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## Civility and Freedom of Expression in a Constitutional Democracy

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### MODERATOR

**JOHN MILEWSKI (Woodrow Wilson International Center for Scholars):** Can we begin with some definitions? What is civility? What is incivility? Where do we cross the line from one to the other?



**BENET DAVETIAN (University of Prince Edward Island/Sociology):** Civility is much more than we think it to be. Civility is not the lack of rudeness or the lack of incivility. It's an actual force that needs to be identified and practiced. It is not simply detached tolerance or tolerance itself. I am reminded of Ralph Waldo Emerson, who said that there could be no true high civility without a true high morality.



Morality and ethics are also part of civility. Therefore, civility is restraint of one's own desires, one's own impulses in favor of the comfort of the other—the physical comfort of the other, the emotional comfort of the other, and also at a deeper level concern for the person of the other, the dignity of the other. At what point then is civility not only a relationship between two people but also something that I owe to my nation and that my nation owes to me?

**RONNELL ANDERSON JONES (Brigham Young University/Law School):**



I was thinking about why we call this a *civility* movement instead of one of the many synonyms we might have for that word, such as *respect*, *tolerance*, *politeness*, or *kindness*. One reason extends back to the origins of the word. We want to think about *civitas*, about the rights and obligations of citizens and citizenship. We want to think about something bigger than politeness, kindness, or caring for other people. We want to think about behavior that we presuppose is necessary for community living. This means having conversations that presuppose a community of members, where we respect each other's time, space, and opinions and listen more than we speak, and are inclusive. Likewise, we complain only constructively and cooperatively. We assume responsibility and blame rather than shifting it to others.

Indeed, we undertake a whole host of other behaviors that are not only nice but necessary for group living.

Yes, there are tensions between the norms of civility and a democratic system based upon free expression. But we should also recognize that those two principles share important cores. If we think about conditions that are necessary for community living, we have chosen democracy and the First Amendment because among other reasons we believe that this is the best way to sustain a community. That is the same reason why we should also choose civility. Much Supreme Court precedent on the First Amendment focuses on a marketplace of ideas, where we toss ideas out into the public square, sometimes with graphic language or images. There follows some kind of ultimate fighting championship of ideas, where truth and falsehood, or simply different opinions, grapple. That kind of rigorous exchange of ideas can happen in ways that are not shrill. You can be passionate without being shrill. The marketplace analogy helps us to think about why civility is a good idea. Words and ideas that are delivered in a civil tone through earnest engagement and thoughtful consideration of other

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people's vantage points are often better accepted than angry, militant, or pig-headed ideas.

The marketplace of ideas includes space for embracing a duty of civility. To quote my former boss and mentor, Justice Sandra Day O'Connor, every time I have heard someone ask her: What's the most important thing I can learn as a lawyer? What's the most important trait I can have as a lawyer?, she has responded "learn to disagree agreeably." That is both good advice and a useful summary of the middle ground between free expression and civility.

**JOHN KASSON (University of North Carolina/History):**



Civility has a whole host of definitions. The ones that struck me as most relevant to our discussion are, first of all, the virtues of citizenship and the ways in which we as citizens help con-

struct and contribute to a larger social order. Then, there's a notion more commonly used of refinement, respect, and politeness. If you dig deeper, you'll see decency. At different times we bring one or a combination of those meanings into discussion, but they can also be distinguished, and in some ways certainly as a citizen I would want to include them all.

If there were one definition we most want to defend, it would be the one where civility promotes democracy. This often results in a lack of polite conversation or even a lack of decency in expression. Civility can be used as a way of seeming to talk about manners and politeness. It may also be a way of obstructing people who have legitimate things to say that other people do not want to hear.

We can think about many rights movements in our own country's history, the civil rights movement, for example, that challenged prevailing notions of behavior. That movement challenged authorities and societal rules in a variety of ways. It was objected to as being not in good manners. Of course, the civil rights movement helped to expose the violence of a racist society that undergirded what

was supposedly a system of racial etiquette. We can think of similar analogies with other rights movements in the twentieth century, including women's rights and gay rights.

We need to remember that it is important to disagree passionately but also respectfully. We need to model that behavior wherever possible. We also need to protect people and interests even when they become disagreeable or disrespectful and acknowledge the importance of doing so. There are ways in which people can intentionally try to disrupt the workings of civil exchange, not only polite exchange but also the constructive dialogues that contribute to the working of our social order, to democracy itself. In short, we need to protect the vitality and the robustness of a democracy against elements that would in effect shut it down. But we also need to be vigilant to ensure that we don't close people down by objecting to unseemly or bad manners or disruptive or unpleasant behavior when people are saying what we simply don't want to hear.

**ANDREW KOPPELMAN (Northwestern University/Law School & Political Science):**



Civility refers to how you ought to behave in civilized society. This includes a wide range of behaviors, which have nothing to do with speech. Because we

are interested in the issue of speech here, we are therefore interested in a society where this "peculiar practice" developed in the last few centuries, since the invention of moveable type. There is a whole sphere of speech about public matters directed to an audience of strangers, or people who are never going to meet one another face-to-face. Yet these are people who are talking to one another, and there are accompanying rules, norms, and underlying values.

Speech is absolutely necessary to democracy. It is, of course, potentially dangerous and disruptive. Just ask former Egyptian president Mubarak about Facebook. The point of this public sphere is

to form some kind of collective will. The relevant aspect of civility here involves the norms inherent in this practice, one of which is treating your interlocutor with enough respect for the conversation to continue. Indeed, a central idea of democracy is that the conversation ought to be able to continue. Part of what comes with public discourse is encountering views hostile to your own—indeed, views that you think nobody should hold because they are so mistaken and pernicious in their consequences.

Consider, as an example, the recent controversy over whether a student could show up at her high school on the day after the Day of Silence, wearing a T-shirt that read "Be Happy, Not Gay." This suburban Chicago school has "civility" rules. She was deemed to have violated those rules. She filed a lawsuit against the school for suppressing her free speech rights. The case eventually reached the Seventh Circuit, which held, correctly in my view, that students do have free speech rights and that the school must be able to show some serious disruption of the educational process before it can justify suppressing a student's free speech rights (*Zamecnik v. Indian Prairie School District #204*, March 1, 2011).

This speech, while it is quite unwelcome to some students, actually seems to have been conducive to discourse among the students. In the Seventh Circuit opinion, Judge Posner states that one response to the lawsuit was the creation of a Facebook group titled "Be Happy, Not Heidi," where hundreds of comments were posted. Evidently, Judge Posner read them all, remarking that many of the comments addressed substantial issues involving First Amendment claims, school policies, the treatment of gay students, and the role of the media in the dispute. Apart from the excessive use of expletives, the discussion of the issues was substantive and even to a degree thoughtful, in the eyes of Judge Posner.

In sum, we must be careful with "civility" rules, because part of what free speech contemplates is being exposed to views that you really don't want to hear. In fact, one of the admirable traits of character that a culture of free speech fosters is the ability to be able to hear things that

you really don't want to hear without hitting someone. That restraint is not something that you can take for granted that a culture is going to develop. Consider Pakistan, where a minister of minorities' affairs was assassinated in March 2011 because he thought there should not be blasphemy laws. The idea that we ought to be willing to expose ourselves to deeply hostile views is not one to be taken for granted. It is an aspect of civility that has to be constructed and nurtured.

**DAHLIA LITHWICK (Senior Editor,**



**Slate):** I have an elaborate First Amendment framework, and as a parent of young children, I also have an elaborate “mommy” framework. They only occasionally intersect. It has been interesting for

me to see how painful words can be, and how when you are trying to teach civility to young people, you refrain that back through the way we should all talk to each other.

I think of civility as a type of “Golden Rule of Speech,” don't say to others or about others words that you would not like to be said to or about you. That does not mean you cannot speak sharply or passionately, as others have already noted. Ours is a country born in a revolution. The Boston Tea Party was not a civil affair. But I strongly believe that you should not lie in political discourse nor presume that the other side lies. If you start from the presumption that the other side is always lying, that's an enormous incentive to become a liar yourself. I think you should attack the speech, not the speaker. You should not knowingly mischaracterize the other side. That will incline them to mischaracterize you. These are basic “Golden Rule” propositions about speech and civility, ideas that one (hopefully) teaches one's own children.

We are talking about a communal enterprise here. Civility is not something that you do by yourself when you are brushing your teeth—it presumes you and another person. As a result, there is

an enormous burden in the conversation about civility to be listening, not just talking. Although I am not sure about whether we are now less civil than in the past, I am certain we are now in the midst of a culture of raging narcissism, where the sense that our voice is more important than anyone else's and that our dignity is more important is now prevalent. When our rights are impinged, somehow the theater of acting out becomes very important. Civility is an inoculation against that kind of narcissism that has, indeed, grown rapidly in recent times.

My model for civility comes from the amazing Brer Rabbit, Tar Baby story, where Brer Fox invents a fake Tar Bear baby. Brer Rabbit comes along and is convinced that the Tar Baby is insulting him and being rude to him and pummels him and is eventually trapped by him. It seems to me that the opposite of civility is the world we live in now. We are fighting most of the time against something that is not real. If I can offer a prescription, let us stop fighting pretend monsters and instead talk to each other.

**SUZANNE SPAULDING (Bingham Consulting Group):** I



agree with Dahlia that we women learn a lot of important lessons through our experiences as mothers and parents. CIA officer and counterterrorism expert Gina Bennett has written a book,

*National Security Mom*, where she observes that much of what she has learned about national security has come from her kids. There are some fundamental lessons that should not be lost in our discussion. For me, one lesson about civility occurred when my kids were in elementary school, and my husband and I discovered that our children had very strong opinions because their teachers told us that our children had very strong opinions about topics, particularly political issues. Initially, we were proud of this behavior. Then their teachers told us that they intimidated the other children in the class who were afraid to speak up. We realized we had not done a good job of

teaching our children how to engage in a civil debate. We had to explain that not everyone who disagrees with them is an idiot. You will be a much better advocate if you try to understand others' opinions and how they reached them. You have to approach these conversations with respect. You have to avoid personalizing issues and impugning people's motives and instead keep to the substance of the conversation.

Many years later, when I went to work on Capitol Hill, I discovered that many members of Congress also needed to have this same kind of instruction. The members who have the greatest credibility on the Hill are those who remember these rules about how to engage in a civil public discourse. Yes, there is an important place for anger in public discourse. Indignation about injustice, for example, can be very appropriate, but we have to be careful here. Certainly, the First Amendment was not designed merely to protect civil public discourse.

**JOHN MILEWSKI: I want to ask you about national security and civility. This is an area that was supposedly once above incivility or harsh partisanship. Is this still the case?**

**SUZANNE SPAULDING:** No, and it's been very sad for me to see. When I started working national security issues in 1983, it was always the case that nobody knew my party affiliation, and I didn't know the party affiliations of the people with whom I worked. There was a strong consensus that you did not bring your partisan views for political purposes to national security discussions. Yes, there were disagreements that broke down along party lines, which never struck me as inappropriate or improper. It is when politics begins to supersede national interests that we cross a dangerous line. Unfortunately, I think this trend of hyperpartisanship has now moved into the national security arena. Much of it started post 9/11, when these issues began to have some real political currency. The 9/11 families were very effective advocates for the reforms they were pursuing, and some of these concerns became issues in a presidential

election, where politicians saw some political advantage in politicizing national security issues. In the field of counterterrorism where I work, there is a real detriment to our overall efforts from some of the uncivil public discourse that's taking place around Muslims, the role of Muslim Americans, talk about Sharia law as a threat to America, and the like.

**JOHN MILEWSKI:** Such as General Petraeus urging that the Quran should not be burned to “celebrate” 9/11—as advocated by a fringe group here in the United States. This would be harmful, indeed detrimental to our troops, their efforts, and safety?

**SUZANNE SPAULDING:** Exactly. The Quran burning episode is a very good example. Our best response is not to make such behaviors unlawful, but to engage, to get all citizens to engage, and to reassert the kind of America that we really represent, which is an America that believes in freedom of religion, an America that is tolerant. We should not sit quietly by and bemoan this kind of harmful speech. We need to speak up and challenge it.

**JOHN MILEWSKI:** Is 24/7 cable television news, which thrives on hyperbole, shouting, and the like, a cause of incivility these days?

**RONNELL ANDERSON JONES:** It is certainly an important question to think about how much the media is to blame for our state of incivility. But I think it is uncivil to place blame on a single entity. Changes in our media ecology have put us in a place where we can more quickly be uncivil to more people. I have been researching the fragmentation of the American media. Just a generation or two ago, the daily newspaper came to our houses, and we looked to it for everything—our sports, our city council meeting, our movie listings, our recipes, opinions and classified, etc. So, if we went to the newspaper mostly for sports, we would stumble upon news, public affairs, and opinion. But the world of media consumption has totally changed. Accidental encounters with others' opposing ideas

are waning in our new media ecology. As we move to social networking, following blogs, and polarizing cable news entities, the result is that incivility prevails and is rewarded. The First Amendment presupposes a marketplace of ideas, and to the extent that we have less of one, we become less tolerant. We have so much constant validation of our own cloistered ideas and so little real competition to them. Similar thinking audiences are increasingly being served a steady diet of anger and dissatisfaction.

**BENET DAVETIAN:** The Canadian environmental advocate David Suzuki has used the metaphor of the runaway automobile, where we are all sitting in a car headed for a brick wall, and we are arguing about where to sit. I'm becoming worried that this focus on definitions might distract us from asking *why* people are behaving in an uncivil way. I have a couple of ideas I would like to share. The media are the exceptions, really. What is happening is that the United States, which has always believed in the censoring of anger, is now in a state of panic, because emotions of the people are coming out. Americans are becoming Europeanized, basically. Look at the Italians or the French. They can be both uncivil and civil. There is no contradiction. I think the biggest danger facing us now is to make too big a deal out of this incivility and not examine those factors that are really affecting people and their lives. Let's not forget what is happening in the economy these days. It's not just the politicians because the politicians are arguing (albeit loudly) over resources that are no longer there, a shrinking pie so to speak. In my view, that's why we see this kind of uncivil talk.

**JOHN KASSON:** Americans have been concerned, at least since the eighteenth century, with the question: Who appropriately can express anger? In fact, anger is something that people of the highest social status have always been able to express, starting with God and working on down. God could express rage, Lords and Kings could express rage, but it was not suitable for others to do so, certainly not for women or for slaves, for example.



Now we discover that everyone can express rage, although I think it's still highly gendered. We see a whole lot more of male anger out there.

People at times are now both in violent disagreement or violent agreement with one another. But we also have staged in the media violent disagreement as a type of theater. What we get less of in our society than we used to is *face-to-face*, disciplined disagreement and disciplined discussion. The decontextualization of those interchanges and the anonymity of them in various technologies, from blogging to driving on interstates, lead to the expression of anger and incivility, even to rage and violence. These exchanges are no longer mediated or tempered by ongoing personal relationships.

**ANDREW KOPPELMAN:** A lot of gloomy things have been said about the state of civility. But if you asked me about the general direction of civility in American culture, I would say that it is a complicated story. Yes, we know of recent examples of members of Congress shouting at one another on the House floor. But back in the nineteenth century at the peak of the slavery debates prior to the Civil War, there was once an episode where one member of Congress mutilated another with a cane on the Senate floor. Yes, you can talk about a television commentator challenging another commentator to a duel, but Aaron Burr did more than that to Alexander Hamilton.

In current times, there is plenty of anonymous abuse on the Internet. But at the same time, among different blogs there is a norm of linking to the person who you are responding to, so as to facilitate a polite exchange. I recently had one such exchange about gay rights with the political scientist Robert George of Princeton, who is a very sweet guy but wrong about absolutely everything. Each of us understood that what we were going to say was going to be more persuasive to the audience if we could be more polite than our interlocutor. I think these norms of civility are also a part of the Internet culture of discourse. In short, the trajectory of civility is indeed a very com-

plicated story. I don't think it's all going downhill.

**DAHLIA LITHWICK:** Despite all the rampant incivility around us, I do think as a society we are, paradoxically, thinner skinned than we have ever been. We are much too inclined to take personally what was never intended to be personal. This is very much tied to the narcissism that I spoke about, where we think we're the only person in the room wherever we go. The Internet does not help. The more connected we are to the world, the more utterly alone we are. Certainly, in terms of experiencing subjectively what other people are feeling, we have almost com-

pletely lost empathy. At the same time, we're very aggressively mean because there's a cycle going on here. The moment someone insults you, and the Internet is great for this, the gloves are off because now you are enemies.

What has changed is that the benefit of the doubt to the other speaker is now gone. What we now see is a metadiscussion taking place. We begin to have a conversation on the merits of a question. When I decide that I don't like what you say and accuse you of being politically correct or incorrect, or of being on MSNBC, or any number of vile epithets that I can throw at you about the way you are talking to me, this is all a way of

### Civility Programs on College Campuses

Civility, or its absence, is a national issue, and college campuses have not been immune to strident dialogue and actions. Conflicts between claims for civility and First Amendment freedoms have occurred between different groups on campus, including Democratic and Republican clubs, environmental and business clubs, and various ethnic and religious student groups. Then, too, individual students have been targeted because of their race, ethnicity, gender, religion, or sexual orientation. The most prominent recent examples include sexual assaults of women by male students at Yale University and the suicide of a gay Rutgers University student who was unknowingly filmed by his roommate.

A number of colleges and universities have responded by instituting mandatory civility codes, where students agree to abide by a set of rules about speech and behavior. Some of these colleges, however, have run afoul of First Amendment principles for codes that violate protected, if uncivil, speech. Other colleges have begun more ambitious but voluntary educational programs designed to teach students and other campus members about the values of inclusiveness, respect, and civility.

Johns Hopkins University was the site of one of the first campus civility projects begun in the mid 1990s by a professor of Italian literature, Pier Massimo Forni,

who became concerned by the growing incivility in American society and on his campus. He now teaches a course on civility, writes for newspapers, and speaks widely. He has also published a book, *Choosing Civility: The Twenty Five Rules of Considerate Conduct*, which other campuses have adopted or used, including, for example, Grand Rapids Community College, where Forni's book was the subject of the school's "One Book-One College" program, and where all faculty have been encouraged to incorporate civility discussions into their classes.

At Allegheny College, the Center for Political Participation has conducted national surveys on the declining state of political discourse. The college recently hosted students from around the country to develop guidelines for more civil political dialogue, and it has also established a "Civility Award" to recognize a national political figure who has demonstrated civility throughout his or her career.

Rutgers University recently began Project Civility, a two-year program to raise awareness of the issue around campus. One of the first events was an evening of parliamentary debate in which members of the college's debate club took opposing sides of the question as to whether the university lacks civility and sought to model the value of civility in their style of debate.

The University of Wisconsin, Oshkosh hosted a workshop earlier this year to discuss ways that the UW system could develop programs to support free speech in environments that honor respect and diversity. Administrators, faculty, staff, and students from UW campuses statewide participated in discussions to define civility and learn from other successful campus-based programs.

At Lafayette College, hundreds of students, faculty, and staff have voluntarily taken the college's new Civility Pledge to support the values of thoughtfulness, respect for others, and breaking down barriers on campus. The text of the pledge is now displayed at the student union, where hundreds of students and other community members posted their photographs on a pledge wall to show support.

These are but a few examples of the different kinds of proactive programs that colleges are undertaking to advance the values of civility—including intellectual freedom, diversity, and respect for differences. Most importantly, administrators are typically developing such programs in close collaboration with faculty, other staff, and students so as to ensure broad campus support. How is your college or university addressing the balance between civility and free expression? Continue the dialogue on Facebook: <http://www.facebook.com/abapubliceducation>.

disengaging from the merits. It's a way of saying I don't want to have this conversation anymore so I am going to talk about the way we are talking to each other. This is quite pernicious really, because once you start talking about the conversation you have lost the substance of what you were meant to be talking about.

**SUZANNE SPAULDING:** Much of this uncivil tone, unfortunately, is set by our political leadership and what we see them doing. Politicians learn very quickly that you can convey much more to voters with a negative ad and quick slur than you can by trying to engage them in a substantive debate about issues that,



perhaps, they lack information or understanding of. It's very much like the power of music, the power of symbols, or the power of poetry—nonverbal ways of communicating that are incredibly powerful. Politicians know this and act accordingly. Because the media reports more readily about confrontation, it does a politician or any political figure no good to engage in civil public discourse.

More generally, this hyperpartisanship is driven by fear. The power of incumbency isn't what it used to be. Members of Congress who used to feel secure in their seats and therefore could take a risk to reach across the aisle and actually work with a member of the opposing party are now terrified. They're all terrified of losing their seats. As a result, party cohesion becomes very important, and the (negative) consequences of trying to act in a bipartisan manner loom large.

**JOHN MILEWSKI:** Can we identify a “Golden Age” for civility in American history? What's the high point of American civility?

**JOHN KASSON:** I don't think there was a “Golden Age” for civility. There are two ways that people like to talk about civility. One is that it's worse than ever, which is demonstrably not true. Alternatively, it's better than ever, which is unsatisfying as well. Looking at the composition of our society and the dynamics of our problems, we can see continuities. We can also see many issues that are in fact novel, though not necessarily unprecedented. We can see on the one hand that if people want to go back to an earlier time and say that was a Golden Age of civility, you can point to all kinds of people who were silenced or kept out of the democratic process in those conversations. We can also see many troubling things about our own democracy today, where not all of the people and their voices are represented in a strong and vital way. But I also don't subscribe to the idea that at one time everyone in society behaved very well and now people behave badly.

**JOHN MILEWSKI:** Where do we learn the rules? Who teaches us how to be civil?

**BENET DAVETIAN:** Before the 1980s, parents had a great deal of influence. Parents taught children manners, empathy, a sense of bipartisanship, and how to listen. The schools supported and reinforced these virtues. Once upon a time, schools were empowered to do this to socialize students to have some kind of conscience, dignity, a sense of duty—patriotism, may I add. But the schools are no longer doing this.

Traditionally, the aristocrats and the upper middle classes led society, while the rest of the people—the “rebels”—did not have a voice. We now live in an age where the rebels have a voice; the rebels may not have a job, but they're on the Internet communicating and organizing. As a result, the socialization process now lacks any hierarchical control. When you

look at a country's constitution, for example, the constitution makes sense only if it surrounds a nation and the people support it. But the nation itself must have a shared goal and a definition of what it holds sacred, what it holds profane, and how to separate the two. We had that and I say “we.” I'm not American, but I went to American high schools. My dad worked with the United Nations, and I grew up with American professors. My heart is broken to see what has happened to the United States of America, the country that we worshipped. We still have hope for it to be the world leader. I don't think the lack of civility is the problem. Education is the problem, the schools. If you can integrate civility instruction into schools, that would be good. But what's the use of teaching civility to people who can't read and write?

**JOHN MILEWSKI:** It's not just that we don't teach kids to debate civilly, we don't teach them to debate or think critically. We're too focused on testable outcomes.

**BENET DAVETIAN:** Yes, that's exactly right.

**ANDREW KOPPELMAN:** I agree with Benet about the importance of education and the schools. That is one of the reasons why Pakistan, for example, is having such terrible problems. That government has completely neglected education for such a long time. One of the skills



that you need to have for civil discourse is this skill of being able to unpack the argument that the other person is making and engage with it. People aren't born with that skill. They have to develop the skill, which is a very different kind of education from teaching to the standardized tests. The ability to be good at taking a test is not an irrelevant skill, but it's a very different skill than the ability to construct arguments and write coherently.

**JOHN MILEWSKI: Taking standardized tests is not a civic skill?**

**ANDREW KOPPELMAN:** No, that's not the ability to write and construct arguments. The fundamental issue, and this relates to the recent very popular practice of beating up on schoolteachers, is that education has some broader and different goals. We're not only trying to educate efficient workers, which in my opinion is what teaching to the test does. We're also trying to educate citizens.

#### **"Fighting Words" Doctrine**

In *Chaplinsky v. New Hampshire* (1942), the Supreme Court upheld the conviction of a pamphleteer for Jehovah's Witnesses who called the public officials trying to curb his activity "fascists." The Court held that a few narrowly defined categories of speech lie outside the protection of the First Amendment, including so-called "fighting words," words that by their very nature inflict injury or incite to violence. In subsequent decisions, the Supreme Court narrowed its scope of fighting words, notably in *Cohen v. California* (1971), where it protected an expletive-based criticism of the military draft, and later in *R.A.V. v. City of St. Paul* (1992), where the Court struck down the constitutionality of a municipal ordinance prohibiting fighting words on the basis of race, religion, and gender. Today, the fighting words doctrine remains part of American jurisprudence; *Chaplinsky* has been trimmed but not overruled and is still cited favorably by some lower courts.

**JOHN MILEWSKI: Let me ask about the legal dimension. Can we legislate civility? Is there a role for law in this discussion?**

**ANDREW KOPPELMAN:** Yes, there is a critical role for law in our discussions of civility. Having a rule of free speech actually does have an educative role, because it means that we are going to have to live in an environment where we know that our fellow citizens disagree with us. As a result, we have to learn to cope with that situation, and we have to learn to engage with it. This helps to develop a different kind of character than when the orthodoxies that you accept or take for granted are the same orthodoxies accepted by every decent person around you.

**JOHN MILEWSKI: I want to ask about two contemporary situations to further inform our discussions here. One is the recent *Snyder v. Phelps* decision of the U.S. Supreme Court and the other is John Galliano's anti-Semitic rant in Paris.**

**DAHLIA LITHWICK:** *Snyder v. Phelps* is the March 2, 2011, decision involving the Westboro Baptist Church and its band of protesters who go to military funerals holding up all sorts of incredibly hurtful signs. They believe that the reason soldiers die in war is because of America's tolerance for homosexuality. The Supreme Court said that this kind of protest is protected speech, because it's a matter of public concern. The protesters are talking about the war and sexuality, and they marched and stood where they were supposed to. In short, they did nothing wrong. Justice Alito offered a lengthy dissent, arguing that the First Amendment does not protect the kind of verbal assaults launched upon the deceased marine's family at or near the funeral site. John Galliano, a designer for Dior, got drunk in a bar in Paris, where he said unspeakable things about Jewish people. Because France has the kind of hate speech laws at which Andrew cringes, he actually has been charged with a crime and is due to stand trial.

The funeral protest case (*Phelps*) would have been particularly interesting from a legal standpoint if it were an incitement case. There is some discussion in both the majority opinion and the dissent that flirts with the question: What if somebody was so affronted by this speech that they punched someone in the mouth? This precise example is not in the language of the opinion, but certainly present is the idea or fear that this kind of speech is so egregious that it could lead another person to respond violently. When we talk about First Amendment doctrine, we need to ask anew whether we are using the wrong test for incitement. The test is a very old one, and perhaps the requirements for incitement have changed. Consider Glenn Beck sharply criticizing the political agenda of the Tides Foundation, of which few people had ever heard. Soon afterward, there's a guy loading shotguns into his truck to go kill people in the Tides Foundation, before the police arrested him. We have a doctrinal problem. Perhaps the test for incitement may no longer be working in our current political environment. But when we talk about the need for civility, we don't usually discuss the potential for uncivil speech to incite and provoke.

**RONNELL ANDERSON JONES:** I have this debate with my students every time I teach the First Amendment, when we talk about the "fighting words" doctrine (see sidebar box). Prior to the 1960s,



“fighting words” was one of a very small number of categories of words that the Supreme Court declared to be *not speech* for the purposes of the First Amendment. If the words were fighting words, then the Court had consistently said that the state was free to regulate them, free to ban them, indeed free to penalize people for uttering fighting words.

Initially, the fighting words doctrine had two different parts. One part was the kind of speech that Dahlia talked about, speech likely to cause someone to punch another person in the face, the immediate trigger to violence. The other type of fighting words involved words that, by their very utterance, inflicted injury. So, for example, saying really terrible, scathing, nasty things about a person where the words themselves hurt you, we used to treat those as not speech and therefore not protected by the First Amendment. But by the 1970s, the Court reversed the second part of the doctrine. Now, these kinds of words are totally protected by the First Amendment. In short, the Court has turned the doctrine from a focus on uncivil words to a focus on uncivil behavior. Thus, if your words cause physical violence or are the trigger to physical violence, then you are outside the umbrella of the First Amendment. But a wide variety of thoroughly uncivil words are wholly protected. In fact, the Court has said that the onus is on you, the listener, to restrain yourself. It’s on you to avert your eyes, if you see something that offends you, and to keep control of yourself rather than ask others to control their words.

**BENET DAVETIAN:** This idea that the victims should restrain themselves is the thoroughly mistaken mind-set that is legalizing bullying, which is crippling our students today. This mind-set is also prevalent in the corporate and political worlds. I remember a scene recently from this very city of Chicago, where a woman who was running for mayor accused another candidate of having been a “crack head” some years back, knowing that the woman had done drugs as a teenager but no longer did. This is the kind of discourse we get due to what I would call First Amendment abuses.

**ANDREW KOPPELMAN:** One aspect of the way the regime of free speech works here in our country is that there is speech that is fully protected in the United States that is criminalized in other countries. For example, you can engage in racist and anti-Semitic speech in the United States and, unlike in France, the police will not arrest you. On the other hand, such speech has consequences here. If you are a public representative of a large corporation, I strongly advise you for the sake of your continued employment not to engage in racist and anti-Semitic speech. This is not a matter of law; rather, your employer is likely to fire you, bowing to public pressure. The political candidate Benet referred to, Carol Moseley Braun, slandered her opponent but nobody called the police. The reaction of the Chicago electorate, however, was swift and decisive. She received less than ten percent of the vote. Thus, those nonlegal or social sanctions about which I spoke are a part of the regime of free speech in the United States.

**JOHN MILEWSKI:** **How much of this talk about civility is generational? When we talk about words, something we hear young people say all the time is “this sucks.” They don’t believe that they’re being rude or uncivil, it’s just a common phrase that younger people use, but some of us of an older generation might react differently. How much of our perception of a slippery slope of civility is part of this failure to decode language properly?**

**JOHN KASSON:** Some of this is generational, but I think it’s also contextual. Certain words will be used within a certain context or with certain groups. I think now we might say the boundaries of those words, for technological or social reasons, have been removed. One result is some words lose their meaning and their force.

**JOHN MILEWSKI:** **Dahlia, you are someone who writes in a very witty and entertaining fashion. Do you consider that some of the words you choose, when attempting to be entertaining, might be perceived as impolite?**



**DAHLIA LITHWICK:** I think that the cornerstone of what I do is impolite and irreverent, and I feel that’s important—this is what the First Amendment protects. I want to flip your question and ask: Are we doing the right thing by creating a regime in which one child who posts one statement on the Internet is accused of cyberbullying, and that every child in the country who does what every child in the universe throughout all of history has done, which is call other children names, is now in peril of having a cyberbullying record?

**JOHN MILEWSKI:** **But isn’t the difference that, in the past, children didn’t do this through a broadcast medium?**

**DAHLIA LITHWICK:** That’s part of it. Although the entire “bullying industrial complex” that has arisen in this country isn’t just about what you post on the Internet, it’s also about what you say to other children in school. So, I’m just flipping the presumption and saying that we have this presumption of eggshell children. But it’s also a reflection that we are increasingly turning to others to deal with these problems for us, particularly the government, i.e., if we’re uncomfortable with a situation, then there “ought to be a law against it.” I worry about this tendency because it gives us permission to disengage. What really needs to happen in these contexts is for us to become more engaged. The way to address a lack of civility in public discourse and offensive speech is to become very much engaged. The marketplace of ideas depends upon all of us swarming like antibod-

ics, and if instead we think that certain speech should be illegal, we tend to disengage, which is dangerous.

**JOHN KASSON:** I don't think people have become more thin-skinned; rather, there has been a dynamic in bullying in school-age kids that has increased, and the cause is technological. The ability of kids to communicate out of school, as well as in school, with cell phones and other social media has created a new and regrettably robust environment for bullying.

**BENET DAVETIAN:** Just because bullying has been around forever doesn't mean that it should go on forever. If you think kids have become too thin-skinned, I would point out that bullying is leading them to suicide in ever-greater numbers. The rate of suicides in Canada due to bullying is horrendous. We now have girls fighting physically almost as much as boys. We shouldn't be afraid that we are going to lose all of our freedoms if a few laws are put into place to protect children. This concern about First Amendment violations is peculiarly American.

**DAHLIA LITHWICK:** Benet, how can it be the case that a parent is in an adversarial position with the school or the state, because that governmental entity has decided it knows best? This is your point, that the government knows better how to address bullying than a parent? I don't want my children to be free to bully. But the question is whether there should be a regime that is criminalizing bullying, a regime that substitutes its judgment for mine as a parent.

### Q & A from the Public Forum

**How has the fragmentation of our common culture contributed to incivility? Recently, for example, social science behavioral research has enabled marketers to target aspects of consumer behavior and desire with a high degree of precision. All of this "microtargeting" has moved from the consumer to the political realm. How much of this contributes to the lack of civility?**

**SUZANNE SPAULDING:** I think marketing is surprisingly civil. Compared with consumer advertising, political advertising is so different and less civil. For example, cars that battle against each other in advertising wars are appealing to you based on their functionality. Subliminally, they may be appealing to you based on the sexiness of their car, but it's a much more civil discussion. I do think that the microtargeting of voters has contributed to this hyperpartisanship, because it allows a candidate to pull in more of the voters who agree with this package of ideas, often extremist ideas. Before microtargeting, candidates had to draw upon a broader base of voters and attract some political independents.

**RONNELL ANDERSON JONES:** Civility takes more time than incivility does. In a sound byte in seven to eight seconds, you can easily capture anger and vitriol, you can lie pretty quickly. You can level an accusation that is targeted

at a campaign, and likewise you can do a lot of things quickly in public schools. But talking about and engaging in civility is a longer, more percolated educational process, not as well suited to the faster-paced environment in which we now live.

**In a perfect world, there would be a cost to incivility. But it feels like that doesn't happen very often; most times, there isn't any cost. Can we say that in our country, or community, there is a shunning or shaming that might follow from incivility?**

**JOHN KASSON:** I think the most famous moment in the second half of the twentieth century in American history about rebuking someone for shameful behavior was Joseph Welch in the Army-McCarthy hearings, when he asked of Senator McCarthy, "Have you no sense of decency, sir?" We pine for moments like that to be recreated. We should also remember that, for all the figures currently in Congress who we think behave badly in one way or another, there are those who do not get a lot of headlines but are very civil persons.

**How about two types of speech that are harmful to democracy? One is the uncivil speech that we've been talking much about. But a second type of speech is speech that is simply not true, speech in the public dis-**

**course that purposely distorts figures and precedents and otherwise harms public understandings. If you say something intentionally negative about an individual and there is harm, the individual has legal recourse. If you say something intentionally negative about a candidate or a president's tax policy and there is harm to the public discourse, it is much tougher to see what recourse there may be. What are your thoughts?**

**ANDREW KOPPELMAN:** Let's take the example of recent health-care reform discussions and references to "death panels." The problem with allowing that speech to be sued or prosecuted is that then you have to decide which false speech to sanction. That person doing the deciding is likely to be the exact incumbent who is being criticized by the speech. This might lead to you thinking that you don't trust that person to decide fairly as to which is the false speech that needs to be sanctioned. This is the best reason for keeping the government out of the business of policing true versus false speech, when it comes to matters of public policy.

**There has been a long series of cases in the South involving students wearing T-shirts and other clothing with images of the Confederate flag. These cases have resulted in quite**

different court decisions, depending on whether or not the school had a history of racial tension. Where the school had such a history, the courts have said that schools could bar the flag because of a fear of substantial disruption on school grounds. But if the school doesn't have that history of racial tension, the First Amendment protects wearing the flag on a T-shirt. How do you educate middle and high school students about the proper way to handle an issue like this, especially when the court's standard, substantial disruption, seems to hinge on historical artifact or how clever the school is at demonstrating particular types of disruption?



**ANDREW KOPPELMAN:** This relates to our earlier discussion about legal sanctions versus social sanctions. The legal test is that you can't sanction the speech absent substantial disruption. If you didn't have that rule, schools would be free to censure any political speech that they don't like, which would almost certainly involve suppression of politically unpopular viewpoints. Courts have to make a threshold determination about whether or not students ought to have legally enforceable free speech rights. If students do have such rights, then the school has to offer something beyond speculation in order to support its claim that it has an important reason to suppress this speech.

Of course, the legal suppression of speech is not the only sanction that's available. Social sanctions are also available. The defense of the Confederate flag typically involves mischaracterizations of the Confederacy, e.g., the idea that the Confederacy was not fundamentally about slavery. The best way to counter this wrong idea is for students (or adults) to read, for example, the var-

ious state resolutions of secession that were passed at the outbreak of the Civil War. If you read the primary sources explaining why the states were seceding from the union, you would conclude that this controversy was indeed very much about slavery.

#### **Does the lack of civility have something to do with the lack of discipline in the family?**

**SUZANNE SPAULDING:** This question refers to our previous talk about whether the lack of civility is a generational issue. But I actually don't see the younger generation to be significantly less civil in their discourse than adults, such as those on Capitol Hill. I don't know quite how to evaluate what families are doing today. The role of the family is important. One of the things I worry about when we expand law into these spheres is that law begins to displace the family, in particular the relationship between parents and their children and the obligation of parents to educate their children about these kinds of values.

**RONNELL ANDERSON JONES:** I do see a very serious problem that underlies the sense of expanded entitlement, whether it is a parenting problem or a changing cultural norm, which is con-

nected to these civility questions. No one wants to concede any ground. Everyone feels that they are totally entitled. Frankly, I think that better parenting would help this situation. Every day, I find myself coming home from my job at the law school and saying to my children, "when you're in law school, treat your professor in this way, treat your colleagues in this way, because you're not entitled to a legal education, you have to work hard for it." I think dialogue between educators and parents can help.

As educators, we can say to parents: "Here are the expectations and goals we hope that you will set, and we will help your children achieve them."

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