

# LAW, LIBERTY AND STATE

Oakeshott, Hayek and Schmitt on the Rule of Law

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## The rules of the game

### Stochastic rationality in Oakeshott's rule-of-law theory

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[W]hen dealing with human actions, in so far as these can be allotted to different categories, we must be able to define a standard against which these too can be measured. Now insofar as we act simply as human beings, we possess a capacity to act – a 'virtue', if we understand this in a general sense – and according to this we judge people to be good or bad. In so far as we act as human beings who are citizens, we have the law, by whose standards we can describe a citizen as good or bad; in so far as we act as human beings who are Italians, there are certain very simple features of manners and appearance and speech, by which the actions of the people of Italy can be weighted and measured. But the most noble actions among those performed by Italians are proper to no one Italian city, but are common to them all; and among these we can now place the use of the vernacular that we were hunting above, which has left its scent in every city but made its home in none.

Dante<sup>1</sup>

Oakeshott claims in *On Human Conduct* that the theoretical understanding of the rule of law has been led astray 'because the theorists of law have laid so many false trails':

The most difficult feature of the civil condition to identify and get into place has been law . . . It is made difficult also because the theorists of law have laid so many false trails (for example, misidentifying it as a 'command' and as instrumental to the achievement of substantive satisfactions), and have usually been so much more concerned with the so-called 'sources' of law, with contingent beliefs about its authority, and with its so-called 'purpose' than with what it is.<sup>2</sup>

<sup>1</sup> Dante, *De Vulgari Eloquentia* (Cambridge University Press, 1996), trans. and ed. S. Botterill, 1.16.3–5.

<sup>2</sup> Michael Oakeshott, *On Human Conduct* (Oxford University Press, 1975), 58.

Oakeshott thus positions himself radically against many conventional accounts of the rule of law: he does not accept that law is a command and that law is to be followed in order to achieve results, even if this result is the higher end of prosperity or peace. This indeed is an unusual theoretical position, which Oakeshott desperately tries to clarify in an awkwardly put argument that takes up one third of *On Human Conduct* (which, in fact, as a whole is dedicated to his theory of the rule of law). This long introduction argues that only embarking on Oakeshott's own kind of intellectual adventure will lead to an adequate understanding of the civil condition without explaining it away<sup>3</sup> in the manner of analytical philosophy or the so-called social sciences (with psychology and sociology singled out in particular for his criticism). Oakeshott's strenuous efforts to clarify his position, however, only seem to have led to further frustration and what he perceived as profound misunderstandings of his arguments, as his uncharacteristically petulant response to his critics demonstrates.<sup>4</sup>

In fact, the problem with the awkward first part of *On Human Conduct* might be simply that Oakeshott, by trying too hard, has abandoned his usual style of elegant nonchalance. He could not keep to his maxim, which recommends an exercise of agency in which 'the energy of pursuit is prudentially mixed with *nonchaloir* in respect of the outcome.'<sup>5</sup> In the spirit of this maxim, this chapter recalls a (tongue-in-cheek) theory from Oakeshott's juvenilia in order to elucidate Oakeshott's highly original and indeed still misunderstood account of the rule of law – and also more freely to explore some of its implications. The early piece in question, co-authored with his friend Guy Griffith,<sup>6</sup> intimates the concept of the genuine gambler who precisely exercises the kind of agency in which purposiveness is overwritten by *nonchaloir* in respect of outcomes. Gambling as a metaphor is used almost interchangeably with 'unconditional adventure' in Oakeshott's oeuvre to illustrate the particular mentality required for liberal education, genuine conversation and – as argued in *On Human Conduct* – both for the ideal mode of civil conduct and for its theorizing.

<sup>3</sup> *Ibid.*, 101.

<sup>4</sup> Michael Oakeshott, 'On Misunderstanding Human Conduct: A Reply to My Critics', *Political Theory*, 4 (1976), 353.

<sup>5</sup> Oakeshott, *On Human Conduct*, 71.

<sup>6</sup> Guy Griffith and Michael Oakeshott, *A Guide to the Classics or How to Pick the Derby Winner* (London: Faber & Faber, 1936).

Gambling, or wagering, in Oakeshott's work refers to an epistemologically relaxed mode of intellectual engagement which is somewhat unconcerned with outcomes. And it is this mode, I argue, which is crucial to grasp to make sense of Oakeshott's peculiar, but, I would argue, also normatively highly promising, account of the rule of law and his correlating theory of enterprise versus civil association. In this chapter, this relaxed intellectual engagement is referred to with a term that at first might seem rather unusual: 'stochastic rationality'. I shall contrast stochastic rationality with the epistemologically rigorous and purely purposive rationality unmixed with *nonchaloir*, which Oakeshott opposed throughout his work, though for different reasons at different times. Furthermore, I shall examine Oakeshott's distinction between civil and enterprise association as one between postulates of stochastic and purposive rationality, respectively.

Oakeshott himself does not use the particular expression 'stochastic rationality', but he articulates its contours negatively as the counterpart of instrumental rationality. Aristotle, however, uses the ancient Greek verb *tugkhano* – which is the etymological root of our word 'stochastic' – to make a distinction between the everyday intellectual engagement of the people who try and err and guess and gamble as best as they can, often enough hitting upon (*tugkhano*) the truth in the process, and the intellectual elite (experts), who calculate in order to get it exactly right and in order to achieve some goal instrumentally.

Aristotle claims in his *Metaphysics* that it is crucial to know which topics require what kind of epistemological treatment ranging from perfectly diligent to completely lax. His *Rhetoric* introduces enthymeme (the rhetorical argument) which is the lax counterpart of the epistemologically strict syllogism. Within enthymemic reasoning, Aristotle differentiates several types according to how lax they are. It is easy to see that, in fact, there are gradations of epistemological diligence, from an ideal of perfectly analytical engagement to the one as nonchalant as our intellectual engagement while dreaming. The expressions 'adventure', 'voyage', 'gambling' and 'dreaming' are used by Oakeshott to describe the difference of stochastic rationality from its epistemologically diligent counterpart, that is, instrumental rationality.

While his ideas are highly original, Oakeshott himself refers to his book, *On Human Conduct* – in which he elucidates his ideas about the rule of law – as a theory of a 'somewhat Aristotelian cast'.<sup>7</sup> The most

<sup>7</sup> Oakeshott, 'On Misunderstanding Human Conduct', 356.

important reason for calling his theory of law Aristotelian could be their common emphasis on the particular kind of rationality – 'stochastic rationality' – which both thinkers connect with the kind of intellectual engagement involved in civil conduct (even though neither gives it a specific name). Aristotle describes the rhetorical competence to produce persuasion in the vocabulary of gambling: 'hitting upon (*tugkhano*) the truth', which is usually translated as 'to make a good guess'.

The obscure but rational conduct hidden in the shadow economy of the mind postulated by the condition of stochastic rationality significantly contributes to civil conduct. The *nonchaloir* of stochastic rationality has a moral and an epistemological dimension. *Nonchaloir* in the moral sense corresponds to non-instrumental conduct and epistemologically to a wagering (i.e., guessing, approximating, intuiting) intellectual conduct. The importance of stochastic rationality is that it enables the immature and those without the enlightenment of formal education 'to hit upon truth'.

Simply being native to a vernacular language provides a cognitive edge that can compensate for the lack of mature, formally, reflectively and diligently acquired competence. A good example to illustrate this point is the comparative advantage of small children in language acquisition not despite but because of their naturally lax epistemological engagement of trial and error. Vernacular competence (the competence to learn informally, stochastically) therefore ensures equal access to the conversation of humankind and to the rule of law for those (to use a Kantian term) in the state of minority and not only for those who are in the state of majority. Oakeshott's insistence that civil understanding is not learned with epistemological diligence but is still as good as if it were might be inspired by Aristotle's claim that 'the true and the approximately true are apprehended by the same competence; it may also be noted that men have a sufficient natural instinct for what is true, and usually do arrive at the truth'.<sup>8</sup>

As Dante's lines quoted earlier, written in the first years of the fourteenth century, testify, the analogy between the rule of the civic and the linguistic law had been explored long before the modern linguistic turn of philosophy. In fact, long before Dante, Socrates and his sophist opponent agreed in *Protagoras* that civic virtue is acquired like a native language, without formal instruction. More precisely, they agreed that it seems possible to acquire civic virtue in the vernacular mode directly through

<sup>8</sup> Aristotle, 'Metaphysics' in *The Complete Works of Aristotle* (Princeton University Press, 1984), ed. Jonathan Barnes, 1355a14–18.

acquiring one's native language without formal and specialized learning. It is Aristotle who first reflected theoretically on the fact that the epistemological condition of democracy is the acknowledgement of this competence of acquiring adequate enough knowledge without epistemological diligence. He thereby emancipates rhetorical persuasion as an epistemologically valid way 'to hit upon truth' and makes it the discursive mode of law, politics and the liberal arts.

Aristotle's three branches of rhetoric in modernized terms – aesthetic (epideictic), judicial (forensic) and political (deliberative) – model the correspondence among the arts, the law and the state as all three hinge upon rhetorical persuasion. Bad (i.e., propagandistic, dogmatic, sentimental) art, law conceived of as policy and the telocratic state operate via purposive rhetorical persuasion within the frame of instrumental rationality. Genuine art, authentic law and nomocracy operate via genuine rhetoric that is via the capability (or imagination, in Oakeshott's terminology) of seeing all the possible means of persuasion without pursuing one definite line of persuasion, that is, not teleologically but rather stochastically.

Aristotelian epistemology, which does not recognize any hierarchy between vernacular-vulgar learning and formal-expert-elite learning, is the counterfoil of the epistemology of the Enlightenment articulated clearly in Kant's manifesto, *What Is Enlightenment?* Kant's imperative to know everything for oneself makes epistemological diligence the criterion sorting the *cives* in the state of maturity from the human beings who are in a state of immaturity. From the point of view of democratic theory, however, the Kantian hierarchy between human beings in the state of maturity versus human beings in the state of minority is a step back from the Aristotelian epistemology, which insists on the universally homogeneous condition of human competence for learning, be it lax or diligent, stochastic or analytical.

Oakeshott is firmly within the frame of Aristotelian epistemology, which allows for the trial-and-error approach to access the rules of living together linguistically as well as in terms of civility. I claim that stochastic rationality is also and predominantly at work in the way people learn their native language starting from birth – and that for this very reason Oakeshott could argue that *cives* 'learn' the rule of law the same way they learn a vernacular language. In fact, Oakeshott argues that the rule of law is a vernacular language. As a consequence, in Oakeshott's scheme, there are no 'experts' of civil conduct – we all 'learn' it by observing adverbial qualifications in the appropriate manner, the same way we

learn a language and observe its rules in the appropriate manner. It follows, then, that for Oakeshott, the human condition as a competence of self-expression and self-enactment, which is both universally and at the same time particularly expressed through the vernacular practices of an association, is a sufficient criterion for citizenship.

Language learners eventually develop a *Sprachgefühl*; *cives*, Oakeshott suggests, eventually need an appropriate *Rechtsgefühl* (feeling for the rule of law). As with a vernacular language, the rule of law will not prescribe what has to be said, and sometimes things can be said that nobody had ever thought could be said in the language at all; as with gambling, we do not know what the outcomes will be – we can just wager as best as we can, using our judgement. In this sense, Oakeshott's theory of the rule of law poses a radical challenge to anyone who associates the rule of law with certainty, predictability, or, for that matter, bases the rule of law on some kind of instrumental rationality (law for the purpose of peace, prosperity, etc.).

I argue that Oakeshott uses the notion of *Rechtsgefühl* (through his analogy between vernacular language and the rule of law) to criticize a game-theoretical approach to the rule of law. He insists that the rule of law is not stochastic in the sense of a chess or cricket game, whose system of rules is invented in a more or less arbitrary fashion, but as a vernacular-language game, whose rules are like those of a natural language. A vernacular-language game is imbedded in heterogeneous vernacular practices based upon the kind of stochastic conduct that relies on a historically acquired and analytically obscure feeling for stochastic approximation. Analytical (including game-theory) approaches to the rule of law – Oakeshott argues – are based upon the false assumptions of finiteness, commensurability and the concept of mathematical probability as opposed to real-life likelihood. Consequently, these approaches are unable to address the phenomena of *Rechtsgefühl* and the inherent condition of uncertainty – all they can do instead is to explain it away.

At the same time as Oakeshott contrasts a simple game in the ordinary sense with the language game of the rule of law, he also draws an analogy between the rule of law and the linguistic art of poetry on the basis of the work of the stochastic *Rechtsgefühl* and *Sprachgefühl*, respectively. He suggests that the rule of law requires the same sensitivity for nuances from its examiner as literature does from its critic. Relating Oakeshott's account of the rule of law to a proper understanding of vernacular language and to literature, I suggest in this chapter, helps us to grasp what is truly original in this account; it also invites further normative and

empirical investigation as to whether Oakeshott's theory does perhaps a better job than conventional ones to elucidate the rule of law as a lived reality.<sup>9</sup>

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In *On Human Conduct*, Oakeshott strikes an intellectual pose uncharacteristic of him, which could be easily taken for the kind of *superbia* (an hubristic confidence over one's abilities) he constantly draws attention to as the main vice of modern philosophy and science. The book claims that law has not been theorized properly because, at best, the uncertainty inherent in it is explained away by analytical calculations of probability. Law should be theorized – Oakeshott argues – as a performance of the *ars artium* of agency, that is, the art of human conduct (moral self-disclosure and self-enactment).<sup>10</sup> Accordingly, Oakeshott draws a sharply analytical line to demarcate where the analytical approach must stop when theorizing law. This line is between calculable probability and incalculable likelihood. He writes that

probability in the strict sense of distributional uncertainty of a factor in a finite series of commensurables, plays no part in the deliberations of actions. Likelihood may be guide to life, but not probability.<sup>11</sup>

Apprehending likelihood – that is, to see a persuasive case about strange things or strangers appearing as familiar, as well as familiar things or familiars appearing as strange or strangers – is the ability to metaphorize, according to Aristotle. In terms of citizenship, the *cives* have to be able to see the familiar quality (in respect of the law) in what is in fact not familial or not from one's own tribe, and vice versa they have to be able to see their familial and tribal fellows as strangers in respect of the law. The contingency involved in civic and legal relationships therefore is not probabilistic but rather based upon likelihood, which is incalculable and conditioned upon the ability to metaphorize (to apprehend likelihood).

<sup>9</sup> For intensive discussion of these ideas, I thank David Dyzenhaus, John S. Brunero and Jan-Werner Müller.

<sup>10</sup> 'Moral conduct is agents related to each other in the acknowledgement of the authority of a practice composed of conditions which because of their generality attract to itself the generic name, "practice"; morality, *mos*. A morality is the *ars artium* of conduct; the practice of all practices; the practice of agency without further specification' (Oakeshott, *On Human Conduct*, 60).

<sup>11</sup> *Ibid.*, 44.

Metaphorizing, Aristotle claims, cannot be taught, which does not mean that its competence cannot be acquired through learning in the mode of stochastic rationality. Rather, it means that its acquisition cannot be guaranteed through the epistemologically diligent way of formal teaching. Consequently, it is impossible to teach a machine how to metaphorize meaningfully. Analytically simulated stochastic rationality (such as game theory) can model likelihood in form of calculated probability only by explaining it away, to use Oakeshott's expression. Only natural, vernacular stochastic rationality can apprehend likelihood, form genuine civic and legal conduct and make genuine metaphors.

The other side of the fact that the apprehension of likelihood cannot be taught is that it is impossible to give an account of it by externalizing its rules in the analytical fashion. This is because there is no traditional explanation for the particular congruence of the contingent elements of a likelihood: neither causal nor functional, neither utilitarian nor teleological. 'They touch'<sup>12</sup> contingently by virtue of a particular kind of human conduct. Just like metaphors can be taken to be simply false in the ordinary sense, a genuine law, if taken in the ordinary sense as a command, can also be said to be badly constructed. Law as a command will not be able to instruct clearly or provide an unambiguous line to follow:

A criminal law, which may be thought to come nearest to forbidding actions, does not forbid killing or lighting a fire, it forbids killing 'murderously' or lighting fire 'arsonically'; and these adverbs are narrowly specified terms of the evidence required to substantiate or to rebut the considerations alleged.<sup>13</sup>

Legal utterances, just like metaphors, are formulated in relations of contingency. It is this contingent nature which explains why law in Oakeshott's understanding cannot give specific commands. While it is possible to command the performance of a specific conduct, one cannot command one to perform this conduct in a specific style. I can command someone to sing but cannot command: 'Sing elegantly!' One cannot simply follow such a command either because adverbials cannot become definite ends of intentions. (Exceptions are the adverbials that are not truly modal but adverbials of measurement such as 'loudly' or 'fast'.) Legal and poetic utterances of the human condition exhibit an interminable indeterminacy on the one hand and, on the other, a particular

<sup>12</sup> *Ibid.*, 104.

<sup>13</sup> *Ibid.*, 58.

(even unique) exercise of the art of agency. It is the style of the performance of the rule of law and of poetry that account for their authority, not their content.

The English expression 'the rule of law' becomes perplexing when scrutinized closely: it has an oddly self-referential structure, since 'rule' and 'law' are synonyms in the common use of English. Yet, is this repetition a result of a mere mistake (as in an unintended stutter) or that of a careful articulation of a self-referential conduct in the manner of 'art for art's sake' and 'education for education's sake' or, in this case, 'law for law's sake' and 'legality for legality's sake'?

Oakeshott chooses to take the circularity of the expression to be a sign of precision, the precise articulation of a demand for non-instrumental conduct. His claim is that the expression means literally what it says:

[T]he expression 'the rule of law', taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction.<sup>14</sup>

There are two metaphors hidden in Oakeshott's definition of the rule of law just quoted, which he will make explicit and clear especially in the 1983 essay: (1) the rule of law is like a game, and (2) the rule of law is like social tissue. The first quality explains the stochastic, probabilistic (wager-like) character of the rule of law. The second quality, Oakeshott argues, makes the rule of law not just a simple game but rather a vernacular (or language) game. It is a game that is performed by the civil association in such a way that in their performance the rule of law is being created while simultaneously the rule of law is creating the specific conditions of the association, most importantly, its non-purposiveness. The fact that the performance of the rule of law is like a game ensures that its performer cannot shake the responsibility of being creative: the following of the rules is not mechanical but stochastic, that is, wager-like.<sup>15</sup> The fact that it is a vernacular game, that is,

<sup>14</sup> Michael Oakeshott, 'The Rule of Law' in Oakeshott, *On History: And Other Essays* (Totowa, NJ: Barnes and Noble Books, 1983), 119.

<sup>15</sup> An analogy for this distinction is following a recipe by measuring the weight of ingredients as well as the time and temperature of cooking exactly as opposed to taking a guess and approximating all these quantities according to a sense developed by repeated experience of cooking the dish. This example shows that vernacular practice is naturally but not necessarily accompanied by stochastic rationality.

that the rules are like the social tissue of the association, ensures obligation without external coercion.

David Dyzenhaus is right in pointing out that 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',<sup>16</sup> although precision is not what one should expect from Oakeshott on human matters, which, for him, are always of indefinite character. Still, Oakeshott's work provides the most acute analytical breakdown of what intrinsic standard is in the context of law. Oakeshott chooses an unusual strategy in investigating the concept of intrinsic standard – which is what 'law as social tissue' refers to – by avoiding any reference to values. He does not make it entirely clear why he avoids talking about values. The reason, only implied by Oakeshott, might be that intrinsic values are in fact invaluable because they cannot be externalized and reified and thereby made available for assessment. This would explain Oakeshott's insistence on using the expressions 'adverbial qualification' or 'modes'.

The nominal term 'value' reifies and thereby distorts the quality of being intrinsic to something: it supposes that we could take what is internal in and out when, in fact, being intrinsic is a mode of being characterized by inextricability. Oakeshott attempts to define intrinsic measure as a modal category (like the tuning of a musical instrument) by avoiding the nominal phrasing and characterizing it in terms of adverbial qualifications. Therefore, he shifts the discourse from value (a nominal category) to conduct whose qualifications are not nominal but adverbial. His sharp focus on the adverbial qualifications of human conduct is a highly original idea and proves most productive in the philosophical investigation of the problem of intrinsic standard as well as the problem of non-coercive rule following. One of the most frequently occurring adverbial qualifications in Oakeshott's theory is 'incidental'.

According to Oakeshott, the internal standard provided by the rule of law is 'strict yet unexacting';<sup>17</sup> its rules are not commanding or coercive but rather guiding; its outcomes are not consequences determined in a cause-effect pattern but produced incidentally. Therefore, the rule of law is not compatible with utilitarian justifications, that is to say, it cannot be recommended as useful because it is unable to deliver desired (useful) ends in a reliable manner.

<sup>16</sup> David Dyzenhaus, 'Dreaming the Rule of Law', in this volume (Chapter 10).

<sup>17</sup> Oakeshott, 'The Rule of Law', 148.

Many writers who have undertaken to *recommend* this vision of a state [civic association, that is, governance according to the rule of law] have sought its virtue in what they present as a consequence, something valuable which may be enjoyed as the outcome of this mode of association. And some have suggested that its virtue is to be instrumental to the achievement of 'prosperity' understood as the maximum continuous satisfaction of the wants of the associates.<sup>18</sup>

The continuation of this long passage reveals the most original bent of Oakeshott's philosophy:

But the more discerning apologists (recognizing the inconsistency of attributing the virtue of a non-instrumental mode of association to its propensity to produce, promote or even encourage a substantive condition of things) have suggested that its virtue is to promote a certain kind of 'freedom'. But this is misleading.<sup>19</sup>

After making a distinction between utilitarian and non-utilitarian conceptions of the rule of law, Oakeshott goes a step further by making another sharp distinction between proponents of justifications of non-purposive conduct versus his own Socratic-style apology for non-purposive conduct. Non-purposive conduct (such as obliging the rule of law, learning for learning's sake or art for art's sake) is impossible to justify because justifications refer to some external end. Moral freedom cannot be posited as the external end of the rule of law or the liberal arts or the free market because freedom cannot be a product determined by a conduct. This sharp distinction between so-called higher ends and internal ends runs through all of Oakeshott's philosophical investigations. Oakeshott denies the possibility of any consistent justifications of liberal education or the free market or the rule of law on the basis that they pursue and fulfil the higher end of moral freedom since 'freedom does not follow as a consequence' of any of these; rather, 'it is inherent in [their] character'. Moral freedom is not in the service of satisfying individual wants in the utilitarian manner. Moral freedom, however, is also not in the service of the so-called higher ends of peace and prosperity, society or market.

But this 'freedom' does not follow as a consequence of this mode of [civic] association; it is inherent in its character. And this is the case also with other common suggestions: that the virtue of this mode of association is its consequential 'peace' (Hobbes) or 'order'. A certain kind of 'peace' and 'order' may, perhaps, be said to characterize this mode of association, but not as consequences.<sup>20</sup>

<sup>18</sup> *Ibid.*, 161.    <sup>19</sup> *Ibid.*    <sup>20</sup> *Ibid.*

If freedom does not follow as a consequence, then it is not produced in a chain of cause and effect but is an unplanned, un-purposeful, incidental by-product of a human conduct. Purposeful conduct can also have incidental outcomes, such as the damage to the environment in the pursuit of the external end of prosperity. Incidental outcomes, however, are the blind spot of purposeful conduct because of this kind of conduct's compulsive orientation toward external, definite ends. Self-referential, non-purposive conduct, which does not predetermine a cause-effect path for itself to follow, can only result in incidental outcomes. Being mindful of incidental possibilities weakens the fixed and focussed compulsion to reach a definite end, but the adventurous act of wager will replace this weakened compulsion with an unfocussed and flexible compulsion to proceed 'blindly', stochastically among likelihoods.

On the one hand, non-instrumental conduct is adventurous, that is, epistemologically lax, because it proceeds in the boundless sea of uncertainties without a plan. On the other hand, not having a fixation on a definite end affords it a cognitive edge over teleological conduct because non-purposive conduct has a heightened awareness of incidental outcomes, even if this awareness has no analytical clarity. This heightened awareness is a state of mind of being able to expect the unexpected, or even unpredictable, incident is like the state of mind of wagering, or stochastic rationality. While purposive conduct is facilitated by an epistemologically diligent, analytical rationality, non-purposive conduct is made possible by an epistemologically lax, stochastic rationality.

Let us return now to Oakeshott's youthful work on wager. Oakeshott and Griffith's guide to the classics is, of course, not about Plato, Dante or Shakespeare but the classic English horse races, first and foremost the Derby, which the authors at one point assert is the heir of European Antiquity.<sup>21</sup> Not all horse races are classic, we learn in the first pages, only the ones which have historically acquired a certain style. And only the classic ones allow a 'rule of law'-like character, stable in their style and impersonal enough to bet on with the help of the guide. Moreover, not all gambling is genuine gambling. According to Oakeshott, gambling does not simply consist in going to the races and following the procedures of placing a bet but in performing all that while at the same time

<sup>21</sup> T. S. Eliot mentions this book on how to bet on the Derby in his famous 1944 lecture 'What is a classic?' Curiously, both Eliot, characterizing the classic, and Oakeshott, characterizing the rule of law, claim that these phenomena are typically but not exclusively European.

observing the 'adverbial qualifications' of genuine gambling. Not unlike the proper manner of observing the rule of law, or the mind's activity in the poetic mode, or in the state of dreaming, genuine gambling lies in not having purposeful or prudential considerations relating to ends external to their activities.

The idea that there is a mode or, in other words, an adverbial of intellectual engagement that is neither purposeful in terms of practical outcome nor in terms of a conclusive outcome of reasoning runs through Oakeshott's entire oeuvre and gives it an appearance of quixotic idealism. Oakeshott, however, emphasized that while non-instrumentality as an adverbial (a mode) of conduct is real,<sup>22</sup> one cannot realistically expect it to be actualized unmixed with other adverbials, with other qualifications: a conduct might have both an internal and various external (two birds with one stone) ends at the same time. A student may study for its own sake in a liberal arts college as well as enjoy benefits external to her education such as student discounts in museums or the opportunity to meet other young people or, for that matter, a future job. The non-purposive manner of human conduct manifested in genuine gambling and analyzed playfully but thoroughly in the juvenilia on the Derby returns in the 1956 essay, 'The Voice of Poetry in the Conversation of Mankind'.<sup>23</sup>

Conversation is not an enterprise designed to yield an extrinsic profit, a contest where a winner gets a prize, nor is it an activity of exegesis; it is an unrehearsed intellectual adventure. It is with conversation as with gambling, its significance lies neither in winning nor in losing, but in wagering.<sup>24</sup>

Gambling for gambling's sake is a non-instrumental activity: its success lies not in winning but in the observance of the adverbial qualifications of wagering itself. Obliging internal standards, however, cannot be assessed in a positive manner of measurement to external standards. The small book, *A Guide to the Classics or How to Pick a Derby Winner*, is not really a 'how-to' book but rather an attempt to specify the adverbial qualifications of gambling itself, including an argument on why a technical 'how-to' attitude is just as inappropriate as the attitude of getting tips from

<sup>22</sup> Oakeshott, answering his critics, says about his concept of civil association that '[i]t is no more an ideal type than the kitchen sink' (Oakeshott, 'On Misunderstanding Human Conduct', 356).

<sup>23</sup> Michael Oakeshott, 'The Voice of Poetry in the Conversation of Mankind' in Oakeshott, *Rationalism in Politics and Other Essays* (Indianapolis, IN: Liberty Press, 1991), 488.

<sup>24</sup> *Ibid.*, 490.

your great aunt's dream, as the book explains. But how can we tell apart genuine gambling from the instrumental kind?

The first sentence of the guide to the classics sets up a minimal pair that fleshes out the difference between instrumental and genuine gambling:

Nearly 2000 years ago the poet Ovid wrote: *Ne te nobelium fugial certamen equorum* – Never miss a good race meeting; and Ovid, like most poets, knew what was what. It is true that he intended this maxim primarily for lovers, and that when Ovid went to the races he went not to watch the horses but to watch the girls; but the advice is a good advice for all that, and indeed Ovid is a conspicuous example of a man who does the right thing for the wrong reason.<sup>25</sup>

Doing the wrong thing for the right reason or the right thing for the wrong reason is only possible if our conduct could admit both an internal and an external measure, that is, both an end in itself (which cannot be pursued but only be revealed in the adverbial qualifications of our conduct) and a possible external end which can be pursued and can serve as a transparent measure of accountability.

To take the example quoted earlier, if the lover heeds Ovid's recommendation and attends the race only in order to get the girl, he abides the rule of law not for its own sake but rather in order to pursue a chosen end. Oakeshott defines *telocracy* as a form of governance that might discharge its obligation to laws only in order to be able to reach its chosen ends. As Oakeshott says in his London School of Economics lectures on the history of political thought, '*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>26</sup> Therefore, the rule of law – when taken 'roughly' and not precisely – can be followed for instrumental reasons, in order to achieve an end that lies beyond the internal end of following the law. Similarly, you can go to the Derby for the wrong – instrumental – reason, namely, not to wager for its own sake but instead planning to win the girl (or the money, for that matter). The manner of your gambling will have no provable effect on the external success of winning, while only the non-instrumental manner of conduct can fulfil the internal end of gambling. Moreover, the successful fulfilment of an internal end is independent of any external outcome because

<sup>25</sup> Griffith and Oakeshott, *Guide to the Classics*, 1.

<sup>26</sup> Michael Oakeshott, *Lectures in the History of Political Thought* (Exeter, UK: Imprint Academic, 2006), ed. Terry Nardin and Luke O'Sullivan, 474.



it is guaranteed by the self-referential structure of the non-instrumental conduct. Since successful fulfilment of internal ends does not depend on any external outcome, courses of action pertaining to internal versus external ends do not compete with each other for external success: the operation can be successful (according to the internal standard) even if the patient dies (external end).

Law can also admit both internal and external ends, but justice can only be served according to the internal standard of the rule of law. The external end of law might feel like justice, but in fact, this feeling is the satisfaction of retribution, a transactional as opposed to a non-instrumental adverbial quality. Let me evoke Socrates' trial to illustrate this point, even if it is not one of Oakeshott's examples. Socrates claims that he fulfils the internal standard of Athenian law by obeying the law that puts him to death: justice is served even when the external outcome is a false sentence.<sup>27</sup> Justice itself (not law) has only an internal standard, which is fulfilled by Socrates' conduct of obeying the rule of law he has previously consented to as a citizen. Socrates' seemingly eccentric teaching that no injustice can happen to the just man is the central quality of the rule of law, which demands 'the recognition of the authority of known, non-instrumental rules'<sup>28</sup> in a conduct that is measured only by its own internal standard: the success of just conduct is self-referential. Socrates is aware of the gamble involved in going to the Athenian court, which his *daimon* (the voice of his stochastic rationality) made him avoid up to this point. Socrates' acceptance of the conditions of genuine wager, by not pursuing 'justice' as an external end, ensures the success of justice enfolding intrinsically in his conduct during his trial. Socrates' eccentric moral teaching to dedicate life to internal as opposed to external success is dramatized in his trial in which living up to the internal standard of his life comes to mean sacrificing it in order to reinforce the morality (and the rule of law) of his city. He is confident that his eccentricity will be recognized as the very centre of the public morality of Athens soon after his death.

Given that your gambling itself does not in fact determine the success of winning, but observing the qualifications of non-instrumental gambling is the successful fulfilment of the internal end of gambling, you might say that the more rational choice is to gamble genuinely rather than

<sup>27</sup> Plato, 'Apology' in *The Collected Dialogues of Plato* (Princeton University Press, 1989), ed. Edith Hamilton and Huntington Cairns.

<sup>28</sup> Oakeshott, 'The Rule of Law', 136.

instrumentally.<sup>29</sup> This way you at least have the self-referential success guaranteed, while your chances of winning are not diminished by it. The only reason why the rationality of this wager is overlooked is that internal success has no clear external signs to prove one's claim for reward and, therefore, generally it is not acknowledged as a value.

Education can also admit both internal and external ends. You can study the same curriculum in the truly liberal arts manner for learning's sake or as a means to get a job. Liberal arts college education is often advertised as the better instrument to achieve external success than the straightforwardly instrumental education, which is like arguing that, statistically, genuine gambling for gambling's sake brings more success than instrumental gambling. The real argument for liberal education, however, is that it is your best bet because it can determine success in something (the fulfilment of its own internal end) that instrumental education excludes by definition, while neither kind of education can determine who, in fact, will get the job. It is impossible to discern the difference between betting on a horse as part of a plan to win and betting on a horse for the sake of the wager itself just by looking at the procedure or the outcome of the wager. Planning and wagering can only be distinguished by the different adverbial qualifications of the different conducts.

So it seems that in affairs of the state, which are indefinite by nature, the better gamble is to gamble rather than to calculate with a definite end in mind. The Finnish state, for example, successfully gambles with a sizeable per cent of Finland's gross domestic product by giving it to its citizens who are caretakers of pre-school-aged children without a hint of any incentive on how to spend it. There is a gamble in trusting the Finnish citizen not to spend this money frivolously, but a gamble whose incidental outcome seems to have proven to be the total eradication of child poverty, a superb educational system and superb economic productivity, more than worth the risk. There is no positive way to prove whether the current Finnish government is acting in the *mentality* of planning, but *de facto* they do gamble by giving direct agency to parents to decide how to use a considerable percentage of the available tax revenue.

The adverbial qualifications of planning are such that it is future oriented going from mental purpose through the means of betting to the pursued end of the prize while shunning the present. (An analogy for

<sup>29</sup> This can be recognized as the argument of Pascal's wager.

this is making your child work very hard in kindergarten because your plan is for her to go to a good college a dozen years later and you believe that her hard work at five is a means to your desired end in the future.) The adverbial qualifications of a genuine wager for its own sake, on the other hand, favour the present and shun the future. In the Derby, it would mean a mentality in which the present activity of betting is enjoyed by savouring the momentum of the wager and the state of indeterminacy with its complex play of possible incidents as opposed to preposterously and narrow-mindedly 'pursuing' the desired result enfolded in the race. The gambler who wagers with the adverbial qualifications of planning experiences the outcome of the race either as a frustrating failure in producing the desired end or as a success in determining the desired end. Both the frustration and the satisfaction are based upon the false and hubristic thought that the outcome of the race was determined by the act of betting. The genuine gambler, on the other hand, experiences the outcome of the bet as an incidental by-product of the coincidence of the act of wager and the horse race. Here, there is neither frustration nor pleasure over the instrumental loss or gain, only the pleasurable savouring of the self-referential act of wager while all the possibilities of the future outcome are still up in the air.

Lawfulness in the rough sense is not absent in the instrumental conduct, but the rule of law (taken in the precise sense in which Oakeshott uses it) certainly is. The rule of law in the rough sense is not completely self-referential because it uses the law as a means to an end, even if as a means to a so-called higher end. The unique character of Oakeshott's philosophy lies in his analytical distinction between the purposive and non-purposive adverbial qualifications of human conduct and, moreover, in his recognition that so-called higher ends are still instrumental. Planning the unplanned is still planning.<sup>30</sup> As Luke O'Sullivan points out, for Oakeshott, 'the relevant political distinction was not between left and right but between those who would "plan and impose a way of life upon a society" and those who "not only refuse to hand over the destiny of a society to any set of officials but also consider the whole notion of planning the destiny of a society to be both stupid and immoral",<sup>31</sup> Nomocratic governance is an unrehearsed adventure, while governance

<sup>30</sup> 'A plan to resist all planning may be better than its opposite, but it belongs to the same style of politics' (Oakeshott, *Rationalism in Politics*, 26).

<sup>31</sup> Luke O'Sullivan, 'Michael Oakeshott on European Political History', *History of Political Thought*, 21 (2000), 132, 137.

in the telocratic style is planning the destiny of a society, that is, laden with the hubris of social engineering.

The difference between the telocratic and the nomocratic obligation to law can only be captured in terms of style, in the different adverbial qualifications of their characteristic conduct, but not in terms of accountability. From the point of view of assessment *telocracy* or *nomocracy*, either obeys the law or not. In case they do, the possible difference (whether they oblige the law as a means to an end or for the sake of allowing solely the law to rule) cannot be positively accounted for. Yet David Dyzenhaus is right in pointing out that according to Oakeshott's theory, when *telocracy* uses the rule of law instrumentally, it still has a civilizing effect<sup>32</sup> – as if the values intrinsic to the rule of law would incidentally rub off on the telocratic state even if used for the wrong reason. The act of wager used as a means to an end still obliges the rules of wagering procedurally, if only with the wrong adverbial qualification (planning-ly), and could eventually change the mentality of planning into genuine wagering.<sup>33</sup> The current Finnish government might gamble strategically (planning-ly) with a sizeable per cent of the country's gross domestic product, but their law based upon the practice of trusting and being trusted is changing the quality of the association on the scale of enterprising to civil through the exercise of trust. It is quite obvious that the social contract between American citizens and the U.S. government would not make it possible to 'gamble' with the taxpayers' money in the Scandinavian manner. An enterprise society in the direct mode of planning would want to implement transparent mechanisms of accountability and guarantees for enforcement at every level of legislation rather than relying on trust. 'In this *mode* of association' – says Oakeshott – 'there is nothing whatever to correspond to the expression "the rule of law": there is only Purpose, Plan, Policy and Power.'<sup>34</sup>

When a *telocracy* gambles with the adverbial of planning (only to win), it does so by simulating the state of mind of wager. However, simulating the state of mind pertaining to wager can only be done by an acknowledgement of randomness and what follows from it: the impersonality and neutrality law requires. The mentality of the genuine gambler, however, is not a simple acknowledgement of arbitrariness but a sense

<sup>32</sup> Dyzenhaus, 'Dreaming the Rule of Law,' in this volume (Chapter 10).

<sup>33</sup> See Pascal's recommendation to follow the rules of religion even if you are unable to make the genuine wager.

<sup>34</sup> Oakeshott, 'The Rule of Law', 125.

developed in the vernacular practice of the game that makes the act of wager a leap of faith based upon an historically conditioned sense as opposed to a truly random choice. The cognitive leap in the genuine wager is a stochastic act of cognition with different adverbial qualifications from those of the mechanically simulated stochastic rationality that operates not as a leap of faith backed by an unenlightened historical sense but as a calculated suspension of instrumental rationality for an ultimately instrumental reason. The adverbial qualification of the genuine, not calculated, stochastic rationality is its being intrinsically embedded in a (re)current vernacular practice.

As a practice, the civil condition is an enactment of human beings; a continuous, not a once-and-for-all enactment. And what is enacted and continuously re-enacted is a vernacular language of civil understanding and intercourse; that is, some historic version of what I have called the language of civility.<sup>35</sup>

Here Oakeshott explicitly qualifies the adverbial of the vernacular stochastic conduct as 'historical'. The epistemologically lax leap of the genuine wager falls back on an historically developed sense informing habits of conduct, about which Oakeshott writes in 'Tower of Babel':

Custom is always adaptable and susceptible to the *nuance* of the situation. This may appear a paradoxical assertion; custom, we have been taught, is blind. It is, however, an insidious piece of misobservation: custom is not blind, it is only 'blind as a bat'.<sup>36</sup>

In the context of law, the historical sense, which is 'only 'blind as a bat', is a feeling for the law that informs both civil conduct and the theorist of the rule of law. The blind bat in fact has the advantage of superb navigation in the dark. Oakeshott does not only point to a more or less mystical *Rechtsgefühl*. After drawing a sharp analytical line between calculable probability and real-life 'likelihood of uncertainties',<sup>37</sup> he does not fall silent but keeps philosophizing, only in a different manner, that of the sceptic.

Oakeshott's definition of the rule of law can only make sense from the perspective of his scepticism. In a possible world of certainties, we would not need the rule of law. What we would need instead is either experts or technocrats leading us to these certainties in an accountable, reliable,

epistemologically diligent but fundamentally undemocratic and illiberal manner or God leading us according to His inscrutable plans. Since all human affairs are uncertain (and even admit opposites), we need the rule of law to protect us from the claims of certainties and truths. An epistemology that postulates certainties corresponds to a morality that demands either the epistemologically diligent pursuit of truth or the faith in the dogma of divine revelation. Oakeshott's entire oeuvre can be interpreted as his resistance to the increasing dominance of instrumental rationality as a morality, for which he thought both the idealizing morality of Christianity and the modern march of enlightened science were responsible. His juvenilia of a guide to how to gamble fits into his general warning about the hubris of the Enlightened Man and his recommendation of the unrehearsed adventures of the *homo ludens*.

<sup>35</sup> Ibid., 120. <sup>36</sup> Oakeshott, 'The Tower of Babel' in *Rationalism in Politics*, 471.

<sup>37</sup> Oakeshott, *On Human Conduct*, 44.