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Civility and Formality
Jeremy Waldron

1. Incivility is like injustice on Amartya Sen’s account: it is easier to identify clear cases of injustice than to say what justice consists in, and likewise it is easier to identify conduct as uncivil, as an instance of incivility, than to say what civility actually is. Moreover, in exactly the way Professor Sen said that “we can have a strong sense of injustice on many different grounds, and yet not agree on one particular ground as being the dominant reason for the diagnosis of injustice,” so equally we can identify incivility (in the words of one law review article) as “hostility, combativeness, rude behavior, insults, threats, or demeaning conduct or words,” without being able to say which of these—the rudeness, the hostility, the insults—is key to the diagnosis.

Maybe that doesn’t matter much for the civility codes that many jurisdictions and Bar Associations are having to set up to combat incivility among Americans attorneys. There seems no reason why such codes can’t just consist in a list of prohibitions, like

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1 University Professor, NYU Law School and Chichele Professor of Social and Political Theory, University of Oxford.
3 David A. Grenardo, Making Civility Mandatory: Moving from Aspired to Required, 11 Cardozo Public Law, Policy and Ethics Journal 239, 244 (2013).
4 Austin Sarat’s rubric for this conference observes, quite rightly, that civility is a notoriously slippery concept. Sarat cites an unnamed scholar as noting that “civility is concerned with so many different things that it is difficult to specify the range of its applicability.” See http://www.law.ua.edu/programs/symposiums/civility- legality-and-the-limits-of-justice/
5 Ibid.: “The lack of civility by attorneys caused no less than 140 state and local bar associations to adopt civility codes.” For some critical consideration of this discourse of concern about incivility, see Austin Sarat, Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation, 67 Fordham Law Review 809 (1998).
Never, without good cause, attribute to other counsel bad motives or improprieties. … Never engage in conduct that brings disorder or disruption to the courtroom.  

Or, if they want to forsake the *via negativa*, they can add affirmative admonitions, like

> **Always uphold the dignity of the court.** … Be punctual and prepared for all court appearances.

without having to prioritize the items on the list or privilege any one element as the essence of civility. Both civility and its opposite may be family resemblance terms, which can’t be defined in terms of necessary and sufficient conditions. Some scholars have suggested that we can’t say much more about incivility than that (like Justice Potter Stewart on “hard core pornography”) we know it when we see it, though they reassure us that “there is sufficient consensus on the meaning of political incivility…that promoting political-civility norms is reasonable and practical.”

Still it would be a pity if we couldn’t say more than this about what civility involves—I don’t mean now the actions it requires, but the sort of virtue it is and isn’t. I mean something like a ballpark explanation—if you like, a *feel* for civility and incivility—not any sort of precise dissection of the concept. In my remarks today, I want to do just that: talk loosely about the kind of virtue civility isn’t and the kind of virtue that it is.

I say it would be a pity if we can’t do this. Why? Well, for one thing, we need to be able to abstract a sense of what civility is from the particular norms (like those quoted above) that work in a particular setting or for a particular profession. Civility for lawyers may not be the same as civility for politicians, and civility for politicians is not the same as civility for ordinary citizens in their arms-length dealings with one another. But they are still all instances of civility. So we need to

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6 These are taken from *Principles of Civility*, promulgated by the American Board of Trial Advocates, available at https://www.abota.org/index.cfm?pg=Civility

7 Ibid.


be able to say *something* about what is in common here, even if we don’t offer it in the form of a definition.

For another thing, we don’t want to fall into the trap of regarding civility as the sum of all good things in people’s public dealings with one another, and incivility as the sum of all bad things. Civility is not always the most important thing at stake. Take the matter of speech, for example. I have an idea that I might have been invited to give this address because of my recent work on hate speech—my Holmes Lectures at Harvard in 2009 and the book that developed out of them, *The Harm in Hate Speech* published last year by Harvard University Press. But though hate speech is usually uncivil, incivility is not its specific vice, at least as the law understands it in countries that have hate speech laws. Hate speech is defined in the first instance as speech that is calculated to have a certain social effect: the British formulation refers to “words … intended to stir up racial hatred,” the Canadian formulation refers to statements that incite “hatred against any identifiable group,” and the New Zealand formulation (my favorite) “words likely to incite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of [their] colour, race, or ethnic or national origins.” True, the British and New Zealand formulations require speech satisfying this condition to also be “threatening, abusive, or insulting” before it can be prosecuted, and *that* sounds like incivility. But not all such uncivil speech is penalized. What matters for the hate speech legislation is the effect the speech is calculated to have on social peace and on the dignity and security of vulnerable groups. And that is a bad thing that is additional to—and in my view—much worse than the incivility. (I don’t find the effort of scholars like Robert Post, who try to analyze hate speech laws purely in terms of civility norms, very helpful.) Sometimes to call something uncivil is radically to underestimate or misconceive its wrongness. I think it is good to cultivate a sense that there are many different kinds of wrongs and vices that may be exhibited when people speak or participate in public: mendacity, insincerity, vulgarity, indecency, a breach of privacy, defamation, the insensitive disruption of a funeral, inflammatory rhetoric,

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incitement to violence, and so on. Everything is what it is. I don’t see any point in stretching the concept of incivility to cover all these things, which means that I at least have to have some sense of the specific character of civility.

One other point about the value of inquiring into the specific character of this virtue. It seems unlikely that civility is an absolute or unconditional virtue—a virtue in all circumstances, at least as it is currently understood—or that the positive and negative admonitions of civility codes are moral absolutes or categorical imperatives. Sometimes hostility and combativeness are what a situation requires; sometimes it is important to be rude and to act outraged or just to burst through the established liturgies that define an existing form of life. Perhaps sometimes civility should give way on the other side too, give way to love and to a kind of relation between persons that goes beyond the chilly limits of mutual respect. It may be a mistake to seek a definition of civility that makes it always good, always desirable, even as we recognize that—as things stand, in the peculiar pathologies of legal practice, say, or certainly political practice in early 21st century America—civility is something that right now we need much more of.

2.

I believe civility is a cold virtue not a warm one, not really a matter of affection or benevolence. As my title indicates, I am going to associate civility with formality. And I want to maintain that this indicates an important contrast with kindness, niceness, and familiar forms of friendship.

The temptation to think of civility in terms of niceness is sometimes overpowering. When we see angry lawyers engaged in pissing contests, with all the “hostility, combativeness, rude behavior, insults, threats, or demeaning conduct or words” that that involves, it is tempting to say to them, “Why can’t you just play nice?” And some leaders of the legal profession say this: “I firmly believe

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14 See the argument of Linda Zerilli, Against Civility: A Feminist Perspective, paper prepared for this conference.

15 Compare the title assigned to Michael Sandel’s op-ed piece on civility, Making Nice Is not the Same as Doing Good, NEW YORK TIMES, December 29, 1996.

16 Grenardo, Making Civility Mandatory, supra note 3, 244.

17 See, e.g., Terri Day and Erin Bradford, Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency, 10 FIRST AMENDMENT LAW REVIEW 57, 97 (2011): “At its core, civility is ‘play nice in the sandbox;’ a concept drilled into the psyches of most people from earliest memories.” See also JOAN DUNCAN OLIVER, THE MEANING OF NICE: HOW COMPASSION AND CIVILITY CAN CHANGE YOUR LIFE AND THE WORLD (Berkeley Trade, 2012) and Michele Radosevich, Civility: Just be Nice, in Washington State Bar Association, NW LAWYER, February 2013
that the core of the civility problem in our profession is a fundamental lack of kindness,” says Shane Vannatta, President-elect of the State Bar of Montana; ¹⁸ and John Berry, who supervises the professional regulation for the State Bar of Florida, offers this definition: “Generally, civility is acting with respect, kindness, courtesy and graciousness with everyone you contact.”¹⁹ These lawyers seem to be seeking the equilibrium that Shakespeare defined in The Taming of the Shrew, “And do as adversaries do in law—strive mightily, but eat and drink as friends.”²⁰

Friendship is a complex issue: maybe it is possible to define a form of friendship between people who share the same polity or trade in the same market but remain strangers to each other and largely indifferent, in any affectionate sense to one another’s feelings.²¹ Certainly friendship in the affectionate sense that most of us recognize is beside the point. Civility is a virtue for relationships that involve antipathy rather than affection, or disinterest rather mutual concern.

Consider for example the interactions that constitute market exchange. In a famous passage, Adam Smith observed:

In civilized society [man] stands at all times in need of the cooperation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons. In almost every other race of animals each individual, when it is grown up to maturity, is entirely independent, and in its natural state has occasion for the assistance of no other living creature. But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only.²²

We have to find ways of dealing with one another on the basis of something other than friendship and affection. On Smith’s account, the basis on which we deal on occasion after occasion with strangers is in the repeated interactions of market exchange, driven by the independent self-interest of each of the participants: “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect

¹⁹ As quoted in Grenardo, Making Civility Mandatory, supra note 3, 244. See also Bronson D. Bills, To Be or Not To Be: Civility and the Young Lawyer, 5 CONNECTICUT PUBLIC INTEREST LAW JOURNAL 31, 35 n.26 (2005), defining civility as “treating others—opposing counsel, the court, clients, and others—with courtesy, dignity, and kindness.”
²¹ See John Kekes, Civility and Society, 1 HISTORY OF PHILOSOPHY QUARTERLY 429 (1984), discussing Aristotle’s notion of advantage-friendship.
²² ADAM SMITH, THE WEALTH OF NATIONS, Bk. I, Ch. 2.
our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love…”

But it is not just unmediated self-interest either. Market transactions take place against a background of rules and rights: they operate in a framework of rights of property and rules of contract. I wrote about this years ago in a paper called “When Justice Replaces Affection: The Need for Rights.” There I suggested that people positively need such structures—the formalities if you like of contract and rights—and that kindness, niceness, affection, and forms of community predicated on such warm virtues are no substitute for the formalities of market dealing:

If we were limited to the structures of **gemeinschaft**, if there were a sense that economic transactions and economic co-operation had always to be predicated upon substantial and affectionate solidarity, then the result would indeed be a warm and caring society, but also a desperately primitive and impoverished one. Human life would not be solitary, but many of the devices by which we have succeeded in mitigating its poverty, its nastiness, its brutishness, and its brevity would be limited or unavailable. The division of labor, national and international trade, commercial research and development, and above all the co-ordination of the activity of millions of different centers of production, distribution, and exchange would be impossible. Those who wanted to take an initiative and deal with strangers, or strike bargains with those they neither cared for nor expected to care for them, would … have to step outside the world of social structures altogether, and take their chances in an environment where there was nothing to count on but the unstructured self-interest of others. They would be stuck, as it were, in a perpetual black market.

Ground rules of rights and contract, on the other hand, conceived independently of communal [and affectionate] bonds, make it possible for us to initiate dealings every day, directly or indirectly, with thousands of people we barely know, and to take advantage of their situation and abilities as they take advantage of ours, with the

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23 Ibid.


25 Forgive me for quoting myself at such length, but I am taking the opportunities to bring together from my own past work a number of different themes about formality and civility.

26 By a “black market” I meant practices of transacting without any real legal frameworks or legal assurance.
confidence that there are rules available to facilitate, structure, and secure these dealings even when there is no affection to base them on.27

Civility, I want to maintain, has an important relation to this kind of formality. Civility may not be formality, but it involves a willingness to respect the formalities of an interaction and to submit one’s feelings towards the person you are dealing with—whether they are warm feelings, hostile feelings, or feelings of indifference—to one side, at least in the sense of subordinating them to the rules prescribed for the interaction. The rules provide a basis for coordination and mutual trust, for the pace and order of interaction, and for mutual assurance that the deal will go through as all the steps are taken. It is a sort of liturgy, in a way: offer, acceptance, consensus idem, followed by fulfillment on one side and then the other. Words are matched with actions and it is the words that indicate the actions that are to be matched with one another. The deal is consummated on the basis of formality. I want to say that civility (for this context—I’ll say more about other contexts, like political interaction, in a moment), is the specific virtue of orienting one’s conduct and the self-interested pursuit of one’s goals to these rules and these frameworks.

Let me add a few observations about civility and formality in social interactions:

(1) First, we should stress that the rules, the formalities don’t come out of nowhere. I am not enough of a Lockean to think that there are any natural structures here. The gist of the “Justice Replaces Affection” article was that we need to provide these structures for ourselves as a matter of positive social and legal creation. I argued this on the basis of another Shakespearean example: that of Romeo and Juliet.28 Following an interpretation of the play by Germaine Greer,29 I argued that the tragedy of the play was that there was nothing furnished in the city of Verona on the basis of which two people, hereditary enemies to one another, could construct an ordered but unprecedented relationship independently of the affections and hostilities of their respective communities. That’s why things went so badly wrong—the wretched bad luck of Acts 4 and 5 of the play: Romeo and Juliet and their pusillanimous allies had no structure to fall back on to order their relations, their plans, and their expectations. I said that

29 See Germaine Greer, Romeo and Juliet, in 1 SHAKESPEARE IN PERSPECTIVE 22-23 (R. Sales ed. 1982).
What this implies is that it is important for there to be a structure of rights that people can count on for organizing their lives, a structure which stands somewhat apart from communal or affective attachments and which can be relied on to survive as a basis for action no matter what happens to those attachments … some basis on which individuals or groups can reconstitute their relations to take new initiatives in social life without having to count on the affective support of the communities to which they have hitherto belonged. Of course, we need not parade this as the most desirable basis for social action. The Veronan equivalent of marriage by a judge in a civil ceremony, which ought to have been available to Romeo and Juliet when their families failed to provide the necessary support, would seem a cold and arid setting for a wedding, compared to the lavish ceremony which a loving community might have made available to them. … The point is that the civil ceremony would have been better than nothing—better, that is, than the lovers being driven by the disaffection of their families to take their chances in an outside world devoid of public structures upon which they could finally and in the last resort rely.  

But absent any positive social provision of this kind, there was nothing that they and their families could orient themselves towards.

(2) The second point I want to add is that in setting rules and formalities, on the one hand, apart from affections and feelings, on the other, I do not want to be heard as espousing anything like doctrinal formalism of the sort propounded by Canadian legal formalists such as Ernest Weinrib. The formalities that I am talking about don’t necessarily matter for their own sake: they are not ends in themselves. Their social provision may be a way of advancing important social policies. The point is that social policy needs to be advanced on a basis that structures interactions with formality and that does not rely for its success just on people’s feelings of friendship and affection. Michael Ignatieff wrote eloquently about this in his marvelous little book, The Needs of Strangers (1984). On Ignatieff’s account, even in non-market relations—in a welfare state, for example—people take care of each other as strangers through the formalities of law and policy. Talking of his relation to some elderly poor person whom he sees in a public setting but does not know, Ignatieff says this:

30 Waldron, When Justice Replaces Affection, supra note 23, 634-5.

31 See, e.g., ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1995) and his article Formalism in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Dennis Patterson ed., 2010).
As we stand together in line at the post office, while they cash their pension cheques, some tiny portion of my income is transferred into their pockets through the numberless capillaries of the state. The mediated quality of our relationship seems necessary to both of us. They are dependent on the state, not upon me, and we are both glad of it.... My responsibilities towards them are mediated through a vast division of labour. In my name a social worker climbs the stairs to their rooms and makes sure they are as warm and as clean as they can be persuaded to be. …When they can't go on, an ambulance will take them to the hospital, and when they die, a nurse will be there to listen to the ebbing of their breath. It is this solidarity among strangers, this transformation through the division of labour of needs into rights and rights into care that gives us whatever fragile basis we have for saying that we live in a moral community.32

(3) A third point. I am not maintaining the incompatibility of affection and friendship, on the one hand, and formality and civility, on the other. The two can combine. As I said in “When Justice Replaces Affection,” many market transactions—say in a corner store in my neighborhood—are governed by implicit friendship and goodwill as much as by self-interest, the formalities of contract, and legal obligation. But these informal transactions may rely on formalities being available in the background:

My grocer can deal with me in an informal, friendly way, sometimes giving me credit when I need it, or ordering some trivial item that I want, and so on, only if he has confidence that in the last resort he would be able to recover the money I owe if I abused his friendship, and that no-one else can take unfair advantage of the “goodwill” he has accumulated. He may hope … that he never has to invoke these formal guarantees, but that is quite compatible with the proposition that his assurance of their existence is one of the reasons he is able to act as informally as he does.33

The thesis of my article was that formalities operate as fall-back mechanisms in case affection fails. (I used the relation of marriage to matrimonial and divorce law as an example.)

(4) This may be important, too, for another reason. In a powerfully argued chapter in her book *The Alchemy of Race and Rights*, Patricia Williams tells a story


33 Waldron, When Justice Replaces Affection, supra note 23, 642.
about how she rented an apartment and how her co-teacher, Peter Gabel, a white man, a founding member of the Critical Legal Studies movement rents an apartment when they were co-teaching in New York.

It turned out that Peter had handed over a $900 deposit in cash, with no lease, no exchange of keys, and no receipt, to strangers with whom he had no ties other than a few moments of pleasant conversation. He said he didn't need to sign a lease because it imposed too much formality. The handshake and the good vibes were for him indicators of trust more binding than a form contract. At the time I told Peter he was mad, but his faith paid off. His sublessors showed up at the appointed time, keys in hand, to welcome him in.34

Williams, an African-American woman, says “There was absolutely nothing in my experience to prepare me for such a happy ending.” When she found an apartment on offer, she was in a “rush to show good faith and trustworthiness,” and she “signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's-length transactor.”35 Gabel valued his ability to transform a formal transaction into an informal one. But for Williams things were different:

I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute. Futility and despair are very real parts of my response. So it helps me to clarify boundary; to show that I can speak the language of lease is my way of enhancing trust of me in my business affairs. As black, I have been given by this society a strong sense of myself as already too familiar, personal subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; although superficially resembling Peter's transaction, such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm's length as legitimately commercial and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce.36

35 Ibid.
36 Ibid., 147-8. Williams continued: “Peter, I speculate, would say that a lease or any other formal mechanism would introduce distrust into his relationships and he would suffer alienation, leading to the
For her as an African-American woman, the formal chilly language of rights is massively important:

“Rights” feels new in the mouths of most black people. It is still deliciously empowering to say. It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, in relation to others.\(^37\)

She acknowledges that this is not everyone’s experience of rights and legal form. The discourse of formality is perceived by different people in different ways, Williams argues. And perhaps we should add to this that formality is something made for difference, made for people’s dealings with one another when they are not identified or situated in social life on the same basis.

3.

With this in mind, I want to move on now to talk about politics, which is where this concern about civility is really located (if you ignore the stuff I mentioned at the beginning about the professional regulation of lawyers).

Man is a political animal, said Aristotle; you can tell this by his power of speech.\(^38\) But speech is about plurality and diversity. It is not just a faculty for chanting in unison. It is a way we disclose to one another things that the other does not know or does not believe. We have speech because we are different, because we do not already share a conception of justice or the social good,\(^39\) and the way we speak and the way we regulate our speech—including our codes of civility—must reflect and respect that difference.

I want to consider civility and its companion formality in the context of two separate concerns about difference in politics. The first concern is about disagreement and hostility; it addresses the point that those who participate in politics—in the politics of the same community—often perceive one another as

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\(^37\) Ibid., __.

\(^38\) ARISTOTLE, THE POLITICS, Book I, chapter 2.

adversaries. The second, which I will pursue in section 4, is about diversity. In a modern multi-ethnic or multi-cultural society, we are strangers to one another, not just in the sense that we are not friends, but in the sense that we are closed books to one another, we don’t really understand one another, certainly not in the cozy implicit way that friends have. If there is such a thing as civic friendship defined as an affirmative relation among those—all of those—who inhabit the same polity, it has to be defined in a way that transcends affection, that transcends ideological hostility, and that transcends the differences that make us largely unintelligible to one another. And whatever ideal of civility we set up has to be able to flourish and do its business in these unpromising settings.

Take first political hostility: the hostility, say, between a socialist or a social democrat on the one hand and a conservative or a neo-liberal on the other. (I am using these just as examples: we might equally talk about the enmity between conservatives and feminists or between militarists and those opposed to imperial adventures.) Those who belong to these parties or factions are likely to regard the others as enemies, indeed as undesirables. And so, in a sense, they should. By social democratic lights, neo-liberals plan to starve or neglect the poor and do all they can to promote the exploitation and deterioration of working conditions for ordinary working people. By conservative lights, socialists are enemies of freedom, property and order; their programs make impossible the prosperity on which modern society depends. These are not games or, if they are, they are games that are being played for very high stakes: life and death, prosperity and suffering, freedom and oppression, hope and despair, for millions of people.

It is sometimes said that civility requires a lessening of adversarial enmity in politics, or an emphasis on what we have in common rather than on what divides us. 40 No doubt these are wise recommendations, the second in particular as a strategy for political bargaining. But anything we say about civility in politics has to accommodate the possibility—the strong possibility—that the things that divide us and the divisions that seem deepest and most bitter may be what matter above all to those who participate in politics. People come into the political realm determined to sustain and enact a view that they know others bitterly oppose, and they can see no way forward for the view that they hold which involves diminishing the distance between them and their opponents. Any view that is more moderate, for example, might seem to them a betrayal, particularly where the currency of compromise is the interest of those who have put their faith in the advancement of this view. And coyness or hesitation in opposing the other view—pulling one’s rhetorical punches as it were—may also seem like a failure to keep faith with what one is convinced really matters. People lament the fury with which

40 Who?
modern American politics is conducted, with the implicit assumption either that the same positions could be defended more moderately against one another, or that participants could retreat, without serious loss, to more moderate positions that would not require this extreme of political antagonism. Maybe sometimes they could.\textsuperscript{41} The question is: is it a requirement of civility to moderate one’s views or one’s advocacy in this way? Or, to put it the other way round, does a refusal to moderate one’s views and one’s advocacy constitute a denial of civility—possibly a justified denial, possibly representing what I said earlier were the outer limits of civility as a virtue? Is that what we have to accept?

I’m not sure. I am inclined to think that civility can be understood as a political virtue even in the midst of uncompromising antagonism between political positions bitterly opposed to one another. There is a saying on the web-site of The Institute for Civility in Government (a grass roots organization that organizes “Congressional Student Forums,” bringing elected officials of opposite parties together on college campuses to model civil dialogue): “Civility is the hard work of staying present even with those with whom we have deep-rooted and fierce disagreements.”\textsuperscript{42} Usually one finds platitudes on these web-sites; but this saying, it seems to me, captures something important.

“Civility is the hard work of \textit{staying present} even with those with whom we have deep-rooted and fierce disagreements.” What does “staying present” mean? It means, I guess, that fierce political antagonism need not precipitate exit from the political process. It should not precipitate either one’s own exit (as in “I refuse to have anything to do with these people”) or the attempted expulsion of others. One stays with one’s antagonists, one stays as it were \textit{in the room}, confronting them, debating with them (if that is possible; if it is not, then just opposing them in speech that they understand and the broader citizenry understand). They will no doubt reciprocate). One shows up when it is one’s turn to speak and one remains to hear—to listen attentively—to what is said from the other side, even when the other side is at a considerable moral or ideological distance. That seems to me to be what civility requires in this sense of “staying present.”

Now, to make sense of any of this, we have to presuppose a process, an institutional housing for politics that assigns places to the participants and

\textsuperscript{41} Sometimes we do have to think about the possibility of negotiation among people who differ in principle in their political positions. Refer to Jane Mansbridge’s \textit{Presidential Address to the APSA}, August 30, 2013.

\textsuperscript{42} The Institute for Civility in Government, at \url{http://www.instituteforcivility.org/who-we-are/what-is-civility/}
opportunities to speak and listen, to challenge and question.43 Once again, we must relate civility to formality, to one’s good faith observance of the forms of procedure that enable one’s own contributions to remain in the same political space with others’.44 This is part of what I mean when I say that civility does not necessarily involve the reduction or minimization of disagreement. One might reasonably strive to see what space there is for negotiation and compromise and the conversion of one party or the other away from its view. But success along these lines is not a condition of politics. On the contrary, well-structured political forms must stand ready to accommodate views that simply cannot be reconciled with one another.

Again, I want to add a set of observations to the position I have outlined in this section.

(1) What I have set out is partly a normative thesis; it is not always descriptively true. Consider this example. In the politics of the United States, space has rarely been found for communist alternatives; the political process has been set up so that such an alternative is not accommodated but suppressed. My normative thesis implies that this is a failure of civility, or rather a failure to provide the conditions of formality and procedure that would allow the opponents of communism to be civil to communists as political opponents in the sense that I am describing. The suggestion is not that people ought to be happy or comfortable with communism or any other view they wholeheartedly oppose. But there ought to be a place provided where it can be represented as one of the many views held in the community whose politics is in question.

(2) Another part of what I mean when I say that civility does not necessarily involve the reduction or minimization of disagreement is that it need not evacuate the passion from politics. Passion, anger, and so on are certainly disciplined by the

43 I think the work of Hannah Arendt on the “furniture” and the “in-between” of politics is very important in this regard. In HANNAH ARENDT, THE HUMAN CONDITION 52 (1958), she talks of “[t]he public realm [that] … gathers us together and yet prevents our falling over each other, so to speak.” See also Jeremy Waldron, Arendt’s Constitutional Politics in THE CAMBRIDGE COMPANION TO HANNAH ARENDT 205 (Dana Villa ed., 2000).

44 We may draw an analogy with courtroom procedure: the two sides in (say) a serious criminal trial (in relation to a mass murder or to crimes against humanity) may be utterly opposed to one another: one side stands for the interest of someone who we may think of as the embodiment of evil; the other stands for the interest of the community, or humanity, certainly for the victims. But the formalities of criminal procedure locate the two in the same procedural space and offer them both an opportunity to speak and a duty to listen.
requirements of political form, but they need not be eliminated. The procedures of politics are often associated with the arts and conventions of rhetoric which provide a language appropriate to vehemence and the burden of denunciation that the opponent of an opposing view may feel called on to express. Nor do I want to diminish the role of distaste. One may not want to have anything to do with one’s political opponents so far as schmoozing or socialization are concerned. Here again we see the advantage of formality. Civility requires political opponents to be arrayed in a common process and to be in each other’s presence; it requires this juxtaposition in a formal sense; and formal doesn’t mean merely notional or unreal; but it is not like admission to a club or a dining fraternity.

(3) Above all, civility imposes on all political views and positions, even those extremely opposed to one another, a burden of recognition.45 One recognizes the opposing view for what it is: an opposing view. One does not try to convert it to something else, either in one’s own understanding or in the way one participates in the political process. When we confront opposition on a position that we regard as morally and politically serious, it is tempting to try to diagnose the opposition as something else: it must be motivated by self-interest or some special interest, we say to ourselves, or it must be the product of irrationality or prejudice; we say, “How else could they possibly come up with a view so much at odds with our own?” For years in my work—most notably Law and Disagreement—I have argued that we need to get over this tendency.46

I am heartened by Anthony Kronman’s similar opposition to this tendency in his writing on civility.

[I]t is now often said that appeals to the public interest are always and only disguised efforts to advance the private good of the person making the appeal. The modern “masters” of suspicion … have taught us to regard the seemingly selfless judgments of those who claim to have only their community's welfare at heart as a subtle ideological trick designed to advance the interests of their economic class; … Today when we hear someone invoke the public good, our first reaction is often to ask what private interest this masks, and to search for the real motive of the statement, below the surface of expression, in some other and more self-centered concern. The depths having been revealed to us, we now find it more difficult to take the surface seriously, to credit at face value the claim that one is acting for the sake of the public good and not out of private interest

45 Some theorists of civility have seen it as a burden of tolerance: see, e.g., Barak Orbach, On Hubris, Civility, and Incivility, 54 ARIZONA LAW REVIEW 443, 445 (2012).

46 See especially JEREMY WALDRON, LAW AND DISAGREEMENT 111-13 (1999).
instead. Suspicious as we are, this claim has become for us quite literally incredible….

On Kronman’s view, any revival of civility in our politics requires abandonment of this corrosive culture of suspicion. I am inclined to agree with him.

Of course particular disagreements may sometimes be rooted in interest or irrationality. But civility’s first impulse is to accept the opposing view for what it is: simply a different position on a problem on which people in good faith may be opposed. As Rawls observed, in his comments on “the burdens of judgment” in Political Liberalism,

Different conceptions of the world can reasonably be elaborated from different standpoints and diversity arises in part from our distinct perspectives. It is unrealistic to suppose that all our differences are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain.

It is something that has to be confronted and dealt with, in a process dedicated to such confrontation. It can’t be dismissed or diminished as something else that does not need to be dealt with on political ground.

(4) The tendency of this position that I have been sketching is to associate civility with a denial that every political system must require some sort of substantive commitment on the part of its members or exclude some sort of substantive position as inimical to the polity as such. Opposition there may be, it will be said, but the opposition must be loyal opposition: no society can tolerate rejection of its deepest values or rejection of the idea or reality of the nation itself or rejection of the country’s constitution or what I have been calling the forms of its political process. Civility, it will be said, cannot require us to “stay present” even with those whose values are so deeply at odds with our own. I am a strong proponent of the principle of loyal opposition, but I don’t accept this. The world, including the liberal democratic world, is full of people who participate in politics while condemning the constitution as it stands, or a radical change in the

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49 Notice this is not a relativist position. Philosophically, there may be an objective truth on the matter on which the parties are so bitterly divided. One side may be right and the other wrong; but we can’t say definitively which is which; and anyway—as we should know from the case of our own occasional fallibility—a political position may be objectively and still something that is held in good faith. See the chapter in LAW AND DISAGREEMENT, supra note 46, entitled “The Irrelevance of Moral Objectivity.”
boundaries or character of the nation, or the revision of its most cherished values. One can even advocate for reformation of the very political process that civility requires one to participate in for the time being.

From the point of view of civility, nothing is beyond the pale. And the “loyal” in loyal opposition is better understood as an admonition to those in power or those who identify themselves with the mainstream along the following lines: their opponents are to be regarded for all purposes as loyal; their loyalty is not to be questioned; it is to be assumed. You may ask: “Their loyalty to what is not to be questioned?” I answer loosely: “Their loyalty to anything whose perceived absence might be cited as a ground for suppressing their criticism or disqualifying them from the formal process that I have been talking about. They are to be assumed to be loyal, not in the sense that there are certain things they may not criticize, but in the sense that none of their criticism is to be a reason for abandoning the obligation to “remain present” with them in politics."

(5) Perhaps I should add that these remarks are not intended as absolutes. Sometimes one comes up against thugs and murderers who should not be accommodated in a political process in the sort of way I have been describing. The rubric for this conference quotes Randall Kennedy as saying “if you are in an argument with a thug, there are things much more important than civility.” But it seems to me that that is the way to put it—not that civility requires something else when thugs are in prospect, but the demands of civility may have to yield to other considerations. I think the analysis I have given explains what is going on in those cases—which is not that we don’t want to be nice to thugs, but that there may sometimes be overwhelming costs even in the chilly formal accommodation of thugs in a proceduralized politics.

“Who counts as a thug?” is of course the burning question? And even more burning is the question: “What are we supposed to extrapolate from a genuine case of thuggery so far as political interactions are concerned?” Hitler certainly, and Franco; we don’t have to be civil to them. But does Dick Cheney count as a thug, or Richard Nixon? If the point is about civility-as-niceness then many unpleasant people count as thugs for the purposes of Kennedy’s observation. But if the point

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50 This is an adaptation of some arguments made towards the end of Jeremy Waldron, The Principle of Loyal Opposition, unpublished but available on SSRN at http://ssrn.com/abstract=2045647
52 Winston Churchill notoriously referred to the British Labour Party in 1945 as the Gestapo; he denounced them in effect as “thugs” (in Randall Kennedy’s terms). This was one of the (many) reasons why he lost the general election that year as the war continued. Are we tempted to similar hyperbole with regard to our political opponents?
is the formal one that I have been stressing, then the cases where civility must give way may be comparatively rare and may crop up only as a last resort. And that may make us a little suspicious of Michael Sandel’s line to the effect that civility is an overrated virtue.\(^{53}\) If no one has argued that civility is an absolute, then showing that it has to give way when genuine thugs are around is not a way of showing that it has been overrated. And nor should we infer that civility is overrated merely from the fact of someone’s insistence that it ought to be the first and ordinary resort in the kind of politics with which we are familiar.

4.

I said that I wanted to consider civility and its companion formality in the context of two separate concerns about difference in politics. One was about the accommodation of radical disagreement, and that’s what we have just been discussing. The second is about the politics of diversity, people coming to the politics of a given society from different backgrounds, different ways of life, and different assumptions.

Diversity need not involve radical opposition, but it raises the possibility of failures of comprehension, misunderstandings and hurt feelings, and the difficulty of the members of one group—perhaps the majority—understanding what it is like for the members of other groups to live in the same society. There are all sorts of ways of avoiding or ameliorating these possibilities. Members of different groups need to learn about one another’s ways of life and they need to develop sensitivity and an understanding of the facts and circumstances on which sensitivity has to be based. I doubt though that these can be perfect solutions.

What does civility require under these conditions, which are, I think, the conditions of most advanced democracies? Its requirements bring us back again to the issue of friendship that I talked about at the beginning of section 2. Once again, I want to say that civility may require us to chill and diminish the role of friendship (at least in the warm, cozy, affectionate sense of friendship), looking for an atmosphere in politics that is cooler and much more formal. I want to illustrate this with a line of argument I developed in *Law and Disagreement* about legislative formality.

In modern democracies, legislative institutions comprise hundreds of members, not just five or nine like the highest court or one or twenty like the highest echelon of the executive. One way of characterizing this is that we think it particularly important to have diversity in the legislature, a multiplicity of people with different views and experiences, different ways of life and background, so

\(^{53}\) See footnote 15 above.
that all the features of the ways life is led in a given society can be brought to bear on legislation. The price (or the advantage) of this is that not all the members of the legislature will be familiar with each other in the way they (or their constituents) live or in the way they think. In Chapter Four of Law and Disagreement, I asked readers to imagine this:

A large number of persons have assembled in a hall as representatives from different parts of a diverse society. Let us suppose that it is a radically diverse society—so that the members of the assembly represent not only different interests and regions, but come from completely different backgrounds, ethnic and cultural, as well as representing whatever political differences divide them. (Imagine, for example, that we are considering the national legislature in India or in some other vastly diverse modern state.) The representatives may belong to various religious traditions; they may be familiar with quite different social forms; they may have disparate senses of what gives meaning to life. They may not even speak the same language. Perhaps there is a state language stipulated for their proceedings in the legislature; if so, we may think of it as a second language for most of them, and one that they must use carefully and hesitantly.

I said that if such a body wants to act like a legislature, its members have to find ways of talking to each other “so each can contribute insights and perspectives, including some that would otherwise be quite outside the experience of the other legislators he is addressing.”

However, the very reasons that make this interaction desirable and necessary also make it quite unlikely that the members can proceed with their deliberations as though they were conducting an open-ended conversation among friends. They simply are not transparent to one another as friends are, and they do not have much common ground on which confidences could be shared, premises assumed, and nuances taken for granted.

Indeed, the prospects for mutual misunderstanding and for talking at cross-purposes are greatly enhanced by the very features of their situation that make it important: their diversity and the need to bring diverse perspectives to bear on the common problems of the society.

54 See the discussion in Jeremy Waldron, Representative Lawmaking, 89 Boston University Law Review 335 (2009).

55 Ibid., 73.

56 Ibid., 74.
These representatives cannot deal with one another like members of a tightly-knit *gemeinschaft* or an “old-boy's network.” They share very little beyond an overlapping sense of common problems, and the rather stiff and formal language that they use in their debates about those problems. If anyone says, in the rather cozy way that people have who share tacit understandings, “Come on, you know what I mean,” the answer is likely to be: “No, I don't know what you mean. You had better spell it out for me.”

The chances are that any mode of deliberation that looks like an informal conversation will either be fraught with misunderstanding—people talking at cross purposes—or it will come to be dominated by discourse among the largest subset who share common understandings, whose cozy discourse will tend to freeze the others out.

In these circumstances, I said, we can see the importance of deliberative formality, mediating discourse with things like parliamentary procedures and Robert's Rules of Order.

The members of our assembly need to establish rules and procedures that address issues like the following: How are debates initiated and how are they concluded? Who has the right to speak when, how often, and for how long? Who may interrupt, who may exact an answer to a question, who has a right of reply? How is a common sense of relevance maintained -- or in other words, how are members assured that they are not talking at cross purposes? What issues, subjects, or details may be addressed at various stages in the proceedings? How are topics for debate selected, how are subject-matter priorities set, and how is an agenda determined? How is the conduct and conclusion of a deliberative session related to the assembly's powers of resolution and action?

These norms and the processes they define are artificial, dedicated specifically for circumstances in which the chances of mutual misunderstanding are acute (not to mention the other circumstance of mutual hostility that we discussed in the previous section). In *Law and Disagreement* I used this point to explain the particular combination of procedural formality and textual formality that legislation involves: there (as opposed to what I said here in section 2), I was aiming towards a sort of legal formalism. That is not my point here. Instead I simply want to rest on the perceived need for formality where difference is present.

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57 Ibid.
58 Ibid., 76.
59 Ibid., 77-87.
and valued, and to insist that civility in politics should categorically not be associated with the diminution of formality in the interests of warm discourse and friendship. The duty of civility is to keep faith with the forms that enable people to speak with one another in circumstances of difference, and that may require a political ethic of chilly formality and procedural pedantry that we associate, quite rightly, with parliamentarism.

I am sorry to have been citing my own work so extensively. You’ll think it’s just cut-and-paste. But, as I said earlier, this conference has represented for me an opportunity to bring a number of different themes in my writing together in one place to illuminate the formal dimensions of civility.

5.

There is more we could say. One line of thought would draw attention to the connection the dictionary makes between civility and order, the way political participation and political interaction are ordered by formal norms when other modes of informal ordering are unavailable or inappropriate. Another line of thought would connect some of this business about formal civility with the chilly principles of respect and dignity. These also have a cold and demanding aspect, in the work of Immanuel Kant for example, and Kant’s observations on the dignity of citizenship—as well as his better known observations on the dignity of humanity—could be adapted here. Cold and demanding principles, but they are none the worse for that. Sometimes we need to emphasize formality, with all the chill and artifice it involves, in order to pre-empt the various ways in which the warmer virtues might tend to frustrate, prejudice, and exclude.

60 See note 23 above.

61 The second definition of civility in the OXFORD ENGLISH DICTIONARY is “Civil order; orderliness in a state or region; absence of anarchy and disorder.” The fifth definition is “Observance of the principles of civil order; orderly behaviour; good citizenship.”