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CIVILITY AND FREEDOM OF SPEECH

THE HONORABLE WILLIAM H. REHNQUIST†

The word civility, as we think of it today, suggests courtesy or politeness. It is something of a surprise, therefore, to learn from one of the unabridged dictionaries that the Latin word *civilitas*, the lineal ancestor of the word civility, means "the art of government." In these remarks, I hope to develop the idea that the kind of common decency which the present understanding of the word civility suggests is a good deal more important than would appear at first blush. I wish particularly to focus attention on what seems to be the virtue of civility in connection with the exercise of our traditionally valued freedom of speech and expression.

A famous English poet is responsible for the couplet:

How small, of all the ills that men endure
That part the law can cause or cure.

This is assuredly not a very encouraging thought to those of us in the legal profession who tend to think that most, if not all, of the evils which men endure can be cured by some law or other. But even in those areas where legislation may be helpful or even necessary to solve a problem, it is seldom capable of affecting the solution by itself. As Ring Lardner said, "Prohibition is better than no liquor at all." It is equally true that even though a constitutional provision or law may be necessary to safeguard an important right, these are not enough by themselves.

To lawyers and interested laymen, it is an easy assumption that because constitutional protections against governmental infringement of freedom of speech and free discussion are necessary and indispensable preservatives of those freedoms, they are also sufficient by themselves to preserve them. I think both common sense and history suggest that the latter is not the case.

Indeed, modern European history would indicate that even affirmative governmental sanctions may be insufficient to assure even the mini-

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imum necessary physical safety on the part of the participants in free discussion. If we look to the troubled last days of the Weimar Republic, shortly before Adolf Hitler came to power in Germany, we find as virtual commonplace the disruption of political meetings by armed bands of both the Communist Party and the Nazi Party. They took special delight in breaking up one another's meetings, but they visited havoc upon all opposition parties with fine impartiality. Hans Frank, one of the defendants in the Nuremberg trials and a lawyer for the Nazi Party, once stated that in the eight years before Hitler's accession to power, no less than 40,000 prosecutions were brought against party members charged with street violence. The fact that this many people were prosecuted by the government suggests that it was doing its best to preserve a right to hold political meetings, but that its best at that time and place was just not good enough.

Along with the Nazi's willingness to physically disrupt the political meetings of their opponents went an absolutely cynical disregard for the value of any rational public discussion at all. An observer on the scene in Germany at this time recounts his amazement at seeing a huge sign hoisted at a meeting of Nazi supporters which read as follows:

We don't want higher bread prices; we don't want lower bread prices; we don't want unchanged bread prices: We want National Socialist bread prices.

Perhaps the cynicism as to any value served by public discussion made it easier to break up political meetings, or perhaps the ease with which such meetings were broken up led to the cynicism about their value. Certainly there was some cause and effect relationship.

It is quite possible, at least in the philosophic sense, to believe thoroughly in the right of free speech, but to have a good deal of doubt about its usefulness. After all, one can in theory justify freedom of speech as a political good on either of two quite different grounds. John Locke and others of the natural law school would say that the right to express one's views on a political subject is a fundamental "right of man." It is an end in itself which needs no further justification.

On the other hand, John Stuart Mill, and probably Thomas Jefferson, supported freedom of expression not simply as an individual right, but as a necessary condition for an informed public opinion which, in turn, is a necessary condition to popular government. As Thomas Jefferson said in his first inaugural address:

If there be any among us who would wish to dissolve this union

or to change the republican forum, let them stand undisturbed as monuments of the safety with which error or opinion may be tolerated where reason is left free to combat it.

The justification for freedom of expression in the eyes of the utilitarians is the benefit which it confers upon the political community.

One can subscribe to either or both of these justifications, but one's attitude towards a speaker may well depend on which justification he chooses. If one believes only that freedom of speech is a natural right, guaranteed because the individual ought to have it, he can rest content with the knowledge that Hyde Park corner exists in London, and similar podiums exist in other places, where those disposed to speak freely may practice their hobby with the least possible inconvenience to others. Those bystanders who happen to be attracted are free to listen or to observe the speaker almost as one would observe a curiosity in a zoo.

The utilitarian, on the other hand, ought not to be satisfied with the notion that everybody who desires it has the opportunity to expound in some public park. He must have the additional conviction that somehow these efforts are a part of the free market place in ideas. If one subscribes to the utilitarian justification for free speech, and accordingly believes that protection of the right to speak is not solely for the benefit of the individual, then it seems to me that his commitment to the speaker and to the speech must exceed the rather negative determination that Congress shall make no law abridging the speaker's freedom to speak.

It is this commitment which represents a part of what I intended to include by the term "civility." Such a commitment must include at the very least an affirmative belief that the speaker should not be physically disturbed in the course of speaking. This is about as modest a commitment as can be asked, and insofar as a large public meeting is concerned, it is probably the extent of the commitment which the notion of civility requires. Certainly no one is obligated to agree with the speaker at such a meeting, nor, indeed, is he obligated to attend at all.

But in a smaller group, whether in the classroom or elsewhere, the notion of civility suggests something more, namely a sort of private orderliness. This may be every bit as essential in preserving meaningful freedom of expression as the sort of public order which the Constitution imposes on the government, and the government by law imposes on those who would physically disrupt public meetings. The constitutional command that the government shall not abridge freedom of speech must be obeyed. But clearly this alone is not enough even for public orderliness. The government could abide the constitutional restrictions, and we could

still have a form of unregulated anarchy where neither freedom of speech nor any other worthwhile pursuit was possible. As Learned Hand, one of this nation's greatest judges, observed:

And what is this liberty which must lie in the hearts of men and women? It is not the ruthless, the unbridled will; it is not freedom to do as one likes. That is the denial of liberty, and leads straight to its overthrow. A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few; as we have learned to our sorrow.

So we must be assured not merely that the government itself will not punish those who speak freely, but that it maintain order to the end that speakers who wish to speak to audiences who wish to listen are not wrongfully disturbed in pursuing these goals. These are the requirements of public orderliness.

Civility, however, requires more than merely acquiescence in the necessity for public orderliness. It suggests, in addition, a personal belief in private orderliness. In small groups where there can be the give and take necessary to an informed discussion, it suggests some commitment to an atmosphere of discussion free of visible and bristling hostility.

While the courtroom practice of law is more akin to public discussions of disputes than to private ones, the lessons learned in the courtroom practice of law may be of some use in developing this notion of private orderliness or civility. In court, a young lawyer must learn to rise above his primitive urges, and reach the more subtle levels of professional courtroom conduct. Even when not tempted to physically assault opposing counsel, or to at least verbally interrupt him, the temptation remains to audibly groan, sigh, frown or silently shake one's head during opposing counsel's argument. This, too, most of us learn to dispense with by experience, for purely selfish reasons if for no other. The judge sits and hears contentious lawyers all day; he will generally view it as a difficult enough job without its being made more difficult by personal abrasiveness on the part of counsel.

Having learned to remain silent and relatively motionless during an opponent's argument, one has at least one additional refinement to add to one's courtroom conduct. The natural tendency at the beginning of one's own allotted time is to roast opposing counsel, and accuse him of misstating both the law and the facts. However, those who attend courtrooms with any frequency will recognize this as a sign of a beginning lawyer or a journeyman practitioner. The master practitioner, on the other hand,

when he finally rises to his feet, commends counsel on the extraordinarily fine argument he has just made, adding only that even a truly fine argument can't make a winner out of that side of the case.

In the courtroom practice of law, one progresses through these behavioral steps out of sheer necessity. One soon realizes that while judges and juries generally enjoy hearing both sides of a case vigorously debated, they don't care to have opposing counsel personally disparage one another. One also realizes that they value fair play and will often summarily penalize the lawyer who appears to them not to value it.

I think the great majority of courtroom lawyers who are really imbued with the tradition of the profession ultimately come to a point where they conduct themselves in this way not because of self-interest, but because they have come to value the rules of an adversary system for their own sake. They realize that the role of opposing counsel is just as much a part of the system, and just as necessary, as their own.

Similar lessons may be drawn from the ordered conduct of the business of legislative bodies. Thomas Jefferson, certainly no enemy of free speech, included in his manual of parliamentary procedure these injunctions:

No one is to disturb another in his speech by hissing, coughing, spitting . . . speaking or whispering to another . . . nor stand up to interrupt him . . . nor to pass between the speaker and the speaking member . . .

No one would suggest that these rather formal rules by which the business of courts and legislatures are conducted ought invariably to be the guide for smaller and more informal discussions. Rather, they suggest a core of common understanding in two different forums which are organized for the purpose of deciding disputes about important matters. In both, at least outward civility is maintained. And I think that the lawyers and legislators who command the greatest respect from their peers are probably those who observe the rules in substance as well as in form.

This notion of civility is entirely consistent with vigorously advocating the ideas in which one believes. One need give no quarter in the duel of ideas by reason of any demand of civility. Its demands go not to the substance of the argument, but to what might be called its form and manner in the best sense of those terms. For civility is very important; it is not only form and manner, it is an underlying attitude. In its absence, rancorous *ad hominem* attacks, personally savage and often intellectually blunt, pass for reasoned argument.

As with civility in the rather isolated world of the courts, so it is with civility in the wider world. Its outward manifestations are, more often than not, formal, but they represent an attitude of mind that is more important than form or manner. All of us like to win, and those of us given to disputing like to win arguments and debates, whether they be in court, in Congress or in the classroom. But in the discussion of public issues, the participants are engaging in a process which should be more than the sum of the views expressed; it is a part of the formation and maintenance of the marketplace of ideas. Just as the unsuccessful bidder for goods in an economic market plays a part in the market economy even though he fails in his immediate object, so all participants in a discussion play their part by seeking converts or, perhaps, by resisting conversion to the views of others.

If the give and take of public discussion does occupy a place of importance in a democratic republic, and certainly our federal and state constitutions, our laws, and our heritage say that it does, it must be because the process and result of such debates somehow make a difference. It is easy to point to great debates in the halls of legislatures and constitutional conventions which can be shown to have made a difference in the course of history. But we must bear in mind that it is not only this type of discussion that is important, or is protected by the Constitution.

If this is so, there must be potential buyers as well as sellers in the market of ideas. Perhaps I cannot better define this aspect of civility than to say that it is a commitment to the importance of the process of debate, discussion and even conversation, quite apart from one's own success in marketing one's current stock of intellectual wares.

I would like to return finally to another quotation from Learned Hand:

What do we mean when we say that first of all we seek liberty? I often wonder whether or not we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

I would not underrate the importance of constitutions or laws in preserving freedom of expression, any more than would Judge Hand, but I would be very skeptical that what they can do by themselves is sufficient to preserve informed public discussion. The truly resolute political revivalist will not be deterred by the threat of being driven from the

podium. Indeed, he may glory in it. The zealot will not be turned aside by barbed words or sneering looks. But surely freedom of expression is too important a matter to be left entirely to political revivalists and to zealots. There must be room in the process for the less positive, the less informed, the thin-skinned. But only in an atmosphere of civility can these forensic late bloomers be expected to play the game.

Judge Hand says the ultimate fate of freedom, and surely he would include here freedom of expression, is reposed in the hearts and minds of men and women. An atmosphere of civility is an indirect assurance of continuing to maintain the broad based support of this liberty in its fullest form in the minds and the hearts of the men and women of this country. These men and women are not apt to rise up in its defense if they feel that freedom of expression is the prerogative of only a few, in which they do not participate and from which they derive no benefit. They are even less apt to rise to its defense if those who claim the freedom for themselves would deny it to others. I am convinced, however, that so long as the men and women of this country can believe that the process of debate and discussion is not simply the special preserve of some small group, but is instead a process in which all may participate and from which all will benefit, this freedom will be secure in their minds and hearts.