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MORALITY AND THE RULE OF LAW

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ABSTRACT:

This paper lays out the logic of a conservative view of liberty and morality based on an understanding of human nature as both social and rational on the one hand, and radically individual and self-seeking on the other. Without public virtue, a people cannot govern itself as a free people. But neither virtue nor moral truth can be legislated. The rule of law under constitutionalism is the most successful human arrangement for providing freedom and allowing moral action on the part of individuals.

KEY WORDS:

human nature, rule of law, law and morals, law, individualism, constitutionalism, enforcement of morals, principles of rule of law, republican virtue

I will begin with a modest claim for morality and end with a strong one. The modest claim is that the state is not founded or logically dependent on any particular moral theory. Rather it is justifiable primarily on grounds of practical necessity. We cannot do without it. Even a weak or inadequate state may be far preferable to no state at all.

I. HUMAN NATURE

The reason for this lies with human nature. Human beings are both social and rational. They prefer, or even require, group affiliation and the interdependence that grows out of it. The essence of humanity is reflected in language, which in turn is a reflection of this basic sociability and rationality. Without group affiliation, there could be no language.

But human nature is also radically individual. Each man and woman possesses a body and a mind which constitute a permanent boundary between that

individual and all others. No other individual can ever think or feel exactly what any given individual thinks and feels. Each individual experiences the world from a unique perspective that cannot be shared fully by anyone else. Each individual makes countless choices, usually within a context of rules provided by the larger group, which choices over time define the character of the individual chooser. With the passage of time, individuality grows out of sociality and becomes increasingly pronounced.¹

In a world of scarcity, where every individual cannot have everything he or she might desire, individuality inevitably generates conflicts of interest and of view. But conflicts threaten group affiliation. And rationality suggests that routinized conflict resolution mechanisms might regulate the effects of individuality and make group affiliation an enduring possibility.

Such mechanisms would not be necessary if men and women were essentially different than they seem to be. If men were disposed to seek the interest of all others before their own, individuality would promote social harmony and productivity, and not threaten it. If such altruistic beings were free from the limitations of ignorance and were capable of always drawing the right conclusions from their store of total knowledge, their well motivated actions would always benefit the other members of the group.

But men are not yet gods. They are, by and large, corruptible, in that they can be tempted to sacrifice the good of others for private advantage. And their ignorance is far greater than their knowledge. Even when motivated by good will, we don't often know what the real consequences of our choices might be. And benevolent action may not always be helpful to others in the long run. Even when our information or knowledge is adequate, we do not always reach the right conclusions. Our powers of reason and inference are imperfect. We make many mistakes.²

This is not the argument of some theologies that man is essentially evil. Nor does it deny that there are many people who are routinely benevolent in their actions. It is a recognition of the weaknesses of men that can come out in unpredictable ways and affect our ability to live together, and that make life without some community conflict resolution process unattractive.

II. LAW

¹See S. Letwin, The Gentleman in Trollope: Individuality and Moral Conduct 63 (1982).

²My discussion of human nature parallels that of J. Lucas, The Principles of Politics at 1ff. (1966).

The idea of a neutral social mechanism for resolving disputes is the idea of law. Coercion is a necessary adjunct to law to make it credible. But coercion is not the essential characteristic of the law. Its essential characteristic is that of facilitating individual action and choices by assuring all individuals of a predictable, neutral and orderly mechanism of resolving conflicts that may arise between individuals while pursuing their own ends.

But human nature constitutes an additional threat to this process of law in that the process can only be administered by men, who necessarily have their own interests and weaknesses, which in turn have the potential to interfere with the neutrality of the legal process or to reduce its predictability. The law addresses these issues in various ways, primarily by specifying in advance the means of identifying future administrators of the law and the rules by which future conflicts will be resolved.

Because the interests of individuals often lead them to join groups whose interests are similar, factions naturally emerge in a society of law and sometimes attempt to subvert the legal process for their own advantage. The dangers of anarchy are reduced by law, but not eliminated. Rather, they are organized and elevated to a higher level.

By founding the state on our needs we can explain it fully in terms of the purposes and choices of individuals. Although it may well be true that there are moral theories that could be developed as fundamental justifications of the state, that approach is not necessary. And the advantage of taking the minimalist approach is that the locus of purposes and objectives for human action is clearly with the individual, the family and the voluntary association of individuals. Men may be seeking the highest moral achievements on either the individual or social level. But those pursuits are essentially private. The state is their facilitator. Virtue remains private in a fundamental way.

Furthermore, had we chosen to develop a rationale for the state out of a particular moral theory, the resulting state would have to be one in which that moral theory was authoritative. It would inevitably be accorded legal status. And morality, in effect, would be nationalized. Individual differences of moral view could not enjoy equal legal standing, because there would be a national norm. And any individual choices or pursuits not in conformity with the authoritative moral point of view would be subject to regulation, or even extirpation.

One reason the approach through law does not require an undergirding moral theory is that the idea of law has within it certain implicit norms or principles that are quasi-moral in function, if not in character. These norms will

provide metalegal standards or criteria against which both the rules and the procedures of a legal system may be evaluated without bowing either to the interests or the moral theories of any particular faction.

III. THE RULE OF LAW

The idea of law leads us therefore, to the rule of law, the rule of neutral rules rather than of any individual or group that can judge arbitrarily according to its will. The opposite of rule of law would be rule of will or tyranny. By establishing the same legal rules and procedures as binding on all members of the community, including those who make or administer the law, the opportunity of manipulating the legal system for the advantage of a faction or an individual is theoretically eliminated.

To the extent a society can achieve the rule of law in this sense, legal rules are like the laws of nature.³ For just as our knowledge of natural laws enables us to predict with reasonably accuracy the probable outcomes of a huge range of possible actions from which we might want to choose, so our knowledge of the law enables us to predict the probable legal consequences of all our choices. Just as our understanding of the immutable laws of nature enables us to avoid many natural dangers, so our grasp of the law in a society ruled by law enables us to avoid actions that would bring the sanctions of law on our heads. And in each case, the knowledge serves to facilitate intelligent individual action in pursuit of individually chosen objectives, without imposing a single set of authoritative objectives on anyone.

Rule of law then serves to protect us from coercion in three directions. By submitting to a society of law, we can avoid the totally unpredictable and unpreventable predatory coercions of anarchy. Second, by obeying the law, we can avoid the sanctions prescribed for law-breakers. And third, the rule of law prevents factions from perverting the system and engaging in entrepreneurial coercion for their own advantage.

Rule of law can now be seen to provide a comprehensive theory of freedom. The freedom provided in a society of law consists in protection from the arbitrary coercive intrusions of others in one's life. It is not derived from any theory of natural rights, but sees rights as creations of law. The rights that count in society are essentially legal. And one's property is constituted by the collection of one's legal rights. One is free to the extent that others cannot invade one's rights with impunity.

³This analogy was noted by F. Hayek, The Constitution of Liberty, at 142 (1960).

This brief account may be adequate to initiate an analysis of the principles and assumptions implicit in the idea of rule of law. The vision of a system of law that provides stable and impartial standards for all suggests some general criteria for determining the extent to which any particular society attains to rule of law.

IV. PRINCIPLES OF THE RULE OF LAW

The most important criterion for rule of law is generality.⁴ It is the requirement that laws and procedures binding on anyone are binding on everyone. Stated negatively, it is the principle that no identifiable individuals or groups can be singled out by law or procedure for special benefits or penalties. The principle specifically includes the officers of the law, both those who make it and those who enforce it. They are subject to all the same rules and procedures as everyone else. The classic example of the violation of this principle is the bill of attainder, which is disallowed under the American Constitution, and the special bills according benefits to particular individuals, that are still commonly accepted by the U. S. Congress as a matter of congressional courtesy.

Of course, the law can prescribe different benefits and penalties to people not identifiable in advance who might meet certain general criteria. This only works if the criteria serve to guide the choices people make, but not if they bring the coercive weight of the law on people that have no way of avoiding it. It is true that general categories can be so narrowly defined as to in effect single out identifiable individuals or groups. But to the extent this ruse is allowed, rule of law is sacrificed.

The second principle, sometimes, confused with the first, is equality. It sometimes helps to distinguish it from notions of material equality by calling it "formal" or "legal" equality. The principle requires that the society not be divided into legal classes that have systematically different standing with respect to the rules and procedures of the law. Equality before the law means that every individual is subject to the same rules and procedures and is protected by the same sets of rights and procedures as every other individual.

Both generality and equality are important in eliminating discrimination from the law. The principle of generality allows the law to create legal categories of persons for different social purposes and only prevents the law being used to harm or benefit antecedently identifiable individuals or groups. The principle of equality requires that no groups be systematically privileged or prejudiced by the

⁴F. Hayek, supra note 3, at 179ff. Although many theorists have addressed themselves to the topic of rule of law in recent years, Hayek's 1960 treatment is still one of the best.

substance or process of law.

The third fundamental principle of rule of law is prospectivity. It is the requirement that any change or addition to the law refer only to the future in the sense that past actions cannot be reclassified retroactively to change their legal implications. A legislature that can change the legal status of past actions can condemn anyone it chooses, thus replacing rule of law with tyranny. The American Constitution provides for this simply with the prohibition against ex post facto laws. The expectation is that every individual can calculate the future legal consequences of present choices without fear that the rules will be changed retroactively.

In spite of the analogy between the laws of society and the laws of nature, there is also a profound difference. The laws of society are not immutable. Not only can they change over time, but they must do so. Even in traditional societies some social change is necessitated by changing circumstances. And if the rules of society cannot be adjusted to meet these changes, the level of social support for the laws will decline. So even though the idea of law in principle favors stasis to enable long range predictability, in practice, social and technological change require continual adjustments in the legal system. The challenge for rule of law is then to provide mechanisms of change that maximize predictability and minimize uncertainty. Achieving rule of law in a dynamic society requires processes of change and adjustment in the law that reflect the basic principles of rule of law.

V. CONSTITUTIONALISM

Constitutions are devices for preserving the rule of law under conditions of change. Constitutions come into being as implicit or even written agreements about how changes in the law will or will not be made. Law is therefore both logically and historically prior to a constitution. Because the inevitable changes that must be made in the laws over time tend to decrease the value of prospectivity in the law, constitutions are necessary to establish in advance what the mechanisms of change will be and to minimize changes that could not themselves be predicted. Because our mortality limits the tenure of all public officials, constitutions must also provide mechanisms for selecting and installing new authorities.

Constitutions are often mistakenly thought to be statements of true moral or political principles that govern a society. A glance at the world's most successful constitutions immediately discloses the error of this assumption. These constitutions do little more than set up institutional devices that are designed to frustrate factions and eliminate practices that might endanger rule of law. The

American Constitution is a deliberately complicated set of procedures for changing and enforcing the law that make it nearly impossible for any single faction to gain control over all aspects of the process. It erects a set of practical obstacles to tyranny. But it announces no authoritative moral or political principles.

Constitutions are, however, designed according to certain principles or understandings about what kinds of provisions are necessary or helpful in preserving rule of law through the frustration of factions. The principle of consent is now almost universally recognized as one means of ensuring that a population is not exploited against its own will. By incorporating the principle of publicity, constitutions require legislative and judicial bodies to deliberate and make decisions before the public eye, thus restricting the opportunity for secret factional arrangements. And constitutions provide extra protection for the procedural safeguards of the law. These procedures are designed to protect the individual participant in the legal process from being unfairly treated or judged.

Most constitutions provide for the separation of powers, or the separation of the law making and law enforcing functions of government. This arrangement protects against the eventuality that law makers might use their unequalled powers for private advantage. Someone else will enforce the laws they make. In the American system, the principle of federalism is used in a unique way to divide public authority between different levels of government, again frustrating factional ambitions. Numerous checks and balances between the different branches of government are designed to preserve the effectiveness of the separation of powers by maintaining the independence of the various officers of the government.⁵

Constitutions are not statements of moral principles and rights. Rather, they are structured combinations of procedures, prohibitions, and institutional devices, all designed to provide for limited government and to frustrate tyranny. Constitutionalism is, therefore, the science of limiting governments by such devices. It is not just another name for rule of law, but is the study of the means of achieving and maintaining rule of law. The institutional devices recommended by constitutionalist thinkers are not ends in themselves, but are contrivances designed to discourage rule of will and maximize rule of law over the long run.

VI. REPUBLICAN VIRTUE

Given the commitment of the American founding to these kinds of principles, some commentators have attacked it for its denial of any need for

⁵See Madison's arguments, especially in J. Madison, The Federalist Nos. 10 and 47-51.

morality or devotion to the public good.⁶ But such critics need to look further to find the essential and even dominant role of the moral argument in the American founding. Sam Adam's phrase, "a Christian Sparta," illustrates the way that the Americans saw two great moral traditions of almost equal antiquity coming together in their own brand of republicanism. Classical republican thought goes back to those great philosophers of the early decline of Rome who longed hopelessly for the simpler and more virtuous world of the early republic--Cicero, Tacitus, and Plutarch. Americans, like their radical republican predecessors in England, idealized the Roman republicans, and used their names repeatedly as authorities in argument and even as pen names.⁷

Like those ancient Romans and like contemporary republicans in Europe, the Americans saw the corruption of liberty resulting from the corruption of individual citizens through luxury, dependence and moral flabbiness. But to this ancient republican axiom, the Americans added the dimension of Christian faith. The Puritan mission to found in the New World "a citty on a hill" evolved into a mission to establish a Christian republic. And the corruptions and luxuries that were believed by republicans to undermine free societies, were also believed by the Americans to be abominable before God and bound to be punished by his wrath.

Republicanism had both a political and a moral thesis. Politically it denoted limited, popular government based on some scheme of representation, but not direct (or "pure") democracy. The "radical republicans" of 17th and 18th century England had first been concerned to establish the pre-eminence of Parliament over the king. The Glorious Revolution produced a permanent solution by establishing a revised balance between King and Parliament. Their second concern was to prevent the "corruption" of Parliament by the king and his ministers. By the first decades of the eighteenth century, the constitutionally limited king had found ways to buy influence in Parliament, trading "places" or public appointments for votes.

The Americans picked up these radical republican themes and adopted them as mainline political wisdom, insisting on actual (rather than "virtual") representation in Parliament. Republicanism held that the liberty of the people was a function of their moral independence and resistance to the corruptions of

⁶G. Will, Statecraft as Soulcraft: What the Government Does (1983).

⁷I have relied on various accounts of American republicanism for these characterizations. See especially, G. Wood, The Creation of the American Republic: 1776-1787 (1969).

luxury. It rejected the older patronage system based on social relations of dependence and subservience in favor of a society based on natural merit and equality of independent citizens linked to one another in harmony. As individual property holders, republican citizens would rise above a narrow selfish individualism in promoting social cohesion and the common welfare. This ideal was reflected in the choice of some new states to style themselves "commonwealths." But they recognized that theirs was a fragile ideal. Holland and the Italian and Swiss city-states were the only contemporary examples of republican government. And these were tiny and endangered by faction. The English experiment of 1642 had failed.

American republicanism demanded an extraordinary moral quality in its people. This was called "patriotism" or "virtue" or public virtue. Patriots must eschew the selfish pursuit of luxuries. They must regard one another as moral and legal equals. The extraordinary displays of popular order in 1774-75 during times of breakdown in royal government convinced Americans that they were naturally virtuous in this way and therefore ideally suited as a population for an experiment in republican government.

Implicit in this concept of the republican citizen was a recognition that liberty is only possible for a people that can govern themselves at the level of the individual. Republican men must by and large be capable of holding themselves to principles of equity and fair action in their conduct with others. The anti-social calculator of narrow self-interest who deliberately violates law and morals when it suits his advantage, is a threat to the fabric of freedom. But a free society can only control his activities at the borders. And if his amoral style becomes widely emulated, liberty will be reduced as government steps in to give stronger guidance to a citizenry that has proven incapable of governing itself.

The American republicans believed that "patriots" could not be courtiers. They must be free of corrupting dependency connections, being tied to their associates only by "friendship connections" and a shared love of their country. Jefferson argued that dependency begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition."

Individual ownership of property was viewed as essential to foster this "independency." Property provided an economic basis for independence. Property creates a permanent attachment to the welfare of the community. The propertyless could be denied the vote because of their dependency and vulnerability to influence, "having no wills of their own." Some states allowed established artisans the same rights as property holders reasoning that they had a

similar independence. Jefferson at one point recommended that Virginia give 50 acres of land to each citizen. Jefferson's idea that a republic was safe only in the hands of yeoman farmers was largely derivative from this same reasoning.

The social emphasis on friendship connections and the frontier conditions of relative economic and social equality produced a pervasive assumption that the citizens of the American republic should treat each other as moral and political equals. Artificially based inequalities were no longer acceptable. Legal privileges of an established aristocracy must be abolished. Social mobility based on merit and effort would prevent further hardening of social distinctions. A natural aristocracy might therefore emerge, but with no means of perpetuating itself across generations.

Liberty under republican principles also required one additional form of public virtue. The institutions of liberty will not function well if every citizen acts only because of calculated self-interest. Each individual citizen, on careful reflection, will discover that the effort it takes to be an informed and active voter, a participant in public councils and committees, and even an elected official, will almost never bring in a positive return. The benefits of these kinds of action are distributed throughout the population, and the individual who makes these contributions captures only a tiny portion. But republican liberty is self-government, and it cannot endure if the population will not exert itself voluntarily without immediate tangible rewards to maintain and service the institutions of liberty.

Critics who have accused this republican tradition of constitutionalism of ignoring morality have taken the arguments of Adams and Madison out of context. It is true that many eighteenth century thinkers did believe that constitutional devices could be so designed as to harness self-seeking behavior of public officials for the public good. And as has been pointed out above, their theory of human nature did not lead them to trust in the good will of the officers of government. Indeed, they maintained that all men are corruptible. But that is not the same as claiming that all men are corrupted. And it is the possibility that corruptible men will not become corrupted that gives substance to the republican vision.

Madison made it clear that the primary safeguard of freedom was a reliance on the people, i.e., on public virtue. But experience has taught us the necessity of "auxiliary precautions."⁸ And these are the constitutional devices he is defending

⁸J. Madison, *supra* note 5, at No. 51.

in the new constitution. These are the means by which those individuals and factious groups that are determined to pursue their own interests, even at the expense of the public good, can be tamed or controlled. Adams' theory of emulation held that powerful public officials will be constrained by their great desire for the admiration of an approving public from doing any mischief that might tarnish that public reputation. Madison's theory held that by dividing up the powers of government many different ways and giving each department checks on the others, the self-interest of each group would naturally serve to check the self-promotion of the others. But these were "auxiliary precautions" taken by men that recognized the necessity of preparing their government to deal with men of all varieties of moral fibre. They intended to protect their great republican experiment from failure at the hands of a corrupted few. But they only believed it was possible because of the moral virtue of the majority.

Again we see that the system described here is not indifferent to morality. Rather, it is high moral commitment that makes it possible. But the human pursuit of moral visions or utopias is left to individuals and to voluntary association. That responsibility is not taken up by government. The role of government is precisely to protect and facilitate the actions of free individuals and groups, within the law, as they pursue their life objectives. The genius of American republicanism is that it capitalizes on the moral strength of the people without nationalizing the moral enterprise.

VII. MORALITY AND THE RULE OF LAW

The relationship between morality and the law is therefore not so much logical in character as causal. The law is not derived logically from accepted true moral principles. Rather, it is established by legislatures that come to agreement on public rules that are shaped by a political consensus about right and wrong. In this political process, people or groups holding different fundamental moral or religious views are brought into agreement precisely because the laws do not need to articulate or be tied to fundamental moral truths. Because they only need agree on consequences and policies, divergent moral points of view can be marshalled in support of a single piece of legislation.

By this account, morality is intimately involved in the making and changing of law. But it is never through acknowledgment of an official moral theory that is legally binding or that occupies some special constitutional status. Rather, the moral views of the citizenry must work themselves out in the political process through legislative compromises. Sometimes severe differences of moral principle make such compromises difficult or impossible as with the abortion issue. But

even in such cases, the issue of moral differences is firmly restricted to the domain of politics. Resolution can only come through political resolution. And thus the pluralist integrity of the society is preserved.

Strong challenges to this view have been raised in recent years by legal philosophers. In particular, Ronald Dworkin has argued that both laws and constitutions are unavoidably rooted in political and moral principles.⁹ In the case of western liberal democracies, Dworkin finds the principle of equality lurking behind everything else, and he therefore accords to it the status of a fundamental constitutional and legal rule. When all else fails, judges are correctly instructed to invoke this moral principle in the decision of hard cases. The same is true of rights in general on Dworkin's view. They are grounded in moral principles and are more binding on judges than any legislative statute. It has been my claim that this approach, like some of its natural law predecessors, constitutes an attempt to nationalize morality and institute an official moral view as legally binding on all. And the issues that should be resolved through the give and take of political discourse, are urged on our judges as if they were simply questions of law. Dworkin is candid that one reason for taking his approach is that the judges have shown themselves to be much more interested in social reform than are the cumbersome legislatures.¹⁰ So he is attracted to the advantages of having small judicial bodies make the hard social decisions and force the rest of society to move along more sharply in the way in should be going.

VIII. THE ENFORCEMENT OF MORALITY

On the other hand, Dworkin and most liberals have been strident in their insistence that judges and legislatures have no business getting involved in matters of personal immorality.¹¹ Nothing is more certain to attract their ridicule than defenses of laws punishing the extreme forms of immorality. Yet one common outcome of legislative deliberations is the statute designed to prevent or punish gambling, pornography, prostitution, homosexual associations, or drug abuse. The interesting outcome of interpreting the law as an expression of fundamental moral principles of liberty or equality is precisely to limit the authority of legislative assemblies to control the more extreme forms of immoral conduct.

Yet as Patrick Devlin has persuasively argued, if society is a moral as well

⁹See R. Dworkin, Taking Rights Seriously (1977) and A Matter of Principle (1985).

¹⁰R. Dworkin, Political Judges and the Rule of Law 282 (1980).

¹¹See R. Dworkin, supra note 9, Taking Rights Seriously, at 240-58.

as a political association, the core of moral beliefs and practices needs protection. For once the core of shared moral views and practices is undermined, the threads holding everything else together will unravel.¹² The approach through rule of law gives us an interesting alternative way to approach this problem. If the citizenry truly believe that certain behaviors have the potential of destroying or fundamentally damaging a society, who has the right to tell them they can do nothing to prevent it? Are they to stand by while an impertinent and irreverent few carry on in all forms of self-indulgence that the majority honestly believe will undermine their own future quality of life and the future of their children? Why can they not act to protect their future lives from such external effects?

A family is not a totally flexible organization. Its effectiveness and continuity are conditional on the adherence of family members to basic norms of affection, loyalty, and mutual support. And it is precisely these norms that are undermined when family members get involved with pornography, prostitution, abortion, gambling, drinking, etc. Though there may be an infinite array of family destroying vices to which men and women can succumb, those that are widely recognized as regularly posing substantial threats to family have often been prohibited by legislation designed to punish the family threatening behavior. Such laws even go beyond threats to actual families by trying to protect potential families. Homosexuality and drug abuse are commonly restricted, and they endanger the upcoming generation's ability to establish strong new families.

If there is an official moral theory, judges can use it to frustrate such laws. Without it, legislatures and judges are still bound by all the considerations of rule of law. And they cannot use such laws to harass selected individuals. But as long as the legislature and the prosecutors adhere to the principles of generality, formal equality, and prospectivity, the rule of law itself will not prohibit such legislation. It is everywhere evident to the honest observer, that laws punishing immorality are notorious for their tendency to abuse people and to corrupt the legal process. That is a note of caution to those who support such laws and recognize the fundamental value of rule of law. But it does not exclude such legal projects in principle.

IX. MORALITY AS AN ECONOMIC RESOURCE

I have made much of the fact that the moral quality of the citizenry is an irreplaceable resource for the political system. Free government requires it. But it should also be pointed out, in a day when the economy and the state have become so closely intertwined, that the strength of the economy is dependent on the moral

¹²P. Devlin, The Enforcement of Morals 1-25 (1965).

strength of the population. A strong market economy depends on a productive labor force, on people who work regularly, dependably, intelligently, and honestly. It also requires a people who observe the law and the rules of commerce largely out of habit and self-governance, that the excess product of the economic process is not eaten up in the endless demand for enforcement of the law. In other words, in spite of the fact that some economists teach us to think of a market economy as a process governed only by the pursuit of selfinterest, the economy's function is heavily dependent on the level of moral conduct between the economic actors at every level.

Both the state and the economy are heavily dependent on the moral quality of the population. It would then seem that from the perspective of either, there is strong reason to do whatever is possible to encourage those moral qualities, and at the very least to avoid destroying them. But the state that has no official morality is not in a good position to inculcate moral values directly. Mediating institutions such as the family and the church are in far the strongest position to do this effectively.

One of the great ironies of the welfare state has been that it was instituted to protect and strengthen individuals and families. But instead it seems to be weakening them through the institutionalization of family dependency. The public sector has increased its spending from 12 to 40 percent of our national income in the last 50 years. And now over half of all Americans are dependent for some of their income on government spending.¹³ Family independency has contributed a great deal to make America the success it has become. But with the institution of the welfare state we have come increasingly to regard employment and income, education, medical care, child care and many other forms of aid as entitlements that we have a right to expect the state to provide. The welfare state dream may be turning into a nightmare.

Long term government welfare is often linked to the worst statistics in measures of family stability. For example, the recent income maintenance experiments in both Denver and Seattle resulted in increased divorce rates as the costs of divorce were reduced.¹⁴ The evidence is convincing more and more researchers that welfare reduces family cohesion, resiliency in the face of

¹³U. S. News and World Report 73 (March 9, 1981).

¹⁴M. Hannan, Income and Marital Events, 82 Amer. J. of Soc. 1186 (1977). See also, M. Hannan, Income and Independent Effects on Marital Dissolution, 84 Amer. J. of Soc. 611 (1978).

challenges, and commitment to the moral norms that are essential to the perpetuation of strong families. Indeed, we are faced with the growing possibility that the billions we have spent to help the unfortunate may be both harming those it is designed to help and undermining the system that has made it possible to pay for the experiment.

Welfare recipients are not the only families that may be directly affected by welfare state policies and attitudes. Many observers are also alarmed by the increasing tendency of economically independent families to pass traditional family responsibilities to the state. Schools and day care facilities, social security and medicaid, combine with numerous other programs to absorb more and more functions of the family, reducing the family from its position as basic economic and moral unit of the society to a hotel or club taking care of a much narrower and less compelling range of the needs of its individual members. This kind of concern is much more difficult to assess because so many of these external resources are truly assets to families which free family members for other activities that may be of much greater value to the family. But in many cases the real result is that family interdependency is weakened, and other key family functions suffer before people realize what is happening to them.¹⁵

Both the state and the economy are institutions that facilitate the private actions of individuals, families and private associations. But just as these need the state and the market to serve them in this role, the state and the economy need them as conveyors of the moral tradition to rising generations. Moral values are best taught in early youth in the home, through the institution of the family. Churches and other voluntary associations may also play significant roles in this process. But it is hard for governments to do more than reinforce what has been learned earlier. Governments should adopt policies that reward and protect virtuous citizens, not giving advantage to the unscrupulous or corrupting the weak and dependent.

X. CONCLUSIONS

I began with the modest claim for morality that it is not essential logically for the founding of the state. The reason for this approach was to free the modern pluralist state from the tyranny of an authoritative moral theory which would be binding on judges as a part of the law. Instead, I argued that the principles of the rule of law under the protection of a strong constitution are the best formal

¹⁵Portions of this argument are borrowed from N. Reynolds, *Families and Markets: Allies or Enemies?* 19 Family Perspective No. 2, 91 (1985).

protections of our freedom and our relationships as equals.

I ended with the strong claim that morality in the sense of public virtue and moral practice are essential for a population that will govern itself successfully. The moral fibre of the citizenry determines the levels of freedom that can be maintained in a society as well as the productivity of the economy. Finally, I argued that because mediating institutions are the only effective means of conveying moral beliefs and practices from one generation to another, government policies that weaken such institutions constitute long term threats to both a free society and a strong economy.