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FOREWORD: LEGAL AND CONSTITUTIONAL IMPLICATIONS OF THE CALLS TO REVIVE CIVIL SOCIETY

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I. INTRODUCTION

This symposium addresses legal and constitutional implications of the calls to revive or renew civil society (a realm between the individual and the state, including the family and religious, civic, and other voluntary associations). Calls to revive or renew civil society are prominent in political and legal discourse. The erosion or disappearance of civil society is a common diagnosis of what underlies civic and moral decline in America, and its renewal features prominently as a cure for such decline. Broadly speaking, there are two strands of civil society advocates, which a leader in the civil society movement recently characterized as the civic revivalists and the moral revivalists.[1] The first strand is illustrated by the recent report of the National Commission on Civic Renewal, *A Nation of Spectators: How Civic Disengagement Weakens America and What We Can Do About It*,[2] and the second by the recent report of the Council on Civil Society, *A Call to Civil Society: Why Democracy Needs Moral Truths*.[3] The former emphasizes "civic renewal" and reinvigorating civic character and engagement in shared civic purposes, while the latter stresses moral renewal, moral character, and consensus about

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1. *See* Don Eberly, *Civic Renewal or Moral Renewal*, J. AM. CITIZENSHIP POL'Y REV., Sept.-Oct. 1998, at 44.

2. NATIONAL COMM'N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT (1998) [hereinafter A NATION OF SPECTATORS]. Copies of this report are available through the National Commission on Civic Renewal, 3111 Van Munching Hall, University of Maryland, College Park, Md. 20742; (301) 405-2790 (phone); (301) 314-9346 (fax); http://www.puaf.umd.edu/civicrenewal.

3. COUNCIL ON CIVIL SOC'Y, A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS (1998) [hereinafter A CALL TO CIVIL SOCIETY]. Copies of this report are available through the Institute for American Values, 1841 Broadway, Suite 211, New York, N.Y. 10023; (212) 246-3942 (phone); (212) 541-6665 (fax); iav@worldnet.att.net (email).

moral truths.

To date, there has been a great deal of discussion of civil society and proposals for its revival or renewal, but not enough discussion of legal and constitutional implications of such proposals. This symposium seeks to help fill this void.[4] The articles pursue questions such as the following. What role do law and the Constitution play in the constitution of civil society? Does the Constitution secure the basic liberties and impose the basic responsibilities that are preconditions for the development of a vital civil society? Or have the Constitution's commitments and omissions undermined the vitality of civil society? What, in our constitutional order, is the role played by civil society? Does civil society serve as "seedbeds of virtue"—"our foundational source of competence, character, and citizenship"[5]—and foster self-government? Or is civil society's more vital purpose to serve as a buffer or check against the state? Should government attempt to secure congruence between democratic values and the structure and values of voluntary associations, or would such an effort offend commitments to pluralism and diversity? If it is not possible to establish a clear link between participation in associations, as such, and the inculcation of democratic values, are there some institutions of civil society that are especially valuable for cultivating civic virtue and fostering democratic deliberation?

The family features, in the calls for reviving civil society, as first and foremost among the seedbeds of virtue. Is the family a seedbed of virtue or a school of inequality and injustice? What forms of regulation of the family are necessary and appropriate? Does the vitality of the family as a seedbed of virtue depend upon one particular form of family (i.e., the heterosexual, two-parent, marital family) and should government seek to encourage that family form and discourage others? How does the market factor into calls to revive civil society? If business, labor, and economic institutions are within civil society, are they seedbeds of virtue that foster civic health or do current economic practices hinder civic health, and put pressures on families, endangering their strength? More generally, how do proponents of renewing civil society view the relationship between systemic inequality (including racism) and civic health? Have civil rights movements and gains in equality and liberty

4. Two other symposia have also addressed questions concerning law and civil society. *See Symposium: Law and Civil Society*, 72 IND. L.J. 335 (1997); *Symposium*, 15 ARIZ. J. INT'L & COMP. L. 1 (1998).

5. A CALL TO CIVIL SOCIETY, *supra* note 3, at 7.

contributed to the decline of civil society and civic virtue? Finally, would a revitalized civil society support democratic self-government or supplant it?

The recent reports calling for a revival or renewal of civil society offer numerous prescriptions, many of which implicate legal reforms and constitutional issues. Here we give a few examples pertaining to the family, separation of church and state, and federalism. Both civic and moral revivalists focus upon family "breakdown" as a leading cause of civic and moral decline and prescribe shoring up the two-parent, marital family as the necessary starting point for any strategy aimed at recovery.[6] Among their prescriptions are reform of the tax laws to provide incentives and benefits for two-parent, marital families and disincentives for divorce and nonmarital child-bearing.[7] They also endorse covenant marriage and reform of no-fault divorce laws as ways of strengthening marital stability. Another prominent theme is that religious institutions should play a central role in America's moral and civic renewal. Both *A Call to Civil Society* and *A Nation of Spectators* advocate that Congress should expand the "charitable choice" provision in the 1996 welfare reform legislation—which allows religious institutions to accept governmental funds for provision of services to welfare recipients while retaining their "religious integrity"—to all federal laws currently authorizing the government at any level to contract with nongovernmental organizations to provide services.[8] Moral revivalists also call for the government to expand the ability of parents to choose their children's schools, which might include vouchers for religious schools.[9] Finally, many revivalists advocate localism: for example, moral revivalists support legal reform to limit federal judicial oversight over structures and functions of local government such as housing, education, and crime control, and in general both moral and civic revivalists advocate that the federal government not hinder state and local experimentalism.[10]

6. *See* A CALL TO CIVIL SOCIETY, *supra* note 3, at 18; *see also* A NATION OF SPECTATORS, *supra* note 2, at 13.

7. *See* A CALL TO CIVIL SOCIETY, *supra* note 3, at 19-20.

8. A CALL TO CIVIL SOCIETY, *supra* note 3, at 21; A NATION OF SPECTATORS, *supra* note 2, at 17.

9. A CALL TO CIVIL SOCIETY, *supra* note 3, at 23. By contrast, *A Nation of Spectators* states that "public support for parental choice broadened to include private and religious schools" is "an important area of ongoing disagreement" among its signatories. A NATION OF SPECTATORS, *supra* note 2, at 16.

10. *See* A CALL TO CIVIL SOCIETY, *supra* note 3, at 10, 23; *see also* A NATION OF SPECTATORS, *supra* note 2, at 11 (but insisting that "reinvigorated localities cannot substitute

In *Some Questions for Civil Society-Revivalists*,[11] we raise some questions for proponents of reviving civil society as a cure for many of our nation's political, civic, and moral ills (whom we designate as "civil society-revivalists"). The questions include some of those mentioned above. How does civil society serve as "seedbeds of virtue" and foster self-government? Have liberal conceptions of the person corroded civil society and undermined self-government? Does the revivalists' focus on the family focus on the right problems? Have gains in equality and liberty caused the decline of civil society? Should we revive civil society or "a *civil* society?" Would a revitalized civil society support democratic self-government or supplant it? In the article, we largely agree with the revivalists that it would be a good thing to revive civil society, but we raise doubts about whether its revival can reasonably be expected to accomplish what its proponents hope for it, e.g., moral renewal, civic renewal, and strengthening the bonds of citizenship. We suggest that civil society is at least as important for securing what we call "deliberative autonomy"—enabling people to decide how to live their own lives—as for promoting "deliberative democracy"—preparing them for participation in democratic life. Working within the tradition of political liberalism, and guided by key feminist and civic republican commitments, we also sketch our own views concerning the proper roles and regulation of civil society in our morally pluralistic constitutional democracy.

II. THE CONSTITUTION OF CIVIL SOCIETY

In *Law in Civil Society, Good Society, and the Prescriptive State*,[12] Amitai Etzioni makes a plea for conceptual clarity about two distinct "crises" faced by American society, a civil crisis and a moral crisis: he contends that, although they are lumped together in the discourse about civil society, they warrant separate attention. Sympathetic with the diagnoses of both the civic and the moral revivalists, he nonetheless argues, for both sociological and intellectual reasons, that it is best to keep separate the quest for a good society, which is the goal of the moral revivalists, and the quest for a civil society, which is

for effective national institutions").

11. Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301 (2000).

12. Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355 (2000).

the goal of the civic revivalists. The quest for a civil society seeks to address the challenges posed by the deterioration of civil society (as reflected in, for example, declines in voter turnout, interest in public affairs, and participation in voluntary associations). The quest for the good society seeks to address the challenges posed by the deterioration of society's moral fiber (as reflected in and fueled by, for example, teen pregnancy, nonmarital births, and the rise in "vile and violent" elements of the mass culture).[13] Etzioni elaborates three concepts—civil society, good society, and the prescriptive state—to distinguish among three different models of society. He contends that there are some sharp tensions between the civil society and the good society models with respect to social philosophy, the role of law, and the role of associations, and that packing too much into the quest to revive civil society hinders sound analysis.

Mark Tushnet begins his essay, *The Constitution of Civil Society*,[14] with a paradox: calls to revitalize civil society view civil society as a check on the government, yet the institutions of civil society are themselves constituted by the government. How, then, can civil society's institutions constrain and be a source of appropriate influence on the government, when the government defines the boundaries of such institutions and provides support for them? Surveying contemporary American constitutional law concerning some of civil society's institutions—families, religious institutions, civic associations, and political parties—he concludes that, although the law in theory might support such institutions, constitutional law in practice does little to ensure their vitality. This reality limits the extent to which the institutions of civil society can serve as counterpublics. Tushnet criticizes as erroneous this failure of constitutional doctrine to protect civil society and concludes that it is a lack of will and leadership—rather than institutional obstacles—that bar us from developing a democratic citizenry capable of supporting a powerful yet constrained government.

Stephen Macedo's essay, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*,[15] analyzes civil society in the context of his call for a civic liberalism. Such liberalism accords a proper role for government in shaping the character of its citizens through the noncoercive

13. *Id.* at 355.

14. Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379 (2000).

15. Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000).

promotion of civic virtue. Acknowledging that the sphere of free association is first and foremost a sphere of freedom, he nonetheless contends that, from a public point of view, we cannot ignore that it is also a sphere in which moral education takes place. His perspective on the calls to revive civil society is that the best argument for strengthening and putting more reliance on civil society is that, in so doing, a liberal society can pursue public purposes more effectively. He does not here propose to have the state attempt to coerce liberal virtues. Instead, using the example of school vouchers, he proposes that when the state provides money to the institutions of civil society such as religious schools, it may regulate those institutions by attaching conditions and in doing so moderate excesses and even subtly and gently inculcate liberal democratic virtues. It bears noting that for some time conservatives have proposed such an approach—that recipients of governmental benefits must "take the bitter with the sweet." Now, Macedo proposes that liberals give them a bit of their own medicine.

In his response, *The New Establishmentarianism*,[16] Michael McConnell objects to Macedo's approach, which he calls a subtle and gentle form of liberal establishmentarianism. He defines "establishmentarianism" as the idea that a nation should be animated by a set of common values and beliefs, backed by governmental authority. He contends that liberalism, at least in the form of the political liberalism attributed to John Rawls, breaks with establishmentarianism in positing that citizens of a political community need not share common values regarding the nature of the good life and that there are many reasonable, but mutually inconsistent, worldviews that are compatible with good citizenship. In this form of liberalism, it is private associations that are the primary place for the development and inculcation of ideas of the good life and of virtue. Macedo departs from this liberal approach to civil society, McConnell charges, and attempts to use state power to establish a liberal orthodoxy that enforces conformity in the name of advancing pluralism and diversity. Illustrating with some recent case law concerning religious individuals and institutions and certain voluntary associations, he argues that the new establishmentarianism is really "intolerance masquerading as nondiscrimination."[17]

16. Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000).

17. *Id.* at 465.

McConnell, an advocate of reviving civil society, expresses concerns that when the modern insistence upon common values and diversity within groups collides with freedom of association, it threatens to undermine the genuine diversity and pluralism of the society as a whole. If this happens, and the institutions of civil society are molded in the image of the liberal democratic state, those institutions will lose their distinctiveness, and will cease to serve as buffers against the state.

In *Civil Society and Multiple Repositories of Power*,[18] Abner Greene suggests that we should understand the revivalists as arguing for a plural form of human flourishing, one that encompasses participation in the institutions of civil society as well as action through governmental or individual forms. He argues that the central defining norm of American constitutionalism is multiple repositories of power—a norm that animates a constant struggle for authority, power, and privilege—and that this arrangement refuses to privilege any locus of power, public or private. This framework allows for multiple types of collective action to challenge governing norms, including forms of action arising in civil society. He questions Tushnet's formulation of a paradox and argues that the institutions of civil society can provide a source of power to challenge and offset the government even if they are not strictly independent of the government. He criticizes Macedo's attempt to achieve some congruence between the liberal democratic virtues of the state and the virtues of the institutions of civil society. He contends that, although McClain and Fleming argue that civil society may be of as much importance for deliberative autonomy as for deliberative democracy, their view would judge the institutions of civil society by how successfully they replicate the virtues of a democratic public realm. Judging civil society by this test, and imposing such requirements as public reason and the moral duty of civility upon its institutions, Greene fears, might blunt their power as buffers between individuals and the state. Yet, at least where the education of children is involved, he cautions against a "parentalist" approach to strengthening the institutions of civil society against the state, and suggests that, for children to reap the benefit of multiple repositories of power, both schools and parents should play a role in shaping and educating children.

18. Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477 (2000).

In her well-received book, *Membership and Morals*,[19] Nancy Rosenblum argued that, despite common assumptions that the institutions of civil society contribute to democracy by inculcating or at least supporting democratic virtues, the effects of associational life are more indeterminate and complex. In her contribution to the symposium, *Primus Inter Pares: Political Parties and Civil Society*,[20] Rosenblum takes up the challenge to identify the associations that stand out as qualitatively most valuable for democratic public life and political virtues. She argues that the voluminous literature on civil society ignores one of the most important institutions of civil society: political parties. She contends that political parties deserve a central place in the discussions of civil society because they are unique and irreplaceable voluntary associations. The defining characteristics of political parties lend themselves to deliberation about the common good. As such, they should be valued and strengthened. She argues that political parties have a unique, Janus-faced legal status among voluntary associations: for some purposes they are highly regulated, for other purposes they are deemed constitutionally protected associations. Yet even this two-fold treatment of parties fails to capture why parties should be considered first among equals in civil society. Rosenblum attempts to make the case for parties' unique contributions to democratic life in her article, concluding by advancing certain reforms that would better allow parties to make such contributions.

In her article, *The Family in Civil Society*,[21] Martha Albertson Fineman takes up an institution that is at the core of civil society-revivalists' diagnoses of civic and moral decline and their prescriptions for renewal: the family. Addressing the treatment of the family in the two reports, *A Call to Civil Society* and *A Nation of Spectators*, as well as in the work of William A. Galston, who played a role in both reports, she argues that the revivalists' emphasis upon the decline of the two-parent family, and their insistence upon that family form, operates to eclipse concern with social and economic forces that are truly destructive of families regardless of their form. She also criticizes the reliance by revivalists upon public opinion polls showing

19. NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA (1998).

20. Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493 (2000).

21. Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531 (2000).

concern for family "breakdown" because it is not clear what definitions of "family" respondents have in mind when replying to polls inquiring about the family. Fineman attempts to move beyond the moral and empirical debates over family forms to highlight the lack of attention in the civil society debates to the pressures placed on the institution of the family (however defined) by significant trends or changes in the nonfamily institutions of civil society, particularly those in the business or market sector. She suggests that revivalists should focus more closely upon the irresponsibility of the state in not regulating or mediating the excesses of market activities. Fineman points out that, although revivalists rely on suasion and exhortation with respect to problems they attribute to other institutions of civil society (such as business, labor, and economic institutions), when it comes to families, their concentration on family form leads them to recommend a system of coercive laws and regulation over the formation and dissolution of marriage. She focuses specifically on the costs to families and, hence, to civil society of increased income disparity, wage stagnation for middle and lower income wage earners, and persistent impoverishment for many children in the United States. Fineman concludes by urging civil society-revivalists to think more about the family as a "public" institution that serves a vital function of meeting the burdens of "inevitable dependency" and engaging in society-preserving care, as well as about how to redistribute responsibility so that the market and the state share some of the costs inherent in meeting such burdens and providing such care.

In *The Moral Exclusivity of the New Civil Society*,[22] Dorothy Roberts also charges that the program of the civil society-revivalists, as reflected in *A Call to Civil Society* and *A Nation of Spectators*, gives insufficient attention to persistent economic and social disparities and the impact of such inequality on families. This leads to a troubling moral exclusivity in a two-fold sense. First, she argues that, notwithstanding the superficial appeal of proposals to revive civil society, and some concessions in the reports about the problem of widening inequality, revivalists' analysis of moral decline promotes a narrow meaning of morality that excludes social justice from its heart and even suggests that moral decline or personal degeneracy explains economic and social injustice, rather than focusing on how systemic

22. Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 CHI.-KENT L. REV. 555 (2000).

inequality weakens civil society. Second, this leads, she contends, to a reform agenda that privileges those who benefit most from societal inequality and penalizes those who are most injured by it. Here, Roberts offers specific examples from revivalists' calls for various reforms of family law, pointing out how such proposals would especially burden black families. Roberts also finds "moral exclusivity" evident in the reports' exclusion of a serious recognition of past and present racism and its devastating impact on any effort to forge a common civic purpose among all Americans. Racism in America, she contends, has an ongoing legacy requiring attention and structural change. On her view, this inattentiveness to history also seems to lead revivalists to link gains in social equality with losses in civic virtue, and to devalue the tools, such as protest and social movements, that disempowered people have used successfully to achieve greater inclusion in the social, economic, and political life of the nation. She concludes that it is only by recognizing social inequalities as our chief moral problem, and as a critical threat to the institutions of civil society, that civil society-revivalists can make good on their "commitment to freedom and justice for all."[23]

III. RESPONSES

We are fortunate to have among our contributors Jean Bethke Elshtain and William A. Galston, two of the most prominent voices in the civil society movement. Elshtain is the Chair of the Council on Civil Society, which issued the report *A Call to Civil Society.* Galston is the Executive Director of the National Commission on Civic Renewal, which issued the report, *A Nation of Spectators.* In these pages, they respond to some of the articles and arguments in the symposium.

In her response, *Will the Real Civil Society Advocates Please Stand Up?*,[24] Elshtain begins by insisting upon the importance of a moral dimension to civil society advocacy. She calls into question the portrait of "civil society-revivalists" painted in some of the articles as nostalgic, inattentive to violence and abuse within marriage, and insufficiently concerned about growing inequality and systemic injustice. She states that she does not recognize these so-called "revivalists." Elshtain then takes up specific criticisms in essays by

23. *Id.* at 555.

24. Jean Bethke Elshtain, *Will the Real Civil Society Advocates Please Stand Up?*, 75 CHI.-KENT L. REV. 583 (2000).

McClain and Fleming, Fineman, and Roberts, laying out how *A Call to Civil Society* addresses such criticisms as the civil society-revivalists' seeming ambivalence toward rights and the liberal virtues of toleration, and their alleged insufficient attention to issues of inequality and racism. She suggests that while civil society-revivalists (such as herself) may be skeptical about turning to the federal government and to big "movement" politics for solutions to social problems, they do affirm the importance of efforts by local communities, including community organizing, to address such problems. Furthermore, she attacks Fineman's critique of the revivalists' treatment of the family, in particular, the critique of the revivalists' readiness to turn to coercive legal regulation to shore up a certain family form and their focus on family form rather than function. Elshtain suggests that moving from no-fault divorce laws to tougher divorce laws is moving from one scheme of regulation to another, not from deregulation to regulation. As to family form, she takes exception to Fineman's discussion of skepticism among feminists and social scientists concerning claims for the superiority of the two-parent family over the single-parent family. She contends that *A Call to Civil Society* does pay heed to the issue of how inequality affects families, although not as much as she herself would have liked. But to Fineman's call for public support for the caretaking work of families, which she evidently interprets as a call to subsidize women's choices, Elshtain strongly objects that this is an undesirable approach because of the harmful impact upon children in single-parent families.

In *Civil Society, Civic Virtue, and Liberal Democracy*,[25] Galston responds to questions posed to civil society-revivalists and to criticisms of some of their positions on the basis of his own views. He rejects certain positions, such as any notion that civil society is self-sustaining in the absence of the state. At the same time, responding to Tushnet, he suggests that it is an exaggeration to suggest that civil society is a creation of government or that government "constitutes" civil society. He argues, as against Fineman, that the vocabularies of economic and culture are complementary and yet she seems to take the view that the economy is the realm of the real and that the culture is epiphenomenal. He sets forth his views on the role of rights and on the various functions of civil society, along with his view that it is

25. William A. Galston, *Civil Society, Civic Virtue, and Liberal Democracy*, 75 CHI.-KENT L. REV. 603 (2000).

correct not to insist upon "congruence" between civil society and democratic virtues and beliefs. Nonetheless, he insists upon the need for some account of liberal democratic virtues suitable for a culturally and morally diverse society. Responding to Fineman's analysis of the family, he differs with her assessment of the social science evidence on family forms but argues that if we move away from empirical debate to take up the challenge of the "moral balancing involved in setting family policy"[26] (e.g., the sometimes conflicting interests of parents, children, women, and men), this has implications for optimal family law and policy. This leads him to reject Fineman's proposed shift in family policy from the state subsidizing the male-female dyad to subsidizing the mother-child dyad. He agrees with Fineman's call to look at economic issues affecting families, but concludes that this fortifies the case for the two-parent family, given its generally higher level of well-being than that of the single-parent family. Responding both to McClain and Fleming's and to Roberts' critique of his moral accounting, which appears to juxtapose gains in equality and liberty against losses in civic virtue, he restates his basic argument that fundamental changes have occurred in our public culture over the past four decades, some of them positive, others negative. Finally, he closes by appealing to public sentiment and judgment, including ambivalence about the moral condition of American society, and suggests that it is incumbent upon democratic social theorists to give such views respectful consideration, as proponents of renewing civil society attempt to do.

26. *Id.* at 607.