Purpose and Politics: Can There Be a Non-Instrumental Civil Association?

basic commopurposes. Michael Oakeshott's idea of the state as a "civil association" (or association in terms of "the rule of law") challenges this conventional view by describing a mode of political association that has no common purposes whatsoever, or at least no common "substantive" purposes. This essay examines this surprising idea of political association, and discusses Oakeshott's response to some important questions and criticisms. Although I do not argue that Oakeshott's defense of the idea of civil association completely succeeds, I will argue that he forces us to reconsider some of our fundamental ideas about the role of common purposes in politics, law, and morality. In particular, I will argue that the cogency of Oakeshott's description of civil association as a non-instrumental or "moral" form of association depends a great deal on Oakeshott's understanding of "morality" and on the degree to which moral, legal, and political decisions can be justified without reference to their external consequences. In my conclusion, I will also suggest why the idea of civil association is likely to remain important and controversial.

Enterprise Association and Civil Association

Oakeshott's account of civil association begins with the idea that human beings are "agents," which means, among other things, that their conduct is not to be understood as the product of some causal or functional process, but rather as an intelligent, and therefore "free," response to their own circumstances. Oakeshott argues that this intelligent response is always "contingent," i.e., "nonnecessary," and that it is always particular in character. In other words, human beings can neither "deduce" how to respond to their situations, since

there is always more than one appropriate response possible, nor can they act for the sake of general ends, such as "happiness." Instead, agents always respond to their own circumstances by choosing to pursue one of many possible, particular satisfactions: "I cannot *want* happiness, what I want is to idle in Avignon or hear Caruso sing."[1]

Oakeshott also argues that human relationships can be understood in terms of two "modes" or logical types of association. The first basic mode of human association is "transactional" association. In this kind of association, human beings are related in terms of their pursuit of individual or common satisfactions, e.g., a grocer and a customer. bargaining over a price, or a group of people devoted to saving the whales. Since transactional association is a relationship in pursuit of some individual or collective end, it is essentially a relationship in terms of power or the marshalling of resources. Where a transactional association is a joint undertaking or an "enterprise association" devoted to some common end, it is also relationship in terms of each member's approval of that common end as desirable.

Since human conduct is always particular in character, a commonend must involve a "policy" or set of contingent decisions about how best to pursue the common end: according to Oakeshott, enterprise associations are therefore inherently "managerial" in character. Enterprise associations may also adopt a "practice," e.g., ā set of considerations, manners, principles, standards, maxims, rules, or perhaps even a rule book or a constitution. However, in transactional relationships such practices are always instrumental or prudential in character: they possess authority only insofar as they directly or indirectly further an individual or common end. In short, in transactional relationships generally and in enterprise associations in particular, "there is only Purpose, Plan, Policy, and Power."[2] According to Oakeshott, this mode of human association is almost always taken to be the only possible model for the state.

The second basic mode of human association is relationship in terms of anon-instrumental practice An instrumental practice, such

1. Michael Oakeshott, *On Human Conduct,* (Oxford: Clarendon Press, 1975), 53.
2. Oakeshott, "The Rule of Law," in *On History and Other Essays* (Totowa: Barnes and Noble, 1983)125.

as a practice of cabinet-making, aims at producing an extrinsic or separable product, such as cabinets. In contrast, a non-instrumental practice, such as etiquette, aims at an intrinsic or inherent purpose that can be achieved only in observing the considerations and rules of the practice itself: "polite" conduct, for example, is not something separable from the rules and considerations of etiquette, but rather is exemplified or illustrated in observing those rules and considerations. We might say that in a non-instrumental practice the rules and purposes of that practice come so tightly bound together that they cannot be separated, except perhaps analytically. Since a non-instrumental practice has no extrinsic purpose, Oakeshott argues that it does not involve any policies and does not require any particular actions or performances. Rather, a non-instrumental practice is said to establish purely "adverbial" or "formal" 'conditions" which must be taken into account by individuals pursuing purposes of their own. According to Oakeshott, participation in a practice therefore respects "agency" and leaves individuals "free." Consider, for example, our most basic practice, the practice of a natural language. A natural language consists in certain formal conditions, such as rules of grammar. These formal conditions do not tell us what to say, but merely establish conditions that must be observed in choosing to say anything at all.

It is important to emphasize, however, that a language consists in much more than rules, as do most practices. The practice of "morality," for example, involves much more than rules or even considerations of "right" and "wrong." Morality, according to Oakeshott is a "vernacular language" of conduct. Like a language, a morality has rules, but like the rules of grammar, these rules are mere "abridgements" or "abstractions" which "help a practice keep its shape, but do not give it its shape."[3] What gives a morality, or any practice, its shape are the continuous self-interpretations and contingent choices of those who participate in a practice. As a vernacular language of conduct, a morality can be spoken well or ill: slavishly, monotonously, and pedantically, or inventively and masterfully. It has its grammarians, its dictionary makers, and its moral "theorists" who reflect on the presuppositions of morality, and it also has its "moralists" or connois-

3. On Human Conduct, 68.

seurs of moral style, "who explore its hidden resources and uncover its ironies."[4] In short, a morality "is a ,ntinuously accumulating residue of conditional relationships . . . a continuously extemporized dance whose participants are alive to one another's movements and to the ground upon which they tread."[5]

According to Oakeshott, civil association is a non-instrumental practice and therefore a "kind of morality." In contrast with morality in the strict sense, however, civil association is concerned almost entirelywith rules. It also differs from morality in having a procedure for distinguishing the authority of a rule from approval of its legal or moral desirability, and in being concerned with its own kind of "justice." Obviously, civil association is fairly close to what we think of as a system of law. Rather than speaking of legal association, however, Oakeshott chooses to use the expressions "the rule of law" or "civil association" and he refers to the rules within civil association as *"lex."* This is because civil association is not quite as narrow as what we ordinarily think of as "legal" association and not as indiscriminate as what we ordinarily think of as "political" association.[6]

A civil association consists in a self-contained system. *of* offices and procedures for determining the jurisdiction and validity of *lex* and for adjudicating, making, and enforcing *lex.* According to Oakeshott, the rules of *lex* reflect neither a minimal common interest nor a consensus of interests: *lex* is not concerned with interests at all. These rules do not have to be attached to penalties and they do not have to be expressly enacted, although a "common law" of unknown source must be capable of being appropriated, rejected or changed by an office that can determine its authenticity as law. The rules of *lex* are neither theoretical theorems nor commands. Rather, they are general assertions of authoritative conditions. of conduct. As such, they do not require approval or any judgment about their desirability, but only a procedure for determining their authenticity as *lex.*

If we ask how we can recognize a particular rule as a law or as having authority, then, Oakeshott refers us to its place within the

4: Ibid., 66.
5. Ibid., 63.
6. Ibid., 108.

entire practice of law that constitutes civil association. Yet this answer only leads to another, more basic question:

> And should it be asked how a manifold of rules, many of unknown origin, subject to deliberate innovation, continuously amplified in judicial conclusions about their meaning in contingent situations, not infrequently neglected without penalty, often inconvenient, neither demanding nor capable of invoking the approval of all whom they concern, and never more than a very imperfect reflection of what are currently believed to be "just" conditions of conduct may be acknowledged to be authoritative, the answer is that authority is the only conceivable attribute it could indisputably be acknowledged to have.[7]

Civil association has authority because it is acknowledged to have authority; there is no other basis on which it could have. authority, given that an entire system of law is never capable of "invoking the approval of all," as well as the numerous other imperfections that Oakeshott mentions in the passage above.

If we distinguish the question of *how* a civil association *could* possess authority from the question of *why it should* have authority, this view is not as surprising as might first appear. It is roughly similar, for example, to the "positivist" view of legal theorists such as H;L.A. Hart, who also base the existence of a legal system on the sociological fact that there are a sufficient number of people who take the "legal point of view" or who acknowledge the authority of both particular laws and "rules of recognition."[8] No doubt, it is also necessary for the existence of a civil association that a sufficient number of people believe that authority serves some important purposes, but there does not seem to be any necessary set of common or even overlapping purposes that all members must share in order for the authority of a civil association to be widely acknowledged.[9] Civil association is therefore truly a "minimal" state, in the sense that widespread

7. Ibid., 154.
8. H.L.A. Hart, *The Concept of Law,* (Oxford: Clarendon Press, 1961).
9. For the necessity of a belief that civil association serves some purposes, see

acknowledgement of its authority is the only common bond necessary between its members. It is also a nonpurposive state, not in the sense of lacking any purposes, but in the sense that there is no particular set of purposes that it must have.

Yet surprisingly, Oakeshott also says that there are some requirements of justice in a civil association that are "inherent; not in the notion of a just law, but of law itself... It is only in respect of these considerations that it may perhaps be said that *lex injusta non est lex.*"[10] And this appears to complicate matters greatly, since the claim that an unjust law is not law" is of course associated with the natural law position, not with the legal positivism of writers such as H.L.A. Hart. More precisely, Oakeshott suggests that a rule which does not satisfy the "inner morality" of a legal system cannot be considered a law, and this famous phrase is of course associated with the procedural natural law position of Lon Fuller, who was H.L.A. Hart's principal critic. Against Hart, Fuller argued that *"law" cannot* be defined sociologically but must instead be understood as inherently "purposive."[11] Where, then, does Oakeshott's idea of civil association or "the rule of law" fit into this important debate between Hart and Fuller?

According to Fuller, the basic purpose of law is to ensure a relatively stable reciprocity between subject and law-giver. This basic purpose led Fuller to argue for eight necessary features as part of an "inner morality" of law: rules must be promulgated, general, prospective, clear, noncontradictory, stable, possible of compliance, and there must be "congruence between official action and declared rule" or "fidelity to law." Fuller argued that these features distinguish "law" from a system of "managerial" control (or from what Oakeshott calls "enterprise" association) because they exert an empirical "pull" toward substantive justice. In reply, Hart and other legal positivists argued that Fuller had confused conceptual and empirical claims, i.e., that he had not shown that an "inner morality" is necessary to the *idea* of law, but only that it is necessary to a "good"

Richard Flathman, *The Practice of Authority,* (Chicago: Chicago University Press, 1980), 51-90.

10. Oakeshott, "The Rule of Law," 140.

11. Lon L. Fuller, *The Morality of Law,* (New Haven: Yale Press, 1963).

legal system. If Fuller was making an empirical claim, then he was not offering a "definition" but an "ideal" of law. If he was offering a definition, he needed to make his argument on conceptual grounds. But according to Hart, on conceptual grounds the only thing that is needed to define a system of social control as "legal" is the presence of "rules of recognition."

Does Oakeshott's agreement with Fuller mean that civil association is "purposive" after all, and does Oakeshott therefore run afoul of Hart's criticisms of Fuller? Although Oakeshott vehemently attacks and Fuller insistently celebrates the idea of purpose in law, their views are similar in many fundamental respects. This should make us aware of *how* slippery any discussion of "purposes" can become.

Fortunately, there is a methodological point that allows us to untangle matters somewhat. *On Human Conduct suggests* that the question whether civil association should be seen as a "definition" or as. an "ideal" of law already reveals a deficient understanding of the *problem* facing legal theorists. For the question suggests that *we* can distinguish a definition from an ideal by testing various proposed definitions of law against a single "preanalytic" experience of law.[12] In other words, a definition is supposed to tell us what law "is" rather than what it "should be," which suggests that we can consult some fact of the matter. Yet one of Oakeshott's central claims in *On Human Conduct* is that for almost five centuries the political imagination of Europe has oscillated between *two* imperfectly understood preanalytic conceptions of "law," a "managerial" or "enterprise" conception of law and a "moral" or "civil" conception. Unlike most contemporary legal theorists, Oakeshott therefore understands that the "philosophical" problem of defining law has an essentially "historical" dimension and that historically there has been no unambiguous practice of "law." For this reason, *On Human Conduct* employs neither "definitions" nor "ideals" but rather "modes" of association or "ideal characters," that is, theoretical constructs devised in order *to* reveal certain important tensions in the history of legal and political thought. These constructs *can* be treated as ideals or "possible practical engagements," although Oakeshott recognizes

12. Thanks to Richard Friedman for this observation.

that "an association in terms of the rule of law would certainly be a work of art," and he also admits that it has been contingently impossible for any modern European state to be exclusively a civil association given the necessity of a "foreign *policy"* between states." Nevertheless, the real function of these ideal characters is not practical but theoretical: to better understand our confused and ambiguous historical practices by clarifying and restructuring their implicit assumptions. [14]

Since he is not defining law but rather describing an ideal character, civil association or "the rule of law," Oakeshott therefore does not choose between Hart and Fuller. Instead, in "The Rule of Law," Oakeshott summarizes the idea of civil association both in terms of the positivist idea of a procedure that allows us to identify law independently of morality and in terms of an inner morality of law. And he adds a third important feature, namely, concern with a kind ofjustice that goes beyond the justice inherent in "law" as Fuller understood it. In discussing the role of this kind ofjustice, Oakeshott continues to be quite circumspect: this kind ofjustice is not the basis of legal authority; it is not an attribute of the totality of civil laws; and in particular it cannot be "deduced" from or even "modeled" on a higher law or on abstract moral principle. Nevertheless, Oakeshott says that civil association is concerned with ajustice of its own that is "neither arbitrary, nor unchanging, nor uncontentious, and that [is] the product of a moral experience which is never without tensions and internal discrepancies.'[15]

Questions About Civil Association

It is important to appreciate the breadth of Oakeshott's analysis of civil association, which runs from a philosophical analysis of the postulates of human conduct to an historical consideration of the ideas

13. Oakeshott, "The Rule of Law," 149.
14. For an argument that legal theory must be "practical" rather than "theoretical" in character, as well as an interesting general discussion of some methodological issues in legal theory, see Philip Soper, *A Theory of Law,* (Cambridge: Harvard University Press, 1984), 1-56.
15. Oakeshott, "The Rule of Law," 143.

of civil and enterprise association in the history of modern European thought. While leaving aside most of what Oakeshott says about civil association, the sketch I have presented still raises many more issues than can be discussed here. In this section, I focus on only two questions: whether individuals can be said to be "free" by virtue of participation in a practice; and what Oakeshott means by describing civil association as a non-instrumental or "moral" practice:

The first way in which Oakeshott explains the nonpurposive character of civil laws is by treating them as parts of a practice. As mentioned above, a practice is a set of considerations, manners, standards, uses, principles, or rules that govern conduct. Whether instrumental or non-instrumental, prudential or moral, all practices share a similar character: they do not establish particular purposes to be pursued or actions to be performed; rather, they are said to specify "adverbial" or "formal" conditions that must be observed in choosing purposes and performing actions of our own. Since a practice does not require particular purposes or actions, Oakeshott argues that participation in a practice leaves individuals free. Accord - ing to Oakeshott, the laws of a civil association are "formal" in this sense, since they are part of a practice of law. This formality supposedly extends even to criminal laws: "A criminal law, which may be thought to come nearest to forbidding actions [i.e., substantive performances], does not forbid killing or lighting a fire, it forbids killing `murderously' or lighting a fire 'arsonically. "'[16] Thus, without differentiating the idea of a practice any further, Oakeshott believes he can offer avery general explanation of the nonpurposive character of civil laws.

This argument is problematic. Of course, no one doubts that the rules of a practice always leave individuals free to perform *particular* actions: this much follows from their character as general rules. This important difference between rules and commands, which sometimes do require particular actions, has often been stressed by critics of the "command theory" of law. Similarly, no one doubts that rules can be more or less general. The law of contracts, for example, says nothing about the substance of particular contracts, and many laws are

16. Oakeshott, *On Human Conduct, 58n.*

almost entirely general in this way. Nevertheless, while the rules of a practice are never "particular," they are quite often "specific," or to put the point another way, while rules do not forbid particular actions, they often do forbid certain types of action, and do so for some "purpose." For this reason, general or "format" rules can still restrict freedom greatly and certainly cannot be understood as literally nonpurposive.'[7]

In light of such criticisms, one commentator has concluded that "the difficulty is to know exactly what is the difference between the form and substance of conduct."[18] However, Oakeshott does give us other terms in which to understand his formal/substantive distinction once he begins to differentiate between *kinds* of practices. The most basic distinction is between instrumental and non-instrumental practices. According to Oakeshott, instrumental practices are "substantive" because they aim at a goal extrinsic to a practice; non-instrumental or "moral" practices are "formal" because they aim at goals intrinsic to a practice. However, in one sense this is apparently too broad an understanding of "morality," since we do not count non-instrumental practices such as codes of etiquette or games *as* "moral."

In another sense, it is apparently too narrow an understanding of "morality," since it excludes much of what we ordinarily think of as moral. For example, Oakeshott argues that considerations of utility and distributive justice cannot be part of civil association because these notions concern the distribution of "substantive benefits" rather than "formal conditions" of conduct and are therefore not matters of "justice" at all. Even more fundamentally, morality (and therefore *lex)* cannot be explained in terms of the pursuit of "human excellence," "basic human goods," or "respect for persons" because "these are not, properly speaking, purposes at all."[19] To add to our puzzlement, civil association is not only described as non-instrumen-

17. For this sort of criticism, see Richard Flathman, *The Practice of Political Authority,* (Chicago: Chicago University Press, 1980), 51-71; John Liddington, "Oakeshott: Freedom in a Modern State," in *Conceptions of Liberty in Political Philosophy,* eds. Zbigniew Pelczynski and John Gray, (New York: St. Martin's Press, 1984), 311[1]14.

18. Liddington, "Freedom in a Modern State," 314.

tal, but said to be concerned with a "morality" or "justice" of its own. The question, then, is how Oakeshott understands the idea of "morality."

As noted above, Oakeshott cannot simply identify "morality" with any and all non-instrumental practices. This suggests that he *should* try to differentiate morality from other kinds of non-instrumental practices in terms of some particular "intrinsic" purpose, say "respect for persons," if not in terms of some more "extrinsic" purpose, such as a just distribution of resources. When Oakeshott discusses morality, however, he mentions many familiar considerations of justice and virtue but does not try to identify morality in terms of a purpose; He does not, for example, enter into the controversy between Kantians and natural lawyers about whether the purpose of morality best understood as "respect for persons" or "respect for basic goods," nor does he argue about which rules of moral conduct should be derived from such foundations: "It is of no consequence that we cannot answer the question, Why is magnanimity a virtue, and envy a vice? or even that we do not know how to answer it."[20] Instead, he discusses morality as a "practice" or "vernacular language" of conduct and treats moral rules and even basic principles as "abstractions or "abridgements."

According to Oakeshott, controversies between moral theorists about both the foundations of morality and the derivation of particular moral rules are misguided from the start. This is because morality is a language, not a set of rules; because philosophical reflection is not about building up from foundations but rather about discovering internal coherence between mutually supporting elements; and because it is a mistake to look for complete coherence in morality or any other practice. From this point of view; the "secondary" or "derivative" moral rules discussed by Kantians and natural lawyers are not to be understood as ways of realizing some more fundamental principle, such as respect for persons or respect for basic human goods. Rather, "secondary" rules and "primary" principles are equally important, since each modifies the other. There really is no

19, Oakeshott, *On Human Conduct, 63.*
20. Ibid., 77.

independently standing basic principle that a particular moral rule serves, appearances to the contrary notwithstanding.

While moral philosophy can make our judgments, rules, and principles somewhat more coherent, and thus "remove some of the crookedness from our thinking," it is also mistaken to think that we can ever make our moral experience completely coherent: "That there should be many [moral] languages in the world, some with perhaps familial likenesses in terms of which there maybe profitable exchange of expressions, is intrinsic to their character. This plurality cannot be resolved by being understood as so many contingent and regrettable divergencies from a fancied perfect and universal language of moral intercourse."[21] In other words, there is no "universal" or fully "critical" or "rational" morality available: we have no choice but to participate in a particular, historical moral practice and "being moral" is entirely a matter of such participation.

Even if morality does not have a "foundational" purpose, however, why can't relative "coherence" in morality be a matter of interlocking, more or less specific, purposes? Do rules and purposes really come so tightly bound together in morality that we cannot cogently argue about which way a moral rule should be specified in order to realize an independently identified moral purpose? It appears that there are many ways to specify what i' to be protected or required by moral rules, and many ways to specify moral rules in order to require or protect something. This is the case even if we do not take a utilitarian view of morality but instead describe what is to be protected as a "condition," such as "acting in a way that respects persons," rather than an "interest" or "benefit," such as "a fair share." Although Oakeshott calls all such casuistical enterprises "devious engagements," we often do seem to argue cogently about morality in this way.[22] Moreover, why can't such arguments over moral "conditions" be equally well described as controversies over moral "purposes?" These questions are not as thoroughly discussed in *On Human Conduct* as one might hope, and as a result it is unclear whether Oakeshott really has good reasons for excluding as much as he does

21. Ibid., 80.
22. Oakeshott, "The Rule of Law," 145.

from his understanding of morality.

The same questions arise about the role of purposes in law and politics, although here Oakeshott does have more to say. He asserts, for example, that "civil" legislation and politics cannot be concerned with wants, interests, beliefs or moral convictions, but can only be concerned with conditions of conduct fit to be enacted as obligations. One cannot show that it is legally or politically desirable, for example, to have a criminal law against adultery by showing that adultery is morally wrong. Instead, we must draw on a different set of considerations in debating the desirability of a proposed law, e.g., general legal concepts, such as those of a negligence, an offence, an injury, a crime, etc.; or general moral ideas, such as fairness or humanity, "which have been `civilized' by being given civil meanings."[23] We must also consider whether a civil prescription is difficult to enforce; whether it is primarily concerned with preventing harm to others (Mill's principle reformulated conditionally as "respect for a circumstantial privacy"); andwhether a proposed law can "fit" with economy and continuity into an existing practice of law.[24] In short, what is needed "is not a set of abstract criteria but an appropriately argumentative form of discourse in which to deliberate the matter; that is, a form of moral discourse, not concerned generally with right and wrong in human conduct, but focused narrowly upon the kind of conditional obligations a law may impose."[25]

Oakeshott readily admits that this view of legislation and politics "calls for so exact a focus of attention and so uncommon a self-restraint that one is not astonished to find this mode of human relationship as excellent as it is rare."[26] However, the question is not whether a focus of attention this exact is difficult, but whether it does not involve a greater concern with "substantive" or extrinsic purposes than Oakeshott appears to recognize. I do not think we can answer this question decisively until we better understand what it means to "justify" moral or legal rules. Oakeshott is right in agreeing with Aristotle that the subjects of morality

23. Oakeshott, On *Human Conduct,* 177.
24. Ibid., 178-80.
25. Oakeshott, "The Rule of Law," 143.
26. Oakeshott, *On Human Conduct,* 180.

and law are too complex and indefinite to ever permit the achievement of a deductive system and that we therefore do encounter real and serious conflicts of value; however,'Oakeshott is also right that the alternative method ofweighing:and balancing conflicting considerations by"perceplion" or "intuition seems *ad hoc.* Rational, discursive justifications are required in morality and law. But how does this justification proceed?

This brings us to the difficult idea of "specifying" a moral or legal rule or principle.[27] In "specifying" a rule, we neither "apply" it deductively nor "balance" it intuitively, nor do we use, some combination of these methods, as philosophers such W.D. Ross and H.L.A. Hart have suggested. Rather, we tailor our norms to cases by making them, more specific. As Henry Richardson argues, however, in specifying a norm we must be *refining* that norm, not just *replacing* it with another; otherwise, "specification" is *as ad hoc* as "balancing."' This refinement must take place dis cursively and in such a way that the original point of the norm is to some extent retained, but it must also allow us to get a clearer idea of the point or "purpose" of that norm. This means in turn that the norm itself cannot be understood as absolute, but rather must be formulated in a way that permits revision, e.g., "`generally speaking' it is wrong to kill innocent people," not "it is always wrong to kill innocent people." By reflecting further on the meaning of such a norm, we may then decide that it is itself a specification of a yet more general principle, e.g., the norm against killing the innocent is really a specification of a more general norm of respect for self-conscious life and therefore should be reformulated as "do not kill human beings with self-conscious life or the potential for self-conscious life."[29] Alternatively, further reflection may persuade us that, the norm against killing the innocent should be specified less generally in terms of who, where, when, how, and by what means, e.g., not as a norm involving all innocent people, but, say, as a norm involving all normal as opposed to defective

27. The next two paragraphs draw on Henry S. Richardson, "Specifying Norms as a Way to Resolve Concrete Ethical Problems," *Philosophy and Public Affairs* 19, no.4 (Fall 1990): 279-310.
28, Richardson, "Specifying Norms," 290-3.
29. Ibid., 302-4.

newborns,"

Obviously; such specifications of the relevance, scope, exceptions, and contours of a norm can be quite controversial. However, unlike the idea of "balancing," we *can* argue about specifications in terms of whether they introduce more or less coherence elsewhere in our moral judgments. Just as obviously, Oakeshott has something like the notion of specification in mind in his discussions of "adjudication" and "legislation" in a civil association. Adjudication, for example, is said to be neither a matter of deduction nor of balancing but of "amplifying" the "meaning" of *lex* by analogical reasoning. However, Oakeshott's exploration of adjudication and legislation are cursory in character and suggestive at best.[31] This is hardly surprising, since the ideas of "deducing" and "balancing" have dominated moral and political philosophy largely to the exclusion of "specification.". As Alan Donagan remarks, "the question of how we specify norms "is both serious and difficult. Nor has it been much studied by philosophers."[32]

Upon studying the method of specification, however, we may discover that one of several possibilities is the case: 1) we cannot in fact specify norms without surreptitiously "balancing" various principles, values, or interests; 2) we can make many moral; legal, and political decisions by specification, but must still do some "balancing" of conflicting principles or interests after we have specified various rules as far as possible; 3) as Oakeshott asserts, we can successfully make important moral, legal, and political decisions without using the notions of "balancing" ends or "deducing" secondary rules at all; 4) different kinds of moral, legal, and political issues may require different combinations of these methods of decision-making. We may also discover that we need (and can provide) more "normative" or "substantive" moral and political theory than Oakeshott thinks possible. This is because we show that the specification of a norm is rational by showing how it introduces more coherence

30. Ibid.

31. See Oakeshott, *On Human Conduct, 133-40.*

32. Alan Donagan, *The Theory of Morality,* (Chicago: University of Chicago Press, 1977), 68.

throughout our moral thinking, and this in turn involves revision of both moral principles and considered judgments. This is not the sort of metaethical theorizing about the "postulates" of morality that Oakeshott endorses, but rather normative theorizing about moral principles and judgments themselves.

In short, I do not think that we are in a position to assess whether a civil association is logically (let alone, practically) possible, if what we mean by a "civil" association is a completely "non-instrumental" form of association that adjudicates and legislates without ever "balancing" various substantive interests. And we cannot make this assessment because it is unclear to what extent the "balancing" or "weighing" of principles and interests *must* play a role in moral, legal, and political thought. If we find that we cannot completely escape the need to consider external consequences in' morality, law, ' and politics, then civil association will prove neither a defensible idea nor a practicable ideal.

Conclusion

Is it possible even to imagine a "nonpurposive" state? In what ways could we cogently describe a "civil association" as "nonpurposive"? I have argued that civil laws do *not* involve *particular* purposes. To this extent, there is a sort of "freedom" inherent in the idea of civil association, namely, the sort of freedom from "commands" which is inherent in any association in terms of rules.[33] However, I have also argued that civil laws can and do forbid action-types, and that to this extent Oakeshott should recognize that the idea of civil association must involve the restriction of freedom of action. Indeed, all laws have purposes. Therefore, a civil association must have as many purposes as it has laws. Yet if a civil association must have purposes, there is *no* set of purposes that it *must* have: in this sense, Oakeshott has articulated an interesting idea of a minimal state, one that is united by nothing other than an acknowledgement of its authority. Finally, if what we mean by "nonpurposive" is "non-instrumental,"

33. Although civil association does not issue commands, it does make "rulings." For further discussion, see David R. Mapel, "Civil Association: and the Idea of Contingency," *Political Theory* 18, no.3 (August 1990), 392-410.

then we have reached no clear conclusion about whether a completely non-instrumental association is possible. Our assessment of this possibility depends on whether we believe laws can be made and interpreted entirely by means of "specification," without implicit or explicit appeal to external consequences. However, we *can* say that any actual political association is more or less "civil," "non-instrumental," or "nonpurposive" to the degree that its laws are generated by "specification" rather than by "deduction," "weighing," or "balancing."

What is the larger significance of Oakeshott's critique of the role of purpose in law and politics? In this respect, two aspects of his thought stand out: his resistance to the insistently purposive and broadly utilitarian character of a great deal of modern politics and modern political thought; and his attempt to counter this aspect of modern life with an alternative vision of human conduct and politics. The breadth of this vision guarantees that *On Human Conduct* will remain important. The anti-consequential character of this work guarantees that it will remain controversial. Those who feel the urgency of political purposes are likely to find Oakeshott's conceptions of "morality" and "the rule of law" unduly restrictive and even infuriating. Those who feel oppressed by the felt urgencies of others are likely to find Oakeshott's idea of civil association refreshing. But very few readers of Oakeshott are likely to remain indifferent.

Aside from these more personal reactions, I have suggested that Oakeshott leaves us with many interesting philosophical questions to think about, and in particular with the question of how much "purpose" is necessary or desirable in politics. Most contemporary political theorists simply debate which collective purposes we should pursue, without ever asking about the degree to which it is possible or desirable to pursue collective purposes at all. A few other political theorists, most notably Robert Nozick, have recently asked this more fundamental question, but have answered it in a rather unpersuasive manner.[34] The idea of civil association poses this question without relying on the idea of "absolute" rights or side-constraints, and offers the more attractive alternative of association in terms of the rule of law.

34. Robert Nozick, *Anarchy, State, and Utopia,* (New York: Basic Books, 1974).

Whetiierthe idēaof civil association is finally judged successful, there Oil be no doubt that it forcefully challenges our ordinary assumptions *Jut ,the role of the state.

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