

Law, Liberty, and The Limits of Selfhood

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Is the state justified in protecting individuals from themselves? This paper advances philosophical conversations around the interlinked nature of selfhood and the law, proposing that the self ought to be understood not as an isolated concept, but rather as a series of narratives deeply connected to the communities around us. From this conception of selfhood that is advanced, an analysis of the relationship between individuals, government and the community is put forth, culminating in the consideration of questions surrounding ‘consent of the governed.’ This paper contributes to the literature on selfhood and the scope of the law by putting political philosophers in conversation with one-another and with decisions made in courthouses over the past century. While ultimately arguing that the state does have a right to protect individuals from themselves in certain cases, it provides a more grounded justification for doing so and calls for a re-evaluation of current policy to ensure it adheres to the principles laid forth.

On one side of the intellectual boxing ring is John Stuart Mill, who claims that individuals are ‘not accountable to society for [their] actions, in so far as these concern the interests of no person but [themselves].’¹²⁹ On the other side of the ring are thinkers like Richard Thaler and Cass Sunstein, arguing that the state should play a more active role in nudging people towards actions deemed beneficial to their overall wellbeing.¹³⁰ The idea of a personal sphere free from state interference isn’t new: we see it in ancient Roman family structures, helmed by a powerful *Pater*

¹²⁹ Mill et al., *On Liberty, Utilitarianism, and Other Essays*, Chapter 5.

¹³⁰ Thaler and Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*.

Familias (father figure) who held absolute power, including the power of life and death, over his family. The concept is most evident in the American Constitution, which demarcates the individual sphere from the collective through its non-exhaustive enumeration of rights. What's interesting is that paternalism isn't a rejection of the individualist values underpinning the constitution. It isn't the state telling individuals to act against their own interests in favor of that of the *collective* interest. Instead, paternalism amounts to an assertion that individuals should be forced to act in a particular way because it is in their *own* interests to do so.

This essay is about selfhood and the state. More precisely, it is interested in the question of whether the proper role of the state extends to protecting individuals from themselves. The issue has direct salience in light of ongoing debates over access to assisted suicide, drug legalisation, bans on fast-food advertising and, in the case of the UK, moves to ban cigarettes even for consenting adults.¹³¹ For these debates to be more than a battle of *wills*, further analysis is needed.

Preceding the political philosophical debates on consent of the governed and individual rights is a metaphysical debate on what selfhood actually *is* and requires. In policy and beyond, I argue, the self is often conceptualized as being this discrete 'authentic' entity, something which directly justifies the legal recognition and enforcement of rights and would suggest the answer to this paper's research question is *no*.

¹³¹ 'Prime Minister to Create "Smokefree Generation" by Ending Cigarette Sales to Those Born on or after 1 January 2009,' GOV.UK.

This paper posits that this conception of selfhood is misplaced: people don't exist in a vacuum and so the 'individual' must be understood in the context of the broader social and political community into which he is born. This still paves the way for the creation of an 'individual' sphere in the eyes of the law, stemming from a need to manage and mitigate conflict. But that does not necessarily rule out protecting individuals from actions deemed harmful to their welfare. Consent of the governed need not apply to every single action, that would simply be unworkable given the millions of collective decisions that need to be made and the plurality of different interests at stake. Instead, where consensus (*ideally*, or general agreement *in practice*) is needed is on the higher-order rules and frameworks that govern political decision-making.

1. Toward a New Conception of the Self

In our everyday lives, we take it as a given that we, as individuals, are self-defined and well-ordered units, distinct from the rest of the world. In the context of law and justice, this is certainly the dominant doctrine. *Baltimore v. Goodman* (1927), for example, stated the need for *individuals* to take reasonable precautions in negligence cases.¹³² If an individual is convicted of murder, it is he, not his mother that will be incarcerated. The principle is omnipresent in our lives: In economics many of us consider what is just to be what has been meritocratically acquired by individuals through their *own hard work*. Meanwhile our philosophy has progressed

¹³² "Baltimore & Ohio R. Co. v. Goodman, 275 U.S. 66 (1927)," Justia Law.

to a view of man whereby, in the words of Schopenhauer, his ‘mind is by its nature free, not a slave; only what it does by itself and willingly is successful.’¹³³

It is from this perspective of an authentic, true self that we derive rights-based theories of justice, including those proposed by Nozick, Mill and Ayn Rand. In her essay entitled *Man’s Rights*, Rand argues that because man exists, and if he is to continue existing, he has a *right* to his own life and by derivation, his own body. For the state to step in and coerce an individual to act — even if in their own interest — against their will, amounts to a violation of man’s rights. Rand herself never directly addressed the issue of ‘paternalism,’ the view that the state should urge people toward behaviors that might advance their welfare. Nevertheless, the work of her intellectual heirs provides some confirmation of this view. One former Fellow of the Ayn Rand Institute went as far as to label anti-smoking legislation a ‘cancer on American Liberty’ in a 2010 op-ed.¹³⁴

More broadly, underlying this view of the well-defined individual is the concept of a *will* that is perfectly rational and knows exactly what it wants. From this, it follows that when government claims to act in an individual’s interest, it is really just infringing upon their rights, using their ‘well-being’ as an excuse. After all, an individual with perfect rationality and clear desires has no need for government to act on its behalf. Most libertarians, including Rand and Nozick, would concede that governments have the ability to act when a genuine collective action

¹³³ Schopenhauer, *The World as Will and Representation*.

¹³⁴ ‘Anti Smoking Paternalism A Cancer on American Liberty,’ The Ayn Rand Institute.

problem is involved. However, this could not be extended to cases where no externality is present (or is minimally present), as in the case of someone drinking alone at home. The main takeaway is that this conception of selfhood leaves no space (and no need) for the state to protect individuals from themselves.

The obvious objection is that the individual *can't* be as clearly defined as the view above would imply. Alasdair MacIntyre is one figure who provides a counter-narrative of the self in his 1981 book *After Virtue*.¹³⁵ We do not exist in a sandbox but rather as embodied members of a community which shapes our values and vice-versa, he posits. MacIntyre's work draws heavily on that of Aristotle's. The line between the self and his community is far more blurred than it appears, for first is the question of values, which derive from one's community and whom one in part shapes. Then there is a question of ethics: What is considered ethical by a community, even if one does not agree, will shape one's incentives to act in a certain way (take, for example, the age of consent which varies across regions and time periods, but which carries severe penalties for breaching it). From this view, we see things completely differently — things are less a question of the state protecting individuals from themselves, but rather the community taking steps to safeguard its own existence and moral integrity. Actions matter and influence others. There are no neutral acts — everything sends a normative signal. If any individual, under this view, wishes to do good, he must aim at the good of his community. This view seems convincing but falls short. Ultimately, decisions are still being made from an individual even if influenced by

¹³⁵ MacIntyre, *After Virtue: A Study in Moral Theory*, Chapter 14.

others. Attempting to drive policy purely based on the majority will therefore *inevitably* lead to conflict and stagnation.

There's another objection we must take seriously: that there is no such thing as the self at all. If we extend the logic of the MacIntyre / Aristotle argument above, we realize that everything we are, both our physical bodies as well as our souls, ideas and minds, are deeply interwoven with the world around us. '*For dust thou art, and to dust thou shalt return,*' as the verse from Genesis goes. This monist understanding deserves credit, but in the words of Parmenides, we live according to 'the way of mortals'¹³⁶ and therefore hold onto a pluralistic ideal of the self. The self exists, I have written elsewhere, not as an objective or atomised entity, but rather as a set of narratives one creates about one's life and one's identity.¹³⁷

It has become clear that any protection of individuals against *themselves* cannot proceed on a pure rights theory. We have seen that the self is in fact a fluid concept, shifting over time and being deeply connected to the community. Only from this understanding of the self can we establish the proper limits of government.

2. From Selfhood to Nationhood

Our conversation proceeds from this new paradigm for the self that we have established: One where far from being an atomised unit, 'selfhood' is understood as constructed through narrative

¹³⁶ Parmenides, Fragments.

¹³⁷ Lehodey, "Decoding the Self through Auster's City of Glass | The New York Trilogy Analysis."

yet still containing an element of autonomy. Individuals do have wills, even if that *will* is not absolute.

To proceed from here, a more thorough investigation of the self and the polis is needed. Individuals, we have recognised, do not live in isolation; and the very morals and standards that individuals assume in their lives are shaped by those of the community. Assuming that individuals are self-interested and rational,¹³⁸ it nonetheless holds that attempts to improve themselves will include those aimed at improving society. One cannot live well without those around themselves living well. This reordering in how we understand the self — a view of the individual closely aligned with Aristotle's¹³⁹ — does imply that to pursue goodness, individuals must order others around them towards the *good*. Of course, everyone has a different conception of what they take *the good* to mean, and so the result *is* in fact a relativistic majoritarian imposition on other people. This is why, in the case of drugs and alcohol, some countries fix the drinking age at 18 whilst others fix it at 21. All the while Oregon decriminalizes all drugs whilst the UK clamps down.¹⁴⁰

If this view of justice as a social dynamic seems familiar, it's because it is – this was the perspective of law that dominated before the Enlightenment, visible in Miller's *Crucible* where the villagers of Salem burn witches for the external moral corruption they inflict.¹⁴¹

¹³⁸ Dawkins, *The Selfish Gene: 40th Anniversary Edition*.

¹³⁹ Aristotle, et al. *The Nicomachean Ethics*.

¹⁴⁰ 'Possession of Nitrous Oxide Is Now Illegal,' GOV.UK.

¹⁴¹ Miller, *The Crucible: A Play in Four Acts*.

As the Enlightenment caught on, so did notions of responsibility and ideas about universal human rights. Flourishing in our own lives, we realized, requires the codification of rights into the law. At the time the dominant rhetoric was commonly one of rights endowed by a creator. The Declaration of Independence, for example, famously states that “we hold these truths to be self-evident, that all men are created equal, endowed by their Creator with certain unalienable rights.”

First came Rousseau, who argues that individuals enter into social contracts because it is beneficial to *them* to do so, and that Governments are only valid insofar as there is a covenant between men.¹⁴² Although, in *The Social Contract*, Rousseau provides us with a useful perspective on why we should accept government in our lives, the book provides no answer to the limits of said government (indeed he argues that if men choose not to accept, they should be *forced* to ‘be free’). Here, Hayek comes to our rescue, arguing that protecting minority rights is in the interests of all, including the majority, for it is from there which progress is derived, and a progressive society is fundamental to living a good life.¹⁴³ Hayek’s claims are complemented by those of Amartya Sen, who illustrates that the value of rights is not purely procedural, but also grounded in their outcomes.¹⁴⁴ We can therefore understand rights as procedures that help to secure the best outcome for the most individuals across an extended period of time, counteracting the Randian and Nozickian argument that rights *exist* out there.

¹⁴² Rousseau, *The Social Contract*.

¹⁴³ Hayek and Stelzer, *The Constitution of Liberty*.

¹⁴⁴ Sen, *Development as Freedom*.

Chief amongst these rights which guarantee human flourishing is the right to govern one's life, which implies the individual be left alone so long as they are not harming others. Though one could argue that *no* actions are purely individualistic given the nature of individuals identified further up in this essay, Hayek again notes the need for a useful threshold before which the state can intervene — historically when individuals begin to cause physical harm to others. We find ourselves back at Locke's initial argument for autonomy and consent of the governed, albeit with a much richer understanding of the self and its relation to other selves and the world. To rule without the consent of the governed is to pave the way for despotism and conflict. Only in accordance with this almighty principle can we achieve a state of flourishing in our lives and in those of others.

3. Neutrality and Consent

All of the above points in one direction: Government cannot have either the duty or the right to protect individuals from themselves for this would violate the principle of consent of the governed. I will reiterate that whilst any government *could* of course choose to violate this principle, we are assuming that individuals are self-interested and rational, which therefore limits this possibility.

The principle of the consent of the governed would be violated by asserting that an action protects an individual from themselves. To justify such an action, the individual must recognize the need for protection, thus placing them in the best position to make the decision independently. Alternatively, even if both the individual and government officials agree on

intervention, if the government acts on behalf of the individual, it may coerce another party to dedicate time or resources involuntarily. This would occur because, in the absence of state intervention, the transaction would have been purely voluntary. The conclusion is straightforward: the state should neither protect individuals from themselves nor force third parties to contribute to such protection against their will.

But what if there were a way to bridge the two? Peter de Marneffe's paper, *Liberalism, Liberty, and Neutrality* does exactly that. In distinguishing between 'Concrete Neutrality' and 'Neutrality on Grounds,' De Marneffe helps to show that consent can be secured even if individuals do not agree with the outcomes of justice.¹⁴⁵ In a system of law for example, an individual convicted of a crime might not be content with that decision, even if he would concede that the legal system at large is premised on principles with which he agrees. The same is true in a wider system of Government — one need not agree with every single law, but so long as individuals agree with the principles according to which laws are made and justice applied, there is legitimacy in the system. Testing the criteria for if neutrality of grounds has been met is difficult in practice, and we revert to proxy measures like voter turnout and media engagement. Nonetheless, de Marneffe's paper is crucial in advancing our understanding of this question and helping us recognise that the principle of consent can still be met even when individuals do not agree with every specific law.

¹⁴⁵ De Marneffe, "Liberalism, Liberty, and Neutrality," 253–74.

4. Conclusion

We end where we began, at our thesis, having shown that despite selfhood being in many ways an illusion, consent of the governed is still an essential characteristic of any government. From there, I outlined that consent of the governed does not *on principle* exclude the state from protecting individuals against themselves. The exception to this would be if individuals enacted a constitution that outlawed this, or clearly showed their disavowal of these measures in the press or at the ballot-box. Such would be a clear example of the fact that individuals did reject such measures at a second-order level. Failing that, state action aimed at protecting individuals from themselves, such as prohibiting drugs, mandating seatbelts, or outlawing underage drinking, must be assessed on grounds of expediency and not principle.

Having drawn on many thinkers and objects of analysis throughout this essay, I too have advanced the conversation further by providing a stronger justification for rights through the synthesis of various thinkers, causing us to question this issue deeply. I will conclude by urging my readers to think about what good policy on grounds of expediency *means*. It increasingly looks as if the prohibition approach, particularly on drugs and other substances, has failed to deliver over the past few decades. Perhaps now is the time to assert a new path forward.

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