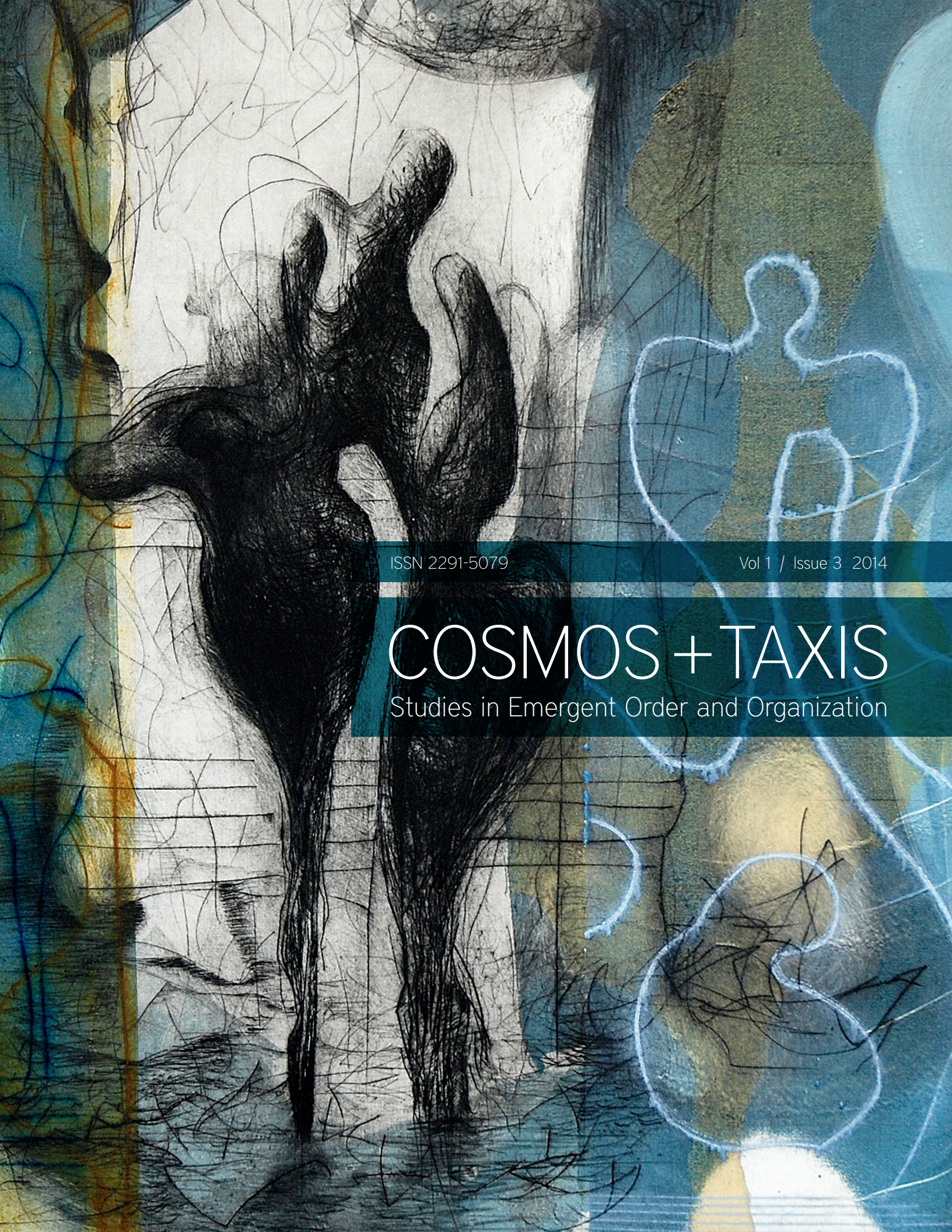

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COSMOS + TAXIS

Studies in Emergent Order and Organization

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IN THIS ISSUE

Editorial Note 1

The Critique of Rationalism and the Defense of Individuality: Oakeshott and Hayek 3
Chor-Yung Cheung

Jane Jacobs' Critique of Rationalism in Urban Planning 10
Gene Callahan and Sanford Ikeda*

Oakeshott on Modernity and the Crisis of Political Legitimacy in Contemporary Western Liberal Democracy 20
Noël O'sullivan

Oakeshott and the Complex Ecology of the Moral Life 27
Kevin Williams

Homo Ludens and Civil Association: The Sublime Nature of Michael Oakeshott's Civil Condition 35
Thomas J. Cheeseman

The Instrumental Idiom in American Politics: The 'City on the Hill' as a Spontaneous Order 48
Corey Abel

Dogmatomachy: Ideological Warfare 60
David D. Corey

Oakeshott on the Rule of Law: A Defense 72
Stephen Turner

Editorial Information 83

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Editorial Note

GENE CALLAHAN* AND LESLIE MARSH**
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This, the first themed issue of COSMOS + TAXIS, is dedicated to the memory of Kenneth Minogue (1930-2013). Ken, as most will be aware, was a longtime colleague and friend of Michael Oakeshott and was the first President of the Michael Oakeshott Association. Moreover, following in the footsteps of Friedrich Hayek (the first President of the Mont Pelerin Society), Ken served as the Society's 27th President. Hayek, of course, is very much part of the conceptual DNA of this journal.

Ken will be remembered as a most generous and congenial person both professionally and privately. He had a twinkle in his eye and a quick and cultured wit. He was never pompous and always showed a genuine interest in things beyond his (pardon the pun) ken. Much of what John O'Sullivan (2013) observed, namely Ken's intellectual honesty and modesty, was borne out by many others' experience. O'Sullivan recalls that:

> [H]e would delight in having his arguments caught, turned around, and sent whirling back by an opponent. Hearing this mix of logic and wit was rather like listening to a Platonic dialogue re-written by Noel Coward or Tom Stoppard.

Moreover, as O'Sullivan puts it:

> [Ken] knew that being a good teacher meant being a good learner. He was always ready to listen to other views, however out of the way, and to debate them "politely." On one occasion he accepted an invitation from Arianna Huffington to the Café Royal to meet her guru of the moment. In the formal informal manner of such events the guests had to introduce themselves. Ken's opening gambit was "My name is Ken. I am a teacher. But I am here to learn rather than to teach."

Ken was always responsive to the many requests that came his way—indeed, in retirement he seemed to be busier than he ever was while at the LSE. Ken had time for students

even if they weren't *his* students. I** for one first wrote to him (pre-email) and within a few days he phoned me and invited me into have lunch with him in the senior common room. This began a series of meals over the next twenty-five or so years. Even after I relocated to the US, we always made a point of meeting up when both of us were in London. Ken, the most widely traveled person I knew, was always on the go as his son Nick attests. Our last London meetings included a Laphroaig session in his small transitional flat in Baron's Court followed by a Thai dinner and a similar lunch in Fulham. I* once had the pleasure, as a lowly Master's Degree student, of being seated next to Minogue at a dinner at LSE. He seriously wondered what sorts of things I was working on (I was already publishing at the time), and took the time to give me advice on sorting out my work priorities. The last time a few of us saw Ken was for a lovely half-week in April of 2013 in upstate New York at an event held under the auspices of the Alexander Hamilton Institute. Despite a most grueling travel itinerary, Ken, ever the trooper, was on sparkling form both in the conference hall and at the dinner table and the bar.

Outside of academe, Ken and his late wife Bev (Cohen), threw the most wonderfully convivial house parties at their Fulham home (not very far from where one of us** lived). In the tradition of the salon, these instantiated the recognizably Oakeshottian virtues of conversation—*politesse*, *civilité* and *honnêteté*. The food was superb, the wine flowed, and the cigars were alight (by the men *and* the women). Once again, John O'Sullivan:

> Bev and he gave an apparently limitless series of lunch and dinner parties at which visiting conservative firemen from abroad, local Tory intellectuals, sporting left-wingers fond of debate, next-door neighbors, actors, painters, novelists, journalists and the couple's extended families—very much including Val—would gather at a long table in the conservatory to be fed delicious food, drinkable wines, and provocative argument. Ken was a generous host, champagne bottle always at the ready, Bev a superb cook.

It was through several of these parties that I** met Maurice Cranston, Elie Kedourie and Robert Orr, names from the "golden age" of the LSE. Later I came to meet their widows and Simon Oakeshott (Michael's son), himself a most gentle and generous man. Through Ken I also met Digby Anderson at some Pall Mall club (I forget which); Anderson ran an occasional discussion group that included Anthony O'Hear and several others. Knowing my penchant for literature, Ken invited me to a Liberty conference held at the glorious Royal Wells Hotel in Tunbridge Wells, despite our divergence over the value of *The Catcher in the Rye*, one of the discussion pieces.

One of the things that made Ken so appealing was, as O'Sullivan says, that he was "an equal enemy both to the political demagogue and to the academic mystagogue." In this day and age, in which the university has become a refuge for the *il*liberal ideologue, Ken was *the* sceptic par excellence. On this note, there is a nice symmetry to this issue in that Ken's daughter, Noonie, has kindly provided the artwork, appropriately entitled "The Sceptic."

At first sight it might seem odd that Oakeshott is the special subject of a journal that has complexity, broadly conceived, as part and parcel of its scope. But as Ken in one of his last pieces observed: ". . . the more Oakeshott developed his thought, the more he became a kind of rhapsodist of complexity . . ." (Minogue, 2012, p. 232). Regarding this piece, the editors (Franco and Marsh) were somewhat hesitant to ask Ken to write "yet another" essay on rationalism; after all, he'd been writing on the issue for fifty years (Minogue, 1963). Ken's response was that there was always something fresh to say on the topic and, accordingly, he subsumed Oakeshott's lifelong concern with abstraction under the umbrella of complexity. Unsurprisingly, rationalism features strongly across the papers in this collection.

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The Critique of Rationalism and the Defense of Individuality: Oakeshott and Hayek

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Bio-sketch: Chor-yung Cheung teaches politics at the City University of Hong Kong. His prime interest is in the study of social and political philosophy and Hong Kong politics. His published books include *The Quest for Civil Order: Politics, Rules and Individuality* (2007, Imprint Academic) and *The Poetic Character of Human Activity: Collected Essays on the Thought of Michael Oakeshott* (2012, Lexington Books) co-authored with Wendell John Coats, Jr.

Abstract: Oakeshott and Hayek were both towering figures of the twentieth century in social and political philosophy who had contributed a lot to the defense of individual liberty. While this paper acknowledges that there are important affinities in their respective intellectual outlooks, it also attempts to argue that there are significant differences in their critique of Rationalism and defense of individuality. Oakeshott's criticism of the sovereignty of technique in modern Rationalism is premised on his claim of the inseparable partnership of technical knowledge and practical knowledge in all human cognition and action. This, together with his recognition of the poetic character of all human activity, allows Oakeshott to develop a critique of Rationalism that fully appreciates the importance of individual style, meaning, and freedom. Hayek's critique of constructivism, while highly original and persuasive, still relies on the primacy of demonstrable abstract principles that is rationalist at least in style if not in substance. Furthermore, Hayek's defense of individualism is, in the final analysis, epistemological and evolutionary, making his justification of individual liberty at times instrumental rather than intrinsic.

Keywords: Rationalism; individuality; practical knowledge; technical knowledge; experience; abstract principles; rules; poetic character of human activity

INTRODUCTION

Oakeshott and Hayek were among the most profound theorists of civil association of the 20th century. In their respective philosophical responses against totalitarian politics, I believe that they share a number of important common positions: the critique of centralized or collective planning, the adherence to the rule of law as one constitutive element of civil association, the defense of individual freedom, and the preference for emerging practices to deliberately designed institutions.

Although the more conventional understanding is that the Oakeshottian kind of conservatism is theoretically quite opposite to Hayek's classical liberalism (Sandel, 1984, pp. 1-11), recent scholarly studies appear to put more emphasis on the affinities shared by Oakeshott and Hayek. For example, Richard Boyd and James Ashley point out that both Oakeshott and Hayek recognize the importance of spontaneous order in their social and political philosophy. To them, Oakeshott's critique of Rationalism and Hayek's attack of constructivism demonstrate in similar manner the pretense of Reason with a capital R, and both theorists argue persuasively that a kind of neutral rules of just conduct is required in order to maintain civil order, in which individual freedom is protected (Boyd and Ashely, 2007, pp. 87-106). Equally interesting is Leslie Marsh's most recent work on Hayek and Oakeshott. Marsh argues that both thinkers share more or less the same conception of mind/cognition and embrace a kind of embedded individualism (Marsh, 2012, pp. 248-267).

While I find many of the views in Boyd and Ashley's paper and in Marsh's article agreeable, I intend in this paper to examine the differences between Oakeshott and

Hayek instead. As I shall argue later in this paper, despite their affinities in many respects, there are important differences between the two as regards their respective critiques of Rationalism and defenses of individuality. A good understanding of these differences will not only help us to better recognize the nature of their respective philosophical positions, but also to better appreciate the strengths and weaknesses of their different approaches. Like any profound thinkers whose ideas are worthy of comparison, a close examination of their affinities may reveal important differences, just like going beyond the differences may discover significant common concerns. Learning these differences, just like recognizing the affinities, will, I believe, help us to better grasp the complexity of profound thinking and help to illuminate the human condition.

THE CRITIQUE OF RATIONALISM

Let me begin with Oakeshott's famous swipe at Hayek in "Rationalism in Politics" where he regards Hayek's *The Road to Serfdom* (1944/1972) as rationalistic despite its opposition to socialism: "A plan to resist all planning may be better than its opposite, but it belongs to the same style of politics" (Oakeshott, 1962, p. 21). For those who are familiar with Hayek's criticism of scientism (Hayek, 1952/1979) and constructivism (Hayek, 1973), they may be puzzled by such a remark, since Hayek is one of the most severe critics of synoptic planning and is keenly aware of the limits of centralized reason because of the inevitable "fragmentation of circumstantial knowledge" and the impossibility of an abstract Cartesian mind that can model our civilization afresh after its own image or rationality (1973, pp. 8-34).[1] Leslie Marsh in fact thinks that Oakeshott is "just plain wrong" (Marsh, 2012, p. 260) about Hayek in this regard.

However, on closer examination, I would say that Oakeshott's comment on Hayek in fact is not too far off the mark. Let me explain.

First, Oakeshott of course is not saying that Hayek is an advocate of central planning. But to Oakeshott, however, Hayek in some important respect is still following the rationalist style of politics precisely because he is employing an ideology (liberalism or libertarianism) or a doctrine derived from abstract political principles to defend individual freedom and the western civilization. That is why Oakeshott has this to say: "only in a society already deeply infected with Rationalism will the conversion of the traditional resources of resistance to the tyranny of Rationalism into a self-conscious ideology be considered a strengthening of those resources" (1962, pp. 21-22).

Hayek in fact all along is very clear and frank about this. For example, in "Individualism: True and False" (first published in 1946, after the publication of *The Road to Serfdom*), Hayek laments the declining influence of religion and hence "the need for a generally accepted [set of principles] of social order" which is "implicit in most Western or Christian political tradition but which can no longer be unambiguously described by any readily understood term." Therefore, it is necessary "to restate these principles fully" with the hope that they can serve as "practical guides" for Hayek and the liberals. (1948/1980, p. 2) Indeed, in his perhaps most important philosophical 3-volume work the trilogy *Law, Legislation and Liberty* (Hayek, 1973; 1976; 1979) which were published in the 1970s, the subtitle of this work is "A new statement of the liberal principles of justice and political economy".

Oakeshott never says that one should not under any circumstances abstract traditional resources into a doctrine or a set of principles. In fact, Oakeshott had given quite a favorable peer review to Hayek's *Constitution of Liberty* (1960) before it came out, saying that it was impressive and breaking new grounds. But Oakeshott in his review had consistently described Hayek's attempt as setting out a "doctrine" that is "deeply rooted in European civilization" (Oakeshott, 2004, p. 301).

Oakeshott's main point is that while knowledge necessarily involves technique and skills that are susceptible of formulation in rules, principles, directions, maxims, there is at the same time no knowledge which is not also "know how", or practical knowledge, the characteristic of which is that it is not susceptible of formulation of this kind (1962, pp. 9-11). In other words, practical knowledge cannot be explicitly taught or learned, but "can be acquired only by continuous contact with one who is perpetually practicing it", because it is expressed by way of doing things, like in taste or connoisseurship, as it "exists only in practice" (1962, p. 11). The problem with Rationalism, according to Oakeshott, is that it does not recognize practical knowledge as knowledge at all, and it asserts that only technical knowledge is rational and hence the sovereignty of technique is what is assumed in Rationalism (*ibid*).

To be fair to Hayek, one must point out that although Hayek is very much in favor of adhering to abstract theories and general principles in order to steer the society towards the progressive direction of individual freedom and social and economic growth, he does recognize that tradition and

practical way of doing things do play a part in this process. To him, one should not "disdain to seek assistance from whatever non-rational institutions or habits have proved their worth" (1960, p. 406). Nevertheless, it is still true to say that under such a formulation, unlike Oakeshott's conception of the partnership of the technical and the practical in all knowledge or concrete experience, a somewhat bifurcation of these two aspects is still maintained, with preference given to the demonstrable and technical aspect, which is regarded as the "crowning part" (1960, p. 33)[2] of civilization. The practical and non-rational aspect will have to "prove" its worth before it is accepted, though given Hayek's ideas of complex phenomenon (particularly in the social and cultural arena), the concurrent development of mind and civilization and spontaneous evolution, such a proof is never nomological and exhaustive, but can only be shown by way of established long term beneficial effects as demonstrated by such institutions and habits or by what Hayek calls "explanation of the principle," which, however, still belongs to a kind of indirect demonstrative proof (1967, chapters 1-2; 1973).[3]

If we look at Oakeshott's conception of concrete experience and the role of abstract principles plays in such an experience, the difference is significant. For example, in his first "The Tower of Babel" essay (1962, pp. 59-79),[4] Oakeshott tries to show that while the dominant reflective mode of morality in the West appears to be very self-conscious, rational and scientific, in reality, it is abstract, detached from the concrete day to day tradition of moral habit, unstable and dogmatic. The requirements to constantly and critically analyze our moral practice with reference to some abstract, reflective, and supposedly supreme principle "tend to undermine, not only prejudice in moral habit, but moral habit itself, and moral reflection may come to inhibit moral sensibility" (1962, p. 68). To Oakeshott, the moral life in fact is a form of more or less coherent, concrete and inter-related habits and practices. In the human world, man cannot live without morality. When we want to communicate with each other, relate one's individual self to others, or understand one's individual self (like what kind of person I ought to be), one cannot do any of these without resorting to our moral affection, habit and sensibility. In other words, morality, like our common language, always exists in a community. Through the subscription to the concrete practices of morality, members of the community are able to express their moral sentiment and choose their specific moral conduct in their individual or cooperative undertakings. We learn and pick up our moral practice mostly in our daily life by following the actual behaviors of our seniors and peers, just like we learn and pick up our mother tongue from childhood by following how the adults speak in our community.

Of course like language, morality has its grammar (explicit rules and regulations), and there are moral theoreticians using reflective and demonstrable methods to try to list out the so-called essential rules for the community to consider or to follow and make rational enquiry about them. However, if we use these abstracted principles as the supreme guides for our moral conduct, this is just like putting the cart before the horse, because these principles are what have been distilled from the actual concrete practices, without which they will lose most of their meanings.

ABSTRACT PRINCIPLE AND CONCRETE EXPERIENCE

Hayek, like Oakeshott, has used language as an example to show why Rationalism or constructivism is a mistake. In "Rules, Perception and Intelligibility", Hayek makes the following remark: "The most striking instance of the phenomena from which we shall start is the ability of small children to use language in accordance with the rules of grammar and idiom of which they are wholly unaware" (1967, p. 43). Furthermore, "Rules which we cannot state…do not govern only our actions. They also govern our perception. The child who speaks grammatically without knowing the rules of grammar not only understands all the shades of meaning expressed by others through following the rules of grammar, but may also be able to correct a grammatical mistake in the speech of others" (1967, p. 45).

In other words, what Hayek is saying here is that men's ability to engage in successful social interaction does not entail conscious understanding of the abstract rules behind the related practices, because most of these practices are the results of human action, not human design. To Hayek, men's ability to follow abstract rules without being aware of them makes it illusionary to think that only through rational reasoning with full understanding of all the relevant data and facts under the guidance of explicit and demonstrable premises can one arrive at truth or successful social actions (Hayek, 1967, pp. 96-105; Hayek, 1973). Hayek goes on to cite some other examples: one does not need to deliberate on the mechanics of cycling before one is capable of riding a bicycle, nor does one need to know in a game of billiards how to construct mathematical formulas that would give the directions of travel of the balls the chance to score most points before one is a good billiards player (1967, pp. 43-45). As a result, Hayek thinks that these examples show that the ability

to act successfully is not necessarily derived from the ability to explicitly demonstrate by "reason" why one is successful.

Hayek certainly agrees with Oakeshott that we all learn from experience, which is "a process not primarily of reasoning but of the observance, spreading, transmission and development of practices which have prevailed because they were successful" (Hayek, 1973, p. 18). However, Hayek in this regard chooses not to tackle the question of how men learn from others to become competent actors in these practices through example and imitation or by analogy (1973, p. 19). To him, "the important point is that every man growing up in a given culture will find in himself rules, or may discover that he acts in accordance with rules—and will similarly recognize the actions of others as conforming or not conforming to various rules" (1973, p. 19), and it is his ambition to restate, in a systematic manner, those rules and principles of the spontaneous order to help us to resist the error of constructivism and to rebuild a liberal and just society for the modern world.

But can the articulation of rules and principles substitute learning by example and imitation? Let's take a closer look at those "learning from experience" examples mentioned above again.

First, the ability to ride a bicycle, which is a practical way of doing something, is one thing. But the ability to understand the laws of mechanics, which is an engagement in some theoretical or explanatory undertaking, is quite another. We certainly can learn how to ride a bicycle by imitation and by actually doing it, but it is not entirely clear in what sense riding a bicycle should be understood as following the laws of the mechanics, though those laws could help to explain why (but not how) the cyclist manages to keep his/her balance and direction when riding. The same can be said for the example of the billiards player.

Of course for professional cyclists engaging in competition, it is now common that they are helped by many experts who are well versed in the mechanics of cycling and in sports science in order to help them to improve their performance by highlighting, among other things, the importance of using the right kind of materials for the bicycle and taking the right angle in negotiating a sharp turn when riding in accordance with their theoretical or engineering knowledge in sports science. But this again is no substitute for the cyclists' actual practice and performance. Even with full knowledge of the mechanics of cycling would not automatically help one to ride a bicycle, not to say to become a professional cyclist. On matters like this, the way to learn and to excel is ultimately really to do it by riding on a bicycle, and that is what Oakeshott means when he says that practical knowledge "exists only in practice." Confusing these two (i.e. the practical mode and the explanatory modes, such as science), according to Oakeshott's modal theory of experience, is committing *ignoratio elenchi* (Oakeshott, 1933).

This does not mean that when engaging in doing, one cannot derive some practical rules or guidelines to help one's practice. When learning to ride a bicycle, for example, it is useful to remember that one's focus should not be on where the wheel touches the ground but rather much further in front. And when one is losing their balance, it is more helpful to accelerate than to slow down. All these can be developed into explicit and practical rules for beginners to follow. But again, they are no substitutes for doing the thing itself even if one is aware of them, and that is why Oakeshott says that in all knowledge or skills, there is always a partnership between the technical and the practical, but it is also important not to confuse the theoretically technical with the practically technical.

Hayek's theory of spontaneous order is a very impressive explanatory attempt to help us to better understand why social institutions like the market, the rule of law, morals, language, and so on are emerging and evolutionary practices rather than deliberately designed organizations. His works in this area certainly have enlightened us as to why constructivism is a mistake. To systematically articulate the general principles presupposed by the practice of spontaneous social order is one important way to enhance such an understanding. Another way to go about it is historical, explaining how the twists and turns in the development of social institutions evolve into a spontaneous order according to available evidence. Hayek certainly has done both of these in his political and social philosophy. However, Hayek is more ambitious than that since he has turned many of the principles he has articulated into a plan. One good example is the model constitution he proposes for modern democracies, with the intention to save them from bargaining politics and the scramble for particularistic interests by organized coalitions of fleeting majorities. This is his gallant attempt to restore the liberal order from an ideal he thinks has gone astray in the modern world (Hayek, 1979).[5]

Hayek is of course acutely aware that his plan is not going to be realized in the foreseeable future. But for him, the task of the political philosopher is "not to be concerned with what is now politically possible", but to "consistently [defend] the 'general principles which are always the same'" (Hayek, 1960, p. 411), for he as a liberal believes in "the long-range power of ideas", and regards the advance of knowledge

of this kind as important progress for the development of human civilization (1960, p. 404). This at once reveals both the strengths and weaknesses of Hayek the philosopher with a political plan: he has contributed a lot in enhancing our intellectual understanding of the abstract principles of spontaneous order, but such a plan is still no substitute for the actual practices that provide the concrete ingredients for this order.

THE DEFENSE OF INDIVIDUALITY

One fundamental point implies by the view of partnership of the technical and the practical is that there always exists an element of uniqueness and contingency in concrete human experience. While the formal and theoretical part of it may help us to formulate explicit rules and precepts to further our understanding, the practical and know how part can only be achieved via actual and patient practice on each and every concrete occasion by a separate individual or a group of individuals working in a concerted manner, making the achievement of concrete human experience on each occasion somewhat unique, since it cannot be achieved by simply following repeatable rules or instrumental reasoning alone.

In other words, what this view of partnership implies is that in human understanding and practice, particularly when it is at its most accomplished level, there is always a creative or poetic element inherent in it that cannot be replaced by formulated rules and reason, and Rationalism's so called sovereignty of technique is always "unskillful and imbalanced", as Wendell John Coats, Jr. says, "[since] it overestimates the role of conscious intellect in activity (making it the generator rather than critic of action); and it ruptures the fluidity of action by mechanically breaking down into discrete, accessible steps what is properly spontaneously and (largely) unreflectively done by adepts" (Coats, Jr., 2012, p. 8). Oakeshott sometimes even goes so far as to say that "Not to detect a man's style is to have missed three-quarters of the meaning of his actions and utterances" (Oakeshott, 1989, p. 56).

According to Oakeshott, poetic experience is the experience of contemplative imagining. At its purest, it is an activity released from any sort of practical, moral, or scientific concerns, and is characterized by absence of any premeditated design, and by the creation or production of a unique individual which induces contemplative delight in the creator and beholder. Strictly speaking, its creations, unlike the scientific or practical mode of experience, are not symbolic and representational, because the creation itself, be it a poem, painting, sculpture, a piece of musical work or the like, *is* the image, the creation and appreciation of it is itself poetic or artistic imagining if it creates the experience of contemplative delight for its own sake. On Oakeshott's view, "[a] poem is not the translation into words of a state of mind. What the poet says and what he wants to say are not two things…they are the same thing; he does not know what he wants to say until he has said it" (1962, p. 72). Likewise, "A poet does not do three things; first experience or observe or recollect an emotion, then contemplate it, and finally seek a means of expressing the result of his contemplation; he does one thing only, he imagines poetically." (1962, p. 232).

This perhaps is the most profound critique of Rationalism by Oakeshott, which not only shows that the imposition of the sovereignty of technique will destroy the poetic and spontaneous element of concrete human experience, the momentary unity of form and content in this element also indicates that the individual as a unique and autonomous agent who is capable of poetic or creative imagining has an intrinsic value of his/her own that is not dependent on anything extrinsic. From this perspective, one can understand why Oakeshott places such an important emphasis on what he calls the morality of individuality in the modern era where "human beings are recognized (because they have come to recognize themselves in this character) as separate and sovereign individuals, associated with one another, not in the pursuit of a single common enterprise, but in an enterprise of give and take, and accommodating themselves to one another as best they can" (1962, p. 249).

As regards Hayek, of course it would not be fair to criticize him for the absence of any substantial discussion of the poetic element in his social and political philosophy, since, unlike Oakeshott (Oakeshott, 1975/1991), it is never his intention to develop a comprehensive philosophy on human conduct. However, given his preference to the restatement of principles and his idea of advancement of articulated knowledge for the sake of human progress in the spontaneous evolution of the humankind for better adaptation and survival, Hayek's philosophical perspective is very likely blind to a lot of the things that Oakeshott has said regarding the poetic character of human activity.

But there is also a worrying sign in Hayek's defense of the individual too. Although Hayek, given his elaborated argument of the concurrent development of mind and civilization and his attack on false individualism (which to him is derived from Cartesian constructivism), is no abstract individualist,[6] his defense of individualism is at times rather instrumental. Let me elaborate.

First, while abstract individualism is untenable, Hayek believes that in the long run, the individual will have to prove the worth of his salt in the evolutionary process by coming up with actions and practices that will make his existence more favorable when coping with challenges of the environment. As Hayek says, "What we call understanding is in the last resort simply [man's] capacity to respond to his environment with a pattern of actions that helps him to persist", and such actions and practices would be transmitted and become prevalent because "they were successful—often not because they conferred any recognizable benefit on the acting individual but because they increased the chance of survival of the group to which he belonged" (1973, p. 18). By the same token, in his discussion of cognitive psychology, Hayek argues that the self's conscious action in the end has to be understood as linking up to the conditions that promote the individual's continual survival in the evolutionary process and that is why he says, "The question of what determines purposiveness is in the last instance really the question as that of what ensures the continued existence of the organism" (1952, p. 82). In other words, while the human individual to Hayek is important, his individual conscious and purposive actions are subject to the test of evolution to see if they are desirable in the long one for better group survival.

Owing to the inherent limitations of our mind for comprehensive self-understanding and for full explanation and determination of complex social interaction, no human individual, no matter working separately or jointly, is in a position to come up with synoptic design that can dictate the outcome of human interactions and the development of human institutions. The best we can do is to allow the individuals to come up with their respective best attempt for better and more successful existence through open competition, the results of which cannot be foreseen by us, although the better practices in the end will prevail in the evolutionary process and oblige others to follow if they do not want to lose out. Individual liberty and diversity are treasured in Hayek's conception of the self, but this is so largely because through open and free competition and the process of trial and error by the several individuals, the best practices will emerge in the course of evolution. That is why Hayek says, "[I]f the result of individual liberty did not demonstrate that some manners of living are more successful than others, much of the case for it would vanish" (1960, p. 85). If freedom is to be justified primarily on the grounds of beneficial results, does that mean that the autonomous self has little value in itself or in other aspects that are important to humanity? Here, it seems that Hayek's defense of the individual has very little to do with what is unique in the individual.

The uniqueness of the human individual is valuable, according to Stuart Hampshire, because among living things as we know them, only the human individual displays the salient capacity "to develop idiosyncrasies of style and imagination, and to form specific conceptions of the good" (1989, p. 118). In addition, Hampshire points out that individual style and imagination (such as works of art or the emotion attached to sexual love) are mostly unrepeatable, as "the leaps and swerves of a person's imagination do not follow any standardized routes" and defy the prediction of rational and general rules and are therefore irreplaceable (1989, p. 126). Likewise, when it comes to human love and friendship, Oakeshott has this to say: "its object is individual and not concretion of qualities: it was for Adonis that Venus quit heaven. What is communicated and enjoyed is not an array of emotions…but the uniqueness of a self" (1962, p. 244) "If this individual essence is destroyed when the individual is destroyed," says Hampshire, "the world is to that degree impoverished" (1989, p. 117).

In the light of the above, I think it is fair to say that something important appears to be missing in Hayek's critique of constructivism and defense of the individual and spontaneous evolution. Nowhere in Hayek's voluminous works can we find any convincing and in-depth discussion of the non-instrumental value of individuality. If the self is unique and irreplaceable, if practical knowledge is never to be displaced by technical knowledge, and if the poetic element in human practices is to be treasured on its own, the individual as an unique moral agent should have values that go beyond the requirements to struggle for better group survival, important though better survival for the human race is. The individual's unique style, imagination, and personality should not be blinded by the reinstatement of general principles. Such principles should, on the contrary, be understood in the context of the concrete elements of human practices, whose values probably go beyond the instrumental ones of better survival.

NOTES

1 For my discussion of Hayek's philosophical and epistemological position on these important issues, see (Cheung, 2007, pp. 51-73).

2 Here it is instructive to note that in talking about the creative power of a free civilization, Hayek has quoted this from A. N. Whitehead: "Civilization advances by extending the number of important operations which we can perform without thinking about them. Operations of thought are like cavalry charges in a battle—they are strictly limited in number, they require fresh horses, and must only be made at decisive moments." See (Hayek, 1960, p. 22). So what is "decisive" is still the technical rather than the practical aspect in Hayek's mind.

3 For a fuller elaboration and explanation of Hayek's idea of "explanation of the principle" and other related issues, see (Cheung, 2011, pp. 224-231).

4 Oakeshott published two "The Tower of Babel" essays during his lifetime. The first one can be found in (Oakeshott, 1962, pp. 59-79), and the second one in (Oakeshott, 1983, pp. 165-194).

5 For an assessment of Hayek's proposed model constitution, see (Cheung, 2014).

6 See (Kukathas, 1989, Chapter 3) for a good defense of Hayek against the charges of abstract individualism. Also see (Cheung, 2011) for an account of Hayek's culturally embedded individualism deriving from his theory of mind.

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Jane Jacobs' Critique of Rationalism in Urban Planning

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Abstract: Twentieth century critiques of rationalism by thinkers such as Hayek and Oakeshott often were conducted on the level of "high theory," with little in the way of detailed analysis. This paper aims to bring their analysis down to earth, or, more accurately, down to city pavement, by demonstrating how the work of urbanologist Jane Jacobs illustrates concrete applications of many of their ideas in the context of rationalist urban planning and its failures.

Keywords: Hayek; Oakeshott; Jacobs; rationalism; urban planning; spontaneous order

INTRODUCTION

There were a number of well-known critiques of "rationalism" penned in the mid-twentieth century by thinkers such as F. A. Hayek and Michael Oakeshott. But they were conducted on the level of "high theory," with little in the way of detailed analysis. This paper aims to bring their analysis down to earth, or, more accurately, down to city pavement, by demonstrating how the work of urbanologist Jane Jacobs illustrates concrete applications of many of their ideas in the context of rationalist urban planning and its failures. She showed that the ideas driving city planning in the first six decades of the twentieth century were largely unmoored, abstract visions of the city, divorced from any detailed understanding of what actually makes cities work, when they do so.

The remainder of the paper consists of four sections. In the first, we will explain what these thinkers meant by rationalism. In the second section, we will detail the rationalist nature of much twentieth-century urban planning. We will highlight figures such as Ebenezer Howard, Le Corbusier, Frank Lloyd Wright, and Robert Moses. In the third, we will show how the work of Jacobs offers concrete examples of how the rationalist makes a botch of things. In particular, we will illustrate the very real, concrete harms done to urban residents by the abstract schemes of the rationalist city planners.

WHAT IS RATIONALISM?

Michael Oakeshott and F. A. Hayek offered similar critiques of what they each called "rationalism" (Hayek sometimes used "constructivist rationalism," as we shall see later) in the mid-twentieth century. Each of the two thinkers read and was influenced by the work of the other. Let us first examine Oakeshott's analysis of rationalism, and then Hayek's. In doing so, we will not be addressing some subtle differences that are unimportant for the purposes of this paper.[1]

As Oakeshott saw it, perhaps the most important feature of the rationalist approach is the conviction that every essential aspect of any human practice can be conveyed adequately by means of a 'guidebook' comprising explicitly stated rules, formalized technical procedures, and general, abstract principles. Such a belief implies that mastering the 'correct' theoretical model of some subject is all that is required to achieve successful performances in that domain. Furthermore, the rationalist regards attending to any features of a practice other than the theoretical principles that purportedly capture the essence of the activity in question as merely thwarting the effort to conduct the activity in question rationally. To achieve rationality vis-à-vis some activity

one must begin with a *tabula rasa* upon which the correct technique for that activity can be cleanly and clearly inscribed; as Oakeshott put it, in this view, rational conduct involves 'a certain emptying of the mind, a conscious effort to get rid of preconceptions' (1991 [1962], p. 101).

Against that understanding of the relationship between abstract principles and the technical guidelines that follow from such principles and concrete performances, Oakeshott argues that the rationalist, in awarding theory primacy over practice, has gotten things exactly backwards. Theoretical understanding, he contends, is always an outgrowth of practical know-how and never its source. In fact, he sees the parasitical dependence of theory upon practice as being so unavoidable that not only is the rationalist incapable of successful performances guided solely by a theoretical model of the activity to be performed, he is not even able to stick to his purported guidelines while performing the activity poorly; instead, he inevitably will fall back on some familiar but unacknowledged existing practice in trying to realize his abstract schema.

Oakeshott's contention, that the rationalist ideal of conduct guided entirely by explicitly adopted and provably justified 'principles' is impossible to achieve, is a close kin of Wittgenstein's insight that every attempt to follow correctly a set of formalized rules necessarily is grounded upon informal customs and practices that determine what it *means* to follow a rule 'correctly'—the formal rules cannot also embody their own 'correct' interpretation because any effort to incorporate that interpretation into the first-level rules would create a set of 'meta-rules', themselves requiring meta-meta-rules to guide the interpretation of the meta-rules, and so on, in an infinite regress.[2]

But to return to our analysis of the ideal character of the rationalist itself, when he is applying his method to, say, gardening, he is oblivious to the years that the skilled gardener has spent establishing intimate relationships with his plants and tools, and tries to get by in the garden solely with what he can glean from a gardening book. As a result, he makes a botch of the flowerbeds. However, Oakeshott suggested, his repeated failures typically do not lead him to suspect that his fundamental method of proceeding might be faulty. Instead, each disappointment only spurs the rationalist to search for a new, improved, and even more 'rational' book of gardening rules.[3]

The place of pre-eminence that Oakeshott assigns to rationalist influence in modern conduct may appear to be at odds with his assertion that the rationalist can never actually realize his full program, but will always, in fact, wind up acting more or less along lines indicated by some tradition. However, Oakeshott's assertion that the rationalist never really can proceed according to her avowed principles does not mean that her attempt to adhere to them will be inconsequential, but only that it will not succeed. An analogy may be helpful here: For Oakeshott, the rationalist is a character somewhat like Monty Python's Ron Obvious, who was tricked by his unscrupulous manager into trying to perform feats like leaping across the English Channel and eating Chirchester Cathedral. Ron was unable to perform these feats, of course, but that does not mean he could not injure himself trying. (A major difference is that the rationalist planner does not injure only himself, since he necessarily involves others in his attempted "feats.") As Collingwood wrote, 'A person may think he is a poached egg; that will not make him one: but it will affect his conduct, and for the worse' (1924, p. 206). Since the pronouncements of the rationalist disparage current practices, customs, and morals, insofar as they do not follow from his rational deliberations about how his society *ought* to be ordered, they will erode the spontaneous ease of the communal life that those traditions nourished, while offering in its stead only the artificial routines and regulations of a 'rational' bureaucracy, or worse. Oakeshott offered this example: 'First, we do our best to destroy parental authority (because of its alleged abuse), then we sentimentally deplore scarcity of "good homes", and we end by creating substitutes which complete the work of destruction' (1991 [1962], p. 41). As we will see, this is strikingly similar to the way in which rationalist urban planners destroyed decent neighborhoods and created substitutes for them that made things worse. Traditional ways are undermined further by the rationalist fantasy that social perfection is a realistic goal, so that any practice promoting social order, however workable it might have proved in the past, will be condemned as an atavistic relic standing in the path of progress for failing to have brought about utopia.

It does not follow, from Oakeshott's view of the rationalist project as ruinously misguided, that all traditional practices are sacrosanct, or even that they all are laudable. Traditions are like living organisms: both can suffer illnesses and other disabilities; both ought to and usually do learn and adapt in response to their external circumstances and internal tensions; or, failing to do so, both soon cease to exist. But those adaptations, if they are to successfully meet the challenges presented by novel situations, must not promote the deterioration of the very organic order they purport to be serving. An appreciation for such evolutionary adaptation does not entail denying that intellectual criticism of the

present state of some practice has a genuine and vital role to play in that process. The expert can serve to diagnose and treat ills in the area of practice in which he specializes much as a physician does with those ills he detects in his patients. But, as Oakeshott noted, citing Aristotle, 'to cure is not to transform, it is not to turn the patient into a different sort of being; it is to restore to him such health as he is naturally capable of enjoying' (2006, p. 114). Because the rationalist physician attempts to transform rather than merely heal his charge, his treatments are likely to do far more harm than good.

Unfortunately, as noted previously, the rationalist gardener's counterpart in social reform similarly is inclined to interpret the social maladies produced by his projects not as evidencing any problem with his modus operandi but, quite to the contrary, as signaling the need for an even more energetic and thorough implementation of rationalist social engineering. The engineering metaphor itself encourages the planners to regard the rest of the citizenry as parts of a machine, cogs to be readjusted and rearranged as called for by each new blueprint, each drawn up to fix the problems generated by its predecessor.[4] Since most people are disinclined to acquiesce to a life in which they are constrained to behave as an externally controlled mechanical device, the breakdown of each new, rationalist design for some aspect of society is made even more probable.

F. A. Hayek distinguished between a rationalism that recognizes the limits of human reason with respect to the ability to comprehend (and thus perhaps to control) the outcomes of complex systems, such as those found in social orders, and a rationalism that fails to recognize such limits.[5] He used various terms to designate the latter including Cartesian rationalism, constructivist rationalism, and even naïve rationalism.

> The basic conception of this constructivism can perhaps be expressed in the simplest manner by the innocent sounding formula that, since man has himself created the institutions of society and civilization, he must also be able to alter them at will so as to satisfy his desires or wishes (Hayek, 1978, p. 3).

Note the similarity to Oakeshott's point that rationalists wish to begin thinking about social life with a *tabula rasa*. Hayek elaborates on this elsewhere:

> Rationalism in this sense is the doctrine which assumes that all institutions which benefit humanity have in the past and ought in the future to be invented in clear awareness of the desirable effects that they produce; that they are to be approved and respected only to the extent that we can show that the particular effects they will produce in any given situation are preferable to the effects another arrangement would produce; that we have it in our power so to shape our institutions that of all possible sets of results that which we prefer to all others will be realized; and that our reason should never resort to automatic or mechanical devices when conscious consideration of all factors would make preferable an outcome different from that of the spontaneous process (Hayek, 1967a, p. 85).

Hayek argued that non-naïve rationalism is more effective because it does not attempt to reach beyond its area of competence.

> To the medieval thinkers reason had meant mainly a capacity to recognize truth, especially moral truth, when they met it, rather than a capacity of deductive reasoning from explicit premises. And they were very much aware that many of the institutions of civilization were not the inventions of the [sic] reason but what, in explicit contrast to all that was invented, they called "natural," i.e., spontaneously grown[6] (Hayek, 1967a, p. 84, footnote omitted).

Solving a mathematical problem or calculating a result in a controlled laboratory experiment involve a relatively small number of variables and interactions and thus a small number of possible outcomes or solutions, compared to the problem of using a central authority to effectively manage, say, the allocation of labor in the macroeconomy. In the latter case, what Hayek termed "predictions of the pattern" will be more successful than the "point predictions" that are possible in more artificial circumstances.

> Our tentative explanation will thus tell us what *kinds* of events to expect and which not, and it can be proved false if the phenomena observed show characteristics which the postulated mechanism could not produce. It will thus give us new information by indicating the *range* of phenomena to expect (Hayek 1967b, p. 11, emphasis original).

For example, if the Federal Reserve were to withdraw credit from the banking system, it is more reasonable to pre-

dict that, *ceteris paribus*, prices will fall by some not-fully-predictable amount over some not-fully-predictable period of time (a pattern prediction) than to predict that prices will fall by two percent by next June (a point prediction). While the difference between a point and a pattern prediction may be one of degree, we could say from a Hayekian perspective that a weakness of constructivist rationalism is its reluctance to recognize a basis for the distinction. One of the most important tasks of rationalism rightly understood is to recognize the limits of its competence.

Hayek did of course not limit his critique of constructivism to the economic realm. To mention but two of his extensive writings that critiqued various forms of constructivism are *The Road to Serfdom* (1972[1944]), regarding the impact of central planning on the moral proclivities of the planners (see especially the chapter on "Why the worst get on top") and his essay "The results of human action but not of human design" (1967d) on its impact on moral philosophy and legal theory.

A failure to recognize such limits was a prominent feature of early-to-mid twentieth-century rationalism. It appeared on a grand scale in the planned economies of the communist countries. On a smaller scale, it was apparent in the rationalist urban planners whom Jacobs critiqued, as we will see in the next section.

RATIONALISM IN URBAN PLANNING

Early-to-mid-twentieth-century urban planners, possessed by the rationalist mindset, looked at city tenements, and, indeed, cities in general, and saw only un-designed chaos. As James C. Scott says of Le Corbusier, who was perhaps the leading light of rationalist urban design: "[He] had no patience for the physical environment that centuries of urban living had created. He heaped scorn on the tangle, darkness, and disorder, the crowded and pestilential conditions, of Paris and other European cities at the turn of the century" (1999, p. 106). Le Cobusier would re-create Paris as an "organized, serene, forceful, airy, ordered entity" (quoted in Scott, 1999, p. 107). This would require despotism, it is true, but an impersonal one: "The despot is not a man. It is the *Plan. The correct, realistic, exact plan*, the one that will provide your solution once the problem has been posited clearly, in its entirety, in its indispensable harmony" (quoted in Scott, 1999, p. 112). If someone was authoring a Hayekian or Oakeshottian morality play and depicted the rationalist planning villain talking about "the correct, realistic, exact plan" from which the solutions to all of a society's problems would automatically flow, we might accuse him of creating a caricature rather than a character, but Le Cobusier was real.

Rationalist urban planning was sometimes executed on an even grander scale that the American urban renewal projects. Scott, who draws heavily on the work of Hayek, Oakeshott and Jacobs, describes the planning of Brasília and the actual results achieved at some length. He notes that Brasília "was… designed from the ground up, according to an elaborate and unified plan. Housing, work, recreation, traffic, and public administration were each spatially segregated as Le Corbusier would have insisted" (1999, p. 118). He cites the utopian nature of the rationalist plans made for the city: "Brasília was conceived of by [its designers] as a city of the future… a realizable utopia. It made no reference to the habits, traditions, and practices of Brazil's past or of its great cities…" (1999, p. 119). The commitment to utopia has its ugly side, however, as "the goal of making over Brazil and Brazilians necessarily implied a disdain for what Brazil had been" (*ibid*).

As Oakeshott claimed was true of rationalists in general, the rationalist planners of Brasília could not really do what they set out to do. Scott writes:

> From the beginning, Brasília failed to go precisely as planned. Its master builders were designing for new Brazil and for new Brazilians—orderly, modern, efficient, and under their discipline. They were thwarted by contemporary Brazilians with different interests and the determination to have them heard… In the end, by 1980 75% of the population of Brasília lived in settlements that had never been anticipated, while the planned city had reached less than half of its projected population… The unplanned Brasília—that is the real existing Brasília—was quite different from the original vision. Instead of a classless administrative city it was a city marked by stark spatial segregation according to social class (1999, pp. 128-130).

Two other urban planners whom Jacobs criticized, Ebenzer Howard and Frank Lloyd Wright, were perhaps less outwardly extreme in their rationalist constructivism but their enthusiasm for imposing a ideal vision of urban life was no less exuberant than le Corbusier's.

Howard was one of the first modern urban planners. He regarded both the congestion of the town life and the dullness of the countryside as pathological. Creating the right balance would, he argued, bring people voluntarily into what he called "Garden City." His solution was to cre-

ate a "town-country magnet" in the form a Garden City that retained the best and shed the worst of both worlds.

> There are in reality not only, as is so constantly assumed, two alternatives—town life and country life—but a third alternative, in which all the advantages of the most energetic and active town life, with all the beauty and delight of the country, may be secured in perfect combination; and the certainty of being able to live this life will be the magnet which will produce the effect for which we are all striving—the spontaneous movement of the people from our crowded cities to the bosom of our kindly other earth, at once the source of life, of happiness, of wealth, and of power. The town and the country may, therefore, be regarded as two magnets, each striving to draw the people to itself—a rivalry which a new form of life, partaking of the nature of both, comes to take part in (Howard, 1898, p. 347).

His carefully conceived Garden City was meant to retain the culture and economic opportunities of the city and the fresh air and open space of the country. But it also incorporated a vast system of infrastructure—roads, railways, parks, and towns specializing in particular urban functions—that had to be carefully planned and constructed on a regional scale. Jacobs notes that "He conceived of good planning as a series of static acts; in each case the plan must anticipate all that is needed and be protected, after it is built, against any but the most minor subsequent changes" (1992 [1961], p. 19).

A near contemporary of le Corbusier, the American architect Frank Lloyd Wright, sought to take the urban population even farther from densely populated settlements than Howard. Drawing heavily on modern building techniques Wright imagined a "Broadacre City" of well-regulated but thinly populated suburbanish, single-family homesteads tied together via telephone, radio, automobiles, and even helicopters. Achieving that outcome, however, would depend on a significant degree of government planning.

> In the hands of the state, but by way of the county, is all redistribution of land—a minimum of one acre going to the childless family and more to the larger family as effected by the state. The agent of the state in all matters of land allotment or improvement, or in matters affecting the harmony of the whole, is the architect. All building is subject to his sense of the whole as organic architecture (Wright, 1935, p. 378).

Although le Corbusier, Howard, and Wright offered vastly different visions of the city—from densely populated towers-in-a-park to low-rise suburban sprawl—Jacobs recognized that at a deep level they all shared not only an antipathy for an urban life that none of them fully understood but also the same sort of rationalist hubris. (Or as one of our referees put it, "the rationalist may be said to unite an unthinking reformism with an uncritical conservatism.")

While we are dealing mainly with theoreticians of constructivism in urban planning, it is probably worth mentioning two outstanding practitioners of rationalist constructivism, planners who actually tried to realize their visions. (Although, as Oakeshott would point out, the results would never conform to what they set out to do.)

Baron Haussman, Napoleon III's prefect of the Seine (Paris) in the mid-nineteenth century created what we know today as "The City of Light" by ruthlessly leveling whole sections of Paris, including thousands of private residences, to make way for the Champ Élysées and other famously wide boulevards. And Robert Moses, who held a number of official positions in city and state government, did much the same thing for and to New York (Callahan and Ikeda, 2004). It is hard to deny that the efforts of both Haussmann and Moses sometimes produced benefits results for some though at great cost. The point here, however, is that they could not possibly have foreseen the actual outcome of their planning, which to this day is still emerging.

JACOBS' ATTACK ON URBAN RATIONALISM

So let us apply this critique of the rationalist approach to conduct to a particular practice, that of urban planning. The very term we currently give this field implies a rationalist blueprint (the plan) can be drawn up for a city that will make that city function as it truly should. It might seem that to reject urban planning means to reject theorizing about cities at all, and to merely let the grow as they will, and let the chips fall where they may. But the urban theorist we will examine, Jane Jacobs, certainly does not reject thinking about what makes cities work—after all, that is precisely what she does throughout her own most famous work, *The Death and Life of Great American Cities*. What she endorses is itself a *sort* of planning, but one that regards its ability to predict and control aspects of urban life with great humility, one that is based on close observation of what is already going

on rather than on a wholesale effort to replace that life with one conforming to a theoretical plan, and one that seeks to encourage healthy growth and carefully treat diseased areas rather than to remake the urban body in the image of its own, abstract design. Jacobs argued that before anyone can think sensibly about what a city should be and how it should work she needs to first understand what a city is and how it actually does work. We might well, then, call Jacobs an "urban physician," to invent a term to oppose to "urban planner": she sought, like a good Aristotelian physician, not to turn the city she examined into a different sort of being, but to restore to it such health as it is naturally capable of enjoying. This requires deep thought and much observation; what it does not entail is dreaming up visions of imaginary cities and trying to transform the actual city one is charged with treating into a realization of that vision.

Jacobs recognized the rationalist mindset of those, such as Le Cobusier, whom she criticized: '[T]he practitioners and teachers of this discipline (if such it can be called) have ignored the study of success and failure in real life, have been incurious about the reasons for unexpected success, and are guided instead by principles derived from the behavior and appearance of towns, suburbs, tuberculosis sanatoria, fairs, and imaginary dream cities—from anything but cities themselves' (1992 [1961], p. 6). Jacobs also saw that the rationalist planner, despite his pretension of working only from first principles, in reality, as Oakeshott contended, unconsciously draws upon some tradition or other in devising his schemes. Jacobs' point here is that these planners turned to *inappropriate* traditions—and to abstractions drawn from those inappropriate traditions—since they refused to admit that they were working from a tradition at all.

As Jacobs saw it, the fundamental problem that all great cities solve is how to get very large numbers of strangers with vastly different beliefs, knowledge, and tastes to live peacefully together. Jacobs explains how this is possible without central direction.

Great cities harness the diverse "locality knowledge" (Jacobs, 1992 [1961], p. 418) of each of its individual inhabitants. (This point, of course, is essentially identical to Hayek's emphasis on "how valuable an asset in all walks of life is knowledge of people, of local conditions, and of special circumstances" (1945, H.9) What planners typically failed to see is that safe and lively urban life is largely the unplanned outcome of informal contact in public spaces. Jacobs argued that under the right conditions (see note 5) large numbers of people will choose to use public spaces—e.g. sidewalks and plazas—throughout the day and night, providing "eyes on the street" that informally monitor and constrain bad behavior. Safe, interesting public spaces attract people, who in turn attract even more people, making the spaces more interesting, and so on.

The more diverse in knowledge and tastes those people are, and the more congenial public spaces are for informal contact, the greater are the opportunities for mutually beneficial exchange of goods and of ideas. What enables contact among people who would otherwise be very socially distant are social networks that emerge unplanned at the neighborhood level—Jacobs popularized the term "social capital" to identify this (Jacobs, 1992 [1961], p. 138). Social capital, i.e. the relations among people in public space that help to generate private value, promotes trust among long-time inhabitants of a neighborhood, providing an important signal to the multitude of strangers who pour through it every day.

Jacobs observed that social capital tends to be more important the less private wealth people have. Poor people by definition have little private wealth and slums are where poor people tend to live. The wealth of slum dwellers then generally consists of social capital in public spaces—on corners, in barbershops, on stoops and sidewalks, and in bars and coffee shops—when the physical lay-out allows it to form.

But what Jacobs called "unslumming" slums, poor neighborhoods on the rise, tend to be noisy and chaotic looking—like any lively and successful city neighborhood (Jacobs, 1992 [1961], pp. 270-90). Unlike Jacobs, however, typical urban planners failed to distinguish these poor neighborhoods on the rise from poor neighborhoods in decline. An uslumming slum with its stable population and safe, lively streets with flourishing low-income commercial development, stand in stark contrast with declining neighborhoods with their empty storefronts and barren sidewalks. What each neighborhood has in common, of course, is that poor people live in them and that old, worn-down buildings far outnumber brand new ones.

As the planners saw things, the residents of tenement neighborhoods were subjected to the noisy activities of industry and commerce, disturbing their peace. Their children, living in densely built-up districts, were forced to play *on the sidewalks*! What these people lacked was fresh air, sunshine, green spaces, and quiet. The planners inadvertently tried to create a likeness of their own wealthy, suburban lives in the context of poor neighborhoods, completely ignoring the differences that made suburban life workable, such as greater wealth, ubiquitous ownership of automobiles, lower population densities, more homogeneous populations, the relative absence of strangers passing through the neighborhood, the

ability to hire private security forces or pay for greater police protection via taxes, and so on.

Therefore, these planners claimed, the 'obvious' solution to the discomforts of ghetto life was to tear down these 'slums' en masse, and in their place erect purely residential complexes, consisting of high rises separated by wide swaths of grass and trees—in other words, the giant American housing projects of the 1950s and 1960s. As Jacobs noted, the rationalist planners, blind to the concrete reality of tenement life, failed to realize that the mix of businesses and residences increased the safety of the residents by providing 'eyes on the street'—the neighborhood shopkeeper, who knew all the residents, was out sweeping his sidewalk early in the morning; the workers going to and from their jobs meant a steady stream of pedestrians; and even the neighborhood bar meant that the streets were not deserted until the wee hours of the morning. Parents transporting their children to and from school would appear on the street in the morning and again in the afternoon. Mothers with preschool children would head to the parks, workers would come out to eat lunch in the public spaces of the neighborhood, and shoppers would occupy the sidewalks as they frequented the area shops. The children playing on the sidewalks could easily be monitored by all of those people, many of whom knew those children, at least by face and lineage, if not also by name, allowing those neighborhood "security cameras" to check incipient anti-social behaviors by those children before they became habitual. What's more, given the relatively low height of most buildings in such "blighted" neighborhoods, the children's' parents were able to exercise a great deal of local control, by, say, leaning out the second story window next to which they were sewing a dress and shouting, 'Johnny, stop that nonsense!'

By contrast, the new, 'rational' housing projects were empty of life around the buildings for most of the day. The basketball courts and the lovely green parks were unsupervised because there was no one around, since the businesses that might have provided "eyes on the sidewalk" had all been zoned out of the development. The tenement mother had formerly had lived no further above the street than the fourth floor of an "inadequate" walkup, from the window of which she could supervise her children's play. But after receiving the "help" of modernist urban planners, she found herself living in a thirtieth-floor, modern apartment. From such a distance, she could not possibly regulate what her children were up to, and, therefore, she, if responsible, could not allow them to spend time in those "common" areas. The planners had tried to construct an imitation of upper-class standards for apartment living while ignoring the fact that the residents lacked "upper-class cash for doormen and elevator men," the paid security that made the upper-class apartment building safe (Jacobs, 1992 [1961], p. 42).

Planners intended none of these outcomes. So then, why did they plan this way? Because their basic approach to planning and their concept of the "rational" neighborhood or city, blinded them to the fine-structure of social life and the intricacies of interaction in public space, making it unlikely that they would anticipate to the deleterious effects of their interventions. They failed to look outside their Oakshottian "guidebooks."

As a result, the corridors and stairwells of the rationally designed housing projects (council flats) became like unwatched and deserted streets, meaning that they were lawless and dangerous places. That danger isolated law-abiding residents even more, so that parents concerned for their children's safety and character refused to allow them to go out of their apartment except when absolutely necessary, meaning that they received no benefit at all from the pleasant green spaces that the planners had thought would be their salvation. Jacobs offers a vivid illustration of this in the anger of a resident of such a project about a much-touted lawn:

> Nobody cared what we wanted when they built this place. They threw our houses down and pushed us here pushed our friends somewhere else. We don't have a place around here to get a cup of coffee or a newspaper even, or borrow fifty cents. Nobody cared what we need. But the big men come and look at that grass say, "Isn't it wonderful! Now the poor have everything!" (1992 [1961], p. 15)

The same errors of constructivism have plagued and continue to plague the approach to designing areas for public recreation.

Public parks and playgrounds are often touted as the solution to juvenile delinquency: "give the kids someplace to go, to get off the street!" But, as Jacobs noted, "When the New York Times… summed up the worst adolescent gang outbreaks of the past decade in the city, each and every one was designated as having occurred in a park" (1992 [1961], p. 76). And why is this? Because in moving from "the streets" to a park or playground, "children have moved from under the eye of a high numerical ratio of adults, into a place where the ratio of adults is low or even nil" (1992 [1961], p. 77). Another major design failure in these projects, issuing from a constructivist-rationalist mind-set, was the lack of transi-

tional spaces between public and private ones. Rationalist planners were not unaware of the need for community spaces, but they failed to realize that a community cannot flourish faced only with the stark binary choice of either all private or all public space. The community spaces of large housing projects left one totally vulnerable to any person whatsoever who came in, but the only alternative was to stay shut up in one's apartment. By contrast, traditional neighborhoods had features such as stoops, diners, and bars, where one could be partially in public without total exposure.

Constructivist rationalism tends to produce these negative unintended consequences because the attempt to solve urban problems using a pre-determined "answer sheet" will eventually confront the unpredictable complexity and messiness of the real social order. By their nature, constructivist designs tend to be static and so cannot easily evolve and adapt to unforeseen and often rapid changes in technology, tastes, resources, and demographics. Problems get particularly bad when, as often happens, planners attempt to create a *tabula rasa* within the existing urban fabric—by bulldozing sometimes whole neighborhoods—and replace them with large, single-use structures.

Thus, among the practical consequences of the large-scale, urban planning and renewal programs Jacobs so deplored, is the creation of a massive areas devoted to single uses, which she called a Border Vacuum (Jacobs, 1992 [1961], pp. 257-69). A border vacuum in turn is a manifestation of a kind of deep homogeneity (Jacobs invokes the concept of "chaos" i.e. disorder that results from the absence of differentiation) that undermines the vitality of a city. That is, for Jacobs, the foundation of a living city—i.e. "a settlement that consistently generates its economic growth from its own local economy" (Jacobs, 1969 [1961??], p. 262)—is the diversity of how public space is used. Combined with the cohesion provided by social networks, land-use diversity affords local entrepreneurs an array of inputs from which to draw and then experimentally combine in novel ways.[7] If local authorities impose a single, over-arching plan, even one that has built-in "mixed uses," the outcome tends to be deeply homogeneous, if only because its architecture and urban design are limited to a few minds at a given moment in historical time. A living city is one in which government planning has at most provided a basic matrix within which an unpredictable variety of uses, often several in the same space over a period of decades, mingle. Trying to create an "arts district" or to "revitalize downtown" via a particular vision, no matter how creative at the moment, will inevitably result in dull border vacuums or deep homogeneity. Boring spaces, because they repel people, become dangerous and dead places.

In the final chapter of *The Death and Life of Great American Cities*, "The kind of problem a city is," Jacobs carefully spells out the hyper-modernist bias of the 20th century "scientific mind" shared by the growing numbers of professional urban planners of her day. As the above examples illustrate, what they failed to acknowledge or appreciate is the crucial role that the perceptions of ordinary people of their local environment—Jacobs' "locality knowledge"—plays in the effective operation of a city. Like Hayek and Oakeshott, Jacobs recognized the errors of a rationalism that treated social orders as machines rather than spontaneous orders.

To explain the nature of this error, the final chapter of Jacobs (1992 [1961], pp. 428-48) draws on Warren Weaver's distinction among three kinds of scientific problems. The first are problems of simplicity, which deal with situations involving a very few independent variables, in which the rules of ordinary algebra are appropriate. The second level are problems of disorganized complexity, which concern situations involving so many independent variables that their interactions produce random variations. Here formal statistical analysis is appropriate. Finally, there are problems of organized complexity that lie between the first two kinds of problems. This is the realm of social orders in which the movement of individual elements are not predictable but overall, non-statistical patterns are discernable. Jacobs's and Weaver's warning is that the methods appropriate to solving one problem should not be used for the solution of the others: "The theorists of conventional modern city planning have consistently mistaken cities as problems of simplicity and of disorganized complexity, and have tried to analyze and treat them thus" (Jacobs, 1992 [1961], p. 435).

Hayek has stated the problem this way in his essay "The theory of complex phenomena" as follows:

> But a simple theory of phenomena which are in their nature complex (or one which, if that expression be preferred, has to deal with more highly organized phenomena) is probably merely of necessity false—at least without a specified *ceteris paribus* assumption, after the full statement of which the theory would no longer be simple (Hayek, 1967c, p. 28).

The dominant approach to urban planning of Jacobs' day relied too heavily on simple models—e.g. to handle more cars simply widen roads—or on statistical analysis—e.g. determine how many cubic meters of fresh air healthy

people need per day—instead of viewing the city as a complex, emergent order. They treated the city as a problem of simplicity or disorganized complexity instead of a problem of organized complexity.

This is related to Hayek's insight that is exemplified in his essay "The errors of constructivism." There, Hayek distinguished three kinds of rules that people use to guide their decisions. Using our own labels we may call these "explicit rules," "contextual rules," and "tacit rules" (Hayek, 1978, pp. 8-9).

Tacit rules contain elements that are wholly or mostly inarticulable and contextual.[8] For example, the rules that tells us when a person is happy, the particular look that she has when she is happy rather than in pain or just being polite, are extremely difficult for people not skilled in facial analysis to spell out. Rules that tell us when a person walking toward us on the sidewalk is harmless or threatening are also like this. Contextual rules have more articulable elements but still rely crucially on the contextual knowledge for interpretation. For example, the rule of "pass on the right when approaching someone on the sidewalk" depends on a number of factors just to tell us when to apply it. Is the sidewalk wide enough, is there someone coming from behind that would make passing on the right difficult, or am I in New York or Tokyo? Finally, explicit rules contain information that is wholly or mostly articulable, such as the lines of code in a computer program, which leave little room for their interpretation for the "particular circumstances of time and place." (Oakeshott would here add that in practical activity, the employment of *any* of these types of rules requires judgment.)

Jacobs was then in a sense arguing that inhabitants of city neighborhoods possessed contextual knowledge about local rules and participation in social networks that urban planners tended to ignore. Hayek, extending the critique of Ludwig von Mises, applied this insight to macro-level planning in his critique of socialism insofar as it tended to treat a national economy as a giant machine, in principle programmable by a central authority. Similarly, Jacobs argued that central planning at the municipal level was subject to the same kinds of errors and ruinous consequences.

CONCLUSION

Jacobs' work illustrates the fact that rejecting rationalism is not equivalent to defending entrenched privilege, opposing all 'progressive programs', or being a political reactionary. Jacobs is in favor of planning done with the real needs of real cities in mind; for instance, she argues that lot usages 'too big' for a neighborhood, such as a huge department store dominating a block in an area otherwise devoted to a mix of residences, small shops, and light industries, should be banned. Neither is she against all social programs aimed at helping the poor. Instead, she is arguing that programs that ignore the factors that actually make the life of the urban poor workable, and instead destroy their communities in an attempt to realize the fantasy of turning their neighborhoods into grassy, tree-filled suburbs, do much more harm than good. Jacobs is not merely interested in the theoretical issue of the philosophical errors of rationalism; she is much more concerned with its actual, destructive effects. And while Jacobs held that certain planning schemes may at least assist the creation of the spontaneous urban order she admires, she firmly rejected the idea that all that is needed is a new, improved form of master plan: '[The] cultivation [of city order] cannot be institutionalized' (1992 [1961], p. 56).

Jane Jacobs was a keen observer of modern city life, highly alert to the concrete circumstances that tend to create a modern urban life that might allow for the flourishing of the inhabitants of the modern city. Her keen awareness of such factors drove her critique of the unmoored abstractions that underlay much of the urban planning efforts of her time. As such, her work offers empirical evidence supporting the more theoretical case that condemned the rationalist misunderstanding of human conduct provided by Hayek and Oakeshott.[9]

NOTES

1 In order not to be too mysterious, we can say that these differences are similar to those between Winch and Oakeshott described in Callahan (2012a), and turn on Oakeshott understanding all experience as more or less of a world of ideas. The material on Oakeshott's understanding of rationalism is drawn from Callahan (2012b).

2 See Wittgenstein (1994, pp. 86-107).

3 Jacobs notes this tendency in rationalist city planning: "The silliest conception of salvage is to build a duplicate of the first failure and move the people from the first failure into its expensive duplicate, so the first failure can be salvaged! This is a stage of slums shifting and slum duplicating that our cities are reaching, however" (1992 [1961], p. 393n).

4 Jacobs recognized this facet of rationalist planning as well: "[Howard's] aim was the creation of self-sufficient small towns, really very nice towns if you were docile

and had no plans of your own and did not mind spending your life among others with no plans of their own. As in all Utopias, the right to have plans of any significance belonged only to the planners charge" (1992 [1961], p. 17).

5 This helped to protect Hayek against the charge, sometimes incorrectly aimed at Oakeshott, that he was anti-reason.

6 Oakeshott similarly insisted he was not against reason but against its abuse:

"First, of course, when I argue against rationalism, I do not argue against reason. Rationalism in my sense is, among other things, thoroughly unreasonable. That reason has a place in politics, I have no doubt at all, but what I mean by rationalism is the doctrine that nothing else has a place in politics and this is a very common view. The place of reason, in politics & in life, is not to take the place of habits of behaviour, but to act as the critic of habits of behaviour, keeping them from superstition etc." (1948, par. 3).

7 Jacobs (1992 [1961], pp. 143-238) spends several chapters explaining how a neighborhood in a great city spontaneously generates land-use diversity via 1) a variety of uses to attract people at different times of the day, 2) short blocks that add intricacy and interest to urban environments, 3) a number of low-cost private spaces ("old buildings") to incubate new ideas, and 4) a high concentration of people to use public spaces in order to promote safety and demand for local services.

8 Whether it is really correct to call this tacit knowledge "rules" was taken up in Callahan (2012).

9 The authors would like to thank the participants in the 2013 COSMOS + TAXIS conference and two anonymous referees for helpful comments.

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Oakeshott on Modernity and the Crisis of Political Legitimacy in Contemporary Western Liberal Democracy

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Abstract: In his late essay on 'The Tower of Babel' Oakeshott gave graphic expression to his fear that modern liberal democracies have fallen so deeply under the influence of acquisitive and utilitarian modes of thought devoted primarily to policy issues that they have become almost completely indifferent to the constitutional issue he regarded as the essence of political legitimacy (Oakeshott, 1983). Echoing de Tocqueville, Oakeshott maintained that the external signs of stability and prosperity displayed by the democracies should not obscure the fact that their loss of concern about legitimacy means that they are in effect on the road to serfdom, having almost abandoned the ideal of civil association upon which the survival of individual freedom depends. In this essay I will begin by considering more closely the reasons which led Oakeshott to his pessimistic vision of the future of liberal democracy. I will then suggest that his pessimism was exaggerated, due to problematic features of his model of civil association which I will try to identify. Finally, I will very briefly and tentatively explore several ways of revising Oakeshott's model of civil association that might make possible a less dire assessment of the place of political legitimacy in the contemporary liberal democratic world.

Keywords: Authority; civil association; constitutionalism; ius?; legitimacy; nationalism; patriotism; pluralism; power; rule of law.

Until the advent of utilitarianism in the nineteenth century, liberal and democratic political thinkers from Hobbes, through Locke and Rousseau to Hegel regarded the principal political concern posed by Western modernity as the problem of political legitimacy: the problem, that is, of finding a moral basis for state power in a post-cosmological age of individualism, egalitarianism and moral pluralism. This moral basis they identified as civil association, despite disagreement about what kind of political order that entailed. With utilitarianism, however, emphasis shifted decisively away from the issue of legitimacy and civil association to the problem of implementing the greatest happiness of the greatest number and eventually, after the Second World War, to the related themes of welfare and social justice. The issue of political legitimacy, however, remained central for Oakeshott, who shares with his early modern predecessors the conviction that the only satisfactory solution to that problem is a constitutional state understood in terms of the ideal of civil association. Oakeshott's interpretation of constitutionalism, however, differs in at least one crucial, highly counterintuitive respect from that of his predecessors. This is his complete rejection of their tendency to think of a consti-

tution as what Oakeshott terms a 'piece of political machinery' (Oakeshott, 1975, p. 192).

Since his rejection of 'mechanical' approaches to constitutionalism as incompatible with the moral conditions for legitimacy eventually led Oakeshott to profound pessimimism about the future of civil association in modern Western democracies, I want to consider whether it is possible to modify his theory of legitimacy in a way which permits a less pessimistic view, on the one hand, whilst retaining the substance of his model of civil association, on the other. Before going further, however, it is necessary to consider more fully Oakeshott's reasons for dissatisfaction with his predecessors' interpretation of the constitutional conditions for political legitimacy in the modern Western world.

OAKESHOTT'S CRITIQUE OF MODERN CONSTITUTIONAL THEORY AND PRACTICE

In Oakeshott's own words, 'Most constitution makers and constitutional reformers in modern times have not been disposed to think of a constitution as that in terms of which a government may be acknowledged to have authority: they have [instead] confused it with the apparatus of governing *and have recognized it merely as a piece of machinery for doing with the least opposition and delay whatever they thought proper to be done*'(*ibid*, italics added).

It should be emphasized that Oakeshott did not reject the instrumental perspective in its entirety, since constitutions inevitably have an instrumental aspect: what he objected to was the tendency to make the instrumental perspective an *exclusive* one. This tendency, Oakeshott maintains, lies at the very heart of modern Western political philosophy since Hobbes, who regarded constitutional government as a device for protecting citizens against violent death and facilitating the 'commodious living' he believed peace and freedom make possible. Locke, likewise, regarded constitutions as political devices, this time for protecting in particular the right to private property. For Kant, in similar vein, constitutions are devices for promoting the development of mankind to moral maturity. For Hegel, constitutions are devices for promoting what is perhaps the most ambitious aim of all, which is to enable modern citizens to feel at home in the world. For Bentham, they are devices for promoting the greatest happiness of the greatest number. More recently, Hayek has identified constitutions as devices for protecting the free market, while Habermas has treated them as a vital means for promoting the ideal speech situation which he regards as the key to a non-exploitative political relationship.

Why, it must be asked, does Oakeshott reject the instrumental approach to constitutionalism characteristic of his predecessors? The reason he gives is that the instrumental view judges everything 'from the point of view of the desirability of its outcome in policies and performances', and therefore tends 'to discount legitimacy' (*ibid*, italics added). It is this indifference to legitimacy, he believes, that has created a crisis for contemporary liberal democracies by leaving them unprotected against arbitrary power, since insensitivity to legitimacy entails insensitivity to the crucial distinction between power and authority. As Oakeshott explained in *On Human Conduct*:

> Governments have become inclined to commend themselves to their subjects merely in terms of their *power* and their *incidental achievements*, and their subjects have become inclined to look only for this recommendation. Indeed, it is long since *this rejection of the idea of authority began to infect our thoughts about the constitutions of governments* (*ibid*, italics added).

For Oakeshott, in short, the contemporary failure to distinguish between authority and power created by indifference to legitimacy is the road to serfdom. The only way to avoid that fate is a renewed commitment to civil association which Oakeshott maintains, however, is unlikely to be made by modern constitutional democracies due to a spiritual malaise from which they suffer. In his late writings, he regarded this crisis as so profound that it led him to share the experience of wholesale alienation from the modern world found in thinkers like Nietzsche and Heidegger on the right, and members of the Frankfurt School like Adorno and Horkheimer on the left (Podoksik, 2003).[1] More precisely, Oakeshott identified this malaise as an all-pervasive instrumental mentality wholly incompatible with the sense of play on which he believed a commitment to constitutionalism ultimately depends (Oakeshott, 2004).[2] A culture without a sense of play has no secure foundation for the non-instrumental rules upon which civil association relies.

Five problematic aspects of Oakeshott's model of civil association as a response to the modern Western problem of political legitmacy

I now want to ask whether the contemporary problem of legitimacy is really quite as dire as Oakeshott takes it to be. The answer, it will be suggested, is that it appears considerably less acute if five problematic assumptions underlying

his concept of civil association are called into question. Since all the assumptions are familiar from the critical literature, my concern here is only to draw them together and highlight briefly the difficulties they create for Oakeshott's model.

The first problem concerns what John Charvet has described as Oakeshott's 'extreme version of a society of autonomous selves' (Charvet, 2005). The problem, to be precise, is that Oakeshott claims that political legitimacy can exist only when civil association is structured to accommodate a society composed entirely of autonomous selves. In response, critics like Bhikhu Parekh have claimed that Oakeshott's concept of legtimacy rests on a concealed ideological commitment rather than on philosophical analysis (Parekh, 1979, p. 503). This concealed commitment takes the form of his claim that individuality is a logically constitutive aspect of human conduct as such. In reality, Parekh maintains, Oakeshott's concept of individuality is a commitment to a very specific view of life as an adventure in choosing, self-disclosure and self-enactment. Such an image, Parekh remarks, cannot avoid arbitrarily devaluing the life of those, for example, like an Indian peasant 'hidebound by centuries-old practices and [with] little interest in action as an adventure and a medium of self-disclosure and self-enactment' (*ibid*). Oakeshott's concept of the autonomous self, in short, is not a logical presupposition of the conditions for legitimacy in modern democracy but a personal commitment to a specific concept of selfhood.

The second problem presented by Oakeshott's model of civil association is his distinction between civil and enterprise association. There are two difficulties here, of which the first is the vital distinction between the formal and substantive aspects of action upon which Oakeshott depends in order to differentiate between the two kinds of association. The difficulty of distinguishing beween what is formal and what is substantive was in fact illustrated by Oakeshott himself in the course of an early formulation of it in which he used the terms 'regulative' and 'substantive'. If a censor 'removes only some words of a work that has already been written', he wrote, 'the censor's activity is regulatory rather that substantive' (Oakeshott, 2008, p. 99). It is hard not to see, however, that whether or not the censor's act is purely 'regulatory' depends on the precise words he removes, since these may completely change the meaning of a text. The distinction between what is formal or regulative, then, and what is substantive, falls into the class of what have been termed 'essentially contestable' concepts.

The other difficulty presented by Oakeshott's distinction between civil and enterprise (or purposive) association arises from his rejection of enterprise association as a model for civil association on the ground that it involves a substantive purpose incompatible with the formal nature of civil association. This effectively confines moral legitimacy to civil association. If we look beyond the confines of civil association to the state, however, of which civil association is only an aspect, then it is not clear that a state which promotes an enterprise such as securing the minimal conditions of human flourishing necessarily forfeits all ethical status, even if it flouts the moral requirements of formal or procedural freedom.

The third problem concerns Oakeshott's interpretation of the rule of law. Law in civil association, he maintains, is only authentic if it is formal. The difficulty, however, is that Oakeshott insists that law is only authentically formal when what he terms '*jus*' is intrinsic to it (Oakeshott, 1983, p. 159). At first sight, this requirement does not seem to jeopardize the formal nature of law since by it, Oakeshott writes, he means only that law must observe such formal principles as 'non-instrumentality, indifference to persons and interests, the exclusion of *prive-lege* [i.e. exemption from legal obligation] and outlawry, and so on' (*ibid*). The problematic nature of *jus* emerges, however, when Oakeshott writes that 'to deliberate the *jus* of *lex* is to invoke a particular kind of moral consideration' which can only be discerned by a 'prevailing educated moral sensibility capable of distinguishing between the conditions of virtue, the conditions of moral association ('good conduct') and those which are of such a kind that they should be imposed by law ('justice')' (Oakeshott, 1983, p. 160). But who possesses the 'educated moral sensitivity' which, Oakeshott adds, is able to distinguish between *jus* and 'whatever moral idiocies there may be around'? (*ibid*). And how is 'moral idiocy' to be eradicated? Even if it is eradicated, Oakeshott writes that *jus* still 'cannot be expected to be without ambiguity or internal tension' (Oakeshott, 1983, pp. 160-161). Oakeshott's reliance on the consensus of an enlightened moral elite is especially problematic in view of the moral diversity of modern Western societies which not only makes it difficult for such an elite to exist, but also for it to be regarded as authoritative, were one to be identified.

The fourth problem presented by Oakeshott's concept of civil association concerns his failure to explain how a sense of identity is to be created between citizens, on the one hand, and the legislative and executive institutions of civil association, on the other. Oakeshott's neglect of this issue in his late work is puzzling in view of his insistence in 1955, two decades before *On Human Conduct*, that the central principle of modern European politics is that a government 'should

be formed and set up in such a way that its subjects would identify with it, not as an alien power, but as their own government' (Oakeshott, 2008, p. 96). Only when this sense of identity is achieved is it possible to satisfy the most fundamental requirement of legitimacy as ordinarily understood in modern European politics, which is that 'the appropriate constitution of government has to be such that the governed may feel satisfactorily governed by themselves. This', Oakeshott adds, 'is the conviction at which contemporary European practice and thinking has arrived; and it is maintained with such confidence that the enjoyment of that position and ability to exercise it is by everyone understood as political maturity' (Oakeshott, 2008, p. 97). Although Oakeshott observed that 'we do not agree on how best to satisfy this condition', he acknowledged the crucial importance of nationalism for the sense of identity of governors and governed (Oakeshott, 2008, p. 96). In yet earlier writings, when the shadow of Bernard Bosanquet still fell over his thought, he had attached even greater importance to patriotism, which he described as not only 'the basis of all morality' but as 'the greatest emotion and intellectual effort of which we are capable' (Oakeshott, 1993). Despite these acknowledgements of the emotional basis of political legitimacy, however, Oakeshott's subsequent mature formulation of the model of civil association ignored this issue.

It is not only nationalism and patriotism, however, which were neglected in Oakeshott's mature political thought. No less striking is his neglect of the role of intermediate institutions in fostering the shared sense of identity between governors and governed required by the predominant modern European concept of legitimacy. Indeed, the simplicity of his portrait of modern liberal democracy as a struggle between individualists and anti-individualists offers an atomized vision which makes it almost impossible to see how such an overarching sense of identity could ever be achieved.

Finally, Oakeshott's conception of civil freedom as merely 'the exercise of arbitrary will' has been unfavourably compared to Hegel's Aristotelian view of the state as the embodiment of freedom. Oakeshott's commitment to negative freedom, Paul Franco maintains, effectively deprives the state of any moral dignity, despite Oakeshott's claim that civil association is moral association (Franco, 1993, p. 131). Hegel, by contrast, is much closer to our 'deepest intuitions about freedom' when he maintains that freedom is not a purely formal ideal emptied of all content, as Oakeshott assumes, but is, rather, a substantive ideal involving 'self-mastery, cultivation of capacities and fullfilment of significant purposes'. As a result, Franco observes, Hegel's state is able to 'generate the sort of allegiance and identification . . . necessary to sustain it', whereas Oakeshott's ideal, being formal and without content, is devoid of emotional appeal for all but a few (ibid).

In Oakeshott's defence it may be argued that what he actually defends is in fact an ideal freedom which shares Hegel's ideal of self-mastery, embodied in Oakehott's case in sympathy for a somewhat bohemian version of the English ideal of the gentleman—an ideal whose implications were explored in particular by Shirley Letwin (to whom Oakeshott dedicated *On Human Conduct*) in her study of *Trollope's Gentleman* (Letwin, 1982). Despite the need to qualify Franco's critique, however, it remains true that the absence of an explicitly substantive dimension in Oakeshott's politcal thought makes it in practice an unsatisfactory response to the problem of political legitimacy.

This brief sketch of the main problems created by Oakeshott's model of civil association is not intended to subvert it but only to suggest that, if it is to have continuing relevance for contemporary liberal democracy, it needs to be recast on a broader basis, less narrowly committed to a purely formal ideal of freedom and law, and to the existence of an elite whose grasp of *jus* can ensure the moral legitimacy on law. It also needs to take account of the emotional basis of legitimacy. I now want to consider three possible ways of constructing a revised, broader foundation for the civil ideal.

Towards a revised model of civil association.

The first way of reformulating the conditions for legitimacy in civil association is suggested by the sociological approach of Ernest Gellner, which is completely non-moralistic. The key to this approach, which Gellner termed 'sociological realism', is recognition that man's essence in the twentieth century is 'not that he is a rational, or a political, or a sinful, or a thinking animal, but that he is an industrial animal' (Gellner, 1964, p. 35). What now defines man, in other words, is not his moral or intellectual or aesthetic or civil attributes, but 'his capacity to contribute to, and to profit from, industrial society' (*ibid*). The trouble with this standpoint is that it becomes impossible to criticize the legitimacy of a totalitarian regime, for example, in so far as it pursues industrialization. More generally, any concern for such features of civil association as the rule of law is rendered precarious by Gellner's seemingly uncritical conviction that 'power rightly belongs to the possessors of the new [industrial] wisdom . . . [that is, to] those who have acquired diplomas from the schools of the societies which are themselves already . . . industrialized'

(Gellner, 1964, p. 39). Although Gellner's sociological realism, then, detached civil association from a restrictive moral foundation like Oakeshott's, it risked destroying the civil ideal itself in the process by relative indifference to modern constitutional thought. In particular, Gellner risked replacing all regard for rules and procedures as the conditions for freedom by a dangerous trust in the managerial structures of industry.

The second way of revising Oakeshott's model of civil association aims to relocate it in a more explicitly political framework. Shortly before the publication of *On Human Conduct*, Hannah Pitkin accused Oakeshott of developing 'a theory essentially unpolitical' because it systematically omits 'the very stuff of political life', which is 'power, interest, collective action [and] conflict' (Pitkin, 1973, pp. 284-285). In the last analysis, Pitkin maintained, Oakeshott is 'one of those political theorists, like Plato, who are so deeply concerned about the dangers of power interest [and] conflict that they develop a theory in which those problems are eliminated rather than solved.' As Luke O'Sullivan has argued, however, this is in fact a misrepresentation: what Oakeshott thought of himself as doing is not leaving politics out but putting it in its proper place by making clear its dependence on the exisence of a legal and consitutional order. Politics, to be precise, consists in the activity of debating the desirability of the specific features of that order (O'Sullivan, 2008, pp. 34-35). A further defence of Oakeshott against Pitkin's charge is offered by Chantal Mouffe, who has suggested a way of making explicit a political dimension to Oakeshott's model of civil association which eliminates its dependence on the moral consensus of an enlightened elite. Mouffes's aim, more precisely, is to adapt Oakeshott's model to the complex challenges of moral and social pluralism by resituating it within a radical democratic theory indebted to a modified version of Carl Schmitt's political thought.

This seems at first sight unpromising, since the essence of Schmitt's thought is a rejection of rule-based models of politics like Oakeshott's ideal of civil association on the ground that they ignore the core of the political relationship, which is a decision about who the political foe is. Only the identification of a foe, Schmitt maintains, can unite a populace by creating an overriding sense of friendship among its members. Mouffe, however, manages to revise Schmitt's concept of the political in a way which she believes renders his thought compatible with Oakeshott's.

As Mouffe acknowledges, the problem with Schmitt's concept of the political is that it identifies politics with war by making political unity dependent on an existential threat. His mistake, Mouffe maintains, was to interpret this dependence in a way that identifies all conflict as essentially antagonistic. By doing so, Schmitt ignores the possibility of an 'agonal' concept of the political in which conflict is embraced as the sphere of affirmation, rather than the destruction, of otherness. When Schmitt is revised in this 'agonal' way, Mouffe maintains, his concept of the political paves the way for the relocation of Oakeshott's ideal of civil association in a radical conception of democracy that enables it to accommodate greater diversity.

In this way, Mouffe suggests, the dependence of Oakeshott's model on what may prove to be a minority consensus about forms and procedures might be overcome. Mouffe fails to explain, however, why the agonistic conflict she wishes to encourage would ultimately contribute to political unity rather than to irresoluble conflict (Mouffe, 1993, pp. 66-69). She relies, in other words, on an extremely optimistic view of the ability of conflictual politics to produce a rainbow coalition consensus. A somewhat similar revision of Oakeshott's model of civil association, it may be added, has been proposed by David Boucher, who has suggested that the seeming dependence of Oakeshott's civil association on a minority consensus might be overcome by exploring his sympathy for Roman republican sentiment. Even if Boucher's interpretation of the 'Roman' aspect of Oakeshott's political thought is accepted, however, the trouble is that republicanism of every kind presupposes a degree of civic virtue which is lacking in modern democratic states (Boucher, 2005, pp. 81-96).

The final attempt to increase the contemporary relevance of Oakeshott's ideal of civil association by detaching it from his relatively narrow moral foundation is suggested by Douglas Den Uyl's interpretation of Spinoza, to whose political philosophy Oakeshott gave surprisingly superficial attention (Den Uyl, 1993, pp. 62-116).[3] This neglect may be partially explained by the fact that Spinoza began his *Political Treatise* by specifying three main foundations for a theory of civil association which all placed him at odds with Oakeshott. The first is Spinoza's claim—in effect—that the kind of individuality Oakeshott esteems cannot be the foundation of a political order because it is an altogether exceptional achievement by those few who manage the difficult transition from passive to active self-consciousness, this being the condition that constitutes the human good for Spinoza.

It is not only the exceptional nature of this achievement which leads Spinoza to dismiss it as politically irrelevant, however; it is, more fundamentally, the fact that the

moral freedom which characterizes the rare achievement of individuality is wholly irrelevant politically, since the main purpose of politics is shaped entirely by the predominant characteristic of human nature. This, Spinoza writes, is the fact that reason plays little part in the life of most men, who are of necessity

> liable to passions, and so constituted as to pity those who are ill, and envy those who are well off: and to be prone to vengeance more than to mercy: and moreover, that every individual wishes the rest to live after his own mind, and to approve what he approves, and reject what he rejects. And so it comes to pass, that, as all are equally eager to be first, they fall to strife, and do their utmost mutually to oppress one another . . . (Elwes, 1955, p. 289).

Confronted by this predicament, all that matters is to ensure the permanence of the social order by countering the universal dominance of the passions in a way which does not depend on trusting to any man's good faith or honesty (ibid). The important thing, from this point of view, is simply that public affairs 'should be so ordered, that those who administer them, whether guided by reason or passion, cannot be led to act treacherously or basely. Nor does it matter to the security of a dominion', Spinoza adds, 'in what spirit men are led to rightly administer its affairs. For liberality of spirit, or courage, is a private virtue; but the virtue of a state is its security' (Elwes, 1955, pp. 289-290). For Spinoza, then, the concept of civil association does not involve privileging a particular concept of individuality.

The second observation Spinoza makes is that entry into civil society does not entail any change in moral identity. It is not, in particular, a movement from an amoral state of nature to a morally superior condition of freedom, since morality and freedom are intrinsically private and personal matters for which the political order is merely a framework, rather than an embodiment of morality (Elwes, 1955, p. 287).

Spinoza's third observation is that the contrast drawn by thinkers like Hobbes between the state of nature and civil association is untenable because civil society in some form always exists. Consequently, there can be no movement from a state of nature into civil society, or from a non-moral to a moral condition. In Spinoza's own words,

> inasmuch as all men, whether barbarous or civilized, everywhere frame customs, and form some kind of civil state, we must not, therefore, look to proofs of reason for the causes and natural bases of dominion, but derive them from the general nature or position of mankind . . . (Elwes, 1955, p. 290).

For Spinoza, then, civil association is conceived of as a rational rather than a moral response to the human predicament. As such, he seeks to provide it with a more hybrid foundation than Oakeshott by refusing to restrict the conditions for legitimacy to the purely formal moral demands of individuality. It is true, of course, that Oakeshott's own thought seems to point in this hybrid direction when he acknowledges that it is impossible to give a full account of the modern state in terms of civil association. What is problematic, however, is that he nevertheless makes the legitimacy of the modern state depend upon the extent to which it is satisfies the ethical requirements of civil association.

CONCLUSION

I began by questioning whether Oakeshott was right to believe that a concern for political legitimacy is disappearing from contemporary liberal democracies. Although I have not denied Oakeshott's claim that issues of policy increasingly dominate over constitutional issues, I have suggested that his pessimism about the future of the legitimacy issue is open to the charge of exaggeration, largely because he conferred a monopoly of the claim to moral legitimacy on civil associaition.

My conclusion is not that Oakeshott's model of civil association should be abandoned, but only that it would benefit from a revised, less moralistic foundation. The aim of the paper, more precisely, was to find a way of defending Oakeshott from the charge of exaggeration by exploring what this less moralistic foundation might involve. Its main characteristic, I suggested, is that it would offer a more hybrid, less purely moral theory of legitimacy that incorporated an acknowledgement of what Oakeshott himself identifies as the principal character of the modern European state, which is its ambivalent attempt to combine purposive and non-instrumental perspectives.

This hybrid theory of legitimacy would acknowledge, above all, that what constitutes legitimacy at any particular time can be determined only by an essentially political debate about the relative weight to be attached to different, and potentially conflicting, aspects of the state. Oakeshott's exclusively formal or proceduarl conception of the conditions for legitimacy, in other words, is incorporated into a more comprehensive one which includes political debate about the

substantive purposes associated with the modern state, as well as about the constitutional issues that civil association presents.

In the quest for such a foundation I turned in particular to Spinoza, who is unusual in the modern Western tradition for grounding civil association on a naturalistic, non-moral foundation which is the antithesis of Oakeshott's own position. Whether such a revised foundation for Oakeshott's model of civil association is possible, or would simply serve to threaten its coherence, are issues which I do not pretend to have resolved but continue to ponder.[4]

NOTES

1 I do not share Efraim Podoksik's (2003) interpretation of Oakeshott's philosophy as fundamentally affirmative of Western modernity. Although Oakeshott is indeed affirmative when identifying the different forms of autonomous discourse which he termed 'modes of experience' he believes have been indequately identified and disitnguished in the past, this affirmation does not extend to what he considers to be the dominant moral and political tendencies of the age.

2 For the influence on Oakeshott of J. Huizinga's thesis in *Homo Ludens,* see Oakeshott's 2004.

3 Den Uyl considers the possible reasons for this neglect in his illuminating essay.

4 I am indebted to Luke O'Sullivan for commenting on a draft of this paper.

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Oakeshott and the Complex Ecology of the Moral Life

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Abstract: The first of three parts of this article explores Oakeshott's indictment of rationalism in the moral life and endeavors to explain why he is so negative towards this version of morality. The second investigates the role that he ascribes to habit in moral conduct and argues that his writings can be understood to accommodate the place of reasoning in the moral life. The third part demonstrates the role of formulated principles and ideals in his conception of morality.

Keywords: Morality; ecology; rationalism; habit; reason; principles; justification; literature.

This essay explores the complex texture of the moral life in the work of Michael Oakeshott and to this end it draws on literary texts, interpreted broadly to include biography. The difference between philosophy and literature as conduits of human understanding is communicated in Goethe's distinction between theory and life itself, mentioned by Robert Grant in his monograph on Oakeshott. '*Grau, theurer Freund, ist alle Theorie,/ Und grün des Lebens goldener Baum* (Grey, dear friend, is theory all/ And green the golden tree of life)' (Grant, 1990, p. 118).[1] Of necessity there is greyness in some philosophical work but literature does offer something of the 'green' of life's 'golden tree'. Margaret Watkins (2008) draws attention to the power of imaginative literature to capture what she calls both the 'particularity and complexity' p. 311) of ethical contexts in teaching moral philosophy. Noel O'Sullivan (2005, p. 13) perceptively notes the potential contribution of imaginative literature in understanding Oakeshott's account of human practices. Literature communicates some of the pulse of human lives. For example, writing on one the classic autobiographies of Western literature, Saint Augustine's *Confessions*, David Denby commends the work as possessing 'the juice of life' in it (p. 192).

So what then is the character of the rationalist morality the Oakeshott condemns?

1. RATIONALISM IN THE MORAL LIFE

The 'morality of the Rationalist' (1991, p. 41) consists in the self-conscious pursuit of moral ideals or principles and the deliberate application of moral rules. This form of morality is a classic *taxis* based on self-consciousness and planning. What it proposes is that individuals firstly determine 'in the abstract' (p. 473) their moral ideals and then formulate them in words. Then they learn by applying a set of rules to regulate their conduct in accordance with these ideals before finally learning to defend their chosen ideals from the criticism of others. The dangers which Oakeshott sees in this view of the moral life are, firstly, that it sets such a high value on reflection that full participation in moral life is restricted to the kind of person who is 'something of a philosopher and something of a self-analyst' (p. 475). The second and more damning indictment of this form of moral life is that applying such rules to conduct is not an art easily learned and the intellectual effort involved in determining how and where to apply them can paralyze action. Oakeshott also maintains

that an individual who does not enjoy a broad intellectual grasp of the relative importance of different moral ideals can become obsessional in the pursuit of one particular ideal. And, as he observes in a memorable and poetic aphorism, the pursuit of such an obsession 'has made many a man hard and merciless' (p. 476). Although this rationalist morality in a pure form is unlikely to be found in reality, yet in our culture it is the dominant strain in thinking about the moral life.

Why is Oakeshott so hostile to the morality of rationalism? It is interesting here to note how religion and the moral life were communicated in the school that he attended. As a community it 'was remarkably equipped with heroes, with a past and a relationship to that past' (Grant, 1990, p. 119):

> Religion did not appear as a set of beliefs but as a kind of *pietas*; morals was knowing how to behave; Florentine and Pre-Raphaelite art was on the walls. These things were very little 'intellectualised', and afterwards, when some of them were left behind, I never felt that they were things I had to be released from (*ibid*).

This absence of intellectualization captures much of the spirit of the appropriate version of the moral life advocated by Oakeshott. The fundamental flaw in the understanding of morality in which reflection and the self-conscious pursuit of ideals are dominant is its intellectualized nature whereby formulated ideals are conceived as being generative of moral conduct. In reality moral ideals, principles and rules depend on there being concrete episodes of conduct to reflect upon and many such ideals are the result of reflection upon actual conduct. A further disadvantage of the form of moral life where reflection dominates is that thought and speculation are given priority at the expense of action, and moral conduct is seen as a constant attempt to resolve moral dilemmas. And this can lead to a higher value being placed on intellectual coherence than on a coherent pattern of conduct. This form of moral life, suggests Oakeshott, may be compared to a religion where the construction of a theology has become more important than the practice of a way of life (p. 479). Or, as he puts it in an another apposite and illuminating analogy, the preaching of moral ideals such as that of social justice is considered a greater achievement than possessing 'a habit of ordinary decent behaviour' (p. 482). And in respect of moral education the danger of a predominantly reflective form of morality is that instruction in principles and rules will come to assume greater importance than the cultivation of appropriate patterns of conduct through the provision of good example.

When it comes to moral conduct Oakeshott believes, as does Shakespeare's (1997) Coriolanus, that 'action is eloquence' (Act III, Sc. ii, line 76). He envisages formulated principles as tending to be otiose, trivial, sanctimonious and often invoked to disguise hypocrisy. They represent what the narrator's mother in Proust's great novel, *Remembrance of Things Past* is thinking of in her witty comment about her antipathy to preached virtue—'What virtues lord thou makest us abhor' (Proust, 2012, p. 43). The moral exhortations of the pigs in *Animal Farm* exemplify a dramatic version of preached morality. This is also the form of moral and political discourse that a character in a Milan Kundera (1985, pp. 111-112) story describes as '[p]olitical rhetoric and sophistries' that do not exist to be ' believed' but rather only to serve to promote the self-interest of the political authorities. It is only '[f]oolish people ... who take them in earnest' and even these people 'sooner or later discover inconsistencies' in the 'rhetoric and sophistries' (*ibid*). From the time of the condemnation by Jesus of the Pharisees, disingenuous moralizing is also to be found in religious rhetoric. There is a passage in *The Catcher in the Rye* that captures this tendency very well. The students in the narrator's school enjoy a visit from the successful past pupil called Ossenburger who has made a fortune in the undertaking business. In the chapel he delivers an oration in which he says that:

> he was never ashamed, when he was in some kind of trouble or something, to get right down on his knees and pray to God. He told us we should always pray to God—talk to him and all—wherever we were. He told us we ought to think of Jesus as our buddy and all. He said he talked to Jesus all the time. Even when he was driving his car. That killed me. I can just see the big phoney bastard shifting into first gear and asking Jesus to send him a few more stiffs (Salinger, 1972, pp. 20-21).

But moral principles do not have to be so self-serving and hypocritical. In an account of his experience as a parent of three young children growing up in Italy entitled *An Italian Education,* the British novelist Tim Parks (2000) writes about the shock and cultural dissonance that the moral double standards that he detected in many Italians provoked in his English sensibility. The double standards of provincial Veneto between professed beliefs and actual conduct are reflected in what he refers to as an 'extraordinary

conflict of cultures' (p. 71). There is 'peasant, Catholic, superstitious Italy, physically present in the roadside shrines and Madonnas' (*ibid*), but where many people who claim to be non-believers dress up in their best clothes to appear at Mass on Sunday. Children will be baptized and receive catechetical instruction at the behest of parents who never go to Church themselves. There is also there the secular, liberal Italy of fashion, the latest technology and a surface acceptance of the rhetoric of equality—between races, sexes, the able-bodied and those who suffer from disabilities. Yet a young mother might cry when she is told that she has given birth to *una bella bambina* (a beautiful baby girl), a mere girl, rather than to the much more desirable *maschio* (boy) (Parks, 2000, pp. 71-72). When it comes to gender preferences and to the upbringing of children, modern pieties carry less weight than inherited attitudes. Girls and boys will be brought up in terms of traditional gender roles (Parks, 2000, p. 73). Parks suddenly becomes aware that his Anglo-Saxon presumption that there should be internal consistency between one's beliefs and further consistency between one's beliefs and behavior is not shared among the inhabitants of the Veneto. It then dawns on him that values seem to be held 'more for their aesthetic properties than anything else' (*ibid*). Modern liberal orthodoxies are pleasant to embrace as indeed are the beliefs of traditional Catholicism. Parks learns what Oakeshott perceived in 1948, that formulated principles are not necessarily designed to connect with the conduct of real life.

2. AFFIRMING THE HABITUAL

On account of the intellectualized and unrealistic character of much morality embodied in pious propositions, Oakeshott therefore advocates a form of moral life in that habit is the dominant but not exclusive element. In other words he envisages the moral life as a spontaneous rather than a planned practice. This form of moral life is based on habits of 'affection and behaviour' (1991, pp. 467-468) in which individuals unselfconsciously act in accordance with a tradition of moral behavior. It is the form that moral conduct takes in 'all the emergencies of life when time and opportunity for reflection are lacking' (p. 468) and in which actual conduct is given priority over the mere profession of moral convictions. And there are two good grounds for this salutary emphasis in Oakeshott's writing on the subject. This is because, firstly, how we actually behave, as opposed to what we merely profess, represents our real moral convictions and consequently what is most morally worthwhile about us. As noted earlier, in the moral life 'action is eloquence' (Coriolanus, Act III, Sc. ii, line 76). Secondly, where precedence is given to action over reflection, moral ideals, rules, and principles are assigned their duly subordinate epistemological status because formulated moral rules depend on there being conduct to reflect upon in the first place.

Nevertheless, in spite of Oakeshott's claim that what he calls habits of 'affection and behaviour' (Oakeshott, 1991, pp. 467-468) go beyond mere 'imitation' to take the form of 'selective conformity' to traditional moral conduct (p. 469), his use of the term 'habit', on account of its association with mere acquiescence and blind conformity, must give us pause (see Williams, 2007, pp. 169-87). And indeed it is on the very grounds that the high value which he places on habit in moral life would lead to mere conformity in moral conduct that Peter Winch (1980, pp. 54-65) criticizes Oakeshott's commitment to a form of moral life based on habit.[2] Now there is a lack of precision in Oakeshott's writing regarding the meaning of the term habit and even such a careful writer as Winch could be more sensitive to the different senses of the term. Accordingly it is necessary to look more closely at the way in which the term is used in order to establish what Oakeshott understands by a form of moral life based on habit.

The concept of habit: an elucidation

As a preliminary distinction, a habit must not be identified with such reflex responses as blinking, flinching, wincing or recoiling. Rather we use the term habit in the first instance to refer to a low-level automatic response to some familiar stimulus, that is, to the performance of elementary operations, each of which is the exact replica of its predecessor. Examples would be a child reciting the multiplication tables or a soldier saluting or standing to attention. In this sense, where habit comes nearest to mere reflex, we even speak of doing things from sheer force of habit. A second use of the term habit is to be found in its application to the performance of relatively sophisticated operations where these are carried out on a predictable and regular basis. Here habit has the sense of something done habitually or as a matter of routine. Examples of a habit in this sense would be the routine preparation of laboratory equipment or a routine check on tyre pressure, oil and water levels in a car. The distinction between the first and second senses in the use of the term is between habit as automatic response and habit as the habitual exercise of a capacity. In a third sense of the use of the term, a habit may be a performance which expresses a disposition

or tendency to behave in a particular manner, such as, for example, where we surrender our seat on a bus to an elderly or infirm person. Perhaps here we could say that habit refers to something which is done as a rule.

Now conduct that expresses a disposition to act in a particular manner will always require some reflection as to its necessity and appropriateness. In the last example we may ask ourselves whether the potential recipient of our considerateness will feel happy at being treated as less than youthful and able-bodied, or we may wish to excuse ourselves from making an offer on this occasion because we are feeling particularly tired or unwell. Conduct performed as a matter of routine, on the other hand, requires reflection only in non-routine circumstances. In the context of the first example, such a situation may occur where we have to look for some pieces of equipment which have been mislaid by a careless colleague or, in respect of the second example, we may have to cope with a situation where the car is leaking oil. Much of the routine work carried out by a doctor or a dentist could be done by a paramedic with minimal training—but it is the ability to detect when something is not susceptible to routine treatment which distinguishes the skill of a doctor or dentist from that of the lesser qualified paramedic.

Both the habitual performance of routines and performances that express dispositions differ from the production of automatic responses. Each automatic response, the act of standing to attention, for example, is an exact replica of its predecessor and can be produced at will outside the context in which it normally has its place. The capacity to produce an automatic response is inculcated by means of drill and we can speak of someone producing such a response without thinking in that it can be produced without taking thought regarding whether or how to perform the act in question. Routine and dispositional performances, however, cannot be acquired by drill alone. These are normally learned through trial and error or through supervised initiation supplemented by demonstration and explanation. Performances of this kind cannot be produced without taking thought, although they can take place without conscious reference to rules regarding means and ends. Both kinds of performance are also rooted in contexts from which they cannot normally be detached. The preparation of laboratory equipment can only occur in a laboratory context and the activity of servicing cars can only be practiced on actual cars. Performances which express a disposition are similarly rooted in actual situations, although they may have a component of social skill which can be practiced in a simulated setting. For example, a teacher may organize a role play situation in the classroom to show his/her pupils how to offer a seat graciously, politely and without ostentation.

When he talks of a 'habit of affection and behaviour' Oakeshott is thinking of dispositional performances of the third kind. In his writing there is an unfortunate parsimony of illustration on the matter but the pre-eminent moral habit, the 'habit of ordinary decent behaviour', is clearly a habit in the sense of a settled disposition to act in the light of certain attitudes, convictions, values and commitments. Moreover, in the description of how we acquire this 'habit of affection and behaviour' he says, as we have just seen, that although habit begins in imitation, it becomes in time 'selective conformity' to the moral values that a society offers. Consequently habit goes beyond mere mimetic and automatic response. More explicit again is his attribution to the property 'elasticity' to 'a moral life which is firmly based upon a habit of conduct' (Oakeshott, 1991, p. 470). Perhaps we can best understand Oakeshott's habits of moral conduct as analogous to the kind of habit involved in being able to speak a language. In speaking a language we do not simply produce utterances; rather we respond to contexts or matrices of human meaning in terms of our particular intentions and purposes.[3]

And the analogy between moral habits and speech habits demonstrates the essential point which Oakeshott wishes to make. Just as in speaking our mother tongue we observe rules of grammar and syntax without consciously adverting to these, in the version of moral life advocated by Oakeshott rules of conduct are observed implicitly and unselfconsciously, 'tacitement, naturellement et sans art' (tacitly, naturally and without art) (Oakeshott, 1991, p. 25). And the essential distinction which Oakeshott wishes to make is between conduct that involves conscious reference to rules and that in which rules are observed implicitly and 'as nearly as possible without reflection' (Oakeshott, 1991, p. 468). An example of the kind of moral character from literature is that of Captain Brown in *Cranford* by Elizabeth Gaskell. Gaskell refers to the Captain's 'infinite kindness of heart, and the various modes in which, unconsciously to himself, he manifested it' (Gaskell, 1963, p. 15). To say that Captain Brown manifests his good nature 'unselfconsciously to himself' means that he acts consistently or habitually in a kindly manner, without conscious deliberation about ideals and rules. Accordingly for the Captain, articulated knowledge is superfluous. Yet his habit of kindly behavior is not a habit in the sense that he responds to situations in an automatic, reflex manner. Doubtless Oakeshott's use of the term 'habit', with its suggestions of automatic, unreflective, reflex

response is somewhat misleading. In using the term, however, his aim is simply to mark a distinction between conduct which is normal, customary and/or traditional and that which is premeditated and self-conscious.[4] Just as people can speak their mother tongue without being overtly and concurrently aware of the rules of grammar and syntax that they are following, so can people behave morally without self-conscious reference to the principles and ideals in terms of which they are acting (although this is not to deny that, if called upon to do so, they must be able to give some justification for why they act as they do).

It would, however, be less confusing and more accurate to speak of moral conduct as a practice rather than as a habit of 'affection and behaviour'. Practice is indeed the term which Oakeshott himself uses in *On Human Conduct*, together with the illuminating metaphor of moral conduct as a language (1975, pp. 58-89). The version of the moral life that he defends could be better described as ecological rather than habitual. The term appears (as oecological) in Oakeshott (1991, p. 64) and prompts Hanna Pikin to write that 'more profoundly than anyone since Burke [Oakeshott has] developed for us a vision of human society that might properly be called "ecological": an awareness of the complexity and delicacy of the interrelationships among institutions, customs, and ways of life' (Pitkin, 1976, p. 301).

The notion of moral conduct as an embodied practice of an ecological nature is shown in the actions of Captain Brown and can be found in many other literary characters. The doctor in *Macbeth* (Shakespeare, 1963) represents a classic instance of a person who responds with ethical sensitivity without moralizing. The lady in waiting has sought the doctor's advice on Lady Macbeth who is walking and talking in her sleep about the murder of the King and his servants (Act V, Sc. i). In response to her guilty ravings, the doctor sympathetically comments: 'What a sigh is there! The heart is sorely charged', while the lady exclaims 'I would not have such a heart in my bosom for the dignity of the whole body' (line 56-9). The doctor goes on to explain that '(i)infected minds/To their deaf pillows will discharge their secrets,/ More needs she the divine than the physician. /God, God forgive us all' (lines 76-79). For the doctor, compassion for the stricken is far more compelling than passing judgment in moral formulae.

Another famous fictional character who represents a similar moral outlook is Georges Simenon's Inspector Maigret. The detective, whose moral universe is perceptively explored by Peter Ely (2010), like the doctor above, seeks to understand rather than to judge. Ely refers to Maigret's refusal to judge the criminals whom he is charged with apprehending (p. 466), some of whom he views as misguided human beings gone astray rather as morally reprehensible. His virtues are 'humility, the ability to enter into the lives of other people, a determination to understand and not to judge, and above all, compassion' (p. 470). Compassion for Maigret is not a theoretical principle but rather an ideal that he embodies. In the Maigret novels, as in several stories of Maupassant's, prostitutes are depicted positively and are far more likely to exemplify patterns of 'ordinary decent behaviour' than are upstanding citizens.

3. MORAL DISCOURSE AND MORAL PRINCIPLES

Yet, as noted earlier, Oakeshott himself is aware of the conspicuous limits of an habitual form of moral life merely based on habit. In the first place, he does attribute to moral ideals a 'power as critics of human habits' (Oakeshott, 1991, p. 480) that enable people to reflect on their conduct. Secondly, such an education cannot give individuals the ability to defend and to explain their conduct and they may remain unaware that there are genuine alternatives before them in action. Moral virtues are to this extent cloistered and patterns of behavior may collapse under threat or they may degenerate into a form of superstitious allegiance to the past. Both responses are to be expected from individuals brought up in an uncritical and closed environment who are then exposed to the world outside their communities. Moreover if what is conventionally done were to be accepted as the sole criterion of moral value, the result would be that, to invoke again words of Shakespeare's (1997) Coriolanus, the 'dust on antique time would lie unswept,/And mountainous error be too highly heaped/For truth to o'erpeer' (Act II, Scene iii, lines 108-111).

Yet it must be acknowledged that there is some basis for the criticism by R. S Peters that for Oakeshott principles are 'somehow spurious in relation to justification' (Peters, 1974, p. 451 and Benn and Peters, 1959, pp. 317-318). It is certainly true that he believes that justificatory principles can be spurious. The character of such principles is very well communicated in Maupassant's famous story *Boule de Suif* that formed the basis for the plot of John Ford's movie *Stagecoach*. This *novella* captures the distinction between individuals who invoke spurious, self-serving principles and the inherent decency and kindness of the prostitute heroine, *Boule de Suif* (which can be translated as ball of lard). She takes a coach with a group of upstanding citizens to escape

from German occupied Rouen but, because *Boule de Suif* is a prostitute, she is ignored by the other passengers who condemn her based on their narrow rationalistic principles. Yet she shares her food with them when those around her are extremely hungry. They are all held captive by the Germans in the village of Tôtes unless *Boule de Suif* consents to have sex with the German commanding officer. Her patriotic convictions are deeply offended by the suggestion and this sense of outrage is shared by her companions. But as the captivity drags on the others become impatient and use every spurious, dishonest moral argument based on very different principles to persuade her to change her mind. She very reluctantly allows herself to be cajoled into sleeping with the German. This results in the passengers being permitted to continue their journey but they treat *Boule de Suif* with contempt and refuse to share their food with her. The story is a classic expression of a clash between a spurious 'principled' morality and the morality of ordinary decency.

The criticism of Oakeshott's attitude to principles is, however, quite untrue of the later work where he very explicitly upholds the necessity of being able to justify our moral choices. Indeed it is interesting to note that he himself offers a useful analysis of the different forms in which justification may be used to rebut the imputation of injustice in respect of our actions (Oakeshott, 1975, p. 69). He explains that we may justify an action (1) by relating it to the moral principle which we are accused of violating (2) by pointing to the relationship between the action in question and the duties attaching to an office or role (3) by invoking a principle of a higher moral priority. An example (the examples are mine) of justification of the first form would be where a person argues that his taking another's car keys is not a case of theft or an injustice to the other party as this person commonly drives when drunk and thereby puts at risk his own life and that of others. A doctor offers a justification of the second kind where, to the accusation of professional negligence, she claims that she was precluded on the grounds of professional ethics from disclosing to her patient's parents, without the daughter's consent, the fact of her pregnancy. The individual in the first example offers justification of the third kind where he admits to telling a lie about his knowledge of the whereabouts of the other person's car keys by arguing that his falsehood is justified in terms of the higher moral principle of respect for life. Thus he justifies his action by invoking a principle which can be said to be more compelling because it is of a higher order of moral priority than the one purportedly neglected.

Unless people can articulate the basis of their moral judgments, it is impossible for them to endorse or condemn conduct. Where standards of 'affection and behaviour' have not been observed, then it is necessary to be able to explain why. One of the most stinging reproofs in the work of Jane Austen is where Mr Knightley takes Emma to task for her sarcastic rudeness to the hapless Miss Bates, an elderly impoverished spinster. In a game, participants have to provide various responses and Miss Bates informs the others that she is bound to utter three dull things when she opens her mouth. Emma cruelly retorts that this may be difficult because Miss Bates will be 'limited as to number- only three at once' (Austen, 1982, p. 364). Emma attempts to justify her actions by referring to the combination of the good and the ridiculous in Miss Bates's character. Mr Knightley acknowledges that both of these qualities are present in the woman but that this does not justify Emma's cruelty. He proceeds to show why her words have so dramatically violated acceptable standards of 'affection and behaviour'. In the first place Miss Bates is poor and far from being the 'equal in situation' (Austen, 1982, p. 368) of Emma, who is the first lady of the neighborhood. She has come down in the world from the comforts of her earlier years and is likely to sink even further.

> Her situation should secure your compassion. It was badly done, indeed!—You, whom she had known from an infant, whom she had seen grow up from a period when her notice was an honour, to have you now, in thoughtless spirits, and the pride of the moment, laugh at her—and before her niece, too—and before others….(*ibid*)

Some of the people making up the party, he adds, will be likely to be 'entirely guided by *your* treatment of her' (*ibid*). Mr. Knightley goes on to explain that his rebuke will not prove pleasant to Emma—no more than it gives him pleasure to administer it. In his moral condemnation Mr. Knightley relates Emma's action to the moral principle that she has violated and further points to the relationship between the action in question and the duties attaching to Emma's position as a role model in their society.

CONCLUSION: RECONCILING CONDUCT AND PRINCIPLES

In the introduction to this essay attention was drawn to the potential of literature, including autobiography, to commu-

nicate something of the complex texture of the moral life. In conclusion I propose to dwell on a recent autobiography that does precisely this and which also captures the complex tension between moral conduct and the articulation of ethical stances. The autobiography of Sister Emmanuelle (2008) has important lessons to teach us about the springs of moral and religious commitment. Her life and thought embody a reconciliation between conduct and principles that Oakeshott would find congenial.

Born in Brussels in 1908, Sr. Emmanuelle spent her life working tirelessly on behalf of the dispossessed of this earth and died just before her one hundredth birthday. There is an irony that the year of the birth of Sr. Emmanuelle was also that of Simone de Beauvoir, one of the most notable atheists of the twentieth century. But these two outstanding women have much in common besides sharing the same year of birth. Both were committed to the welfare of the poor and both were impelled by the passionate pursuit of truth. Sr. Emmanuelle's work led her to give voice to the voiceless in many countries—in the Sudan, the Philippines, Senegal and especially to the families who dwelt beside the garbage dumps of Cairo.

Her account of her religious vocation is quite compelling. She had to overcome the opposition of the family and the skepticism of the order of Our Lady of Sion, the order that she joined. The skepticism came from their perception that she was stubborn and self-willed and likely to struggle with the vow of obedience as indeed she did. She also acknowledges with a great honesty that she was sexually driven and practiced masturbation and would find the sexual aspect of life difficult to forgo. Yet the impulse of her vocation to serve God and the less fortunate led her to make the sacrifices necessary to embrace the religious way of life.

Less well known perhaps was her extraordinarily generous openness to the beliefs of others. In her life she had no fear of self-righteous Catholics who might have perceived her as a reprehensible relativist. What the life and spirit of this exemplar of compassion and religious commitment show is that individuals who are most deeply connected to their own religious tradition can display openness to others because they are confident and non-defensive in their own convictions. In 1944 in Istanbul her teacher of philosophy, Mr. Auerbach, and Mr. Feyzi who taught her philology in preparation for her degree at the Sorbonne, were Jewish and Muslim respectively. These two teachers were as committed to the truth claims of their religions as she was to those of Christianity. It suddenly dawned on Sr. Emmanuelle that she may not be in possession of all truth. Because she believed in the truth proclaimed by the Catholic Church did not mean that she had exclusive access to the truth. With her friend, Mme. Mano, daughter of the Chief Rabbi, she embarked on an eager, passionate and shared study of the Torah so that both could learn for themselves what it revealed about God, the world and humankind. The Rabbi himself arrived to visit his daughter at the convent. Sr Emmanuelle found herself on the same spiritual 'wavelength' (p. 92) and he went with her and some of the other sisters to pray in the chapel of the convent.[5] He promised to give a list of the psalms from which he derived most spiritual sustenance. Sadly he died suddenly before he could share the list with his Christian friends. Yet Sr. Emmanuelle did go on to offer her Jewish students extra lessons on the bible and taught them to recite the Shema. As one of the girls told her in later life, this was her most precious gift to them.

The Church authorities then invited Mr. Feyzi to work with Sr. Emmanuelle on a translation into Turkish of the Catholic catechism. This exciting work was punctuated by engaging and illuminating conversations about their respective beliefs. Mr. Feyzi's genuine bafflement at the doctrine of the real presence of Jesus in the Eucharist led to their agreeing to differ about certain matters of faith that have to be lived to be believed. Instead of leading to bitterness and alienation between the two friends, the discussion ended with smiles and a return to the work in hand. From her Muslim teacher, Sr. Emmanuelle learned not only the Turkish language 'but also and above all to respect the other in his or her identity'. She found that atheists, Jews and Muslims all 'nourished her Christian faith' (p. 263). They extended her understanding of God and enlarged 'her vision of God, goodness and beauty' (*ibid*) and enabled her to see value in human beings irrespective of their allegiances. Yet she did not consider that all religions were equally true. 'Truth is an absolute and cannot be contradictory. Either Jesus is the son of God or he is not' (*ibid*)—there cannot be two views of this defining belief.

Her other influential teacher was a French Franciscan, philosopher and theologian, Father Gauthier, and he helped her to understand contemporary agnosticism and atheism. Atheism was not a sin of impiety but rather in most cases the response of an individual following an upright conscience and unable to believe in an invisible God in a world where tragedy is common. She came to believe that people accept or reject God on account of their education and upbringing, their reading and life events. These criteria of judgment are difficult and even impossible to change. Each individual reaches a decision according to her or his lights and both believers and non-believers can be subject to doubts (, p. 272).

He taught her the same lesson as Mr. Feyzi—consider the human being first before focusing on the person's religious, political and cultural affiliation. It is vital to avoid becoming so immersed in one's own identity that one is incapable of joining the other person in his or hers. She did not perceive the struggle on behalf of the poor as the sole preserve of religious believers. She often found herself on the 'same wavelength' (p. 260) as non-believers who shared her concern for human suffering. She saw such individuals, though not in communion with a church, as disciples of the gospel. In her work in helping to create homes for street children, she emphasized the importance of teaching the young people to love one another and for all to respect religious difference. In these homes, there was to be not the slightest trace of proselytizing intent. As she reminds readers, the essence of religion (*re-ligio*) is to bind together human beings to God and to each other. Even young Catholics had to confirm their wish to attend Sunday Mass to ensure that they were going willingly and of their own free will. She shared the French passion to respect and preserve the sacredness of individual beliefs.

The link between the work of Oakeshott and the achievement of Sr. Emmanuelle should be clear. A lesson that he has well taught is that the virtues that people espouse may well be commendable but if they are not given expression in human conduct then they are worthless. Sr. Emmanuelle exhibited consistency between her conduct and the values that she so eloquently articulated and her work thus embodied the complex ecology of the moral life. A virtuous life can be unsupported by moral theories but Sr. Emmanuelle was capable giving reasons for the principles that drove her. It would be misguided to claim that Oakeshott was the first person to understand the primacy of conduct in the moral life but every generation benefits from having it re-stated.

NOTES

1 I have slightly changed Grant's translation.

2 A detailed response to Winch's critique of Oakeshott can be found in Callahan (2012).

3 For an account of how children learn their mother tongue see Donaldson (1987), in particular pp. 32-39. The analogy between moral education and the learning of the mother tongue is also favored by Gilbert Ryle (see Williams, 1986).

4 In Oakeshott (1991, p. 6) the terms traditional, customary, and habitual are used as synonyms.

5 All translations from Sister Emmanuelle's book are my own.

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Homo Ludens and Civil Association: The Sublime Nature of Michael Oakeshott's Civil Condition

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Abstract: How should we consider Michael Oakeshott's distinction between Civil Association and Enterprise Association? Upon a cursory look, one might suggest that Enterprise Association is defined positively, by the goal it strives for, whereas Civil Association is define negatively, by limiting what the state can do. This view is flawed. Instead, we should view Civil Association and Enterprise Association as distinct moral systems. In particular, we should view the two systems in light of their "fundamental emotions" -- play and seriousness with the associated personas of Homo ludens and Homo laborans. By considering Oakeshott's Civil Association in light of play, we can square the formalism of the later Oakeshott with the traditionalism of the earlier Oakeshott, and grasp the sublime nature of the associated Civil Condition.

Keywords: Homo ludens; Homo laborans; play; Oakeshott; Minogue; Huizinga; Civil Association.

INTRODUCTION

> *And the Stoics too, that conceive themselves next to the gods, yet show me one of them, nay the veriest bigot of the sect, and if he do not put off his beard, the badge of wisdom, though yet it be no more than what is common with him and goats; yet at least he must lay by his supercilious gravity, smooth his forehead, shake off his rigid principles, and for some time commit an act of folly at dotage.*
> —Erasmus, *In Praise of Folly*

What sort of man would reject the allure of utopia for a free and imperfect society? In accepting an imperfect society, is one necessarily entailed to only define the political order negatively? Throughout modern history, men of all creeds and ambitions have sought to bring about a just order of society; often, these endeavors have resulted in great leaps forward to desolation and despair. Standing up to the pessimism of the right about the West's lost traditions and the schemers of a just society, we find Michael Oakeshott cautioning against despair and optimism. Yet, is Oakeshott merely a philosophical charlatan, deconstructing the work of others without providing his own answers? Does Oakeshott offer more than skepticism and quietism? In order to answer these questions, I will attempt, following Montesquieu's lead, to discern the fundamental emotion of Oakeshott's civil association and enterprise association (Montesquieu, 1748/1989). Drawing on Oakeshott's essay "Work and Play" and Johan Huizinga's *Homo Ludens*, I will argue that the concept of play and seriousness, with the accompanying personas of *Homo Ludens* and *Homo Laborans*, correspond to civil association and enterprise association, respectively (Huizinga, 1950; Oakeshott, 2004). Further, I will argue that the concept of play makes coherent the corpus of Oakeshott's work and provides the positive and sublime vision inherent in Oakeshott's civil condition. I will then suggest that while Oakeshott articulates a sublime 'civil condition' he mistakenly rejects a limited conception of natural law, based on the interplay of the individual and history, rather than on an abstract metaphysical system. Regardless of Oakeshott's flaws,

what Oakeshott offers us is a chance to celebrate modernity without having to embrace its associated errors.

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The modern man derides play as mere trifle; he insists that the issues currently facing society are 'serious' and will require 'serious' action. Indeed, if pressed to define play, the 'serious' man would define the concept negatively: play is merely what is not serious. Play is the vapid folly that idles man's mind and prevents society from approaching the better world we all desire. Easy as it may be to consign play to the periphery of life as something to entertain us in between serious endeavors, play assumes a much larger role in our lives and in the paths of civilizations. The concept of play and the associated terms of laughter, folly, wit, and joke compose a positive quality neither merely the leftovers of seriousness nor reducible to other concepts such as pleasure. Indeed, when one considers the 'seriousness' with which so many of us play, the fact that play comprises a field far greater than the negation of seriousness becomes readily apparent. What, then, is play?

In *Homo Ludens*, Johan Huizinga identifies four postulates of the play concept operative in every culture. First, Huizinga notes that all play is voluntary. For, "play to order is no longer play: it could at best be but forcible imitation of it. By this quality of freedom alone, play marks itself off from the course of the natural process" (Huizinga, 1938/1955, p. 7). Play cannot be reduced to mere biological instinct, but is rather rooted in a choice to act in one way rather than another. Further, Huizinga notes that, "play is not "ordinary" or "real" life." (p. 8). In play, we move past the calculated goals of life, for in play, we are not calculating the utils we may gain. Clearly, in playing a game of Croquet, an individual is not solely seeking to lower his cholesterol; it is the enjoyment of the action in and of itself that provides the impetus for the game.

Next, Huizinga notes that play is "'played out' within certain limits of time and place. It contains its own course and meaning" (p. 9). Thus, certain basic activities in life are not play, such as cooking, cleaning, and office work. In fact, many, if not the majority, of our activities in life are not play, but are 'serious' goals we approach: getting a raise, deciding what color to paint the house, and other chores. Yet, even in something as essential as providing food, the play element shines through; within the confines of the kitchen and dining room, the game of producing a delicious and aesthetically pleasing dish engages one's skill, taste, and interest. In producing a more complicated pork tenderloin recipe or decorating a batch of cookies, the individual is not satisfying some need, but conforming to the meaning associated with the activity. Individuals, rather than seeing the magic of an activity as all encompassing, root the activity in a particular area- he will not experience the magic of cooking while in a sewage plant. Finally, Huizinga finds another, "very positive feature of play: it creates order, is order" (p. 10). When a child plays a game of 'soldiers' with his comrades, he does not need to be told what to do. Rather, through the process of playing, the children determine what various hand-signals mean and how one 'dies' in the game; for instance, if a pinecone lands at a child's feet he has been 'killed'. If one of the boys continues to refuse to 'die' in the game, later that night the child might pester their parents about how their friend cheated. While the parent might point out that the neglect of rules does not matter in the grand scheme of things, the child will hesitate to agree; the refusal to play along violates the sacred plane of play created by the children.

Here we recognize the different spheres of life that seriousness and play evoke. While the finery of culture may increase society's utility, culture does not develop with an explicit eye towards utility. The "Serious Man" focuses on the utility gained for society, whereas the "Playful Man" focuses on the experience of that activity. We can differentiate the human personas of play and seriousness: *Homo ludens*, man the player, and *Homo laborans*, man the worker. *Homo laborans* is the man of enterprise, working towards exploiting the world to fulfill his goals and satisfactions. The *Homo laborans*, in fact believes that the instrumentalization of all behavior to satisfy human wants is the only way " we *ought* to spend our lives" (Oakeshott, 1960/2004, p. 306). If such a belief were acted upon, the non-instrumental nature of play would be seen as a defect, a type of conduct to be rejected for failing to contribute to society's goal.

Yet what is lost by rejecting the conduct of *Homo ludens*? As Huizinga discovered in his research, play is a universal concept involved in almost every facet of culture, but intimately connected with the sacred ritual of societies from aboriginal tribesman and ancient Chinese to ancient Greeks and Renaissance Christians. Take for example Plato's words that "life must be lived as play, playing certain games, taking sacrifices, singing and dancing, and then a man will be able to propitiate the gods, and defend himself against his enemies, and win in the contest." For Plato, play not only pleases the gods, but furthers one's standing with the gods in order to win favors against one's enemies; therefore, play propels one into the holy and sublime. Play, which might be

derided as pointless, turns out to be the most significant human activity.

Huizinga's study is replete with other such examples that affirm the 'seriousness' of play for the vast multitude of societies. Indeed, Huizinga notes, following Plato, that in play "we in no way abandon the holy mystery, or cease to rate it as the highest attainable expression of that which escapes logical understanding" (Huizinga, 1938/1955, p. 27). The holy mystery is just that, a mystery, not be dissected, analyzed, and perfected, but to be lived, to be played. Just like a glorious sunset over a rugged mountain, the sublime mystery calls for us to experience the moment. No man could ever set out to learn how to paint the sunset just to make a profit. Only by grasping what the picture brings out in humans, thus engaging in the sublime, could he depict the beauty. Whether any individual artist at any particular time might be focused on his potential commission for his portrait, it is not dollar signs alone that have driven him on the path. Even an enigmatic figure such as Andy Warhol, the master of pop-art, had his own ironic, playful spirit imbuing his enterprise. The *Homo laborans*' focus on utility neglects the higher experiences in life afforded by play.

Oakeshott elaborates on nearly the same point in *The Voice of Poetry in the Conversation of Mankind*. In the essay, Oakeshott describes the meeting of various modes of inquiry—be they poetry and practice or history and science—in order to learn from each rather than having one subsume the others. Thus, practical demands should not turn poetry into propaganda, nor should science impose its methods upon history. Instead, the distinct voices should help ascertain the totality of experience. Yet, can we imagine a physicist, who takes his work so seriously, to accept a subordinate existence for science? As Oakeshott notes, "in participation in the conversation each voice learns to be playful, learns to understand itself conversationally and to recognize itself as a voice among voices. As with children, who are great conversationalists, the playfulness is serious and the seriousness in the end is only play" (Oakeshott, 1960/1991, p. 490). The physicist is not seeking his solution to better the world, but rather for the value of the knowledge itself. If one considers the discipline of physics as a method of inquiry that is directed towards truth rather than any societal goal, and one that is governed by rules developed over time by the participants, we can easily see the play element within science. Outsiders cannot foist practical needs upon science, without destroying science. If a racist scientist sought to 'prove' his claim that non-Asians are mentally inferior to Asians, we would be skeptical as to whether he had been truly critical of his methods in obtaining his desired result or if he had predetermined his goal before engaging in research. The pursuit of truth cannot bear the load of political and personal prejudices.[1]

Furnished with sufficient conceptions of *Homo ludens* and *Homo laborans*, we can now see the political implications of the two personas when applied to government. We shall start with *Homo laborans* because, unlike *Homo ludens*, seriousness spans the traditional left-right political spectrum. In particular, consider how the persona links modern day liberals and Puritans in the 'Doctrine of Need.' In such a doctrine, the elite elevate the needs of the society, which the particular movement happens to define, to the exclusion of the other 'wants' of society. As Kenneth Minogue noted, "just as the conception of necessities was, for the Puritans, a moral battering-ram against the aristocratic style of life, so the attraction of 'needs' is that they appear to exclude anything frivolous, eccentric, subjective or capricious" (Minogue, 1963/1999, p. 97). Visualize the churches that Puritans built. Stripped down of the 'smells and bells" of a Catholic or Anglican church, the Puritan churches exemplify the *Homo laborans*' single-minded focus on achieving a goal without distractions. Similarly, in our age where opinion-makers expect universities to be relevant, how can a university justify teaching Latin when there are bridges to be built and starving persons to be fed? This instrumental mentality comports with the ideal type Oakeshott referred to as an 'enterprise association.' Oakeshott defines an enterprise association as a "relationship in terms of the pursuit of some common purpose, some substantive condition of things to be jointly procured, or some common interest to be continuously satisfied" (Oakeshott, 1975/2003, p. 114). Further, the leaders of the enterprise association must manage the subordinates to meet the end, quashing the eccentricities of the individual that may interfere with the realization of the substantive goal.

In contrast to the enterprise association, Oakeshott also presents the civil association. In this ideal type, the conduct of free individuals is restricted by the rules of society, but their substantive goals are not dictated by the government. Civil association has never been realized in its abstract perfection, but came closest to being realized in the West, particularly in the 19th century manifestations of the United States and Great Britain. The best non-political example of civil association may be a liberal arts education, as we shall address later. The *cives,* as Oakeshott terms the inhabitants of a civil association, behave as we would expect a *Homo ludens* to behave; they are rule abiding and playful. I will argue that

by understanding the *cives* as *Homines ludentes*, we can further explore the postulates of civil association. Just as importantly, the concept of *Homo ludens* clarifies Oakeshott's conception of authority in a civil association and makes coherent the formalism of Oakeshott's later work with the traditionalist prescriptions in his earlier work.

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In Oakeshott's civil association, the *cives*' public concerns form the *respublica*—namely the political arena where the *cives* organize to voice their considerations for improving or maintaining their laws. However, the *cives* must restrain what issues they bring into the political arena in order to prevent the civil association from becoming an enterprise association. For, as we have discussed, the civil association eschews a common purpose for an arrangement solely qualifying how persons may legally act. Substantive wants, such as promoting church attendance, cultivating an acceptance of transsexuals, or feeding the poor may be laudatory, but none of them may be brought as goals into the *respublica* without destroying the *respublica*. The *respublica* is a limited engagement that allows persons to seek substantive wants in their private capacities. We see two of the principles of play inherent in the *respublica*- the engagement is confined to a particular area (of life) and individuals engage each other voluntarily. Further, within the *respublica*, the *cives* develop their own procedures for crafting the rules for the civil association. In many Western nations, the rules for passing legislation have been largely codified, but the practice existed long before written recognition. Even today, the way a particular political party in the US begins to consider proposing a law—who should introduce the legislation to the whole house, and the like—are practices that were developed by individual actions in the past and continue to develop with each new political event. Thus, within the confines of the *respublica*, we see another feature of play, that action creates order.

The spirit of *Homo ludens* that characterizes the *cives* mentality is essential to the creation what Oakeshott refers to as the civil condition. Oakeshott argues that the relationship of cives in the *respublica* is not merely transactional. The *cives*' "civil condition is not only [a] relationship in respect of a system of rules; it is [a] relationship in terms of the recognitions of rules as rules" (Oakeshott, 1975/2003, p. 148). Oakeshott does accept that the rules "may be recognized in terms of approval or disapproval of the conditions they prescribe," but maintains that disapproval does not deny the rules their status. To return to the scenario created earlier, the boy who refused to 'die' in the game, no matter how many pinecones have landed at his feet, may have rejected the particular rule that lead to his 'death,' but by refusing to accept the rule he has rejected the game as well.

Similarly, wholesale rejection of the laws in a civil association constitutes the dissolution of the association. Thus, if a *Homo laborans*, acting as a Native American activist, were to reject the existing property rights possessed by private individuals and physically prevent a natural gas company from hydraulic fracturing on their property to get at the natural gas stored under their land, the activist would not merely be rejecting laws but the civil condition itself. One person, a vocal minority, or a majority of persons may disagree with how 'the bundle of sticks' that compose the company's property rights are defined and may believe that fracking risks essential resources for society, but these persons cannot simply nullify those rights by aggressive action. Only within the *respublica*, the designated area of politics, may the *cives* change the adverbial conditions[2] or obligations of society. Action otherwise destroys the game. Further, there is not "any place in civil association for the charismatic authority of a leader: apart from charisma being 'wisdom' and therefore not authority, civil rulers are not leaders, their subjects are not followers, and *respublica* is not authoritative on account of being a schedule of inspired 'managerial' decisions" (Oakeshott, 1975/2003, p. 153). Neither to inspire nor lead, politicians exist to play the game of politics. What, then, is politics?

As Oakeshott sees it, politics centers on a debate concerning whether all "*cives* should have a civil obligation which they do not already have or should be relieved (or partly relieved) of a current civil obligation" (Oakeshott, 1975/2003, p. 163). One might push back against this definition and argue that a free society or a just society is devoid of real obligations. Perhaps politicians can organize society to conform to the General Will; in this instance, the obligations required of a citizen are the obligations that the citizen should want. In this case, can we really call what a man should want to do freely an obligation? According to Oakeshott, the answer is yes. Perhaps a student should want to do his studies and doing so may enable him to avoid subservience to others, but that does not change the fact that the student is being forced to do something that he might not otherwise do. Whereas in a civil association the rules merely qualify how a person can act, in an enterprise association, the rules are commands towards a substantive goal. In the enterprise association, play is constricted and freedom is re-

jected in so far as they do not contribute to the state goal. Thus, admirable as the hope for a new Soviet man and Soviet woman might have been, the 'goodness' of the goal did not negate the complete lack of freedom and the sizable obligation placed on the people.

As Oakeshott notes, "a civil prescription which made adultery a criminal offense is not shown to be desirable if and because this conduct is acknowledged to be morally wrong; and if parents are recognized to have a moral duty to educate their children it does not follow that a *respublica* in which this duty is not made a civil obligation is thereby defective" (Oakeshott, 1975/2003, p. 175). Simply because the new obligation would further an admirable goal does not provide the rationale for the *cives* mandating the conduct. Nearly all of us would agree that abusing children is wrong, but if a state refuses make it criminal to fail to report any knowledge of abuse to the police, it is no less of a state. If the morality of the action does not constitute a basis for the law, then what does? The answer to this question lies in the conduct of the *Homo ludens* and the peculiar nature of the civil association.

As Noël O'Sullivan observes, Oakeshott insists that "the aim of decision (in politics) must be the creation and maintenance of civil association and that civil association ends once rule-following ceases to be its constitutive feature" (O'Sullivan, 2012, p. 306). In the game of basketball, determining how many steps one can take without committing a turnover is aimed at furthering the game; however, creating a rule that players may not score more than twice to make sure the other players do not feel bad violates the game. While both are rules, one deals with how to better facilitate the game, whereas the 'feelings' rule makes basketball an instrument for a particular end. After a game of basketball in which one team wiped the floor with the other, it would be a malapropism to decry the inequity and injustice of the situation. The point of competition is to compete. A team that loses because of their incompetence or relative lack of skill has not been denied justice. Undergirding the civil association is the *Homo ludens* rejection of any attempt to destroy the political arena: for to allow the destruction of the political arena is to allow the destruction of the play element.[3]

How should the *Homo ludens* determine the policies that enhance the civil condition? Steven Gerenscer makes an admirable attempt to fuse the traditionalist Oakeshott of "Rationalism in Politics" with the formulistic Oakeshott of "On Human Conduct," placing tradition as something useful to consider in deliberations (Gerenscer, 2012). However, I find this portrayal of Oakeshott too negative; Oakeshott believed that the civil condition, which is highly connected to the particular traditions of a society, was a moral association itself, not merely a pleasant arrangement. The lack of a substantive 'moral' goal does not preclude the possibility of a distinct moral imagination; indeed the imposition of a goal may be itself an immoral act, given the negative consequnces. As Oakeshott recognized in his earlier treatments of law, "a philosophical concept must always be an affirmative or positive concept, never merely a negative concept. Negativity is merely a sign of an imperfect definition. And where the given concept is negative, one part at least of the business of a philosophical enquiry is to transform this negative into a positive" (Oakeshott, 2007, p. 174). Thus the division between civil association and enterprise association is not a divide between a negatively defined association and a positively defined association, but between two distinct moral visions. Indeed, to move past the formulistic concerns specific to *On Human Conduct*, we can adopt Kenneth Minogue's distinction between free societies versus justice societies, or 'one-right-order' societies (Minogue, 2010). As Minogue argued, democracy is eroding the moral life of free societies by removing choice and responsibilities. Minogue objected to this process because each removal of choice and responsibility was a blow to individualism; as persons have progressively fewer responsibilities they have less reason to behave in the responsible manner necessary to personally survive and maintain our individualist system. While most civilizations in the history of the world have accepted that there is one right order for the world, be it Sharia law, the rule of the proletariat, or the Mandate of Heaven, the West is unique in its dedication to liberty. This is not to say that the West has experienced a pure and abstract liberty, whatever that might mean, but that often individuals were not commanded to act solely according to their station.

Here we begin to see the contours of the positive nature of Michael Oakeshott's civil condition. Instead of seeking to make people or society 'just', or aiming to increase utility by implementing a capitalist regime, civil association is a moral association for liberty. Thus, the maintenance of liberty provides the standard for the politicians of the *respublica*. But what is liberty? Here, I think we will benefit from utilizing another distinction of Minogue's: liberty versus liberation. As Minogue notes, "The point about freedom as it had traditionally been understood was that it incorporated moral limitations with it; liberty was distinguished from license, and those who enjoyed it accepted the conventions and limitations of their duties in respect of family" (Minogue, 2010, pp. 214-215). In contrast, liberation is conceived of as an ab-

solute freedom, one which requires society (a word neatly inserted in the stead of government) to eradicate prejudice. Often, this 'prejudice' is the result of various voluntary organizations in society, such as churches and men's clubs, which are emblematic of the 'heteronormative, racialist, xenophobic, transphobic patriarchy' allegedly controlling society. As Minogue notes, "to destroy this nexus of trust, to treat authority as if it were no different from oppression, is to diminish one of the major resources of Western life, leaving us unprotected against a more brutish world in which the state claims to save us from the oppressions of social authority" (Minogue, 2010, p. 297). In seeking a more perfect 'liberty' or more precisely a liberation from the oppressive world, activists and revolutionaries erode liberty by ignoring the particular historical circumstances that lead to the growth and development of liberty; and as a result, historically, the pursuit of liberation has brought about an even worse tyranny, as the French and Russian Revolutions demonstrate.

Oakeshott's defense of cultural practices in his earlier work is inseparable from the freedom presented by Oakeshott in "On Human Conduct" when understood within the context of history. Indeed, we might go so far to say, as Leslie Marsh suggests, that those practices, habits, and customs known as tradition actually compose the mind of each individual and make voluntary action both possible and necessary (Marsh, 2012). How then did these traditions develop within Western Civilization? I think we can readily conclude, as Huizinga did, that "civilization is, in its earliest phases, played. It does not come *from* play like a babe detaching itself from the womb: it arises *in* and *as* play, and never leaves it" (Huizinga, 2012, p. 173). We might note here, that, contrary to popular caricature, traditions are not frozen in time. Rather, human interactions often confront new situations that force agents to modify their behavior slightly, such that no tradition is ever wholly old or new. Specifically, the *Homo ludens* engages life by playing according to the traditional rules but responding in ways that are not proscribed by the rules and gradually adjusting the rules themselves. In a superficial example, consider the engagement of meeting new people. Gradually, one gathers a sense of how to behave and develops particular ways of interacting that produce more convivial and specific relationship; persons surrounded by their friends are likely to have particular customs that elicit laughter. Indeed, when you interact with someone who clearly has no interest in interacting with you—but for the benefit they can extract from the engagement—the conversation quickly becomes uncomfortable. Those persons most successful at 'using' others must accept the 'game' of human interaction and develop the practices in the process. No person sat down and designed the market, marriage, or churches that compose so much of the traditional way of life. Indeed, what makes these activities so engaging, indeed sublime, is the character imparted to them by the play element. If one simply defends marriage for the benefits it brings society and demands that we accept specific criteria, the play element and the sacredness have been expelled from the activity.

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Oakeshott's defense of a non-instrumental or playful approach to life is mirrored by his contempt for the instrumental or rationalist outlook on life. The *Homo laborans* mentality has led to the insistence that by focusing our mental efforts on the task of utilizing the earth we shall realize an elevated state of existence, a New Atlantis. Yet, in the war against human wants charges of treason began—idleness and inefficiency, play and dreaming were a foolish sin, stopping man from entering the gate of a new Eden. We thus come to Oakeshott's allegorical story about the Tower of Babel; the story typifies the mindset of *Homo laborans* and the resulting impact on society. Representing the supreme *Homo laborans* is Nimrod, the leader of the Babelians. Nimrod, as imagined by Oakeshott, "was admired for his audacity and he acquired a considerable following of flatterers and hanger-ons who, dazzled by his blasphemies, surrendered to his leadership" (Oakeshott, 1983, p. 184). Oakeshott sets up the *Homo summus laborans* as an individual who shows irreverence for the mores of his time, supposedly demonstrating his independent mind. Yet, Nimrod, fearing the threat God posed to him, "determined to deal radically with an insecurity that had become his obsession. It was no good trying to outwit or to intimidate God…he must be destroyed" (*ibid*). For the *Homo laborans* is "a creature of wants; of desires that cannot have more than a temporary satisfaction," always leading to new wants (Oakeshott, 1960/2004). Nimrod, being the embodiment of *Homo laborans,* realizes that the only way to end frustration is to destroy frustration; by realizing utopia Nimrod will destroy the uneasiness of life. Nimrod rallies the people to the cause of the Tower of Babel in order to wage war against God and end his anxieties associated with scarcity. To mobilize the people, Nimrod must draw up the moral ideal that will 'light a fire in the minds' of the Babelians: the manifest superiority of the ideal distinguishes it from the consolation of everyday life. Indeed, Nimrod, as the "leader of a cosmic revolution," leads an enterprise that

not only fails, "but entails the destruction of all the virtues and consolations of the vita *temporalis*" (Oakeshott, 1983, p. 189). Ultimately in Oakeshott's tale, the Babelians become obsessed with the project and, fear being cheated out of the 'right' to enter Eden, rush into the tower to make sure Nimrod has not entered Eden alone. As a result, the mass influx of people crashes the tower, killing everyone inside. The moral ideal 'learned' by every Babelian was ultimately their downfall; the Babelian obsession with the perfect ushers in a crushing nihilism, the 'death' of all members of the enterprise.

How did the Babelians learn the moralistic ideal? More importantly, how does the *Homo ludens* learn the rules guiding his non-instrumental mentality? In order to answer these questions we must briefly engage Oakeshott's philosophy of education. As Oakeshott noted, education "is learning to follow, to understand and to rethink deliberate expressions of rational consciousness; it is learning to recognize fine shades of meaning without overbalancing into the lunacy of decoding" (Oakeshott, 2001, p. 69). Further, while learning, one "is learning in acts of constantly surprised attention to submit to, to understand and to respond to what (in this response) becomes a part of our understanding of ourselves" (Oakeshott, 2001, p. 70). Thus, Oakeshott distinguishes between learning and conditioning. Real learning requires the learner to think through the facts and understand the rules and conduct from the subject's mind. Suppose we were trying to understand the sermons of an antebellum Southern preacher, say James Henly Thornwell. In order to understand such a mind, we must engage the world as Thornwell saw it. We cannot simply see that he defended slavery and cast our condemnations at him. Ignoring the fact that cursing a dead man seems to be an exercise in futility, nothing can gleaned from this attempt to 'learn'. Indeed, only a cynical man could call this learning. Rather, understanding Thornwell's ideas and actions as he did provides us a window into another world. Yet, to fully empathize with the character, the student has to recognize that his own assumptions diverge from his subject's. The student not only gains the ability to write about Thornwell, but will now be aware of his own assumptions, changing how he views the world. In this sense, learning is a fundamentally transformative experience. Most importantly, as Oakeshott recognized, "one may learn to read only by reading with care, and only from writings which stand well off from our immediate concerns" (*ibid*). If the student could not look beyond how terrible his peers consider slavery or how en vogue persons find radical individualism, the process of learning can never take place. The words of Thornwell's sermons will be nothing more than stillborn ideas in a sea of current pretensions.

Oakeshott responds to those who would make education more relevant with knives bared. In "The Universities," Oakeshott takes particular aim at the effort to make education serve 'scientific humanism' to save civilization. Scientific humanism, or the goal of alleviating the needs of society through technical progress, is precisely what Oakeshott railed against the Tower of Babel story. Oakeshott's critique of scientific humanism—or the *Homo laborans* mentality—represents a specific example of his dissent from the project of consciously trying to 'save' our civilization. With regards to the moralistic endeavor of 'redeeming' society, Oakeshott notes "this (the saving) is all well if you are trying to save a man's soul or convert a drunkard, but in this sense civilizations cannot be 'saved,' they cannot take the pledge and from that moment never touch another drop" (Oakeshott, 2001, p. 123). As we saw earlier, when one want is satisfied another will spring up, but more generally, life has no neat and clean solutions.

In criticizing Oakeshott, Paul Franco notes, "but, as in so many other aspects of his philosophy, Oakeshott's determined effort to avoid utilitarianism and instrumentalism leads him to hive education off from any sort of moral or practical or societal effect" (Franco, 2012, p. 192). Franco insists that "the university can be—indeed, must be—more than that: not merely an interval but a transforming power" (*ibid*). This pleasant Babelian sentiment, imbued with the best of intentions, misses Oakeshott's message. Franco says education must be transformative, but transformative to what? Shall we 'teach' students the American creed such that the next generation ceremoniously snaps off salutes to the flag and worships the myth of the Founders, creating little foot soldiers for liberty? Or should we impart the proper level of 'tolerance' for the cause célèbre to the proper strictures of the Radical Chic? Oakeshott would certainly agree that education is relevant. Indeed, as Oakeshott sees it, "as civilized human beings [those who have been educated], we are the inheritors neither of an inquiry about ourselves and the world, nor of an accumulating body of information, but of a conversation, begun in the primeval forests and extended and made more articulate in the course of centuries" (Oakeshott, 1960/1991, p. 490). Education is nothing less than grappling with our entire civilization's identity and thought, but men only acquire and develop our education and culture. There will be no 'transvaluation of values' brought about through a new education schema designed to revitalize society from its state as a mausoleum culture. It is

only by abandoning the narrow needs of today that we can tend to the fields of tomorrow. But unlike the farmer, who knows what crops he will produce and knows how to allocate his field, man is not to be allocated. Man is to play.

Today, the belief in 'saving civilization' or 'saving society' has taken hold, with activists crafting governments in the West ever towards the enterprise association ideal. Who are these people who would wish to be allocated by the elites? In "The Masses in Representative Democracy," Oakeshott sets out to analyze the historical embodiment of the *Homo laborans*, the mass man. Oakeshott believes that the mass man cannot be understood by himself, but only in relation to the individual. From the twelfth century onwards, "the enjoyment of the new opportunities of escape from communal ties gradually generated a new idiom of human character"—individualism (Oakeshott, 1960/1991, p. 365). The individualist embraced his release from the communal ties of the past and enjoyed his newfound ability to pursue his preferences. Unfortunately, not everyone was suited for the new environment of freedom. Oakeshott notes with regards to the mass men that, "we need not speculate upon what combination of debility, ignorance, timidity, poverty or mischance operated in particular cases to provoke this character; it is enough to observe his appearance and his efforts to accommodate himself to his hostile environment" (Oakeshott, 1960/1991, p. 371). Long before the age of democracy, Oakeshott notes that the mass men, or the individual manqués, began to resent and rebel against their freedom. The individual manqués at first persuaded themselves that their poverty resulted from their lack of rights. Surely, if they obtained the same rights as the nobles and bourgeois the individual manqués would attain the same results. According to Oakeshott, we thus see the anti-individual disposition in the sixteenth century clamoring for rights, long before the growth of workers' movements in the nineteenth century. Consider the English Diggers and their much less radical cousins the Levellers during the English Civil War. These groups pushed for universal suffrage and either sought the abolition of property rights or demanded that the 'natural right' to property that each man possessed be respected. In either case, we see demands by the individual manqués to be given rights so that they can become equals with the nobles. Notice however, that the 'rights' demanded are not the right to dispose of one's property freely, but rather that these individuals be given property. As with all demands for positive 'rights' what is really demanded is an entitlement based on the infringement of others negative rights. The individual manqués demands are not for rights and freedom, but for a state imposed telos. It is no coincidence that the Puritans who we discussed earlier in this paper also sought at first to live in a society with communal property. Only starvation and death could dissuade the Puritan ideologues of their grand design, resulting in the institution of property rights and the survival of the Puritans.

For Oakeshott, the mass men represent the seeds of a new barbarism that opposes the individualist idiom and will seek to undermine it. How did these mass men obtain power in an age before democracy? The mass men "composed the natural-born recruits for the army of retainers which was to take the place of 'subjects' in states managed by lordly monarchs and their agent. Indeed, from one not insignificant point of view, enlightened government may be recognized as a new response to what had been called 'the problem of the poor'. Utilizing the morality of communal ties, the mass man sought to impose himself on society. As Oakeshott explains the historical situation, the growth of the mass men led to destruction of civil association and the imposition of the enterprise association model on society. The base materialism and destruction of the civil condition is the dire situation of our age. Everywhere new towers are being built up and collapsing upon themselves. Yet, is it the yearning for communal ties that solely brought about this situation?

IV

In the history of liberalism, individualism, and liberty, the current generation ballyhoos one character above many others: John Stuart Mill. How might Oakeshott have dealt with Mill? More importantly, if Mill and his epigones like H. L. A. Hart have had a significant impact on society and the mass men, then perhaps Oakeshott's interpretation of Modernity needs additions to properly diagnose the sickness of the West.

If ever there was a *Homo laborans* philosopher *par excellence*, J. S. Mill would be the clear choice. As a short biography notes with regards to Mill, "the boy's precocity, combined with his father's extremely high standards, unusual breadth of knowledge, and resources, resulted in Mill having an amazing range of Greek classics by the time he was eight years old" (Mill, 1859/2002, p. iii). Like the helicopter parents of today, Mill had his nose thrust firmly to the grindstone. Without going too far into a psychological analysis of Mill, we may simply note that from Mill's birth until his death, play was not a topic very often countenanced. From his rigorous studies as a child, to his 'mathematical' approach to society and free expression, one can only glean a delib-

erate seriousness about Mill's life. I am not trying to smear Mill, only to place his enterprise association ideas within the context of a very serious or *Homo laborans* background.[4]

Within Mill's arid utilitarianism, custom is viewed as naught more than prejudice. As Mill contends, the customary rules of society "appear self-evident and self-justifying. This is all but universal illusion is one of the magical influences of custom, which is not only, as the proverbs say a second nature, but is continually mistaken for the first" (Mill, 1859/2002, pp. 4-5). Oakeshott confronted such an idea in "Rationalism in Politics" and neatly disposed of the idea as a false pretense of knowledge (Oakeshott, 1960/1991). As we noted earlier, liberty, as opposed to liberation, assumes a cultural framework that provides a nexus of trust necessary for voluntary interaction. Mill, on the other hand, fails to take into account the limited abilities of the human mind. Rather than being a rational calculating instrument, the human mind cannot calculate how to maximize its utility or foresee all the consequences of its actions. As the 20th century demonstrates, the attempt to fully plan an economy fails for a number of reasons, including the failure of central planners to acquire local knowledge (Hayek, 1945). Humans are not purely rational, but, utilizing a market, respond to incentives, thereby producing an efficient allocation of resources. In this way, the market operates like a super computer, showing that customary, non-conscious designed patterns of behavior can be far superior to rationalistically determined behavior. Similarly, customs produced by human action, but without human design, harness the specific knowledge of humans gained through experience. Unlike Mill's contention that "to an ordinary man…his own preference…is not only a perfectly satisfactory reason, but the only one he generally has for any of his notions of morality," man's reliance on custom does not rely on preferences (Mill, 1859/2002, p. 5). Instead, as argued earlier, the acceptance of customs is part of a non-instrumental mentality towards society. Thankfully, the 'playing' out of specific practices and the gradual adjustment of rules leads to an adaptive process that allows for both change and a reasonable forecast of the associated consequences.

Yet, when Oakeshott deals with individual actions in "On Human Conduct," he presents a complicated process. Oakeshott postulates that human conduct is composed of two things: self-enactment and self-disclosure. Oakeshott defines self-disclosure as "choosing satisfactions to pursue and pursuing them; its compunction is, in choosing and acting, to acknowledge and subscribe to the conditions intimated or declared in a practice of moral intercourse" (Oakeshott, 1975/2003, p. 76). By contrast, self-enactment is "choosing sentiments in which to act; and its compunctions are conditions of 'virtuous' self-enactment intimated in the language of moral conduct" (*ibid*). What exactly do these terms mean? Self-disclosure deals with how others perceive our actions, whereas self-enactment deals with how we conceive of our own actions. Thus, if I were to help a child escape an abusive environment, I would be disclosing my intention to fix this situation. If I were to fail to act, persons would view me as guilty of violating our 'practices of moral intercourse'. If I only rescued the child to win the favor of women, I would not be guilty, but my intentions would be viewed as shameful. Yet Oakeshott posits that moral conduct is neither focused upon solving problems nor confined to one standard. Rather, in moral conduct, 'there is room for the individual idiom, it affords opportunity for inventiveness, it may be spoken pedantically or loosely, slavishly or masterfully" (Oakeshott, 1975/2003, p. 65). By restricting his explanation of human conduct solely to choice, has Oakeshott opened up an entirely different problem? As Noël O'Sullivan notes, despite the benefits of defining the self as Oakeshott does "it [the definition] is open to the charge of identifying selfhood with a narrowly existentialist emphasis on choosing as the primary expression of human identity" (O'Sullivan, 2012, p. 306). What role do customs play in human identity? Can men ever truly escape identifying with a tribe or community?

The apparent issues in Oakeshott's description of human conduct can be broken down into two parts: the issues that can be resolved in understanding Oakeshott's goal in "On Human Conduct" and issues that seem to come from errors within the body of his work. With respect to the first set of issues, we must recognize that *On Human Conduct* is vastly different from the other magnum opuses of the age, such as *A Theory of Justice* or *The Constitution of Liberty*. Oakeshott, following in the tradition of Hobbes, deals with the static and abstract postulates of a free society, rather than presenting a guide for his followers. Oakeshott's recognition in his third essay in *On Human Conduct* that the modern political situation of the West is characterized by ebbs and flows between enterprise association and civil association. Whereas the third essay and the corpus of Oakeshott's early political writings analyze the dynamic elements of society, the first two essays of *On Human Conduct* focus on the postulates of human conduct and the postulates of civil association. Further, Oakeshott explicitly recognized in *On Human Conduct* that self-disclosure occurs within "conditions articulate in relationships, customs, rules, duties, etc.," that com-

pose "considerations currently believed to be appropriate in the intercourse of 'free' individuals" (Oakeshott, 1975/2003, p. 76). And yet, while the play element may help us understand Oakeshott's work as a coherent whole, issues remain within the Oakeshottian framework that cannot be resolved by further reference to Oakeshott's work. Instead, by engaging the postulates of play we discussed earlier, we can critique and make coherent the sublime civil condition.

V

Within Oakeshott's philosophy, I would argue we find three major issues: (a) Oakeshott appears to attack the notion of a community in various works including "The Tower of Babel" and "The Masses in Representative Democracy," but leaves us to wonder where else individuals learn the habits and customs essential to society; (b) Oakeshott's infamous swipe at Edmund Burke, while celebrating arch-rationalist Thomas Hobbes, seems to undermine Oakeshott's critique of rationalism; (c) Oakeshott suggests in the essay "On Being Conservative" that conservatism can be separated from the concept of natural law, but introduces the equally mystical concept of intimations. We can address all three issues through a brief examination of Edmund Burke's conception of natural law and the concepts relationship to play. In particular, I will be relying heavily on Peter J. Stanlis' *Edmund Burke and the Natural Law*, a book recognized by no less than Russell Kirk as the finest book ever written on Burke (Stanlis, 1958/2003).

Unfortunately, to begin our discussion of Edmund Burke and the natural law, we must vanquish a common misunderstanding. Derived from Leo Strauss's interpretation of Burke in *Natural Right and History*, certain scholars have characterized Burke as a proto-historicist (Strauss, 1965). If we give but a cursory look at Burke's speeches on India or Ireland, we soon realize that the historicist Burke never existed. If Burke merely accepted what history provided, then why did he reject the oppression of religious minorities and the Irish by the English crown? Yes, Burke certainly respected local customs and found them to be an essential part of a society, but this recognition does not preclude Burke from accepting a natural law theory. Yet, in order to understand how Burke reconciled the individual, the community, customs, and the natural law, we must understand the larger Christian tradition within which Burke operated.

While contemporary liberals will almost certainly claim that secularization caused the rise of Western individualism, the real history of individualism must be traced further back. Oakeshott, as we noted earlier, pointed to the rise of individuals in the 12th century; however, we can go back further to understand the ideas essential to the realization of individualism in society. The answer is almost certainly yes and we can trace western individualism back to its Christian roots. At first glance, the idea that Christianity and individualism are not only linked, but the advent of western individualism is in great part a product of Christianity may seem absurd. When we denizens of modernity consider Christianity and Christian doctrine's condemnation of egoism, we cannot help but believe that Christianity is not the basis of individualism, but that Christianity is opposed to individualism. Certain historical developments and not necessity determine our association of individualism and egoism. An individual may choose his actions in a variety of ways, including according to his own preferences or according to his Christian beliefs. Christian doctrines on the relationship of the individual to the state and the individual to the community compose an essential paradigm to understand Western individualism. Further, by understanding these two positions we can better understand where Oakeshott's interpretation of modernity goes awry.

The Christian notion of community, or rather the Christian distinction between the individual and the community provides a persuasive response to Oakeshott's condemnation of community. Jesus said in the Gospel of Luke:

> If any man come to me, and hate not his father, and mother, and wife, and children, and brethren, and sisters, yea, and his own life also, he cannot be my disciple. And whosoever doth not bear his cross, and come after me, cannot be my disciple. For which of you, intending to build a tower, sitteth not down first, and counteth the cost, whether he have sufficient to finish it? Lest haply, after he hath laid the foundation, and is not able to finish it, all that behold it begin to mock him, saying, this man began to build, and was not able to finish. Or what king, going to make war against another king, sitteth not down first, and consulteth whether he be able with ten thousand to meet him that cometh against him with twenty thousand? Or else, while the other is yet a great way off, he sendeth an ambassage, and desireth conditions of peace. So likewise, whosoever he be of you that forsaketh not all that he hath, he cannot be my disciple (New Testament, 14:26-33).

Here, Jesus attacks the hierarchal and rigid social system extant in the Jewish community during his time. Rather than understanding one's self as a part of the communal whole, a Christian must bear his own cross; a Christian must act as an individual. Yet, we often hear Christians use such terms as a 'community of believers' or 'disciples of Christ', terms which seem to conflict with our notion of individuality. Instead of conflicting with individuality, the community of believers represents a voluntary community, not associated for egoistic reasons, but for a non-instrumental good. In contrast, Mosaic Law, which is both the political and moral law of Judaism, purports to establish a just society, falling into the category of an enterprise society.

Christianity posits a more complicated relationship between the political realm and the moral realm. As Jesus said, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" (New Testament, Matthew 20:21-22). Political law is not subsumed under the moral law in Christianity. As the Christian doctrine developed, the distinction between the perfection of Jesus and the frailty of the mortal human condition was further emphasized. St. Augustine, considered one of Christianity's most important early defenders, argued that the City of Man could never approximate the glory of the *City of God* (St. Augustine, 1998). A fundamental skepticism about immanent utopia characterizes the early orthodox Christian thought. Indeed, as St. Thomas Aquinas noted "the general principles of the natural law cannot be applied to all men in the same way on account of the variety of human affairs: and hence arises the diversity of positive laws among various people" (St. Thomas, 1917, Question 95, Second Article, Reply to Objection 3). Unlike Judaism or Islam, where the holy scriptures have promulgated the just laws of society, Christianity and Christian thought recognizes a multiplicity of possible arrangements dependent on circumstances. Indeed, as I will discuss, the Christian (particularly Catholic) notion of community and society necessarily utilizes custom. The Christian notion of community recognizes free action, a non-instrumental, sublime good, and particular customs, elements that we have already associated with the play element. For this reason, I would argue that the term community obfuscates discussions rather than serving as a useful analytical tool. Instead, we should distinguish between the two notions of community: I would suggest we regard the Christian community as an "Individualist Community" and we regard anti-individualistic communities, such as traditional Jewish and Islamic communities, as "Collectivist Communities".

We can now address Oakeshott's conception of community. Whereas Oakeshott portrayed community as the fulfillment of the enterprise association in his Tower of Babel story, we can reasonably argue that an individualist community fits with Oakeshott's civil association. Yet, we can go further and argue that the individualist community and the Christian, and by extension Burkean, notion of natural law is an essential part of the civil condition. First, if we look at modern Western history, we can easily see that the individualist community has acted as a powerful break on the gradual conversion of the state into an enterprise association. In America, characterized by the individualistic communities that Tocqueville extensively described in "Democracy in America", the ideal of the civil association has fared far better than in European states. Yet, perhaps the prevalence of individualistic communities and the realization of a civil association are merely correlated or perhaps I have reversed the causality. Thus, the historical argument is both the easier argument to make and the more superficial argument. In contrast, we can address the postulates of play and the postulates of civil association, focusing on the potential corruptions of the *cives* from a collection of *Homo ludens* to a collection of *Homo laborans*.

While Oakeshott's point about the individual manqués explains a certain portion of the destruction of civil associations in the West, the corruption of a Burkean conception of natural law inherent in the Western tradition helps explain the damage our civil associations have incurred in recent history. In the place of the non-instrumental natural law, came a program of progress, an attempt to recreate society. However, we have already told this story in the context of seriousness and play. In large part, the play spirit animates the traditional natural law. Consider a few elements of play we have already discerned; play generates order; the order play creates gradually changes through further play; play is non-instrumental; play is sublime. All four qualities listed play prominently in Burke's conception of the natural law.

As we have previously stated, Burke subscribes to a Christian worldview, an individualistic worldview. Indeed, for anyone familiar with Burke's writing outside of the *Reflections of the Revolution in France*, Burke vociferously defended various freedoms for American colonists, religious minorities, the Irish, and the Indians. Yet, Burke's defense never deals with abstract rights, but with the particulars of the situation. How did Burke reconcile his regard for the particulars with his respect for the sublime? According to Burke, man is a political animal; or to reformulate it, man by his nature seeks to be part of a game or an enterprise. In

the case of the game, man experiences the sublime through playing the game by the rules. Similarly, Burke believed that the realization of the sublime comes through the rootedness of humans in a particular set of circumstances; the particular set of rules the human being "plays" enables him to experience the sublime. In situations such as the French Revolution or post World War I, where the 'rules' have been destroyed, man has been denied the option of a 'game'. As a result, man seeks to be part of an enterprise. Thus, we might controversially note that there is more political wisdom in the words of Georg Sorel than John Stuart Mill; when people are stripped of their traditions, they will not pursue an abstract liberty according to pure reason, but seek a myth to dissolves themselves into a collective. In the absence of distinct traditions, the mass men, the utopian dreamers, and other lost souls will unite to achieve one glorious goal. Unfortunately, like the Tower of Babel, the glorious goal will collapse as well. The persons, who sought to elevate themselves towards the goal, to wear a different mask, will meet nothing but failure; the collapse of the goal and resulting chaos will mean nothing.

The resulting nihilism is not inevitable. Rather, as we saw earlier, the play element provides an alternative to the nihilism. And yet, play occurs within a limited arena. Outside of the political realm, the free man must play within a particular arena. The most obvious arena we may present is the individualist community. While man may play alone[5], play generally creates order and custom best through the interaction of many individuals. Within the context of an individualist community, we find the greatest potential for the sublime to take hold and regenerate a genuine culture. In contrast, moves toward pure individualism, whether based on an abstract notion of liberty or through welfare payments that allow the individual to avoid depending on his neighbors, make the move from *Homo ludens* to *Homo laborans* inevitable. The reason for the change is simple; by destroying the constitutive rules of the game, you are destroying the game itself; you are ending the civil condition.

How should we understand the balance between the rules and the game? As Aquinas noted, "to a certain extent, the mere change of law is of itself prejudicial to the common good: because custom avails much for the observance of laws, seeing that what is done contrary to general custom, even in slight matters, is looked upon as grave. Consequently, when a law is changed, the binding power of the law is diminished, in so far as custom is abolished. Wherefore human law should never be changed, unless, in some way or other, the common weal be compensated according to the extent of the harm done in this respect." (St. Thomas, 1917, Question 97, Second Article, On the Contrary). Aquinas's rationale sounds very similar to the practical, non-instrumental reasoning that Oakeshott prescribes for the *cives*; changes should only occur for the benefit of the civil association. Oakeshott asserted that, "if a 'higher' law is postulated, such that the authority of *respublica* is conditional upon a correspondence with it, this 'law' (if it is to serve a theoretical purpose) must itself be shown to have authority" (Oakeshott, 1975/2003). Given what we have discussed, is there any question that the organically developed rules composing the civil association serve as the basis of authority? We cannot separate the sublime experience of the civil condition and the sublime experience of Burkean natural law; the play element unites the two experiences into one. While gradual, prudential change may preserve the game, a wholesale re-ordering of the rules destroys the game.

If man's instrumentalization of society has led to the widespread increase of the state and the destruction of our individualist morality, what solution does Oakeshott offer? How do we convert a *Homo laborans* to a *Homo ludens*? Turning to Oakeshott's use of Plato's metaphor of the state as a boat, what is a captain to do when his ship enters treacherous waters? In truth Oakeshott presents no solutions for society. Though a ship may be caught in rough waters and charging fast towards a perilous cliff, pulling all control from the captain, it takes but an errant wind to send the ship back out to sea, towards new challenges and new adventures. Therein lies the magic of Michael Oakeshott. Oakeshott does not present a solution to the problems of modernity, precisely because there is no solution for a "captain" to implement. Rather, Oakeshott forces us to put asides our "serious" concerns, governed as much by chance as by choice, and gives us the opportunity to embrace the adventures of the open seas; a chance to think, a chance to play, and a chance to dream.

NOTES

1. Obviously, each individual scientist will have a multitude of beliefs that he will have to contend with in his pursuit. A dedicated environmentalist and conservationist would have to proceed carefully if he were to research climate change; in his desire to "help the environment" he might make suppositions about feedback loops and other casual mechanisms that would render his model useless.
2. Qualifying actions, but not designating actions; within the civil association, the state instructs that however you act, you don't act "murderously" or "fraudulently," but it does not tell you to do a particular action.
3. Admittedly, this case, as Corey Abel has helpfully pointed out to me, is an "easy" case. Instead, what if we were proposing a rule to make the game more entertaining? Provisionally, I would suggest that such a rule change, which enhances the engagement in the limited field, would clearly "fit." However, in the process of this paper, I've articulated a "positive" vision of Oakeshott while articulating a "negative" view of politics. This is an issue to be addressed in another paper.
4. This is not to suggest that an individualist must have a weak education. Rather, I mean to suggest that children, for whom play comes easiest, should allowed to be children with all the associated frivolity. If your education is an enterprise, rather than an adventure, the satisfaction of learning will come from imposing your ideas rather than experimenting. In a way, I am partially persuaded by Maurice Cowling's work that Mill is not an individualist, but a rationalist looking to impose uniformity on society. By contrast, Oakeshott has no interest in ruling others.
5. I for one "play" alone when I drink scotch. While at first, I simply poured a dram and enjoyed over time, I have developed my own ritual. I grab a freshly cleaned glencairn glass, pour about two fingers, and allow the dram to sit. Meanwhile I grab my edition of Michael Jackson's Complete Guide to Single Malt Scotch. I open the page to the particular single malt and test whether I apprehend the same smell, the same taste, and the same finish. And yet, even I have expanded the "tradition," it is with friends that I have gotten the most out of the experience. Competing to see who can discern the most transforms the scotch into much more than the chemical components.

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The Instrumental Idiom in American Politics: The 'City on the Hill' as a Spontaneous Order

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Abstract: In this paper I draw on a few remarks made by Michael Oakeshott about American politics, expanding on them by applying his ideas to several episodes in the American political tradition. Using a selection of notable documents and some examples drawn from more recent political experience, I suggest that Oakeshott's insights might help us better understand the American regime, refracted through the famous and persistent American metaphor, the city on the hill. In my view, what is exceptional in American politics is the clear-sightedness with which America began not as a self-consciously formulated enterprise but as a "civil association." The "choice and reflection" that characterizes the Founding is not the discovery of a political creed but rather the recognition that a government of and among free men must pass the crucial (Kantian) test of political obligation. It must rest on the acknowledgment of human agency in one's fellows. The Founders, including both the Federalists and Anti-Federalists, ultimately reached agreement on a non-purposive conception of government for the United States. In this sense they chose a "Lockean," enjoyment of rights rather than the pursuit of a "Puritan" goal. The Progressives, on the other hand, were inspired by ideas explicitly hostile to the "civil" tradition, and quite knowingly set about to put the United States on a purposive course. This has led to a divide in the political culture greater even than that between the Federalists and Anti-Federalists, although it has usually been misunderstood in terms of mere policy differences.

Keywords: Oakeshott, Hayek, American tradition, Rationalism, instrumental order, spontaneous order, founders, *teleocracy*, *nomocracy*, enterprise association, civil association, rule of law.

I

In this paper, I draw on the spare remarks made by Michael Oakeshott about American politics, and expand on them by applying some of his key ideas to the American tradition. In a brief treatment, my choice of examples is almost necessarily going to be arbitrary. I have chosen a few notable documents, and some examples drawn from more recent political experience, to show how Oakeshott might help us understand the American regime. I also make some comparisons with the writings of Hayek, since his and Oakeshott's readers could benefit from visiting the other's territories. The comparisons drawn are mainly suggestive. Some deeper analyses have been undertaken in recent works by others (Marsh, 2012; Boyd and Morrison, 2007).

After the US Presidential election of 2008, there was a great deal of commentary on the death of conservatism. Within two years there came a counter-movement of commentary. This lead some to rhapsodize on a resurgence of conservatism such that a Wall Street Journal op-ed writer offered an "Autopsy of Liberalism." Such is the to-and-fro of politics at ground level. Along the way, there has been some slightly more disinterested debate about the character of American politics, the character of American conservatism, and the prospects of liberalism. I do not think I can predict the next elections or decide whether conservatism or

liberalism has really died. Both, I suspect, will survive the recent and the coming elections and go on for some time. But perhaps Oakeshott has something to offer us with a view of things at a few steps of theoretical remove.

I will use Oakeshott to reflect on the possible meanings of a famous and persistent American metaphor, the city on the hill. Since politicians ranging from JFK to Sarah Palin have invoked this metaphor, first introduced by John Winthrop in 1630, it serves as a convenient touchstone for an inquiry into America's political character. Scholars, journalists, and the American Founders themselves have invoked this metaphor, or analogous concepts to describe America's uniqueness, its special historical role, or its exceptionalism.

Oakeshott's remarks on America are limited to two main observations. In a famous essay he criticized the American Founders as Rationalists (Oakeshott 1947/1991, pp. 31-33). (The charge of Rationalism was partly softened later [Oakeshott 1975, p. 166]). In *On Human Conduct*, he praises the American Founding, saying it "was conducted by men endowed with *civilis sapientia* to the degree of genius," who secured the authority of a state understood as a civil association (Oakeshott, 1975, pp. 190, 244). Oakeshott's blend of criticism and praise for the American founders is somewhat confusing. I need first to discuss Oakeshott's ideas on Rationalism. Then I will examine the two *modes* of political association he labels as 'civil' and 'enterprise', and show how they surface in different ways in the American tradition. I will also briefly note some overlap with Hayek's famous contrast between 'spontaneous order' and 'instrumental organization' and his thoughts on the dysfunctions of modern democracies. We will see how Oakeshott can criticize the Americans for Rationalism while praising their work in building a civil association. We will also see how Oakeshott's categories relate to an actual polity.

II

The Rationalist is a modern character type, or disposition, that occurs in the living out of an epistemological error. The Rationalist is much abused by Oakeshott. His criticism is so thorough, at times so satirical, that it has led some critics mistakenly to conclude that Oakeshott was an irrationalist.

The Rationalist scorns the past, thinking it to be composed of unreflective prejudice. He wants to be guided by reason; that is, whatever remains after an individual's searching examination of an opinion. Reason, for him, is what can be proved before the bar of individual insight. Now, there may be something to admire in this. What Hegel called the "right of subjectivity" is just this demand to have the world make sense to the individual. One does not rely on Oracles, for example, but tests political proposals in public and open debate (Hegel, 1830-31/1956, p. 254). Oakeshott is both Hegelian and an individualist who admires those who have the courage to set off on their own self-defined adventures. So while he may seem critical of the Rationalist's individualism, it is a defective form of individualism and a defective form of reason that concerns him. Oakeshott finds the Rationalist's demand that everything always be put to the test of reason both destructive in practice and impossible in theory. For Oakeshott, Rationalism's belief that in human affairs we can find guidance for our actions by purging our minds of all their content and starting from scratch, on the basis of fixed and demonstrable principles, is wrong. Against coarse Cartesianism, Oakeshott insists on the constitutive role tradition plays in our conscious experience. A good deal of what Oakeshott has to say about tradition resonates with Michael Polanyi's thoughts about the "tacit dimension," Hayek's thoughts about spontaneous orders, and Burke and Hume's rejection of modern ideological politics.

As an illustration of Rationalism and its faults, Oakeshott cites the invention of bloomers (Oakeshott, 1950/1991, pp. 100-102). Bloomers might be thought of, from a rationalistic point of view, as an ideal garment that satisfies a set of rational principles. The design of bloomers takes into account human anatomy and the design of bicycles. It apparently disregards or even upsets tradition by introducing something new.

However, Oakeshott argues, far from upsetting tradition, bloomers actually answer to needs determined by tradition; namely, considerations of decency. They do not answer the question, "What is the ideally best garment for bicycling?" But rather, "What sort of garment is it appropriate for a woman to be seen in while bicycling in England in the 1890s?" One hundred years later, cyclists are nowhere to be seen wearing bloomers. The design of bloomers does take into account human anatomy and the design of bicycles, but also much more, things the rationalist will fail to see or account for. This failure to see may result in distortions or misjudgments in practical life. Regardless of the practical effect, the rationalistic attempt to guide behavior by purely rational principles is, according to Oakeshott, just not possible. What the Rationalist believes is going on when he thinks and acts, is not what is going on. This failure is a destructive feedback loop arising from misunderstanding the character of an activity (or the character of all activity). Instead of seeing the spontaneous and implicit aspect of practices the rationalist

thinks everything can be managed and administered by a supervening intelligence. It amounts to a peculiar view of expertise as divorced from experience in the activities. We will soon see how this impossibility surfaces in American politics at the time of the Founding.

Oakeshott's response to the invention of bloomers situates that invention in a broader cultural and temporal context. He takes the isolated invention and puts it in a more concrete setting. That actions are located within idioms or traditions of activity, he would say is always the case. This is true even for actions that have the appearance of being isolated and set off from other affairs. But the Rationalist tends to see all conduct as a series of isolated acts, with a structure of thought, reflection, and deed. This gives support to another important tendency, which is to characterize human conduct in an intellectualized way as the solving of problems.

A "problem" is an isolated instance of conduct, which ordinarily occurs in a moving stream of activity. But when we identify something as a problem we have abstracted it; we have performed a work of identification and definition that allows us to grasp the issue at hand as a problem. Of course, this usually happens when there is a disruption. When learning a dance, an awkward move is repeated, refined, and eventually smoothed out. And it is often useful, even necessary, to abstract from conduct in this way and to examine the possibilities of action, precisely to resolve the difficulty.

By thinking of conduct as a series of problems, however, we may be unwittingly adopting the belief that all our activities are successions of crises. We may ever master moves but never learn the dance. In particular, to think of an entire institution or the whole of society as such a series of problems distorts its character. Something like an entire social order or tradition is ecologically entwined, continuous, and dynamic. Problem-thinking may lead us to believe that if we are not engaged in "problem-solving" we are somehow inadequate. And yet, by trying to examine everything we are doing and to reflect on every aspect of our lives (which we can't actually do), we may end up creating problems. We may fail to understand the flow of activities, or to see the larger coherencies that contribute to the success of our actions, which always proceed little by little within larger channels of activity. We may miss the interconnectedness of things and the value of what is settled. We may produce false puzzlement and undue complexity, especially if we seek for general principles to follow like rules, or some fool-proof guidance, instead of appreciating how our own experience in the activity supplies us with examples, analogies, precedent, and an awareness of the artful way disruptions can be resolved.

If Rationalism were confined to clothing design, we might wonder why Oakeshott is so concerned with it. But the disposition to invent anew, to follow reason, to ignore or subvert whatever is merely traditional has become prevalent in modern societies. It affects every area of human conduct, including morals, politics, religion, and more.

In politics, the rationalistic disposition is found in efforts to overthrow traditional authorities and replace them with supposedly rationally designed laws or constitutions aligned with, or devoted to, purportedly self-evident principles. In modern times, rationalistic habits of thinking have become quite common. In America, "We hold these truths to be self-evident" has attained the status of a creedal invocation. This is, in part, because of the intellectual authority of science (although genuine science, as Hayek and Polanyi understood, is not Rationalistic). It is also in part because longstanding institutions and practices have been challenged in all domains of conduct, from art to family life, with the demand they be conducted "rationally."

III

I turn now to examine American politics in terms of the presence of Rationalistic habits of thought, and later, in terms of the tensions between two modes of association, 'civil' (non-instrumental, spontaneous) and 'enterprise' (instrumental, purposive organization).

From very early on, it was plain to the American Founders that they were building a society on the basis of a new science of politics. They were following universal but previously non-recognized principles, and establishing reflection as the basis of a new order. Oakeshott thinks all of that is an exaggeration.

When Hamilton declares in *Federalist 1* that the ratification of the Constitution involves "decid[-ing] the important question, whether societies of men are really capable or not, of establishing good government from reflection or choice, or whether they are forever destined to depend, for their political constitutions, on accident and force" (Publius, 1787/1961, p. 33), and that this decision is so important that "a wrong election of the part we shall act . . . deserves to be considered as the general misfortune of mankind," he is indulging in hyperbole.

As a well-versed reader of English history and European political thought, Hamilton must have known that such rhetoric would appeal to a people that thought of itself as highly independent in spirit and original in its designs. Some of them had, incidentally, a tradition of considering their poli-

tics in light of theories of "election," or chosenness. He may have been right that a great historic moment was at hand. But he must have known better than to think that all prior history was composed of nothing more than "accident and force." That takes the "one damn thing after another" view of history to an extreme. Nor could he have thought that from now on, American politics, or anyone else's politics, could really proceed solely on the basis of "choice and reflection," as if accident could be removed from political affairs or force removed from the activities of states. Nor could he have believed a political act would settle a moral and anthropological question once and for all—"whether societies of men are really capable," etc. To think of politics as a surrogate for philosophical debate is textbook Rationalism, and practical hogwash.

Sometimes, political rhetoric may be too successful for its own good, leaving us a legacy of perplexity and misleading our efforts to understand ourselves. The actions of statesmen and the participation of all of us in traditions of behavior have an indirect educative dimension, sometimes referred to as a political (or civic) education. One of the hazards of a Rationalist formulation like Hamilton's is that it teaches bad lessons. Instead of stressing his own deep historical knowledge and practical experience, instead of showing how the present is tied to the past, he valorized this once-and-for-all, debate-settling mode of political discourse. Elsewhere, he famously disdained "old parchments" and "musty records" (1775/1987)—the very things attention to which civic education now sorely lacks.[1]

Hamilton's exuberant opening to *The Federalist Papers* is hardly the only example of high-flown rhetoric announcing the specialness of American politics. On this theme of Rationalism it is easy to find, in American political writings, invocations of first principles that supposedly guide American political choices, ideals that inform practices (sometimes creating 'disharmonies'). Whether it is principles supposed to be "self-evident," or a nation's "dedication to a proposition that all men are created equal," we find many examples of a rationalistic frame of mind in the American tradition. With it, we can find many examples of thinking of politics as a technical problem solving activity and as an intellectual debate to be settled through a political demonstration.

Needless to say, the debate is never settled as advertised. Americans still argue about fundamental issues such as the limits of the Fourth Amendment as applied to electronic communications or the need for Presidents to have Congressional approval before initiating military strikes, among so many others. If these questions were supposed to have been settled in 1789 and they remain unsettled today, it would seem the only possible conclusion would be that men are not at all capable of governing themselves "by reflection and choice." Are two and one quarter centuries not enough time to draw simple conclusions from self-evident principles?

As Oakeshott pointed out, rights like *habeus corpus* are not "bright ideas" (Oakeshott, 1947/1991, p. 54). Freedom, he says, is not *exemplified in* habeus corpus, it *is the availability of that procedure*. It is available because human beings have continuously chosen to use, defend, and preserve it over time, not because someone deduced it in 1787. The Rationalist idea of finding principles to guide politics fails because principles are really *post facto* generalizations from experience. Even when they can be articulated, they require an interpretive act or casuistic judgments to apply in practice.

An implicit rejection of Rationalism can also be found even in the mouths of Rationalists themselves. Their writings prove to be informed by tradition and full of links between present and past. Federalist and Anti-Federalist writers quote liberally from Montesquieu and other theorists. They cite examples from the history of Rome, Poland, Germany, England, and other nations. Some examples are used to defend and illustrate principles and critique past errors; but they show more. They reveal that the present conduct of affairs owes much to ancient practices, even when it seeks to correct them. The present's indebtedness to the past also shows in Federalist and Anti-Federalist debates, as both sides continually refer to their local colonial traditions. A good deal of the debate over ratification turns out to be about whether the existing institutions of government will be subverted or preserved.

Even in individual writers, there may be vacillation. Hamilton, Rationalist in many passages, thinks more in terms of practical contingencies when he explains that a Bill of Rights might actually be dangerous—"why declare that things shall not be done which there is no power to do?" (Publius, 1787/1961, p. 513). But this runs directly contrary to the Rationalist desire to settle great debates once and for all and do as the French did, and many in America wanted to do, expressly declare their rights. Elsewhere, Hamilton judges the Constitution as a whole in practical, not ideal terms: "the best that the present views and circumstances of the country will permit" (Publius, 1787/1961, p. 523). He acknowledges that the conduct of politics cannot be contained within a discreet set of rules in the matter of war, which,

"*like most other things*, is a science to be acquired and perfected by diligence, by perseverance, *by time, and by practice*" (italics added). Further, rebellion and discord in various states teaches us "how unequal parchment provisions are to a struggle with public necessity" (Publius, 1787/1961, pp. 166-167.) We find, in *Federalist 57* and elsewhere, Madison admitting that in spite of the brilliantly designed political machinery, the ultimate check on abuse of power will have to be "the vigilant and manly spirit which actuates the people of America." So America may be founded on true principles, but there is a limit to the value of intellectual articulations of principle; Americans cannot escape the profound effects of contingency, or attain more than the 'practical best.' America will rely, when in danger, on its culture and traditions, the people's 'esprit'. The Founders turn out to be traditionalists despite themselves.

When Hamilton announced the great significance of the American experiment, he not only framed it in a rationalistic way, he also invoked America's world historical role. He was echoing, in a secular idiom, John Winthrop's suggestions about the unique role America would play in history. Rationalism and teleological politics are not identical, but often align or co-exist, a point made by Callahan (2012). The split in Oakeshott's criticism and praise reflects this. While exhibiting classic symptoms of Rationalism, the founders nonetheless firmly held to the skeptical idea of the state as a limited, non-teleological association.

IV

This leads me to the second main area of Oakeshottian overtones I would like to explore in the American context, and one that also bears on the question of tensions between spontaneous orders and instrumental orders. Hayek's criticism of instrumental orders overlaps Oakeshott's criticisms of both Rationalism and the "inherently belligerent" quality of government that approximates the ideal of enterprise association. Stressing, as Oakeshott does, the associational angle and distinguishing it from the epistemological problem of Rationalism allows us to see that the state conceived as an instrumental order does not merely produce bad outcomes, or rest on bad epistemology, but actually entails a complete reorientation of basic human relationships.

Oakeshott argues that modern European political history and the history of reflection on politics is constituted in a profound tension between the idea that a state is a purposive, or instrumental association, and the idea that the state has no substantive purpose at all.

The 'city on the hill' image might support the idea of America as purposive; or, it might have other meanings depending on whether or not one thinks America has a purpose. In other words, there may be a purposive and a non-purposive interpretation of that image. The same duality applies to America's exceptionalism: the country might be exceptional for having some grand historic purpose; or, it might be exceptional for the clarity with which its Founders saw the dangers of purposive association, eschewed power, and grounded association in genuine consent. On the first view, it is imperative that government be organized so as to maximize the power available and facilitate its use in pursuit of the purpose. The people's role is to endorse or guide the projects and ensure politicians' assiduousness in pursuing them. Voters can 'check' power by checking to see it is being used well and fully. On the second view, power must be limited because the state has no overarching purpose beyond maintaining an adjudicative order. 'Theoretic politician' is a term of abuse. The people's role is to be vigilant in defense of their own autonomy, even as they submit to legitimate authority grounded in their consent.

V

Rather than make an argument about the size of government or its limitation to some basic, minimal or 'enumerated' set of responsibilities and powers, Oakeshott develops a novel and striking argument about the *mode of association*. As a modal argument, it is not a quantitative argument about the size or scope of government. Like Hayek, Oakeshott is explicitly not endorsing a so-called 'minimal state' because the size of the government is relative and changing. What matters more than the amount of power is how and why power is used. Although both Hayek and Oakeshott agree that the availability of great power is a standing temptation to governmental mischief.

In his distinction between enterprise association and civil association, the crucial issue turns out to be whether the state is understood as having some identifiable common, substantive purpose or not, whether it is an instrumental association or not. In Hayek, a few different, but overlapping distinctions come into play, such as between "law" and "specific direction" or between "democratic *legislation*" and "democratic *government*" (Hayek, 1979; 1982/2013, p. 431). For Hayek, planning is the key issue. He does not, however, hone in on purpose as Oakeshott does. If government has a purpose, it becomes difficult to argue that government should be limited, that it should *not* engage in planning on

a significant scale. On the contrary, government should be vested with as much power as possible to pursue its purpose with as much vigor as possible. In spite of disavowing the 'minimal state', Hayek creates some ambiguity by emphasizing the quantity of resources under state control (Hayek, 1979; 1982/2013, Vol. 3, Ch. 14). Beyond some hard to specify limit and certain spheres of control (some monopolies, for example), government control leads to major economic and social distortions. Oakeshott's argument shows why *any* amount of resources controlled for the sake of pursuing a common substantive end implies a specific mode of association and governance hostile to what he and Hayek understand by the 'rule of law'.

The more sure we are about the desirability of the end to be pursued, the less interested we will be in limiting power and the more we will seek ways to make government effective. In extreme cases, this results in a complete denial of the value of human individuality, political rights, and legal order. Divergence from the common pursuit, hesitancy to commit to it, or a tendency to arrest the exercise of power for merely "technical" legal reasons will be seen as obstruction, possibly as crime, or even sin. This applies with equal force to projects of the political right as well as the left. Whether a regime fosters virtue, seeks global democratization, promotes income equality, or strives for social justice here and abroad, it speaks in the idiom of enterprise association. A Republican President can be a good Wilsonian. Defense spending can add to budget deficits and encroaching government control as easily as welfare, medicine, or education.

A civil association, by contrast, is "the only morally tolerable form of compulsory association" (Oakeshott, 1975a/1991, p. 406). If we are studying spontaneous orders, it is crucial to notice this particular kind of association. We need to ask whether it is possible for compulsory association to retain a spontaneous character. Political association is a specific kind of association, one where power exists and is used on the basis of some claim about its authorization. Without authority, power is just raw force. It is the manner of authorization and the beliefs of the individuals associated in terms of that authority that open at least the possibility that the political use of power is legitimate.

Some question whether government is necessary at all: perhaps we do not need this odd form of association in which power is used to enforce obligations. Along with Aristotle, Madison, and Hobbes, I think it is necessary (and with them I deny that its necessity gives it any prestige or nobility). Among freely interacting human beings, 'collisions' or controversies are likely, without any fault or sin on the part of the colliders. Many of these conflicts can be and are resolved voluntarily, spontaneously, and without government intervention. However, it is worth considering how much of that voluntary resolution is possible because the participants know themselves to be 'backstopped' by a third party arbitrator, the government. In any case, voluntary and spontaneous resolution of conflict also breaks down; the parties sometimes will not agree. This is the condition of 'nature' as understood by Hobbes, a condition in which there may be natural laws available to the minds of human beings, but in which the natural laws remain ineffective, unenforceable, and ignored. What is needed then is an indifferent, impartial arbiter to whom parties may submit their quarrel. Government comes into being, in principle (but not in fact, as Hume pointed out) as an adjudicator, reconciling numerous and diverse claims to rule (Cf. Aristotle, 1984, Bk. II and Hobbes, 1651/1962, Chaps. 12, 13).

This fundamental agreement to be politically associated needs to rest on consent, in order to bind individuals while acknowledging their freedom. As Hobbes puts it, "The desires, and other passions of man, are in themselves no sin, no more are the actions that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know: nor can any law be made, till they have agreed upon the person that shall make it" (1651/1962, Ch. 13). Even god's law, the law defining sin, must be secured by the consent of the governed. Without agreement to be governed by law, Hobbes says, there is no justice or injustice: we live in a state as beasts or as moving particles, with no moral relation to one another, but with "a right to every thing; even to another's body" (1651/1962, Ch. 14). So for Hobbes (and Kant, Oakeshott, and others) the agreement to form a political association profoundly changes the human condition; it introduces relationships of justice and injustice, and places those who consent to it under obligations that may be enforced by the use of the government's power. Hayek's efforts to expose the undermining of the classical liberal ideal through the false democracy of interest group politics and administrative bureaucracy is also grounded in this tradition (Hayek, 1979; 1982/2013, p. 412). He repeatedly points out how actions taken in the name of majorities are in fact not supported by open and honest consent. And, he opens "The Political Order of a Free People" with an epigram from Kant.

Oakeshott is at pains to stress the compulsory aspect of the state as a non-voluntary form of association. In both civil and enterprise association, the question why we are using coercion is always a focus of concern. In enterprise association, this is always in relation to the end pursued. The jus-

tification of power, the legitimacy of the regime, hinges on acceptance of the validity or desirability of the end pursued. This makes everyday legislative, executive, and judicial activities contentious; it also puts the very basis of the association on the same contentious plane. For, in any moderately diverse association of human beings, there will be differences of opinion as to what ends in life are worth seeking. The decision to devote resources controlled by the government to the pursuit of one or a few such ends necessarily excludes a significant portion of what a substantial part of the people believe to be their goods. They will be imposed upon for the sake of others' private visions. Oakeshott nails this point in terms of associational theory, while Hayek's scathing account of "government driven by blackmail and corruption" nails it in empirical description (Hayek, 1979; 1982/2013, p. 440).

In civil association, power is used on an "as needed" basis. The reason this non-purposive mode of association is morally tolerable is the same reason why it is more profound than a 'minimal state' argument. What can be unanimously agreed to is almost nothing at all. Agreement to be bound by law needs to be unanimous because no person can live in a political community and exempt himself from its laws. But in agreeing to be bound, we do not agree to be happy about any of the particular decisions, outcomes, or actions of the government we consent to. That is all perpetually up for debate, a debate that is possible because there is an underlying agreement to abide by the non-instrumental rules of the association. Therefore, the more a government acts to direct a society's resources toward substantive goals, the more it seeks to control, the more it moves away from what can be consented to, the more it chafes and aggravates its citizens, and loses their loyalty. The move toward purposiveness is a move toward what cannot be universally consented to, and is therefore a move toward the non-consensual use of power.

A civil association is association in terms of the non-instrumental rules of law that qualify the manner of acting, without giving concrete direction to individual agents. Law, Oakeshott says, has an 'adverbial' character, shaping the manner of acting without 'specific direction' or commands to do specific things. Civil association will seem most compelling and appropriate whenever we are able to focus on the enjoyment of known goods. When we face crises, feel an overpowering need to address great evils, or respond to external threats, the simple pleasures of living peaceably and commodiously with our neighbors fade, and enterprise association restates its argument, always ready for accomplishment.[3]

To further explore this contrast, it is useful to think of the sorts of things that would be unquestionably legitimate to pursue in voluntary associations, like corporate enterprises, churches, clubs, and so on. Civil society is the realm where these sorts of instrumental organizations have their place and where they flourish. The reason Oakeshott regards the organization of the state along similar lines as *immoral*, is that in these associations, the individual has the freedom to opt out, a freedom lacking in the state (excepting the rare case of emigration). To pursue the common aim of the group is a choice the individual makes, so it does not violate his or her conscience.

Associations within the state can be instrumental, and need not undermine the non-instrumentality of the state. In fact, the only way there can be a variety of instrumental organizations in civil society is if the state as a whole remains steadfastly non-instrumental. If the government 'takes sides' with instrumental organizations (in preferential legislation, tax breaks, subsidies, exemptions, and so on) it sows seeds of jealousy and strife. If it embarks on its own instrumental path, it sets itself at odds with the instrumental activities of its citizens. In the first case, it is entirely reasonable that citizens not receiving preferential treatment wonder why they should be equally obligated to obey the laws, but disadvantaged when it comes to the distribution of benefits. Under a pretense of lawfulness, as Hayek so vividly describes, society becomes a war of all interest groups against all; this is called 'pluralism.' In the second case, all activities are suppressed for the sake of a general push toward perfection, however conceived. This is called a salvation from interest group politics, and appeals to the weary to 'hope for change', or 'win back their country'.

The slide of a state into full-blown purposive association is called different things, but is always a travesty. Occasionally, though, it will turn up comic incidents, as when Iranian authorities decided it was necessary to suppress water gun fights because they violated the principles of the Revolution.[4] Sadly, the ayatollahs are right: the revolution requires a total transformation of society in alignment with a particular vision of human happiness and social harmony. In implementing the vision, leaders are expected and required to attend to even the smallest detail of everyone's conduct, just as a corporation might monitor every keystroke of every employee on every company keyboard in its push for higher productivity. Of course, you can always quit your lousy job; it is harder to flee Iran. In a free republic, authorities would never, of course, descend to the level of con-

fiscating school children's water pistols or monitoring their every computer keystroke.

The authorization of power is the critical issue: what makes the use of power acceptable? If the state has an end to pursue, power is justified on the basis of success in pursuing it; to dally or delay is to disqualify oneself from having a claim to rule. Oakeshott's ideal-typical distinction between modes of association leads to understanding a legitimacy crisis in terms of the breakdown of consent when the attempt is made to ground consent in shared aims. Hayek's work on factions is not logically incompatible with such a view, but focuses on the practical activities of governments. The problem as Hayek defines it in dealing with the politics of "blackmail and corruption" is that in the process of coalition building and log rolling, there is no room for democratic consensus at all (Hayek, 1979, 1982/2013, pp. 419, 424, 440-441). Government ends up doing things that no majority actually supports, and that no possible majority could support.

An interesting feature of Hayek's analysis that Oakeshott's theoretical perspective ignores is that this profound dysfunction could occur, it would seem, whether there is a purpose or not. Civil association could degenerate into mere administration and stray from the rule of law. However, since civil association is expressly association in terms of law, one could hope—perhaps predict—that a civil association whose inhabitants were aware of their tradition, would, by dint of that awareness, keep "law" at the forefront of their minds and keep "administration" at bay. Also, as the state shifts to a purposive idiom, it seems likely that the "blackmail and corruption" model will become more prevalent, as the regime finds it needs to manufacture consent.

Individuals will usually bend to the demands of the instrumental state because they have very little choice. But this bending, this mere outward compliance, will likely lead to one of two reactions, or both of them: the individual will be forced into a condition of spiritual or mental duplicity, professing outwardly their willingness to cooperate in the pursuit of the common aim while inwardly dissenting; or, they will actually and outwardly dissent, resist, or act to undermine what they see, quite rightly, as the imposition by force of someone else's vision of a good life.

Moreover, as Hayek has pointed out, in the administrative state pursuing a large-scale social plan, the actual implementation of that plan will require *ad hoc* decisions that degrade the rule-like character of law. Wide discretionary power will have to be wielded by unaccountable bureaucrats, as unpopular decisions have to be taken. The types of people suited to this sort of governance will be the worst types (Hayek, 1979, 1982/2007, Ch. 10). A heavenly dream will end up being be implemented by devils.

Oakeshott argues that modern European political experience has been composed by the interplay and tensions between these two dispositions: the one tending to understand the state as an enterprise, or as an instrumental organization, the other to see it as a non-purposive, civil association. If he is right, we should be able to find examples of these opposed dispositions in the experience of a modern nation like the United States.

VI

Let me offer just a few examples. In John Winthrop's Massachusetts, we have the makings of an enterprise association. In his "Modell of Christian Charity," he calls for "a due form of government, both civil and ecclesiastical" and identifies a fairly clear end: "to improve our lives to do more service to the Lord / the comfort and increase of the body of Christ / whereof we are members / that our selves and posterity may be the better preserved from the Common corruption of this evil world / to serve the lord and work out our Salvation under the power and purity of his holy Ordinances" (Levy, 1630/1992, p. 11). By contrast, in "The Bloody Tenet of Persecution for a Cause of Conscience," Roger Williams makes an argument, at around the same time, for separating civil and ecclesiastical rule. He notes that uniting these powers will result in oppression of individuals' conscience, which is the opposite of what Christians should want to do. Oakeshott's angle of vision on this allows us to see in it more than—or other than—a debate about church and state. Williams is not endorsing a secular state so much as denying that the power of the state should be used for the pursuit of an end, religious or otherwise (Levy, 1644/1992, pp. 29-37).

We see in some of the debates between the Federalist and Anti-Federalists a similar tension. In some of the letters of Anti-Federalists, for example, we find calls for republican virtue interwoven with and expressed as calls for the enjoyment of liberty. In some cases, for example Agrippa's letter No. 4, it is not obvious that we should read his call for laws "to promote the happiness of the people" as a call for purposive association, though it sounds like a purpose (Levy, 1787/1992, pp. 141-142). The "promotion" and the "happiness" sound teleological, but may not add up to what Oakeshott has in mind. Agrippa seems to be calling for the enjoyment of liberty, though he is also noting some of the

background conditions he thinks are necessary for liberty to flourish—small states, direct relationships between the rulers and ruled, an adaptation of law to local conditions, and little or no legal innovation. In some other writings, like Centinel, No. 1, the call for republican virtue sounds more purposive. He delineates the need for the body of the people to be virtuous, to have an equal division of property, a simple government, direct popular sovereignty, and so on (Levy, 1787/1992, p. 144). In short, he seems to have a more clearly worked out picture of what an ideal regime is, and how to pursue it, than Agrippa has. Yet, this too, falls short of a really purposive vision of the state.

On the Federalist side, some of the comments, usually by Hamilton, relating to the need for power and the potential for commercial development, hint at another idiom of purposive association. But again, these suggestions of a commercial purpose seem to be outweighed by arguments that the real reason for the existence of the United States is simply the enjoyment of liberty.

In other words, a tradition can have multiple or ambiguous voices. Even individual writers can combine different tendencies in their works. On balance, the early periods of American' politics suggest a strongly "civil" character and an aversion to "enterprise" association, even where one can find hints of a purposive idiom.

One of the great expressions of the American political character is Madison's *Federalist 10* (Publius ,1787/1961, pp. 77-84). While this text is often seen in the social sciences as a classic of the literature on interest groups, this interpretation limits our ability to understand how it reflects Madison's considered view of the state as non-purposive. To see only the interplay of interest groups limits us to a mechanical theory of opposed actions. But this mechanical view could just as easily suggest that there is some means of balancing and harmonizing these diverse groups, among which Madison included religious sects and political parties, but also economic groupings, and social classes. The goal of a technically achieved harmony of interests would completely undermine Madison's meaning.

The core of Madison's argument, in my view, is the impossibility of making all think alike. This he offers as an impracticable solution to the problem of "factions." His argument is that the effects of faction must be dealt with, not the causes. The causes of faction might be cured—either by "destroying the liberty which is essential to its existence," or "by giving to every citizen the same opinions, the same passions, and the same interests" (Publius, 1787/1961, p. 78). To abolish liberty, Madison says, is utmost folly. For, liberty is essential to political life. To give all the same opinions is impracticable.

Due to the fallibility of human reason, the prevalence of self-love, and the narrowness of interests, "the latent causes of faction are thus sown in the nature of man." That is a remarkable statement of political skepticism: Human nature limits the ambitions of social harmonizers. We see again how a skeptical idea favoring civil association can be expressed in Rationalistic terms, either in technical terms (balancing interests), as a general principle, or as part of a 'new science'. Because of liberty, faction will be irreducible. No wonder Madison's solution to the problem is not to eliminate its causes, but treat its effects by multiplying factions. The larger the society, the more diverse it is, the less likely it will be to have a majority that tyrannizes.[4] But there is more going on here than a theory of quantitative pressure and counter pressures. If the problem of factions is dealt with not by perfecting our natures, but by magnifying an apparent vice, one way to understand what Madison is up to is to rearticulate it as the effort to retain, in a compulsory association, a spontaneous and open character. Madison rejects any plan to bring people closer together or use education to promote civic harmony. He goes radically in the other direction and promotes a wilder, less close-knit society.

To see this, a few remarks of Kant's from an essay he wrote in 1793, are helpful (even though I have no evidence of Madison's being exposed to Kant). Kant says, in the context of discussing how his idea of duty relates to the laws of a civil constitution, that "Men have different views on the empirical end of happiness and what it consists of." Their wills cannot be harmonized with the will of others in respect to happiness. Human freedom expressed politically means that "No one can compel me to be happy in accordance with his conception of the welfare of others." To do this, Kant says, results in a paternal government, which he calls "the greatest conceivable despotism, i.e., a constitution which suspends the entire freedom of its subjects, who henceforth have no rights whatsoever" (Kant, 1793/1991, pp. 73-74).

Why is Kant so drastic in his judgments about the political pursuit of a common happiness: "suspend the entire constitution," "no rights whatsoever"? It is not a judgment that a state organized around the pursuit of happiness for all will eliminate freedom piece-by-piece. Rather it is a judgment that freedom *as such* is banished when someone, or some group of persons decides what shall count as happiness for everyone else, and makes it the aim of the government to bring this state of affairs about. It is a judgment, like Oakeshott's, and, I believe, Madison's, about radical dif-

ferences between two modes of association. Roughly four decades later Tocqueville made similar observations and expressed horror at the possibility of a mild, widely accepted form of gentle despotism. Another century later, Hayek explained how the democratic states of the twentieth century were on the road to replicating medieval conditions of servitude of the masses.

My slightly anachronistic Kantian reading of Madison helps to make clear that he was not interested in engineering a common good by bringing the diversity of interests into some sort of ideal balance. Rather, he thought citizens should do what human beings naturally do: pursue their own individual idea of happiness. If they do this, there is a danger they will try to use the powers of the government to further their own cause: "Shall domestic manufactures be encouraged," he asks, "and in what degree, by restrictions on foreign manufactures?" Of course, it is hard for us to understand such arcane, eighteenth century concerns as the tension between the landed and manufacturing classes, or to envision some groups using political influence to skew the legal rules of society in their favor. But the larger point remains. The value of faction is its essential relation to liberty. You do not multiply factions because you think you can bring about a common good, but because you want to magnify and amplify liberty, giving it the widest possible reign. This skeptical way of dealing with the problem of faction shows Madison to be firmly on the side of understanding the U.S. Constitution as erecting a civil association, not an enterprise association.

I hope these few examples show that Oakeshott's purposive/non-purposive distinction can be seen operating in American politics, in some of its great debates, sometimes within a single text. I will have to leave it at the level of a barely argued assertion that the American political tradition as a whole is weighted to the side of civil association. There are notable tendencies toward enterprise association, especially as we move into the twentieth century. The tradition is revisited and put to new uses, whether envisioning, with Beveridge, "The March of the Flag," (1898), or, with Croly, "The Promise of American Life" (1909). But throughout all these changes, Oakeshott allows us to see that beneath the debates about church and state, or about states rights and the interests of the Union, or in other great debates, there is usually another debate lurking about whether or not the state is purposive. This is a rather "high level" concern, but it is vital for the moral reasons Kant, Hayek, and Oakeshott point to.

Enterprise association is an equal opportunity temptation: Hamilton, in certain moments, perhaps some of the Anti-Federalists, Winthrop, Croly, and Beveridge take their places alongside Woodrow Wilson, George W. Bush, and others as adherents, at least partially and fitfully, but sometimes clear-sightedly and consistently, of enterprise association. However, this tendency is always a reaction against the dominant tendency in American history, to see the state as the site of the enjoyment of liberty, where, as Kant says, the only "aim" we might speak of is for the state "to ensure its continued existence as a commonwealth" (Kant, 1991, p. 80). The spontaneous order of society, governed by consent, only seeks to retain its character as a spontaneous order.

VII

If retaining its character as a spontaneous order is the only aim, or the only thing like an aim that a state may have and still be consistently grounded in consent, is politics just too boring? Should there not be some kind of inspiration in political action, some redemptive, noble cause in which we can all join, so as to avoid living among strangers and seeing each other only at a distance? Shouldn't political life foster that supreme twenty-first century virtue, community engagement? There are those who think so. I am not one of them.

Let me try to draw out some more contemporary implications of this view to suggest that a boring, 'civil' politics may be just fine.

In an enterprise association, it is the end that confers authority to and guides the activities of government. Oakeshott at times calls it "teleocracy," the rule of the end (as distinct from "nomocracy," the rule of law). When the end rules, power is desirable. When there is an aim, what counts is whether we attain it. For its attainment, the availability and use of power is almost always preferable to the curtailment of power. The idiom of governance will tend to be managerial, with *ad hoc* decision-making, and constant adjustments made in order to maintain progress toward the end. Recruitment of support will be important. So, with enterprise association, we should expect a heightening of sensitivity among the rulers to dissent, which they will tend to see as disloyalty. The ruled, as I described above, will labor under an inner self-division and resentment against their country. Since an enterprise association loves power, it will often find the analogy of military power appealing for peacetime rule. In the extreme, devotion to a cause can lead to ruthlessness, a logic of "you are for us or against us," like that of a corporate boss. If you are not contributing, you are dead wood; and you are not being paid to think for yourself.

Hayek, as noted above, pointed out the ruthlessness of central planning, and showed why unscrupulousness was not an accidental feature of centrally planned regimes. However, Oakeshott's argument offers a slightly different view. The issue is less the centrality of planning, but the fact that the planning is directed toward a substantive end. Planning may be decentralized and thereby made more efficient, but it is still the pursuit of an end. It is the coupling of an end with state power that introduces ruthlessness. "Getting something done" is what counts, by hooks or by crooks.

In recent times we have seen a number of political projects couched in war-like terms: wars on poverty, drugs, and terror, for example. We have seen the seductiveness of power coupled with a belief in America's providential role in history. The rise of what Andrew Bacevich and others call the "national security state" has been accompanied by a greater and greater reliance by Presidents on secrecy, executive orders, and declarations of emergency. These are all to be expected in the actions of a state understood as an enterprise. In non-military matters, there has also been an increasing reliance on agency rule-making in regulatory bodies, something Hayek points out was known in post-war Britain as "delegated legislation."

Oakeshott's analysis of the modes of association would lead us further to expect politics in the enterprising mode to lead to intense partisanship, because to govern is to articulate a vision, and one vision usually excludes another—not only excludes it, but views it as wrongheaded and maybe evil. Because managerial discretion is needed, the authorities must take more and more controversial actions, all the while claiming to have a popular mandate. When you are trying to impose your vision of happiness—which is never how you would publicly put the matter—it is easy to become impatient with those who are so benighted that they fail to see their own best interests, to think that you must simply 'stay the course', or do a better job of communicating the significance of your signature legislation. Since reason is universal, well-meaning rational people cannot disagree. So, your opponents must be malicious, stupid, or both. Whether you are promising to rid the world of evil, or heal the planet, you have set yourself a huge task. You may find that having an opposition is most inconvenient. It will not be surprising to have high officials remark upon the inadequacy of Congressional governance, to have editorialists note the impossibility of dealing rationally with 'the people', to have supporters of a President opine on the glories of authoritarian rule in China, or advocate unilateral executive action on policy, whatever the cost, and whatever the legality of the matter. Nevertheless, the American political system, designed by men who believed in the diffusion and not the concentration of power, who distrusted the promises of visionaries, will still be a stumbling block. Some have said the American system is dysfunctional because it makes sweeping and rapid decisions difficult. It might be that the system is functional for exactly that reason.

Oakeshott gives us a way of seeing that the most common ways of understanding political differences may be misleading. Americans (and citizens in other modern democracies) often argue as if it is assumed that there is a shared commitment to ends and differences only regarding the means to attain them. If that were the case, politics could be reduced to a merely technical matter. Or, we see, when certain intractable differences of opinion present themselves, that there is an argument about the ends to be pursued. This is the level of much contemporary political discourse. But perhaps there is another argument, at least some of the time, about whether or not there is a purpose at all. That is the most significant debate, and the least partisan. If the United States were true to its character as a civil association, it might indeed be a city on a hill as so many people seem to think it is, not because it had seized the sword of Caesar, but because it calmly resolved to be a model of respect for individuality, spontaneous order, and legitimate authority founded on consent.[5]

NOTES

1 In his response to "The Farmer," Hamilton invokes natural law, natural rights, and 'axioms' of politics, and claims, "The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself" (1775/1987).

3 Oakeshott refers to civil association as "the only morally tolerable form of compulsory association" (1975a; see 1991, p. 46), and argues that enterprise association is "inherently belligerent" (1975, p. 273).

3 The above section was taken, with modifications from (Abel, 2011).

4 Reported in the *Wall Street Journal*, Wednesday, August 31, 2001, "Iran's Wet Blankets Put a Damper on Water-Park Fun," section A, pp. 1-2.

5 This point was made, incidentally, by Aristotle, in *The Politics* Bk. IV, Ch. 11, 1296ª7, p. 135.

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Dogmatomachy: Ideological Warfare

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Abstract: Dogmatomachy (ideological warfare) has infected contemporary liberal-democratic politics, and we need to understand it. In this essay I analyze domatomachy in terms of its logical postulates: abstraction, absolutization and the belief that total victory is achievable in domestic political disputes. I then show the folly of approaching politics in this manner by contrasting the constraints that necessarily characterize human politics with the relatively unconstrained politics exhibited by the mythopoetic figure of Olympian Zeus. In the end I conjecture that dogmatomachy, while wrongheaded as an approach to everyday politics, is likely to be with us for a long time, though I hold out some hope that by understanding its defects we may begin to seek its cure.

Keywords: ideology, dogmatomachy, Voegelin, Oakeshott, Arendt, rights, absolutes, abstraction, just war theory, identity politics, single-issue voting, Federalist 10.

Grau, theurer Freund, ist alle Theorie
Und grün des Lebens goldner Baum.[1]

Anyone who pays attention to the practice of Western democratic politics today will know something of the phenomenon I wish to investigate. What the best theorists and practitioners of politics from ages past called "political deliberation" has now fallen on hard times. Instead of striving to formulate and exchange insights into who we are as a people and what we want to do, political actors today seem bent on using words as weapons. Their goal is neither collaborative wisdom nor comprehensive political action but total victory over all rivals so that the political *cosmos* might be unilaterally controlled. Once control is achieved, a new arrangement (*taxis*) is wrought, more or less according to the victors' own preferences. But of course ultimate victory is rarely possible in politics. Partiality may masquerade as completeness for a time, but it is an unstable ground for political order, if only because our political rivals can never be completely exterminated. Such is the shortsightedness of ideological politics and ideological debate.

Why has this style of politics increased so much in scale and intensity in recent years? No doubt the answer is far from simple, and we may never reach a fully satisfactory explanation. But I do think the phenomenon admits of analysis. In what follows I try to shed light on contemporary ideological warfare by means of two independent but mutually reinforcing methods. On the one hand, I look behind the phenomenon in order to identify its logical postulates. I ask, in other words, what does this approach to politics presuppose on the part of those who practice it?[2] On the other hand, I proceed by a method of metaphorical reasoning, using a carefully selected image—in this case the mythopoetic image of the Titanomachy—as a potentially illuminating *comparatum*. As I argue below, our contemporary clash of ideologies (dogmatomachy) is quite similar to the legendary Titanomachy in its goal of wresting control of the political cosmos from all rivals.[3] However, it differs from the Titanomachy in crucial respects which, once grasped, do not bode well for societies that allow this form of anti-politics to replace genuine political deliberation.

FIELDS OF BATTLE

Before embarking on the analysis, I offer just a few examples of the phenomenon in question so that readers might grasp what I have in mind. In all three examples, I proceed somewhat historically (albeit crudely) so that the phenomenon can be observed as it emerges on the scene. I have intentionally selected cases from three separate political spheres: those of "rights," "the ethics of war," and "voting behavior." These have almost nothing in common, save the accidental trait of becoming a battleground for our ever-spreading dogmatomachy. Once I render the phenomenon clear, readers will no doubt recognize that tragically few areas of political life are exempt from becoming venues for this kind of battle.

1. Rights

The beginnings of the rights tradition are largely obscure. We can, of course, point to early uses of the word "right" in legal codes, political treatises and charters, but this does not explain when or why the "rights tradition" was born. Why did the language of rights catch on? Why was the term pressed into service in contexts far removed from those in which it first appeared? Legal and political theorists have long claimed that the word "right" in its modern sense—that is, a power held by an individual or group to do, or refrain from doing, some act—was unknown to the ancients (e.g., Constant, 1988; Arnaud, 1973; MacIntyre, 1984, p. 67; Guess, 2008, pp. 60-70). But this is not quite accurate. Both the Greeks and Romans used the word right (*dikaios, jus*) to describe a subjective power, though they did so mostly in legal contexts.[4] The term was not part of everyday discourse. In the High Middle Ages, by contrast, "right" appears in prominent political charters, such as the Magna Carta (1215) for instance, where it is used eight times in a sense that seems perfectly modern: e.g., "the English Church shall be free and *shall have her rights entire*" (§1, *jura sua integra*). True, the number of rights in ancient and medieval writings was quite limited, but rights are not strictly speaking "modern." Perhaps the most noteworthy aspect of ancient and medieval rights was their intimate connection to "custom." In Greek the word "right" itself (*dikē*), originally meant "custom," or "manner," as in *hē gar dikē esti gerontōn* (the manner of old men).

As students of the history of political thought know well, rights soon became the centerpiece of early modern political theory and practice. Writing in the middle of the seventeenth century, Thomas Hobbes simultaneously severed rights from custom and dramatically expanded their scope when he claimed that by nature "every man has a right to everything; even to one another's body" (Hobbes, 1996 [1651], chapter 14, p. 91). Of course Hobbes's claim applied only to man in his "natural state," not to man in civil society. But nevertheless, the notion that individuals naturally have abundant rights, that these are operative unless and until they are personally renounced, and indeed that some rights (such as the right to life) are positively "inalienable"—this is distinctly modern. In the realm of practice (as opposed to theory) rights were expanded and codified through the English "Petition of Rights" (1628), the "Habeas Corpus Act" (1679) and the "Bill of Rights" (1689). By 1776, the American "Declaration of Independence" could assert "life, liberty and the pursuit of happiness," as *some* of man's inalienable rights, along with the right to alter or abolish any form of government not conducive thereunto. And in 1789 the French "Declaration of the Rights of Man" expanded the catalog even further to include liberty, property, security, resistance to oppression, the right to have equal rights, the right to participate in lawmaking, either personally or through a representative, the right to free communication of ideas and opinions, the right to decide (personally or through a representative) what taxes should be collected, and the right to hold public servants accountable.

Throughout the eighteenth century and into the nineteenth, novel rights seemed to emerge out of the woodwork. But as the most astute commentators then and now have noticed, something also seemed amiss. Edmund Burke's trenchant critique of the development of modern rights is as salient now as when he wrote. Rights that had once been grounded in longstanding custom—the "rights of Englishmen," secured through political conflict and compromise—were now severed from custom. They had become "abstract," "metaphysical," and in this sense *weakened*. Moreover, as other commentators have noticed, the gradual expansion of rights to include ever-greater lists of goods ran into the problem of incoherence. In "The Declaration of the Rights of Man," for example, the inviolable and sacred right not to be deprived of one's private property (Art. 17), stands in obvious tension with the imprescriptible right of every human being to possess property (Art. 2). Just how will the formerly underprivileged come to possess property, if not from those who already own it? In his magisterial *History of European Liberalism*, Guido de Ruggiero has shown how this and other incoherencies emerged. The Declaration was "composed by a highly eclectic process of compilation, and by compromises voted by closure between the formulae of

the various leaders" (De Ruggiero, 1927, p. 70). In other words, it was a patchwork that had been hastily sewn together. And this is not unconnected to Burke's criticism about abstraction. Only in the abstract can incompatible rights be placed side-by-side without friction. In practice they must, somehow, be reconciled.

The process by which political actors today attempt to reconcile incompatible, abstract rights will be my first example of dogmatomachy. But first let me mark two further developments that make our current predicament especially fraught. One is that our rights have continued to swell since the nineteenth century to the point where a single volume can now scarcely contain them all. Oxford's always-expanding *Basic Documents on Human Rights* now runs more than twelve hundred pages (Brownlie and Goodwin-Gill, 2006). Even our "basic" rights today are legion. The second development is a trend toward the language of "absolutes." Such language itself is quite old. Blackstone, for instance, discussed "absolute rights" much in the manner of Hobbes and Locke as the *residuum* of rights from the state of nature that still obtain in civil society insofar as they do not threaten or harm the equal rights of our fellow citizens (Blackstone, 1893, Vol. 1, Bk. 1, ch. 1). But in Blackstone, unlike today, the word "absolute" admitted of significant qualification:

> The absolute rights of every Englishman [are] subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all. But the vigour of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger (Blackstone, 1893, p. 127).

Blackstone recognized that absolutes in human affairs are never really absolute. Not only did they fluctuate, they could also be pressed too hard. But all such qualifications seem quaint compared to the character of "rights talk" today. For us, "absolute" means something more like "utterly without qualification or exception." Our language of rights is thus "the language of no compromise. . . . The winner takes all and the loser has to get out of town. The conversation is over" (Glendon, 1991, p. 9).

This notion—that the conversation is indeed over—suggests something important about the way rights conflicts must be settled today. They cannot be settled through collective deliberation, because conflicting absolutes are not dissoluble. They cannot be subject to reasonable compromise. And in any event, there are simply too many conflicting rights in our contemporary lexicon to make possible any kind of lasting settlement. Thus we launch our "grievous shafts upon one another . . . with a great battle cry" and fall headlong into war (Hesiod, 1967, lines 678-686, p. 129).

Of course, "war" need not mean recourse to arms—though this can and has been a way of attempting to settle our rights clashes. War more often takes the form of a battle of political wills played out on TV news shows, radio broadcasts, and ultimately in the courts. But it is still war. Once rights have been "abstracted" and "absolutized" to the point of deification, there is nothing left to do but to allow these deified concepts to hammer away at each other until total victory of one over others is achieved, which rarely happens. And what an epic, all-encompassing war this must be. The deified "right to choose abortion" must war against the absolute "right to life of the fetus;" the right to free speech against the right not to be offended; the right to bear arms against the right to safe streets; the right to influence elections against the right to equality of contributions; the right to privacy against the right to live in a secure society; the right to a clean environment against the right to a job that would be eliminated by environmental concerns; the right to smoke against the right not to be subject to second-hand smoke; the right to medical treatment against the right of hospitals to refuse treatment; the right of gay couples to adopt against the right of a child to be adopted by a heterosexual family; the right to know when sex offenders live within one's neighborhood (Megan's Law) against the right of privacy after serving a sentence. And so on. The list could be extended for pages,[5] and what it would reveal is that an enormous amount of our "politics" today is composed of the dogmatic assertion of one deified rights claim against another—in other words, dogmatomachy.

2. *Ethics of War*

Something similar has occurred in public discourse about war. The longstanding ethical framework in which Western democratic nations have historically deliberated about war is the "just war tradition." Of course, other ethical and non-ethical frameworks exist—pacifism, *raison d'état*, holy

war—but by and large, most deliberation, especially when conducted in public, relies on the terms and categories of the just war tradition: just cause, legitimate authority, right intention, likelihood of success, last resort, non-combatant immunity, proportionality, and so on. Even when political decision-makers reject this framework, they seem compelled to *pretend* to be working within it—so dominant is its moral status. And this is good. The very fact that western democratic nations recognize a common framework—a moral language—in which to consider what is legitimate and illegitimate in war helps foster stability and supply moral orientation.

Of course, the just war tradition does not speak with a single voice. Different theologians, philosophers, natural lawyers and international jurists have contributed various arguments, as well as various kinds of argumentation, to the common store. In fact, from St. Augustine in the 5th century to Brian Orend in the 21st, the style as well as the substance of the tradition has become so varied that it would be false to say the tradition really "tells us" what to do. Because of its rich pluralism, it offers no univocal instructions, teachings or doctrines, but only a "language" or "grammar" within which to deliberate *for ourselves* about the ethics of armed force. It is an aid, not an oracle.

But a change has recently taken place in the way the just war tradition is invoked. Increasingly, political theorists and practitioners appeal to it as if to a body of abstract doctrines. Various "criteria" for just war are discussed in the manner of items on a moral checklist. And political actors now expect the tradition to tell them unambiguously what to do. The problem, of course is much like the problem observed with rights above. As the lists of essential criteria grow longer, and a gradual process of absolutization sets in, the tradition, whose original power to illuminate depended on our sensitivity to the texts and contexts from which it emerged, suddenly appears as vexingly *incoherent*. Of course, its incoherence would not be problematic, save for the fact that we expect it to deliver timeless, moral absolutes.

An example will help clarify the problem. In the just war tradition the category of "last resort" is as old as the tradition itself: If policies and actions short of war have a *reasonable likelihood of success*, then war is not just. The phrase "reasonable likelihood" is a key qualification which, in effect, reconciles the idea of last resort with the overall aims and purposes of the just war framework. Unfortunately, the way this "criterion" is now expressed in our overly-parsimonious checklists is quite different: "War must be a last resort." Understandably, but nevertheless erroneously, this criterion has been taken to mean that as long as something, *anything*, can be said or done in order to delay an impending war, it *must* be done, or else the war is unjust. The notion of last resort has thus been abstracted and absolutized.[6] But now there is no choice but for those who hold this view to oppose doggedly all those who maintain—also in keeping with the just war tradition—that leaders have a responsibility to protect the innocent and punish the wicked. This too can be dogmatically defended in absolute terms: Leaders have a moral obligation, indeed an absolute *duty* to protect and punish. Hence we arrive at incompatible absolutes vying for preeminence, or dogmatomachy.

3. Voting

A final example of the phenomenon appears today in voting behavior. Historically speaking, voter preferences in liberal democratic regimes have tended to coalesce around different, competing visions of the common good. This is largely due to the role political parties play in electoral politics, gathering together diverse groups and interests and melding them into a coherent platform. Party platforms tend to be broad and inclusive, rather than narrow and exclusive, for the simple reason that to achieve electoral success, parties need as much support as possible. The effect on voters has been positive. Voters who might otherwise incline to a radically individualized set of preferences are compelled to broaden their horizons—to aggregate with other voters—in order to find political support.

But voters and parties alike today seem less focused on a vision of the common good and more willing to agitate unapologetically for partial and idiosyncratic goods. I am referring to the rise of "identity politics" and "single-issue politics" which began in the latter part of the twentieth century and continues today. So-called identity politics focus on the narrowly defined self-interest of particular groups who share some trait such as race, class, gender, religious outlook, sexual orientation, ethnic or national background, medical condition, profession or hobby. By means of a process that can be quite ruthless, individuals who share this trait are assimilated, willingly or unwillingly, into the group. (The process is called "conversion.") If someone resists, he may be publically "outed"—exposed as possessing the very trait or traits in terms of which he refused to define himself. Apostates are sometimes subject to fierce reprisals. Thus the very identity of a unique and complex human being is reduced to a category (an abstraction) for purposes of political action.[7]

Single-Issue politics are similar. They involve campaigning for, or voting with an eye to, one essential policy area or outcome. Areas such as the environment, education or healthcare are treated as all-important. Outcomes such as "pro-life" or "pro-choice," "gun control" or "gun rights," a "balanced budget" or "the President's budget," are treated as non-negotiable. The phenomenon is as widespread as liberal democracy itself. In some countries, single-issue parties are formed and enjoy electoral success, though this tends to occur mainly in parliamentary systems based on proportional representation. In other countries such as the United States, well-established parties vie for the support of ever more idiosyncratic advocacy groups and their supporters. Perhaps the most troubling aspect of single-issue politics is the way voters are encouraged to cast votes according to a "litmus test"—that is, to go to the polls with one issue in mind and to support anyone who holds the desired stand on that issue, no matter what else he or she may stand for. The result is a titanic *bellum omnium contra omnes*, which, while occurring within institutionalized political structures, has little to do with politics in fact. All considerations of the political "whole" have been abandoned for special interests narrowly conceived. The goal is to *win*, not to balance competing goods in a publicly acceptable way through political deliberation.

To what extent have electoral politics been infected by single-issue and identity voting practices? Remarkably, researchers have not been able to answer this question, despite the fact that voting behavior is one of the most intensely studied and data-driven areas of political science. The problem in the United States is that our National Election Survey does not ask voters if they are driven by a single issue. The data are simply not available. Often, commentators try to claim that single-issue politics is "nothing new," that it's as old as the Abolition Movement in the United States (Flanigan and Zingale, 2010). But this is to miss the point. Not the origin but the sudden increase of single-issue politics is what is new. One way (admittedly indirect) to gauge the trend is to look at the growth of campaign contributions that come from groups that are narrowly defined in terms of one ideological or single-issue goal. According to one source, contributions to American political campaigns from individuals and political action committees associated with single-issue groups rose from $27.6 million in 1990 to $261.7 million in 2008, to $316.9 million in 2012, an increase of over 1,048% over the past 22 years.[8]

SOME LOGICAL POSTULATES

The three cases discussed above are merely indicative, not exhaustive, of a phenomenon that seems to be growing all the time. Certainly the instances could be multiplied, but let me now try to look behind the mere fact of dogmatomachy and consider some of its logical postulates. What must those engaged in this style of politics assume or believe in order to approach the political domain in this way? Of course the logical postulates behind any way of acting are myriad. But by hewing close to the phenomenon itself, without trying to peer too far behind it, we can highlight some postulates that prove quite revealing.

One postulate is unmistakable. It is a belief in the superiority of abstractions over embedded ideas and practices. What else could account for the process by which, in all three cases, something contextually rich and nuanced is transformed into something apparently released from all contingency? A tradition of rights, embedded in local compromises, practices and writs, is recast as a catalog of free-floating universal claims. A tradition of ethical reflection on war, embedded in various texts, historical contexts, and theological-philosophical frameworks, morphs into a bare-bones "just war theory" of supposedly universal application. A tradition of democratic political accommodation, embedded in various written and unwritten understandings of the best way for *this* people to live together, is transmogrified into an array of categorical imperatives ("issues"), each with its dogged defenders.

In all three cases, the process of abstraction is viewed as an improvement. Indeed, it has the appearance of a kind of magic operation, as in alchemy. Beginning with the base metals of a tradition, the ideologue performs his obscure rites, mumbling "*abstrahe, abstrahe*" (draw off, draw off), until, at last, he unveils something dazzlingly different from the raw materials with which he began, a pure doctrine. This is how "the criterion of last resort," "the right to life" and "single-issue politics" were born. Without the initial postulate that the abstract is better than the embedded, the process would not be nearly as ubiquitous as it appears today in democratic political life.

But are abstractions really better than embedded moral claims? No doubt abstractions seem more lucid and stark, and this has practical benefits: The clearer a moral or political doctrine, the more easily it can be taught and learned, and the more powerful it is for purposes of political debate. But such benefits come at a frightfully high cost. In fact, for every

degree of abstraction a moral insight undergoes, something is necessarily lost in its contact with human reality. Crucial nuances, caveats, and conditions are lost. And something is lost too in terms of coherence, as the three cases above well illustrate. These are not minor losses. They account, on the contrary, for a great deal of bad policy-making and unnecessary misunderstandings. In the case of the rights tradition, for example, people frequently enter the political fray today with radically false notions of what rights they actually possess and what a valid political outcome might entail. Often citizens believe they have been wronged or personally violated, when in fact all they have experienced is the everyday process of having to balance their preferences with those of others with whom they must coexist. The result is unnecessary political conflict and political instability.

But over-simplification and incoherence are not the only problems associated with political abstraction. Another problem, which arises when moral and political doctrines are torn from their original contexts, is that of groundlessness. At first, of course, the process of abstraction is perceived as strengthening the interests that are freed from all context. The heightened simplicity, clarity, and universality all seem to redound to their benefit. But eventually, some skeptic will be found to ask the pesky but inevitable question: "what is the ground of this claim?" And then, as if one suddenly realizes he is naked, a desperate search for cover occurs. It is amazing to consider how much ink has been spilt over the past century in the effort to find grounds for our homemade abstractions. The enormous scholarly literature on whether human rights are grounded in revelation, natural law, utilitarian considerations, or in Kantian deontology supplies one example of many. Once moral and political goods are severed from their actual grounds, and then later exposed as groundless, they seem suddenly more vulnerable to attack than was initially assumed. Abstraction suddenly appears as a weakness, not a strength. So we desperately search for grounds that will never seem satisfactory, because abstractions are *ex definitione* cut off from their grounds. It is as if we turn out the light and then complain that we cannot see.

Ultimately, the problem with the first postulate—that the abstract is better than the embedded—is that it is simply false. In mathematics, if someone can latch onto one truth, he can often use it to find others. For example if one element of a complex equation can be solved, it may be used to solve the rest. But moral and political "truths" are not like this. We cannot focus on one aspect of the human political terrain, abstracted from the overall context, and expect this to point the way to social harmony. This is because (to put it bluntly) humans are not numbers, and our affairs admit of irreducible contingency.[9] No doubt, we are frustrated by contingency. We wish for a degree of simplicity and universality that human moral claims do not actually possess. But to allow such frustrations to overwhelm us, to insist that the abstract is superior to the embedded when the results tell us otherwise, is to engage in a kind of intellectual dishonesty, all the worse for the disastrous political consequences.

Abstraction is a precondition for the second of dogmatomachy's logical postulates: the belief that the best, or at least a good, way to think about political goods is in terms of absolutes. To abstract a political good from its originating context is not yet to absolutize it. This requires a second step. To absolutize means to assert that something must be acknowledged unconditionally, to believe that it represents a solid piece of ethical reality such that it must not be compromised in the least by circumstances or even the presence of competing goods or principles. Again, the temptation to embrace this view lies in its promise of deliverance from complexity. Neither moral calculation nor political deliberation is necessary in a world of moral absolutes. The absolute itself serves as a talisman whose sacred properties guarantee the rightness of our cause. But of course moral and political absolutes do not deliver us from evil. They are in fact a kind of idealist fiction which, if taken too seriously, are more likely to plunge us headlong into the very evil we wish to avoid. I will not say that moral absolutes do not exist, though I admit I incline to this view. But they cannot be as abundant as our current style of politics suggests, or else we must admit to an incredibly tragic view of the cosmos, since we would be completely surrounded by logically incompatible and ontologically irresolvable moral imperatives.

The precise moment when the language of absolutes entered our moral discourse is difficult to pinpoint. The word itself ("absolute," a noun derived from the Latin verb *absolve*, "to set free") hails from the domain of metaphysics and mathematics. It refers evidently to something set free from contingency, as in the case of "2+2," which equals "4," no matter the circumstances. Among the great classical moralists: Plato, Aristotle, Augustine and Aquinas all agreed in the non-absolute condition of the moral life. One must transcend human experience, including the entire domain of ethics, in order to find goods that are not contingent.[10] From the time of Hobbes forward, the language of absolutes can be documented with relative ease. But even here the details are telling. Hobbes's programmatic claim that "by nature every man has a right to everything" depends on a prior abstraction: the so-called natural condition of mankind, which in

fact does not exist. Hobbes's state of nature is a poetic image, forged for purposes of clarification. But like all abstractions, it obscures as well as illuminates. Similarly, the conception of "absolute sovereignty" which Hobbes attempts to construct is by his own admission "artificial," not natural, and it too admits of exceptions: absolute sovereignty dissolves when the sovereign cannot protect his people, or when he poses a threat to the life of any one of them. In Kant, by contrast, we find full-blown moral absolutes. But they depend for their force on Kant's rigid separation of the noumenal and phenomenal worlds and his eccentric insistence that what is true in theory must also be true in practice—a claim that reduces human ethics to the level of math and eschews all responsibility for the consequences.

Absolutes, then, seem to have some place either above or below human politics. If we can somehow escape the phenomenal world—or if we can create an artificial God, like Leviathan—then we can rest in absolutes. Or if we reduce the human condition to one of total unpredictability and animal desire, we can speak with Hobbes of absolute natural rights, short-lived though they turn out to be. But politics is a domain in which moral absolutes are by definition tempered by one very stubborn "condition"—if not by thousands of conditions: the inescapable presence of other people who do not embrace the same absolutes. Politics is, no doubt, messy and frustrating. But the escape we attempt through moral absolutism is a fictional one at best. I do not mean to imply that if citizens simply *talk* more and try harder to understand each other, political conflict will wither away. On the contrary, I do not believe it will. But the effort to escape from the trials and tribulations of political deliberation by appealing to the language of absolutes is not only unworkable but predictably calamitous. That is because, unlike mere abstractions, absolutized abstractions cannot be reconciled with one another. Precisely because they are absolutes—unconditional moral and political imperatives—they must be relentlessly pressed. Thus the postulate of absolutization supplies the "trigger," as it were, that sets dogmatomachy in motion.

Still, but for a third postulate of dogmatomachy, liberal democratic citizens might yet avoid the endless wars it generates. Observing the political havoc that abstraction and absolutization have wrought, we might be inclined to glance back with some humility at the assumptions that carried us to this point, and inquire whether we have perhaps been thinking about politics in the wrong way. But the third postulate of dogmatomachy seems to keep such humility in check. It consists in the belief that total victory of one deified absolute over another can easily be achieved. Let me now throw some critical light on this postulate by introducing the Titanomachy as a *comparatum*.

ZEUS AGAINST THE TITANS

In Greek mythology, the Titanomachy refers to the decade long war between the Titans and the Olympian gods, long before the existence of mankind. The war itself has a backstory. After Gaia (Earth) created and mated with Ouranos (Heaven), she bore three kinds of offspring: the Hekatonkheires (hundred-handers), the Cyclopes, and the Titans. But Ouranos imprisoned all but the Titans in Tartaros. Outraged, Gaia arranged for the youngest of the Titans, Kronos, to attack Ouranos with a sickle, to cut off his genitals and leave him to die—all of which Kronos did. He then freed all his siblings from Tartaros. But before Ouranos died, he uttered an ominous prophecy to Kronos: that just as Kronos had rebelled against his father's reign, so too would Kronos' children rebel against him. Coup d'état begets coup d'état. And thus began Kronos' own paranoid rulership of the cosmos. His first move was to re-imprison his siblings in Tartaros. His next was to ingest his own children after they were born from his wife Rhea. But Rhea—much like Gaia before her—found such behavior frustrating, to say the least. And before long, she tricked Kronos by serving him a blanket-clad rock to ingest instead of his youngest son, Zeus.

The story of the Titanomachy is one of brutal rule punctuated by violent rebellions. But the final victory of Zeus over his father, Kronos, would mark the end of this cycle. Of course, Zeus' rebellion against Kronos was as violent as previous revolutions. Pretending to be a servant, Zeus served Kronos a mixture of wine and mustard to make him vomit up the Olympian gods, who soon joined Zeus in battle against the Titans. Ultimately, with the help of Athena, Apollo and Artemis in particular, Zeus was able to cast the Titans headlong into Tartaros. But, significantly, Zeus did not betray his allies in the war. His was not a paranoid or brutal style of leadership, though it was certainly grounded in power. Rather, Zeus divided the world among his three brothers such that Poseidon had the sea, Hades the underworld and Zeus himself the heavens. All three could share the earth. And all the other Olympian gods and goddesses were given a unique role in a new *taxis* according to their natural proclivities and talents. Though this new "pantheon" of gods and goddess was not free from conflict, their discord was kept within bounds, because Zeus was so superior to the rest in strength that he could intervene decisively when

peace required. Indeed, as he reminds his fellow Olympians in Homer's account, he is so far stronger than all the rest, that if he fastened them to a chain, he could swing them all into the air at once, even if earth and sky were likewise attached, and leave them dangling there in space (Homer, *Iliad* VIII.1 ff).

Let us now consider the Titanomachy against the *comparandum*, ideological warfare. No doubt, the similarity is what strikes us first. Just as Zeus attempted to wrest control of the cosmos from all rivals, so do ideological elites today attempt to "win it all." The basic similarity thus aligns with the postulate of final victory. But the *comparatum* also reveals why that postulate is flawed. Two basic ontological facts make Zeus's victory possible. One is his decisively superior strength. The other is the existence of a place, Tartaros, where political enemies can be made to disappear. But neither of these facts obtains for man—especially not for liberal democratic man. As Hobbes most famously pointed out,

> the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he. For, as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself (*Leviathan*, chapter 13).

Human relations are thus characterized by a degree of natural equality that prevents us from resolving political conflict in the way Zeus seized control of the cosmos. We may try, even going so far as to dream of a mortal god, a Leviathan, whose power would surpass all. But this is ultimately impossible. The inescapable fact of rough human equality ensures that Olympian-style victories will not last. Nor can we, in any event, bury our enemies with anything like the finality of landing them in Tartaros. Murder may be attempted, or one might try to "eliminate the bloodline" as Machiavelli shockingly recommended. But avengers tend to emerge nonetheless. Perhaps mass murder, if undertaken systematically enough, could supply political coverage for a while, but even this proves less than perfectly final. In any event, liberal democratic countries have come to find the practice distasteful.

Now it may be objected that final victory does in fact occur in human relations, with the following examples cited as proof: the defeat of the Nazis in the Second World War, the defeat of institutionalized slavery in the American Civil War, and the substantial legislative and cultural victories of the American Civil Rights Movement in the 1960s. Does this not stand as evidence enough that final victory *is possible*? One observation will serve, I hope, to put these cases in perspective. It is that they all involved immense cultural upheaval and miserably tragic events that no one in his right mind would wish for. These are not normal cases. Rather the bare necessity of putting a stop to evil (in the case of National Socialism) and to unrelenting violent oppression (in the cases of slavery and civil rights) left the lovers of liberty with no reasonable alternative save "war," to make things right. But it does not follow that these are good paradigm cases for everyday political disagreement. On the contrary, they are the exceptions which prove the rule that dogmatomachy rarely settles anything and, anyway, takes far too much toll on human relationships and cultural institutions to be a normal way of approaching politics. In this light, it becomes clear that the problem with much of liberal democratic "politics" today is that we have lost the wisdom and the prudence to discern that not every conflict is an extreme case.

Returning, then, to the Titanomachy, the differences between Zeus and mortal men do indeed help clarify the way human politics should be understood in all but the rarest cases of violent oppression. We should not copy Zeus. For we shall rarely succeed in eliminating our rivals once and for all, or in unilaterally creating a stable *taxis* of our own liking. The postulate of total victory is for the most part a dangerous illusion. And yet our dogmatomachies rage on as if some kind of conclusion were easily achievable—as if our most basic political focus should be on pushing our militant causes one step closer to total victory. What we are in fact doing is naively disregarding the end game. Our political armies look only to the next election cycle or the next case before the judiciary. Our outlook is thus not only partial, but myopic. We all seem to believe that somehow, as if by magic, a near-term victory will settle the differences among us once and for all. But this is folly. The postulate of total victory can be maintained in domestic politics only by refusing to differentiate the extreme from less extreme cases and by refusing take the long view.

HISTORICAL CONSIDERATIONS

What I have described so far is a political problem of considerable scale, along with some logical postulates that stand behind it. Logical postulates are not exactly "causes." They reveal what must be in the minds of those who engage in this style of political warfare—prior assumptions, beliefs, expectations. But to ask why this style of politics has increased

in recent decades is to ask a different kind of question; it is to seek a historical, not a logical set of preconditions. Why, we might ask, have the postulates relating to abstraction, absolutization and total victory become more widely characteristic of politics today than in the not-so-distant past? On this score, I can only conjecture. I am not sure that anything more rigorous than conjecture is possible.[11] Still, I would be surprised if the following amalgam of historical factors has not contributed something significant to the rise of dogmatomachy.

The first is not an historical event per se, but a process whereby political wisdom gradually dissolves over time. When political insights are first achieved, they are almost always prompted by rare events. From the experience of the English Civil War, we learn something of the value of toleration. From the experience of violent oppression, we learn to savor freedom. But as political insights are conveyed from one generation to the next, they tend (quite naturally) to become diluted. The stories and precepts we communicate to the young are less vivid than the original experiences. And as generations go by, we end up with little more than ghostly shadows of former wisdom.

> *Those who knew*
> *what was going on here*
> *must make way for*
> *those who know little.*
> *And less than little.*
> *And finally as little as nothing* (Szymborska, 2002).

Typically, these shadows take the form of abstract concepts. We know that we stand for "toleration," "freedom" and "equality," but we do not know why we cherish these goods or how to temper them in concrete political contexts. They are the desiccated relics of a more embodied political wisdom from the past. Now, this comes quite close to the process of abstraction identified above, but I am arguing here that it is a natural, even inevitable historical process. In fact, the political philosopher Eric Voegelin has studied this process with great care and referred to it, not surprisingly, as one of "dogmatization" and "doctrinal hardening." Hannah Arendt focused on it as well, and referred to it as "reification."[12] This is likely to be one factor in the rise of dogmatomachy.

But if dogmatization occurs all the time, then it seems incapable of explaining the sudden spike in dogmatomachy in recent decades. Let me therefore introduce another factor, which might contribute to our present situation. It is the waning of common experiences among citizens of liberal democratic countries, a problem that modern technology has only made worse. In comparison to the citizens of ancient Athens, for example, who had their public festivals, saw each other daily in the agora and fought side-by-side in war, contemporary democratic citizens scarcely have a single common experience. We each listen to different music, read different books, watch different movies. We allow a professional army to fight our wars. And now social networking media have enabled us to surround ourselves exclusively with like-minded "friends," while blocking out everyone else. Television and news programs increasingly cater to specific demographics and narrowly defined ideological types. The result is that we simultaneously become more diverse and less schooled by our diversity. How often have we heard of fellow citizens who become outraged when they learn that people elsewhere in their polity do not cherish the same values as they? Have we not reached the point where most of us regard large numbers of our fellow citizens as "beyond the pale?" We attempt to silence those we do not like, hoping to remove them from public view—denying them airtime—as they attempt to do the same to us. Thus the historical trend toward atomization, or at least a more highly fractured social environment, seems to contribute directly to the problem.

A final explanation, which I take to be the most illuminating, is a change in the way Western democratic peoples view the nature of government. In the eighteenth century, when liberal ideas and movements were initially spreading across Europe, Britain, and the United States, the concept of "limited government" was widely embraced for two reasons. On the one hand, people knew firsthand how much havoc could be wrought by overreaching monarchs, and they wished to keep this cancer in check. On the other hand, they were witnessing (also firsthand) the astonishing degree of creativity and economic growth that occurs when governments leave people free to use their capital and ingenuity as they see fit, without undue interference. The shift in liberal philosophy away from the idea of limited government to the idea of a powerfully active government which must intervene in private affairs in order to ensure desired outcomes is a fairly recent phenomenon. In much of Europe that shift occurred in the middle of the nineteenth century in response to the needs of an enormous underclass that was suffering from the upheavals and dislocations of the Industrial Revolution. In America, the change came much later for a number of reasons, including our founding commitment to Lockean principles of classical liberalism.[13] But it came nonetheless when, during the Great Depression, unemployment rates reached such heights that to do nothing seemed counter-productive

and callous. So America too went the way of European liberalism, and the result has been a steady—indeed meteoric—rise in the size, scope and power of government ever since.[14]

But there is a downside to this, which has largely gone unanalyzed. When governments are as powerful and involved in private affairs as they are in liberal democratic countries today, when they are willing to support *some* private ideals and enterprises at the expense of others, when the possession of this awesome power is up for grabs during every election cycle, what naturally occurs is that everyone wants to win that power—or, put differently, no one can afford to lose it. The stakes are simply too high. This was not a problem when government was "limited," because the sorts of things that governments did were for the most part boring. But today, government is far from boring. It is the most compelling show in town, one in which competing factions relish the chance to lord it over all others as long as possible. And under such conditions, how could citizens think of politics as anything else but war? Currently, the war is mostly waged by means of money and words. More than six billion dollars was spent in 2012 by the combined American presidential candidates in their titanic effort to knock each other out of contention.[15] Politics today often seems to ignore the common good and to focus only on winners and losers, tearing the culture apart rather than bringing it together. And yet there's no end in sight, no "end game" that promises to release us from the destructive impulses that have been let loose.

THE THEORIST'S GAZE

People naturally want to fix the problems they see, and I confess to wondering if any remedy might be found for the predicament in which we find ourselves. Because human beings are not machines, or inanimate objects, the mere understanding of a problem can often contribute to its solution. Surely it is in our power to recognize the absurdity of the logical postulates behind dogmatomachy—the postulates of abstraction, absolutization and total victory. Surely we can, if we will, abandon them. But for various reasons such a change of heart and mind is not likely to occur anytime soon. Like a marriage that has turned sour, political associations that devolve into war are hard to put right again. The good will is gone, the trust, the pride in the collective identity. It was in times like these that the ancients called upon a lawgiver—a Lycurgus, Solon or Moses—to create something new and well-ordered without the daunting challenge of having to reform ourselves for ourselves. But lawgivers like these are in short supply today.

Still, the problem seems to me chiefly constitutional. As long as the power of government is simultaneously all-determining and up for grabs, the result will be bitter conflict. Thomas Hobbes understood this more clearly than anyone. That is why he attempted to remove political power into the hands of a third party, as superior to the would-be political competitors as a god is to man. At the same time, he tried to emphasize a "limited" conception of the reach of government—not its power (which is absolute), but its scope. One almost pities the poor Hobbesian sovereign when one learns that his awesome, absolute power to make laws is to be exercised mainly in the manner of a gardener, trimming the hedges along the road so as to keep travelers "in the way" (*Leviathan*, ch. 30). This has nothing of the excitement or adventure that attends the art of lawmaking today. Who would want to govern if it did not mean the ability to help your friends and harm your enemies, to have a dream and compel others to live it?

The psychological underpinnings of dogmatomachy, which amount to little more than the love of power and the belief that we are gods, are a permanent feature of the human condition. They are not so much the *cause* of dogmatomachy as they are contributing factors. The logical underpinnings are similarly perennial, but they seem to flare up from time to time. We can expose the folly of abstract, absolutist, winner-take-all politics, but people will do what they will do. We should know from experience that cultures do not change their thoughts and practices simply because these appear incoherent or irrational to some academic observer. But, in any event, the change in the way we *understand* government—as active rather than limited—seems to be curable. And this has created the conditions under which the logical and psychological factors can thrive. My hunch, however, is that things are going to get worse before they get better. What we seem to have forgotten is a piece of political wisdom from the dawn of the liberal era. Before there were ideological wars, there were religious wars, and a great amount of bloodletting took place before people came to the conclusion that war was a colossal waste of time and energy; and that, perhaps, we should rather limit the role that government plays in religion (and *vice versa*). Not only has the broader lesson been forgotten—that limited government is better than war—but the specific lesson about religion is slipping from our grasp as well. This bodes ill for the decades to come, because political wisdom renews itself not through book-learning or through college lectures, but through the

pain of experience. "*Wenn die Philosophie ihr Grau in Grau malt, dann ist eine Gestalt des Lebens alt geworden, und mit Grau in Grau lässt sie sich nicht verjüngen, sondern nur erkennen*."[16] Perhaps, then, only when our dogmatomachies get worse, much worse, will we begin to recover the practice of politics that suits human beings rather than gods.

NOTES

1 Mephistopheles in Goethe, *Faust*, Part 1, lines 2038–9: "My worthy friend, gray are all theories/ And green alone life's golden tree."

2 This is a method I borrow from Michael Oakeshott (1975).

3 "Dogmatomachy," from the Greek, *dogma* (an opinion that falls short of knowledge) and *machē* (battle) is a neologism I draw from the writings of the late political philosopher, Eric Voegelin. Voegelin used this colorful and philosophically pregnant term in passing without developing it. See for example his lectures, "The Drama of Humanity," (in Voegelin, 2004), esp. pp. 174-177; and his essay, "What is Political Reality," (in Voegelin, 2006), esp. pp. 385-391.

4 The Greek *dikaios eimi* with the infinitive means "I have a right to do" or "am bound to do." The Latin *jus* can also be used to designate a personal right, and was so used in Justinian's *Digest* at least 294 times, as pointed out by Donahue (2001), pp. 506-35.

5 Dershowitz (2004), pp. 166-168, lists 50 incompatible rights. The examples above are selected from his.

6 See Walzer (2006), pp. 155, 160-161, who rightly complains that "lastness" is too often invoked as if it were a metaphysical principle that can never be reached in real life; it is invoked "as an excuse for postponing the use of force indefinitely." But last resort really means simply this: "Look hard for alternatives before you 'let loose the dogs of war.'"

7 A classic study is Schlesinger (1991).

8 http://www.opensecrets.org/industries/totals.php?cycle=2010&ind=Q. OpenSecrets.Org's Center for Representative Politics gathers data from the Federal Election Commission and compiles it each year.

9 Auden (1948), p. 61, deftly contrasts two worlds: the world of "identical relations and recurrent events, describable, not in words but in terms of numbers," and the world of "faces, analogical relations and singular events, describable only in terms of speech."

10 When God commands Abraham to sacrifice Isaac—a command which Abraham is willing to obey—God is testing Abraham's "fear," not his commitment to moral absolutes (see Gen. 22:12). Christ's Sermon on the Mount has something of the flavor of absolutes. But Christ never describes them as such, and they must, in any event, be reconciled with competing moral strictures from elsewhere in the gospels, as St. Augustine

famously showed in his seminal reflections on war: Sometimes the counsel to "turn the other cheek," if taken absolutely, violates the demands of charity.

11 Readers of Oakeshott and Voegelin will know that each thinker offered careful historical accounts of the rise of phenomena similar to what I call dogmatomachy. Oakeshott traced modern "Rationalism" back to the dawn of the modern era and to the inordinate quest for certainty that the upheavals of modernity wrought. Voegelin similarly traced the origins of modern "ideology" to the early-modern rise of scientism and the collapse of imperial Christianity in the West. I find both accounts plausible and illuminating. But I am looking for a more proximate explanation for a spike in ideological warfare that is decades old, not centuries old.

12 See, Voegelin (1974), pp. 39, 56; and Arendt (1957), p. 95: "always the 'dead letter' replaces something which grew out of and for a fleeting moment indeed existed as the 'living spirit.'" Arendt, however, is equivocal about this process since, without reification human action, speech and thought would not be remembered. In order to remember, we reify. But then the object of remembrance is different from the experience itself.

13 On which Hartz (1955) is still illuminating.

14 Tragically, the American political tradition includes a unique teaching that makes dogmatomachy much worse for us, once the idea of limited government is abandoned. It is the way we have always thought of factions, following James Madison in *Federalist* 10, as cancelling each other out under conditions of competition. On this theory, the common good is supposed to emerge from factional strife, like a phoenix rising up from the ashes. But in fact, the theory of factions in *Federalist* 10 has not worked. And what has happened instead is that American citizens wage political war against each other with an utterly clear conscience.

15 The Center for Responsive Politics calculates the total cost at $ 6.3 billion. They reported $5.8 billion for the 2008 race and $880 million for 2004.

16 Hegel (1911), p. 17: "When philosophy paints its gray in gray, then has a form of life become old. With philosophy's gray in gray it cannot be rejuvenated but only understood."

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Oakeshott on the Rule of Law: A Defense

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Abstract: Oakeshott's essay on the rule of law has had no impact on the literature on the rule of law. But it deserves more serious consideration. Oakeshott provides an account of the modern legal order that parallels the two tier models of Hans Kelsen and H. L. A. Hart, as well as Max Weber, Georg Jellinek, whom Oakeshott cites as a source, was Kelsen's teacher and Weber's colleague. What Kelsen and Weber have in common is the ideal of the law as a neutral object, as distinct from an instrument of policy, a notion that Oakeshott adopts and expands on.

Keywords: Michael Oakeshott, Hans Kelsen, Rule of Law, Max Weber, Legal Positivism, Freedom

The concept of the rule of law has been a topic under continuous discussion since at least the 1830s, when the liberal concept of the *Rechtsstaat* was developed by Rudolph Gneist to characterize what Germans understood to be the type of legal order found in Britain. Since then it has been routinely invoked as a Conservative Liberal[1]doctrine, for example by Friedrich Hayek, and in more recent years as a sign and index of national development. Indexes are used to rate the extent to which the rule of law prevails in different countries, and the promotion of the rule of law thus understood was a policy goal of the World Bank. The rule of law was linked in various studies to development, that is to say modernity.

There are, however, serious conceptual problems with the concept of the rule of law, which appear not only in these indices but in the tradition of legal theory itself. One of these can be seen in Hayek's attempts to formulate the concept. Hayek made a point of tracing concepts such as equal treatment before the law to their Greek root in isonomy, but made the bugaboo of *Rechtsstaat* thinkers, official and judicial discretion, central to his concept of the rule of law: the rule of law was identified as the elimination of official discretion. The difficulty, as Hayek himself acknowledged, was that discretion in application of the law was ineliminable and in many cases desirable. Equal treatment was another problem: failing to give equal treatment under the law would be a violation of the law or failure to enforce the law in the first place, not some additional fact about the law or its role. Similar issues arise for the long lists of rule of law criteria that appear in indices, some of which seem to confuse the notion of the rule of law with extensive dependence on the state, leading to the placement of the Scandinavian countries, which lack any rule of law tradition in the usual sense, on the top of the indices.

The fundamental problem is this: obeying the law, obedience to the law by officials, and the effective application of the law by the state, seem together to be the meaning of the rule of law as it appears in these indices. The various specific criteria that appear on the relevant lists include protections or means of assuring that the law will be obeyed, especially by officials, but in the end obedience and effective enforcement and administration is what counts. This undermines the notion that the rule of law is somehow a fundamental or

even distinctively liberal idea, and leaves hanging our intuition that the rule of law is a distinctive and desirable state. In Hayek, indeed, it turns into a kind of mysticism, suggested or intimated by the notions of isonomy and limiting discretion, but lying tantalizingly beyond them.

It is striking that the two least mystical of continental legal thinkers, Hans Kelsen and Max Weber, avoided the concept of the rule of law. Kelsen denounced it as ideological and excluded it from his pure theory of law. Weber replaced the ideologically loaded concept of the *Rechtsstaat* with the de-ideologized sociological concept of rational-legal legitimate authority, which he treated as an ideal-type. The concept of the ideal-type was taken from Georg Jellinek, though for Jellinek the sense of "ideal" was normative and good, whereas for Weber it meant an idealization without normative implications. The notion of ideal-type, as we will see, becomes relevant to Oakeshott's own account.

Oakeshott's essay on the rule of law (1983) has had no impact on the literature on the rule of law. But I will argue that it deserves more serious consideration as an account of the phenomenon that Gneist was trying to capture, which the indices and Hayek do not. Oakeshott provides a rich account of the modern legal order. It parallels the two tier models of Kelsen and H. L. A. Hart. But the difference in Oakeshott's approach is that it is not focused on obedience and effectiveness, as Kelsen was, but on something external to the law itself. Like Weber, who was concerned with legitimacy, Oakeshott was concerned with the understanding and nature of commitment to the law, and thus with understanding the law as an unusual object of commitment or subscription. Like Weber, he was concerned with understanding it as something both distinctively Western and modern.

Oakeshott was sparing with sources, and his German sources remain somewhat mysterious. The textual basis of this discussion is the similarities and differences in the arguments, but there is a specific and for Oakeshott unusual comment that reveals his appreciation for this body of thought. In the middle of his paper "The Rule of Law," Oakeshott makes an apparently odd comment, to the effect that the idea of the rule of law "appears in a slimmed-down version in the writings of the jurist Georg Jellinek. It hovers over the reflections of many so-called 'positivist' modern jurists" (1983, p. 162). This is an important clue to Oakeshott's own thinking, which diverges radically from the conventional literature on the rule of law and also from what has been called the rule of law industry. Weber and Kelsen are relevant comparisons because it is their immediate predecessors, notably Jellinek, who was Kelsen's teacher and Weber's colleague, whom Oakeshott mentions specifically as posing the issues. When Oakeshott refers to positivism, it is less likely that he means the obscure legal positivists who preceded Kelsen than Kelsen himself, who became the representative and most famous by far of all positivists and defined the category in the twentieth century. What Kelsen and Weber have in common is the idea of the law as a neutral object, as distinct from an instrument of policy. This is what supports freedom, for Oakeshott, and distinguishes rule of law countries from others, in contrast to the bias toward state-dependent regimes in the indices.

The mention of legal positivism is somewhat startling, however, for a simple reason, and one that relates to freedom itself. Hans Kelsen in particular made an argument that seems completely contrary to the notion of the rule of law as traditionally understood when he rejected the idea that the law of dictatorships was not law. To many of his critics, the whole point of having a concept of law was to distinguish genuinely legal regimes from pseudo-legality. A theory of law that failed to do so amounted to a kind of endorsement of evil regimes and a legitimation of their law. Natural Law theorists in particular were opposed to Kelsen and "positivism," and indeed Kelsen was opposed to them. But it was difficult to produce an account of the rule of law that made the relevant distinctions without appealing to some sort of notion of Natural Law, or to appeal to claims which had the same logical structure, and therefore the same flaws. Behind any discussion of Oakeshott is this issue: is the rule of law a differentiating standard, or is it coterminous with legal order itself, and if it is a standard, what does its authority come from?

Oakeshott, making a comment on Hobbes, uses Kelsen's language of the *Grundnorm*, when he mentions "the entrenched Basic Law of a *Rechtsstaat*" (1983, p. 158). This at least raises the question of how Oakeshott's own argument relates to these thinkers. It turns out that the relation is close. Kelsen says explicitly that idea of the *Rechtsstaat*, the German language version of the rule of law is ideological.[2] The project of Kelsen's 'pure theory of the law' is one of refining law of extraneous or extra-legal ideological elements. Oakeshott is also concerned with the problem of ideology, and the relation of ideology to law, which he addresses, as we will see, in a slightly different but closely related way, in terms of the typically Kelsenian problem of the relation between justice and law.

Although Kelsen approached the problem in a radically different way, the results, and even the central thesis, turn out to be very similar, though in the end there is a striking

difference with obscure implications. For Kelsen, such notions as the *Rechtsstaat* were historical half-truths, only partially emancipated from their origins in religiously-tinged Natural Law thinking, with misleading affective associations that had developed in the *longue durée* of political and philosophical contestation, which sufficed neither as sociological nor legal ideas—nor indeed as adequate factual descriptions in any *wissenschaftliche* or disinterested scholarly setting.[3] Having intuitions about such things or their essences was of no interest to him: his goal was to strip them of their ideological content to get to their factual core. Kelsen's 'pure theory of the law' was an attempt to retain some concept of legal validity in a theory of the law that was otherwise purged of ideological, valuative, and non-legal elements.

Oakeshott also wants to think of the rule of law in a purified way. He does this in terms of the notion of authenticity.

> The sole terms of this relationship are the recognition of the authority or authenticity of the laws. Thus, the first condition of this mode of association [i.e., the rule of law] is for the associates to know what the laws are and to have a procedure, as little speculative as may be, for ascertaining their authenticity and that of the obligations they prescribe (1983, pp. 137-38).

On the surface this formulation seems lapidary and innocuous. Oakeshott adds in a footnote "That 'law regulates its own creation' is not a paradox but a truism" (1983, p. 139 n5). But Kelsen formulated this issue in terms of validity, and claimed that the sole criteria for the validity of a law was that it had been enacted in accordance with law, by persons authorized by law to do so. Oakeshott makes the same claim, in terms of offices.

And this [condition of the rule of law] is satisfied only where laws have been deliberately enacted or appropriated and may be deliberately altered or repealed by persons in respect of their occupation of an exclusively legislative office and following a recognized procedure; where the sole recognition of the authenticity of a law is that expressed in an acknowledgment that it has been properly enacted; where this acknowledgment does not entail approval of what the law prescribes; and where there is no other independent office authorized to declare a law inauthentic on account of what it prescribes. In short, the first condition of the rule of law is a "sovereign" legislative office (1983, p. 138)

This sounds different than Kelsen: sovereignty vs. legality or the *Grundnorm* as the first condition of law. But

> … since this authority cannot be identified with any natural quality (virtue, prudence, wisdom, charisma and so on) possessed by or attributed to its contingent occupants, or inferred from any such quality, it must be an endowment of the office itself; that since it is an authority to create obligations…; and that since it is an antecedent authorization to make law, it cannot be identified with approval of what the law prescribes (Oakeshott, 1983, p. 139).[4]

Authorization is a matter of law, not justice. So the result is the same as for Kelsen: "the expression 'the rule of law' denotes a self-sustained, notionally self-consistent, mode of human association in terms of the recognition of the authority or authenticity of enacted laws and the obligations they prescribe in which the considerations in terms of which the authenticity of a law may be confirmed or rebutted are themselves enacted law; in which the jurisdiction of the law is itself a matter of law" (*ibid*). This last phrase is at the core of Kelsen's conception of both the state and law, and leads directly to his notion of the *Grundnorm*:

> Law regulates its own creation inasmuch as one legal norm determines the way in which another norm is created, and also, to some extent, the contents of that norm. Since a legal norm is valid because it is created in a way determined by another legal norm, the latter is the reason of validity of the former. The relation between the norm regulating the creation of another norm and this other norm may be presented as a relationship of super- and sub-ordination, which is a spatial figure of speech. The norm determining the creation of another norm is the superior, the norm created according to this regulation, the inferior norm. The legal order, especially the legal order the personification of which is the State, is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms. The unity of these norms is constituted by the fact that the creation of one norm—the lower one—is determined by another—the higher—the creation of which is determined by a still higher norm, and that this *regressus* is terminated by a highest, the basic norm which, being the supreme reason of validity of the whole legal order, constitutes its unity (Kelsen, [1925] 2006, p. 124).

This, again, might seem innocuous, as might Oakeshott's comments on the authenticity of law being governed exclusively by considerations that are themselves a matter of law. But in both cases it is directed against the dominant Western tradition. Oakeshott recognizes this when he comments:

> In the writings of many of its early exponents and for a large part of its history, a state ruled exclusively by law been represented as a state ruled by *jus*; not merely the *jus* inherent in *lex* (which nevertheless received appropriate recognition), but *jus* in the extended sense of a "natural," "rational" or "higher" law, recognized and declared (but not made) in legislative utterances and correspondence (or absence of conflict) with which endows them with the quality of *jus* (1983, p. 155).

This is the doctrine of Natural Law. Oakeshott spends much of his discussion of the rule of law on showing that this will not work: that *jus* and *lex* have a relation, but not this one. Kelsen spent much of his career attacking Natural Law and its vestiges in legal philosophy. In the end, they have a very specific disagreement on the relation of *jus* and *lex*, but it is a difference that is intelligible only in terms of their agreement on the nature of *lex*.

STATE-LAW IDENTITY, AUTHENTICITY, AND SUBSCRIPTION

Oakeshott uses the language of "subscription" to understand the relation of the individual to "authentic law" and the state understood as an association between subscribers.

> … the vision of a state in terms of the rule of law should, then, be that of an association of *personae* indistinguishably and exclusively related in respect of the obligation to subscribe adequately to the non-instrumental conditions which authentic law imposes upon their self-chosen conduct (1983, p. 161).

Kelsen's language is different, but the point is parallel. For Kelsen, at least in this early text, there is notion of real validity implied by the notion of belief in validity—or as Kelsen puts it "the individuals living within the State have an idea of law in their minds, and this idea is—as a matter of fact—the idea of a body of valid norms" (Kelsen, [1925] 2006, p.177).

> The Pure Theory of Law, as a specifically legal science, directs its attention not to legal norms as the data of consciousness, and not to the intending or imagining of legal norms either, but rather to legal norms qua (intended or imagined) meaning. And the Pure Theory encompasses material facts only where these facts are the content of legal norms, that is, are governed by legal norms. The problem of the Pure Theory of Law is the specific autonomy of a realm of meaning (i.e., the meaning of positive laws). (Kelsen, [1934] 2002, pp.12-13).

The content of legal norms is Oughts, or in Oakeshott's terms "the non-instrumental conditions which authentic law imposes upon their self-chosen conduct" (1983, p. 160).

Where does this leave us with the state? For Kelsen, the core idea is that the law consists in the production of norms in accordance with norms, that legality is a matter of action in accordance with legal norms, norms which in turn are produced in accordance with other norms. Oakeshott reiterates this: For Kelsen, state action is the action of individuals or bodies that are authorized by norms to produce norms according to norms. The acts of the state are no more than these norm-governed or authorized acts. The 'state' and state power, accordingly, are not the source of law, the law is the source of the state and state power: Kelsen's famous thesis of the identity of the law and the state is precisely this: there is nothing more to the state than is given in the law. Kelsen's distinctive contribution to the philosophy of law is his relentless insistence on the idea that law is norms created in accordance with norms, and the key implication of this idea, the hierarchical structure of the normative order itself, the *Stauffenbautheorie*.

Oakeshott's account of sovereignty under the rule of law is a version of the identity thesis. He rejects any grounding of the state in the will of the people or natural law: the grounding is and can be only in law itself, which authorizes personae as occupants of offices.

> … the rule of law does not itself specify any particular constitution or procedure in respect of this legislative office. It does not itself stipulate who shall occupy it, the rules in terms of which it may properly be occupied, or the procedure to be followed in enacting law. It requires only that these should themselves be matters of law. And it attributes a *persona* to the occupant or occupants of this office which reflects the engagement of enacting authentic rules: a *persona* without inter-

> ests of its own and not representative of the interests of others. That is, a *persona* which is the counterpart of the persona of those related in terms of the rule of law (1983, p. 138).

This is Kelsen's identity thesis *in nuce*. But there is a difference in the scope of application. For Kelsen this is a general theory of law and state, as the title of one of his major works puts it ([1925] 2006). His theory, as another work puts it, *Pure Theory of Law* ([1960] 1967), is a theory of positive law, meaning of all actual law, not merely that which is deemed to be genuine law according to some theory, such as one of the endless list of neo-Kantian theories of law or the theory of Natural Law.[5]

THE 'NOTHING MORE' QUESTION: DIFFERENT ANSWERS?

Kelsen's point in the *Pure Theory of Law*, and in other texts, is that not only is the *Grundnorm* or Basic Law the normative ground of a dynamic legal system, it is the sole and sufficient normative ground. Kelsen pursued this argument by systematically re-analyzing traditional legal notions in order to show that the implications for legal and political thought that had been read into them by previous theorists did not follow from what was logically required to account for the law. Kelsen's claim was that the complete legal meaning of the concepts could be adequately analyzed in terms of the idea that norms are produced by norms. This was the core of his project of de-ideologization. Oakeshott's reference to the rule of law as an ideological slogan, and his statement that he is confining himself to what it might mean apart from its ideological meaning, signals a parallel but different aim. And this difference is connected to the difference between Kelsen's attempt to construct a general theory of state and law and a theory of positive law, meaning of all law. The obvious implication of this difference is that Oakeshott is not committed to claims about the legality of dictatorships. But there is much more at stake.

Kelsen was a straightforward relativist. His account of the problem of values can be captured in a passage from Joseph Schumpeter quoted by Kelsen but more famously by Isaiah Berlin: "to realize the relative validity of ones convictions, and yet stand for them unflinchingly is what distinguishes a civilized man from a barbarian." Berlin comments that "To demand more than this is perhaps a deep and incurable metaphysical need; but to allow it to determine one's practice is a symptom of an equally deep, and more dangerous moral and political immaturity" (Berlin, 1958, p. 57; cf. Hardy, 2010, pp. 89-90). These were also Kelsen's views with respect to value questions, as he reiterated in many places (1957; [1929] 2000). But Kelsen was a normativist with respect to the law itself. This places him in a unique position, and its uniqueness is central to understanding how he differed from his peers. For Kelsen, justice was a value, and a highly contested one. It was not part of a normative science of the law: the normativity of the law consisted in and was exhausted by the *regressus* to the *Grundnorm*. Justice is a valuative question. Legality, in contrast, is a factual issue, though one in the realm of normative fact, the system of law itself: was the supposed law created in accordance with law? This is why, for Kelsen, *jus* and *lex* are separate.

Oakeshott is asking the different but parallel question "What exactly is the notion of *jus* postulated in the rule of law?" For Kelsen, the answer is that there is none, though it is consistent with his account to say that there is no notion of justice in law other than that which is contained in the law itself. The structure of the argument, however, is the same for both: like Kelsen, Oakeshott is asking whether there is anything more here than the consideration that the law has been created in accordance with law. He puts this in very similar language:

> In the rule of law, the constitution of the legislative office is neither more nor less than that which endows law with authenticity, consequently the *jus* or *injus* of what is enacted cannot be inferred from such a constitution or procedure. Thus, to favor a so-called "democratically elected" legislature is to express a belief that its authority to enact laws will be more confidently acknowledgeable than that of a legislature assembled and constituted in any other manner; it forecasts nothing whatever about the *jus* or *injus* of its enactments. For that we must look elsewhere (1983, p. 140).

The belief in democracy is thus irrelevant both to legality and to the question of what the *jus* in law is. So the question is whether there is any *jus* in *lex* beyond issues of the authenticity of a law. Oakeshott adds something:

> There are some considerations that are often and understandably identified as considerations of *jus* but are in fact inherent in the notion, not of a just law, but of law itself. They are conditions which distinguish a legal order and in default of which whatever purports to be a legal order is not what it purports to be: rules

> not secret or retrospective, no obligations save those imposed by law, all associates equally and without exception subject to the obligations imposed by law, no outlawry, and so on. It is only in respect of these considerations and their like that it may perhaps be said that *lex injusta non est lex*. And there are also similar considerations concerned with adjudicating cases (for example, *audire alteram partem*), which we shall come to later (1983, p. 140).

This is a line of argument that resembles the lists of the rule of law industry, and indeed includes Hayek's notion of equality before the law as a condition of the rule of law. But Kelsen would accept all these considerations as well: they are conditions that he would place under the heading of law made according to law, and the effectiveness of a legal order. He appeals to the international law notion of *lex imperfecta*. When Kelsen discusses such things as the technical inadequacy of the law of the League of Nations, he is primarily concerned to exclude ideological elements with no legal meaning (Kelsen, 1939). But his positive proposals for legal structures making ineffective treaties like the Briand-Kellogg pact effective conforms to Weber's usage: the pact was technically inadequate because it lacked a court with compulsory jurisdiction—this was error of construction (Kelsen, 1942, p. 45).

Is this all there is for Oakeshott as well? It appears that the answer is "no." He cites "considerations" distinct from questions of authenticity:

> Beyond this, the *jus* or *injus* of a law is composed of considerations in terms of which a law may be recognized, not merely as properly enacted, but as proper or not improper to be or to have been enacted; beliefs and opinions invoked in considering the propriety of the conditions prescribed in a particular law. *Jus* or *injus*, here, is an attribute neither of the mode of association, nor of the totality of the rules which may constitute the current conditions of such an association, nor of the performance of a legislator, but only of what a particular law prescribes (1983, p. 141).

This is to say that these considerations do not apply to a legal order, or to the mode of rule of law association itself, but rather to specific laws.

But what sort of considerations are these? Are they the unchanging universal principles of Natural Law? Or are they value-choices, which in Kelsen's terms at least would imply that they are ungroundable and ultimately arbitrary. Can they be the kinds of considerations that would exclude dictatorial regimes? Or is there some other way, consistent with this account, that this exclusion could be made?

Oakeshott's comments are, up to point, Kelsenian. He rejects the relevance of Natural Law. But he puts the point negatively, in terms of the problems:

> But whether or not such certainty and universality are attainable in this or any other manner, it may be said that association in terms of the rule of law has no need of them. First, it postulates a distinction between *jus* and the procedural considerations in respect of which to determine the authenticity of a law. Secondly, it recognizes the formal principles of a legal order which may be said to be themselves principles of "justice." And beyond this it may float upon the acknowledgment that the considerations in terms of which the *jus* of *lex* may be discerned are neither arbitrary, nor unchanging, nor uncontentious, and that they are the product of a moral experience which is never without tensions and internal discrepancies (1983, p. 143).

This is a somewhat opaque formulation, even in the larger context of the argument, but the point is clear: the rule of law recognizes the legal procedural distinctions that authenticate law, and distinguishes between these and *jus*. But there is something more: something non-arbitrary, changing, and contentious that is the product of a moral experience that itself has internal tensions and discrepancies.

Moreover, this extra thing, this meta-discussion of the law, is part of the rule of law as a mode, even though it is not part of the law itself. As Oakeshott explains,

> What this mode of association requires for determining the *jus* of a law is not a set of abstract criteria but an appropriately argumentative form of discourse in which to deliberate the matter; that is, a form of moral discourse, not concerned generally with right and wrong in human conduct, but focused narrowly upon the kind of conditional obligations a law may impose, undistracted by prudential and consequential considerations, and insulated from the spurious claims of conscientious objection, of minorities for exceptional treatment and, so far as may be, from current moral idiocies. And what it has no room for is either a so-called Bill of Rights (that is, alleged unconditional principles of *jus* masquerading as themselves law),

> or an independent office and apparatus charged with considering the *jus* of a law and authorized to declare a law to be inauthentic if it were found to be "unjust." Such considerations and institutions may perhaps have an appropriate place where association is in terms of interests and "*jus*" is no more than an equitable accommodation of interests to one another, but they have no place whatever in association in terms of the rule of law (1983, p. 144).

The rule of law has no place, in short, for courts applying the principles of Natural Law to determine whether a law is just, or conforms with the will of God, or even one concerned with what one would now call "social justice." But it *requires* something more than authentication: an appropriate form of discourse which is akin to moral discourse.

This is still largely negative. And it raises for Kelsen the question that his Natural Law critics repeatedly pressed against positivism: what about dictatorial regimes? One could imagine a highly aggressive and intrusive legal regime that conformed to this core notion of the rule of law that afforded little protection for the individual against the state: a well-oiled police state. Beyond this crude riposte, there is a more subtle question: whether, without going very far beyond the positivist conception of law, we can capture the more elusive and ambiguous sense that writers on the rule of law appeal to but struggle to define. Kelsen's question would be this: can there be any politically neutral notion of the rule of law which respects the fact-value distinction, or captures the elusive sense—or whether the concept of the rule of law is inevitably ideological or valuative, or a concealed political preference. Oakeshott needs to be answering a different question, and it hinges on what I am calling the elusive sense of the rule of law.

Oakeshott does not, as Kelsen does, think that his problem is to provide a general account of positive law. Not all legal orders are rule of law associations. So he is in a position to answer the police state objection. His answer is subsumed in a more general one:

> What we are seeking is an alleged mode of association in which the associates are expressly and exclusively related in terms of the recognition of rules of conduct of a certain kind, namely "laws." And what we have here is associates related expressly and exclusively in terms of seeking to satisfy substantive wants (1983, p. 125).

It is evident, and becomes more evident in *On Human Conduct* (1975), that there are no, and perhaps cannot be, states in which relations are "exclusively" in these terms. The two "exclusively" clauses above are polar. Oakeshott puts this in terms of a question:

> The rule of law may be recognized as one among the ideal modes of human relationship, but is it a possible practical engagement? Could it be made actually to occur? And further, what place, if any, does it occupy as a practical engagement in the history of human hopes, ambitions, expectations or achievements in respect of association? (1983, p. 149).

The answer is that this construction is an instance of what Jellinek and later Weber called an ideal type. It is a conceptual construction or idealization that may never be fully realized in the actual world of politics, but which nevertheless, by virtue of its conceptual clarity, enables us to make clear something about what is in the real world, by comparing the idealization to the actual. But it is also, as Oakeshott points out at length, an idealization of a deep and variously articulated impulse in European history to live under the rule of law and to create states that operate under it.

The dictatorship question that motivated so much criticism of Kelsen can be disposed of quickly. As Oakeshott has defined the mode of association of the rule of law it excludes purposive organizations. The usurper or tyrant is paradigmatically purposive:

> A usurper and a tyrant are alike without authority, but for different reasons. A usurper may have the disinterested persona required of a legislator but he cannot make authentic law because he does not properly occupy the legislative office. A tyrant may properly occupy the office but he uses his occupation to promote interests, chiefly his own, and therefore does not make genuine law (1983, p. 139 n4).

The ursurper fails the test of authenticity. The dictator by definition supplants the legislative office rather than occupying it. The tyrant fails the test of making law governed by a certain class of considerations. So what is this class, rooted in a moral-like discourse?

INTERNAL LEGAL VALUES

The philosophical dilemma posed by the concept of the rule of law, if we appreciate the positivist critique, is this: either the rule of law just means obedience to the law and no more, or it refers to some standard of law outside the positive, actual law, such as Natural Law or one or another political ideology. The former does not distinguish dictatorships and a police state from the rule of law; Natural Law is a dead inheritance from theology which can ground nothing and about which there is incessant dispute, and ideology is or should be irrelevant to the concept of the rule of law. But we still have some elusive sense of what the rule of law is apart from these alternatives. And this sense seems equally difficult to banish. We have an especially strange sense that some states approximate the rule of law and others do not. This is a sense Oakeshott is at pains not to deny. As he puts it in the opening of the discussion,

> "The rule of law" is a common expression. It is often used, somewhat capriciously, to describe the character of a modern European state or to distinguish some states from others. More often it appears as a description of what a state might perhaps become, or what some people would prefer it to be. But, as with all such shorthand expressions, it is ambiguous and obscure. Let me try to take it to pieces and see what is hidden in it. And I want to begin as near to the bottom as I can and confine myself to what it must mean, leaving out of account the desirability or otherwise of the condition it describes and neglecting what it may or may not be made to mean when used as an ideological slogan (1983, p. 119).

So what is left when we try to construct an ideologically sanitized notion of this elusive thing that makes the relevant distinctions between rule of law states and other states?

Hayek and his followers exemplify the elusive and ambiguous sense, and it is in Hayek that one ought to find a formulation of the elusive sense that allows us to make a sharp distinction between what Kelsen describes and the genuine rule of law. Hayek's account runs into trouble, but it also is, as we shall see, partially correct. An influential tradition stemming from Hayek is concerned with administrative discretion (Hayek, [1960] 1978, pp. 212-15, 225) and the idea that the central feature of the rule of law is the limitation of administrative discretion: this is the practical form or modern meaning of the idea of the rule of law not men. There is a variant of this tradition concerned with the increasing role of administrative law and administrative courts for the supervision of administration (Dicey, [1914] 1962). This tradition has its roots in the experience of the *Obrigkeitstaat* or magistrate state, where there was a wide range of discretionary power and consequently arbitrariness of legal process and state action. Weber contrasts this more traditional form with the modern bureaucracy, whose hallmark is predictability, and with modern rational-legal authority, which also achieves the maximum degree of predictability ([1968] 1978, pp. 1394-95). This comes very close to Hayek's concerns.

What is the difference between predictability and restricted discretion? One could of course have predictable outcomes which result from the biases of the decision-making process or the decision-makers, and these could be distinguishable from the predictability that results from the rule of law, which in turn could be affirmed by appeals courts. But a significant theme of the literature is this: that some discretion is unavoidable, and that even the courts regularly acknowledge this and defer to administrators. This concession means that if the limitation of administrative discretion is the stand-in for the elusive sense, the concept of the rule of law remains as elusive as the elimination of discretion itself. The same can be said for much of what appears in the lists made by the rule of law industry, lists which typically include legal institutions, such as courts of appeal, which exist to assure that the law is being followed, in this case by judges in lower courts. One could treat the independent judiciary as a technical improvement in legal institutions that assures predictability.

With this in mind, we can see Oakeshott's point more clearly. Predictability (or certainty, or the elimination of discretion) is a legal value that competes with other legal values. To place it above all other values in characterizing the rule of law or to turn it into a criterion absolutizes it in a problematic way. Gustav Radbruch, Weber's intellectual ally and a Kelsen critic, argued that the realm of law was bounded by three antinomic legal values: certainty, expedience, and justice. This comes very close to Oakeshott's point. In evaluating laws, or even the norm-giving decisions of a judge, authentication is not enough. Just as in a regime oriented exclusively to purposes the law would be discussed exclusively in terms of the purposes it serves, in an exclusively rule of law regime the discussion would be exclusively in terms of legal values such as certainty, expedience, and justice. And this discussion would acknowledge conflicts between these values, and that they are contestable and always, so to speak, alive and

relevant. It is in this respect that a form of discourse in terms of these considerations resembles moral discourse, with its antinomies and contestables.

When courts make decisions and deliberate, they are governed by a procedure. Oakeshott notes that "The oath of an English judge to render justice 'according to the law' reflects the notion of the rule of law" (1983, p. 147 n8).

> The procedure and these considerations identify the business of the court to be neither more nor less than that of declaring the meaning of a law in respect of a contingent occurrence. Of course, the rules of this procedure cannot themselves announce such conclusion, any more than a law can itself declare its meaning in respect of a contingent occurrence, but they distinguish the casuistical engagement of a court of law from the exercise of what has been called "a sovereign prerogative of arbitrary choice" (1983, p. 147).

It is the trammeling of arbitrary choice by demanding casuistical engagement that is critical to distinguishing the operation of courts operating in terms of the rule of law from those that operate simply in terms of authenticity.

CONCLUSION

I have subtitled this essay "A Defense," but I have engaged instead in explication and some historical contextualization. What I have explained, however, is the arguments of Kelsen that refute the standard approaches to the problem of the rule of law, and how this adds what is missing in Kelsen's account: a distinction between the rule of law and obedience to law. Kelsen would insist, and Oakeshott would agree, that this could not be a legal distinction of the kind that authenticates law, and should not be an ideological one. The mere existence of a distinctive form of discussion that appeals to legal values, and which applies both to legislation and to judicial decision-making may seem like a poor answer to this question.

But it is neither ideological nor authenticating. And the regimes in which this kind of discussion play a role do, to the extent that they do so, approximate the ideal type of the mode of association called the rule of law. That many present regimes fall short of this ideal should be evident, as it was evident to Oakeshott. But for there to be a way of saying how they fall short other than by invoking an ideological conception of the rule of law one needs an answer like this—one that does not take the side of one value or another. And by describing "a procedure composed of rules, conventions, uses, presumptions and so on," as distinct from a *volontè particuliere*, we do get an answer.

NOTES

1 There is a saying, repeated to me by Edward Shils, that the only serious politics are those of conservative liberals and liberal conservatives. Hayek would be a case of the former, Oakeshott of the latter.

2 The differences between the two concepts have been widely discussed: see Loammi Blaau 1990, Pietro Costa and Danilo Zolo 2007, Paul Craig 1997, Gottfried Dietze 1973, 1985, Richard A. Fallon 1997, Gustave Gozzi 2007, Michel Rosenfeld 2000. Despite the discussion, there is little agreement. Both concepts imply some sort of intuited normative content beyond the statutes that make up the written law: something that tells us what law is in accord with the rule of law. Both can be construed as constraints on the state. Both are afflicted with the paradox that the only way in which the law can regulate the state is through the state itself: stated in this way, the question of which does the regulating can only end in either a circle or a regress.

3 Nor was this surprising. Leonard Kreiger's T*he German Idea of Freedom* (1957) documents the endless confusions surrounding the concept of the Rechtsstaat in the writings of nineteenth century thinkers, especially in connection with its use to obscure the issue of the conflict between state power and individual freedom.

4 Oakeshott explains why:

> there has been one unavoidable contingent circumstance of modern Europe for which the rule of law cannot itself provide, namely, the care for the interests of a state in relation to other states, the protection of these interests in defensive war or in attempts to recover notional irredenta, and the pursuit of larger ambitions to extend its jurisdiction. And this is not on account of the complete absence of rules (although most of so-called international law is composed of instrumental rules for the accommodation of divergent interests), but because "policy" here, as elsewhere, entails a command over the resources of the members of a state categorically different from that required to maintain the apparatus of the rule of law, and may even entail the complete mobilization of all those resources (1983, p. 163).

5 There are a number of other Kelsenian touches in Oakeshott's essay, which I will not discuss here. One important one is his view of the separation of powers, which, like Kelsen, he says "properly speaking is a distinction of authorities" (1983, pp. 144-45 n6) and his comment that the rule of law "provides, not so much for the enforcement of the law (which is a nearly meaningless expression), as for the punishment of those convicted of failure to observe their obligations and perhaps something by way of remedy for the substantive damage attributable to delinquency" (1983, p. 147). This is Kelsen's view that the law shows itself in the sanctions it imposes. Oakeshott says that "penalties are, in general, authorized by law, to submit to them is not to subscribe to the non-instrumental conditions imposed by law upon self-chosen action and utterances; they come as the commands of a court addressed to assignable persons to perform substantive actions or to suffer substantive deprivations, and they invoke obedience" (1983, p. 148). This is a version of Kelsen's idea that judges issue individual norms when they pass a sentence, as distinct from the idea that judges apply the law.

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