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## OAKESHOTT, AUTHORITY AND CIVIL DISOBEDIENCE

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### Abstract

Michael Oakeshott, in his most developed political thought, works to account for the freedom available in and distinctive to the modern state, as it is found in the model of a civil association. This model accommodates freedom by suggesting that a civil association need not require substantive agreement over policy as long as the agreement about the authority of its practices goes unquestioned. This position, this paper argues, is inconstant since it compels agreement among those who may not recognize the state's authority. While even a limited, liberal regime needs to maintain and possess authority for its rules and procedures, Oakeshott seems to assume that by claiming such authority, a state necessarily has it, since he provides no means for evaluating and judging it. To explore this more thoroughly, this paper will examine one type of political action regarding authority, the example of civil disobedience. For Oakeshott, those who act outside the law are simply criminals or worse rebels. Yet, I argue that one method of identifying and drawing attention to unjust laws or actions by the state is through civil disobedience. This form of political action highlights the dilemma that a liberal state has in recognizing criminal activity as a challenge to its authority, as opposed to merely a sign of the delinquency of the criminal.

### Introduction

Political theorists are often interested in the character of the law.<sup>[1]</sup> They consider questions about how law is and should be created. They examine different arguments for what constitutes a just law and what, in fact, characterizes legitimacy at all. They sometimes reflect on the procedures for making law or challenging law. They might consider the advantages and disadvantages that different codes, polices and institutions offer to different possible outcomes. Sometimes, they wonder about why it is that citizens and subjects obey laws, and sometimes, why occasionally they do not. This paper picks up that last theme and focuses upon one thread of argument about the authority of law and when it does, but importantly when it does not serve to bind those that seem subject to it. This paper will consider one sophisticated argument about the character of authority in liberal democratic regimes, that of Michael Oakeshott, and reflect both on its ability to account for why citizens and others subject to law recognize the authority of law and on its inability to account for complicated circumstances when some do not. In particular, I will suggest that a liberal democratic regime, as characterized by Michael Oakeshott's conception of civil association, or *societas*, while needing a conception of authority, needs also to be cautious about the political dimension of at least some of those who break its laws.

Of course, John Locke's *Second Treatise*, one of the oldest contributions to the tradition of liberal thought, was written in part to justify certain types of law-breaking. In particular, the

right of a people to revolution when the sovereign breaches its authority by ruling in a fashion against the natural law. But a few caveats here. First, the Lockean solution is about the right of a people, not the right of individual persons; second, it is an all-or-nothing game, there is no place for questioning authority, recalling parts of authority, selecting certain agents, institutions or laws for scrutiny for lacking or abusing authority; and third, Locke and many liberal theorists assume a commonly recognized source of authority (natural law, reason, social contract, etc). This means they cannot account for radically different ideas of authority, entailing that certain laws, policies or agents, while reflecting authoritative practices to some, even a majority, are yet abusive to the ideas or beliefs of some group. If the persons in that group submit, I suggest, the act must be understood to be a submission to power, not the recognition of authority. If they do not, it will likely be characterized as criminal activity by the state, and yet its political dimension must be recognized as well.

How does Michael Oakeshott fit in to this debate? Oakeshott's place as one of the English speaking world's most significant conservative political theorists in the twentieth century is well secured. Admirers praised him for his "distinctly contemporary contribution to conservative thought" and detractors such as Perry Anderson, have happily agreed placing Oakeshott among "The Intransigent Right" ([Quinton 1978](#), 292; [Anderson 1992](#), 80). Oakeshott's uniquely English conservatism, with its attachment to tradition and his curious predilection for Hegel, has set him at a distance from American conservatives, with their more liberal temperament. While much of the interpretative debate about Oakeshott has been over what type of conservative he was, there has been a minor and alternate theme: through the years a handful of those committed to democratic, even radical, political theory and practice have been tempted by opportunities in Oakeshott's work. Now, given that there is a broad menagerie of democratic and radical theorists to draw upon, why would, for instance, Chantal Mouffe, an avowed advocate of "a radicalization of democracy," look to Oakeshott? Or why would David Mapel bother to suggest "Participatory democrats should therefore recognize [Oakeshott's] view of authority as their own" ([Mouffe 1992](#), 225; [Mapel 1990](#), 405)? But the attraction is not mere curiosity, for each of these, among others, finds theoretical potential in Oakeshott's work.<sup>[2]</sup> I argue below that Oakeshott's account does offer the view of authority its opportunities that Mapel and Mouffe claim for it. I do, though, suggest that there are some significant limits to Oakeshott's thought for those interested in democracy, and Oakeshott is not only aware of these limits, he explicitly advocates for them. Yet, ironically, in doing so, he helpfully reveals a boundary, sometimes explicit sometimes implicit, of liberal democratic theory and practice that must be crossed if a more full--if more unruly--democracy is desired. Of course, I realize not all desire such; my concern here, though, is to explore the possibilities and limitations of Oakeshott for those who do.

Mouffe is attracted to Oakeshott's elaboration of the concept of *societas*, his term for the historical instantiation of civil association, because with it Oakeshott has portrayed a strong conception of political community, where members are united, but not by a substantive notion of common good. Instead, while persons are connected, "what links them is the recognition of the authority of the conditions specifying their common or 'public concern,' a practice of civility" ([Mouffe 1992](#), 232).<sup>[3]</sup> Mouffe claims to differ from Oakeshott only in the particular conditions of the "practice of civility." However, Mouffe does criticize what she calls Oakeshott's "flawed idea of politics . . . What is completely missing from Oakeshott is division and antagonism" ([Mouffe 1992](#), 234). She argues that the consensus required concerning the rules of *societas* once again erases division: "To introduce conflict and antagonism into Oakeshott's model, it is necessary to recognize that the *respublica* is the product of given hegemony, the expression of power relations, and that it can be challenged" ([Mouffe 1992](#), 234). Conversely, this is exactly where David Mapel finds the advantages of Oakeshott's conception of authority. He points out that "even a completely egalitarian, participatory democracy must face the objection that it rests on a structure of domination," and the benefit of Oakeshott's view of authority is that it does not "encourage approval or disapproval of the conditions it prescribes. Strictly speaking, this indifference opens up the maximum amount of space for criticism" ([Mapel 1990](#), 405). Similarly to Mapel, I contend that Oakeshott understands himself to have allowed for considerable conflict and antagonism in his discussion of politics, and in particular in terms of actual laws and policies by which civil association is structured. However, I want to go beyond Mouffe and Mapel to suggest that what Oakeshott does not allow is conflict and antagonism concerning "the recognition of the authority of the conditions specifying their common or 'public' concern." Oakeshott's skepticism about the common good of community is arrested in the matter of authority. This

restriction not only refuses to recognize the political dimension of rejections of authority in law breaking, but weirdly, in rejecting discussions of authority from politics, makes such law breaking more likely. To examine these limits, I will discuss the character of the distinction between civil and enterprise association and the potential for politics that results from it.

## Enterprise Association, Civil Association and Human Agency

Michael Oakeshott's conceptions of civil association and enterprise association, their relationship, and their respective advantages and disadvantages as models for the state have been fruitfully and fully analyzed and criticized elsewhere and I will not repeat either of those ventures here.<sup>[4]</sup> I will, however, discuss a few basic, distinguishing elements. Civil association and enterprise association work as ideal types of organized human relationship; features of both of these types can be seen in all versions of the modern state. While none is purely one or the other and the mix and emphasis can change, and so either can serve as a model for the political association of the modern state. Oakeshott examines these types in accordance with two theoretical claims: one about character of the modern state and the other concerning the freedom of human agency. These claims, when taken together, pose what he takes to be a political and theoretical dilemma. The feature of the modern state that is significant for this dilemma is based on one central, theoretical claim presented as a simple, empirical observation: "a state on any reading of its character, is a comprehensive, exclusive, and compulsory association" ([Oakeshott 1991a](#), 242). Citizens in modern states do not, except under extraordinary circumstances, choose the state in which they live. Perhaps the possibilities of emigration and naturalization exist, but in maintaining the medieval principle of *ne exeunt regno*, modern states can refuse these and they always determine and enforce rules regarding these options.

Oakeshott's conception of human agency and conduct, and the concept of freedom that accompanies it, is complex and I will not explore all of its dimensions.<sup>[5]</sup> There is, however, one central element to the various ways he conceives of freedom. Oakeshott claims, "The 'freedom' intrinsic to agency is, then, the independence enjoyed by the agent in respect of being a reflective consciousness composed of acquired feelings, emotions, sentiments, affections, understandings, beliefs, convictions aspirations, ambitions, etc., recognitions of himself and of the world of *pragmata* of the world he inhabits, which he has turned into wishes, and wishes he has specified in choices of actions" ([Oakeshott 1991a](#), 40). Oakeshott reveals an intriguing but ambiguous concept of agency in this passage. Later he extends these elements by claiming that the freedom associated with this conception of agency is related to acting upon those choices, suggesting that there is a "link between belief and conduct which constitutes 'free' agency" ([Oakeshott 1991a](#), 158). Consideration of these aspects of the state and human agency generates the following question for Oakeshott: given the exclusive and coercive character of the modern state, can it still recognize and incorporate human freedom? The conceptions of civil and enterprise associations are in some ways candidates as, models of the state, to answer this question.

Human agents exhibit their freedom in pursuing their own choices. When agents elect to pursue their choices in common with others, a relationship or association is established, which Oakeshott labels enterprise association. This mode of human association relies on "relationship in terms of the pursuit of some common purpose, some substantive condition of things to be jointly pursued, or some common interest to be continuously satisfied. It is association not merely concerned with satisfying substantive wants, but in terms of substantive actions and utterances" ([Oakeshott 1991a](#), 114). Oakeshott accepts enterprise association as an wholly appropriate mode of human association and he gives many examples of such; for example, human agents "may be believers in a common faith . . . they may be partners in a productive undertaking (a bassoon factory); they may be comrades, or allies in the promotion of cause, colleagues, expeditionaries, accomplices or conspirators; they may comprise an army, a 'village community,' a sect, a fellowship" ([Oakeshott 1991a](#), 114). Importantly, however, in order for such an agent as associate to retain her freedom she must also be able to change her choices, readjust her goals; to remain free she must reserve the capacity to withdraw from the association if her understanding of her place in the world

and the goals she seeks change, or if she comes to judge the association to be ineffective or even destructive of the sought-for goal. If such an agent could not rescind her membership, then it would not be a choice based on her understanding of the world about her, then her membership would neither express nor retain the freedom of human agency.

It is, perhaps, clear now that Oakeshott will have difficulties with the enterprise association as a model for the state as a form which can secure the freedom of human agency. While it may accomplish any number of desirable things, this sort of state disrupts the freedom of human agency. Again, the modern state is "a comprehensive, exclusive, and compulsory association"; the freedom of human agency entails that if one can choose to join with others to achieve a common substantive good, it also requires that one must be able to rescind membership. Oakeshott explains: "For [an agent] to be associated in the performance of joint actions contingently related to a common purpose and not to have chosen his situation for himself and to be unable to extricate himself from it by revoking his choice, would be to have severed the link between belief and conduct which constitutes moral agency" ([Oakeshott 1991a](#), 158). As appropriate as enterprise association may be for any number of less comprehensive and non-compulsory relationships, it presents problems as a model for the state, for it would dissolve "the link between belief and conduct which constitutes 'free' agency."

How does civil association stand in the matter of freedom's relation to the power of the state? Because Oakeshott maintains that civil association does not expect its associates to share common beliefs about the proper set of substantive ends, purposes or goods, it stands quite well. Civil association requires of associates only that they modify or qualify their actions according to rules while pursuing their own self-chosen ends, thus preserving freedom. In the recognition of those rules as having authority, Oakeshott maintains, civil association is found. The central feature of Oakeshott's understanding of civil association is that citizens "are related solely in terms of the common recognition of rules which constitute a practice of civility" ([Oakeshott 1991a](#), 128). As a practice of civility, the rules of civil association are understood as "the adverbial conditions of a procedure" ([Oakeshott 1991a](#), 57). Here, even proscriptions against particular types of actions can be understood as mere requirements to modify how one acts: "A criminal law, which may be thought to come nearest to forbidding actions does not forbid killing or lighting a fire, it forbids killing 'murderously' or lighting a fire 'arsonically'" ([Oakeshott 1991a](#), 58). Rules in civil association are like the rules of language: "rules do not enjoin, prohibit, or warrant substantive actions or utterances; they cannot tell agents what to do or say. They prescribe norms of conduct" ([Oakeshott 1991a](#), 126). How does this analogy help align freedom within the coercive state? How is being forced to obey a law understood as a rule in a civil association different from being forced to follow a law dedicated to the common good of the enterprise association? First, civil association does not expect action or allegiance towards a common substantive good; rather it allows associates to pursue self-chosen actions and to choose differing substantive goods. Second, civil association does not expect approval of its rules, but instead only demands the recognition of their authority.

The first of these two claims is true by definition for Oakeshott. He has suggested that a rule of civil association does not tell an associate what to do, but prescribes "norms of conduct" that act as formal considerations in choosing and acting. Looking again at Oakeshott's example from above, if one chooses to light fires one is free to do so, with the stipulation that one not do it "arsonically." One might even choose to kill, so long as it is not done murderously, although the examples here (self-defense?) might seem few indeed. The second is a bit odd, but it reprises the theme Mapel states above, and why this conception of authority seems to respect freedom. Again, an enterprise association incorporates freedom, in part, by allowing disassociation. If one no longer accepts the goals of an enterprise one can terminate membership. Thus, Oakeshott is suspicious of this model for the state which can encompass freedom: "a comprehensive, exclusive, and compulsory association" does not allow such disassociation, or does so only on its terms. A state as an enterprise association expects all associates to choose and share the common good, to approve of the goals of that comprehensive association; disapproval of the common good or purpose is seen as treason or heresy. However, civil association does not need a consensus concerning a common good, where the choice of different ends must be disallowed as disruptive of that end. Instead, "There is, then, in civil association nothing to threaten the link between belief and conduct which constitutes 'free' agency, and in acknowledging civil authority *cives* have given no hostages to a future in which their approvals and choices no longer being what they were,

they can remain free only in an act of disassociation. Civil freedom is not tied to a choice to be and to remain associated in terms of a common purpose; it is neither more nor less than the absence of such an approval or choice" ([Oakeshott 1991a](#), 158).<sup>[6]</sup> This is the promise of civil association has for freedom. Civil freedom is tied to the common recognition of rules in self-chosen actions, not "to a choice to be and to remain associated in terms of a common purpose." For Oakeshott, the recognition of authority indicates "a formal, not a substantial relationship; that is, association in respect of a common language and not in respect of having the same beliefs, purposes, interests, etc., or in making the same utterances" ([Oakeshott 1991a](#), 121). However, as much as Oakeshott wants to have done away with the need for consensus, clearly it is still present: it exists in the unquestioned acceptance of a "common language" of civility, in the consensus required for the recognition of associates of the authority of the state.

## The Potential and Limits of Authority

Oakeshott maintains that civil association is a "relationship in terms of the recognition of rules as rules"; and when rules are acknowledged to have authority, they are recognized as law ([Oakeshott 1991a](#), 148).<sup>[7]</sup> But what is the substance of this acknowledgment or recognition? Why would a *civis* acknowledge one institution to have authority and another not? or how might a *civis* come to recognize a rule? As is often the case, Oakeshott clarifies his meaning by listing what does not allow for such a recognition or acknowledgment in civil association.

*Respublica*, Oakeshott maintains,

cannot be acknowledged to have authority on account of its being recognized to have some other valuable quality or attribute . . . Thus, it cannot be alleged to have authority on account of being identified with a 'will' of any sort, that of a ruler, a majority of cives, or a so-called 'general' will. Nor can the authority of *respublica* lie in the identification of its prescriptions with a current 'social purpose', with approved moral ideals, with a common good or general interest . . . civil association has no such common purpose, and the attribution of authority does not postulate approval of the conditions it prescribes ([Oakeshott 1991a](#), 152-3).<sup>[8]</sup>

This is a long and diverse list, but what connects these elements is that looking to them as the ground of authority would confuse civil association with enterprise association. For those whose relationship is unified because of a common purpose, enterprise association is appropriate. If nothing from that long list, then what does allow *cives* to recognize or acknowledge the authority of *respublica*? Oakeshott replies simply "the answer is that authority is the only conceivable attribute it could be indisputably acknowledged to have" ([Oakeshott 1991a](#), 154). For Oakeshott it appears to be a matter of definition. The civil condition is that condition in which rules are commonly acknowledged to have authority.

Civil association, by not founding authority upon the desirability or "approval of conditions the conditions it prescribes" or dependence on "approved moral ideals, with a common good or general interest," allows for a wide range of what Oakeshott understands to be freedom. Thus, he hopes to have identified a form of association that can avoid the disruption which the need for consensus causes in "the link between belief and conduct which constitutes 'free' agency." A difficulty remains, however, because civil association does still require a consensus about what ought to be acknowledged as authoritative. Oakeshott has merely moved the place of required consensus from that regarding a substantive purpose, good or end, to that regarding authority. In doing so he makes no argument for why this consensus does not threaten the "link" central to his conception of human freedom.

Oakeshott never denies that there are disagreements about the desirability of the conditions of *respublica*; to the contrary, it retains a place for such disagreement. Politics is what Oakeshott understands to be the forum for deliberation and disagreement concerning the desirability of differing ideals to be incorporated in *respublica*. He claims, "In considering the engagement to deliberate the conditions prescribed in *respublica* in terms, **not of their authority but of their desirability**, to imagine them different from what they are and to undertake or to resist their alteration, we are concerned with politics properly speaking" ([Oakeshott 1991a](#), 163, emphasis added). Politics is an activity of deliberation about the particular conditions that constitute *respublica*. In civil association, there is no expectation, of course, that this process of deliberation will result in a common good or general will, rather it will consider the desirability and the alteration or maintenance of current conditions. Here, Oakeshott has already located the "conflict and antagonism" that Mouffe feels she needs to

introduce; this is what can take place in the "space for criticism" that Mapel identifies in civil association. However, it is also exactly here, in his exclusion of certain issues from politics, that Oakeshott reveals his need for consensus about authority.

Oakeshott claims that politics concerns the deliberation of conditions, but "not of their authority." That is, politics can only take place if the "*lex*" of *respublica*, what he calls the rules of civil association, are already recognized as possessing authority; and he completely excludes from politics any discussion concerning whether those rules, or the institutions and procedures through which they are created and interpreted, are authoritative (Oakeshott 1991a, 128).<sup>91</sup> "Political engagement" Oakeshott claims, "then, is an exploration of *respublica* in terms of the desirability of the conditions it prescribes, and this entails a relationship to *respublica* which is at once acquiescent and critical. The acquiescence is assent to its authority. Without this there can be no politics" (Oakeshott 1991a, 155-6). Where Oakeshott has presumed consensus is not in "terms of the desirability of the conditions" of *respublica*, but in the recognition of its authority. There civil association can countenance no disagreement and assumes a unanimity of shared belief that supports the acknowledgement of authority. However, when Oakeshott claims that politics in *respublica* requires "acquiescence . . . to its authority," he reveals that in civil association itself there is something "to threaten the link between belief and conduct which constitutes 'free' agency." If a civil associate does not believe that a rule, or the institution which produced it, possesses authority, and yet must still alter her conduct to follow that rule, then she is in no better condition than in a state as enterprise association where one does not believe in the goal. Authority can be simply a mask for the exercise of power that is as much abusive of free agency as can be the common good in an enterprise association.

In *On Human Conduct*, Oakeshott provides little insight into the character of the beliefs that allow for the acknowledgment of authority; and he gives no reason why these beliefs, which lead to choices concerning acquiescence and assent to authority, are any different than those which lead to the sorts of choices that support enterprise associations. In each case, consensus is required, and while Oakeshott has provided reasons for why the consensus required for an enterprise disqualifies it for a model for the state, he does not in the case of the consensus required to support authority in a state conceived as a civil association. In the necessity for acquiescent assent to authority, I argue, "*cives* have given . . . hostages to a future in which their approvals and choices no longer being what they were, they can remain free only in an act of disassociation." If beliefs about authority change, but the institutions of adjudication, legislation and rulership do not recognize this change, and politics cannot address this issue, then hostages have been given. I do not mean to point to the approval or disapproval, desirability or undesirability of the conditions prescribed by *respublica*, because Oakeshott defines his conception of politics around deliberation of such desirabilities. Instead, I am concerned with deliberation which would critically engage whether the laws, and institutions that create, maintain and enforce such laws, also reflect beliefs about authority. Even more, I want to question whether there is a common set of beliefs or consensus regarding what ought to be acknowledged or recognized as authoritative. On the contrary, it would seem that the skepticism about such common attitudes that sours Oakeshott on the enterprise model ought to be directed here as well. How then do we understand the actions of those who do not recognize this authority as their own? How much faith do we put in authority's self-evident quality when it is not so evident to all?

Oakeshott contends that the advantage of civil association is that it neither expects consensus about the desirability of its institution, nor does it view disapproval as a sign of bad faith or a mark of a bad citizen. While enterprise association requires or assumes consensus and cannot abide dissent, civil association allows for difference and critical engagement about the particular rules of the civil association. However, I suggest that the state doubtlessly exercises power over those who not only desire another rule, but also those who do not recognize its authority--or at least the authority of certain of its offices and agents. Building from much of what Oakeshott has written, I want to propose: first, that his skepticism needs to be directed to the beliefs that allow the recognition of authority; second, that the critical posture and deliberation he describes regarding the approval or disapproval of laws and institutions needs also be directed to the matter of their authority as well; and finally, that this is in keeping with the politics of democratic citizenship. I do not recommend such a democratic politics in the matter of authority because it is more likely to generate the shared beliefs about authority that allow certain institutions to be acknowledged as authoritative. Instead, in keeping with a skeptical incredulity towards such shared understandings, I suggest

democratic politics makes more likely the recognition of the disagreement in beliefs about the authority of the state. Again, Oakeshottt proscribes recognition in politics of such disagreement about authority. For him, there is only either acquiescence on the one side or civil war or secession on the other. "Dissent from the authority of *respublica*," Oakeshott suggests "is giving notice of a resolve to terminate civil association, and genuine dissentients are either secessionists who design to place their investment in civil discourse elsewhere, or they are disposed to destroy the civil condition in civil war" ([Oakeshott 1991a](#), 164). However, we may scale back our assumptions regarding consensus, to accept there are over-lapping, cobbled together, differing beliefs about authority that land us between "acquiescence" and "civil war." Political possibilities exist whereby the exercise of power by the state is questioned both to consider on what authority it undertakes its engagement and to bring to light those who disagree with such a claim to authority. Does this make authority weaker? Most likely. Does it destroy authority? No. Though it does heighten caution about the exercise of power and acknowledges that the state does act in ways that some subject to its power do not recognize it as authoritative.

## Disobedience and Authority

I have just suggested that politics, at least democratic politics, must also allow critical deliberation of the character of that recognition, the authority of the procedures of attending to arrangements, and the arrangements that actually result. Perhaps a good share of politics in modern states that share in the characteristics of civil association turn out to be exactly what Oakeshott proposes in *On Human Conduct*: critical deliberation about the desirability of altering or maintaining existing arrangements. Yet as I hope to have shown, this alone cannot account for those who do not recognize their beliefs about authority in the institutions and agents of the state who claim authority. A more fully democratic politics needs to incorporate a variety of opportunities for this type of dissent. Of course, without such a place for dissent about authority in politics, it is possible that a citizen would choose to recognize the authority of the state for the simple self-interest in the security offered by the rule of law--the Hobbesian explanation. This is not recognition based on belief but fear, although it may not be fear of the exercise of power by the state but rather of the consequences of destroying that power. A constitutional democracy with amending procedures to its fundamental law already allows for some politics regarding the alteration of arrangements whose authority can be challenged. In this case, a political response is open to those who cannot acknowledge the authority of some arrangements by strategically employing existing decision-making structures--even if some agent, office or institution is acting in an "unrecognizable" fashion--and to use official deliberative procedures to adjust either the institution or values.

A thoroughly democratic politics must also recognize the position of those citizens who may still not accept the values on which authoritative acts are taken, policies made, laws enforced, and, thus, those who may even risk putting into question the authority of the offices or institutions. These citizens might find that there is no way for them to acknowledge the authority of a rule or institution and in this case take on a type of action that explicitly rejects the law or office. One expression of this activity may be through passive resistance to state power exercised as authoritative. In an act of civil disobedience such as this, those rejecting the authority of the law or office may attempt to reveal that it does not cohere with the shared and common beliefs of the society. This is one way to view the strategy Rev. Martin Luther King Jr. described in his "Letter from Birmingham Jail." There he not only defends his actions in terms of a long tradition of resistance but also develops his critique of segregationist laws and voting restrictions of African-Americans by arguing that these were not in keeping with the ideals of the American tradition of democracy. There are many ways to read King's essay, but in the "Letter from Birmingham Jail," he discusses a variety of understandings of "just law." While he calls upon Saint Thomas, claiming that "A just law is a man made code that squares with the moral law or the law of God," King also suggests, "A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law" ([King 1964](#), 84-5). This claim is not simply about the desirability or approval of a law, but about what sort of procedure can claim to be recognized as authoritative. Thus it seems that at least one way to view his "Letter" is as a strategy to call

upon a variety of beliefs about authority in order to highlight how current legal and political institutions do not reflect them.

The distance traveled from Oakeshott here is clear. Civil disobedience, for him, would be an oxymoron; the disobedient must misunderstand the character of civil obligation. Oakeshott can accept only two options: the recognition of rules as having authority or civil war; from his perspective, the activities of civil rights protestors who are civilly disobedient cannot be seen as political. However, this insistence, I have argued, ignores both the possibility that some elements or agents of institutions of governance do not reflect beliefs about authority or that there are differences in belief that support recognition of authority. From a democratic perspective that is skeptical of the notion of completely shared beliefs about authority, the civilly disobedient citizen attempts to highlight at least the first of these and possibly the second as well. The significance of civil disobedience here is that it be understood as a certain type of breaking of the law. One that is complex in its political meaning as it attempts to acknowledge authority not in whole, but in part. There is a limit however to the example of King. While an excellent case of the political challenge to the authority of only certain laws and certain agents, it is also too easy to use. King tells us exactly what he is doing and why, his letter is a manifesto that justifies a broad political movement that encompasses selective breaking of the law for a larger purpose. It is also too easy of an example because in the United States, King is generally lauded as a hero (even if he had personal flaws) and it is common to have judged his actions and his cause generously.

Conversely, consider the variety of types of beliefs shared within some communities or held by some who understand the authority of the state to be in question at least for certain of its policies and agents who implement them. As an example, for religious reasons certain orders of the religious sect of the Amish deem it evil and dangerous to their soul to adorn their persons and property with ostentatious display, such is considered an offence to god. Yet traffic laws in most locations in the USA require a bright orange reflective triangle to be attached to slow moving vehicles, such as Amish horse drawn buggies, as a safety precaution. This, of course, presents a dilemma for the Amish since the authority claimed by the state runs against the higher authority and what they understand god to expect of them. Thus, the Amish do not simply desire another law. Although that would be satisfactory, in the meantime, they cannot obey this law or recognize it as authoritative for them and still remain faithful believers in god as they understand their duty to that "higher authority." Thomas Hobbes, of course, saw this dilemma and thought by giving the sole right to interpret religious doctrine to the sovereign that he could solve it. Then again, even Hobbes saw that all the sovereign could control was actions not beliefs, and he thought this could allow for freedom of belief in the subject so long as in his actions he acknowledged the authority of the sovereign. But some beliefs are of the character that they demand actions, not only the right attitude of the soul. The old order Amish cannot adorn his buggy with bright reflective orange triangle and yet claim that in his heart it is really black. The Amish have some difficult choices: they can try to change the law, but as a small minority in an elective democracy this is unlikely; they can look to the civil court for relief, and they might win, although they have usually lost; or upon losing in court, they might choose to selectively break the laws and risk prosecution in criminal court. From the liberal democratic perspective, as seen in Oakeshott's conception of civil society, there is no way to account for this type of law breaking. It is clear these are not mere scofflaws, and yet they break laws which are the product of seemingly legitimate decision making structures, and from the perspective of the state these laws serve to protect the broader public safety and good.

Perhaps the Amish example is still too genial, too quaint. Consider the dilemma of the practitioners of the Mormon faith who understand themselves to be commanded by god to have more than one wife. In every state of the United States of America, polygamy and bigamy are against the law, yet in certain Western states, especially Utah, some practitioners of the Mormon faith understand themselves as required to participate in bigamy and polygamy, and they do so. Here the relationship of beliefs about authority and law breaking is especially interesting because seldom are those practitioners prosecuted. These Mormons do not see such a law as having authority for them, and the law does not challenge that belief except in rare cases.<sup>[10]</sup> Perhaps it is clear that a law passed by a legislature can and should be enforced; a legislature passes such a law claiming authority and an authorized executive may enforce it. And yet, authority in this case is hard to follow. A polity may chose to enforce such a law, but interestingly it may also chose not too, and further, it may do so only in some cases, as with polygamy laws in Utah; but then the idea of the rule of law itself is less clear. It



may serve or undermine a polity to ignore certain law-breaking activities, but it cannot assume that all share and recognize the beliefs that uphold its actions and decisions.

I have chosen to refer to religious communities because they highlight the clearest examples of conflicts about authorizing beliefs. The members of these religious communities situated within states may join in recognizing much of the authority of the state. Yet, certain actions are demanded of them which may be seen as criminal by the state because these adherents cannot recognize the authority of all of its laws, institutions and officers. Thus they reveal the limits of state authority, the lines in which even a democratically constituted states acts with mere coercion against some of its members.

Finally, however, some who refuse to recognize the authority of the state may simply choose to withdraw or to work actively to destroy the institutions claiming authority. This is the strategy of secession or civil war, acts of disaffection that Oakeshott saw as the only posture relative to authority other than acquiescence. Here even radical citizenship has ended, because the civil association is rejected *in toto*, there being such conflict among the institutions claiming authority, ideas about what is required to recognize authority, and the values and beliefs of some group. Depending upon the size of this breakdown, it may mean the end of civil association. The radical, democratic citizen here turns into the revolutionary. This is the farthest extreme of the criticism and rejection of authority, but again it is the only option that Oakeshott acknowledges other than acquiescence. Perhaps in fear that any infringement or criticism of authority leads inextricably to civil war, more and more like Hobbes, Oakeshott shields it from critical deliberation. Yet the skepticism concerning common purposes and will that allows Oakeshott to reject the enterprise association needs to be focused on these common recognitions of authority as well.

Critical deliberation about both the desirability of governing institutions and also their authority may in the end weaken authority. Yet it may also strengthen those institutions that can be readjusted or at least highlight the coercion of those institutions when they exercise power against those who do not recognize their authority. Oakeshott famously wrote, "The arrangements which constitute a society capable of political activity, whether they are customs or institutions or laws or diplomatic decisions are at once coherent and incoherent; they compose a pattern and at the same time they intimate a sympathy for what does not fully appear. Political activity is the exploration of that sympathy" ([Oakeshott 1991b](#), 56-7). He has been criticized for the mystical and darkly conservative connotations of politics understood as the pursuit of intimations, yet a more radical element of this passage is evident here as well, and it is an appropriate reminder to the later Oakeshott. Incoherence is an inescapable feature of politics; coherence may be greater or less, but it will not be complete. The problem of rationalism, as Oakeshott saw it, was not that it could do away with incoherence, but that it attempts to do so; the problem with Oakeshott's conception of civil association is that it attempts to do away with incoherence in beliefs about authority. A more appropriately democratic state association will acknowledge such incoherence, accept politics that draws attention to problems with authority, and more cautiously exercise its power, recognizing that to some, such actions are mere coercion, not those of authority.

## Notes

<sup>1</sup> Portions of this essay have been published previously by me in "A Democratic Oakeshott?" *Political Research Quarterly*, December 1999 52:4 (834-869).

<sup>2</sup> Among a number of interesting radical and democratic interpretations and appropriations are many of Richard Rorty's works, especially, *Contingency, Irony and Solidarity* ([Rorty 1989](#)), Fred Dallmayr's *Polis and Praxis* ([Dallmayr 1984](#)), John Wallach's "Liberals, Communitarians and the Task of Political Theory" ([Wallach 1987](#)), and most recently Richard E. Flathman's *Reflections of a Would-Be Anarchist* ([Flathman 1998](#)).

<sup>3</sup> It is important to point out a series of terms that Oakeshott uses that carry with them similar meanings. The central theoretical distinction in *On Human Conduct* is between civil association and enterprise association. However, Oakeshott uses a series of Latin terms to explore this distinction. Thus, discussing civil association, he uses "*civitas* for this ideal condition . . . and *respublica* for the comprehensive conditions of association" ([Oakeshott 1991a](#), 108). This becomes a bit more confusing when in the third essay of *On Human Conduct* Oakeshott introduces the terms Mouffe prefers, *societas* and *universitas* for the

historical expressions of civil and enterprise association, respectively. Thus Oakeshott has on the one side: civil association, *civitas*, *respublica*, and *societas*; and on the other: enterprise association and *universitas*. I will favor civil and enterprise association in my discussion, but in following Oakeshott's various discussions will need recourse to the other terms.

<sup>4</sup>. Paul Franco's (1990) *The Political Philosophy of Michael Oakeshott* provides an excellent review of these concepts and their place in Oakeshott's corpus of work. For interpretative debate about *On Human Conduct*, where these concepts are most fully elaborated, *Political Theory* 4:3, has an engaging set of essays including a response by Oakeshott.

<sup>5</sup>. John Liddington's (1984) essay "Oakeshott: Freedom in a Modern European State" provides a thorough discussion of Oakeshott's conception of human agency and freedom.

<sup>6</sup>. Mapel attempts to adjust this claim of Oakeshott's by suggesting there is one overriding purpose even of civil association, its "main purpose is to protect political freedom by refusing to explain the authority of any other common purpose in terms of its 'justice,' 'goodness,' or 'wisdom'" (Mapel 1990, 401-2).

<sup>7</sup>. There may appear a similarity here between Oakeshott and H. L. A. Hart's concept of the "rule of recognition" (Hart 1961, 92, see also Chapter Six). Like Hart, Oakeshott claims that "it is a virtue of *respublica* that it contains rules in terms of which the authority of other rules may be recognized," (Oakeshott 1991a, 150). However, Hart suggests that in a system of law there is an "ultimate rule of recognition" which "provides criteria for the assessment of the validity of other rules; but it is . . . unlike them in that there is no rule providing criteria for the assessment of its own legal validity" (Hart 1961, 104). Oakeshott, however, claims, *pace* Hart, "Nor can there be a single ultimate rule of recognition, an unconditional and unquestionable norm from which all others derive authority" (Oakeshott 1991a, 151).

<sup>8</sup>. Recall Oakeshott's conception of *respublica* in Note 2, above.

<sup>9</sup>. Oakeshott explains his choice of *lex*: "Such rules I call shall call 'law'; and, so that they not be confused with the heterogeneous collection of rules and rule-like instructions, instruments, provisions, etc. which constitute the conditions of those ambiguous associations we call states, I will call them *lex*" (Oakeshott 1991a, 128).

<sup>10</sup>. Recently, more prosecutions have taken place of Mormon men who practice polygamy, but not for the practice itself, but more often for rape both, criminal and statutory, and domestic abuse.

## References

ANDERSON, P. (1992) "The Intransigent Right at the End of the Century." *London Review of Books*, September.

DALLMAYR, F. R. (1984) *Polis and Praxis, Exercises in Contemporary Political Theory*. Cambridge: The MIT Press.

FLATHMAN, R. E. (1998) *Reflections of a Would-Be Anarchist: Ideals and Institutions of Liberalism*, Minneapolis: University of Minnesota Press.

FRANCO, P. (1990) *The Political Philosophy of Michael Oakeshott*. New Haven: Yale University Press.

GERENSCER, S. (1999) "A Democratic Oakeshott?" *Political Research Quarterly*, 52 (4): 834-869.

HART, H. L. A. (1961) *The Concept of Law*. Oxford: Oxford University Press.

KING, M. L. Jr. (1964) "Letter from Birmingham Jail." In *Why We Can't Wait*. New York: Harper and Row. LIDDINGTON, J. (1984) "Oakeshott: Freedom in a Modern European State." In: Z. Pelczynski and J. Gray (Eds.) *Conceptions of Liberty in Political Philosophy* New York: St. Martins Press.

MAPEL, D. R. (1990) "Civil Association and the Idea of Contingency," *Political Theory* 18 (3): 392-410.

MOUFFE, C. (1992) "Democratic Citizenship and the Political Community." In: C. Mouffe (Ed.) *Dimensions of Radical Democracy: Pluralism, Citizenship, and Democracy* London: Verso.

OAKESHOTT, M. (1991a [1975]). *On Human Conduct*. Oxford: Clarendon Press.

OAKESHOTT, M. (1991b. [1951 & 1962]) "Political Education." In: T. Fuller (Ed.) *Rationalism and Politics* Indianapolis: Liberty Press.

QUINTON, A. (1978) *The Politics of Imperfection*. London: Faber and Faber.

RORTY, R. (1989) *Contingency, Irony and Solidarity*. Cambridge: Cambridge University Press.

WALLACH, J. (1987) "Liberals, Communitarians and the Tasks of Political Theory," *Political Theory* 12 (4) 581-611.

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