

# MARKETS, LAW, AND DEMOCRACY

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What passes for a market economy in many of the countries that abandoned communism in the last decade has offered a sorry spectacle: In Russia, it has produced few material benefits for the majority of citizens. Their levels of health care, life expectancy, education, and economic security have all declined. In China, the transition to a freer economy has produced some striking material gains, in part because the starting point was so low and in part because a ruthless suppression of political liberties has underwritten a measure of social stability and order. Russia and China may be cited as models of bandit and tyrant capitalism, respectively. Of the smaller states that have emerged from the wreckage of the Soviet empire, few have been unqualified successes, and most have been plagued to some degree with the bandit mentality that afflicts Russia in a more extreme form. Undoubtedly, Václav Havel was correct to warn that a half-century or more of communism had degraded the human spirit so thoroughly that privatization, property rights, and even the recognition of basic political and personal liberties could not quickly reproduce in those ravaged lands the lineaments of a functioning liberal democracy.<sup>1</sup>

If we ask what is missing in either bandit or tyrant capitalist societies (in the way a physician studies the pathological in order to understand

the healthy constitution), we will be led to those presuppositions of a healthy liberal market democracy so basic that they are almost invisible. The pathology that casual observers and critics of bandit economies have tended to emphasize is a crushing disparity between the situation of the many and the few. The focus on income inequality, however, obscures deeper truths, falsely suggesting that income equality is both necessary and sufficient to a well-ordered society. This fallacy leads many to treat the attainment and maintenance of income equality as the overriding virtue of the good society, and to be willing to sacrifice everything to its attainment and to suppress by all means anything that would disturb it.

This undue focus on equality deflects attention from the true goal of a good and well-ordered society: to offer every citizen a reasonable opportunity to define and attain his or her goals in life. This means a prosperous society. The few recent experiments in which societies have tried to create a good life for their citizens by deliberately suppressing prosperity (Pol Pot's Cambodia, Mao's Cultural Revolution) have been disasters. To be sure, they avoided prosperity, but they also crushed the human spirit with a brutality and totality unmatched by even the most corrupt, venal, and materialistic of regimes. The good society is also a prosperous society—not because material goods are an assurance of happiness, but because being productive for oneself, one's family, and one's fellow human beings is a natural expression of the active human spirit.

This definition of a good society may not seem, at first glance, to contradict the claims of tyrant capitalists. Their societies might permit infinitely varied opportunities for economic contracting (and thus engender economic prosperity), though without popular control over the mechanisms of government. Indeed, Hong Kong under Chinese rule may currently embody just such a compromise. Defenders of tyrant capitalism sometimes posit "Asian values" that are said to justify diminished individual political liberty in the name of increased collective wealth. Yet in the end, no matter what their geographic locale, tyrant capitalists defend their power-grabs by variants of the same slogan: The poor prefer bread to the ballot.

I believe that this general defense of tyrant capitalism fails for two interrelated reasons. First, as argued above, the true goal of society is to facilitate the independent choices of its constituent members. Even the desperately poor recognize that these choices cannot be restricted to the economic realm. Indeed the boundaries of the economic are not all that clear: Consumer choice is not free if it does not extend to the books and newspapers one may read, and labor freedoms are no less economic than they are political. The lack of political choice itself subtracts from a society's prosperity.

Second, tyrannies cannot remain both wealthy and stable indefinitely. We have seen in recent years how the erosion of the rule of law by tyrant capitalists soon undermined their economies. Because tyrant

capitalism both enriches and insulates its political leaders, it leads to crony capitalism, which is itself unstable. Individuals living under such a system lose confidence in the honesty of their government, the impartiality of their judges, and the trustworthiness of their neighbors. Absent such trust, a free market cannot function. Thus tyrant capitalism tends to degenerate into bandit capitalism.

In contrast to tyranny, political liberty nourishes both polity and economy. Democracy supports the institutions on which it, in turn, depends: the rule of law and the free market. Moreover, as Amartya Sen has argued, democracy seems to be a vaccine against certain kinds of socially created disasters. Two such plagues have yet to affect a fully functioning democracy: war with another democracy and famine.<sup>2</sup> Much as in the economic market, free choice among competing “goods” is the most efficient way to produce good government.

### **Trust, Promise, and Markets**

I begin with fundamentals. A society cannot prosper without stable institutions to elicit the thought and efforts of its members: stable entitlements (that is, property); regular, ready ways of engaging, transferring, and exchanging property (contracts); and transparent, dependable institutions to protect property and enforce contracts. None of this is possible without a community of trust and mutual respect. To work together, to trade, and to accept authority as an enabler rather than a hindrance to enterprise, people must trust each other, and trust requires and engenders respect. Gross inequalities are incompatible with relations of trust and respect. There can be no trust between citizens living in such radically different circumstances that they appear to inhabit different universes, to belong to different species, and not to share a common humanity. By the same token, a hungry, inarticulate citizen clothed in rags is likely to receive very different treatment from a person in authority than a citizen whose status more nearly approximates (or perhaps far surpasses) that of the official. Yet it is not inequality as such that is the hindrance. It is the destruction by inequality of relations of trust and respect. If we were all equal but did not trust and respect one another, there would be neither prosperity nor happiness.

Without trust there can be no freedom, no markets, and in the end, no prosperity. This is what the tyrant and bandit capitalists do not understand. I am afraid that people under such systems have been taken in by a combination of their propaganda and our clichés. The discourse of capitalism is replete with Darwinian metaphors: competition; survival of the fittest; bankruptcy as the death penalty of the market; ruthless selfishness as somehow leading, by the invisible hand of market economies, to the greatest good of the greatest number. A market economy is often seen as one in which the most violent, ruthless, cunning,

deceitful, and fortunate prosper at the expense of everyone else. In such a jungle, there is no guarantee of prosperity, civilization, beauty, or even human survival. That is just what the old Marxist propagandists said about markets and what some of the new bandit and tyrant capitalists appear to believe.

The Darwinian jungle metaphor is worse than inapt; it entirely obscures the true nature of a market economy. The market is not a jungle. Rather, it is the convergence of free choices by free men and women in a context of mutual respect and the equal dignity of all. In the Darwinian struggle, the fittest do not prevail because they are antecedently identified as more fit; they are fit because they have survived. If circumstances favored the universal dominance of slime mold, then human beings, giraffes, whales, and orchids would have to bow to that edict. The market, by contrast, can be defended as a social, human, and moral institution that leads to the most effective fulfillment of human needs and desires. Competition in the market takes place on a platform of honesty, decency, and mutual respect. The way in which the bandit capitalists have understood the market may be likened to the reaction of a stranger who views the competition on a soccer field, tennis court, or even boxing ring, and does not understand that he is, in fact, seeing a game, a contest played according to rules, among athletes who respect, perhaps admire, and maybe even have affection for one another. To be sure, the end of these games is to amuse, but it is also to elicit a form of human excellence and to edify both players and audience by a demonstration not only of skill but also of faithfulness—faithfulness to the rules of the game and to the ethic of sportsmanship. That is why athletes are heroes, while thieves, poisoners, and arsonists are not.

Faithfulness and trust—these are the foundations of the market and of capitalism. Start with the basics. Even a single exchange requires the participants in that exchange to have a minimum of trust in each other: When we hand something over to another, we expect to receive in return roughly the thing we bargained for. A market is a locus of such exchanges. It deepens and complicates them along two axes: time and number. Take time. It is a great invention of the human spirit that the minimum of faithfulness implied in a transaction has been amplified into an institution that allows us to exchange things over time as if the exchange were instantaneous. This is called the institution of promise. It allows us to receive something now in exchange for something we will not be able to give until later. It allows us confidently to give up something now in return for something another person will give us later.

It is worth pondering for a moment what a remarkable thing this is. We live in time as a bird lives in the air. If we could not beat our wings against it, no coherent movement would be possible. Anything we do that has any complexity or importance, indeed all the things that make us alive and human, are spread out over time. Our most wonderful plans

and our simplest gestures are extended in time as they are in space. Consider a dance step: It consists not only of the instantaneous deployment of limbs but also of the movement from one position to another, and the sequence makes a single unit just as much as an object in space is a distinct thing. Yet to accomplish the dance—or song, or story—we must carry through. Without this faithfulness to our project, this coherence over time, we would be incoherent not only to one another but to ourselves. Think of each moment during the performance as a promise to carry through to the end.

The regime of promise is a special case of this most general aspect of what makes us human, rational animals. It allows a kind of higher-order coherence, for just as our steadiness in our performance makes possible our own personal projects and thus makes us understandable to others, so promise is a way of coordinating our individual projects with those of others—and more. It makes possible higher-order, cooperative undertakings. We wish to act together: your shoes for my bread, but your shoes will not be ready for weeks and I want bread now. Moreover, the bread exchanged for shoes will be baked and eaten over several months. You might say that there is an immediate exchange here—bread for money and shoes for money. With that money, you can buy fresh bread every day over months, and I can buy my shoes when they are ready. But money is just a surrogate, the storehouse of our mutual promises to each other. And so performances are coordinated not only through time but also across space. It is almost a miracle. It is the conquest of time and space not by a machine but by another sort of human invention: mutual commitment.

We are not quite at the market. For coordination and coherence can also be found in armies and bureaucracies. This is top-down coherence, and it requires intelligence and coordination. And there is certainly an important element of reciprocity in this kind of coordination. An officer's orders must be understood by his soldiers, and that understanding requires a kind of minimum sympathetic response. No order can be completely explicit. The soldier must understand to some degree the purpose of the order, or he will fail to carry it out appropriately. In any complex organization, there is a degree of horizontal coordination as well. Each soldier must be able to count on his fellow soldiers having understood and being willing to carry out the orders given. Yet markets carry this intelligent coordination a step further. A market is the coordination of formal equality. It is pure horizontality, and it is the architecture of human liberty. It is the coordination of free choices by free persons.

There are many well-known efficiencies in organizing economies through markets, although they have not always been as celebrated as they are today. For my purpose, it is not necessary to add to this celebration. It is sufficient to take as a premise that markets are, in general, at least as efficient as other forms of economic organization in

satisfying people's needs and wants. As I have said, the discourse of capitalism is highly misleading, and nowhere more so than in describing the functioning of markets. Comparing markets to a jungle emphasizes competition, but the competition is not the central aspect of a market; it is an epiphenomenon. The central aspect is the coordination of free choices. To be sure, this produces a kind of competition when the market attains any degree of complexity beyond the simplest uncoordinated system of barter. Competition ensues when people have choices—when they are free. When there is more than one person with whom I may deal, these persons may compete to deal with me. But this already gives the lie to the conception of the competitive market as a jungle, as a scene of force and fraud. Force and fraud are the antithesis of freedom: When people are tricked or bludgeoned, they have not exchanged freely; they have been cheated or robbed.

Market exchange, by contrast, must be free and honest. Thus each exchange not only satisfies the needs and wishes of the exchanging parties but also expresses respect between them and strengthens the bonds of community that make future exchange possible. When we move beyond the simple bilateral exchange to the multiparty, time-extended system of exchange that is the market (where I satisfy the wishes of unseen and unknown persons who may be distant from me not only in place but also, miraculously, in time), those bonds take on a depth and complexity that are truly wonderful. A particular exchange may satisfy the need of a person who has since died or who may not yet know that he has such a need. Such is the alchemy of money. The market binds together unknown persons and creates a practical community extending from the past into the future.

All this may seem hopelessly romantic, Pollyannish, and even ridiculous in light of the realities of any modern market economy—the vulgarity of commercialism, the manipulation of taste, the seduction of persons into imprudent and even destructive purchases, and the sometimes grotesque inequalities of wealth that make nonsense of the notion of free choice on the part of those struggling to meet basic needs. Yet my argument holds in spite—maybe even because—of these grim realities. For I am not saying that the market is a *sufficient* condition of human happiness and of a decent society, but rather a *necessary* condition. More importantly, a well-functioning market requires decency, community, and faithfulness, all of which not only make markets possible but also underwrite conditions of trust, mutual respect, and security that enrich many noneconomic aspects of life.

### Sanctions and Their Limits

A well-functioning market depends on dependability. Moving beyond immediate barter requires people to be able to trust one another's word.

I have said that this is a matter of morality and mutual respect. A cynic might respond that, no, it is a matter of sanctions, both formal and informal. The formal sanctions of the law are exemplified, of course, in the enforcement of contract. The informal sanctions include social disapproval, exclusion from future opportunities, and violent, mafia-like reprisals. Yet to think in terms of sanctions is a big mistake. Sanctions cannot maintain a dependable system of exchange unless the occasions for their imposition are rare. No regime of exchange and mutual cooperation is possible when every exchange is the subject of sanctions. There could be no regime of promises if every promise had to be enforced in court. There could be no such regime even if every promise were enforced only by bringing to bear social or violent pressure. First, such a situation would be incredibly wasteful of time and resources. But more importantly, the dependability and the regularity that sanctions are intended to enforce themselves require that sanctions be dependably and regularly applied. A context in which we can trust the government (or the mafia, or our neighbors) to enforce agreements accurately and dependably is exactly the kind of context of trust and mutual regard that is necessary for successful mutual exchange *without* sanctions. Without trust and mutual regard *and* without sanctions, society becomes a jungle where robbery and fraud are rampant. A regime of sanctions without trust and regard is a regime of robbery and duress by those imposing the sanctions. So sanctions are no substitute for a regime of trust and respect.

In a society of men and women rather than angels, we need sanctions too. We need them for enforcement against the outliers. Honest, decent people must be made to feel that when they keep their word (which at any particular moment it may not be in their interest to do) they are not being taken for suckers. They must know that the few who steal or cheat will not profit. We see this in a tax regime. No system of enforcement and penalties can make an income-tax system work if everyone cheats. For the system to function, most people have to comply voluntarily, but they will do so only if they know that the few who do not are unlikely to wind up better off. Enforcement is society's collective debt to those who are willing to keep their word without being forced to do so. If society does not honor that debt, then fewer and fewer will be willing to keep their word. And if hardly any are willing to keep their word voluntarily, then enforcement can accomplish nothing. Moreover, enforcement itself depends on a higher-order agreement honestly meant and honestly kept: the agreement between those given (lent?) the power of enforcement and those on whom the enforcement eventually may be brought to bear. Just as there is a difference between a free exchange and a robbery, so there is a difference between a policeman and a thug who happens to wear a uniform. Trust and respect are that difference.

A complex society is not a family, or even a village. Like these, it functions best in an atmosphere of trust and respect, but its trust and

respect are built into elaborate, abstract institutions: law, courts, and police. It is easy to think that because these institutions are elaborate, formal, and abstract, moral virtues like trust and respect are not relevant to them. That is a mistake. In a family, trust and respect work unmediated by institutions. In a complex society, the human nexus is maintained insofar as various levels of mediating institutions, beginning with the family, instantiate and foster trust and respect. A brutal father may hold his family together by fear, but his is a poisoned community. Instead of promoting the welfare of his wife and children, he inspires terror and desolation. If anything is created, it is despite, not because of, his regime. Moreover, brutality tends to replicate itself from generation to generation. A social regime based on force, fraud, and brutal inequality may also somehow survive, feed its people, and wring work and product out of them. But there is no joy there, no creativity, and at best only a mockery of prosperity. A healthy society has laws and courts and police, of course, but these are abstract, complex manifestations not of brutality and force but of trust and respect. When force is brought to bear—as it sometimes must be—it does no more than insist on the fulfillment of the duties of trust that are generally respected without the resort to force. Force is not the paradigm; it is the exception that maintains the paradigm.

### **Law and Civic Friendship**

It is a mistake to focus too much on force and policemen for another reason. It is not just that force is exceptional even among the abstract, formal institutions of the society. Force is—and in a well-ordered society, must be—the last resort. Laws and courts, by contrast, are not a last resort. They do not represent what is anomalous and must be brought into line. Law is intrinsic to a free, complex society of persons who trust and respect one another. In a perfect world, there would not have to be policemen, but there would still be law and courts. Law is the nexus of the reasonable expectations that free persons entertain of one another. Citizens of a well-ordered society cannot know all their fellow citizens personally. Indeed, it is the virtue of a complex society that it can bind together by bonds of trust and mutual respect people who have never met. The laws are those bonds. To the extent that they are good laws, my willingness to abide by them expresses my respect for my fellow citizens. When I come together in an abstract relationship with a citizen-stranger—say, in buying goods from him online or in paying taxes for our common civic amenities—I perform an act of trust, and thereby I express my respect for him. We prosper and also strengthen the bonds of civic friendship between us. When I cheat or betray him, I weaken those bonds. In each case, the impact is infinitesimal. When I pass a counterfeit bill, I loosen those bonds and degrade the utility of the currency by an infinitesimal amount, but degrade it I do. And if too



many others follow my example, we will be reduced to the penury of barter. That much is obvious. It is less obvious, but no less true, that each time I keep my bargain, pay my bill, pay my taxes, I strengthen those bonds. It is not too much to say that every honest dealing is an act of civic friendship that, on its cooler and more abstract level, is analogous to an act of kindness to a friend or family member.

The law binds us together and makes possible our civic friendship. Yet not all law does that, but only law that expresses and facilitates our dealings with one another on a basis of trust and equality. I come back to my description of the market: a nexus of free citizens, most of whom are unknown to one another. The nexus of the market is like the nexus of the law. Of course, the relation is more intimate than that. Citizens deal with one another in the market according to the rules of law, and citizens' mutual contacts according to the law are in fact a kind of market, or an aspect of the market, or the market itself. This suggests what the law must be like. It must encourage citizens to deal with one another by reaffirming their reasonable expectations and facilitating their exchanges. In other words, it must establish stable rules of property and reasonable rules of exchange.

If law fails to establish stable rules of property and reasonable rules of exchange, it hinders growth. A recent World Bank study found that red tape imposed a 50 percent tax on the cost of new housing in Kuala Lumpur,<sup>3</sup> while researchers in Peru trying to set up a textile factory found that the process took 289 days, 11 permits, two bribes, and 32 times the minimum monthly living wage.<sup>4</sup> In Peru and Malaysia, these examples suggest, the law plainly does not exist to facilitate the activities of the countries' citizens. It is an impediment, not a framework. This is an insult to the citizenry and a violation of equality, because the law in these cases is clearly not a servant of the people. It is, to a greater or lesser extent, part of an organized protection racket of those who already make or import certain products, or simply of the officials who would have less to do if their permission were not needed. The people are subordinated to the interests of the officials; the law becomes a racket and the bureaucrats become racketeers. This is the misuse of law. Its proper use is to define and protect expectations so that people may deal securely with one another, so that they can plan and invest in schemes of cooperation. That means that the law must define a stable regime of property rights and offer a regular framework for the exchange and combination of those rights. The details may vary; it is the stability, completeness, and transparency of the definitions and framework that matter.

However clear the definitions and however transparent the rules of cooperation and exchange, they will not establish a regime of confident and fair dealing unless they establish *in fact* the terms of the citizens' common life. This means that rules must not only be written and known;

they must also be enforced. Even if men were angels—that is, willing always to act according to the law—there would still be a need for authoritative exposition at the cognitive level. Even among men of perfect good will there will be divergences about where property lines are drawn and how engagements are to be understood in concrete circumstances not fully anticipated when they were made. The need for enforcement exists at the borders of men’s willingness to act in good faith and at the borders of their understanding. It exists only at the borders because if reluctance and lack of mutual understanding were to characterize the entire terrain, the law would be swamped and powerless. As I have said, we must expect most people in most circumstances to know what they have to do and to do it without any prodding. Understanding and fidelity must be the rule, disputes and defaults, the exception. That is why the law—its definitions and its framework—must be transparent. If the law were not transparent and if persons outside the exchange had to step in to order (or reorder) it every time, it would not be—or be experienced as—the free ordering of free men. It would be an order imposed from outside by whoever had the power of interpretation and enforcement. Yet the borderland exists, and it must be policed. Otherwise, the desert on the other side of the border will encroach more and more on the heartland until no voluntary system and no order is left. Thus the need for judges and policemen.

### **The Duty of Judges**

Judges are even more essential than policemen. Even men of the greatest good will need judges to settle disputes and misunderstandings. More fundamentally still, just as there can be no contracts and no schemes of mutual cooperation without a settled and secure scheme of property rights and a settled and certain way of transferring, exchanging, and coordinating them, so neither of these can exist without institutions to interpret and apply the rules of property and the rules by which it is transferred and exchanged. All of these require both will and mind: the will to respect property and to keep your word, but also the intellect to understand what your property rights are when I have indeed given you my word—in short, the intellect to know the law. A system of laws must be transparent and perspicuous (close enough to ordinary understanding for ordinary men and women to be able to abide by it in most cases just by being members of the same community, in the way that ordinary men and women who are educated native speakers do not need professional grammarians to help them speak their language correctly and understandably). It is also important for courts to apply the rules in close cases and to keep them serviceable for new situations. Honest men know what it means to shake hands after a long negotiation to signal that they have come to terms. Currency traders know that the slightest

hesitation after being given a bid over the phone is inadmissible and means that the bid is withdrawn.<sup>5</sup> But what are the understandings on the Internet?

The application of the rules and their adaptation to new circumstances require knowledge, imagination, and steadiness: *knowledge* of the rules and of the world to which the rules apply; the *imagination* to conceive of the possible arrangements that might solve difficult puzzles and to recognize how the inappropriate application of old rules to new situations disappoints rather than fulfills expectations; and *steadiness*, because the rules can be very intricate and because their application to new situations may be controversial. Trust and respect, prerequisites for a good society, must apply to judges in particular. In every dispute, one side is likely to be disappointed. They must have grounds to believe that their arguments were heard and considered on their merits, that who they were had nothing to do with the decision, and that the decision was according to law and not according to anything else. Only in this way can the steadiness and regularity of a regime of rules be transmitted to concrete individuals in a particular case. Without trust and mutual respect, you cannot have a society that elicits the best, most imaginative contributions from its members. And without law, you cannot move from a primitive society to a complex society of trust and respect.

Yet laws are only as good as the judges who interpret and apply them. So how does one get steadiness and regularity in judges? Article 29 of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts, drafted by John Adams in 1780, put it this way:

*It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but essential for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.*

The language may be a bit archaic, but the meaning is clear: Those who interpret and apply the law must be altogether independent of the political pressures that inevitably—and even properly—attend the process by which the rules are made and the ordinary business of government is administered. Democracy makes law, but after that it must yield to reason in the law's application. It is a little like the old children's system for distributing cake: One side divides, the other chooses. Democracy makes the rules and cuts up the cake, but independent judges, ruled by the reason of the law, distribute the pieces. What in legislation is politics in judging becomes corruption.

The duty of judging according to the rules is often put in terms of favoring neither the rich nor the poor. Mindlessly, this is taken to mean merely that judges should not seek personal advantage by currying favor with the rich and powerful. But the maxim speaks of favoring neither the rich *nor the poor*. This requires more thought than it usually gets. In general, it seems a virtue to be especially solicitous of those whose lot in life is hard. This is human kindness, but in a judge it is as much corruption as is seeking the favor of the rich. For once a judge respects persons and not the law, all regularity is gone. It takes a particular kind of fortitude to be a good judge. Without that fortitude, the rule of law collapses. And in its collapse, the poor suffer most of all. A well-ordered society is a regime of trust and respect. If a judge favors the rich man because he is rich, then the poor man has been despised. But if the judge favors the poor man in a way that the law does not, then he insults the poor man's standing as an equal citizen. And the bond of civic friendship that should bind the two together is replaced by a poisonous web of envy and condescension.

It is not an easy job to be a judge. According to an Islamic saying: "Judges are three: two in Fire, and one in Paradise. A man who has knowledge, and judges by what he knows—he is in Paradise. A man who is ignorant, and judges according to his ignorance—he is in the Fire. A man who has knowledge and judges by something other than his knowledge—he is in the Fire."<sup>6</sup> And this is what Jethro said to Moses: "Moreover thou shalt provide out of all the people able men, such as fear God, men of truth, hating covetousness."<sup>7</sup>

Who is "a man of truth"? Is it not a man who judges according to the facts and according to the law? A judgment that ignores the one or the other is a false judgment. Who is "an able man"? He is one who knows the law and is worldly enough to know the ways of men. Yet despite his worldliness, he is neither a cynic nor a relativist, but rather a man of truth who fears God. Pontius Pilate is the archetype of a judge who is not "a man of truth"—not because he was a liar or corrupt, but because in his worldliness, his world-weariness, he acted expediently and bureaucratically. "What is truth?" he shrugged and carelessly gave the most famous unjust judgment in history. The man of truth is not a bureaucrat, and neither is a good judge.

Where does one find such men (and women)? In practical terms, a society seeks its judges from among its most respected members—"able men," "men of truth," learned men. Then, following John Adams's advice, it makes them "as free, impartial and independent as the lot of humanity will admit." That means paying them well, say at the level of the governor of a state or a senior executive. It means giving them long tenure, preferably for life or until they retire. And it means offering them a retirement pension dignified enough so that society may reasonably ask them not to seek to earn more, thus avoiding the

appearance that later employment was in fact the postponed payment of a bribe for services rendered while in office. A system in which judges serve only for the term of the political officials who appoint them seems designed to make these judges not as “free, impartial and independent as the lot of humanity will admit,” but as subservient and partial as the will to power can bend them to be. A man must be a hero indeed to resist that kind of pressure. Although it is a cynical and self-defeating stance to deny that ordinary men and women will behave decently and reasonably unless strongly coerced to do so, it is a first principle in designing institutions not to rely on moral heroism as a necessary condition of their proper functioning.

### **Forming Virtuous Individuals**

So we must have citizens who trust and respect each other, laws of property and exchange that assume such trust (allowing citizens to deal with one another in all confidence and security), and magistrates who will interpret and enforce the laws in a spirit of impartiality. Where does one find such magistrates, and how does one produce citizens who trust and respect one another? Well-functioning institutions, including the rule of law, foster and sustain such qualities among citizens, but those qualities, in turn, seem to be a necessary precondition of such institutions. I return to Václav Havel, who saw that merely importing Western institutions into the blasted moral landscape of postcommunism would not be sufficient to create a society of law. Trust and mutual respect are moral virtues of individuals, and we must ask what will form such individuals. It seems like a circle into which we cannot break: Either men and women are virtuous and they sustain the institutions that sustain their virtues; or men and women lack these virtues, and then no institutions capable of sustaining them can arise or flourish.

There is a way, however, to cut into the circle—through the most fundamental social institution, the family. Because the family is held together by ties more primitive and basic than the abstract ties on which civic friendship rests, it can serve as the school for human affection and mutual forbearance which, when abstracted and generalized, can become the habits of mind and heart from which trust and mutual respect may grow. It seems altogether obvious that civic friendship is not just a metaphor; it is an abstraction from personal friendship, and it assumes a capacity for human sympathy. But surely the family is the school of human sympathy (as it is also the school for many of society’s pathologies). There are few, if any, autodidacts in the subject of human fellowship. So here is a ground for hope: Mothers and fathers can show the way. Learning from how they treat one another, mothers, fathers, and children may begin the extrapolation to civic friendship, trust, and

respect. There is no guarantee—but there are surely more loving families than there are just and prosperous societies. The former will always provide the soil from which, from time to time, the latter arise.

### NOTES

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1. Václav Havel, “The State of the Republic,” trans. Paul Wilson, *New York Review of Books*, 5 March 1998, 42; Václav Havel, “The Post-Communist Nightmare,” trans. Paul Wilson, *New York Review of Books*, 27 May 1993, 8.

2. Amartya Sen, *Development as Freedom*, (New York: Random House, 1999), 152.

3. “Citadels of Power,” *The Economist*, 29 July 1995, 14.

4. Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York: Harper and Row, 1989).

5. The reason: A hesitation allows the recipient of the bid to check a screen or other phone to see if a better bid is available and thus to turn what is intended as a firm offer into the start of a negotiation. The only control against this is just that the bidder may treat as ineffective an acceptance that is not immediate. Instead, it becomes a counter offer that the former bidder may accept or decline.

6. A saying attributed to the Prophet, Ibn Hanbal, 6:75; al-Bayhaqi, 10:96. Quoted in Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia*, unpubl. ms., 24, n. 41.

7. Exod. 18:21.