



Civility —ITS URGENT NECESSITY

FOR A CIVILIZED FUTURE

by Edward R. Slaughter Jr.

Many articles have been written in recent decades about the decline of civility in the legal profession. There has been far less discussion in legal publications and law-related programs on the decline of civility in society. The legal profession is not unrelated to the society in which it exists. Attitudes and customs affect how lawyers interact.

Sociology Professor James Davison Hunter of the University of Virginia's Institute for Advanced Studies in Culture taught me much about this fascinating topic.

Hunter suggested I read his book, his landmark study, *Culture Wars: The Struggle to Define America* (Basic Books, 1991).

The book offers examples of people on opposite sides of our cultural divide and provides the reader a chronology from the time of the first settlers. Hunter says that there has always been cultural conflict in America.

To describe the combatants in shorthand, Hunter chose the titles "orthodox" and "progressive" to describe the "*formal properties* of a belief system or world view." He distinguishes the combatants as follows:

What is common to all three approaches to *orthodoxy*, for example

(and what makes orthodoxy more of a formal property), is *the commitment on the part of adherents to an external, definable, and transcendent authority*. Such objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are. It is an authority that is sufficient for all time.

Within cultural progressivism, by contrast, moral authority tends to be defined by the spirit of the modern age, a spirit of rationalism and subjectivism. Progressivist moral ideals tend, that is, to derive from and embody (though rarely exhaust) that spirit. From this standpoint, truth tends to be viewed as a process, as a reality that is ever unfolding. (p. 44)

Through twelve absorbing chapters—including chapter 10, entitled "Law"—Hunter discusses the present battle, the means of conducting the battle and the areas in which the battle is waged. In the last section of the book, "Toward Resolution," Hunter attempts to reconcile opposing sides, but he is not optimistic. While he acknowledges that many

Americans find themselves between the two warring factions, he notes that those in the middle do not raise their voices loud enough to be heard. They leave the battle to the extremists on both sides, many of whom have a moral stake in the outcome and a financial interest in continuing the battle.

Hunter also referred me to *The Therapeutic State: Justifying Government at Century's End* (New York University Press, 1998) by James L. Nolan Jr. of Williams College. The book details the evolution of our national life, from operating within a framework of outwardly imposed moral authority to patterns of behavior that are treated as illnesses that require therapy.

First, and perhaps most important, the therapeutic ethos, unlike traditional moral orders, is at its heart self-referential. As I discuss in the next chapter, the conditions of industrialized capitalism effectively undermined old forms of moral authority. Consequently, the individual has been left to himself or herself to establish standards of moral interpretation. Where older moral orders looked to a transcendent being, to a covenantal community, to natural law, or to divine reason to provide

the substantive basis for culture's moral boundaries, the therapeutic ethos establishes the self as the ultimate object of allegiance. The self has become, as Daniel Bell contends, "the touchstone of cultural judgment".

The book describes a therapeutic doctrine that dominates some of society. Included are analyses of how therapy has invaded civil case and criminal justice. Throughout the book there are references to therapeutic justifications for legislation.

Nolan, like Hunter, tries to be objective. However, his last chapter, entitled "The Paradox of Unintended Consequences," points out dangers to individual liberty. He cites the peril of having an individual's future determined by therapists rather than by judges with the power to mete out punishments. Nolan asks if our country has produced students for whom self-esteem is the ultimate goal of education—rather than the achievement necessary to make them productive citizens. He asks if our students can compete with individuals from other societies whose goal is achievement and not self-esteem. (p. 306, et seq.)

On the subject of civility, Hunter singled out the works of Stephen L. Carter, William Nelson Cromwell Professor of Law at Yale Law School. Carter is the author of *Civility: Manners, Morals, and the Etiquette of Democracy* (Basic Books, 1998). For those who do not have the time to read the book, an interesting adaptation may be found in "Just Be Nice," Carter's article from the May 1998 *Yale Alumni Magazine*. Carter contends that our society has, in the assertion of rights with regard to trivial matters, minimized the idea that we have obligations. Citing Pepperdine University Professor James Q. Wilson, Carter notes that we suffer from the "elevation of self expression over self control."

Carter discusses *Cohen v. California*, 403 U.S. 15 (1971), a decision of the U.S. Supreme Court that overturned the conviction of a young man who wore on his jacket the "benign legend" (Carter's term) "[expletive] the draft." While Carter agrees

that, as a matter of free speech, the Supreme Court was correct in overturning Cohen's conviction, he notes that the case arose at a time when public insults were becoming vulgar. He distinguishes these expressions of free speech from the witty insults of an earlier day, which were not obscene or—in his view—offensive. Saying that politicians and other public figures competed to demonstrate their cleverness in repartee, Carter points to one of his favorites, British Prime Minister Benjamin Disraeli's explanation of the difference between a misfortune and a calamity: "If Gladstone fell into the Thames, that would be a misfortune. And if anyone pulled him out, that would be a calamity." Carter writes, "Nowadays the tradition of barbed wit has given way to a witless barbarism." He asserts that "when the framers of the Constitution envisioned

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the rough-and-tumble world of public argument, they almost certainly imagined heated disagreements against a background of broadly shared values." He later notes, "When offensiveness becomes a constitutional right, it is a right without any tradition behind it, and consequently we have no norms to govern its use. The right, even if called self expression, comes from no source other than desire."

Carter states:

If we fail to distinguish desire from right, we will not understand that rights are sensible and wise only within particular contexts that give them meaning. The Constitution protects a variety of rights, but our moral norms provide the discipline in their exercise. Sometimes the moral norm of civility demands that we restrain our self-expression, for the sake of our community.

Returning to the topic of civility:

Yet we should recognize the terrible damage that free speech can do if people are unwilling to adhere to the basic precept of civility, that we must sometimes rein in our own impulses—including our impulses to speak hurtful words—for the sake of those who are making the democratic journey with us.

None of the authors address the existence of a supreme being. Carter, however, refers to our age as "morally bereft."

However, the question of whether it is possible to have civility without reference to a supreme being is certainly one worth discussing. Given the different forms that a supreme being takes throughout the world, not to mention the number of people who do not believe in a supreme being, our ability to realize a civilized world cannot depend on belief in a supreme being.

While many undoubtedly would disagree, science provides some hope for the future of reasoned and civil discourse. Religious beliefs of scientists run the gamut from a firmly held belief that there is no God to deeply held beliefs in one religion or another. But, in addition to their training in objective or empirical inquiry, the ability of scientists to debate civilly about passionately held beliefs can be considered one of the hallmarks of their disciplines.

With monitors in the form of judges to oversee behavior in the courtroom—and

by extension in other arenas of litigation—it should be easier for lawyers than for scientists to adhere to civility. However, it has to be remembered that lawyers are representing warring parties in a nonphysical fight. Thus, as our civilization has become at best more informal and at worst less restrained, civility has been reduced to secondary importance by those who believe that the causes of their clients or a greater cause justifies bullying or incivility. Such behavior must not be tolerated and should not be confused with less formal manners that characterize today’s society over those of earlier times.

Hunter stated to me that he believes the structural factors against an increase in civility are great, but it is essential to “fight the good fight.”

For many in our country, the last fifty years removed the yoke of racial segregation and incivility through a series of legal decisions. *Brown v. The Board of Education*, 347 U.S. 483 (1954), is the best known. Virginia had a policy of “massive resistance” to desegregation. Now, just over fifty years later, our country shows greater civility to minorities. Still, many persons believe that prejudice has been replaced by a stifling “political correctness.” Be that as it may, for those among us who were adults in Virginia fifty years ago, it seems truly remarkable that a U.S. senator could have lost his position of leadership in the senate because he seemed to say that the country had erred in not electing an openly segregationist presidential candidate in 1948. It is equally wondrous that the 2007 loss of a reelection bid by another U.S. senator could have had its genesis in a word that was perceived to be a racial slur.

As for the population as a whole, in politics there seems to be ground for hope that the pendulum is swinging from

extreme “take no prisoners” partisanship to a realization that the future of our country depends on the diminution of that venomous relationship and a recognition of

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the need that we listen to one another—that we engage in civil debate. In the 9/11 Commission and the Baker-Hamilton Commission, Democrats and Republicans came together under bipartisan leadership. While many do not agree with all or a portion of the conclusions of the commissions, I have seen no one assert that the commissions reached their decisions with

anything less than reasoned, informed, serious and, yes, civil debates. The reports likewise have generated reasoned, informed, serious and civil debates.

The general public approved of how the commissions conducted their deliberations, and this gives grounds for hope that the future of our country and the world will be characterized by more civilized relations.

Carter wrote:

Even the controversial limits on sexual harassment and “hate speech” that have sprouted in our era, limits that often carry the force of law, are really just more rules of civility, more efforts, in a morally bereft age, to encourage us to discipline our desires.

My point is not to tell us how to speak. My point is to argue that how we speak is simply one point on a continuum of right and wrong ways to treat one another. And how we treat one another is what civility is about. ☪



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