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The Anglo-American Conception of the Rule of Law

Nadia E. Nedzel · Nicholas Capaldi

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For
Diana, Meredith, Chantal, Michael, Anna, Sophie,
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Praise for *The Anglo-American Conception of the Rule of Law*

"In their new book, Nadia E. Nedzel and Nicholas Capaldi offer a real tour de force of the history of the English legal tradition of the 'rule of law', which has been under attack since 19th century Positivism made inroads into jurisprudence. However, Nedzel and Capaldi trace the beginning of the attacks on Rule of Law to the 17th century, and link it with the Baconian Project and the later Enlightenment Project, which was bound to undermine "civil association" and, consequently, individual freedom. They begin their discussion with Ockham, Bacon, Coke, Hobbes, and others before concluding with Hayek and Oakeshott—the last great proponents of the English legal tradition. This is by far the most scholarly, comprehensive, insightful, and provocative discussion of the rule of law to date. This book is a hallmark of profound scholarship and sound philosophical analysis."

—Zbigniew Janowski, *Lecturer, Towson University*

Contents

CHAPTER 1

Why the 'Rule of Law'

Introduction

The 'rule of law'[1] arose in England[2] both because of its individualistic cultural heritage and because of the non-rationalist character of its intellectual heritage, most especially in the common law. An understanding of and appreciation for this 'rule of law' has been limited to legal theorists like Hayek and Oakeshott[3] (and before them Dicey, Leoni, and Fuller) because they opposed the rationalism and 'scientism' that has been the basic intellectual orthodoxy since the nineteenth century. This opposition enabled them to resist the idea that reason or science can identify a substantive common end for society in the service of which all individuals must be directed and that law is the instrument that directs this service.

The mainstream of contemporary social scientific and legal thought has little room for the traditional understanding of the rule of law. Hayek and Oakeshott find such a place and articulate a morally significant picture of the rule of law precisely because they reject the rigidity of the rationalist, scientistic, positivist perspective. Their non-rationalist, inductive understanding of human life and human society underwrites this 'rule of law' perspective according to which the role of law is to define the rules that enable individuals, who have their own ends and commitments, to live in peace and voluntary cooperation with their fellows.

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Our purpose is to explain the meaning and significance of that 'rule of law.' The meaning has been obscured because much of twentieth-century jurisprudence and the philosophy of law has lost its way. It did so because it was misguided by a powerful intellectual movement. The significance of the 'rule of law' is that it was thought to have promoted and protected human freedom. That significance has been challenged by writers who have a different conception of freedom or who prioritize other values over individual freedom.

We shall begin by identifying the larger intellectual movement and then identify its use within jurisprudence. In the context of the larger intellectual world, we can label that movement as the Enlightenment Project,[4] namely, that there can be social experts armed with a social technology for addressing social issues. The Enlightenment Project presupposes 'scientism,' namely, the view that science is the whole truth about everything and that there can be a social science modeled along the lines of physical science. This view originated in France in the eighteenth century and was called 'positivism' by the French sociologist Comte in the nineteenth century.[5] In the twentieth century, this movement was programmatically developed in Vienna in the 1920s and 1930s before being transplanted to the UK and to the United States. Legal theorist Hans Kelsen was initially identified with this movement, and he became one of the transplants.

'Positivism' has generated confusion, in part because every scholar or every movement defines it differently.[6] 'Positivism' is a version of 'scientism,' and when developed programmatically becomes the Enlightenment Project. Although it is possible to be committed to some version of scientism without any ulterior agenda, the most prominent legal theorists of the twentieth and twenty-first centuries (Kelsen, Hart, Raz, Rawls, and Dworkin) have been uniformly in favor of different versions of social technology.[7]

When we, as the authors, use the term 'positivism' we have something quite specific in mind, something that has a clear historical pedigree.[8] In the eighteenth century, there was a philosophical movement primarily among the French *philosophes*[9] called the Enlightenment Project.[10] Inspired by the success of Newtonian physical science in explaining the world and the subsequent technological control it engendered, the *philosophes* initiated the idea of a social science, the aim of which was to explain, predict, and control the social world. In short, they believed in the existence of a beneficial if not utopian social technology. Legal

thought primarily in the United States in the late nineteenth and early twentieth centuries had already found advocates who wanted to apply science to the law. Rather than thinking that law has to be understood in its own terms, various aspects of social science have been applied to legal analysis. They go by different names such as sociological jurisprudence, formalism, anti-formalism, realism, legal positivism,[11] analytic jurisprudence, critical legal studies, even law and economics. What holds all of these together is the view that some version or understanding of social science can discredit all previous jurisprudence and provide an alternative version that makes law a better instrument to achieve some favored political agenda.

According to the *Stanford Encyclopedia of Philosophy*[12]:

> Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits. The English jurist John Austin (1790-1859) formulated it thus: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry." (1832, p. 157) The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. *Whether a society has a legal system depends on the presence of certain structures of governance*, not on the extent to which it satisfies ideals of justice, democracy, or *the rule of law*. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction. Austin thought the thesis "simple and glaring." While it is probably the *dominant view among analytically inclined philosophers of law*, it is also the subject of competing interpretations together with persistent criticisms and misunderstandings. [italics added]

Legal positivism so understood is inconsequential to the point of being reduced to triviality. Even defenders of natural law can agree with its definition of law and then add that the laws are unjust. So, everyone is a legal positivist. That is not helpful.

None of the important questions in jurisprudence have been adequately answered. Many of these questions have merely been obfuscated by positivist semantics. Worse still, some of the questions such as the meaning of the rule of law have been abandoned or misconstrued. More importantly, the real story of the genesis and controversial motivation behind legal positivism has not been told. We think that there is a story, there is an agenda, and there is no place for the 'rule of law' in that agenda.

When we speak of 'legal positivism,' we are here following Hayek's understanding, an understanding that was informed by intellectual developments in Germany in the late nineteenth and early twentieth centuries. What we mean is the program of giving a 'scientific' account of the law or even a specific legal system, an account that is intended to challenge the previous normative framework that informs that law and to replace it with an instrumental conception of law that serves a different normative framework. All talk about separating law from morality obfuscates the substitution of 'scientific' politics as both the foundation of law and a replacement for morality; hence, the subordination of law to some political vision.[13] As heirs to the Enlightenment Project, positivism has a normative agenda: morality itself (a la Comte) is the product of custom, superstition, and naïve theology. Morality will be replaced by scientifically rooted legislation.[14] This concern might strike some as odd given the insistence by positivist-inspired legal philosophers that law should be understood independently of normative concerns, but in those countries where law has been codified, the hierarchy of norms is now internal to the positive law itself. In so doing, legal positivism has encoded into legal theory its own morality, and that morality incorporates the values of representative democracy and socialism. Thus, the insistence that law and morality be separated turns out to be either illusory or a sleight of hand because law, in any scientistic-positivistic account, should serve a particular political agenda. Normative concerns are merely postponed or assigned a different locus. Inevitably, politics is prioritized over law. Positivist-inspired legal theorists are not focused on individual liberty but on the role of the state in maintaining or enhancing equality. The analysis of the meaning of the rule of law is a reflection of a hidden normative debate. It should come as no surprise that positivist democratic socialism seeks to eviscerate traditional centers of moral authority (churches, family, etc.) of all legitimacy and to absorb all the functions of welfare (e.g., charity, philanthropy, medical care, care for aged, child care, education, etc.) into the government.

'Scientistic' thinking supports a mind-set that encourages us to think that institutions such as 'law' have some sort of objective meaning so that we can speak of law as a genus of which specific national legal systems are mere species all of whom share some specific features. As a consequence, there is a tendency to talk about the *rule of law* as if it were something universally present in all the species. The rule of law then comes to mean something innocuously formal like legality. What is missed is that the 'rule of law' has a special meaning in English-derived legal systems, a meaning that is lacking in other systems, most especially in Continental legal systems and their derivatives. Unfortunately, the 'scientistic' approach tends to downgrade the intellectual significance of history in favor of more timeless preoccupations. Finally, there is a utopian philosophical conceit that scientism will lead to objective results on which there can be unanimous rational agreement such that universal global standards and perhaps world peace will be achievable through conceptual clarification.

The Main Theses

a. The five writers who have done the most to clarify the 'rule of law' are Dicey, Leoni, Fuller, Hayek, and Oakeshott.
b. All five of these writers locate and explicate the meaning of the concept primarily within the Anglo-American legal inheritance.
c. There are non-English Continental writers who have also articulated this concept but the political and legal entities to which they belonged did not embrace it; instead those states embraced what is called 'rule thru law'[15] (mere 'legality').
d. The difference between the Anglo-American legal inheritance and the Continental legal tradition reflects both a different intellectual starting point and a difference in their histories; Continental law (sometimes known as the 'civilian' tradition) reflects 'rule thru law.' The 'rule of law' protects individual freedom; the 'rule thru law' is based upon and promotes community.
e. Positivism is one form of the commitment to scientism. Scientism is the position that science (ultimately understood in terms of physical science) is the ultimate truth about everything; that science exhibits a method(s) of authentication that achieves universal agreement. Concomitantly, parliamentary democracy ideally mimics or is supposed to mimic science by engaging in debate until

everyone agrees. Norms should inevitably be the product of democratic decision-making. There is, in short, a social democratic bias built into positivism. On the contrary, one of the distinctive features of the specifically Anglo-American 'rule of law' legal inheritance is the assumption that the function of a legal system is not to achieve universal agreement but to manage conflict.

f. Individual liberty is an important component or presupposition of the 'rule of law.' Individual liberty is threatened by the belief that there can be a principled and effective managerial state in which law becomes the administrative arm of politics. The possibility of such a managerial state presupposes the existence of scientifically ascertainable and meaningful universal truths about human beings. The social sciences are supposed to be the source of such truths. The belief that the social sciences are really scientific in the relevant sense is based upon a larger understanding or philosophy of science. If that conception or philosophy of science is mistaken, then the hope for the reality of such social sciences is misplaced. That is why it is important for Hayek and Oakeshott as well as Fuller to challenge the current dominant notion of what constitutes science. If the philosophy of science is wrong, then the idea of social science is misguided, and if the latter is the case then the idea of a managerial state is misguided. This necessitates a different understanding of law and the meaning of the 'rule of law' within it. Dicey, Hayek, Leoni, Fuller, and Oakeshott provide such an understanding through a deeper historical[16] understanding of the Anglo-American legal inheritance.
g. There are Anglo-American writers who reject or seek to replace the 'rule of law' and embrace 'rule thru law' (Hart, Raz, Rawls, Dworkin, Allison, and Loughlin); the intellectual dominance within law of these writers accounts in part for the neglect of Dicey, Leoni, Fuller, Hayek, and Oakeshott. Fuller, Hayek, and Oakeshott are writers all of whom directly and consciously oppose 'scientism.' For that reason alone, this trio of writers is either ignored or dismissed in much of the jurisprudential literature.
h. The five writers who defend the 'rule of law' either against Continental writers or Anglo-American critics did so because they were concerned both with the erosion of the 'rule of law' and what they perceived as a threat to individual freedom.

i. All five defenders of the 'rule of law' (Dicey, Leoni, Hayek, Fuller, and Oakeshott) attribute the erosion to the ever-increasing power of regulatory government bureaucracies.
j. One of those writers, Fuller, further attributes it to a fundamental jurisprudential misperception of the nature of law itself.
k. Three of the writers, Fuller, Hayek, and Oakeshott, believe that the ever-increasing power of government agencies rests upon a political vision (Enlightenment Project social technology or managerialism) that in turn came to rest upon a faulty philosophy (namely scientism/positivism and its later manifestations).
l. That philosophy, interestingly, was a product of Continental thinkers (French *philosophes*, Comte, Marx) and presently dominates even the Anglo-American intellectual world and accounts for why 'rule thru law' has become popular.[17]
m. Hayek and Oakeshott understood their philosophical role, specifically in their philosophical jurisprudence, as partly therapeutic: to alert their audience that a specific scientistic misconception of philosophy is ultimately unintelligible and dangerous.
n. Hayek and Oakeshott expended great effort in exposing and critiquing what they saw as a misguided intellectual framework; in its place, they will provide an alternative intellectual starting point (what Hayek called 'spontaneous order').
o. In order to get the whole argument, it is first necessary to explain 'spontaneous order' and respond to misunderstandings (usually scientistic) of it; Hayek and Oakeshott use some version of 'spontaneous order' to explain the unique history of Anglo-American law as well as some pivotal events. What Oakeshott highlights is an important transition in the early modern period, one that influenced every institution including the law. That transition was a movement away from community and toward the rise of the autonomous individual. This transition was documented both by those who approved of it (including Hobbes, Locke, Hegel, Maine, Dicey, Hayek, and Oakeshott) and those who opposed it (e.g., Rousseau, Tonnies, etc.).[18]
p. The 'rule of law' arose in England (or Britain) both because of its individualist cultural heritage (Macfarlane) and because of the non-rationalist (not anti-rationalist) character of its intellectual heritage, the strong non-rationalist character of English (British)

culture/thought as exemplified by figures like Ockham, Hume, and Burke, and most remarkably in the common law.

q. Legal scholars and students, especially in the United States, are largely unaware of both the philosophical explications of 'spontaneous order' by Hayek and Oakeshott and the legal writings of these two authors; there are two reasons for this: Hayek is usually thought of only as an economist and Oakeshott as a political philosopher who had been largely ignored and then dismissed by English critics most of whom were favorably inclined to 'rule thru law'; the education of US legal scholars begins with self-selected students who want to politicize the law in order to change the world prior to understanding it, largely consists of political theory as taught by ideologues of the left, and who think Hobbes was an authoritarian and who do not understand Hegel let alone read him. To top it all off, the reigning intellectual giants of their world are Hart, Rawls, Raz, and Dworkin—all of whom had no use for the 'rule of law.'

Order of Presentation

Chapter 2 explains 'spontaneous order' in the works of Hayek and Oakeshott, explains that it is meant to replace misguided scientism, and responds to some typical misunderstandings. Part of the chapter is a form of therapy in which we show how the misunderstanding is largely the assumption that scientism is correct. The connection among scientism, the Enlightenment-Baconian project (collective goal of all political entities is economic growth and domination), and the 'rule thru law' will be explored. Throughout the book, we emphasize the remarkable commonalities between Hayek and Oakeshott and their occasional differences.

Chapter 3 presents a history of the British or English mind-set from Ockham to Oakeshott with special emphasis on the importance of nominalism, the individual, and the abhorrence of abstractions.

Chapter 4 presents a brief overview of the English legal inheritance from the Anglo-Saxons to the twentieth century. This overview is meant to show how the common law is an example of the English mind-set, how the law evolved in relation to judicial decisions and legislation, how the 'rule of law' evolved within that framework,

and how Anglo-American jurisprudence reflects a peculiar kind of thinking (we call explication) that is opposed to the kind theorizing (we call exploration) that is a reflection of scientism.

Chapter 5 presents a summary of the first serious explication of the concept of the 'rule of law' in A. V. Dicey followed by a defense of Dicey by Leoni and Hayek, followed by the identification of the perspective of Dicey's critics.

Chapter 6 is an interlude designed ultimately to explain the eclipse of the 'rule of law' by putting it into a larger history of law in general and a specific history of the philosophy of law as it was transformed in theory in the twentieth century by Kelsen and Hart. Fuller emerges as the main voice against Kelsen and Hart.

Chapter 7 focuses on Hayek's retrieval of the 'rule of law' from Dicey. The first part focuses on Hayek's critique of Kelsen's positivism (*Cairo lecture* of 1955 *and The Constitution of Liberty*). The second part focuses on the transformation of positivism (analytic jurisprudence) in Rawls and Dworkin. The third part focuses on Hayek's largely ignored critique of transformed positivism and his deeper defense of the 'rule of law' (via Oakeshott) in *Law, Legislation, and Liberty.*

Chapter 8 is all about Oakeshott, presenting and situating his magisterial explanation and defense of the 'rule of law' within his larger philosophy, his understanding of the history of English law, his understanding of politics, and his warning about the Baconian Project[19] and its promotion of what we call 'rule thru law.'

The Progression of the Discussion

a. Dicey raised the issue of the meaning and importance of the 'rule of law'; he identified its role in protecting individual liberty; stressed its origin in the common law and the difference from the Continent; he recognized the increasing danger to the 'rule of law' from administrative or public law; he left some ambiguity about the status of liberty as a norm and the relationship between legislation and adjudication.

b. Leoni gave a more thorough discussion of the difference between English and Continental law and gave the classic exposition of the danger to individual liberty posed by legislation.

c. Hayek did three important things: First, he gave a more detailed historical account of the unique emergence of the 'rule of law' in England; second, an account of the failure of Continental law to adopt the 'rule of law' which he attributed largely to positivism and the relation of positivism to legislation (politics) and collectivism; third he rooted the 'rule of law' philosophically in spontaneous order and identified it as a meta or cultural norm.
d. Fuller elaborated the threat of positivism and managerialism within the American context, challenged the positivist inability to give an adequate account of norms in the works of Kelsen and Hart, and gave an early expression of what became Oakeshott's adverbial account of the rule of law in a civil association.
e. Oakeshott agreed with Hayek on the dangers of positivism and Enlightenment Project collectivism, but resolved by way of Hobbes the tension between adjudication and legislation, defused the potential threat of legislation to individual liberty by rooting the former in a culture of civil association (not a specific list of rights or theory of rights), outlined the historical and philosophical origins of civil association, and specified the adverbial character of law and therefore the 'rule of law' in a civil association.

What these five authors (Dicey, Leoni, Fuller, Hayek, and Oakeshott) share is a commitment to individual liberty as a historical (English) entity—not an abstraction—as well as a philosophical critique of Enlightenment Project planning (Bentham, positivism, and rationalism), the notion of maintaining coherence with a previous inheritance [spontaneous order] rather than a utopian political theory, and a recognition of the Continent as more prone to Enlightenment Project collectivism, and the embrace of a judicial conception of politics as opposed to a politicization of the judiciary.

Notes

1. When we put single quotes around 'rule of law' we are referring to what we claim developed in Anglo-American jurisprudence. When we speak of 'rule thru law' we mean the different Continental analogue. We shall also speak of Anglo-American jurisprudence as an 'inheritance' in Oakeshott's sense; we speak of the Continental 'tradition' because it has a more rigid structure. We are mindful of the sometimes-problematic differences

between English and American law and explain, briefly, how this reflects the Continental influence on American law. We plan a subsequent volume that will focus exclusively on the differences between the two forms of jurisprudence.

2. Tamanaha's historical survey (2004, p. 5) concludes that 'the rule of law ideal initially developed in non-liberal societies' by which he means the classical world. We disagree. Everything depends upon one's definition of the rule of law; the concept of 'the rule of law' is not to be confused simply with limiting the abuse of governmental power, without some argument about what those powers are and what one means by 'abuse.' We shall sharply distinguish between 'the rule of law' and 'rule through law.' We are not claiming that the 'rule of law' is present from day one, rather it evolves within a specific historical jurisprudence. Hence the important role of spontaneous order.
3. The full-scale philosophical challenge to positivism and later analytic philosophy is found primarily in Hayek and Oakeshott because they were thinkers who embraced and excelled in a number of academic disciplines, including philosophy, and because they addressed the underlying philosophical issues as opposed to focusing on law.
4. The 'Enlightenment' is a term used broadly to refer to the intellectual and social ferment in Western Europe during the eighteenth century. 'The Enlightenment … was the work of three overlapping, closely associated generations. The first of these, dominated by Montesquieu and the long-lived Voltaire … grew up while the writings of Locke and Newton were still fresh and controversial, and did most of its great work before 1750. The second generation reached maturity in mid-century: Franklin… Buffon… Hume… Rousseau… Diderot… Condillac … Helvetius … d'Alembert … It was these writers who fused the fashionable anticlericalism and scientific speculations of the first generation into a coherent modern view of the world. The third generation, the generation of Holbach and Beccaria, of Lessing and Jefferson, of Wieland, Kant and Turgot … moved into scientific mythology and materialist metaphysics, political economy, legal reform, and practical politics … In the first half of the century, the leading philosophes had been deists and had used the vocabulary of natural law; in the second half, the leaders were atheists and used the vocabulary of utility' (Gay 1966, pp. 17–18).

   Randall (1962, p. 862) characterized the French appropriation as follows: 'Voltaire and his successors took over and used four main bodies of English ideas. First, there was Newtonian science, which was developed in France into a thoroughgoing materialism. Secondly, there was natural religion, or Deism, which the French pushed to atheism. Thirdly, there was Locke and British empiricism, which became theoretically a

thoroughgoing sensationalism, and practically the omnipotence of the environment. Finally, there were British political institutions as interpreted by Locke, the apologist for 1688, which became the basis of the political theories of the Revolution.'

Our intention is not to generalize about this entire period but to identify a specific strand of thinking that we shall call the Enlightenment Project. Alasdair MacIntyre, in his enormously important and influential book *After Virtue* (1981), identifies the 'Enlightenment Project' as the attempt to provide an independent rational justification of morality (p. 38). *The Enlightenment Project is the attempt to* explain, predict, and control *the human predicament through so-called social science and the use of a social technology*: see Becker (1962, Chapter Four), for an exposition of the position that the dream of a technological utopia is the common inheritance of liberals, socialists, and Marxists.

Advocates of social science, modeled after the physical sciences, believed they could engage in the explanation, prediction, and control of social phenomena. Berlin (2013, pp. 27–28) characterizes the Project as follows: '… there were certain beliefs that were more or less common to the entire party of progress and civilization, and this is what makes it proper to speak of it as a single movement. These were, in effect, the conviction that the world, or nature, was a single whole, subject to a single set of laws, in principle discoverable by the intelligence of man; that the laws which governed inanimate nature were in principle the same as those which governed plants, animals and sentient beings; that man was capable of improvement; that there existed certain objectively recognizable human goals which all men, rightly so described, sought after, namely, happiness, knowledge, justice, liberty, and what was somewhat vaguely described but well understood as virtue; that these goals were common to all men as such, were not unattainable, nor incompatible, and that human misery, vice and folly were mainly due to ignorance either of what these goals consisted in or of the means of attaining them-ignorance due in turn to insufficient knowledge of the laws of nature… Consequently, the discovery of general laws that governed human behaviour, their clear and logical integration into scientific systems-of psychology, sociology, economics, political science and the like (though they did not use these names) - and the determination of their proper place in the great corpus of knowledge that covered all discoverable facts, would, by replacing the chaotic amalgam of guesswork, tradition, superstition, prejudice, dogma, fantasy and "interested error" that hitherto did service as human knowledge and human wisdom (and of which by far the chief protector and instigator was the church), create a new, sane, rational, happy, just and self-perpetuating human society, which, having arrived at the peak of

attainable perfection, would preserve itself against all hostile influences, save perhaps those of nature.'

In the field of law, the Enlightenment Project was originally reflected in the work of Jeremy Bentham. Guided by its commitment to a narrow positivism, Bentham came in time to identify law with the commands of a sovereign. The fate of this direction will be elaborated upon shortly.

5. We think it is significant that this movement originated on the Continent. It reinforces our contention that the legal/intellectual systems of the Continent are, for historical reasons, different from Anglophone systems. Comte, unlike Mill, did not believe that any fundamental truths could be located in the psychology of the individual and therefore placed the locus of such truths in the social whole—hence the invention of the discipline of sociology. Hayek contends that this positivism undermined in the mid-nineteenth century the budding *Rechsstaat* which was initially inspired by the English model.
6. As we shall spell out below, positivism as a movement is not clear on its own history because positivism does not take history seriously as an explanatory domain. Ironically, positivism promotes an ahistorical mentality in later generations of its adherents. For example, Anthony J. Sebok (1995), identifies 'legal positivism' with three theses anachronistically attributed to Bentham as its originator: the separability thesis (that there is no necessary connection between law and morals); the command theory of law's origin; and the 'sources thesis' that the authenticity of a law is a question exterior to, and independent of, that of its content, and one therefore had to know by whom and in what manner a norm was promulgated in order to determine its status as law.

   Sebok does not identify the French origins of Bentham's own thought, does not connect positivism with the Enlightenment Project, failing to note that Bentham was the social engineer *par excellence*, nor does he connect it with its formal program as articulated in Vienna in 1929 [Thesis one]. The notion of a connection between law and morals is ambiguous. Sometimes it meant a rejection of natural law—but one does not have to be a positivist to share in the rejection; sometimes it meant the controversial and now largely debunked view that a legal system can be identified independent of all norms (scientism). One can also agree with the so-called sources-thesis [three] without being a positivist (Dicey, Oakeshott). As we shall show in Chapter 3, there is a long-standing tension in Anglo-American law between customary law and legislation. Those who have wanted to use law as an instrument of social reform have emphasized the primacy of legislation as well as minimizing the importance of the 'rule of law.' What is significant in the Anglo-American legal inheritance is that the norm of the 'rule of law' serves to limit the

rationalist excess of such reform, and this is precisely what Dicey meant by the *Law of the Constitution*. Sebok's interpretation of positivism is itself positivistic. It presents 'positivism' in the form of conceptual analysis without context. 'Positivism' appears as an innocuous theoretical position vaguely associated with Bentham ('fake' history); it is what Oakeshott would call a 'rationalist' analysis of a term, abstracted from actual theorists. Sebok ignores real history, the fact that positivism was held by specific people who used the term (e.g., Comte) and had an agenda which could be read back into previous theorists. Historically, legal positivism was espoused in opposition to 'natural law.'

7. Perhaps the most remarkable early treatment of 'legal positivism' is to be found in Fuller's *The Law in Quest of Itself* ([1940 Lectures at Northwestern University] 1966). His specific focus was on American legal realism, Holmes, and Kelsen. His overall conclusion is 'the essentially sterile nature of any form of legal positivism which purports to divorce itself from a definite ethical or practical goal' (p. 99). He specifically calls attention to '[t]he most dangerous quality of legal positivism [is]…the inhibitive effect it inevitably has upon the development of a *spontaneous ordering of human relations* [italics added]…[citing Kelsen who denies] the possibility of an ordering of society which rests upon a voluntary acceptance of guiding notions and is not dependent upon any governmental structure' (pp. 110–111). In trying to understand the vogue of positivism, Fuller points out that '[the] tacitly accepted philosophy of positivism seems to me also to underlie the modern preference for legislation as a means of legal reform' (p. 131). See also in Chapter 7 a comparison to Oakeshott's conception of the 'rationalist.'
8. One of the consequences of a commitment to 'scientism' is the denigration or demotion of history as an important explanatory factor.
9. The British thinker most enamored of this program was Jeremy Bentham. Bentham has been retrospectively called a 'positivist,' and his follower who allegedly employed some of these ideas in the law was John Austin. When many people talk about 'legal positivism' they mean the literature that begins with Austin and his twentieth-century critics such as Kelsen and Hart. This literature has taken on a life of its own. Generations of students have been initiated into a conversation without discussion of the origin or the rationale of the conversation. What is lost or obscured by this approach is the understanding of the basic importance of the program of social technology.
10. See N. Capaldi (1998).
11. Some are under the misimpression that 'legal positivism' only means that law must be identified with, and defined by, 'positive' law and not something else. However, the 'positivism' part actually refers to a philosophical

program initiated by Bentham and the French *Philosophes* and the term was coined by its greatest nineteenth-century advocate, Auguste Comte, and is anachronistically, but not inaccurately, applied to Bentham, perhaps controversially to Austin. Recognizing this requires some knowledge of intellectual history, but positivists and their progeny never took history itself seriously. We count analytic philosophy and analytic jurisprudence as part of the progeny. More will be said on this later.

12. https://plato.stanford.edu/entries/legal-positivism/.
13. Early positivists like their predecessors the *philosophes* championed democracy. The *philosophes* naively believed that all knowledge could be reduced to a finite set of truths (*The Encyclopedia*) that could be empirically verified and then taught to everyone because education was naively thought to be based on total environmental determinism (James Mill's and Bentham's education of J. S. Mill). In time, everyone would agree in a free and open discussion. Once these naïve conceptions were abandoned, analytic jurisprudence shifted its focus of reform from political democracy to an elite judiciary (The US Supreme Court became more important than Congress or the legislative power). A technocracy is the appropriate model of governance in light of the Enlightenment Project. This explains, in part, its attraction to law school faculty in particular and university faculty in general.
14. Legal positivism 'is the carbon copy of positivism in the sciences. It seeks to turn the law into an empirical science along the lines of physics or biology. The subject matter of that science must confine itself to positive, observable law. This comprises the legal rules which have been introduced according to the formal procedures provided therefore in the legal system. In those countries where the law has been codified … legal positivism is the same as legislative positivism. All hierarchy of norms is internal to the positive law itself … legislative positivism is the transition into legal theory of the system of representative democracy combined with popular sovereignty' (Lesaffer 2009, pp. 462–463).
15. See Rachel Kleinfeld (2006) for a discussion of the distinction between 'rule of law' and 'rule by law.' Kleinfeld focuses on the difficulties of promoting the rule of law in developing countries. Nevertheless, she is among the few to mention Oakeshott as well as Dicey and Hayek, is cognizant of the threat to the rule of law posed by administrative law, and recognizes the importance of the cultural context for reforming institutions, something Oakeshott stresses in his discussion of civil association. Our focus is on the conflict between these opposing conceptions as reflections of an underlying debate between advocates of liberty and advocates of equality within the Anglo-American legal inheritance.

The concept of the 'rule ***of*** law' can be distinguished from rule ***by*** law, or what we are calling 'rule thru law,' according to Li Shuguang: 'The difference….is that, under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law is a mere tool for a government that suppresses in a legalistic fashion.' Quoted in Mufson (1995).

16. This is why it is important to Oakeshott to establish the autonomy of history, specifically that it cannot be reduced to or further explained by any alleged social science. To take history seriously is to recognize that (a) there are no laws of historical causation or development and (b) not every thing and every concept exists from the beginning of time or in the ancient world but might have arisen much later (see next note).
17. Tamanaha (2007, p. 469) asserts: '…the notion that law is a means to an end became entrenched only in the course of the nineteenth and twentieth centuries.'
18. This loss is reflected in Hobsbawm's argument that globalization leads both to global *gesellschaft* and to artificially contrived collective (*gemeinschaft*) identities.
19. According to Oakeshott, Bacon and Descartes suggested the idea of a socially organized program to use science and technology to dominate and economically exploit the world. Neither intended or aspired to create a social technology—that was what the Enlightenment Project of the *philosophes* became. Nevertheless, such a program has ominous implications for social organization.

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CHAPTER 2

Spontaneous Order

Introduction

An understanding of and appreciation for the rule of law has been limited to legal theorists like Hayek and Oakeshott (and before them Dicey) who have themselves rejected the rationalism and 'scientism' that has become the basic intellectual orthodoxy since the nineteenth century. An alternative, non-rationalist understanding of human life and human society is needed to underwrite the rule of law perspective according to which the role of law is to define the rules that will enable individuals who have their own ends and commitments to live in peace and voluntary cooperation with their fellows.

In this chapter, we explain what a spontaneous order understanding is in general. In subsequent chapters, we show how the British intellectual tradition in general reflects spontaneous order and how the legal inheritance in particular is an example of spontaneous order.

Spontaneous Order[1]*: The Simple Version*

Spontaneous order is easy to explain but difficult to understand. Here is the easy explanation.

N. E. Nedzel and N. Capaldi, *The Anglo-American Conception of the Rule of Law*, Palgrave Studies in Classical Liberalism,
https://doi.org/10.1007/978-3-030-26361-4_2

1. Practice precedes theory.
2. Theory at best is the clarification of previous practice in order to explicate norms for future practice.
3. The clarification seeks consistency and coherence with previous practice.
4. The clarification is an imaginative and inductive process for which there is:
   a. No algorithm;
   b. No possible appeal to any structure outside of practice (hence there can be no theory of how practice and theory are related);
   c. No guarantee of convergence either within one culture (one set of practices) or among cultures;
   d. The lack of a guarantee does not preclude an evolving convergence. However, 'There are, strictly speaking, no closed systems within the Universe.'[2]
5. All those committed to epistemological realism (positivists, natural law theorists) will either fail to grasp or object to 4(b) and 4(c).
   a. All versions of scientism (positivism, analytic philosophy, etc.) are anti-philosophical in their refusal to question their own starting point and ultimately lead to the end of rationality.
   b. Epistemological realists, i.e., those who believe that there is something outside of us to which our thoughts must conform, do not and cannot demonstrate the truth of their position[3] but find subscribing to the concept of spontaneous order very uncomfortable.
   c. The spontaneous order view cannot guarantee a utopian resolution of all potential conflict, it posits that intellectuals in general and philosophers in particular possess no special public policy wisdom, and thus it does not entail a specific ideology or public policy theory.
   d. Whereas, scientism (which is a form of epistemological realism as is positivism) entails
      i. Reductive epistemology in which we can eventually explain everything.
      ii. A social technology that would make (modern) liberals, socialists, and Marxists into heroes because they can in principle produce a utopian resolution of all social conflict by reference to a collective good.

iii. Hence, the fact that both Hayek and Oakeshott object to scientism[4] and to the undermining of individual liberty and link them together.

6. The 'rule of law' evolved out of the spontaneous order of the Anglo-American legal inheritance. It appears full-blown in England in the seventeenth century but has a long history from before that time. Both Hayek and Oakeshott show its English historical origin, and Hayek goes on to explain why and how it was thwarted on the Continent.

Human action precedes human thought. Within human action, individuals pursuing individual goals in interactions with each other are not originally intending to create order through a previously agreed-upon plan. They may not even have a common language. Through trial and error, they find ways to agree on how to carry out one or more cooperative undertakings. Subsequent to the successful action, they articulate their understanding. In explaining the rules to later initiates, they articulate the groundwork for future planning and cooperation; but the original action did not depend on a preexisting or self-conscious plan. They might not even articulate the rules as rules until someone fails to perform correctly or disagreement arises on the next step. This is how social order emerges.

The development of a natural language is an excellent example of spontaneous order. Languages cannot be planned or developed except by using a preexisting language. The first language itself is taught through actions such as pointing, head shaking, facial expressions, etc. According to advocates of spontaneous order, there cannot be a purely theoretical account showing some hidden plan underlying the relationship between thought and action. Nor can anyone control future permutations.

Practice precedes theory. Recall Hume's example of two men rowing a boat and who gradually coordinate their strokes. We theorize (explicate) when we need to clarify a practice either because someone has made a mistake (did not do what was expected) or we cannot agree on the next stage of the practice. The disagreement or confusion is understandable because a vast multitude of practices develop over a long period of time among many different members of a culture. Moreover, if a practice has been explicated, it may confront novel circumstances that call for further explication or refinement. The refinement may take the form of a rule or set of rules.