Symposium: Political Discourse, Civility, and Harm
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THE POLITICS OF INCIVILITY

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The Flemish painter, Pieter Bruegel, portrayed in his artwork men relieving themselves, cripples begging, and peasants toiling—as well as butchery and the gallows. In his masterful work, The Civilizing Process*, Norbert Elias showed how the "late medieval upper class" had not yet demanded, as later generations would, that "everything vulgar should be suppressed from life and therefore from pictures."*

For centuries now, defining incivility has been intimately connected with social rank, class status, political hierarchy, and relations of power. The ability to identify and sanction incivility has been associated with positions of political privilege—and simultaneously has constituted and reinforced political power. This, I fear, remains true today: Defining incivility in political discourse continues to be a political strategy that is deeply embedded in relations of power.

In the aftermath of the Tucson shootings, there have been renewed calls for greater civility in our political discourse. Although at a personal level I favor civil discourse as the wiser path in politics, I recognize that it is inevitably a political strategy that comes more easily to those who already have an audience or a professional position that affords them greater access to the media and the public. This suggests, at least to me, that we should be cautious about telling others how civilly they should speak.

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> Middle French *civilité* (French *civilité*) organized community or its institutions, political organization or system or conception of this (*c*1370), polite behaviour (1409; *c*1640 denoting an instance of this) and its etymon classical Latin *cīvīlitāt-*, *cīvīlitās* art of civil government, politics (after ancient Greek *πολιτική* POLITIC n.), behaviour as an ordinary person, unassumingness, in post-classical Latin also citizenship . . . .
>
> —Etymology of civility, *Oxford English Dictionary*[1]

INTRODUCTION

In his *Nouveau traité de la civilité* [*New Treatise on Civility*] originally published in 1671, Antoine de Courtin counseled his reader to be particularly attentive to their relations with those of inferior social rank. Persons of a superior rank "must at a minimum, for their own self-interest, be good to their domestics, and civil and honest to those who are not their dependents," de Courtin advised.[2]

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1. *See Civility Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/33581?redirectedFrom=civility (last visited Mar. 9, 2012) (etymology and definitions 1, 2, and 3).

2. ANTOINE DE COURTIN, NOUVEAU TRAITÉ DE LA CIVILITÉ QUI SE PRATIQUE EN FRANCE PARMI LES HONNETES GENS [NEW TREATISE ON CIVILITY AS PRACTICED IN FRANCE AMONG THE *HONNETES GENS*] 191 (Presses Université de Saint-Étienne 1998) (1671). This is

"What a monster it is, in effect, to be a *grand seigneur* that has no civility."[3] In the following chapter, de Courtin addressed civility among equals. Ordinarily, de Courtin remarked, conversation among equals "is more free and more gay."[4] But precisely for that reason, de Courtin thought it was important to observe certain rules of honesty; pleasantries among equals, especially when spirited and jocular, demand special attention so as not to offend. In his treatise, de Courtin sketched out a few guidelines. First, never take aim at a person of one's equal or anyone recently deceased. Second, be careful to distinguish between voluntary and involuntary defects. "It is a very mean quip indeed to mock someone because they are one-eyed or lame, since it is not their fault," de Courtin advised.[5] Third, be sure to distinguish between the interior and exterior of the person. "A man will not take offense if you tell him that he is not looking well, but he will get very angry if you tell him that he does not have much wit."[6] And so on. There is a place for pleasantries among equals, de Courtin wrote, but within reason. And not, of course, in one's relations with those of superior social standing "before whom one must evince one's submission by means of studied comportments."[7]

Social rank and relations of power have been deeply imbricated with norms of civil discourse and conduct for centuries now—perhaps since the dawn of civilization. In his masterful volumes on *The Civilizing Process*, originally published in 1939, Norbert Elias traced the transformation of the term *civility* from its origins rooted in notions of citizenship, political activity, and civil organization, to the realm of manners and politeness, or what had previously been called *courtesy*.[8] Elias painstakingly unearthed the deep interconnection between the evolution of manners and social hierarchies—class rank, social status, political standing, and cultural distinction.[9] In a complementary work, *A Genealogy of Manners*, Jorge Arditi shows the later reconfiguration of the notion of civility with the emergence of the word *etiquette* in the English language.[10]

Each of these transformations would reflect and be shaped by changing social relations, new ways of being, shifting relations of power, and new

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a reproduction of the edition of the treatise published in 1728 after the death of the author. This translation is my own.

3. *Id.*

4. *Id.* at 193.

5. *Id.* at 196.

6. *Id.*

7. *Id.* at 192.

8. NORBERT ELIAS, THE CIVILIZING PROCESS: THE HISTORY OF MANNERS, AND STATE FORMATION AND CIVILIZATION (Edmund Jephcott trans., Wiley-Blackwell 1994) (1939). *See generally* 1–4 A HISTORY OF PRIVATE LIFE (Philippe Ariès & Georges Duby eds., Harvard Univ. Press 1991); STEPHEN MENNELL, NORBERT ELIAS: CIVILIZATION AND THE HUMAN SELF-IMAGE (1989).

9. *See, e.g.*, ELIAS, *supra* note 8, at 16–19, 59–63 (discussing the history of manners in relation to class distinctions).

10. JORGE ARDITI, A GENEALOGY OF MANNERS: TRANSFORMATIONS OF SOCIAL RELATIONS IN FRANCE AND ENGLAND FROM THE FOURTEENTH TO THE EIGHTEENTH CENTURY 1–17 (1998).

organizational and institutional arrangements.[11] As Arditi writes, referring to Elias, each shift would mark "the coming of a new order of social relations, and of a transformed person[,] . . . a growing separation of bodies and psyches out of which emerged, two hundred years later, the modern, 'civilized' individual."[12] Even more, each of the transformations would reconstitute the political sphere. They would mark "the formation of a new matrix of social practices that both enable and shape the rise of the modern state."[13]

A. The Politics of Incivility

Political discourse is embedded in relations of power: It is permeated through and through, and simultaneously constitutive of power relations—in a constantly fluid and reiterative process. Power relations shape, and are themselves affected by political discourse. The capacity, for instance, to call a member of a social movement "a terrorist" or "a freedom fighter"—and to get away with it or not—is tied in complex ways to one's position in the political sphere. Whether someone is heard, applauded, ridiculed, ignored, or excluded is a reflection of the political influence of the person speaking and at the same time affects the political standing of that speaker. What one is able to say, to get away with, and to repeat is not only a measure of the speaker's political clout, but also affects that speaker's station in complex social relations and in politics.

By the same token, the ability to brand a particular discourse as uncivil is itself a political accomplishment that reflects a certain position of privilege. The faculty to define certain speech as uncivil, to castigate a speaker, to call for, urge, or demand civil discourse—and to get away with it—is intimately connected to one's place in the political realm. It is also, unquestionably, a political stratagem. Those who call for more civil discourse—just like those who do not respond in kind to incivilities, who remain above the fray, who take the high road—are themselves engaged in a discursive tactic. It is not, in any sense, neutral or apolitical. It may well be a smarter political strategy—smarter, I believe, because it reflects and projects (simultaneously reinforcing the perception and through perceptions, the reality of) political strength and power. But let us not be mistaken: It is a political strategy.

Calling out incivilities and urging greater civility in political discourse are arrows in the quiver of the political arts. Although they are presented as neutral, they are not. They represent, instead, a way to seize the political high-ground. As such, they often redound to the benefit of those who are in stronger political positions. Often, they serve the interests of the more dominant or mainstream political voices. The fact is, certain speakers in the public sphere are at greater ease to be civil. They may already have an audience that is listening, or a professional position that affords them more access to the media and to the larger public. Others, less well-situated, may feel a more urgent need to go to extremes to attract attention. Still others may feel anger at being on the margins of the political debate

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11. *See id.* at 4.
12. *Id.*
13. *Id.*

and turn to uncivil rhetoric to get their voice heard—rightly or wrongly. In many cases, it may redound to their detriment, perhaps because their social position already threatens to minimize or distort their speech. There tend to be sharp differences in the reception of linguistic expression based on gender, racial, and ethnic differences among speakers. Some speakers, it turns out, can ill afford to be uncivil—and yet may choose to, deliberately and after deep reflection.

All this suggests that there is a complex politics surrounding incivility in political discourse—surrounding the naming and identifying, the use and avoidance, the criticism and defense of uncivil speech. There is, in other words, a *politics of incivility*. And in this politics, it is important to tread carefully so as not to inadvertently empower those who can already and more easily afford to be civil.

B. The Incivility of Politics

The problem in the debate over civil discourse traces back to the slippage in the use of the term *civility*. In its earliest sense, the word *civility* was coextensive with the "art of civil government," with "orderliness in a state or region," with the "absence of anarchy and disorder," with "citizenship," and "government"—more simply, it was coextensive with "politics."[14] Civility meant the internal ordering of a *polis*, and in that sense, civility itself was just as "civil" as politics. In a curious way, "civil war" marked the outer bounds of *civility*.[15]

In its more common usage today, *civility* qualifies politics. It is a *kind* of politics, a *type* of political discourse that does not harm, injure, or offend fellow citizens. The usage here connotes discourse or behavior "appropriate to civil interactions; politeness, courtesy, consideration."[16] (Incidentally, in this sense, *civility* in political discourse is no longer limited to civil government. One can speak of a head of state demanding civility in their relations with allies or even with enemies.)

The slippage between the two connotations of *civility*—as politics *writ large* versus as a kind of acceptable politics—has affected our conception of politics itself. It has fostered a liberal understanding of politics as an art of governing that is civil and benefits citizens. It has promoted the idea that we are all better off by being part of the political community, especially a political community marked by order, domestic peace, and tranquility.

That conception of politics may have made sense in an earlier time, when our ancestors were imagining commonwealths and civil societies and writing about the brutish state of nature. But it is somehow hollow today. In the contemporary

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14. *See Civility Definition*, *supra* note 1 (etymology and definitions 1, 2, and 3).

15. The expression "civil war," naturally, differentiates domestic conflict internal to the state from war between states. This explains why many Southerners referred, and still today refer, to the American Civil War as "the war between the states."

16. *Civility Definition*, *supra* note 1 (definition 12.a). For this definition, the *Oxford English Dictionary* refers the reader to the *New York Review of Books* from August 1991, where it is written, "Nixon often mistook civility for weakness, as one sees in his taped references to loyal followers as 'candy asses.'" *Id.*

United States, we are born into civil society. The relevant political question is not *whether* the political ordering benefits everyone as compared to a state of nature. The relevant question is *how* political structures distribute resources and welfare among citizens. And in this political competition, the outcomes themselves are by no means "civil"—if by civil, again, we mean that they do not harm, injure, or prejudice members of our shared community.

Politics today, paradoxically, is not a "civil" activity—or no longer, assuming it ever was—but an agonistic field fraught with conflict, negotiation, and compromise. At its core, politics favors some to the detriment of others. There is no possible way to maintain our colossal political system—involving tax and transfer, education and social welfare, domestic security and national defense—without implicating sacrifice by some for the benefit of others. It is entirely unrealistic to imagine that politics would involve only what we could call Pareto-optimal political outcomes—outcomes that benefit one group of citizens without setting anyone back in any way. It is not even clear that the concept of Pareto optimality functions in the political domain, given that it is one's *relative* position in society—one's relative social rank and welfare—that defines political well-being.

We are today born into the *polis*, and contemporary politics is contestation over relative status, wealth, social rank, and well-being, over opportunities and resources, education, jobs, and so on. It is a struggle within complex relations of power. In that competition, in that struggle, some fare better, others less well. President John F. Kennedy's famous line was noble: "[A]sk not what your country can do for you—ask what you can do for your country."[17] But it also betrayed what we all know, namely that some sacrifice more than others, and some others benefit more than the rest. In that process, relations of power are determinative. Social rank, cultural status, and political stature will have significant effects. Whether to leverage and empower those effects, or instead to try to limit them, is a political choice—a choice that is deeply connected to the debates over civility in political discourse.

In these debates, I personally favor the civil path with respect to my own political discourse. But I recognize full well that this represents a deliberate political strategy. It is also, often, a form of self-protection. I have never regretted being civil. Telling truth, as I see it, straight and honestly, with as little venom as humanly possible is, in my opinion, the wiser path. It is, however, a privileged path, and part of that privilege, I believe, entails not telling others how they should talk. Let me not get ahead of myself, though, and turn first to more recent American history.

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17. President John F. Kennedy, Inaugural Address (Jan. 20, 1961) (transcript available at http://avalon.law.yale.edu/20th_century/kennedy.asp).

I. A MORE RECENT AMERICAN HISTORY

A. The Tucson Shootings and Sarah Palin's Facebook

The issue of civil discourse in American political life has received increased attention, especially since the mass shootings that took place in January 2011 in Tucson, Arizona. The tragic incident left six people dead and nearly took the life of Representative Gabrielle Giffords.[18] The issue of civility in discourse arose, in large part, because of this particular image—a map from Sarah Palin's Facebook page in March 2010 featuring 20 gun sights aimed at the 20 Democratic districts that Palin's PAC planned to target:

18. *The Tucson Shooting*, TIME, http://www.time.com/time/specials/packages/0,28757,2041535,00.html (last visited Apr. 7, 2012).

As the Huffington Post reported, Palin's rhetoric accompanying the map was "decidedly militant."[19] Palin wrote on her Facebook page: "We'll aim for these races and many others. . . . *This is just the first salvo in a fight to elect people across the nation who will bring common sense to Washington. Please go to sarahpac.com and join me in the fight*."[20] Many asked whether the pitch of political discourse contributed to the shootings. *The Washington Post* posed the question in the title of a lead story, *Gabrielle Giffords Shooting in Tucson: Did It Stem from State of Political Discourse?*[21]

Few informed people answer that question in the affirmative. Proving causation is a high burden, and it would be difficult to establish that political rhetoric caused the mass shooting in Tucson. The National Institute for Civil Discourse ("NICD") at the University of Arizona, a research-based organization at the forefront of the debates, does not take the position that uncivil political discourse causes political violence or caused the Tucson shootings. Instead, Dr. Brint Milward, the Director of the NICD, argues that incivility discourages good people from going into politics and makes it harder to get decent people to govern.[22] That is a far cry from arguing that it causes political violence. For good reason. The fact is, there is no good evidence to support a causal relation.

There is extensive research in the analogous context of the broken-windows theory—the theory that incivilities such as minor social disorder (e.g., loitering, public drinking, panhandling, and prostitution) and minor physical disorder (e.g., litter, graffiti, and abandoned buildings), if tolerated in a neighborhood, produce an environment that is likely to cause serious crime.[23] That research conclusively establishes that there is no reliable evidence of a causal link.[24] By contrast, there is not even reliable research on the connection between uncivil discourse and political violence. At least, I have found none. For now, it is

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19. Jeff Muskus, *Sarah Palin's PAC Puts Gun Sights on Democrats She's Targeting in 2010*, HUFFINGTON POST (Jan. 9, 2011, 11:56 AM), http://www.huffingtonpost.com/2010/03/24/sarah-palins-pac-puts-gun_n_511433.html.

20. *Id.* (emphasis added).

21. Sandhya Somashekhar, *Gabrielle Giffords Shooting in Tucson: Did It Stem from State of Political Discourse?*, WASH. POST (Jan. 9, 2011, 12:38 AM), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010803652.html.

22. Brint Milward, Director, Nat'l Inst. for Civil Discourse, Address at the Arizona Law Review Symposium: Political Discourse, Civility, and Harm (Jan. 14, 2012).

23. *See, e.g.*, James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 38 (arguing that a correlation exists between law enforcement's failure to control certain types of "quality of life" crimes, such as loitering, public drunkenness, and vandalism, and the increased likelihood that violent crimes, such as robbery, will occur).

24. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 88–89 (2001); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry*, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 461–62 (2000); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 315–16 (2006); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. (forthcoming 2012).

fair to assume that the level of incivility of political discourse, in all likelihood, does not cause political turmoil.

B. Republican and Democratic Party Polarization

Now, in the analogous context of the broken-windows theory, there is evidence that supports another hypothesis, namely that both minor disorder and serious crime may have common antecedents. In the most thorough research, Robert Sampson and Stephen Raudenbush trace the common antecedent to a notion of what they call "collective efficacy"—a form of trust in a neighborhood.[25] They find that both incivilities and neighborhood crime are likely to increase when there is lower trust among residents in the neighborhood.

By analogy, we might ask whether political incivility and political violence have similar antecedent conditions—and, if I had to venture a hypothesis, I would propose polarized politics. The suggestion would be that as political opinions and positions become more extreme and polarized, the level of discourse might get elevated, as well as, possibly, political violence. This is akin to Cass Sunstein's hypothesis, discussed in *Going to Extremes* and *Republic.com 2.0*, that, when people find themselves in like-minded groups, they move to extremes and that, as people become more extreme in their political views, it increases the risk of contempt for others and possibly violence.[26] Much of this work remains normative and anecdotal—but it does bear similarity to the analogous situation of neighborhood trust, for which there is empirical evidence.

There is some evidence that political opinion has become more polarized in this country since the 1970s, especially among political elites. Professor Richard Pildes at New York University has marshaled some relevant data, as have Professors Toni Massaro and Robin Stryker at the University of Arizona.[27] The increased polarization is most evident among political party leaders. According to Pildes, "The parties have become purer distillations of themselves. They are internally more unified and coherent, and externally more distant from each other,

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25. *See* Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–39 (1999) (arguing that due to shared theoretical features, both public disorder and predatory crimes are explained by a concentration of disadvantage and lowered collective efficacy); *see also* Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 923 (1997) (offering evidence that the social cohesion among neighbors combined with their willingness to intervene on behalf of the common good acts as "a robust predictor of lower rates of violence").

26. CASS R. SUNSTEIN, GOING TO EXTREMES: HOW LIKE MINDS UNITE AND DIVIDE 3–5 (2009); CASS R. SUNSTEIN, REPUBLIC.COM 2.0, at 10–11 (2007).

27. Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 412 (2012); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011); *see also* ROBIN STRYKER, NAT'L INST. FOR CIVIL DISCOURSE, RESEARCH BRIEF NO. 6, POLITICAL POLARIZATION (2011), *available at* http://www.nicd.arizona.edu/sites/default/files/research_briefs/NICD_research_brief6.pdf.

than anytime over the last one hundred years."[28] Massaro and Stryker similarly find that "today's elite party polarization is much higher than it was 40 years ago, with the 1970s standing out as one of the most *bipartisan* eras in American history."[29] There is substantial empirical evidence to support this: "In 1976, moderates constituted 30% of the House; by 2002, this proportion had shrunk to 8%. Similarly, in 1970, moderates constituted 41% of the Senate; today, that proportion is 5%."[30] Pildes adds that, "over this same period 'strong conservatives' grew from 17% of House Republicans to 67%, while 'strong liberals' went from 35% of House Democrats to more than 50%."[31]

There is some debate as to whether this elite phenomenon has affected polarization within the general public. Pildes marshals evidence in support, noting that "one study concludes that only 13% of voters in the 2004 presidential election were 'swing voters,' compared to an average of 23% in presidential elections from 1972–2004."[32] Pildes adds, "Split-ticket voting has declined sharply: more voters express consistent, partisan political preferences by voting for candidates from the same party across all races, whether for the House, the Senate, or the presidency."[33] Massaro and Stryker caution, though, that although research finds "that mass polarization *with respect to political party identification* has increased since the early 1970s," this does not necessarily imply that "the nation is beset by more general societal 'culture wars.'"[34] It is unclear to what extent polarization among the political elite has seeped into the public imagination. There is some anecdotal evidence, although, that this may be the case.

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28. Pildes, *supra* note 27, at 277.

29. Massaro & Stryker, *supra* note 27, at 412 (relying primarily on Marc J. Hetherington, *Review Article: Putting Polarization into Perspective*, 39 BRIT. J. POL. SCI. 413 (2009), and Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 85–86 (2006)).

30. Pildes, *supra* note 27, at 277 (footnote omitted) (citing ALAN I. ABRAMOWITZ, THE DISAPPEARING CENTER: ENGAGED CITIZENS, POLARIZATION, AND AMERICAN DEMOCRACY 139, 141 (2010); Alan Abramowitz, U.S. Senate Elections in a Polarized Era (Oct. 24, 2009) (unpublished manuscript), *available at* http://www.vanderbilt.edu/csdi/archived/Bicameralism%20papers/abromowitz3.pdf).

31. *Id.* at 277 n.4 (citing ABRAMOWITZ, *supra* note 30, at 142).

32. *Id.* at 277 n.7 (citing THE SWING VOTER IN AMERICAN POLITICS 138 (William G. Mayer ed., 2008)).

33. *Id.* at 278 (citing Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35 (2000)); Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 629 (2001)).

34. Massaro & Stryker, *supra* note 27, at 412–13. They note there that, "From 1972–2002, within the American electorate there was *convergence* in issue opinions by age, education, race, religion, and region, suggesting at the very least that the culture wars trope is exaggerated." *Id.* at 413; *see also* Claude S. Fischer & Greggor Mattson, *Is America Fragmenting?*, 35 ANN. REV. SOC. 435, 435 (2009) (reviewing "claims that between 1970 and 2005 American society fragmented along lines of cultural politics, social class, immigration, race, or lifestyle" and finding "little evidence for increasing fragmentation of America along lines of race, ethnicity, or immigration status").

C. Anecdotal Evidence from the Tea Party and the Occupy Movement

Anecdotally, it does seem that the Tea Party and the Occupy Wall Street movement reflect greater polarization of American politics. They represent two new extremes on the political spectrum—and they seem to have elongated that spectrum. Interestingly and revealingly, their language tends to be, at times, uncivil. Tea Party communications tend to refer to war and enemies—to revolution, to combat, and to armed struggle. A good illustration is the typical newsletter from a Tea Party website, TeaParty.org. Notice the blood-dripping script, the way "Amerika" is spelled, the hammer and sickle. Notice the direct reference to a "war chest." These are all direct references to the American Revolution, the Cold War, and the need for violent revolutionary or civil war—the very antithesis to civil discourse:

Lower down on the page, the Tea Party writes: "In times of peace, prepare for war!" The iconography is also entirely revolutionary:

At the other end of the political spectrum, the Occupy Wall Street movement expressly embraces nonviolence (and for the most part has been nonviolent[35]), but the protesters often display posters that could easily be interpreted as uncivil—or at least, that contain a lot of language that would have to be redacted from newspapers. (When I tried to have these photos published with an editorial in the *New York Times*, I was simply told "no way.") Some of the posters read as follows:

35. *See* Bernard Harcourt, *Outlawing Dissent: Rahm Emanuel's New Regime*, GUARDIAN (Jan. 19, 2012, 5:57 PM), http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/19/outlawing-dissent-rahm-emanuel-new-regime; OCCUPY WALL STREET, http://occupywallst.org (last visited Apr. 7, 2012).

Photo by Mia Ruyter

Notice a feature that characterizes many of these Occupy posters: the use of humor. In contrast to other contemporary social movements, the Occupy protesters often add humorous twists to their interventions—though the rhetoric remains nonpublishable. This poster reflects this well:

Photo by Mia Ruyter

D. Presidential Politics and the "Santorum" Google Episode

The Tea Party and the Occupy movement, however, are by no means the only ones who are, at times, "uncivil" (at least by some definitions). Republican presidential candidate Rick Santorum has often been accused of incivility. At one point during tense political debates, then Senator Santorum compared Tom Daschle, the then Democratic Senate leader, to a "rabid dog."[36] Santorum was also "one of a group of Republican senators who in 2002 called a press conference featuring a pack of bloodhounds to 'sniff out' any legislation that the Democratic majority had produced."[37] His rhetoric often triggered backlash. As the *New York Times* reports:

> The late Senator Robert C. Byrd, a West Virginia Democrat and one of the most devout traditionalists in the chamber, was appalled by Mr. Santorum. After [Senator Santorum] accused Mr. Clinton of speaking "bald-faced untruths," Mr. Byrd delivered a blistering speech in which he derided his colleague's "insolence" and "rude language" and suggested that Mr. Santorum might be better-suited to "an alehouse or beer tavern." He lamented that he had lived long enough "to see Pygmies stride like colossuses" in the august chamber.
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> Mr. Santorum's antics in the budget debate inspired Senator Bob Kerrey, Democrat of Nebraska, to make a semifamous remark that "santorum" was in fact a Latin word for an anatomical vulgarity. Mr. Santorum complained, and Mr. Kerrey clarified his remark.
>
> "I said that in fact 'santorum' might not be the actual word in Latin," Mr. Kerrey explained in an interview. "But that he was behaving like that word."[38]

As Professor Kenji Yoshino suggests, 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.[39] Rick Santorum is again a good example here—quite the pugilist when it comes to political discourse. Santorum gives a lot, but receives a lot as well. Santorum famously compared same-sex marriage to polygamy, only recently telling a group of College Republicans in Concord, New Hampshire, "So anyone can marry anyone else? . . . So anybody can marry several people?"[40]

As payback for some of his more outlandish comments, if you Google the word "Santorum," one of the first things that pops up (and for several months in

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36. Mark Leibovich, *The Santorum of 2012 Comes from a Long History of Political Brawling*, N.Y. TIMES, Jan. 7, 2012, at A14.

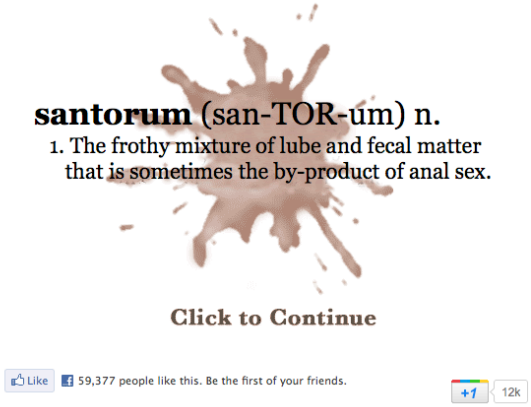
37. *Id.*

38. *Id.*

39. Kenji Yoshino, *The "Civil" Courts: The Case of Same-Sex Marriage*, 54 ARIZ. L. REV. 469, 472 (2012).

40. Leibovich, *supra* note 36.

2011, the very first entry) is a made-up definition of the word "Santorum," courtesy of the gay-rights activist Dan Savage. If you click on that Google-provided site, you will come across this on your screen:



Dan Savage had found a way to make sure that this website was always one of the first to pop up in a Google search of the former Senator's name. Rick Santorum objected strenuously and asked Google in September 2011 to have the definition removed and the search result altered. But Google said that it does not "remove content from our search results, except in very limited cases such as illegal content and violations of our webmaster guidelines."[41]

E. The Lack of Any Solid Empirical Evidence of Harm

None of this anecdotal evidence, of course, tells us anything about the connection between possible polarization and incivility, or for that matter between polarization and political violence. Regarding the first, the connection remains tenuous. There is evidence, as Professors Massaro and Stryker suggest, that "during the time period that polarization increased, uncivil discourse on the floor of the House of Representatives likewise increased"; and the same is true for the Senate.[42] But the correlation has not yet been explained, leaving us with little information about "whether polarization produces incivility, incivility produces polarization, or—as it seems most likely—there is a reciprocal relationship between the two."[43] Regarding the connection to political violence, there is even less to go on. I have found one study offering some empirical evidence backing the claim that political polarization is associated with increased risks of violence or

41. Alexander Burns, *Rick Santorum Contacted Google, Says Company Spreads 'Filth,'* POLITICO (Sept. 20, 2011, 2:49 PM), http://www.politico.com/news/stories/0911/63952.html.

42. Massaro & Stryker, *supra* note 27, at 413.

43. *Id.*

serious political turmoil.[44] However, the research is not specific to the United States, and is more focused on interstate conflicts and civil war.

Professors Massaro and Stryker address the related problem of political fragmentation, balkanization, and echo-chambers, which might also exacerbate polarization, incivility, and perhaps political violence. Although they do find evidence that "people may be more motivated to seek out opinion-*confirming* information than . . . information that challenges their opinion,"[45] and although they express concern that these balkanization and echo-chamber effects may have negative effects (including nefarious consequences for political participation and democratic engagement), they are clear that the mix of studies leaves the question inconclusive at best.[46] In the end, we are, again, left with little solid empirical data to go on.

F. True Threats and the American Coalition of Life Activists

In this discussion, it is important to carve out a particular category of political discourse that goes beyond traditional incivility and encompasses direct, real threats to identifiable persons that are likely to trigger physical violence, harm, and personal injury. Here, the causal relation is direct, and as a result, there are separate bodies of jurisprudence to deal with these cases. There are criminal statutes that prohibit intentionally threatening physical harm to individuals where there is a real likelihood of harm,[47] and there are also categorical exceptions to First Amendment free speech protections where true threats or fighting words are

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44. *See* Joan Esteban & Gerald Schneider, *Polarization and Conflict: Theoretical and Empirical Issues*, 45 J. PEACE RES. 131, 131–41 (2008).

45. Massaro & Stryker, *supra* note 27, at 419.

46. Massaro and Stryker marshal a number of studies that both support and undermine the hypotheses of fragmentation and echo-chambers *See id.* at 413–19. In the first category, see especially Benjamin R. Warner, *Segmenting the Electorate: The Effects of Exposure to Political Extremism Online*, 61 COMM. STUD. 430 (2010) (creating a 2010 cross-sectional study of a random sample of participants in neo-Nazi online discussion groups that showed those who reported visiting the site more often also reported more support for racial violence and for Hitler, holding constant their gender, education, age, income, news media exposure, and more general online participation); in the second category, see especially JOHN HORRIGAN ET AL., PEW INTERNET & AM. LIFE PROJECT, THE INTERNET AND DEMOCRATIC DEBATE 14–18 (2004), *available at* http://www.pewinternet.org/~/media//Files/Reports/2004/PIP_Political_Info_Report.pdf.pdf (finding significant heterogeneity of opinion among discussion groups organized around political issues). They also point us to studies that are inconclusive regarding these hypotheses. *See* R. Kelly Garrett, *Echo Chambers Online?: Politically Motivated Selective Exposure Among Internet News Users*, 14 J. COMPUTER-MEDIATED COMM. 265, 269–70 (2009) (finding that people tend to select articles that reinforced their views, but they also chose some articles that challenged their views; if they start to read something and found it did challenge their views, they only infrequently stop reading for this reason); Tetsuro Kobayashi & Ken'ichi Ikeda, *Selective Exposure in Political Web Browsing: Empirical Verification of 'Cyber-Balkanization' in Japan and the USA*, 12 INFO. COMM. & SOC'Y 929, 949–50 (2009) (similar findings).

47. *See, e.g.*, 18 U.S.C. §§ 115, 248, 844, 871, 875, 876 (2012).

at issue. The constitutional analysis tends to fall under the "true threats" doctrine of *Brandenburg v. Ohio*,[48] and the Supreme Court has delineated the scope of protected threats in several other cases, notably *Watts v. United States*[49] and *NAACP v. Claiborne Hardware Co.*[50]

An illustration of true threats involves the targeting of abortion doctors and the case brought on October 26, 1995, by four individual physicians and two clinics against the American Coalition of Life Activists ("ACLA").[51] In that case, the doctors claimed that the ACLA had engaged in a campaign of terror and intimidation by targeting them with specific threats—including a "Deadly Dozen List" poster.[52] The "Deadly Dozen List" was part of a series of "Wanted" posters that identified 13 physicians by name, included some of their home addresses, declared them guilty of crimes against humanity, and offered $5,000 for information leading to their arrest, conviction, and revocation of their license to

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48. 395 U.S. 444 (1969) (per curiam). In *Brandenburg,* the Supreme Court established the test used to determine the constitutionality of a statute that criminalizes violent incitement. *Id.* at 447–48. The *Brandenburg* case involved a Ku Klux Klan leader who made a speech advocating violence against Blacks, Jews, and their supporters to a group of armed hooded men. *Id.* at 444–47. He was convicted under an Ohio statute that criminalized advocacy of violence as a means of accomplishing political reform. *Id.* at 444–45. The Supreme Court overturned the conviction and the Ohio statute, stating that

> the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447.

49. 394 U.S. 705 (1969) (per curiam). In *Watts*, the Supreme Court ruled that hyperbole must be distinguished from true threats, overturning the conviction of an 18-year-old who had "threatened" the President by saying: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court suggested several factors that should be considered when determining whether a statement is a true threat, including: (1) whether or not the speech constitutes political hyperbole; (2) the overall context in which the statement is made; (3) the reaction of the listeners; and (4) whether or not the statement was conditional, especially if it was conditional on an event that was unlikely to occur. *Id.* at 706–08.

50. 458 U.S. 886 (1982). *Clairborne Hardware* involved a group of Black citizens who organized a boycott of White merchants. *Id.* at 888. A group of men called the Black Hats recorded all Blacks who entered the stores. *Id.* at 903. These names were then read aloud at meetings and published in a newspaper. *Id.* at 904. Approximately ten violent acts were committed against violators of the boycott. *Id.* at 905. One of the issues for the Court was whether a man who gave a speech at a meeting, threatening to break the necks of anyone who violated the boycott, had made a criminal threat. *Id.* at 902, 906. The Court unanimously said no, calling the speech a kind of political hyperbole protected under *Watts*. *Id.* at 911.

51. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 945 F. Supp. 1355 (D. Or. 1996), *vacated*, 244 F.3d 1007 (9th Cir. 2001), *aff'd in part*, *vacated in part*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

52. *Id.* at 1362.

practice medicine.[53] The doctors also claimed ACLA maintained a set of "Nuremberg Files"—a mix of hard files and a website that contained pictures, addresses, and other information about abortion doctors.[54] A number of doctors identified in the Nuremberg Files were murdered or otherwise victimized, and the website would strike their names off or gray out their names if they were murdered or injured, respectively.[55]

After years of appeals, the Ninth Circuit en banc decided that the ACLA's actions constituted "true threats of force" within the meaning of the Freedom of Access to Clinics Entrances Act ("FACE") (18 U.S.C. § 248) and were therefore not protected speech under the First Amendment. The Ninth Circuit held that:

> "threat of force" in FACE means what our settled threats law says a true threat is: a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person. So defined, a threatening statement that violates FACE is unprotected under the First Amendment.[56]

In so doing, the Court distinguished *Brandenburg*, *Watts*, and *Claiborne* by pointing to the fact that the ACLA had individualized their message:

> The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted. There were no individualized threats in *Brandenburg, Watts* or *Claiborne.* However, no one putting Crist, Hern, and the Newhalls on a "wanted"-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed. And they were seriously worried.[57]

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53. *Id.*

54. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1065 (9th Cir. 2002) (en banc).

55. *Id.*

56. *Id.* at 1077.

57. *Id.* at 1086.

Despite this ruling, it is interesting to note that a Nuremberg Files successor website still exists today and contains identical information.[58] Here is the page on their website:

ALLEGED ABORTIONISTS AND THEIR ACCOMPLICES

Tiller the Killer Aborted!

Due To The Recent Ninth Circuit Court of Appeals Decision We Have Reverted To A Version Of The Nuremberg Files Published Without The Strike Through Lines Defined By A Hysterical Ninth Circuit Court of Appeals As A "True Threat". (Most weirdly, the Ninth Circuit found that it was only the use of the strike through graphical device on the names of dead abortionists that somehow made the Nuremberg Files a "true threat." I temporarily removed that graphic device to conform to the cloud coocoo land decrees of the Ninth Circuit.)

Since we were forced to remove the names of the abortionists who were killed or wounded, we have found another list that contains precisely the same information that we had published with the exception that this list uses no graphic devices such as strike through lines, etc. The form and most of the content of the list that follows was obtained from a pro-abortion web site.

Aborted and Nearly Aborted Abortionists

Donald L. Catron **Claudia Gilmore** Shot 12/28/91 at Central Health Center for Women in Springfield, Missouri *Victims*: Wounded *Terrorist*: At large, planning next murder?	**Dr. David Gunn** Shot 3/10/93 at clinic in Pensacola, Florida *Victim:* Murdered *Terrorist:* Michael Griffin, serving life sentence	**Dr. George Tiller** Shot 8/19/93 at clinic in Wichita, Kansas *Victim:* Wounded *Terrorist:* Rachelle "Shelley" Shannon sentenced to 11 years in prison, planning next murder?	**Dr. Wayne Patterson** Shot in Mobile, Alabama *Victim:* Murdered *Terrorist:* At large, planning next murder?
Dr. John Britton James Barrett **June Barrett** Shot 7/29/94 outside clinic in Pensacola, Florida *Victims:* Murdered (John and James) and wounded (June) *Terrorist:* Former minister Paul Hill, facing death sentence	**Dr. Garson Romalis** Shot 11/8/94 at home in Vancouver, British Columbia *Victim:* Wounded *Terrorist:* At large, planning next murder?	**Shannon Lowney Leanne Nichols** Shot 12/30/94 at clinics in Brookline, Massachusetts *Victims:* Murdered *Terrorist:* John Salvi, prison suicide following life sentence	**Anjana Agrawal** **Antonio Hernandez** **Brian Murray** **Jane Sauer** **Richard J. Seron** Shot 12/94 at clinics in Brookline, Massachusetts *Victims:* Wounded *Terrorist:* John Salvi, prison suicide following life sentence
Dr. Hugh Short Shot 11/10/95 at home in Ancaster, Ontario *Victim:* Wounded *Terrorist:* At large, planning next murder?	**Dr. Calvin Jackson** Stabbed 12/96 outside the Orleans Women's Clinic in New Orleans, Louisiana *Victim:* Wounded *Terrorist:*	**Unidentified Victims** 4-7 victims of 2 bombs 1/16/97 outside the Northside Family Planning Services clinic near Atlanta, Georgia *Victims:* Wounded *Terrorist:* At large; $1 million reward for Eric Rudolph; planning next murder?	**Unidentified Doctor** Shot 10/28/97 at home in Perinton, New York *Victim:* Wounded *Terrorist:* At large, planning next murder?
Dr. Jack Fainman Shot 11/11/97 at home in Winnipeg, Manitoba *Victim:* Wounded *Terrorist:* At large, planning next murder?	**Officer Robert Sanderson** Bombed 1/29/98 outside New Woman, All Women Health Care Clinic in Birmingham, Alabama *Victim:* Murdered *Terrorist:* At large; $1 million reward for Eric Rudolph; planning next murder?	**Emily Lyons** Bombed 1/29/98 outside New Woman, All Women Health Care Clinic in Birmingham, Alabama *Victim:* Wounded *Terrorist:* At large; $1 million reward for Eric Rudolph; planning next murder?	**Dr. Barnett Slepian** Shot 10/23/98 at home in Amherst, New York *Victim:* Murdered *Terrorist:* At large, planning next murder?
Paul Wellstone Senator from Minnesota. Died in Plane Crash With Wife and Daughter on October 25, 2002 *Terrorist:*No Evidence of Terrorism At Present	**George Tiller**		

And there is an interesting note on their page:

> Due To The Recent Ninth Circuit Court of Appeals Decision We Have Reverted To A Version Of The Nuremberg Files Published Without The Strike Through Lines Defined By A Hysterical Ninth Circuit Court of Appeals As A "True Threat". (Most weirdly, the Ninth Circuit found that it was only the use of the strike through graphical device on the names of dead abortionists that somehow made the Nuremberg Files a "true threat." I temporarily removed that graphic device to conform to the cloud coocoo land decrees of the Ninth Circuit.)
>
> Since we were forced to remove the names of the abortionists who were killed or wounded, we have found another list that contains precisely the same information that we had published with the exception that this list uses no graphic devices such as strike through lines, etc. *The form and most of the content of the list that follows was obtained from a pro-abortion web site.*[59]

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58. *Alleged Abortionists and Their Accomplices*, CHRISTIAN GALLERY, http://www.christiangallery.com/atrocity/aborts.html (last visited Mar. 10, 2012).

59. *Id.*

Despite the continued existence of this website, and the legal wrangling over the availability of the information, this is precisely the kind of political discourse that goes beyond incivility and constitutes a direct threat of real harm to individuals. This type of discourse evidently falls outside the scope of debates over civility in politics and should be legally prohibited.

Naturally, this raises line-drawing questions, such as whether Sarah Palin's crosshairs map on her Facebook page amounted to true threats or whether the rhetoric of more revolutionary groups in this country presents a true threat of violence.[60] It is extremely unlikely that they would qualify as such under current First Amendment doctrine.[61] However, drawing lines and defining terms can be an exercise in politics, too. It is important to narrowly define the category of true threats, but also not to allow such speech where the causal connection to political violence can be established through court proceedings.

II. THE POLITICS OF INCIVILITY

It is curious, but not entirely surprising, that many of these illustrations of purportedly uncivil discourse are associated with less mainstream positions (as in

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60. For instance, the Revolutionary Communist Party maintains that:

> In order to bring this new socialist state into being, it would be necessary to thoroughly defeat, dismantle and abolish the capitalist-imperialist state of the USA; and this in turn would only become possible with the development of a profound and acute crisis in society and the emergence of a revolutionary people, in the millions and millions, who have the leadership of a revolutionary communist vanguard and are conscious of the need for revolutionary change and determined to fight for it. To work for this objective—to hasten while awaiting the emergence of these necessary conditions, with the goal of revolution and ultimately communism clearly in mind—is the strategic orientation of the Revolutionary Communist Party, USA.

CONSTITUTION FOR THE NEW SOCIALIST REPUBLIC IN NORTH AMERICA (DRAFT PROPOSAL), at i (2010), *available at* http://revcom.us/socialistconstitution/SocialistConstitution-en.pdf.

61. For a civilian, it is certainly legal to preach revolution. Today, the test used for assessing the legality calling for a revolution would be the *Brandenburg* test: (1) advocating violence; (2) that is directed to incite imminent violence; and (3) is likely to incite imminent violence. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). In *Yates v. United States*, 354 U.S. 298, 300–01 (1957), which was overruled by *Burks v. United States*, 437 U.S. 1 (1978), a group of California Communists were arrested for violating the Smith Act, which criminalized advocating the overthrow of the U.S. government. The Supreme Court ruled that the Communists could not be convicted under the Smith Act unless they made an overt act towards committing an illegal act (beyond advocacy). *Yates*, 354 U.S. at 329–30. In this case, the Court was moving away from the McCarthy Era and *Dennis v. United States*, 341 U.S. 494, 508–10 (1951), where the Court ruled that the gravity of the evil of preaching communist revolution outweighed First Amendment concerns. These things said, arguably the fear surrounding terrorism and some Court decisions surrounding the Patriot Act have us sliding back toward the era of *Dennis* and the Alien and Sedition Acts. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010); Adam Liptak, *Court Affirms Ban on Aiding Groups Tied to Terror*, N.Y. TIMES, June 22, 2010, at A1.

the case of the Tea Party or Occupy Wall Street) or with the more strident or extremist politicians, activists, and political parties (such as Sarah Palin, Rick Santorum, Dan Savage, or the Revolutionary Communist Party). I say "not entirely surprising" because, when one has a lot of political power or clout, one often does not need to be uncivil. It is almost as if being uncivil correlates, somehow, with being somewhat out of the mainstream.

The truth is, Dan Savage likely does not have the same ability to attract media attention, barring his extreme discourse, as more established politicians or commentators. Similarly, it is Rick Santorum's and Sarah Palin's extreme discourse, in part, that turned them into media stars. As Stephen Carter suggests in his book, *Civility*, part of the problem involves the structure of the market, especially the news media and its focus on extreme talk.[62] The media tends to pander to the lowest common denominator, which produces a race to the bottom. What gets attention in the news cycle and talk shows tends to be the extreme and uncivil.[63] But the problem, ultimately, cannot be dissociated from the larger issues of status and power. What would it mean, exactly, in terms of access to public debate, air time, and political influence, to demand that Savage refrain? Putting aside, for a moment, the question of who started it—what Professor Yoshino refers to as the "tit-for-tat" problem[64]—the issue of civility is inextricably related to the question of political power.

A. Privilege and the Definition of Incivility

The very definition of incivility—who gets to define it and how it gets defined—is itself intimately connected to power. Today, much like in the eighteenth century, what counts as civil discourse is politically loaded. The term itself is remarkably malleable—inevitably so—and shaped by political forces. We often think we know what is at the very core of the category, until we look more closely.

In the analogous context of the broken-windows theory, we have seen that the definition of incivilities is a political exercise. Typical examples of disorder include prostitution and loitering. How they became synonymous with disorder, though, is a reflection of dominant political views—and is often factually incorrect. Commercial sex neighborhoods—what are often referred to as "red light districts"—tend to be more orderly than expected, given that commercial sex operations need to ensure that their customers not feel threatened.[65] Similarly, neighborhoods that are governed by organized crime often have reputations for being safe neighborhoods.[66] And loitering—people hanging out at the corner—it

62. STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 130 (1998).
63. *Id.* at 129.
64. Yoshino, *supra* note 39, at 472.
65. *See* HARCOURT, *supra* note 24, at 132–33.
66. *Id.*

turns out, often is a form of social control and monitoring that ensures safety in a tight-knit community.[67]

It is also true that perceptions of incivility are racially coded: How we perceive disorder is the product of the racial composition of the neighborhood. Black and Hispanic neighborhoods are perceived as far more disorderly than an objective measurement would establish.[68] Professors Robert Sampson and Stephen Raudenbush, in a 2004 study, show that neighborhood racial composition affects people's perceptions of neighborhood disorder.[69] Their study explores the grounds on which individuals form perceptions of disorder and concludes that, although observed disorder may predict perceived disorder to some degree, the racial and economic context affects an individual's perceived disorder to a greater extent.[70] In other words, people look at race, but see disorder.

This bias makes it difficult to define incivility in the broken-windows context. In fact, it is practically impossible. Disorder is in the eye of the beholder—it is, ironically, a normative category. Although it is used as a descriptor, it functions as a normative statement. Here, perhaps, is the best evidence: In New York City under Mayor Rudolph Giuliani, crime rates fell precipitously from 1994 to 1996.[71] The rate of robbery, for instance, fell approximately 60%. During the same period, the allegations of police misconduct by civilians increased by approximately 68%.[72] Was this a period of order or a period of disorder? How you answer that question, it turns out, says a lot more about your politics than it does about any "neutral" definition of order.

In this sense, Professor Barak Orbach is entirely right. In his essay *On Hubris, Civility, and Incivility*, he writes that the very definition of "civil" and "uncivil" discourse is deeply ambiguous.[73] Our cognitive frailties, as humans, mean that we are extremely bad or uneven—in other words, biased—at identifying incivility. Our heuristic imperfections, and worse, our blindness to our own imperfections, get in the way. I would merely add that the problem is not only one of cognitive bias, but is political in nature as well. Being able to call something

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67. MARY PATTILLO, BLACK ON THE BLOCK: THE POLITICS OF RACE AND CLASS IN THE CITY (2008).

68. *See, e.g.*, Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of 'Broken Windows,'* 67 SOC. PSYCHOL. Q. 319 (2004); Danielle Wallace, *A Test of the Routine Activities and Neighborhood Attachment Explanations for Bias in Disorder Perceptions*, 58 CRIME & DELINQUENCY (forthcoming 2012). *See generally* Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004).

69. Sampson & Raudenbush, *supra* note 68, at 337.

70. *Id.*

71. Clifford Krauss, *New York Crime Rate Plummets to Levels Not Seen in 30 Years*, N.Y. TIMES, Dec. 20, 1996, at A1.

72. HARCOURT, *supra* note 24, at 167–68. *See generally* Bernard E. Harcourt, *Policing Disorder: Can We Reduce Serious Crime by Punishing Petty Offenses?*, BOS. REV., Apr.–May 2002, at 16.

73. Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443, 444–45 (2012).

"uncivil," ironically, is not that different from what Margaret Radin refers to as rhetorical capture.[74] It is not that different than her example of the term "cyber squatter." It raises a similar "baseline problem."[75] It is all about labeling, about attaching labels to things, and in the process gaining the upper hand.

B. Questioning the Consensus on Incivility

In their brilliant article, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, Professors Toni Massaro and Robin Stryker emphasize that reliable polling research finds significant overlap on what amounts to incivility.[76] "Contrary to what many assume," they write, "there is fairly substantial *consensus*, both among citizens, and between citizens and behavioral researchers, about what is more or less civil or uncivil in politics, and the core of what counts as political incivility."[77] And I have no doubt, for instance, that many Americans would find Dan Savage's web attack of Rick Santorum to be uncivil. If ever there were a case of "I know it when I see it," Savage's definition of Santorum would seem to qualify. Most of us would agree it is a case of political incivility—regardless of who started it—even if some also find it humorous.

But even here, it is important to dig deeper and to question whether part of the label of "uncivil" in this very case has something to do with the fact that it alludes to male homosexual intercourse. Would we all feel the same way if it alluded to heterosexual intercourse, not in a way that targeted women, but instead displayed the prowess of a heterosexual man? What happens when we shift places within existing relations of power? What if the web attack had defined the word "Santorum" as "being a stud"? That term also has a sexual connotation. It means, as we all know well, a "man of (reputedly) great sexual potency or accomplishments."[78] Could it be that we would have found that less offensive—and might that be because it refers to a more mainstream sexual type or fantasy? Body fluids, it is true, tend to be "disgusting" and a source of insult. But even there, the disgusting nature of bodily fluids has often been used, specifically, as a way to impugn homosexuality.[79] What is the role of sexual hierarchies in our imaginations of civility—or in labeling and defining discourse as uncivil?

Insults and offense are intimately connected to social rank, as Norbert Elias emphasized in *The Civilizing Process*. Elias's insightful discussion of pictorial representation in the drawings and paintings of the late-Medieval upper

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74. Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 457 (2012).

75. *Id.* at 461.

76. *See* Massaro & Stryker, *supra* note 27, at 439–40.

77. *Id.*

78. *Stud Definition*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/192047?rskey=fAZcMs&result=2&isAdvanced=false (last visited Mar. 9, 2012) (definition 4.d).

79. Martha Nussbaum writes about the connection between bodily fluid and disgust. *See generally* MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (2010); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004).

class serves as an illustration. The inclusion of images of paupers begging, or lame peasants, or of toiling servants in the artworks were not, at the time, viewed as a political statement and did not give offense—as they would later. "They [were] not emphasized in a spirit of protest, in the manner of later times," Elias would emphasize.[80] Rather, in the Middle Ages, it was "an inseparable part of the existence of the rich and noble that there also exist peasants and craftsmen working for them, and beggars and cripples with open hands."[81] These depictions did not present a threat to the noble, nor any offense or painful feelings. In fact, often enough, Elias added, "the yokel and peasant are even the objects of pleasantries."[82] The presence of these now-disturbing figures were not viewed as offensive or uncivil. "It is not distasteful, it is part of the natural and unquestioned order of the world that warriors and nobles have leisure to amuse themselves, while the others work for them."[83]

The changing norms of offense and manners would allow someone like the Flemish painter Breughel "to bring cripples, peasants, gallows, or people relieving themselves into his pictures."[84] The idea of portraying someone urinating may strike people, at a different time, as inappropriate or offensive, but that only reflects how shifting relations of class and power inflect our norms of manners. As Elias wrote, "The feelings of the medieval upper class [did] not yet demand that everything vulgar should be suppressed from life and therefore from pictures. It is gratifying for the nobles to know themselves different from others. *The sight of contrast heightens joy in living* . . . ."[85]

There is a political dimension to defining what is vulgar and unseemly. This remains true today. In a similar way, New York City's quality-of-life initiative, which targeted incivilities such as public urination, was inflected with relations of social rank, wealth, and cosmopolitanism—and not surprisingly, was influenced by real estate interests.[86] Much of the redefinition of civility and incivility in New York from the 1970s to the 1990s, and also in other large metropolises such as Los Angeles and Chicago, revolved around the interests of real estate developers and property owners.[87] The commercial development of New York's Times Square, the trendy loft developments in Downtown Los Angeles's Skid Row, and the bulldozing of Chicago's Near-West Side Skid Row were not the product of heightened sensitivity to urban incivilities, but of material, commercial, and financial interests—mixed with lots of city politics.[88] The truth is that civility and its enforcement are not so much matters of universal or

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80. ELIAS, *supra* note 8, at 170.
81. *Id.*
82. *Id.*
83. *Id.* at 171.
84. *Id.* at 172.
85. *Id.*
86. Bernard E. Harcourt, *Policing L.A.'s Skid Row: Crime and Real Estate Development in Downtown Los Angeles [An Experiment in Real Time]*, 2005 U. CHI. LEGAL F. 325, 326–34.
87. *See generally id.*
88. *See id.* at 326–27, 351–65, 385–403.

unchanging norms, or of neutral principles, but more often are tied to material interests.

There is also a political dimension to what we might call "acceptable uncivil discourse." There is, in effect, a shifting "Overton Window" of incivility: Uncivil discourse may represent the extreme, but what represents "mainstream incivility" changes over time. Professors Massaro and Stryker offer several examples of historical uncivil rhetoric that show well that what society deems "acceptable" uncivil speech shifts over time. For example, they write, "Newspapers that opposed the policies of Abraham Lincoln carried political cartoons that depicted white men dancing with African-American women, and captioned 'The Miscegenation Ball'—patent efforts to mobilize racist anxieties about interracial relations to promote anti-Republican sympathies."[89] Similar racial attacks would not be acceptable today even in mainstream uncivil debates.

At the same time, socio-linguistic research has revealed variances in the way in which we hear discourse. These differences often emerge along gender, racial, and ethnic lines parallel to those delineating social power. Women, for instance, are more likely to be heard to adopt indirect and deferential speech patterns, which can impact their communicative relationships—especially in the civic realm.[90] This difference, which has often been referred to as a "female register," constitutes a gendered mode of speech identified by its syntactic and paralinguistic features, and has been shown to reinforce in certain ways the subordinated role of women in society.[91] These linguistic differences also appear along racial and class lines.[92] If indeed one's mode of speech—or the way in which one is heard—affords more or less social communicative power, and if those differences are tied to gender or race, then surely we should proceed with caution regarding the very concept and definition of incivility.

While there are, to be sure, certain extreme forms of insult that most of us would agree count as political incivility, they themselves are often laced with troubling dimensions of social hierarchy and relations of power. They are also, most often, outnumbered by the borderline cases of sharp speech where the charge of incivility is politicized and may mask biases and prejudices. The existence of a few easy cases of incivility should not obfuscate the complex politics of incivility.

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89. *See* Massaro & Stryker, *supra* note 27, at 403 (basing their discussion on *Political Caricature. No. 4, The Miscegenation Ball*, LIBR. CONGRESS, http://www.loc.gov/pictures/item/2008661682 (last visited Mar. 9, 2012)).

90. *See* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 262 (1993).

91. *See id.* at 285; *see also* ROBIN LAKOFF, LANGUAGE AND WOMAN'S PLACE 52 (1975).

92. *See* Ainsworth, *supra* note 90, at 274–75. *See generally* JOHN BAUGH, BLACK STREET SPEECH: ITS HISTORY, STRUCTURE, AND SURVIVAL (1983); WILLIAM LABOV, LANGUAGE IN THE INNER CITY: STUDIES IN THE BLACK ENGLISH VERNACULAR (1972); WILLIAM LABOV, SOCIOLINGUISTIC PATTERNS (1972); WILLIAM LABOV, THE SOCIAL STRATIFICATION OF ENGLISH IN NEW YORK CITY (1966); R.K.S. MACAULAY, LANGUAGE, SOCIAL CLASS, AND EDUCATION (1977); PETER TRUDGILL, THE SOCIAL DIFFERENTIATION OF ENGLISH IN NORWICH (1974).

C. The Political Dimensions of Civil Discourse

The call for civil discourse privileges a certain political position—a more centrist, dominant, reasonable, accommodating, and mainstream political position that can more easily afford to pooh-pooh political conflict. It manages to avoid uncivil discourse precisely because of its privilege in the political sphere. The call for civility is often couched as politically neutral; but it is not. It aligns with a dominant, centrist, status quo approach. Let me explain.

There have been, throughout history, calls for radical political change and sometimes political violence—in other words, for incivility—at all ends of the political spectrum, since the American and French Revolutions, to the Bolshevik and later, the Russian Revolution, all the way to the Arab Spring. Sometimes these have involved political actions that practically all of us would endorse and embrace. The Egyptian people, for instance, overthrew their despotic leader, President Hosni Mubarak. There is no doubt that this act was "uncivil"—it involved a popular uprising and a quasi-*coup d'état* by the military. And yet a majority of Americans supported the revolution in Egypt and elsewhere.[93] Similarly, both the Revolutionary Communist Party and the Tea Party in the United States believe that we need revolutionary change. That too is uncivil. Some political positions, it turns out, do not promote the status quo. They call for radical reform, if not revolution—changes that necessarily involve "uncivil" harm to the interests of certain fellow citizens.

But it is not only revolutionary or radical politics that are uncivil. Even mainstream politics tends to be uncivil, in the sense that it will have harmful effects on some citizens. Even mainstream politicians—the Republicans and the Democrats—are consistently advocating positions that will harm certain Americans, whether at the top or at the bottom of the socioeconomic hierarchy. Taxing the wealthy more (or not) will harm (or benefit) the financial position and welfare of different classes of Americans. There is no way around this. Providing universal healthcare (or not) will also benefit (or harm) different groups of Americans. Politics, it turns out, is an uncivil business.

If this is indeed true, is it not somewhat hypocritical to demand "civil" discourse? Isn't it like asking the executioner to smile when he pushes the syringe, or the police officer to say please when she puts on the hand-cuffs? Why demand civility in discourse when the discourse itself is inevitably going to produce uncivil outcomes? In his essay praising the virtues of legal decisionmaking as a model for civil discourse, Professor Yoshino argues that courtroom trials avoid the harms of incivility by allowing adverse parties to speak through professionals who are socialized into civility and taught to speak not at each other, but to a neutral party (the judge or jury).[94] In doing so, trials encourage a discourse that is less political without sacrificing rigor or barring authentic treatment of the issues. But isn't it

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93. *American Public Sees Democratization of Middle East as Positive for US*, WORLD PUB. OP. (Apr. 11, 2011), http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/685.php.

94. Yoshino, *supra* note 39, at 476.

odd that the "civil" trial method is precisely what legitimizes and performs, as a speech act, the execution of a convicted capital defendant, the life imprisonment of a felon, the foreclosure of your home, the taking of your property, or even worse, the removal of your children? The method is civil in form only. The outcomes are decidedly not. And which matters more? Ironically, the more uncivil the act—for instance, lethally injecting a human being—the more civility we demand in the process. Uncivil, *ad hominem* debates over the death penalty never lead to a legal execution; only a civil method can achieve that ultimate punishment.

D. Personal Choices About Political Civility

As a personal matter, I tend to avoid being uncivil, in large part, I suspect, because of the way I was brought up—but also, perhaps, because of my own privileged professional, social, and importantly, demographic status. Somewhat like Stephen Carter, I too was taught manners and disciplined strictly at school and at home (though unlike Carter, I was never quizzed on whether knife blades should point in or out; for some reason, my son and daughter seem to know).[95] That has long-lasting effects—effects that have gone hand-in-hand with certain kinds of privileges in education and profession. These have instilled in me—and have allowed me to be able to afford—an ethic of truth-telling and civility.

Still today, I tend to believe that the strongest and more forceful way for me to engage others in politics and in life is to be truthful and sincere. I am drawn to an ethic of honesty and truth-telling, and believe in its power of persuasion. In my political discourse, I strive to talk genuinely and earnestly, and to avoid, as much as possible, the tit-for-tat strategy—though sadly I fall short on occasion. I believe there is an important role for truth-telling as a mode of self-governance, both for oneself but also as a political matter.[96] But I also realize these are political choices. They represent political strategies.

Avoiding incivility, taking the higher road, turning the other cheek—these acts are embedded in relations of power and simultaneously are constitutive of power relations. The interlocutor who stands untouched by acerbic and uncivil discourse emerges stronger. Nietzsche captured this perhaps best in a passage that I so often find myself coming back to. It is from his more aphoristic writings in the *Genealogy of Morals*, and it concerns punishment. Nietzsche writes:

> As its power increases, a community ceases to take the individual's transgressions so seriously, because they can no longer be considered as dangerous and destructive to the whole as they were formerly: the malefactor is no longer "set beyond the pale of

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95. CARTER, *supra* note 62, at 66.

96. In terms of a personal ethic, I have been greatly influenced by Michel Foucault's later writings, especially on the topic of truth-telling, *parrhēsia*, and the care of the self. *See generally* MICHEL FOUCAULT, THE COURAGE OF TRUTH: 2 THE GOVERNMENT OF SELF AND OTHERS—LECTURES AT THE COLLÈGE DE FRANCE, 1983–1984 (Frédéric Gros et al. eds., Graham Burchell trans., 2011); MICHEL FOUCAULT, WRONG-DOING, TRUTH-TELLING: THE FUNCTION OF AVOWAL IN JUSTICE (Fabienne Brion & Bernard E. Harcourt eds., Stephen W. Sawyer trans., forthcoming 2012).

> peace" and thrust out; universal anger may not be vented upon him as unrestrained as before . . . . It is not unthinkable that a society might attain such a *consciousness of power* that it could allow itself the noblest luxury possible to it—letting those who harm it *go unpunished*. "What are my parasites to me?" it might say. "May they live and prosper: I am strong enough for that!"[97]

In the end, the choice to be civil *is* a political decision in a world in which politics is, most often, uncivil. Despite that, I do not believe that we face a crisis of incivility in our political discourse today, nor do I fear that we will descend into a hellish excess of incivility. I have a sense—unfounded perhaps, and naive as well—that positive, civil, truthful, and genuine discourse tends to prevail, or at the very least, to counter the power of incivility. And I know that the call for civility comes more easily for some than for others. For these reasons, I resist the temptation to urge more civil discourse.

CONCLUSION

In his elegant essay, *The 'Civil' Courts: The Case of Same-Sex Marriage*, Professor Kenji Yoshino discusses three types of arguments against the project of civilizing political discourse.[98] The first is that embracing civility in political discourse will rhetorically disadvantage the civil speaker.[99] The second is that civility honors the dishonorable, or, in the words of Gertrude Himmelfarb, it honors "despicable people."[100] The third is that civility in the face of insults bars authentic engagement.[101] The idea, as Randall Kennedy suggests, is that demanding civility is at odds with what true liberalism calls for: to debate ideas loudly.[102]

I am not persuaded by any of these three arguments, and yet I both resist the call for civility and personally embrace a civil touch. I firmly believe, like Nietzsche, that civility is a sign of strength, not weakness. I doubt that it honors one's adversary; to the contrary, and somewhat unfortunately, it demeans them by exposing their antics. And I am skeptical that civility in the face of incivility does not allow for a full, robust debate. My position, in the end, is somewhat different.

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97. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 72 (Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1989) (1887) (emphasis added). I refer to this passage also in two of my previous essays. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and the Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 171 (2001); Bernard E. Harcourt et al., *Randomization in Criminal Justice: A Criminal Law Conversation*, *in* CRIMINAL LAW CONVERSATIONS (Paul H. Robinson et al. eds., 2009).

98. Yoshino, *supra* note 39, at 7.

99. *Id.*

100. *Id.* at 9; *see also* GERTRUDE HIMMELFARB, VICTORIAN MINDS: A STUDY OF INTELLECTUALS IN CRISIS AND IDEOLOGIES IN TRANSITION (1995).

101. Yoshino, *supra* note 39, at 9.

102. *See generally* Randall Kennedy, *The Case Against "Civility,"* AM. PROSPECT, Nov.–Dec. 1998, at 84.

It is that civility is a personal preference and a political strategy—a powerful political strategy in a political realm that is inherently uncivil.

On April 13, 1956, Reverend Martin Luther King, Jr., stood in the pulpit of Rockefeller Memorial Chapel at the University of Chicago and declared:

> We cannot slow up, because we have a date with destiny and we must move with all deliberate speed . . . . This is a conflict between the forces of light and dark, and in the end there will be victory for justice and democracy because love will triumph. . . . If you can't run, walk; if you can't walk, crawl, but keep moving forward![103]

Many accused Martin Luther King of fomenting social disorder with this language of conflict, light and dark, victory, and triumph. Many accused him of being uncivil. And of course, things were even worse for Malcolm X with his notorious appeal to "all necessary means."[104]

Theirs were, I would say, marginalized voices in the larger fabric of political power in this country at that time. It would have been too easy, I think, to ask for more civil discourse. It would have assumed too much of a position of political power. It would have been too comfortable—perhaps not sufficiently respectful. As Antoine de Courtin explained in his treatise over 300 years ago, civility has its roots in modesty, humility, and respect—in his words, in "a modest sentiment about ourselves toward others who we believe worthy of our submission and our love."[105]

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103. Susie Allen & Michael Drapa, *When King Made History at UChicago*, UNIV. CHI., http://www.uchicago.edu/features/20120109_mlk (last visited Apr. 7, 2012).

104. MALCOLM X: THE LAST SPEECHES 133 (Bruce Perry ed., 1989) For an enlightening discussion of these two different forms of political resistance, see Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126, 157–58 (2007) (discussing Martin Luther King, Jr. and Malcolm X).

105. DE COURTIN, *supra* note 2, at 59.