Against Incivility – Bad manners and general crossness in Australian civic discourse

Order of Australia Dinner

The Hon Robert French AC

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It seems almost old fashioned today to speak of 'good manners' and more than merely quaint to speak of the attributes of a 'gentleman'. Such terms may evoke accusations of gender and class biases. Nevertheless detached from gender and class they retain a certain general validity.

John Henry Newman in his classic essay 'The Idea of a University' published in 1854 set out an extended definition of a 'gentleman' which included the following:

> If he engages in controversy of any kind, his disciplined intellect preserves him from the blundering discourtesy of better, perhaps, but less educated minds; who, like blunt weapons, tear and hack instead of cutting clean, who mistake the point in argument, waste their strength on trifles, misconceive their adversary, and leave the question more involved than they find it … Nowhere shall we find greater candour, consideration indulgence: he throws himself into the minds of his opponents, he accounts for their mistakes. He knows the weakness of human reason as well as its strength, its province and its limits.[1]

Despite the lofty tone of that 19th century concept of a gentleman engaged in debate, the ideals to which Newman aspired are still relevant even if only by the way of illuminating contrast with public civic discourse in present day Australia.

It is important to remember that the essay on 'The Idea of a University' did not idealise universities as places of refuge from the controversies of civil society. They were not to be likened to the Elysian Fields of Greek mythology, the resting place of the souls of the

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1 Frank M Turner, *The Idea of a University: John Henry Newman* (Yale University Press, 1996) 146.

heroic and the virtuous, in which the strife of the world was forgotten. Rather the university was, in his description:

> the place … in which the intellect may safely range and speculate, sure to find its equal in some antagonist activity, and its judge in the tribunal of truth … a place where inquiry is pushed forward, and discoveries verified and perfected, and rashness rendered innocuous, and error exposed, by the collision of mind with mind, and knowledge with knowledge.[2]

Of course, if you were to ask a contemporary student what those words, taken out of context, described they might mistake them for a definition of Wikipedia.

A degree of adversarialism, particularly in relation to the promotion of ideas, theories and values is inevitable in maintaining and enhancing creative energies in our society and through those energies enriching and improving it for the general good. But it is a qualified adversarialism open to the modification or abandonment of opinions and even values if they are demonstrated to be deficient. Qualified adversarialism however is not acceptable to ideological or religious fundamentalists or those whose primary object is to attain ascendancy and power over others.

Qualified adversarialism is built into important public institutions. It has long been a feature of our judicial system. The lawyer for a plaintiff who comes to court to sue another party must prove the facts necessary to establish the client's cause of action on the balance of probability. The lawyer will put forward the evidence and the arguments that favour the plaintiff's case. Counsel for the defendant may try to tear down the plaintiff's case by exposing weaknesses in the evidence or the legal argument and may put evidence and legal arguments that point to a conclusion that the plaintiff's case should be dismissed. The theory underlying this adversarial approach is that the judge is in the best position to determine the truth of the matter after being informed of the strengths and weaknesses of the respective cases by strong statements from opposing sides of the question. The process of criminal prosecution is itself inherently adversarial. Many legal practitioners have been asked the question from time to time, usually at dinner parties, — how can you defend someone that you believe is guilty? The answer is simple enough, although many find it difficult to accept.

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[2] John Newman, 'What is a University. 1 The Idea of a University' in Charles W Eliot (ed) *Essays: English and American, Vol XXVIII. The Harvard Classics* (New York, P F Collier & Son 1909-14).

In our adversarial system, the prosecution must prove guilt beyond reasonable doubt to the satisfaction of a judge or a jury. It is the judge or the jury, not counsel who determines the answer. In our adversarial system it is perfectly legitimate for an accused simply to put the Crown to proof and to endeavour to demonstrate at the end of the Crown case that there is insufficient evidence to convict.

The kind of adversarialism in our judicial process is qualified by case management measures which seek to narrow the issues in dispute and make the most efficient use of the court's time. This adversarialism does not provide space for incivility. Incivility in this context would include rudeness, sarcasm, and offensive or insulting speech from either the bar table or from the bench. In our time, Australian judges have insisted on civility as a standard of behaviour in their courts. It is an insistence rooted in a recognition that civility supports the effective functioning, dignity and authority of the courts. The first Chief Justice of Australia, Sir Samuel Griffith, was described by one of his successors, Sir Harry Gibbs, as 'dignified and courteous'. Sir Harry Gibbs was described by former High Court Justice, Dyson Heydon, as 'cool, mild-mannered, unpretentious and tactful … quiet, unflustered and, above all, unfailingly polite.'[3] That was my experience of him when I appeared before the High Court over which he presided.

In Western Australia, the best of our Chief Justices are remembered for those same traits. Paul Hasluck wrote of the period between the World Wars when Sir Robert McMillan was Chief Justice of Western Australia, observing that:

> The Supreme Court of those days had great dignity and, while I do not know whether the judges were good lawyers or not, they certainly had presence and a status that belonged to the great traditions of the law.[4]

And after McMillan died in 1931, Sir Walter James wrote of him:

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[3] Hon Justice Dyson Heydon AC, 'Chief Justice Gibbs: Defending the Rule of Law in a Federal System', Inaugural Sir Harry Gibbs Memorial Oration in *Upholding the Australian Constitution*: Volume 18, (Proceedings of the 18th Conference of the Sir Samuel Griffith Society, 2006) vii.

[4] Paul Hasluck, *Mucking About: An Autobiography* (Melbourne University Press, 1977) 115-20.

> he moved with his characteristic modesty and quietness but in time he asserted his powers of leadership in the bench of this Court. He always impressed me by his open-mindedness … he was always good-tempered, and in addition to his patience with and deference to, litigants and witnesses, he showed unfailing courtesy to the members of this Bar …[5]

These are examples of a kind of institutional leadership that is expressed and exercised, not in terms of dominance or force of personality, but by example and personal conduct in addition to the possession of the requisite skills. From my own experience, following a period in which the Supreme Court of Western Australia had been characterised by a degree of impatience and discourtesy from the bench, Sir Lawrence Jackson, who was Chief Justice from 1969 to 1977 brought a new and lasting culture of courtesy and efficiency to the Court. His successor, Sir Francis Burt, recalled that before Jackson was appointed the atmosphere between the Bench and the Bar had been combative. Jackson almost single-handedly changed that.

The low tolerance for incivility in courts in Australia today does not mean that the things that courts have to decide are not important or value-laden. Frequently the legal rules which have to be applied in particular cases may require value-based judgments. Those kinds of judgments are made in countless cases every day in courts high and low across the country. Sometimes the work of the appellate courts of the States and particularly the highest appellate court, the High Court, may call upon them to make decisions which touch on important and contested societal values upon which members of the court itself may have strongly differing views. In that context I can mention two rather different cases.

In *Mabo v Queensland (No 2)*[6] the High Court of Australia held, in 1992, that the common law of Australia could recognise the interests of Australian Indigenous people in land and waters of which, according to their traditional law and custom, they were the owners. Despite the intensity of the interests affected by the decision the adversarial process which played out in the High Court was conducted according to the usual disciplines governing advocacy in that and every other court in the land.

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5 Geoffrey Bolton and Geraldine Byrne, *May it Please Your Honour: A History of the Supreme Court of Western Australia from 1861-2005* (Scott Print, 2005) 167 citing *The West Australian* (Perth, 25 April 1931) 7.

6 (1992) 175 CLR 1.

Incivility broke out in intemperate attacks from political and sectoral interests who saw themselves as adversely affected by the decision. Those attacks intensified after the High Court's subsequent decision in *Wik Peoples v Queensland*[7] in which it held that the grant of a pastoral lease did not necessarily extinguish native title in the land over which the lease was granted. Among the many choice denunciations of the High Court for its decision was that of one Federal Member who described them as 'pissants'.

In 2003, the High Court was concerned with the question whether the parents of an unintended child could claim damages for negligent advice by the doctor who had performed a sterilisation procedure upon the mother. The Court held by a 4-3 majority that the couple were entitled to the damages claimed for the cost of raising and maintaining the child. The question before the Court involved exquisitely difficult value judgments. This perhaps was reflected in the narrow majority. As Chief Justice Gleeson observed in dissent, the question before the Court could not be confined to financially negative aspects of the parent/child relationship. In this case, as in *Mabo*, and although dissent may be expressed emphatically and robustly it did not descend into uncivil attacks on the views of the majority. Incivility tends to come from outside the Court.

In the United States the apex court, the Supreme Court of the United States, is often asked, much more so than the High Court of Australia, to make decisions on matters which cross over hotly contested societal norms — including on such topics as abortion, gun control and the death penalty among many others. The engagement with those kinds of decisions informs a kind of hyper-adversarialism, if not on the court then close to it and as has been seen in recent times, affects the selection and confirmation process for Federal Judges and Judges of the Supreme Court. The expression of dissent on the Supreme Court of the United States is also very much sharper than that in the British and Australian traditions.

Unlike the judicial process, there are only limited controls on the manifestation of uncivil expressions of adversarialism in our political process and in public debate associated with that process. Parliament has its standing orders and its prohibitions on unparliamentary language and the authority of the Speaker of the House of Representatives or the President of the Senate. Few would disagree that in its most public face, Parliament at question time and in contentious debate hardly resembles exchanges by 'gentlemen' which accords with Newman's understanding of that concept. There are, of course, many people who would say

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7 (1996) 187 CLR 1.

'nor should it'. The business of democracy is not to be conducted with the kind of restraint that might be expected in court or polite company. The issues at stake may be too important and raise fundamental conflicts about important values that require articulate and forceful argument.

In a paper published in the *Boston University Studies in Philosophy and Religion* in 2000 entitled 'Is Civility a Virtue', James Schmidt referred to a definition of civility by Chicago sociologist Edward Shils, largely in terms of sacrifice and restraint. Shils said:

> Substantive civility is the virtue of civil society. It is the readiness to moderate particular, individual or parochial interests and to give precedence to the common good … Whenever two antagonistic advocates arrive at a compromise through recognition of a common interest, they redefine themselves as members of a collectivity, the good of which has precedence over their particular objectives.[8]

This approach to civility would no doubt welcome what we often long for in our political discourse under the designation 'bipartisan approaches'. Schmidt however draws a distinction between justice and civility. He gives us an example: the 'gag rule' that the United States Congress adopted in May 1836 as a way of coping with increasingly bitter debate over what should be done about slavery. South Carolina's Henry Pinckney introduced resolutions stating that Congress had no power to interfere with slavery in the States and that it would be unwise and politic for Congress to interfere with slavery in the District of Columbia. He also proposed that any further measures on the subject would be laid on the table and no further action. Congress, wary of a debate which had engendered animosity and bitterness, moved on to consider other business. Schmidt observes:

> Perhaps, to that extent, the cause of civility was served — which may be enough to suggest that civility may not be the first virtue of political associations, a point that certainly was not lost on John Quincy Adams, who secured his greatness through his long struggle to break the gag rule.[9]

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8 James Schmidt, 'Is Civility a Virtue' in Leroy Rouner (ed) 'From Civility' (2000) 21 *Boston University Studies in Philosophy and Religion* 17, 23. https://hdl.handle.net/2144/17895.

9 Ibid 25.

Beyond the boundaries within which we accept that robust debate, which some might think uncivil, is appropriate, incivility in the sense of personal abuse in the political and public arena has been catching on and infecting our public discourse generally. Some elements of the media contribute mightily to that infection because they have a financial interest in inflaming the passions of readers or viewers who will want to hear more of what they want to hear. Media outlets increasingly seem to occupy ideological silos. When I read the online newspapers in the morning I quickly scan the pages of *The Australian*, which offers one perspective both in their selection of new stories and in its opinion columns and the *Guardian* for another perspective in its selection of news stories and its opinion columns. These ideological opponents are left for dead by the excesses of some of those who present on the electronic media. And beyond all of those is social media, which has become a kind of sewer line for emotional incontinence, offering outpourings of shaming, denunciation, abuse and hatred from a variety of quite different perspectives.

There have been from time to time famous political put-downs — which have caused people to admire cleverness of their authors even if the put-down does nothing to advance the public good. The trouble with such sayings is that they create a kind of cult of the polemical. Examples go back a very long way. They include Napoleon Bonaparte's description of Talleyrand as: 'A piece of dung in a silk stocking.' Closer to our own time, Harry Truman said of Richard Nixon 'Richard Nixon is a no good, lying bastard. He can lie out of both sides of his mouth at the same time, and if he ever caught himself telling the truth, he'd lie just to keep his hand in.'

Turning to the Australian scene, Prime Minister Paul Keating has expounded a number of famous denunciations of his political opponents, describing John Howard as 'just a shiver looking for a spine to run up' and saying of Shadow Treasurer Andrew Peacock, 'I suppose that the Honourable gentleman's hair, like his intellect, will recede into the darkness'. His characterisation of Peacock's second attempt at leadership of his party 'a soufflé doesn't rise twice' was borrowed, apparently without attribution, from Teddy Roosevelt's daughter Alice Roosevelt Longworth, who said of Governor Thomas E Dewey who was defeated for the Presidency in 1948: 'any women knows you can't make a soufflé rise twice'. Margaret Thatcher also appropriated the saying in 1989.

Beyond colourful insults and intemperate debate, incivility in the form of crudely offensive and insulting language seems to be an entrenched phenomenon in our contemporary

culture, magnified through print, electronic and social media in ascending order of intensity. It generates a general sense of anger about almost every topic that can be imagined.

Can there be a law about it?

We have of course laws about defamation and laws dealing with offensive conduct and communications and so-called 'hate speech'. Some of these laws generate controversy because they seem to some to overreach in their restrictions on free speech in our society. Section 18C of the *Racial Discrimination Act 1975* (Cth) is a good example of a controversial law in this area. In the end, however, the law cannot save us from being offended. It cannot save us from the social disharmony which some kinds of offensive expression can cause, nor can it protect the dignity of people if our culture does not respect them.

As I have said on other occasions, we must be free to speak our minds and let other people speak theirs. We must accept that we will sometimes be offended or even outraged by the things other people say about us or others or about our or their beliefs or values. At the same time we must accept that for a culturally and ethnically diverse society to work, there must be an ethic of respect for the dignity of all of its members. There are some very old-fashioned ideas of courtesy and good manners which I referred to in opening, which embody that kind of world view. They empower us to apply the art much finer than that of giving or taking offence, of getting along together in full participation in a free and democratic society. The members of the Order of Australia Association, recognised across a range of walks in life and many different activities for their contribution to the common good, offer examples of what the civic virtues can achieve. They also have the opportunity to actively promote a culture of mutual respect.

Individual examples of civility can count. I notice sometimes driving along Stirling Highway in Claremont to work that there seems to have developed a convention of alternate vehicles giving way to allow a vehicle waiting at a side road to enter the line of traffic. This is not always seen in other parts of Australia. It is said that in Melbourne drivers do not know how to merge. Simple individual acts of courtesy, if repeated and imitated, go viral, in the contemporary argot, and build into conventions. Conventions can build into our societal culture. Individuals applying in their own lives the simple rules of civility in dealing with each other are builders of a civil culture. In this respect we should all lead by example and insist that our opinion makers and public officers do the same.