**Chapter 12**

**Hayek and Oakeshott: Making a New Case for Liberty**

**Introduction: revisiting the philosophical pillar of liberty**

There are several reasons for revisiting Hayek even as we focus on Oakeshott in this chapter. Differences aside, both were deeply concerned with philosophical foundations and even though they came from different traditions and read the history of philosophy somewhat differently they ultimately arrived at the same answer. It is the shared philosophical perspective that explains (1) their marginalization by the philosophic community, (2) their vehement rejection of the Rousseau Equality Narrative and (3) their trenchant critique of economic planning or government regulation. In addition, (4) they focused on an aspect of the two narratives that had been largely neglected until the late nineteenth century, namely, the ‘rule of law’. They argued, in effect, that the liberty narrative needed a new philosophical foundation.

**Philosophy in the twentieth century**

The academically dominant philosophical movements in the twentieth century were based on scientism, that is, the view that science is the whole truth about everything, and the job of philosophy is spell out the implications of that view. One of the implications of that view is that there is or should be social science – the explanation, prediction, and control of social phenomena. This is the agenda of the Enlightenment Project, specifically to formulate and implement a social technology. The articulation, defense, advocacy or implementation of this social technology is what later adherents of the equality narrative have urged: e.g., the Marx-Engels version of scientific socialism, the Progressives’ notion of the administration of things, Keynesian macroeconomics, etc. By its very nature, scientism looks for the alleged generic truths about humanity (Rawls), that the promise of human fulfilment consists in acting consistently with these truths, i.e., in subordinating our will, and therefore these generic truths allegedly entail a harmonious collective conception of social organization. For all of these reasons, the ascendency of scientism poses a serious challenge to the liberty narrative.

The philosophic origins of scientism go back to classical Greek philosophy, specifically its espousal of the view that knowledge is the reflection of a structure independent of human beings. This conception of knowledge is called epistemological realism. Classical philosophy, the philosophy of the Greeks, Romans, and most of medieval thought asserted that knowledge is the grasping of an external structure in objects themselves. This view of knowledge is historically associated with adherence to the idea that society is a collective enterprise administered by elite wise men (philosopher kings or clergy) who alone are capable of grasping this structure. We say ‘historically’ because there is no necessary logical reason why, prior to actual empirical confirmation, we should assume harmony either within the individual or within a social whole. The harmony assumption reflected the classical belief (hope and faith) that explanation had to be teleological.

Modern philosophers as early as Descartes began chipping away at this view of knowledge, and this culminated in the works of Hume (alleged to be a skeptic) and Kant who proclaimed the Copernican Revolution in Philosophy. The latter two opposed epistemological realism and asserted that knowledge was a structure imposed upon experience by human beings. This view of knowledge is historically associated with the advocacy of the liberty narrative.

In opposition to this Humean/Kantian theory of knowledge, nineteenth century philosophical positivism reasserted epistemological realism and proclaimed physical science as the vehicle for accessing the objective structure of the world independent of human structuring. Moreover, it was postulated that science could totally explain human beings. The resurgence of epistemological realism in its positivist form gave new life to the eighteenth century program of the Enlightenment Project, designed to discover the objective structure of the social world along with enabling the derivative development of a social technology. In the nineteenth century, Auguste Comte, the major French social positivist (ultimately provoking Mill’s ire) and Marx’s scientific socialism are the premier examples. Curiously, even though this post-Newtonian scientism assumed that explanation had to be ultimately mechanistic instead of teleological, it also allowed that underlying mechanistic explanation was compatible with teleology.

In the twentieth century, the epistemological realism and a derivative social technology were espoused by the so-called Vienna Circle (Schlick, Carnap, Reichenbach, Neurath, Popper, etc.) whose members eventually migrated to the US as a consequence of the rise of Nazism and WWII. These positivists and their progeny not only dominated the discipline of philosophy but they had an enormous impact on the methodology of the social sciences. In the positivism of the Vienna Circle one sees optimism about how science is the successful elimination of superstition and nonsense and how philosophy is the intellectual overseer of the transition period to a totally scientific world view.

The *Manifesto* of the Vienna Circle endorsed the idea of regulating economic and social life according to rational principles. Carnap asserted “that the great problems of the organization of the economy and the organization of the world at the present time, in the era of industrialization, cannot possibly be solved by the ‘interplay of forces’, but require rational planning. For the organization of [the] economy this means socialism in some form; for the organization of the world it means a gradual development towards a world government” (“My philosophical development,” in P.A. Schilpp (ed.), *The Philosophy of Rudolf Carnap,* 1963, p. 83). Neurath argued that after seeing the fruits of central economic planning during wartime (WW I), market economies would be replaced by a communal economy. “In a socialized economy the living standards and wages of everybody will be fixed by… decrees… they will not be decided by contract” (Neurath, *Through War Economy to Economy in Kind,* 1973). Given human fallibility, Popper concluded that social technology should be used but central planning ought not to be. As we progress in scientific knowledge there should be a corresponding growth in the area that central planners can legitimately control. Although totalitarian control is unacceptable, we can have ever increasing growth by social planning. The totalitarian implications of Popper’s conception of social engineering, despite its intention, has been duly noted and criticized by F.A. Hayek (*Law, Legislation, and Liberty*,1973), despite the fact that Popper dedicated his book *Conjectures and Refutations* to Hayek.

**The Philosophy of the liberty narrative in Hayek and Oakeshott**

Hayek and Oakeshott returned to the views of Hume andKant’s Copernican Revolution in Philosophy. In the *Critique of Pure Reason*, Kant rejected the classical epistemological notion that cognitive knowledge must conform to objects and replaced it with the exact opposite contention, namely, that objects must conform to our cognition. Standards are not external but internal. In the classical world, the epistemological challenge was to identify the alleged external standard, and the practical challenge was for human beings to conform to the external standards. In the modern Copernican world, the epistemological challenge is to identify the internal standards and the practical challenge is to transform the physical world to conform to the internal standards. Conforming to internal standards does not mean adjusting ourselves to the world, rather it means adjusting the world to ourselves.

Two things should be immediately evident. First the technological project, the transformation of the physical world for human benefit, is intelligible only in the light of this philosophical transformation. In retrospect, this is already present in the views of Bacon, Descartes (who spearheaded the modern scientific rejection of the medieval Aristotelian teleological view of the universe) and Locke. The technological project is a state of mind, an attitude, a fundamentally different way of conceiving the relationship of human beings to the physical world.

Second, the transition from classical epistemology to modern epistemology makes possible the transition from a collectivist or communitarian enterprise association to an individualist civil association. The defense of a collectivist enterprise association can never adequately rest simply on the notion that it is a human ‘construct’, - even a universal ‘construct’. It is much easier to demand the subordination and allegiance of the individual to an external collective goal if that goal is absolute and independent of human construction. To carry the argument a little bit further, once the social world itself is viewed as a construct, and once the ‘imagination’ is released from its subordination to ‘reason’, - it is but a short step to the view that all authority is rooted in the ‘consent’ of the governed. Again, this is already present in Locke. In turn, one might even construe alternative human constructs as an embarrassment of riches rather than a problem to be overcome. It is a short step to conclude that the entire political and legal world should serve the interests of individuals. Given the existence of moral pluralism, it will be asked – what system of law and politics is most consistent with that moral pluralism? – The answer will be civil association that is premised on individual autonomy. The coordination problem is solved by appeal to voluntarily accepted procedural norms rather than agreement on substantive norms.

More importantly, from the perspective of the Copernican Revolution in philosophy, the very idea of a social technology is bogus and a non-sequitur. Human beings create the epistemological constructs, including science (now viewed as experimental and technological). Physical science is a human construct. It is therefore, impossible, and nonsensical, to use physical science to try to describe the structure of the social world or even to explain in physical scientific ways (physics, chemistry, biology, artificial intelligence, etc.) how and why human beings structure the world in the way they do. The tool maker explains the tool; the tool does not explain the maker. In philosophical jargon, the pre-conceptual cannot be conceptualized.

…David Hume and Immanuel Kant….It was they who came nearer than anybody has done since to a clear recognition of the status of values as independent and guiding conditions of all rational construction. What I am ultimately concerned with here…[is the] destruction of values by scientific error…The tendency of constructivism to represent those values which it cannot explain as determined by arbitrary human decisions…rather than as the necessary conditions of facts which are taken for granted by its expounders, has done much to shake the foundations of civilization, and of science itself, which also rests on values which cannot be scientifically proved. (Hayek, *Law, Legislation, and Liberty*, 1973, p. 7).

**Hayek: A neglected aspect of spontaneous order**

Hayek is among the heirs to the Copernican Revolution in philosophy, a revolution which he carries into the sphere of economics and law. A realist epistemology presupposes that there is a real objective order to the social world, including the economy, and that it is possible to conceptualize that order. Hayek maintains that (a) there is a market order, but (b) the market order is spontaneous (unplanned) – hence has no externally induced overall purpose, and (c) it is not possible to conceptualize that order. It is not possible to conceptualize that order because there is in the market a background of inarticulable knowledge. The market order is an example of spontaneous order, which Hayek describes as a discovery procedure. Competition is a process of creative discovery (Schumpeter’s “creative destruction”), the discovery of new products, services, and the creation of new preferences. Entrepreneurship creates new opportunities, new states of affairs. Reading Hayek in light of Oakeshott’s first essay of *On Human Conduct* helps us to recognize this usually neglected aspect of Hayek’s economics. Each action creates a new context within which subsequent understandings will be formed and against which both old and new understandings must be rethought. All conduct both enacts a prior self-understanding, and alters the context within which that understanding is obtained. Thus, all conduct brings about novel contexts and novel understandings. The market is an extended order within which various enterprise associations may exist, but which cannot itself be an enterprise association. Oakeshott would agree that in the end knowledge is not reducible to representation. It also embodies customs, practices, traditions, maxims, rules of thumb, habits, and forms of conduct that cannot be reduced to theory.

Spontaneous orders lack a substantive purpose, but that makes it possible to pursue many such goals within the context of a spontaneous order. That is what Oakeshott calls ‘civil association’. Spontaneous orders or structures are arranged according to non-instrumental rules. Because these orders are defined by end-independent or non-instrumental rules, they cannot be said to aim at or achieve any substantive purpose. The ends that spontaneous order serves are the separate ends of those individuals, in all their variety and contrariness. A spontaneous order is not composed of individuals subject to the commands of managers, but of individuals whose actions conform to universally-applied rules of just conduct, which Oakeshott calls “conditions of adverbial desirability” that are immaterial to the object of individual pursuits (Oakeshott*, On Human Conduct*, 1975, p. 66). Hayek (and Oakeshott would agree) argues that the substantive arrangement of the components of spontaneous orders cannot rightfully be called just or unjust. This is because they are not intended to fulfill any particular purpose, but only to provide the conditions within which individuals may pursue their own purposes.

Like Oakeshott, Hayek does not deny the value and importance of teleocratic institutions or enterprise associations. He does not advocate the reduction of all substantive, personal relationships—like the family, marriage, friendship, community—to relations according to contract, or non-instrumental rules. “[I]f we were always to apply the rules of the extended order to our more intimate groupings, *we would crush them*” (Hayek, *The Fatal Conceit*, 1988, p.18). Hayek is not a doctrinaire advocate of laissez-faire or of any libertarianism that seeks to reduce all of society to contract relations. He supports the policy of an economic safety net even though he holds that market competition is the best way to organize the economy, and that a safety net can become an impediment to the operation of competition.

Hayek’s economic argument applies to the rule by law. The rule of law can exist only within what Oakeshott calls a civil association; law will otherwise degenerate into an enterprise association. The rule of law cannot be salvaged by collectivist politics – this would only be true if all disputes could be resolved in parliamentary discussion because of the alleged prior existence of an ultimate teleology or the general will. In the *Road to Serfdom* Hayek asserts that free markets and the potential for the rule of law were extinguished in Germany by late nineteenth century positivism.

Hayek has abandoned the notion that there is a common good, even a Smithean invisible hand which tacitly assumes some kind of harmony. What Hayek has done is to collapse the distinction between communitarianism and collectivism. He opposes the notion of planning and how it can be imposed upon us. Let the Socialists have their collectivist conception and the language of the common good as their concept, to be strived-for in an enterprise association; but lovers of liberty should embrace the evolutionary process, so that what emerges is the common good. Hayek does acknowledge the need for government institutions, or what he calls “the rule of law” which is different from the law of rules. To the extent that the rule of law expresses neutral procedural norms within which individuals pursue their private ends, the rule of law is the common good.

Contemporary Rousseauean movements in the law like Critical Legal Studies reject the rule of law on the grounds that it is but another mask for economic oppression and exploitation. The planners want a law of rules, administrative law. Without trust you have to have regulations. Supporters of the Rousseauean Narrative have moved away from an understanding of the rule of law as one which emphasizes procedural neutrality to one that focuses on substantive rights, a movement that gives a privileged position to the state over the market.

**Oakeshott: free to choose**

Michael Oakeshott (1901 – 1990) was a political philosopher, historian and leading intellectual light at the London School of Economics from 1948-1969. His major philosophical work was *Experience and Its Modes* (1933). Operating from within the post-Kantian and post-Hegelian Copernican Revolution, he maintained that what distinguishes us from animals is that we are free to choose how we interpret experience. To be human is to be free; our freedom is employed in our imagination and intelligence; these faculties are used in defining ourselves as individuals and in giving meaning to our experience of the world we inhabit. In philosophy the best way to defend a view is simply to elucidate it; it is futile to attempt to win arguments with other philosophers. “Philosophy consists, not in persuading others, but in making our own minds clear.” (*Experience and Its Mod*es, 1933, Cambridge University Press, p. 3).

Since we always approach the world with some perspective it is a basic philosophical error to think you can step outside of all perspectives at once. Hence, like Hayek, he identifies epistemological realism as the philosophical origin of all mistaken thought. As a consequence he was an outspoken critic of all forms of utopian thinking, particularly post-[World War II](https://en.wikipedia.org/wiki/World_War_II) British socialism, but also the belief in the existence of social or bureaucratic expertise, all fixed ideologies, and party politics. He laid this out in his 1947 essay “Rationalism in Politics.” His epistemology was social: only through interaction with our social inheritance do we become who we are. Our Inheritance is a set of cultural achievements and practices, not a doctrine to be learned. The inheritance is not constitutive of, and determinant of, who we are; rather it needs to be re-created through its appropriation. It is not homogeneous, there can be no final or definitive formulation of it, and any explication of it will acknowledge that there are many voices in the ‘conversation’. A ‘conversation’ is an endless, unrehearsed intellectual adventure in which, through imagination, we enter into a variety of modes of understanding both the world and ourselves, and we are not disconcerted by the differences or dismayed by the inconclusiveness of it all. There are limits to discursive reason, and acknowledging those limits is a form of liberation from ideological thinking.

How then is thought related to action? Practice precedes the reflection on practice (In the beginning is the deed and this is the pre-conceptual). We can never fully conceptualize this pre-conceptual, but we can offer a sort of abridged version of it. In practical decision making we do not infer practical consequences from the conceptualization. Rather we engage in an explication of the norms inherent in the previous practice, or in the words of Oakeshott, we engage in the *pursuit of intimations* of previous practice. Like Hayek’s spontaneous order, our inheritance is not a permanently fixed order but a fertile source of adaptation. Arguments constructed out of this material cannot be ‘refuted’. They may be resisted by arguments of the same sort which, on balance, are found to be more convincing. Honest and intelligent disagreement is always possible and likely. Oakeshott embraced a non-reductive pluralism which is compatible with liberty. Oakeshott’s understanding of his own inheritance was laid out in his 1949 essay “The Political Economy of Freedom.”

The freedom which the English libertarian knows and values lies in a coherence of mutually supporting liberties….the absence from our society of overwhelming concentrations of power….our experience has disclosed to us a method of government remarkably economical in the use of power and consequently peculiarly fitted to preserve freedom: it is called the rule of law…. Of the many species of liberty…we have long recognized the importance of two: the freedom of association, and the freedom enjoyed in the right to own private property. (pp. 388,390,391 in Fuller).

What Oakeshott opposed in politics is what we have called the twentieth century Rousseauean administration of things. He identifies this mentality as ‘rationalism in politics. The ‘rationalist’ is Oakeshott’s enemy. “The general character and disposition of the Rationalist” is that “he stands (he always stands) for independence of mind,” that is thought free from obligation to any authority save the authority of reason.” The rationalist “is the enemy of authority, of prejudice, of the merely traditional, customary or habitual.” “His cast of mind is Gnostic.” “[M]uch of his political activity consists in bringing the social, political, legal and institutional inheritance of his society before the tribunal of his intellect.” The rationalist searches “for an innocuous power which may safely be made so great as to be able to control all other powers.” His disposition is “to believe that political machinery can take the place of moral and political education.” All knowledge must be “technical knowledge.” The “Rationalist aims to begin by getting rid of inherited nescience and then to fill the blank nothingness of an open mind with the items of certain knowledge which he abstracts from his personal experience, and which he believes to be approved by the common ‘reason’ of mankind…” (“Rationalism in Politics,” [1947], *Rationalism in Politics and Other Essays*, ed. T. Fuller, Liberty Fund, Indianapolis 1991, pp. 5-42; all subsequent quotations from Oakeshott’s essays, except for the “Rule of Law” are from this edition).

By contrast, Oakeshott was a self-described conservative, and in his essay “On Being Conservative” (1956), he explained that “to be conservative ... is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to utopian bliss” ([1956] 1991, p. 408). Being conservative is not about being rigidly doctrinaire but about managing inevitable change coherent with past practice through the pursuit of intimations.

Rather than simply dismiss the Rousseau narrative and endorse the Lockean narrative, Oakeshott put them into historical perspective. In *On Human Conduct* (1975) Oakeshott identifies two major views that have developed within the Western Inheritance. The first is "enterprise association" (or *universitas*), which assets the existence of a collective social goal to which all individual goals are subordinated or within which individuals may pursue fulfillment. This has been the mode of thinking of Rousseau, Marx, and all those who seek to recapture the classical/medieval sense of community in subscribing to some version of the Rousseau equality narrative. In his posthumously-published *The Politics of Faith and the Politics of Scepticism*,1996, those who believe that there is such a universal collective goal see the role of the government (politics of faith) as potentially unlimited in requiring all subjects to work toward that purpose. Curiously the success of what we have called the technological project gives rise to the false hopes of what we have called the Enlightenment Project, specifically the belief that we have the power to achieve some great social project (e.g., end world poverty, eradicate all forms of human misery, etc.)

In opposition to enterprise association, Oakeshott posits civil association (*societas*) which, by contrast, does not assert the existence of a collective all-encompassing good. Rather, there are only the specific goals of individuals. The role of government is limited to providing the context within which individuals pursue (not necessarily achieve) their specific goals. To the extent that there are rules or laws, such laws specify the conditions of how the pursuit is to take place but not what to pursue. Groups of individuals may choose to form or join sub-enterprise associations (e.g., the family, a religion, a sports team) but entry and exit are purely voluntary. Subscribing to civil association reflects a fundamental skepticism about the ability either to apprehend or to achieve a universal good (politics of skepticism). The focus of government should be on preventing evil rather than achieving good.

By identifying the tension between enterprise association and civil association, Oakeshott explicates the ongoing modern tension between equality and liberty. Both are a part of our inheritance. It is primarily a modern tension because the ideal of civil association came into existence only with the Renaissance and Reformation. Modern European states began to take shape in the sixteenth century, and by then they were articulating themselves not only in the new idiom of autonomy but in the old and inherited idiom of a universitas, a teleocratic enterprise in Hayek’s words.

In a follow-up essay, “The Masses in Representative Democracy,” (1961), Oakeshott introduced another distinction that accounts for the advent of civil association. In contradiction to Ortega’s theory, what is new in Western Europe is not the ‘masses’ but the autonomous individual. This persona arose overtly during the Renaissance, and accounts for all the creativity in Europe in every field.

Almost all modern writing about moral conduct begins with the hypothesis of an individual human being choosing and pursu­ing his own directions of activity. What appeared to require expla­nation was not the existence of such individuals, but how they could come to have duties to others of their kind…. This is unmistakable in Hobbes, the first moralist of the modern world to take candid account of the current experi­ence of individuality….even where an individualistic conclusion was rejected, this autonomous individual remained as the starting point of ethi­cal reflection. Every moralist in the seventeenth and eighteenth centuries is concerned with the psychological structure of this as­sumed ‘Individual’….*nowhere is this seen more clearly to be the case than in the writings of Kant. Every human being, in virtue of not being subject to natural necessity, is recog­nized by Kant to be a Person, an end in himself, absolute and au­tonomous…. as a rational human being he will recognize in his conduct the universal conditions of autonomous personality; and the chief of these conditions is to use humanity, as well in himself as in others, as an end and never as a means….* personality is so far sacrosanct that no man has either a right or a duty to promote the moral perfection of another: we may pro­mote the ‘happiness’ of others, but we cannot promote their ‘good’ without destroying their ‘freedom’ which is the condition of moral goodness… [*italics* added] (1991, pp.367-68).

Both Hayek and Oakeshott understand human individual freedom in a Kantian sense. The fundamental truth about human beings is their potential for freedom (not to be confused with liberty). We are not simply the product of our heredity or our environment. Neither of these (contra Rawls) fully determines our responses. We are free to choose. Our choices become autonomous when we impose order on them; the choices become heteronomous when we allow others or outside influences to determine or intrinsically modify the choice. Autonomous people do not impose on others because that imposition would be a form of heteronomy. Autonomous people treat other human beings as ends in themselves and not merely as means to their own agendas. In an enterprise association, without voluntary entry and exit, however, every human being at best plays a pre-determined role and at worst gets “used” by others. Autonomous people advocate liberty (absence of arbitrary external constraints) for themselves and others as a means to the expression of their freedom, that is, their capacity for making autonomous choices.

Prior to this period, everyone was part of a community. Some people found the transition from a communal identity to a personal identity challenging and unattractive. The latter define themselves negatively against the autonomous individual. Whereas the autonomous individual wants negative rights and the rule of law, the anti-individual wants the state to become the new community in which they possess positive rights. The anti-individual is a pathological character, forever parasitic upon the autonomous individual. Oakeshott describes the anti-individual in Rousseauean terms: “the counterpart of the…*entrepreneur* of the sixteenth century was the displaced laborer.” The “anonymity of communal life was replaced by a personal identity which was burdensome” (*ibid*., p. 371). It “bred envy, jealousy and resentment” (*ibid*., p. 372). It rejected the morality of ‘liberty’ and substituted the morality of ‘equality’, ‘solidarity’ and ‘community’ (*ibid*., 375). The anti-individual is a derivative character who survives only by defining itself against individuality. The destructive urge of the anti-individual is inhibited only by the desire to enjoy the fruits of what individuals create. The anti-individual reflects a pathology of someone who has failed to realize freedom and responsibility.

**Equality vs. liberty revisited**

The distinction between the autonomous individual and the anti-individual enables Oakeshott to provide a serious response to perhaps the major criticisms that the adherents of the Equality Narrative have of adherents of the Liberty Narrative, namely that the latter cannot (1) establish that the good of individuals is coherent with the social good; nor (2) can they deal adequately with dysfunctional members of the community. To begin with, the assertion of the existence of a collective good is a chimera and throughout human history has been the excuse for the worst crimes committed against humanity. Fanatics not skeptics go on crusades. Like Hayek, Oakeshott denies that we need postulate a Smithean hidden hand. Second, the existence of dysfunctional members of society is not caused by modernity or modern market societies or by the indifference or moral blindness of successful members of society. Social dysfunction reflects the inability of anti-individuals to embrace moral maturity, individual freedom and responsibility.

Autonomy, or more precisely the lack thereof, explains the existence of dysfunctional people in free societies. The standard Rousseauean diagnosis for the existence of dysfunctional people - and we might add every conceivable social problem - is the lack of resources or the lack of positive rights. The default remedy, given the standard diagnosis, is some form of redistribution. Some proponents of this view are willing to endorse counter-productive public policies (e.g., the minimum wage) because of its symbolic reflection of solidarity. As Bertrand de Jouvenel once noted, in the process of redistributing the wealth, the State becomes increasingly powerful. Indeed, “The more one considers the matter, the clearer it becomes that redistribution is in effect far less a redistribution of free income from the richer to the poorer, as we imagined, than a redistribution of power from the individual to the State” (de Jouvenel, *The Ethics of Redistribution*, 1990, p. 72). But if Hayek and Oakeshott are right, the existence of these dysfunctional people and a whole host of social problems is the presence of people who have not yet developed a sense of personal autonomy.

Poverty is not the cause of being an anti-individual but the product of being an anti-individual. Many people who are born poor nevertheless pursue autonomy and become economically successful. Many people born into comfort or wealth are nevertheless anti-individuals and sink into the culture of poverty. Being autonomous has nothing to do with intelligence. It is a matter of character. The “leaders” and spokespersons of the anti-individuals exploit their followers. You can become rich and powerful being such a leader. No one objects to your wealth and power, or even your corruption, because you are allegedly helping the “people” (i.e. anti-individuals).

Autonomous individuals have a positive narrative and focus on trying to help others to become autonomous. Your success contributes to my success. Anti-individuals find it necessary to have a negative narrative: (a) they are “victims;” (b) they have to demonize or blame somebody else for their problems; (c) and their leaders and spokespersons (including Rousseauean intellectuals) are constantly blaming somebody. The significant difference between criticizing and blaming is that ‘criticism’ focuses on attacking arguments, whereas ‘blaming’ focuses on attacking people.

**Law and the rule of law**

The distinction between enterprise and civil association (identified and articulated by Hobbes, Spinoza, Locke, Montesquieu, Hume, Kant, Hegel and Mill) allowed Oakeshott to make a further important distinction, namely the difference between law and the rule of law. Law is a social practice. As a practice it is not a place, a building, or a set of people acting in a certain uniform way. It is a practice that emerged in a certain specific historical context. Law - as opposed to merely imposed order - first emerged, according to Oakeshott, with the rise of the modern European State during the sixteenth and seventeenth centuries. What distinguished these states or political entities was not only the imposition of order over an extended and identifiable geographical area but also the additional attributes of (a) not being subject to any external authority (e.g. feudal obligations, other states or empires or the authority of the Papacy) and (b) the custodianship of laws or rules which specified the ‘legal’ rights and obligations of subjects as well as the procedures for making and amending laws (*On Human Conduct*, Oxford University Press, 1975, pp. 228-29). In this respect, part of the problem with Kelsen’s idea of a ‘Grundnorm’ is that it seems to suggest the idea of a higher legal authority that created or validated positive law, and as such it reflects a residual and dysfunctional idea from the medieval natural law tradition.

The legitimacy of the modern European state as proto-type is not derived from any non-legal substantive norms. The validity of the laws themselves rests solely on the character of their maker and the manner in which they were made, promulgated, and interpreted. What makes someone a subject is not the possession of any ‘rights’ (metaphysical. natural, human, or otherwise for all of these appeal to some political agenda) and not consent to the rules. Rather a subject is someone who acquiesces in the terms of the relationship. As argued by Hume and Hegel, both the ‘state’ and ‘law’ emerged from custom, not contract, hence their validity rests on compliance not consent.

What then constitutes the ‘*rule of law’*? What distinguishes the rule of law from law in the generic sense is that the rule of law involves categorical prescriptions. To distinguish this kind of law from the heterogeneous collection of rules called laws, Oakeshott introduces the term ‘lex’. Lex is “an authoritative system of prescribed conditions to be taken account of in choosing actions.” (*On Human Conduct*, p.139). The expression ‘the rule of law’, taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction…. it is an abstract relationship of *personae*…” (“Rule of Law,” in *On History and Other Essays [1983 ,* Liberty Fund, Indianapolis*, 1999,* p. 136).

Oakeshott employs the analogy of the [*adverb*](https://en.wikipedia.org/wiki/Adverb) to describe the kind of restraint law involves. The law that requires us to drive on the right (or the left) does not dictate that I have a car, does not dictate that I must drive, does not dictate my destination if I do drive. What it tells me is *how* to drive, namely, on the same side of the road as everybody else and within certain speed limits. Such rules are not designed to achieve a collective goal but to enable each individual to choose and arrive at his or her destination. This contrasts with the rules of an enterprise association in which specific laws are compulsory, that is they tell us *what* to do.

The rule of law cannot be present when laws are promulgated to achieve targeted results. As Hayek put it, the rule of law gives us the rules of the same but does not determine the outcome. For the same reason, Oakeshott dismisses Rawls’ conception of the rule of law because it promulgates “‘fairness’ in the distribution of scarce resources, and ‘fairness’ as what rational competitors , in certain ideal circumstances, must agree is an equitable distribution.” This turns law into “regulations understood in terms of the consequences of their operation and as guides to the achievement of a substantive state of affairs” (Ibid., p. 170 n. 13).

Oakeshott has three theses about the rule of law. First, the rule of law is a strictly modern phenomenon. What the classical and medieval world always exhibited was enterprise association. What it had was order and rule *through* law, not the rule *of* law. The development of the rule of law within modern European states reflects several things: the increasing recognition of human autonomy, the gradual articulation of it within the inherited context of Roman private law, and by implication a certain kind of political economy.

Oakeshott’s second thesis is that the rule of law can only exist in a civil association. Once you subscribe to an enterprise association, which has a collective goal, you are always able to override the wishes and plans of any individual in the name of the alleged national (common, global, etc.) good.

As a mode of human intercourse the civil condition is an ideal character glimpsed here or there…but it nowhere constitutes a premeditated design for human conduct….Aristotle discerned some of its important features in the Athenian *polis*, Cicero in the Roman Republic, Hobbes and Montesquieu in the emergent states of modern Europe….The most difficult feature of the civil condition to identify and get into place has been law….It is made difficult also because the theorists of law have laid so many false trails (for example, misidentifying it as a ‘command’ and as instrumental to the achievement of substantive satisfactions), and have usually been so much more concerned with the so-called ‘sources’ of law, with contingent beliefs about its authority, and with its so-called ‘purpose’ than with what it is.” (*On Human Conduct*, pp. 180-181.)

The role of government is to be the guardian of the common good or the conditions. Individuals in a civil association may thus share a common good in the formal conditions to be observed but it is not a substantive collective good in which their interests are subsumed. Within an enterprise association, the law is a set of rules that are instrumental in advancing the collective goal as articulated by the government. The politicized, managerial or totalitarian implications of law within an enterprise association are manifest. Within a civil association, the law is formal, not instrumental, and the rule of law prescribes the conditions within which individuals pursue self-chosen purposes.

What democratic socialist societies lack is the ‘rule of law’ even though they may have rule through law. Part of the significant difference, as J.S. Mill put it long ago, reflects the placing of the burden of proof in any argument about expanding the role of the state or infringing upon so-called negative liberties. In the presence of the ideal, the *onus* now is on those who wish to violate negative liberties just as it is on the state to prove that I am guilty not on me to prove that I am innocent. Implicit in this, once more, is an underlying tension between Anglo-American ideals (Lockean) and continental ideals (Rousseau).

Oakeshott’s third thesis is that every modern state is a historically ambiguous compound of both a civil and an enterprise association. This is not a surprising thesis in view of Oakeshott’s other well-known views. In addition to the inherited ambiguity, namely that the modern state is an ambiguous amalgam of civil and enterprise association, there are a number of conditions that reinforce adherence to the idea of the state as an enterprise association: (a) the unending growth of bureaucracy, (b) monarchical lordship, (c) colonial adventures, (d) war, (e) the continuous presence of the anti-individual, and (f) advocacy of world government.

**Oakeshott’s correction of the liberty narrative**

What Oakeshott has achieved is a reorientation of the Liberty Narrative. That narrative encompassed the following elements: Technological Project 🡪 Market Economy 🡪 Limited Government 🡪 Rule of Law 🡪 and the culture of Personal Autonomy. It is not the technological project (contra Locke and Smith) which is the crucial element. Not only do some people risk turning the technological project into a collective goal (a Tower of Babel) but the technological project has as a serious side-effect: the growth of the Enlightenment Project and its concomitant faith in social technology.

Nor, according to Hayek, is the market economy the crucial element (contra Hayek and Friedman).Free economic activity, effective economic competition and free markets unfettered by monopolies are, in Oakeshott’s words, “not something that springs up of its own accord,” but are “the creature of law.” They are created by the systematic rule of law. Economic competition can only exist, Oakeshott maintains, by virtue of a legal system which promotes it. This underscores the fact that Oakeshott draws a connection between the rule of law and a free society as a whole. This explicit language of promotion, creation, and connection suggests some causal relation between rule of law, economic and general freedom. To say that free market economic objectives are promoted *by* or are the consequence *of* the rule of law is not to say that the objective or purpose of the rule of law is to do so.

From the vantage point of the economist, it could be argued that one direct ‘purpose’ of the rule of law is to maximize economic utility. However, this directly conflicts with Oakeshott’s famous insistence that the rule of law is a mode of ethical association in terms of the recognition of the authority of known, non-instrumental laws. Such ethical association are fundamentally distinguished by Oakeshott from purposive or enterprise associations. As Oakeshott points out in his “*Rule of Law*” essay, proponents of the rule of law recognize the inconsistency of attributing the virtue of a non-instrumental mode of association to its propensity to produce, promote or encourage a substantive outcome. Peace, order, economic efficiency, or more prominently freedom, are not the consequences of an association of legal persona, but instead are inherent in its character.

Given his view that law must be non-instrumental, all talk about the *purpose* of law is nonsensical and irresolvable metaphysical mischief. The Friedman claim that there is no government that respects individual freedom unless there is first a free market should be rendered as the claim that free markets only exist where there is a government that respects individual freedom. Present day China seems to be a society that is both an enterprise association and has a market economy. Nevertheless, the Chinese market economy is not really ‘free’. The notion that authoritarian societies exhibit ‘free’ markets is a misnomer. Sometimes such societies are characterized by Marxists as capitalist, but no society where one group can arbitrarily and ‘legally’ exclude others from the market can be said to be a free market society. The overall economy might not be a planned economy, but that does not make it a free economy. From Oakeshott’s point of view, a ‘free’ market economy reflects the existence of the rule of law which in turn reflects the existence of a culture of personal autonomy, namely, civil association.

**Conclusion: Oakeshott and Hayek revisited**

Oakeshott refuses to endorse the idea that free markets trump all other considerations. In a spontaneous order there is no final or definitive ranking of values such that ‘a’ always trumps ‘b’. The ultimate test for Oakeshott on the political level is whether civil association is preserved.

Much to the chagrin of hard-core libertarians, Hayek acknowledged the role of some sort of welfare state. Hayek was not advocating a theory but explicating practice. The world which was the object of his explication was the product of spontaneous order, possessed a market economy, had evolved a notion of the ‘rule of law’ as a meta-norm, and it was/is a world in which other practices (e.g., a welfare state) represented a potential threat to the continuing survival of both a market economy and the ‘rule of law’. Neither Hayek nor Oakeshott are, strictly speaking, advocates of a theory, neo-liberal or otherwise. Nor is there or can there be within their framework a logical contradiction between a market economy or civil association on the one hand and a welfare state or enterprise association on the other. Spontaneous order and evolving historical practices do not eventuate or form a mechanical system that can be deductively ordered or re-ordered. To be sure, there can be tensions, potential conflicts, and even the eventual disappearance of one practice in favor of another. It is these scenarios that concern both Hayek and Oakeshott.

A similar predicament is present in the work of Michael Oakeshott. The modern (Western European) state is not just a civil association. Historically, the modern state is also the product of history and as such has elements of an enterprise association. These elements constitute a distinct threat to the continuing survival of the ‘rule of law’. As a consequence, we can expect an indefinite life-span for the tension between the liberty narrative and the equality narrative. As long as there is a significant number of anti-individuals it will be necessary to restate (or remind ourselves and others of) the case for liberty.

Autonomous individuals do not need to justify either to others or to themselves why they acquiesce to a system. They do not believe that there is or there has to be a larger metaphysical reason. They do not believe, as Rousseaueans do, that we must commit ourselves to a form of teleology. Autonomous individuals need not conceptualize themselves or others as rational maximizers – there is no sense in providing an argument for why one ultimately chooses what one chooses as long as it does not conflict with one’s own autonomy.

This is an enormously practical mode of thinking. There are only ever specific contexts with a history (common law) and we can never move to a general level where the enunciation of principles leads to their own application without context unless we presuppose an enterprise association. Those who conceive of themselves as libertarian, conservative, liberals, socialists, etc. all fail to perceive the rule of law as a specific alternative form of political organization. Oakeshott is not a classical liberal or libertarian, etc. He is philosophically conservative not understood as membership in a particular party.

One of Oakeshott’s major contentions is that we live in a world that is *inherently* morally pluralistic (not relative). There is no rational way to achieve consensus. The rule of law operates within this context, and those who object to Oakeshott’s account either (a) have a private political agenda and wish to seize or maintain governmental power in the service of that agenda or (b) hold a *theory* about how the world ought to operate, a theory which has the same logical status as any other metaphysical doctrine on which there can never be consensus or (c) believe that (b) is a rationalization of (a).

The rule of law only exists in civil association and there cannot be even the idea of a civil association until the advent of the autonomous individual. So, the culture of personal autonomy is the key to the logic of modernity. The culture of personal autonomy gives rise to the ‘rule of law’ which permits the existence of limited government which fosters the market economy and advances the technological project rightly understood. In the context of the twentieth century, Oakeshott reasserted and further elaborated the Kant-Hegel-Mill defense of liberty as opposed to Friedmanesque positivism.

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