

Cambridge University Press  
 978-1-107-06371-6 - Civility, Legality, and Justice in America  
 Edited by Austin Sarat  
 Excerpt  
[More information](#)

# Introduction

## The Meanings and Uses of Civility

### Austin Sarat

People, I just want to say, you know, can we all get along? Can we get along?... Please, we can get along here. We all can get along. I mean, we're all stuck here for a while. Let's try to work it out. Let's try to beat it. Let's try to beat it. Let's try to work it out.

Rodney King,  
<http://www.youtube.com/watch?v=2PbyioJwNug&playnext=1&list=PLB874144170217AF6&index=15>

Incivility isn't just accepted these days – from celebrity news to TV shows – it's glorified.

Kristen Powers, *A Crisis of Civility*

Civility may well be a virtue, but it is probably not a virtue that will be of much help in deciding the political questions that ultimately matter.

James Schmidt, *Is Civility a Virtue?*

## Introduction

Today we are in another of those eras in which political leaders and commentators periodically bemoan a crisis of incivility.<sup>1</sup> Throughout American history, the discourse of civility has proven quite resilient and concern for a perceived lack of civility has ebbed and flowed in recognizable patterns. Somehow, we continue to find ways to talk about civility and to warn of its demise.

<sup>1</sup> See Timothy Sherratt, "A Crisis of Civility and Representation" (August 19, 2011), <http://www.capitalcommentary.org/christian-democracy/crisis-civility-and-representation>. See also Kristen Powers, "A Crisis of Civility" (December 5, 2008), [http://www.nypost.com/p/news/opinion/opedcolumnists/item\\_ox1JWLgsTVsNbCXcmzSUJO](http://www.nypost.com/p/news/opinion/opedcolumnists/item_ox1JWLgsTVsNbCXcmzSUJO); David Eisner, "The Civility Crisis Is Real, Not Imagined" (April 13, 2011), [http://articles.philly.com/2011-04-13/news/29413925\\_1\\_incivility-civil-war-discourse](http://articles.philly.com/2011-04-13/news/29413925_1_incivility-civil-war-discourse).

Today we see civility eviscerated daily on cable TV. “Uncivil” has become synonymous with being wholly and closed-mindedly “partisan.” Today we witness the most vile and random destruction of human life in the name of one or another political cause. As a result, the claims of civility, and the call to restore civility, seem undeniably pertinent.

Yet disputes about the relative importance of civility abound. Some critics argue that civility is not a primary virtue. It is not an end in itself. Insofar as it aids the cause of justice, civility has, so the critics argue, a powerful claim on democratic citizens; insofar as it impedes the attainment of justice civility can, and should, be breached. As political theorist Michael Sandel says, “In politics civility is an overrated virtue.”<sup>2</sup> For Sandel, it is a secondary and contingent virtue whose value ultimately depends on other things. Moreover, critics suggest that all too often we hear the call for civility made with no reference to the background conditions that bring forth breaches of civility. Civility talk leads us to ignore the limit cases where injustice, not lack of civility, is the problem that needs to be addressed and to act as if civility uniformly was aligned with justice and advanced the cause of human dignity.

Speaking at Notre Dame’s 2009 commencement, President Obama highlighted our alleged loss of civility and called for its restoration. He asked his listeners to “temper our passions, and . . . be wary of self-righteousness . . . to remain open, and curious, and eager to continue the moral and spiritual debate that began for so many of you within the walls of Notre Dame. And, within our vast democracy,” Obama continued, “this doubt should remind us to persuade through reason, through an appeal whenever we can to universal rather than parochial principles, and most of all through an abiding example of good works, charity, kindness, and service that moves hearts and minds.”<sup>3</sup>

Obama returned to this theme in January 2011 at a memorial for the victims of the Arizona shooting of Congresswoman Gabrielle Giffords. Obama observed:

But at a time when our discourse has become so sharply polarized –  
at a time when we are far too eager to lay the blame for all that ails

<sup>2</sup> Michael Sandel, *Public Philosophy: Essays on Morality in Politics* (Cambridge, MA: Harvard University Press, 2005), 54.

<sup>3</sup> President Barack Obama, “Commencement Speech, Notre Dame University,” [http://www.huffingtonpost.com/2009/05/17/obama-notre-dame-speech-f\\_n\\_204387.html](http://www.huffingtonpost.com/2009/05/17/obama-notre-dame-speech-f_n_204387.html).

## The Meanings and Uses of Civility

3

the world at the feet of those who happen to think differently than we do – it's important for us to pause for a moment and make sure that we're talking with each other in a way that heals, not in a way that wounds. . . . As we discuss these issues, let each of us do so with a good dose of humility. Rather than pointing fingers or assigning blame, let's use this occasion to expand our moral imaginations, to listen to each other more carefully, to sharpen our instincts for empathy and remind ourselves of all the ways that our hopes and dreams are bound together. . . . And if, as has been discussed in recent days, their death helps usher in more civility in our public discourse, let us remember it is not because a simple lack of civility caused this tragedy – it did not – but rather because only a more civil and honest public discourse can help us face up to the challenges of our nation in a way that would make them proud. We should be civil because we want to live up to the example of public servants like John Roll and Gabby Giffords, who knew first and foremost that we are all Americans, and that we can question each other's ideas without questioning each other's love of country and that our task, working together, is to constantly widen the circle of our concern so that we bequeath the American Dream to future generations.<sup>4</sup>

In an interview with Fox News's Bill O'Reilly, Obama again returned to the issue of civility. "The media, unfortunately, if I have a nice talk with John McCain, and we're agreeing to do something, nobody is going to report it," the president said. "But if there's an argument, then that's what gets reported and, as a consequence, I think a lot of politicians think the way I get on the news is if I insult somebody." Personal attacks are what the media gravitates toward, Obama said, and that fact, "over the long term, is making it harder for the sensible center to get together to solve problems, and I think that is damaging." Civility and cooperation are necessary, Obama argued, to achieve policy goals such as cutting government spending. "The only way you make those tough decisions is if you're willing to cut the other side a little bit of slack."<sup>5</sup>

<sup>4</sup> President Barack Obama, "Arizona Memorial Speech," [http://www.huffingtonpost.com/2011/01/12/obama-arizona-memorial-sp\\_n\\_808335.html](http://www.huffingtonpost.com/2011/01/12/obama-arizona-memorial-sp_n_808335.html). For a critique of Obama's emphasis on civility, see David Bromwich, "Obama on Civility and Lincoln on the Rule of Law," [http://www.huffingtonpost.com/david-bromwich/abraham-lincoln-on-violence\\_b\\_809546.html](http://www.huffingtonpost.com/david-bromwich/abraham-lincoln-on-violence_b_809546.html).

<sup>5</sup> "Barack Obama to Bill O'Reilly: Policy Goals Require Civility," <http://www.politico.com/news/stories/0211/49011.html>.

Cambridge University Press

978-1-107-06371-6 - Civility, Legality, and Justice in America

Edited by Austin Sarat

Excerpt

[More information](#)

Those who, like President Obama, worry about the loss of civility variously name and define it. “Civility is concerned with so many different things that it is difficult to specify the range of its applicability.”<sup>6</sup> Yet however it is defined, civility describes how we act. More specifically, it defines how we *should* act toward one another.

According to *Webster’s New World Dictionary*, “civility” refers to refraining from rudeness, while “politeness” implies some further effort to extend courtesies to others. For some, civility is little more than politeness in public discourse.<sup>7</sup> Others claim that there is more to civility than manners. “Civility is an attitude and a mode of action which attempts to strike a balance between conflicting demands and conflicting interests.”<sup>8</sup> In this view, “Civility is a disposition that makes political life possible because it allows those with different and conflicting views of the good to live peacefully side-by-side under conditions where a deeper moral agreement about shared purposes or comprehensive systems would be impossible.”<sup>9</sup> Thus understood, civility is “primarily a stance toward strangers.”<sup>10</sup> It “requires that we show respect for people we do not know.”<sup>11</sup>

Still others treat civility as a kind of self-restraint. As the psychologist Robert Coles puts it, civility “means all of us subordinating our feelings to certain shared imperatives.” It is all about collective interest, not “collective

<sup>6</sup> James Schmidt, “Is Civility a Virtue?” in *Civility*, ed. Leroy Rouner (South Bend, IN: University of Notre Dame Press, 2000), 22.

<sup>7</sup> As Randall Kennedy puts it, “Civility typically connotes courtesy, respectability, self-control, regard for others – a willingness to conduct oneself according to socially approved rules even when one would like to do otherwise”; see “The Case Against Civility,” *American Prospect* (December 19, 2001), <http://prospect.org/article/state-debate-case-against-civility>. Civility, Michael Walzer notes, makes for “political peace . . . It makes politics less dangerous and less interesting.” See Michael Walzer, “Civility and Civic Virtue in Contemporary America,” *Social Research* 41 (1974): 593, 602.

<sup>8</sup> Edward Shils, *The Virtue of Civility: Selected Essays on Liberalism, Tradition, and Civil Society*, ed. Steven Elliot Grosby (New York: Liberty Fund, 1997), 76.

<sup>9</sup> Richard Boyd, “The Value of Civility,” *Urban Studies* 43 (2006): 865.

<sup>10</sup> Michael Meyer, “Liberal Civility and the Civility of Etiquette: Public Ideals and Personal Lives,” *Social Theory and Practice* 26 (2000): 71. See also Richard Sinopoli, “Thick-Skinned Liberalism: Redefining Civility,” *American Political Science Review* 89 (1995): 612–20. According to Sinopoli, a norm of civility “defines a *standard of conduct* that citizens can rightfully expect from strangers.”

<sup>11</sup> Nicole Billante and Peter Saunders, *Six Questions about Civility* (Saint Leonards, NSW Australia: Centre for Independent Studies, 2002), 82:2.

Cambridge University Press

978-1-107-06371-6 - Civility, Legality, and Justice in America

Edited by Austin Sarat

Excerpt

[More information](#)

## The Meanings and Uses of Civility

5

egoism.”<sup>12</sup> Civility, Stephen Carter notes, “is the sum of the many sacrifices we are called to make for the sake of living together.”<sup>13</sup>

In Carter’s view, “Respect for rules of conduct has been lost in the deafening and essentially empty rights-talk” of modern American politics. And, he warns, the popular illusion “that all desires are rights only continues its insidious spread.” Referencing James Q. Wilson, Carter makes the further claim that we, as a culture, suffer from “an elevation of self-expression over self-control.” He writes particularly of civility’s decline in both elementary education and in political life. Even our insults were once expressed in a manner one might call “civil.” The pointed wit of the nineteenth and early twentieth centuries has fallen to obscenity in the traditional domain of public insult. An unabashed “witless barbarism” dominates the conversational life and political etiquette of our age. Carter repeatedly mourns a tragic loss of self-restraint: we have developed a “right to our own offensiveness.” And we take great pride in that “right.”

Our society, Carter worries, has lost a necessary degree of “moral focus.” Instead of emphasizing the protection of valuable speech (whatever that might be), we celebrate the brazenness of the Howard Sterns of American pop culture. The law should not limit the right to free speech, for it is at least backed by profound tradition. Instead, Carter argues, “We should recognize the terrible damage that free speech can do if people are unwilling to adhere to the *basic precept of civility*.” “We must sometimes rein in our own impulses,” he writes, “for the sake of those who are making the democratic journey with us.”<sup>14</sup>

Rules of civility, Carter continues, “are thus also rules of morality: it is morally proper to treat our fellow citizens with respect, and morally improper not to.”<sup>15</sup> In this vein, civility is equated with “respect for the dignity and the desire for dignity of other persons.”<sup>16</sup> Breaches of civility are not simply bad manners; they signal “disdain” for persons as “moral beings. Treating someone rudely, brusquely or condescendingly says loudly and

<sup>12</sup> Robert Coles, “Civility and Psychology,” *Daedalus* 109 (1980): 136, 140. For a contrasting perspective, see Glenn Tinder, “Transcending Tragedy: The Idea of Civility,” *American Political Science Review* 68 (1974): 548, 558, 560.

<sup>13</sup> Stephen Carter, *Civility: Manners, Morals, and the Etiquette of Democracy* (New York: Basic Books, 1998), 11.

<sup>14</sup> See Stephen Carter, “Just Be Nice,” *Yale Alumni Magazine* (May 1988).

<sup>15</sup> Carter, *Civility*, 11.

<sup>16</sup> Shils, *Virtue of Civility*, 338.

Cambridge University Press

978-1-107-06371-6 - Civility, Legality, and Justice in America

Edited by Austin Sarat

Excerpt

[More information](#)

clearly that you do not regard her as your equal.”<sup>17</sup> Put in the affirmative, civility is “a precondition of democratic dialogue.”<sup>18</sup>

Taking up this theme, Anthony Kronman offers a view of civility as something much more important than mere politeness. When journalists, Kronman observes, bemoan the current crisis of civility, they trivialize civility by equating it with decorum and politeness. In Kronman’s view, American politicians have always insulted each other’s characters and ideas, and citizens have always been fascinated by the prurient details of their representatives’ lives. In fact, he argues, we’ve actually become more civil; for example, politicians’ quarrels no longer end in duels. Beyond that, some level of rudeness is necessary, he suggests, because rough candor keeps politicians humble.

Yet Kronman believes American society is indeed facing a crisis of civility, not in a loss of politeness, but in a loss of interest in the public good. In his view, the root sense of civility is found in the art of civil government.<sup>19</sup> This art is not innate; it demands experience and training. Civility is the art of creating a government – its laws, customs, and institutions – based in concern for the public good. Civility involves an appeal to a public good, and from this appeal, we can, Kronman believes, build institutions and customs.

Reading civility’s defenders calls to mind Herbert Marcuse’s critique of what he called “Repressive Tolerance.”<sup>20</sup> Writing in the mid-1960s, Marcuse argued that tolerance was not itself a primary political virtue and we should not extend tolerance to “policies conditions, and modes of behavior which should not be tolerated because they are impeding, if not destroying, the chances of creating an existence without fear and misery.” Marcuse opposed tolerance of that which is “radically evil” (such as racial segregation) even if that came at a cost to “the cohesion of the whole.” In his view, only when

<sup>17</sup> Boyd, “Value of Civility,” 867.

<sup>18</sup> Carter, *Civility*, 25. See also William H. Rehnquist, “Civility and Freedom of Speech,” *Indiana Law Journal* 49 (1973): 1. According to Rehnquist, civility requires a belief in the necessity for both public and private “orderliness,” that is, some personal commitment to establishing “an atmosphere of discussion free of visible and bristling hostility” (ibid., 4). For Rehnquist, civility is crucially important: “it is not only form and manner; it is an *underlying attitude*” (5). Civility in this sense constitutes a profound “commitment to the importance of the process of debate, discussion and even conversation” (6).

<sup>19</sup> Anthony Kronman, “Civility,” *Cumberland Law Review* 26 (1996): 727.

<sup>20</sup> Herbert Marcuse, “Repressive Tolerance” (1965), <http://ada.evergreen.edu/~arunc/texts/frankfurt/marcuse/tolerance.pdf>.

Cambridge University Press

978-1-107-06371-6 - Civility, Legality, and Justice in America

Edited by Austin Sarat

Excerpt

[More information](#)

## The Meanings and Uses of Civility

7

tolerance was practiced by “the rulers as well as by the ruled, by the lords as well as by the peasants, by the sheriffs as well as by their victims” would it have value.<sup>21</sup>

Marcuse warned that the call for tolerance masked, or ignored, background conditions that gave it a particular political tilt. He warned that society should not be indiscriminate in its embrace of tolerance “where the pacification of existence, where freedom and happiness themselves are at stake: here, certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.”<sup>22</sup>

This book takes up the claims of civility and asks whether what Marcuse said about tolerance applies with equal force to civility. “When tolerance mainly serves the protection and preservation of a repressive society, when it serves to neutralize opposition and to render men immune against other and better forms of life, then tolerance has been perverted.” Many embrace civility out of a humble recognition that no one is in “possession of truth and capable of defining what is right and wrong, good and bad,” just and unjust.<sup>23</sup> While there is much to praise in such epistemological and ethical modesty, this book asks whether it should disable us from recognizing that, as Randall Kennedy once put it, “if you are in an argument with a thug, there are things much more important than civility.”<sup>24</sup>

*Civility, Legality, and Justice in America* charts the uses of civility in American legal and political discourse. How important is civility as a legal and political virtue? How does it fare when it is juxtaposed to the claim that it masks injustice? Who advocates civility and to what effect? How are battles over civility played out in legal and political arenas? This book brings the work of several distinguished scholars together to critically assess the relative claims of civility and justice and to assess the manner in which law weighs those virtues. The afterword offers a set of reflections aimed specifically at

<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 5. As Thomas L. Dumm puts it, “To identify a decline of civility in public discourse with the breakdown of civil society is itself to engage in a political strategy that excludes and marginalizes subordinate groups.” See *A Politics of the Ordinary* (New York: New York University Press, 1999), 102.

<sup>23</sup> Marcuse, “Repressive Tolerance,” 10.

<sup>24</sup> Quoted in Benjamin DeMott, “Seduced by Civility: Political Manners and the Crisis of Democratic Values,” *The Nation* 263 (December 9, 1996), 11–14, 13.

thinking about the ways legal institutions should respond when the claims of civility appear to compete with the claims of justice.

The first chapter locates the discourse of civility in the fear that “the mutual contempt on display in uncivil disagreement can corrode the affective bonds of democratic citizenship.” Teresa Bejan and Bryan Garsten argue that disagreement “cannot help but carry a whiff of contempt,” and that agreement to norms of mutual respect can be impossible on divisive issues. The project of their chapter is to explore the ongoing attempt to reconcile “contempt and condemnation” understood as an integral practice of liberal politics and to develop a definition of liberal civility that both recognizes the reality of disagreeable debate and facilitates its continuation.

Bejan and Garsten carry out this project by examining the political philosophy of Thomas Hobbes and Benjamin Constant. Doing so, they set out to map resources for developing a conception of civility that “moves beyond the impasse between those who emphasize the exclusionary and suppressive potential of civilizing language and those who present civility” as essential in facilitating debate. Bejan and Garsten argue that if civility is to be more than a “pious wish for concord,” it must be understood as an attempt to “grapple with,” not change, the fact that a certain amount of disrespect and contempt is inherent in disagreement.

Both Hobbes and Constant recognize the “inherent disagreeableness of disagreement” and both attribute it to “human partiality and pride.” However, their attempts to grapple with this problem differ. In *Leviathan*, Hobbes’s eighth law of nature banned “contumely” or “declaring hatred or contempt of another.” To commit contumely is to violate “one’s duty to acknowledge equality and thereby create and maintain the egalitarian order upon which a just and peaceful civil society depends.” Contempt harms the very basis of the social order (particularly that of a democratic society). For Hobbes, “the mere act of disagreement is offensive” (*De Cive*) because “any difference of opinion implied the inherent contempt of another’s intellectual abilities.” Because it is impossible to disagree civilly, attempting to civilize speech through legislation would never be enough. Therefore, within a Hobbesian scheme, the sovereign must have the power to regulate any expression of disagreement.

In contrast, Constant found a solution to the conundrum of disagreement and civility in the cultivation of “a liberal sensibility, a character robust enough to withstand the slings and arrows of public debate.” In



Cambridge University Press

978-1-107-06371-6 - Civility, Legality, and Justice in America

Edited by Austin Sarat

Excerpt

[More information](#)

## The Meanings and Uses of Civility

9

the hypercharged culture of honor and respect in late eighteenth-century France, many of Constant's contemporaries shared Hobbesian fears about the destabilizing effect of incendiary debates: calumny was viewed as a capital crime. However, Constant held that "fear of violence was not a sufficient reason to adopt . . . restrictions on the press." He argued that governmental restrictions on speech only intensified problems of uncivil disagreement because they promoted and affirmed a culture of sensitivity. He held that a robust, free, public dialogue was essential because it created the very "callous" "thick-skinned" democratic citizen that it required if society is to have disagreement without violence. Rather than sequester democratic citizens from the "disagreeableness of disagreement," Constant argued they should don stronger armor.

Through their analysis of Hobbes and Constant, Bejan and Garsten highlight the idealism of many contemporary civilitarians' arguments. Those arguments assume that "we can respect (i.e., recognize) and take into account the personhood of others as our moral equals without respecting (i.e., positively appraising) their beliefs." Civility, in this view, is an aspiration, an attempt to overcome the "moral failing" of personal contempt in intellectual argument. However, Bejan and Garsten argue that civility should be understood as "the practices and character traits necessary to engage in disagreement suitably when moral aspirations have not been met."

They describe "liberal civility" as "the set of habits of speaking and listening that make passionate debate possible and sustainable, the habits that allow us to disagree and to tolerate the disagreeableness involved in doing so." In contrast to recent writings that address the duty of the speaker, this "liberal civility" places new emphasis on the duty of the listener to be less easily offended. Liberal civility de-emphasizes the public world so that we can participate in it more safely because the "*uncomfortable* conditions" of disagreement are necessary in pluralistic societies.

The next chapter, by Jeremy Waldron, offers a different and contrasting explanation and defense of civility. Civility, for Waldron, is a "cold virtue" associated with formality and juxtaposed with kindness, niceness, and friendship. Civility functions in relationships, such as those in our economic market, "that have the potential for antipathy rather than affection, or mutual disinterest rather than mutual concern." Civility in this conception involves a willingness to respect the "rules proscribed for an interaction"

and push one's feelings about the other person to the side for the sake of the interaction. Civility and formality work hand in hand to create an interactional framework that does not require, or strive to emulate, interactions shaped by mutual affection or understanding.

Waldron then considers the relationship of civility and formality in the context of concerns about difference in politics of the kind that worried Hobbes and Constant. Some understandings of civility interpret it to require a "lessening of adversarial enmity in politics," but Waldron holds that this is too narrow a view. Civility, he argues, can be understood as a political virtue even "in the midst of uncompromising antagonism." Civility is predicated not on a willingness to compromise but instead on a willingness to "stay present." Civility understood in this way requires continual engagement both with the political process and with political opponents along with the recognition that their views are worthy of debate, if not of agreement. Civility does not require a reduction of passion or enmity. However, no matter how tempting it may be to label opponents as traitors and forsake the political process as a mechanism for engaging with them, Waldron holds that civility's requirements continue to apply and that opponents remain engaged in debate.

The single caveat to this maxim is the case of "thugs," or those who cannot be accommodated in the political process. For such people the demands of civility must "yield to other considerations." The problem then shifts to the definition of "thug." Though there are no clear criteria to demarcate someone "with whom civil relations are impossible" from a radical opponent, Waldron holds that designating someone a "thug" should be a "last resort." Civility, he argues, is greatly important and can be acknowledged as important even though there are some rare cases in which civility should be abandoned.

Waldron then turns to another concern about difference in politics: diversity. He takes up the example of a radically diverse legislative body. The strength of this body (its ability to "bring diverse perspectives to bear on the common problems of society") makes it more vulnerable to mutual misunderstanding. Difference in this body is both present and valued, but negotiating differences requires "deliberative formality," namely, definitive norms and processes for communicating effectively through difference, that is, civility. Civility in diverse political bodies seeks to establish communicative channels across difference that "may require a political ethic of