on the principle of subsidiarity in a section titled "An Image of Limited Government," in his *What It Means to Be a Libertarian*, 36-44.

the use of physical force in some geographic area and exercising power over its subjects."¹⁶⁰

By "the government" libertarians really mean to point to the judiciary and especially the constitution to acknowledge and enforce rights, especially property rights, while (so far as possible) steering clear of the legislature ("the state") since the latter is the site of laws made for special interests, providing narrow benefits to select groups while dispersing costs over the public at large,¹⁶¹ or administering welfare functions that are more appropriately carried out by families, associations, and communities in civil society. The point Boaz is highlighting is that instead of conflating politics, government and the state as many of the more polemical critiques have a tendency to do, a positive, complex, and realistic account of a libertarian vision that wishes to distance itself from interest-group style politics while advancing constitutionally limited, but strong and effective government, needs to be clear about the distinction between each of these institutions and their respective functions within a viable libertarian society. As such, there are two branches of government/state which conventional libertarianism is concerned--the legislature (Congress) and the judiciary (the Supreme Court). To some degree Boaz's distinction is helpful since it is a genuine attempt to escape from the more polemical assaults on politics by explaining the legitimate role of politics within a libertarian framework. Arranged properly, politics is not irretrievably

¹⁶⁰ Boaz, *ibid*, 187.

¹⁶¹ See, for instance, Hayek's discussion of the distinction between law and legislation in *The Constitution of Liberty*, as well as further discussion on the judicial role in a libertarian regime in the following chapter.

corrupt. And yet in another sense Boaz does not go far enough because he seems to provide no place for any discussion or consideration of the institutionalization of the fundamentals of government discussed above. While it is true that a libertarian regime would be able to assume that the individuals who compose it are committed to a certain way of life--i.e. libertarianism--this would still be quite general, and leaves room for a good deal of interpretation and variation in the instantiation of that ideal.

If, as seems likely, a goal of a libertarian politics within a libertarian regime would be to keep congressional activity that results in legislation (i.e. statutory rules and restrictions) to a bare minimum and to guide behavior through obedience to general rules consistent with the constitution and enforced by legal institutions, we might expect, or at least hope, that politics will fulfill a severely abbreviated role within a larger free society. Indeed, we might nearly eliminate its role altogether, if what we mean by "politics" is the governance and management of public power, since public power will be kept to a bare minimum, at a level that is just sufficient for the maintenance of the regime. In their institutional analysis, Boaz, Crane, and Murray certainly appear to suggest that politics as we know it (i.e. an activity that has some vague association with public activities involving legislation) would virtually disappear in a libertarian regime, to be replaced by constitutional legal theory and the rule of law, but is this quite accurate? Since politics is left undefined, it is difficult to say precisely what kind of legitimate function politics would have. Circumscribing the scope of an activity is impossible if we do not know what the activity is. In the quote above Boaz mentions the "provision of certain common needs" as one legitimate function of the government. Presumably, on the conventional libertarian view, the other two--settling

disputes and defending (pre-existing) rights (e.g. those already enumerated in the Bill of Rights)--may be carried out by the judicial branch. But is this likely to be satisfactory for the provision of common needs, since they are fundamental, likely to change their form over time due to alterations in political and economic circumstances and peoples' perceptions of what is desirable and possible. Someone or something has to decide what those common needs (and, indeed, for that matter, what those rights) are. Perhaps there might be some minimal role for politics in the sense of collective, deliberative decision making after all, but there is no direct mention of this in any of the current libertarian discussions. Congress is almost always vilified and denigrated--as many of the term limit debates indicate. Instead, the positive focus rests upon constitutional government and the rule of law, and the workings of the free market. But is that all there is to be said? Another way of accessing the conventional wisdom concerning the appropriate role of politics in a libertarian regime is to consider discussions of individuals' activities, and particularly individuals functioning as citizens. What clues do Boaz et. al offer us in helping to understand the function and limits citizenship, and, by extension, politics more broadly?

Citizenship and Libertarianism

Typically, when libertarians point to the unit of analysis in their theories they refer to "individuals" rather than "citizens." This is important because from the outset it serves to identify the status a person whose fundamental identity is not politicized, or at least whose identity is not primarily politicized. In any modern liberal theory, as John Stuart Mill says in

The Subjection of Women (1869), "citizenship fills only a small place in modern life, and does not come near the daily habits or inmost sentiments."¹⁶² Compare, for instance, a republican theory such as Michael Sandel's with that of Robert Nozick's libertarianism. Sandel's account always refers to persons as "citizens," thereby establishing and reinforcing a political identity with respect to the state, e.g. "The republican conception of freedom, unlike the liberal conception, requires a formative politics, a politics that cultivates in citizens the qualities of character self-government requires."¹⁶³ By contrast, Nozick rests his theory on an intuitive claim that "*individuals* have rights and there are things no person or group may do to them (without violating their rights)."¹⁶⁴ For Nozick, individual rights constrain political power, outlining and delimiting the bounds of liberty through which power should not enter. On Sandel's account, citizens have no hope of becoming anything worthwhile until such time as they have joined together politically in the polity. For Nozick, citizenship would be a necessary evil at best, deriving from the primary purpose of achieving individual liberty. As Michael Walzer neatly puts it, "on the liberal view, men and women are not free in the state so much as from it."¹⁶⁵ One of the crucial features of liberalism (including, and perhaps, especially, libertarianism) is, as we shall see below, precisely its

¹⁶² Cited in Berkowitz (1999), 157.

¹⁶³ *Democracy's Discontent: America in Search of a Public Philosophy*, (Cambridge, MA: Belknap/Harvard, 1996), 6.

¹⁶⁴ *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974) ix, emphasis added.

¹⁶⁵ "Liberalism and the Art of Separation," *Political Theory* 12:3, (August 1984), 326.

reliance upon the "Art of Separation," dividing the public and the private spheres. The reference to "individuals" rather than "citizens" helps to signify this.

That said, "citizens" and "citizenship" are mentioned occasionally by libertarians. However, as we might expect, when libertarians use the term "citizen" it does not carry much weight. It is used in a general, almost careless manner, rather than a deliberate, theoretical way as it is in republican theory to connote a certain encumbered identity with its respective duties and obligations. For instance, libertarians occasionally employ it in a comparative sense, to talk about "citizens of the United States" as opposed to (e.g.) citizens of the United Kingdom. Sometimes it will be used historically and legally when libertarians want to refer to a member of a country (again, usually the United States) governed by a particular set of political institutions--i.e. a republic with a Constitution (including a Bill of Rights that secures the rights of individuals against government). But since, for a libertarian, the important and valuable parts of life are lived in the (relatively) non-political sphere of civil society, most of the time it is appropriate to refer to persons as individuals (or entrepreneurs, employees, taxpayers, parents, agents, and so on) rather than citizens.¹⁶⁶ This is true even if

¹⁶⁶ Edward Crane prefers to look to "netizens"--those individuals who participate on the Net, as opposed to citizens deliberating in political society. So, for instance, Crane cites Jon Katz writing in *Wired* in 1997: "The Digital Nation constitutes a new social class. Its citizens are young, educated, affluent. They inhabit wired institutions and industries--universities, computer and telecom companies, Wall Street and financial outfits, the media . . . Some of their common values are clear: they tend to be libertarian, materialistic, tolerant, rational, technologically adept, disconnected from conventional political organizations--like the Republican and Democratic parties--and from narrow labels like liberal or conservative. . . The digital young, from Silicon Valley entrepreneurs to college students, have a nearly universal contempt for government's ability to work; they think it's wasteful and clueless. On the Net, government is rarely seen as an instrument of positive change or social good. Politicians are assumed to be manipulative or ill-informed, unable to affect reform or find solutions, forced to lie to survive." *ibid*, 12.

it is recognized that living a free life is impossible without the guarantees of security and order provided by the state since it denotes a set of priorities in relation to the status and identity of the person. For libertarians, politics is a necessary evil; it is an activity that is always instrumental ("procedural") and it is engaged in by individuals (as citizens) only fitfully and begrudgingly. It is decidedly not the site of individuality. (That is civil society, as we shall see later.) Politics then, is a necessary, but not a sufficient condition for real freedom during times of normal, peaceful existence. The exception to this would be a call to civil disobedience in times of severe crisis if freedom is threatened by malevolent authority.¹⁶⁷ However, the hope would be that this is likely to be an extremely rare occurrence. Nonetheless, at a minimum libertarian citizens would need to take to heart the old maxim that the price of freedom is "eternal vigilance," and consequently a minimal involvement in politics is necessary for some reasonable portion of the citizens of a libertarian regime.

Politics, Libertarianism and Individuality

Bearing the considerations mentioned above in mind, what might we reasonably expect the role of politics and individuals attitudes and behavior toward citizenship to be in a libertarian good society? The previous chapter highlighted what I take to be the most

Superficially, this may be fine as far as it goes. But netizens cannot replace citizens, for citizens share a basic equality in relation to other citizens who are also protected by and from the state. Netizens are a privileged group who have access to information technology, and there is no particular reason why they should work together to sort out their "common needs."

167 See Henry David Thoreau, *Civil Disobedience*, (Mineola, NY: Dover, 1993).

appealing and worthwhile goal of libertarianism--individuality--in an effort to try to explain why a life of maximal freedom might be attractive. In so doing it advanced an ideal for individuals who develop themselves so that they might become true individuals--distinctive, unique, persons who celebrate their difference in their individuality. However, in order to achieve those kinds of ends a good deal of ground has to be covered to explain how individuals in society might first provide for their basic needs--security-- and the needs of the institutional framework that enables them to live a certain way, before moving toward something more sophisticated including work in the market, education in the family and schooling at school, and ultimately cultivation in civil society. Consequently, we need to start with a foundation that would establish security on the basis of what individuals have in common, before they can go off and cultivate themselves as separate, distinctive individualists in civil society. This is why libertarians need politics. As Kenneth Minogue says "Politics, with difficulty, sustains the common world in which we may talk to each other. . . Politics is the activity by which the framework of human life is sustained; it is not life itself."¹⁶⁸ Treating people first and foremost as individuals means that differences between individuals must be guarded very carefully. If different people are to be able to live together in a peaceful, prosperous and even flourishing manner, then in an account of a libertarian good society something needs to be said about the relations (institutional, behavioral, and psychological) between people that enables them to do this. Individuality

¹⁶⁸ *Politics. A Very Short Introduction*, (Oxford: Oxford University Press, 1995,) vii.

alone, as an achievable aspiration, will not supply the answer to this. After all, individuality is based upon the development of the self,¹⁶⁹ and while this may (but need not consistently) be carried out by interacting with others, such interaction is selective. Within a libertarian regime of the sort outlined here, different groups of people will inevitably gravitate toward each other on the basis of their particular conceptions of their own individuality and their shared views of the good life. (This may include political debates and deliberations, but it would not be anything like the kinds of demands placed on civic republicans.) But even those who share very little in common--perhaps nothing beyond their desire for peace and security and the avoidance of harm from others--need to be able to get along in society in some minimal sense. We need an account of a means by which people may learn to tolerate--get along, but not necessarily to respect and admire--each other. The standard is deliberately set quite low so that it may be achieved by as many different individuals as possible, taking differing capacities for self-governance into consideration. This need for toleration of diverse ways of living is precisely why politics and governance is important and must retain a place within a libertarian regime. For politics is an activity that connects individuals to each other, where that connection, in a liberal and especially a libertarian regime is political--formal and legal,¹⁷⁰ not metaphysical--revealing the relations between all

169 Individuality is based upon a kind of self-interest. It is broader, and potentially more well-balanced than market liberalism; it might be closer to Tocqueville's self-interest properly understood--but at bottom it is personal and self interested nonetheless. Politics is not (or at least, not supposed to be) fundamentally personal or self-interested, it is collective and social.

170 Or, as John Gray puts it when he describes Isaiah Berlin's work, politics is a *modus vivendi*.

free individuals in society, including those who pursue individuality and those who do not. Politics is purely instrumental; it protects the pluralism and diversity that is at the heart of a free society by providing the means--the ordered institutions--that secure the foundations of freedom.

Politics arises then, according to the great Aristotle, in organized states which recognize themselves to be an aggregate of many members, not a single tribe, religion, interest, or tradition. Politics arises from accepting the fact of the simultaneous existence of groups, hence different interests and different traditions, within a territorial unit under a common rule . . . (It is) a process of deliberate conciliation.¹⁷¹

In all liberal theories, and quite unlike republican theories, politics serves as a forum for *mediation* not the immediate realization of the good. Moreover, the greater the differences between individuals, the greater the need for politics to secure those differences. To give some concrete form to these rather general and abstract comments concerning such relational arrangements the following section will begin with a framework for the institution of politics using Berlin's theory of negative liberty and Shklar's liberalism of fear. This will serve to provide the explanation and justification for the separation between state and society mentioned above. Next, I shall discuss pluralism, and drawing on the work of William Galston argue that a libertarian politics must be based upon diversity rather than the autonomy associated with individuality in civil society if it is to create peace for all citizens, regardless of their pursuits in civil society, thereby providing a minimal equal liberty for all.

171 Crick, *ibid*, 18-19.

This contrasts sharply with the more strongly autonomy-grounded individuality outlined previously, which may be a goal of any individual within a libertarian regime, however the achievement of individuality is left entirely to the devices of each individual. The state will play no direct role in the cultivation of it, and there is no expectation that equality will be a particularly influential value in the achievement of individuality.

Self-government and democracy are two other themes that are central to current debates on politics and the good life. How does libertarianism treat them? Institutionally, would a libertarian regime be likely to adopt the characteristics of a constitutional liberal democracy? Why not liberal autocracy or something similar? What, if anything, is so special about democracy? To discuss the status and behavioral component of citizenship I will draw on Richard Flathman's theory of citizenship and mention the need to be continually vigilant if conditions of freedom are to be maintained. In extraordinary times this may require civil disobedience on the part of citizens.

Finally, what kinds of psychological and behavioral demands would a libertarian politics make on individual citizens? Nancy Rosenblum's democracy of every day life is useful here, together with consideration of Robert Putnam's notion of "bridging social capital." Together, these elements--the institutional arrangements of politics, and the behavioral and the psychological components of citizenship will help to bring together some of the kinds of things a viable libertarian regime would need to contain and encourage.

The Institution of Freedom: Negative Liberty and The Liberalism of Fear

All liberals share an ambivalence toward government, but for some kinds of liberals

this is more pronounced than it is for others.¹⁷² In the case of libertarians, as I have suggested, political power is considered to be a persistent and dangerous threat to liberty like no other. (At its most extreme it conjures up visions of the state as "the men with guns," or slogans such as "taxation is theft.") This is due to both theoretical concerns of libertarians as they understand liberty--the need to maximize liberty logically and practically entails the minimization of political power and coercion—as well as practical experience. Historically, classical liberalism, libertarianism's predecessor, grew out of the religious wars, but all forms of strife, especially war, are obviously deeply antithetical to liberty. As such, it is helpful to begin by considering the political theories of Isaiah Berlin and Judith Shklar respectively, each of whom, while not libertarians, layout theories that are consistent with the strongly negative and continually vigilant attitude to political power libertarianism adopts and promotes. Both advance a variety of negative liberty, but Berlin's argument is primarily conceptual and analytic, whereas Shklar's is explicitly historical, empirical and institutional, explaining not only what is needed for liberty in theoretical terms, but how that need is to be realized institutionally in practice. Together they help to describe some of the fundamentals with which a practical political libertarian theory would need to begin.

¹⁷² Berlin notes that in practice liberty will need to be considered alongside other values, and that inevitably trade-offs between values will occur. For instance, liberty will need to be considered and balanced alongside equality, but precisely what this means and what it entails will vary according to the definitions any particular liberal theory attributes to these values, together with their relative emphasis on each. By comparison with other liberals, libertarians are less apt to compromise freedom and trade-off freedom for equality (or any other value.) Liberty will take priority over other values and act as a constraint or fundamental reference point when other values are considered.

As I have suggested, libertarians recognize that political power is necessary to secure liberty through the guarantee of individual rights from encroachments by others. But, government itself is and has been the greatest potential threat to liberty, theoretically and historically. When defining liberalism as a political doctrine, Judith Shklar says “It is a political doctrine, because the fear and favor that have always inhibited freedom are overwhelmingly generated by governments, both formal and informal. And while the sources of social oppression are indeed numerous, none has the deadly effect of those who, as the agents of the modern state, have unique resources of physical might and persuasion at their disposal.”¹⁷³ Consequently, at bottom, liberals recognize that as Isaiah Berlin puts it, the central questions of politics are obedience and coercion. Politics has to do first and foremost with power, not liberty, so the activity of politics needs to be treated skeptically and cautiously at all times.

As a *political* institution, government must be guided by the principle of negative liberty that answers the question “What is the area within which the subject--a person or group of persons--is or should be left to do or be what he is able to do or be, without interference by other persons?” Negative liberty informs government of its function and limits. This is justified by Berlin in a number of ways; here I focus on only one of those ways. Government is beneficial to individuals (citizens) because it provides individuals with

¹⁷³ “The Liberalism of Fear,” in Nancy Rosenblum, *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989), 21.

(some of the) basic conditions under which they are free to be able to develop their natural capacities:

... it is assumed, especially by such libertarians as Locke and Mill in England, and Constant and Tocqueville in France, that there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.¹⁷⁴

Politics and government are beneficial to individuals when they secure liberty, but that is their only function in relation to individuals' freedom. Anything more constitutes an abuse of power that may turn out to have sinister consequences for individuals, inhibiting the development of their capacities. This is especially true when political leaders employ power to try to transform individuals so that they may become "better," or more fully realized versions of their "true" selves. When government asks the question "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?" When government tries to render individuals positively free using politics it exceeds its legitimate bounds. (Remember that individuality is a positive *moral* theory, not a positive *political* theory. Individuals must develop themselves. This may be done with others so

174 "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 124. Shklar justifies her version of negative liberty--the liberalism of fear--as a universal condition for the recognition of the dignity of persons. Shklar in Rosenblum , 30.

long as it is carried out voluntarily. But individuals must not be forced to be free by politicians using the coercive powers of the state, which is why individuality is consistent with, or at least not inconsistent with Berlin's liberalism.)

Drawing a line between the public and the private spheres of life--the art of separation mentioned above--is central to any liberal theory. Shklar says that it does not matter where the line is drawn, only that it is drawn, but here is one of the distinctions that separates libertarianism from other varieties of liberal theory. For a theory than maximizes liberty must draw a line so that the public (political as opposed to social) sphere is as small as is practically possible such that maximal negative liberty might be secured and maintained. Precisely where that line would be drawn is impossible to say without having a concrete example of a particular regime, and such a line is likely to shift slightly over time, within a certain margin. Nonetheless, we can be sure that in a libertarian regime it will be important than it would be in other kinds of liberal regimes to have a relatively clear division between public and private and also to make sure that the public sphere is minimized as far as is practically possible for the government to carry out its legitimate tasks--securing peace and rights and maintaining itself so that it can continue to serve that function--but that is all.

Both Berlin and Shklar agree that politics should be confined to securing the conditions of liberty; the government should not act as a tutor and tell people how to live. However, both agree also that some ways of life are better than others, and some are more psychologically consistent with liberalism than others. But for Shklar, to consider such ways of life is to go beyond politics. She says that this is inappropriate--it is not the proper subject matter of politics, but something else--ethics or sociology, perhaps. Moreover, to consider

other (related) areas of life is wrong for other reasons. It is potentially highly dangerous because it may cause us to become distracted by utopian dreams, when in practice we ought to focus our attention on the precarious facts of reality and the omnipresent potential threats to our peace. To forget these threats is to cast off the historical memory that reminds us of past atrocities, a memory that should haunt us and remind us of what a noble, but also delicate achievement true liberty--peace--really is. This is a serious point, and by turning attention to individuality I do not mean to dismiss Shklar's concerns. However, perhaps I am slightly less pessimistic about society's--at least the contemporary United States'--ability to maintain peace, and hopeful that individuals living in a free society can experience freedom as more than the absence of dire atrocities. Accordingly, what I am after is more a recognition of the several factors that would need to be taken into consideration in order to achieve freedom as individuality in a libertarian regime. In regime theory, as I noted in the first chapter, mere political doctrine is an insufficient guide for the good life (or, the best possible life, given human constraints) since, as Hayek, Rosenblum and others have noted, taken separately certain domains may not have the same logics or values, yet together they may function to create a regime that is morally desirable and, what is equally important, practically possible. It is certainly the case that in a libertarian framework a good deal of attention and action would need to be directed at something like a principle of negative liberty or the liberalism of fear in connection with the state, but there is more to be said, both in relation to politics and other private social domains beyond the reach of the state. Naturally, in Shklar's liberalism different people would experience different positive ways of living too, but on the view being articulated here, this needs to be recognized quite self-

consciously because it is an achievement that requires a good deal of work, and so that others may be persuaded to join in the fostering of a movement that promotes a culture of self development. This is why I wish to consider a regime rather than (merely) a political doctrine. However, as Berlin points out, in the end the connection between negative liberty and individual self-development is and would be empirical. It might work, but it might not. Still, specifying the political focus on negative liberty helps to ground the basic political institutional framework within which a free life would be lived. Furthermore, the separation between the public and private domains serves to give some sense of the breadth of that separation needed to maximize liberty.

Pluralism

Berlin's and Shklar's liberalism both rest on the fact of pluralism. Berlin claims that we disagree about the ends of life, not just the means by which we achieve our ends. Discord, rather than harmony is the state that politics has to contend with, and this is why, from the perspective of more perfectionist or participatory political theories, liberal political theory must set its sights so low. If liberalism is to remain true to its commitment to liberty, it must protect liberty for as many individuals as possible, perhaps even accommodating some illiberal elements so long as they do not threaten to undermine the broader liberal framework itself. What implications does this have for a libertarian politics? What are the limits of libertarianism? Is it more or less capacious than other mainstream varieties of liberalism? Furthermore, just how accommodating would it be toward those who choose not to pursue individuality?

At first glance we might expect that libertarianism, since it is the self-proclaimed

champion of liberty, would take the "fact" of pluralism a good deal more seriously than most other liberal theories. After all, the basic individualism that informs classical liberalism and market liberalism, as well as Nozickian libertarianism rests on an empirical recognition of the differences between persons who are physically separate--and in that sense distinct--entities.¹⁷⁵ However, libertarianism properly understood, not only recognizes the fact of separate plural individuals, it respects and even hopes to encourage the development of distinct, unique individuals. For libertarianism, pluralism is not only a brute fact, but a value to be achieved and promoted. This is clearly what individual flourishing means, at least in part, in a theory of individuality--individuality goes beyond physical variety to aesthetic and spiritual variety at the level of the personality and the soul. The promise of individuality is for each individual to experience greater diversity, not standardization, within some very broad and minimally onerous political limits.

On the other hand, specifying any type of lifestyle that is consistent with but also, and additionally, morally and aesthetically desirable within an open-ended political liberalism that in itself has nothing to say about the kinds of things liberal individuals are (beyond their respect for the basic laws of a liberal society that enable them to exist together peacefully) is inevitably going to present a theory than is more constrained and less accommodating to some free lives than to others because not all ways of living a free life entail self

¹⁷⁵ Shklar says "For political purposes liberalism does not have to assume anything about human nature except that people, apart from similar physical and psychological structures, differ in their personalities to a very marked degree", *ibid*, 35.

development. To borrow from Richard Flathman (who, in turn, adapts Michael Oakeshott), theories of individuality are governed by adverbial principles and rules such as civility, magnanimity, generosity, fastidiousness, and courage.¹⁷⁶ Such principles and rules describe a manner or attitude that attaches to the pursuit of individual goals, but it does not prescribe the goals themselves. At bottom, many of these types of theories look to reason or imagination and, in Flathman's case, will, to ground and motivate actions. What about lives based on tradition, faith, and authority? Or indeed, those based on simple lethargy? Can such apparent (political) open-endedness, but also (moral) discipline and constraint be reconciled? Ultimately, I am not sure that this contradiction may be settled satisfactorily, but one way of responding to this problem is to refer again to the distinction and relation between politics and moral theory. In a libertarianism that promotes individuality, politics is the framework that establishes a set of minimal general principles in order that all individuals (regardless of their principles above and beyond their minimal commitment to freedom and therefore in libertarianism in the political sense) may live together peacefully and securely. It requires a minimal respect of others rights (but not admiration for their lifestyle as such) and toleration of different ways of living. It will be guided by a respect for the diversity at the heart of pluralism. In principle, any mode of living could and should be tolerated in a libertarian regime (including those based upon so-called victimless crimes such as a life devoted to narcotic stupor or sexual perversity), so long as others are not harmed

¹⁷⁶ See Richard Flathman, *Reflections of a Would-Be Anarchist*, especially chapters 1 and 3.

and the way of life does not threaten the continued existence of the regime.

However, practically and functionally some ways of life will be more consistent with libertarianism than others. If the state is rolled back, then some individuals--perhaps many or even most individuals--will need to pick up the slack and provide for those individuals who cannot provide for themselves if a civilized society is to survive and flourish. Thus, socially, a more creative and imaginative culture seems appropriate and maybe even necessary in practice simply for that society to maintain its institutions and its way of life for the individuals who live it. Echoing Tocqueville, William Galston outlines a problem that libertarians will have to face squarely:

A narrow society is one in which only a small fraction of inhabitants can live their lives in a manner consistent with their flourishing and satisfaction. The rest will be pinched and stunted to some considerable degree. All else being equal, this is an undesirable situation, and one that is best avoided. To the maximum extent possible in human affairs, liberal societies do avoid this kind of pinching. This is an important element of their vindication as a superior mode of political organization.¹⁷⁷

Moral theories guiding lives in the non-political realm may be more demanding than political obligations so that individuals who share similar values can join together in associations to pursue more strenuous visions of the good, including what Peter Berkowitz calls the discipline of individuality.¹⁷⁸ Due to the primacy of individual freedom and responsibility accorded to individuals in libertarian theories self-imposed restrictions of

177 William A. Galston, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory," *William and Mary Law Review* (1999) 40:869 at 892.

178 Berkowitz, chapter 4, 134-169.

freedom are acceptable to libertarians, whereas external restrictions, including political restrictions from the state above and beyond those required for security, are not. Inevitably this will be more selective and those who do not share such a vision of the good will be left out, but they are free to pursue their own version of it.

Freedom of association based upon voluntarily consent has always been a central tenet of libertarianism. In his work on multi-cultural groups Chandran Kukathas has argued that virtually any lifestyle should be permitted within a larger libertarian regime so long as its members are free to leave whenever they choose.¹⁷⁹ In principle having an exit option sounds adequate. However, in practice there are likely to be many problems with this, such as having insufficient knowledge about one's options in the world beyond the community, or having sufficient resources and skills to survive outside the group. Thus, it would seem that a formal exit option is an insufficient guarantee for meeting the standards of liberty in a libertarian regime. Instead, there needs to be some consideration of the substantive means by which the exit option can be made meaningful in practice. This is likely to entail some mandatory basic level of education to make choice substantive more than merely formal, and thus to establish institutions that indicate to individuals that there are other ways of life that may be lived.

Democracy and Self Government

¹⁷⁹ Chandran Kukathas, "Are There Any Cultural Rights?" *Political Theory* 20 (February 1992), 105-39.

Does a regime that prizes the pursuit of liberty also require some kind of commitment to democracy? If so, what kind of commitment? Historically, as Judith Shklar has noted, liberalism and democracy seem to have coexisted in a marriage of convenience. But would this be true in a libertarian regime? Again, typically there is little discussion of democracy within libertarianism, except insofar as the current broad institutional framework that is arranged according to the principles of a constitutional liberal democracy are generally accepted and discussed. That is, there is no radical challenge to this framework. However, in the “Two Concepts” essay Berlin questions the relationship between liberalism and democracy. He says “self-government may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes, and has been defended as such by libertarians. But there is no necessary connection between individual liberty and democratic rule. The answer to the question “who governs me?” is logically distinct from the question “How far does government interfere with me?”¹⁸⁰ He goes on to suggest that a benign autocracy is consistent with negative liberalism, and in certain circumstances it might be preferable to democratic government. While I do not wish to rule out autocracy,¹⁸¹ it seems that democracy is a better companion for a practical libertarianism precisely because we have some idea of what we can expect from it, based upon past experience. Moreover, if we take seriously the idea of maximizing liberty for all, democracy has an important expressive

180 Berlin, *ibid*, 130.

181 Although Mill’s discussion of the good despot in *Considerations of Representative Government*, chapter 3, might give us good reason for doing so—since the likelihood of finding an “all-seeing monarch is”

relation to individual liberty since it reflects a commitment to equal individual liberty based upon the rights or dignity of each person. Still, libertarians need to be careful. In both *The Constitution of Liberty* and *The Political Order of a Free People*¹⁸² Hayek warns against the rhetorical use of democracy as a substantive ideal--to advance equality--rather than as a procedure for governing. In particular, he is concerned about the tendency of majoritarian government to lead to expansionist government, thereby violating the rights of minorities and abandoning principled limited power.

Libertarian Citizens and Citizenship

After considering the institutional aspects of politics, it is now time to return to the perspective of the individual as citizen. What, in practice, is the attitude of the ordinary libertarian individual toward politics in a libertarian regime? How does this attitude compare to the priority accorded to other roles and activities in other domains? Will the attitude to politics be consistent, or will it change, subject to circumstances such as severe threats to an individual's liberty from his own regime or other regimes? As I have already noted, libertarians will not embrace citizenship with much enthusiasm because it will entail participation in the domain that has the most power and authority to thwart freedom. However, practical considerations require a tempering of this skepticism because some

virtually nil, but also because of the passivity of the subjects that such a government would entail.

182 See also Juliet Williams, "Many Roads to Serfdom. Liberalism Against Democracy in the Writings of F.A. Hayek," paper presented to the J.M.Kaplan Workshop in Political Economy at George Mason University, Spring 2000.

involvement in politics is necessary to secure maximal freedom within the regime through the state. How is this ambivalence to be solved or at least accommodated? In *Toward A Liberalism . . .*¹⁸³ Richard Flathman proposes what he calls a chastened view of citizenship that seems appropriate for libertarian citizens. It is neither wildly enthusiastic about participatory politics, as some of the descendents of Aristotle and Rousseau seem to be (e.g. Benjamin Barber,) nor wholly antagonistic, as many libertarians currently proclaim themselves to be. Rather, it is chastened because libertarians recognize the need for politics, and therefore citizenship, but they are wary of potential expansions of power backed by the ability to compel individuals to act. In fact, as Flathman notes, for those liberals who are primarily concerned with political authority as a threat to freedom, at bottom the problem of citizenship rests on the fact that citizenship will oblige individuals to do things that they would not otherwise do, based on the merits of the act alone.¹⁸⁴ Libertarians, like Shklar's liberals of fear, recognize this only too well. Keeping a critical and vigilant attitude to political authority and one's involvement in it are vital. By contrast, in theories (and practices) of high citizenship, individuals will privilege politics and their status as citizens over all other statuses. Furthermore, they will lose their independence insofar as they agree to uphold whatever decision is produced by the political process. Civil disobedience and conscientious objection are out of bounds for supporters of high citizenship.

183 (Ithaca: Cornell University Press, 1989), chapter 3, "Citizenship and Authority: A Chastened View of Citizenship."

184 Ibid, 103-105.

The politics of high citizenship may begin in plurality and disagreement, but (insofar as it acts in a determinate manner on any specific question) it *must* end in unchallengeable agreement (concerning that question). But of course agreement cannot alter (what as likely as not will be) the fact that there are excellent reasons against the decision or policy. In short, the politics of high citizenship would not change the fundamental character of authority; it would change the attitudes of citizens toward authority.¹⁸⁵

For libertarians such as stance is unacceptable. Since Locke and Thoreau individuals have reserved the right to threaten the withdrawal of their support for the government when it is considered to have exceeded its bounds of authority. As Emerson said in his essay on politics, “Good men must not obey the laws too well.” Consequently, libertarians must adopt a theory of low citizenship instead.

On a practical level involvement in politics obviously requires a trade-off of time and resources since it takes attention away from other pursuits that individuals would prefer to engage in civil society, so this is another reason for severely curtailing the citizen’s participation in politics, in addition to the principled point above. Having said that, a case could be made for political participation as a means for fostering individuality in relation to statesmanship and leadership. As I have noted above, many classical liberals and libertarians point to the Founding Fathers as exemplary individuals who served their country, but such examples are unlikely to be considered typical, and given the potential for the abuse

¹⁸⁵ Ibid, 104.

of power over others, in general politicians would not be the preferred exemplars of libertarian individuality. What will all of this entail in practice? What can we reasonably expect libertarian citizens to do?

Political Psychology and Behavior

If citizens are to act individually and in associations, especially in a democracy, to protest and block any sign of government illegality and abuse, they must have a fair share of moral courage, self-reliance, and stubbornness to assert themselves effectively. To foster well-informed and self-directed adults must be the aim of every effort to educate the citizens of a liberal society. There is a very clear account of what a perfect liberal would look like more or less. It is to be found in Kant's *Doctrine of Virtue*, which gives a very detailed account of the disposition of a person who respects other people without condescension, arrogance, humility, or fear. He or she does not insult others with lies or cruelty, both of which mar one's own character no less than they injure one's victim's. Liberal politics depend for their success on the efforts of such people, but it is not the task of liberal politics to foster them simply as models of human perfection. All it can claim is that if we want to promote political freedom, then this is appropriate behavior."¹⁸⁶

Libertarianism is notoriously poor at specifying the virtues and habits of character or personality that are necessary and desirable to make their aspiration real. As we noted above, historically, classical liberalism relied upon the family, the market, and religion to

186 Shklar, *ibid*, 34-35.

help to foster the “right sort of citizens,”¹⁸⁷ but in post-modern times this may be an unrealistic hope or expectation. Instead, perhaps the best that we can hope for as a political goal is for some (very) minimal standards so that people may live together peacefully. And yet, individuality is a rather strenuous ideal. This seems contradictory, except for the fact that I am referring to two different, but related things. Most immediately liberty for individuality champions what Robert Putnam calls “bonding social capital”--exclusive, private voluntary associations of individuals who come together in civil society to “reinforce exclusive identities and homogeneous groups.”¹⁸⁸ Within such groups, as I began to suggest in the second chapter on the self, and will discuss further in chapter 5 on civil society, individuals will often join together and use their will, imagination, and creativity to perfect themselves and others similar to themselves. The libertarian movement itself is a good example of bonding social capital, as I shall show later. However, for a regime--a collection of very different, and potentially antagonistic groups-- to live together peacefully in the regime as a whole, a certain amount of “bridging social capital” is required. That is, connections among people using networks of trust and norms of reciprocity and trustworthiness that includes all members of a libertarian society, regardless of whether they

187 Ronald J. Terchek, “The Fruits of Success and the Crisis of Liberalism,” in *Liberals on Liberalism* Ed. Alfonso J. Damico (Lanham, MD: Rowman & Littlefield, 1986), 15-33 at 30. And of course, historically it was relatively easy to point to a certain level of homogeneity and common standards because some sectors of the population, such as women and minorities, were systematically excluded from political consideration.

188 See *Bowling Alone, The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), 22-24.

in fact choose to pursue individuality through self development, or not.

In relation to the maintenance and perpetuation of liberal democracy in *Membership and Morals* Nancy Rosenblum describes two mechanisms to help bridging social capital and the institutions that will help to hold the regime together. One is direct and the other is indirect. The first is an approach that she calls the democracy of everyday life. It describes a set of psychological attitudes and behavioral traits.

Much of life in public is carried on in the interstices of groups and attachments. A foundational moral temperament allows us to get along. The democracy of everyday life is a habitual way of going about our ordinary business as we move about among groups and institutions, public and private. For many moments we are all on our own in society. So the democracy of everyday life has to do with mundane face-to-face interactions and involves encounters with strangers, since involuntary association is a fact of social life.¹⁸⁹

According to Rosenblum, the democracy of everyday life requires two rather minimal standards: 1. treating people identically and with easy spontaneity, and 2. speaking out against ordinary injustice.

Easy spontaneity refers to the rejection of deference and various sorts of cultural, ethical and economic differences that create status divisions between people. It is a kind of

189 1998, 350.

reciprocal democratic norm that accords basic respect to oneself and to others and is part of the traditional cultural makeup of the United States. Speaking up against ordinary injustice describes a reflexive disposition to call attention to mistreatment of ourselves and others. Both kinds of attitudes and behaviors will be learned from experience within groups with others in civil society, often through imitation.

Secondly, her phenomenology of liberal pluralism explains how the personal uses of pluralism in the form of membership within voluntary associations (Putnam's bonding social capital), serve to support the regime. This is in spite of the fact that many of these groups appear to be in direct contradiction with the overall liberal democratic regime as a whole due to the kind of illiberal values and sentiments some groups promote. This is because groups like the militia provide a home for the disaffected, a space where they may practice their illiberalism within the group, thereby acting as "safety valves" without threatening the continued life of the (liberal) regime as a whole. Together, these behavioral traditions and institutional arrangements would work to make libertarian pluralism workable.

Conclusion

Contrary to much conventional wisdom, libertarians need politics. But the kind of politics that libertarians would require in the construction of a good society would have to be quite different from the kind of activities we typically think of when we refer to politics today. The public choice school is right to point out the corruption and waste associated with the buying and selling of votes to select interest groups. However, that does not mean that all politics is necessarily and irretrievably corrupt. Rather, politics needs to be considered more abstractly and in connection with freedom--as an activity that helps to

shape, guide, and maintain the institutional framework of a libertarian regime. While it is certainly true that the practice of politics is not or should not be libertarian individuals' main preoccupation, the relationship between politics and the continuous enjoyment of their freedom must be stressed repeatedly to avoid inertia and ultimately the loss of freedom that libertarian individuals will need to work hard to achieve. Extraordinary efforts in the form of civil disobedience would be a last resort if threats to freedom could not be avoided, but it is to be hoped that this would take the form of a potential threat to, and therefore constraint on, public power rather than an occasional practical tool actively utilized for the protection of the peoples' liberty.

CHAPTER 4: LIBERTARIAN LEGAL THEORY AND INSTITUTIONS

. . . the task of the lawgiver is not to set up a particular order but merely to create conditions in which an orderly arrangement can establish and ever renew itself. As in nature, to induce the establishment of such an order does not require that we be able to predict the behavior of the individual atom--that will depend on the unknown particular circumstances in which it finds itself. All that is required is a limited regularity in its behavior; and the purpose of the human laws we enforce is to secure such limited regularity as will make the formation of an order possible.¹⁹⁰

On the face of it, outlining and criticizing a libertarian legal theory should be relatively straightforward. Given a theory that is associated with minimal state interference, notions of negative liberty and "leaving people alone," we should expect that there would not be much to a libertarian legal theory except the securing of peace and property rights. Of course, in practice securing peace and property rights are not easy tasks, but to understand the proper role of law in a libertarian regime we need to consider its function abstractly and relationally before we consider its more narrow particular role. In fact, like the political theory examined in the previous chapter, it turns out that law is extremely important because it anchors and secures basic liberties within an institutional framework. Without law, together with the politics that prescribes the functions of law, there will be no liberty in a libertarian regime. Furthermore, there will be no realization of individuality since the necessary conditions for its achievement would not exist. Put simply, in a libertarian regime

190 F.A. Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960), 161.

law will play a more expansive and complex role than is usually acknowledged by those who consider libertarianism.

More than that however, law, unlike politics, has, and should have, an important private function in a libertarian regime. For private law, in the form of contract law, forms the basis of much of the activity associated with the realization of one variety of liberty--economic liberty--between freely consenting persons acting voluntarily within the market. Indeed, when the state (including the welfare state) is severely pared down in a libertarian regime many of the functions previously undertaken politically will be transferred to the market sphere, increasing the scope of private law further still. Thus, in relation to the establishment and workings of the basic conditions of liberty, law is both a constraining and an enabling mechanism within a libertarian regime. What this means in practice is that in a libertarian good society law would be likely to play a much greater role in individuals' lives than politics. Accordingly, in devising the arrangements of a good society libertarians would need to turn much of their attention away from politics and toward law.

At the same time, however, like politics, law--because of its uniform and general standards--is in tension with the plurality at the center of individuality in both theory and practice. Consequently, like politics it will need to function, but within certain specified, controlled limits so that the space for individual self cultivation is maximized and the practical tension is rendered manageable. Law, like politics, is a necessity but insufficient condition for individuality, providing an opportunity for individuals to develop themselves within that secured sphere should they choose to do so. Again, ultimately, the relationship between law and liberty as individuality is not logical and only indirectly causal; it is

empirical. Individuals may choose to use their basic freedom to develop themselves, but they may not.

This chapter will consider three areas. First, the basic legal-political (constitutional) structure of government is taken up. Second, while the role of contract law will not be discussed directly since that is well documented elsewhere and the burden of the argument presented here is to make a case for cultural or aesthetic liberty, some application of market principles to legal theory will be considered and criticized in light of some of the ideas presented earlier about the appropriate conception of the libertarian individual, including pure restitution criminal theory, and law and economics. Third, I take up the law's relation to individuality in a regime that values individual self development, but that also requires social order and peace.

The Basic Structure

In an effort to try to sort out some implications that derive from the basic political theory and to suggest how such a legal theory *ought* to look, this section will distinguish between a number of levels of analysis, starting with 1. The conventional and revised relations between politics and law, including the location of the place of legal theory within libertarianism. Then, the analysis will move towards 2. Some basic principles that may be drawn from the general concept of libertarianism to try to highlight some of the minimal characteristics a libertarian legal theory would need to have, focusing primarily on the protection of rights and the rule of law to limit public power. 3. Structurally, what kind of institutions would a regime that is committed to individual liberty require? Here I borrow from the existing liberal democratic constitutional order, and note the importance of

institutional design for the realization of liberty, especially with respect to the separation of powers and federalism to constrain power, and the bill of rights to add further protections for individual liberty. Strains of both federalism and anti-federalism exist within and are compatible with libertarianism, depending upon the degree of conservatism or radicalism that any given particular regime takes. 4. In relation to the structure of government and especially the legal-constitutional order something needs to be said about constitutional interpretation. Evidently, a regime that intends to constrain public power is likely to construe the powers of government enumerated in the Constitution narrowly and fairly strictly, so it seems that some variety of originalism will be preferred, although there are problems with this. Still, on balance, originalism seems to be the least dangerous doctrine available to libertarians. Together these points will help to continue to sketch out the fundamental political-legal structure of the regime upon which the practical achievement of individuality rests.

1. The Conventional View: From Law v. Politics to Politics and Law

What are the differences in function and scope between politics and law as they are employed now? What should the differences be between law and politics in a libertarian regime? As we saw in the previous chapter, when libertarians currently discuss "politics" they have in mind a subject (rather than a *discipline*) that deals with power, interests, and voting. From the comparatively lofty perspective of more principled disciplines such as law and philosophy, the term "politics" carries with it distinctive empirical and normative characteristics. Indeed, normatively it may even be said to convey certain pejorative connotations precisely because it *lacks* the logic, elegance, and consistency of its rival

disciplines. However, the relationship is certainly not a strictly separate one, although there are those who, like Robert Bork and Roger Pilon,¹⁹¹ wish that it were.

If we begin at the beginning with the Federalists¹⁹² and the Constitution, a straightforward functional account will tell us that government is structured around a separation of powers, with each branch--executive, legislative and judiciary--performing its own particular functions. The supremacy clause in the Constitution (Article VI, section 2) states that the Constitution is the supreme law of the land. This, together with the doctrine of judicial review established in Marbury v. Madison (1803) supports our belief that there is indeed something different and separate about the law. If there were not, we would not need a separate judicial branch. Libertarians typically accept and support this constitutional ordering of power, but argue that so far as is practically possible we should return to a government that is strictly limited in scope and powers to a government of limited, enumerated powers: if the power for one of the branches of government does not exist in the Constitution, then government may not act and individuals are at liberty to do as they wish.

As compared with the pervasive notion that politics is driven by competition and strategy about "who gets what, when, and how," libertarians, and indeed, most constitutional

191 See *The Tempting of America. The Political Seduction of the Law*. (Bork is often cited by libertarians for just this reason.) Also, Roger Pilon "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," in *Market Liberalism* ed. Crane and Boaz, (Washington, DC: Cato Institute, 1993), 21-52. Pilon prefers to distinguish between "principles" and "policy" (since he is a natural rights theorist whose legal theory derives from claims about our nature. See below.)

192 See *The Federalists Papers* 10 (on factions) 33 (supremacy of the Constitution) and 78 (judicial review).

theorists reserve to law a more noble understanding. For law embodies "first principles" and "higher law,"¹⁹³ it is "the forum of principle,"¹⁹⁴ or the embodiment of our aspirations.¹⁹⁵ Instead of dividing us as politics appears to do, law brings us together as a people. It captures our sense of identity (who we are) and our aspirations (who we would like to be) in our written constitution and the practices employed by our public institutions, particularly the Supreme Court. Even if we have slipped a little, and our legal practices are converging with our political practices, the idea that law is "special" and distinct from politics is embedded in American political culture. As political jurist, Martin Shapiro explains:

We do not know why Americans still identify the Court with the law of the Constitution rather than with simple policy making. We suspect, however, that part of the reason is that the Supreme Court is called a court, its members called justices, and its law making continues to be dressed in the language of discovering, not making, the meaning of the Constitution.

When all is said and done, the Supreme Court's power stems not only from its service to particular constituencies or its collaboration with other segments of government but also from the fact that its pronouncements are perceived as "the law" in a nation that believes in obeying the law--and not only "the law," but "the constitutional law" in a nation that believes that the Constitution is a higher and better law.¹⁹⁶

Such an understanding is shared by libertarians. Indeed, since they have a tendency

193 Pilon, 21.

194 Ronald Dworkin, "The Forum of Principle," 56 *New York University Law Review* May-June 1981, 469-518.

195 Sotirios Barber, *On What the Constitution Means* (Baltimore: Johns Hopkins University Press, 1984).

196 Martin Shapiro, "The Supreme Court: From Warren to Burger," in *The New American Political System*, Ed. Anthony King (Washington, DC: AEI, 1978) at 195. Of course, Shapiro does not subscribe to this

to dismiss politics as being irretrievably corrupt and interest driven, the appeal to law--especially the Constitution--is especially marked in contemporary libertarian theory. Indeed, at times this verges on what Judith Sklar calls "legalism: . . .the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules. . .The habits of mind appropriate, within narrow limits, to the procedures of law courts in the most stable legal systems have been expanded to provide legal theory and ideology with an entire system of thought and values. This procedure has served its own ends very well: it aims at preserving law from irrelevant considerations, but it has ended by fencing legal thinking off from all contact with the rest of historical thought and experience."¹⁹⁷

And yet, what I would like to suggest, and have been hinting at in chapter 3, is that the gap between politics and law is, or should not be, quite as stark as it is sometimes presented if libertarians are to move from a critique of the existing system to the establishment of a libertarian regime. Perhaps a more profitable way to think about the relationship between law and politics is to re-conceive "politics" in a legal manner. On this view what is needed is not a separation of law and politics, but rather a kind of political emulation of law, where law is considered to be "argumentative" as Dworkin puts it--in the philosophical rather than the conventional sense. Law requires us to seek out reasoned

particular interpretation himself.

¹⁹⁷ *Legalism*, (Cambridge: Harvard University Press, 1964), 1, 3.

arguments and to make public justifications for our conclusions,¹⁹⁸ and we should employ these methods in politics as well as law. This would not entail advancing as far as republicans such as Sunstein¹⁹⁹ and Sandel,²⁰⁰ who call for a deliberative politics--a more consensual, clear thinking forum in which citizens (in the strong or "higher" sense) learn how to think *as citizens* about the public interest first, and their private concerns second. Nonetheless, it is true that for a libertarian regime to work citizens would need to consider the basic requirements that are needed to establish and maintain that (libertarian) way of life. The kind of acquisitive behavior associated with the "politics" that I mentioned above would, so far as possible, be reserved for the economic sphere. Law would be the means by which the vision that is hammered out in a political arena is actively established and secured through the constitutional structure, especially the courts, together with a commitment to the supporting culture of liberty (the mentalities, dispositions, norms, and mores) that is shared by individuals who would choose to live in a libertarian society.

2.Libertarianism and Law

As we saw in the previous chapter, at bottom, libertarianism is a *political* theory that defines a relationship between the individual and the state, and to some degree, between different citizens who are governed by that state. As a strictly political theory (as opposed to

198 See also Stephen Macedo *Liberal Virtues* (Oxford: Oxford University Press, 1986).

199 "The Enduring Legacy of Republicanism," in *A New Constitutionalism* (Chicago: University of Chicago, 1993).

200 See, *Democracy's Discontent* (Cambridge: Belknap/Harvard 1997.)

a kind of regime theory, or theory of the good society), it has nothing to say about morality or the good life.²⁰¹ Rather, it establishes a framework within which the individual is as free as he may be, consistent with the freedom of others, to pursue the life he wishes to pursue. Thus, conventionally understood libertarianism is not primarily a legal theory, (much less a cultural or aesthetic theory or way of life). However, the legal theory derives from the political theory. Indeed, it is instrumental in securing the liberty of the individual in so far as it provides the basic practical framework protecting the individual from encroachments from others, including and especially the state. If we move from the narrow focus of political theory to a more abstract and general perspective of regime theory we can see how law and politics relate to each other. Fundamentally, law has a role in securing the life, liberty and property of the individual. In philosophical parlance, within libertarianism legal theory does the work of political theory. As such, in a theory that advances beyond mere critique, it turns out that there may be a lot more to libertarian legal theory than we typically recognize.

3. Basic Principles for the Content of a Libertarian Legal Theory

To make a legal theory distinctively libertarian it must secure the liberty of the

201 "Libertarianism is not at base a metaphysical theory about the primacy of the individual over the abstract, much less an absurd theory about 'abstract individuals.' Nor is it the anomic rejection of traditions, as Kirk and some other conservatives have charged. Rather, it is a political theory that emerged in response to the growth of unlimited state power. Libertarianism draws its strength from a powerful fusion of a normative theory about the moral and political sources and limits of obligations and a positive theory explaining the sources of that order: each person has the right to be free, and free persons can produce order spontaneously, without a commanding power over them." Tom G. Palmer, "Myths of Individualism" *Cato Policy Report* (September/October 1996), 7.

individual and the rights that help to protect it. All libertarian legal theories will include something like a theory of public law that seeks to limit government power (or, more generally, the central institutional framework that secures peace). In addition, however, theories that go beyond a critique of the existing order and the minimal state will set out a theory that describes how law may be used to facilitate and realize liberty through a system of private law, such as contract law involving the free exchange of goods and services-- which in some theories extends to the private provision of policing through protective agencies.²⁰² (Just how far it is reasonable and desirable to extend the principles of consent, contract, and exchange to parts of life normally governed by other principles (such as equity, justice, respect for the human being as more than a collection of roughly equal preferences) is an important consideration, and the answer to which will help to circumscribe the limits of libertarianism conceived as market liberalism. For now I mention contract law to give some sense of the scope of law, and the varieties of law that are important to libertarianism-- especially regime-style libertarianism. This will be taken up later in the discussion of Randy Barnett's pure restitution theory. Since this is a project in political theory broadly understood, and not contract law I shall devote attention to the arrangements of the governing order, and discuss contract law incidentally, to point to the principles that should be employed to guide this.

The rule of law is a concept that is frequently placed at the center of libertarian legal

²⁰² See Robert Nozick, *Anarchy, State, and Utopia*, (Oxford: Basil Blackwell, 1974), chapter 4.

theory since it serves to define and confine the reach of public power. In his chapter "Law & the Constitution," David Boaz's discussion of law rests on this idea, and borrows from Hayek's discussion of "general and abstract principles" to guide and limit power and to prevent its abuse.²⁰³ At a minimum this refers to a system that excludes the arbitrary exercise of power creating the celebrated "government of laws not of men." More broadly, it denotes a number of propositions about the character and form of law--a kind of "meta" law or law about law-- that must pertain if the law is to work, and to work consistent with the protection of the liberty of the individual. Here we might look to Lon Fuller's eight rules defining the "inner morality of law" as a guideline outlining some general characteristics for any legal theory without specifying the precise content of those laws. As Fuller defines them, there are eight rules to failure:

The first, and most obviously, lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; the enactment of contradictory rules or (6) rules that

²⁰³ See *Libertarianism: A Primer*, (New York: Free Press, 1987), chapter 6. Boaz also mentioned the preference for common law over administrative regulation since common law involves particular real disputes. Without a dispute, under common law, judges could not rule and make a new law. Other complaints are made against special interest law. Boaz's constructive suggestions include giving the constitution real teeth to limit power (enforcing the Bill of Rights), a balanced budget, forbidding congressional delegation of powers to administrative agencies, term limits and the line item veto.

require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure to achieve congruence between the rules as announced and their actual administration.²⁰⁴

Fuller says "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system of law at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract." Of course Fuller's rules apply to all systems of law--they are generic rules. Something more still needs to be said about libertarian laws.

Hayek and the Common Law: Protecting Liberties

Hayek is usually considered to be a classical liberal rather than a libertarian.²⁰⁵ The vital distinction rests on the absence of rights in his theory. This is important since rights claims are used by libertarians to signify the importance and even inviolability of the individual.²⁰⁶ However, Hayek is frequently cited as an authority in discussions of

204 See Lon Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1964), Chapter 2, especially 39. See also Geoffrey Marshall's discussion of Dicey "Rule of Law," in *The Blackwell Encyclopedia of Political Thought* ed. David Miller (Oxford: Basil Blackwell, 1987), 458-459. Also, F.A. Hayek, Chap 11, "The Origins of the Rule of Law," in *The Constitution of Liberty*.

205 As Jeremy Shearmur has pointed out, "his liberalism is founded, ultimately, on his belief that a social order of a classical liberal character best enables the individual citizen to satisfy his preferences and to avoid coercion by others. His argument is consequentialist, and broadly utilitarian in character. But all this is qualified by the almost Kantian requirement that laws should treat every citizen equally." "Friedrich von Hayek," in Miller, Ed., *ibid*, 195.

206 Recall again Nozick's oft-quoted opening of *Anarchy, State, and Utopia* "Individuals have rights, and there are things no person or group may do to them (without violating their rights)," ix or the frequent appeal to property rights scattered throughout libertarian theories.

libertarian legal theory, along with Lon Fuller and Bruno Leoni, who share his evolutionary approach.²⁰⁷ This is because much of Hayek's writing is motivated by a critique of socialism and various welfarist systems. As a result, the focus of his theory examines how law has been used to reign in government power, the latter being considered a necessary evil in ordering liberty.

At the heart of Hayekian legal theory, then, is a commitment to the preservation of the individual's *liberties* against arbitrary power rather than the protection of a sphere of individual *rights*. Crucially, there is a presumption that individuals are free, and a burden is placed on those who would regulate conduct through law. (This avoids complicated and often unconvincing appeals to natural rights and moral intuitions associated with rights-based theories that will be discussed below.) Since individuals are not assumed to be terribly rational--or at least they are incapable of meeting the kinds of pure deliberative rational autonomy-based models required for individuals by some Kantian theories and/or the social blue-print models preferred by the old left--Hayek recommends looking to a spontaneous system of social order, including legal order based upon norms and conventions, that has evolved over time. On this view law is a product of experience (tradition) not reason, and so much of Hayek's legal theory derives from anthropological studies relating to norms, customs, and the like. This approach has been adopted by Richard Epstein who favors

²⁰⁷ *The Morality of Law*. See also Barry Macleod-Cullinane, "Lon Fuller and the Enterprise of Law, Legal Notes 22, (London: Libertarian Alliance, 1995). Bruno Leoni, *Freedom and the Law*, (Indianapolis: Liberty Fund, 1991). Hayek is cited favorably throughout David Boaz's chapter "Law and the Constitution," Chap. 6, in *Libertarianism: A Primer*.

regulation of behavior via local norms over centralized legal power.²⁰⁸ Up to a point relying upon the evolution of spontaneous systems of social order may seem preferable if we are concerned to limit the growth of government power. But, as we saw previously in the discussions of Mill and Charles Murray's communitarianism, the personal or individual (often nonmonetary) costs need to be balanced alongside social order and will depend in part upon the options for exit available to the person being punished and the level of cruelty inflicted since this harms both the person receiving the punishment and the punisher by diminishing their humanity and civility.

One way that may be helpful in drawing the distinction between liberty and rights is to think about the Federalist model of constitutional government that set up a structure of checks and balances and separation of powers, together with an enumeration of powers. (Meaning that if the power is absent from the constitution, the government may not act, leaving a sphere of individual freedom to act wide open.) Like the market system that it supports, law is spontaneous, dispersed, and competitive.²⁰⁹ This is important for Hayek,

208 See "Enforcing Norms: When Law Gets in the Way" *The Responsive Community*, with a comment, "Social Mores Are Not Enough," by William Galston. Also Epstein's *The Principles of a Free Society* (New York: Perseus, 2002). Galston criticizes Epstein for his utilitarianism (social norms are favored by Epstein because they are more cost-effective than expensive legal institutions) since this fails to protect the individual liberty he claims to be advancing adequately. As we saw earlier in the discussion of Mill's *On Liberty*, social norms may be (unfairly) oppressive to individuals, they may provide the "right" outcome by punishing offenders, but they may not. As Galston points out ". . . Epstein is silent about the non-monetary costs of social enforcement, which are very real and may loom large enough to induce us to turn to the law," 17. Such costs include the unpleasantness of face-to-face confrontations and ostracism.

209 On this see Tom W. Bell, "Polycentric Law," *Humane Studies Review* (Winter 1991/2) 7:1, 1-10.

who is particularly well known for his distinction between law (common law), and legislation (statutory law). He describes the problems facing society:

. . .the loss of the belief in a justice independent of personal interest; a consequent use of legislation to authorize coercion, not merely to prevent unjust action but to achieve particular results for specific persons or groups; and the fusion in the same representative assemblies of the task of articulating the rules of just conduct with that of directing government.²¹⁰

To the extent that Hayekian legal theory fails to create guarantees for the protection of individuals (i.e. rights) it may be considered inadequate as a libertarian legal theory. Instead we need to turn to other more radical conceptions. But, it should also be said that one of the virtues of the Hayekian approach is that it is empirically grounded and regime oriented, (*The Constitution of Liberty*) connecting law to other institutions in society. If libertarianism wishes to advance beyond a critique of the existing order to a general and viable theory about society, then we will need to know how such a legal theory will relate to the other parts. e.g. we will need to know how people learn to obey the rule of law (this, in fact, is notably absent from Hayek,²¹¹) which will probably include some discussion of education, and socialization. This is not typically part of a libertarian legal theory, but it is vital because such norms and habits of character or personality are necessary for it to work. Some of this will be taken up in the next chapter on civil society. Charles Murray's work on

210 F.A. Hayek, *Law, Legislation and Liberty, Vol. 1, Rules and Order*, (Chicago: University of Chicago Press, 1973), 2.

211 That is, except in a very vague and general sense. Hayek discusses his theory of knowledge that is based upon cultural evolution at the end of *Law, legislation and Liberty Volume 3, The Political Order of a Free People*, (Chicago: University of Chicago Press, 1981). See the "Epilogue: The Three Sources of Human

the welfare state suggests that if public institutions are removed, the culture of dependency that they promote will, to some large degree, be replaced by greater personal and communal responsibility and forms of self-help. This may go some way to clearing up this problem, but I am not convinced that it would be wholly adequate. This is clearly an area that requires more work if libertarianism is to be viable for a society of diverse individuals, rather than a select group of strong, healthy, independent, anarchists.

Pilon and Barnett Protecting (Natural) Rights

As described above, Hayekian legal theory is said to be the product of generations of experience. It is careful to avoid any appeal to any single kind of moral theory to ground itself (this might include a kind of Kantian deontology or Aristotelian teleology--both types of value theories have been used by libertarian philosophers,) although there is no doubt that Hayek recognizes that fundamentally the framework that governs our lives rests on a type of moral intuitionism combined with an accretion of knowledge based upon experience.²¹² By contrast, pure libertarian legal theories look to natural rights, or at least some kind of rights--

Values," 153-176.

212 For instance, "From this it follows that no person or body of persons has complete freedom to impose upon the rest whatever law it likes. The contrary view that underlies the Hobbesian conception of sovereignty (and the legal positivism deriving from it) springs from a false rationalism that conceives of an autonomous and self-determining reason and overlooks the fact that all rational thought moves within a non-rational framework of beliefs and institutions. Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey." F.A. Hayek, *The Constitution of Liberty*, 181.

natural or otherwise--to ground legal theory. One version of this view is espoused by Roger Pilon of the Cato Institute. He combines Hayekian legal theory (enumeration of powers) with a vigorous defense of the Bill of Rights.²¹³ Randy Barnett's work on the Ninth Amendment ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,") and his book *The Structure of Liberty* takes a similar approach.²¹⁴

There are theoretical, practical, and even historical problems with the natural rights view. First, it is notoriously difficult to convince anyone who does not already subscribe to a natural rights theory to follow the reasoning of a natural rights argument since, at bottom, it has to be taken on faith. We cannot prove that individuals have rights; rather we make an intuitive moral claim that is groundless if it is not shared by others with similar intuitions. For a variety of reasons this has become harder and harder to do, and it is difficult to convince critics that claims to natural rights are not merely ideological constructs that are designed to defend narrow class, gender or other ideological interests. Part of the appeal to libertarians who make appeals to natural rights in their arguments seems to be that the argument takes on a kind of absolutism accompanied by a set of guarantees--there is a

213 See, for instance, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," 68 *Notre Dame Law Review* 3, (1993), 507-547, including numerous appeals to natural rights, natural law, the higher law tradition.

214 See "Getting Normative: The Role of Natural Rights in Constitutional Adjudication," 12 *Constitutional Commentary* (1995), 93-122, and *The Rights Retained by the People* (Fairfax, VA: George Mason University Press, 1989), as well as *The Structure of Liberty* (Oxford: Clarendon, 1998).

Dworkian "rights as trumps" quality to these arguments.²¹⁵ But real life is rarely so cut and dried. Moreover, life in a liberal polity should not be. For as Judith Shklar has shown, the problem with appeals to natural law theories is precisely the fact that such theories "set a premium on moral agreement and social cohesion and that these ends are not compatible with freedom in a diversified society."²¹⁶ Indeed, such extreme claims run the risk of imposing perverse consequences, inhibiting life rather than simply liberating it from "artificial" constraints in practice.²¹⁷

Furthermore, as Walter Lippmann has argued, the regime of private property that is said to flow naturally out of the recognition of natural rights and the laissez faire arrangements of the eighteenth century is a fallacy. Rights to property are legal constructs that may be made and unmade as the people wish.

The whole regime of private property and contract, the whole system of enterprise by individuals, partners, and corporations, exists in a legal context, and is inconceivable apart from that context.

Just how the latter-day liberals came to overlook something so obvious as that is rather obscure. But apparently they had some sort of notion that because the existing law of property and contracts had not been formally

215 And it is noteworthy that Dworkin's political inclinations are a long way from libertarianism, supporting instead a much more egalitarian vision. This should give us further pause when considering the natural rights strategy as a worthy, or at least unproblematic, support for libertarianism and libertarian legal theory and practice.

216 Shklar, *ibid.*, "Natural Law and Ideology," 64-88.

217 See, for instance, Mark Sagoff's discussion of free market and libertarian environmentalism. Although generally more sympathetic to a rights-based rather than a free-market style environmentalism, Sagoff says when applying it through the common law remedy of nuisance "the problem with allowing routine injunctive relief in nuisance cases . . . is that individuals who refuse to be bought off could close the economy down." "Free Market versus Libertarian Environmentalism," *Critical Review* 6:2-3, (1993), 227.

enacted by the legislature, but had evolved by usage and judicial decision under the common law, it was somehow a natural law originating in the nature of things and valid in a superhuman sense. They came to think of these traditional laws of property and contract as prevailing in a realm of freedom, and when statutes they did not like were enacted to amend the traditional law, they thought of them as interferences by the state.²¹⁸

Lippmann continues, "Contracts are legal instruments. Corporations are legal creatures. It is, therefore, misleading to think of them as existing somehow outside the law and then to ask whether it is permissible to interfere with them."²¹⁹ For Lippmann the source of legitimacy for law and the state comes from the people, but it is also the product of moral experiences and reflects changes in human relations. This seems right. A practical legal theory would rest upon a set of principles that emerge out of a kind of human moral tradition that is shaped and modified over time by reason and circumstances. Thus, although natural rights theory is appealing to a libertarian in principle, it seems that a Humean/Hayekian approach that combines principle and experience would be more useful to a view that intends to be viable--especially in a world of pluralism and diversity. Still, there is the sticky question of the place of fundamental individual rights, and this is why a Bill of Rights is so important.

4. Institutional Structure: The Separation of Powers, Federalism, and the Bill of Rights.

This is a vast and complex area and I cannot hope to do justice here. However, it is

²¹⁸ Walter Lippmann, *The Good Society*, (Boston: Little, Brown & Company, 1943), 189.

²¹⁹ Ibid, 269.

worth pointing out that institutional structure is vitally important to libertarian legal theory, and indeed, the broader regime, as I have already mentioned. All libertarian legal theories are likely to support the institutional separation of powers since as one theorist puts it, "the overwhelmingly distinctive feature of checks and balances is that almost all of them operate negatively. Each branch is given the power to negative--to veto--actions of the other branches."²²⁰ Evidently any political theory that hopes to minimize political power will applaud such an inherently conservative institutional mechanism. However, the matter of federalism (or anti-federalism) is not so straight forward.

The libertarian movement is made up a coalition of individuals who share an antipathy toward government, especially large, centralized government. However, as I noted in the second chapter there are disagreements as to the nature and type of individuals libertarians believe exist (or, in their more ambitious variants, might exist when called upon to govern themselves.) One strand of thought that we see in Murray and to some degree in Hayek is relatively conservative and hierarchical, and therefore favors a federalist approach to law. Another strand is much more democratic, localist, and anti-authoritarian in all spheres of life. The latter will tend to favor anti-federalism, at least in principle.²²¹ Since it

²²⁰ Geoffrey P. Miller, "Rights and Structure in Constitutional Theory," *Social Philosophy and Policy* 8:2, (1981), 202.

²²¹ See, for instance, Michael Allen, "Anti-federalism and Libertarianism," *Reason Papers* 7, (Spring 1981), 73-94, especially the discussion of the Anti-federalists' opposition to a standing army on the grounds of a violation of civil liberties at 82. Allen says that "the Anti-federalists believed the federal Constitution to be an outright repudiation of the goals and ideals of the American Revolution," 84. The legacy of the Revolution was thus anti-authoritarianism--a belief in democratic, local control and a subservient national government. Of course, since we are also concerned with practicalities the anti-federalist view is likely to fall

is so integral to our constitutional thought and practices any libertarian who wanted to abandon the bill of Rights and rely only upon the separation of powers and checks and balances of the Federalist model would be hard pressed to make their case. Furthermore, for those more pragmatically minded libertarians, the Bill of Rights is useful means of protecting individual liberties from central power. At least, this is true when they are interpreted strictly and narrowly.

5. Constitutional Interpretation

The first way to further individual liberty is to limit government. One way to do this is to interpret the powers of government as strictly and narrowly as possible, consistent with the enumerated powers of government in the Constitution. Accordingly, it would seem that practically speaking original intent is the most appropriate doctrine of constitutional interpretation for libertarianism, and indeed, it is the doctrine most often employed by libertarian legal theorists and practitioners. This approach is not without its problems, especially if libertarianism, (as compared with Conservatism) is to live up to its promise of providing a genuinely dynamic view of liberty that may be enjoyed in a variety of forms by increasing numbers of people in future generations. Critics of originalism notoriously criticize it for its conservative rigidity ("freezing a fixed set of rights into constitutional ice in

out of favor since the kinds of people and the lives that they lived, small yeoman farmers and the like, have virtually ceased to exist in today's modern world of corporate employees. Even if anti-federalism is an appealing intellectual option, it may not be practically viable.

accord with a supposed "original meaning" of that provision"²²²) and yet this is precisely what libertarians need from their law if they are to be able to devote most of their time to the enjoyment of economic, moral, aesthetic and any other kinds of liberty that are practiced beyond the political-legal structure.

By contrast, the more expansive "living constitution" approach is less appealing because it allows for greater use of public power in the service of what may or may not be (from a libertarian perspective) admirable goals (e.g. civil rights legislation advancing negative liberty might be greeted enthusiastically; however affirmative action law certainly would not be.) But the living constitution approach would require greater use of public power to force citizens to expand their liberties, which is antithetical to libertarianism. Furthermore it is not clear what the source of legitimacy would be for applying such an approach. Pragmatism won't do. This violates Hayek's general principles of the rule of law. Thus, we are left with originalism. To the extent that the living constitution approach has any appeal for libertarians--especial those focused on social rights such as abortion, or as a strategic tool for "getting from here to there"--for moving from liberal democracy to

²²² The characterization is Laurence Tribe's, although he claims to share more in common with Scalia that Scalia himself recognizes since both appeal to "sets of principles whose understanding may evolve over time." See Tribe's comment in Antonin Scalia, *A Matter of Interpretation*, (Princeton, NJ.: Princeton University Press, 1997), 81.

libertarian democracy it may also contain some temptations. However, to use the "strong arm of the state" (in this case, the courts) would be inappropriate to a libertarian philosophy and if employed it entail a severe departure from its own self-declared principles. The means could not justify the ends. Instead a libertarian regime would need to rely upon peaceful change through changes in public opinion. Securing, e.g. a right to abortion would either have to be undertaken through the political process and added to the bill of rights as a constitutional amendment. Or, what is more likely in a large, culturally and religiously diverse country such as the United States, as a matter of federalism it could be left to the states, to be regulated or not on a state by state basis.

In *The Tempting of America, The Political Seduction of the Law*, (1990) Robert Bork employs a version of originalism to criticize what he regards as the pervasive distortion of law by politics, conceived as ideology, particularly left-wing or liberal ideology. According to Bork, policy making, including decisions regarding hard moral questions (e.g. abortion, the death penalty) are "questions left for the people and their elected representatives, not for courts, to decide."²²³ Judges are (or should be) bound by the law, which means that they have a duty to apply or administer the law enacted by the other branches of government. Further, judges do not really interpret, rather they judge using neutral standards. He says, "[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation

223 Robert Bork, *The Tempting of America*, (New York: Free Press, 1990), 9.

of law."²²⁴ By way of clarification he relates the following tale:

There is a story that two of the greatest figures in our law, Justice Holmes and Judge Learned Hand, had lunch together and afterward, as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, "Do justice, sir, do justice." Holmes stopped the carriage and reproved Hand: "That is not my job. It is my job to apply the law."²²⁵

The problem with Bork's view is that it assumes that the meaning of the Constitution is clear and distinct. It suggests that when judges consult the Constitution during their review of cases that come before the Court there is no gap between what the Constitution says and what the judge understands it to mean. Politics--the forum of choice, power, and even morality (Bork does not distinguish among these)--is unnecessary because we need only consult the Constitution to discover how we should act. He says that there is no need for us to choose our understanding of the Constitution because the Framers already decided for us when they constructed the Constitution and its meaning is self evident. Further, looking to the Constitution is not one more value choice, rather it belongs to a separate category because it carries with it the support of the people who ratified the document and who continue to accept the authority of the Constitution. If there is a choice to be made in some area of law, it should be done in Congress not on the court.

While there may be something to this--as Bork said in a earlier article²²⁶ why bother

224 Ibid, 6.

225 Ibid.

226 "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, 1, (1971), 1-11.

to have two legislative chambers?--it seems to me that it is too simple. His separation is overdrawn. First, because it fails to take account of the spirit of the Constitution--that includes constitutionalism, which means creating institution that provide both continuity and change, so something other than a straightforward reading of the text needs to be employed to help us to apply the Constitution to modern cases. Also, while many parts of the Constitution are clear and straightforward (e.g. Art. I "No Person shall be a Representative who shall not have attained to the Age of twenty five years, and have been seven Years a Citizen of the United States. . . "), there are large parts that are not, and which therefore require interpretation, not mere application. (e.g. The first amendment regarding free speech--what is Speech? What constitutes the "establishment" of religion? The equal protection clause and due process clauses, and so on.) Bork's view cannot adequately deal with the penumbra of the Constitution, (He would not have found a right to privacy as per Griswold, for example, which many libertarians strongly support) so we need to look elsewhere--possibly to politics, possibly somewhere else, to help us to find answers to the hard questions.

Associate Justice of the Supreme Court Antonin Scalia also employs a variety of originalism in his opinions. He is not quite as strict as Bork, preferring to apply standards of reasonableness when necessary. Still, Scalia is quite clear about the need for discerning the precise meaning of the text and the need to apply standards of consistency to law: Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law--both judge-pronounced common law and judge-pronounced determinations of the application of statutory and constitutional provisions. Legislatures are subject to democratic

checks upon their lawmaking. Judges less so, and federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic. . . courts apply to each case a system of abstract and entirely fictional categories developed in earlier cases, which are designed, if logically applied, to produce “fair” or textually faithful results.²²⁷

Both Bork’s and Scalia’s approaches are firmly grounded in both a conservative (small “c”) and Conservative (large “C”) philosophy. Consequently, someone who is more attracted to libertarianism might find it unsatisfactory. However, taking a conservative approach seems appropriate for law in a libertarian regime. The real work of self-creation, development, and even liberation does not require and is not intended to receive direct constitutional sanction through the courts. All that is necessary is that individuals have the freedom guaranteed by law to pursue their goals.

The Use and Abuse of Market Principles as Applied to Law

Barnett's theory of restitution is distinctive because it goes beyond the usual arrangement of political power and attempts to treat the individual seriously by examining criminal behavior as crimes against the person rather than the state. On this view, private

²²⁷ Antonin Scalia, “Assorted Canards of Contemporary Legal Analysis,” *Case Western Reserve Law Review* 40:581, (1989-90), 588-589. See also *A Matter of Interpretation*, (Princeton: Princeton University Press, 1997).

law is considered superior to public law for both moral and economic reasons. [It treats the individual seriously, and it is argued that a system of competing policing agencies would have a stronger incentive to work (via the market mechanism--if you don't protect me I can take my services elsewhere--so it is more efficient.)

Thus, crime should be seen as an offense by one individual against the rights of another. The victim has suffered a loss. Justice consists of the culpable offender making good the loss he has caused. . . Where we once saw an offense against society, we now see an offense against an individual victim. . . *The armed robber did not rob society; he robbed the victim.* His debt, therefore, is not to society; it is to the victim."²²⁸

On this view individual rights and obligations are the principal focus. Barnett says "Restitution recognizes rights in the victim, and this is a principal source of its strength. The nature and limit of the victim's right to restitution at the same time defines the nature and limit of the criminal liability. In this way, the aggressive action of the criminal creates a *debt* to the victim."²²⁹ "No longer would the criminal deliberately be made to suffer for his mistake. Making good that mistake is all that would be required."²³⁰

With the substitution of criminal law by a pure theory of restitution, crime becomes a crime against the person not the state. This, presumably, is why Barnett refers to the wrong

228 Randy Barnett, "Restitution: A New Paradigm of Criminal Justice." *Ethics*, 87:4 (July 1977), 287-88, cited in Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" *Ethics*, 88: 4 (July 1978), 349.

229 Barnett, *ibid*, 291.

as a “mistake” rather than a “crime.” Insofar as Barnett's theory engages a *principle* that treats seriously the harm done to the *individual* libertarians would surely wish to embrace him. However, a second glance at the theory suggests that the *implications* of restitution theory do not in fact do that, if we are concerned about an individual as a human being, rather than an object that has suffered some diminution of value. In fact, as it turns out, this theory misses the point in a fundamental way. For as Roger Pilon explains, the element missing from tort law that is captured by criminal law is not just a harm, but an affront to one's dignity or integrity. "There is simply no amount of money that will rectify certain kinds of wrongs."²³¹ The criminal act and the mere tort are altogether different magnitudes; they are different categories of action, calling for different remedies. Indeed, the criminal act calls not only for compensation but for punishment as well." Moreover, it follows that this policy could create perverse incentives for the wealthy criminal (murder or rape might be committed with impunity by Bill Gates,) while also failing to substantially compensate the wealthy victims (in relative terms). The point is that there is no amount of money that can rectify rape or murder. They are non-negotiable acts, which goes back to my earlier comments about individuality and the law. Having said that much, and in spite of these problems there is no doubt that some sort of rights-based legal theory would be preferred by libertarians over a theory that fails to include rights because of the guarantees they accord

230 Ibid, 289.

231 Pilon, *ibid*, 352.

the individual.

Law and Economics

To the extent that libertarians are interested in helping and promoting the values and interests of the *individual*, it surely matters what our conception of the individual is. Commonly, as was noted previously, libertarianism is associated with the model of economic man--a rational chooser who bargains with others to maximize his freedom, and this has been extended to legal theory through law and economics. Many of the criticisms that may be made here have already been outlined in the chapters above, so it is not necessary to dwell on them at length. Suffice to say that when acting in the legal domain libertarian individuals and judges should not only consider personal preferences and the costs and benefits of the social policy or law with which they are concerned. Indeed, since law is the means through which politics (conceived in the constitutional or regime sense) is practically enacted practically and functionally, we should expect individuals acting as citizens to be concerned with something rather different from individual preferences. Instead, it is likely that we shall want to consider values, beliefs and opinions about how we ought to live--our aspirations as a libertarian regime, and other expressive, moral, or aesthetic judgments about our lives that are not captured in an economic calculus. Thus, as Jane B. Baron and Jeffrey L. Dunoff explain in their critique of economic based legal theory, to apply economics in this way is to make a category mistake. It is also to disregard the deeper question about whether certain aspects of life ought to be judged in relation to economic calculation. Of course, a balanced and reasonable view of social policy will not therefore abandon economic considerations altogether. Rather, it will require a balancing of different kinds of values (e.g. economic,

moral, aesthetic) to capture what is at stake for human beings.²³²

Law and Individuality

In his chapter on the rule of law in *Reflections of a Would-Be Anarchist*, Richard Flathman discusses the fundamental tension between law and other forms of rule-following and individuality. The problem is that

As with "institutionalizing" a person, to institute an organization, arrangement, or procedure is to attempt to fix and to settle, to structure and to secure, to order and to control, larger or smaller aspects of the thinking and acting of some number of human beings. It is an attempt to render uniform, constant, and predictable that which would otherwise be diverse, fluctuating, and uncertain. By adopting and enforcing the norms and rules, offices and procedures of which institutions primarily consist, successful processes of institutionalization confine and direct the conduct of those who are subject to the arrangements that those processes establish.²³³

By contrast, Flathman notes that freedom, individuality, and plurality call forth that which is unique, particular, spontaneous and unpredictable. Nancy Rosenblum echoes this assessment when she considers the relationship between the "law of the heart" that governs romantic anarchists and liberal legalism in *Another Liberalism*. . . romantic anarchy has nothing to do with social order and control. It is concerned with individuality and self

232 See Jane B. Baron and Jeffrey L. Dunoff, "Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory," 17 *Cardozo Law Review* 1996, 431-496 comparing environmental ethics, civic republicanism and commodification theory to law and economics; Also Robin Paul Malloy, "Is Law and Economics Moral?--Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis," *Valparaiso University Law Review* 24: 2 (Winter 1990), 147-161, arguing for a theory of value that extends beyond efficiency, wealth creation and cost-benefit analysis; also see Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics," 64 *University of Chicago Law Review*, (Fall 1997), 1197-1214.

233 Flathman, *ibid*, chapter 5, "Liberalism and the Suspect Enterprise of Political Institutionalization: The case of the Rule of Law" citing MacIver at 79.

expression, with perfect freedom."²³⁴ Accordingly, at the very heart of individuality is a tremendous antipathy toward law and all forms of institutionalization that will need to be accommodated in a practical political theory. Any individual who values individuality will maintain a distinctly skeptical attitude with respect to law and following the rule of law and it entails that law must be confined not only to generality and regularity, but also in its very scope. This is where Hayekian classical liberalism is transformed into libertarianism, for, as Flathman points out, neither Fuller nor Hayek are especially concerned with the application of law once it is confined by regularity.²³⁵ Rule-following is insufficient. The rules themselves must be given some content so that the scope of political authority is limited.

Conclusion

Libertarians need to recognize that law is not a panacea that cures all ills, or even completes all (voluntary, consensual and freely chosen) visions. Law would not ultimately be the key to the realization of all aspects of individuality, and to suggest that it does would be to miss the point. Rather, law would have a clearly delimited place within a broader

234 Rosenblum, *ibid*, 41. Also, "individualism always draws attention to the common and invariant characteristics of persons . . . there is no trace of the affective or original, the imaginative or unexpected", 55.

235 "The dominant concern of these thinkers, accordingly, has not been whether or how much governance there should be, but rather how to prevent arbitrariness and other misuses of political authority and power," 84.

theory that secured and that enhanced certain aspects of individual life, while staying out of other areas (e.g. cultural sphere) altogether. Thus, a libertarian legal theory is vitally important for securing basic conditions (public law) and furthering some forms of liberty (private law), but it must be clearly delimited so that it does not interfere with other areas (no law, or at least only moral and conventional law such as norms). In practice, particular policies may generate tensions between the different spheres, in which case some hard choices will need to be made. For now it is important to recognize that as a general principle the bounds of law are at least as important as its formal structure and content.

It is vitally important to include within libertarianism a general attitude that is self-consciously critical and continually evaluating its own aim and methods. Such an attitude is vital for the realm of law because the consequences of legal sanctions are potentially great both positively (securing markets to make money) and negatively (denying life, liberty or property in the case of crimes).

In relation to the economic analysis of the law and natural law theories I have tried to suggest that they are both relevant and likely to play significant roles in a libertarian theory, but they both suffer from a kind of reductionism. Economics stresses freedom of exchange and choice, but reduces the individual to a rational maximizer, a consumer. This takes account of only one aspect of individuals. Similarly Judith Shklar has complained about natural law's stress on moral agreement at the expense of diversity and tolerance. The question, then, would appear to be to what extent to which we want to legislate diversity, tolerance and individuality through law. But this is the wrong question. Instead, we should try to minimize the extent to which law threatens individuality. This can only be done if we

maintain a critical stance and focus on the individual and his place within the larger constitutional structure and look at law in relation to the other spheres of life.

CHAPTER 5: LIBERTARIAN COMMUNITIES AND CIVIL SOCIETY

In the West . . . we have lived in civil society for many years without knowing it. Or, better, since the Scottish Enlightenment, or since Hegel, the words have been known to the knowers of such things but they have rarely served to focus anyone's attention.²³⁶

In spite of a rich historical tradition including the theories of Smith, Hume, and other members of the Scottish Enlightenment within classical liberalism, libertarians have been largely absent from the contemporary debate regarding community and civil society beyond the market. When they have participated, they have been on the defensive, fending off criticisms against individualism (atomism), abstraction, and neutrality with respect to the good. This chapter will argue that in fact, intelligent and thoughtful classical liberals have and indeed need to have, a vibrant and dynamic theory of community if a society secured by a limited government is to present a viable but also attractive alternative to more statist political theories. This is especially true if it is to promote and encourage the cultivation of individuality.

Unfortunately, it must be admitted that currently, to the extent that community is considered at all within libertarianism, it usually appears in its barest form in the guise of the free market. However, I shall argue that such an approach--the advancing of individual interests collectively--fails to capture some of the distinctive aspects of community--namely, its sense of connectedness and solidarity. Instead, what is needed is a theory of community

236 Michael Walzer, "The Idea of Civil Society," *Dissent*, (Winter 1991), 293.

that fosters affective ties at the non-state, non-market (i.e. what has come to be called "civil society"²³⁷) level through a complex plural system of voluntary associations. Such organizations, I will argue, complement rather than contradict the state and market. This is because they are necessary to support a political theory that lays out the relationship between the individual and the state, while also taking seriously what one does with that freedom once it is secured. Strictly speaking, a liberal theory of community is not therefore a political theory. Rather, it is a social theory, but one that closely relates to the overarching political theory that outlines and defends liberties and rights.²³⁸ Moreover, it is a vital element of the larger political theory or regime theory. For civil society helps to protect and realize the freedom of an individual, where an individual is considered to be something more than a consumer, a property owner, or a rights holder. Instead, on this view the individual is conceived as a human being, and his capacities and individuality are developed as he freely engages with others in civil society. This will be followed by a discussion of the application of the ideas grounded within such communities--voluntarism and reciprocal altruism--in the institutional practices of a libertarian organization.

237 "The words "civil society" name the space of uncoerced human association and also the set of relational networks--formed for the sake of family, faith, interest, and ideology--that fill this space." *ibid.*

238 Compare this, for instance, with more explicit political theories of community such as nationalist theories in which we look to the state for our source of identity. See, "Conventions and Conversions, or, Why Is Nationalism Sometimes So Nasty?" by Robert Goodin in *The Morality of Nationalism* Ed. Robert McKim and Jeff McMahan, (Oxford: Oxford University Press, 1997), 88-104. Or, communitarian theories that argue for community because of the kinds of characters it fosters, disposing its citizens towards a more deliberative and participatory (civic republican) polity. See Michael Sandel, *Liberalism and the Limits of Justice*, (New York: Cambridge University Press, 1982).

In 1991, as libertarianism appeared to be gaining increasing influence after the fall of communism, Richard Cornuelle published a short essay titled “the Power and Poverty of Libertarian Thought.”²³⁹ Cornuelle argued that at the time libertarians were unprepared to seize the opportunity that the collapse of communism provided since they were wedded to their critique of socialism and lacked a coherent positive vision. In particular, he identified two problems: 1. the lack of a distinct libertarian vision of community and 2. a myopia in relation to disparities in freedom between employers and employees. The second was mentioned in an earlier chapter. Here I take up the first omission.

Cornuelle complained and noted a curious irony--the lack of a coherent, comprehensive vision of voluntary community has forced libertarians, unnecessarily, I think, into an individualist emphasis, a suspicious aversion to any kind of collective activity beyond the commercial, in spite of the fact that the libertarian movement is, itself, a voluntary collective with a strong sense of solidarity and remarkable power.²⁴⁰ Instead of devoting attention to politics and economics, Cornuelle said that it was time for libertarians to turn their attention to the social sphere and to consider the voluntary relations between and among individuals in the non-profit independent sector (or what has come to be known as “civil society). If libertarians do that, they might begin to have a greater appreciation for the

239 Reprinted in *The Libertarian Primer*, Ed. David Boaz, (New York, Free Press, 1997), 363-371.

240 Ibid, 370.

complexity of their project—the achievement of freedom, and indeed the sophistication of the individual whose freedom they are supposed to be championing. Cornuelle pointed out that one of the principal authorities often cited by libertarians, the economist Ludwig von Mises, recognized that within the vast spectrum of human activities “economics treated only a slice.” Other areas of free lives needed to be studied so that theorists and policy makers could begin to appreciate the tremendous benefits of civil society in helping to support and promote free lives within a society, not simply an economy.

Writing in *Reason Magazine*, a libertarian publication, two years later Paul Weaver echoed Cornuelle’s sentiments and called for a “do-good libertarianism.”²⁴¹ Specifically, Weaver said that what libertarians needed was to transform libertarianism from a negative critique of state power and regulation of the market and adopt a more positive programmatic approach to convince the public that libertarianism could provide a genuine viable alternative to the command and control politics of the preceding period. Weaver exhorted “The time has come to wage a war for hearts as well as minds, and to recover or re-create a classical liberal culture.” To some degree theorists like Boaz and Murray have begun to move in this direction, but there is still much to be done. Not only in developing a psychology associated with libertarian civil society, but also its relation (tension or “contradiction”) with other psychologies associated with other domains of society. To talk blithely about relations of consent and voluntarism is inadequate for any serious

241 Paul H. Weaver, “Do-Good Libertarianism,” *Reason Magazine*, May 1993, 61-63.

understanding of what constitutes a free life, as I shall note later in this chapter. The point I wish to make here is that libertarian individuals must be concerned with the cultural aspects of the self, not just the political or economic aspects.

Community: Some Conceptual Models

In *The Blackwell Encyclopedia of Political Thought* Raymond Plant lays out three models of community that are useful for this discussion.²⁴² These are:

1. The Organic Community Model
2. The Commonality of Interests or The General Will Model and
3. A Community of Communities Model.

Starting with the thickest or most robust form of community and moving to the thinnest we can see that there is in fact no single theory of community.

1. The Organic Community (strong community):

Following Ferdinand Tönnies' *Gemeinschaft und Gesellschaft* (Community and Association) (1887), on this view the defining characteristic of community is its origin. A true community is based upon blood, kinship, shared habitat and locality, as well as a set of common attitudes, experiences, feelings and dispositions. Community, therefore, is something which one is born into and grows within. As such, an organic community is clearly not a social order that is self-consciously built by a group of rational individuals

²⁴² Ed. David Miller, (Oxford: Blackwell, 1987), 88-90.

trying to escape from the perils of the state of nature. Further, it is distinct from a society or an association because it is based upon birth, status, habit and disposition rather than interest or contract. Once an individual is a member of such a community he can never leave it. Or rather, he may choose to exit it physically, but he will always remain tied to the community because of his kinship ties.

2. Commonality of Interests or The General Will (association):

In contrast to the liberal/contractarian model outlined below, on the General Will model community is not constituted by the aggregate of individual private interests. It is more than that--indeed it is dependent on the existence of the group for its identity and proper functioning. In contrast to the organic model, a community based upon a commonality of interests may be created by will to form an association, but it has to be a particular kind of will--one which expresses the common good, or a set of interests which the group as such has in common.

3. The Community of Communities (market):

The third model describes a series of overlapping, competing and contrasting associations, clubs, and groups to which individuals form partial attachments to defend or advance a set of private interests collectively. According to this view, an individual might consider himself to be simultaneously a member of the Internet community, a religious community, a family, and some type of professional association.

Primitive societies are an example of the first type of communities, but these ideas are also invoked to some degree by nationalists and strong communitarians, especially those who share a kind of republican nostalgia. The second conception is most famously

associated with Rousseau's social contract but also, and perhaps more charitably, with Tocqueville's "self-interest properly understood." Here the application of these ideas might range from communitarians (including Sandel in his less polemical moments), but also Amitai Etzioni and William Galston (who refers to himself as a "worried liberal"). However, I shall argue that this approach may be utilized by classical liberals so long as it is done within civil society rather than at the level of the state. The third view is, of course, a version of market society, and this is precisely the view that is typically identified with libertarians. However, it seems that this is an inadequate conception of community because it does not capture the essential communal feature that is distinctly related to community. (The parts never become more than the sum of the parts.) Furthermore, it tells only half of the story of libertarianism. The view that I want to argue for seems to have elements of the second and third conceptions of community since it advances more than shared interests,²⁴³ but it is likely to do this within a community that exists alongside other partial communities (or associations).²⁴⁴ But, I shall return to this in a moment. First, we will consider the relationship between community and liberalism at the conceptual (and political) level, before moving to a conception of liberal community--libertarian communities.

Macedo and Liberal Community

243 The kinds of ideas supported by the organization that I discuss in the second half of the chapter probably contain a mixture of values and interests, where interests are contingently related to the individual's position in the social structure, while values are relatively autonomous and advanced for their own sake, as goods in themselves, rather than instrumental goods (interests.)

244 Hence my title "libertarian *communities*" in the plural, that may be compared with the singular

In his book *Liberal Virtues* (1990) Stephen Macedo responds to some of the criticisms leveled at liberalism by communitarians, while maintaining true to the basic tenets of it, including the principles of consent and voluntarism.²⁴⁵ He states that at bottom the crucial distinction between liberals and communitarians is their sense of self, which guides the kinds of political institutions that communities and societies construct. Communitarianism focuses attention on the characteristics we share as citizens--the "social" quality communitarians wants to emphasize--and therefore our sameness and connectedness. By contrast, liberals look to the differences between individuals (as such), and try to construct institutions so that individuals may coexist within groups that reflect their differences rather than cohere in a self-governing community.²⁴⁶ Thus, for Macedo liberalism is a political (rather than a moral or social) creed:

The liberal project is to find regulative political principles for people who disagree. Disagreement about ends, goals, and the good life is a basic precondition of liberalism, generating scarcity among altruists. Liberal justice is best understood . . . as a public morality that all citizens have a duty to interpret, criticize, and support in their own conduct and against the possible transgressions of public officials. Liberal politics protects the equal right of persons to devise, criticize, revise and pursue a plan of life, and it furnishes institutional settings for the activity of public justification.²⁴⁷

models of nationalism and communitarianism.

245 I have chosen Macedo because he is sympathetic to classical liberalism, and therefore quite close to a broad libertarianism, although he pitches his argument at the more general conceptual level by talking about liberalism per se. As one conception of libertarianism the theory that I wish to present fits into Macedo's framework, but places emphasis on particular aspects of it.

246 I borrow this distinction from Chandran Kukathas who says "the good society liberal political theory describes is not a unified entity," *The Liberal Archipelago*, (Oxford: Oxford University Press, 2003).

247 Stephen Macedo, *Liberal Virtues*, (Oxford: Clarendon, 1990), 203-4.

Notice that Macedo places critical or self-conscious rationality at the center of his theory--the very element for which Sandel is criticized for neglecting in his account of the socially constituted self.²⁴⁸ But in so doing, Sandel would argue that liberals like Macedo forgo the possibility of ever experiencing true solidarity in a real community.

Instead of looking to community as a source of identity through which individuals *discover* who they are, Macedo suggests that liberals ask the question "what kind of life do I want to live?"²⁴⁹ and *choose* to join, or remain within, or exit their various communities accordingly.

Achieving autonomy is not a matter of detaching one's "self" from all one's commitments and aspirations and from social understandings and ideals, choosing a purely abstract subject constituted only by "reason" or sheer arbitrary will. Situated autonomy involves critical reflection on inherited values, personal commitments, and basic goods, not a flight from and abandonment of them. Liberal autonomy engages our understanding and responsibility at a deep level by engaging the capacity critically to reflect upon morality and personal identity, itself already constituted by projects,

248 See Macedo (1990), Chapter 6 "Freedom, Autonomy and Liberal Community," and Will Kymlicka, "Communitarianism and the Self," chapter 4 in *Liberalism, Community and Culture* Ed. Will Kymlicka, (Oxford: Clarendon, 1989)

249 I borrow this distinction from Will Kymlicka (1989).

plans, commitments, and strong evaluations.²⁵⁰

What counts for Macedo is that we criticize and live according to good publicly justifiable reasons. By comparing the rewards and obligations that membership within different communities afford us, we can continue to revise and improve our lives as freely choosing, but thoughtful individuals who enjoy life in many communities. What counts for communitarians like Sandel is that we belong--we have a sense of identity which is part of a larger whole.

Libertarianism and Community: Concepts and Conceptions

250 Macedo, *ibid*, 220.

Conceptually, libertarianism is associated with concern for the sanctity of the individual, toleration, peace, constitutional government with limited powers, freedom of contract, and the free market. When conceived as a pure political theory, it places emphasis on the relationship between the individual and the state. Therefore, when engaging in analytic political theory we may reasonably expect to exclude community from our considerations. However, it seems to me that if we are interested in using our analysis profitably, we need to be concerned with the way in which the various parts of a society relate to each other in practice. Indeed, echoing Judith Shklar's comments regarding the abstract treatment of liberalism²⁵¹ one might argue that makes little sense to discuss liberalism as a concept. Rather, we would be better served to conceive of liberalism in terms of historical traditions and particular conceptions, and perhaps differing interpretations of conceptions within a conception. That is, we might consider libertarianism as a conception of liberalism, and the free market version of libertarianism (market liberalism) as compared with a more balanced version including the cultivation of individuality in civil society as interpretations of that conception.

As it turns out, contrary to the communitarians' broad statements about liberalism in general, it is not the case that one version of liberalism--classical liberalism--necessarily

251 Judith N. Shklar, "The Liberalism of Fear," in Nancy Rosenblum, *Liberalism and the Moral Life*, (Cambridge: Harvard University Press, 1989).

excludes consideration of community from its theory.²⁵² However, it would probably be fair to say that when libertarian theorists have considered the place or function of community in a liberal society, their attention is drawn to community because of its relation to the individuals who compose it. That is, consideration is derivative, not first order, as it is for communitarians.

Libertarians tend to approach community with ambivalence, recognizing that as an institution of mutual aid, friendship, and affective ties it may offer a preferable alternative to the (by definition) coercive state.²⁵³ However, they also recognize that in practice communities may turn out to be at least as oppressive as the state. Due to the proximity of communities in relation to the people who live within them communities are often better able to gather information about what the members of that community need and can provide. This is particularly true when one considers again the community's proximity to the members of it.²⁵⁴ Thus, within a classical liberal theory social efficiency in the provision of public and

252 For instance, Michael Sandel's criticisms concerning the liberal "unencumbered self" are misguided because they fail to recognize that the abstraction used by liberal theorists to identify an individual is a methodological device, and it is not intended to say anything about actual individuals who live in the world. Rather, it is used to clarify careful thought about a complex world, not to reduce the world to a simplistic parody. See Ryan, 1990.

253 F.A. Hayek, "Coercion and the State," chapter 9 in *The Constitution of Liberty* (Chicago: University of Chicago Press), 133-147.

254 I.e. Norms of behavior in communities may be regulated with public shame and humiliation. J.S. Mill knew this only too well, and it formed the focus of his critique of prejudice and custom in *On Liberty*. By contrast, it may be the case that the expensive, but frequently inefficient and therefore ineffective state leaves the average citizen more or less alone (save for the payment of taxes.) Of course, Tocqueville makes similar criticism about the tyranny of the majority throughout *Democracy in America*, (Chicago: University of Chicago, Press, 2000).

private goods needs to be carefully counter-balanced with concerns for freedom (autonomy) and privacy.

One of the enduring characteristics of libertarians is that they are at pains to distinguish themselves from the right and the left. A way of doing this is to criticize others' conceptions of community. They point, for instance, to traditional communities that are venerated by the romantic right or the rational blueprint models of the left. Thus, to the extent that libertarians have considered community, they have tended to do so cautiously and often critically.

Taking these points together, it is hardly surprising that digging up libertarian conceptions of community, particularly within contemporary political theory, is a little difficult. Furthermore, we might consider that during the twentieth century libertarianism has taken the form of a critical theory that has developed in response to what its supporters regard as excessive government intrusion into the private sphere. To the extent that this has been true, libertarian theorists have been even more preoccupied than they might ordinarily be with the relationship between the individual and the state. Consequently, the part of society that falls between the two--community and civil society--is frequently ignored.

However, if libertarians wish to advance beyond mere critique to advance a constructive theory of the free society, they must be prepared to discuss "freely evolved intermediary institutions".²⁵⁵ Functionally, somebody and something need to do the work of the welfare state, so in theory and especially in practice we should expect to see a vibrant market and civil society.²⁵⁶ Beyond that, however, communities are a crucial counterbalance to the state, with its political equality and legal neutrality.²⁵⁷

Libertarian Conceptions of Community

1. The Economic Model

Undoubtedly, in the minds of many people, including some who consider themselves to be its supporters, classical liberalism and libertarianism is identified solely with the free market. As a result, classical liberal and libertarian scholarship has tended to focus on the virtues of self interest and even egoism in motivating individuals to act spontaneously to produce ordered liberty. Indeed, theorists ranging from Bernard Mandeville to Adam Smith,

²⁵⁵ *A Student's Guide to Classical Liberal Scholarship* (Fairfax: Institute for Humane Studies, undated), 4.

²⁵⁶ On this point, the work of historian David Beito on mutual societies and self help is particularly illuminating. See "Mutual Aid for Social Welfare: The Case of American Fraternal Societies," *Critical Review*, vol. 4, no. 4, (Fall 1990), 709-36. In a similar vein, in *Losing Ground: American Social Policy, 1950-1980* and *In Pursuit of Happiness and Good Government* Charles Murray has documented how the state has crowded out traditional communities.

²⁵⁷ Recall Robert Nozick's account of communities in the third section titled "Utopia" in *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974): "Utopia will consist of utopias, of many different and divergent communities in which people lead different kinds of lives under different institutions. Some kinds of communities will be more attractive to most than others; communities will wax and wane. People will leave some for others or spend their whole lives in one. Utopia is a framework for utopias, a place where people are at liberty to join together voluntarily to pursue and attempt to realize their own vision of the good life in the ideal community but where no one can *impose* his own utopian vision upon others)", 312.

David Hume and Friedrich Hayek have championed laissez faire economics and the related theory of the spontaneous order of the market as an alternative to other planned political orders.²⁵⁸ In *The Scottish Enlightenment and the Theory of Spontaneous Order*, Ronald

Hamowy describes the theory:

The theory (of spontaneous order) holds that the social arrangements under which we live are of such a high order of complexity that they invariably take their form not from deliberate calculation, but as the unintended consequence of countless individual actions, many of which may be the result of instinct and habit. The theory thus provides an explanation of the origin of complex social structures without the need to posit the existence of a directing intelligence. Rather, such structures come into being as a consequence of the aggregate of numerous discrete individual actions, none of which aims at the formation of coherent social institutions. Society is not the product of calculation but arises spontaneously, and its institutions are not the result of intentional design but of men's actions which have as their purpose an array of short-term objectives.²⁵⁹

Hamowy's account describes individuals who are motivated by self interest "not a disinterested concern for the welfare of others." He cites Hume, noting that "Hume believed it was not possible to infuse "a passion for the public good" sufficient to act as a spur to industry, as was apparently the case in the ancient republics. Therefore, "it is requisite to govern men by other passions, and animate them with a spirit of avarice and industry, art and

258 The latter having been found to be wanting both theoretically and practically because of the burden placed on rationality, the need for coercive techniques to facilitate political programs thereby diminishing freedom and consent, and the practical inefficiencies associated with actual political programs, well-documented by the public choice school.

259 (Carbondale and Edwardsville: Southern Illinois University Press, 1987), 3.

luxury." By such indirection, Hume contended, could one provide for the public welfare."²⁶⁰

Reading such extracts one has the impression that there is nothing more to libertarian theory than a discussion of the relationship between the individual and the state. Community is utterly absent. Moreover, from the perspective of other theories that extend beyond narrow self interest, the values and motivations undergirding the theory of the classical liberal market are unappealing to say the least. But this tells only part of the story. Hamowy's and Hume's discussion is about social order and therefore one that is posited at the most general level--society, not communities within society. Further, it refers to only one set of activities in society: commerce. In fact, self interest is a necessary but not sufficient condition for a viable classical liberal society.

260 Hamowy , 10 citing Hume "Of Commerce," from *Essays Moral, Political, and Literary*, 1, 294-95.

2. Communities in Civil Society

That classical liberals do indeed have a theory of community may be seen if we shift our attention away from political economy and toward moral philosophy and social practice.

Starting with a broader, more human conception of the individual we are told by Adam Smith in his *Theory of Moral Sentiments* that human behavior is regulated by a collection of sentiments including self interest, justice and benevolence.²⁶¹ His notion of sympathy describes how individuals moderate their selfishness:

How selfish soever man may be supposed, there are evidently some principles in his nature, which interest him in the fortune of others, and render their happiness necessary to him, though he derives nothing from it except the pleasure of seeing it. Of this kind of pity or compassion, the emotion which we feel for the misery of others, when we see it, or are made to conceive it in a very lively manner. That we often derive sorrow from the sorrow of others, is a matter of fact too obvious to require any instances to prove it; for this sentiment, like all the other original passions of human nature, is by no means confined to the virtuous and humane, though they perhaps may feel it with the most exquisite sensibility. The greatest ruffian, the most hardened violator of the laws of society, is not altogether without it.²⁶²

261 I am following the conventional reading of Smith's theory as outlined in "Setting the Scene: Adam Smith's Moral Philosophy," by Jerry Evensky in *Adam Smith and the Philosophy of Law and Economics* (ed.) Robin Paul Malloy and Jerry Evensky, 7-29. This suggests a dichotomy between Smith's *Wealth of Nations* (propounding a social and economic theory of self-interest) and his *Theory of Moral Sentiments* (a social and moral theory grounded in benevolence and sympathy). However, according to D.D. Raphael and A.L. Macfie a more accurate reading of Smith would recognize that there is continuity between the two works. In both works, Smith relies upon self-love (self-interest) but this may include a concern for others. See "Introduction," *Theory of Moral Sentiments* (Oxford: Clarendon: 1976), 20-22.

For an interesting application of the conventional approach to contemporary legal theory see Robin Paul Malloy "Debate: Is Law and Economics Moral?--Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis," *Valparaiso University Law Review* 24:2, (Winter 1990), 147-161.

262 Adam Smith, *The Theory of Moral Sentiments* (Ed. D.D. Raphael and A.L. Macfie) (Oxford: Clarendon, 1976), 9.

Thus, we learn that individuals are not strict individualists. Still, we need to look elsewhere to examine the kinds of communities I wish to incorporate into libertarian theory on the basis of such traits.

Anthony Black's analysis of the role of guilds²⁶³ in medieval and modern society is instructive in this regard. In his *Guilds and Civil Society*,²⁶⁴ Black provides an account of the "history of medieval and modern political thought from the viewpoint of the guild and of the values which have been associated with it."²⁶⁵ In so doing he calls attention to a version of community that falls between the second and third models that I contrasted above. Black presents an analysis of tightly-knit affective communities based upon mutual oaths rather than blood ties. Crucially, (since we are trying to outline a libertarian theory), Black notes that entry into the guilds was voluntary and consensual, but that one joined in order to form a permanent bond of "eternal brotherhood" in organizations that resembled "artificial families." (Although it must be pointed out that Black emphasizes that at no time did the guilds supercede the natural family.²⁶⁶) Instead, the values promoted within the guild--

263 "Guilds" includes primarily craft guilds, but also social guilds, territorial fraternities, and communes, and extends later to trade unions.

264 (Ithaca, NY: Cornell, 1984)

265 Ibid, xi.

266 "Gierke exaggerated when he said that guilds 'embraced the whole man.' At no point, it would seem, did they outweigh family ties which, craft-guild membership usually being hereditary, were actually incorporated in the guild system." Ibid, 27. "Gierke's analysis is not borne out by the evidence. His model is essentially based on his own strong imagination, reinforcing a popular nineteenth-century myth still alive today of a good, old, warm, cohesive society, located in a fictitious past,"28.

fellowship, honor and mutual aid--ran parallel alongside the values of the market (which Black calls civil society--not to be confused with its current use to denote the guild-style values of non-market, non-state society) including contract and exchange. In describing the spirit and practice of the early trade union and the co-operative movements which continues some of the traditions of the guilds Black says

While it is true that workers professed an affective attitude towards their associations, and did not regard them solely as a means either to individual well-being or to the 'improvement' of living standards, this does not indicate that their attitude was 'collectivist' as this term is generally understood today. For, like medieval guilds men, they believed no less devoutly in individual rights and liberties, to secure which was one reason why they acted in unison: there is no evidence that the subordination of the individual to the community was part of their programme.²⁶⁷

What is of particular interest, however, is that Black argues that the value system and its impact on political theory have been largely ignored. (Marsilius of Padua, Althusius, Bodin, Gierke and Hegel are the notable exceptions.) He provides a number of reasons to explain this. Part of the problem is that political theory was written by individuals schooled in the ancients, and who were therefore unfamiliar with new modes of arranging society that

267 Ibid, 178-9.

developed in the medieval and modern period. In addition, there is a class dimension since intellectual history and political theory was done by those who were unfamiliar with the values and ethos of the artisan class. Also, guild values tended to be overlooked by theorists of the new state who were caught up in the values of liberal civil (market) society.

Black's work is important since it highlights an aspect of society that is "essential to man." He says the idea of the guild is "deeply, perhaps genetically, imprinted upon the human psyche. . . It is implanted in our experience as a species."²⁶⁸ Judging by the empirical studies of anthropologists and sociologists, together with an appreciation for the way in which the liberal-communitarian debate has captured the minds of so many, this seems right.

Drawing on Black and Nozick it is evident that practical and desirable classical liberal communities combine a degree of flexibility to the extent that they retain voluntary entry and the right of exit. However, this must not be construed to mean that communities are unstable and that members are free to come and go as they please, exiting as soon as the strictures of membership become too onerous, as communitarians argue. Rather, members enter such communities precisely because they recognize that the qualities of the relationships that are forged in guild-style communities are grounded in a set of duties and obligations. Since these may be unfamiliar to members outside the community they are frequently undervalued, if they are recognized at all. But, understanding that place of such duties and obligations is vital for an appreciation of community. To understand how the

268 Ibid, 241.

social practice that is community would work within a libertarian world we need to look to elsewhere to work on reciprocity.

Case Study: The Institute for Humane Studies

The Institute for Humane Studies is a classical liberal organization affiliated with George Mason University in Fairfax, Virginia. Established in 1961 the Institute promotes classical liberal and libertarian ideas through programs devoted to research and education primarily involving university students at both the undergraduate and graduate levels. The Institute's website describes its mission in the following manner:

The Institute for Humane Studies supports the achievement of a freer society by discovering and facilitating the development of talented, productive students, scholars, and other intellectuals who share a commitment to liberty and who demonstrate the potential to change significantly the current climate of opinion to one more congenial to the principles and practice of freedom.²⁶⁹

In practice, the Institute advances its goals through a variety of programs. However, it's summer seminar program, together with a scholarship program that it administers on behalf of the Claude R. Lambe Charitable Foundation²⁷⁰ form the core of its activities. While it is true that a formal institutional structure exists within the organization to plan, organize and execute its programs--and I shall say more about those in a moment--my

269 "The Mission of the Institute," at <http://mason.gmu.edu/~ihs/story/mission.html>.

270 "The Claude R. Lambe Charitable Foundation is a private charity that seeks to advance the understanding and appreciation of the value of a free society in advancing the well-being of mankind. Through its grants and programs, the Foundation supports the development and application of market-based ("market" is used in the broadest sense, to cover all voluntary exchanges among the actions of individuals.) solutions to pressing societal problems," taken from the back page of *An Investment in Change*, (Fairfax, VA: Institute for Humane Studies, no date) based on a speech delivered by Charles G. Koch on January 23, 1993, to the Institute for Humane Studies' 10th Anniversary Celebration of the Claude R. Lambe Fellowship Program.

purpose here in describing these programs is to suggest that they have given rise to a diverse network of classical liberals and who together resemble one of Black's guild communities as a voluntary association that has been established to promote interests (intellectual careers), but which also fosters a type of friendship and solidarity among and between libertarians, in addition to helping individuals to cultivate their own individuality. Members of the intellectual community associated with the Institute (and its sister organizations) share a commitment to a common set of values and ideals, and as such they exhibit various norms of reciprocity and an example of bonding social capital as they help each other in the exchange and promotion of ideas.

To understand how this works we need to refer to Kant's distinction between perfect and imperfect duties, together with more recent work on reciprocity, especially reciprocal altruism. In *Grounding for the Metaphysics of Morals*, Kant distinguishes between perfect and imperfect duties. Perfect duties are those that we owe in the political and legal spheres; they are narrow and clearly defined. (E.g. a duty to pay taxes.) By contrast, imperfect duties fall into the sphere of moral duties, and they are inchoate or vague, (e.g. a duty to support charity that is owed to the public at large.) The reciprocity exhibited within the classical liberal community resembles an imperfect duty because as a member of the community an individual feels himself bound by duty and obligation to help others (to the extent that he is able to do so) whose identity is unspecified (save for their own membership in the community) at some unspecified date (i.e. whenever they need help). In *Sharing Without*

*Reckoning, Imperfect Right and the Norms of Reciprocity*²⁷¹ Millard Schumaker discusses the practice of general reciprocity (mutual aid) in which neighbors lend a hand without keeping account of the "debt," confident in the knowledge that at some future point when they are likely to need help they will receive help from their neighbors as well. Helpers are not "paid" for their services in the sense that they receive monetary rewards. Rather, they help because they consider it to be their duty to do so and because that is what one does on the basis of their shared relationship.

If we apply this to the Institute for Humane Studies (I.H.S.) we can see that through the institutions of the Summer seminars and scholarships programs, individuals are introduced to each other, they engage with others and after they leave (or their scholarship is completed) they are encouraged to maintain informal ties with members of the community so that they may continue to advance their own knowledge, but also to encourage others who they believe may have an interests in these subjects to participate in future years. Thus, via an informal process of networking, which is undertaken for both professional and personal (fraternal and self developmental) reasons, and by the contributions to the "favor bank,"²⁷²

271 (Waterloo, Ontario: Canadian Corporation for the Studies in Religion, 1992).

272 "The favor bank" is a term that apparently was coined by Tom Wolfe in *The Bonfire of the Vanities* and it is frequently employed by Tom Palmer of the Cato Institute, a former IHS employee, to describe the particular version of reciprocal altruism employed by members of the classical liberal community who are associated with the Institute. Specifically, each time a person provides a favor to another individual he makes a kind of metaphorical deposit to a common pool (the favor bank). At some point in the future he may make a withdrawal from the bank when he needs help from a member of the community himself, but the help may or may not be provided by the original recipient of his aid. The process is voluntary, decentralized and spontaneous. Individuals who have benefited from the libertarian community (by attending seminars and lectures, receiving free books, scholarships, etc.) return the favor to other up-and-coming classical liberals, (via

the Institute helps to maintain an intellectual community of young scholars.

Unfortunately, much of the reciprocal altruism and networking that takes place within the community surrounding I.H.S has taken place implicitly not explicitly because it appears to be carried out by individuals acting on tacit knowledge. That is, the people who belong to the community understand the rules of the game, so they have not found it necessary to publicize them. Both the ideas and the process by which they are promoted are experiential, educational, voluntary and incremental. Indeed, they appear to function along the lines of some of the ideas Black articulates toward the end of his book:

The configuration of man's social instincts cannot, any more than his physical and emotional make-up, be radically altered. In this respect, therefore, the present-day champions of civil society are indulging in a utopian dream with the usual results. On the other hand, no amount of socio-economic crisis will of itself change our fundamental moral beliefs, whatever these may be. *Belief in the solidarity of labor can only be awoken by experience of it, and by persuasion.*²⁷³

This is unfortunate since libertarians might be more successful in persuading others to adopt their approach to life if they took the time to explain how an alternative social arrangement might in fact work.

recommendations, lecturing to new students, mentoring, etc.) thereby maintaining and promoting the continuity of ideas over time.

273 Black, *ibid*, 241. Emphasis added.

Conclusion

Throughout this chapter I have tried to outline a theory of community that is consistent with libertarianism. Unlike nationalist and communitarian theories, libertarian communities are not explicitly political entities, but they are crucial constituents of a broader social theory. They serve to support and separate the political sphere from the rest of society. The absence of theories of community from libertarian theory may be attributed to a number of factors. These include:

1. The fact that many who regard themselves to be classical liberals are (naive) materialists. Or, put differently, they misunderstand what libertarianism is.

2. In the twentieth century, in the face of the growth of government and particularly the welfare and regulatory state, classical liberalism has not advanced beyond critique to provide a constructive analysis of how a the good society might function in a classical liberal world.

3. In an effort to understand small parts of the complex world liberal, analytic philosophers have employed methodological individualism and this has been misconstrued as an endorsement of individualism, or worse, atomism.

4. If we look at the history of political thought carefully, we can see that with few exceptions large chunks of political theory are absent from the account provided by those

who write intellectual history. One plausible reason for this is that such theorists are either ignorant of or disinterested in the ideas and practices of a different class (the artisans).

5. The values and decentralized practices of classical liberal groups are based on a kind of tacit knowledge, and consequently they are often applied without conscious and explicit knowledge.

Libertarian theorists should be particularly interested in community if they want to convince those who are sympathetic to their ideas that they actually have some practical bite. Theory needs to be embedded in real experience. From time to time one may find it useful to discuss ethical egoism and side constraints, but if one is seriously interested in getting people to consider libertarianism as a viable alternative to say, theories of social justice, then theoretical discussions must be related to lived experience to show how the capacities necessary for living a free and responsible life for all people may be achieved, including self cultivation. Community may not be libertarians' first concern, and silence on the matter does not mean that libertarians are ignorant of the need for communities. But if they are going to continue to congratulate themselves on the fact that their conception of the self and the society is truly realistic, it is time for a consideration of community.

CONCLUSION

Besides general opposition to change, another reason that conservatives traditionally have opposed libertarianism is because libertarian ideas often are associated exclusively with the promotion of market capitalism. Conservatives (and socialists for that matter) make serious arguments that something more than markets is required for human flourishing. Libertarians must address these concerns. The appeal of libertarianism must be based on claims of ethics and morality, not simply on the ability of a libertarian state to deliver superior material goods. And, perhaps most importantly, libertarians must be able to identify concrete things that people want (that are currently being offered by the government) and explain how these things still will be available (in the market) under a libertarian system of social and economic ordering...economic arguments alone are unlikely to succeed in public policy debates over the desirability of a shift to libertarianism. In order to succeed, libertarianism must be supported by credible appeals to people's higher conceptions of themselves, both as individuals and as citizens in a broader society characterized by mutual respect for individual liberty.²⁷⁴

In this thesis I have sought to provide three things: 1. a friendly constructive critique of contemporary libertarianism 2. a positive alternative ideal in the form of a psychological theory of individuality grounded in notions of the self that combines economic and personal freedom, with an emphasis on the latter, describing what individuality means for an individual and how he could achieve it. 3. a constitutional theory that explains how individuality is institutionalized—that is, how the institutions of a libertarian regime or a good society secured by a minimal state act in a formative manner to shape individuals so

274 Jonathan R. Macey, "On the Failure of Libertarianism to Capture the Popular Imagination," *Problems of Market Liberalism*, Ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, (Cambridge: Cambridge University Press, 1998), 373-4, 375. Macey's argument is specifically directed at concerns that are quite different from those propounded here. Specifically Macey mentions, the movement's inability to respond to people's systematic risk-aversion and their concomitant demand for insurance (e.g. welfare). However, some of his broader claims and suggestions for reform overlap with those discussed here, especially his discussion of individual's desire to participate within civil (but not necessarily political) spheres of society.

that they have the opportunity and the requisite capacities to become free and responsible beings. The intention is to show that a more balanced interpretation of libertarianism than goes beyond narrow political freedom or market liberalism is, or should be, more appealing to supporters committed to libertarian ideals, and potentially, in the long run, it is hoped, to others individuals who could be persuaded that adopting the ideals of libertarian individuality would help them to enjoy a better life.

If it is the case that libertarians are genuinely keen to transform the world and to make it freer and more consistent with their professed values, they will need to do a lot more than rely upon trends such as increasing disenchantment with government or the spread of free markets via technology and globalization to achieve their vision. Libertarianism must become more than a marginal critique. Discussing the moral and practical failings of government is insufficient. So are narrow discussions of specific policy issues or institutional debates. Rather, libertarians must present an attractive and viable vision of freedom for individuals living in a libertarian society. This requires libertarians to reveal their larger aspirations, and to demonstrate that there is a reasonable expectation that such aspirations may be achieved. Both Charles Murray and David Boaz recognize this and they have gone a long way towards the articulation of something that approaches the sort of libertarianism that is needed to make the transition from a critique to a viable vision, but their views are still partial and underdeveloped. What is needed now is a more substantial vision that connects with individuals *as individuals*, to show why a libertarian life is valuable to them, and, as Macey says, can help them to lead a life of flourishing in which they are able to attain the things that they want. Such a variety of libertarianism is more

perfectionistic than critiques concerning the use and abuse of state power alone, however it does not require its adherents to be perfect. Rather, it needs to convey a genuine belief in its hopes for the future, which rest on solid understandings of formal and informal institutions (including culture), as well as the self reliance and self-cultivation of individuals who are committed to individual liberty. As they consider the way ahead and adapt to meet the new challenges before it, members of the movement will need to make choices about the priorities they share and the issues that they raise.

The crucial question that needs to be considered here is the following: if something like my interpretation of libertarianism is right--that is, more consistent with the underlying ethos of libertarianism, and therefore more appealing than the prevailing variety to those who are sympathetic to robust individual freedom, then why have these ideas failed to be taken seriously and developed in the practices of the political-social movement thus far? Is there a serious chance that individuality will become a more prominent goal of libertarians in future? There are a number of ways to respond to these questions, theoretically and practically. First, to return to the place where we began we need to ask--is this really libertarianism or is it some other set of ideals that have been grafted on to a libertarian political theory? Second, throughout the previous chapters the discussion has drawn comparison between the stated ideals of the some members of the movement and those of individuality, taking the respective ideas at face value and comparing each of them. What kinds of problems—externalities or unintended consequences might arise on the way to realizing libertarian individuality? Are these problems fatal to the stated project of libertarianism, or can they be ameliorated and contained sufficiently to keep libertarianism

authentic and viable? And third, apart from theoretical similarities and disjunctions between libertarianism as it is and as it might be reinterpreted, what sort of difficulties might arise given the current nature of the libertarian movement, including its goals, priorities and overall political strategy? What sorts of constraints exist within the institutional structure of the movement itself and the broader political context that it works within to promote change? Finally, taken together, what do these three questions imply for the intellectual prospects of the of the libertarian movement, and for the adoption of individuality as part of its program?

1. Is this really Libertarianism?

Perhaps the most fundamental issue that needs to be raised is, is this really libertarianism or something else? The answer to this question could be variously “yes,” “no”, and “maybe.” Liberty for individuality is grounded in a commitment to minimal government which provides for the maximum political liberty for individuals. At the same time, it is clear that liberty for individuality goes beyond narrow political libertarianism, and to the degree that that is true, and there are those who refuse to consider anything having to do with institutions and actions of individuals outside the state (“libertarianism is a political philosophy, not a complete guide to life,”), this could not be properly referred to as libertarianism. However, as it has been noted above, since most self-professed libertarians do not in fact subscribe to such a narrow view themselves, as we can see given their discuss of economic and philosophical matters in addition to politics--this hardly seems to be a trenchant or, indeed, an accurate, criticism. The two proponents of libertarianism that have been criticized here—Charles Murray and David Boaz go far beyond politics and arguments for limiting government, for instance, by engaging in discussions with communitarians to

discuss the relationship between individuals and community in a free society.

On the other hand, to be charitable, we might consider the possibility that there are libertarians who do take other kinds of individual freedom that exist beyond the market very seriously indeed (for instance, religious observation, the creation of artistic works). In fact, it might be argued that it is precisely because they take these ideas seriously, and, like all liberals, uphold a careful distinction between the public and private spheres, that they recognize that a political-social movement is not the place within which to advance *individual* freedom. By definition, only individuals can advance individual freedom. However, again, this is probably presented as a false dichotomy since American libertarians join together to consider all sorts of issues that are vital to the practice of their freedom, and indeed the nature of libertarianism itself in seminars, colloquia, and listserv discussions on the web. Many of these are not directly political, but they are discussed in relation to the state because libertarians are keen to preserve their independence from it.

Similarly, as we noted above, there are those who identify libertarians with those who apparently care only about the free market--they *are* only radical free marketers who apply economic theory to any institution they study, and they treat individuals as rational self-interested maximizers who perform cost-benefit calculations as they perform any actions in any sphere of society. If we import the logics of analysis used by other disciplines (e.g. art, psychology, or sociology) are we necessarily going beyond the bounds of libertarianism? It could be argued that insofar as liberty for individuality does not place emphasis on these traditional disciplines of libertarian discourse (namely, politics, philosophy, and economics), or to the extent that it does it tries to grapple with them in relation to other areas, such as

psychology, sociology, and cultural theory, it is not libertarian in the contemporary sense, but rather a reform, supplement, and expansion of existing theory. It is a revised libertarianism. This is the point. Descriptively, liberty for individuality is not libertarianism (as it currently exists), but normatively—in terms of the shared values that are at the center of the theory--individualism, minimal government, voluntarism, free will, choice, toleration and skepticism with respect to power and authority, it is. However, these are interpreted in a slightly different way from e.g. Nozickian libertarianism to give priority to the cultivation of a unique person, not simply an individual or a physically separate person. Politics and individual political freedom are still the primary concerns that ground the other areas of concern. For without political freedom, as Humboldt and Mill said, there can be no individuality. Freedom is the fundamental political value, but human flourishing is the ultimate human value. For it to be meaningful, freedom must be connected to the activities we engage in once we have achieved political freedom. Freedom is the preeminent thing that people need so that they can get the concrete things that they want. This is the promise of libertarianism and this is why pursuing individuality is integral to it.

2. Practical Difficulties and Possible Unintended Consequences

As it is outlined here, individuality is a moral and aesthetic aspiration that is open to all. It is achieved by self-cultivation with others in civil society. It is not directly political. However the political and legal institutions of a libertarian regime would be crucial to the realization of freedom because they provide the security and order that are essential for creating opportunities to shape freedom for themselves. Of course, freedom alone is insufficient for the development of the individual. As Humboldt, Mill, and Emerson note,

education, persuasion, varieties of experience, and the emulation of role models who value individuality and who pursue it by living their own lives in their own way in civil society will be vital too. What is not quite clear is whether these will be sufficient for most people to develop their individuality in fact. Or indeed, if the kinds of resources libertarians would be prepared to use to support schooling and the development of basic capacities more generally, such as independence and responsibility (i.e. in voluntary, non-coercive, privately funded educational institutions), critical thinking, and toleration would be sufficient for the rudimentary skills needed to pursue the cultivation of individuality subsequently. If they are not, there is a serious danger that individuals may become frustrated and turn to politics and the state to achieve their goals, thereby abandoning their initial commitment to libertarian ideals. This, after all, is one of the lessons that libertarian economists have taught us in their discussions of rent-seeking. So while individuality might appear attractive and feasible if considered as an extension of existing ideals because it is addressed to individuals who already share certain commitments, practices, and assumptions about how a free individual ought to live, (as evidenced by their participation in the libertarian movement), we still need to think further about the way that these ideas are likely to be established and maintained in a broader society if liberal democracy were to be transformed into libertarian democracy. This requires careful empirical comparisons between people who rely on the state and those who rely upon institutions in civil society to support their welfare.

As noted above, one of the fundamental questions that all libertarians have to grapple with is why should we expect libertarians to be any different from any other group of politically motivated individuals? Why should they resist use of the state to achieve their

goals? What kinds of institutions might libertarians employ to help to preserve and maintain their integrity and commitment to freedom using civil rather than political society for the achievement of *libertarian* individuality? Libertarians are fond of quoting Madison's famous comment from Federalist 51 where he says "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."²⁷⁵ And yet, some might quip, it appears that if libertarians move to a world of minimal government that co-exists next to a vital civil society, as if by magic, individuals suddenly become disciplined, self-policing lovers of freedom who keep themselves in check so that they do not abuse their access to political power. Mysteriously, human nature in civil society appears to be cooperative, virtuous, and reciprocal, while human nature in political society is avaricious, self-serving, and devious. On the one hand, libertarians have a tendency to consider human nature rather skeptically and pessimistically, and on the other, there is a kind of naïve romantic-anarchic quality that is curiously similar to some of the ideas found in the writings of one of their arch enemies. Which is it? Undoubtedly, some libertarians simply are more optimistic than others about the potential for individuals to develop their human nature freely and responsibly. However, even within that optimism there must be a certain amount of guardedness, and a recognition that some people will not meet the strenuous expectations demanded of individuals such as Mill or Emerson. Otherwise libertarians would be anarchists. In a libertarian society some are likely to abuse

275 James Madison, Federalist 51, *the Federalist Papers*, Ed. Clinton Rossiter (New York: Penguin,

the access that they have to power, but the impact of this may be minimized if such behavior is kept to the private sphere in one of the relatively small voluntary associations of civil society rather than broadcast across the entire domain of politics that affects all individuals within that society. Consequently, there must be some institutions, both formal and informal, that will create barriers to using the state for inappropriate matters, as well as inducements to participate anti-social or illiberal activities within private associations in civil society.²⁷⁶ This is why constitutional design, including the appropriate checks and balances and the dispersal of power will be extremely important in a libertarian regime. At the same time, however, culture will help to reinforce these formal arrangements, and may even build upon them so that free individuals are encouraged to be strenuous, vital, excellent persons. In his recent writings dealing with what he calls “constitutional political economy,” James Buchanan has composed an “extended essay in persuasion” that outlines a formal constitutional design that is complemented by a civic religion. What Buchanan’s work indicates is that attempting to deal with the political and psychological problems that arise when establishing and maintaining a free society is not a matter of relying on changes in human motivations, or political institutions or culture, but rather combining all of these so that they are mutually reinforcing.²⁷⁷ This is what I have tried to do here.

1961), 322.

²⁷⁶ Nancy Rosenblum, *Membership and Morals*, (Princeton, NJ: Princeton University Press, 1998).

²⁷⁷ *The Reason of Rules*, Volume 10, *The Collected Works of James Buchanan*, (Indianapolis: Liberty Fund, 2000), especially chapter 9, “Is Constitutional Revolution Possible in Democracy,” 149-167.

Perhaps promoting individuality focuses attention on the wrong set of ideas and places too great a burden on libertarianism. Libertarianism can only work if the burdens on it are kept to a bare minimum and libertarians confine their attentions to politics within the state apparatus.²⁷⁸ This can only be settled empirically if a libertarian society were established. Alternatively, some would argue that establishing a free society with a strong, but limited state to secure freedom, while providing private provision to support the welfare of those who have fallen on hard times, or those who fear falling on hard times (i.e. most people) is asking more than enough. This is because the single factor that dominates individual preferences and inhibits them from embracing libertarianism is their aversion to risk. In an essay that explicitly deals with what he takes to be the reasons for libertarian's failure to capture the popular imagination, Jonathan Macey says that at bottom libertarians need "to develop their conception of security more fully if libertarian ideas are going to reemerge as viable concepts in the social philosophy and public policy of the nation." On Macey's view the crucial issue is insurance and weaning people away from the dependency of the welfare state. He says

Libertarians need to tie their arguments about how to deal with uncertainty with libertarian theories about community. The ineluctable reality is that people all over the world exhibit a strong redistributive impulse. Libertarians would do well to recognize that this emotional impulse exists. Libertarians are also wrong in thinking that they can win supporters by merely demonstrating that the state does a poor job in helping the neediest. That is beside the point. What matters is that the state allows private citizens to have an excuse to avoid charity. The all powerful state substitutes

278 See, for instance, Douglas B. Rassmussen and Douglas J. Den Uyl, *Norms of Liberty, A Perfectionist Basis for Non-Perfectionist Politics* (State College: Penn State Press, forthcoming.)

for the principle of personal responsibility. People have the state, and the state allows them to think that something is being done for the neediest. The state provides a convenient, albeit costly, outlet for the redistributive impulse. And more importantly, the state provides the assurance that something will be done for them if they become needy.²⁷⁹

According to Macey, “Libertarians should stop trying to change people’s preferences” and focus on the kinds of private institutional arrangements that will help to get the kinds of things that they want now, living in a liberal democracy with a relatively large welfare state, but through the market. Yet, we might ask, if the welfare state can and does tend to cultivate a certain sort of state of mind (and therefore change people preferences so that they favor even more welfare), changing institutional arrangements so that people have greater independence will also have an impact in the other direction. Institutions, within certain limits, can and do shape the way people think and behave.²⁸⁰ The important empirical question is, to what extent may people be influenced by such institutional shifts? Boaz and Murray both note that the welfare state and big government in general can have an enervating effect on individual personality, fostering dependency, irresponsibility, and an overall lack of discipline—the very opposite of the sort of personality that they seem to imply (but never fully articulate) is desirable within a libertarian regime. And indeed, throughout libertarian accounts we see an ambiguity about human nature—whether it is relatively timid and risk averse (Hobbesian), or more independent and critical, but still

²⁷⁹ Ibid, 377.

²⁸⁰ Stephen L. Elkin, *City and Regime*, (Chicago: University of Chicago Press, 1987), 105-123 on formative institutions. See also, more generally, Charles Murray’s works on the welfare state mentioned above.

fundamentally bourgeois—tolerant, property loving etc, (Lockean), or even progressive, expressive, and creative (Millian.) Since the libertarian movement is, as I have said, a broad coalition of concerns, different kinds of sympathizers with different assumptions about individual personality are to be found within it. Moving forward to promote a positive position on some issue would require a degree of agreement on what kind of individual the libertarian individual is—but at what level and to what degree must this agreement be reached? There may appear to be relatively small differences of opinion among those who identify themselves as libertarians. Yet when they are compared to other moral and political ideologies, such as Conservatism, there is no doubt that Libertarians share an assumption that the individual is (or should be) independent, dynamic, rational, assertive, and “pro-choice on everything.”²⁸¹ This brings us to the next important consideration—the Conservative/Libertarian alliance.

3. The Libertarian Movement

Since the end of the Second World War libertarians have joined forces in an uneasy and somewhat tension-ridden alliance with groups of individuals who are best described as Conservatives or traditionalists. The purpose of this alliance has been to try to influence political power directly, from within the Republican Party, and indirectly, throughout the broader social and political grouping that is known as the “right wing.” George Nash’s

²⁸¹ The phrase is from Robert Teeter, quoted by E.J. Dionne in *Why Americans Hate Politics*, (New York: Simon and Schuster, 1991), 261.

classic intellectual history, *The Conservative Intellectual Movement in America*²⁸² describes a post-war coalition of libertarians, new conservative traditionalists, and militant, evangelical anti-Communists who united in a common cause against twentieth century liberalism and Communism. As he explains it, so long as the alliance directed its attention at its common enemies it could unite and seemed to be quite effective in pushing back the forces of modern welfare liberalism and communism. However, periodically, there were fractures and even breaks in the alliance when the respective groups turned from their enemies and toward the ideas they wished to promote. This was especially true in the case of issues such as abortion, foreign policy, and drug legalization, and revealed the fundamentally different visions for society that they hoped to achieve. (Broadly speaking, Conservatives were more likely to be pro-life, more hawkish on foreign policy, and against drug legalization. Libertarians, tended to be pro-choice, non-interventionist, and in favor of drug legalization.) Numerous commentators have analyzed the differences and similarities between these groups, and it is possible to give only a brief sense of the alliance and division here, but it is important because it helps to explain the reason why certain sorts of issues such as constitutionalism, the free market, property rights have been championed by the Libertarians from within the “right wing,” as opposed to others, including calls for self-development, self-expression, and ultimately, the cultivation of individuality. For instance, speaking from the Conservative perspective, Nash says: “on a purely philosophical or “ideological” level, American

282 (Wilmington, DE: ISI, 1996)

conservatism did not speak with a single voice. It had never done so and probably never would. There was a continuing gap between the traditionalist ethos of self-restraint, of limits on will, and the libertarian ethos of self-assertion, self-cultivation, and resistance to the State.”²⁸³ From the libertarian wing, F.A. Hayek, famously wrote the chapter “Why I am Not a Conservative,” in *The Constitution of Liberty*, which reveals some large divisions between conservative and libertarians attitudes to a number of topics, including authority and liberty, (Conservatives are apt to be less suspicious of different forms of authority—the State, the Church, or Society-- over the individual as compared with libertarians who are skeptical of all forms of authority,) rationalism, (libertarians tended to favor enlightenment rationalism, conservatives were likely to use tradition, emotion or feeling, received wisdom) the past, present and future (libertarians tend to be future-oriented, “cultural optimists”, whereas traditionalist and conservatives prefer the status quo or the past and are often share a romantic nostalgia for what has been lost, and a fear or pessimism with respect to the future), and finally, Hayek suggested that Conservatives lacked principle so they had no standards by which to judge the fruits of their labors, and no genuine vision for society.

It would be misleading to portray this marriage of convenience simply in negative terms, since libertarians and conservatives share a commitment to many political values and institutions in common, including the free market, the institution of private property, constitutionalism and the rule of law, and restrictions on the power of the federal

²⁸³ Ibid, 322.

government. However, their reasons for their respective commitments differ sharply in relation to the assumptions undergirding these features of right-wing doctrine. Explaining this difference in value and their conceptions of the individual in his chapter on libertarianism, E. J. Dionne contrasts the views of Jeff Riggenbach, a libertarian writing “In Praise of Decadence” in the *Libertarian Review* followed by Conservative intellectual, Russell Kirk: “When an individual chooses his ideas for himself, judges them for himself, and does with them what he wishes to do with them, he is much more likely to devote himself to ideas with enthusiasm and dedication than when he is forced to rely on an authority to decide for him what is worth studying and what use is made of it.”

For traditionalists such as Russell Kirk, libertarians such as Rigenbach had learned exactly the “wrong” lessons—the sort of lessons that capitalism, when uniformed by transcendent values, could teach. “The ruinous failing of ideologues who call themselves libertarians,” Kirk declared, “is their fanatic attachment to a simple solitary principle—that is, to the notion of personal freedom as the whole end of the civil order, and indeed of human existence.” The libertarians accepted “no transcendent sanctions for conduct,” said Kirk, and thus bought into their own version of Marx’s “dialectical materialism.”

Throughout the fifties, sixties, and seventies some intellectuals on the right tried hard to maintain the alliance. Some understood it to be purely pragmatic, while others claimed that there were ideological connections between the two sides. Among libertarians the best known of these is Frank S. Meyer, who propounded a theory of “fusionism”:

...the principles which inspire the contemporary American conservative movement are developing as the fusion of two different streams of thought. The one, which, for want of a better word, one may call the “traditionalist,” puts its primary emphasis

upon the authority of transcendent truth and the necessity of a political and social order in accord with the constitution of being. The other, which, again for want of a better word, one may call “libertarian,” takes as its first principle in political affairs the freedom of the individual person and emphasizes the restriction of the power of the state and the maintenance of the free-market economy as guarantee of that freedom.”²⁸⁴

Many Conservatives and Libertarians were convinced by Meyer, but even those who were not recognized the strategic value of at least pretending that there were close ties between the two sides. Dionne relates the historical development of the Cato Institute and notes that there was a distinctive conscious shift to the right in the early 1980s, after Cato moved from California to Washington, D.C. and abandoned publication of its magazine *Inquiry*, which had included civil libertarians and other who championed a kind of adversary culture that is usually associated with the left.²⁸⁵ Such a strategy is politically astute. Non-economic (“social”) issues and policies are more divisive than economic issues, so strategically--both in terms of fund raising and gaining support for policies through the ballot box--it makes sense for a relatively marginal political-social movement to advance ideas that will command support from a range of supporters who would like to roll back the state. If the libertarian movement wishes to reach those who influence the use of political power it behooves it to try to meet other with whom it can form a critical mass of power to achieve its goals strategically. On the other hand, does this mean that contentious issues must be

284 “The Twisted Tree of Liberty” originally published in *National Review* January 16, 1962 and reprinted in *Freedom and Virtue, The Conservative/Libertarian Debate* ed. George Carey (Wilmington, DE: ISI, 1998), 16.

285 See Dionne, *ibid*, 272-280.

dropped? What is the price of this compromise? Does it mean forgoing some of the ideas that are at the very heart of libertarianism and animate its loyal supporters, or can it work slowly and strategically to reform the culture so that it becomes more favorable to its ideas and concerns? Only time will tell. However, the matter of the sustainability of the conservative coalition has been raised again recently. In writing about the growth of conservative power in America, (or as they refer to it, “the Right Nation,”) John Michelthwait and Adrian Wooldridge call into question the viability of the current coalition precisely because of its overlapping contradictions.²⁸⁶ Some libertarians may choose in future to break away from the coalition. On the other hand, even if some libertarians wish to maintain their strategic alliance within the right wing, there is a possibility that they may be ousted from it by some of the more traditional elements of it who are no longer prepared to try to make compromises on certain issues.

Taken together, these points will help to determine if the libertarian movement is necessarily confined to advancing market liberalism. For the movement, a richer theoretical conception of libertarianism may be beside the point if institutional and organizational factors conspire to limit the impact of policies based upon concerns for individuality. Worse

²⁸⁶ *The Right Nation, Conservative Power in America* (New York: Penguin, 2004), especially chapter 10, “How It Could Go Wrong: Too Southern, Too Greedy and too Contradictory,” 252-253. Michelthwait divide up the right wing into slightly different categories: they identify an “ideological split between libertarians and traditionalists; the social split between religious conservatives and the business community; and the logical tension between free-market principles and the heartland’s values.” Nonetheless, the underlying point remains. How long will the alliance be able to sustain itself?

still, *any* consideration of these ideas may be beyond the scope of the public policy process because of its structural limitations. If this is so, libertarians may be doing the best that they can, given such constraints. However, this is significant because such findings will suggest that libertarianism, if not doomed theoretically, may be doomed practically, since it is unlikely ever to capture a broad base of support among a large mass of people who might be inclined to support a more humanist libertarianism. Still, even if a libertarian regime based upon individuality is a long way off, perhaps a few will reconsider their interpretation of libertarian freedom and work to promote cultural liberty to influence the bounds of market liberalism, to ensure that cost-benefit analysis does not direct all parts of a libertarian life.

BIBLIOGRAPHY

- Allen, Michael. "Anti-Federalism and Libertarianism," *Reason Papers* 7, (Spring 1981), 73-94.
- Alperovitz, Gar, and Jeff Faux. *Rebuilding America*, (New York: Random House, 1991).
- Anderson, Charles W. "The Place of Principles in Policy Analysis." *American Political Science Review*, 73:3, (September 1979), 711-723.
- Barber, Sotirios. *On What the Constitution Means*, (Baltimore: Johns Hopkins University Press, 1984).
- Barnett, Randy. "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," 68 *Notre Dame Law Review* 3, (1993), 507-547
- _____ "Getting Normative: The Role of Natural Rights in Constitutional Adjudication," 12 *Constitutional Commentary*, (1995), 93-122,
- _____ *The Rights Retained by the People*, (Fairfax, VA: George Mason University Press, 1989)
- _____ *The Structure of Liberty* (Oxford: Clarendon, 1998).
- Jane B. Baron Jane B. and Jeffrey L. Dunoff, "Against Market Rationality: Moral Critiques of Economic Analysis in Legal Theory," 17 *Cardozo Law Review*, (1996), 431-496
- Barry, Norman P. *On Classical Liberalism and Libertarianism* (New York: St. Martin's, 1987).
- Beito, David. "Mutual Aid for Social Welfare: The Case of American Fraternal Societies," *Critical Review*, 4:4 (Fall 1990), 707-736.
- Bell, Daniel. *The Cultural Contradictions of Capitalism*, (New York: Basic, 1976.)

- Bell, Tom W. "Polycentric Law," *Humane Studies Review* (Winter 1991/2) 7:1, 1-10.
- Benn, S.I. "Freedom, Autonomy and the Concept of a Person," *Proceedings of the Aristotelian Society* 12, (1976), 109-130.
- Berkowitz, Peter. "Liberalism Strikes Back," *The New Republic*, December 15, (1997), 32-37.
- _____ *Virtue and the Making of Modern Liberalism*, (Princeton: Princeton University Press, 1999).
- Berlin, I. *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969).
- Black, Anthony. *Guilds and Civil Society*, (Ithaca: Cornell University Press, 1984.)
- Boaz, David. *Libertarianism*, (New York: Free Press, 1997)
- _____ *The Libertarian Reader*, (New York: Free Press, 1997).
- Boaz, David, and Edward H. Crane. *Market Liberalism*, (Washington, DC: Cato Institute, 1993).
- Bork, Robert H. "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 1, (1971), 1-11.
- _____ *The Tempting of America* (New York: Free Press, 1990).
- Boyd, Richard. "Frank H. Knight and Ethical Pluralism," *Critical Review* 11:4, (Summer 1997), 519-536.
- Bramsted, E.K. and K.J. Melhuish. *Western Liberalism*, (London: Logman, 1978).
- Buchanan, James M. "The Soul of Classical Liberalism," *Independent Review*, V:1, Summer 2002, 111-119.
- _____ *The Reason of Rules*, Volume 10, *The Collected Works of James*

Buchanan, (Indianapolis: Liberty Fund, 2000).

Buchanan, James M. and Gordon Tullock, *The Calculus of Consent*, (Ann Arbor: University of Michigan Press, 1962.)

Carey, George. Ed. *Freedom and Virtue, The Conservative/Libertarian Debate*, (Wilmington, DE, ISI, 1998).

Crane, Edward H. "The Future of Liberty," *Cato Policy Report*, Vol. XXII No. 1, January/February 2000.

Crick, Bernard. *In Defense of Politics* (Fourth Edition), (Chicago: University of Chicago Press, 1993).

Dionne, E.J., *Why Americans Hate Politics*, (New York: Simon and Schuster, 1991.)

Dryzek, John S. "From Irrationality to Autonomy: Two Sciences of Institutional Design." in *The Constitution of Good Societies*, Ed. Karol Edward Soltan and Stephen L. Elkin, (University Park: Penn State, 1996).

Dworkin, Ronald. "The Forum of Principle." 56 *New York University Law Review*, (May-June 1981), 469-518.

Eckstein, Harry. "A Culturalist Theory of Political Change," *American Political Science Review* 82:3 (September 1988), 789-804.

Elkin, Stephen L. "How to Think Constitutionally," unpublished manuscript, (no date.)

_____ *City and Regime*, (Chicago: University of Chicago Press, 1987).

_____ "Escaping From Politics," *Report From the Institute for Philosophy and Public Policy* 15: 2+3 (Summer 1995), 16-19.

_____ "Madison and After: the American Model of Political Constitution,"

Political Studies, XLIV, (1996), 592-604.

Elkin, Stephen L., and Karol Edward Soltan. (Eds.) *A New Constitutionalism* (Chicago: University of Chicago Press, 1993).

Ellison, Ralph. "The Little Man at Chehaw Station. The Artist and His Audience," *The Collected Essays of Ralph Ellison* Ed. John F. Callahan, (New York: Modern Library, 1995), 489-519.

Emerson, Ralph Waldo. *The Selected Writings of Ralph Waldo Emerson*. Ed. Brooks Atkinson, (New York: Modern Library, 1950).

_____*The Portable Emerson*, (New York: Viking Penguin, 1981).

_____*Emerson's Antislavery Writings*, Ed. Len Gougeon and Joel Myerson, (New Haven: Yale University Press, 1995).

Epstein, Richard A. "Enforcing Norms: When Law Gets in the Way," (with a comment by William A. Galston, "Social Mores Are Not Enough,") *The Responsive Community*, 7: 4, (Fall 1997), 4-20.

_____, *Principles of a Free Society*, (New York: Perseus, 2002).

Evensky, Jerry. "Setting the Scene: Adam Smith's Moral Philosophy," in Eds., Robin Paul Malloy and Jerry Evensky. *Adam Smith and the Philosophy of Law and Economics*, (New York: Kluwer, 1994), 7-29.

Feinberg, Joel. "Autonomy," in *The Inner Citadel*, Ed. John Christman, (Oxford: Oxford University Press, 1989), 27-53.

Flathman, Richard. *Toward A Liberalism*, (Ithaca: Cornell University Press, 1989).

_____*Willful Liberalism* (Ithaca, NY: Cornell, 1992).

_____ *Reflections of a Would-Be Anarchist*, (Minneapolis: University of Minnesota Press, 1998).

Frankfurt, Harry G. "Freedom of the Will and the Concept of a Person," *Journal of Philosophy* 68:1, (January 14, 1971), 5-21.

Friedman, David, *The Machinery of Freedom*, (La Salle, IL: Open Court, 1995).

Friedman, Milton. *Capitalism and Freedom*, (Chicago: University of Chicago Press, 1962).

Fuller, Lon. *The Morality of Law*, (New Haven: Yale University Press, 1964.)

Galston, William A., "Defending Liberalism," *American Political Science Review*, 76 (1982), 621-629.

_____, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991).

_____, "Two Concepts of Liberalism," *Ethics* 105 (April 1995), 516-534.

_____, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory," *William and Mary Law Review*, 40 (1999), 869-925.

_____, "Value Pluralism and Political Theory," *American Political Science Review* 93:4, December 1999, 769-778.

_____, "Review of Richard E. Flathman's *Reflections of a Would-Be Anarchist: Ideals and Institutions of Liberalism*," *Ethics*, (April 1999) 663-666.

Goodin, Robert. "Conventions and Conversions, or, Why Is Nationalism Sometimes So Nasty?" *The Morality of Nationalism* Ed. Robert McKim and Jeff McMahan (Oxford: Oxford University Press, 1997), 88-104.

Hamburger, Joseph. "Individuality and Moral Reform: the Rhetoric of Liberty and the Reality of Restraint in Mill's *On Liberty*" *Political Science Reviewer* 24 1995, 7-70.

_____ *John Stuart Mill on Liberty and Control*, (Princeton: Princeton University Press, 1999).

Hamilton, Alexander, James Madison, and John Jay. *The Federalist Papers*, Ed. Clinton Rossiter, (New York: Penguin, 1961).

Hamoway, Ronald. *The Scottish Enlightenment and the Theory of Spontaneous Order* (Carbondale and Edwardsville, IL: Southern Illinois University Press, 1987).

Hart, David M. "Real Liberalism," *Humane Studies Review*, 1:1, (no date.)

Hayek, F.A.. "The Use of Knowledge in Society." *The American Economic Review*, 35: 4 (September, 1945), 519-530.

_____ *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960).

_____ *Law, Legislation and Liberty, Volume 1, Rules and Order* (Chicago: University of Chicago Press, 1973).

_____ *Law, Legislation and Liberty, Volume 3, The Political Order of a Free People*, (Chicago: University of Chicago Press, 1981).

Hirschmann, Albert O. *The Passions and the Interests* (Princeton: Princeton University Press, 1977).

Hospers, John. *Libertarianism. A Philosophy for Tomorrow*, (Los Angeles: Nash, 1971.)

Humboldt, Wilhem von. *The Limits of State Action*, (Indianapolis: Liberty Fund, 1969).

Institute for Humane Studies, *A Student's Guide to Classical Liberal Scholarship* (Fairfax, VA: Institute for Humane Studies, no date.)

Izenberg, Gerald N. *Impossible Individuality, Romanticism, Revolution, and the Origins of Modern Selfhood 1787-1802* (Princeton: Princeton University Press, 1992.)

- Kahan, Alan S. *Aristocratic Liberalism*, (New York: Oxford University Press, 1992).
- Kant, Immanuel. *Political Writings*, Ed. Hans Reiss, (Cambridge: Cambridge University Press, 1991).
- Kateb, George. "Democratic Individuality and the Claims of Politics," *Political Theory* (August 1984), 335-340.
- _____ *The Inner Ocean*, (Ithaca, NY: Cornell University Press, 1992)
- _____ *Emerson and Self-Reliance*, (Thousand Oaks, CA: Sage, 1995).
- _____ "Democratic Individuality and the Meaning of Rights," in *Liberalism and the Moral Life*, Nancy Rosenblum Ed. (Cambridge: Harvard University Press, 1989), 183-206.
- Koch, Charles G. *An Investment in Change* (Fairfax, VA: Institute for Humane Studies, no date.)
- Kukathas, Chandran. "Are There Any Cultural Rights?" *Political Theory*, 20 (February 1992), 105-39.
- Kymlicka, Will. (Ed.) *Liberalism, Community, and Culture*, (Oxford: Clarendon, 1989).
- _____ *The Liberal Archipelago* (Oxford: Oxford University Press, 2003)
- Lachmann, Ludwig M., "From Mises to Shackle: An Essay on Austrian Economics and the Kaleidic Society," *Journal of Economic Literature*, (March 1976), 54-62.
- Lane, Robert E. "Autonomy, Felicity, Futility: the Effects of the Market Economy on Political Personality," *Journal of Politics* 40 (1978) 2-24.
- Lasch, Christopher. *The Culture of Narcissism*, (New York: W.W. Norton, 1978).
- _____ *The Minimal Self* (New York: W.W. Norton, 1984).
- Leoni, Bruno. *Freedom and the Law*, (Indianapolis: Liberty Fund, 1991).

- Lewis, Sinclair. *Main Street* (Mineola, NY: Dover, 1999).
- “Lexington: The Charge of the Think-tanks,” (no author) *The Economist*, (February 15, 2003), 33.
- Lippmann, Walter. *The Good Society*, (Boston: Little, Brown & Company, 1943).
- Lukes, Steven. *Individualism*, (Oxford: Basil Blackwell, 1973.)
- McClay, Wilfred M. “Mr. Emerson’s Tombstone,” *First Things*, 1998, No. 83, (May 1998), 16-22.
- _____ “Fifty Years of the Lonely Crowd,” *WQ*, (Summer 1998), 1-11.
- Macedo, Stephen. *Liberal Virtues*, (Oxford: Clarendon, 1990).
- Macey, Jonathan R. “On the Failure of Libertarianism to Capture the Popular Imagination,” *Problems of Market Liberalism*, Ed. Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, (Cambridge: Cambridge University Press, 1998), 372-411.
- Macleod-Cullinane, Barry. “Lon Fuller and the Enterprise of Law”, *Legal Notes* 22, (London: Libertarian Alliance, 1995).
- Malloy, Robin Paul. “Is Law and Economics Moral?--Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis,” 24:2 *Valparaiso University Law Review* (Winter 1990), 147-161.
- Markus, Hazel and Paula Nurius. “Possible Selves,” *American Psychologist* 41:9 (September 1986) 954-969.
- Marshall, Geoffrey, “The Rule of Law,” in *The Blackwell Encyclopedia of Political Thought* Ed. David Miller (Oxford: Basil Blackwell, 1987), 458-459.
- Michels, Robert, *Political Parties*, (Glencoe, IL: Free Press, 1949).

- Michelthwait, John and Adrian Wooldridge. *The Right Nation* (New York: Penguin, 2004.)
- Mill, J.S. *Essays on Politics and Society, Collected Works* Vol. 18 Ed. J.M. Robson, (Routledge & Kegan Paul, 1963).
- _____ *On Liberty and Other Writings* Ed. Stephan Collini, (Cambridge: Cambridge University Press, 1989),
- _____ *On Liberty and Other Essays* Ed. John Gray, (Oxford: Oxford University Press, 1991).
- _____ *Autobiography*, (London, Penguin, 1989).
- Miller, Geoffrey P. "Rights and Structure in Constitutional Theory," *Social Philosophy and Policy* 8:2 (1981) 196-223.
- Minogue, Kenneth. *Politics. A Very Short Introduction*, (Oxford: Oxford, 1995).
- Morgan, Claire. "Liberty for Individuality," *The Good Society* 8:2 (1998) 37-43.
- Murray, Charles. *Losing Ground: American Social Policy, 1950-1980*, (New York: Basic, 1995).
- _____ *In Pursuit: Of Happiness and Good Government* (San Francisco: Institute for Contemporary Studies, 1994).
- _____ *What It Means to Be a Libertarian* (New York: Broadway, 1997).
- Myers, Milton L. *The Soul of Modern Economic Man*, (Chicago: University of Chicago Press, 1983).
- Nash, George. *The Conservative Intellectual Movement in America*, (Wilmington, DE: ISI, 1996.)
- Nehamas, Alexander. "How One Becomes What One Is." *The Philosophical Review* 92:3

(July 1983) 385-417.

Nisbet, Robert A. *Community and Power*, (New York: Galaxy, 1962.)

Nolan, James L. *The Therapeutic State, Justifying Government at Century's End*, (New York: NYU, 1998).

Nozick, Robert. *Anarchy, State, and Utopia*, (Oxford: Basil Blackwell, 1974).

Nussbaum, Martha C. "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics," 64 *University of Chicago Law Review* (Fall 1997), 1197-1214.

Oakshott, Michael. *Morality and Politics in Modern Europe*, Ed. Shirley Robin Letwin, (New Haven: Yale University Press, 1993).

Palmer, Tom G., "The Myths of Individualism," *Cato Policy Report*, 38:5, (September/October 1996), available at http://cato.org/pubs/policy_report/cpr-18n5-1.html.

Paul, Ellen Frankel, Fred D. Miller, and Jeffrey Paul. *Problems of Market Liberalism*, (Cambridge: Cambridge, 1998).

Pilon, Roger. "Criminal Remedies: Restitution, Punishment, or Both?" *Ethics* 88, (July 1978), 348-357.

Plamenatz, John. *Readings from Liberal Writers* (London: Allen & Unwin, 1965). Plant, Raymond. "Community," *The Blackwell Encyclopedia of Political Thought*, Ed. David Miller, (Oxford: Basil Blackwell, 1987), 88-90.

Putnam, Robert. *Bowling Alone. The Collapse and Revival of American Community*, (New York: Simon and Schuster, 2000).

Raico, Ralph. "Wilhelm von Humboldt," *New Individualist Review*, 1:1, (April 1961), 22-26.

_____ "Benjamin Constant," *New Individualist Review*, 3:2, (Winter 1964), 499-508.

- Rand, Ayn. *The Virtue of Selfishness*, (New York: Penguin, 1964.)
- Rasmussen Douglas B. and Douglas J. Den Uyl, *Norms of Liberty, A Perfectionist Basis for Non-Perfectionist Politics* (State College: Penn State Press, forthcoming.)
- Riesman, David. *The Lonely Crowd*, (New Haven, CT: Yale University Press, 1961).
- Roepke, Wilhelm, *A Humane Economy*, (New York: Regnery/Wilmington, DE: ISI, 1998).
- Roper, Jon. *Democracy and It's Critics. Anglo-American Democratic Thought in the Nineteenth Century* (Boston: Unwin Hyman, 1989).
- Rosenblum, Nancy. *Another Liberalism*, (Cambridge, MA: Harvard University Press, 1987).
- _____ *Membership and Morals*, (Princeton: Princeton University Press, 1998).
- _____ "Pluralism and Self-Defense," in *Liberalism and the Moral Life* (Cambridge, MA: Harvard University Press, 1989), 207-226.
- _____ "Democratic Character and Community: The Logic of Congruence," *The Journal of Political Philosophy* 2:1 (March 1994), 67-97.
- Rothbard, Murray. *For A New Liberty*, (San Francisco: Fox & Wilkes, 1996).
- Ryan, Alan. *The Philosophy of John Stuart Mill*, (Second Edition) (Atlantic Highland, NJ: Humanties Press, 1987).
- Sagoff, Mark. "Free-Market versus Libertarian Environmentalism," *Critical Review* (Spring-Summer 1992) 211-230.
- Sandel, Michael. *Liberalism and he Limits of Justice* (New York: Cambridge University Press, 1982).
- _____ *Democracy's Discontent. America in Search of a Public Philosophy*. (Cambridge: Belknap/Harvard, 1996).

Scalia, Antonin, "Assorted Canards of Contemporary Analysis," *Case Western Reserve Law Review* 40:3 (1989-90) 581-597.

_____ *A Matter of Interpretation. Federal Courts and The Law*, (Princeton: Princeton University Press, 1997).

Schumaker, Millard. *Sharing Without Reckoning, Imperfect Right and the Norms of Reciprocity*, (Waterloo, Ontario: Canadian Corporation for Studies in Religion, 1992).

Scitovsky, Tibor, *The Joyless Economy* (Rev. Edition) (New York: Oxford University Press, 1992).

Semmel, Bernard. "John Stuart Mill's Coleridgean Neoradicalism," *The Political Science Reviewer* 24 (1995), 147-178.

Martin Shapiro, "The Supreme Court: From Warren to Burger," in *The New American Political System*, Ed. Anthony King (Washington, DC: AEI, 1978), 179-211.

Shearmur, Jeremy. "Friedrich von Hayek", *The Blackwell Encyclopedia of Political Thought* Ed. David Miller, (Oxford: Basil Blackwell, 1987), 194-196.

Shklar, Judith. *Legalism*, (Cambridge: Harvard University Press, 1964.)

_____ "The Liberalism of Fear," in Nancy Rosenblum, *Liberalism and the Moral Life*, (Cambridge: Harvard University Press, 1989), 21-38.

_____ "Emerson and the Inhibitions of Democracy," *Political Theory*, (November 1990), 601-614.

Smith, Adam. *The Theory of Moral Sentiments*, Eds. D.D. Raphael and A.L. Macfie, (Oxford: Clarendon: 1976).

_____ *An Inquiry into the Nature and Causes of The Wealth of Nations* (Oxford:

Clarendon, 1979).

Soltan, Karol Edward. "Agape, Civil Society and the Task of Social Reconstruction," *Cardozo Journal of International and Comparative Law* 4, (1996), 241-260.

Sorkin, David. "Wilhelm von Humboldt: The Theory and Practice of Self-Formation (*Bildung*), 1791-1810." *Journal of the History of Ideas* 55, (1983), 55-73.

Spitz, David. "Freedom and Individuality: Mill's *Liberty* in Retrospect," *NOMOS IV, Liberty* Ed. Carl J. Friedrich, (New York: Atherton, 1962), 176-226.

Stephen, James Fitzjames. *Liberty, Equality, Fraternity*, (Indianapolis, IN: Liberty Fund, 1993).

Sweet, Paul R. "Young Wilhelm von Humboldt's Writings (1889-93) Reconsidered." *Journal of the History of Ideas* 34:3 (July-September 1973) 469-482.

Ten, C.L. *Mill on Liberty*, (Oxford: Clarendon, 1990).

Terchek, Ronald J. "The Fruits of Success and the Crisis of Liberalism," in *Liberals on Liberalism*, Ed. Alfonso J. Damico (Totowa, NJ: Rowman and Littlefield, 1986), 15-33.

_____ *Republican Paradoxes and Liberal Anxieties* (Lanham, MD: Rowman & Littlefield, 1997.)

"The Good Think-Tank Guide, The Joys of Detached Involvement," (no author), *The Economist*, December 21, 1991-January 3, (1992), 53.

Thoreau, Henry David. *Civil Disobedience*, (Mineola, NY: Dover, 1993).

Tocqueville, Alexis de. *Democracy in America* translated by Harvey C. Mansfield and Delba Winthrop, (Chicago: University of Chicago Press, 2000).

Valls, Andrew. "Self Development and the Liberal State: The Cases of John Stuart Mill and

Wilhelm von Humboldt," *The Review of Politics*, 61:2, (Spring 1999), 251-274.

Vogel, Ursula. "Liberty is Beautiful: von Humboldt's Gift to Liberalism," *History of Political Thought* 3:1 (Spring/January 1982), 77-101.

Vordung, Klaus. "Unity Through Bildung: A German Dream of Perfection," *Independent Journal of Philosophy*, Vol. 516, 1998, 47-55.

Waldron, Jeremy. "Mill as a Critic of Culture" unpublished paper presented at the American Political Science Association Meeting, Atlanta, GA, (September 1999).

Walzer, Michael. "Liberalism and The Art of Separation." *Political Theory* 12:3, (August 1984), 315-330.

_____ "The Idea of Civil Society," *Dissent*, (Winter 1991), 293-304.

Weaver, Paul H. "Do-good Libertarianism," *Reason Magazine*, (May 1993), 61-63.

Williams, Juliet. "Many Roads to Serfdom, Liberalism Against Democracy in the Writings of F.A. Hayek" paper presented to the J.M. Kaplan Workshop in Political Economy at George Mason University, (Spring 2000).

Willis, Ellen. "Their Libertarianism--And Ours," *Dissent*, (Fall 1997), 111-118.

Wolfe, Robert Paul. *The Poverty of Liberalism*, (Boston: Beacon, 1968).

Wolff, Jonathan. "Libertarianism," in *The Encyclopedia of Philosophy* (New York: Routledge, 1998), V, 617-619.

Young, Steven M. "Beyond the Union of Social Unions: Civil Society, Political Society, and Liberal Individuality in Wilhelm von Humboldt & John Stuart Mill." Harvard University, Center for European Studies Working Paper Series, 7.8 (1997).

_____ "The Unified Self and the Cultural Community: Romantic Self-

Development and the National Ideal in Wilhelm von Humboldt." Paper presented at the American Political Science Association Annual Meeting, Boston, (September 3-6, 1998).