

Fall 1997

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### Recommended Citation

Clarence Thomas, *A Return to Civility*, 33 *Tulsa L. J.* 7 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol33/iss1/2>

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## A RETURN TO CIVILITY\*

The Honorable Clarence Thomas†

Tonight, I would like to talk with you a moment about a topic that has been very much on my mind for the past fifteen years, beginning with my tenure in the Reagan Administration: civility. It is a subject that has received increased attention over the past few years and certainly during the past year. Indeed, it has become almost cliché of late to observe that civility is disappearing from public discourse and public conduct. I am concerned that unless each of us, whether as judges, lawyers, professors, students, or citizens, encourages others, by example, to become more civil, we will be contributing to the erosion of the rules that allow our civil society to function.

Evidence that civility is on the decline is all around us. One area where this has occurred is of great interest to me as it is to all Americans: professional sports. Who has not heard of the baseball player who spat on an umpire because he disagreed with the call? Who has not seen the excessive showboating that occurs after a home run or a touchdown? Who has not witnessed the now commonplace taunting that all too often replaces sportsmanship in competitive sports?

As in other areas, sports is only a reflection of our society. We see more and more stories about individuals who have forgotten the common standards of decency that every individual should show to others. I sometimes think it unusual when I hear someone say a simple “thank you,” or “excuse me.” It has become the case that one might even be shot at if one is driving too slow or in the wrong lane.

As others have commented, civility is slowly disappearing from the political world. To be sure, that is not a realm where civility was ever king. But, to the extent that there were rules of the game, those rules are certainly on the decline. We are now regularly subjected to negative attack advertisements and to debates in which personal insults and mudslinging are substituted for arguments over policy.

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\* These remarks were delivered at the Tulsa Chapters of the American Inns of Court in Tulsa, Oklahoma, on May 2, 1997. They are published here substantially as delivered. To aid the reader, footnotes have been added.

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Academia has not been immune either. Unfortunately, it is not unusual to hear hissing at speeches or talks when an unpopular point of view is raised. I sometimes read passages in law reviews or in books where criticism goes beyond the open discussion of ideas to something more personal, if not ad hominem. I cannot imagine what goes on in faculty meetings, but it makes me thankful that I work in a less contentious place, like Washington, D.C.

More seriously it makes me appreciate my colleagues at the Court, where civility is a matter of fact not a matter for debate. Civility has also been on the decline in the common profession which we all serve. Lawyers and judges have been complaining for years now about the absence of professional courtesy and just plain good manners that has occurred in both the courtroom and in the law office. There have been studies done (and task forces formed) to discover what is to be done to forestall this slide into a legal "state of nature." These efforts have not been successful, I believe, because—while I think that there are surely some special reasons to explain why common decency is disappearing from law practice—the decline in good manners in law practice is only one manifestation of the general erosion of common standards of decency throughout society.

In my mind, civility plays two significant roles in our society. First, civility is essential to the functioning of a civil society. By civil society, I mean the existence of a private sphere of human interaction that is separate from and independent of government control. Civil society has long been one of the hallmarks that has made America unique, even exceptional, in the world. We Americans have relied primarily on the private interactions between individuals and private institutions, such as schools, churches, businesses, and civic and professional organizations, to organize our society. To be sure, every society needs government to protect life, liberty and property and to handle foreign relations, though we may argue at the margins concerning which issues are best handled by the government and which by private actors.

But there can be little doubt that one of the important factors that has contributed to the stability and success of our nation has been the existence and growth of a civil society. One important function of a civil society is that it leaves to individuals the choices over what to do or not do, what to spend your money on, how to save, whether to go to school, whether to become a lawyer. A second, and perhaps equally important function of a civil society, is that it creates what political scientists like to call "mediating institutions" that stand between the individual and the power of the state. By defining a private sphere and by protecting it, civil society and its institutions prevent tyranny, whether by an individual or by a majority.

This is not a new idea. Indeed, it was de Tocqueville, who, after visiting our young nation, wrote in his classic *Democracy in America*, that he was struck by the great number of private associations and organizations that Americans had established and joined.<sup>1</sup> It was also de Tocqueville who commented

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1. See II ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 106 (Henry Reeve et al. trans., 1945.)

that “no countries need associations more—to prevent either despotism of parties or the arbitrary rule of a prince—than those with a democratic social state.”<sup>2</sup> As de Tocqueville concluded: “in countries where such associations do not exist . . . I see no other dike to hold back tyranny of whatever sort.”<sup>3</sup> In this, as in so many things, de Tocqueville has been proven correct. On any number of occasions, I have spoken with jurists or political leaders from the emerging democracies who have asked how they too can emulate the creation of a civil society in their own nations.

The decline in civility presents a threat to the maintenance and preservation of a civil society. If individuals cannot treat each other with common decency and respect, it is difficult to see how they will form the type of civic and community groups in which de Tocqueville placed so much store. If people today are unwilling even to treat others as equals, to live by the golden rule, it is hard to see how they will think well enough of their fellow man and woman to join a club or participate in joint activities with them. A lack of civility implies a lack of respect for the worth and autonomy of each individual in our society, and without that, a civil society that aims to provide each individual with control over his or her own life cannot function.

Putting aside its effect on the private world, the decline of civility is also a symptom of a decline in our ability to govern ourselves in the political world. Our democracy is founded on the idea that each individual is an equal, autonomous actor in our political system—each individual has an equal vote and each individual has an equal (though perhaps somewhat attenuated) voice in the decisions of the government. As the Declaration of Independence established so eloquently, our government is founded on the idea that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . .”<sup>4</sup> For the collective self-governance that our democracy relies upon to work, each individual must be given equal respect and must receive equal recognition of his or her rights and responsibilities in society.

Civility is an important part of this enterprise of self-government. Civility is the everyday expression of the equal respect and recognition that is due in a civil society. No less a framer than George Washington, the true American Cincinnatus who led his people through war and then returned to his farm, only to be recalled by his people to preside over the Constitutional Convention and then to lead their new nation, understood the importance of civility. As a young man, Washington would copy by hand the *Rules of Civility*,<sup>5</sup> a book used to

2. See I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 195 (Henry Reeve et al. trans., 1945.)

3. See *Id.*

4. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

5. The RULES OF CIVILITY were “first compiled by French Jesuits in 1595, in a set of maxims called BIENSEANCE DE LA CONVERSATION ENTRE LES HOMMES (DECENCY OF CONVERSATION AMONG MEN). . . . In 1640, they appeared in English as YOUTHS BEHAVIOR, OR DECENCY IN CONVERSATION AMONGST MEN. The translator was listed Francis Hawkins. . . .” GEORGE WASHINGTON, *RULES OF CIVILITY* 4 (1747)(Richard Brookhiser ed., The Free Press 1997).

instruct English schoolboys. One such rule was: "Kill no vermin, as fleas, lice, ticks, &c., in the sight of others."<sup>6</sup> I have always found this to be a good rule to follow. "Spit not into the fire,"<sup>7</sup> was another rule that has received the approval of history.

When personal hygiene was not at issue, however, the more serious of President Washington's rules of civility underscored the importance of the political equality of each individual. Washington wrote: "Every action done in company ought to be done with some sign of respect to those that are present."<sup>8</sup> Or later, even "[a]rtificers and persons of low degree" should be treated "with affability and courtesy, without arrogance."<sup>9</sup> As one of President Washington's recent biographers has noted, politeness was "the first form of politics."<sup>10</sup>

Without the civility that President Washington believed was so important, democracy becomes more and more difficult. Civility is one of those civic skills, in the words of Professor Mary Ann Glendon, along with deliberation, compromise, consensus-building, and reason-giving, that makes self-government possible. If we cannot treat others as equals, if we cannot accord each other respect, how can we ever hope to ask them to listen to our arguments on the merits? How can we ask those who have been hardened and embittered by personal attacks and insults to be open to change and to be willing to reconsider their positions? Without the self-restraint and respect for others that lie at the heart of civility, how can we engage in the open and honest debate and deliberation that make democracy work? Will we be able to trust those whom we have just verbally assaulted or ridiculed?

As I said earlier, I believe that the decline of civility in the legal profession has gone hand-in-hand with its disappearance in the political and private worlds. Allow me now to suggest why I think this has occurred. While we all may know of famous stories of rudeness and meanness that have occurred in the legal system throughout our history, it seems that the decline in civility really began in earnest in the 1960s. Unlike others, I would not be so quick to attach this change to an increase in the financial pressures that have occurred in the legal profession. To be sure, one cannot deny that the demand for ever higher billable hours by larger and larger firms may force some to ignore the common standards of professional decency that must guide our conduct toward one another as lawyers, judges, professors, or students. But at its core, I believe that the decline in civility among lawyers is due to a broader, more intellectual change in our vision of the law's role in our society.

Before my generation arrived on the college and law school campuses of this nation, the function of the law traditionally was private dispute resolution.

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6. *Id.* at 33.

7. *Id.* at 31.

8. *Id.* at 27.

9. *Id.* at 50.

10. RICHARD BROOKHISER, *FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON* 129 (1996).

A lawsuit commonly arose between two private parties because they had a dispute over a private right. In the 1960s, the model of the traditional process of dispute resolution began to change. Lawsuits started to challenge unconstitutional social conditions; private parties were replaced by interest groups or large class action plaintiffs, with public institutions and governments as defendants; the role of judges was transformed from impartial umpire to manager of an ongoing process to reform the institution.

This in itself was not wrong or even unwelcome. But this change in our forms of procedure was accompanied by a corresponding alteration in our vision of the purpose of the law. The law was no longer a process for settling private controversies; it was no longer simply our democracy's way of funneling certain conflicts and disputes into a neutral forum for adjudication. As I have described elsewhere, the generation of the 1960s envisioned the law and the legal system as a tool to achieve social change, not as a process for state-sponsored dispute resolution. The law was no longer composed of neutral principles that applied equally to everyone, no matter their status or background; the law became a tool to favor certain groups at the expense of others.

It seems to me that a decline in civility was, at least in part, a natural outgrowth of the belief that the law was to be used for instrumental purposes. Using the law to advance a broad political or social agenda requires one to believe that one's goals are universally the right ones. If that is the case, then deliberation and consensus-building become unnecessary. If you believe that you know the right answer, and that it is the *only* right answer possible, then you will have little interest in participating in the deliberation and compromise made possible by civility. You will seek to have issues removed from the democratic sphere and transferred to the domain of judges and courts, where one can achieve one's goals without having to win majoritarian support.

Attacking civility produces a polarizing effect in both the political and legal worlds. In the former, the absence of civility will help throw a wrench into the political process. Encouraging rudeness, nastiness, and personal attacks will make actors in the political system less likely to compromise and less willing to engage in meaningful deliberation. The different parties will be less likely to reach a consensus that blends different, opposing views. Incivility also discourages individuals from taking an active interest in public affairs. Furthermore, if the political system becomes stymied, then there will be more pressure to take the issue to the courts.

In the legal world, acting uncivilly will discourage parties from settling cases, or even agreeing on uncontroversial issues of law and fact. This may facilitate a winner-take-all approach to litigation, particularly institutional litigation, in which a complete victory can place substantial portions of a state's government under federal judicial control and the achievement of one's constitutional, political, or social vision.

To think of it in a different way, civility is necessary if one believes in the law as a neutral, autonomous system in which there are right and wrong answers. Civility then is but the natural functioning of a legal profession in which

we are all servants of that higher, nobler master, the Constitution and the law. The lawyer on the other side, or the judge, is not the enemy, but a fellow traveler on the journey toward discovering the correct legal answer.

But if one disavows this vision of the law, and if one sees the law as only a tool toward greater social or political end, then the need for civility disappears. One does not want to help others change their minds, or even to see the virtues of your arguments; he simply wants them to accept his arguments, regardless of the method. For him, the law is not a body of right and wrong answers, but simply another way of achieving one's policy preferences. He and his fellow lawyers are no longer colleagues in a common profession, but fierce competitors for limited resources.

The more you can attack the other side, the more you can make life difficult for them, the more you can rattle them, the more likely that the issues may be framed your way. If you can make the issues starker, if you can prevent settlement or prevent the court from finding a middle ground, then you stand a better chance of winning everything. In institutional or public law litigation, the few victories that win everything can be far more important than the many losses that may result, because it is those few victories that can stand as symbols for social change that will have force in the political world and force in the classroom.

I hope that these thoughts have not discouraged you. I, for one, always remember above all the resiliency and the good nature of most Americans. If history has taught us anything, it is that the American people seem to have endless resolve to recover from immense social or political strain with their optimistic nature and their civility intact. Unlike perhaps many other areas, this is an issue on which each of us, in the course of our daily lives, can have an impact. We should start the recovery today.

I call on each of you, lawyers, professors, students, and judges, to raise the level of your conduct toward your fellow colleagues and those with whom you come in contact, whether they be allies or opponents. Accord them the respect and treatment that you would like for yourself and that is their due as fellow citizens and fellow members of the legal profession. Encourage others by example to be more civil in both their public and private lives. In small, but important and personal ways, we can change things for the better, by example rather than fiat or dictate.

Thank you very much for the opportunity to visit and speak with you this evening.

May God bless each of you!