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INDIVIDUALITY AND FREEDOM: FROM AESTHETIC INDIVIDUALISM TO A MODERN APPROACH

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ABSTRACT: This article provides a detailed study of the conceptual relationship between individuality and freedom. While individuality is often recognized as a valuable aspect of human life, its relationship to a social state of freedom is rarely examined. On closer inspection, there are various tensions between individuality and freedom. This article begins by introducing Mill's theory of individuality and freedom, also known as the philosophy of aesthetic individualism. It then provides an explanation of the weakness of Mill's approach, demonstrating inconsistencies between Mill's

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vision of individuality, and the functioning of a free society. These criticisms and alternative interpretation are drawn from the work of Hayek. The third section of the article attempts to transcend the limitations of Mill's approach by offering an updated interpretation of individuality. This approach combines the understanding of individuality provided by Mill with that of Hayek, in an effort to overcome the specific weaknesses identified in section two. The modern approach builds on a scientific basis of individuality, an economic understanding of institutional costs and collective action problems, and proposes an alternative interpretation of how individuality can flourish without threatening the freedoms engendered by social order. It is hoped that this modern perspective might reconcile dissenting views on this important topic, and show that the possibility of a free and peaceful society, composed of individuals "of all types", still remains feasible.

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> If the claims of individuality are ever to be asserted, the time is now, while much is still wanting to complete the enforced assimilation. It is only in the earlier stages that any stand can be successfully made against the encroachment. The demand that all other people shall resemble ourselves, grows by what it feeds on. If resistance waits till life is reduced *nearly* to one uniform type, all deviations from that type will come to be considered impious, immoral, even monstrous and contrary to nature. Mankind speedily become unable to conceive diversity, when they have been for some time unaccustomed to see it.
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> -John Stuart Mill[1]

> Paradoxical as it may appear, it is probably true that a successful free society will always in a large measure be a tradition-bound society.
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> -Friedrich A Hayek[2]

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[1] JOHN STUART MILL, ON LIBERTY 139 (The Walter Scott Publishing Co. 1919) (1859).
[2] FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY, 61 (1960).

INTRODUCTION

John Stuart Mill's proclamation in support of individuality remains as relevant and important today as it was when he wrote it in 1859. The capacity for society to receive diversity among its people remains valuable from many different perspectives. The more society can tolerate differences between individuals the greater is the freedom of choice that can exist. The more that a society can peacefully embrace these differences the greater the degree of social harmony that might be obtained. Furthermore, acceptance of diversity among individuals has implications for the livelihood of social groups: if the society can accept individuality, then minority groups might also be respected.[3] The peaceful existence of individuality among the population is therefore a central ingredient in freedom of choice, social acceptance, and the existence of minority rights. It is unfortunate that society is still grappling with these issues, and thus Mill's concern for the preservation of individuality across society is an imperative that has not diminished with time. In this sense, Mill's concern is now our concern.[4]

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[3] A later section of the present article will argue that one of Mill's motivations in emphasising individuality was to simultaneously protect the rights of the minority. The individual, in Mill's perspective, is the smallest of minorities. Protection of the individual might be extended to minority groups also as, at least conceptually, there are some similarities between dissenting individuals and dissenting groups. Mill's allusion to this is discussed in a later section.

[4] This very point has been recently recognized by legal scholar Jeremy Waldron, who also highlights the connection between Mill's arguments, and modern voices in support of diverse community:

> Nor is it hard to see continuity between Mill's concerns in *On Liberty*, and the concerns of those argue in the late twentieth and early twenty-first centuries for a diverse society with a citizenry of disparate ethnic and national origins, a society in which many cultures are embraced, in which people are respected for their cultural identity, in which both the state and the members of its ethnic and national majority (if there is one) go out of their way to tolerate and accommodate practices that are quite different from their own.

Jeremy Waldron, *Mill and Multiculturalism, in* MILL'S ON LIBERTY: A CRITICAL GUIDE 165, 165–84 (C. L. Ten ed., 2008).

The tendency of laws and social norms to constrain forms of individual expression certainly changes over time, but does not necessarily disappear. A recent example of

In keeping with Mill's passionate argument, many modern theorists across social science have indeed recognized, in some cases explicitly, the importance of individuality to society. This acknowledgment has emerged either through direct reference to individuality and autonomy of individuals, or indirectly through analysis of individual opportunity.[5] The specific focus of these discussions has included the value of individuality and

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the social restrictions on individual consumption decisions comes from Barton Beebe, who has argued that a modern form of sumptuary code is emerging through intellectual property law. In economic terms, what Beebe is describing, is the tradeoff between dynamic and static efficiency: intellectual property encourages innovation, but at the cost of restraint on static dissemination of the product. Beebe's argument is that the cultural manifestation of such restrictions is the opportunity for increased social distinction and levels of hierarchy created by consumption of now more scarce products. A point of difference in the present article, is that while Beebe argues that consumption is the primary mode of distinguishing ourselves, the current discussion is that individuality emerges through many channels, rather than self expression of conspicuous consumption. *See* Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010).

[5] The most recent work on individuality, much inspired by Mill's original exposition, comes from Robert Sugden, who has explored this topic in a series of excellent articles. The particular emphasis of Sugden's approach is the value of individuality as expressed by Mill, and the difficulty of measuring the opportunity for its manifestation. Sugden argues that any attempt to measure opportunity will naturally rely on the limits placed on choice sets by the theorist. *See* Robert Sugden, *The Metric of Opportunity*, 14 ECON. & PHIL. 307 (1998); Robert Sugden, O*pportunity as a Space for Individuality: Its Value and the Impossibility of Measuring It*, 113 ETHICS 783 (2003). Of work that emphasizes the broader category of opportunity for individuals, the most recognized is Amartya Sen's discussion of individual capabilities as an instructive measurement of economic development. AMARTYA SEN, DEVELOPMENT AS FREEDOM (Alfred A. Knopf 1999); AMARTYA SEN, INEQUALITY REEXAMINED (1992). Earlier works to consider emphasis on individuality include Robert Nozick who considers rationality, free will, and moral agency, to be central in one's own unique life plans. ROBERT NOZICK, ANARCHY STATE AND UTOPIA 48–51 (1974). Similarly, for Joseph Raz a significant range of choices offers an opportunity for a person to create an autonomous life. JOSEPH RAZ, THE MORALITY OF FREEDOM (1986). A different approach is offered by Gerald Dworkin, who critiques the interpretation of autonomy as having supreme value. Instead Dworkin argues that independence needs to be tempered by recognition of importance of community and relationships. Yet even in Dworkin's argument, where individualism is critiqued, autonomy of individual is again highly valued. GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY (1988). In early sociological theory Georg Simmel developed the concept of individuality in a series of articles. For an excellent overview of these contributions see GEORG SIMMEL, ON INDIVIDUALITY AND SOCIAL FORMS (Donald N. Levine ed., 1971).

opportunity for an individual life, the merits of individuality and autonomy in comparison to other social objectives, and most recently, the challenge of actually measuring individuality and opportunity. While a general consensus has not been forthcoming, and the relative weights theorists have attributed to individuality is at variance, this literature has tended to confirm the role of individuality as one of the most important aspects of individual happiness and welfare.

A more fundamental consideration, however, and one which is rarely explored, is the relationship between individuality and social freedom itself. At first glance, this relative neglect would appear understandable as the very notion of individuality seems itself embedded in some conception of a free society: it is not easy to comprehend the healthy existence of one without the concurrent flourishing of the other. In this context, it might surprise many readers that Mill's famous emphasis on individuality has not garnered universal support among those theorists who have attempted to explain the emergence and maintenance of freedom in society. In particular, Friedrich Hayek outlined serious reservations as to the relationship between an understanding of a free society and alternative notions of *individualism*.[6] As will be demonstrated in a later section,

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[6] *See* Friedrich Hayek, *Individualism: True and False*, *in* INDIVIDUALISM AND ECONOMIC ORDER 3, 1 (1967). The alternative interpretations of many intellectual terms, particularly when of a political nature, is a concern to Hayek, who advocates a very specific understanding of terminology. As will be discussed in a later section of the paper, individualism in the form of Mill's *individuality* is not one that Hayek supports. The propensity for variation in the use of the term is summarised by Hayek:

> Terms like "liberalism" or "democracy," "capitalism" or "socialism" today no longer stand for coherent systems of ideas. They have come to describe aggregations of quite heterogeneous principles and facts which historical accident has associated with these words but which have little in common beyond having been advocated at different times by the same people or even merely under the same name. No political term has suffered worse in this respect that "individualism."

Id. at 2–3.

Mill's version of individuality was indeed considered by Hayek to be inconsistent with an interpretation of a truly free social order.

On the surface, this lack of unity between Hayek and Mill on the topic of individuality is puzzling: surely a central ingredient of a truly free society is to accommodate the manifestation of diversity, just as Mill's own emphasis clearly implies. Hayek and Mill are regarded as two of the greatest proponents of individual freedom, and to some observers their grand statements on the topic, *On Liberty* from the pen of Mill, and *The Constitution of Liberty* by Hayek, have been regarded as somewhat complimentary.[7] Given this *prima facie* similarity of intention, how could there exist division between the two on the ability of the individual to be granted the greatest freedom of expression possible? Further reading of Hayek's views, however, reveals that the type of individuality and freedom Mill's theory promotes may not be as conducive to the type of free and peaceful social order that Hayek hoped to advance.

As this article demonstrates, Mill and Hayek approached the idea of freedom from different perspectives, and this, in turn, led to

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Aspects of Mill's exposition of individuality have also been described as incompatible with basic freedoms by John Rawls. For example, Rawls is not convinced that Mill's arguments can support an equal liberty for all. For a detailed discussion of Rawls's arguments against aspects of Mill's position, see Robert Amdur, *Rawls's Critique of On Liberty*, *in* MILL'S ON LIBERTY: A CRITICAL GUIDE, *supra* note 4, at 105–22.

[7] A recent study of Hayek's attitude toward Mill's writing is provided by Légé. As Légé explains, *The Constitution of Liberty* was even interpreted as the successor to the earlier work from Mill:

> This book, *The Constitution of Liberty*, was completed in 1959 and published in 1960. When it came out in 1960, it was sometimes compared to *On Liberty* by the British and American Press. Hayek's work was thus hailed by Henry Hazlitt as "the twentieth-century successor to John Stuart Mill's essay, *On Liberty*."

Philippe Légé, *Hayek's Readings of Mill*, 30 J. HIST. ECON. THOUGHT 199, 208 (2008), *quoting* Henry Hazlitt, *Liberty and Welfare*, NEWSWEEK, Feb. 15, 1960, at 84. In the same work, Légé also notes that Hayek even replicated some of Mill's travel experiences before he started writing *The Constitution of Liberty*. *See id.* at 208.

For an overview of Hayek's attitude toward the scholarship of Mill, a recent contribution by Caldwell provides an excellent summary. Caldwell's article serves as an excellent background to the specific discussion contained in Section III of the present paper. *See* Bruce Caldwell, *Hayek on Mill*, 40 HIST. POL. ECON. 689, 689–704 (2008).

their different interpretations of the potential for individuality within a free society. Mill's approach to freedom has its roots in early aesthetic theory, and measures freedom by the degree of autonomy society would grant to individuals. For him, freedom of expression was a chief ingredient in individual well-being. Hayek, on the other hand, considered that freedom from coercion was the defining feature of a free society and was much more circumspect in the license he afforded individual expression. Hayek had reservations as to the rationality that Mill (and others) seemed to be prescribing in their own interpretations of individualism. This is in keeping with his well-known emphasis on the limits to knowledge. More importantly, however, Hayek also cautioned that unrestrained individuality may pose a genuine threat to social stability, and ultimately the freedom provided by spontaneous social order. In Hayek's view, the social costs to a free society that are incurred from unrestrained individuality are not negligible and may, in some circumstances, even be fatal.

The motivating assumption of this article is that the theoretical relationship between individuality and freedom will benefit from further investigation.[8] Given the apparent divergence between Mill and Hayek on the topic, the pages below represent an attempt to advance understanding of the issues and present a way forward. Though numerous concepts at the centre of this discussion will be immediately familiar to many readers, particularly Mill's interpretation of individuality, these issues will be reached via an alternative path. The present discussion will consider the development of Mill's

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[8] A work from almost one full century ago contains a title almost identical to the present article. This earlier work considers the relationship between individuality and freedom at a philosophical level. Specifically, it reconsiders the notion of real alternatives as central to the manifestation of individuality, and enquires directly as to whether individuality requires freedom, in the form of real alternatives, to exist at all. Although it considers some of the same broad ideas as the present discussion, its focus is aimed at understanding the role of free will in the manifestation of individuality—how much is caused by free individual choice versus how much is the product of outside forces. The present article differs in that it focuses on behavior as revealed by individuals and the ability of a free society to accommodate individuality. Ellen Bliss Talbot, *Individuality and Freedom*, 18 THE PHIL. REV. 600 (1909).

interpretation of individuality as the philosophical doctrine to which it is only occasionally referred: aesthetic individualism. Beginning with Platonic and Aristotlean perspectives on the role of aesthetics in the education of man, and then German aesthetics on education and freedom, this article will explain some of the many influences that lead to Mill's own theory of individuality. A superior understanding of Mill's individuality and his interpretation of freedom can be obtained through an appreciation for these various influences.[9]

This article is divided into three main sections. The first will outline the intellectual development of aesthetic individualism, and particularly the influences on Mill that led to the theory of individuality he offers in the work *On Liberty*. The second main section considers the relationship between individuality and the existence of a free society. The criticisms of Mill's individuality, primarily represented by the work of Hayek, are presented here. In addition, this section will note alternative insights on individuality that also exist in the work of Hayek. In the final section of the paper, a revision to aesthetic individualism is attempted. In this section, there is an effort to update Mill's theory by integrating the notion of aesthetic individualism with more recent theoretical and scientific perspectives regarding individuality, and modern economic interpretations of rationality and collective action problems. It is hoped that by the conclusion, the reader will be convinced that the uncompromising support of individuality in the work of Mill can be retained and reconciled with the vision of freedom presented by Hayek. Thus, the possibility of a free and peaceful society composed of individuals "of all types" still remains feasible.

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[9] While the theory of aesthetic individualism is often overlooked in favor of other elements in Mill's larger theoretical constructions, one of the contentions in the present article is that it can still offer some guidance on the more general topic of individuality and freedom. A recent discussion of Mill's *On Liberty* is MILL'S ON LIBERTY: A CRITICAL GUIDE, *supra* note 4, at 165–84.

II. AESTHETIC INDIVIDUALISM

A. Early Aesthetics and the Individual

Mill's perspective on individuality and freedom can be traced back to the early aesthetics literature. These contributions emphasize the role aesthetics might play in the development of an individual and their subsequent relationship to society more generally. This section is not intended to offer a comprehensive survey of the philosophical approach to aesthetics—this can be understood more effectively in the work of others.[10] The focus here will be restricted to concepts that played a role in the development of Aesthetic Individualism by influencing the work of Mill. This section is comprised of three brief sub-sections focusing on Plato and Aristotle, Immanuel Kant, and Frederich Schiller.

1. THE CLASSICAL GREEKS AND THE AESTHETIC EDUCATION

For both Plato and Aristotle, aesthetics are important to the development of an individual: an education in aesthetics was instrumental in obtaining the state of *euthymia*, a harmonious balance of the soul. Why is such education in artistic pursuits necessary according to Plato? Exposure to aesthetics "engenders temperance" in the individual, while poetry and music play a role in managing a harmonious soul.[11] Even Plato's ideal public

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[10] For an overview of the development of Aesthetics, particularly its roots in German Romanticism, the reader should consult the following two excellent recent pieces: CLASSIC AND ROMANTIC GERMAN AESTHETICS (J. M. Bernstein ed., 2003) and KAI HAMMERMEISTER, THE GERMAN AESTHETIC TRADITION (2002). Both of these works will be referenced extensively in the present discussion. My own understanding of the development of aesthetics owes a debt to both of these books.

[11] Plato encourages Glaucon to understand the value of both gymnastics and music, and the balance that need be struck between the two. One may note that Plato felt that those who would not be instructed in arts such as music, would not have balance, and in relying only on gymnastics, the individual would become hardened: "Then such a man, I fancy, becomes a hater or reason, and unmusical. He no longer uses the persuasiveness of discourse, but accomplishes all his ends by violence and fierceness, like a brute beast, and lives in ignorance and ineptitude, devoid of all rhythm and grace." PLATO, THE REPUBLIC § 411 (A. D. Lindsay trans., Heron Books 1969).

guardians, while extensively trained in gymnastics, must have exposure to music and poetry to ensure sensitivity. Yet, Plato is also suspicious of art and its potential for negative influence over the individual. For Plato there is little epistemic content in art, [12] and in the third book of *The Republic*, he warns that art has the potential to influence the young in undesirable ways, even distorting their interpretation of reality.[13] This leads to Plato contemplating a restriction of expression, going so far as to advocate state control of those arts to which the people have exposure.[14]

Like Plato, Aristotle recognizes that art could change the individual's perception, noting that even ugly things can be portrayed as beautiful through art. For Aristotle, art, particularly music, is part of a catharsis whereby the artist can relinquish feelings such as anger. This might prevent the individual from inciting such

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> Then seemingly for those two elements of the soul, the spirited and the philosophic, God, I should say, has given men the two arts, music and gymnastic. Only incidentally do they serve soul and body. Their purpose is to tune these two elements into harmony with one another by slackening or tightening, till the proper pitch be reached.

Id. at § 412. The Socratic instruction of *Protagorus* utilises a poem by Simonides to demonstrate the interpretation of the same person as either good or bad. In the Protagoras, Plato considers the problem of whether virtue can be taught, and he claims that it can, by the end of the dialogue. Art plays some role in this. *See also* PLATO, THE LAWS OF PLATO § 653-6, §797-816 (Thomas L. Pangle trans., Univ. Chi. Press 1988).

[12] *See* PLATO, THE REPUBLIC bk. X, where he explains that when art copies nature something is lost in the process. *See* HAMMERMEISTER, *supra* note 11, at 25.

[13] Such themes are present throughout the third book of *The Republic*. Much of this discussion is in reference to the work of Homer.

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> Then we must speak to our poets and compel them to impress upon their poems only the image of the good, or not to make poetry in our city. And we must speak to the other craftsmen and forbid them to leave the impress of that which is evil in character, unrestrained, mean and ugly, on their likenesses of living creatures, or their houses, or on anything else which they make. He that cannot obey must not be allowed to ply his trade in our city.

PLATO, THE REPUBLIC, *supra* note 11, at § 401.

anger in others and restore a balance of the soul, or *euthymia*.[15] The simple but important point to be taken from the classic Greek thinkers is that they believe the study of aesthetics plays an important role in the development of the individual. The influence of their thinking can be observed in many later works, some of which are examined below.

2. KANT AND FREEDOM THROUGH AESTHETICS

Immanuel Kant attempts to build a separate study of judgement and aesthetics independent of other studies such as reason.[16] Demonstrating the influence of Plato, Kant identifies a pedagogical role for both morality and particularly truth, but claims that art has no capacity to teach and is not a rational sentiment.[17] Like Aristotle, Kant elsewhere concedes that art can represent ugly things in beautiful ways.[18] While there is much to Kant's theory of aesthetics, the importance of Kant's work for the present discussion is a relatively simple one. In short, Kant expands the reach of aesthetics beyond Plato and Aristotle to one that begins to encompass a sense of freedom for the individual.

Kant explains how the feeling of the sublime is a subjective reaction created by a feeling of freedom. Through an artistic depiction of nature, the individual can view and experience the

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[15] *See* ARISTOTLE, THE ETHICS OF ARISOTLE: THE NICOMACHEAN ETHICS (J.A.K. Thompson trans., Penguin Classics, 1976) (1955). This is related to Aristotle's vision of overall human flourishing, or eudaimonia, as discussed in his Ethics.

[16] HAMMERMEISTER, *supra* note 10, at 23. While Immanuel Kant is credited with being one of the first to create an independent theory of aesthetics, it was Alexander Baumgarten who first attempted to generate a philosophy of aesthetics that was genuinely distinct and separate from other philosophical doctrines. *Id.*, at 4. While dissatisfied with some of the results of his effort, Kant continues Baumgarten's philosophical enterprise, and through his work, the *Critique of Judgment*, the term "aesthetics" begins to acquire its modern usage. *Id.* at 23. Kant wanted to strengthen the study of aesthetics, but separate it from cognition. Judgments about art and beauty would always appear to be inferior relative to rational cognition according to Kant, so he sought to separate them. That is one purpose of Kant's *Critique of Judgment*, according to Hammermeister.

[17] *Id.* at 28.

[18] *Id.* at 23, 27.

fearsome elements of nature at some distance. The individual may feel an indestructible element in human existence, and even a freedom and temporary mastery, rather than vulnerability, over nature.[19] A variation of this theme is also located in the work of Schiller, who further emphasizes aesthetics and freedom.

3. SCHILLER, THE AESTHETIC EDUCATION AND FREEDOM

Friedrich Schiller combines elements of the Classical Greek thinking (particularly Plato) about the role of aesthetics in education with a specific focus on freedom partly inspired by Kant. Schiller interprets man as a purely selfish being when in his natural state. Writing at a similar time, Adam Smith had recently identified the free market mechanism as an institutional framework in which this selfishness might serve the common good. Schiller, in contrast, and more influenced by the Greek thinkers, sought a way to educate man out of such a state.[20] The influence of Plato is salient in Schiller's central argument that aesthetics must be learnt and appreciated in order for the individual to develop. For Schiller, the gift of freedom is wasted on any man who has not been tempered by an aesthetic education.[21] Kant also influenced Schiller in his description of the way aesthetics can create a sense of freedom for the individual, and in this regard Schiller sees himself as extending the reasoning of Kant. In what might represent an attempt to bring these ideas together, Schiller flags an objective that to some extent he never truly achieves: extending from the subject of aesthetics a theoretical model of political freedom.[22] Indeed, Schiller argues that

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[19] *Id*. at 34.

[20] *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Andrew Skinner, trans., Penguin Books 1999) (1776).

[21] Few other works that I am aware of have discussed the importance of beauty to be a cornerstone for general education. One exception is Herbert Read. *See* HERBERT READ, EDUCATION THROUGH ART (Random House 1974) (1943).

[22]

> Is it not at least unseasonable to be looking around for a code of laws for the aesthetic world, when the affairs of the moral world provide an interest that is so much keener, and the spirit of philosophical enquiry is, through the cir-

it is through an appreciation for aesthetics that men can create for themselves a state of true political freedom.[23]

Schiller bemoans the natural character of man, expressing frustrations that it has not attained the character trait of reason. He complains of the wealthy, for whom culture has driven them to selfishness, and he also criticizes the masses of the lower classes for whom lawless behavior is now less constrained and impulses are freely acted upon.[24] The comparison with Adam Smith, noted above, is again relevant when considering Schiller's response to the division of labor that he was witnessing for the first time. Schiller laments this division,[25] and even argues that it is damaging the development of the individual.[26] Schiller contends that the central challenge for man is to overcome a destructive state of nature in order to enable the advent of a new state ruled by

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> cumstances of the time, so vigorously challenged to concern itself with the most perfect of all works of art, the building up of true political freedom?

FRIEDRICH SCHILLER, ON THE AESTHETIC EDUCATION OF MAN: IN A SERIES OF LETTERS 25 (Reginald Snell trans., Dover Publ'n 2004) (1965).

[23] "I hope to convince you that this subject is far less alien to the need of the age that to its taste, that we must indeed, if we are to solve that political problem in practice, follow the path of aesthetics, since it is through Beauty that we arrive at Freedom." *Id*. at 27.

[24] Schiller is critical of the fascination with material property: "Proud self-sufficiency contracts, in the worldling, the heart that often still beats sympathetically in the rude natural man, and like fugitives from a burning city everyone seeks only to rescue his own miserable property from the devastation." *Id*. at 36.

[25] While Smith seems to think that division of labour helped to create differences between individuals, this is not the case with Schiller. Schiller seems to suggest that these differences are already there, and taken advantage of by society through the market.

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> That zoophyte character of the Greek States, where every individual enjoyed an independent life and, when need arose, could become a whole in himself, now gave place to an ingenious piece of machinery, in which out of the botching together of a vast number of lifeless parts a collective mechanical life results . . . Man himself grew to be only a fragment; with the monotonous noise of the wheel he drives everlastingly in his ears, he never develops the harmony of his being, and instead of imprinting humanity upon his nature he becomes merely the imprint of his occupation, of his science.

Id. at 40.

reason. This "reason" can only be found by abandoning the recourse to any use of coercion while at the same time avoiding depression of the moral development of individuals.[27]

Although Schiller is romantic about the diversity of men and even idealistic in his hope for the evolution of an ideal man, he is not optimistic about the role of the state in this process. Any constitution aimed at lifting man through some form of paternalism only results in the crushing of diversity:

> "It will therefore always argue a still defective education if the moral character can assert itself only through the sacrifice of what is natural; and a political constitution will still be very imperfect if it is able to produce unity only suppressing variety. The state should respect not merely the objective and generic, but also the subjective and specific character of its individuals, and in extending the invisible realm of morals it must not depopulate the realm of phenomena" (Schiller, 1795: 32).

Schiller's alternative is to turn to aesthetics in education. To Schiller, aesthetics plays its role by uniting opposites.[28] Sensation and thought contradict each other, yet they also cancel each other out, and in their place is left the free will of humans.[29] It is in this sense that we can explicitly observe the influence of Kant and his explanation of the sublime. Schiller explains the way he envisions aesthetics affecting the individual: "As soon, that is to say, as both the opposite fundamental impulses are active in him, they both lose their sanction, and the opposition of the two necessities gives rise to *freedom*."[30] The human will is what gives the man a consciousness of

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[27] *Id*. at 30.

[28] "Beauty, it is said, links together two conditions which are opposed to each other and can never become one." *Id.* at 88. Schiller argues that they work in opposite directions. *Id.* at 94.

[29] *Id*. at 94.

[30] *Id*. at 96 (emphasis in original).

himself and the ability to reason. This is definitive for humanity: a free consciousness of *himself* is what makes humanity.[31]

The influence of Plato on Schiller is seemingly enormous, specifically in his argument that aesthetics can educate man out of his selfish natural state.[32] Furthermore, Schiller presents an idealistic interpretation of man (once educated in aesthetics), which is largely normative.[33] It can be argued that Schiller does not construct a comprehensive theoretical model of aesthetics and political freedom. However, while Humboldt and Mill would later develop the relationship between individuality and freedom in a more systematic way, Schiller's inspired discussion represents an important step in the development of this line of thinking. His description of individuality and true self-consciousness, in addition to his prescription for a limited role for the state due to likelihood it would suppress individuality, are both to be found in the later works of Humboldt and Mill, and thus, are important components of the philosophy of Aesthetic Individualism.

B. Humboldt and Aesthetic Individualism

Drawing from the work of Plato, Aristotle, Kant, and his friends Goethe and Schiller, Wilhelm Von Humboldt emphasizes the essence of human life to be the unique development of the individual.[34] It was not long before Humboldt's argument

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[31] "Reason—that is to say absolute consistency of universality of consciousness—is required only from the man who is conscious of himself; before that he is not a man, nor can any act of humanity be expected from him." *Id*. at 95.

[32] There is one difference with Plato which needs to be noted. In the ninth letter, Schiller appears to give art a role in the protection of truth. While Plato ascribed to art a small epistemic content, Schiller elevates art to be the bearer of truth. "Humanity has lost its dignity, but Art has rescued and preserved it in significant stone; Truth lives on in the midst of deception, and from the copy the original will once again be restored." *Id*. at 52.

[33] Again in the ninth letter he describes the ideal artist, as part of his broader argument as to the nature of aesthetics for the education of man and for freedom. In separate correspondence, Schiller writes to Goethe that it is for him that the passage is based. *See id*. at 55 n.1.

[34] A good introduction is presented by Bramsted and Melhuish:

exerted its own influence, and John Stuart Mill famously opens *On Liberty* with a quotation from Humboldt.[35]

Humboldt's argument can be summarised through a simple comparison with the work of his influences, particularly that offered by Schiller. Humboldt effectively inverts the relationship between aesthetics and the individual that Schiller outlines in his Letters. While Schiller—following Plato, Aristotle, and Kant—highlights the importance of aesthetics in creating a well-balanced and free individual, Humboldt begins to emphasize the individual as an aesthetic expression in and of himself. More specifically, Humboldt emphasizes an aesthetic in each individual human life. In this sense, human life becomes akin to a work of art; it is this idea that has led to the use of the term *aesthetic individualism* to refer to this perspective.[36]

> Philosopher and diplomat, educationist and statesman in different phases of his life, Wilhelm von Humboldt's attitude was greatly influenced by his early association with Goethe and Schiller. This group of Philhellenists regarded an idealized picture of the ancient Greeks as a model for the fully rounded and harmonious human character. They saw the essence and meaning of life in the cultured individual and believed in reason as a creative faculty, sharing a belief in *Bildung* as a main value. *Bildung*, a term difficult to translate, meant both the process of education and the state of mind arrived at through it. In Humboldt's concept of the individual who for his own good exposes himself to a variety of situations, the influence of Kant's philosophy is also discernible.

WESTERN LIBERALISM: A HISTORY IN DOCUMENTS FROM LOCKE TO CROCE 272 (E.K. Bramsted & K.J. Melhuish eds., 1978).

[35] As explained by Burrow's introduction:

> Wilhelm von Humboldt is widely remembered as the architect of the Prussian educational system and the founder of the University of Berlin. To the student of the history of political ideas, however, he is probably most familiar as the author of a single sentence, taken by John Stuart Mill as the epigraph for his essay *On Liberty*: "The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity."

J.W. Burrow, *Editor's Introduction* to WILHELM VON HUMBOLDT, THE SPHERE AND DUTIES OF GOVERNMENT (THE LIMITS OF STATE ACTION), at xvii. (J.W. Burrow trans., 1993).

[36]

Humboldt begins his own treatment with a statement as to what he regards as the central purpose of man: the harmonious development of himself as a complete whole.[37] The two requirements that allow a man to pursue individual development are simple:

1) *A freedom to follow his individual aims.*
2) *The exposure to a variety of circumstances or experiences.*

These two requirements of individual development are clearly related. The freedom to explore one's own aims and goals is at the heart of an individual's opportunity for self-development. This emphasis on self-exploration perhaps stems from the arguments of Schiller discussed earlier, who emphasized what he perceived to be the innate existence of individuality.[38] In adding his second criterion, Humboldt claims that it is only the experience of a variety of situations that allows humans to fully develop. Exposure to monotony, in contrast, does not promote individual growth. His strong introduction emphasizes variety across individuals, and encourages relationships between diverse populations as a way to enrich cultural life and allow individuality to further flourish.[39] Humboldt concludes his introductory chapter with the deduction to which he would steadfastly return throughout the entirety of his thesis:

> I therefore deduce, as the natural inference from what has been argued, that reason cannot desire for man any other condition than that in which each individual not only enjoys the most absolute freedom of developing himself

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> Though the philosophy of aesthetic individualism originated in the period of classicism in Germany at the end of the eighteenth century it only reached wider circles half a century later through the work of John Stuart Mill. Mill was much stimulated by an early essay from the pen of Wilhelm von Humboldt . . . .

WESTERN LIBERALISM: A HISTORY IN DOCUMENTS FROM LOCKE TO CROCE, *supra* note 34, at 271–272.

[37] Searching for a purpose of man is, in itself, Aristotelian. *See* HUMBOLDT, *supra* note 35.

[38] SCHILLER, *supra* note 22.

[39] *See* HUMBOLDT, *supra* note 35, at 11.

> by his own energies, in his perfect individuality, but in which external nature itself is left unfashioned by any human agency, but only receives the impress given to it by each individual by himself and of his own free will, according to the measure of his wants and instincts, and restricted only by the limits of his powers and his rights.[40]

Humboldt also recognizes that man is a social animal and acknowledges that isolation is a feeling man is naturally inclined to fight. One might expect a tension between these two notions: individuality on the one hand and some sense of community on the other. Yet Humboldt immediately attempts to dissolve any such friction, as in his approach the two concepts maintain an important relationship. In fact, the relationships between individuals, and particularly the free interaction of different peoples, are a central part of Humboldt's vision of individuality and development. Identified as the second of Humboldt's two essential criteria above, a variety of experiences is essential in the development of the individual, and interaction with other individuals represents an important part of this. To be even more specific, part of individual development for Humboldt is interacting freely with different individuals and modifying one's own self through the influence of others. The influence we take from others is not for the purpose of conformity, but enhances our own unique development.

> It follows that men are not to unite themselves in order to forgo any portion of their individuality, but only to lessen the exclusiveness of their isolation; it is not the object of such a union to transform one being into another, but to open communication between them. Each is to compare what he is himself with what he receives by contact with others, and, to use the latter to modify but not to suppress his own nature. For as truth is never found conflicting with

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[40] *See id.* at 17.

> truth in the domain of intellect, so too in the region of morality there is no opposition between things really worthy of human nature. Close and varied unions of individual characters are therefore necessary, in order to destroy what cannot co-exist in proximity, and does not, therefore, essentially conduce to greatness and beauty, while they cherish and foster the qualities which can coexist harmoniously, and make them fruitful in new and finer ways.[41]

This passage offers insight into how the free interplay between individuals contributes to the development of man, and reinforces Humboldt's emphasis on the desirability of coexistence with other individuals. Humboldt does not endorse as worthy of a developed human nature any aspect of individuality that does not mandate peaceful coexistence (or in his terms, *close proximity*) amongst individuals. In this, Humboldt appears to be suggesting that only those aspects of individuality that can exist harmoniously among others should survive, and interaction with other individuals plays the important role of eliminating those characteristics that cannot flourish among other individuals.

To Humboldt, the desirable qualities an individual might develop are only produced by freedom for the individual, and freedom is at all times the central ingredient in the development of human individuality. According to Humboldt, then, the institutions that most threaten the development of individuality are religion and the state. Though Humboldt demonstrates a respect for diversity of religious doctrine, he also has a distinct uneasiness as to its possible use against the freedom of individuals. He argues that religion attempts to educate people in its ways and thus warns against the prospect of any religion interwoven with the constitution. His thesis is that through religion the state can suppress freedom,[42] yet

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[41] *See id.* at 27.
[42] *See id.* at 54–55.

his conviction is that religion is still valuable when an individual is allowed his own interpretation of his beliefs.[43]

Humboldt's consistent defense of diversity among individuals as a means of individual development naturally circumscribes the role of the state.[44] This is because, for Humboldt, the state has a limited ability to promote individual interests and individuality, and its interference only restricts the true development of the individual.[45] Even in those instances where the state attempts to promote individuality through some positive (as opposed to negative) liberty, it only results in the smothering of both individuality and freedom. Humboldt claims that virtue cannot be forced onto men, and as a result, neither religion nor the state can make men moral, and neither can make men individuals. When individuals cannot see the value of different persons the best we can do is remove barriers to ideas and free inquiry.[46] In this sense, any form of dirigisme, whether economic or moral, is rejected by Humboldt in his theory of individual development.[47]

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[43] Religion is subjective experience, according to Humboldt: "As it is, religion is wholly subjective, and depends solely on each individuals' unique conception of it." *See id.* at 56. Later, Humboldt also argues that belief in god enhances the soul. *See id.* at 58–59.

[44] "From this principle it seems to me that reason must never retract anything except what is absolutely necessary. It must therefore be the basis of every political system, and must especially constitute the starting-point of the inquiry which at present claims our attention." *Id.* at 15.

[45] Hardin, focusing on another topic, shows the considerations that Humboldt pays to the question of whether the state should act beyond the protection or security. The answer is a combination of quasi-logical argument, and "facile causal claims." The limitations on state action are, according to Hardin's interpretation of Humboldt, based on how such legislation might constrain the energy of individuals, and hinder individuality. The implication is clear: individuality and the creative actions of individuals are the central human characteristic that the state is to protect. Even state action aimed at improving the welfare of individuals, i.e., government action beyond the mere protection of security, is to be limited. *See* Russell Hardin, *Civil Liberties in the Era of Mass Terrorism*, 8 J. OF ETHICS 77, 83–84 (2004).

[46] HUMBOLDT, *supra* note 35, at 62–63.

[47] For contemporary discussion of moral dirigisme, and the inability of the state to "make men moral," *see* Mario Rizzo, *The Problem of Moral Dirigisme: A New Argument Against Moralistic Legislation*. 1 N.Y.U. J.L. & LIBERTY 789 (2005).

Finally, Humboldt argues that the development of individuality plays a role in the emergence of virtue and morality. While acknowledging that religion is one means through which virtue may develop, Humboldt is wary of this. For Humboldt, virtue is derived from an individual becoming conscious of her own self and her goals and beginning to see others as similarly independent agents. Such realization demonstrates that there is no necessary relation between morality and religious belief, and that concern for the well-being of others need not be derived from spiritual inspiration.[48] This insight becomes a central piece of aesthetic individualism: individual development allows men to see others as individuals, which itself is a source of virtue.[49]

C. Mill, Liberty, and Individuality

Mill's theory of individuality is driven by his fear of the majority. He certainly lauds the advent of "elective and responsible government" and the improved protection a minority will likely receive under such states.[50] However, even in the context of a state governed by an elected representative, Mill is still fearful of the power of the majority to exert its influence and control. The tyranny of the

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[48] . . . [M]y only object was to show that human morality, even the highest and most consistent, is not at all dependent on religion, or in general necessarily connected with it, and incidentally to contribute a few additional reasons for rejecting the faintest shadow of intolerance, and for promoting the respect which should always entertain for the individual thoughts and feelings of our fellow-men.

HUMBOLDT, *supra* note 35, at 58–59.

[49] This self-consciousness, moreover, this living solely in and through himself, need not render the moral man hard and insensitive to others, or shut out from his heart every loving sympathy and benevolent impulse. This very idea of perfection, the goal of all his actions, is really not a mere cold abstraction of the reason, but a warm impulse of the heart, which draws his own being towards that of others.

Id. at 58.

[50] MILL, *supra* note 1, at 7.

non-state majority is, for Mill, potentially even worse than the oppression caused by the formal state structure.[51] In fact, according to Mill, the will of the majority is not simply executed by the state, but rather, the majority can effectively impose its views through social attitudes. Such an informal exertion of power can itself have an impact on the minority,[52] and thus, one of Mill's primary concerns is how to protect the minority from such majority oppression. In formulating his response, he focuses on the protection of the very smallest minorities of all: the individual.

Mill delimits legitimate interference by the state in the affairs of the individual with his well-known principle of harm.[53] Through this principle, the state's role is effectively circumscribed such that the state may intervene only in the act of preventing harm to its citizens.[54] This is not derived from any abstract conception of individual rights, however. Whereas Humboldt nominated the development of the individual as the focus of his approach, Mill is clear in his contention that he is in

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[51] The seriousness with which Mill takes this is outlined below:

> Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.

Id. at 8.

[52] *See id.* at 14. Mill takes exception to churches, which he claims are the single domain in which minorities have been able to plead for a difference of opinion.

[53] As Mill explains in the very first line: "The subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity; but Civil, or Social Liberty; the nature and limits of the power which can be legitimately exercised by society over the individual." MILL, *supra* note 1, at 1.

[54]

> That principal 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 civilised community, against his will is to prevent harm to others.

Id. at 17.

fact advancing a strictly utilitarian view. His contention is that the derivation of his theory from a utilitarian base generates a stronger argument in favor of individuality, as it is effectively connected to the permanent development of mankind.[55]

Mill's interpretation of individuality and freedom is best understood in this utilitarian context. He contends that freedom allows the individual the most scope for the development of her individuality. It is on this point that his own perspective successfully integrates Humboldt's emphasis on individual development through freedom and exposure to range of circumstances. For example, he laments the fact that a variety of experiences were, in his view, beginning to narrow.[56] However, Mill adds an explicitly utilitarian justification for promoting this individual freedom, claiming that the development of this individuality generates broader social benefits. In simple terms, the more individuality is developed, the greater the gains to society. Thus, the ultimate foundation for Mill's interpretation of freedom is individual freedom.

It is desirable for society to accommodate the largest range of individual expression in order to obtain the most benefit. Such a utilitarian perspective on individuality and freedom can be observed in the specific criteria Mill nominates to measure the level of freedom in society. Moving beyond Humboldt's criteria, which relate to individual freedom and circumstantial variety, Mill turns his attention to developing a set of *social* requirements which must

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> It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.

Id. at 20.

[56] "Great as are the differences of position which remain, they are nothing to those which have ceased." *Id*. at 136.

be met for individuals to develop. It is only by meeting these criteria that Mill would consider a society unqualifiedly "free":[57]

1) *Absolute liberty of conscience and expression.*
2) *Absolute liberty of interests and pursuits – to live our life as we see fit.*
3) *The freedom to unite and congregate.*

Mill's discussion of individuality is developed most expansively within the first two categories, and particularly the second.

Freedom of speech should allow the views and interests of the minority a fair hearing,[58] and to this end the expression of one's own ideas and thoughts should not result in persecution by the greater public.[59] Mill emphasizes the importance of providing an individual the *opportunity* to think and express his own beliefs.[60] Development of the individual requires an opportunity to follow arguments and lines of thought to whatever their natural end. Furthermore, Mill is clear that this is not a principle that should be applied only to some intellectual elite, but instead, it should also

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[57] "No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified." *Id.* at 23.

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> On any of the great open questions just enumerated, if either of the two opinions has a better claim that the other, not merely to be tolerated, but to be encouraged and countenanced, it is the one which happens at the particular time and place to be in a minority. That is the opinion which, for the time being, represents the neglected interests, the side of human well-being which is in danger of obtaining less than its share.

Id. at 89.

[59] While he admits that governments do not any longer legally persecute those who have different ideas, he notes that the treatment of such individuals is still less than desirable:

> For a long time past, the chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which really effective, and so effective is it, that the profession of opinions which are under the ban of society is much less common in England, than is, in many other countries, the avowal of those which incur risk of judicial punishment.

Id. at 58.

[60] *Id.* at 60.

benefit even those of "average" intellect.[61] Mill's utilitarian viewpoint can again be detected in the fact that, to him, restraints on freedom of expression have significant social implications.[62] He argues that any such restrictions on the development of intellectual pursuits only serve to stifle intellectual progress for society.[63]

It is important to note that Mill did explicitly recognize natural limits to his individuality principle. Thus, while his language often suggests the individual should be unconstrained, there is recognition that the pursuit of individuality will likely encroach on the activities of others, and possibly create conflict. As a result, in discussing the importance of freedom of action to individual development, Mill is careful to stress that freedom of action should be more constrained than speech and not as freely pursued as freedom of opinions or ideas.[64] Of paramount importance to Mill is the idea that individuality should not generate a nuisance to others,[65] and individuality should only be used to benefit a person so long as it does not generate such negative externalities.[66] Like his harm principle, however, the nuisance

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[61] For Mill's recapitulation of the importance of freedom of speech, *see id*. at 62–3.

[62] In his discussion of freedom of speech, he is primarily concerned with 1) why it is a good thing in terms of truth and a false assumption of our own infallibility, 2) that the controversial perspective may contribute to the attainment of the truth, or 3) argument is needed to show the rational grounding of truth, and finally 4) that the truth may be somewhat lost it if is not reminded through vigorous and healthy argument. *See id*. *at* 64–72.

[63] The gains from freedom of speech accrue via the criticism of false opinion, and then also the false criticism of truth. Mill's greater emphasis is, however, on the more common occurrence of when two opinions each contain elements, but not the entire composition, of the truth. *See id*. at 28–102.

[64] *Id*. at 104.

[65] *Id*.

[66]

> The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgment in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost.

Id. at 104.

principle is perhaps too vague to give us a clear understanding of its application.

Central to Mill's approach is the pursuit of different modes of living, through which individuals may discover a unique existence for themselves.[67] This includes the breaking of custom and the formation of new modes of behavior and potentially even experiments in living. Although Mill recognizes the value of established custom and tradition and the knowledge that such previous experiences provide,[68] it is for Mill, a privilege of our species that individuals might still select their own independent path when obtaining some level of maturity. It is in this sense that Mill's discussion of individuality is clearly inspired by the work of Humboldt, which he freely recognizes,[69] and the influence of the Greek thinkers, which Mill also acknowledges.[70]

Mill does take a step further with his emphasis on rationality and thought. Mill's individual only calls upon all his powers and begins to exercise his individuality when actively considering

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> As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.

Id. at 105.

[68]

> On the other hand, it would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it; as if experience had as yet done nothing towards showing that one mode of existence, or of conduct, is preferable to another. Nobody denies that people should be so taught and trained in youth, as to know and benefit by the ascertained results of human experience.

Id. at 108.

[69] *See id*. at 64 for Mill's extended homage to Humboldt.

[70] The influence of the Greek thinkers, particularly the Platonic conception of individual development, is openly made reference to by Mill: "There is a Greek ideal of self—development, which the Platonic and Christian ideal of self-government blends with, but does not supersede." *Id.* at 116.

action outside of custom; the development of individual judgement and choice can only exist in Mill's terms when the individual considers the possibility of acting outside the dominant rules of behavior:

> [T]hough the customs be both good as customs, and suitable to him, yet to conform to custom, merely *as* custom, does not educate or develop in him any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice . . . He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties (Mill, 1859: 65, emphasis in original).

For Mill, it is clear that the individual is only activating their full faculties when they are following a tradition or custom *because they have consciously decided that it is the course of action she wants to pursue*, or when they otherwise *act outside of such social structure*. Human development can be realized only when the individual starts to reconsider the customs and rules that are most commonly employed, and begin to construct their own response to the world outside of those existing behavioral guidelines.[71]

So what are the limits of individuality for Mill? Mill argues that mankind has advanced beyond those historical periods where laws were ignored and the tendency of the individual was to pursue every impulse.[72] Instead, the modern challenge is not unrestrained

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[71] A similar point has been made previously by John Gray, who identified "unmistakable traces of a Kantian conception of autonomy, absorbed by Mill (in a neo-Romantic variant) from Humboldt." JOHN N. GRAY, MILL ON LIBERTY: A DEFENCE 78 (2d ed. 1996).

[72] "In some early states of society, these forces might be, and were, too much ahead of the power which society then possessed of disciplining and controlling them. There has been a time when the element of spontaneity and individuality was in

individuality but its overall deficiency.[73] Any demarcation of behavioral limits, therefore, should provide for the greatest possible range of activities. Again, it is the harm principle that governs his approach, and Mill endeavors to maintain the individual's autonomy by applying the principle sparingly. For example, even though public opinion may condemn a man for conduct that does not benefit *his own person*, it has no right to compel him to act in a way other than that which he himself specifies.[74] Further still, even if social inconvenience, or what Mill calls "constructive injury", is the result of individuality, such individual action is permissible as long as it does not hurt individuals or is caused by a break with basic duties of care.[75]

Those cases where Mill suggests the strongest restraint on individuality are in relation to the rule structures that protect individuality: individuality is not to threaten those basic rules that provide for individual autonomy. Indeed, Mill makes it clear that individuality needs to be restrained if the action "has infringed the rules necessary for the protection of his fellow creatures, individually or collectively".[76] Protection for weaker individuals is also considered

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excess, and the social principle had a hard struggle with it..." MILL, *supra* note 1, at 113.

[73] "But society has now fairly got the better of individuality; and the danger which threatens human nature is not the excess, but the deficiency, of personal impulses and preferences." *Id*. at 68.

[74] Mill concentrates at length on the important distinction between the social limits, and the man's limits. *Id*. at 147–48.

[75]

> But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.

Id. at 154.

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> He may be to us an object of pity, perhaps of dislike, but not of anger or resentment; we shall not treat him like an enemy of society: the worst we shall think ourselves justified in doing is leaving him to himself, if we do not interfere benevolently by showing interest or concern for him. It is far otherwise if he has infringed the rules necessary for the protection of his fellow creatures,

in his reference to preventing the "stronger specimens" from impinging upon the rights of others.[77] Individuals should pursue their individuality only ". . . within the limits imposed by the rights and interest of others . . . ."[78] However, like the harm principle, this appears to be underdeveloped in Mill's approach. He does not specify in which areas of social interaction individuality might need to be tempered or even eliminated.

The one avenue through which the state can contribute to the development of individuality, according to Mill, is via the enforcement of those basic social rules that protect the safety of individuals. Firstly, it is for the development of individuality that such restraint is recommended, as "on net" what the one individual loses by these constraints is regained in the enjoyment of the restraint from the other. More interesting, however, is Mill's second argument: an individual's development will be improved through the exposure to the laws that constrain him. Such restraints can even lead an individual to develop feelings for others.[79] Like Humboldt, Mill is clear that state action can contribute to individuality simply by protecting its manifestation, but not by actively developing it. Mill is quite clear in his conviction that any further state attempt at intervention in the pursuit of individuality, however well-meaning its intentions, is likely to be mistaken.[80]

In summary, for Mill a free society is one in which individuality can flourish; wherever possible, individuality is neither to be constrained nor tampered with. From Mill's utilitarian perspective, the manifestation of

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> individually or collectively. The evil consequences of his acts do not fall then on himself, but on others . . .

Id. at 149.

[77] *Id.* at 118.

[78] *Id.* at 117.

[79] Mill is seemingly emphatic on this point. *Id.* at 118. ("To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object.").

[80] "But the strongest argument of all the arguments against the interference of the public with purely personal conduct, is that when it does interfere, the odds are that it interferes wrongly, and in the wrong place." *Id.* at 157.

individuality represents a benefit to society.[81] Demonstrating the influence of Humboldt, the continual development of the individual herself needs variation of environments.[82] The limits to individuality are to be few, in order to encourage its growth. Attempts by the state to interfere to the benefit of individuality are likely to be inappropriate and should therefore be restrained. Individuality is so important to society that, for Mill, there is no role for moral imposition on men outside of those basic laws of protection, and there is no rationale that is acceptable for its constraint:

> Even despotism does not produce its worst effects, so long as individuality exists under it; and whatever crushes individuality is despotism, by whatever name it may be called, and whether it professes to be enforcing the will of God or the injunctions of men.[83]

D. Individuality and Freedom

From classical Greek thinking to Kant and then the German romanticism of Schiller, an interpretation of individuality as the development of an individual to a unique, complete, and harmonious whole, is elaborated by the Aesthetic Individualism of Humboldt and Mill.[84] While Humboldt and Mill have been nominated as part of this singular philosophy of individuality, there are slight variations between their respective expositions of individuality and freedom that are not necessarily disagreements, but perhaps differences in emphasis. Where Humboldt emphasizes individuality as the purpose of man, Mill goes further and argues that this individuality serves a utilitarian end. The individuality of

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[81] "In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a great fullness of life about his own existence, when there is more life in the units there is more in the mass which is composed of them." *Id.* at 118.

[82] *Id.* at 137.

[83] *Id.* at 119.

[84] *See* WESTERN LIBERALISM: A HISTORY IN DOCUMENTS FROM LOCKE TO CROCE, *supra* note 34, at 271–72.

Humboldt is nourished and fertilised by social interaction, and the opportunity for an individual to select among cultural experiences—and even modify his own individuality in response—is an important element of individual life for Humboldt. For Mill, the individual should be allowed to think as freely as she wishes, and can break from custom in any case if they will. Mill's interpretation of freedom in society is founded on the range of activity open to individuals.

There are a number of omissions in their approaches that, with the benefit of over 100 years research, might be developed further. In some respects, they are making an empirical claim about the existence and development of individuality. It is possible for the sources of individual differences, and furthermore the details on the causes of individual development, to be understood further. In addition, there is a lack of detail in their explanation of when individuality should be restrained: Humboldt's endorsement of individual development only when it is convivial to peaceful coexistence and Mill's extension of the harm principle, though offering a general theme, do not provide much practical relevance to the limits of individuality. Later sections of this paper will return to these issues in an attempt to provide further elucidation.

II. THE CONFLICT BETWEEN INDIVIDUALITY AND FREEDOM

The interpretation of individuality and freedom inherent in the philosophical vision of Mill's aesthetic individualism is not without complications. Hayek presents significant reservations as to whether this type of individuality could coexist with the social stability that itself provides a basis for freedom. This section will present Hayek's critique of Mill's individualism in the form of two related arguments. First, Hayek criticizes the rationality that Mill ascribes to the individual actor, particularly when exercising individuality.[85] Second, Mill's very notion of individuality seems at odds with the

[85] *See* Hayek, *supra* note 6, at 3. For a background to Hayek's interpretation of Mill's work the reader should consult Caldwell's contribution on the two authors. *See Generally* Caldwell, *supra* note 7.

important role of tradition and cultural norms that contribute to the emergence of spontaneous order, and ultimately a freedom itself.[86] Full appreciation of this aspect to Hayek's position requires some understanding of his own unique interpretation of a free society. Finally, this section will also outline Hayek's own alternative vision of the individual, and the notion of individuality. There appears to be some internal tensions between Hayek's own vision of individuality and his overall social system, and this section will argue that Hayek's discussion of the individual inadvertently emphasizes the importance of individuality to the long-run survival of the type of free society he outlines.

A. Individuality and Constructivist Rationality

Mill recognizes that traditions and customs contain elements of knowledge and understanding beyond that held by the generation of men living under them.[87] In so doing, he demonstrates an awareness of the limitations in the stock of knowledge held by individuals. On the other hand, an individual in Mill's approach does not use all his faculties until he is "consciously choosing" at each decision node rather than unconsciously following tradition. This description of individuality as *conscious choice* is susceptible to the criticism that it prescribes an unrealistic form of rationality. Such a criticism will be immediately recognized as echoing the voice of Hayek.[88]

In contrast to the interpretation of individuality presented by Mill, Hayek recommends an anti-rationalistic view of individualism

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[86] In an economic approach to these issues, James Buchanan emphasizes that unrestrained individualistic behavior may threaten stability. Although Buchanan is not addressing Mill's perspective directly, there are similar arguments to those made by Hayek in reference to Mill. *See* JAMES BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 17–34 (1975).

[87] MILL, *supra* note 1, at 64.

[88] Hayek's suspicion of man's knowledge and decision-making ability is widely understood to be a cornerstone of his life's work. Hayek is very Kantian in this sense, constantly concerned with the limits of human understanding and pure reason. *See* JOHN GRAY, HAYEK ON LIBERTY 4–8 (3d ed. 1984).

that emphasizes the limitations of rationality as a resource.[89] In Hayek's terms, "true individualism" refers to an understanding that the interaction of freely acting individuals "produces a society of institutions that a single mind could never plan or design."[90] Once this is understood, the theorist is more circumspect in the rationality that an individual can be thought to possess, particularly in terms of acting beyond conventionally accepted institutional guidelines. From this standpoint, the individual's cognitive ability is certainly not resigned to the "irrational";[91] however, explicit cognitive limitations are emphasized. Understanding the limitations of rationality requires simultaneous recognition of the role of custom, tradition, and informal rules generally.

Though it is now commonplace to acknowledge the role of informal rules in guiding the behavior of individuals, one of Hayek's more unique contributions to this topic is to claim that men's submission to these customs and traditions is not necessarily based on an explicit understanding of such social conventions.[92] In other words, individuals follow norms without necessarily understanding what the precise role of each norm actually is. Customs, traditions, and even moral norms have evolved over many generations, and while some further evolve into formally codified legal constraints, many guiding principles of society

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[89] Mandeville, in Hayek's view, is the first to fully espouse an "anti-rationalistic," view of the world.

[90] Hayek claims this is precisely the view of Burke, Ferguson, Smith, and Tucker, each of whom recognized the individualism with which he is agreed. *See* Hayek, *supra* note 6, at 7–8.

[91] Hayek has been clear on this point. *See* Hayek, *supra* note 2, at 69.

[92]

> The willingness to submit to such rules, not merely so long as one understands the reason for them but so long as one has no definite reason to the contrary, is an essential condition for the gradual evolution and improvement of the rules of social intercourse; and the readiness ordinarily to submit to the products of a social process which nobody has designed and the reasons for which nobody may understand is also an indispensible condition if it is to be possible to dispense with compulsion.

Hayek, *supra* note 6, at 23.

remain informal social structures. Though individuals may not comprehend the practical importance of such rules, this does not diminish their value to society—in many ways it increases it.[93] Because Hayek views submission to these norms as important in maintaining an evolved free social structure, he naturally has great concern with any form of individualism that prescribes an explicit, calculating, rationality at every juncture, which would potentially challenge each custom.

Hayek's emphasis on the fact that individuals follow norms without understanding their significance also has import when considering the value of the extant social institutions. Not only would explicit understanding of each existing custom or rule be out of reach, any attempt to *reconstruct* any such system of behavioral norms is equally beyond men's mental capacity. The conventions that underpin stability and allow free interaction among individuals are important in Hayek's thought, certainly not because they are infallible, but precisely because of what he views to be man's limited ability to construct any such comparable set of guides.[94] This point is paramount in understanding Hayek's overall interpretation of a spontaneous order. The cultural traditions and conventions that guide the behavior of individuals contain the lessons learned over generations, and they may possess knowledge that is beyond that understood by the individuals who act within such a social structure.[95] In layman's terms, humans take for granted the sets of rules and institutions that allow free interaction among

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[93] "Far from assuming that those who created the institutions were wiser than we are, the evolutionary view is based on the insight that the result of the experimentation of many generations may embody more experience than any one man possesses." HAYEK, *supra* note 2, at 62.

[94]

> Indeed, the great lesson which the individualist philosophy teaches us on this score is that, while it may not be difficult to destroy the spontaneous formations which are the indispensable bases of a free society, it may be beyond our power deliberately to reconstruct such a civilization once these foundations are destroyed.

Hayek, *supra* note 6, at 25.

[95] *See* HAYEK, *supra* note 2, at 62.

many individuals. The limitation in cognitive ability that is overcome through adherence to social norms also has important implications for the purpose of any rational social construction that individuals, independently or as a group, believe themselves to be capable of creating in terms of law or policy.[96]

It is in the context of his awareness of cognitive limitations that leads Hayek to express concerns with the individuality espoused by Mill and to directly confront Mill's approach in a number of works.[97] Hayek argues that the tendency toward this form of individualism, which depicts the individual as consciously comprehending the purpose and meaning of all actions he pursues, places unreasonable demands upon the cognitive abilities of individuals. He explains that, in his view, these tendencies are the "results of that same rationalistic 'individualism' which wants to see in everything the product of conscious individual reason."[98] Hayek sometimes refers to this rationalistic approach, including

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[96] In regards to the development of law, for a comparison of Hayek's interpretation of legal analysis as compared to Richard Posner's, see Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559 (2008).

> In Posner's model, the law is only as good as a particular judge is wise. Hayek's model, by contrast, is built on the insights of a sound Burkean tradition, in that the common law reflects the accumulated knowledge of many judges collaborating over time. Indeed, Poser's model surrenders the very purpose of Hayek's framework—the idea that the common law is imbued with tacit knowledge that should be followed even if all of this knowledge cannot be fully understood and articulated.

Id. at 583. This recognition of limited cognitive ability plays a central role in Hayek's understanding of government. Indeed, the reasons behind the minimal role Hayek often ascribes to state action are easily misunderstood. His argument is in fact based on these knowledge limitations; it is because of knowledge limitations that the part of society that is constructed by men to serve as the guidelines for social interaction should be small. In this sense, Hayek's argument in favor of a limited state is not a purely normative one. It is deduced from the fact that the ability of man to redesign effective social institutions is limited, and hence, government itself must be limited by men's own limitations.

[97] Gray, in his important synthesis of Mill's work, also notes such points in Hayek's work. *See supra* note 88 and accompanying text.

[98] *See* Hayek, *supra* note 6, at 25.

that used by Mill, as a *constructivist rationality*.[99] Many economists would recognize his use of this term as part of his critique of rationality in policy, in particular what he views to be conceited attempts at economic central planning. In his criticism of Mill, however, he appears to be drawing this point down to the level of individual decision making. Hayek contrasts this *rationalist* perspective with his own *evolutionary* understanding of social institutions and order. Hayek likewise complains of Mill's depiction of the economic man for much the same reasons: "The homo economicus was explicitly introduced, with much else that belongs to the rationalist rather than to the evolutionary tradition, only by the younger Mill."[100]

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[99] The present discussion obtains support on the issue of Hayek's critique of Mill's rationality as "constructivist" from the work of Philippe Légé. Légé also argues that Hayek interprets Mill's approach as containing a constructivist rationality, and that this is one of the driving criticisms that Hayek presents with Mill's work. One of Légé's important contributions is to show that Hayek's interpretation of Mill's work changed over time:

> Since the way he viewed Mill's role evolved through time, we have chosen to chronologically present the different works he wrote either dealing with or referring to Mill. We will content ourselves with following the evolution of Hayek's opinion on Mill and to identify which of Mill's ideas he found "constructivist." Hayek's readings of Mill are revealing as to the evolution of Hayek's thought.

Légé, *supra* note 7, at 200.

[100] Hayek explains:

> Even such a celebrated figment as the "economic man" was not an original part of the British evolutionary tradition. It would only be a slight exaggeration to say that, in the view of those British philosophers, man was by nature lazy and indolent, improvident and wasteful, and that it was only by the force of circumstances that he could be made to behave economically or would learn carefully to adjust his means to his ends. The *homo oeconomicus* was explicitly introduced, with much else that belongs to the rationalist rather than to the evolutionary tradition, only by the younger Mill.

HAYEK, *supra* note 2, at 61.

*B. Individuality versus Freedom **as** Spontaneous Order*

From Mill's perspective, freedom in society is measured by the degree of freedom open to an individual. It is central to Mill's approach that the social environment be sufficiently malleable to allow the individual their freedom of action, restrained only by the harm principle. Such demands of freedom ensure that individuals have the right to act outside such behavioral guidelines as customs and conventions. Although still a concern for Hayek, to him, individual freedom is less important in defining a free society than the nature of the social structure that the individual acts within. Freedom for Hayek does not represent unrestrained choice, but rather, a society that has evolved over time and "works" without the need for outside intervention and coercion. Thus, freedom for him is a spontaneous social order; Hayek is very clear that freedom is certainly not un-ordered anarchy. Hayek's perspective on freedom in society generates a different interpretation of individuality. This section will demonstrate Hayek's misgivings about the type of individuality that Mill describes, and its relation to his evolutionary vision of a free society.

Hayek emphasizes the social value of conventions and customs, in particular for the "knowledge content" they possess.[101] However, the role of these conventions and norms in providing order, and ultimately a free society, is another important concern.[102] If a society is to exist without coercion, the order required for stable socio-economic relations must emerge from some informal set of guidelines. Informal norms, cultural tradition, and conventions are part of the emergence of order

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[101] Consider the following, for example:

> While this applies to all our values, it is most important in the case of moral rules of conduct. Next to language, they are perhaps the most important instance of an undesigned growth, of a set of rules which govern our lives but of which we can say neither why they are what they are nor what they do to us: we do not know what the consequences of observing them are for us as individuals and as a group.

Id. at 64.

[102] *Id.* at 61.

in society. In this view, these social institutions are not coercive in the sense Mill has suggested, but instead provide the most basic structure to social interaction.[103] According to Hayek, the existence of such informal rules of behavior is what differentiates a stable social order peopled by free individuals, from a social state of chaos.

An important role of social customs and norm-following behavior in preserving a spontaneous order is that their existence offers some assurance as to what the future behavior of others will be. This ability to form expectations of the future is an important ingredient in Hayek's vision of a free society. Other authors have also observed this aspect to Hayek's approach. For example, in his own interpretation of Hayek, Gray outlines the importance of expectations in relation to plans and actions. Gray claims that Hayek disagrees with Mill in regards to the desired social response to expressions of individuality. While Mill claims that social judgement should not be issued against the individual when they break with social convention and moral norms, Gray claims that Hayek suggests otherwise.[104] Gray emphasizes the importance of social disapproval in Hayek's system, particularly in discouraging individuals from diverging with the accepted norms.[105] It is social pressure that ensures individuals adhere to

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[103] The same argument is made elsewhere in Hayek's *Constitution of Liberty*. When considering the importance of coercion, Hayek again argues that norms and conventions are not to be seen as coercion in the way that Mill describes. Instead, they represent the stability that is required by society: "On the whole, those conventions and norms of social intercourse and individual conduct do not constitute a serious infringement of individual liberty but secure a certain minimum uniformity of conduct that assists individual efforts more than it impedes them." *Id.* at 147.

[104] He clearly explains that this issue in the work of Mill, that unbounded individualism in Mill is a claim to be free from the judgments of others. THOMAS SOWELL, KNOWLEDGE AND DECISION 107 (1980).

[105] The clearest exposition of this difference between Hayek and Mill is perhaps provided by Hayek himself:

> A hundred years ago, in the stricter moral atmosphere of the Victorian era, when at the same time coercion by the state was at a minimum, John Stuart Mill directed his heaviest attach against such 'moral coercion.' In this he probably overstated the case for liberty. At any rate, it probably makes for greater

custom and tradition, such that expectations as to the future behavior of others can be formed.[106]

This difference in perspective on the response to individuality from Hayek to Mill, illustrates the difficult relationship between Mill's form of individuality and the maintenance of order and freedom. Hayek is critical of what he sees to be a tendency in German philosophical thinking that celebrates individuality and uniqueness in behavior and even personality.[107] His most explicit citation to this includes authors such as Goethe and even Humboldt, and he further identifies their influence in the work of Mill.[108] From Hayek's perspective, the tendency toward the individuality recommended in their thinking is antithetical to the achievement of a free social order.[109] This is a very important

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> clarity not to represent as coercion the pressure that public approval or disapproval exerts to secure obedience to moral rules and conventions.

HAYEK, *supra* note 2, at 146.

[106] In his discussion of Hayek, Gray argues the following:

> We cannot act effectively if we are unable to form sound expectations about the reactions of others, and this can occur only if social relations are in major part governed by conventions which constrain the expression of individuality. Such conventions will in turn be effective in governing conduct only if they are allowed to provide, by way of social censure and disapprobation, negative feedback on the conduct of others.

GRAY, *supra* note 88, at 100.

[107]

> With some truth this so-called German individualism is frequently represented as one of the causes why the Germans have never succeeded in developing free political institutions. In the rationalistic sense of the term, in their insistence on the development of "original" personalities which in every respect are the product of the conscious choice of the individual, the German intellectual tradition indeed favors a kind of "individualism" little known elsewhere.

Hayek, *supra* note 6, at 25–26.

[108] "This cult of the distinct and different individuality has, of course, deep roots in the German intellectual tradition and, through the influence of some of its greatest exponents, especially Goethe and Wilhelm von Humboldt, has made itself felt far beyond Germany and is clearly seen in J.S. Mill's *Liberty*." *Id.*

[109] Hayek, *supra* note 6, at 25–26; see also GRAY, *supra* note 88 (explaining Hayek).

concern, and one of the central issues in the present study of individuality and freedom: A spontaneous order is not infallible, and individuality of the type extolled by Mill may strain the limits of this social order:

> It must remain an open question whether a free or individualist society can be worked successfully if people are too "individualistic" in the false sense, if they are too unwilling voluntarily to conform to traditions and conventions, and if they refuse to recognize anything which is not consciously designed or which cannot be demonstrated as rational to every individual.[110]

Hayek even suggests that a powerful government is a natural implication when individuals across society refuse to submit to the order of traditions.[111] The theme of Hayek's argument against Millian individuality gradually becomes clear: if individuality is pursued to the extent that order is eroded and even destroyed, the tendency towards stability and order must be imposed from outside.[112] Thus, individuality may drive society away from a spontaneous order, and further in the direction of coercively imposed stability.

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[110] Hayek, *supra* note 6, at 26.

[111] *See id.* at 25–30.

[112] This interpretation of Hayek's argument can be well understood through John Gray's explanation of it. He writes:

> The important point is that a society without such strong moral conventions would unavoidably be chaotic. Most likely, coercion would have to fill the gaps left by the erosion of moral convention, since some means of social coordination there must be. The real alternative to a society containing strong conventions enforced by public opinion is not a Millian bohemia, but a Hobbesian state of nature.

GRAY, *supra* note 88, at 97.

To Hayek, such an outcome is precisely the opposite of what constitutes a truly free society.[113]

C. Hayek's Individual: Strengths and Weaknesses

On the surface it would appear that Hayek's endorsement of customs and tradition as the basis for order and freedom in society leaves very little role for an expressive individuality that resembles anything like that presented by Mill or even Humboldt. This is, however, not entirely correct, as in various works he does offer some valuable insights into the nature of the individual and even the manifestation of individuality. Indeed, detailed studies of Hayek's political thought—such as that provided by Kukathas—have pointed to Hayek's great esteem for the notion of individuality and highlight a "Kantian strain" in his thinking that ascribes significant value to the individual.[114] While some aspects of his interpretation of the individual are highly valuable additions to a modern understanding of individuality and freedom, they also lead to some tensions in Hayek's overall perspective on the subject.

There are two specific contributions by Hayek on the topic of individuality that are especially valuable. The first is an explicit recognition of the scientific basis of individuality. Although at the time the field of genetics was still emerging, Hayek recognizes in the writing of some contemporaries in this burgeoning research

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[113] To clarify this issue further, an economic approach to social contract by Buchanan demonstrates the trade-off further in terms of formal and informal rules. He argues that the social stability must comprise some combination of formal law and informal ethics, such as customs and traditions. Behavior that erodes informal rules may only serve to increase the need for more formal law, and thereby decrease the degree to which individuals can act without formal coercion. While Hayek argues explicitly in favor of the spontaneous order, Buchanan leaves it to the reader to decide what combination of informal guidelines and formal coercive structures is most desirable. *See* BUCHANAN, *supra* note 86, at 74–90.

[114] "Despite the predominance of consequentialist arguments for liberty, his writings reveal a Kantian strain which asserts the value and dignity of the individual." CHANDRAN KUKATHAS, HAYEK AND MODERN LIBERALISM at 138 (Clarendon Press 1989).

program that human individuality is a scientific fact.[115] He recognizes explicitly that individuality is a proven reality of every individual human life, and further recognizes the different influences on individual development, both environmental and purely biological.[116] Although Hayek does not further pursue all the implications of these ideas, this discussion of individuality as scientific fact motivates various adjustments to a modern theory of individuality.

The simple insight that individuality has a factual existence is significant because it forces us to alter our understanding of individuality itself and any theoretical representations we make of it. Individuality is not simply a behavioral form, but a fact of human existence. An adequate understanding and theory of individuality, therefore, requires an acknowledgement that it is a permanent phenomenon of humanity, and is not limited to being an action or single behavioral form that is distinct from others. Instead, when studying individuality we need to look for its manifestation in behavioral forms of many kinds. This point will be emphasized in a later section of this paper to create a modern (and ultimately broader) interpretation of individuality. Therefore, acknowledging the factual existence of individuality provides us with a firmer base than Mill's theory rested on, and encourages broader categorizations of individuality in behavior.

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[115] Hayek quotes from Roger Williams at length on the issue of biological diversity among humans. It is clear that Williams' arguments seriously appeal to him. Indeed, some of Hayek's writings appear alongside the work of Roger Williams. *See* Hayek, *supra* note 2, at 85–102; Conway Zirkle, *Some Biological Aspects of Individualism*, *in* ESSAYS ON INDIVIDUALITY (Felix Morley ed., 1958).

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> It has been the fashion in modern times to minimize the importance of congenital differences between men and to ascribe all the important differences to the influence of environment. However important the latter may be, we must not overlook the fact that individuals are very different from the outset. The importance of individual differences would hardly be less if all people were brought up in very similar environments.

HAYEK, *supra* note 2, at 86–87.

A second valuable insight into the nature of individuality that can be drawn from Hayek concerns the value of tradition and cultural experience in the life of the individual. Hayek interprets culture as social experience that enriches life. Rather than urge the breaking of traditions, Hayek emphasizes the opportunity for the individual to participate in different cultural experiences. Other authors have also previously noted this aspect of Hayek's thinking. For example, in his own interpretation of Hayek's approach, Gray argues that traditions compete for followers in Hayek's analysis, and thus are an enrichment of individual life.[117] Furthermore, the individual is a social being, and any individuality can only possess meaning in the context of social environment. Gray argues that, in Hayek's approach, individuality must be interpreted as "cultural achievement" in itself.[118] The rise of various traditions offers a great number of options for the individual, i.e., more choice, not more constraint. While Mill interpreted tradition as a constriction, Hayek offers a variant on Humboldt's perspective observed earlier.[119] This notion that individuality can incorporate an element of choice among existing options is an issue that later sections of this article will also return to.

It is important to note other elements of Hayek's approach that seem to create tensions in his overall theoretical perspective. Although he emphasizes the important role played by customs and norms in providing order, there is no doubt that Hayek also views the role of dissent as valuable. In fact, elsewhere he attributes an important role to the ability of the individual to question the activities of others who follow traditions and even act beyond those established boundaries.[120] Furthermore, he argues

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[117] It is not clear to me that Hayek definitely says this, but Gray's argument has merit. *See* GRAY, *supra* note 88, at 97–98.

[118] *Id.* at 97.

[119] "One may go even further, and observe that an array of flourishing traditions, each with its own sanctions against deviancy, enhances the options of the choosing individual." *Id.* at 98.

[120] Kukathas also cites various parts of this discussion. *See* KUKATHAS, *supra* note 114, at 138–9.

that individuals must be allowed to pursue their own value set, even in those circumstances in which it conflicts with the dominant mindset or established thinking. Hayek extends this further, and at one point even argues that this ability to pursue one's own unique value set is a central aspect of individual freedom. At this point, his view of freedom begins to sound very much like that presented by Mill.[121] As will be discussed later, the two perspectives may not be as far apart as they sometimes appear.

Despite his strong criticisms of Mill's tendency toward constructivist rationality, Hayek himself outlines a version of rationality that at times actually resembles Mill's. In another work focusing on Hayek's thinking, Kukathas argues that one of the reasons Hayek values freedom is that it leads to the further development of human rationality.[122] As he explains, "For it is only when the individual is not confined in his actions by limits imposed by others who wield the power to determine what is rationally permissible that his own rational powers can be extended."[123] If the interpretation presented by Kukathas is correct, it would appear that Hayek also interprets the ability to think outside of existing social institutions as a part of individual development.[124] There

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> The recognition that each person has his own scale of values which we ought to respect, even if we do not approve of it, is part of the conception of the value of the individual personality. How we value another person will necessarily depend on what his values are. But believing in freedom means that we do not regard ourselves as the ultimate judges of another person's values, that we do not feel entitled to prevent him from pursuing ends which we disapprove so long as he does not infringe the equally protected sphere of others. A society that does not recognize that each individual has values of his own which he is entitled to follow can have no respect for the dignity of the individual and cannot really know freedom.

HAYEK, *supra* note 2, at 79.

[122] *See* KUKATHAS, *supra* note 114, at 139.

[123] *Id*.

[124] It is possible Kukathas draws too strong a conclusion here; it must be noted that Hayek's preferred terminology when discussing the decision-making process is the term *reason*.

is, therefore, some difficulty in reconciling this with his earlier noted criticisms of Mill's approach.

D. The Need for Individuality?

Finally, there is an aspect to Hayek's social system that inadvertently demonstrates how important some form of individuality, even akin to that outlined by Mill, actually is for society. Although he endorses the role of customs and traditions in providing a non-coercive order and thus the basis of a free society, he also notes that any existing set of traditions will not necessarily be the "correct" ones. In fact, it is not clear to Hayek that the existing beliefs and values, particularly in the moral realm, will be of benefit to the society, and can indeed be destructive.[125] Even if the beliefs a society subscribes to are seemingly unselfish, or in Hayek's own words "saintly" values, they could prove to be deleterious and may even lead to a failure of the society generally.[126] What solution does Hayek advance to this possibility? In a truly free society, Hayek claims these possibilities are not a terminal threat, for as long as some dissenters are able to practice alternative methods there will be a viable option if the merits of mainstream behavior is found

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[125] These considerations, of course, do not prove that all the sets of moral beliefs which have grown up in a society will be beneficial. Just as a group may owe its rise to the morals which its members obey, and their values in consequence be ultimately imitated by the whole nation which the successful group has come to lead, so may a group or nation destroy itself by the moral beliefs to which it adheres. Only the eventual results can show whether the ideals which guide a group are beneficial or destructive.

HAYEK, *supra* note 2, at 67.

[126] The fact that a society has come to regard the teaching of certain men as the embodiment of goodness is no proof that it might not be the society's undoing if their precepts were generally followed. It may well be that a nation may destroy itself by following the teaching of what it regards as its best men, perhaps saintly figures unquestionably guided by the most unselfish ideals.

Id.

wanting.[127] It appears that in Hayek's overall system, *at least some individuality* is desirable as a means to advance further options for others to follow in the event of failure in dominant modes of action. This dissension is an important part of his evolutionary perspective.

There appears good reason to concern ourselves with the limitations of Mill's individuality. Hayekian concerns in regards to a constructivist rationality and the role that norms play in the maintenance of freedom are both valuable in highlighting the potential for individuality to strain the social structures that support ordered and free interaction in a society. However, they do not deliver the aesthetic individual a knockout punch. In fact, Hayek also demonstrates a concern for the important presence of individuality in and among the social order. In advocating the benefits that thinking independently of tradition and custom has for the sharpening and development of individual reasoning, Hayek stresses the apparent need for some degree of individuality within a free society. Indeed, Hayek suggests that at least some dissension is valuable as a door to lead society to other options if the current set of traditions is not successful.[128] Finally, Hayek also offers a valuable contribution in

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> There would be little danger of this in a society whose members were still free to choose their way of practical life, because in such a society such tendencies would be self-corrective: only the groups guided by 'impractical' ideals would decline, and others, less moral by current standards, would take their place. But this will happen only in a free society in which such ideals are not enforced at all. Where all are made to serve the same ideals and where dissenters are not allowed to follow different ones, the rules can be proved expedient only by the decline of the whole nation guided by them.

Id.

[128] Like Hayek, Buchanan—whose argument concerns the role of some informal institutions in maintaining order, stability, and ultimately freedom—also emphasizes the failure of simple "rule" following or a completely tradition bound social environment. And yet, Buchanan is also concerned with the blind following of culture. *See* BUCHANAN, *supra* note 86, at 117–18 ("Both anarchy and formalized constitutional structure must be distinguished from a setting in which individuals behave strictly in accordance with customary or traditional modes of conduct, with little or no connection with rationally selected norms. This alternative is likely to be grossly inefficient, and it must be placed beyond the extreme limits of formalised legal structure in its coerciveness. Under such a regime, order is present in the predictability

noting that individuality is indeed a scientific fact. It would appear, then, that despite the apparent conflict between the two in some contexts, individuality and freedom still retain an important connection. The problems of aesthetic individualism as outlined here with reference to the perspectives offered by Hayek, are significant however, and it is hoped that the foregoing discussion has done justice to these arguments.

As has been foreshadowed, the third main section of this paper is an attempt to modernise the general approach of aesthetic individualism. Some of the very same traditions, customs, norms, and ethics, which might be challenged as part of Mill's individuality, play an important role in the maintenance of order. The existence of these social institutions means that less formal rules and coercive control is required to maintain order. In this sense, the customs, traditions, and ethics do not just maintain social order, as Hayek explains, rather, they are an essential ingredient in the emergence of a free society itself. Perhaps the most important question that we are left with is precisely which social structures are most important and should thus be protected from individuality?

IV. A MODERN APPROACH TO INDIVIDUALITY AND FREEDOM

The purpose of this section is to present a revised interpretation of individuality and freedom. In this regard, the theoretical understanding outlined here is in large part inspired by the theory of aesthetic individualism outlined in section two. However, the work takes seriously the potential criticisms of Mill's vision of individuality and freedom that were advanced in section three, primarily through the work of Hayek. The approach to individuality presented here will therefore attempt to transcend some of the limitations identified by these authors and also incorporate insights into the nature of individuality that have been discovered since Mill wrote his theory. This revised approach is presented in segments

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sense, but this order need bear no relationship to the "publicness" of the rules or customs that are being followed.").

that pertain to different aspects of individuality, particularly those weaknesses outlined above. The sections of focus include the scientific basis of individuality, two levels of its manifestation in a society, the cognitive basis for individuality, the need for a rational agreement for mutual constraint, and finally the relationship between individuality, freedom and the social order.

A. Understanding Individuality

For Humboldt the purpose of a human life is individual development, this development leading to the manifestation of a unique and harmonious whole. For Mill, the development of individuality extends even beyond the emphasis of Humboldt, and includes the creation of original and unique ways of living. In particular, Mill strongly advocates the ability of society to accommodate differences and embrace different modes of living. But why are individuals different? Humboldt and Mill take individuality for granted without investigating its source. If an explanation cannot be made in response to this issue, then perhaps support for individual differences might be thrown into question. Accounting for the source of differences should be important if we are to argue that allowing these differences is socially and individually desirable.

The modern scientific understanding of human evolution has exposed a wonderful duality: while the biological differences between humans are small enough to categorise them as from one single species, it is also scientifically established that humans are each unique.[129] Individuality is always there and allowing for it is essential if we are to allow people to be free. In other words, denying individuality is, in essence, denying the freedom to be

[129] It is common for science to examine animals in a way that carves out individual species. When considered with the same methodological perspective, humans are not delineated into separate species. Despite the many differences across race, humans are from the one single species. For an excellent explanation as to the similarities among individuals across the human species in terms of personality that also acknowledges the uniqueness of each individual, see John Tooby & Leda Cosmides, *On the Universality of Human Nature and the Uniqueness of the Individual: The Role of Genetics and Adaption*, 58 J. PERSONALITY 17 (1990).

oneself. Identifying the root source of individuality itself will provide a firm starting point from which to build a modern interpretation of its manifestation in society. The scientific basis for human individuality has developed to an extent that it can now be discussed in concrete terms. Although Hayek and others had noted the diversity of humans through biological differences, the scientific understanding of these differences has increased markedly since their early reference to it. The tools and methods now available to scientists have created the opportunity to investigate the primary determinants of human individuality in terms of both genetic building blocks and the environmental impacts on human trait formation.[130] The scientific basis for individuality can become the link between Mill's call to embrace differences and the issue of whence these differences originate. This section comprises two parts: 1. A basic outline of the scientific explanation of individual differences, and 2. A simple framework that explains the functional realization of these differences through individual behavior.

1. THE SCIENTIFIC BASIS OF INDIVIDUALITY

Human individuality can begin to be appreciated with the simple insight that, in terms of pure heritable genetics, no two humans can be identical, with the rare exception of Monozygotic (identical) twins. The variation in this basic genetic structure is enormous, and humans demonstrate heterogeneity in the observed combinations of heights, and eye, hair and skin coloring, just to nominate a small selection of these traits. However, it is now widely understood that many human traits are formed via some combination of the individual's genetic make-up, i.e., their genome or genotype, and the environmental factors that interact with this genetic structure.[131]

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[130] It should be noted that there is still debate and inquiry into determining when genetic influences dominate, and when environmental issues are the primary force behind the development of specific traits. For an outline of these issues, and the continuing discussion of the nature versus nurture debate, see Steven Pinker, *Why Nature and Nurture Won't Go Away*, 133 DAEDALUS 5 (2004).

[131] The traits of an individual are their characteristics, which broadly include their physical composition, behavior, and tastes and preferences.

These factors interact to produce the overall individual phenotype, or in layman's terms, how the individual "turns out". On the one hand, the realization of phenotype from a genotype can be simple, as many traits—such as eye color—are determined by the relationship between the genes inherited from each of the parents without the intrusion of environmental effects. On the other hand, many characteristics of actual human behavior are the product of *interaction* between a basic heritable genotype and different aspects of the environment. Once we recognize the unlimited environmental factors that also affect individuality, we can understand the enormous and potentially infinite number of ways that humans may differ.[132] In fact, environmental factors have such an enormous impact on the final realization of the phenotype, or the traits that people possess, that even monozygotic twins demonstrate enormous heterogeneity. Environmental factors that can begin as early as the womb affect the development of the individual and even the range of genes that are "switched on".[133]

The evolution of an individual's phenotype is often difficult to trace and at times even mysterious; hence the term "complex traits" is used in reference to these features of individuality. While complex traits can include some aspects of our physical composition, they also extend to our behavior and personality development. Psychological characteristics are an example of complex traits that have been the subject of much study and research. For many years it had been assumed that the environmental factors comprehensively dominated genetic effects in determining psychological traits. However, research conducted in the area of quantitative genetics

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[132] ROY H. BURDON, GENES AND THE ENVIRONMENT 2–3 (1999) ("Genes provide the initial guidelines for the development of an organism, and a range of possible phenotypes. Within that predetermined range, a specific phenotype is moulded by environmental influences.").

[133] *Id.* at 2–3 ("An organism's phenotype unfolds during development and maturation when genes, and the products derived from them, interact with one another and with environmental factors.").

has, in recent years, suggested that psychological traits are the product of a mix of both genetic and environmental factors.[134]

Understanding of the environmental effects on the development of individuality has advanced with the use of twin studies. Extensive research has attempted to use identical twins to identify more precisely the source of differences between individuals and to understand the detail of environmental effects. In these studies environmental factors are split into two: those environmental factors that are shared by the twins and those that are not. Non-shared environmental effects are those environment influences that are exclusive to one of the siblings, e.g., peer group activities and pressures, accidents, different employment, etc. The shared environmental factors, such as the familial structure and the home, were predicted to be the cornerstone in determining the similarities and differences between individuals.[135] However, the empirical results of these studies have uncovered significant evidence that the non-shared environment is dominant in determining an individual's uniqueness.[136] Indeed, it is now argued that the environment encountered *outside* the home is dominant in determining many of the individual's traits and decisions.[137]

Recognising that other factors outside both genetics and home environment affect the development of an individual is

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[134] For one discussion of these findings that genes are responsible for *at least some* of the variation in psychological behavioral traits, see Robert Plomin et al., *The Genetic Basis of Complex Human Behaviors*, 264 SCI. 1733 (1994).

[135] Shared environmental effects are assumed a source of phenotypic similarity.

[136] *See* DAVID D. ROWE, THE LIMITS OF FAMILY INFLUENCE: GENES, EXPERIENCE, AND BEHAVIOR (1994); Robert Plomin & Denise Daniels, *Why are Children in the Same Family So Different from One Another?* 10 BEHAV. BRAIN SCI. 1 (1987). The literature on "twin studies" has increased dramatically in recent years. Both of these texts provide examples of studies that find dramatic differences between Monozygotic twins that are traced to non-shared environmental effects.

[137] In a pair of well-known works, Judith Rich Harris has argued persuasively that children obtain most of their traits from the peer group rather than the family. Children respond to their peer group in the formation of their personality. See JUDITH RICH HARRIS, NO TWO ALIKE: HUMAN NATURE AND HUMAN INDIVIDUALITY (2006); JUDITH RICH HARRIS, THE NURTURE ASSUMPTION: WHY CHILDREN TURN OUT THE WAY THEY DO (1998).

very important for the argument of this article. It leads us to consider the effect of broad social environment on individuality.[138] It is clear that many traits are purely environmentally determined, and are not heritable at all. For example, many cultural encounters will have a significant effect on the development of the individual, and the more exposure the individual has to different social and cultural experiences, the more complex the process of individual development becomes. We are left with a spectrum of potential determinants on individuality and development. At one end are the purely heritable traits of an individual, such as eye color. At the other end of the spectrum are the purely environmental impacts such as cultural exposure. In between these extremes is a range where the two contribute differing proportions to the individual's make-up. In the context of these different factors, the individual is also making choices, often in response to the various stimuli around them. Through these choices uniqueness in personality, and ultimately individuality, will emerge on its own.

The scientific basis for individuality is readily apparent. The emergence of individuals is clearly determined by a mix of genetic information and exposure to both the immediate and social environment. The combination of these elements works to create the individual phenotype and the specific mix of the two remains in many instances remains mysterious. [139] Factors outside the home

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[138] For another recent discussion of the importance of social environments for individual development, see Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007). Rosenbury explains the significance of the time a child spends between home and school, and its role in shaping the development of children. Although such time appears small in comparison to the time allocated to home and school, it should not be underestimated in significance. The relevance for the current article is simply that environments of all types have a very significant impact on individual development.

[139] Even those such as Pinker, who believe that we can pursue these determinants of what effects what, and that it is not too complex to prevent us from study, admit the complexity and outline the detail of it. *See* Pinker, *supra* note 130, at 14 ("Of course, concrete behavioral traits that patently depend on content provided by the home or culture–which language one speaks, which religion one practices, which political party one supports–are not heritable at all. But traits that reflect the underlying talents and temperaments–how proficient with language a person is, how reli-

environment often generate the greatest effect on individual personality, and cultural exposure is therefore one of the primary factors behind individual development. This is significant, as it suggests any theoretical explanation of individuality must come to terms with cultural experience and the nature of choice as some of the primary sources of individuality.

2. TWO FUNCTIONAL LEVELS OF INDIVIDUALITY

Having established the scientific basis for individuality, this subsection will now consider the manifestation of this individuality in the social environment. A central argument of this section is that the manifestation of individuality in society is more variable than outlined by Mill. By focusing on distinctly original actions, Mill has made the expression of individuality both restrictive and demanding. Therefore, the first task pursued here is to loosen these bounds on individuality. Indeed, the most important insight gleaned from the scientific basis for individuality is that individuality is an ever-present phenomena: regardless of what behavior is observed, individuality is always in existence. This section will contend that there are, however, different functional levels at which this individuality materializes.[140]

Individuality will be divided into two distinct categorises. The first is a lower functional level individuality, which can be summarised as simply the variability of tastes and preference that can be exercised through choice. This is perhaps more consistent with the interpretation of Humboldt, whose discussion implies that individual development occurs through choice among alternatives and an increasing exposure to varying circumstances. The second is the higher functional form of individuality, which is the more demanding form of "individuality as originality" that represents

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gious, how liberal or conservative–*are* partially heritable. So genes play a role in making people different from their neighbors, and their environments play an equally important role.").

[140] I would like to specifically acknowledge Paul Dower's help with this particular distinction.

the centrepiece of Mill's approach.[141] The lower functional level individuality will be considered first, as it is contended here that this mode of individuality is the most dominant manifestation of individual differences. A discussion of the higher functional level of individuality will follow.

The way differences between individuals are most often observed is not through the development of purely original modes of thinking and behavior. Instead, the heterogeneity between individuals is most apparent through their unique set of choices. Given the array of options available to an individual in all facets of life, each individual makes the choices that will define their own life. This is driven by taste and personality, and may sometimes emerge as an observable set of preferences such as a preferred style.[142] This simple choice among available options is defined here as the lower functional level individuality. While this has been termed individuality at a "lower" functional level, this is not to suggest secondary importance in the life of an individual. In fact, simply choosing among the many options open to an individual is sufficient in expressing individuality. Some thought regarding the myriad of options presented to an individual demonstrates that there is a potentially limitless combination of life choices an individual can make, in terms of occupations, pastimes, and the simple exercise of tastes and preferences. Through such choices individuals reveal the uniqueness of their own self.

Of course, it must also be acknowledged that choice sets are not always without constraint. Indeed there are some options, particularly in relation to religious and cultural practices, that

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[141] For another discussion of originality in the context of individuality, see Talbot, *supra* note 8.

[142] Choices made under duress may suppress individuality temporarily, but not definitively. Forcing a youth to attend a certain school or college, or participate in a social program, may squash hopes of other pursuits. However, it will also expose the individual to a different set of experiences, which will in turn generate individual actions that are alternative. This is a point that deserves rigorous discussion on its own.

are seemingly mutually exclusive.[143] Yet even with the imposition of this constraint, there is an enormous (and potentially infinite) number of ways an individual's unique choice set can differ from that of others. At the simplest level, consider all possible employment options, let alone the enormous range of leisure activities and simple consumption choices. Thus individuality is manifested in the individual's unique selection from a menu of possible actions. Individuality, therefore, need not be as demanding as Mill has implied, and can materialize simply through day-to-day choices.

In many ways, this lower functional level of individuality is most similar to Humboldt's interpretation rather than Mill's. Humboldt emphasizes that the individual will *develop* as an individual through a variety of experiences, and even specifies this exposure as an essential ingredient in the growth of individuality. Like Humboldt's interpretation, this functional level of individuality has the most scope to develop when the individual has exposure to a greater variety of experiences. Similarly, this is the type of individuality that is implied by Hayek in his reference to cultural choices: traditions offer the individual a richer cultural life from which to draw. This argument obtains even more support from the modern scientific studies of individuality which seem to demonstrate that exposure to different environmental factors can be the most important factor in generating individual differences between otherwise identical individuals.[144]

The contention that alternative cultural experience offers scope for the manifestation of individuality through choice can be further extended to other social experiences. Cultural tradition is not the only set of options from which the individual can make a choice, and new life experiences are not limited to other cultural traditions.

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[143] This assumes the practice is not modified in any way. Modifying any practice in some way may make it possible to be combined with other activities that are seemingly otherwise irreconcilable.

[144] The reader may recall specifically the brief discussion of monozygotic twins, *supra* p. 49–51. In the case of such twins, it is generally found that non-shared environment, that is, environmental factors outside the home, have a large impact on the development of the two individuals.

Through the market, the individual can be presented with a range of commercially based experiences as well. In fact, the expansion of the menu of cultural experiences and continued commercial expansion have been shown to be related.[145] The market is a vehicle capable of transferring new cultural experiences across time and space, as through trade individuals can be exposed to consumer goods produced in another culture.[146] In summary, there is ample scope for the manifestation of individuality through this most basic functional level: simple choice. The discussion now moves "up" to the higher functional level.

Higher functional level individuality is defined here as being consistent with Mill's own more demanding version. In the instance of higher-level individuality the individual pursues his course of action independently of customs and traditions. Mill's approach implies that individuals select their own specific course of action, and this may often conflict with an existing social custom or tradition. While Mill has emphasized this type of individuality, the empirical reality is that this higher functional level of individuality is rarely exercised. In fact, utter originality in nearly any practice is seldom observed. Certainly small modification in relation to the accepted behavior of others is perhaps common as individuals make marginal adjustments to common social practices to "better

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[145] As Cowen explains:

> A typical American yuppie drinks French wine, listens to Beethoven on a Japanese audio system, uses the Internet to buy Persian textiles from a dealer in London, watches Hollywood movies funded by foreign capital and filmed by a European director, and vacations in Bali; an upper-middle-class Japanese may do much the same. A teenager in Bangkok may see Hollywood movies starring Arnold Schwarzenegger (an Austrian), study Japanese, and listen to new pop music from Hong Kong and China, in addition to the Latino singer Ricky Martin.

TYLER COWEN, CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES 4 (2002).

[146] Cowen also notes a number of critics of this perspective, including Alexis de Tocqueville, John Gray, Benjamin Barber, Jeremy Tunstall, and Frederic Jameson. *Id.* at 2–4.

fit" their own lives. However, absolute novelty is extremely scarce in reality. In many fields of activity, individuals may strive for their entire lives to achieve pure originality, achieving it only once—if at all. This is particularly true in those pursuits where originality is most valued, such as the production of art. The implication is that the higher functional level individuality can be a demanding form of behavior, and its occurrence is likely to be rare.

There is a sub-section of higher-level individuality that needs to be acknowledged in order to temper this emphasis on celebrated incidences of individuality. Previous writers have argued that this is the distinction between the "genius and the crank". The behavior of the latter is, for example, being too far removed from common expectations and universal appeal.[147] Of course, identification of precisely how far from common expectations an incidence of higher-level individuality must be to drift from one classification to the other is seemingly impossible. In fact, the distinction between the two may often be overdrawn, as the genius may himself be (temporarily) regarded as a "crank". This sub-section of higher-level individuality will be discussed in later sections. For the moment, it is important to theoretically deal with it as within the same category, acknowledging that it is a manifestation of individuality and thus needs to be accommodated.

The acknowledgement of the higher-level individuality that is "strange" naturally leads to the notion that this higher-level individuality will sometimes face the social resistance Mill was

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> It is not that, beyond a certain limit, individuality does not appeal to us as desirable; it is rather that we feel that that which is bizarre is less truly individual that that in which the uniqueness recognizes certain bounds. We do not regard the crank as having more originality than the genius, but as having less. The genius is always, indeed, a highly differentiated being; but at the same time, unless a man can make us feel that he speaks the common language of humanity, that he sounds the deep note of universal passion, that he gives expression,—in his own way,—to the experience of us all, we refuse him the name of genius; we refuse to recognize in him individuality of the highest order.

Talbot, *supra* note 8, at 602.

fearful of. Through breaking with traditions and customs, the individual is likely to arouse the suspicion of those who follow them. This is another aspect of Mill's approach to individuality that remains as applicable in contemporary society as it was during his own lifetime.[148] As the quotation from Mill at the beginning of this paper suggests, the less that individuals have been exposed to diversity and alternative forms of behavior, the more suspicion they are likely to encounter. This is not to suggest that lower level individuality will never encounter such a response, as in fact it may also be subject to some social resistance—individual stereotypes can generate expectations of what are appropriate combinations of choices. However, the activity itself will be unlikely to encounter criticism from others.

A final point regarding these functional distinctions and the existence of individuality should also be noted. While always present, sometimes individuality does not manifest itself in observed behavior. In some social contexts, individuals make the same choices and behave in the same way. Thus, individuality cannot be observed in such behavior and hence does not qualify as either of the functional manifestations described above. In these instances, the heterogeneity among the individuals does not cease to exist; it simply remains *latent*. The same set of individuals may, in another context, behave in a way that documents their individuality clearly.[149]

The distinction made between the two types of individuality is simple but valuable. Given the genetic or scientific basis for individuality, it is clear that individuality is an ever-present

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[148] For a modern and systematic explanation of social resistance to new or "deviant" behavior, see YOUNG BACK CHOI, PARADIGMS AND CONVENTIONS: UNCERTAINTY, DECISION MAKING, AND ENTREPRENEURSHIP (1993).

[149] It is widely recognized that generally individuals appear to demonstrate a need to feel distinct. *See* Beebe, *supra* note 4 at 819–24; Vivian L. Vignoles et. al, *The Distinctiveness Principle: Identity, Meaning, and the Bounds of Cultural Relativity*, 4 PERSONALITY AND SOC. PSYCHOL. REV. 337 (2000). However, even when differences are not observed in behavior, the literature on genetics and individual development discussed earlier, would suggest they are always there. I would like to thank Paul Dower for assisting in the clarification of this point.

phenomenon: *individuals are unique*, and the lower functional level individuality allows for this permanence. It is through unique combinations of activities that individuality most commonly manifests itself. Thus while we do not always observe purely original behavior, individuality is still in existence. Recognising the higher functional level individuality, the type celebrated by Mill, is also important. However, outside of "crank" behavior", we must note that it is less frequent and a much more demanding behavioral form. Focusing solely on higher-level individuality is a very demanding way to gauge the existence of individuality in a person.

B. Rationality and Individuality

This section has two purposes. It first examines the various thought processes that may underlie the manifestation of individuality. The primary motivation for this is Hayek's critique that Mill's interpretation of individuality requires a constructivist form of rationality. However, the discussion will also examine alternative interpretations of rationality, and in particular the cognitive basis for the different forms that individuality may take. This section will argue that Hayek's concerns with constructivist rationality *at the individual level* can be alleviated, and perhaps some elements of his criticism of Mill's interpretation of individual rationality can be overcome once and for all. The second purpose of this section is to consider the importance of a rational agreement to the founding of a social order. In particular, this discussion will link the formation of a rational agreement to the manifestation of individuality. This rational agreement might be interpreted as a form of social contract, or simply the day-to-day recognition of laws and norms. Rational agreement will be shown to be highly important in circumscribing limits to individuality.

1. INDIVIDUALITY AND NON-CONSTRUCTIVIST RATIONALITY

Lower level individuality, i.e., choice among existing options, will not require a rationality that is as demanding as that constructivist form of which Hayek has been fearful. In the simplest terms, lower level individuality requires only the ability to make a choice, as at

this functional level the individual is simply choosing from among established modes of behavior. This choice does not even require that the individual "know" all possible (or even available) long-run options or the possible outcomes of the various choices. Any notion of rationality that governs this choice may certainly be a form of "bounded rationality"; strict maximization in the traditional economic understanding may be ruled out.[150] Once the theorist acknowledges the presence of such knowledge deficits in individual decision-making, the depiction of an individual choice need not be based on a constructivist rationality. The decision making *process* which underpins the lower functional level of individuality can still be categorised as rational, as the individual chooses an option as directed by her preference. Lower level individuality, therefore, demonstrates rationality as a process, wherein the agent makes a rational choice based on their own belief that the action selected will lead to the fulfilment of their respective preference.[151] The general rational actor assumption, therefore, need not be dispensed with.[152]

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[150] Some of the seminal explanations of bounded rationality can be found in Herbert A. Simon, *Theories of Decision-making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253 (1959). See also Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99 (1955); *Theories of Bounded Rationality, in* DECISION AND ORGANIZATION: A VOLUME IN HONOR OF JACOB MARSCHAK (C.B. McGuire & Roy Radner eds., 1987).

[151] *See* Frederic Laville, *Foundations of Procedural Rationality: Cognitive Limits and Decision Processes*, 16 ECON & PHIL. 117 (2000). Laville looks beyond optimization in decision making and instead outlines an interpretation of decision making as a procedural rationality. In essence, he draws out the details of the position explained by Herbert Simon, *supra* note 150.

[152] Of course, the individual's beliefs that underlie the decision process can certainly be subjective. This is particularly true regarding the relationship between cause and effect—different agents may have alternative views as to precisely how to achieve a specific outcome. However, acknowledging this subjectivity does not undermine the *process* of rational decision making: actions and choice need only be consistent with the individual's own subjective beliefs (and not everyone else's). When restricting focus to the lower functional level of individuality, the potential for differences in subjective interpretation of a decision are of little import. They may cause different decisions in the same circumstances, but the functional outcome is the same: choice among existing options. In the case of higher level individuality, which is now to be considered below, this is perhaps more significant. Beliefs and

Categorizing the cognitive process behind the higher-level manifestation of individuality is more challenging. At first glance, the demands that Mill's form of individuality makes of rationality do appear lofty.[153] As a reminder, constructivist rationality suggests that individual actions are based on unrealistically specific plans and anticipated details in regards to the various ramifications and precise consequences of these actions. In fact, constructivist rationality would accept nothing less, and would be unwilling to act without rationalizing the reasons underlying every chosen behavior. However, it is not the case that constructivist rationality is the necessary source of this mode of behavior. In fact, and as will be explained below, it may be that other cognitive processes are the more likely causes of many instances of higher-level individuality.

There are two simple scenarios in which the decision-making process behind higher-level individuality largely resembles lower-level individuality and does not suggest a constructivist rationality. The first is the possibility that the behavior, while outside convention, does not possess creativity, i.e., other individuals are aware of the option and simply choose not to pursue it. This example seems to lie at an awkward juncture *between the two forms of individuality.* The behavior may not represent a socially acceptable option and therefore it is not often regarded as a feasible choice. It is unlikely that such actions would be considered particularly novel, given that other individuals are well aware of the behavioral form but simply ignore it. For example, it is acknowledged that in many instances individuals follow social norms in spite of the fact they appear to work against the individual's self-interest, at least in the short

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preferences will result in different individuals, in the same circumstances, making different selections, and potentially even new alternatives and thus demonstrating a higher functional level of individuality. For a discussion of the general rational actor assumption, see DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, ECONOMIC ANALYSIS, MORAL PHILOSOPHY, AND PUBLIC POLICY (2d ed. 2006).

[153] When considered as a *decision making process*, the rationality which underpins higher level individuality may be precisely the same form of preference satisfaction as that which gives rise to lower level individuality, i.e., the course of action is intended to satisfy a preference.

term.[154] Breaking with such norms would not always require creative innovation nor constructivist rationality. In some instances, breaking with norms simply represents a preparedness to accept any social sanction as the cost to the pursuit of self-interested action.

The second scenario wherein the cognitive process underlying higher-level individuality need not be considered significantly different from that giving rise to lower-level individuality is in relation to differences in social context. Understanding the different social contexts in which certain forms of individual behavior occur is important in recognizing the potential cognitive sources of what appears to be higher-level individuality. For example, an action may represent higher-level individuality in one specific social context. Elsewhere, the very same action may be registered as a simple choice, and therefore lower-level individuality. The cause of these two different interpretations is a restricted subset of information in existence at the former location in comparison with the social context of the latter. In simple terms, an instance of higher-level individuality may simply be an activity learned or observed in another social environment. Indeed, Humboldt refers to this possibility in his allusion to the experience and influence of other cultures and traditions on an individual's development. The most important point for the present discussion is that no constructivist rationality is required for the manifestation of such individuality.

Having dealt with simple examples, which seem to lie awkwardly between higher and lower-level individuality, we can now enquire as to what types of cognitive processes can be identified as leading to the pursuit of genuinely innovative activity, i.e., higher functional level individuality. The first explanation to be offered is that the action is derived from some incident of pure chance or accident. In this instance, the activity may be pursued reactively, wherein the cognitive process leading to the activity is

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[154] For a general discussion of the social forces that might prevent individuals from pursuing their self-interest, see Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSPECTIVES 99 (1989).

simply a quick and even immediate response to outside stimuli. Such spontaneity is clearly the antithesis of a strictly constructivist rationality, and yet it may also be the source of higher-level individuality that Mill focuses on. There is no requirement that the individual know in advance the precise outcomes of this activity, and no need for the action to constitute part of a broader plan on the part of the individual. In fact, this type of "chance" behavior would seem to be the opposite.

The second explanation is in relation to the cognitive process behind those acts in which individuals consciously pursue a truly new mode of behavior. In both economic and philosophical literature, novel and creative behavior which appears to have no clear relation to previous activity, is described as action that stems from the imagination.[155] This connection has been identified by economics scholars who have studied entrepreneurship and emphasized creativity as the source of new modes of behavior. Additionally, the same link has been made in some specific branches of modern philosophy.[156] Similarly, the most likely cognitive source that underlies the manifestation of higher-level individuality is simply one of imagination, i.e., the individual's imagination leads to a new type of action. However, the question still remains, how much of the subsequent action need be planned or predicted on the part of the acting individual?

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[155] A good introduction to the idea of imagination in the making of choice is provided by G. L. S. SHACKLE, IMAGINATION AND THE NATURE OF CHOICE (1979). For a classic work on the philosophical foundations of this perspective, see HENRI BERGSON, CREATIVE EVOLUTION, (Arthur Mitchell trans., Henry Holt & Co. 1911) (1907).

[156] *See, e.g.*, LUDWIG M. LACHMANN, THE MARKET AS AN ECONOMIC PROCESS (1986); G. L. S. SHACKLE, EPISTEMICS & ECONOMICS: A CRITIQUE OF ECONOMIC DOCTRINES (1972). These are both examples of works that emphasize creativity and choice in economics. For an elaboration of these ideas in theories of entrepreneurship, see Keith Jakee & Heath Spong, *Uncertainty and Institutional Change in the Entrepreneurial Process*, *in* CHANGE, TRANSFORMATION, AND DEVELOPMENT (J. Stan Metcalfe & Uwe Cantner eds., 2003). While these approaches are based on little science, representing a largely empirical and philosophical claim, they do restore a place to the role of imagination and creativity in an understanding of human choice.

If imagination can be the source of those instances of truly higher-level individuality, the next step in pin-pointing the type of rationality that governs the action is to consider how this "imagined" activity is transferred into action. Again, it is not necessary that this action is the product of constructivist rationality, where the individual has seemingly calculated a precise and detailed outcome in advance. Rather than any precise calculation, the action may instead be the product of trial and error. Repeated efforts of trialing alternative actions, which might include many failures, can lead to the selection of one new activity that is worth pursuing. This might give the impression of calculative rational planning which anticipates precise outcomes. However, it is simply a combination of imagination and plans of action that are consecutively exposed to repeated trials. Thus, what appears to be well-planned higher-level individuality may instead be the outcome of simple trial and error—a series of actions as part of an experimental process aimed at achieving something resembling the imagined idea. The important point here is that such a cognitive process contrasts with the more constructivist rationality that Hayek opposed as part of Mill's theory of individuality.

As has been demonstrated, constructivist rationality does not seem to be the necessary cognitive process that drives a higher functional level of individuality like that which Mill describes. Perhaps it is, at this point, worth reinterpreting Hayek's critique of Mill on this issue. Hayek's arguments against a constructivist rationality that presents intention to design and create any form of *social order* remain some of the most significant in modern social science. And to be fair to Hayek, this concern was the primary object of his critique. However, in the period since Hayek contributed his critique of alternative forms of individualism, understanding of decision-making processes has developed, often adding nuances to his own earlier discussion of the topic.[157] Hence, there are a number of qualifications we may

[157] We can perhaps assume Hayek's position on the issue of rationality in individual decision-making would now be different, and that he might consider retracting

place on the process of rational decision-making that underpins individuality. First, the type of calculating rationality implicit in a strict interpretation of the homoeconomicus concept can be expelled and replaced with a bounded, even ecological, rationality that acknowledges explicit cognitive limitations.[158] Finally, higher-level individuality leads us to acknowledge the often underestimated role of chance, imagination, and simple trial and error.[159]

2. INDIVIDUALITY AND RATIONAL AGREEMENT

To some degree, both Mill and Humboldt acknowledge the importance of limits on individuality. While Mill identifies the harm principle as the only instance in which society may intervene in the activities of individuals, he also notes that individuals should sometimes limit their behavior to prevent a nuisance to others. He even argues that rules of justice contribute to the development of individuals by forming feelings for others and causing them to recognize the affect of their behavior.[160] Humboldt's position is that those aspects of individuality that can peacefully coexist among others represent a worthwhile human quality; aspects of individuality that cannot exist harmoniously in society are not to be encouraged.[161] In both approaches there is an *implicit* reliance on the ability of individuals to identify appropriate limits or bounds on their own behavior. However, it can be argued that neither author develops this point sufficiently given that it is central to

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those statements where he extended his critique of constructivist rationality to the context of individual decision-making.

[158] The understanding that economics has moved beyond an interpretation of rationality that resembles constructivism to a less demanding (and perhaps realistic) appraisal of rational decision making can be found in Vernon Smith's Nobel Lecture. *See* Vernon L. Smith, C*onstructivist and Ecological Rationality in Economics*, 93 AM. ECON. REV. 465 (2003).

[159] Other factors that might also affect the choices of different individuals include the psychological process of self-creation and ego development. *See, e.g.*, ERIK H. ERIKSON, IDENTITY AND THE LIFE CYCLE (1980); JONATHAN GLOVER, I: THE PHILOSOPHY AND PSYCHOLOGY OF PERSONAL IDENTITY (Penguin Books 1991) (1988).

[160] MILL, *supra* note 1, at 117.

[161] HUMBOLDT, *supra* note 35, at 27.

the compromise between the concepts of individuality and freedom and an essential ingredient in the type of society which they advocate. This section will present an argument that the peaceful existence of individuality within society requires rationality among individuals such that they recognize the value of limiting their own behavior when it impedes upon others.[162] This point, while simple, will be shown to be important when considering individuality and social order in later sections.

While it has been shown that individuality is a factual and ever-present phenomenon, prior to the functional manifestation of individuality in a social environment some agreement on a level of common restraint must first be obtained. A degree of rationality must be assumed for the purposes of obtaining this agreement on mutual restraint. The rationality that must be relied upon is a simple understanding of the *reciprocal* nature of the agreement that is being sought: *an agreement wherein one secures the limits of others' behavior must begin with a realization that one's own behavior must itself be constrained*. There is, of course, nothing new in the suggestion that such restraint must be observed, whether this be in the form of abstract social contract or simply the acquiescence to an extant set of rules and laws. What is to be emphasized here, however, is that this mutual restraint is imperative for the functional realization of individuality itself. In fact, this rational agreement must preclude any expression of individuality in society.

Functional individuality requires an opportunity for its manifestation. A social environment with tolerance for alternative choices and expression is a pre-requisite for the emergence of individuality. Furthermore, the greater the range of available choices and expressions, the greater the opportunity for individuality to manifest itself.[163] While

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[162] It is likely the higher functional form of individuality is that which is of most concern on this issue, i.e., that whenever individuals are acting outside established practices they are capable of recognizing the impact this will have on others.

[163] For works that focus on the possibility of measuring the opportunity for choice and individuality, see Robert Sugden's recent articles: *Opportunity as a Space for Individuality: Its Value and the Impossibility of Measuring It* and *The Metric of Opportunity*, Sugden, *supra* note 5. In a similar theme, the work of Amartya

for each individual a maximum opportunity may appear desirable, at some critical point the expansion of one individual's range of activities will begin to erode the range available to others. The reciprocal is also true, and so each individual has the potential to threaten the opportunity available to others. It is only through a mutual recognition of this potential conflict that the formation of a rational agreement in support of some behavioral restrictions becomes possible. In short, we must rely on an individual's ability to make a rational agreement in support of their own individuality.

The idea of a "rational agreement" is borrowed from economist Frank Knight, who urged that for freedom to exist, some level of induced restraint must be sustained. However the nature of the restraining device, whether formalised or otherwise, cannot be coerced—it must be a "rational" agreement the terms of which satisfy both agents.[164] As Knight further emphasized, individuals may break the bounds of this underlying agreement as long as such temporary adjustment is voluntary for all parties. What Knight was describing is the often-overlooked importance of informal agreement between individuals, and its ability to change at the discretion of the individuals themselves. There is a fluidity in the rational agreement that is being described which allows individuals to make

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Sen examining individual capabilities is also related to this concept. *See* SEN, DEVELOPMENT AS FREEDOM, *supra* note 5, at 54–86 (Chapter 3, *Freedom and the Foundations of Justice*).

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> The ultimate limit of social freedom is realized when all the members of any social aggregate, who would otherwise infringe upon one another's sphere's of individually free action, and so come into conflict, "freely" agree in the formulation of such boundaries. The boundaries still exist, and have essentially the same meaning, when individuals associate with any degree of intimacy in any way or for any purpose. In short, coercion arises or exists whenever one person associates with another or affects him in any way, and the terms of the relationship are not "voluntarily" and rationally accepted by the later. Within a sphere of action defined by right law (in either of the meanings already distinguished), an individual is free in the purely individualistic or Crusoe sense.

2 Frank H. Knight, *The Meaning of Freedom and the Ideal of Freedom: Conditions for Its Realization*, *in* SELECTED ESSAYS BY FRANK H. KNIGHT 177 (Ross Emmet ed., 1999).

adjustments among themselves voluntarily as their own behavior changes. It is central to the fluidity of this agreement that any changes are indeed mutually agreeable.

The previous point, which stems from Knight's discussion, has some important implications for the agreement that underpins the manifestation of individuality. The potential fluidity of the rational agreement demonstrates that the type of agreement at issue is not one that is represented simply by the observance of law. In fact, the rational agreement described here is one that underlies law, and the law may simply encode some subsection of this broader agreement. It therefore includes the range of informal space that the law is too cumbersome (one might even say, inefficient) to manage.[165] The fluidity of this agreement is further highlighted when one considers that it is not simply designed *ex ante*—indeed it could not be! Many activities, particularly those of higher-level individuality, may strain social relations in a way that is largely unanticipated. Instead, an individual may *discover* that some new form of behavior is a nuisance to the other. In recognising the reciprocal nature of rational agreement, the individual must adjust their behavior or obtain permission from the other for continuation. Hence, rational agreement may be subject to continual adjustment due to instances of individuality in a way that cannot be feasibly achieved by formal legal codes.[166]

It should be emphasized that the agreement of mutual self-restraint is rational precisely because it is in the interests of individuality for each party. Self-interest and self-restraint are compatible in this case because

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[165] *See* Eric Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996).

[166] The point is that the idea of rational agreement is broader than what most people recognize. As an analogy, consider the formal constitutional document. Recent scholarship by Ernest Young has argued that the Constitution, when interpreted by function, rather than strict form, is much broader than most people would define it. Thus changes in the structure of government have emerged in ways that do not appear to be discussed by the canonical document. *See* Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 408–73 (2007); Ernest A. Young, *The Constitutive and Entrenchment Functions of Constitutions: A Research Agenda*, 10 U. PA. J. CONST. L. 399 (2008).

they are directed at obtaining the reciprocal commitment of others. As other authors have pointed out, self-restraint is rarely an end in itself, but instead a sacrifice aimed at binding others.[167] A constitution for example, may be interpreted as such a binding mechanism, most specifically a pre-commitment device aimed at restricting others. But self-interest also may require the adjustment of the terms of agreement when behavior changes. When the individuality of one agent breaks with the expectations of another, whether this be inadvertent and unintentional or otherwise, adjustment can be made. If adjustment is made that is mutually agreeable to both parties, then the rational agreement remains intact.

If individuality expands such that it overlaps the range of another agent, and if no adjustment is forthcoming, the result is likely conflict. The continuation of individuality that will ultimately lead to conflict is a result of an inability (unwillingness) to "see" or acknowledge the impact such behavior has on others. This type of individuality will be referred to here as "blind individualism." On one hand, while blind individualism represents the breaking down of the rational agreement, it need not be considered irrational. The individual may have made their own decision that it is worthwhile, at least over a short-run period, given their respective preference. This may be the case when the relative power structure of two agents is such that unrestrained individuality is unlikely to meet with a comparable challenge from the weaker agent. Left unchecked, blind individualism and the associated breakdown in rational agreement may be a force leading to Hayek's concerns with Mill's individuality. The problems associated with blind individualism will be discussed in more detail below.

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[167] This argument obtains considerable support from the work of Jon Elster, who examines the motivation of the individual to exercise self-restraint and commit to contract, even in terms of constitutional agreement. In the second of two important works, Elster adjusts his emphasis to reflect the decision to restrict oneself as a rational strategy used to elicit the similar commitment from others. In his own terms, binding oneself with pre-commitment is aimed at securing the similar commitment of others. For the initial exposition of a rational decision to bind oneself, see JON ELSTER, ULYSSES AND

C. Individuality, Spontaneous Order, and Freedom

Reconciling individuality with a spontaneous social order is an important consideration: if individuality challenges those institutions which generate stability, then it is possible that individuality is itself not compatible with a free social order of the type Hayek emphasizes. This conflict highlights most precisely the differences between Mill and Hayek and the present section is an attempt to deal with this conflict directly. One may understand this discussion as an attempt to provide some answers to the following question: How much individuality can a free social order endure and still remain viable?

This section begins by arguing that individuality at the lower functional level will not damage spontaneous order, social stability, and the free society these informal structures engender. However, individuality at the higher functional level—the type Hayek interpreted as a threat to social order—represents more of a challenge. While some examples of higher-level individuality are shown to be benign, this section also seeks out explanations as to how blind individualism might be automatically tamed by a free social structure. In particular, social norms that solve conflict are identified as the most important in maintaining such a social order. The analysis is therefore restricted to those specific norms ahead of other informal institutions, and this discussion takes place in the first subsection. The second subsection focuses solely on the processes of social decision-making and contends that these processes are a social context in which individuality is inappropriate. Finally, the third subsection briefly turns to the role of the state that might be ascribed. In outlining the difficult relationship between individuality and the state, an important distinction will be made between the state's role in protecting individuality on the one hand and any efforts in directly contributing to individual development on the other. A continuing theme emerging from this whole section is that the *rational*

THE SIRENS (1984). For his second analysis, see JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT AND CONSTRAINTS (2000).

agreement remains central to the preservation of a free social order. In short, individuality can be accommodated, but only if rational agreement is maintained. This is particularly true when individuals are participating in those social mechanisms and processes that manage changes in political office or even the adjustment of rules themselves.

1. INDIVIDUALITY AND INFORMAL SOCIAL STRUCTURES

Lower-level individuality, defined above as the selection of behavioral forms from among *existing practices or activities*, should not threaten the informal social structures that maintain social order and freedom. The reasoning behind this contention hinges on the assumption that any such practices and activities currently in existence are compatible with the social rules and norms that provide social order in society.[168] In other words, the subset of behavioral options from which an individual selects are drawn from among the larger set of pre-existing activities and practices. These norms and rules have evolved over time in support of such activities.[169] For example, an individual's life is composed of their selected occupation,

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[168] This argument rests on the assumption that whatever set of social rules and norms currently exist are stable. One can interpret this as a theoretical dependency on the existence and value of the status quo. The status quo is not without action, or even change, but instead a reliable set of rules and expectations that allows for future plans. For an explanation of its value in understanding potential contractual adjustment, see BUCHANAN, *supra* note 86, at 74–91. *See also id.* at 77 ("The whole set of rules and institutions existing as of any point in time defines the constitutional status quo. This set includes more than an imputation or assignment of private ownership claims, along with the rules under which these claims may be exchanged among persons and groups. The existing situation also embodies rights of membership in the polity, the collective organ of community, and this entity in its turn carries specified powers or rights to undertake the provision and financing of public goods and services. The constitutional status quo should not be interpreted to embody rigidity in social interaction. Shifts in individual claims may take place, provided that these are themselves processed through defined rules, which may also define the responses of the system to exogenous shocks. What is important is not stability but predictability; the constitutional status quo offers the basis upon which individuals may form expectations about the course of events, expectations which are necessary for rational planning.").

[169] *See* Sections III.A–B, *supra.*

their pastimes, any cultural or religious participation, and the exercise of their tastes and preferences. When these choices are drawn from established practices or existing options, any random combination will not destroy norms or customs that engender social order in society. The relationship between these activities and the norms and ethics that provide stability is already in existence.

In the case of higher functional level individuality, the threat to the social structures that provide spontaneous order is not as easily addressed. However, it will be argued that most incidences of higher-level individuality generate benign results, and the instances in which individuality leads to a breakdown of social order are likely to be few. To begin considering these issues, a somewhat obvious yet important point needs to be immediately recognized: some informal institutional structures are of more significance in social order than others, and not all traditions, conventions, and particularly social norms play roles of equal importance in maintaining this stability. This is most obviously revealed through variations in the degree of social punishment that is apportioned when individuals break with informal rules. Behavior that contravenes tradition, custom, and norms encounters a wide variety of reactions. This range may itself be considered a spectrum of response, from ambivalence and amusement (perhaps like that which greets a child who does something strange) to utter outrage (when someone breaks a moral norm).[170]

While there are many types of cultural institutions and social conventions, those that will be the focus here are specific types of social norms. These are identified as the most important for the preservation of a spontaneous social order. A definition presented by

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[170] Building on his own definition and account of the process of evolution in norms, Axelrod explains that norms, and the behavior they generate, are not homogenous in nature, but instead fall into a range and often change over time. It is this variation and malleability that allows Axelrod to study their emergence and adjustment: "[T]he existence of a norm is a matter of degree, rather than an all or nothing proposition, which allows one to speak of the growth or decay of a norm." Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1097 (1986).

Axelrod demonstrates how broad the category can be: "A norm exists in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way."[171] As is implied by this definition, the use of sanction means that norms can potentially substitute for law, as explained in detail elsewhere by Eric Posner.[172] Where these informal constraints solve, or often prevent, situations of conflict, they become important in maintaining social balance and order. This is because they effectively substitute for the need of outside coercive forces and thus contribute to a genuine spontaneous social order.[173] Given their importance in performing this function, it is these norms and conventions to which Hayek's concerns with the threat of individuality are most pertinent. The present focus will therefore be deliberately confined to those informal rule structures that serve to alleviate situations of conflict.

There are many social norms that have particular roles in ensuring peaceful coexistence. Although precise terminology varies across different literature, such simple informal conventions are often referred to in categories including *norms of cooperation* and

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[171] *Id.*

[172] Eric Posner's work on norms is an example wherein the dynamics of law versus norm are explored, in a legal framework. Posner begins his contribution with the following statement:

> Most people do not take their disputes to lawyers and judges. Norms, rather than laws, provide the rules of conduct; friends, relatives, and coworkers, rather than juries, make findings of fact; shame and ostracism, rather than imprisonment or legal damages, punish the wrongdoer. Court is held not in a court- house, but in homes, work places, and neighborhoods, among networks of kin, friends, and associates. In a sufficiently closeknit group, where norms are well defined and nonlegal sanctions are effective, the law has little impact on behavior.

Posner, *supra* note 165, at 133.

[173] Some of the most important qualitative study on the role of norms as the source of social order has come from Ellickson. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991).

norms of reciprocity.[174] To the extent that a free social order exists in any culture, so too do such conflict solving, and even conflict *avoiding*, norms. Often, these are of the simplest forms.[175] To understand the relation between individuality and these rule structures that solve conflict, this section will focus on two primary issues, both of which relate to the incidence of blind individualism:

1) If individuality occurs such that it contravenes a norm that solves conflict, and is therefore blind to the effect it will have on social order, what is the informal mechanism (if any) that will respond and prevent a breakdown of social balance?

2) In what context or circumstances might the higher level individuality actually lead to collapse of social stability?

A third, more fundamental, concern will also be considered:

3) Does the behavior described as blind individualism represent individuality at all?

The first issue concerns the potential breakdown of social order caused by individuality. Social norms have accompanying mechanisms that ensure their maintenance in the form of punishments against those who break with such norms. These social mechanisms are layered, such that further norms are enacted if an earlier norm is ineffective. For example, if the initial enforcement mechanism fails, i.e., those who observe the breaking of a norm do not enforce it, often a "meta-norm" will take effect against those who themselves fail to punish the initial violators. This sequence has been clearly explained by Axelrod, who clarifies the role and importance of these

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[174] Elster's typology is useful here. See For a general discussion of the social forces that might prevent individuals from pursuing their self-interest *see* Elster, *supra* note 154.

[175] *See* BUCHANAN, *supra* note 86, at 20 ("The set of manners, the customary modes for personal behavior, which reflects the mutual acceptance of limits, will of course vary somewhat from culture to culture, but it is relatively easy to think of examples in any setting. I do not start my power mower early on Sunday morning, and my neighbor does not play stereo music loudly after eleven at night. Both of us recognize the possibly harmful effects on the other, and we refrain from imposing costs in this manner, even at some personal sacrifice.").

meta-norms.[176] Two additional points are important in regards to this punishment mechanism. Firstly, Axelrod speculates that those norms that are most important will have the accompanying meta-norm of greatest severity.[177] Second, in his own discussion, Elster explains that the act of administering punishment is in itself, self-interested.[178] Both these points help explain how the social order resists acts of blind individualism.

In relation to the incidence of higher-level individuality, there are two processes that will likely result in the protection of the norm against blind individualism. Firstly, by definition, an act of higher-level individuality is only pursued by one single individual. Therefore the punishment mechanism, and any meta-norm that supports it, should be effective in maintaining the norm against a transgression of one individual. Secondly, an important aspect to the maintenance of some norms is their internalization by individuals. For example, both Buchanan and Axelrod explain that internalization is an important part of the continual adherence to norms over time as the norm enters the individual's utility function.[179] While an individual may demonstrate an instance of blind individualism, the internalization of the norm among those agents who surround the individual should lead to a sanction. Thus, combining these two points—first that blind individualism is a threat posed by only one individual, and second assuming some degree of internalization among other agents—individuality should not occur to the detriment of those norms that alleviate social conflict and promote harmonious coexistence. The associated punishment

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[176] Axelrod, *supra* note 170, at 1101.

[177] "The types of defection we are most angry about are likely to be the ones whose toleration also makes us angry." *Id.* at 1103.

[178] Elster explains, "When there is a norm to do X, there is usually a 'meta-norm' to sanction people who fail to do X, perhaps even a norm to sanction people who fail to sanction people who fail to do X. As long as the cost of expressing disapproval is less than the cost of receiving disapproval for not expressing it, it is in one's rational self-interest to express it." Elster, *supra* note 154, at 105 (citing Axelrod, *supra* note 170).

[179] As Buchanan cogently states: "To the extent that ethical precepts are widely shared, and influence individual behavior, there is less need for the more formal restrictiveness of legally imposed standards." BUCHANAN, *supra* note 86, at 117.

mechanisms support the maintenance of these norms over time, resisting individual transgressions.

The second consideration in relation to the higher-level manifestation of individuality and informal social structure is to identify the circumstances in which it may lead to the disruption of order and stability. The contention here will be straightforward: an act of individuality alone is not enough, and it is only through a collective adjustment in behavior that the destruction of conflict solving devices such as norms of cooperation and reciprocity may occur. To be more specific, an instance of higher-level individuality that is blindly individualistic could lead to this drastic outcome only when there is no correction of it, and subsequently the behavioral form then itself expands beyond the single case (the individual). The occurrence of such an outcome is only possible when the support norms, and the associated meta-norms that maintain them, fail to perform their own roles in preserving conventional behavior.

The potential for this outcome is related to a breakdown in the rationality of agreement that acts in support of individuality.[180] Assuming that individuals can observe the deleterious social outcomes, when norms that are fundamental to the resolution of conflict begin to fail, the wider acceptance of the blindly individualistic behavioral form can only be the result of a further failure in the ability of each individual to identify the (self-interested) worth of those norms and the mutual restraint that attends them. This point is perhaps the key to clarifying the possibility of degeneration in social mechanisms: just as the opportunity for individuality is underpinned by a rational agreement in securing mutual restraint, a collapse in the social structure is likely due to underlying breakdown in the rationality required to secure commitment to the social order to begin with. The failure of rational agreement is beyond the incidence of one individual making the calculation that their own self-interest is no longer extended through the maintenance of norms

[180] Outlined in section IV.B.ii, *supra*.

that delineate behavioral limits, but instead becomes a shared attitude among a significant minority.[181]

Although rational agreement is based on self-interest, there is no suggestion that rationality is thrown away in the present scenario of instability and failing norms. "Norm following" does not always represent a dominant strategy for the self-interested individual.[182] Instead, norms exist as part of an equilibrium wherein other agents are also following the norm. This straightforward observation about the existence of norms has implications for individuality. Although mutual restraint in support of individuality represents self-interested commitment for the individual, in a social context where such restraint is no longer commonly observed the rational actor will likely not act in support of a mechanism that no other agents are seen to commit to.

The likely outcome of such a scenario is of course a loss of social stability with some form of disordered anarchy the result. All behavioral forms, individuality or otherwise, are threatened in such a non-structured environment. Hayek's further fear is that from this, the restoration of order and mutual restraint may require coercion. The finer detail of such a social convulsion is beyond the scope of the present theoretical discussion. It is sufficient to clarify the point to be made here: stability and freedom may indeed be destroyed by the many, but not by individuality. Hayek's concerns for the maintenance of a social structure sufficient to ensure

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[181] To be clear, I am not describing anything like a social rationality, just a shared attitude or belief. However, this also underscores the problem that a breakdown of rationality in agreement, such that spontaneous order is lost, does not have to be created by a majority. Instead, even a significant minority is enough to destroy a free social order and create the need for more law and coercive intervention.

[182] A formal representation of a norm as a Nash equilibrium is provided in Christina Bicchieri, *Learning to Cooperate*, in The Dynamics of Norms 27 (Christina Bicchieri, Richard C. Jeffrey & Brian Skyrms eds., 1997). Bicchieri explains that a norm may be regarded as a behavioral regularity observed when almost all members of a population conform to it, and each member of the population believes that almost all other members will conform. The important point here is that the rationality of the norm following behavior is dependent upon the decision of others, norm following is not a dominant strategy. This means that if others are not following the norm, it is rational to break with it also.

order without resort to coercion is an issue of a collective change in attitude wherein the internalization of norms collapses among many individuals.[183] Individuality itself, even the blindly individualistic, is not a threat to the informal social structure.

The third issue, which perhaps underlies the former two, is particularly important. Does blindly individualistic behavior in fact represent a form of genuine individuality at all? In other words, although the previous discussion demonstrates that support norms will act to prevent destruction of the social order, the question is whether it is individuality that is the potential problem in threatening these social structures in the first place? The contention here is that it is not. Instead, action that contravenes the norms that provide the basis for conflict resolutions and social order is more appropriately deemed as a failure of rational agreement. The reader will no doubt recall that the manifestation of individuality relies upon the acceptance of a rational agreement. It was argued that individuality must presuppose the existence of, and a commitment to, a rational agreement in regards to behavioral limits. While this agreement exists beyond formal legal structure and is thus somewhat fluid in nature, it is nonetheless there as the basis of social stability. Hence, part of rational agreement is the acceptance of some social norms even if they are at times constraining. Expressions of individuality, wherein individuals demonstrate their differences by acting in ways different from others, are not achieved through actions that destroy the ability of society to function—this will remove the opportunity for individuality to manifest itself.

Blindly individualistic behavior is more likely the type of action recognized as purely anti-social rather than expressive or even aloof. A further comment on this type of activity can be linked to the incidence of "crank" behavior discussed earlier. Ironically, such behavior might be a lesser threat to social structures than those incidences of

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[183] The point here is that individuality is not enough to destroy the stability of social order. On the other hand, Buchanan again has shown that when there is a collective disruption of norms and customs social stability is threatened. *See* BUCHANAN, *supra* note 86, at 74–90.

higher-level individuality regarded as genius. The simple reason is that the so-called "crank" is unlikely to elicit a group of followers that may lead to the overthrow of social structures. Hence, the so-called "crank" is more likely to act in isolation than in leadership of any group significant enough to place stress on the informal social structures.

2. HOMOGENOUS BEHAVIOR AND SOCIAL MECHANISMS

The above sections have outlined the ability of informal social structures to respond to cases of blind individualism and maintain their own existence through support norms and meta-level mechanisms. Restrictions on individuality are, however, formalized in those contexts in which any incidence of higher-level individuality is problematic. In short, rather than freely pursue all personal inclinations, individuals generally agree to restrict their own individuality and "play by the rules." Such rules are beyond those obvious constraints intended to protect individual safety from potential physical threats and seek instead to protect a process from disruption. The purpose of this discussion is not to underscore the mere existence of rules in the social process but to explain why, in certain realms, higher-level individuality is explicitly "ruled out" by those rules. This section will discuss environments in which such higher-level individuality is explicitly disqualified as a behavioral option, and the reasons why this constraint might be imposed. It is not intended as a detailed outline of all restrictions imposed by rules of formal social processes, but rather a general recognition of where individuality needs to be tempered for the purposes of preserving formal processes of public decision-making.

The reasons why social mechanisms often require homogeneity in behavior stem directly from the difficulty of collective action. As the number of participants rises, the costs of making a collective decision will generally increase—a point that has

long been noted by the political economy literature.[184] Lowering this cost requires a level of homogeneity in participant behavior and a general adherence to uniform process. It is easy to identify contexts in which decision-making costs (or even bargaining and transaction costs) are particularly high, and therefore higher level individuality is deliberately constrained. For example, social mechanisms that aggregate individual preferences, such as elections, require a degree of homogeneity in behavior in order to obtain a meaningful registration of these preferences. Other areas of social process requiring some absence of individuality includes judicial enquiry and even the process of market exchange. Such social mechanisms enforce homogeneity in critical aspects of behavior by setting out a specific mode of participation that is largely non-negotiable with legal penalties sometimes imposed against contravening behavior. In some instances where individuality may not be eliminated absolutely it can still be rendered meaningless through more subtle means.

Section II.B introduced the notion of a rational agreement and emphasized the value of this ongoing commitment and mutual restraint in the manifestation of individuality. To this point, the aspect of rational agreement that has been the primary focus has been informal rules and conventions that can be adjusted, even on a day-to-day basis.[185] The fluidity of this agreement was identified as a virtue that provided scope for regular renegotiation and adjustment in behavior. This is of particular value in the context of the free spontaneous order with minimal coercive rules. Hence, the focus has been on informal rule structures, rather than formal ones. The concept of rational agreement, however, also includes acceptance of and commitment to those rules that are legally enshrined. These

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[184] JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965). These works are the classic statements on the difficulty of making social choices in terms of the costs of decision making.

[185] Hence, the fluid nature of rational agreement described earlier.

more formal constraints represent a much less fluid component of rational agreement. Some specific examples are now considered.

Individuals must recognize that broad constitutional agreement is a domain where individuality will often need to be restrained. While political candidates and their policies may be built on a creativity that might stem from a higher-level individuality, the process through which electoral outcomes are obtained deliberately restricts such creativity. In other words, the formal mechanisms of the electoral process require some absence of individuality. The act of voting, for example, requires individuals to agree to participate with some restrictions on the way they handle the ballot. Making the vote "count" requires nomination of preferences according to the rules, as straying from certain voting norms will not be accepted. Higher-level individuality is rendered inconsequential and perhaps even meaningless (to the overall process), as the vote will not become a registered preference if deviation from the prescribed process is observed. The chambers of the elected legislatures likewise adopt the discipline of due process, the observation of which is required to pass legislation.

Similarly, the whims or idiosyncrasies of individuals may serve to be detrimental to the process of allocating justice. While legal technicians may employ their own "style", some conformity on the part of representative individuals, such as retained standards of argument and burdens of proof, are required. Obtaining justice in society requires some degree of consistency and stability in expectations. Scope for individuality, in terms of widely divergent forms of argument and procedures, is not a priority. While this may of course create barriers to participation on certain fronts, it is difficult not to acknowledge that such a social process does require a uniform set of standards. The point is, individuality must work within certain behavioral rules in this context, and experimentation with some processes may only lead to disaster. In courts of law and voting processes, Hayek's concern for observation of rules and traditions is perhaps more important than in any other sphere of society.

Another domain of social life in which the role of individuality is deliberately restricted is the process of economic exchange. For

the purposes of maintaining a low-cost mechanism to facilitate simple and frequent exchange, it must be possible to complete transactions of an impersonal nature. Of course, such exchange can be negotiated even without uniform process. However, economic efficiency requires some conformity of process in order to promote gainful exchange that is low cost and therefore frequent.[186] Because some medium of exchange must be agreed upon, higher-level individuality in terms of money would be essentially meaningless.[187] Likewise, economic efficiency is achieved through uniform weights and measures. A more basic yet no less important aspect of exchange is also required to be uniform: the acknowledgement of rights between agents.[188] A consistent acknowledgment of rights for both consumer and producer needs to be obtained and the recognition of a uniform set of rights significantly reduces transaction costs.[189]

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[186] The work of Douglass North, who considers economic history with an emphasis on how the prevailing institutional structure has impacted economic development, highlights the value in expectations of others. North considers different structures of institutions that impact the process of a transaction. More efficient institutions, which reduce differences between behaviors and create uniformity in modes of transaction, are generally the most efficient in promoting economic exchange. *See* Douglass C. North, *Institutions*, 5 J. OF ECON. PERSP. 97 (1991); Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359 (1994).

[187] It is these types of institutional issues that North addresses in the works cited above. *See* North, *Institutions*, *supra* note 186; North, *Economic Performance*, *supra* note 186. Of course, it is possible to conduct exchange without such commonality. For example, the American Indians preferred to trade in Wampum, a chain link of ornate seashells. This allowed an exchange to occur, but it might also have restrained the frequency of trading. *See*, JOHN ROMEYN BRODHEAD, HISTORY OF THE STATE OF NEW YORK 172 (Harper and Bros. 1859); *see also* JOHNATHAN HUGHES & LOIS P. CAIN, AMERICAN ECONOMIC HISTORY (7th ed. 2007).

[188] This point has been carefully acknowledged and explained by James Buchanan. *See* BUCHANAN, *supra* note 86, at 17–34.

[189] *See Id.*at 18 ("Economic exchange among persons is facilitated by mutual agreement on defined rights. Both parts of this principle must be satisfied. Individual rights must be well defined and non-arbitrary, and, in addition, these rights must be recognized and accepted by participants. If rights are known to be well defined and nonarbitrary but if knowledge about them is available to persons only on considerable investment in information gathering, many exchanges that are otherwise mutually beneficial may never come into being.").

Finally, in spheres of general public interaction we are often required to abandon our higher-level individuality. Road sharing is one clear example where the manifestation of higher-level individuality may increase the cost of social decision-making.[190] In these contexts, rules are formalized in an effort to eliminate blind individualism, as the costs of such behavior are simply too high; thus "crank behavior" cannot be tolerated in these contexts.

The need for homogenous behavior in some contexts is so great that higher-level individuality is deliberately sanctioned away. While the informal rules discussed earlier maintain the free spontaneous order that Hayek celebrated, some formal rule structures also contribute to the ability of peoples to manage the process by which they themselves are governed. This is interpreted broadly across society, from elections to the judiciary, and also processes of interaction, such as economic exchange and road sharing. While we might sympathize with those among us who wish to "do things totally differently," the trade-off between such freedom and the broad processes of public decision-making and constitutional maintenance are simply too great.

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[190] Brennan and Buchanan consider these rules to be the rules of the road:

> Road rules have a social function, which is to facilitate the achievement of the purposes of all persons who use the facility, regardless of what these purposes might be. And the rules are adjudged in accordance with their ability to satisfy this criterion. In much the same way, the rules that constrain sociopolitical interactions—the economic and political relationships among persons—must be evaluated ultimately in terms of their capacity to promote the separate purposes of all persons in the polity. Do these rules permit individuals to pursue their private ends, in a context where securing these ends involves interdependence, in such a way that each person secures the maximal attainment of his goals consistent with the equal liberty of others to do the same? Concentration on the road rules example allows us to isolate another feature that is often overlooked. Rules provide to each actor predictability about the behavior of others. This predictability takes the form of information or informational boundaries about the actions of those involved in the interaction.

GEOFFREY BRENNAN & JAMES BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 7–8 (1985).

3. INDIVIDUALITY AND THE STATE

This section will consider the difficult relationship between the state and the development of individuality. Freedom in a society, whether in terms of Mill's unconstrained individuality or Hayek's spontaneous social order, can be potentially threatened by an enlarged state role. Any proposed expansion of the state *in support of individuality* has the potential to immediately erode the very freedoms of the individual or impose outside coercive interference on the functioning of the evolved social stability. This discussion attempts to understand a possible state role in relation to individuality but within the context of these issues and challenges.[191] Two general issues will be considered, both of which stem from the previous works: first, a concern for the protection of the individual from the non-state majority and even the state itself; second, a considered role for the state support of social stability, particularly in response to a collapse of rational agreement. The potential for the state to perform these roles will be distinguished from any attempt by the state to somehow instruct individuals in their own development.

The primary role that Mill ascribed to the state in support of individuality is the protection of the individual from persecution by the non-state majority. In the context of this paper, it might be argued that the individual may need protection from the non-state majority when rational agreement has failed and given way to intolerance. Such a scenario may occur if the social majority is self-aware of possessing a majority power leading to a perversely rational decision to abuse the weaker minority. State power can be extended to protect freedom of choice and higher functional

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[191] This discussion will not extend to a range of state roles but will instead limit its attention to the relationship between the state, individuality, and freedom, as discussed by the authors. While these issues will be identified and discussed here, this is not intended to be a detailed prescription of state duties or limitations—such a study deserves and indeed requires many more pages of focus than the present discussion can allow and would naturally spill into debates about the state's role. The intention is simply to present a framework of considerations between the *state and individuality*, in the context of the issues that have been already discussed above.

individuality when it elicits such antagonism. Unfortunately, state protection of minorities is itself complicated by the relationship between the social majority and the state—there is no permanent guarantee that the state is a reliable agent, as the state may itself have the interest of the majority at hand.[192] What must be obtained, therefore, is protection for individuality that is somehow enshrined outside of the government through a separate institutional entity.[193] Constitutional protection wherein the range of state actions is clearly outlined and thus restricted is the obvious place to start. Some would argue for protection of specific rights that are entrenched beyond the grasp of the government in office. However, specified rights are not necessarily the only avenue, and instead separate judicial review via common law courts may also be sufficient.[194]

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[192] To highlight this issue, it is worthwhile to reconsider Hayek's point regarding the desirability of some dissent from dominant modes of thinking. If such dissent is desirable for the purposes of criticising the government, or even providing some options or alternative ways of living as Hayek described, can the government always be relied upon to accommodate the proliferation of such views or protect the manifestation of such behavior?

[193] The present argument is that the protection of the minority from the majority needs to be enshrined beyond the reach of the state. The maintenance of a rights structure that protects individuality is thus an issue of constitutional design and judicial review. Yet this is no easy issue, and one should not doubt the power of the majority that Mill and Humboldt feared. For example, recent scholarship has demonstrated that even the Supreme Court demonstrates a surprising sensitivity to majority will. In its protection of civil rights cases, it appears to be routine for the Supreme Court to follow a majoritarian position when counting among the states. The tendency of the majority to win the day, at many levels, remains even now:

> For constitutional theorists, the phenomenon of explicitly majoritarian doctrine provides arguably the strongest evidence yet of the Supreme Court's inherently majoritarian institutional nature. The result is constitutional protection that shatters the conventional conception of judicial review as an undemocratic exercise, eviscerates the countermajoritarian function that justifies the Court's existence, and reveals the freedom of federalism to be more illusory than real.

Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 419 (2009).

[194] Rights to freedom of speech and association, and also property, are enshrined in constitutions to protect the minority, and ultimately individuality. It should be add-

Humboldt's concerns for the protection of the individual from the state can now be dealt with quickly. The discussion above has inadvertently dealt with the concerns of Humboldt for the protection of the individual from the state. This requires entrenched protection from the state and hence the entrenchment of rights or the protection via common law courts. Such entrenchment is important to protect individuality from both non-state social threats or abuse of state power.

The second domain in which the state may play a role in support of individuality is in response to a collapse in rational agreement. This is an issue of difficulty precisely because it is antithetical to the existence of stability and order *without recourse to state intervention*. In other words, the need for the state to intervene to preserve order represents a failure of a free society, i.e., spontaneous order. Therefore, this second aspect of the state's potential role in support of rational agreement is the reparation of the stability in which individuality exists.[195] It is not so much the support individuality itself, but the support of the context in which free individual choice is available.

"Rationality in agreement"—the ability to reach acceptable terms of mutual restraint—is fundamental in allowing individuality to flourish. If that rationality in agreement fails, the free social order may fall. If individuals cannot be relied upon to recognize behavioral limits that allow them to maintain a voluntary and reciprocal relationship with others, then the state may indeed be

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ed that Australia is an example of a common law country that does not have a specific bill of rights in its formal constitutional apparatus. Which is "best" for the protection of individuality is not an issue within the scope of this article. The point is simply that individuality requires some institutionalized protection through constitutional design.

[195] Of course, the State may certainly have some role in protecting orderly social process by simply enforcing rules. This might simply represent maintaining the homogeneity of behavior required in the functioning of social mechanisms. Of course, this is limited to those spheres of public interaction that require homogeneity in behavior. As discussed above, the electoral process, for example, is built on standards that restrict individual participation to ways that can be meaningful contributions toward the realization of the outcome.

forced to intervene to restore social order. Again it should be emphasized that such a scenario is a failure of spontaneous order and a free society. Furthermore, such a scenario is likely not the result of individuality or even cases of blind individualism; instead, such a failure of rational agreement stems from the actions of a significant group that breaks with those social mechanisms that maintain order.[196] It appears that in such circumstances the state structure might be the only means through which to regain some form of social order (it will not be a free social order in the terms expressed by Hayek, and is instead, precisely the opposite: an order obtained through coercion).

A point of caution should also be identified in relation to the state's role in preserving social stability. As outlined, the state may be the protector of order under the dire circumstances in which rational agreement degenerates into chaos. However, if the state acts too soon or willingly, this is likely to be a greater threat than individuality to the social order and a more fearsome challenge to individuality than the non-state majority. In fact, government may prove to be the greater threat to the norms that maintain freedom in society. Pildes shows that government can also destroy norms that are central to order, either through the destruction of those social conditions that enable reciprocity to emerge, direct attacks

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[196] At what point the number of individuals becomes significant to erode the social order is difficult to estimate precisely. Perhaps the best we can claim is that at some critical level of rule-breaking, some individuals who were previously willing to follow an ethical structure find it counter their own interest to continue doing so. Buchanan explains the cascading effect the growth in disruptive behavior can create:

> So long as a significantly large proportion of the community's total membership abides by the same standards, the temptation placed on any individual, although always present, may not be sufficiently great to cause him to modify his cooperative behavior. However, if and when some persons, or a critically large minority of persons, are observed to violate ethical precepts that previously have been accepted by almost everyone, and to act on self-interest grounds, those who might continue to adhere to the precepts find themselves subjected to what may seem to be exploitation.

BUCHANAN, *supra* note 86, at 118–19.

on norms of reciprocity and failure to appreciate the relationship and differences between enforcement of norms and the enforcement of laws.[197] These are the very same informal structures that allow society to maintain a peaceful social order without the need for intervention.

To this point the discussion of the state's role in relation to individuality has been primarily concerned with a protection of individuality from the incursions of the majority and the unfortunate advent of a collapse in rational agreement. Consideration can turn to the issue of how far the state should be extended in support of individuality. Following Mill, and Humboldt before him, it will be argued that the protection of individuality should be tempered by a realization that the state has a limited capacity in the development of individuality. This point rests on the distinction between the *protection of individuality* on the one hand, and the *instruction of individual development* on the other. The state may play a role in protection of individuality, but a state role in the development and instruction of individuality is an entirely different matter.

One can first consider the literature that explains the expressive value of law. Certainly, law might illuminate and signal to the broader society what is to be regarded as discrimination.[198]

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[197] In one of his earlier discussions of the potential for expressive lawmaking, Richard Pildes shows that government can also destroy social capital. Richard H. Pildes, *The Destruction of Social Capital through Law*, 144 U. PA. L. REV. 2055 (1996) (providing an excellent overview). At the extreme, one can take the potential jurispathic tendency represented by the state enforcing law over the top of an organic culture. *See* Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 44 (1983) ("By exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities."). Pildes also refers to an article by Philip Pettit, which describes the possibility of heavy regulation in reducing opportunities for trusting relations, thus potentially harming the ethical state of affairs. Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 225 (1995).

[198] Law might have the ability to change informal norms through its expression. For a recent explanation of this possibility, and its application to discrimination in cyberspace, see Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009); Deborah Hellman, *The Expressive Di-*

In relation to individuality, the state's expressive role through law might contribute to greater tolerance and protection of the minority. On the other hand, it is also apparent that individual development is not as easily fostered through the law as examples from the expressive law literature may suggest. The danger overzealous lawmaking poses to the order generated through informal social mechanisms has already been identified above. However, it should also be noted that laws made in efforts to regulate behavior may in fact generate a reduced tendency to internalize the very social norms they are attempting to uphold.[199] In other words, the tendency for individuals to follow ethical precepts of their own volition, so important in the maintenance of informal social structures explained earlier, can be eroded by efforts to force compliance via a shift from informal to formal constraints. The effect of legal constraints, even if they are those that appear to encourage tolerance, will not necessarily generate the desired outcomes.

Another consideration is the selection of rules the state might wish to formalize in an attempt to instruct development. The reasons why the state cannot develop individuality can be succinctly outlined with theoretical insights developed since both Humboldt and Mill presented their arguments.[200] In particular, an understanding of dispersed and localized knowledge leads to a recognition that instructing the development of individuals along any desired path, whether morally informed or otherwise, might be well beyond the ability of the state. For a central authority,

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mension of Equal Protection, 85 MINN. L. REV. 1 (2000). For an overview, see Elizabeth S. Anderson & Richard M. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000).

[199] *See* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009). "Internalization, however, is not an inevitable consequence of legal coercion and may even be stifled by it. Excessively controlling, intrusive, or alienating contexts displaces people's sense of their own moral compass. Excessive control also leads people to engage in defensive or self-protective processes, disown responsibility for negative outcomes, and blame others." *Id.* at 1939.

[200] Mill and Humboldt are explicit that freedom from constraint is fundamental in allowing individuals to develop themselves. As noted above, Schiller and Humboldt see no role for the state in promoting individuality.

whether legislative, administrative, or judicial, to identify rules that instruct development in all possible circumstances is largely impossible. A literature is developing that argues that restraints intended to improve moral development cannot apply in all cases appropriately.[201] In relation to individuality this seems even more apparent. The uniqueness of the individual which stems from genetics and environment, is likely to be best understood by the individual herself. Trial, error, and experimentation are the means through which individuality is best explored. The state, not having access to the same personalized information as the individual, cannot write rules that force every individual down an appropriate path of self-development. The basic protection of individuals is likely the farthest the state can venture in contributing to the development of individuality.

VI. CONCLUSIONS

This paper has presented a detailed study of the conceptual relationship between individuality and freedom. The first main section of the paper outlined the development of Aesthetic Individualism as a philosophy of individuality and freedom. This theoretical perspective is the product of a series of influences, from Plato and Aristotle, to German romantic aesthetics in Kant and Schiller, before the defining statements of Humboldt and Mill. In the second main section, this paper outlined some criticisms of Mill's individuality, which stem from the work of Hayek. These pertain to an overly demanding form of rationality on one hand, and the possibility that unrestricted individuality could threaten the social structures that offer freedom. Hayek's alternative interpretation of individuality is also recognized as offering two important insights: individuality as

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[201] For an excellent outline of the knowledge problems in imposing moral development by the state, see Rizzo, *supra* note 47. Rizzo explains that the knowledge of time and place, central is identifying the good or morally appropriate action in any given scenario, is beyond the ability of the state to collect. For a recent extension of Rizzo's earlier elaborated position, see Michele Alexandre, *Sex, Drugs, Rock & Roll and Moral Dirigisme: Toward a Reformation of Drug and Prostitution Regulations,* 78 UMKC L. REV. 101 (2009).

a scientific fact and the role of culture in enriching the potential for individual development.

The third section of the paper presented a modern interpretation of individuality and freedom. An understanding of individuality can be grounded in scientific evidence that individuality is an ever-present fact, rather than one specific form of behavior. Two levels of the manifestation of individuality were outlined. The first is simple freedom of choice, which allows individuals to make a unique subset of choices from the range of possible courses of action. The second is the higher-level, stronger form individuality consistent with Mill. In neither case does individuality necessitate the type of constructivist rationality that Hayek had criticized in Mill's writing. However, it was argued that some degree of rationality underpins an agreement to some level of mutual restraint. The most important section, and the one that dealt most directly with the conflict between individuality and freedom, examined society's informal social structures. In particular, social norms were explained to be resilient against blind individualism and thus preservative of the free social order. It is not individuality that threatens social structure, but is instead a breakdown in rational agreement. Finally, there was an exploration of the state's role in ensuring homogenous behavior in certain domains of public life and also an important distinction between the state's ability to protect individuality versus attempts to instruct individual development.

It would be remiss of the present paper to not acknowledge those aspects that have not been considered in this argument, and that might be considered in future work on the topic. This paper focused on those social norms that solve conflict and have supporting sanctions that keep them in place. Other work on this topic should consider the same type of meta-norms that might work against individuality in the context of purely cultural norms. Higher-level individuality may be thwarted by support norms that sanction against behavior that is different from the cultural tradition. While this is an issue that has not been considered here in detail, it is at the heart of Mill's discussion.

An implication and potential extension is the possibility of a process that is stimulated by the higher functional form of individuality. The present paper has been primarily concerned with how stability might be maintained in response to such individuality. However, the occurrence of changes, and perhaps even long-run cultural evolution, which occur in response to such activities is worthy of further investigation.[202] This can be considered from the perspective of either Mill or Hayek. Mill's individuality leads to questions as to what such individual freedom might generate in terms of new behavioral forms. Related to this, Hayek's emphasis on the role of some deviancy from existing practices as a way of offering options for society is another important issue that deserves attention.

Another potential topic of extension is the original inspiration for aesthetic individualism, in particular the role of aesthetics in the education of man. Through Plato and Aristotle and in particular the work of Schiller, the emphasis has been on educating man to encourage appreciation for others. Although Humboldt later inverts this relationship to emphasize the aesthetic quality of individuality, consideration of the earlier argument may yet be of value. The underlying message in the romanticism of Schiller is that an ability to see others as individuals, unique in and of themselves, is a prerequisite for the "gift" of freedom. A modern interpretation of the same argument might be the ability to look beyond group identification and see others as individuals. Such an argument, essentially a normative one, is the opposite of the proclivity to see group conflict, and it deserves further consideration.[203] Emphasizing individuality may draw attention away from group identification and the ensuing conflicts that often occur. It may also make rational agreement easier to obtain.

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[202] *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990). Another work that considers some of these issues in relation to entrepreneurial behavior, is provided by Jakee & Spong, *supra* note 156.

[203] *See* RUSSEL HARDIN, ALL FOR ONE: THE LOGIC OF GROUP CONFLICT (1995). In this work, Hardin explains that group identification is a force that can sometimes lead to conflict.

Finally, much of this paper attempts to reconcile Mill and Hayek on the topics of individuality and freedom. Hayek, living after Mill, offers the more critical argument, and so it has been his arguments that this paper has attempted to satisfy. Despite the differences, however, it is worth concluding with an emphasis on the shared inspiration of the two approaches. Indeed, their arguments can be interpreted as simply two different sides of the very same coin. Mill begins with diversity of individuality and measures the freedom of a society by its ability to accommodate such diversity, and protection from the masses. Hayek, on the other hand, emphasizes freedom as a society that can "work" without the need for coercion. Thus, Hayek begins with freedom and looks for a society that can accommodate individuality at its limits. While Mill opens with Humboldt's quotation, such is his emphasis on individuality, it is poignant that Hayek chooses to close his own argument with the very same paragraph:

> The Grand, the leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.[204]

[204] HUMBOLDT, *supra* note 35, at 48.