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# Values, Virtues, and the New American Testament

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JAMES A. MONTANYE

A sense of social and moral malaise overhangs America amidst unprecedented economic prosperity. It is reflected in popular books lamenting the nation's "death of outrage" (Bennett 1998), its "slouching toward Gomorrah" (Bork 1996), and its tendency toward "civic disengagement" (Putnam 1995 and forthcoming). The malaise is reflected also in media stories that spotlight disaffected individuals, some the victims of grinding bureaucracy, others concerned about such woes as increasing social violence (for example, school shootings and road rage) and the fish of state's stinking from the head. Suggested prescriptions for this malaise run the gamut from the inculcation of "traditional values" to a return to prayer in public schools, the use of television's V-chip and the Internet's software equivalents, and state-brokered censorship of information and entertainment.

Every generation imagines that society is descending. Ambient malaise is the background noise of society. The translator's preface to Karl Mannheim's classic treatise on the sociology of knowledge is as apropos today as when it was written in the 1930s:

It seems to be characteristic of our period that norms and truths which were once believed to be absolute, universal, and eternal, or which were accepted with blissful unawareness of their implications, are being questioned. . . . We are witnessing not only a general distrust of the validity of ideas but of the motives of those who assert them. This situation is aggravated by a war of

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*The Independent Review*, v.IV, n.4, Spring 2000, ISSN 1086-1653, Copyright © 2000, pp. 577-600

each against all in the intellectual arena where personal self-aggrandizement rather than truth has come to be the coveted prize. (Mannheim 1936, x–xi)

The relevant question, then, is whether today's malaise is objectively worse than yesterday's. Are appearances merely a product of heightened awareness; a consequence, perhaps, of increased media coverage and professional whining? The conjecture of this essay is that social and moral malaise has indeed become worse, and empirical work broadly confirms this prediction.

A derivative question asks whether the trends noted by Bennett, Bork, Putnam, and other scholars are the *cause* of the malaise (as these scholars suggest) or are merely artifacts of some other social process. The argument here is that they are artifacts; the cause lies much deeper.

The present period can be distinguished from the past by one key point: Today's prescription to remedy social and moral malaise rests, to a greater extent than ever before, on an implicit belief that every social ill can be cured painlessly and costlessly by using positive (statutory) law to fine-tune private behavior, maximize public wealth, promote fairness, and create social harmony. That this approach has proven unsuccessful so far is dismissed a priori by its proponents on grounds that positive law is fundamentally restorative; only the dosage has been wrong.

The essence of today's malaise and its prescriptive consequences are aptly characterized by a recent editorial in the *Economist*:

In its determination to be fair, America has introduced law into every corner of life: the lone consumer can get even with the biggest corporation, the lone citizen can humiliate the mighty government in court. And yet, time and again, America is nagged by a sense that the law has made life less fair, not more so: the rich know the loopholes that protect their riches, the powerful work the rules so as to amass more power. And this nagging pessimism gives rise to a lament that has gained currency recently. Perhaps America should rely less on legal codes, and more on common-sense morality. Perhaps the whole attempt to make America fair and decent by amassing written rules of conduct needs to be rethought. (*Economist*, March 8, 1997, p. 32)

Perhaps? I shall argue that the proliferation of positive law, which is deeply rooted in predatory rent-seeking (public fraud) and coercion, creates, rather than ameliorates, social and moral malaise by driving out of circulation the traditional virtues of cooperation, reciprocity, integrity, trust, and reputation—virtues that have guided civilized society for centuries and whose disappearance presently is being lamented. The problem is exacerbated, I shall argue, because the proliferation of law proceeds without careful regard to the collateral sacrifice of subjective private utility and to the public and private disutility of coercion. The resulting burden (cost) to so-

ciety is enormous, but because it is more easily felt than measured, its extent goes unrecognized by policy makers, who proceed as if a cost ignored is a cost avoided.

Ordinary individuals, on the other hand, easily recognize the burden created by the proliferation of positive law: compliant individuals increasingly are denied legitimate opportunities to build private utility; individuals choosing not to forgo those opportunities bear a substantial risk that the punitive state will take away their property (through fines or forfeitures) and liberty (through incarceration or required community service). From this double bind arises malaise rooted in disaffection, frustration, social polarization, anger, and hatred, all in the midst of economic plenty. These symptoms give resonance to, and eventually find vent through, incivility and violence (both virtual and real), which in turn create a clamor for more positive law, thereby intensifying the spiral.

Attacking social problems large and small, real and imagined, with positive law is the hallmark of what I term the New American Testament. It resembles the Bible's Old Testament in its plethora of rules and paucity of mercy, but differs from it by replacing a benevolent and wise, if vengeful, God with a venal and unwise, but comparably vengeful, state. I shall argue that today's social malaise is a consequence of America's move toward an Old Testament-style social and political structure, and that the proper remedy for it is to reduce the scope of positive law to the point where the spontaneous virtues of human nature, which were recognized by the New Testament and brought to fruition by the Protestant Reformation, can reemerge.

I begin by discussing the nexus between morality and the state and examining some ways in which quantitative thinkers (economists and others) have dealt with it. I then derive economically based definitions of *values*, *virtue*, and *moral sense* and explore religion's traditional role in promoting those concepts. Finally, I show how the New American Testament undermines traditional virtues, giving rise to social and moral malaise in the process. I conclude with some corroborative evidence and a prescriptive comment.

## Morality and the State

The allusion to religion in this essay's title emphasizes the state's arrogated role as understudy to an omnipotent God. The linkage between religion-based morality and the American state was contemplated long ago by Alexis de Tocqueville ([1835] 1988), who wondered "how could society escape destruction if, when political ties are relaxed, moral ties are not tightened" (294). Tocqueville correctly noted that political ties and moral ties are substitutes; they compete over a wide range of human activities. One implication is that political ties must be strengthened when moral ties flag; that implication underpins much of present social practice. I shall explore a more subtle implication: moral ties strengthen spontaneously when political ties are relaxed, and weaken when political ties proliferate. The dissolution of moral ties that appears

presently to be sapping the energy and degrading the quality of American society is a consequence of political ties knotted by positive law.<sup>1</sup>

Substitutability between religiously based morality and politics implies a substitutability between God and the state. The sociologist Helmut Schoeck (1966) considered this relationship by characterizing the modern state as an egalitarian deity that acts in response to the private envies of its constituency. The economist Ludwig von Mises ([1949] 1996) took a stronger view, characterizing the state as acting out of a desire to *be* God:

The terms “society” and “state” as they are used by the contemporary advocates of socialism, planning, and social control of all the activities of individuals signify a deity. The priests of this new creed ascribe to their idol all those attributes which the theologians ascribe to God—omnipotence, omniscience, infinite goodness, and so on. (151)

Both views are of a “rent-seeking” society that uses state power to capture and redistribute private wealth: Schoeck characterizes the state as an instrumentality of a rent-seeking citizenry; Mises, as an instrumentality of rent-seeking “priests” who act in the capacity of the state.

Public-choice theory teaches that both views are essentially correct (Buchanan and Tullock 1962; Buchanan, Tollison, and Tullock 1980). In Christian theology, not a single sparrow falls without God’s knowledge. Public choice shows that, in contrast, the government has no comparably benevolent incentive to concern itself so intimately with the life, death, and prosperity of its citizens. Rather, the incentive of public decision makers is to capture private benefits through a marketlike political process, wielding the state’s coercive power in God-like fashion to distribute wealth and build private utility in ways that benefit themselves and a competitively determined set of constituents (Stigler [1971] 1975; McChesney 1987, 1997). Statutes and administrative regulations represent enforceable, long-term contracts between public decision makers and private factions (Landis and Posner 1975). The inescapable consequence of these political dynamics is long-run economic decline (Olson 1982), preceded, predictably, by increasing social and moral malaise.

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1. The political scientist Robert Putnam (1995) caused a stir among both conservatives and neoliberals by noting correlations between civic participation and “good government.” Putnam’s hypothesis is that “membership in horizontally ordered groups (sports clubs, cooperatives, mutual aid societies, cultural associations, voluntary unions) should be positively associated with good government.” Conversely, “membership rates in hierarchically ordered organizations (the Mafia, the Catholic Church) should be negatively associated with good government” (Putnam 1993, 175). Notice, however, that government itself is a hierarchal organization. Putnam thus hypothesizes, in effect, that reliance on government for civic virtue (strengthened political ties) is deleterious to good government, whereas cooperative social activities (strengthened moral ties) are conducive to it. This interpretation of Putnam’s thesis is consistent with the argument of the present essay.

No competing theory of political economy surpasses this overarching view in its explanatory and predictive power. Perhaps the closest contender is a “theory” of government failure rooted in ignorance and mistaken good intentions. But theories of this sort are empirically empty: They are not just nontestable; they can be invoked to explain almost any alleged failure of governance. When “mistaken” policies are repeated and their consequences permitted to persist, positive theory and common sense require that they be analyzed as if their outcomes had been intended (Stigler [1971] 1975, 140).

The modern state has assumed Godlike powers and responsibilities that transcend the classical political goals of protecting life, liberty, property, and the pursuit of happiness and of providing a narrowly defined set of economic public goods. It presently pursues social engineering programs at will, especially those that are highly visible and readily quantifiable (Wilson 1989). It does so, moreover, in abject disregard of forgone private utility, which lies below the surface of visibility and defies quantification, and therefore is easily ignored.

### **Ethics and Economics**

Professional economists, qua economists, no longer discuss public issues in moral terms, as Adam Smith ([1759] 1969) and others once did, and so they largely have abandoned this ground to professional philosophers, freelance moralists, and politicians. Not even welfare economists, whose work “must ultimately dissolve into a study of aesthetics and morals” (Coase 1960, 43, citing Frank Knight), take up the metaphysical aspects of their work. By their silence, economists are missing an opportunity to further the understanding of society’s moral quandary.

Economists have at least two practical reasons for this abstention. They, like philosophers generally, accept that moral principles cannot be derived from factual premises; that is, what ought to be cannot be derived from what is (Hume [1739] 1969). In this regard, Immanuel Kant ([1785] 1987) refined David Hume’s insight, concluding that moral principles are a priori and emanate from an “intelligible” world that is fully separate from the “sensible” (quantifiable) world of everyday experience. Kant’s views are so deeply ingrained in contemporary thinking about morality as to be taken for granted. The political theorist James Q. Wilson (1993), for example, recently asserted without elaboration that “morality has no basis in science or logic . . . no rational foundation can be given for [moral] judgments” (xiii–xix). Conventional thinking thus promotes moral principles as public “credence goods”—public goods whose qualitative aspects are not objectively verifiable—by placing their foundations beyond the reach of empiricism and in so doing perpetuating Kant’s claim that empiricism is fatal to moral inquiry. Empiricism, however, is the *sine qua non* of modern economics (Friedman 1953). Moral issues therefore are well shielded from the attention of professional economists.

Economists, moreover, regard values and virtues as intertwined with subjective private utility. Economic theory explains all human action in terms of the individual's desire to maximize his own uniquely conceived good (Mises [1949] 1996). Modern economics admits, however, that private utility escapes cardinal quantification and is not otherwise commensurable. Positive economics is stymied once again by the intrinsic nature of morality.

Nevertheless, a few economists have made niche contributions to the literature of moral inquiry. James Buchanan (1994) argues that private behavior and public policies are ethical so long as they expand the scope of the market process, and thereby increase the potential for specialization and division of labor, which is limited by the extent of the market (Smith [1776] 1976). Gary Becker (1976) has shed light on the rational foundations of altruism. William Baumol (1987) and Edward Zajac (1995) have contributed to the understanding of "fairness." And Amartya Sen has generated a thick literature of insights and criticisms, building an Aristotelian middle ground between the excesses and deficiencies of competing ideas. Otherwise, economists have tended to focus on the empirical consequences of public policies, leaving professional philosophers, such as Bertrand de Jouvenel ([1952] 1990), to comment on their ethical implications. For the layman, morality remains a normative exercise rooted in a private sense of his own dignity and the importance of his own desires and preferences.

A few scholars pursue moral questions within a quantitative framework (Hamlin 1996). Some may feel compelled to consider the moral dimension of welfare economics; others may simply take courage from Aristotle's view of the limitations of ethics and politics:

[A] well-schooled man is one who searches for that degree of precision in each kind of study which the nature of the subject at hand admits. . . . [He] should not require precision in all pursuits alike, but in each field precision varies with the matter under discussion and should be required only to the extent to which it is appropriate to the investigation. (Aristotle [n.d.] 1962, 5, 18)

Distinguishing between the private activity (rational preferences) and public activity (moral duty) nominally allows "moral" issues to be defined and analyzed in terms of social-welfare maximization. This approach narrowly satisfies Kant's criterion for "objective" moral principles; that is, it specifies the choice of moral individuals who have control over their will, and it also specifies the choice that nonmoral individuals *ought* to make. However, it contributes little to the theory of morality apart from illuminating the potential for public-private conflict whenever morality is invoked as a constraint on private interest.

The nexus between the private and public spheres of activity typically is illustrated using the "prisoner's dilemma" problem of mathematical game theory (Hamlin

1996). The setting is as follows: each of two prisoners will be sentenced to, say, a year in jail on a lesser charge if neither confesses to a more serious charge; each will receive a five-year sentence if both confess to the serious charge. If one prisoner confesses (implicating the other) and the other does not, then the confessor is set free and the silent partner serves ten years. A dilemma arises because private rationality dictates that each prisoner confess in the expectation of freedom, but confession makes each prisoner worse off than he otherwise might be.

The ostensibly moral solution to this dilemma is for each prisoner to act in the way that minimizes the total amount of incarceration time for *both* prisoners, who collectively constitute a “society” of two. The relevant numbers in this context are two years total for not confessing, and ten years total for any combination of confessing. The “moral” choice, then, is bilateral silence (assuming that each prisoner attaches the same relative importance to his own freedom). This choice maximizes their “social” welfare, despite producing potentially avoidable jail time for one of them.

Notice, however, that “morality” in this illustration is cast as a normative maximand: What is globally moral about engineering the early return of felons to civil society? Who decides the scope of morality in such contexts? And by what “moral” criteria are such decisions to be reached? Compound problems of “aesthetics and morals” remain unavoidable. Moreover, morally neutral work in game theory has established that prisoner’s dilemma-type problems can sort themselves out spontaneously (Axelrod 1984). The allegedly moral outcome of this example is routinely achieved, not through the application of moral philosophy and economic reasoning, but through a single, spontaneous internalizing force: the fear of retribution for snitching. Fieldwork similarly has shown that efficient solutions to real-world social problems are found routinely by private individuals’ “developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements” (Ellickson 1991, 4). “Moral” issues appear in this light to be a philosophical distraction rather than an empirical social problem requiring solution.

Nevertheless, the notion that parameters of “moral” governance might be established quantitatively has encouraged the modern state to try. These attempts often resemble pursuit of production of “the greatest good for the greatest number.” The inherent problem with so-called moral governance of this sort is deciding what to do about those individuals who find themselves among the lesser number whose rights and interests are sacrificed in the name of some greater good. Several alternative rationalizations have been proposed. One has “winners” compensating “losers” for their sacrifice. Another assumes every individual to be an occasional winner so long as the state pursues enough disparate policies; that is, it assumes the burdens and benefits of moral governance to be distributed fairly in the long run by the law of large numbers. The cavalier, and increasingly popular, solution is simply to assert that the prevailing distribution of wealth and utility is morally indefensible because it is to some extent randomly determined by nature, thus making involuntary private sacrifice in the name



of some greater social good an acceptable burden of citizenship. Each of these rationales tacitly presumes that public action increases aggregate social welfare along some important dimension, for example, by increasing aggregate social wealth or by decreasing aggregate malaise. But the choice of maximand here too is inherently normative. Once again “aesthetics and morals” present an unavoidable barrier. Another approach is needed.

## Values, Virtues, and Moral Sense in an Economic Perspective

Mindful of Aristotle’s dictum about the limits of a method of inquiry, I proceed by deriving, within an economic framework, consistent definitions for two moral concepts, *values* and *virtues*. I define these concepts separately, thereby breaking with the current convention of treating *values* as “a code word for virtue or morality” (Wilson 1993, x). I then employ these concepts as constituent elements of *moral sense*. Although the framework is essentially economic in nature, it also incorporates insights gleaned from sociobiology and other disciplines that lie outside the mainstream of economics and moral philosophy.

### *Values and Value Systems*

Values represent tastes and preferences. They are the sometimes complementary, sometimes competing alternatives that individuals pursue in a rational attempt to maximize their private sense of satisfaction (private utility). A *value system* is the subjective ranking of values, that is, the assignment of a relative weight to every value that can be satisfied through private choice. This ordering is necessitated by the limitation of resources (time, information, abilities, wealth) that imposes a binding constraint on the individual’s total private utility.

### *Virtues*

Virtues are the strategies used to realize a value system and, thereby, to maximize private utility. “Traditional virtues,” which include cooperation (Axelrod 1984; Ridley 1996), reciprocity (Becker 1986), integrity (Carter 1996), trust (Harrison 1992; Fukuyama 1995; Putnam 1995; cf. Williamson 1993), and reputation (Klein 1997), arise spontaneously in circumstances where no individual’s existence imposes any affirmative obligation on anyone else. Autonomy in this setting gives spontaneous rise to a social system held together by virtuous behavior.

Practicing the wrong virtues in a harsh environment impairs the individual’s prospects for survival and reproduction. In a wealthier and more diverse environment, faulty virtues merely constrain the individual’s total utility below its achievable maximum. Knowingly practicing the wrong virtues is self-penalizing in either situation,

and so constitutes irrational behavior. Virtuous behavior in this sense is its own reward (Sade [1778] 1964).

The individual's value system influences his choice of virtues. Although this linkage implies that the individual's value system can be traced by observation of his actions, the individual is free to confound observation by acting deceptively in order to gain strategic advantage. The economist Gary Becker's (1976) "rotten kid," for example, games the social system by behaving *as if* he has internalized the values and virtues taught by his parents; Becker calls such behavior "simulated altruism." Strategic behavior of this sort is virtuous by definition so long as it promotes private utility, even though its overtones are negative and by conventional standards it may be judged "immoral." Sociobiologists argue that evolution favors such behavior because it increases prospects for both individual survival and the long-run survival of the species (Ridley 1993, 1996).

Simulated altruism is a virtue, but altruism per se is a value that individuals treat as they would any other value. Altruism-like behavior, sometimes termed "reciprocal altruism" or "symbiosis," also is not a virtue, but rather a consequence of virtuous behavior that coincidentally benefits others as well as the individual. Altruism-like effects are produced by virtuous behavior even though no party is either pursuing altruism as a value or simulating it for strategic advantage. A concerned moralist may be unable to distinguish between purely altruistic acts, coincidentally beneficial acts, and acts undertaken strategically in the expectation that they will contribute to private utility over time.

Unalloyed selfishness also is not a virtue (pace Nietzsche and others). Individuals who pursue their self-interest selfishly quickly discover that the maximization of long-term private utility involves exchanging something of value in order to get something of greater subjective value. Children discover this trade-off in the course of play (Wilson 1993), and adults rediscover it when dealing with tougher issues and higher stakes (Ellickson 1991).

### *Moral Sense*

One seeming implication of the prisoner's dilemma model is that moral (virtuous) behavior necessarily constrains private utility. This is broadly consistent with the practice of venerating, as moral, private conduct that entails unselfish personal sacrifice. Of course, such behavior is easily characterized less charitably as foolish, reckless, and even pathological, and it is in this sense that biologists once argued that altruistic behavior is irrational (Wilson 1975).

Equating morality and virtue with private sacrifice is wrong in principle. The privately beneficial aspects of virtuous behavior were first demonstrated experimentally by the political scientist and game theorist Robert Axelrod (1984). Axelrod showed the inherent incentive of individuals to enter social relationships with a

spirit of cooperation and reciprocity, and to expect that others, also acting out of self-interest, will do the same. A similar argument has been made by the philosopher Lawrence Becker (1986), who characterizes reciprocity as the virtue that causes individuals to act cooperatively. No fundamental conflict exists between private interest and public (moral) duty in this context. Indeed, these virtues are now believed to compose the dominant social strategy of nature. Chimpanzees, for example, keep accurate account of who owes whom a grooming, and they respond to shirkers through ritualized acts of moral aggression, such as stigmatizing and temporary refusals to deal (Dawkins 1989; Rothschild 1990; Ridley 1993, 1996).

This is not to argue that rationality causes individuals to behave genteelly all of the time. Permanent advantage can be gained by defecting selectively from the expectation of cooperative behavior (Williamson 1993). Sociobiologists argue that the human brain has evolved to its present state largely for engaging in opportunistic behavior and for detecting similar behavior in others (Frank 1988; Dawkins 1989; Ridley 1996). Consequently, prudence, wisdom, skepticism, cynicism, and the use of contracts must be regarded as practical virtues. The cost of practicing these virtues is the cost of a Type II error; that is, mistakenly forgoing, on occasion, bona fide opportunities to build private utility. Conversely, the cost of not practicing these virtues is the cost of a Type I error; that is, pursuing fraudulent “opportunities” that are indeed too good to be true. A utility-maximizing individual seeks out the cost-minimizing balance between these extremes, being neither too cautious nor too trusting. It follows that the achievable level of total private utility necessarily is lower than the level that could be achieved in the absence of low cunning.

Some scholars argue against this conception of morality, claiming instead that moral sense is culturally determined and static over time (Fukuyama 1995). Morality, by these lights, defies rational understanding because culture itself is “arational” (325). Inspection reveals, however, that moral sense does change rationally over time in response to changing circumstances. The adaptability of virtues commonly referred to as “family values” is particularly apparent. David Hume (1751) was among the first to note that private utility, rather than the formal values imparted by church, state, and clan, determines the form and function of the family (Wilson 1993). The economists Robert Fogel and Stanley Engerman similarly observed that family values among African-American slaves were situational:

While both moral convictions and good business practices generally led planters to encourage the development of stable nuclear families, it would be a mistake to assume that the black family was purely, or even predominantly, the creation of white masters . . . there is considerable evidence that the nuclear form was not merely imposed on slaves. Slaves apparently abandoned the African family forms because they did not satisfy the needs of blacks who lived and worked under conditions and in a society much different from

those which their ancestors experienced. The nuclear family took root among blacks because it did satisfy their needs. (Fogel and Engerman 1989, 142–43)

The contrary, “cultural” view of moral sense appears to rest on casual observation of isolated societies. The political theorist Francis Fukuyama (1995) bases his argument on two observations: the culture of Chinese peasants has remained essentially unchanged for millennia, and it has resisted recent government efforts to change it. However, when peasant culture is compared with that of Chinese entrepreneurs (a social class that emerged after social and economic liberalization began in the late 1970s), it is apparent that adaptation has indeed occurred. The incidence of divorce, for example, has increased markedly. Fukuyama’s second observation, that Chinese culture has resisted government-initiated change, is consistent with the predictions of the theory offered here: Change occurs *only* when it enables individuals to achieve higher levels of private utility. It is unsurprising, therefore, that the state’s attempts to impose arbitrary virtues by fiat have produced little of the intended effect: privately beneficial virtues hardly need be imposed at gunpoint.

### Values, Virtues, and the Role of Religion

Value systems differ among individuals, but a common core of virtues comes into play whenever the self-interests of free individuals are interdependent. It is more efficient for individuals to be instructed in the practice of these virtues than to discover them piecemeal through costly trial and error. Consequently, it is not surprising to discover that basic virtues are taught systematically by all cultures as part of the socialization process (Bennett 1993, 1995, 1996).

One rule of thumb for teaching virtue is the Golden Rule. This rule, which appears in all great religions and cultures, instructs individuals to maximize private utility by “doing unto others as we would have them do unto us.” A “silver” rule—a negative reformulation of the Golden Rule, which overcomes information limitations—teaches that we should *not* do unto others those things that we would *not* want them to do unto us. The gravamen of these rules is that private utility is maximized in the long run when individuals regard others with the same dignity with which they regard themselves. Kant reformulated this essence as a religion-free “categorical imperative” that instructs individuals to act *as if* their actions would become universal law. The logical contradiction between private and public behavior to which Kant’s rule pertains also makes the economic case against free riding: If everyone is a free rider (if everyone acts immorally), then ultimately there will be nothing for anyone to ride (the concept of morality becomes empty). Kant’s rule thus provides both a positive and a moral foundation for virtuous behavior; both an *is* and an *ought-to-be*.

The Ten Commandments of Judeo-Christian religion modulate these overarching generalizations into specific rules (virtues) about honoring parents and eschewing murder, theft, adultery, perjury, envy, and other, more superficially attractive systems of val-

ues and virtues (“false gods”). Those rules arose spontaneously in response to the harsh realities of life in ancient times (Mannheim 1936); life in the absence of such rules would have been (and sometimes was) a truly Hobbesian state of Hell.

Although each of the great religions and cultures teaches similar virtues, the ideologies that transport these virtues vary. The Old Testament teaches, among other things, the virtues of diet and sanitation. Confucian-Taoist teachings stress as virtues education, courtesy, merit, discipline, punctuality, work, planning, and frugality. Buddhism teaches the renunciation of many worldly values, and thus it offers a fundamentally different path to private utility maximization. The privately preferred ideology is dictated by the individual’s value system.

Rabbi Hillel famously asserted that ideology is merely commentary, but that assertion is wrong. Old Testament ideology is built around voluminous rules and merciless punishment that constrain the scope of individual choice. New Testament ideology, by comparison, promotes an open-ended culture of forgiveness, flexibility, and cooperation. Shakespeare’s play *The Merchant of Venice* (1596) is a classic tale of conflict between these two ideologies. Shylock, an Old Testament moneylender, offers onerous contract terms (a “pound of flesh”) to his Christian debtor, Antonio. He then petitions the court to enforce this contract, despite a settlement offer by Antonio that apparently would make all parties better off. Shylock’s preoccupation with rules and vengeance becomes his undoing when the court orders him to take exactly one pound of flesh, no more and no less, and to inflict no other harm in the process. Recognizing the impossibility of contract performance, the court finds Shylock guilty of contemplating murder and, as punishment, declares his wealth to be forfeit, save that he may retain a portion of it by converting to Christianity, that is, by adapting to the practice of modern morality.

The virtues of Shakespeare’s time were evolving out of the Reformation’s philosophy of living life and serving God without arbitrary interference from church and state. These virtues, whose arrival paralleled the evolution of private property rights (Pipes 1999), rationalized the human propensity to truck and barter and therefore were enormously profitable, both to individuals who practiced them and to governments that tolerated them. Their usefulness was so great, in fact, that they outlasted the religious passions that spawned them. And yet many scholars, including Max Weber ([1905] 1930), mistakenly attribute the success of Protestantism entirely to the private desire to serve God. Such attempts to reconcile God and mammon turn a blind eye to reality.

Old Testament doctrine taught virtues appropriate to nomadic tribal life in a harsh and homogeneous environment (for example, keep your thoughts and hands off your neighbor’s wife, and don’t eat pigs). The New Testament, in contrast, rationalized the evolution of virtues better suited to a heterogeneous, cosmopolitan life in which many social obligations were incompletely defined. The medieval (Catholic) Church repressed for centuries the New Testament’s potential for utility maximization and wealth

creation, preaching instead an egalitarian system of values and virtues that constrained private utility while, not coincidentally, benefiting the Church itself. The Reformation was, above all else, a rebellion against the restrictive doctrines of a church that operated as a profit-maximizing monopoly (Ekelund and others 1996). The Church continued preaching restrictive doctrine long after the Reformation's seed had reached fruition, as generously demonstrated by the 1894 papal encyclical *Humanum Genus*, in which Pope Leo XIII condemned the liberal virtues of Freemasonry:

Naturalists teach that men have all the same rights, and are perfectly equal in condition; that every man is naturally independent; that no one has a right to command others; that it is tyranny to keep men subject to any other authority than that which emanates from themselves. Hence the people are sovereign; those who rule have no authority but by the commission and concession of the people; so that they can be deposed, willing or unwilling, according to the wishes of the people. . . .

Once grant that men through God's will are born for civil society, and that sovereign power is so strictly necessary to society that when this fails society necessarily collapses, it follows that the right of command emanates from the same principle from which society itself emanates; hence the reason why the minister of God is invested with such authority. Therefore, so far as it is required from the end and nature of human society, one must obey lawful authority as we would obey the authority of God, supreme ruler of the universe; and it is a capital error to grant to the people full power of shaking off at their own will the yoke of obedience. (Reproduced in Robinson 1989, 352–54)

The Reformation freed Christians from arbitrary hierarchial restraints (political ties), thereby enabling a spontaneous evolution of the superior virtues and social structures (moral ties) that evolved from New Testament ideals. The United States was built on these virtues. Its historical discrimination against Catholics was intended to prevent a return to the ways that existed in medieval Europe before the advent of enlightenment and reason.

America's founders, for the most part, did not apprehend Protestantism's success as attributable to the power of spontaneous virtue. Rather, they considered belief in God to be the sole guarantor of an honest and prosperous society, as evinced by Article 3 of the 1780 Massachusetts Constitution:

As the happiness of a people, and the good order and preservation of civil government, especially depend upon piety, religion, and morality: and as these cannot be generally diffused through a Community, but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore to promote their happiness and to secure

the good order and preservation of their government, the people of this Commonwealth have a right to invest their Legislature [with authority to provide for mandatory church attendance and support of churches from public funds]. (Quoted in Smith 1995, 19–20)

Pennsylvania's constitution similarly sought to guard against venal and immoral government by requiring officeholders to believe in the New Testament's "future state of rewards and punishments."

### The New American Testament

Tocqueville and Weber, like many commentators before and since, give short shrift to the importance of spontaneous human virtue, both by underestimating its role in creating happiness and prosperity and by failing to recognize that no visible hand is needed to cement it in place. Strengthening political ties through the proliferation of law—that is, substituting political ties for moral ties—not only weakens moral ties but also undermines the process by which happiness and prosperity are created. The proliferation of positive law, in this light, is a "mistaken" public policy whose unintended consequence is social and moral malaise. But simply characterizing this political trend in terms of "mistaken good intentions" is insufficient. The American moral tradition encourages individuals to correct mistakes in the course of pursuing private utility. The presence of systemic and persistent malaise indicates that America's traditional virtues no longer work, that they are being displaced by different virtues. A positive theory of this process is needed. I shall argue that the present malaise is an artifact of public policies—and of the foul virtues they spawn—that are intended to benefit politically influential groups, including politicians and bureaucrats, at the expense of everyone else.

The Protestant Reformation was a rebellion against bureaucratic restrictions that constrained private utility. The New American Testament, in contrast, encourages individuals to build private utility by gulling and coercing fellow citizens through the bureaucratic and benevolent-sounding machinations of "deliberative democracy." Force and fraud emerge spontaneously in this environment as privately rational virtues, despite their being socially wasteful (Bhagwati 1982). The virtues of cooperation, reciprocity, integrity, trust, and reputation lose currency as they become increasingly irrelevant to the pursuit of private utility. Altruism-like effects disappear as one individual's gain becomes another's loss. Society's present winners are those individuals whose virtues are best suited to the competition for rent-seeking spoils.<sup>2</sup> Private success of this sort engenders in others feelings of

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2. *Editor's note:* Precisely such conditions inspired James Madison's advocacy of the United States Constitution in January 1788, when he wrote: "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. "The Federalist No. 44," in *The Federalist* (New York: Modern Library, n.d.), 291.

frustration, disaffection, envy, anger, and hatred; in sum, all of the constituent elements of social and moral malaise.

Moral governance is expected to promote private wealth and utility. Political ties, on the other hand, foster virtues that undermine those ends. Moral governance would promote policies that render force and fraud worthless as virtues, but strengthened political ties have caused American government to expand the environment in which those virtues flourish. The New American Testament represents a fundamental departure from traditional virtues that no amount of corrective law can restore.

The French essayist Fredric Bastiat ([1850] 1996) argued that the legitimacy of any government action can be ascertained by asking whether it would be deemed illegal or immoral if performed by a private individual. Thomas Jefferson, writing in the Declaration of Independence, argued that government derives its just authority from the consent of the governed, a principle that goes back at least to the Roman law of consent. The legitimate power of the state, in other words, cannot rise above the private rights of its citizens, and citizens collectively cannot confer upon government any power (rights) that they do not possess as individuals. The concept of legitimate government thus is consistent with the virtues of voluntary cooperation and exchange. A government whose policies drive those virtues out of circulation fails, by every useful standard, to provide moral governance.

James Madison's constitutional structure anticipated the potentially adverse consequences of strengthened political ties. He reasoned that "the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of constituents" (letter to T. Jefferson, reproduced in Schwartz 1980, vol. 3, p. 616). Madison referred to those constituents, in "The Federalist No. 10," as factions:

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community. . . . The regulation of these various and interfering interests forms the principal task of modern legislation. (Hamilton, Madison, and Jay [1787–88] 1961, 78–79)

Madison further explained, in "The Federalist No. 51," that his constitutional structure would check the power of factions by causing "ambition . . . to counteract ambition" (322), thereby minimizing the potentially deleterious consequences of strengthened political ties.

Hindsight reveals that Madison underestimated the resourcefulness and resilience of factions. (He also failed to anticipate the Fourteenth Amendment, which has



weakened the Tenth Amendment's reservation of decision-making power "to the states respectively, and to the people," and which, contrary to the framers' design, has concentrated legislative and judicial power in Washington.) The law Professor Richard Epstein succinctly characterizes the present state of the Union:

The state can now rise above the rights of the persons whom it represents; it is allowed to assert novel rights that it cannot derive from the persons whom it benefits. Private property once may have been conceived as a barrier to government power, but today that barrier is easily overcome, almost for the asking. . . . Under the present law the institution of private property places scant limitation upon the size and direction of the government activities that are characteristic of the modern welfare state. (Epstein 1985, x)

The co-option of state power for private benefit is not a new phenomenon, of course. Individuals and factions for centuries have achieved, through state action, private blessings that were more costly, if not impossible, to achieve cooperatively. Shakespeare, in *The Merchant of Venice*, unwittingly anticipated the rhetoric of rent-seeking when he explained Shylock's antipathy toward Antonio: "I hate him for he is a Christian; But more for that in low simplicity, he lends out money gratis and brings down the rate of usance here with us in Venice" (act 1, scene 3). Church doctrine nominally forbade Christians, such as Antonio, to charge interest. Nevertheless, economic history teaches that local interest rates generally *rose* after Jews were expelled, a clear indication that Christian merchants rid themselves of economic competitors by perpetuating myths that made the use of coercive church-state power inevitable.

The *laissez-faire* virtues taught by Adam Smith ([1776] 1976) and others during the eighteenth-century Scottish Enlightenment (which was linked to the Reformation through Scottish Presbyterianism) diminished rent-seeking of that sort. They also presaged, by a few decades, the emergence in Europe and America of the mythical, romantic, and highly exaggerated virtues of chivalry (honor, valor, loyalty, fair play, etc.) first popularized in Thomas Malory's book *Morte d'Arthur* (1485). These confectionery virtues lay at the core of the nineteenth-century literature authored by the likes of Walter Scott (ca. 1810–20) and Alfred Lord Tennyson (ca. 1830–40), and they were specifically taught in such applied works as Robert Baden-Powell's 1908 book *Scouting for Boys* (Girouard 1981). They remained in vogue until shortly after the First World War, to which their romance arguably contributed. They were displaced in Europe and America after the war by the growing sympathy for socialism and social engineering that arose out of chivalry's sense of noblesse oblige, a misbegotten virtue that is disparaged today as "the vision of the anointed" and "the quest for cosmic justice" (Sowell 1995, 1999).

The New American Testament reflects a continuing trend away from the robust virtues of *laissez-faire*. Contemporary virtues, which enable individuals once again to

build private utility by means of fraudulent and coercive state action, reflect society's transportation "back to the future." Parables of the New American Testament, which are preached from the pulpit of public primary and secondary schools (Lott 1990; Sowell 1993) and reinforced by the popular media's need to simplify and satisfy, once again teach such fashionable nonsense as the deleterious effects of free trade; the greed, adverse power, and failure of unregulated markets; the hellish evil of private property; the implausibility of objective truth; and the Godlike benevolence of the state. Individuals who reject these teachings on grounds of fact, reason, morality, and legitimate self-interest increasingly are constrained by positive law to accept them anyway.

The New American Testament is rationalized, if only superficially, by the notion that "moral" governance implies not only uncompensated private sacrifice in the name of some greater good but also the state's obligation to maximize aggregate social wealth or, alternatively put, to maximize some measure of economic efficiency. This rationale begs the question, Why should the state pursue pecuniary wealth maximization when its constituents maximize subjective private utility, of which wealth per se is only a part?

James Q. Wilson (1989) offers one plausible answer wrought of bureaucratic incentives: Public wealth is readily quantifiable, and therefore provides a useful indicium of the state's power and effectiveness while simultaneously shielding politicians and bureaucrats against objective criticism. Private utility, by contrast, is invisible and not directly quantifiable, and therefore easily ignored (indeed, sacrificed). Economists, on the other hand, think naturally in terms of maximizing wealth and economic efficiency. The father of modern law and economics, the economist Ronald Coase, once argued that "the economic problem . . . is how to maximize the value of production," concluding that "it would therefore seem desirable that the courts should understand the economic consequences of their decisions and should, insofar as this is possible without creating too much uncertainty about the legal position itself, take these [economic] consequences into account when making their decisions" (Coase 1960, 15, 19). But Coase also acknowledged that a program of social engineering (based on Pigovian taxes and subsidies) intended to maximize the value of production "in its widest sense" (that is, in terms that encompassed private utility) "would require a detailed knowledge of individual preferences and I am unable to imagine how the data needed . . . could be assembled" (41). Coase concluded that any such pursuit would simply create a potential for political mischief. These cautions unfortunately have been forgotten, or willfully ignored, by policy makers, as have other cautions to the effect that the proper task of judges is simply to apply the law as legislated (Bork 1990; Sowell 1999).

Richard Posner, a federal judge, scholar, and influential standard-bearer of the technocratic "law and economics" school, offers a less circumscribed rationale for maximizing society's pecuniary wealth: "The things that wealth makes possible—not only or

mainly luxury goods, but leisure, comfort, modern medicine, and opportunities for self-expression and self-realization—are major ingredients of most people’s happiness, so that wealth maximization is instrumental to utility maximization” (Posner 1998, 16). This broad rationalization of the public-wealth fetish fails to recognize that wealth maximization entails a trade-off between wealth and all the other private values that are sacrificed when pecuniary wealth is the normatively chosen maximand. Other values in the individual’s utility function may well be unquantifiable and incommensurable, but they nevertheless have objective reality for the individual, and their sacrifice in the name of social wealth maximization, or of the attainment of any other “greater good,” imposes real burdens. Burden is avoided *only* when the law protects every individual’s “unalienable” right to pursue his unique conception of the good, constrained only by the right of every other individual to do likewise. This right, at bottom, reflects the moral essence of Kant’s categorical imperative. It also forms the basis for economists’ positive conception of ethics in market terms (Buchanan 1994). Protection of this right, as described by John Locke ([1690] 1953) and Thomas Jefferson (in the Declaration of Independence) and as implemented by America’s founders in the Constitution, is the primary duty of the state. Moral empiricism is unnecessary to this task. The state need only keep the channels of cooperation and voluntary exchange open and provide a limited array of public goods.

Policies inspired by the misuse of “law and economics” principles have greatly expanded the state’s decision-making role. The law professor Guido Calabresi (1970) was among the first to argue that an ounce of positive law is worth a pound of common law. The legal system, in Calabresi’s view, can prevent accidents, and thereby increase social wealth, by prescribing some activities and proscribing others *ex ante*, hence reducing the use of law *ex post* to assess tort liability. Economically “efficient” sanctions, which tap into human rationality by incorporating such variables as the probabilities of detection, apprehension, and conviction, now are used routinely to promote compliance with law, both by “sending a message” about the seriousness of intended enforcement and by providing the pecuniary incentive for private parties to seek civil judgments against individuals who run afoul of vaguely defined laws (Posner 1998; Sowell 1999).

This facet of the New American Testament seems too good to be true, and of course it is. In at least three ways, the present misuse of “law and economics” deepens social malaise. First, as always, the burden of forgone private utility is ignored. Any scheme that focuses on quantifiable benefits while ignoring costs (or, occasionally, vice versa) is bound to appear attractive (though certainly not economically efficient), particularly to a bureaucracy whose performance is gauged by quantifiable results. Speed limits, for example, are predicated on the observable benefits of reducing highway fatalities at the margin, but they ignore the value of private wealth and utility sacrificed because of increased travel time for all commuters. Gun-control proposals focus on the obvious costs of gun violence while

ignoring the overall reduction in serious crime (which must be, and has been, demonstrated statistically) that results from widespread gun ownership (Lott 1998). Public policy in these cases and others is driven by whichever side of the political argument is most easily quantified.

Second, the costs and benefits of alternative social policies are incommensurable, and thus provide no unique basis (empirical, moral, or otherwise) for trade-offs between them. How, for example, should the benefits of fewer traffic fatalities be balanced *de jure* against the costs of increased travel time? No unambiguous calculus exists, and arbitrary trade-offs yield utility-reducing results (except by coincidence). Congress presently avoids the incommensurability problem by decreeing, in Kantian and Godlike fashion, that its “moral” choices for such things as air quality are neither predicated on, nor to be officially second-guessed by, empirical analysis—not even where it is feasible to do so.

A third explanation for the adverse social consequences of “law and economics” practice is that factions predictably have hijacked for private benefit its well-intentioned ideals. Public policies increasingly provide a lottery ticket with enormous pay-offs to rent-seeking politicians, bureaucrats, consultants, trial lawyers, and conniving plaintiffs. The resulting explosion of litigation, penalties, and pecuniary settlements has been, and continues to be, enormously wasteful (Huber 1988; Olson 1991). The recent tobacco industry “settlement” is only the most egregious case of political wealth extraction and redistribution, the burdens of which will be shouldered by ordinary Americans for years to come while a few successful rent-seekers acquire unfathomable riches as a result. A predictable collateral consequence of “law and economics” is the diminishing public respect for both economics and the legitimate rule of law (Huber 1991).

## Back to the Future

The New American Testament purports to be rooted in precepts of moral governance and, to a lesser extent, in America’s reliance on and devotion to God. Inspection reveals neither justification to be warranted. “Morality” has become code for rent-seeking cloaked in the rhetoric of maximization, which itself is rationalized by the fatal conceit that legislation can overcome—at negligible cost—private rationality, biological imperatives, and every wrinkle in the fabric of everyday life. The nation’s avowed devotion to God similarly has become a shibboleth for factions whose value systems assign relatively great weight to certain aspects of religious ideology (Kramnick and Moore 1997).

The theory of this essay predicts the displacement of America’s traditional virtues. Casual empiricism confirms this prediction: The growing extent of public coercion and the frequent resort to private violence themselves speak volumes. The theory also predicts a diminished role for religion as teacher and reinforcer of traditional virtues, a prediction borne out by empirical evidence. Annual surveys conducted by the

Princeton Religion Research Center (for example, 1996, 1–3) show that Americans are substantially less likely today to regard religion as “relevant” and “important in their own lives” than they were forty years ago, a pattern of decline that parallels the declining importance of traditional virtues. The theory also predicts that the nature of, and participation in, civic organizations would change in response to the declining relevance of traditional virtues, a prediction confirmed resoundingly by the work of Robert Putnam (1995 and forthcoming) and Everett Carlil Ladd (1999), which documents the shift in civic participation away from humanitarian social organizations (for example, the Elks) and toward organizations that engage to a greater extent in political action (for example, the Sierra Club). Where individuals once might have joined together spontaneously, say, for a community barn-raising, they appear increasingly to be joining organizations that lobby the government to build the barn for them, on confiscated private land, using tax dollars, and then to transfer to them the property rights in the finished project. Correlations of the foregoing sort do not prove causality to the satisfaction of every empiricist, but they are richly suggestive.

Finally, the theory predicts that the ambient malaise of American society is greater today than it used to be. No direct test of this prediction is possible at present, because the available data are spotty, ambiguous, and inconclusive. However, the prediction is confirmed indirectly by the evidence cited previously. Empirical work in this area is likely to improve as empiricists are attracted to the theoretical work of Putnam and others.

Traditional virtues cannot be reinvigorated by means of positive law, compulsory religious practice, and normative “moral absolutes” proffered as public credence goods. Virtues are a consequence of individual tastes and preferences, and they reflect what works for building private utility. They cannot be imposed by fiat in the pursuit of arbitrary social agendas, normative notions of civic virtue, and the asserted importance of “social capital.” If society doesn’t like the virtues that it sees being practiced, then it must relax political ties so that other virtues—presumably more “moral” and productive, and therefore qualitatively more desirable—can emerge. If society is unwilling or unable to take this step, then it must accept disaffection, frustration, anger, hatred, and violence—and the malaise they engender—as the uncompensated cost of political folly.

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**Acknowledgments:** Helpful comments by the editor and an anonymous referee are acknowledged. The usual disclaimers apply.