Symposium: Political Discourse, Civility, and Harm
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THE "CIVIL" COURTS: THE CASE OF SAME-SEX MARRIAGE

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This Essay argues that the embattled movement for civility in public discourse should direct its attention toward the perceived harms of civility, rather than the perceived harms of incivility. The alleged harms of civility include the views that civility harms adherents, that civility honors the dishonorable, and that civility impedes authentic engagement. Examining the case of same-sex marriage, this Essay shows that these perceived harms were surmounted in the counterintuitive context of civil litigation. It remains unclear whether the civility of the courts can be replicated in other forums. Nevertheless, this case study demonstrates that none of the harms associated with civility necessarily attends it.

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INTRODUCTION

On the eve of President Barack Obama's inauguration in January 2009, Mark DeMoss began the Civility Project in response to the rancor that roiled the 2008 election.[1] The Project sought "to call people from all races, walks of life, and religious . . . and political persuasions to graciousness, kindness, common decency and respect—civility—toward all people, and particularly those with whom we may disagree."[2] To underscore the endeavor's nonpartisan nature, DeMoss, a conservative Republican, partnered with his friend Lanny Davis, a liberal Democrat.[3] The Project featured a 32-word Civility Pledge, which read:

> 1. I will be civil in my public discourse and behavior.
>
> 2. I will be respectful of others whether or not I agree with them.
>
> 3. I will stand against incivility when I see it.[4]

DeMoss and Davis sent a letter to every member of Congress and sitting governor—585 individuals—inviting them to sign the pledge.

The results can only be described as dismal. Only three members of Congress—Senator Joseph Lieberman, Representative Frank Wolf, and Representative Sue Myrick—took the invitation. No governors did so. After two years, DeMoss shuttered the project. Announcing that dissolution, DeMoss expressed puzzlement that "only three members of Congress, and no governors, would agree to what I believe is a rather low bar."[5] He further observed that elected officials should support his cause, given that "[t]wo-thirds of Americans

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1. Letter from Mark DeMoss to Sen. Joseph Lieberman, Rep. Frank Wolf, and Rep. Sue Myrick 1 (Jan. 3, 2011), *available at* http://www.demossnews.com/resources/civility_project.pdf.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

consider a general lack of civility to be a major problem for the country," and that 83% said "people should not vote for candidates and politicians who are uncivil."[6]

Deemed a "miniboom in progress" as early as 1996,[7] the civility movement appears to have survived such setbacks. Books on civility come out at regular intervals.[8] Civility initiatives are burgeoning around the country, particularly on university campuses. In the last year alone, Rutgers began a two-year "Project Civility";[9] the University of Wisconsin Oshkosh hosted a workshop titled "Civility in Everyday Life";[10] and, in the wake of the tragic shootings in Tucson, the National Institute for Civil Discourse was founded at the University of Arizona.[11]

I am honored to be part of this Symposium, which is my first tentative foray into the topic of civility. I will use this opportunity to explore the puzzling gap between aspiration and achievement I have just described: the 83% of the public who favor more civil discourse and the less than 1% of the Congress willing to commit to it. To solve this puzzle, I believe we must look less to the calls for civility than to resistance to those calls. So although this Symposium directs our attention to the harms of incivility, I will redirect the focus to the perceived harms of civility itself. Only when we address these perceived harms will we succeed where others have failed.

In Part I, I explore three objections to civility initiatives.[12] The first is that civility disadvantages its adherents. The second is that civility legitimates unworthy opponents. The third is that civility impedes authentic engagement. I examine these objections in general terms, but also specifically with regard to the current debate over same-sex marriage, over which the nation today is passionately divided.

In Part II, I consider whether any existing models of civility have overcome these objections. I posit that judicial proceedings routinely produce civil discourse even with respect to highly contentious issues. I realize that this contention is counterintuitive, given that lawsuits are often cast as the antithesis of polite discourse. Yet judicial trials have certain attributes—such as an authoritative referee, the assumption of an adversarial baseline, and probing examination of

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6. *Id.* at 2.

7. Benjamin DeMott, *Seduced by Civility: Political Manners and the Crisis of Democratic Values*, NATION, Dec. 9, 1996, at 11, 12.

8. *See, e.g.*, STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY (1998); P.M. FORNI, CHOOSING CIVILITY: THE TWENTY-FIVE RULES OF CONSIDERATE CONDUCT (2002); KENT M. WEEKS, IN SEARCH OF CIVILITY: CONFRONTING INCIVILITY ON THE COLLEGE CAMPUS (2011).

9. *Project Civility*, RUTGERS, http://projectcivility.rutgers.edu/ (last visited Apr. 6, 2012).

10. *Civility in Everyday Life Workshop*, UNIV. OF WIS. OSHKOSH (Mar. 22, 2011, 2:36 PM), http://www.uwosh.edu/chancellor/civility-workshop.

11. NAT'L INST. FOR CIVIL DISCOURSE, http://nicd.arizona.edu (last visited Apr. 6, 2012).

12. This list is exemplary, not exhaustive.

witnesses under oath—that meet the objections to civility noted above. To illustrate these points, I focus on the prominent "Prop 8" trial—the federal constitutional challenge to a California constitutional amendment restricting marriage to opposite-sex couples.

In Part III, I ask whether anything can be done to close the gap between judicial discourse, where civil discourse seems relatively secure, and political discourse, where it remains elusive. Because the enabling constraints effectuated in court will be hard to replicate in the political context, I remain cautiously pessimistic.

I. THREE OBJECTIONS TO CIVILITY

Skeptics of civility frequently raise three objections. First, civility punishes its adherents. Second, civility forces individuals to honor the dishonorable. Finally, civility papers over real conflicts.

A. Civility Disadvantages Adherents

The first objection to civility is that it disadvantages its disciples. Explaining his skepticism about DeMoss's Civility Pledge, conservative pundit Bill O'Reilly stated:

> The reason I would not sign it is because my opponent may be cutting my heart out and throwing dirt at me all day long. . . . All you've got to do is look at what's going on in this country and see how dirty and nasty it is on both sides. And it's never going to change. It's going to get worse.[13]

For this reason, O'Reilly cast the project as "noble," but "dopey."[14]

In his 1998 book *Civility: Manners, Morals, and the Etiquette of Democracy*, Stephen Carter elaborates on the conventional wisdom about the risks of civility:

> If you want to win, you must not be civil, especially if the other side will not be civil in return. Every politician, upon being accused of going negative, answers that the other side did it first. Game theorists call this tit-for-tat and insist that it is often the only non-losing strategy, but, to the student of civility, it is, again, the ethics of the kindergarten.[15]

Carter persuasively presents civility as a collective-action problem. If individuals are rewarded for defecting from an agreed-upon public good, individual self-interest will ensure a race to the bottom.

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13. *The O'Reilly Factor: Factor Follow Up Segment: Dems Encouraging Dirt-Digging on GOPers* (Fox News television broadcast July 8, 2010) (transcript available at http://www.demossnewspond.com/civilityproject/news/oreilly_factor_transcript/).

14. *Id.*

15. CARTER, *supra* note 8, at 125–26.

Civility's call to act against self-interest presents a formidable obstacle to its attainment. The most powerful concept in Carter's book is that civility "requires that we sacrifice for strangers, not just for people we happen to know."[16] Yet Carter himself acknowledges that this nostrum has a utopian aspect: "Unfortunately, hardly anyone believes this, which is why protestations against negative campaigning carry a hollow ring."[17]

In the popular debates about same-sex marriage, the race to the bottom is all too evident. Consider a recent CNN debate relating to the church's involvement in Proposition 8 between gay activist Dan Savage and the Family Research Council's Tony Perkins.[18] Savage repeatedly cut off Perkins. When Perkins objected, Savage shot back: "[Y]ou strip me of my rights [and] I interrupt you, who is really suffering here?"[19] The seemingly instinctive response to the charge of incivility, as Carter notes, is that it began on the other side.

B. Civility Honors the Dishonorable

The second perceived harm of civility is that it honors the dishonorable. Gertrude Himmelfarb noted at a 1996 conference that civility "assumes a commonality—a commonality of purpose, of beliefs, of manners and morals, a common human nature."[20] Yet sometimes participants in a conversation seek to deny precisely that commonality. Randall Kennedy, speaking at the same conference, observed: "The people who marched under the banner of civility; the people who were the compromisers, the people who were being afraid of being labeled as radicals and extremists, were the people who were willing to allow slavery to continue."[21] Under Kennedy's view, civility can sometimes be a form of appeasement, or even a collaboration with evil.

More recently, Columbia University President Lee Bollinger encountered protests when he invited Iranian President Mahmoud Ahmadinejad to speak. Bollinger, a specialist in free speech, eloquently defended his decision: "It should never be thought that merely to listen to ideas we deplore in any way implies our endorsement of those ideas, or the weakness of our resolve to resist those ideas or our naiveté about the very real dangers inherent in such ideas."[22] Bollinger noted that, to the contrary, "[i]t is a critical premise of freedom of speech that we do not honor the dishonorable when we open the public forum to their voices."[23] His critics were having none of it. The Shurat HaDin-Israel Law Center in Tel Aviv

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16. *Id.* at 279; *see also id.* at 55–75.

17. *Id.* at 126.

18. *Anderson Cooper 360°: Battle over Same-Sex Marriage* (CNN television broadcast Nov. 12, 2008) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0811/12/acd.02.html).

19. *Id.*

20. DeMott, *supra* note 7, at 15.

21. *Id.* at 16 (quoting conference remarks of Randall Kennedy).

22. Lee C. Bollinger, President, Columbia Univ., Introductory Remarks at SIPA-World Leaders Forum with President of Iran Mahmoud Ahmadinejad (Sept. 24, 2007) (transcript available at http://www.columbia.edu/cu/news/07/09/lcbopeningremarks.html).

23. *Id.*

threatened legal action. It wrote: "Hosting Ahmadinejad at a banquet is not merely morally repulsive: It is illegal and will expose Columbia University and its officers to both criminal prosecution and civil liability . . . ."[24]

In the case of same-sex marriage, a similar call for civility has been likewise condemned. Last year, conservative commentator Matthew J. Franck wrote an editorial in the *Washington Post*, titled *On Gay Marriage, Stop Playing the Hate Card*.[25] His thesis was that the charge of "hate" was a conversation stopper, and that progressives needed to be more civil if they sought to have a genuine intellectual exchange on the issue. Specifically, he contended that pro-gay individuals needed to stop calling opponents of same-sex marriage "bigots." Some progressives agreed. The dominant response, however, appeared to be that more would be lost in not calling a bigot a bigot than in including a bigot in the debate.[26]

C. Civility Impedes Authenticity

The third and final perceived harm of civility that I will consider is that civility bars authentic engagement. In his important article, *The Secret Ambition of Deterrence*, Dan Kahan asks why deterrence plays such a large role in the debates over capital punishment, gun control, and domestic violence.[27] He explains that arguments over whether, for instance, guns deter crime constitute a "face-saving" rather than a "face-breaking" conversational strategy.[28] A disagreement about deterrence is an empirical disagreement that permits the parties to leave the table on friendly terms.[29] Kahan stresses, however, that there are downsides to this face-saving strategy. Face-breaking conversations, while more disagreeable, may be more honest about the moral conflict fueling the debate.[30] Kahan observes that there are "no final answers" as to which strategy is superior.[31]

Randall Kennedy is much less ambivalent:

> The civility movement is deeply at odds with what an invigorated liberalism requires: intellectual clarity; an insistence upon grappling with the substance of controversies; and a willingness to fight loudly, openly, militantly, even rudely, for policies and values that

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24. Benjamin Weinthal, *Israeli NGO Targets Columbia over Ahmadinejad Visit*, JERUSALEM POST, Sept. 18, 2011, at 5.

25. Matthew J. Franck, *On Gay Marriage Marriage, Stop Playing the Hate Card*, WASH. POST, Dec. 19, 2010, at B01.

26. *Matthew J. Franck Is a Bigot. And a Liar.*, DV8 (Dec. 19, 2010), http://thedv8.wordpress.com/2010/12/19/matthew-j-franck-is-a-bigot-and-a-liar/.

27. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415–16 (1999).

28. *Id.* at 478.

29. *Id.* at 476–77 ("[T]he attraction of deterrence is precisely that it doesn't speak to the contested expressive values that make these matters so contentious.").

30. *Id.* at 477 (acknowledging the possibility that deterrence can "contaminate" public debate "with hypocrisy" or "prolong the influence of morally bankrupt social norms").

31. *Id.*

> will increase freedom, equality, and happiness in America and around the world.[32]

In the same-sex marriage context, some have observed that something akin to the famous "Bradley effect" might obtain. The Bradley effect posits that individuals are much less likely to express racist attitudes in public than in private, leading to a discrepancy between what people tell pollsters and what they do when sequestered in the voting booth.[33] With respect to same-sex marriage, commentators have regularly posited that individuals are much more likely to favor same-sex marriage in polls than at the ballot box.[34] If this is true, civility may be hindering substantive debates that could transform views rather than driving them underground.

II. SURMOUNTING THE OBJECTIONS: THE PROP 8 TRIAL

Having set forth these objections to civility, I suggest that all three were overcome in a rather counterintuitive context—the judicial trial. I say "counterintuitive" because it is conventional wisdom that law begins where civil discourse breaks down. To quote one of Stephen Carter's so-called "rules of civility": "Civility discourages the use of legislation rather than conversation to settle disputes, except as a last, carefully considered resort."[35] Carter hopes that this rule "speaks for itself,"[36] and I can certainly see why he finds it intuitive.

Nevertheless, as I read the trial transcript in the nation's most followed same-sex marriage case, I found myself reconsidering this intuition. In *Perry v. Schwarzenegger* (now *Perry v. Brown*), two same-sex couples challenged California's Proposition 8, a state constitutional amendment that restricted marriage to opposite-sex couples.[37] The trial in this case took place over 12 days in

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32. Randall Kennedy, *State of the Debate: The Case Against "Civility,"* AM. PROSPECT, Nov. 1998, at 84, 85.

33. *See, e.g.*, GWEN IFILL, THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA 10 (2009). The effect draws its name from Los Angeles Mayor Tom Bradley, who lost the 1982 California governor's race. *Id.* Bradley, who was African American, led by 22 points in pre-election polling but ultimately lost to his opponent, who was white. *Id.* The explanation for this discrepancy was that individuals were less likely to express racial antipathy in polls than in the ballot booth. *Id.* The existence or extent of the Bradley effect has been a matter of "considerable debate." *Id.*; *see also* Daniel J. Hopkins, *No More Wilder Effect, Never a Whitman Effect: When and Why Polls Mislead About Black and Female Candidates*, 71 J. POL. 769 (2009) (contending that the Wilder effect—another name for the Bradley effect—has diminished over time).

34. *See, e.g.*, W. James Antle, III, *Gay Marriage "Bradley Effect,"* AM. SPECTATOR (Nov. 5, 2009, 2:29 PM), http://spectator.org/blog/2009/11/05/gay-marriage-bradley-effect; Nate Silver, *What Happened and Why*, FIVETHIRTYEIGHT (Nov. 4, 2009, 2:43 AM), http://www.fivethirtyeight.com/2009/11/what-happened-and-why.html.

35. CARTER, *supra* note 8, at 283.

36. *Id.*

37. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

January 2010, resulting in a 3,000-page transcript.[38] In reading that transcript, my dominant impression was that I had found an oasis of civil discourse in a conversational wilderness. In this Part, I will outline how the trial showed that the harms of civility I have just discussed can be surmounted.

A. Civility Does Not Necessarily Disadvantage the Adherent

The Prop 8 trial demonstrated that civility does not necessarily punish its adherents. The kind of tit-for-tat in which Savage and Perkins engaged during the CNN debate would not have been possible during the trial. For starters, the adverse parties were not speaking directly to each other, but only to opposing counsel. Even conflicts between adverse witnesses and counsel were extremely polite—indeed, I recommend David Boies's cross-examination of David Blankenhorn as Exhibit A for the proposition that the more obstructionist the witness, the more polite the counsel became.

The plaintiffs embraced participation in the trial in part because of the civilities of the courtroom. One plaintiff, Kristin Perry, pled "same-sex marriage fatigue" when asked in vague terms whether she was "interested in working on a big project to restore marriage equality."[39] Informed it was a federal lawsuit, she changed her mind: "We get to talk about this in a nonpolitical way? Now I'm really interested."[40] Another plaintiff, Paul Katami, had a similar reaction. He felt the lawsuit would "put a respectable face to the fight," elaborating that "I didn't want to just come out with my arms swinging."[41] It may seem odd to think about a judicial proceeding as a "nonpolitical" event, or an adversarial proceeding as not requiring a plaintiff to come out with "arms swinging." Yet I believe both plaintiffs meant that they knew that a federal trial would differ significantly from a CNN interview, a political rally, or, at worst, the physical violence that Katami had experienced in the past.[42]

To understand why the trial would ensure civility without sacrificing rigor, we might return to Carter's characterization of incivility as a collective-action problem. One solution to the "race to the bottom" is an authority with the capacity, in the name of the common good, to keep individuals from defecting; one response to what Carter calls the "ethics of the kindergarten" is for the teacher to arrive. Although many factors contribute to the decorum of the courtroom, the

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38. The trial transcripts are available online, and are consecutively paginated, starting with page one on day one. Transcript of Record, *Perry*, 704 F. Supp. 2d 921 (No. 09-2292), *available at* http://www.arizonalawreview.org/perry-v-schwarzenegger-trial-transcripts.

39. Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 45.

40. *Id.*

41. *Id.*

42. Transcript of Record, *supra* note 38, at 93–94 (testimony of Paul Katami) ("We were struck by these rocks and eggs. And there were slurs. And again we couldn't see who the people were, but we were definitely hit. And it was a very sobering moment because I just accepted that as, well, that's part of our struggle. That's part of what we have to deal with.").

ultimate one is the presence of the judge, who has the power to require civility from both sides.

The presence of Judge Walker permitted the trial proceedings to remain both civil and rigorous. The trial transcript shows that plaintiffs' counsel David Boies experienced proponents' witness David Blankenhorn to be unresponsive. When Boies became frustrated, he appealed to the judge: "Your Honor, could I ask that my witness be instructed to listen to the question, answer my question and not make a statement that is not responsive to the question, even if he believes it's important."[43] The judge obliged, instructing Blankenhorn:

> [T]he demeanor of the witnesses is sometimes gauged, importantly, by the responsiveness of the witness to the questions that he's asked. . . . So with that in mind, because I'm sure you would not want your demeanor on the stand to be a negative factor in your testimony, I would urge you to pay close attention to Mr. Boies's questions and to answer them directly, succinctly.[44]

At the same time, the judge underscored that Blankenhorn would have his turn: "Then, to the extent additional elaboration should be brought out, your very able counsel, I'm sure, Mr. Cooper, will be able to do that."[45] Thus reassured, Blankenhorn became noticeably more responsive without any incivility from either side.

B. Civility Does Not Necessarily Honor the Dishonorable

The Prop 8 trial also demonstrates that civility does not necessarily honor the dishonorable. Mostly, this is because everyone understands the adversarial baseline from which litigation proceeds. No one thinks Linda Brown's lawyers are validating the Board of Education when they file suit.

In fact, if anything, the opposite is true. If an individual is truly dishonorable, the usual complaint is that he or she should be brought to trial rather than left to roam free. The individuals who complained about Bollinger's invitation of Ahmadinejad to a university would probably have cheered if Columbia had tried to sue him for war crimes.

By starting from an adversarial baseline, trials may allow more, rather than less, civility between the parties. In the Prop 8 trial, plaintiffs' lawyer Ted Olson and defendant-intervenors' lawyer Charles Cooper are good friends—both are major Republican establishment figures. But no one complained when they embraced outside the courtroom on the first day of trial.[46]

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43. *Id.* at 2845.
44. *Id.* at 2846.
45. *Id.*
46. *See* Howard Mintz, *Prop. 8 Trial Day 1: Live Coverage from the Courtroom*, MERCURY NEWS (Jan. 11, 2010, 8:39 AM), http://www.mercurynews.com/ci_14165465.

C. Civility Does Not Necessarily Bar Authentic Engagement

Finally, civility does not bar authentic engagement. One reason that the transcript seems like such an important move in the debate over same-sex marriage is that, in fact, so many of the issues that only receive superficial treatment in ordinary disputes were so deeply vetted during the trial. The core issues—whether opposite-sex couples make better parents than same-sex couples, whether gays are politically powerless enough to warrant judicial protection, and whether the inclusion of same-sex couples would fulfill or subvert the institution of marriage—were explored in painstaking detail.

Indeed, at times the experts strove mightily to press through what Kahan would call "face-saving" rhetoric to engage in more "face-breaking" discourse, while still expressing themselves in civil terms. Plaintiffs' expert, historian George Chauncey, for instance, observed that although what can be said about gay people "in polite society"[47] has changed, the underlying attitudes can still remain negative. Thus, Chauncey noted that the Prop 8 campaign's mantra of "Protect Our Children" had echoes in previous "Save Our Children" campaigns such as those of Anita Bryant.[48] The earlier campaigns drew explicitly on stereotypes about gay individuals as predators who would either abuse children or "convert" children to homosexuality. Chauncey maintained that the rhetoric used in the Prop 8 campaign was just a kinder, gentler version of the real animus behind the ballot initiative.[49] His testimony sought to delve beneath the surface to unearth what (in his view) truly animated the amendment.

It may seem like a sad commentary on our discourse that we need to get into a courtroom to have a debate that capitalizes on the perceived benefits of civility without incurring its perceived harms. It probably is. Nevertheless, the instance of the civil trial demonstrates that the harms of civility are not intrinsic to civility itself. In the Prop 8 trial, we observe civility without rhetorical disadvantage, civility without the honoring of the dishonorable, and civility without the sacrifice of authenticity.

III. CLOSING THE GAP

The question now is whether we can export the civilities of trials into our public discourse. Because many of the constraints of a trial are hard to replicate outside the courtroom, I remain pessimistic.

We have seen that the presence of a judge can do wonders for mitigating the race to the bottom of incivility. The question is whether norms can do that work in the absence of direct authority. Carter's book makes exactly that prescription, advocating a religious revival as the solution. It maintains that religion is the only force powerful enough to police us from defecting, by

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47. Transcript of Record, *supra* note 38, at 429.

48. *Id.* at 429–30.

49. *Id.* at 430 ("And so here I think you have got a pretty strong echo of this idea that simple exposure to gay people and their relationships is going to somehow lead a generation of young kids to become gay.").

impelling us to the selflessness he finds at the core of civility.[50] But Carter does not present this as a magic bullet.[51] I share his skepticism, not least because religious convictions can stoke conflict as well as soothe it. It is, in fact, difficult to think of any norm that would enforce civility with the same efficacy as a court.

I am also skeptical that political discourse will be able to overcome the perception that civility can, at times, honor the dishonorable. An invitation to a university debate is different from a summons to a courtroom—it implies, at a minimum, that the invitee is worth debating. Unlike courts, which exist only to manage conflict, educational institutions are also established as communities. When a dishonorable person is invited into that community, it is hard to engage without feeling tarred, however irrational that feeling might be.

Finally, I am also skeptical that civility will not often result in the perception that conflicts are being cabined rather than aired. The difference between a trial and ordinary public discourse is that one can at least nominally require authenticity in a trial. Individuals are testifying under oath for relatively long stretches of time. In public discourse, individuals are much less answerable with respect to their motives. This increases the likelihood that civility will be linked—both in perception and in actuality—to hypocrisy.

So I end on rather a dark note. The challenges are real. The failure of the DeMoss project with which I began is not surprising. Still, there is a counsel of hope in the idea of the "civil" trial, which suggests that civility does not necessarily draw the ascribed harms after it. The civil trial can stand as an example of how we might engage with each other. The law can be a teacher about process as well as about substance. Teachers can only exhort, not command. But students of civility can hear the exhortation.

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50. CARTER, *supra* note 8, at 18.
51. *Id.* at 75.