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A Response to Marvin Becker, "An Essay on the Vicissitudes of Civil Society with Special Reference to Scotland in the Eighteenth Century"

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I agreed to participate in this symposium partly because, like many others, I have become intrigued by the growing presence of the concept of civil society in contemporary political discourse. And before offering a few brief comments on Marvin Becker's paper, I think I should make two confessions that reveal the perspective from which I approach the subject and the paper. First, unlike Becker, but I think like many historians, I consider myself rather "philosophically challenged." That is, I am troubled by overly abstract analyses that divorce ideas from their time and place and treat them rather like *Genesis* treats birth—one begetting after another. It seems to me that much of the discussion of civil society approaches the topic in that manner. Second, in terms of the debate as framed in the materials compiled for this symposium, I would lump myself with skeptics who share doubts about the normative and prescriptive ramifications of the revival of civil society.

Becker's paper has helped me navigate through some of the philosophical shoals of the debate over civil society while it has also reinforced my skepticism. I want to explain both of these reactions by underscoring what I think are the main lines of his argument and then by suggesting the kinds of questions and challenges that I think it poses for a discussion of civil society.

As I read it, Becker has drawn on his extensive study of the emergence of civil society to offer a series of reflections on the development of the concept and on the problems it has faced as a reality and as an idea since its inception in eighteenth-century Scotland, England, and France. Like many readings of the past that are directly addressed to present concerns, it is basically a cautionary tale; in this case, a warning that fundamental elements of civil society led to its quiescence in the nineteenth century and that those same elements make its current revival a problematic enterprise. It seems to me that Becker develops this argument by treating civil society as *both* a reality experienced in the past and an idea borrowed from the past. Though he presents the reality and the idea of civil society in a rather interwoven way, and clearly they are interconnected, I want to separate the two to highlight what I think are the two basic components of his argument.

The central focus of Becker's essay is a presentation of civil society as a timebound concept produced during a privileged moment in late eighteenth-century Western Europe, particularly in Scotland. He suggests in this piece, and explains more fully in his recent book, that civil society not only emerged at a certain time and in a certain place, but that it had a particular life course that revealed its basic features if not its fundamental flaws or contradictions. These essential features of civil society sprang from the primal connection of the

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concept to private property and a reified notion of a free market, the hierarchies of power and authority that it sanctioned, and its tendency to tolerate only incremental change.

At the same time, Becker also wants to chronicle civil society as a timeless concept that can be and has been appropriated from the past for use in contemporary political debate. He does so—particularly in his oral presentation—in a series of asides, assertions, and analogies that range over a variety of present-day, and primarily American, issues. These issues range from abortion to the Congressional Republican “Contract with America.” He points to the revival of civil society to suggest that in many ways contemporary European and North American polities are fundamentally inhospitable to civil society as it has been conventionally conceived. And he expresses skepticism in particular about the likelihood of using civil society to try to redress basic forms of inequality, to achieve social and economic justice, or to resolve fundamental ideological disagreements.¹ Despite its appeal to many as an idealized set of institutions separate from the state, Becker’s argument implies that civil society may be a rather weak vessel for social transformation.

Becker’s presentation of civil society as a dual concept purposefully raises questions about the meaning and significance of the connections between the civil society as a timebound reality and as a timeless idea. I think that the way to introduce those questions is to rely on one of the keywords of historical analysis—*context*. It is a word that historians use to label the particular timebound environment that produces an event or idea. To understand the dualities of the concept of civil society, Becker has tried to reconstruct the context in which it was first created as well as to suggest the need to do the same for the present. He has done the former by using a form of historical analysis that turns the word “context” into a method: contextualization. This form of intellectual history was developed most fruitfully by J.G.A. Pocock and Quentin Skinner in studies of early modern European political thought.² Its governing assumption is that ideas cannot be understood apart from their context; and thus, the past is not readily understandable to people in the present. Its ideas, in short, are not easily exportable across time and space. And I would add that attempts to appropriate uncontextualized ideas from the past, evident I think in so much American constitutional discourse, ought to be considered primarily as forms of legitimation. That is, they are examples of the use of the past to give a present policy belief an intellectual pedigree by treating it as a child of ancient and thus seemingly unassailable parentage. In any event, through the method of contextualization the job of the historian is to make the past comprehensible by reconstructing the context that produced its dominant ideas. Those ideas, in turn, become the means for explaining the past in the present.

1. Marvin Becker, *An Essay on the Vicissitudes of Civil Society with Special Reference to Scotland in the Eighteenth Century*, 72 IND. L.J. 463, 469 (1997).

2. For the seminal studies using this method see J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975); QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* (1979).

As I have tried to suggest, I think Becker's intent is to argue that civil society can only be understood through a double process of contextualization. First, the moment of its origin must be reconstructed and analyzed; second, its present revival must be subjected to similar analysis. His essay concentrates on the former task, while hinting at the need for the latter. Thus he implies that historical analysis can be brought to bear on the present as well as the past. In doing so, it seems to me that his message is that civil society was a product of a particular time and place whose meaning cannot be known without understanding that context. And thus the present incarnation of civil society is in many significant ways a different concept that is linked to the past but equally tethered to a particular present. Once again, I would suggest that one implication of this argument is to suggest that many contemporary attempts to appropriate the past by treating civil society as a constant and unchanging feature of European and North American politics ought to be understood as forms of legitimation.

Both of Becker's usages of contextualization raise a number of questions for me, and I want to highlight two of them. First, as a historian I wonder how his approach to the meaning of civil society helps us recover and better understand the era in which it was conceived. In particular, Becker's paper forces me to think about how his reading of the period can be integrated into our understanding of that time. Thus I wonder about the relationship between the creation of civil society and the seemingly simultaneous reliance on republican political thought. The literature on republicanism has become voluminous and has engaged the passions of lawyers as well as historians. Just as Pocock and Skinner argued that we had misunderstood Early Modern European political actors because they had used republican ideas and rhetoric that we had not understood, so Becker's argument implies that many of those same political actors were busily constructing a civil society and we have simply failed to recognize the existence let alone the importance of this construction project. Yet the relationship between the civil society and republicanism, and the apparently coterminous creation of liberalism, clearly warrants further elaboration and explication. And if I try to apply Becker's argument to the United States, it seems like the construction of key institutions of an American civil society, particularly voluntary associations and nonstatist institutions like newspapers, occurred during incredibly divisive and polarizing times such as the 1790s with its bitter political warfare over the French revolution and civil liberties. Thus, American experience may suggest civil societies might well be constructed in times of fundamental disagreement. In a similar fashion, historian Richard R. John has recently argued that the most critical source of American civil society was a singular state action: the establishment of an expansive postal system early in the nineteenth century that subsidized the free flow of communication through newspapers, journals, and private correspondence.³ In a different vein, Becker's argument about the period provokes comparisons with Jürgen Habermas's influential notion of the creation of a public sphere at roughly the same time that

3. RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 25-63 (1995).

Becker charts the construction of civil society.⁴ Indeed, though less confident than Habermas in the ability of civil society to create reasoned discourse and spawn significant social change,⁵ Becker treats the public sphere and civil society rather like interchangeable labels for the same phenomenon. And like Habermas, he also treats civil society as a rather monolithic and uniform phenomenon. Consequently, his argument is open to the same kind of critique as that which has been directed at Habermas. In particular, recent attempts to understand the eighteenth-century public sphere have treated it less as a monolithic sector of society, and have instead recovered its gendered, racial, class, spatial, and other dimensions.⁶ Finally, I wonder about the relationship in the era between civil society and the creation and application of legal rules. It was a period, as P.S. Atiyah has demonstrated for England and Morton J. Horwitz for the United States, in which contractualism not only played an important role in political theory, but contract law played a crucial role in economic thought and practice.⁷ The role of contractualism in the market regimes of the era and its tendencies to deify individual wills and promote certain allocations of power and authority must be related to civil society as well. In sum, Becker's call to contextualize civil society in the eighteenth century makes me think about the range of challenges unleashed by that request.

Second, as I have said, the implication of Becker's approach and the message of his asides is that the present use of civil society must be subject to the same kind of contextualization that he has applied to the eighteenth century. Though this point is far less developed in his essay than the previous one, Becker's detailed explication of the emergence of civil society in a particular time and place raises questions about how we ought to go about understanding its revival. Two questions seem particularly significant: What are the central elements of the present use of the term that can be identified to understand its meaning? Why is the present such a supportive environment for the concept? These questions, in turn, raise another equally critical one that link the two central points of Becker's essay: why has the idea of civil society persisted from the late eighteenth century to the late twentieth? In other words, his questions about the present provoke questions about now and then and the connections between the two.

Much of this symposium is devoted to an analysis of contemporary usages of civil society. As a historian, my own response to these questions is to think about ways that civil society was institutionalized, and thus, not only how the concept was constructed, but how it was modified over time. Becker suggests that the longevity of civil society has been due in part to the "political brokering of

4. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1989).

5. Becker, *supra* note 1, at 471.

6. For discussions of this concept see HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun et al. eds., 1992); Anthony J. La Vopa, *Conceiving a Public: Ideas and Society in Eighteenth-Century*, 64 J. MOD. HIST. 79-116 (1992); Benjamin Nathans, *Habermas's "Public Sphere" in the Era of the French Revolution*, 16 FR. HIST. STUD. 620-44 (1990).

7. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

bargains between 'citizen-haves' and 'citizen-have-nots'" and to the successes of the welfare state.⁸ I would add to that analysis a development that seems particularly relevant to this forum: the continuing importance of lawyers in Western European and North American civil societies. Members of the bar seemed to have occupied privileged places and indeed assumed authority to police the boundaries between public and private in all civil societies. And yet their role also underscores the diverse forms of civil society. As Becker points out, David A. Bell has argued that French lawyers found a voice and power through the creation of a civil society.⁹ Yet, conversely, David Sugarman suggests that the English bar maintained its authority not by creating but by colonizing civil society.¹⁰ At the same time, there are numerous testaments to the uniquely powerful role of American lawyers in the public sphere, and especially in the creation of its nonstatist institutions.¹¹ In short, understanding the persistence of civil society seems critical to unpacking its present context and to probing its past diversity.

I will close, then, by saying that Becker's paper has been very useful to me because it helps me locate the concept of civil society in the past as well as the present and, in the process, suggests the importance of the connections between the two. And thus, rather than providing pat answers, I think that Becker's primary contribution to this symposium, like most compelling works of historical analysis, is to raise critical questions. My intent has been to identify some of them and suggest their significance.

8. Becker, *supra* note 1, at 466.

9. See DAVID A. BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* (1994); David A. Bell, *Barrister, Politics, and the Failure of Civil Society in Old Regime France*, in *LAWYERS AND POLITICAL LIBERALISM* (Terrance Halliday & Lucien Karpik eds., forthcoming spring 1997).

10. David Sugarman, *Who Colonized Whom?: Historical Reflections on the Intersection Between Law, Lawyers, and Accountants in England*, in *PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS, AND THE SOCIAL CONSTRUCTION OF MARKETS* (Yves Dezalay & David Sugarman eds., 1993).

11. For a particularly evocative discussion of the power of lawyers as private actors in American society see PETER D. HALL, *THE ORGANIZATION OF AMERICAN CULTURE, 1700-1900* (1982).

