

February 18, 2010

# UNDERLYING THEORETICAL DIFFICULTIES IN THE CONCEPTION OF INDIVIDUAL RIGHTS IN AMERICAN CONSTITUTIONAL LAW

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# UNDERLYING THEORETICAL DIFFICULTIES IN THE CONCEPTION OF INDIVIDUAL RIGHTS IN AMERICAN CONSTITUTIONAL LAW

**ABSTRACT:** Two competing perspectives regarding the individual's relationship with government pervade American legal thought. Our nation has its foundation in a perspective that considers the citizen as sovereign and the State as merely the instrument of the citizenry's dictate. Another perspective with roots deep in European thought considers the State to be the embodiment of the best interests of the populace and regards government as naturally destined to lead the citizenry accordingly. Aspects of both perspectives are implicit in legislation and judicial reasoning concerning the relative roles of individual and State. The first, the common law American perspective, recognizes that where the people are sovereign it is counterintuitive to permit government to mold the consensus of the governed. By contrast, the collectivist approach perceives the individual's submission to the public interest or general will as represented by government to be the true realization of freedom. John Stuart Mill grappled with these two polar approaches to the relationship between the individual and the State. This article examines the ramifications of each approach and Mill's effort to reconcile them in terms of his concept that society was moving historically from a transitional to an organic stage. Mill's concept of an organic society is evaluated in the face of evidence that the actual function of social processes more accurately reflects the competition and autonomy consistent with the American constitutional approach.

## I. THE STATE AND ITS ROLE IN CREATING CONSENSUS IN AMERICAN CONSTITUTIONAL GOVERNANCE

The two fundamentals of our constitutional system of government are popular sovereignty and limited government.<sup>1</sup> Tied to these principles and evolving naturally and logically from them is a constitutional analysis anchoring the protection of freedom of expression to the bedrock of our nation's *raison d'être*. This has evolved in first amendment decisional rhetoric as characterizing the process of popular governance as entailing a "marketplace of ideas" where voters shop for the "truth."<sup>2</sup> Ideas are freely offered, exchanged, considered, evaluated and rejected or accepted on their merits by the electorate.

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<sup>1</sup> Shapiro and Tresolini, *American Constitutional Law* (Macmillan Publishing Co., Inc., 1983), p. 9.

<sup>2</sup> Chafee, Zechariah, *'Free Speech in the United States'* (1947) Harvard Univ. Press.

It is beyond peradventure that the founding fathers were concerned with restrictions placed upon basic individual rights by dominating governments.<sup>3</sup> The intellectual origins of the concepts of popular sovereignty and limited government originated outside the colonial experience but found fertile ground to take root in the pre-revolutionary period.<sup>4</sup> Likewise, the political significance of freedom of speech in the public sphere developed historically outside the colonial experience,<sup>5</sup> but was entirely philosophically congruent with the concepts of individual autonomy/responsibility and popular self-governance.

The founding fathers regarded government as the chief threat to the governing power of the people.<sup>6</sup> The underlying basis for protecting freedom of expression which

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<sup>3</sup> Comments. "Unconstitutional Government Speech" (1978) 15 San Diego L.Rev. 815, 833.

<sup>4</sup> The key concepts of limited government and popular sovereignty found acceptance in the unique experience of the colonies:

What we have here are two fundamental – perhaps the most fundamental – principles of American politics: The principle that men make government, and the principle that there are limits to the authority of government. The philosophical origins of the first principle may be found in the natural-rights philosophy of the seventeenth century – in the notion that all rights inhered originally in men and that men, living in a state of nature, came together for mutual self-protection and set up government, and that the governments thus instituted derive all their just powers from the consent of the governed. . . .

The second great basic principle – that governments are limited, that there are things no government may do, rights no government may impair, powers no government may exercise – traces its philosophical origins deep into the past but again derives authority from American experience with Parliamentary and royal pretensions. It held, simply enough, that as government was instituted to secure certain rights, its jurisdiction was strictly limited to the fields assigned to it, and that if it overstepped the bounds of its jurisdiction its acts were not law. . . .

[The] generation [of the American Revolution], more conscious of the dangers than the potentialities of government, more concerned with protection against government tyranny than with the promotion of majority welfare, devised cunning mechanisms for putting limitations upon government.

Commager, *Majority Rule and Minority Rights* (Oxford Univ. Press, 1943) pp. 4-6.

<sup>5</sup> Withington, Phil, *Public Discourse, Corporate Citizenship, and State Formation in Early Modern England* (2007) 112 *The American Historical Review* 1016.

<sup>6</sup> Meiklejohn, *Political Freedom* (Harper & Row, 1960) 102-103, 108. Jefferson wrote in an agrarian era predating the rise of powerful private industrialists and wealthy corporate behemoths:

stems from the founding fathers' suspicion of government and which permeates our constitutional form of government is that our ability to govern ourselves be protected from interference by the government<sup>7</sup>. It is not the State's role to tell the citizens what is good for them. Government's function was conceived as a delegation of certain governing powers to legislative, executive and judicial agencies that remained under the active control of the voting public:<sup>8</sup>

The intent of the Constitution is that, politically, we shall be governed by no one but ourselves. We are not, then, a subject people begging or fighting for such limited privileges and powers as may be grudgingly granted to us by a sovereign legislature. We are the sovereign and the legislature is our agent. And as we play our sovereign role in what Hamilton calls "the structure and administration of government," that agent has no authority whatever to interfere with the freedom of our governing. As we go about that work neither Congress nor any committee of Congress may use force upon us to drive us toward this public policy or that, or away from this public policy or that.<sup>9</sup>

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[T]hat it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere the parent of despotism – free government is founded on jealousy and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power; that our Constitution has accordingly fixed the limits to which, and no further, our confidence may go . (Jefferson, Thomas, Kentucky Resolutions of 1798, Resolution 8).

<sup>7</sup> The question of whether the marketplace of ideas requires some modicum of protection from interference or distortion by private sources such as wealthy and powerful fictitious entities (corporations) or large associational agglomerations of private persons (unions and other interest groups) is left for another day. The Progressive illumination that private forces may pose a far greater threat to the public welfare and to individual rights rose to prominence with the excesses of industrialization after the civil war, but did not gain judicial traction until after FDR's court-packing plan. (Graber, Mark, "Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism" (Univ. of Cal. Press. 1991) ) Legal recognition of this threat ran counter to the judicial protection afforded economic rights in that era. The shift from protection of economic freedom – allowing great deference to legislative efforts to regulate private industry - to an approach more protective of political freedoms represented by the famous *Carolene Products* footnote (*United States v. Carolene Products Company* (1938) 304 U.S. 144 (1938), fn.4) merely obscured a differential treatment of rights lacking a theoretical foundation. No thoroughgoing reasoned basis has been developed for scrupulously protecting some individual rights while fundamentally departing from classical liberal rights theory when it comes to regulating certain associations. This would gradually become apparent in a series of decisions addressing congressional efforts to regulate campaign activity by economic organizations (See, Hasen, Richard, "Beyond Incoherence: The Roberts Court's Deregulatory Turn in *FEC v. Wisconsin Right to Life*," 92 Minnesota Law Review 1064 (2008)) and most recently come to a head in the split decision in *Citizens United v. FEC* (2010) 558 U.S. \_\_\_\_ .

<sup>8</sup> Meiklejohn at 99.

<sup>9</sup> *Id.* at 106.

The constitutional problem with government efforts to create consensus stems from the hypocrisy this entails in the relationship between government and the governed.<sup>10</sup> Where the sovereign people engage in the process of self-governance the courts have given the greatest recognition of the need to curtail government efforts to harness public opinion.<sup>11</sup>

## **II. THE CONTRACTUAL ORIGINS OF AMERICAN CONSTITUTIONAL THINKING VS. COLLECTIVIST THINKING**

The antecedents of the American Revolution were contractual. The colonists regarded British actions – such as taxation and impressment – as intolerable breaches of implied contractual rights.<sup>12</sup> Frequently, Tory efforts to impose upon the perceived rights of the colonists were met with refusal, organized resistance and mob uprisings. British officials were tarred and feathered, thrown in lakes and subjected to various humiliations at the hands of angry mobs.<sup>13</sup> When the colonists' efforts to seek redress were brushed aside, the breach gave the colonists no other choice than to declare their independence and revolt against British rule.<sup>14</sup>

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<sup>10</sup> The United States Supreme Court in West Virginia State Board of Education v. Barnette (1943) 319 U.S. 624, observed the constitutional problem with government efforts to create consensus:

We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority. Id. at 640-641.

<sup>11</sup> Id.; Buckley v. Vallo (1976) 424 U.S. 1, 57; Stanson v. Mott (1976) 17 Cal.3d. 306. But, compare recent decisions casting in doubt the resolve of the judicial branch to stand as a bulwark against corporate and governmental efforts to influence voter choice: Citizens United v. FEC (2010) 558 U.S. \_\_\_\_ ; Vargas v. City of Salinas (2009) 46 Cal.4<sup>th</sup> 1.

<sup>12</sup> Reid, John Phillip, "In Our Contracted Sphere': The Constitutional Contract. The Stamp Act Crisis, and the Coming of the American Revolution" 76 Col.L.Rev. 21.

<sup>13</sup> Maier, Pauline, "Popular Uprisings and Civil Authority in Eighteenth-Century America" (1970, William and Mary Quarterly, 3d ser.27, p.3)

<sup>14</sup> Jury nullification – the defiant power of the jury to depart from positive law and refuse to give sanction to unjust rules or to their unjust application – represents a remaining vestige of this revolutionary colonial spirit. Duncan v. Louisiana (1968) 391 U.S. 145; U.S. v. Spock (1969 1<sup>st</sup> Cir.) 416 F.2d 165; Sullivan v. Louisiana (1973) 508 U.S. 275.

While the legal parameters of contract law had not yet fully emerged from feudal notions of property rights, the philosophical development of the social contract had moved ahead with concepts of individual rights and consensual agreement. One view, commonly associated with the thinking of John Locke, arose against the backdrop of emerging economic institutions designed to accommodate the needs of a rising merchant class and the renaissance-renewed importance of the individual. It regarded the individual as an independent sovereign unit rather than as a component of a whole body.

A competing perspective of the individual's relationship with government with much deeper roots developed in Western tradition alongside the very different view accepted by Madison and Jefferson which formed the basis for American constitutional democracy. Its origins can be traced to such philosophers as Hegel, who stated in his *Philosophy of Law* (1821) that the individual finds his liberty in obeying the State and the fullest realization of his liberty in dying for the State, and Rousseau, whose conception of freedom entailed the individual's submission to a general will.<sup>15</sup>

Under this approach, the concept of popular sovereignty presupposes that there is a common point at which citizens' wills necessarily should coincide.<sup>16</sup> But even the people may not know the general will. "The blind multitude does not know what it wants, and what is its real interest. 'Left to themselves, the People always desire the good, but, left to themselves, they do not always know where that good lies. The general will is always right, but the judgment guiding it is not always well informed. It must be made to see things as they are, sometimes as they ought to appear to them.'"<sup>17</sup> The

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<sup>15</sup> Talmon, *The Origins of Totalitarian Democracy* (Norton Library 1970).

<sup>16</sup> Talmon at 250-251.

<sup>17</sup> Talmon at 47-48. Pursuing the same line of thought, Montesquieu wrote, "It is true that in democracies the people appears to do what it wants to, but political freedom does not at all consist in doing what one

approach is based upon “the assumption of a sole and exclusive truth in politics.”<sup>18</sup> This perspective conceives of the individual as a part of an organic body and the state as the infallible embodiment of the general will.<sup>19</sup> Laws promulgated by the State are, therefore, conceived of as embodying universal moral truths. The perspective is expressed as follows:

Anti-Individualistic, the Fascist conception of life stresses the importance of the State and accepts the individual only in so far as his interests coincide with those of the State, which stands for the conscience and the universal will of man as a historic entity. It is opposed to classical liberalism which arose as a reaction to absolutism and exhausted its historical function when the State became the expression and conscience and will of the people. Liberalism denied the State in the name of the individual; Fascism reasserts the rights of the State as expressing the real essence of the individual. And if liberty is to be the attribute of living men and not of abstract dummies invented by individualistic liberalism, then Fascism stands for liberty, and for the only liberty worth having, the liberty of the State is all-embracing; outside of it no human or spiritual values can exist, much less have value. Thus, understood, Fascism is totalitarian, and the Fascist State – a synthesis and a unit inclusive of all values – interprets, develops, and potentiates the whole life of a people.

. . .

Fascism, in short, is not only a law-giver and a founder of institutions, but an educator and a promoter of spiritual life. It aims at refashioning not only the forms of life but their content – man, his character, and his faith. To achieve this purpose it enforces discipline and uses authority, entering into the soul and ruling with undisputed sway. . . .<sup>20</sup>

Italian fascism is one formulation of the concept of the body politic having absolute power over its members.<sup>21</sup> It was the heir to a long intellectual tradition drawing from an ambiguous legacy left in the work of Karl Marx and Friedrich Engels.<sup>22</sup>

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wants to. In a state, that is, in a society under law, freedom cannot consist in anything but doing what one should want to, and in not being compelled to do what one should not want to.” Waltz, Kenneth N., *Man the State and War* (New York, 1965) p. 123.

<sup>18</sup> Talmon at 1.

<sup>19</sup> Rousseau, Jean Jacques, *The Social Contract* (Henry Regnery 1954) p.38.

<sup>20</sup> Mussolini, Benito, *The Doctrine of Fascism* (1935, Vallecchi Editore Firenze) pp.13-18.

<sup>21</sup> See, Rousseau at p. 41.

<sup>22</sup> Gregor, James, *Italian Fascism and Developmental Dictatorship* (Princeton Univ. Press, 1979) p.21.

Grasping the collectivist take on freedom involves a considerable conceptual reorientation from an individualistic perspective. Fundamentally, the individual is seen as an indivisible part of a whole. The existence of the collective body spells the loss of natural liberty, but the gain of civil liberty. It is transformative, substituting morality for selfishness, replacing base physical cravings with social duty, and desire with the guidance of reason.<sup>23</sup> Man is no longer the slave of his own course desires. He is developed, ennobled and his soul elevated. Therefore, acceptance of the general will - to obey the laws of society - is to be free.<sup>24</sup> This necessarily entails the power of the State as a means to realize freedom:

[I]t must contain, though unexpressed, the single undertaking which can alone give force to the whole, namely, that whoever shall refuse to obey the general will must be constrained by the whole body of his fellow citizens to do so: which is no more than to say that it may be necessary to compel a man to be free – freedom being that condition which, by giving each citizen to his country, guarantees him from all personal dependence and is the foundation upon which the whole political machine rests, and supplies the power which works it. Only the recognition by the individual of the rights of the community can give legal force to undertakings entered into between citizens, which, otherwise, would become absurd, tyrannical, and exposed to vast abuses.<sup>25</sup>

This organic or collectivist perspective is essentially antithetical to the basics of American constitutional governance. The American conception of democracy derived from a different social contract tradition<sup>26</sup> which accepted the premise that man is able to

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<sup>23</sup> Rousseau describes the social compact as altering the orientation of the individual dramatically: The passage from the state of nature to the civil state produces a truly remarkable change in the individual. It substitutes justice for instinct in his behavior, and gives to his actions a moral basis which formerly was lacking. Only when the voice of duty replaces physical impulse and the cravings of appetite does the man who, till then, was concerned solely with himself, realize that he is under compulsion to obey quite different principles, and that he must now consult his reason and not merely respond to the promptings of desire.

Social Contract (Everyman, 1997) p. 195.

<sup>24</sup> Rousseau, The Social Contract (Everyman, 1997) p. 196.

<sup>25</sup> Rousseau, The Social Contract (Everyman, 1997) p. 195.

<sup>26</sup> This is not to say that Mill's thinking was grounded in a social contract analysis. It was not. (On Liberty, p.322) Mill's organic perspective on the nature of society existed apart from that construct and derived more from his close association with the positivists and the emerging science of sociology.



govern himself by virtue of his having reason. The purpose of the State is to protect the individual and his property.<sup>27</sup> Rather than the collective body or State having absolute power over the people, the people have the absolute right to rid themselves of an unsatisfactory government.<sup>28</sup> This approach rejects the ideas of state infallibility and a single political truth and regards government as fallible and governance as an experimental or trial and error type of process.<sup>29</sup> Law is perceived as man-made determinations resulting from this process. Under this individualistic approach, while the citizen may distrust the ability of government officials to act in the peoples' best interests, at the ballot box he or she has the opportunity to oversee policy and correct official deviations, failures and excesses.

The collectivist or totalitarian view of the nature of the relationship between governed and governors is in stark contrast to the elucidation of the now accepted view of American governance<sup>30</sup> as involving a marketplace of ideas freely competing for acceptance by the sovereign voters. Justice Brandeis, concurring in Whitney v. People of State of California,<sup>31</sup> stated what has become the classic American view of democracy as dependent upon the voices of individuals freely debating and ultimately dictating the duties of the subservient State based upon the survival of the fittest idea expressed.<sup>32</sup> This

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<sup>27</sup> Locke, John, Second Treatise on Civil Government.

<sup>28</sup> Declaration of Independence.

<sup>29</sup> Ebenstein, Today's Isms (1970, Prentice Hall) p.163.

<sup>30</sup> The American view stresses protection of the individual from majoritarian impositions in a political system controlled by majority rule. Thorson, Thomas L., The Logic of Democracy (Holt, Rinehart & Winston, 1962) p.153; Dahl, Robert A., A Preface to Democratic Theory (Univ. of Chicago Press, 1956) p.4.

<sup>31</sup> (1927) 274 U.S. 357.

<sup>32</sup> Brandeis stated the underlying object of the first amendment in terms of the social purpose of arriving at truth - what is truly in the public interest:

[We] must bear in mind why a state is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence. Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the

voiced Professor Chaffee's synthesis of a Spencerian Social Darwinism with a perspective generally associated with John Stuart Mill.<sup>33</sup>

The organic perspective is without express heritage in this nation, although undeniably the implicit power to bend individual prerogatives to the impulses of the State (expressed as the "public interest" or "common good") to achieve conformity is constantly evident and expressed in manifold ways. Looking closer, the history of American law reveals a tug-of-war between the two perspectives.

#### A. THE AMERICAN APPROACH TO REGULATING MORALITY

Initially in the American approach to governance, grave concern was expressed with protecting the individual from oppression at the hands of the bulk of the social body. This concern with protecting the individual has moved beyond that expressed by Madison in *The Federalist Papers* over the threat posed by majority factions. The concern has expanded and developed into a rights analysis logically consistent with the American

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deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

*Id.* at 374-376.

<sup>33</sup> Mill did not conceive of the effect of divergent opinions as one of threshing out "truth" so much as an emetic to purge outworn ideas, superstition and unclear thinking and to thereby facilitate conditions receptive to a dramatic change in the social order. Closer examination of the bulk of Mill's work reveals that his adherence to libertarian principles was only temporary. It only had application to achieving specific objectives in the special conditions prevailing in the historical age in which he believed he lived. See, *infra*, pp. 19-22.

theory of democratic governance. Thus theorists acknowledge the right of the individual to rail unmolested against the mighty force of social consensus and without being smothered by the wet blanket of social control. This counterpoint to the collectivist approach is found in Tocqueville, who in *Democracy in America* lamented the tyranny of the majority, and in Mill, who in *On Liberty* stressed the hazard of collective opinion and spoke of protecting a person's freedom to do as he wished short of causing some injury to others. Yet, outside of the deference afforded commercial transactions,<sup>34</sup> recognition of the desirability of protecting individual autonomy as a fundamental value did not emerge in Supreme Court doctrine until much later.<sup>35</sup>

This is not to say that the American approach does not allow the State to inculcate values and promote social policies inconsistent with individual desires. It is just to say that this agenda is not permitted to intrude upon areas of individual conscience. Nor is the power of the State to promote the values of the current elected representatives of the electorate allowed to counter the power of the sovereign people to ultimately determine policy at the ballot box. The voters can always cast out the current legislature and vote for new elected officials who adhere to different values.

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<sup>34</sup> Horwitz, Morton, "The Transformation of American Law: 1780-1860" Harvard Univ. Press, 1977.

<sup>35</sup> Compare Justice Holmes' majority opinion in Debs v. United States (1919) 249 U.S. 211, or Schenck v. United States (1919) 249 U.S. 47, with his now-famous dissent in Abrams v. United States (1919) 250 U.S. 624. There, Holmes gave voice to what is now recognized as capsulizing the American common law: "... the best test of truth is the power of thought to get itself accepted in the competition of the market. . . . That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions which we loathe and believe to be fraught with death." Later, in his dissent in Gitlow v. New York (1925) 268 U.S. 652, Holmes was prepared even to accept that this fundamental right contemplated the ability of the citizenry to replace our system of government. The mystery of why the founding fathers' concerns did not find voice in American legal thought until more than a century after the Bill of Rights spelled it out as a fundamental political premise is addressed in an article tracing the process of countervailing forces gradually giving rise to recognition of non-economic individual rights as meriting protection. Weinrib, Laura M., "From Public Interest to Private Rights: Free Speech, Liberal Individualism and the Making of Modern Tort Law" 34 Law & Social Inquiry 187.

It is a mistake to regard government as the source of advice on how the people should act to govern themselves. This would fundamentally misunderstand the basic decisional hierarchy in American constitutional democracy. This misconception pertains to the nature of government and the proper role of the sovereign electorate and the government administrator. The public administrator does not make policy, he or she carries it out.<sup>36</sup> It is not the petty government official's proper role to make or influence policy or to impose discretionary views of the common good on the citizenry.<sup>37</sup>

## B. THE CONTRASTING COLLECTIVIST APPROACH

By contrast, the collectivist approach to the social contract has no problem with the idea of legislating morality regarding individual conduct or with the idea of having petty officials impose the social will backed by legal sanction upon those nonconformists who would test society's bounds. Accepting the idea that society has normative

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<sup>36</sup> The misconception is laid bare by the following exposition:

[T]here are those who [ ] deplore the plight of democracy because the people simply cannot undertake the task of coping with all the complex issues of modern government. [ ] Representative democracy [ ] does not put such an impossible strain on the citizen. The people, let us repeat, do not and cannot govern; they control the government. In every live democracy they decide the broad march of politics. They decide whether there is to be more social legislation or less, more collectivization or somewhat more play for private enterprise, more dependence on an international system of security or more self-sufficiency and relative isolation, and so forth. They decide these issues, not one at a time but by voting for an administration favorable to one or another "platform." They decide them partly – and in the last resort – at the polls, and partly by continuously manifested indications of public sentiment. [ ] [T]he citizens of a democracy are *continuously* engaged in a massive give-and-take of creative opinion-making. Certainly not as experts who must willy-nilly do the job of the administration, that is, by finding answers to the very specific questions that the administration must face from day to day. [ ]

We observe in passing that in a democracy there are two stages of decision-making before the *proper* job of the expert begins. First, there is the primary function of policy-making, the choice between directions, the function of the people. Second, there is the delineation of policy by the legislators and the heads of the government – in accordance with the "mandate" thus entrusted to them. Third, there is the implementation of policy. At this third stage the expert finds his place. It is here, and here alone, that he belongs.

Maciver, R. M., "The Ramparts We Guard" (1950, The Macmillan Co.) pp. 27-30, 49-51.

<sup>37</sup> Ziegler, "Government Speech and the Constitution: The Limits of Official Partisanship" 21 B.C.L.Rev. (1980) 578, 578-580.

boundaries set by the society and enforced by social pressures, the collectivist would give legal force to these pressures. The individualist, conversely, would lend social norms the force of the law only where the breach of the normative standards of the society was of a degree that caused an identifiable harm to other individuals. The traditional libertarian perspective would not have law involve itself in regulating trivial or speculative harms or enforcing ephemeral or purely moral standards.

It is not the purpose of this article to attempt to precisely define the parameters of what regulatory power the State should properly wield in the individualistic approach. The inculcation of traditional values has been accepted by the Supreme Court's more conservative members and by its more liberal members as a natural function of the State, although none of the Court's members have expounded a consistent set of values proper for the pedagogic process.<sup>38</sup> To ignore the fact that a society has a culture, a heritage of norms and traditions that underlies any form of government it evolves is to commit the error pinpointed by Edmund Burke that plagued the French revolution.<sup>39</sup> It will not work to try and start fresh – create a social tabula rasa – and then try and derive social consensus from sheer reason. Norms precede law and whether one believes that the law represents the double-institutionalization<sup>40</sup> of those norms or the imposition of a

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<sup>38</sup> In Board of Education v. Pico (1982) 457 U.S. 853, the Supreme Court, in dealing with book banning efforts in a public school, observed the educational function to be “vitally important ‘in the preparation of individuals for participation as citizens.’” Id. at 864. In this regard, such preparation entails “‘inculcating fundamental values necessary to the maintenance of a democratic political system.’” Id. But Justice Brennan, writing for the plurality, did not stop there. He also saw the State’s educational mission of inculcating values as including “community values” and “respect for authority and traditional values be they social, moral or political.” Id.

<sup>39</sup> Burke, Edmund, *Reflections on the Revolution in France*

<sup>40</sup> Kelsen, H., *General Theory*, p.39; Hart, H.L.A., *The Concept of Law* (1961, Clarendon Press)

conflicting set of norms to replace a descendant value structure,<sup>41</sup> they are the accepted basis for the society's functioning and cannot be ignored. It is a different question whether such norms should be reified as law. It is a different question still which norms the State should get involved in instilling and transmitting apart from the normal mechanisms society has for defining and preserving its norms.

The question becomes especially pointed when we are looking at a heterogeneous nation such as the United States where polyglot cultural differences run the gamut. At a minimum,<sup>42</sup> it would seem the State is expected to inculcate in the citizenry a basic understanding of the nation's heritage and traditions, an appreciation of the legal and political institutions, the importance of the citizen's role and value in self-governance, the importance of individual liberties which may inspire patriotism,<sup>43</sup> respect for the diverse cultural backgrounds that compose the melting pot, understanding and tolerance of different points of view and the importance of considered viewpoints and voting.

The totalitarian State does not stop there. It has no difficulty with employing public funds and legal mechanisms to mold consensus and has no use for a marketplace of ideas. Normative questions are identical with political issues and are readily regarded as the proper subject of legislation. The collectivist perspective assumes the State will

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<sup>41</sup> Diamond, Stanley, *The Rule of Law Versus the Order of Custom*, in Robert Wolff (ed.) *The Rule of Law* (1971, Simon & Schuster).

<sup>42</sup> Thomas Jefferson took a minimalist approach consistent with the individualist approach and avoiding indoctrination of consensual values unrelated to the core values of self-governance:

The objects of... primary education [which] determine its character and limits [are]: To give to every citizen the information he needs for the transaction of his own business; to enable him to calculate for himself, and to express and preserve his ideas, his contracts and accounts in writing; to improve, by reading, his morals and faculties; to understand his duties to his neighbors and country, and to discharge with competence the functions confided to him by either; to know his rights; to exercise with order and justice those he retains, to choose with discretion the fiduciary of those he delegates; and to notice their conduct with diligence, with candor and judgment; and in general, to observe with intelligence and faithfulness all the social relations under which he shall be placed.

Report for University of Virginia, 1818

<sup>43</sup> West Virginia Board of Education v. Barnette (1943) 319 U.S. 624, 631.

take a strong role in the educational process by identifying what is perceived to be the general will and indoctrinating and cultivating consensus. Such a perspective has no trouble with banning/burning books such as *The Grapes of Wrath*<sup>44</sup> or *Catcher in the Rye*<sup>45</sup> that contain ideas contrary or dangerous to the commonweal. No qualms exist over seeking to achieve conformity through imposition of trappings of homogeneity such as uniform dress codes. This perspective has no problem requiring school students, regardless of issues of individual conscience, to stand for the flag salute or to forego individual privacy protections and freedom of speech.<sup>46</sup>

The laissez-faire American approach would be self-conflicted if, on the one hand, the State were to educate students into a value system emphasizing the critical importance to the national heritage and future of respecting individual rights and differing points of view and of the marketplace of ideas, while, on the other hand, it refused to accommodate issues of individual conscience and discouraged or suppressed student speech. To this writer it has always seemed that the educational setting is the place where American citizens should first become acquainted with the importance of these rights, the desirability of engaging in the free interchange of opinions, the responsibility of self-governance and the exercise of first amendment rights. Surely it is hypocrisy to teach students the significance of the Bill of Rights while simultaneously denying that these rights have any application to them.<sup>47</sup> To the extent that the Supreme Court's

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<sup>44</sup> Steinbeck, "The Grapes of Wrath." This book portraying the plight of those fleeing the dustbowl and trying to survive in California was banned in many California communities because of the negative portrayal of the treatment migrant farm workers were given by those communities.

<sup>45</sup> Salinger, J.D., "Catcher in the Rye." This book has long been the subject of bans and banning efforts by school boards.

<sup>46</sup> Tussman, Joseph, "Government and the Mind" (Oxford Univ. Press, 1977)

<sup>47</sup> "Prior Restraint and the Public High School Student Press: The Validity of Administrative Censorship of Student Newspapers Under the Federal and California Constitutions" (1987) 20 Loyola L.Rev. 1055, 1155-1156.

decisions in Barnette<sup>48</sup> and Tinker<sup>49</sup> captured this individualistic conception and have not subsequently been eroded,<sup>50</sup> these holdings are consistent with an American approach to public education.

### III. JOHN STUART MILL'S TWO APPROACHES TO FREEDOM

The importance of protecting a free marketplace of ideas from encroachment by forces seeking to suppress, dominate or drown-out independent citizen expression is frequently associated with the thinking of John Stuart Mill. Mill, writing 150 years ago made observations from a rational and individualistic approach to democracy regarding the danger posed by authoritarian forces that remain persistent today.<sup>51</sup> Mill's response to the efforts of government to impose opinions on the populace and to decide what views citizens should hear was to resoundingly reject such efforts to create or guide

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<sup>48</sup> West Virginia Board of Education v. Barnette (1943) 319 U.S. 624. Justice Frankfurter dissented in that case. In the case it overruled. Minersville School Dist. v. Gobitis (1940) 310 U.S. 586, Justice Frankfurter, writing for the majority, saw the flag salute as a "means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious." *Id.* at 597. The collectivist basis for the decision became more apparent as he cited the "ultimate foundation of a free society" to be "the binding tie of cohesive sentiment" (*Id.* at 596) and described society's need for self-protection as the justification for requiring Jehovah's Witness children to stand for the flag salute:

The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.

*Id.* at 600.

<sup>49</sup> Tinker v. Des Moines Independent Community School Dist. (1969) 393 U.S. 503.

<sup>50</sup> See, Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 279; Morse v. Frederick (2007) --- U.S. ----.; Jacobs v. Clark County School District (2008 9<sup>th</sup> Cir.) 562 F.3d 419.

<sup>51</sup> Mill observed:

[T]here is also in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation; and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable.

Mill, John Stuart, *On Liberty* (1859), in *Essential Works of John Stuart Mill* (1961, Bantam) p. 267.



consensus. Mill saw State involvement in controlling political correctness as inherently dangerous:

. . . Let us suppose, therefore, that the government is entirely at one with the people, and never thinks of exerting any power of coercion unless in agreement with what it conceives to be their voice. But I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate. The best government has no more title to it than the worst. It is as noxious, or more noxious when exerted in accordance with public opinion, than when in opposition to it. If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. . . . But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit. The clearer perception and livelier impression of truth, produced by its collision with error.<sup>52</sup>

Although Mill might be cited and commonly regarded as the apotheosis of civil libertarians, the protection he would afford the individual was only valid and would only last while a new vision of social consensus was achieved. This becomes apparent when we acquaint ourselves with Mill's vision of history. Mill took on the task of reconciling two differing perspectives on freedom. One perspective takes the individual to be an autonomous agent who has only an obligation to her or himself alone. Mill's view on the ability of society to impose upon the individual is commonly represented by the following statement in *On Liberty*:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is *to prevent harm to others*. His own good, either physical or moral, is not a sufficient warrant. . . . The only

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<sup>52</sup> *On Liberty* (1859) pp. 268-269.

part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of absolute right. Over himself, over his own body and mind, the individual is sovereign.<sup>53</sup>

Conceptually, the idea of freedom explicated here is that restraints imposed on the individual by government or society are absent. Counterpoised to this view of freedom, is the collectivist idea that society liberates the individual from undesirable conditions existing in a state of natural liberty. The logic of this latter perspective is that the individual owes everything to the society that produced him and that his selfish interests are best served by following the general will of this society which he will naturally come to identify with. Freedom lies in identifying with the needs of the social corpus.

Mill, realizing that each foregoing view appears flawed when analyzed from the other perspective, identified a middle path. This involved historical stages during which each perspective would hold sway. It also involved weighting the influence of an educated elite in ascertaining the general will and creation of a humanistic religion to instill the general will in the populace.

Mill felt strongly that reason would prevail among rational minds and that agreement on political questions was merely the inevitable result of discussing the issues thoroughly and looking to the end of maximizing the greatest happiness. This was the utilitarian yardstick that Bentham reduced mathematically to the addition and subtraction of utils and hedons. Mill remarked that he agreed with his father in his “. . . reliance on the influence of reason over the minds of mankind, whenever it is allowed to reach them.”<sup>54</sup> Mill also accepted the positivist doctrine that mankind was existing in a

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<sup>53</sup> Mill, *On Liberty*, p. 263.

<sup>54</sup> Mill, *Autobiography*, *Essential Works of John Stuart Mill* (Bantam, 1961), p.68.

“critical period” of transition which began at the Reformation<sup>55</sup> and would not end until the advent of a superior philosophical system brought about a new organic period.<sup>56</sup> The emphasis Mill placed upon education and the free interchange of opinions has different meaning depending upon whether he was considering the transitional<sup>57</sup> or the organic phase. Education and free expression and interaction of ideas are seen as means of producing reasonable minds and bringing about the organic period. The role of the creative individual, the genius – those who stand on the higher eminences of thought<sup>58</sup> in the transitional phase – is one of fostering the conditions for acceptance of the new philosophical system.

The problem for Mill’s evaluation of individual rights and treatment of the power of society to impose general needs on individuals is that Mill simultaneously and wholeheartedly embraced divergent and incompatible philosophical approaches. He had one foot solidly on atomistic, individualistic bedrock, the other on organic soil and he straddled the abyss between these incompatible approaches to the question of the respective relations of society and the individual. In spite of the conflict between organic solidarity and unbridled individualism in term of treatment of deviant conduct, Mill insisted on having it “both ways.” He noted in his autobiography:

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<sup>55</sup> Mill, *Autobiography*, p. 100.

<sup>56</sup> Mill, *Autobiography*, p. 141.

<sup>57</sup> Mill’s thinking on the State’s role in seeking to guide the social body during the transitional period was to eschew government efforts to impose its views upon the citizenry: “All attempts by the State to bias the conclusions of its citizens on disputed subjects, are evil; but it may very properly offer to ascertain and certify that a person possesses the knowledge, requisite to make his conclusions, on any given subject, worth attending to.” *On Liberty*, p. 353. The State was to remain neutral in the marketplace of ideas and was to educate, not brainwash, public school pupils. The teaching of creationism – because it is not accepted as a valid scientific theory in the field of biology and is actually dogma – would not occur. School prayer – obviously a disputed issue in a nation of different religious and non-religious backgrounds – would not be permitted. Indoctrination one way or the other as to disputed public issues such as abortion, tax measures or same-sex marriage would not be proper.

<sup>58</sup> Mill, *On Liberty*, p. 315.

I looked forward, through the present age of loud disputes but generally weak convictions, to a future which shall unite the best qualities of the critical with the best qualities of the organic periods; unchecked liberty of thought, unbounded freedom of individual action in all modes not hurtful to others; but also, convictions as to what is right and wrong, useful and pernicious, deeply engraven on the feelings by early education and general unanimity of sentiment, and so firmly grounded in reason and in the true exigencies of life, that they shall not, like all former and present creeds, religious, ethical, and political, require to be periodically thrown off and replaced by others.<sup>59</sup>

Only by reading this passage in light of Mill's understanding of the differing meanings of freedom in the different historical phases does it make sense. Otherwise we simply puzzle over the unreconciled clashing notions of uniformity of social thought and individual liberty of thought.

Not only does the organic concept of the general will run at loggerheads with the individualistic idea of a marketplace of ideas, but elsewhere in Mill's thinking he embraced competing and incompatible approaches bearing upon this issue of the primacy of the collective body versus the individual. Mill's unique reconciliation of the contradictory ramifications of libertarian and totalitarian approaches is evident in several ways. Initially, he was unable to come to grips with his apprehension over accepting the utilitarian thinking of his father and Jeremy Bentham. Mill's inability to reconcile the contradictory ramifications of libertarian and totalitarian approaches is evident in his extolling basic classical ideas of individualism and personal excellence and achievement. By contrast, he premises his defense of libertarian principles entirely upon a utilitarian foundation.<sup>60</sup> As such, the fundamentally collective utilitarian principle<sup>61</sup> that the

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<sup>59</sup> Mill, *Autobiography*, p. 101.

<sup>60</sup> Mill, *On Liberty*, p.264. Here again, the utilitarian basis for protecting the individual in the face of majoritarian considerations makes sense when it is viewed as a temporary measure – a means to accomplish the higher utilitarian end of ushering in the organic age. Mill stated, “it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.” *Id.*

greatest possible happiness for the greatest number of human beings should prevail over individual claims, clashes with individualistic principles. It necessarily requires that majoritarian considerations of happiness trump individual rights and triumph over the inconvenience of a few censored radicals and malcontents.

The influence of Saint-Simon and Comte is clear from Mill's acceptance in "The Spirit of the Age"<sup>62</sup> of the positivist philosophy of historical progression. Mill saw societies as progressing in stages, developing from transitional periods characterized by conflict and disunity into organic periods characterized by consensus and stability. Each successive historical period represented an advance. In this theory of social dynamics, the movement of history is conceived as progressing from an initial primitive "theological" state of the human mind and society, into an intermediate "metaphysical" state, and culminating in a final "positivist" state. The positivists maintained an organic view of the individual's relationship to the social body: what is good for the organ, the individual, is determined by what makes it effective in the organism. This holistic functionalism about the individuals' worth in terms of the collective body cannot be minimized in understanding Mill's approach to individual rights. Mill saw society as currently in a transitional phase on the verge of emerging into the final organic stage which would be blessed with strong consensus and harmony.

The transitory period Mill saw as a time when "people of any mental activity, having given up many of their old beliefs, and not feeling quite sure that those they still

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<sup>61</sup> To characterize utilitarian thinking as collectivist is not entirely accurate. Its approach is really individualistic, but its thinking is driven by the "happiness" maximization calculus to inevitably accept general over individual objectives.

<sup>62</sup> Mill, *The Spirit of the Age* (1831).

retain can stand unmodified, listen eagerly to new opinions.”<sup>63</sup> This is a time when the sophist in light of the pronounced deficiency of personal impulses and preferences can rally a majority of the masses around a body of doctrine which will impress itself upon new generations and result in an oppressive yoke of uniformity in opinion and practice stunting human nature.<sup>64</sup> Mill remarked that “There has been a time when the element of spontaneity and individuality was in excess and the social principles had a hard struggle with it . . . But society has now fairly got the better of individuality . . .”<sup>65</sup> The masses in the transitional stage do not have any inclination except for the customary. Like Tocqueville, Mill saw this proclivity as exercising a stultifying censorship over those who would be different. But Mill regarded the need to shed this smothering effect on individuality as critical to catalyzing a new way of thinking – a prerequisite to the organic stage. It is quite consistent with Mill’s cyclical conception of history for him to consider unity of opinion as undesirable unless it is the product of the free comparison of opposing opinions unrestrained by a preexisting common conception. Diversity is a positive thing until mankind becomes capable of evaluating and recognizing the truth.<sup>66</sup>

Mill regarded it as essential that the intellectual and moral discipline of the populace be altered. Education was only one part of achieving this end. The mental emancipation of England depended upon individuals being open to considering new ideas. People need to be shaken from their dull complacency and smug, unreasoned satisfaction with archaic institutions. This openness Mill referred to as “a spirit of free

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<sup>63</sup> Mill, *Autobiography*, p.149.

<sup>64</sup> *Id.*

<sup>65</sup> *On Liberty*, p.309.

<sup>66</sup> *On Liberty*, p.305.

speculation.”<sup>67</sup> First, however, another essential condition must exist. Mill believed strongly in self-determination and objected to the idea that the individual’s character is innate. He argued that differences between individuals are produced by differences in circumstances and that this must be understood if any progress is to be made at all.<sup>68</sup> In the education of the “uncultivated herd”<sup>69</sup> who composed the labouring mass and the majority of their employers the answer was to be found. The existing imperfect system of education did not result in producing any change of character in society from the predominating emphasis placed upon personal advantage to an identification with the common good. Therefore, Mill, wishing to uproot the deep-seated selfishness of society and replace it with a new cultural priority, encouraged the example of co-operative societies.<sup>70</sup>

The value of diversity in shattering loose the encrusted shibboleths holding mankind to outworn institutions and keeping it from achieving the next historical stage lends a prescriptive overtone to Mill’s approach to nonconformity. He wrote “In this age, the mere example of nonconformity, the mere refusal to bend the knee to custom, is itself a service. Precisely because the tyranny of opinion is such to make eccentricity a reproach, it is desirable, in order to break through that tyranny, that people should be eccentric. . . . That so few now dare to be eccentric, marks the chief danger of the time.”<sup>71</sup> This undesirable process he regarded as being furthered by every political change, every extension of education, improvements in communication and increases of commerce and

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<sup>67</sup> Autobiography, p.141.

<sup>68</sup> Autobiography, p. 160.

<sup>69</sup> Autobiography, p.137.

<sup>70</sup> Autobiography, p.137.

<sup>71</sup> On Liberty, p.315.

manufacturers.<sup>72</sup> Indeed, Mill did prescribe some approaches for dealing with a situation where the masses are not only moderate in intellect, but also in inclinations.<sup>73</sup> His ideas on how this trend might be broken relied upon the emergence of eccentric individuals who challenge the old dogmas and posit provocative new ideas. Out of this interplay of divergent views a new truth might come to be formulated and generally accepted.

For Mill, the interplay of ideas should not be conducted on an equal basis. The speech of society's intelligentsia was given a special place. The opinions of the intellectual elite were given greater weight because they are an agency for shepherding the masses to the new philosophy opening the door to the organic age. Until the selfish mind-set of society has been altered by education and the unrestricted effect of non-conformists acting in an environment where the free interplay of ideas generates a new consensus – a general will – it is necessary to allow special consideration for the superiority “Justly due to opinions grounded on superiority of knowledge.”<sup>74</sup>

Because departure from the transitional period is premised upon the identification and acceptance of a new philosophy, this requires an individualistic view of freedom. The non-conforming individual, to perform his role in smashing the moldering idols and rousing the slumbering and complacent populace, must be protected. Thus, this period requires a view of freedom in which the individual must be sovereign, since this will allow him to stand out as unusual without fear of oppression from the majority. Eccentricity provokes the masses to engage in speculative thinking that will result in the emergence and realization of the new truth. Protection of a vanguard of intellectuals is necessary if this truth is to be realized by the masses. Mill regarded the honor and glory

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<sup>72</sup> On Liberty, p.321.

<sup>73</sup> On Liberty, p.317.

<sup>74</sup> Autobiography, p.151.



of the average person as the capability of following the initiative of those gifted in the higher eminences of thought who will lead her or him out of the period of transition and into the organic period.<sup>75</sup>

Mill, like Marx, concerned himself primarily with considering the prerequisite conditions identified as destined to bring in a new phase of human history. The precise details of the new phase are left vague. To derive the situation of the average man in the organic period from Mill's writings is a far more problematic and speculative task than discerning his situation in the transitional period. It is apparent that diversity is no longer necessary as a provocation or stimulus to examining archaic doctrines, since the general will has already been recognized. Men will now realize their individuality and spontaneity without such incentive. Mankind will acquire universal convictions "as to what is right and wrong, useful and pernicious, deeply engraven on the feelings by education and general unanimity of sentiment, and so firmly grounded in reason and in the true exigencies of life, that they shall not, like all former and present creeds, religious ethical and political, require to be periodically thrown off and replaced by others."<sup>76</sup>

It is no great logical leap to recognize the ramifications of achieving the organic stage for the deviant who formerly served a valuable function in the transitional stage. In the new age, the nonconformist is unnecessary – the shackles of antiquated dogma have been broken and mankind has attained a new recognition of truth. The deviant is, therefore, expendable. Even more, the nonconformist, to the extent he challenges the general will, is a pesky annoyance or even a dangerous threat to the general social organism and merits suppression or eradication. The organic period is one in which the

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<sup>75</sup> On Liberty, p. 314-315

<sup>76</sup> Autobiography, p. 101.

organic view of freedom is realized. The individual has properly come to identify his own selfish inclinations with those of society as a whole. These true interests, Mill believed, are only ascertainable for a small group of creative thinkers in the transitional period.

#### **IV. MILL'S TOTALITARIAN APPROACH AND HIS HISTORICAL RECONCILIATION OF THE TWO CONCEPTS OF FREEDOM**

Initially, the manner in which Mill frames the respective realms of the individual and society bears scrutiny. The term “protection” which he posits as the sole justification for the State to impose upon the individual,<sup>77</sup> has different meanings depending upon whether it is approached from an individualistic or a collectivist perspective. This is not so much an issue in dealing with the idea of defending the community or the nation from physical attack. The difference is more apparent when we move away from the rudimentary idea of society protecting itself from physical harm or the defense of individuals from physical, economic or personal harm. The die is cast when we consider whether this protection should involve moral considerations exceeding the foregoing basic concerns. The degree to which the State may regulate or sanction the behavior of its members which do not result in any physical harm to the State or any of its members - victimless crimes, blue laws, restrictions on the press, associational activity and speech – are the areas where the significant difference in the meaning of “protection” emerges.<sup>78</sup>

That the meaning of “protection” depends on whether one proceeds from a collectivist or an individualistic approach is nowhere better pointed up than in the famous

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<sup>77</sup> On Liberty, p. 263.

<sup>78</sup> The question of protecting the individual from incursions by the State is the opposite side of the same coin.

debate which raged between Sir Patrick Devlin<sup>79</sup> and H.L.A. Hart. This debate concerned society's ability to use law to "protect" itself by way of reaching morally condemned conduct. Devlin's argument commenced from the collectivist approach that "the law exists for the protection of society." The analysis which followed from the premise that deviancy threatens the entire social organism was not surprising:

[E]stablished government is necessary for the existence of society and therefore its safety against violent overthrow must be secured. But an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or to try to set rigid bounds to the part which the law may play in the suppression of vice. There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.<sup>80</sup>

Professor Hart takes the libertarian approach and conceives the *raison d'être* of the state and the enactment of laws to be the protection of the individual.<sup>81</sup> He does not equate morality with the State, seeing morality as existing independently:

Where the aim of the criminal law is, as in the case of murder, to protect individuals from harm, this aim is achieved even if criminals abstain from murder solely out of fear of the law. But, if the aim of the law is not to protect individuals but "to maintain morality" matters are different. What moral value is secured if people abstain from sexual intercourse simply out of fear of punishment?<sup>82</sup>

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<sup>79</sup> Devlin, Patrick, *The Enforcement of Morals* (1959)

<sup>80</sup> *Id.*

<sup>81</sup> Hart, H.L.A., *The Use and Abuse of the Criminal Law* (1961) 4 *Oxford Lawyer*.

<sup>82</sup> *Id.*

Hart questions as unsupportable the claim that the failure to employ legal sanction to enforce a society's morality would lead to the destruction of morality or, for that matter, imperil society. He would take his chances and risk not legislating morality.

Mill accommodated each approach as historically appropriate, depending upon which age we consider.<sup>83</sup> But even in the transitional stage – in which full-blown libertarian values hold sway – Mill moderated the extent of individual freedom in the face of society's need to “protect” certain values. Mill's willingness to compromise libertarian principles in favor of utilitarian priorities is apparent in both his transitional and organic historic stages. The transitional stage reflects a strong emphasis on protecting the individual against the encroachments of society or the State, but this is not as thoroughgoing as many civil libertarians may like. The fundamental statement that, at first glance, appears to limit interference with individual autonomy by the State, another individual or the community to matters of “self-protection” or “preventing harm to others” is given a collectivist bent. For example, Mill had no trouble with mandatory educational requirements, regulating inebriates, requiring individuals to assist others in need, sanctions for idleness, prostitution and gambling. The value of non-conformity gave way in significance to “many acts” including “offences against decency” which “if done publicly, are a violation of good manners, and . . . may rightfully be prohibited.”<sup>84</sup>

Upon scrutiny, it is apparent that Mill subscribed to the view that the stable, organic order requires the unquestioning acceptance of values and views that are outside

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<sup>83</sup> Mill's treatment of individual liberty as a practical and temporary device to achieve a higher end is apparent from his conclusion that libertarian principles have no application where the potential for achieving the organic age does not exist. He wrote, “Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.” *On Liberty* pp. 263-264.

<sup>84</sup> *On Liberty, (Applications)* Id. 349.

the bounds of dispute.<sup>85</sup> Indeed, Mill was a proponent of social control to a degree offensive to most adherents of liberal ideals. Critics have unraveled the divergent tendencies of Mill's analysis, concluding the method to such madness reveals a sophistical ploy. The purpose behind Mill's inconsistencies and willingness to ostensibly engage in philosophical flip-floppery is his objective in ushering in the new age. He would accomplish this by stripping away the protections bestowed upon cultural icons and promoting unrestricted public debate, perceiving that this would have the necessary effect of exposing superstitious dogmas for the unsupportable lies that they are and thereby undermining Christianity in order to replace it with a new "religion."<sup>86</sup>

Mill foresaw, with the dawning of a new organic phase of history, the acceptance of a secular humanistic or scientifically-based religion. This entailed a consensually-based moral authority, individual restraint, and social control - a balanced, coherent program of social and moral reform that was neither liberal nor authoritarian.<sup>87</sup> In the new positivist social order, where spiritual power would be directed by state-supported scientists, philosophers, doctors; women and proletarians would form its subsidiary ranks. The directing vanguard of the spiritual power, the priests of positivism, would lay down ethical codes and direct the progress of science. Bankers, capitalists and landowners would take temporal power. There would be no representative government or popular assembly<sup>88</sup> - individual rights, freedom of conscience and popular sovereignty belonged to yesterday's transitional, not tomorrow's organic, age.

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<sup>85</sup> Hamburger, Joseph, 24 Political Science Reviewer 7-70.

<sup>86</sup> Raeder, Linda C., John Stuart Mill and the Religion of Humanity (2002, Univ. of Missouri Press).

<sup>87</sup> Hamburger, Joseph, John Stuart Mill on Liberty and Control (1999, Princeton University Press)

<sup>88</sup> Like the Marxist vision of the post-revolutionary world, governmental institutions have "withered away."

## **V. RECONCILING THE FOUNDING FATHERS' CONCEPTION OF FREEDOM WITH THE HISTORIC DUALITY DESCRIBED BY MILL**

### **A. MILL'S APPROACH TO "THE PURSUIT OF HAPPINESS"**

The utilitarian approach is really no different than the collective one to the extent that it defines its guiding light – the pursuit of happiness – in terms of the collective whole, rather than emphasizing the importance of protecting individual pursuits of happiness. Mill refers to this as the Greatest Happiness Principle.<sup>89</sup> The hedonistic approach founders when it comes to mathematically calculating what produces the maximum collective pleasure. Aside from the problem of imposing the evaluator's personal moral judgment of which, in a choice of situations, produces the more copasetic outcome, there is a more fundamental difficulty. Happiness differs from individual to individual. It is not susceptible of generalization or indirect measurement and it may vary from moment to moment. One simply cannot perform the arithmetic without knowing how much happiness or unhappiness a particular course of action will bring in each individual instance.

It is curious that Mill should have noted that persons have differing ideas of justice and yet failed to draw the conclusion that persons also have different notions of happiness and how to obtain it.<sup>90</sup> He wrote, “. . . the notion of justice varies in different persons and always conforms in its variations to their notions of utility. Each person maintains that equality is the dictate of justice, except where he thinks that expediency

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<sup>89</sup> Mill, *Utilitarianism*, in “*Essential Works of John Stuart Mill*” (Bantam, 1961)

<sup>90</sup> Kant, writing long before Mill, recognized this. “For both the current circumstances and the highly conflicting and variable illusions as to what happiness is (and no one can prescribe to others how they should attain it) make all fixed principles impossible, so that happiness alone can never be a suitable principle of legislation.” *Kant's Political Writings*, ed. H. Reiss, translated by H.B. Nisbet (Cambridge University Press, 1970) pp. 73-87

requires inequality.”<sup>91</sup> Different ideas of what is important – moral perspectives – are going to result in different ideas of what is just and consequently of what this translates to in social and economic terms for how goods are to be distributed. Likewise, incalculable perspectives exist on what brings happiness and how best to obtain it.

It is even more interesting to observe that Mill recognized that there are different types of pleasure – differing in quality and quantity.<sup>92</sup> He accepted that for some persons it is personally more satisfying to forego certain satisfactions for rewards they find superior. This unwillingness to be placated by whatever palliative might satisfy the great bulk of humanity is a characteristic Mill stated may be variously attributable to “pride” or “the love of liberty and personal independence” or “the love of power, or to the love of excitement.”<sup>93</sup> But he regarded the difference in such individuals’ insistence upon struggling to see a Vermeer when they can more easily enjoy a painting by Kinkade, to stem from the employment of higher faculties by those who, because they are dignified, prefer them above courser pleasures. While Mill concedes (and even applauds<sup>94</sup>) that some are willing to forego courser pleasures for greater rewards, he strangely fails to acknowledge that different individuals find different things give them happiness and have different methods for pursuing their private happiness.<sup>95</sup>

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<sup>91</sup> Mill, *Utilitarianism*, p. 231.

<sup>92</sup> *Utilitarianism*, p. 195.

<sup>93</sup> *Utilitarianism*, p.196-197.

<sup>94</sup> Hence his well-known phrase, “It is better to be a human being dissatisfied than a pig satisfied . . .” *Utilitarianism*, p. 197.

<sup>95</sup> Some people prefer impressionist paintings to Vermeer’s and others prefer skydiving or classic cars to art. The point is, the distinction between refined tastes and the baser preferences of the common herd does not cut it. Even those who are satisfied with jell-o differ over whether they enjoy strawberry flavor more than cherry or lime.

Mill's acceptance of the idea of a general will involves what he perceives as the "social feelings of mankind"<sup>96</sup> - a sort of instilled altruism - being supplanted by utilitarian principles and taught as a religion.<sup>97</sup> Mill saw man as basically cooperative by nature and saw this natural "social feeling" by virtue of which one identifies with the whole of mankind as undeveloped and "a natural basis of sentiment for utilitarian morality." This "powerful natural sentiment" becomes stronger as time progresses.<sup>98</sup> He wrote, with Anne Frank-like naiveté, concerning this collective sentiment:

In the comparatively early state of human advancement in which we now live, a person cannot indeed feel that entireness of sympathy with all others, which would make any real discordance in the general direction of their conduct in life impossible: but already a person in whom the social feeling is at all developed, cannot bring himself to think of the rest of his fellow creatures as struggling rivals with him for the means of happiness, whom he must desire to see defeated in their object in order that he may succeed to his. The deeply rooted conception which every individual even now has of himself as a social being tends to make him feel it one of his natural wants that there should be harmony between his feelings and aims and those of his fellow creatures. If differences of opinion and of mental culture make it impossible for him to share many of their actual feelings – perhaps make him denounce and deny those feeling – he still needs to be conscious that his real aim and theirs do not conflict, and that he is not opposing himself to what they really wish for, namely their own good, but is, on the contrary, promoting it.<sup>99</sup>

This collectivist perspective, that a general will embodies what individuals ought to desire, is at odds with the fundamental reality that men are all different and aspire in many respects to establish their difference from everyone else. Any revolutionary awakening to a universal consciousness will never change this.<sup>100</sup>

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<sup>96</sup> Mill, *Utilitarianism*, p. 217.

<sup>97</sup> Mill, *Utilitarianism*, p. 219.

<sup>98</sup> *Id.* at 217.

<sup>99</sup> *Id.* at 219-220.

<sup>100</sup> Friedrich Nietzsche nailed it when he wrote:

. . . what naivety it is to say: 'Man *ought* to be thus and thus!' Reality shows us an enchanting wealth of types, the luxuriance of a prodigal play and change of forms: . . . But even when the moralist merely turns to the individual and says to him: '*You* ought to be thus and thus' he does not cease to make himself ridiculous. . . . To say to him, 'change yourself' means to demand that



Mill's myopic adherence to utilitarian and positivistic principles caused him to marginalize man's inherent orneriness. Inquiring whether this characteristic is innate or a natural product of the existence of a social structure<sup>101</sup> may be as pointless as asking whether the chicken came before the egg. What matters is the significance of this characteristic for evaluating the validity of the organic perspective.

Merton sought to accommodate it to a functional analysis by conceiving of society as creating material goals and allowing means to attain those goals. He saw deviance as a response to inadequate socially-approved means to achieve such goals. Recourse was left via illegitimate means (crime). Significantly, Merton recognized that one such response was non-conformity – the individual's rejection of and challenge to the normative structure in issue.<sup>102</sup> But his functionalist perspective looked to the source of goals in society rather than in any individual drive to achieve distinction. This is like attributing one's liking anchovies to the fact that the market has them on sale. The individual's drive to achieve exists irrespective of whether society approves particular goals or not.

## **B. THE FAILURE OF THE ORGANIC APPROACH**

A look at the ideas of Emile Durkheim should serve to illustrate the inadequacy of the organic analogy. Society is conceived of as a body composed of interdependent parts performing different functions and all of which require the stable and smooth operation of the whole. What is remarkable is the answer Durkheim formulates to account for the

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everything should change, even in the past. . . . And there have indeed been consistent moralists who wanted man to be different, namely virtuous, who wanted him in their own likeness, namely that of a bigot: to that end, they denied the world!

Nietzsche, Friedrich, *Twilight of the Idols* (Penguin Books, 1977) p. 46.

<sup>101</sup> Society gives one something to differentiate from. By definition, without it there would be no individual. It provides the contrast from which an individual can be free.

<sup>102</sup> Clinard, Marshall and Meier, Robert, *Sociology of Deviant Behavior*, fifth ed. (Holt, Rinehart & Winston, 1975) p. 68.

individual, in particular, the rather extreme individual – or criminal. An improperly functioning organ of the social body would be considered abnormal and one might anticipate that it should have to be brought back to normalcy since the entire social body is disturbed by it. But Durkheim recognized that a certain level of anti-social behavior is normal even for an ideal society.

The manner in which he came to terms with what he saw as an irrational or immoral response to a rational or moral social order is certainly illuminating. Charles Suchar suggests that Durkheim's commitment to the position that such divergent behavior could not exist in the face of collective opposition unless it was functional to the social order leads him to "search for utility where, perhaps, not much can be found."<sup>103</sup> In fact, one might even suggest that Durkheim feared to pursue his explanation fully; foreseeing the unpleasant ramifications social conflict might have for his harmonious conception of society. Durkheim describes why the individual exists in society in lieu of an unexcepting unanimity:

But a uniformity so universal and absolute is utterly impossible; for the immediate physical milieu in which each one of us is placed, the hereditary antecedents, and the social influences vary from one individual to the next, and consequently diversify consciousness. It is impossible for all to be alike, if only because each one has his own organism and that these organisms occupy different areas in space. That is why, even among the lower peoples, where individual originality is very little developed, it nevertheless does exist.<sup>104</sup>

One must ponder why, if Durkheim contends that all organisms differ because they occupy different areas in space, he does not also acknowledge that they differ as well because they are not able to occupy the same area in space. If one is pounding pegs into holes, it is evident to the peg-pounder that while several pegs might fit the hole, and

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<sup>103</sup> Suchar, Charles, *Social Deviance* (Holt, Reinhart and Winston, 1978) p.25.

<sup>104</sup> Durkheim, Emile, *The Rules of Sociological Method* (Univ. of Chicago Press, 1938) p.69.

some pegs might fit more tightly or loosely than others, only one peg can fit the hole at a time. Pounding two pegs in will result – depending upon their respective material – in one being displaced or smashed or, perhaps by both being smashed. The parallel might be drawn to individuals in society who are contending for the same goal. The distinction of obtaining the goal cannot be shared. Victor is set apart from loser by his achievement.

Jealousy is the result of individual differences. Eliminate the differences and you eliminate the source of conflict. Common purposes and shared interpretations of and approaches to goals are certainly essential to social cohesion, peaceful interaction and progress. It might, therefore, appear that homogeneity rather than heterogeneity as the primary aspect of a social body would be desirable. Authors who postulate fictional utopian societies have found fertile ground in the paradox presented by this presumption and the incongruity posed by the indomitable human spirit. The idea that social stability can be achieved by the elimination of all characteristics differentiating one person from another is a self-defeating approach since it ultimately destroys the essential characteristics that make man what he is. Zamyatin's *We* provides what is probably the most developed example of the society of non-individuals. Egalitarian leveling mechanisms pressed to the extreme necessarily destroy individual differences, and the collectivist approach accepted by Mill does exactly this.

Hannah Arendt points out that the utilitarian emphasis on security and rational behavior, by ostensibly making pleasure the ultimate end of action, effectively serves to prevent this as a product of human behavior. The utilitarian is actually guided by pain, not pleasure and by fear, not desire. Motivated by the wish to avoid harm, the rational person also avoids all activity which may result in pleasure, but which may also involve

pain. For Arendt, the consequence of society adopting the utilitarian approach has been a deep distrust of man's senses in their correct reception of reality and of human reason in receiving truth.<sup>105</sup> Happiness for the utilitarian is one-size-fits-all. It is somehow pushed, like a round peg into a square hole, to fit all individuals by relating it to pleasure rather than to the pursuit of stimuli which for each individual might be different or might be sought after differently.

Those who assume that man would act rationally in choosing to join society assume also that it is only rational to want security and happiness and irrational to want otherwise. Both assumptions are fallacious. There is no such thing as a totally rational human being. Nevertheless, utilitarians and some social contract theorists<sup>106</sup> view this characteristic as paramount. This makes their conclusion that the interests of the greatest number should control, inevitable. But to denude a person of his irrationality is to eliminate those elements without which one would be merely a nonentity, since nothing is left in the person to activate development of individual character. Society too is divested of those aspects which promote distinction. Equality is already established. It is a foregone conclusion and so also is the hollowness of freedom. For what good is any degree of freedom if one is bound to behave and decide exactly as other do – in a purely rational fashion? The conception of human nature as ideally and rationally desiring and avoiding selfishness where the society is likely to suffer from such motivation, is flawed. It amounts to substitution of utilitarian values for the true motivations of human behavior in society.

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<sup>105</sup> Arendt, Hannah, *The Human Condition* (Univ. of Chicago Press, 1958) p.384.

<sup>106</sup> Rawls, John, *A Theory of Justice* (Belknap Press, 1971).

By contrast, the American approach to individual freedom and governance assumes fallibility in identifying significant values and in setting rules. Change is accepted as a constant in this process, rather than as an unusual occurrence. The marketplace of ideas is a reflection of a reality of the social process. It provides for the natural tendency of the individual to deviate – to test the boundaries – to instigate change. The individualist approach recognizes change is a normal social phenomenon. It recognizes that change must be accommodated by social/political mechanisms. It recognizes that the individual's capacity and drive to cause change must be accounted for if the social and political system is to endure. In the American approach, "the example of nonconformity" and the "refusal to bend the knee to custom" are accepted as essential to the process of changing as well as identifying society's limits.

## **VI. NON-CONFORMITY, SOCIAL CHANGE AND THE TOTALITARIAN VS. AMERICAN PERSPECTIVE ON FREEDOM**

The organic metaphor is evident in both the political view of the State as the embodiment of the general will and the sociological perspective of society as an organism with a collective conscience. The State is interchangeable with society. Deviancy and the conflict it inspires in reacting with the organism as a whole or aspects thereof is recognized as a natural and essential function of the social body – allowing it to recognize or define normative boundaries, to maintain consensus, and build and strengthen its boundaries.<sup>107</sup> Durkheim recognized crime to be a normal function of society, serving the purpose of reaffirming the acceptable bounds of individual conduct in a process of social reaction to individuals who would test its normative limits.<sup>108</sup>

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<sup>107</sup> Coser, Lewis, *The Functions of Social Conflict* (The Free Press, 1964).

<sup>108</sup> Durkheim, Emile (1893) *The Division of Labor in Society*.

Durkheim's functional treatment of deviancy was expanded upon by Kai Erikson. Erikson applied the organic analogy to deviancy and resultant conflicts experienced in early colonial communities. His thesis was that the experiences of these communities supported the idea that the social body would respond to the threat of non-conformity by seeking to restore equilibrium.<sup>109</sup> Erikson saw the social body labeling particular behavior as deviant upon coming into contact with it.<sup>110</sup> Acts of deviance draw the social body together in a "common posture of anger and indignation" and this "creates a sense of mutuality among the people of a community by supplying a focus for group feeling" resulting in the development of "a tighter bond of solidarity than existed earlier."<sup>111</sup> Erikson describes the social body as effectively constraining growth within definite parameters:

When one describes any system as boundary maintaining, one is saying that it controls the fluctuation of its constituent parts so that the whole retains a limited range of activity, a given pattern of constancy and stability, within the larger environment. A human community can be said to maintain boundaries, then, in the sense that its members tend to confine themselves to a particular radius of activity and to regard any conduct which drifts outside that radius as somehow inappropriate or immoral. Thus the group retains a kind of cultural integrity, a voluntary restriction on its own potential for expansion, beyond that which is strictly required for accommodation to the environment. Human behavior can vary over an enormous range, but each community draws a symbolic set of parentheses around a certain segment of that range and limits its own activities within that narrower zone. These parentheses, so to speak, are the community's boundaries.<sup>112</sup>

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<sup>109</sup> Arguably, what Erikson was characterizing as the social body's effort to restore stasis was instead the manifestation of the dominant power structure addressing a threat to its hold on the reigns of power.

<sup>110</sup> Erikson, Kai T., *Wayward Puritan* (1966, John Wiley & sons, Inc.). Erikson observes: "[D]eviant behavior is not a simple kind of leakage which occurs when the machinery of society is in poor working order, but may be, in controlled quantities, an important condition for preserving the stability of social life." (p. 13). How a society regulates the requisite level of deviance is not satisfactorily answered by the study. *Id.* 180-181.

<sup>111</sup> Erikson, p.4.

<sup>112</sup> Erikson, p.10.

Ironically, in this analysis, the deviant is responsible for realization of the general will. The reaction to the act of non-conformity “creates a climate in which the private sentiments of many separate persons are fused together into a common sense of morality.”<sup>113</sup> This response to the deviant act “draws attention to those common values which constitute the ‘collective conscience’ of the community”<sup>114</sup> and marks the outer perimeter of the community’s tolerance thereby supplying “the framework within which the people of the group develop an orderly sense of their own cultural identity.”<sup>115</sup> Without occasional episodes of deviancy the collective conscience would not emerge and “presumably, social organization would be impossible.”<sup>116</sup>

Erikson’s conclusion in *Wayward Puritans* is that the outbreaks of deviance – witches, Quakers and Antinomians – served to identify and reinforce the normative boundaries of the colonial communities. This is criticized as unsupported by the data. The evidence of the three “crime waves” in a relatively short time span suggests that each outbreak actually failed to accomplish the generating of social solidarity. It appears that these reactions to deviance in the Puritan colony were not so much a boundary reinforcing process as the response of the dominant faction in the colony to conflicting ideas which threatened the ability of that ruling faction to maintain control.<sup>117</sup>

But the boundary-marking function of deviant conduct should itself be considered. If the moral “boundaries” posited by the functionalist approach exist at all, they are very fuzzy and are constantly in a state of definitional flux. Society is

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<sup>113</sup> *Wayward Puritans*, p. 4,

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at p. 13.

<sup>116</sup> *Id.* at p. 4

<sup>117</sup> Chambliss, William J and Mankoff, Milton, *Whose Law What Order?* (1976, John Wiley & Sons, Inc.) pp. 11-15.

characterized more by disputes over the location of property lines than it is by drawing attention to them. The organic metaphor, even if it were valid, is incomplete. Organisms respond to the introduction of new stimuli (whether introduced internally or externally) by adaptation. Something should also be said for the unique capacity and drive of man to seek out new stimuli. Erikson implicitly acknowledges the Darwinian challenge posed by stimuli which threaten the existence of the organism - the failure to adapt to the new threat determines whether the organism will perish or survive, albeit in an altered form. But change is not merely the consequence of such significant peril. It is also a normal and constant consequence of the challenge posed by those who daily assault the fortifications constructed by those who dwell in the comfortable, unquestioned, well-assimilated, innermost sanctums of a society.<sup>118</sup>

The organic perspective conceives of the social conflict generated by non-conformity as a device functioning to maintain the status quo. Characteristically, it does not conceive of it as a source for generating change to the social order. In fact social change is a concept inconsistent with an organic perspective – the idea is that the organism is going to fight to maintain itself and will naturally resist change. Peter Sperlich comments, “Once a system has been visualized as a purely mechanical or organic entity, conflict among system components almost automatically will be perceived as deleterious.”<sup>119</sup> The tendency to study legal controls in terms of comparing actual with

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<sup>118</sup> There are those who question the accepted norms by first asking “Why?” then by saying, “This doesn’t make sense to me.” and finally by deciding, “I’m not going to abide by this.” Whether we are talking about Antigone, Thoreau, Rosa Parks, an investigative journalist or John Q. Public challenging a fee imposed by his bank, the role of conflict as a constant component of the social dynamic is evident. Likewise, the corporate entrepreneur or lobbyist seeking to gain favorable regulatory or legislative treatment for offshore oil drilling, tobacco subsidies or financial bailouts pushes the supposed boundaries to achieve change.

<sup>119</sup> Sperlich, Peter, *Conflict and Harmony in Human Affairs: A Study of Cross-Pressures and Political Behavior* (Rand McNally, 1971) p.173.



idealized behavior rather than as on-going exercises of political exchange is criticized as endemic to political scientists and sociologists.<sup>120</sup>

Crime was regarded by Durkheim as an individual divergence which the collective conscience is not strong enough to suppress. He wrote, “Where [an increased rate of] crime exists, collective sentiments are sufficiently flexible to take on a new form, and crime sometimes helps to determine the form they will take.”<sup>121</sup> In this limited way, Durkheim acknowledged that individual behavior in conflict with the order of society may upon occasion result in social change.<sup>122</sup> He did not persevere in this line of reasoning, however, to conclude that the collective sentiments of a society are generated by and formed in reference to the original initiative and activity of the individual. The collective sentiments – the normative boundaries – precede the deviant conduct which merely serves to maintain them. Consequently, Durkheim saw social change as resulting only where “the conditions of life have been modified,” at which time the traditions by which a people have lived may require adjustment. Durkheim primarily regarded crime

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<sup>120</sup> Feeley, Malcolm M., “The Concept of Laws in Social Science: A Critique and Notes on an Expanded View” *Law & Society Review*. Vol. 10 (1978) 497.

<sup>121</sup> *Id.* at p.71.

<sup>122</sup> Durkheim acknowledged the criminal’s capacity to instigate “transformations” to the social structure. Indeed, he recognized that occasional change is somehow needed. For this reason the requisites for change must be allowed:

[T]he collective sentiments at the basis of morality must not be hostile to change, and consequently must have but moderate energy. If they were too strong, they would no longer be plastic. . . . The better a structure is articulated, the more it offers a healthy resistance to all modification; and this is equally true of functional, as of anatomical, organization. If there were no crimes, this condition could not have been fulfilled; for such a hypothesis presupposes that collective sentiments have arrived at a degree of intensity unexampled in history. Nothing is good indefinitely and to an unlimited extent. The authority which the moral conscience enjoys must not be excessive; otherwise no one would dare criticize it, and it would too easily congeal into an immutable form. To make progress, individual originality must be able to express itself. In order that the originality of the criminal, who is below the level of his time, shall also be possible. One does not occur without the other.

*Id.* at 70-71. But Durkheim did not conceive of such transformation as a fluid or constant process, but as something occurring “periodically in history.” *Id.* at 71.

as useful to a society to the extent that it promotes the order and stability of the society.<sup>123</sup> He merely perceived such behavior as reinforcing an already existing set of collective sentiments.

Without individual initiative, this social condemnation and boundary recognizing and reinforcing process would not be possible. The society's values would not be reinforced, and people would not know when to limit their behavior. But this schema begs a number of questions: By what process did those persons who make up a society come to know when to react?; How is it that limits came to be established in the first place?; Why is it that some individuals wish to defy these limits? Durkheim and Erikson do not give adequate answers to these concerns. The metaphor does not contemplate that crime – or, more generally, conflict – creates rules, not just identifies them.

Durkheim viewed the individual as determined by society rather than vice versa. Constrained by the organic metaphor, he did not appreciate the full extent to which the individual participates in forming what he perceived to be a “collective sentiment.” He was unable to consider that society may be formed from conflict and may exist only by virtue of its ability to maintain conflict among the individuals who compose it. He could not postulate that there may not actually be any “collective sentiment”; that there may exist only individual interests which express themselves as such and not “writ large” in terms of what may be best in a utilitarian sense.

Another problem with the organic metaphor pertains to the attempt to account for a psychological nature of the entity known as society.<sup>124</sup> The assumption is that the psychology of those individuals who compose society are subordinated to this ponderous

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<sup>123</sup> Suchar, p. 25.

<sup>124</sup> Sperlich at p. 169.

entity and are not independently significant as determinative factors in its psychological nature. Durkheim points out in *The Rules of Sociological Method* that such a use of analysis of individual behavior to explain group behavior is unsound. He writes, “. . . the psychological factor is too general to predetermine the course of social phenomena. Since it does not call for one social form rather than another, it cannot explain any of them.”<sup>125</sup> The analogy is attractive, but as with any analogy employed to explain a phenomenon, it can only serve to explain so much, beyond which it begins contributing to misunderstanding and the misperceiving of reality. Freud rejected the collectivist view of freedom as fundamentally at odds with psychological considerations.<sup>126</sup> The individual must be considered as a significant force in creating society.

Mill, perhaps more than Durkheim, appreciated the power of non-conformity to produce change – in fact he counted on it as an essential element in transcending the present age to a new organic phase. Mill provided for it specifically in the transitional phase as a device to tear down weak and outworn ideologies to replace them with a new philosophy and lay the groundwork for the new, stable, organic phase. The conflict and

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<sup>125</sup> Waltz, Kenneth N., *Man, the State and War* (Columbia Univ. Press, 1965) p. 28.

<sup>126</sup> Freud observed:

The liberty of the individual is no gift of civilization. It was greatest before there was any civilization, though then, it is true, it had for the most part no value, since the individual was scarcely in a position to defend it. The development of civilization imposes restrictions on it, and justice demands that no one shall escape those restrictions. What makes itself felt in a human community as a desire for freedom may be their revolt against some existing injustice, and so may prove favorable to a further development of civilization; it may remain compatible with civilization. But it may also spring from the remains of their original personality, which is still untamed by civilization and may thus become the basis in them of hostility to civilization. The urge for freedom, therefore, is directed against particular forms and demands of civilization or against civilization altogether. It does not seem as though any influence could induce a man to change his nature into a termite's. No doubt he will always defend his claim to individual liberty as against the will of the group. A good part of the struggles of mankind centre round the single task of finding an expedient accommodation – one, that is, that will bring happiness – between the claim of the individual and the cultural claims of the group; and one of the problems that touches the fate of humanity is whether such an accommodation can be reached by means of some particular form of civilization or whether this conflict is irreconcilable.

Freud, Sigmund, *Civilization and Its Discontents*, pp. 42-43.

flux of the transitional stage would no longer be desirable (and would likely be undesirable) under the new conditions of stability and consensus which would prevail in the final organic stage. In the organic age reason prevails such that everyone is in agreement on moral, social and political issues anyway. Conflict would simply be the mark of unreasonableness.

Unquestionably, deviance or non-conformity precipitates a societal reaction. Mechanisms of constraint go into action and may range from disapproving glances (informal devices) to invocation of legal/penal devices (formal devices). The results of the reaction process may vary. The deviant may respond by bringing his conduct in line with the normative demands exerted upon him. He may be squashed like a bug by the social leveling process. Or he may continue his activity and the social forces may adjust themselves to accommodate it. There is no certainty about the outcome of the effort to suppress the offending conduct, obtain conformity and restore equilibrium. Sometimes the deviance is suppressed and the socially accepted limits of tolerance are fortified and reestablished. Other times, the conflict can produce change- readjustment, redrawing or establishment of new boundaries. The process is recurring, constant and unending.

The organic perspective conceives of deviance as a device for achieving what is variously characterized, among other things, as stability, stasis, consensus, collective sentiment, the general will, or solidarity. It regards this condition of uniformity as ideal or normal and as essential for survival of the social organism. Because universal consensus can be achieved through reaction toward deviant conduct, the social body can be preserved unaltered. It remains a placid pond undisturbed by the ripples of conflict over norms. If ripples do emerge from some outside infection or internal deviant act, the

social body rises up, terminates the disturbance and restores tranquility and placidity to the pond. Implicit in the concept of a general will deriving from an organic conglomeration is the premise that conflict is undesirable, abnormal and deleterious. The view does not account for change.

But there is always change! Conflict, whether it involves deviant elements or not, is commonplace. Norms do not remain static. They are inevitably dynamic and fluctuate as time progresses, conditions change, the fundamental power structure of a society is transformed, or attitudes are modified through conflict. Indeed, it is the society where conflict is not present which is abnormal.<sup>127</sup> The ripple in the pond is really more akin to a boil.

The collectivist perspective permeates political and social science models. This is likely a reflection of the natural tendency to lend moral valuation to the familiar and negative valuation disfavoring that which threatens or interferes with the status quo. This idealization among political and social scientists of a static conception of the political or social order as functionally normal has led to theoretical distortions. It has also been identified as the source of a myth in traditional legal thinking validating mechanisms of social control.<sup>128</sup>

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<sup>127</sup> Dahrendorf, Ralph, "Out of Utopia" in *Essays in the Theory of Society* (1968 Stanford Univ. Press) p. 111. Dahrendorf criticizes recent sociological analysis as utopian, and points out the error in conceiving of society as a static entity: "Change may be rapid or gradual, violent or regulated, comprehensive or piecemeal, but it is never entirely absent where human beings create organizations to live together."

<sup>128</sup> Richard Quinney writes:

Confused by the disorder around him, the social theorist has advanced theories that not only provide a particular view of reality, but serve as a rationale for controlling the people. Stability has been sought – theoretically and practically – at the expense of significant social change and the realization of human potential.

Quinney, Richard, "The Ideology of Law. Notes for a Radical Alternative to Legal Oppression" (1972) 7 *Issues In Criminology* 1, 5.

Hans Morgenthau writes of two basic reasons for social conflict. The first is that “What one wants for himself, the other already possesses or wants, too. Struggle and competition ensue.” He notes that all of man’s relations with his fellow men contain the germs of such conflicts of interest. The second reason he gives for conflict, is a lust for power which he describes as manifesting “itself as the desire to maintain the range of one’s own person with regard to others, to increase it, or to demonstrate it.” Morgenthau adds the important qualification that “The desire for power . . . concerns itself not with the individual’s survival but with his position among his fellows once his survival has been secured.”<sup>129</sup> Strife does not cease upon attainment of a secure existence.<sup>130</sup> Nor can a state of abundance of goods, services and facilities diminish the desire for power one bit. Morgenthau realizes that the appetite for power, unlike the appetite for food, is not capable of satiety – the more it is fed, the more it grows. Different societies may develop different processes for attaining power and different emphases on particular goals. But they will nevertheless all share in common an underlying accommodation for the drive to power into the social structure.

Upon once attaining a goal, the individual is not in a situation where self-satisfaction may be dwelled upon. There exist others who are ambitious and who would take that goal away or, seeing the individual’s power enhanced thereby, consider the individual threatening to their own power and view it as imperative to at least curtail the value of the individual’s achievement. The nature of man’s relationship with others has predetermined that the aspiration for power can know no limits. Instead, it is the individual’s capacity for attaining power which is limited. The process by which the

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<sup>129</sup> Morgenthau, Hans, *Scientific Man vs. Power Politics* (Univ. of Chicago Press, 1946) pp. 192-193.

<sup>130</sup> On the contrary, the evidence points to a rise in the rate of crime as the affluence of a society increases. Clinard, Marshall and Abbott, Daniel, *Crime in Developing Countries* (John Wiley & Sons, 1973) p. 175.

individual progresses to power may serve to entail the expenditure of the greater part of the individual's capacity to attain power. The accessibility and energy demands of these processes is what will determine the stability of a society. Recognition that the individual's drive to achieve distinction cannot be ignored led Merton to conclude that a stable society is one in which there is a rough balance of goals and norms (agreed upon means for attaining goals), between the society's recognized aspirations and the society's approved modes of achieving them.<sup>131</sup>

It cannot be overlooked that dispute is prior to and necessarily brings forth understandings. The understandings and rules which are formulated regarding the acceptable means for pursuing individual objectives and which ultimately give rise to organized social systems, cannot result in the absence of disagreement. Disagreement provides the impetus for formulation of mutually acceptable rules permitting individuals to pursue objectives without entirely trammeling the ability of others to do likewise. Agreement comes in answer to disagreement. Society cannot be conceived without conflict.

The mere fact that individual needs and desires exist is enough to create conflict between persons. Understanding the goals of others will not reduce social tensions. Any contact between persons is inevitably going to hold inherent in it the potential for dispute. Fundamental objectives are bound to be perceived by each party to the contact as mutually exclusive or at least conflicting in some way. Shared goals, to the extent they are perceived, may entail differing methods for their achievement. Only the elicitation of some common understanding allows the meeting to proceed. This may well include

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<sup>131</sup> Cloward, Richard A and Ohlin, Lloyd E., *Delinquency and Opportunity* (The Free Press of Glencoe, 1960) p.83.

agreement to disagree but involve development of an agreed manner for the dispute to proceed. Whether the interaction results in combat or some level of mutual cooperation, either result produces tacit rules by which conflict between persons may unfold. Human interaction is characterized by the development of means for dealing with conflict. First, the encounter involves arriving at understandings about where conflict exists or can exist. Next, agreements are formulated concerning the nature of the conflict and expectations or rules (of varying degrees of stringency) concerning how the conflict will progress. The basis for future interaction may be premised on what is established in the initial experience.<sup>132</sup> The expectations formulated in one interaction provide the means for later interactions and development of further expectations.

The assumption generally made by those developing a collectivist model of society is that rules, institutions of authority, and the general will all develop to resolve conflict. The corollary to this assumption is the notion that this collective sentiment develops as a product of the rational or moral desires of the participants to be secure from molestation by others. A more accurate description of society, however, should recognize that society exists not to resolve conflict, but to allow and accommodate it by providing rules by which it may be subsumed by society in a manageable form providing for the conflict to progress. Society is something which develops around conflict and not simply in reaction to it.

Collectivist theorists such as Mill, Durkheim and Rousseau took the view that it was only through creation of the community (based on the general will) that man could realize freedom by identifying with the community. But while it is certainly true that man can only realize freedom through the creation of society this is because otherwise he

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<sup>132</sup> Coser, p. 122.



has nothing to be free from. Society provides the individual with something to deny and to stand apart – differentiate himself - from. The individual defines himself in terms of how he compares to others. The process of defining oneself looks not to similarities to the great mass of others, but ways to stand out as distinct from that mass. The individual emerges in reaction to society and in contrast to or distinct in some way from those amorphous, anonymous others who compose society.<sup>133</sup>

This collectivist perspective that sustained conflict is destructive to the social organism is properly criticized as proceeding from an incorrect evaluation of human nature as hedonistically inclined to avoid conflict and as missing altogether the reality that social harmony is actually abnormal whereas conflict represents the accurate paradigm of normal social relations:

The anti-conflict perspective becomes particularly dangerous when it finds a place in the study of politics and informs political theory. Politics, particularly when focusing on modern, complex, heterogeneous societies, cannot be conceptualized apart from conflict. Politics *is* the conflicts and tensions between the various groups and between the several purposes of society, and the acts and events related to them, including the resolution of some conflicts and the maintenance and extension of others. Complete politics include the forceful statement of divergent positions just as much as compromise and the adjustment of conflicting demands. To try to abolish or to suppress the conflict assertion side of politics means to try to forcibly impose a single consensus. Totalitarian movements, whatever their tactics in the period of struggle, are intrinsically and implacably anti-political.<sup>134</sup>

To the extent that the organic model of the political State is unable to accommodate natural forces fomenting for change, it is inherently unstable. Suppression of these forces may prove effective for awhile, but ultimately, if the pressure is allowed to build, the system will fail. The social or political system cannot be anchored in concrete. If it fails to accommodate one normal consequence of deviancy – change in

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<sup>133</sup> Quinney, Richard, *The Social Reality of Crime* (2001, Transaction Publishers) p. 13.

<sup>134</sup> Sperlich, p.183-184.

normative expectations – the conflict which cannot be defused through ordinary social or political processes can fester until it bursts forth violently.

Organic perspectives, including Mill's fail on this basis alone. We will always be in Mill's transitional phase. We will always need to vigorously protect individual liberties – to shield non-conformists from encroachment and smothering by the wet blanket of State directed social consensus. The individualistic approach to society espoused by Jefferson and Madison, given constitutional significance by Holmes and Brandeis and immortalized by Mill in *On Liberty* is a more realistic accommodation of the relationship between the individual and society – the dynamic of freedom, conflict and social change. Sheltering the nonconformist or dissident from the overwhelming force of social consensus is far more essential to the protection of society than is the censorship of thought deemed corrosive to what is presently perceived as the social order.

## **VII. CONCLUSION**

The extent of the State's power to embody the community's interest in intruding upon the individual's affairs is directly tied to whether we proceed from a collectivist perspective or an approach giving individual rights preeminence. For Mill, the appropriate approach to freedom depended upon what historic phase is being examined. The organic perspective is much more amenable to imposing the wet blanket of social control over the individual in relation to matters which affect moral issues – requiring children to stand for the flag salute, blue laws and the like. The individualistic approach is more inclined to draw the line (of social regulation of individual conduct in the name of society) where individual conduct does not directly affect the freedom of other individuals.

Mill's reconciliation of these antithetical approaches is comprehended by appreciating his historical approach to the relationship of man and society. His views on freedom from both the individualistic approach taken in his transitional period and the collectivist approach taken in his organic period are instructive in terms of the constitutional analysis given collectivist and individualistic perspectives in American jurisprudence. To the extent that the collectivist approach fails to recognize the essential function of conflict, it fails to provide an adequate basis for social or political theory. Likewise, it fails to support a viable constitutional approach to balancing the priorities of the State against the importance of protecting the individual's role in the marketplace of ideas.