

SIR JOHN
GRAHAM
LECTURE
 2017

Polls Apart

PROFESSOR JEREMY WALDRON



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Reclaiming respect in a time of polarised politics

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ABOUT MAXIM INSTITUTE

Maxim Institute is an independent research and public policy think tank, committed to the people, land, history, and culture of Aotearoa New Zealand.

We exist to promote the dignity of every person in New Zealand by standing for freedom, justice, and compassion.

As a think tank, we produce rigorous research and communicate our recommendations to help our nation's leaders make good decisions.

To see our work and find out more, visit maxim.org.nz

THE ANNUAL SIR JOHN GRAHAM LECTURE

Sir John Graham was a New Zealand hero. He spent his life training, inspiring and mentoring young New Zealanders in education and sport, having had a celebrated and distinguished career in both fields. He was Headmaster of Auckland Grammar School, Captain of the All Blacks, and President of the New Zealand Rugby Football Union.



Sir John was a dedicated leader in our nation and his passion for New Zealand endowed this country with a brilliant legacy. Appropriately, he was recognised for his services to education and the community with a CBE in 1994, and was further honoured when he was knighted in the Queen's Birthday Honours List in 2011. Sir John Graham's commitment to service and to this country has enriched all New Zealanders.

In honour of Sir John's life of service and contribution to public life, the Annual Sir John Graham Lecture provides an opportunity to invite leading experts to contribute to public debate in New Zealand.

PROFESSOR JEREMY WALDRON

Professor Jeremy Waldron is University Professor at New York University School of Law, teaching legal and political philosophy. Previously he has held positions as University Professor in the School of Law at Columbia University and Chichele Professor of Social and Political Theory at the University of Oxford (All Souls College).



Born and educated in New Zealand, he earned degrees in law and philosophy at the University of Otago before studying for a doctorate in legal philosophy from Oxford University. He was elected a Fellow of the British Academy in 2011 and a Member of the American Academy of Arts and Sciences in 1998. In April 2011, he was awarded the American Philosophical Society’s prestigious Phillips Prize for lifetime achievement in jurisprudence.

Professor Waldron has written and published extensively in jurisprudence and political theory. His books and articles on theories of rights, on constitutionalism, on the rule of law, and on democracy, judicial review, property, torture, security, and homelessness are well known, as is his work in historical political theory. His most recent book is “One Another’s Equals: The Basis of Human Equality” (Harvard University Press), based on his 2015 Gifford Lectures.

In 2008, Professor Waldron delivered the inaugural Sir John Graham Lecture: *Parliamentary Recklessness: Why we need to legislate more carefully*.

Annual Sir John Graham Lecture Auckland, 28 July 2017

Professor Jeremy Waldron

1.

I delivered the inaugural John Graham Lecture in 2008—and I would like to begin by repeating what I said about Sir John at that time. I said, “John Graham is a household name in New Zealand. He stands for a dignity and greatness in public life and in educational and sporting affairs that is emulated all too rarely today.” It is an honour to be standing here again in a lecture dedicated to him and to the work of this Institute, which I know so well.

A lot has happened since that first lecture. Sir John was plain Mr. Graham in 2008.¹ Helen Clark was still Prime Minister in New Zealand. George W. Bush was President of the United States, and in July 2008 the election of Barack Obama to the American presidency was still just a hope and a possibility. Who could have foreseen a Trump administration? Or the Brexit vote in the UK? Or the rage and nationalist resentment that inspired the Orban presidency in Hungary and the powerful populist candidacies of Marine Le Pen in France and Geert Wilders in the Netherlands?

When I spoke in 2008, I addressed a specifically New Zealand theme—the decline of legislative due process in the New Zealand House of Representatives.² But I have

lived outside New Zealand now for almost forty years. Will you indulge me this time if I take up a mainly American theme? What I want to do is bring you a report from the battered ramparts of collapsing civility in American politics, a report which I hope will have some lessons for New Zealand, but which in the age of President Trump exerts a terrible fascination in its own right.

2.

Six weeks ago, an individual by the name of James Hodgkinson, who said he was fed up with the Trump administration took a rifle and a handgun to a ball park in Alexandria, Virginia and he fired his long gun at a bunch of people who were practicing for an upcoming baseball game. The baseball game was an annual charity event organised by members of the US Congress—a bit like the Parliamentary cricket game in New Zealand—and the people practicing were members of the Republican Party team, who were due to meet their Democrat counterparts for the actual match the next day. Mr. Hodgkinson shot four people, and was himself shot dead by police who arrived quickly at the scene. The most seriously injured of his victims, House Majority Whip Steve Scalise of Louisiana, almost died of his wounds.³ He was in intensive care for weeks, and was released from hospital just yesterday. The baseball game between the two parties took place as scheduled. The Democrats won by a margin of 11–2.⁴

Needless to say the incident gave rise to a great many published expressions of concern in the news media and blogosphere about the impact of the rage and incivility that seems to be a settled feature of American politics right now. Of course, Mr. Hodgkinson was a disturbed individual; but disturbed individuals are not uncommon in the United States. And the concern was about the emotional and political background against which it occurs to a disturbed individual like Hodgkinson to act out his anger and resentment.

Hodgkinson belonged to a Facebook group called “Terminate the Republican Party.” He had in the past advocated the legal “removal” of President Trump for “treason.” And a week or two earlier he had posted something on Facebook saying “Trump is a Traitor. [He] Has Destroyed Our Democracy. It’s Time to Destroy Trump & Co.”

The shooting is an anomaly, but Hodgkinson’s sentiments, I am afraid, are common among liberals in the United States. The political atmosphere in the US has been poisoned by incivility, on both sides. America is a big crowded violent country, more violent than any other advanced democracy. It has a population of more than quarter

billion heavily armed and highly opinionated individuals, most of them on drugs, all of them enraged and resentful, snarling and muttering at each other, and professing the utmost offense at each other's convictions.

In their 2017 poll, the Weber/Shandwick group "Civility in America" found that 75% of Americans believe that incivility in the US has risen to crisis levels—though 94% of respondents said they themselves were usually civil to others. Everyone laments the fury with which American politics is conducted. At the same time they embrace negative, hyper-partisan politics by their own candidates, while placing all the blame for incivility at the door of their opponents. They deny that their own incivility is anything like as bad as their opponents' and they indulge the infantile refrain, "He started it!"—"Trump started it" or "Hillary started it"—as though the issue were one of blame rather than consequence.⁵ Each side believes that they cannot afford to pull back from their own incivility lest they be taken for suckers by the continued uncivil behavior of their opponents.

There is a simmering potential for violence. The 2016 presidential campaign was disfigured by scuffles and beatings at political rallies. Candidate Trump yearned out loud for the good old days when you could punch hecklers in the face: "You know what they used to do to guys like that when they were in a place like this? They'd be carried out on a stretcher, folks."⁶ In May of this year, Greg Gianforte, a successful Republican candidate for Congress from Montana, was convicted of assault after he slammed a reporter to the floor—Ben Jacobs, a reporter from *The Guardian*—after Jacobs asked an inconvenient question about the Republican health care bill. We haven't yet seen fisticuffs and furniture throwing in the House of Representatives, which we see in Turkey or in Venezuela, but warnings have sounded that we are flirting with this sort of violence in the low level of rhetoric that is used in the chamber, and has continued to be used after the campaign.⁷

Is it hyperbole to say that we have been this way before? In 1856, a South Carolina Representative attacked an abolitionist Senator from Massachusetts, Charles Sumner, with the gold head of a walking stick, to avenge criticism that Sumner had made of the Representative's cousin, another Carolinian Senator, for "choosing as his mistress the harlot slavery." The cane "splintered with the force of the blows and Sumner ... [who] had [to] rip his desk loose from the bolts holding it to the floor in [an] effort to escape, was rendered unconscious. ... [I]t would be three years before he felt able to resume his senatorial duties." That was just seven generations ago, five years before the beginning of a Civil War in the United States about a moral issue—

slavery—on which opinions were vehement and tempers ultra-short, which claimed the lives of more than 600,000 Americans.

I doubt we are in danger of a second Civil War. But incivility in politics is dangerous, not just for what it may lead to, but for itself as well. As Senator Marco Rubio of Florida warned the modern chamber: “I don’t know of a civilization in the history of the world that’s been able to solve its problems when half the people in a country absolutely hate the other half of the people in that country.”

I know: there have always been complaints about incivility, like the perennial complaints of the old about the disrespect of the young. An historian will tell you that “American politics is characterized by periods of relative calm punctuated by historical spasms of incivility that roughly correspond to partisan realignment.”⁸ But this historicism may not lessen the concern. For even if it is a regular rhythm, the Civil War example shows how it can indeed sometimes spill over into uncontained violence, and who knows where in the rhythm that historians describe that tipping point may be. As Stephen Carter put it, in his excellent 1998 study of *Civility*, “[a]lthough we Americans have always thought civility is collapsing ... this time we might be right.”⁹

3.

Is incivility a problem in New Zealand? I hear mixed reports. Back in the day—when I left NZ in the late 1970s—it was the time of “Citizens for Rowling,” portraying Robert Muldoon as a fascist; it was the time of the Colin Moyle affair, with ill-tempered alcohol-fueled exchanges in the House of Representatives, leading to charges back and forth of homosexuality and financial dishonesty.¹⁰ I myself helped organise some irresponsibly unruly demonstrations in Dunedin. People were gearing up for the violent incivility of the 1981 Springbok tour. New Zealand has had its moments.

On the other hand, the examples people have given me of *current* political incivility in New Zealand seem to drift mainly between failures of courtesy and the trivialisation of politics by the news media.¹¹

New Zealanders have tried to do their share in sustaining an uncivil attitude towards the Trump administration in America. (Apparently a poll showed that only 15% of New Zealanders would have voted for Donald Trump if they had been offered the opportunity.) As you know, when US Secretary of State Rex Tillerson visited Wellington last month, he had to drive by large numbers of New Zealanders greeting him rudely in the rain with their middle-fingers extended. “I’ve been in motorcades

for a couple of years now. ... I've never seen so many people flip the bird at an American motorcade as I saw today," said New York Times reporter Gardiner Harris.¹² But it's pretty mild stuff. Self-satisfied rudeness more than anything else.¹³

I believe politics in New Zealand remain fairly civil. Perhaps I'm wrong; I don't have to live here. We can talk about this at question time. But this is not really incivility on the scale we are experiencing in the United States. And if that's right, then well and good. Keep it that way, and my remarks this evening are intended only to indicate—in a letter from abroad—how hard a task the retrieval of civility is proving to be, if ever you lose your grip on it.

And how dangerous incivility can be. For in these reflections on American politics, I am thinking of forms of incivility whose natural end-point, if left unchecked, is political violence, rather than forms of incivility whose natural endpoint is a Kiwi smirk or a giggle. The end-point is violence, and the mid-point, to which we are already very close, is the choking off of any serious prospect of political cooperation, or even just listening and engagement between rival political factions. I mean a social and political situation in which extremism flourishes and tolerance and compromise are increasingly experienced as psychologically impossible.

4.

Should we try to define civility? I'm not sure. The economist and philosopher Amartya Sen once said that it's easier to recognise injustice than to define justice.¹⁴ It is certainly easy to recognise incivility: we know it when we see it. Examples abound, where hyper-partisanship leads to personal aspersions and vulgar abuse, and where any dispassionate observer will discern an intimation of violence. So, for example:

- Every morning I run into the man with a "Fuck Trump" sign permanently installed outside the West 4th Street subway.
- "At [candidate] Trump's rallies during the campaign, supporters ... denounced Hillary Clinton, chanting "Lock Her Up!" and wearing T-shirts with the slogan, "Trump That Bitch!"
- For her part, Secretary Clinton used the phrase "a basket of deplorables" to describe those of her fellow citizens who were disposed to vote for her opponent.
- Candidate Trump mocked a disabled reporter, and his vulgar comments about women reporters' "bleeding," both during the campaign and in the course of his presidency, have become notorious.

- A number of Democrat representatives and senators turned their backs on First Lady Melania Trump when she entered the chamber for her husband's address to Joint Session of Congress last February. A writer in the *New Yorker* defended this discourtesy, saying that “[i]n times like these, the withholding of ordinary graciousness may be the very least one can do.”
- A few weeks ago, *New York Times* columnist Charles Blow said this about the President on the op-ed page of the *Times*: “A madman and his legislative minions are holding America hostage.” He continued: “Trump is an abomination and a cancer on the country, and none of us can rest until he is no longer holding the reins of power.”
- Calling President Trump a “foul” and “repulsive demagogue,” Leon Wieseltier (who is Isaiah Berlin Senior Fellow at the Brookings Institute) counselled readers of the *Washington Post* to “stay angry.” Another writer cautioned that “[p]eople can get used to anything, and if you don’t take steps to prevent it, you will get used to Trump.” “[D]emocracies fall,” she said, “when their people stop resisting.”

And so on. These are the recognisable phenomena of political incivility, and (much as I hate to say it) they can be recognised on both sides.

As I mentioned, it is easy to say what civility is not. It includes discourtesy but it is not just a matter of politeness. The American columnist Judith Martin, writing under the *nom-de-plume* of Miss Manners, has a book on civility, but most of it is about etiquette at the dinner table and on dates. It is tied down to an outdated sense of delicacy in sexual relations, which, as the author acknowledges, is still coming to terms with the fact that body parts can be used for things other than writing thank-you notes.

Is civility just niceness? Gandhi once said that civility means “an inborn gentleness and desire to do the opponent good.”¹⁵ This is wrong, I think. We should not say that being civil is a matter of affability, or goodwill. Civility, at least in politics, is a chilly virtue—not a warm one. It is a matter of showing respect. Otago law professor Andrew Geddis has put it this way: “the effort required to be civil tells others that we are prepared to incur a cost out of respect for them, as well as in recognition of the value that we attach to engaging with them in pursuit of some jointly satisfactory resolution to differences of opinion.”

I associate civility with formality; with a willingness to respect the formalities of an interaction and to put 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.¹⁶ It comprises forms of speech and interaction that distinguish dealing with an enemy from dealing with an opponent—i.e., a fellow citizen, with whom you stand in an adversarial relation, but not a relation of enmity. It's the blurring of that distinction between opponent and enemy that we seem to be seeing today.

Is civility an absolute, a virtue in all circumstances, a categorical imperative?¹⁷ I have a number of post-modern academic colleagues who disparage civility as a hegemonic ideal. They say it's a way in which Western manners are imposed on outsiders and savages, or a way in which the resistance of those being subjugated by Europeans is stigmatised as a failure of civilisation. I am not convinced by that.

It is true that in a diverse and pluralistic society we are likely to find different mores and different customs of civility; different ways of marking this distinction between opponent and enemy, just as we find different forms of etiquette. We have to get used to the variety of the different formalities that are used by our fellow citizens to distinguish political adversaries from hostile enemies, but some such distinction there must be. In any democratic community where there is disagreement there must be such a distinction, and there must be ways of marking it which of course will be culturally defined and vary from culture to culture. People need to learn and practice ways of marking this distinction between opponent and enemy.

Civility tends to be conservative in character, freezing established patterns of interaction. Breast-feeding by newly arrived women MPs is seen as uncivil, as is the acting-up of gay rights activists. Sometimes people just have to break through existing patterns of behaviour in order to be taken seriously. Geoff Stone, who is an American First Amendment scholar at the University of Chicago, believes that “incivility may be necessary ... to shake complacency.... A burning flag, a well-aimed insult, a scream of protest may be just what the doctor ordered to stir people to anger and awaken their consciences.”¹⁸ Maybe this is what the Trump voters feel in a post-industrial economy that has left them behind.

Or, on the other side, Harvard law professor Randall Kennedy says that “if you are in an argument with a thug, there are things much more important than civility.”¹⁹ And many Americans think that they are in an argument with a thug. Or they believe they are stuck in a political cage-fight with people who fundamentally disparage their race, their identity, their sexual orientation.

5.

Let me return to New Zealand for a moment. I read somewhere recently that Australian politicians compare the “toxic” incivility of their own politics with the relative civility of politics in New Zealand.²⁰ And Helen Clark is reputed to have said that politics in Australia is “too polarised” to offer unified support for an Australian nominee to be UN Secretary-General, whereas she thinks “there’s still some civility in political discourse in New Zealand.”²¹

In 2010 the *Sydney Morning Herald* reported Julia Gillard pleading for a new era of civility and restraint in the Australian Parliament, urging opposition parties to put aside the “empty rancour of partisanship” and work together with Labour for the “betterment of the people”. Tony Abbott rejected the notion. He said “I don’t think what ... what we should aim for in our system is some kind of spurious consensus—our system is an adversarial system.”²²

Abbott is right. Modern democracy works as an adversarial system, and the search for a moral consensus politics is probably a mistake. If there’s one thing I want to argue for this evening, it is that consensus is not the key to civility. We have to look for civility in the midst of our disagreements, not in any proposal for their supersession. Civility is about the way we deal with our disagreements, not about the way we avoid them.

Of course, there are settings like the dinner table where we try to avoid disputes about issues like religion and politics and that, as a matter of etiquette, is important. In politics, however, we have to air our disagreements, and we have to find ways of giving vent to our disputes that do not involve disparaging, hitting, or denigrating the person we disagree with.

6.

Certainly, the problem of incivility is not solved by taking divisive issues out of the rough-and-tumble of politics, so that they are no longer up-for-grabs in majoritarian politics, but rather dealt with on a higher plane in the hallowed halls of our judicial system. “The idea of the Constitution,” the US Supreme Court once said, is “to withdraw certain subjects from the vicissitudes of political controversy.”²³ People say: there are some outcomes that would be so wrong, they have to be taken off the agenda. And give courts the task of patrolling this boundary, ensuring that things beyond the pale are not ever brought back into regular politics. On this rhetoric, we

say to our opponents after a victory in court: “You should never have been promoting this position in the first place.”

I believe this contributes to incivility. I recognise that this is a counter-intuitive approach. After all what could be more civil than dealing with a divisive issue in the decorous surroundings of a courtroom?

But I reach this position reflecting on our experience in the US with constitutionalisation of the politics of abortion. The comedian John Stewart in his guide to American democracy described the 1973 abortion decision *Roe v. Wade*²⁴ saying: “The Court rules that the right to privacy protects a woman’s decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue.”²⁵ Fat chance! Politically and culturally, *Roe v. Wade* didn’t settle anything. The politics of the issue have continued to simmer in civil society in rage and demonstrations, not to mention unpleasantness and violence, despite pro-life people being stigmatised as unworthy of even the prospect of electoral or legislative success. Also, the experience with abortion shows that very quickly the courts and the judiciary begin to display some of the incivility associated with the issue. (Look at some of the interactions between the late Justice Scalia and his more liberal “brethren” on the bench.) And there is a consequent politicisation of the process of judicial appointments.

Constitutionalisation is winner-takes-all. A victory in court leads to a claim that the losing party should never have held its position in the first place. Its position doesn’t just fail politically—as almost every policy does at some time in its career—but is denounced as beyond the limits of decent politics. The mood and tone of this denunciation is quite different from that of an ordinary political or legislative victory, where everyone knows the tables may be turned after the next vote or the next election. It does damage to the rhythm and the fabric of politics. The English philosopher Bernard Williams once reflected on the difference between being able to say to a losing opponent, “You lost” and saying to him, “You were wrong.” Saying, “Well you lost,” is compatible with recognising his position as honest and honourable; it’s like saying, “Better luck next time.” It recognises that we share civil space with our opponents, and that our aim is to defeat their positions, not demonise them. It was one of the reasons why Williams was so opposed to the moralisation of politics.

New Zealand is poised at the beginning of this road, with the Palmer/Butler proposal for a modest but judicially-enforced Bill of Rights in their proposed constitution for Aotearoa New Zealand.²⁶ There is scant consideration of the perils of judicialising

political issues in the Palmer/Butler book. It is mostly dealt with by an assertion that judges get out of control, the people can easily resort to constitutional amendment.²⁷ And in that way, they imply, the give-and-take of ordinary politics is brought back in. I'm not sure that really addresses the difficulty, since it keeps whatever politics are involved at a constitutional boiling point and that's exactly what civility counsels against.

I say: think very carefully before going down that road. I had thought of talking this evening about whether New Zealand actually needs a codified constitution, and even if it does, whether it is appropriate to take that opportunity to substantially alter the balance of power between legislature and judiciary, not to mention abolishing the monarchy. (I ended up speaking about that at the Auckland Law School this afternoon). This evening, all I want to do is warn against the incivility implicit in the constitutionalisation of one's favoured political position. When people disagree in good faith, it is exactly the wrong move to try to entrench one's own position constitutionally and put opposing positions beyond the pale.

7.

What we have to acknowledge and cope with (honestly) is the presence in our society of profound and deeply rooted disagreement on many issues. It is always disconcerting to find that one's own absolutes are not matched by others' convictions. In the years after 9/11, when the US found itself embroiled in a debate about torture, I was amazed to find that most of my philosophical colleagues disagreed with my absolutist opposition to torture. They thought I must be some sort of religious maniac to want to justify an absolutist position; they didn't think it possible rationally to justify moral absolutism about torture.²⁸

When we confront intractable opposition on a position that we regard as morally serious, it is tempting to diagnose the opposition as something else: it must be the product of irrationality or prejudice or it must be motivated by self-interest. 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*²⁹—I have argued that we need to get over this tendency. "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."³⁰

Distinctions of perspective include religious differences. Now, religion plays a greater role in American politics than it does in a basically secular country like New Zealand. I am not one of those who believes that for the sake of civility, religious differences should be muted in politics. We need to be able to call it like it is, and those who hear us need to get used to it, and strain to understand our religiously motivated positions as we strain to understand the dignity of their secular moral principles. If people can learn to talk frankly and without embarrassment about their most compelling convictions, then we can diminish some of the resentment that is associated with the perception that in a garrulous polity some people are being silenced.

There is no doubt that differences of religious experience and philosophy make disagreements more intractable—as does identity politics, where people bind up their whole sense of being with the principles they want to defend. We have to learn to live with that, and not see it as a basis for screaming at each other. All of us think of ourselves as good persons, and each of us associates his or her political positions with a certain amount of self-righteousness. As Immanuel Kant put it, everyone has a sense of morality and everyone wants to direct everything according to his or her own ideas.³¹ And everyone is offended when others disagree.³² But we have *politics* because there are many of us, because not man but men inhabit the world, not person but people.³³

There is no need to abandon strong feelings: The procedures of politics are often associated with the arts and conventions of rhetoric which provide a language appropriate to the vehemence and the burden of denunciation that the opponent of an opposing view may feel called on to express.

Does a refusal to moderate one's views and one's advocacy constitute a denial of civility? 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. 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. “Here I stand, I can do no other.” 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.

But one can say that without denigrating an opponent as godless or amoral, and I hope one can say it without necessarily inviting an attribution of irrationality. One can keep faith with it oneself, but still be prepared to countenance the emergence of compromise in the real political world that we share with others.

There is a saying on the web-site of *The Institute for Civility in Government* (a grass roots organisation in America that brings 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.”³⁴ Usually one finds platitudes on these web-sites; but this saying, it seems to me, captures something important.

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 *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). 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.”

8.

Aristotle said that the mark of the good citizen is that he knows how to rule and be ruled. “[M]en are praised for knowing both how to rule and how to obey.”³⁵ Citizens “take it in turns to exercise authority.”³⁶ They have to be good “at both ruling and obeying,” which is why people who cannot stand being ruled—who cannot stand being losers in the sense that I have defined—may have to be ostracised and exiled, on Aristotle’s account.³⁷ Democracies work by alternation through the procedural mechanism of elections. Sometimes your party is in power (or in coalition); sometimes my party is. All politicians in the modern world have to deal with the gall of defeat. Most do so gracefully and respectfully, doing what they can to ease a potentially problematic tradition—as John McCain did for Barack Obama in 2008.

After an electoral loss, members of the defeated faction do not go on trial or go abroad or into the mountains or go underground. Elections, as Nancy Rosenblum pointed out, are not followed by waves of hangings or expropriation or suicide.³⁸ Defeated opponents move gracefully to the other side of the House where they engage continuously in loyal opposition. The *loyalty* of their opposition is their acknowledgement that for the time being the winners have the right to govern. Indeed as Alexis de Tocqueville pointed out, good losers actually value the empowerment of the victors: “for as the minority may shortly rally the majority to its principles, it is interested in professing that respect for the decrees of the legislator which it may soon have occasion to claim for its own.”³⁹ What a precious thing this is, this aspect of our political culture; historically how rare and how fragile.

But today, in the United States, I regularly get e-mails from an outfit that calls itself “Power to Impeach,” whose mission is to remove what it calls “the structural impediment to initiating impeachment proceedings” against President Trump by helping to elect more Democrats to the House. Six months into the administration and impeachment talk is all over the media, or, if not impeachment, then removal from office under the incapacity provisions of the 25th Amendment. No doubt it would be a huge boost to the morale of the Democrats after their awful defeat last November, and I feel the attraction of it as much as anyone. But think a few yards down the road. I gave a couple of talks in Brasilia recently. Do Americans want to become like Brazil, where removal of a president from office is rapidly becoming the routine mechanism for changing administrations. (In the *New York Times* last week, there was a chilling reversal of this warning: Brazil, said a political scientist, is in danger of becoming as polarised politically as the United States.)⁴⁰

A fanciful comparison, you may say, because surely American politics are much more stable than their Latin American counterparts. Are they? For the first few decades of this 21st century: we had a contested election with George W. Bush against Al Gore that had to be decided by majority voting on the US Supreme Court;⁴¹ we had the birther dispute—a festering controversy (sponsored by Donald Trump among others) about whether Barack Obama was born in the United States and was therefore eligible to be President; during the campaign, the Republicans wanted to incarcerate their opponent (“Lock her up!”); and now we have ugly talk of impeachment against President Trump. What does the next step look like? Tit-for-tat? What’s the end-game? If President Trump is removed from office, do we expect the GOP gracefully to acknowledge the next successful Democratic candidate? Fat chance. How do we walk this back? When and how do we ever revert to the civility of politics

as usual? Edmund Burke, writing of the regicide in France, called “the punishment of real tyrants ... a noble and awful act of justice,” one that should be undertaken with the utmost reluctance. “Justice is grave and decorous, and it ought to be a matter of “submit[ting] to a necessity [rather] than ... mak[ing] a choice.”⁴² No one is proposing to guillotine anyone in Washington just now—though talk of Trump’s “treason” is very common. What is distressing though is the resort to removal from office as though this were now business as usual in our politics.

I am sorry so much of this has been about the Trump administration and the politics and culture of the United States. Maybe America is a special case. Stephen Carter quotes Clemenceau’s observation that it is “the only nation in history which has ... gone directly from barbarism to degeneration without the usual interval of civilization.”⁴³ But I think there are lessons for us all about maintaining our equilibrium in a time of hyper-partisan populist politics.

For I believe we have all been thrown off balance. I’m an opponent of President Trump. As a New Zealander I don’t vote in the United States, but a green-card holder can make campaign contributions, and I gave a considerable amount of money to Hillary Clinton. She lost, and now we have this Berlusconi-type figure in the White House, or some combination of Berlusconi and Marine Le Pen, strutting around the world in the name of the United States. Imagine—I don’t know—if Kim Dotcom were to emerge as a political strongman in New Zealand. That’s what we have in America—and it is my fear that the election of President Trump has thrown us all, depriving us of a certain balance and moderation. Each night we watch CNN or MSNBC expecting—let’s be honest, “hoping”—for some new disgrace or some new twist to the Russian interference scandal or some new manifestation of President Trump’s clumsiness in the art of statesmanship. We root for him to fail. I began these reflections—and you are the first to hear them—when I found myself experiencing serious discomfort (withdrawal?) at any legislative or policy success for President Trump or his administration, even on matters I did not in principle oppose. That is not a healthy situation.

What I have offered this evening are mainly suggestions for the political class. Draw a clear line between campaigning and governing. Don’t talk as though your opponents were enemies. Be careful about constitutionalisation. And drop this talk of impeachment.

But incivility flows both ways; it flows from the bottom up as well as from the top down. The tone of street level politics is pretty bad and it is incumbent on us denizens

of the street to think about a few things that might make it better. Micro-civility is something we also have to take seriously.

So, for example, as voters and participants in politics, we have a responsibility gracefully to accept an electoral result that we deplore (as we would expect our opponents to accept our victory). We ought to put down those signs I see in New York outside Trump Tower on Fifth Avenue saying “Not my President.”

We have to learn how to talk with others who disagree with us, or better still *listen* to them—and listen, as Stephen Carter puts it, “with our ears not our mouths, not just waiting for them to draw breath so that we can pounce on the things they say that have answers in our talking points.” In the United States—I don’t think this is true in New Zealand—engaging with others may require us to go out of our way in the circumstances of the political segregation of the country. There is an excellent book by Robert Bishop called *The Big Sort: Why the Clustering of Like-minded Americans is Tearing Us Apart*, about the tendency of people when they move to settle near others who share their convictions and lifestyle.⁴⁴ And if it’s convictions and lifestyle that are dividing us, then there is less chance of mitigating incivility—quite the opposite perhaps, as interaction with like-minded people tends to promote extremism and distrust of others.

There’s a droll observation by the playwright Arthur Miller at the time of the 2004 election: “How can the polls be neck and neck when I don’t know [a single] Bush supporter.”⁴⁵ That’s New York for you, and it’s even worse in some professions, in mine for example. David Bromwich once observed that “[m]any professors, when asked, will confess that it has been years since they talked about politics in a company less than wholly composed of academics,” and most of us self-segregate pretty effectively within the professoriate.⁴⁶

Robert Bishop and others see religion as an intensifier of political divisions: people choose a church for its politics. Myself, I go to church—to Saint Thomas Episcopal church on Fifth Avenue, just across from Trump Tower—not just for faith and worship, but to meet and talk with people who are politically and culturally unlike myself and unlike the liberal academics I mostly hang out with. I want to reshuffle the big sort. Everyone has to find their own way of doing this. But I do believe that it’s only if we *practice* talking to each other and listening to each other, staying present with each other in the midst of our disagreements, in whatever setting we can, that there is any hope at all of overcoming the incivility afflicting our politics—or, in the happy case of New Zealand, preventing such incivility from rising up and getting out of hand.

ENDNOTES

1. Actually, since 1994, he was John Graham CBE. Sir John was created a Knight Companion of the New Zealand Order of Merit in 2011.
2. *Parliamentary Recklessness: Why We Need to Legislate More Carefully* (Maxim Institute, New Zealand, 2008), available at <https://www.maxim.org.nz/sjgl2008/>
3. Peter Hermann, Paul Kane, and Patricia Sullivan, "Lawmaker Steve Scalise is critically injured in GOP baseball shooting; gunman James T. Hodgkinson is killed by police," *Washington Post*, June 14, 2017.
4. "The Democratic team defeated the Republican team 11–2, but loaned the trophy to the Republicans until Scalise recovers"
5. Cf. Andrew Geddis, "Freedom of Expression and Civility in the New Zealand Supreme Court," <http://journals.sagepub.com/doi/pdf/10.1350/clwr.2013.42.4.0258> : "the more often or the more flagrantly the social norm of civility is breached, the less its constraining effect will be on society as a whole. A ratcheting up effect exists here, whereby as forms of expression previously considered unacceptably discourteous are normalized, the restraint imposed by the civility norm becomes less and less effective." Bernard E. Harcourt, The Politics of Incivility, *Arizona Law Review* 54 (2012), 345, at p. 358 cites my colleague NYU Kenji Yoshino for the proposition that incivility is often a tit-for-tat game--or at least, it is often justified as a legitimate response to someone else's initial incivility.
6. Michael Miller, "Donald Trump on a protester: 'I'd like to punch him in the face'" *Washington Post*, February 23, 2016.
7. Cf. Marco Rubio speech, reported in *Washington Post*, February 9, 2017 about Senate debate: "Turn on the news and watch these parliaments around the world where people throw chairs at each other. And punches. ... Doesn't give you a lot of confidence about those countries. Now I'm not arguing that we're anywhere near that here tonight, but we're flirting with it. We're flirting with it in this body and we're flirting with it in this country. We have become a society incapable of having debates anymore."
8. J. Cherie Strachan and Michael R. Wolf, "Introduction to Political Civility," *PS: Political Science and Politics*, 45 (2012), 40. See also Gordon Wood, Revolutionary Characters: What Made the Founders Different, "The 18th-century Anglo-American Enlightenment was preoccupied with politeness, which ... meant affability, sociability, cultivation; indeed, politeness was considered the source of civility, which was soon replaced by the word civilization." [O]ur early leaders were determined to show the world that we could be just as "civilized" as the European powers we had left behind. – Anne-Marie Slaughter, *New American Weekly*, Feb 16, 2017.
9. Stephen Carter, *Civility: Manners, Morals, and the Etiquette of Democracy* (Basic Books, 1998), p. xi.
10. See Barry Gustafson, *His Way: A Biography of Robert Muldoon* (Auckland University Press, 2000), pp. 166-9 and 199-204.
11. Certainly the decline of serious political journalism is a matter of concern. As entertainment values come to the fore, there is a tendency to report what happens in and around Parliament as a sort of freak show, a source of amusement, irony, and satire (something to put on the wall of the Backbencher pub in Molesworth Street in Wellington.) So we lose the sense of connection between serious debate in the House and serious debate in civil society (which I know is one of the things that the Maxim Institute is trying to fix). That was part of what I was talking about in the first John Graham Lecture ten years ago.
12. Reported in Julia Glum, "Rex Tillerson Had to Drive Past a Bunch of People Giving Him the Finger in New Zealand," *Newsweek* 6/6/17.
13. I say this, mindful of the excellent article by my friend Andrew Geddis of the Law School at Otago University, op. cit. note 5, which analyses the application in recent years (and the compatibility with NZBORA) of provisions in the Summary Offences Act, whose function seems to be to patrol the outer limits of uncivil or offensive behaviour in public.
14. Amartya Sen, *The Idea of Justice* (Harvard University Press, 2011), p. 2.
15. Mohandas Gandhi, *An Autobiography: The Story of My Experiments with Truth* (1940), Ch. 24.

16. Some of this is drawn from Jeremy Waldron, "Civility and Formality," in Austin Sarat (ed.) *Civility, Legality, and Justice in America* (Cambridge University Press, 2014), p. 46.
17. There is a surprising number of scholars who believe, in the words of Michael Sandel, that civility is an overrated virtue. Michael Sandel, "Making Nice Is Not the Same as Doing Good," *New York Times*, December 29, 1996
18. Geoffrey R. Stone, "Civility and Dissent during Wartime," *Human Rights*, 33 (2006), 2.
19. <http://www.law.ua.edu/programs/symposiums/civility-legality-and-the-limits-of-justice/>
20. Terry Barnes, Australia's Toxic Politics Need Kiwi-style Civility, "NZ Herald 24 Feb 2017 at <https://www.pressreader.com/new-zealand/the-new-zealand-herald/20170224/282046211869173>
21. Elle Hunt, "Helen Clark: I hit my first glass ceiling at the UN," *Guardian*, June 14, 2017
22. Josh Gordon, "Abbott Spurs Gillard Plea for Political Civility," *Sydney Morning Herald* Sept 19, 2010. Abbott in *The Sunday Age*.
23. Justice Jackson, *West Virginia State Board of Education v. Barnette* 319 U.S. 624
24. *Roe v. Wade* 410 U.S. 113 (1973).
25. Jon Stewart, Ben Karlin, David Javerbaum, *America (the Book): A Citizen's Guide to Democracy Inaction* (Warner Books, 2004).
26. Geoffrey Palmer and Andrew Butler, *A Constitution for Aotearoa New Zealand* (Victoria University Press, 2016). See Articles 75-106 of their draft and Article 68 for strong judicial review.
27. *Ibid.*, p. 173
28. See Jeremy Waldron, "What are Moral Absolutes Like?" 18 *Harvard Review of Philosophy*, 18 (2012), 4-30. Cf. Susan Mendus, "Professor Waldron Goes to Washington," *Criminal Law and Philosophy* (2012).
29. Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999).
30. John Rawls, *Political Liberalism* (Columbia University Press, 1993), p. 58.
31. Immanuel Kant, *Idea for a Universal History* (8: 20-1).
32. Thomas Hobbes: "For by their nature, men take disagreement as an insult" (*De Cive*, quoted by Teresa Bejan and Bryan Garsten, "The Difficult Work of Liberal Civility," in Sarat (ed.), *Civility, Legality, and Justice*, op. cit. note 25.)
33. Hannah Arendt, *The Human Condition*
34. The Institute for Civility in Government, at <http://www.instituteforcivility.org/who-we-are/what-is-civility/>
35. Aristotle, *Politics*, Book III.
36. *Ibid.*, 115 (Bk. III, ch. 6).
37. *Ibid.*, 109 and 134 (Bk. III, chs. 4 and 14).
38. Nancy Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton University Press, 2008), p. 363 (quoting E.E. Schattschneider).
39. Alexis De Tocqueville, *Democracy in America* (Alfred A. Knopf, 1994), 247 (Vol. I, ch. 14).
40. Max Fisher and Amanda Taub, "Why Uprooting Corruption has Thrown Brazil's Political System into Upheaval," *New York Times*, July 15, 2017.
41. *Bush v. Gore* 531 U.S. 98 (2000).
42. Edmund Burke, *Reflections on the Revolution in France*: "The punishment of real tyrants is a noble and awful act of justice." Should be done with utmost reluctance. "Justice is grave and decorous, and in its punishments rather seems to submit to a necessity than to make a choice."
43. Carter, *Civility*, p. ix.
44. Robert Bishop, *The Big Sort: Why the Clustering of Like-Minded Americans is Tearing Us Apart* (Houghton Mifflin, 2008).
45. As quoted in Deborah Solomon, "Goodbye (Again), Norma Jean," *New York Times Magazine*, September 19, 2004.
46. David Bromwich, *Politics by Other Means: Higher Education and Group Thinking* (1992) 39.



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