

Civility and Chivalry

by William C. Duncan

I suspect that any author of an article on matters related to civility and professionalism has a significant hesitation since none of us is a perfect example of those values, and many more qualified and highly-respected people have written on the subject. The only excuse then, that I can offer for this particular article is that I believe it uses an historical analogy to present another approach to the concept of civility that may be illuminating in a novel way.

In the field of cause-oriented lawyering with which I am most familiar, warlike metaphors are common. It's typical to speak of "fighting" for the rights of a group, "defending" a position, the "battle" for equality or justice. These words often accurately reflect the feelings of lawyers who are deeply, passionately devoted to a cause that is the focus of their law practice. Possibly to a lesser extent, they describe some aspects of nearly all areas of legal practice in an adversarial system. When ideological commitments are added to the adversarial mix, the result can be particularly volatile. As one historian remarked: "Men make gods now, not out of wood and stone, which though a waste of time is a comparatively harmless proceeding, but out of abstract nouns, which are the most treacherous and explosive things in the world." HERBERT BUTTERFIELD, *THE ENGLISHMAN AND HIS HISTORY* 128-129 (1970) quoted in M.E. Bradford, *The Best Constitution in Existence: The Influence of the British Example in the Framers of Our Fundamental Law* 27 *BYU STUDIES* 51, 52 (Summer 1987).

Allegiance to an abstract theory is often proffered as an excuse for the inexcusable. Convinced of the righteousness of a cause an attorney may overcome qualms about timing litigation so as to harm an opponent's interests or browbeating a non-lawyer with threats of legal action. The natural competitiveness of most lawyers further exacerbates the possibility for full-scale conflict.

So, how can standards of civility apply to an area where lawyers feel they are at war for ideas or clients? Here an historical construct might prove helpful. In a larger critique of the idea of "total war" practiced throughout the Twentieth Century, Richard Weaver invoked the medieval concept of chivalry. He noted that chivalry "offered a plan whereby civilization might contain a war and go on existing as civilization." He does not suggest that "chivalry accomplished all that the ideal pointed toward," noting that "there were episodes in the age of chivalry which make unpleasant reading." The idea of chivalry, however, was a "moderating influence" that "insisted that even in war, when

maximum strain is placed upon the passions, man may not become an absolute killer." It did this by insisting that "even your foe has some rights, and those rights you must respect." Interestingly, he uses the legal system to illustrate the continued relevance of this kind of ideal, pointing to our tradition of according to each person due process. "The law is in such instances upholding an idea similar to that of chivalry, inasmuch as it takes the position that no one – not even an 'enemy of society' – can be denied rights entirely." Richard Weaver, *Up From Liberalism*, *MODERN AGE* 21, 30 (Winter 1958-1959).

In this reading, chivalry can be understood as an additional obligation (beyond their obligation to do their best to win the war) that constrains the behavior of combatants. In a similar way, standards of professionalism and civility circumscribe the actions of attorneys over and above the limits of what would be required if their only goal were winning. This ideal is in keeping with a long and honorable tradition that recognizes that "[a]n excellent person recognizes more things as morally binding than ordinary people might do, but a debased person, it appears, will acknowledge fewer." Scott FitzGibbon, *The Formless City of Plato's Republic*, *ISSUES IN LEGAL SCHOLARSHIP* (2005) at <http://bepress.com/ils/iss5/art5>.

The willingness to take on obligations higher than those required of the average person is also a hallmark of professionalism. It is the thing that makes Jane Austen's characters noble (e.g., Mr. Darcy goes to extra effort to anonymously ensure the marriage of Elizabeth Bennet's sister) and creates the humor in P.G. Wodehouse's stories (e.g., Bertie Wooster becomes entangled in an unwanted engagement because his sense of noblesse oblige does not allow him to say no). It is the motivation behind the legal profession's commitment to provide representation even to unpopular clients or causes. Like chivalry, the idea of civility helps us understand that even in a heated contest, some things are just not done, and that even opponents have a claim on our

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courtesy. This may require something as simple as a handshake after a court “battle” or a refusal to impugn the motive of an opponent. It may also prompt the kinds of heroics so powerfully illustrated in an excellent speech that urged lawyers to emulate the great fictional attorney in Harper Lee’s novel *To Kill a Mockingbird*. See Lance B. Wickman, “*In Search of Atticus Finch*” J. Reuben Clark Law Society Devotional (Feb. 10, 2006) available at <http://www.lds.org/newsroom/voice/display/0,18255,5004-1-301,00.html>.

Also like the ideal of chivalry, the ideal of civility is not enforceable in the same way that traffic regulations or other kinds of laws must be. The obligation of civility will have no effect on behavior unless it is recognized by the individual attorney as morally binding on her behavior. Thus, civility is ultimately a matter of character and the legal profession has not always seemed to understand that “no specialized success can compensate for weaknesses in character.” Bruce C. Hafen, *The Coriolanus Syndrome*, CLARK MEMORANDUM 20, 24 (Spring 1992).

This does not mean, though, that the problem of incivility is intractable. It only suggests that it may be difficult as any exercise in character building must needs be. We can begin with a recognition that character is usually a product of religious and ethical commitments that transcend rules. These commitments to such supports of civility as humility and generosity are, in turn, best inculcated by institutions like family, church, neighborhoods, etc, rather than by legal proscription. Therefore, the work of such institutions should be supported and applauded by those who would advance the ethic of civility.

We must recognize the limitations of formal statements (as important as they are) and, through example and celebration of the values of civility and professionalism, work to create a climate within the legal profession that signals to its members the importance of the ideals – the sense that this is what lawyers ought to be. It may be that even a minority of lawyers committed to civil and professional practice can kindle an infectious spirit of moral excellence that will inspire their fellows in the same way the legendary Round Table was supposed to represent the highest manifestation of the chivalric ideal.

A resurgence of the ethic of civility in the legal profession will take a series of individual commitments and a resulting collective shift in attitude and aims. The shift could re-introduce into the profession the valuable idea that, no matter the goal, some things ought not be done and that there are things we ought to do even if we can’t see that they will help us win. If, however, like the ideal of chivalry, a resurgence of the ideal of civility can moderate the warlike elements in the profession, I suspect all would feel the effort was worthwhile.

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