What Is a Non-Instrumental Law?

The idea of a non-instrumental law has become central to some current debates in legal and political theory.[1] Several philosophers have devoted considerable attention to this idea, giving it a prominent place in their efforts to work out a general theory of law and state. None of these philosophers claim, however, to have invented it (although the phrase itself seems to be of recent vintage), but rather to have discovered or rediscovered it in the treatises of some famous earlier philosophers at work on the question of the nature of law. So, for instance, Ernest Weinrib has traced it back into the natural law tradition and found it most fully developed in Kant and Hegel. Michael Oakeshott offers a slightly different pedigree, but "the writers on jurisprudence" he emphasizes are equally illustrious.[2] Still, the idea of a non-instrumental or non-purposive law has proved unfamiliar and puzzling to many readers, and some have balked at the very notion of such a law, declaring it to be illusory, incoherent, or impossible. This paper is a response to the incredulity aroused by the idea of a non-instrumental law. The discussion will, however, be restricted to Oakeshott's version of a non-instrumental law and to the criticism it has engendered; and an attempt will be made to show that the general theory of human conduct in which he locates it provides the intellectual resources required to exhibit its

1. For collections of papers exhibiting this debate, see, for example, *The Rule of Law Ideal or Ideology*, ed. Allan C. Hutchinson and Patrick Monahan (Toronto, 1987); the entire issue of *Ratio Juris*, Vol. 2, No. 1 (March 1989); and Gunther Teubner, (ed.) *Dilemmas of Law in the Welfare State* (Berlin and New York, 1986).
2. Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of the Law," *Yale Law Journal*, V. 97 (May 1988), 949-1016; "Law as a Kantian Idea of Reason," *Columbia Law Review*, V. 87 (April 1987), 472-508. Oakeshott, *On Human Conduct*, (Oxford Press, 1975), especially 252-263 (Hereinafter cited as 1975 within the text).

theoretical coherence and to dispel the confusion surrounding it.

I

The following interpretation of Oakeshott's views will be based primarily on *On Human Conduct* (1975) and "The Rule of Law" in *On History and Other Essays* (1983). Oakeshott does have other discussions of law, going back to the early and neglected "The Concept of a Philosophical Jurisprudence" (1938). There he declared that "the first item" on the "agenda" of "a fresh and profitable start with the philosophical enquiry into the nature of law" is "a thorough reconsideration of the history of the philosophy of law, and in particular of the great texts which belong to that history."[3] Oakeshott's entire corpus suggests that he was himself engaged, for a long time, in this "thorough reconsideration of the history of the philosophy of law," and that the treatment of law in *On Human Conduct* and "The Rule of Law" is the culmination of this effort. In any event, these two later works taken together would appear to supply all that is needful for attaining an understanding of his notion of a non-instrumental law.

In *On Human Conduct*, Oakeshott says, in a rare instance of self-revelation in his philosophical writings, that "the most difficult feature of the civil condition to identify and get into place has been law" (181). And indeed the results of Oakeshott's struggle to identify and get law into place cannot be easily captured by the standard distinctions and categories of contemporary legal philosophy. His views seem to cut across the usual ways of staging the problems and identifying the alternatives in jurisprudence. Thus, Oakeshott expressly praises John Austin and the legal positivists because of their "determined attempt to distinguish legality from all other considerations" (1975, 171; cf. 1983, 161-2).

Yet, he also maintains that there is some sort of basic relation between law and morality; that law properly conceived is "a kind of morality" and that association in terms of law is "moral association" (1975, 129, 161, 174-5). Again, he holds the full-fledged voluntarist thesis that "the first condition of the rule of law is a 'sovereign'

3. *Politica*, V. 3, 1938, 203-222 and 345-360, 357. ("The Rule of Law" hereinafter cited as 1983 within the text).

legislative office" to make "know[n] what the laws are" (1983, 137-8). But Oakeshott also contends that what the modern state actually promulgates under the name "law" is an "ambiguous" and "heterogeneous collection of rules and rule-like instructions" (1975, 128, 186), and he proposes to reserve the word "lex" for a certain designated portion of this state-generated law-stuff. He also adopts an unexpected approach to the rule of law, construing it not in the now familiar fashion as a particular set of constitutional constraints (e.g., a Bill of Rights) on the purposive activity of modern government to prevent it from becoming oppressive, but rather as a particular mode of government, viz., by non-purposive laws. (There is no mention of rights in *On Human Conduct* or elsewhere; Oakeshott's may be the only modern "law conception of ethics" that gets along without rights). Finally, he conceptualizes the relation between law and liberty in an unusual way: the liberty of the citizen consists not in "minimal government" but in being ruled in a distinctive way. The citizen is free to the extent to which he is ruled by non-instrumental laws, unfree so far as he is subject to instrumental laws.[4]

Most commentators on Oakeshott would appear to think that he is on to something in advancing this unusual configuration of ideas about law. But it is also the case that these ideas have provoked much criticism (often as an integral part of a rescue effort aimed at finding something to be salvaged and reconstructed in this configuration). Moreover, it is evident from the various criticisms levelled against Oakeshott, that his ideas have been construed in disparate ways by different readers; this disparity is manifest in the response to his non-instrumental law notion. Some critics focus on the impact of law, taking Oakeshott's non-instrumental law idea to mean that law can have a "neutral" impact on all those affected by it. The point is then made that every law has a differential impact: the criminal law is not neutral because it "frustrates" criminals and the Establishment Clause of the First Amendment to the Constitution of the United States is not neutral because "sects that had no political ambition

4. Cf. John Liddington, "Oakeshott: Freedom in a Modern European State" in *Conceptions of Liberty in Political Philosophy*, ed. Zbigniew Pelczynski and John Gray (London, 1984).

would never feel the pinch, while sects of the other kind would."[5] Other critics shift attention from the effects of law to its source, pouncing on Oakeshott's own contention that a sovereign legislative office is essential to law and arguing that, since legislation is itself a purposive activity, so the law it produces must have a purpose. "Enacted laws are not characterized nor ought they to be enacted in a purpose-independent way."[6] Still other readers seem to think that it suffices to undermine Oakeshott's view to simply call attention to a paradigmatic expression of law, such as criminal law, and then to point out that such law is obviously purposive, having as its aim the prevention of the forbidden behavior.[7] Other critics proceed in a different fashion, appealing against Oakeshott to what they take to be the common conception of law, which is that all law is coercive, restricting the liberty of those subject to it for some purpose, so that the only significant question about law has to do with the identity of the purposes justifying restrictions on liberty, not whether law should have a purpose.[8] Yet other readers regard the very idea of non-instrumental law or "civil association" as itself purposive in that it privileges self-conscious individualism over communal solidarity.[9] Finally, there are those who adopt a general skeptical attitude toward legality as such, maintaining that the law/politics distinction is illusory, that politics is the domain of collective purposes, and that law can always be unmasked as the expression of some prevailing interest.[10]

Two characteristics of these criticisms may be noted. One is that whatever else Oakeshott has accomplished, he has certainly suc-

5. J. Budziszewski, *The Nearest Coast of Darkness A Vindication of the Political Virtues* (Ithaca: Cornell University Press, 1988), 57-8.
6. D. Neil MacCormick, "Spontaneous Order and the Rule of Law: Some Problems," *Ratio Juris*, V. 2 (March 1988), 41-54, 51.
7. John Gray, *Liberalisms* (London, 1989), 210-11.
8. Liddington, op. cit., 308.
9. David Mapel, "Civil Association and The Idea of Contingency," *Political Theory*, v.18 (August 1990), 392-410. This is an attempt to "reconceptualize" Oakeshott's ideas in a more defensive form.
10. John Wallach, "Liberals, Communitarians, and the Tasks of Political Theory," *Political Theory* (November 1987).

ceeded in eliciting from his critics all or nothing theses about law of their own: all law is coercive, no law is capable of neutrality, all law restricts liberty, all law is purposive, etc. The second is that these general claims about law do not themselves necessarily go together. The Austinian who contends that law is essentially coercive is not thereby committed to the collapse of the law/politics distinction: and the utilitarian who proposes to judge every law in terms of its consequences is not necessarily committed to the doctrine that law is incapable of "neutrality."[11] In any event, with respect to both of these characteristics, the reader who encounters this dispute between Oakeshott and his critics will readily recognize that he has entered the province of jurisprudence.

The entire history of jurisprudence is strewn with general theses and counter-theses about what law is or is not. Law is "something rational;" it is "the will of superior power;" it is "the word of him who by right has command over others;" it is "the command of the sovereign;" and so on. The initial interpretive issue posed by these general juridical utterances is, then, to determine how they are to be taken, what question they are intended to answer, what issue or issues were at stake in the (apparent) disagreement between those who advanced the clashing theses. In contemporary jurisprudence, it is generally recognized that the question, What is law?, has meant different things to different thinkers, that general conceptions of law have been put forward from different perspectives, and that different types of theory about law are on offer in the form of abbreviated definitions about the nature of law, the essence of law, etc.[12] So confronted with Oakeshott's "non-instrumental law," it would seem indispensable at the outset to step back and attempt to figure out what sort of thesis about law Oakeshott is advancing. What is the question

11. See Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, 1990) for a helpful attempt to sort out these various positions.

12. Cf. J. Raz, "The Problem About the Nature of Law," *University of Western Ontario Law Review*," V. 21, 1983, 203-218. Philip Soper, *A Theory of Law* (Cambridge: Harvard University Press, 1984). Michael D. Bayles, "What is Jurisprudence About? Theories, Definitions, Concepts, or Conceptions of Law?", *Philosophical Topics*, V. 18 (Spring 1990), 23-40.

to which non-instrumental law is supposed to be the answer? To resolve this interpretive issue is certainly not enough to vindicate Oakeshott, but it would certainly seem to be the necessary first step in assessing the validity of his theory.

Only a stripped-down response to the preceding interpretive issue is possible within the limits of this paper. Certainly no extended textual exegesis can be attempted, but two considerations are basic.

First, the idea of non-instrumental law is the idea of a distinctive method of rule (not a claim about the impact of law, the proper characterization of legislative intention, etc.). The problem Oakeshott conceived himself to be working on within the tradition of legal philosophy was the problem of identifying the character and postulates of one specific way of directing the conduct of that complex creature, a human being, among all the possible ways of directing, guiding, influencing, governing, etc. Law is not any way of getting a human being to act; nor is a legal system any system of power that is regarded as "legitimate" by those subject to it. The quest for law is the quest for a particular mode of rule, and this is why Oakeshott's actual detailed procedure in writing about law in *On Human Conduct* and "The Rule of Law" is continually to compare and contrast law with other methods of guiding human conduct, e.g., by argument, advice, "persuasive discourse," propaganda, threats, etc. Since, then, non-instrumental law is intended to pick out a distinctive method of rule, it becomes necessary to recover the larger typology of methods for directing human beings in which Oakenshott locates it and to recapture the perspective from which he set up his typology.[13]

Second, Oakeshott's theory of human conduct provides the perspective from which his breakdown and analysis of the methods of rule is constructed. The subject of rule is a human, not some other creature, and a human being, because he has a distinctive form of

13. In the language of contemporary analytical jurisprudence, Oakeshott's project might be characterized as that of conceptualizing law as a "distinct method of social control." (cf. H.L.A. Hart, *The Concept of Law*). But every reader of Oakeshott will be aware that "social control" is one of his targets, and further that he is working with a different taxonomy of the genus "control" (or "rule," etc.) than that in contemporary jurisprudence. This is a long story that can't be told here.

action (what Oakeshott called "intelligent movement" in one of his studies of Hobbes), is capable of being subject to a variety of types of direction to which other creatures are not susceptible. The basis of a legal philosophy whose purpose is to identify a distinct mode of rule, must then be a theory of action of the subject of rule, and so *On Human Conduct* opens with a first essay on human action. The main theme of that first essay is that a human being is a free agent capable, in virtue of the possession of intelligence, of acting otherwise, so long as he is not prevented by external compulsion. Oakeshott's constant refrain is that intelligent creatures are free, able to act otherwise, unintelligent things are unfree, determined to act as they do; and the link between intelligence and this freedom of action, for Oakeshott, is that while "in acting an agent imagines, wishes for, and seeks to achieve a satisfaction" (1975, 39). There is no particular satisfaction or outcome that an intelligent being upon reflecting on the objects of his desire, will unavoidably recognize as the one he must inescapably seek as his final good. No matter what object of desire a man considers, it is open to him to interpret it under some description which makes it seem less than completely good for him, and consequently it is always in his power to choose to do some action other than the one in which that particular object is sought. Man is free because his world is always an interpreted world. Thus, although a human being is a purposive agent, he is distinguished from the rest of nature not because he is destined to seek some distinctive purpose, but by his capacity to choose his own purposes. He is self-determined, determining his purposes for himself.

From this perspective, the subject-matter of legal philosophy (the initial data of jurisprudence, so to speak) consists of all possible ways that have been devised for directing this self-determined creature; and the project of legal philosophy is to identify and theorize the particular mode of rule that does not compromise the subject's capacity for self-determination, even while being ruled.

II

Given this abbreviated account of Oakeshott's view of the problematic of legal philosophy, attention can now be turned to his break-

down of the different types of rule. Oakeshott has discussions of this matter in various places in *On Human Conduct* and "The Rule of Law;" the following account takes the liberty of attempting to pull them together in outline form. On this score, two basic distinctions Oakeshott is working with are required. The first distinction is between compulsory and voluntary association; the second is between two types of compulsory association: instrumental and non-instrumental. However, with regard to all that follows, Oakeshott's "programme of inquiry" has to be kept in mind. He does not purport to be presenting a "realistic portrayal" of any actual association, but to be disentangling what he calls "an ideal character" from the "ambiguous" and "equivocal" experience of living in the modern-world (1975, 180; 1983, 121-2). The types of association he delineates are, accordingly, to be understood as logical constructs (1983, 149). In the modern world, the state is commonly thought of as the sole compulsory association, but in other times and places there have been other associations conceived as compulsory in Oakeshott's sense—the "household"—in ancient Greece and Rome or the "church" in medieval Europe.

The first distinction, then, is between compulsory and voluntary association, and here it is crucial to Oakeshott's entire theoretical enterprise to recognize that he employs the concept of authority, not coercive power, to specify the difference. In all his writings, without exception, Oakeshott insists on the importance of the authority-power distinction (1975, 192-5 and 219 especially). Power is the ability to compel obedience by threats or force; authority is an understood normative relation between those involved in it. Thus, some form of expression (a creed, a book, a rule, a command, etc.) is authoritative for a human being when he recognizes that the claim it makes to be heeded (in the manner appropriate to it, e.g. faith, obedience, etc.) does not depend on his own personal judgment of the reasons on which it rests, but instead on the consideration that it comes from a speaker set apart from others by some identifying characteristic that entitled his utterance to adherence.[14]

14. No attempt will be made here to go into this account of authority any further. As an aid to reflection, see J. Raz (ed.), *Authority* (New York, 1990).

The difference between compulsory and voluntary association is not, then, that the one possesses and the other lacks the ability to compel obedience, but that the one has authority of a type that the other does not have. Specifically, the distinction is made by Oakeshott to turn on the kind of relationship that obtains between the rules of the association (or other associational prescriptions, claims, directions, demands, etc.) and the members of the association understood as free purposive agents. So in a compulsory association, the rules have authority in the sense that the member is not entitled to make observance of the rules dependent on his judgment as to whether or not observance serves his purposes.

It is never a legitimate move, within the logic of this type of authority relation, to claim that one is not obligated to observe a rule because action in accordance with it is not rationally adopted to attain the ends one seeks. "Were he to plead that to have observed the rule would have impeded his achievement of a wished-for satisfaction...he would merely reveal his ignorance of what a rule is" (1975, 126). Here it is recognized that the subject of rule could have chosen some alternative action which might have better served his chosen purposes but the claim the rule makes to adherence is insulated from this type of appeal. The function of authority here is to sever the link between action and wished-for outcome in the standard case of rational deliberation. By contrast, an association is voluntary if the associate is understood to be entitled to refuse to observe its rules or other associational demands on the grounds that to do so is incompatible with his purposes. Thus, in voluntary relationships, such as now obtain in churches, partnerships, corporations, and universities, it is always open to a person to exempt himself from the jurisdiction of the rules by disowning the outcome they have for him (1975, 119). An association is compulsory if its rules override its members purposes, voluntary if their purposes can override its rules.

Oakeshott's lengthy account of "the character of the modern European state," which forms part III of *On Human Conduct*, reflects this particular way of defining compulsory association and differentiating it from voluntary association. The distinguishing feature of the modern state is neither that it has some special purpose

that sets it apart from all other associations nor that it has a coercive apparatus giving it effective control over the population of a given territory (nor this behavioral criterion plus "legitimacy"). What distinguishes the modern state as an association of human beings is that they understand themselves to be united together in acknowledgement of the authority of the self-identified rules of the association (and authority must here be understood in the sense previously indicated). So, as Oakeshott stresses throughout part III of *On Human Conduct*, the claim made by the government of every modern state without exception is that its laws possess "sovereign authority." No state recognizes that its subjects are entitled to refuse to observe its laws on the grounds that their purposes would be better served by acting otherwise. This particular "liberty," which is distinctive of voluntary association, is excluded by the authoritative claim made by every state in behalf of its laws. Nor has any modern state shown a disposition to relinquish this claim and turn itself into a voluntary association, allowing its citizens to treat its laws as though they were merely advice, persuasion, argumentative discourse, teaching, pleading, warning, or any other type of hypothetical imperative. "No modern European state has ever been constituted in this manner" (316), a provocative statement repeated more than once (cf. 319): is it meant to suggest that a state could somehow be constituted otherwise? In any event, the main consideration for purposes of this paper is that a particular understanding of authority forms the heart of Oakeshott's account of the modern state.[15]

Oakeshott then employs a particular conception of authority to distinguish compulsory from voluntary association, and from this standpoint it becomes possible to begin to sort out his rather elusive views on freedom. A helpful starting-point is provided by Oakeshott's discussion of what he calls "enterprise association." This is an association whose members are united together in acknowledgement of a common purpose, with the rules and other associational de-

15. This way of conceptualizing compulsory association does not mean that the state is not also a coercive organization, only that coercion is not the defining feature of the state or its "law." This matter obviously calls for further discussion, but not in this place.

mands understood as instrumental devices intended to advance the purpose of the association. The claims these rules make to be heeded is, therefore, that they are rationally adapted to promote the agreed-on joint purpose. They are "hypothetical imperatives," binding on the members only in a watered down sense, since the member may always choose to exempt himself from the claim they make to adherence by disowning the purpose they have been selected to serve. Thus, Oakeshott's constant refrain is that the member of an enterprise association is free providing he is entitled to "extricate himself from it by revoking his choice" to be related in terms of the association's purpose (1975, 199, 157). Or again, as he puts in "The Vocabulary of a Modern European State," an enterprise associate:

> . . . is free if and because his situation is one of his own choosing and because he can extricate himself from it by a choice of his own. Freedom here is conceptually tied to the choice to be and to remain associated.[16]

The freedom involved in a voluntary association, which marks it off from compulsory association, should not then be confused with the distinct kind of freedom involved in what Oakeshott calls "agency." This is the freedom to act otherwise, and this freedom is, as Oakeshott stresses, present in both voluntary and compulsory association. The freedom involved in agency is annuled only by force (whether by external physical compulsion, chemical injections, etc.), which removes the possibility of acting otherwise. But compulsory association does not annul this freedom because, although its rules are authoritative, they do not make it impossible to act otherwise. So the freedom that differentiates voluntary from compulsory association is not that involved in agency; it is the freedom to treat the rules and other requirements of the association as mere "advice," legitimately rejectable on the grounds that one has other more important purposes not served by doing what the association calls for. Voluntary association thus acknowledges, in a special way, the humanity of those who belong to it. For a human being is not defined by any

16. *Political Studies*, v. 23 (1975), 319-41 and 409-14, 340.

particular purpose, but by his capacity to determine his own purposes; and voluntary association acknowledges this capacity in giving priority to the choice to exit over the particular purpose of the association. The member's identity is not then exhausted by the role he plays or the station he occupies in the association.[17] Thus, the member of a voluntary association is "free" in a distinctive sense.

III

The term "freedom" bears several different meanings in Oakeshott's theory, and the preceding is intended to distinguish two among them: freedom in agency and freedom in voluntary relations between agents. Once again, as in his discussion of "law" or "lex," Oakeshott has developed an approach to types of freedom not easily captured by the standard distinctions and categories of contemporary political philosophy—as, for instance, the much-discussed typology of negative and positive liberty. The novelty of Oakeshott's approach has been noticed by several commentators, and it has apparently caused some confusion since Oakeshott has been taken to be arguing that in civil association "the laws do not restrict men's freedom;"[18] or that general rules of law promulgated in advance of the conduct they are meant to govern, in contrast to commands to perform particular acts, are somehow non-compulsory.[19] But these readings are misleading, if they are supposed to mean that the members of a civil association are free in the same sense that members of a voluntary association are free, or that general rules of law do not involve authoritative constraints on the activities of those subject to them. Oakeshott repeatedly emphasizes that civil association is a version of compulsory association, and he goes out of his way

17. The heart of this liberty is "exit," as Oakeshott insists repeatedly. On this point, it is illuminating to compare Aquinas and Hobbes. Aquinas denied that the church could legitimately employ coercion to convert non-Christians, but could maintain the compulsory character of the church for Christians (*Summa Theologiae*, II.II.10). Hobbes contended that "ecclesiastical power" was "teaching and advice" not "law," even to the member of the church, unless promulgated either by God directly to a believer or as civil law by the sovereign (*Leviathan*, ch. 42).
18. Liddington. Ibid., 308.
19. Mapel, Ibid., 397 and Gray, Ibid., 210-211.

to place the concepts of authority and obligation at the center of his account of general rules of law.

So the laws of civil association do restrict freedom, and the crux of interpretation is to recognize the type of liberty they restrict. It is precisely the liberty involved in voluntary association whose rules have the character of "advice," so that it is legitimate for the subject of these rules to make compliance dependent on his own judgment as to whether they advance his chose purposes. This type of liberty no subject of the laws of compulsory association possesses in his capacity as subject—even in the civil version of compulsory association. Thus, whatever turns out to be the difference between civil association and compulsory enterprise association, or between non-instrumental and instrumental law, or between general rules of law and specific commands, it cannot consist in the liberty distinctive of voluntary relations between agents.

What this means, then, is that compulsory association, in either one of its versions, cannot recognize the distinctly human capacity for choosing one's purposes in the same way this capacity is recognized in voluntary association—by recognizing that the capacity for determining one's own purposes rightfully takes priority over the demands of the association. From this standpoint, the basic question about liberty that Oakeshott is addressing may be formulated as follows: Is there some other way self-determination can be recognized besides that of voluntary association? Can there be a form of compulsory association that both claims authority for its rules and yet still recognizes the capacity of an intelligent agent to determine his own purposes? If the answer is yes, then Oakeshott will have arrived at a third type of freedom besides the two already delineated—in agency and in the voluntary relations between agents. And this third type will be liberty that an agent retains even in being ruled.

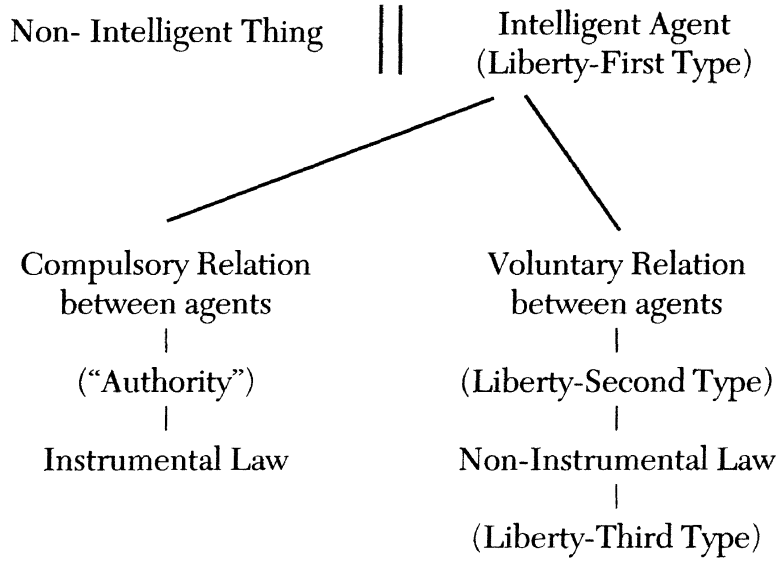
IV

No doubt the entire preceding discussion of Oakeshott's understanding of liberty and authority cries out for further analysis. An important debate over authority is now going on in legal and political philosophy, and an examination of Oakeshott's views in relation to

that debate might prove to be illuminating on both sides.[20] Moreover, an historical inquiry into the legal theories on which Oakeshott is drawing would also be likely to prove helpful in understanding his views. But the purpose of this paper is not to attempt a comprehensive examination of Oakeshott's thought. It is to set out a program of interpretation for reaching his notion of non-instrumental law. The discussion will therefore move on, and the chief point to be made at this juncture is that, given this interpretation of what makes an association of agents compulsory, it follows that all of Oakeshott's famous additional distinctions—distinctions that have occasioned so much comment and controversy—must be seen as distinctions within the category of compulsory association. So Oakeshott's distinction between civil association and compulsory enterprise association (or "teleocracy") are to be understood as two species of the genus compulsory association; and the division between instrumental and non-instrumental law is to be understood as two types of authoritative rule.

The key consideration is, then, that Oakeshott may be recognized to be moving through a series of progressively finer distinctions. The first is between an intelligent agent able to act otherwise and non-intelligent thing of determined to do what it does. The second distinction is between two types of association capable of existing only between intelligent agents, voluntary association whose rules an agent is free to disregard in the light of his chosen purpose and compulsory association whose authoritative rules block this freedom. The third is therefore a distinction within the category of authoritative rule, and this is the distinction between instrumental and non-instrumental law. It looks like this:

20. Cf. Richard Flathman, *The Practice of Political Authority*, (University of Chicago Press, 1980) and *Authority Revisited, NOMOS XXIX*, ed. by J. Roland Pennock & John W. Chapman, (New York University Press, 1987), especially Timothy Fuller, "Authority and the Individual in Civil Association: Oakeshott, Flathman, Yves Simon," 131-151.



Interpreted in this fashion, Oakeshott's instrumental/non-instrumental law dichotomy represents the two ways a rule can possess authority. Oakeshott characterizes an instrumental law as a law that takes the form of a command enjoining the performance of some designated action required to advance a particular goal, and the command is authoritative because the goal it serves is itself taken to be authoritative. The particular structure of the authority relation between ruler and ruled here is specified by what Oakeshott calls "compulsory enterprise association." This is a term of art joining together two key concepts in Oakeshott's theoretical vocabulary, and the reason why he invented this hybrid notion may be seen by considering what it takes to convert an enterprise relation between agents into a compulsory relation. The distinguishing feature of the rules of an enterprise association is that they have the character of advice which the member is entitled to turn down if it doesn't suit his purposes to follow. He is "free" to extricate himself from the demands of the association because he is entitled to give his own purposes priority over the purposes of the association. The rules are a means to an end, but the end is not one to which he is authoritatively committed. So in order to remove the rules from this conditional status, the purpose they are supposed to serve must become authoritative in the

full-blooded sense. The purpose must be regarded as something whose claim to adherence is not conditional on acceptance by the member of the association, so that he is not entitled to renounce the basis on which the enterprise association rests. The member's actions will therefore be determined by those who run the association rather than by a choice of his own, and the liberty an intelligent agent always has to act otherwise in the light of his own purposes (absent external compulsion) will be preempted by the decision of another agent. From this standpoint, the subject of a compulsory enterprise relation becomes an instrument of action of the ruler.[21]

Oakeshott contends that a compulsory enterprise association is "contradictory," and the meaning of this much-discussed contention should now be evident. For the authority structure of a compulsory enterprise association demands that the associational purpose have two characteristics. It must be imputed to the subject as his purpose and it must be authoritative, disallowing the capacity of the associate to accept or reject it by a choice of his own. This arrangement thus postulates a subject to whom is attributed a purpose he has not chosen, thus implicitly eliding the basic distinction between intelligent agents and unself-determined things.

By contrast, a non-instrumental law is characterized by Oakeshott as a rule which identifies some general condition that an agent is obligated to take into account when deciding how to act towards other agents while seeking to realize his own purposes. The particular structure of the authority relation here can be brought out by considering Oakeshott's model example of this type of law.

The model case is not, as has been suggested, a law enabling an individual to do things, like make a will, in which "a legal power is conferred upon individuals; but they are left at full liberty to avail themselves of it as they will."[22] The model is rather, as Oakeshott

21. For additional analysis of the authority relation here, see Richard B. Friedman, "Oakeshott on the Authority of Law," *Ratio Juris*, Vol. 2 (March 1989), 27-40. It should be pointed out that Oakeshott is not arguing that instrumental rule can never be justified; it may be circumstantially warranted as, for example, conscription for war. His argument is rather that the instrumental mode of rule is a distinctive way of ruling an agent in which he is denied his capacity for self-determination.
22. John Gray, ibid., 210.

states, the criminal law (he several times offers the prohibitions on murder and arson as examples of non-instrumental laws) which does limit the "full liberty" of the individual by obligating him to refrain from certain kinds of action towards others in seeking to attain his own ends. The criminal law is conceived by Oakeshott as non-instrumental because although it is authoritative in the strict sense, it does not impose an authoritative purpose on the agent. It is, to use Oakeshott's terminology, "indifferent" to his purposes so long as he observes the law. The criminal law requires that whatever substantive activities an agent decides to engage in among the multitude of possibilities that humans have invented, he is not to use certain means in the course of seeking to attain his ends. But to be prohibited from using other agents as a means to the satisfaction of one's ends is not oneself to be used as a means to any substantive end set by the ruler. The key point here is, then, that the notion of a non-instrumental law has a highly specific meaning within the framework of Oakeshott's theory.

It is no part of his theory—at least on the interpretation presented here—to contend that a "sovereign legislature" which enacted a law, say, prohibiting arson was thereby engaged in a "purpose-independent" activity or that it was not seeking a certain desired outcome, but rather that this sovereign legislature does not rule by establishing and authoritative purpose and dictating the specific actions by which that purpose is to be reached. The City of Detroit may enact a severe arson law for a purpose, indeed for several purposes, to reduce the incidence of arson, to prevent the further deterioration of the inner city, to make Detroit a more welcoming place to visit—but all this is sought through a law prohibiting arson not by conscripting citizens into a fire brigade on which they are issued commands to put out fires and round up suspects. The criminal law constitutes a non-instrumental mode of rule between sovereign and subject because the sovereign does not impose an authoritative goal on his subject and set him to work to attain it.

The law/purpose relationship is, then, more complex than Oakeshott's critics have recognized. It is crucial to distinguish between the content of a law and the way in which a law rules. By

focusing on the content of any law, it is perhaps always possible to formulate or reformulate what it prescribes in purposive language. But it does not follow that because "all rules can be redescribed in terms of their purposes," that all ruling consists in commanding the performance of specific actions for the attainment of some purpose set by the ruler. To assume that the instrumental model is inescapable and ubiquitous is to ignore the distinct mode of governing human beings offered by general rules of law and to lapse into a confusion that Aristotle long ago sought to dispel at the very outset of his political theory. From this angle, it becomes possible to view Oakeshott's instrumental/non-instrumental dichotomy as a contemporary rendition of the old distinction between despotic rule and civil rule, and the object of this paper has been to move through the theory of human action and human association by which Oakeshott's version can be understood.

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