

## Dreaming the Rule of Law

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*Leviathan* has passed for a book of philosophy and a book about politics, and consequently it has been supposed to interest only the few who concern themselves with such things. But I believe it to be a work of art in the proper sense, one of the masterpieces of the literature of our language and civilization. ... We are apt to think of a civilization as something solid and external, but at bottom it is a collective dream. ... What a people dreams in this earthly sleep is its civilization. And the substance of this dream is a myth, an imaginative interpretation of human existence, the perception (not the solution) of the mystery of human life.

Michael Oakeshott<sup>2</sup>

In ‘The Rule of Law’, Michael Oakeshott says that ‘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, noninstrumental 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’.<sup>3</sup>

Oakeshott did not say precisely why he took this form of association to be moral or what it means for a law to be non-instrumental. Nor did he explain exactly how something can be ‘self-chosen’ and subject to obligation, though the thought seems to be something like: it is up to you whether to perform a certain action, but if you do, you are obliged to abide by the conditions the authority has legislated for performing that action.

It does, however, seem clear that the association’s morality has to do with the way in which it makes possible a politically valuable kind of liberty--civil liberty or the liberty of the

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<sup>2</sup> Michael Oakeshott, ‘*Leviathan – a Myth*’ in Oakeshott, *Hobbes on Civil Association* (Berkeley: University of California Press, 1975), 150.

<sup>3</sup> Michael Oakeshott, ‘The Rule of Law’ in Oakeshott, *On History and Other Essays* (Indianapolis: Liberty Fund, 1999) 129, 148; hereafter RL.

subjects of a state who live under an order of public laws, though Oakeshott emphasized that such ““freedom” does not follow as a consequence of this mode of association; it is inherent in its character’.<sup>4</sup> So he does suggest a necessary link between the rule of law and liberty, and thus presents what we can think of as a liberal account of the rule of law, despite the fact that he was anxious at all times to insist that his account was formal, that is, not driven by any *telos* or substantive end.

These ideas are not novel in Oakeshott’s thought. He had fully elaborated them in 1975 in *On Human Conduct*<sup>5</sup> and the theme of the connection between authority, law and liberty is central to his discussion of ‘Roman Political Thought’ in his *Lectures in the History of Political Thought*, given at the London School of Economics in the 1960s.<sup>6</sup> The novelty lies in what Richard Friedman, in my view, the most sensitive expositor of Oakeshott’s legal theory, calls a ‘startling innovation in his interpretation of what natural law is all about in and for Hobbes’.<sup>7</sup> Friedman has in mind Oakeshott’s claim that Hobbes’s laws of nature are ‘no more than an analytic breakdown of the intrinsic character of law, what I have called the *jus* inherent in genuine law which distinguishes it from a command addressed to an assignable agent or a managerial instruction concerned with the promotion of interests’.<sup>8</sup> As Friedman explains, the claim is an innovation because in earlier writings Oakeshott had understood natural law on ‘the vertical model of a higher law whose function is to provide standards for judging the content of man-made laws’.<sup>9</sup>

Oakeshott’s essay is virtually ignored in debates within philosophy of law. On the one hand, it must seem too positivistic to the critics of legal positivism in its insistence that law’s authority is a matter of compliance with formal procedures for enacting positive law, as well as in its apparent endorsement of legal positivist accounts of the rule of law, notably, when Oakeshott said that the vision of the rule-of-law state he was elaborating ‘hovers over the reflections of many so-called “positivist” modern jurists’.<sup>10</sup> In addition, Oakeshott clearly

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<sup>4</sup> *ibid.*, 175.

<sup>5</sup> Michael Oakeshott, *On Human Conduct* (Oxford: Oxford University Press, 1975), chapter 2, ‘The Civil Condition’; hereafter, OHC.

<sup>6</sup> Michael Oakeshott, *Lectures in the History of Political Thought* (Exeter: Imprint Academic, ed. Terry Nardin and Luke O’Sullivan, 2006), especially Lecture 3, 237.

<sup>7</sup> Richard Friedman, ‘Michael Oakeshott and the Elusive Identity of the Rule of Law’ in Corey Abel and Timothy Fuller (eds), *The Intellectual Legacy of Michael Oakeshott* (Exeter: Imprint Academic, 2005) 160. 175. See also Richard B. Friedman, ‘What is a Non-Instrumental Law?’ (1992) *The Political Science Review* 81.

<sup>8</sup> RL, 172-3.

<sup>9</sup> *ibid.*

<sup>10</sup> RL, 175.

rejects versions of natural law arguments that seek to find the standards of *jus* in something external to *lex*, thus abandoning questions of the authenticity or authority of *lex* ‘in favour of “rightness” as the ground of moral obligation’.<sup>11</sup> With Hobbes, Oakeshott regarded such a stance, one that would make the issue of authority or authenticity ‘redundant’,<sup>12</sup> as a ‘recipe for anarchy’, since it amounts to the claim he rejects, following Hobbes, that ‘the voice of “conscience” [is] ... the voice of *jus*’.<sup>13</sup>

But, on the other hand, his position must appear too naturalistic to positivists, in its insistence that the rule of such law constitutes a genuine kind of *moral* association. For that insistence seems to commit Oakeshott to the idea that HLA Hart describes as ‘repugnant to the whole notion of morality’—‘the idea of a moral legislature with competence to make and change morals, as legal enactments make and change law’.<sup>14</sup> I shall suggest below that the perplexing place of Oakeshott when we try to situate him in contemporary debates in philosophy of law indicates precisely why his essay might well be the most important contribution on its topic since, say, World War II.

I suspect that the same sorts of perplexity account for the fact that scholars who give an account of Oakeshott’s views on law tend to regard this essay as little more than a further meditation on the character of ‘The Civil Condition’ in *On Human Conduct* and hence miss what Friedman regards as the startling innovation.<sup>15</sup> In addition, the claim and the analysis that follows it might well seem to provide, or at least go some considerable way to doing so, a rationalist or instrumentalist solution to a puzzle that Oakeshott articulated in all of his attempts to provide an account of the role of law in making possible a civil condition—the relationship between law and a standard of rightness, *lex* and *jus*. For in his innovative move, Oakeshott seems to endorse the Hobbesian idea that the *lex naturalis* is composed of

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<sup>11</sup> *ibid*, 146.

<sup>12</sup> *ibid*, 147.

<sup>13</sup> *ibid*, 169.

<sup>14</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2<sup>nd</sup> ed., 1994), 177.

<sup>15</sup> Moreover, this idea combined with his emphasis on the authority of law as residing in formal procedures for enactment of *lex* must appear to undermine the claims to authority of custom and tradition, including the common law, and hence the idea seems in serious tension with Oakeshott’s general critique of rationalism for its blindness to such claims. Consider that in the essay on law in the most recent collection on Oakeshott, the author pays no attention to this element in Oakeshott’s account of the rule of law: Steven Gerencser, ‘Oakeshott on Law’ in Paul Franco and Leslie Marsh (eds), *A Companion to Michael Oakeshott* (Pennsylvania: University of Pennsylvania Press, 2012), 312. He is not alone. Martin Loughlin in his magisterial *Foundations of Public Law* (Oxford: Oxford University Press, 2010), 331 says that Oakeshott ‘offers us what is probably the most rigorous and coherent account of the concept of the rule of law as a foundation of public law’. But in his close reading of Oakeshott at 324-332 does not mention this remark. See my ‘The End of the Road to Serfdom?’ (2013) 63 *University of Toronto Law Journal* 310, 324-26, for criticism of Loughlin on this point.

‘maxims of rational conduct’, the ‘necessary causal conditions of peaceful association.’<sup>16</sup> And that suggests that the rule of law is the instrument of achieving the *telos* of peace and that the principles of natural law are rationally derived means to achieving that end.

I shall try to show that Oakeshott did provide at least the sketch of a solution to the puzzle of the rule of law—the relationship between *lex* and *jus*—one which makes sense of Hobbes’s thought that *jus* is no more than action in conformity with right, that is, in conformity with the law. The sketch of that relationship goes as far as one can to bringing to the surface the content of the collective civilizational dream Oakeshott portrayed in the text for a radio talk of 1947 from which the epigraph to this paper is taken. To go further would be to go into a kind of institutional detail that Oakeshott perhaps thought beyond the scope of a philosophical inquiry into the rule of law.

But the limits set by this kind of inquiry do not preclude uncovering problems that require a certain kind of institutional solution, nor do they preclude reference to substantive political ideals, as long as the ideals figure in the inquiry as formal features of the *explanandum*. I shall argue in the latter regard that the substantive political ideal is peace, but not peace in the sense of any effectively imposed order; rather it is the kind of order that makes it possible for free and equal individuals to live peaceably together. Whether that ideal is itself desirable is not, however, a question that the inquiry seeks to answer—it is merely the ideal that holds together the other formal features that figure in the *explanandum*—*lex*, *jus*, and *auctoritas* or authority—and so it has a proper place in a formal theory, in which the central idea is the non-instrumentality of law. Law’s non-instrumentality resides in the way it makes possible interaction between individuals in which their actions are ‘self-chosen’.

That our collective civilizational dream is of the rule of law might seem rather dreary to many, as Oakeshott acknowledged when he said that Hobbes’s version of the myth might appear to those whose dream it replaced—that of a providentially-ruled ‘destiny of man’—‘an unduly disenchanting interpretation of the mystery of human life’.<sup>17</sup> However, in that same talk, itself more a work of art than of philosophy, Oakeshott said that the ‘myth of our civilization’ depicted by Hobbes ‘recalls man to his littleness, his imperfection, his mortality, while at the same time recognizing his importance to himself’ and thus that Hobbes

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<sup>16</sup> See Gerencser, ‘Oakeshott on Law’, and in the same volume, Noel Malcolm, ‘Oakeshott and Hobbes’, 217. Malcolm, in contrast to Gerencser, does see the importance of this passage to understanding Oakeshott’s legal theory, though in his view, it leads to a kind of rationalism that Oakeshott generally rejects.

<sup>17</sup> Oakeshott, ‘*Leviathan – A Myth*’, 153.

conveyed the same kind of idea as ‘the literature of Existentialism is doing today with an exaggerated display of emotion and a false suggestion of novelty’.<sup>18</sup>

The rule of law holds out the promise of deliverance from the natural state where each rules himself but is at the same time subject, or at least potentially subject, to the arbitrary rule of others, so that the natural state is one of absolute liberty that is worthless because of the threat of conflict such liberty engenders. However, deliverance might not seem to amount to much. It might be to a civil state which, on a description that Hobbes appears to revel in at times, substitutes a condition in which one is subject to arbitrary rule of all others--the war of one against all--for a condition in which all are subject to the arbitrary rule of one person--the sovereign. And while subjection to the ‘lusts, and other irregular passions’ of a person who has ‘unlimited power’ might seem ‘obnoxious, Hobbes suggests that such subjection is always better than the ‘dissolute condition of masterlesse men’, the condition of the state of nature.<sup>19</sup>

But, as Oakeshott helps us to see, civil society is not only a state where all have security, but also one where each enjoys liberty under an order of public laws. This is the achievement of the rule of law and the concrete manifestation of the civilizational dream. Its description requires a move from the register of art to that of philosophy, and thus to a register of rational argument, but not to a particular form of rational argument, one that directly subordinates all maxims of action to one end. As Oakeshott said in ‘The Rule of Law’, the character of a state in terms of the rule of law was for those who tried to articulate it in the seventeenth century ‘something less than the promise of the fulfilment of the dream of being, at last, ruled by incontestable “justice,” and something more than the mere extrapolation of a current tendency’.<sup>20</sup>

Oakeshott, or so I shall argue, puts in place the basis of an account of legality in which Hobbes effects a radical break with the past in conceiving of the principles of natural law as entirely secularized, formal principles that are constitutive of a form of civil association in which sovereignty inheres in an artificial, that is, legally constituted person. Natural law is reconceived as principles of legality that make intelligible to the members of a political society the claim that they are under a prior obligation to obey the laws made by a

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<sup>18</sup> *ibid.*, 154.

<sup>19</sup> Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, ed. Richard Tuck, 1997), 128; hereafter, *Leviathan*.

<sup>20</sup> RL, 169.

body or person the authenticity of which can be checked formally. This person or body need not be a parliament because what matters from the legal perspective is not the political constitution of the body but that it is legally constituted. The innovation adds that there is more to authenticity than validity—there are also the formal attributes of legality or *jus*.

### **The Puzzle: But Authority and not Truth makes Law**

Carl Schmitt considered Hobbes to be the central figure in the civilizational story of the West and thought that the most significant sentence in Hobbes's work that explained this place was from the Latin version of *Leviathan*: 'Sed Autoritas non Veritas facit Legem'.<sup>21</sup> Oakeshott had the same view of Hobbes and also regarded the claim that authority and not truth makes law as the animating idea in the establishment of the modern state. However, unlike Schmitt, Oakeshott did not think that the idea that authority makes law reduces law to the commands of the powerful.

In order to understand Oakeshott's argument, we need to notice that the idea that authority makes law might seem ambiguous between what appear to be two rather different claims. The first is that law is an artifact produced by an authority in the sense that if we want to know what the law of a jurisdiction is we should find out what its official procedures are for making law; we will then know that all that is produced in accordance with those procedures is the law of that jurisdiction. The second is that whatever counts as law in a jurisdiction has authority in the sense of making a justified or legitimate demand on those subject to it.

But this ambiguity arises mainly because of the hold of legal positivism on our thought with two consequences. First, we tend to assume that political and legal philosophy are distinct endeavours. Second, we tend to adopt John Austin's slogan, 'The existence of law is one thing; its merit or demerit another',<sup>22</sup> the view that legal and moral duty coincide

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<sup>21</sup> See, for example, Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Mass.: MIT Press, trans. George Schwab, 1988), 33-35. This spelling of *auctoritas* is given in Thomas Hobbes, *Leviathan*, Volume 2 of the *Clarendon Edition, The English and Latin Texts*, (Oxford: Clarendon Press, ed. Noel Malcolm, 2012), 431.

<sup>22</sup> Quoted in H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 591, 596.

only contingently, or, in more traditional terms, that *de facto* legal authority does not imply *de jure* authority.

Hobbes did not see any ambiguity because he took political and legal philosophy to be one continuous endeavor to explain why law made by an authority in the first sense has authority in the second sense. In other words, *lex* is always *justa*, which is an affirmation, not a denial, of the natural law slogan, *lex injusta non est lex*.<sup>23</sup> For if law is always just there can be no such thing as an unjust law, precisely the standard interpretation of Hobbes, despite his many assertions that the sovereign can act inequitably.<sup>24</sup> The question is what the standards for justice are.

Oakeshott had grappled with just this issue when he sought to trace the relationship between *jus*, *lex* and *auctoritas* in the third of his lectures on 'Roman Political Thought'. There he argued that *lex*, a statute made in accordance with a 'known process', was the means the Romans discovered for emancipating themselves 'from the rule of ancient custom'.<sup>25</sup> They thus confined their reflection about law to the processes for making law with the exception of one 'speculative idea' taken from the Greeks, who set themselves the task of understanding the relationship between 'law' and 'justice' or the law of nature. The puzzle for them was how law could be legitimate, because made in the proper way and yet unjust.

In order to solve this puzzle, the Romans saw the need to appeal to a law not made by men, which then required appeal to a law 'embedded in the operation of the universe' or made by 'a providential god'. But Oakeshott also claims that the Romans 'clung to the idea of legality' since 'they could think of *no* other way of criticizing the justice of current legal rules than by measuring them against other and higher legal rules, the rules of the laws of nature'.<sup>26</sup> He adds that it was in 'virtue of the high value the Romans placed upon legality ... that the Roman *civitas* became and was what may be called a civil association. That is, a set of private persons joined in the recognition of a law to which they, all alike, owed obedience'.<sup>27</sup> This idea was in turn connected with the ideas of *auctoritas* or authority and *libertas* or

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<sup>23</sup> As it happens, at the point in *Leviathan* where Hobbes makes this striking claim, he is not strictly speaking concerned with the issues set out in the text to this note, but with denying any claim by the writers of books of 'Moral Philosophy' to be a source of law's authority; in the English version: 'The Authority of writers, without the Authority of the Common-wealth, maketh not their opinions Law, be they never so true': *Leviathan*, Chapter 26, 191.

<sup>24</sup> For example, *ibid.*, Chapter 26, 192-93.

<sup>25</sup> Oakeshott, *Lectures in the History of Political Thought*, 244.

<sup>26</sup> *ibid.*, 244-45, his emphasis.

<sup>27</sup> *ibid.*, 246.

‘freedom’, in that the three ideas come together since the Romans knew ‘themselves to be joined in the common recognition of the authority of a law’.<sup>28</sup>

But quite how this common recognition gave rise to liberty, other than as a contrast with slavery, or as a reference to the fact that Rome was founded in a ‘free act’, is not clear from Oakeshott’s account, nor what role the law of nature/legality could play in all of this.<sup>29</sup> Moreover, there is no answer forthcoming in his three last lectures, on ‘Authority and Obligation’, as these lectures—a tour of modern European thought on this topic—reveal the inadequacies of the various proposed solutions, though Oakeshott clearly remains intrigued by the influence of the idea in European thought that it is the procedural legitimacy of statutes that endows them with authority/legitimacy.<sup>30</sup>

This way of approaching the problem makes the legitimacy or authority of law a matter of compliance with procedures whereas the issue of the justice of the enacted law or *lex* will depend on its correspondence, not with procedures, but with higher legal rules or *jus*. But if the source of *jus* is divine, what we get is a set of moral rules that are imposed from above, a kind of natural law that is both vertical and substantive, and in a disenchanted or secular world secular legitimacy is pitted against the versions of substantive natural law that are in contest with each other. The myth of secularism displaces the myth of a providential deity but then, as Schmitt argued, the myth might find itself prey to a contest of conflicting myths: an anarchic condition of warring social groups each with its own claim to moral authenticity and that share only their denial that laws are legitimate merely because they have been enacted in accordance with recognized procedures.<sup>31</sup>

Schmitt sets out a two-pronged critique of what we can think of as liberal legalism, whose twentieth century representative he takes to be Hans Kelsen. First, liberal legalism implodes because the idea of standards of justice internal to legality is incoherent, with the result that justice either gets wholly externalized, and thus becomes the property of a plurality of competing ideologies, or it remains wholly internal, in which case it is reduced to being a property of validity. Indeed, Schmitt seems to suppose that the incoherence arises because liberalism has to embrace both options: because justice is reduced to being a

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<sup>28</sup> *ibid.*, 251.

<sup>29</sup> *ibid.*, 247-51.

<sup>30</sup> *ibid.*, 426-68, and see 429, 455 & 466 for references to procedural legitimacy.

<sup>31</sup> Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, CT: Greenwood Press, trans. George Schwab and Erna Hilfstein, 1996).



property of validity, law becomes seen as a mere instrument of power, with the result that competing interest groups will compete to make the law the instrument of their particular conception of justice.<sup>32</sup> Second, these problems arise out of liberalism's failed attempt at myth-making.

Oakeshott had a different approach, one which seeks to solve the puzzle which had found in his 'Lectures on Roman Law', in which he gestured at an idea of higher law that is not vertical in nature, and higher only in the sense that it not man-made. In so doing, he indicated a possibility that is different from both procedural legitimacy and compliance with a substantive morality, that is, formality, an attribute of law that comes about because to be law artifacts must be more than validly produced; they must also be legal.

The full exposition of this idea comes in 'The Rule of Law'. There Oakeshott says of association in terms of the rule of law that it, first, '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"'.<sup>33</sup> He seems thus to put in place two kinds of formality—on the one hand, the formal procedural criteria of the rule of law that pertain to the recognition of valid law and, on the other, the formal attributes of the rule of law that pertain to its *jus*.

However, his most explicit description of legality criteria is in his discussion of 'The Civil Condition' in *On Human Conduct* in the part where he sets out what the idea of the authority of the civil condition or *respublica* 'categorially excludes'.<sup>34</sup> First, authority cannot be attributed to the *respublica* on account of what it achieves, for example, peace and order, nor on the basis of common conformity, for both peace and order and common conformity are made possible by recognition of its authority; hence any such attribution would be viciously circular.<sup>35</sup> Second, the authority of *respublica* does not lie in social purpose, approved moral ideals, a common good or general interest, or a justice 'other than that which is inherent in *respublica*'. Thus, Oakeshott concluded that the attribution of authority is nothing more than the 'acknowledgement of *respublica* as a system of moral (not instrumental) rules ...'<sup>36</sup>

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<sup>32</sup> See, for example, Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, ed. Jeffrey Seitzer, 2008).

<sup>33</sup> RL, 151.

<sup>34</sup> OHC, 152.

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*, 153.

However, in a note Oakeshott remarks, in a clear albeit unreferenced allusion to the American legal theorist Lon L. Fuller,<sup>37</sup> that included in that which is ‘inherent in *respublica*’ is:

of course, not merely *lex* justified (i.e. validated) in terms of *lex* but the other attributes intrinsic to association in terms of non-prudential rules, such as: the quality of legal subjects; rules not arbitrary, secret, retroactive or awards to interests; the independence of judicial proceedings (i.e. all claimants or prosecutors, like defendants, are litigants); no so-called ‘public’ or ‘quasi-public’ enterprise or corporation exempt from common liability for wrong; no offence without specific prescription; no penalty without specific offence; no disability or refusal of recognition without established inadequacy of subscription; no outlawry, etc., etc.: in short, all that may be called the ‘inner morality’ of a legal system.<sup>38</sup>

In other words, for the rules to be acknowledged as such, that is, as a system of *moral* or *non-instrumental* rules, these rules must have attributes that go beyond the Kelsenian idea that rules are legal because they are the valid products of recognized procedures; they must also display these (and perhaps other) attributes.

This note foreshadows the radical innovation in Oakeshott’s account of civil authority. For until this point in the analysis it had seemed the case that it is necessary and sufficient for a rule to have authority that it is the valid product of a recognized procedure. The procedure itself has to be the reason for our acknowledgement, not any benefits—for example, peace—that might be secured as a result of the acknowledgement. But from the note it seems to be the case that if the procedures produced a rule that affronted the ‘inner morality’ of a ‘legal system’, the rule would not be fit for acknowledgement as authoritative, unless Oakeshott at this point saw a difference between the claim that the attributes are ‘inherent in *respublica*’ and the claim that they are ‘inherent in *lex*’. This would amount to the difference between, on the one hand, a law that was perfectly legal because it had been validly produced but unjust from the perspective of the morality of civil association and, on the other, a law that failed to be law despite its compliance with criteria of validity because it lacked the attributes of legality. The latter option states that the fact that a rule complies with

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<sup>37</sup> See Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, rev. ed., 1969).

<sup>38</sup> OHC, n. 1, 153. Oakeshott adds to this note that there is ‘no place in civil association for so-called “distributive justice”; that is the distribution of desirable substantive goods’. Not only can *lex* not be a ‘rule of distribution of this sort’ but ‘civil rules have nothing to distribute’. I will come back to this qualification in the text below.

criteria of validity makes the rule a candidate to be recognized as authoritative, but points out that there are further criteria—the criteria of legality—that have to be met. It would follow that a secret rule, or a law that was immunized against judicial review, ‘etc., etc.’ would not count as an authoritative rule, which is to say, as a valid rule of the legal system.

Of particular significance, I think, are the first and last items on the list: ‘the quality of legal subjects’ and ‘no outlawry’, and when Oakeshott gives a shorter version of the list in ‘The Rule of Law’, these two items figure prominently on it, as the last two items:

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.<sup>39</sup>

The ‘quality’ of the legal subject, which I take to be a consideration described only a little more elaborately in ‘all associates equally and without exception subject to the obligations imposed by law’, is clearly linked to his claim of the repugnance of outlawry to the inner morality of law, that is, to the practice of declaring a fugitive from justice to be beyond the law, so that the fugitive was stripped of legal status--the status of a *persona*.<sup>40</sup>

A *persona* for Oakeshott is, first, a person abstractly or formally conceived as ‘related to others in terms of distinct and exclusive conditions’, and second, as having the character common to relationships between ‘intelligent agents’—‘what they have seen fit to require of themselves and one another’.<sup>41</sup> His inquiry is thus into the question: ‘What is the character of the mode of relationship whose conditions are man-made laws?’<sup>42</sup> And as I will now show, despite some hesitations, Oakeshott, in turning in ‘The Rule of Law’ to Hobbes for the radical innovation highlighted by Friedman, adopts the claim that the attributes are inherent in *lex*. That makes questions about law’s authority or authenticity still a formal matter, but compliance with criteria of validity no longer seems sufficient for authority since there also has to be compliance with legality.

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<sup>39</sup> *ibid.*, 152-3.

<sup>40</sup> See H. Erle Richards, ‘Is Outlawry Obsolete?’ (1902) 18 *Law Quarterly Review* 207 and for recent treatments, Larry May, ‘Magna Carta, The Interstices of Procedure, and Guantanamo’ (2009) 42 *Case Western Reserve Journal of International Law* 91, and Jane Y. Chong, ‘Targeting the Twenty-First-Century Outlaw’ (2012) 122 *Yale Law Journal* 724. As all three essays show, outlawry was tamed by judges who subjected it to procedural constraints, thus protecting liberty.

<sup>41</sup> *RL*, 130-1.

<sup>42</sup> *ibid.*, 131.

Oakeshott frames the question this essay is seeking to answer as ‘how human beings might acquire the condition of being *obligated* to observe the prescriptions of an *humanus legislator*.’<sup>43</sup> He takes Hobbes to be one of the few who not only addressed exactly this question, but also saw that it had to be addressed in recognition of a prior relationship of obligation between sovereign and subject.<sup>44</sup> And he finds most significant in Hobbes his insistence ‘that the rule of law stands for a moral (not a prudential) relationship’, which entails in part that it does not determine actions but “‘the measure of the good and evil of actions’”,<sup>45</sup> a claim I will come back to below. Hobbes, that is, does not regard the sovereign (as Bentham and Austin were to) as causing subjects to act in a certain way by issuing commands to which sanctions attach, but as putting in place public standards which subjects are obliged to take into account when choosing how to act.

In his discussion of Hobbes, Oakeshott suggests that Hobbes managed to provide an ‘imperfect’ but ‘less shaky’ formulation of the rule of law than is to be found in the writings later jurists-- ‘a state ruled by *lex*, the authority of which lies in its *jus*’. For Hobbes, a state is an association ‘ruled exclusively by law’. ‘Such a state ... is composed of *personae* related solely in terms of their obligation to observe in all their self-chosen conduct certain non-instrumental (that is moral or procedural) conditions prescribed by a sovereign legislative office expressly authorized to deliberate, make and issue such prescriptions which constitute the *lex* of the association’.<sup>46</sup> It follows, says Oakeshott, that:

Authentic *lex* cannot be *injus*. This does not mean that the legislative office is magically insulated from making ‘unjust’ law. It means that this office is designed and authorized to make genuine law, that it is protected against indulging in any other activity and that in a state ruled by law the only ‘justice’ is that which is inherent in *lex*.<sup>47</sup>

Oakeshott, however, seems unsure what to make of this claim. First, even its most abstract institutional implications are unclear, for example, what to make of the fact that the legislative office is both not ‘insulated’ from making ‘unjust’ law and yet ‘protected’ from doing so. For example, if we were to suppose that it is to the judiciary that we should look

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<sup>43</sup> *ibid.*, 162.

<sup>44</sup> *ibid.*, 163.

<sup>45</sup> *ibid.*

<sup>46</sup> *ibid.*, 171.

<sup>47</sup> *ibid.*

for such protection, Oakeshott seems quickly to squash that thought in insisting that *jus* ‘has no room for ... 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”.’<sup>48</sup> His understanding of the separation of powers is as strictly formal as the rest of his legal theory. Legislators deliberate the desirability of changes to the law. But the judge’s ‘task is to relate a general statement of conditional obligation to an occurrence in terms of what *distinguishes* it from other occurrences. Deliberation, here, is an exercise in retrospective casuistry’.<sup>49</sup>

Second, and more generally, Oakeshott seems unsure of the status of the claim. He said that there ‘are some considerations that are often characterized as *jus* but which are inherent in the notion, not of a just law, but of law itself’ and that these amount to conditions that ‘distinguish a legal order and in default of which whatever purports to be a legal order is not what it purports to be’.<sup>50</sup> ‘It is only’, he added, ‘in respect of these considerations and their like that it may perhaps be said that *lex injusta non est lex*’.<sup>51</sup> He also said, again perplexingly, that the ‘only “justice” the rule of law can accommodate is faithfulness to the formal principles inherent in the character of *lex*: non-instrumentality, indifference to persons, and interests, the exclusion of *privelege* and outlawry, and so on’.<sup>52</sup>

These reflections leave intact the puzzle of the relationship between *lex* and *jus*. One could conclude from them that there is no moral quality to *lex* that comes from its conformity with certain formal attributes—from the fact that law to be such has to be legal. However, Oakeshott seems to envisage three possibilities about the morality of the rule of law: (1) the *jus* inherent to *lex* (the inner morality); (2) the substance inherent in the form (i.e. peace); (3) the character of the rules relating civil authority and civil obligation.

The first is that when we have the rule of law a kind of moral deliberation is made possible about *jus* in that the agents may consider ‘the propriety of the conditions prescribed in a particular law’:<sup>53</sup> ‘a form of moral discourse not concerned generally with right and

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<sup>48</sup> *ibid.*, 156.

<sup>49</sup> *ibid.*, 156-7, his emphasis. In note 6 on 157, he speaks of the ‘Dworkinesque judge’ who ‘usurps the office of legislator’.

<sup>50</sup> *ibid.*, 152.

<sup>51</sup> *ibid.*, 153.

<sup>52</sup> *ibid.*, 173.

<sup>53</sup> *ibid.*, 153.

wrong in human conduct, but focused narrowly upon the kind of conditional obligations a law may impose'.<sup>54</sup> It is Hobbes's failure to appreciate this aspect of the rule of law that is, according to Oakeshott, the major problem in his account of the state as an association in terms of the rule of law.<sup>55</sup> Hobbes is right not to identify *jus* with 'a supposedly universal inherently just Natural Law or a set of fundamental Values', for example, a Bill of Rights, since not only does the rule of law have no need of such notions, but 'when invoked as the conditions of the obligation to observe the conditions prescribed by *lex*, they positively pervert the association: they are the recipe for anarchy.'<sup>56</sup> Oakeshott adds that the '*jus* of *lex* cannot be identified simply with its faithfulness to the formal character of law' since to 'deliberate the *jus* of *lex* is to invoke a particular kind of moral consideration',<sup>57</sup> which he elaborates by saying that 'the prescriptions of the law should not conflict with a prevailing educated moral sensibility', one that is capable of distinguishing between conditions of the kind that should be imposed by law, that is, 'justice' in contrast with 'virtue' and 'good conduct'.<sup>58</sup> Hence, it appears that *jus* of the conditions is a:

combination of their absolute faithfulness to the formal character of law and to their moral-legal acceptability, itself a reflection of the moral-legal self-understanding of the associates which (even when it is distinguished from whatever moral idiocies there may be about) cannot be expected to be without ambiguity or internal tension – a moral imagination more stable in its style of deliberation than in its conclusions.<sup>59</sup>

The second possibility is the relationship between the rule of law and values such as freedom and peace. In regard to freedom, Oakeshott notes that Hobbes identifies a category of 'civil rights' or 'liberties'. But these, Oakeshott says, 'turn out not to signify conduct and considerations which *lex* should, in justice, recognize and protect; they represent conduct in respect of which *lex* has not in fact prescribed conditions: the circumstantial silence of the

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<sup>54</sup> *ibid.*, 156.

<sup>55</sup> *ibid.*, 173.

<sup>56</sup> *ibid.*

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*, 174.

<sup>59</sup> *ibid.*

law which may at any time properly be broken'.<sup>60</sup> And he insists that the virtue of the rule of law is 'not to promote a certain kind of "freedom".' Rather, it:

denotes a certain kind of 'freedom' which excludes only the freedom to choose one's obligations. But this 'freedom' does not follow as a consequence of this mode of association; it is inherent in its character.<sup>61</sup>

And the same, he says, is true of "peace" and "order". 'A certain kind of "peace" and "order" may, perhaps be said to characterize this mode of association, but not as consequences'.<sup>62</sup>

Third, the particular rules are themselves moral in kind because they impose obligations on conduct that apply regardless of the particular ends that the *personae* seek. They are not, however, merely moral because the obligations are authenticated through a public procedure:

the distinctive quality of civil freedom, the recognition given in *civitas* to moral agency, springs from civil association being rule and relationship in terms of authority and obligation...It is relationship in terms of a system of *lex* which prescribes, not satisfactions to be sought or actions to be performed, but moral conditions to be subscribed to in seeking self-chosen satisfactions and in performing self-chosen actions.<sup>63</sup>

In my view, all three possibilities are right but the relationship between them has to be appreciated in order to see why *lex* might be thought necessarily to have a moral quality to it; and here both Hobbes and F.A. Hayek are helpful.

### **Hobbes and Hayek on the Quality of Civil Liberty**

There are two places where, as I interpret *Leviathan*, Hobbes held views rather different from those Oakeshott attributed to him, and these views are, as I will argue, pertinent to an elaboration of the relationship that Oakeshott sought to disinter between *lex* and *jus*. The first has to do with Oakeshott's claim that Hobbes failed to appreciate that the rule of law

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<sup>60</sup> *ibid.*, 171-2.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> OHC, 157-8.

makes possible a certain kind of moral deliberation, the second that civil liberty is for Hobbes no more than the space where the individual has freedom to act because the law is silent as to his obligations.

It is true that Hobbes discourages moral deliberation of a certain sort. He insists that it would be irrational for the subject to claim that a law is unjust since he argues that the subjects are the authors of the sovereign's laws, and one cannot be unjust to oneself. In addition, he is generally allergic to public deliberation about justice since subjects should take justice to be no more than compliance with the law and in any case they are ultimately the authors of the law since they authorize the sovereign to make it and one cannot be unjust to oneself. But Hobbes clearly sees that the rule of law require a kind of constrained moral deliberation--the deliberation by subordinate judges involved in interpreting enacted law. Such deliberation is moral because Hobbes regards judges as under a duty to interpret the law in the light of their understandings of the laws of nature, which he regards as the 'true and onely Moral Philosophy. For Morall Philosophy is nothing else but the Science of what is *Good*, and *Evill*, in the conversation and Society of man-kind'.<sup>64</sup>

My claim here is not that Hobbes regarded judges as entitled to invalidate a law that seems to conflict with one or more of the laws of nature, only that judges are obliged to interpret any enacted law as if the sovereign intended it to comply with natural law, and, further, that Hobbes clearly regards a law that cannot be so interpreted as legally as well as morally problematic.<sup>65</sup> Entailed in this understanding of adjudication is that a subject is entitled to challenge an enacted law on the basis that its 'literal' interpretation does not comply with natural law in the hope that a judge will find that there is a way to interpret the law so that its meaning is more consistent with the laws of nature. The subject must take the judge's interpretation as definitive, though it has no force beyond the parties to the matter, as Hobbes is firmly opposed to any doctrine of precedent.<sup>66</sup> But the point remains that the laws of nature condition the content of the subject's obligations insofar as the text of the enacted law relevant to the matter permits and until such point as the sovereign overrules his subordinate judge.

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<sup>64</sup> *Leviathan*, 110.

<sup>65</sup> Though as I have pointed out, Hobbes does think that laws that are perfectly valid are void when they purport to grant away any of the essential rights of sovereignty – see David Dyzenhaus, 'Hobbes on the Authority of Law' in David Dyzenhaus and Thomas Poole (eds), *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012) 186, 205-6, referring to the right of 'judicature'; *Leviathan*, 125.

<sup>66</sup> *Leviathan*, 193-94.



The morality at stake is internal to *lex*--‘The Law of Nature, and the Civill Law, contain each other, and are of equall extent.’<sup>67</sup> And deliberation about it is not about morality at large. It is about how best to understand the conditions of interaction that the sovereign has prescribed in his public laws in terms that live up to the assumption that judges must adopt: that all his law is intended to serve the interests of subjects viewed abstractly, as *personae* equal before the law.

However, those interests are not confined to abstract equality. They include liberty, the second issue where Oakeshott’s account of Hobbes in ‘The Rule of Law’ could do with some refinement, in order to appreciate that the kind of liberty that is constituted by a regime of public laws or *publica lex* is akin to the kind of liberty defended by contemporary republicans in terms of an ideal of freedom as non-domination.<sup>68</sup>

Hobbes begins Chapter 21 of *Leviathan*, ‘Of the Liberty of Subjects’, by saying that freedom is the ‘absence of ... external Impediments of motion’. He goes on to define a free man as ‘he, that in those things, which by his strength and wit he is able to do, is not hindered to doe what he has a will to do’.<sup>69</sup> And it seems from this chapter, and from elsewhere in *Leviathan*, that the point of entering the civil condition is to establish a sovereign who will enact laws that restrain the radical liberty of the state of nature so that individuals can interact on terms set by the sovereign, rather than by other individuals. Hence, the liberty an individual has in civil society is the liberty that one has through the ‘silence’ of the law ‘to act according to his own discretion’,<sup>70</sup> the same kind of liberty one had in the state of nature, but now restricted by the law so that individuals can safely act on their desires within the restricted space.

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<sup>67</sup> *ibid.*, 185.

<sup>68</sup> The claim that Hobbes set out a view of freedom as non-domination will strike contemporary republicans as absurd, since they regard *Leviathan* as a polemic against the republicans of his day. See Philip Pettit, ‘Liberty and Leviathan’, (2005) 4 *Politics, Philosophy, & Economics* 131; Quentin Skinner, *Hobbes and Republican Liberty* (Cambridge: Cambridge University Press, 2008). For an account of Oakeshott as committed to this kind of republican ideal, see David Boucher, ‘Oakeshott, Freedom and Republicanism’ (2005) 7 *British Journal of Politics and International Relations* 81 and for an account of Hobbes in similar terms, see Lars Vinx, ‘Hobbes on Civic Liberty and the Rule of Law’ in Dyzenhaus and Poole, *Hobbes and the Law*, 145.

<sup>69</sup> *Leviathan*, 146, emphasis removed from the definition.

<sup>70</sup> *ibid.*, 152. Hobbes continues: ‘As for the other Liberties, they depend on the Silence of the Law. In cases where the Sovereign has prescribed no rule, there the Subject hath the Liberty to do, or forbear, according to his own discretion. And therefore such Liberty is in some places more, and in some lesse; and in some times more, in other times lesse, according as they that have the Sovereignty shall think most convenient’.

This sketch is mistaken in one fundamental respect and also does not capture the full complexity of Hobbes's views on the liberty of the subject.<sup>71</sup> Whilst Hobbes calls the civil law of the sovereign 'Artificiall Chains' he says that they are in 'their own nature but weak', though he adds that they may 'be made to hold, by the danger, though not by the difficulty of breaking them'.<sup>72</sup> The chains are not physical bonds of the sort that can literally restrict liberty, but rather obligations that subjects recognize as such because they understand that they are under a prior obligation of obedience to the sovereign. Fear of sanctions for disobedience is not the basis for obedience and cannot restrict liberty since fear is not an external impediment. However, it is still important that those who do not understand their obligation to the sovereign are motivated by fear of sanctions, so that those who do understand have the security that permits them to follow the law without making themselves prey to others.

Notice that the idea of being able to act at one's discretion does share something with the liberty one has in the state of nature, since it is the liberty to act on the basis of one's desires. But whilst natural liberty is constrained only by physical obstacles and thus not by legal obligations, this kind of liberty is constituted rather than constrained by legal obligations, since legal obligations cannot constrain in the literal way that Hobbes conceives of external impediments to individual motion triggered by desire. Moreover, it is a liberty I have even when there are such external impediments. For even if I am physically obstructed from doing something that I desire to do and that the law permits me to do through its silence, that obstruction does not take away the permission, but merely prevents me from exercising it. I still have the liberty, even though I cannot execute my desire to use it. It would thus be a mistake to think of civil liberty as a residue of natural liberty. Rather, it is the freedom of the subject to act on his own desires through subscribing to the conditions set out by the law.

Civil liberty thus has two aspects to it—what we can think of as a negative aspect, the freedom to do as we desire, and a positive aspect, the conditions that make it possible for

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<sup>71</sup> Note that this view cannot also properly account for what Hobbes calls the 'true Liberty of a Subject', that is, those things 'which though commanded by the Sovereign, he may nevertheless, without Injustice, refuse to do', and which consists in the freedom of the subject to resist the commands of the sovereign when these threaten his survival or require him to do something dishonourable that is unnecessary to the state's end; *ibid.*, 150. In my view, this kind of situation is a limit situation, in that it indicates a point where the individual is no longer in a reciprocal sovereign-subject relationship but in a power relationship, or, better, a stand-off of the sort found between individuals in the state of nature.

<sup>72</sup> *ibid.*, 147.

us to do as we desire. On this view, the criminal law is not best understood as commands to subjects backed by threats but as setting out the conditions to which subjects have to subscribe in order to interact on peaceful terms with each other. Notice also that the liberty to enter into contracts and the liberty to own property do not only permit the exercise of a discretion; they also create the very possibility of exercising a special kind of discretion, one that permits one to attach legal consequences to one's actions.<sup>73</sup>

Now the first aspect could be cast as a kind of negative freedom and the second as a kind of positive freedom. This would be a little misleading since in both cases there is a positive element in that the law makes action possible and a negative element, in that action is left to the subject's discretion. Hence, civil liberty, or freedom under an order of public laws, makes possible liberties that require legal constitution even if the substantive ends for which they are used is at the discretion of the subjects. And it is, in my view, this kind of non-instrumental law, one that makes possible civil interaction between subjects, that Hobbes has in mind when he offers the following account of the function of law in civil society:

For the use of Lawes, (which are but Rules Authorised) is not to bind the People from all Voluntary actions; but to direct and keep them in such a motion, as not to hurt themselves by their own impetuous desires, rashnesse, or indiscretion; as Hedges are set, not to stop Travellers, but to keep them in the way.<sup>74</sup>

If I am right that Hobbes sees law as constitutive of civil liberty, it might appear difficult to make sense of his remarks to the effect that law is a restraint, notably, as he says in chapter 26 of *Leviathan*, a

Restraint ... without the which there cannot possibly be any Peace. And Law was brought into the world for nothing else, but to limit the natural liberty of particular men, in such manner, as they might not be hurt, but assist one another, and joyn together against a

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<sup>73</sup> See *Leviathan*, 148: 'The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Sovereign hath prætermitted: such as is the Liberty to buy, and sell, and otherwise contract with one another; to choose their own aboad, their own diet, their own trade of life, and institute their children as they themselves think fit; & the like'.

<sup>74</sup> *ibid.*, 239-40.

However, Hobbes also says in chapter 21 that it is absurd to clamour for liberty from the law if it is natural liberty that men have in mind. His argument on this point is in part that to clamour for such liberty—for exemption from the law—is to demand a return to the state of nature in which ‘all other men may be masters of their lives’.<sup>76</sup> It is this thought that lies behind the claim that if one lives under an order of public laws, whether made by an absolute monarch or democratic assembly, ‘the Freedome is still the same’.<sup>77</sup> But Hobbes’s argument is not only about the precariousness of life in the state of nature—the ‘dissolute condition of masterlesse men’;<sup>78</sup> it is also about what we give up in not having a sovereign who rules us through public laws. That is, going beyond the security provided by the sword of the sovereign, we give up on the institution by law of civil liberty, which makes it possible to act on our desires and also to attach legal consequences to some of them in ways that are important to us as creatures who wish so to act.

For Hobbes, then, the point of individuals consenting to live under the authority of an all-powerful sovereign is to move from the natural condition in which the only freedom they can enjoy is a worthless pre-political freedom to the civil condition in which they enjoy civil liberty. However, that point requires not only that the sovereign have a monopoly on political power, but also that when he exercises that power he does so through law, by putting in place an order of public laws. With such an order in place, subjects will find that the law does more than leave to them a secure space in which to act on their desires-- to exercise discretionary liberty. The law also constitutes the spaces of civil liberty, which are unavailable in the absence of law, and that are put individuals’ discretion, thus permitting civil interaction.

Civil liberty, then, does not consist in a freedom from physical obstacles because the bonds of the law are not such obstacles. Rather, the bonds of the law create civil liberty; and as long as that is what the laws do, they will create the same quality of liberty even though the space they make for the exercise of discretion by subjects will vary greatly across both time and space. The quality of civil liberty is thus more important for Hobbes than the

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<sup>75</sup> *ibid.*, 185.

<sup>76</sup> *ibid.*, 147.

<sup>77</sup> *ibid.*, 149.

<sup>78</sup> *ibid.*, 128.

quantity; and that a universal quality is secured, even though quantity will vary according to sovereign will, is important to understanding why for Hobbes sovereign rule is not arbitrary in the way his republican critics allege, despite the fact that their charge against him is accurate that he wishes to argue that it is absurd to demand freedom from the law, whatever its political provenance, because freedom, considered qualitatively, is the same in any civil condition.<sup>79</sup>

Republicans thus fail to appreciate that Hobbes's argument turns on an account of legal order, or of a political society under the rule of law, in which the fact of the rule of law secures liberty for those subject to it. Indeed, Hobbes's argument is not even, in my view, best understood as, contemporary republicans think, as directed against their position. Rather, it is directed against a version of anarchism that claims that 'whatsoever a man does, against his Conscience is Sinne', from which it would follow, according to Hobbes, that no one would 'dare to obey the Sovereign Power, farther than it shall seem good in his own eyes'.<sup>80</sup> If anything, his argument points to a tension in the republican position insofar as republicans seem unable to decide between the view that freedom is constituted by law and this version of anarchism.

Hayek set out a similar conception of freedom almost exactly four centuries later in *The Constitution of Liberty*, though his references to Hobbes in that work consistently put Hobbes on the wrong side of the argument.<sup>81</sup> In his best known essay on the rule of law—'Planning and the Rule of Law' in his polemic against collectivism, *The Road to Serfdom*,<sup>82</sup> Hayek had presented a view of the virtue of the rule of law that it provided determinate points for individuals that permitted them to make plans for their own lives, confident that the state would not disrupt their plans. This view ruled out extensive redistributive efforts by the welfare state on an epistemic rather than a normative ground. Hayek's objection was based not on the inherent wrongness of taxation, but on the claim that any large scale efforts at redistribution required the establishment of an extensive administrative state, which made individual planning difficult since such plans would be subject to unpredictable exercises of discretion by administrative officials. In other words, the state had to avoid large scale

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<sup>79</sup> I will not deal here with those places in Hobbes's works where he seems to give the sovereign a prerogative power to act without legal authorization or even against the law. For discussion, see Thomas Poole, 'Hobbes on Law and Prerogative' in Dyzenhaus and Poole, *Hobbes and the Law*, 68.

<sup>80</sup> *Leviathan*, 223.

<sup>81</sup> For example, F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 1990), 181.

<sup>82</sup> F.A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994).

planning and stick to a regime of general laws in order to enable the epistemic conditions for successful individual planning. It was this idea that led Oakeshott to comment that a ‘plan to resist all planning may be better than its opposite, but it belong to the same style of [rationalist] politics’.<sup>83</sup>

But some ten years later, Hayek resorts like Oakeshott to a more normative account of the rule of law, finding his inspiration in Roman political and legal thought for his conception of the law of liberty. Hayek now claimed Cicero as the ‘main authority for modern liberalism’ because he had provided ‘many of the most effective formulations of freedom under law’, in particular the idea ‘that there is no conflict between law and freedom and that freedom is dependent upon certain attributes of the law, its generality and certainty, and the restrictions it places on the discretion of authority’.<sup>84</sup> Moreover, Hayek relied on exactly the contrast between slavery and freedom so central to Roman and to republican thought. His *The Constitution of Liberty* is presented as an exercise in the recovery of the ‘original meaning’ of freedom, which he takes to be summed up in the ‘time-honored phrase’--‘independence of the arbitrary will of another’.<sup>85</sup> Finally, Hayek is clear that whilst there is an important question about ‘how many courses of action are open to a person’, this is a ‘different question’ from the one that should be the primary focus of political and legal philosophy. This is the question of

how far in acting he can follow his own plans and intentions, to what extent the pattern of his conduct is of his own design, directed towards ends for which he has been persistently striving rather than towards necessities created by others in order to make him do what they want. Whether he is free or not does not depend on the range of choice but on whether he can expect to shape his course of action in accordance with his present intentions, or whether somebody else has power so to manipulate the conditions as to make him act according to that person’s will rather than his own.<sup>86</sup>

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<sup>83</sup> See Michael Oakeshott, ‘Rationalism in Politics’ in Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991), 26.

<sup>84</sup> Hayek, *The Constitution of Liberty*, 166-7.

<sup>85</sup> *ibid.*, 12.

<sup>86</sup> *ibid.*, 13.

For Hayek, then, the kind of liberty that one has under an order of public laws is not freedom from the law, because it is freedom constituted by the law, and its value depends, as I argued is the case for Hobbes, not on its extent or quantity but on its quality.

In this same book, Hayek suggests that there is much to be learnt from Schmitt, especially from his *Constitutional Theory*, in regard to the fact that ‘the law of liberty must possess certain attributes’.<sup>87</sup> Hayek thus seems to be suggesting that Schmitt helps us to appreciate that the rule of law should not be confused with the requirement of ‘mere legality in all government action’ since that confusion leads to the claim that a government acts under the rule of law simply because a law has given it ‘unlimited power to do as it pleased’. The rule of law is more than mere legality and ‘more than constitutionalism’: ‘it requires that all law conform to certain principles’.<sup>88</sup>

But even if Schmitt helps us with this appreciation, the point of his help is to get us to see that that we cannot have what we appreciate. It does not suffice in this regard to point out that while liberal legalism did implode in late Weimar, it enjoyed a resurgence after World War II, with the manifesto for its resurgence Hayek’s *The Road to Serfdom*; and hence to claim that with the collapse of the totalizing myths of Nazism and fascism, and then of communism, Schmitt’s challenge has been answered by history. For Schmitt’s challenge would survive the judgment of history if what we have is a mere myth, one that permits us to dream of the rule of law while in our waking lives we move in a world that Schmitt best describes, save for the fact that it is not in danger of imminent implosion.

Indeed, Schmitt’s challenge becomes even sharper when we note that Oakeshott and Hayek regarded democracy with some suspicion, if not hostility, as did Hobbes. In addition, whilst Hayek regarded considerations of distributive justice as having a restricted place in the civil condition, Oakeshott was prone to lapidary and unsupported assertions that they had no place at all. In *On Human Conduct* he asserted that such a ‘distribution’ of substantive benefits or advantages requires a rule of distribution and a distributor in possession of what it to be distributed; but *lex* cannot be a rule of distribution of this sort, and civil rulers have nothing to distribute’.<sup>89</sup> And he repeated this thought in the magnificent peroration to ‘The

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<sup>87</sup> *ibid.*, 205, and note 1, 484-86, at 485.

<sup>88</sup> *ibid.*, 205.

<sup>89</sup> OHC, 153, note 1.

Rule of Law': the rule of law bakes no bread, it is unable to distribute loaves and fishes (it has none) ...<sup>90</sup>

Finally, since neither Oakeshott nor Hayek, and certainly not Hobbes, thought that judges could legitimately strike down valid laws on the basis that the laws lacked the attributes of *ius*, all three seem to concede that a democratic legislature has the authority to use the form of *lex* to create an administrative state dedicated to redistribution. Such a state might lack the attributes of *lex* on Oakeshott's list from *On Human Conduct*, and thus be an affront to the rule of law, but its laws would still have authority. Still one has to ask why Oakeshott supposed that redistribution must offend against the rule of law, if the state could redistribute through rules that are appropriately enacted, public, prospective, clear, applicable to all, etc. And it is to that question that I now turn.

## Conclusion

In his essay 'Oakeshott and Hobbes', Noel Malcolm comments that Oakeshott's attraction to Hobbes is in his thought that Hobbes had an 'account of the nature of a political community as something constituted by a web of mutual understandings and mutual commitments of a particularly open-ended and unconditional kind'.<sup>91</sup> Hence, in 'Oakeshott's eyes, Hobbes was an archetypal non-rationalist in politics because he had a rich understanding of the non-instrumentality of the state'.<sup>92</sup> And Malcolm says that Hobbes was in fact 'non-teleological and anti-teleological and therefore an opponent of one type of "rationalist" thinker, the type that assumes that reason can intuit supreme values or goals, and that the aim of politics is to construct a state and a society that will fulfill them'.<sup>93</sup>

However, as Malcolm also points out, this requires a view of the state as not existing to 'solve problems; it existed, rather, to be the condition of civilized life'.<sup>94</sup> Oakeshott's answer to the question how such a state differs from standard versions of the neutral liberal state is to be found, Malcolm suggests, in 'the concept of law', that is, in the central idea of 'The Rule of Law' where the argument is that '[o]nly a state where authority remains fully

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<sup>90</sup> RL, 178.

<sup>91</sup> Malcolm, 'Oakeshott and Hobbes', 222.

<sup>92</sup> *ibid.*

<sup>93</sup> *ibid.*, 223.

<sup>94</sup> *ibid.*, 228.



non-instrumental can maintain a full and proper concept of law'.<sup>95</sup> Malcolm says further that Oakeshott's claim that 'the laws of nature are no more than an analytic break-down of the intrinsic character of law, ... the *jus* inherent in genuine law ...' is his 'most extreme claim about Hobbes'.<sup>96</sup>

Malcolm's point here is that Hobbes derived these laws from the substantive aim of peace, itself driven by the substantive end of self-preservation.<sup>97</sup> He recognizes that this is an end that is 'hardly substantive' as it does not tell individuals what to do once it is secured, but he still regards it as too substantive to fit into Oakeshott's austere non-instrumentalism.<sup>98</sup> Oakeshott was not, however, altogether consistent here. Recall that he seemed to endorse the Hobbesian idea that the *lex naturalis* is composed of 'maxims of rational conduct', the 'necessary causal conditions of peaceful association.' And that suggests that the rule of law is the instrument of achieving the *telos* of peace and that the principles of natural law are rationally derived means to achieving that end.

In my view, this tension can be dissolved once one sees that it is produced by an implausible distinction. Consider Oakeshott's remark that '*telocracy* does not necessarily mean the absence of law. It means only that what may roughly be called "the rule of law" is recognized to have no independent virtue, but to be valuable only in relation to the pursuit of the chosen end'.<sup>99</sup> The remark is made in the context of a state that finds the rule of law useful for achieving its ends, and thus merely instrumental.

However, there is no obvious inconsistency in the thought that there are two aspects to an account of the rule of law, the 'external' justification of why we should want that rule, and the 'internal' account of its intrinsic character.<sup>100</sup> Only the external justification can explain why the rule of law has any virtue, though it should be noted that the external and internal are not sealed off from one another. Suppose, as I think is the case for Hobbes, that the external justification is that the rule of law secures a certain kind of peace, the peace that not only makes it possible for individuals to interact with another, but also to interact on

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<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*, 228-9.

<sup>99</sup> Oakeshott, *Lectures on the History of Political Thought*, 472.

<sup>100</sup> See John Rawls, 'Two Concepts of Rules' in Rawls, *Collected Papers*, (Harvard: Harvard University Press, ed. Samuel Freeman, 1999), 20.

terms of equality and liberty. One should then expect that those same terms will then figure as part of the internal account of the *jus* of *lex*.

In addition, the remark presupposes that a *telocratic* state could govern using the rule of law. But if the rule of law is in place, those subject to the law will have what is characteristic of the rule of law--civil liberty of the sort that makes it possible for them to regard the law as prescribing the conditions for their self-chosen acts. It does not matter that the state regards the rule of law as a mere instrument, because it turns out that governing through the rule of law imposes a discipline on government, so that the rule of law is far from merely instrumental.<sup>101</sup> It would then be consistent for a government that recognizes the independent virtue of the rule of law to set out deliberately to achieve through law certain substantive ends, including the ends involved in setting up an extensive welfare state. Tensions will arise, but a rule-of-law order is committed to resolving them by subjecting government to the discipline of the rule of law. Indeed, Oakeshott's analysis of the modern state becomes implausible if it amounts to a covert and radical libertarianism that dresses a 'Tea Party' political agenda in philosophical garb. Rather, we should take his account at face value as pointing out an ineliminable tension that we have to try constantly to eliminate in favour of the rule-of-law side.

Finally, it is not the case that for the rule of law to exert this kind of discipline, judicial review based on what Oakeshott unkindly called the 'moral idiocy' of an entrenched bill of rights is required. All one needs is the hard work done by lawyers in developing the modern law of judicial review in administrative law to see that the purposes of an administrative state can be rendered consistent with *jus* as long as the state purports to govern through *lex*.<sup>102</sup>

This kind of work is for the most part unexciting. But it is work that attempts to show that the *jus* in *lex* makes it possible for individuals who recognize, on the one hand, their littleness, their imperfection, and their mortality, and, on the other, their importance to themselves, to live peaceably together under the conditions of liberty made possible by an order of public laws. Moreover, that it is unexciting is a good thing. As I have argued elsewhere, the more boring the administrative law of a jurisdiction is, the healthier it is on

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<sup>101</sup> That is, the point of the allegory of King Rex in Fuller's, *The Morality of Law*, 33-8.

<sup>102</sup> This point is the main theme of a most illuminating review article of Loughlin's *Foundations of Public Law*: Mark Walters, 'Is Public Law Ordinary?' (2012) 75 *Modern Law Review* 894.

the scale of human dignity, where dignity is understood as the formal equality of individuals before the law.<sup>103</sup>

Once we see this we can also recognize three related aspects of the power of our myth. First, it is a myth that subverts all other myths since it eschews all reference to providence or to the fabric of the universe and requires a justification to mere mortals. They are the little men, or free and equal individuals, who are important to themselves in that they suppose that their judgments as to the ends of their own lives should be given priority. But, second, they regard, as Hobbes suggested, the public laws of their sovereign as a kind of ‘public conscience’ since they recognize that they must subordinate private conscience to the law if they are to enjoy the conditions that make the exercise of private conscience possible. Such subordination requires that subjects be in awe of the sovereign. But since the sovereign is no more than the ‘soul’<sup>104</sup> of the artificial person—the state—that the individuals themselves have created, the person they must be in awe of if they are to have peace and liberty under an order of public law is their artifice. What they should be in awe of, therefore, is themselves.<sup>105</sup>

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<sup>103</sup> See my ‘Dignity in Administrative Law: Judicial Deference in a Culture of Justification’ (2012) 17 *Review of Constitutional Studies* 87.

<sup>104</sup> *Leviathan*, ‘The Introduction’, 9.

<sup>105</sup> See Oakshott, ‘*Leviathan – A Myth*’, 153: ‘The destiny of man is ruled by no Providence, and there is no place in it for perfection or even for lasting satisfaction. He is largely dependent upon his own inventiveness; but this, in spite of its imperfection, is powerful enough to create a civilized life out of the very fears and compulsions that belong to his nature and circumstance’.