

PHILOSOPHICAL LIBERALISM &
THE NATURE OF THE INDIVIDUAL'S PRIVATE SPHERE OF
RIGHTS

A Senior Honors Thesis

By

JOY MARIE BRENNAN

Submitted to the Office of Honors Programs
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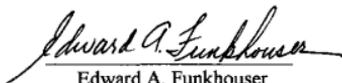
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ABSTRACT

Philosophical Liberalism &

The Nature of the Individual's Private Sphere of Rights. (April 2000)

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The complex system of rights we have in our society has its foundations in philosophical liberalism. This paper analyzes the sphere of individual rights, referred to as the private, within philosophical liberalism. The objectives of this paper are first, to determine whether there is a sacrosanct private within philosophical liberalism and second, to evaluate the concepts theorists give priority to over the private. A textual analysis of works by classical and contemporary liberal theorists (John Locke, John Stuart Mill, John Rawls, and Robert Nozick) provides the methodology for evaluating the objectives. This research provides clarity of the rights afforded to individuals within liberal theory and the validity of the label of philosophical liberalism as a theory that holds individual rights paramount.

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Introduction

In contemporary society we regard our rights as tangible products that can be called upon, referred to, and used as a shield. The view we have of rights has its basis in the assumptions of philosophical liberalism that individuals have a sphere of rights free from restraint or interference. Liberalism according to Ronald Beiner, “allows self-governing individuals to coordinate their reciprocal relations in ways that maximize the attainment of their own individual purposes.” Philosophical liberalism is the study of tension between the maximization of rights and the regulation necessary to the functionality of rights by individuals.

Within philosophical liberalism *the private* is the designation given to the individual’s sphere of rights. This designation is reflective of the interaction between the individual and the state, or *the private* and *the public*. The private and the public are not terms easily explained by a definition because they offer instead a relationship. The boundaries of one create the boundaries of the other. At the heart of the research within this work is whether the private is defined by the boundaries of the public, or the public is defined by the boundaries of the private. This is not simply an argument of semantics, but a question of hierarchy and the placement of rights within society. Philosophical liberalism’s coherence as a theory is based on the protection of the private. If the private is not sacrosanct then the viability of liberalism is called into question. An analysis of the nature of the private within philosophical liberalism is the focus of this paper.

This thesis follows the style and format of *History of Political Thought*.

Evolution of Liberalism

In analyzing the nature of the private within liberalism both classical and contemporary liberal theorists' works are significant. An understanding of the shift in liberal thought from classical liberalism to its present day form provides a framework for methodology. Classical liberalism can be characterized by its view of liberty and includes theorists such as John Locke and John Stuart Mill. Classical Liberalism can be viewed as unique because of the view that what is "best for all human beings is the magnitude of the measure of liberty which it accords its sane adult members. This form of polity uniquely grants them the liberty to do whatever they want provided no one but, at most, themselves is harmed by their doing it."¹

Classical liberalism focuses on the inherent value of liberty and individualism and can be evaluated in terms of its "individualism with respect to ends" and "individualism with respect to means."² The basic construction that follows from this is that the rational individual decides for him/herself on a conception of happiness or individual end and should be afforded the rights to pursue this end.

This construction of liberalism is not without its faults or critics. Liberalism has been criticized as "a kind of caricatured runaway free market that secures liberty but in exchange fosters inequality and social injustice."³ Because the American political framework was drawn from liberal theory some contemporary theorists blame liberal theory for the problems of American society and government. Contemporary liberal

¹ Conway, *Classical Liberalism: The Unvanquished Ideal*. p. 5

² *ibid.*, p. 6

³ Benjamin Barber, "An American Civic Forum: Civil Society between Market Individuals and the Political Community," *The Communitarian Challenge to Liberalism*, 1996.

theorists have responded to this in different ways and are divided on this issue, but passionate nonetheless as Roberto Alejandro points out,

In relation to the classical articulations of liberal theory, contemporary liberal theory represents an important shift...It does not seek to accommodate any more...in a nutshell, it seeks to force them to adopt a liberal vocabulary to frame the moral and political conflicts.⁴

Contemporary liberal theory can be viewed as a spectrum spanning from the right to the left. Right liberals, also viewed as neoclassical liberals, follow in the tradition of liberty and individualism and the “vision of self-government requires that the state intervene as little as possible in the social and economic life of the society.” Right liberal theorists include Robert Nozick and F.A. Hayek. Left liberals are those theorists that are trying to rectify the problems of associated with classical liberalism such as a social inequality. Left liberals prefer “considerable state intervention... in order to give each individual a fair opportunity to give play to his or her unique conception of his or her own personal good.” Left liberals include theorists such as John Rawls and Ronald Dworkin.⁵

The growth of liberalism to respond to criticism on social and communal issues has the added outcome of self-reflection where strong criticism and debate is internal to liberalism itself. Contemporarily, liberal theory has also been attacked externally by communitarian critics. Communitarian theorists are concerned with social and communal bonds and the detrimental effect liberal theory has had on the notion of

⁴ Alejandro, *The Limits of Rawlsian Justice*, p. 11

⁵ Ronald Beiner, “What Liberalism Means,” *The Communitarian Challenge to Liberalism*, 1996. The notion of left and right liberals was taken from Beiner’s work.

community and individual relations. The attention given to the internal debate within liberalism and external debate with communitarians has generated media coverage and a public arena for debate over liberalism. Articles on liberalism and communitarianism have produced articles in *Esquire*, *The Economist*, and *Harper's Magazine* – not the standard soapboxes of academia.⁶ All however still fall into the definition of liberalism offered at the beginning, because all are explicitly committed to the end of liberalism. The means that allow individuals to “maximize the attainment of their own individual purposes” is the main focal point of debate.

Objectives & Methodology

Within liberalism some social inequalities are allowable for the sake of preserving an individual's private sphere of rights. However if the individual's private sphere of rights is not inviolate within liberalism then the justification for allowing social inequality disappears and the legitimacy of liberalism becomes questionable. The objective of my research then is twofold. First, the question that arises from all of this is whether some private sphere of liberty is actually inviolate? The label of liberalism, if it implies anything, historically conveys the inviolate nature of the private. Determining whether there is a sacrosanct private within liberalism is the first objective of my research. My hypothesis is that there is not an inviolate private sphere, because liberal theorists do not uphold their own stipulated intellectual parameters of the individual's

⁶ For examples see “Freedom and Community: The politics of restoration,” *The Economist*, December 24th, 1995; and “Philosopher Robert Nozick vs. Philosopher John Rawls: Give me Liberty or give me equality,” *Esquire*, March 1983.

private sphere. If this is true then it raises the question: what is important enough to override the individual's established private sphere?

The second objective of my research will be to explore this question and to articulate the principles that theorists give priority over their stipulated parameters of the private. If certain principles do consistently take priority over the private then the label of "liberalism" is called into question because its foundations are undermined. The justifications for allowing social inequality fall away and the legitimacy of liberalism becomes very weak.

The methodology that will be employed is a close textual analysis of how the given theorists articulate the private sphere of rights, limitations imposed and theoretical problems that limit the protection of the private sphere of rights. A comprehensive analysis of liberalism requires inclusion of both classical and contemporary theorists. Works of John Locke, John Stuart Mill, John Rawls, and Robert Nozick were used for this purpose. Locke and Mill are both classical liberal theorists with distinct views of liberalism. The contemporary theorists Nozick and Rawls represent dichotomous perspectives on liberalism in present day political theory as Peter Singer writes, "there is a certain appropriateness in the fact that Nozick's chief opponent within this tradition is the American Philosopher, his Harvard colleague, John Rawls."⁷ Nozick representing the right liberals, and Rawls representing the left liberals. These four theorists provide a framework for analyzing liberalism.

⁷ Singer, "The Right to be Rich or Poor," Reading Nozick, p. 45

The works that will be under consideration are John Locke's *Second Treatise on Government*, which presents Locke's contractual view of government. John Stuart Mill's *On Liberty*, along with *Considerations on Representative Government* and his Autobiography are all used to present a cohesive analysis of Mill's work. Nozick's *Anarchy, State and Utopia*, and *The Nature of Rationality* represent contemporary right liberal criticism and Rawl's *Collected Paper's*, *A Theory of Justice*, and *Political Liberalism* represent contemporary left liberalism.

The following four sections provide analysis structured according to each theorist and his respective works in chronological order beginning with Locke, then Mill, and into contemporary theory with Rawls, and finally Nozick. Within each section the sphere of rights will be discussed with a focus on particular issues significant within each theorist's work.

John Locke

The Second Treatise of Government is “a discourse concerning government” as Locke writes in the Preface. The tradition that Locke created continues to be reborn in contemporary theory. Liberalism in its current form has as its basis the theory of John Locke as Daniela Gobetti writes,

The notion of the state as guardian and protector of each individual’s private sphere, and as enforcer of norms which neither the state nor the citizens may change justifies interpreting Locke’s political philosophy as the first expression of modern liberalism.⁸

The Second Treatise not only outlines government itself, but its formation, dissolution, and purpose. The social contract Locke presents in Second Treatise on Government provides both “individualism with respect to means” and “individualism with respect to ends” by maintaining the reciprocal relations of the individual and the government.

Political Power

At the beginning of the Second Treatise Locke offers his definition of political power.⁹

Political Power, then, I take to be a right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the common-wealth from foreign injury; and all this only for the public good.

⁸ Gobetti, *Private and Public*, p. 103

⁹ Locke, *Second Treatise of Government*, p. 8

An explanation of this definition is not offered at this point. Locke moves from defining political power to showing its evolution, or how civil government obtains this power. To do this a pre-governmental state must be considered. This state is the “State of Nature.” Locke writes “To understand political power right, and derive it from its original, we must consider, what state all men are naturally in.” Locke uses the State of Nature as a tool for the establishment and ultimately, the transfer of rights from the individual to the government.

The State of Nature

The state of nature is characterized by a number of characteristics. This is a “state of perfect freedom” and “a state also of equality.” For Locke the absence of government is not necessarily an anarchic situation. Although no civil government is in affect the “law of nature” exists.¹⁰ The implication is that while individuals have rights these rights are not limitless, or as Locke describes,

But though this be a state of liberty, yet it is not a state of license... The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind... no one ought to harm another in his life, health, liberty, or possessions.

The law of nature governs the state of nature, but the issue of enforcement now arises. In a state without a common authority or government enforcement is left to the individuals. Every individual “has a right to punish the transgressors of that law to such a

¹⁰ *ibid.*, p. 9

degree, as may hinder its violation.”¹¹ This is not an absolute power because Locke is careful to outline that an individual should only be punished for “restraint” or “reparation.”¹²

The state of nature as now established is a state with liberty and equality, the law of nature, and an enforcement mechanism. With these provisions a motivation for entering civil society must be established. Locke creates an almost utopic state on the path towards civil government. Why would an individual leave the state of nature? In the state of nature a distinction between the private and public does not exist because there is no public. If the public helps define the limitations on the individuals private sphere of rights then that sphere is only limited by the law of nature. Why would the individual give up such a large sphere of rights? Locke derives the individual’s reason for leaving the state of nature in several ways.

The first reason for leaving the state of nature is based on the enforcement power granted to all persons in regard to the law of nature. Locke is pragmatic in his assessment of human nature, and the consequences of the enforcement of the law of nature when he writes,

That in the state of nature every one has the executive power of the law of nature, I doubt not but it will be objected, that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side, that ill nature, passion and nothing but confusion and disorder will follow, and that therefore God hath certainly appointed government to restrain the partiality and violence of men. I easily grant, that *civil government* is the proper remedy for the

¹¹ *ibid.*, p. 9

inconveniencies of the state of nature, which must certainly be great, where men may be judges in their own case.¹³

The solution to this predicament is then provided in the form of civil government.

In addition to problems of enforcement related to favoritism on the part of the individual Locke offers a harsher view of a non-governmental state to induce individuals into civil society. While the problems of the state of nature may not seem severe the situation could become a state of war. Locke distinguishes between the state of nature and the state of war writing,

Men living together according to reason, without a common superior on earth, with authority to judge between them, is properly the state of nature. But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war.

The state of nature can become a state of war and in order to prevent the possibility of this descent civil society is additionally welcomed, or as Locke writes “To avoid the state of war... is one great reason of men’s putting themselves into society.”

The motivation for individuals leaving the state of nature is established. Locke provides a mechanism for the establishment of government by consent.¹⁴ The nature of civil government and its power can now be discussed.

¹² *ibid.*, p. 10

¹³ See Ruth Grant’s *John Locke’s Liberalism*, page 182, for an analysis of the individuals partiality to oneself and its implications.

¹⁴ *ibid.*, p. 13

Civil Government

The previous discussion on the state of nature establishes the motivation for individuals entering into society. Several necessary conditions exist for the individual to enter into society. First, the individual can never be forced to enter into civil society. Consent is important element in this contractual theory and is the basis of civil society. Without consent a state of war is created that can lead to a “condition of slavery.”¹⁵ The individual also “rational” and “grounded on his having reason.”¹⁶ This may seem an obvious point, but in the latter part of the *Second Treatise* where problems between the individuals and the state are discussed Locke relies on assumptions he makes about a rational citizen to solve problems that may come up in civil society.

The purpose of government within The Second Treatise is clearly to protect the individual’s private sphere of rights as Locke writes, “the end of law is not to abolish or restrain, but to preserve and enlarge freedom.”¹⁷ Later in Chapter nine titled *Of the Ends of Political Society and Government* Locke writes, “The great and chief end, therefore, of men’s uniting into common-wealths, and putting themselves under government, is the preservation of their property.”¹⁸ The “property” Locke is referring to is not limited to tangible items owned by the individual, but encompasses individuals’ “lives, liberties, and estates.”¹⁹

¹⁵ *ibid.*, p. 17

¹⁶ *ibid.*, pp. 34-35

¹⁷ *ibid.*, p. 32

¹⁸ *ibid.*, p. 66

¹⁹ Disagreement exist over Locke’s continuous use of the word “property” throughout the *Second Treatise on Government*. Further analysis of this issue can be found in C. B. Macpherson’s *The Political Theory of Possessive Individualism: Hobbes to Locke*.

Three conditions must be met by civil society that are absent in the state of nature. The first condition is of “an established, settled, known law;” the second condition is “a known and indifferent judge;” and the third condition is a basic executive power to enforce the laws and punishments.²⁰ For pragmatic reasons Locke rests this duty of preserving property on majority rule.²¹ The majority is not given arbitrary power however, and cannot usurp the individual’s rights.

The power that civil society, the majority as an extension and the government have is derived from a transfer of rights from what the individual gives up upon entering society. Locke writes that the power the individual gives up moves “into the hands of the society.”²² This power “can be no more than those persons had in a state of nature before they entered into society.”²³ The stipulations given to rights in the state of nature can be understood in a larger perspective. Locke carefully delineates the rights the individual has and the rights not granted to the individual in the state of nature because of the eventual transfer of those rights. The rights within the state of nature are important because of their relationship to the rights present in society. This has important implications for the private. The government cannot overstep the rights provided which bear the limitations of the law of nature as outlined earlier within the state of nature section.

Locke regards “the great instrument” for protecting the individual’s interest in society as the legislature. Locke writes, “the first and fundamental positive law of all

²⁰ *ibid.*, p. 66

²¹ *ibid.*, pp. 52-53. See Chapter 8.98 for practical purposes of majority rule. Locke includes health, business, and varying interests.

²² *Ibid.*, p. 68

common-wealths is the establishing of the legislative power.”²⁴ The obligations between the individuals in society and the legislature are reciprocal. The legislature is the supreme power governing society as long as it acts legitimately towards the end of protecting individuals’ property. As long as the legislature acts consistent with this obligation the individual is obligated to obey the legislature.²⁵ However, Locke qualifies this relationship with the provision that “the community perpetually retains a supreme power” against attempts to limit individuals’ rights.²⁶ While the legislature is the supreme power it does not have the authority to take away individuals’ property since the protection of property is the “end of government.”²⁷

In addition to the legislature Locke provides for an executive power which would enact and enforce the laws. The executive is subordinate to the legislature and does not have the ability to prevent it from meeting. There is a fine line between the fiduciary power the executive has to call and dismiss the legislature and the executive impeding the legislature from meeting. When the executive oversteps its bounds it then places itself in “a state of war with the people” and loses its authority and no longer is seen as a legitimate authority.²⁸ The relationship between the executive and the legislature is effective, as Peter C. Meyers writes “the division of legislative and executive powers in Locke’s constitution effects a balance not only of opposing passions

²³ *ibid.*, p. 70

²⁴ *ibid.*, p. 69

²⁵ *ibid.*, pp.70 -73

²⁶ *ibid.*, p. 78

²⁷ *ibid.*, p. 73

²⁸ *ibid.*, p. 80

but, more important, of science and art, of general and particular modes of reasoning... to harmonize the claims of the many and the few.”²⁹

Two areas within Locke’s Second Treatise on Government deserve special attention. The two chapters concerning the executive prerogative and the dissolution of government are important because of the potential ramifications to the individuals private sphere of rights.

Prerogative

Locke defines prerogative as the “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.”³⁰ This power is given to the executive to provide for unforeseeable circumstances. The prerogative gives the executive a great degree of power since this power is exercised at the discretion of the executive.³¹ The executive can have the power to override or supercede the law, pardon criminals, and govern concerning areas not covered by the law. Executive prerogative is a pragmatic allowance created to provide for numerous situations as Locke specifies,

For since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may

²⁹ Meyers, *Our Only Star and Compass: Locke and the Struggle for Political Rationality*, p. 224.

³⁰ Locke, *Second Treatise of Government*, p. 84

³¹ *ibid.*, p. 83

come in their way' therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe.³²

While the reasoning Locke offers seem commonsensical the prerogative works as long as the executive is acting on behalf of communal good.

Locke seems to suggest that whether the prerogative is advantageous or disadvantageous to society will be clear. But, Locke writes that the prerogative, when individuals feel the executive is acting on their behalf, is "never questioned."³³ This is important because it is not necessarily outside the realm of a rational individual to believe the executive is acting on behalf of the community when the executive is not. The prerogative by definition is used in ambiguous or ill-defined areas, and also areas not yet covered by the law. Criteria to evaluate the use of the prerogative are then vague.

Locke attempts to side step this issue by relying on society to set the parameters of the executive prerogative. Prima facie, this seems to benefit the individual's private sphere because in this situation the private is dictating the extent of the public right. This occurs with the provision that the extension and use of the prerogative by the executive is understood by individuals in society. If the legitimacy of the use of prerogative power is sufficiently called into question then the mechanisms associated with the executive overstepping his/her power and the dissolution of government may be used.

³² *ibid.*, p. 84

³³ *ibid.*, pp. 84-84

Dissolution of Government

In order to protect the individual's private sphere of rights there must be a way to release oneself from the bonds of an illegitimate government. Locke provides for this in his chapter "Of the Dissolution of Government." Notice this chapter is called "Of the Dissolution of Government" and not "Of the Dissolution of Society" for a specific reason, because even if government is dissolved Locke maintains the individual is still bound to civil society to form a new government.³⁴

Locke outlines specific reasons for the dissolution of a government in situations where "there is no means for resolving this conflict within the framework of the original constitution."³⁵ If the legislature is altered or dissolved then the government is dissolved. The legislature is at the center of Locke's conception of government and without a legislature, or more specifically the legislature created by the commonwealth explicitly, the government should be dissolved. A number of situations arise that affect the legislature adversely that can lead to this situation. If the executive illegitimately extends his/her power then the legislature and its proper power is changed. The legislature is also altered if the executive prevents the legislature from meeting or alters elections. Also, if the government hands over control to a foreign power then the government should also be dissolved. The last condition for dissolving government concerns the negligence of the executive. If the executive acts irresponsibly and is so grossly negligent that the laws cannot be enforced then the government should be

³⁴ *ibid.*, p. 107 The individual is not obligated to society in a situation of conquest.

³⁵ Ashcraft, *Locke's Two Treatises of Government*, p. 196

dissolved also. These are all issues internal to the infrastructure of the government that would lead to its dissolution.³⁶

The second set of reasons for the dissolution of government stems from the relationship of the citizens to the government. If the government acts “contrary to their trust” then the citizens can legitimately dissolve the government. Locke specifies the actions that would meet this criterion as “whenever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power.” If this happens then the government places itself “into a state of war with the people.”³⁷

If a situation arises where the government is acting illegitimately then the citizens have justification for revolution. However, Locke qualifies this right with its pragmatic application by the people. Locke writes,

Such revolutions happen not upon every little mismanagement in public affairs. Great mistakes in the ruling part, many wrong and inconvenient laws, and all the slips of human frailty, will be born by the people without mutiny or murmur. But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people.³⁸

Under this application of the right of the citizens to dissolve the government the private may be severely limited by the public. Locke, in order to create governmental stability places a de facto limitation on the private sphere of rights.

³⁶ *Ibid.*, pp. 107-110

³⁷ *Ibid.*, p. 111

³⁸ *Ibid.*, p. 113

Conclusion

In essence, while Locke gives individuals the right to dissolve the government if rights are impaired he specifies that rights must be severely restricted over a long period of time for this right to be used. This does not adequately provide for the protection of the private from the public. If the public can expand and limit the private unjustly then rights are hampered because the threshold for when the expanding public's infringement on the private will result in action will come after the private has been encroached to a large extent over a long period of time. This does not provide adequate protection for the private from the public in this situation.

However, Locke's contractual theory outlined in the *Second Treatise on Government* effectively creates and establishes a governmental entity designed to protect the individual's private sphere of rights. Problems occur if the government oversteps its bounds and the individuals must seek recourse. While, on a conceptual level infringement of rights will merit a response from the citizens to protect the private from the public pragmatically this only provides protection or response on the most severe level of rights infringement. Overall, *Second Treatise on Government* provides a balance of the tension between the public and the private, as Peter C. Meyers writes "Locke gets results to a degree that no political alternative, premodern or modern, liberal or nonliberal, has equaled."³⁹

³⁹ Myers, Peter C. *Our Only Star and Compass: Locke and the Struggle for Political Rationality*. p. x

John Stuart Mill

The liberal philosopher John Stuart Mill is both celebrated and criticized for his work *On Liberty*. Gertrude Himmelfarb, in her editor's introduction to *On Liberty* writes, "what John Stuart Mill, more than anyone else, bequeathed to us: the idea of the free and sovereign individual."⁴⁰ This idea is not a simple one. Mill was a prolific writer who covered the topic of liberty and government in a variety of texts creating a conception of the private and public, to borrow a phrase from Himmelfarb, that is both "notoriously complicated and devious." Mill's discussion of the individual's private sphere of rights in *On Liberty* gave him "an intellectual authority" that he still carries from that work.

However, Mill's other writings do not afford individual liberty, or the private in this context, an equal amount of protection from the public. Mill neither protects "individualism with respect to ends" because of the priority he gives to individual development over the maximization of rights, nor "individualism with respect to means" because he allows for rights to be trampled in order to reach the aforementioned end. This creates an atmosphere where the private can be subject to the encroachment of the public. The following analysis of Mill's works *On Liberty*, *Considerations on Representative Government*, and his *Autobiography* offered in a topical arrangement will support the above argument.

⁴⁰ Mill, *On Liberty*, p. 8

The Harm Principle

The thesis of *On Liberty*, commonly referred to the harm principle, is what is most recognized as Mill's philosophical legacy. An explanation of the harm principle is necessary to put into context the inconsistencies of Mill's work. Mill outlines the purpose of *On Liberty* in the following passage,

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.⁴¹

This statement seems to be an absolute defense of the private. Mill is offering a firm declaration concerning the individual's sphere of rights as Himmelfarb points out "the words attached to the individual are honorific... those describing society are generally pejorative."⁴² In the introduction where this thesis is outlined Mill articulates that he is drawing a distinction between "the nature and limits of the power that can be legitimately exercised by society over the individual."⁴³ Essentially, he is offering a delineation of the private and the public.

What is considered part of the private is outlined by Mill. The individual is free from interference on all issues "which affects only himself." The individual also has

⁴¹ *ibid.*, p. 68

⁴² Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill*, p. 15

freedom of consciousness, “liberty of thought and feeling,” freedom of expression and the press, “freedom to unite,” and finally freedom for the individual to pursue his/her own plan in life.⁴⁴ Mill spends the remainder of *On Liberty* further outlining the rights to which an individual is entitled. The most important aspect of this designation of freedom is not necessarily the rights contained within the framework of individual autonomy that Mill creates, but rather the commentary Mill provides on a government that does not allow these rights. Mill writes,

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.⁴⁵

Notice the use of the words “absolute” and “unqualified.” Mill places a high threshold for the protection of rights. Mill does not maintain this threshold himself with regard to government. Mill does believe in liberty and its protection, but only to such a high degree for a certain class of society. Mill’s liberty is one based on elitism with a paternalistic view of government.

Elitism and Liberty

The first evidence of elitism within Mill’s conception of liberty can be seen in various sections of *On Liberty*. On the page after outlining the harm principle Mill makes his first concession that,

⁴³ *ibid.*, p. 59

⁴⁴ *ibid.*, p. 71 outlines all of these freedoms.

⁴⁵ *Ibid.*, p. 72

Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement and the means justified by actually effecting that end.

Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.⁴⁶

When Mill is referring to “barbarians” he is not speaking of early bc cultures or some group of humans on the evolutionary ladder, but rather refers to Akbar and Charlemagne who cover 700 ad and 1500 ad respectively.⁴⁷ Was man not capable of “being improved by free and equal discussion” at this time? It can also be argued that this provides a wide avenue for invading the private because as society evolves our conception of “free and equal discussion” changes and no society ever fully achieves that form. There is a circular provision for a government retaining despotic control. As long as the government continues to work towards this goal it may remain legitimately despotic.

Mill’s chapter “Of Individuality” presents another perspective on liberty. This chapter is reflective of the individual’s freedom to pursue his/her own course in life as mentioned earlier. Tensions between the mediocrity of society and the geniuses are highlighted. Mill seems more concerned with providing freedom for those who seem capable of being more productive with their freedom stating,

Persons of genius, it is true, are, and are always likely to be, a small minority; but in order to have them, it is necessary to preserve the soil in which they grow. Genius can only breathe freely in an atmosphere of freedom.⁴⁸

Compare that statement to the following that,

⁴⁶ *ibid.*, p. 69

⁴⁷ *ibid.*, p. 69. See Mill’s footnote 5 on Akbar and Charlemagne.

⁴⁸ *ibid.*, p. 129

In sober truth... the general tendency throughout the world is to render mediocrity the ascendant power among mankind.⁴⁹

This type of elitism may not seem to impact rights distribution within society, but consider the statement Mill makes that “Persons of genius are, *ex vi termini* (by definition), more individual than any other people.”⁵⁰ The implications of this statement must be fully considered. If persons labeled “barbarians” are not entitled to freedom and there exists some group within society that are “more individual,” then does this entail a greater protection of rights or an elevated status? As persons continue along the spectrum of becoming more developed individuals it seems they are entitled to a greater private sphere.

The linear relationship between Mill’s view of development and liberty given to individuals’ is more easily recognized in *Considerations on Representative Government* than in *On Liberty*. The two works are companionable in terms of Mill’s theoretical development because of the close proximity of their being published. *On Liberty* was published in 1859 and *Considerations on Representative Government* was published in 1861. The first chapter of *Considerations* titled “How Far a Matter of Choice” focuses on what types of individuals are entitled to liberty, and as an extension representative government. Mill outlines a number of conditions that make individuals “more or less unfit for liberty.”⁵¹ These conditions are not similar to the conditions outlined by Locke of youth or irrationality, but rather include conditions such as “indolence, or

⁴⁹ *ibid.*, p. 131

⁵⁰ *ibid.*, p. 129

⁵¹ Mill, *Considerations on Representative Government*, p. 15

carelessness, or cowardice,” being a “rude people,” or even “if they can be deluded by the artifices used to cheat them out of it.”⁵²

What can be inferred from this is that if the government is able to take rights away from individuals through manipulation or other means, then those individuals were not entitled to their rights. This, instead of protecting the private provides a mechanism for the private to be co-opted by the public. Mill writes that for some conditions “a civilized government, to be really advantageous to them, will require to be in a considerable degree despotic.”⁵³

This is reflective of Mill’s comment regarding barbarians, but to a larger degree. The Mill of the harm principle who espoused an absolute theory of liberty seems a far cry from the Mill here reducing the individuals entitled to rights to a minimum. Mill not only places conditions on liberty, but also qualifies liberty as not being a sufficient tool to influence the government. The next section will focus on Mill’s focus on power over liberty and its detrimental affect on the private.

Power and Influence

If an individual does not meet one of the conditions that will make one “unfit for liberty,” then the individual has the challenge of exerting power of government to make sure that their rights are not encroached. Mill writes about “active power,” that converts “itself into political power.” The individual having liberty is not enough to ensure a government that protects the private sphere but must also exert considerable

⁵² *ibid.*, p. 15

“will” to this end. Mill writes that,

One person with a belief is a social power equal to ninety-nine whom have only interests. They who can succeed in creating a general persuasion that a certain form of government, or social fact of any kind, deserves to be preferred, have made nearly the most important step which can possibly be taken towards ranging the powers of society on its side.⁵⁴

This is a view concerned more with power than rights. Mill allows powerful groups to arrange governmental or social institutions in the manner they see fit with little regard to those who have only a “general persuasion.” This idea is articulated in his Autobiography where he writes “that government is always either in the hands, or passing into the hands, of whatever is the strongest power in society.”

⁵³ *ibid.*, p. 15

⁵⁴ *ibid.*, p. 23

Conclusion

Despite the profession of Mill's harm principle his theory does not offer adequate defense to the private from the public as Roberto Alejandro points out, "provisos and qualification are also what defines Mill's arguments in *On Liberty*. His radical statements starts to be qualified as soon as Mill recovers his temper."⁵⁵ The elitism and paternalism of Mill's philosophy cannot be ignored. Mill gives priority to other areas ahead of rights, most notably development of the individual and power. These aspects of Mill's philosophy leads to a diminishing private.

⁵⁵ Alejandro, *The Limits of Rawlsian Justice*, p. 8

John Rawls

The political theory of John Rawls is complex because of the shared emphasis of rights and equality. Rawls derives a conception of justice through a set of abstract methods and refers to this as “justice as fairness.”⁵⁶ Pragmatism is not Rawls’ focus, but rather “to generalize and carry to a higher order of abstraction the traditional doctrine of the social contract.”⁵⁷ In understanding the interaction between the private and the public several areas of Rawls’ theory must be analyzed. This section will focus on the basic philosophical elements of his theory and the parameters of the private. Articulating whether Rawls provides for “individualism with respect to ends” and “individualism with respect to means” is difficult. Two ideas will be advanced. First, that the assumptions that Rawls makes in order to achieve his theory of justice do not respect individual rights. Secondly, this creates an arena where rights can be diminished in order to achieve equality.

Two Principles of Justice

The basis of Rawls philosophy is found in the two principles of justice that he uses as the foundation of government. Rawls writes,

First: each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others. Second: social and

⁵⁶ Rawls, *A Theory of Justice*, p. 10

⁵⁷ Rawls, *Political Liberalism*, p. xvii

economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.⁵⁸

Rawls also provides that "the first (be) given priority over the second."⁵⁹ The first principle is well within the confines of liberalism. It outlines the basic parameters of the private and allows individualism with respect to means and ends. The liberties that Rawls includes in the first principle are,

Political liberty (the right to vote and hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person; which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person); the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.⁶⁰

Understanding the parameters of the first principle is crucial to analyzing Rawls protection of the private.

The second principle is not as clearly supportable within a liberal framework. The arrangement of economic inequalities occurs through a system of distributive justice that allows for economic redress.⁶¹ Distributive justice does not seek to create complete economic equality, but seeks instead to make sure that inequalities that do occur are not detrimental to the least advantaged. This is referred to as the difference principle. Rawls is concerned with the allocation of certain "primary goods" within society.⁶² While the difference principle may be critiqued, and is even by Rawls himself, the focus

⁵⁸ Rawls, *A Theory of Justice*, p. 53

⁵⁹ Rawls, *Political Liberalism*, p. 7

⁶⁰ Rawls, *A Theory of Justice*, p. 53

⁶¹ For a further explanation of distributive justice see Chapter 5 of *A Theory of Justice*, and Chapters Seven and Eight in *John Rawls: Collected Papers*.

⁶² A complete discussion of primary goods is provided in "Social Unity and Primary Goods" contained in *John Rawls: Collected Papers*.

here will be how the principles of justice are obtained and the ramifications this has on the private.⁶³

Original Position & The Veil of Ignorance

Original Position is the initial situation of individuals from which the two principles of justice are agreed upon, or as Rawls writes, “the intuitive idea of justice as fairness is to think of the first principle of justice as themselves the object of an original agreement in a suitably defined situation.”⁶⁴ The original position provides the basis for the separation of the public and the private within Rawlsian justice. When Rawls outlines his theory concerning “justice as fairness” the importance of the original position is placed in context. Rawls contends that,

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract...the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement⁶⁵

He uses it to construct his two principles of justice. Is this a valid construction? The following analysis will show that it is not, as Alejandro comments, “there is a sense of uneasiness in the original position arising from the reasonable suspicion that these nonmoral entities will probably fail in their attempt to agree on principles of justice.”⁶⁶ If the construction of the original position is not valid then the parameters created by Rawls are not legitimate.

⁶³ See introduction to *Political Liberalism*

⁶⁴ Rawls, *A Theory of Justice*, p. 102

⁶⁵ *ibid.*, p. 10

Rawls elaborates several characteristics of the original position to have a “suitably defined situation.” First, the individuals are given a variety of options concerning conceptions of justice from which to choose.⁶⁷ Even though this is an abstract situation Rawls does not allow an infinite array of conception to be sorted through because as he contends, “there is no assurance that the parties could make out the best option; the principles that would be the most preferred might be overlooked.”⁶⁸ In order for individual’s to arrive at the two principles that Rawls has designated they must choose from a list provided of “traditional” conceptions of justice as outlined by Rawls’ theory. Rawls narrows the categories of justice to extrapolate his own particular end. The choice of the two principles of justice seems rather forced and contrived. Alejandro writes, “the natural sense of justice and the natural duty Rawls ascribes to his creature comes to the rescue of a project mired in a moral vacuum.”⁶⁹ Notice the choice of the “ascribes,” because that is exactly how Rawls reaches his two principles of justice.

Rawls also places the individuals behind a theoretical “veil of ignorance.” The veil of ignorance is where individuals “do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general consideration.”⁷⁰ What this entails is that no person

knows his place in society, his class position or social status; nor does he know his fortune in distribution of natural assets and abilities, his intelligence and strength, and

⁶⁶ Alejandro, *The Limits of Rawlsian Justice*, p. 37

⁶⁷ The list of conceptions of justice that Rawls considers can be found in *A Theory of Justice* page 107.

⁶⁸ *ibid.*, p. 106

⁶⁹ Alejandro, *The Limits of Rawlsian Justice*, p. 38

⁷⁰ *ibid.*, p. 118

the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life.

Rawls uses the veil of ignorance to prevent to prevent personal favoritism and also allows for a conception of justice to be derived. Without the veil of ignorance and “these limitations on knowledge the bargaining problem of the original position would be hopelessly complicated.”⁷¹ While a conception of justice is arrived at the method does not allow any freedom of conscience. Alejandro illustrates this point writing, “Justice and the very nature of Rawlsian individuals are artificial creations: they are the end result of an agreement.”⁷²

Conclusion

Rawls considers the proper end of the initial position of individuals to be to arrive at a conception of justice and not to advance their own ends. While provisions are made after the fact in the principles of justice for the private to be preserved the method employed to arrive at the principles is corrupt. Rawls is not seeking to arrive at a consideration of individualism with respect to means and ends, but rather to “define the original position so we get the desired solution.”⁷³

While other areas of Rawls’ theory such as distributive justice or overlapping consensus could be addressed they do not stand independent of his analysis of the origination of the two principles of justice.⁷⁴ Essential to liberal theory is the individual

⁷¹ *ibid.*, p. 121

⁷² Alejandro, *The Limits of Rawlsian Justice*, p. 37

⁷³ *ibid.*, p. 122

⁷⁴ See introduction to *Political Liberation*.

having freedom with respect to the means and ends of his life. Rawls does not offer this. The original position denies the individual freedom with regard to ends because he/she cannot be aware of their particular ends in formulating a conception of justice. This is used to create a lack of freedom with respect to means because of the formulation of justice made.

Robert Nozick

Robert Nozick's *Anarchy, State, and Utopia* can be viewed as a reactionary theory. Nozick does not simply offer reasoning for his "minimal state" theory, but rather seeks to prove that no other theory will suffice. In Nozick's theory the private defines the public almost exclusively, but with some serious ramifications. A result of this may be a deficient protection of individual rights that would hamper the private even though it is widely defined.

The Minimal State

Nozick's definition of the ideal government is offered in the preface to *Anarchy, State, and Utopia*. Understanding the end Nozick wants to arrive at helps frame the philosophical considerations he is making. The basis of the minimal state is to be found in individual rights as Nozick maintains "individuals have rights, and there are things no person or group may do to them (without violating their rights)."⁷⁵ From this Nozick derives a definition of the minimal state that,

A minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified; that any more extensive state will violate persons' rights not to be forced to do certain things, and is unjustified; and that the minimal state is inspiring as well as right.

Nozick provides several considerations in support of this theory of government that will be addresses in the following sections. The discussion of the state of nature (anarchy)

⁷⁵ Nozick, *Anarchy, State, and Utopia*, p. ix

and large government (the state) will not be addressed explicitly in that Nozick uses both to frame certain arguments in favor of the minimal state and to that end the two will be addressed in the following analysis.

Invisible-Hand Explanations

The creation of the state is not a sudden occurrence for Nozick from complete anarchy to an explicit and contractual government. Nozick contends that this process develops and is not simply an “intentional design.” There is a process of filtering and reaching equilibrium that creates an invisible-hand explanation.⁷⁶ Nozick describes the phenomena of invisible-hand explanation that,

show how some overall pattern or design, which one would have thought had to be produced by an individual’s or group’s successful attempt to realize the pattern, instead was produced and maintained by a process that in no way had the overall pattern or design “in mind.”

Nozick trails through a series of associations short of being actual “states” in the process of the state being attained.⁷⁷ The invisible-hand explanation is significant to the private because of some of the implications that Nozick makes as a result. Nozick uses the invisible hand to move from the state of nature to the minimal state without intervention. This is important because it allows Nozick to “get from a state of nature to a minimal

⁷⁶ *ibid.*, p. 21

⁷⁷ See Robert L. Holmes essay “Nozick on Anarchism” in *Reading Nozick* for a description of the movement from the state of nature to the minimal state.

state without violating anyone's rights, so that there is no point at which anyone can claim that the state has assumed authority illegitimately."⁷⁸

This is further complicated by the inference that the individual is limited in avoiding the formation of the state and as a result can do little against the claim that "a state would arise from a state of nature."⁷⁹ The state is an inevitable institution individuals are moving towards. The individual does maintain rights, however, especially over holdings and resources. Nozick does not allow the state to be any more "extensive" than the minimal state.⁸⁰

Rights Protection

Several ideas within Anarchy, State, and Utopia are important to understanding Nozick's conception of rights protection and the private. Nozick wants to create a social framework where the degree of rights given to the individual is large, but does not seem to provide adequately for the protection of these rights. His entitlement theory sets forth protection of individual holdings and resources, but not without complications. While his discussion of equality conveys the limitations of the minimal state with regards to rights. Nozick's last section on *Utopia*, further illustrates the ambiguity with regard to rights protection.

Nozick's entitlement theory outlines the just acquiring, holding, and disposing of holdings in society. Nozick is not sure how to deal with the "rectification of injustice in

⁷⁸ Singer, "The Right to be Rich or Poor," *Reading Nozick*, p. 39

⁷⁹ *ibid.*, p. 131

⁸⁰ *ibid.*, p. 149

holdings” creating an ambiguous policy regarding property.⁸¹ While he specifies the nature of “justice in holdings” writing,

The theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or by the rectification of injustice (as specified by the first two principles). If each person’s holdings are just, then the total set (distribution) of holdings is just.

The “rectification of injustice” is not clearly provided for within Nozick’s entitlement theory. Nozick is critical of distributive justice, but does not clearly outline how the entitlement theory will protect rights.

Next attention can be given to Nozick’s discussion of equality. Nozick is derogatory of the emphasis placed on equality in social institutions writing, “the legitimacy of altering social institutions to achieve greater of material condition is, though often assumed, rarely argued for.” Nozick uses his entitlement theory to limit the government’s ability to affect liberty. Mere inequality is not enough to warrant governmental interference. Only injustice in regard to holdings can give the government the right to interfere.⁸² A lack of equality of opportunity does not give the government the right to interfere in social institutions.

Nozick is specific in that since inequality cannot be rectified without some redistribution, then it will cause rights violations because enforcement of equality of opportunity requires “a substructure of things and materials and actions.”⁸³ The minimal state in leaving rights alone, is unable to provide that everyone in society will be able to

⁸¹ *ibid.*, p. 153

⁸² *ibid.*, p. 232

⁸³ *ibid.*, p. 238

exercise or maximize their rights. Nozick seems to enlarge the private to such a degree that if problems occur within the private they are difficult to rectify.

Utopia is Nozick's solution to anarchy and the state. The utopia Nozick creates is best described as a number of smaller states that are each unique and provide the ideal form of government for the individuals within. Individuals choose when to enter into and when to leave a given society and the specific society chooses what individuals to accept.⁸⁴ Through the filter and equilibrium processes societies evolve to better serve individuals. Several issues emerge from this framework. First, these communities are not subject to the restrictions of the individual state. If the individual is unhappy then the individual may leave, or not choose to join specific communities. This creates a situation of flux that may lead to fragmentation that would endanger particular societies' ability to maintain the private and public sphere the individual wants. Peter Singer discusses issues that would develop in Nozick's "meta-utopia."⁸⁵ Communities that rely on members fulfilling specific roles would have trouble functioning if the make-up of their community changed.⁸⁵

⁸⁴ *ibid.*, p. 311

Conclusion

The theory espoused in *Anarchy, State, and Utopia* may be viewed as an example of the fears of the encroachment of the private by the public existing to such a degree that it hinders society. Rights are separated and “protected” to the detriment of rights. The heart of *Anarchy, State, and Utopia* lies in its criticism of the state of nature and modern government, and not in properly clarifying the minimal state. Bernard Williams refers to this as the “minimally positive and the ambitiously negative.”⁸⁶ Nozick now seems aware of the limitations of this philosophical perspective. In his latest book, *The Examined Life*, Nozick hints at the social limitations of such a view of rights as expressed through the minimal state.⁸⁷

⁸⁵ See Peter Singer’s essay “The Right to be Rich or Poor” in *Reading Nozick* for a further explanation of the dependence of societies on members to maintain the social and political environment.

⁸⁶ Williams, “The Minimal State,” *Reading Nozick*, p. 31

⁸⁷ See introduction to Nozick’s *The Examined Life*.

Results and Conclusions

The results of the textual analysis of works by John Locke, John Stuart Mill, John Rawls, and Robert Nozick offer perspective on the notion of liberalism. The objectives of this paper were twofold. First, the question was presented as to whether the private was inviolate within liberalism. And the second objective was to explore and articulate the principles that theorists gave priority over their stipulated parameters of the private. Holistically the private is not inviolate and is evident through the conclusions drawn for each theorist. First, to evaluate Locke's contractual theory of liberalism offers the least internal validity problems. The Second Treatise of Government presents interaction between the individual and the state that is short, simplified, and to a degree ambiguous, but provides a rational and commonsensical approach in distinguishing between the private and the public. Locke is the most consistent of the liberal theorist analyzed.

Nozick and Rawls each take the lockean perspective of government and try to conform it to their perspective concerns regarding the private and the public. Rawls wants a larger public to regulate the private to provide for rights and equality. Nozick wants a narrow public and large private to ensure rights are not usurped by government. Neither is successful in maintaining adequate boundaries of the public and private. Rawls conception of the original position is limited to net the desired results he needs to frame his theory of "justice as fairness." Nozick imposes such restrictions on the public within his theory of the minimal state that the private sphere may not be adequately

limited to provide rights maximization for individuals. In each case the private is not inviolate.

Mill provides an additional perspective of a theorist with liberal elements, but with strong convictions that override liberal considerations or the protection of the private. The elitism of Mill's theory concerning the interaction between the individual and government only protects the rights of a few. This coupled with Mill's view of human development creates a justification for despotic rule over some people. The affect is an ambiguous private dependent on an individual's place within society that does not afford the individual adequate protection from the public.

The conclusion that can be drawn from this is that the private does not exist exclusive of the public within liberalism. Liberalism is not just concerned with the protection of rights, but the protection of rights within a social framework. Other priorities are taken into consideration with rights within a society. The balance of the tension between social priorities and individual rights is at the center of the tension between the public and the private. The convergence of the private and the public will continue to be an area of disagreement as evident by contemporary political theory. The tension between the private and public works to make sure one element does not encroach on the other. Attempts to reconcile the public and the private tend to give preeminence to one at the expense of the other. Perhaps the conflict between the public and the private is necessary in a dynamic social environment to allow for evolution of ideas and rights.

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