

Little Platoons v Big Data: Agonistic Pluralism, Law and Conservatism in Hildebrandt's *Smart Technologies* and Oakeshott's *On Human Conduct*

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Introduction

Mireille Hildebrandt's *Smart Technologies and the End(s) of Law* (2015)¹ is an extraordinary piece of work, looking back to the co-evolution of law, the state and the technology of the printing press, and forward to the contribution that smart technologies of machine learning, big data, artificial agents and pre-emptive environments will make to our society and the threats they make to us individuals (the onlife world).² As incisive points and dry witticisms pile up in the text, the reader will no doubt wish to engage with many issues – privacy,³ data protection, the nature of law and its enforcement, technological determinism, to name only the most prominent.

For my own part, *Smart Technologies* presents history at an inflection point, where technology has the capacity to introduce a step-change in our relations with our selves, our fellows and our society. Hildebrandt defends our plural society with an agonistic reading, resisting the Rawlsian project of developing consensus, and instead suggesting a Mouffe-like position of accepting, even welcoming conflict. Reference points in the text include Latour, Butler, Derrida and Ricoeur (though fortunately she is infinitely more readable than these luminaries).

Yet the focus on forthcoming change implies that a more interesting philosophical lens would be conservatism, the ideology that problematizes and examines social change. And indeed, reading *Smart Technologies* through conservative spectacles results in many insights into the politics of technology, conservatism and Hildebrandt's work as well. Hildebrandt herself may be horrified at this thought, and conservative thinkers (with the possible exception of Hannah Arendt whom I would

¹ All references to this work will appear as page numbers in brackets. All emphases (in all quotes) are the authors' own.

² The onlife world is a neologism describing these new circumstances. One is supposed to write it with an irritating italic 'f', but hopefully this typological solecism can be safely ignored.

³ I certainly take issue with a number of things she has to say on this point, although as Hildebrandt reasonably sees privacy as an essentially contested concept (188), that is perhaps to be expected. I hope to explore this topic on a future occasion, and (O'Hara forthcoming) did manage to engage a little with her arguments. For example, I think, though this is not the place to pursue the argument, that she gives personal data stores or personal data environments too short a shrift in this book (202).

also like to claim for the tradition)⁴ are absent from the text. Nevertheless, in this paper I will argue that a conservative reading of *Smart Technologies* is both appropriate and illuminating.

In its scope, scale and ambition, *Smart Technologies* brings Michael Oakeshott's masterwork *On Human Conduct* (1975)⁵ to mind, and in many ways updates that statement of liberal conservatism for the 21st century. Both books focus on human decision-making and action at the individual level, the use and purpose of law for constraining action, and the role of the law and the state for creating the circumstances for autonomous, authentic, free individuals to flourish. Oakeshott's themes of human behaviour and civil association, and modernity's challenges to individuality, are replicated and extended in Hildebrandt's work. Nevertheless, such is the modern hegemony of liberalism, Oakeshott is not referenced in *Smart Technologies*.

My paper has three further sections. To begin with, I will briefly review conservatism and relate it to liberalism. Next, I will work through many of the prominent themes of *On Human Conduct*, and relate them to themes in *Smart Technologies*. Finally, I will consider ways in which Hildebrandt's work challenges and extends Oakeshott, while remaining within the conservative tradition.

Liberalism and conservatism

In a number of countries at least, conservatism and liberalism are often confused. There is a reason that this is surprising, and two reasons why it is not. The surprise is that the spirits of the two ideologies are diametrically opposed, as Hayek argued trenchantly in his famous essay 'Why I am not a conservative' (1960). The liberal welcomes change, experiment and creative destruction; new opportunities come from disruption of old, tired ways of thinking. The conservative, on the other hand, is timid, clings to old ways and traditions and is pessimistic and resisting of the unfamiliar, untried or unproven.

Yet equally, these two dissimilar ideologies often make common cause. Socialism, identity politics, nationalism and other critical ideologies advocating targeted social change offend both conservatives and liberals. The liberal decries the suppression of the individual (in the name of equality, or greenery, or feminism, or the nation), while the conservative is exercised by the undervaluation and intended destruction of existing institutions.

More subtly, conservatism is a situational ideology (Huntington 1957); it is not concerned with any particular ends as such, but rather problematizes change (Freedman 1996, O'Hara 2011). Consequently, the conservative will defend the political settlement that is in place, as long as it *is* a settlement; a conservative in Tehran would defend very different institutions to a conservative in Paris or Washington, while using parallel arguments. And a conservative in a liberal nation will find herself defending liberal institutions (Brennan & Hamlin 2014, O'Hara 2011). There is nothing contradictory in the idea of conservatives and liberals joining together to defend liberal institutions, if those liberal institutions are in place and functioning. But they will use different arguments; the liberal typically going from universal first principles, while the conservative will argue from the successful function of the

⁴ Hildebrandt and Arendt on the team would also go quite some way to redressing the regrettable gender imbalance in the ranks of conservative philosophy.

⁵ In this paper references to pages in *On Human Conduct* will be page numbers preceded by OHC. I am also indebted to the exegesis of (Digeser & Flathman 2012).

institutions in the particular historical moment (e.g. of 21st century multicultural Europe), without admitting or advocating that her argument will carry across time and space (Gray 1993b).

Conservatism itself is an epistemological philosophy, sceptical towards the claims of science and social science (Oakeshott 1991), and arguing that rationalist philosophers and politicians systematically undervalue functioning institutions and traditions in society, however irrational (or even unjust) they may appear on the surface, while overvaluing their own abilities to reshape society to their preferred blueprint (Burke 1968). Consequently, the aim of conservatism is not to prevent or block change, but rather to place the burden of proof on the innovator, and to ensure that social change is (a) incremental, (b) reversible where possible, and (c) rigorously evaluated (O'Hara 2011).

On Human Conduct

Michael Oakeshott (1901-1990) was a thinker on the borderline between liberalism and conservatism, and is often claimed as a liberal thinker (Gray 1993a). In fact, he defended Britain's (especially England's) liberal constitution using conservative arguments. In this section, I will explore some of the parallels between Oakeshott's major work *On Human Conduct* and Hildebrandt's *Smart Technologies*, before considering how she moves the agenda on in a final section.

Plurality and Agency

Oakeshott's starting point was the pluralism of a modern society, where citizens, groups, associations, enterprises, religions and ideologies compete for space, attention and air time, defending their own practices, gathering resources and persuading others of their merits. A healthy society could easily be quite fractious, and Oakeshott's purpose was to understand how such a plurality could sustain and reproduce itself, without imposing consensus, even as society members were in perpetual conflict. Influenced by his own Hegelian idealism (Oakeshott 1933), Oakeshott argued that the notion of aggregating this plural cacophony was incoherent or unintelligible (OHC12).

One of his most noticeable traits as a philosopher was his tendency to understand a problematic area by postulating a distinction to scope his inquiry. The notion of agency was an example of this – understanding human action or behaviour depends on whether that which was understood is “an exhibition of intelligence or not” (OHC11). Once it is decided that agency is in play, then idioms of inquiry apply, such as ethics, politics or aesthetics, although Oakeshott was firm that these idioms had clear lines of demarcation.

Human action, then, involves an “imagined and wished-for satisfaction”, and a judgment about whether the satisfaction could take place in current circumstances. In Oakeshott's day, agency was an exclusively human trait, although of course philosophers were already trying to extend the concept. A key contribution of Hildebrandt's work is the development of a convincing notion of artificial agency.

Oakeshott used this idea of agency to support his own pluralism. First of all, he argued that there were no facts to determine the proper limits of agency – there were no rights and wrongs, fundamentally, about beliefs, desires and purposes. And secondly, “where conduct is the choice and pursuit of substantive conditions of things every achievement is evanescent” so that “every satisfaction is casual and late or soon

a casualty" (OHC84). In short, in practical life so much is going on that it will make little sense from any perspective other than the specific subjective and partial position of individuals. We might add with Hildebrandt that, in our technology-mediated modernity, our perceptions of reality are altering all the time, so that our hyperconnectivity is reconfiguring our perceived environment and the set of choices we can make (50).

Oakeshott's idea of evanescent achievement leads to another distinction, between a collective and a collected state of affairs (OHC86-87). Oakeshott rejects collective enterprises as inimical to pluralism and therefore inherently totalitarian, and focuses instead on the collected inheritance of myriad interactions between individuals and civil society groups. "It is not Man who relieves the ills of an invalid, nor is it some abstraction called 'medical science'; the healer is a specific practitioner who has learned his art, not from Society, but from particular teachers" (OHC87). Broadly congruent desires and satisfactions create the conditions for the reproduction of a pluralistic society, as traditions, institutions and practices evolve as conventions, norms or regularities which are widely understood and exploited by individuals to achieve their satisfactions and resolve their conflicts. Any interaction between two individuals, however evanescent in itself, will typically exploit a palette of well-understood practices and constraints within which the interaction can be tailored for mutual benefit, without actually determining what that benefit might be.

Oakeshott calls the ability to act within a collected state of affairs effective freedom or liberty. Effective freedom is not simply a lack of coercion, but corresponds to Berlin's positive liberty, though placing much more weight on the notions of agency and responsibility and the idea of individuals as achieving their own satisfaction in a plural society. Whereas Berlin's positive liberty was a type of self-mastery, Oakeshott's effective freedom is founded in the abilities of individuals to negotiate the collected state of affairs, understand its affordances, interpret their own interests within it, and develop coalitions of allies (perhaps via debate and effective advocacy of their own position), in order to adapt their satisfactions to better achieve them. The problem Hildebrandt presents us with is that, in the modern era, the technology that profiles and pre-empts us may leave us short of the reciprocity and ambiguity that autonomous individuals require to communicate, and ultimately to exercise their effective freedom (67).

Practice

As they are discussed, replicated and even theorised about, practices, for Oakeshott, become recognisable and semi-formal, even acquiring a kind of informal authority, without determining what people do or what activities they take part in (OHC56). To take part in a practice may involve using it to achieve the satisfaction desired.

The practice may also be associated with a set of norms (especially when it involves many agents), and what Oakeshott calls the morality of self-disclosure depends on an individual staying or not staying within the normative bounds of the practice. For example, in an exam, the individual basically wants to pass, but the practice of examination also includes a set of normative principles that only accepts a pass under certain conditions (e.g. without cheating – OHC76). The individual discloses himself within such a practice, depending on whether he remains within the normative bounds or not. Such bounds, though obviously fragile in a selfish world both for the individual (who might fail the exam if he respects them) and for others (who will be disadvantaged if cheating is widespread), are important for disseminating trust across

societies (OHC73). Such practices give a social structure to a person's enacting "himself as he wishes to be" (OHC72). Self-enactment relative to a practice involves accepting the norms of that practice and respecting them as far as possible. The outcome for a cheat and for a non-cheat may be identical, but the latter is virtuous in a way that the former is not (OHC73).

Practices, therefore, as characteristic of collected states of affairs rather than collectives, have two crucial functions. First of all, they give individuals a palette of actions and behaviours which facilitate the negotiation of the complexities of plural existence. Secondly, they provide a locus for the individual to enact himself as a virtuous and social person, able play a full part as a trustworthy member of civil associations.

An important contribution of *Smart Technologies* is Hildebrandt's understanding of technology as practice in this sense, and the dangers of going beyond the Oakeshottian notion in such a way as to undermine self-enactment. No-one is forced, she writes, to use a mobile phone, and those who do can use it to support or pursue many types of satisfaction or goal. "But once defaults have settled resistance becomes more difficult and expectations of how things are done consolidate" (11). Furthermore, the development of practice is advanced, if that is the right word, by technologies of pre-emption and profiling. "Roles, institutions and cultural patterns [roughly what Oakeshott refers to as practice] are tied up with predictions; they help to predict how other agents will probably behave" (58). She notes the distancing effect of the printed word in the development of practice, and how what Oakeshott calls effective freedom depends on "specific mental skills, such as sound argumentation, sustained sequential reasoning and the willingness to give an account of one's choices by providing reasons" (58). One needs to embrace autonomy, control and accountability in the post-Gutenberg world. She adds that technology that predicts, aggregates and pre-empts our choices and actions will forever change that world; a new set of practices is being subtended so that effective freedom may require a whole new set of skills (59ff.), and will be protected only partially by data protection rights (187).

The individual v the individual manqué

Individuality, for Oakeshott, goes beyond agency; it involves embracing the possibilities of agency and taking up opportunities for adventure and exploration. With his penchant for deep historical analysis, tracing the genealogy of political concepts and practices, he argued that individuality and effective freedom in this adventurous sense is a relatively recent phenomenon, and that the usual condition of liberty for most of human history was if anything something of a burden. Effective freedom for an individual taking full advantage of one's agency is the condition for autonomy, not in the sense of defining one's own rules (as the Nietzschean *Übermensch*), but in the sense being authentically one's self (OHC237).

This condition contrasts with that of what Oakeshott called the 'individual manqué' (OHC275), who longs "for the shelter of a community", distrusts his own instincts, and recedes into a heteronomous condition where his desires and satisfactions are set out for him by external agencies. The individual manqué is unable or unwilling to make the major investment in resources to self-enact as an individual, and to explore his own individuality, and for Oakeshott this is the outcome of a moral failing. The individual manqué is a danger to plurality, as someone who will be resentful of the

difference which will follow from individuals ignoring the authorities for and sources of his own desires and beliefs.

Hildebrandt agrees that the fallen individual is damaged by pre-emption of actions and patterns of action, “handy and comfortable” though it may be (51). However, despite the reference to the sacrifice of comfort for individuality, she is more sympathetic towards individuals manqués than Oakeshott, and an interpretation of her thesis is that recession into heteronomy is happening covertly via technologies which “conflate time and space into a synchronized environment that allows for ‘always on’ real-time accessibility.” As in Huxley’s *Brave New World*, the individual manqué has been suckered into his supine position, rather than meekly surrendering as Oakeshott argues.

It is extraordinary – to take another conservative liberal philosopher – to consider the accuracy of Tocqueville’s warnings in this context. The decontextualized individual of the onlife world (1-15), with smartphone, personal agent and portable infotainment, whisked from home to office to airport by driverless car, close to but remote from his fellows, is conjured up in this passage from 1840 about the new kinds of soft despotism we might expect in the new democracies.

I wish to imagine under what new features despotism might appear in the world: I see an innumerable crowd of men, all alike and equal, turned in upon themselves in a restless search for those petty, vulgar pleasures with which they fill their souls. Each of them, living apart, is almost unaware of the destiny of all the rest. His children and personal friends are for him the whole of the human race; as for the remainder of his fellow citizens, he stands alongside them but does not see them; he touches them without feeling them; he exists only in himself and for himself; if he still retains his family circle, at any rate he may be said to have lost his country. (de Tocqueville 2003, vol.2, part 4, chapter 6, 805).

This vision prefigures Hildebrandt’s own argument that the data-driven view of society brings a new type of perception in which “even our immediate surroundings are being mediated, especially when engaging with mobile applications that provide us with ‘augmented reality’” (50). Tocqueville, like Oakeshott, was suspicious of democracy. Hildebrandt embraces it, as do most modern conservative thinkers, but recognises the importance of resisting the slide into the condition Tocqueville describes. Can she square the circle?

One important contribution of her work is to refuse to accept existing economic incentives to frame the bigger picture, as it is these incentives that are producing the onlife world’s individuals manqués. There will certainly be costs and benefits to any kind of shift away from the current model of surveillance capitalism (Zuboff 2015), but Hildebrandt is clear that only “after determining what normativity we need to survive as reasonably free and reasonably constrained individual persons, we can decide how to distribute the costs as well as the benefits” (15).

The stakes are certainly high. In a continuation of the above passage, Tocqueville describes the opportunity for power that individuals manqués provide.

Above these men stands an immense and protective power which alone is responsible for looking after their enjoyments and watching over their destiny. It is absolute, meticulous, ordered, provident, and kindly disposed. It would be like a fatherly authority, if, fatherlike, its aim were to prepare men for manhood,

but it seeks only to keep them in perpetual childhood; it prefers its citizens to enjoy themselves provided they have only enjoyment in mind. It works readily for their happiness but it wishes to be the only provider and judge of it. It provides their security, anticipates and guarantees their needs, supplies their pleasures, directs their principal concerns, manages their industry, regulates their estates, divides their inheritances. Why can it not remove from them entirely the bother of thinking and the troubles of life?

Thus, it reduces daily the value and frequency of the exercise of free choice; it restricts the activity of free will within a narrower range and gradually removes autonomy itself from each citizen. Equality has prepared men for all this, inclining them to tolerate all these things and often even to see them as a blessing. (de Tocqueville 2003, 805-806).

Civil association, social machines and the state

Oakeshott's main purpose in *On Human Conduct* is to describe how individuals can form into groups without losing the plurality inherent in their pursuit of their own satisfactions. To that end, he introduces the key concept of civil association (OHC108-184), a self-sufficient, 'constituted' (i.e. rule-based, with a system of adjudication, however informal) relationship of equal free agents (OHC110). This involves:

... 'free' (that is, intelligent) agents disclosing and enacting themselves by responding to their understood contingent situations in chosen actions and utterances related to imagined and wished-for satisfactions sought in the responses of other such agents, while subscribing to the conditions and compunctions of a multitude of practices and in particular to those of a language of moral understanding and intercourse. (OHC112)

An association may exist to complete a purpose or pursue a goal, but to be a civil association it must have no function other than to allow people to interact in a well-understood way. It is my contention that Hildebrandt is best understood as aiming to preserve something like this complex condition of civil association, without overriding goal, in the onlife world.

There is nothing wrong with an association designed to pursue a particular end. Oakeshott calls these enterprise associations (OHC114), and characterises them as a "community of choices", in which people congregate in order to cooperate to achieve a goal. Effective freedom includes the ability to identify and join such associations. Such cooperative behaviour can be found online as well, of course, as *social machines* (Hendler & Berners-Lee 2010).

The idea of social machines brings in the notion of design, which for robust libertarians and existentialists has a totalitarian ring. Norman Mailer, for example (who self-identified as a 'left conservative'), uses the phrase to skewer *bien-pensant* thinking in liberal America, for instance describing the denizens of a smart dinner party as "servants of that social machine of the future in which all irrational human conflict would be resolved, all conflict of interest negotiated, and nature's resonance condensed into frequencies that could comfortably phase nature in or out as you please" (Mailer 1968).

Oakeshott maintains that the state is, at bottom, a civil association (not a machine or a managerial entity), and traces its evolution from medieval court to modernity

(OHC185-326). In particular, this moves us toward the idea of two different kinds of state, which he distinguishes through a detailed if idiosyncratic reading of European constitutional history. The state as *societas* provides security and creates the conditions for the individual to flourish. It holds the ring between different citizens, and attempts to make it possible for plurality, dispute and dispute resolution to occur, via well-understood traditions and practices. The state as *universitas* instead pursues particular enterprises (policies), and subordinates individuality to those policies. Such a state has a cause, a purpose, or an aim.

Neither Oakeshott nor Tocqueville anticipated that this amount of power could also devolve to a private actor (cf. 75).⁶ There is no reason that it shouldn't, as the power Tocqueville envisages is not coercive in the traditional sense, and not underpinned by a monopoly on legitimate violence. Surveillance capitalism requires only a powerful enough body to spread itself across most aspects of the lives of most people – it could be a private company, but no-one anticipated Google until Google appeared. As Tocqueville predicted, such powers are not judgmental; Google and Facebook are quite pleased for people to be happy, want them to be, and do not judge the means by which they are made happy, as long as they are the agents and arbiters of the happiness.

Reciprocity and reflection

Reciprocity with other agents in the association is essential, as the individual responds to what she understands of the situation (OHC114). When the full position is not available to an agent, then her effective freedom is impaired. For instance, Oakeshott uses the example of a punter and a bookmaker entering into the practice of putting a bet on a horse (OHC115). The practice does not determine which horse to choose, or what odds the bookmaker should offer – these decisions made within the practice determine the particular transaction. It is implicit – Oakeshott does not consider this – that the horse in question, and any other horse in the race, has not been doped. If the race has been fixed, then a different practice is underway and punter, bookmaker or both may be misled about what will happen on the racecourse.

In the onlife world, Hildebrandt argues that a system that takes one's first order preferences for granted, catering for them before one is aware of them, diminishes one's capacity to reflect on habits and desires, and therefore one's capacity to remake oneself in order to improve as a person (by one's own standards) (92). Data for profiling and pre-emption is much more easily available for the owner of the databases and software than the individual data subject, which is crucial because the data will produce non-obvious knowledge about matters such as creditworthiness, health or employability (101), again creating an asymmetrical position. The actual affordances of technology matter, not those that are perceived, as some of the former may be hidden (170). In such a world legal expertise is displaced by data expertise, which is worrying because, unlike lawyers who are paid to advise clients who are fully aware of their involvement in a legal case, data scientists are generally funded by the data consumers, thereby exacerbating the asymmetry (182). Furthermore, important social protections – such as the socialisation of risk via insurance or related industries (194) – may disappear, replaced by individual responsibility.

⁶ Except in so far as Oakeshott thought the state as *universitas* was analogous to a medieval lord, rather than a constitutional entity.

It is, however, hard to agree with Hildebrandt's suggestion (222-224) that counter-profiling the profilers will help redress the balance. Quite apart from complex issues such as data gathering and interfaces, the problem in the cases discussed above is sometimes reciprocity (our awareness of our interlocutors' purposes and beliefs about us), but more usually the (non-relational) lack of a space in which to understand ourselves and reflect. The asymmetry between what I know about me and what Google knows about me may be a problem in my relationship with Google, but is certainly an issue for me. I could know so much more, and don't.

In any case, transparency about the self following from the collection and analysis of personal data "can be an infringement of privacy, because one is forced to confront knowledge about oneself that disrupts the future" (74). This very fact forces one to choose between knowing or not knowing, say, the sex of one's baby or the risks associated with one's genome.

Law and authority

Not all associations promote enterprises. Oakeshott writes of civil associations constituted by subscription to rules of engagement which constrain how individuals in the association (*cives*)⁷ go about pursuing their own satisfactions. A civil association is brought together by a manner of doing things (rather than a goal), and the rules governing the manner of its members' interactions and pursuits make up the law (*lex*). The civil association is created precisely through recognition of the law as authoritative.

Oakeshott conceives of the state (as *societas*) as a civil association, and so the *lex* of that particular association is the law as we understand it, and which concerns Hildebrandt. For Oakeshott, there is no narrative about law beyond this (this is perhaps a more plausible contention today, in a world of failed states and narco-states, than it was in 1975). Oakeshott and Hildebrandt agree that law should neither be "sterilized" as an independent construct, nor instrumentalised for economic or political purposes (147).

This recognition of the law as authoritative does not have to be via consent, and the law need not serve justice.⁸ There is no contractual relationship, and no moment of adoption. Law, for Oakeshott, is a fundamental condition of civil association. It does not create an obligation to do anything specific, but rather creates obligations to act in a manner consistent with the law. In this sense, law acts adverbially (Hildebrandt: "law does not prescribe or describe; it predicts what legal effect will be attached to what event, action or state of affairs" – 157). As Hildebrandt notes, complying with law is also consistent with challenging it in a court of law, and understanding, interpreting, extending and changing operative legal norms (10, 173); the nature of law as printed text encourages interpretation and disagreement (177).

⁷ Oakeshott had a tendency to introduce technical terms in his philosophy as Latin words or phrases. I won't follow him in this, in this paper. His rationale for these Latinisms is at (OHC108-109).

⁸ It is not entirely clear whether Hildebrandt would endorse this statement. She wants to avoid idealistic renderings that conflate law with justice (147), though is keen that law, even if unjust, aim at justice (149). Oakeshott argues that a legal system (*lex*) has an 'inner morality' intrinsic to civil association (OHC153n1), and also claims that "no performance is 'just' or 'unjust' in respect of being a wish to achieve an imagined satisfaction or in respect of its actual outcome, but only in respect of its relationship to a moral practice understood as a composition of rules" (OHC69). However, these remarks are somewhat too gnomonic to unravel in the space available.

Unlike with an enterprise association, failure to comply is not an act of disassociation, but it may of course lead to punishment according to the law. Hildebrandt agrees that a hallmark of legal rules is that they can be broken (probably with consequences for the lawbreaker), which distinguishes the law from discipline and administration (10). Oakeshott emphasises the adjudicative function of the law (OHC131), but in terms consistent with Hildebrandt's insistence that law "requires deliberation as well as binding decisions" (183). It follows that a mere decision-making mechanism is not sufficient for a civil association (unless it is written into law).

Civil association and law have an internal relationship – it is impossible to have one without the other. Hence civil authority isn't acquired by some sort of act or endowment, but resides in the continuous acknowledgement of the law by the citizens of the association (OHC154). Individual legal rules, as Hildebrandt notes (10), will appear via a valorised process (by a democratic legislator in the jurisdictions of her focus, though Oakeshott himself was not one of democracy's biggest fans); this is part of the law defining the civil association.

Oakeshott argues that the law laid down by a civil association should understand the state as *societas*, not *universitas*. The law, ideally, will avoid prescriptions about behaviour that cannot easily be enforced because they conflict with norms of civil conduct (OHC178). Second, the law should ideally only have substantive effects on behaviour which has the capacity to harm others (OHC179). This looks very like Mill's harm principle, and subtends a private sphere for the individual. Third, innovation should be within the capacity of the association to absorb it (OHC178).

Because a civil association has a compulsory element (it is hard if not impossible to disassociate as an individual), then for Oakeshott it is wrong for the state to pitch itself as a *universitas*, that is, as an enterprise association. Liberty involves being able to pursue one's goals, and not being forced to pursue others, so the state as *universitas* is a tyranny to the extent that it insists on citizens reinforcing the pursuit of its own goal.

The modern state as *universitas* has a tendency to address tricky, even insoluble, problems, such as 'the problem of the poor', which Oakeshott characterised as reconceptualizing poverty from an issue of embarrassment for a nation, to the unproductive use of human 'assets' – a reconceptualization that helped bring about the enlightened managerial state (OHC303ff., and cf. Hildebrandt at 173). More modern examples might be the wars against crime, drugs and terror, as well of course as highly technologized 'real' warfare itself (OHC272-274). In such a world, where the state takes on such responsibilities, the citizen has to render herself legible to the state so she can be deployed effectively (Scott 1998).

For Hildebrandt, this is an immediate potential locus for privacy problems, as privacy "presumes that a person can anticipate and co-determine how the environment 'reads' her" and that "what matters is *what others may infer from these data*" (102). In order to (appear to) control these big issues of poverty, crime etc., the state renders us legible, categorises us, and makes us take actions. Inevitable failure to achieve a partially-specified goal, together with unintended consequences, require more action, and a vicious circle is in operation.

Hildebrandt also describes a reality in which, although the state does not necessarily have a goal beyond self-perpetuation, law is closed down or marginalised by technology. She worries about the adequacy of written law to cope in this new world

(177). Furthermore, this need not be the state in operation, but a private service provider. Once more, Tocqueville anticipated her, but she extends the critique.

Thus, the ruling power, having taken each citizen one by one into its powerful grasp and having molded him to its own liking, spreads its arms over the whole of society, covering the surface of social life with a network of petty, complicated, detailed, and uniform rules through which even the most original minds and the most energetic of spirits cannot reach the light in order to rise above the crowd. It does not break men's wills but it does soften, bend, and control them; rarely does it force men to act but it constantly opposes what actions they perform; it does not destroy the start of anything but it stands in its way; it does not tyrannize but it inhibits, represses, drains, snuffs out, dulls so much effort that finally it reduces each nation to nothing more than a flock of timid and hardworking animals with the government as shepherd. (de Tocqueville 2003, 806).

Now we hear the cadences of Lessig's *Code* (1999), or Zittrain's *The Future of the Internet* (2008), where architecture intervenes to constrain humanity in pleasant, carefully constructed walled gardens. Hildebrandt sets out the means by which technology undercuts law to create such structures. First, design is not controlled by a democratic (or otherwise) legislator, and, as she points out, we never get to vote on it. Second, whereas we have a right to violate the law without dissociating ourselves from our fellow citizens, side-stepping the design of a technological device takes us out of the association that exists on or via that device. Third, it is hard if not impossible to contest the effects of technological architectures, because they are often invisible, certainly extremely complex, and not least because there is nowhere to contest them (12).

Hence the dangers, which Oakeshott frames as moral unacceptability, of the state as *universitas* are located in its power to inhibit, repress or snuff out. Bulk data gathering, for example, is justified in terms of efficiency, but for Oakeshott the state need not be efficient because it is not there to *do* anything efficiently or badly other than provide optimal conditions for civil society. Hildebrandt does not share Oakeshott's scepticism, but neatly states the dilemma of machine learning.

If the assumptions [of machine learning] restrict the capability of the agent to respond to relevant changes in its environment, it will come up with incorrect, irrelevant or ineffective solutions. ... However, the problem is that if those who pay for these systems believe in their objectivity, and act upon their predictions, we may not easily learn about the inadequacy. (25)

Hildebrandt problematises Oakeshott's distinction, agreeing that individualism and the pluralism he regarded as fundamental are undermined by the state as *universitas*, but going further in arguing that even the state as *societas* may struggle to use state-of-the-art techniques for its Hobbesian duty of providing security for its citizens.

The therapeutic state

Oakeshott discusses the therapeutic state (OHC308ff.), which is the state as *universitas* that goes even further – its goal is the health of its citizens, and it uses its authority to enforce behaviour consistent with its own definition of health. The state becomes a “sanatorium from which no patient may discharge himself by a choice of his own,” eerily reminiscent of the ‘nudge’ programme which has become popular amongst paternalistic *faux*-liberal governments (Halpern 2015).

The therapeutic state works to define problems in and improvements to people's daily lives independently of their actual lived experience, as for example the novelist Malcolm Lowry (writing of his time as an alcoholic squatter in a beautiful forest near Vancouver in the 1940s) describes:

Often I would linger on the way and dream of our life. Was it possible to be so happy? Here we were living on the very window of existence, under conditions so poverty stricken and abject in the eyes of the world they were actually condemned in the newspapers, or by the Board of Health, and yet it seemed that we were in heaven, and that the world outside – so portentous in its prescriptions for man of imaginary needs that were in reality his damnation – was hell. (Lowry 2009)

Hildebrandt also weighs in against citizens being addressed, not as members of a civil association defined by law, but “as entities whose behaviour must change to achieve some greater good,” complaining that “the language has shifted from regulating the *actions* of legal subjects, to regulating the *behaviour* of groups of individuals” (164-165). Lessig's famous argument that behaviour is regulated by law, economic incentives, social norms and architecture (Lessig 1999) is “deeply disturbing” (165), as it implicitly suggests the interchangeability of these constraints, so that in particular a cleverly designed architecture could produce the behaviour change without appeal, reducing the burden on the law and forcing the citizen to work toward the greater good (184-185). Indeed, the position is worse, in that if behavioural economics can show that certain correlations occur under laboratory conditions, the temptation for paternalistic policymakers is to reproduce the laboratory conditions in the world (O'Hara 2015). The response to a prediction (e.g. that someone is likely to be a criminal or terrorist) may inadvertently help to bring the prediction to pass (196-197).

Law is not, on the Oakeshottian view, a means to an end, however good the end; people are not rational agents despised by a system which nudges them into doing what they ought to do. Hildebrandt's slogan remains salutary: *my behaviour should not be redressed without first addressing me about it* (185). For the liberal, this is because my liberty or autonomy is infringed by such actions, while for the conservative, it is because no-one has the legitimacy to erect a standard against which my behaviour can be judged, or the competence to redress my behaviour without unintended consequences.

Hildebrandt's extensions of and challenges to Oakeshottian thought

Forty years on, it is not surprising that Hildebrandt's work extends the Oakeshottian framework significantly in many ways. In this final section, I will single out three: the roles of big data, architecture and pre-emption; the importance of privacy; and the nature of agency, especially artificial agency.

Big data

Interactions between the state (and also private organisations and service providers) and the individual are different because the technological background shifts the entire basis of the relationship, as Hildebrandt argues. Interoperability and automatic categorisation have replaced meanings and causes (196). So, for instance, she points out that:

Instead of building on *explanation* in terms of causes or *understanding* in terms of reasons this kind of knowledge [mined from data] thrives on quantification and syntax. Devices and infrastructures that make use of these data mining techniques are smart because they are capable of detecting and acting upon patterns that are invisible to unmediated human cognition. (26 – cf. also 162-163 about the normative impact of the car)

In this spirit, she considers the development and history of the law in a similar spirit to Oakeshott's, but focusing on the technology of print, the affordances this created for the law, and the effects it had on institutions such as the state, sovereignty and the rule of law (177-181); she follows up with a methodical account of the challenges of digital and networked technologies (181-183). This is an important supplement to Oakeshott's account of the development of the state, not least because of her consistent technological focus.

Smart technologies provide a different locus of understanding than, for example, Oakeshott's characterisation of agency in terms of intelligent behaviour. For Oakeshott, actions have purposes to resolve desires, about which there is no right or wrong, and which generate what Hildebrandt calls "the flux of life" (166). If we take away the purposes and desires from the account, and aggregate over many actions using this abstracted language, we find statistical regularity (which the methods are intended to uncover) rather than the flux which drives our political institutions and underpins the need for pluralism. The focus becomes our machine-readable behaviour (46), which can easily be calibrated against the requirements of a data architecture that eschews the disputes and interpretations characteristic of law in favour of "tacit, invisible interpretations ... performed by machines that have no use for meaning" (181); the new paradigms for behavioural constraint – behavioural economics, nudging, data science and cybernetics – are quantitative, and have no need for interpretable text (183). The requirement for pluralism therefore drops from the political picture, and the state as *societas* loses a key justification.

We also lose the first person perspective – the collected becomes the collective. Big data relies on a model from which machine learning and knowledge discovery techniques can extract correlations. But correlation in the model is not the same as a correlation in the world. Worse, the model itself (whether or not it is produced by the technology itself) inherits all the problems that Oakeshott adduces of a collective. Worse still, "in so far as their focus is entirely on data and analytics, [big data] users may never even notice how wrong[ly] they are guided, because the analytics has not only become their extended cognition but also their extended perception" (38).

Borrowing a trope from Morozov (2013), she cites Big Data Solutionism as the "tendency to redefine the flux of life in terms of machine-readable data that can be operated upon to compute solutions to any computable problem one might want to imagine" (166). Ultimately, we individuals may even end up as the cognitive resource of the models – our function within the system is to create the data that feeds the beast (47), while reciprocity and ambiguity are lost (67). Privacy, identity, autonomy, equality before the law, the presumption of innocence and due process are all potential casualties.

The state which makes policy using big data necessarily adopts the position of *universitas* rather than *societas*, necessarily rejects the first person experiences of its citizens in favour of aggregations or abstractions, and compounds these felonies by policymaking over the abstractions, managing the correlations, and failing to provide

useful feedback mechanisms from those have been abstracted over and who may not accept the conclusions of the machine. As Hildebrandt notes (38-39), scientific method requires some sort of commitment to testing data mining and the data gathered; the consequences of inadequate processing are substantial, especially if a smart environment is able to act on the output to the detriment of individuals.

Big data, the cloud and virtual machines are not ethereal entities. In the technologically-mediated spaces about which Hildebrandt writes, metaphors such as these should not disguise the fact that immateriality is an illusion; they denote real machines located in real places (44-45) which incur real costs (194). Data represents partially, and each technique (and data union) will partially reveal signals, which may or may not correspond to signals (or the important signals) in the world that is being moulded by the actions of smart environments. Different algorithms may produce different results on the same data, and although communication between analysts may produce some consensus, we are still left with the question of how far we can trust the consensus (Silberzahn & Uhlmann 2015), especially if we factor in the fact that data scientists and their funders also have interests which guide their data gathering, the datasets they purchase access to, the algorithms they use, and the noise they choose to reject.

Privacy and data protection

Second, Hildebrandt's main interests are data protection, which post-dated Oakeshott's work, and privacy; in this she naturally goes beyond Oakeshott himself, although much of his work is about the relationship between public institutions and private individuals. For example, he does not consider the importance of providing distance, or safe space, for a member of a civil association (which may be a state) to reflect. Hildebrandt gives the example of the "institutionalized pattern of behaviour" called politeness as protecting privacy and personal space in Japan (and most likely elsewhere – 115). The rules underlying it facilitate interaction between people; in Japan, making it possible to conduct an interaction of equals without undermining civility, while the participants simulate ignorance of each other's affairs (118) and lie about information they do not want to share (119). The key in these situations is that everyone is aware of the rules, and (broadly) of the knowledge that each has about the other. Hildebrandt contrasts this situation with that of the US, where privacy should not be taken, but need not be given or provided (189).

Oakeshott argues that the private sphere is the sphere of desires, goals and satisfactions. "Enterprise, seeking the satisfaction of wants, cannot be in this sense 'public',⁹ no matter who is concerned. ... Thus, if ruling were itself to be understood as the deliberation, the choice, and the execution of a 'policy' in which the substantive resources of the ruled (their attention, their energy, their time and their wealth) are compulsorily or contractually enlisted ... in a joint undertaking or series of undertakings of which the rulers are the 'managers', then it could have no place whatever in civil association" (OHC146). *Universitas* cannot be a civil association, it is an enterprise association, and only *societas* can fill the social need for free agents to relate to each other.

⁹ I.e. in the following sense: given a particular engagement, the public interest is in a series of considerations, set down in law, that are indifferent to its success or failure. Private interests, on the other hand, are indeed concerned with its success, or with its failure, or with its specific effects on individuals, groups, institutions etc.

For Oakeshott, the state as *universitas* intrudes private interests on the public, which is different but not dissimilar to Richard Sennett's contemporary complaint that the *res publica* has been effaced by the false belief that social meanings are generated by the feelings of individuals (Sennett 1977). Both thinkers are interested in the smooth and just functioning of public life, and the protection of individuals is not on their radar in those works. Oakeshott the conservative is clear: only the state as *societas* will allow individuals to flourish and exercise autonomy, but in his rejection of *universitas* he does not consider what the limits could or should be of a purposive state, how an individual should be protected from other private actors, whether they be nosy neighbours or Marc Zuckerberg, or the extent to which individuals should be absolved from responsibilities to protect themselves (cf. 203ff.). Or, rather, Oakeshott believes that they should be protected by the law, but does not specify what that law should or could be. Hildebrandt champions data protection for providing "a limited set of rules that give clear indications of the conditions for lawful processing, instead of depending on a single ambiguous concept" (190, and cf.206), which data subjects can believe in as achievable (191).

Yet an important protection can be developed through reminding ourselves that those collecting data have a purpose. Even if our being rendered machine-readable removes the discourse of purpose from states' and companies' preferred representation of social life, those states (*universitas*) and companies do have purposes for collecting data, and must declare these in advance of doing so as a result of data protection rules (212). The very aspect of these enterprise associations that prevents them from being civil associations can be used to provide accountability and hidden processing.

Agency revisited

Third, the onlife world which Hildebrandt describes sets a challenge to Oakeshott's rejection of collectivity as a locus of agency. Her characterisation of the extended social mind (e.g. 46) is the sort of collective state of affairs that Oakeshott disregards as a "corrupt and corrupting expression." Nevertheless, it is hard to resist the collectivisation of data-driven agency. Oakeshott argues that "the arts of agency are nowhere and never to be found save in the understanding of adepts" (OHC87), yet Hildebrandt begs to differ.

There is work to be done to reconcile these two accounts, but I do not think it impossible. The lines of a reconciliation would involve work on two concepts. First of all there is the constraint of behaviour afforded by an environment. Lessig's argument is discussed and critiqued by Hildebrandt, as we have seen. Oakeshott, however, with his focus on individual action only really discusses three of the four constraints from Lessig's account. The affordances of architectures (which need not be digital, but could be provided by any artificial environment) would need to be placed into the Oakeshottian framework. Hildebrandt does not make concrete suggestions and poses this as an open question. Though we need to "learn how to integrate legal norms in pre-emptive computing systems", we also have to "develop new ways to preserve what differentiates law from administration and techno-regulation" (218).

Secondly, and relatedly, Oakeshott stresses the contribution made by individual agents, whereas in a modern civil association legitimacy and responsibility are quite often distributed around the system and hard to locate at a particular person or point. Collective interests and governmental purposes are tricky to disentangle from collected interests of individuals and the optimal conditions for civil society (Flathman 2005), and Oakeshott's ideas, as Hildebrandt implicitly demonstrates, need

to be augmented with a more realistic account of the use of authority and the affordances of the Hobbesian state (Galston 2012). It may be that one route to this is to explore the idea of extended cognition (Clark 1997). This is, as I have argued elsewhere, a potential tool in the toolbox of conservative political psychology (O'Hara 2014), and Hildebrandt brings the concept into her work. An individual's extended cognition, when augmented with social resources, becomes socialised and less individual as a result; it may be that consideration of this issue will help plug the gap in Oakeshott's framework.

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