

# The State of Justice:

## Does Civility Really Matter? (adapted from a recent WALS CLE program)



The word “incivility” comes from the Latin, “incivilis,” which means “not of a citizen,” and is premised on the idea that “civility” is a fundamental structural component to society, and that its opposite can degenerate into rudeness, and constitute a threat to civic virtue and respect for the rule of law.

Everyone seems to agree that civility is fundamental to the workings of a democratic, pluralistic state because it is the political (communal) equivalent of “respect,” which acts as a calming or moderating influence on social life. Everyone also seems to agree that civility is not the same as the “rule of law.” Rather, it might be said that both civility and the rule of law are necessary to a democratic, pluralistic state and that “civ-

ility” in itself assists in the maintenance of the “rule of law” by fostering habits and customs of a community that precede and may obviate the need for resort to litigation, the courts, or other instrumentalities of the rule of law.

In that sense, “civility” may seem antagonistic to the idea of “litigation” as a zero-sum game, where the system is premised on ending up with a “winner: and a “loser.” If it appears that your adversary is not engaged in good faith, and is intentionally abusing

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the litigation system in one way or another, or when the stakes are high in civil discourse, like when dealing with life and death issues such as genocide, or the conduct of a morally questionable war, it is hard not to believe at such times that “civility” is overrated, and can be used to gloss over any position, however odious or ridiculous. Should not the ridiculous comment be ridiculed? Do we really have to speak in measured “civil” sentences rather than just say, “You’re full of shit!” As some thoughtful pundits

have thoughtfully asked: cannot a murderer or war criminal be very civil? And if so, does civility really count for anything?

We know there have already been too many contemporary events that have influenced

our citizenry’s respect for the rule of law. Every time we hear about an instance of perceived miscarriage of justice nationally, such as the O.J. trial, the McDonald’s spilled coffee case, or the lawyer’s damaged trousers case— or locally, such as the Governor’s daughter allegedly getting favorable treatment in her educational endeavors, or Justice Maynard being photographed with Don Blankenship in Monte Carlo while a fifty million dollar verdict in which Mr. Blankenship has a personal interest is pending before the court – respect for the “rule of law” is challenged.

We have read that you can even buy at the Supreme Court gift shop in Washington D.C., and at the National Constitution Center in Philadelphia, a game called “Lawsuit!,” created by a lawyer, which has as its objective to get and end up with the

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most money. The lawyer who created it says, “The idea behind the game is to give kids a taste of life as a lawyer in a fun way.” <http://blogs.wsj.com/law>.

You know that “disrespect” for the law has become mainstream when a tabloid writer from “US Magazine,” speaking of legal problems of celebrities, gives us her take on the justice system: “We live in a society where there are virtually no repercussions. The repeat offenders who most often populate our gossip know full well they can get arrested one day, walk a red carpet the next, and still have many photographers shouting their names and wanting their pictures.”

One legal pundit has predicted that our civil justice system will not survive to 2050 due to a loss of respect for the system. If that

pundit is correct, does “civility” really matter at a time when sometimes it’s hard not be frustrated, not to want to “lash out” or be “uncivil,” when the “cynicism” noted in the Preamble to the West Virginia Rules of Professional Conduct can sometimes overwhelm us?

While the question of the “value” of civility, in the face of what many would characterize as an already extensive disrespect for the legal system is not an easy one, it is not new.

Professor Garrett G. Fagan, speaking on the history of Rome,

cites the loss of civility as a big factor in the collapse of the Roman Republic – which of course preceded the collapse of the Roman Empire. He discusses the gradual loss of civility and respect for the law that started with supposed good inten-

tions – the bypassing of Senatorial precedent by Tiberius Gracchus in 133 B.C. in his efforts to institute land reform, which ushered in a new threat to Rome’s institutions – domestic violence. Although the Republic transitioned to

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“Empire” through the sheer force of military power, we know how that ended – it too, ultimately collapsed.

The theme of the “value” of civility is also found in thoughtful, popular literature as well. Alexander McCall Smith, a former law professor at the University at Edinburgh, has created the fictional character Isabel Dalhousie of the Sunday Philosophy Club, who refers in her fictional Review of Applied Ethics to “manners” as the “basic building block of civil society.” According to Dalhousie, “They were the method of transmitting the message of moral consideration. In [losing them] an entire generation had lost a vital piece of the moral jigsaw, and now we saw the results: a society in which nobody would help, nobody would feel for others, a society in which aggressive language and insensitivity were the norm.” According to Dalhousie, International

Law is nothing more than “manners writ large.”

So how can we reconcile the thoughts that civility means something, that it can strengthen the “rule of law,” even in the face of widespread disrespect, or even when base actors may, at the very least, be “civil” themselves? One way is by remaining “civil” while necessarily speaking the “harsh truth,” and by letting our immediate instincts of fair play guide us away from convenient rationalizations of “abstract” notions of justice.

We are reminded in this regard of the wonderful story of Winston Churchill’s civil, yet truthful exchange with Nancy Astor, who reportedly attempted to insult him by suggesting that “if you were my husband, I would give you poison...”

To which Churchill was said to have replied, “If I were your husband, I surely would take it” – a brilliant mixing of civility and honesty to a person who, some would rationalize, it would be best not to offend.

Then too, illustrative of the “value” of civility to the preservation of the “rule of law,” are the actions of our first President, George Washington, in 1783.

According to traditional history, when Washington was only thirteen year old in 1745, he jotted down notes in his workbook entitled the “Rules of Civility and Decent Behavior,” presumably

as a result of lectures by the Rev. James Marye, rector of St. George’s Church in Fredericksburg Virginia, who taught Washington in the classical high school of the church, and whose courses included, among other things, “deportment.”

Writing in the Wall Street Journal of December 12, 2007, Thomas Fleming, author of “The Perils of Peace: American’s Struggle for Survival After Yorktown,” (Collins, 2007), argued that the “most important moment in American History” was when George Washshington did





*George Washington's*  
**Rules of Civility**  
*&* **Decent Behavior**

IN COMPANY AND CONVERSATION

not seek absolute power at a vulnerable time of our new Republic, on December 19th, 1783, when the newly discharged veterans of the American Revolution under his command had been sent home without being paid as promised and without thanks by a bankrupt Congress who in fact had fled to Annapolis from Philadelphia because a few hundred of the disgruntled veterans had surrounded the Pennsylvania State House, (now Independence Hall) demanding the pay promised them by Congress. One can imagine the popular outcry against the government for “failing to support the troops.”

him he would have the support of the army—the veterans of the revolution, to do his bidding.

On that day of December 19th, 1783, Washington was scheduled to tender his resignation as Commander in Chief to the President of Congress, Thomas Mifflin of Pennsylvania, who had earlier tried to destroy his career, and was soon after to be forced out of the army for war profiteering. Only a small contingent of delegates actually showed up in attendance that day in Annapolis. Congress was on the verge of going out of business, and many believe Washing-

Washington's supporters, and even some of our allies in Europe, were clamoring for George Washington to seize power to keep the country from what they perceived as imminent collapse, telling

ton could have at that moment had himself declared President or some other title of power – could have seized absolute power over Congress and demanded compensation for himself and his soldiers.

Instead, he resigned his commission as Commander in Chief of the armed forces, and retired to Mount Vernon. As quoted by Fleming, Thomas Jefferson, who was there as a delegate from Virginia and perhaps unconsciously prescient of the way the French Revolution (which had not yet occurred) would end, observed that: “The moderation of a single character probably prevented this revolution from being closed as most others have been, by a subversion of that liberty it was intended to establish.”

Here it was. Washington could have taken it all for the demanding. All power. All reward. But Washington had not been taught that winning was everything, that he should take all

he could from the table. That would have been bad form. Whatever Washington's abstract notions of political science, statecraft or justice, he had been taught, had been conditioned to an appropriate course by what he had learned of good form, good deportment – the rules of civility. 

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