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The Long Con of Civility

Lynn Mie Itagaki

Article

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Civility has been much on the minds of pundits in local and national political discussions since the 1990s. Periods of civil unrest or irreconcilable divisions in governance intensify concerns about civility. While its more archaic definitions refer to citizenry and civilization, civility is often promoted as the foundation or goal of deliberative democracies. However, less acknowledged is its disciplinary, repressive effects in maintaining or deepening racial, gendered, heteronormative, and ableist hierarchies that distinguish some populations for full citizenship and others for partial rights and protections.

In Part I, I examine a recent series of civility polls, their contradictory results, and how these contradictions can importantly expose the fissures of our contemporary moment and our body politic. In Part II, I describe the historical background of civility around race, gender, and sexuality and the unacknowledged difficulty in defining civility and incivility. In Part III, I extend this discussion to address the recent cases before the Supreme Court concerning LGBTQ+ employment discrimination and lack of accessibility. In conclusion, I identify what it would mean to analyze civility in terms of dignity on the basis of these cases about the equal rights and protections of their LGBTQ+ and disabled plaintiffs. We should be deeply suspicious with demands for civility that are often deployed to quell dissent from marginalized populations and to dampen democratic practices.

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LYNN MIE ITAGAKI [*]

INTRODUCTION

Civility, now more than ever, is a concern of our everyday conversations and political debates. Civility is a flexible concept which has referred to everything from polite conversation to an entire civilization, and its very expansiveness undermines its effectivity. Most often, civility denotes orderly turn-taking or polite manners exhibited by a "civilized" citizenry. It also includes internal contradictions, depending on the situation and its practitioners. Civility is the way in which we *should* talk about important things; civility is also the way in which *we do not talk* about important things. One person's civility is another's incivility. From the smallest rude remark to the institutionalized exclusion of groups, the flexibility of the term "civility" encompasses a tremendous range of customs, behaviors, practices, and traditions. Moreover, when people advocate for civility, they often neglect to disclose their implicit assumptions about to whom they owe civility, which may not include those with whom they disagree or disparage. Civility is often understood as the foundation or goal of deliberative democracies; however, it also has disciplinary, repressive effects in maintaining or exacerbating racial, gendered, heteronormative, and ableist hierarchies that distinguish some populations for full citizenship and others for partial rights and protections.

In Part I, I examine a recent series of civility polls, their contradictory results, and how these contradictions can importantly expose the fissures of our contemporary moment and our body politic. In Part II, I describe the historical background of civility around race, gender, and sexuality and the unacknowledged difficulty in defining civility and incivility. In Part III, I extend this discussion to address the recent cases before the Supreme Court concerning LGBTQ+ employment discrimination and lack of accessibility. In conclusion, I identify what it would mean to analyze civility in terms of dignity on the basis of these cases about the equal rights and protections of their LGBTQ+ and disabled plaintiffs. We should be deeply suspicious

with demands for civility that are often deployed to quell dissent from marginalized populations and to dampen democratic practices.

I. THE PARADOX OF THE POLLS

The consensus among Americans is that incivility seems to have gotten worse. Poll after poll appears to represent respondents' increasing frustration with incivility in our media and political debates. A late October 2019 poll[1] about civility in politics seemed to affirm with numbers the political polarization and profound partisanship that most people felt. In response to the statement "[t]he political, racial, and class divisions in this country are getting worse and our national dialogue is breaking down," seventy-seven percent agreed, a six point swing from April 2019's eighty-three percent (albeit within the ±3.1 margin of error).[2] Other similar overwhelming majorities agreed with variations of these statements such as "I am frustrated by the uncivil and rude behavior of many politicians" (eighty-seven percent) and "[b]ehavior that used to be seen as unacceptable is now accepted as normal behavior" (eighty-four percent).[3]

However, polling data for this Civility Poll revealed an apparent contradiction expressed by a majority of respondents: while eighty-seven percent (with sixty-four percent strongly agreeing) agreed that "compromise and common ground should be the goal for political leaders," eighty-four percent (with sixty-three percent strongly agreeing) also agreed with the statement, "I'm tired of leaders compromising my values and ideals. I want leaders who will stand up to the other side."[4] Taking cues from the press release, media coverage repeated and amplified this apparent contradiction between respondents simultaneously wanting

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[1] *October 2019 Civility Poll*, GEO. U. INST. POL. & PUB. SERV. (Oct. 2019), http://politics.georgetown.edu/october-2019-civility-poll-2/. This poll is run semi-annually by the Institute of Politics at Georgetown University with Republican-leaning and Democrat-leaning polling outfits.

[2] *Compare* THE TARRANCE GRP. & LAKE RESEARCH PARTNERS, BATTLEGROUND 65 FINAL STUDY #16440, at 1, 3 (2019), http://politics.georgetown.edu/full-cross-tabs-and-questionnaire-october-2019-2/, *with* THE TARRANCE GRP. & LAKE RESEARCH PARTNERS, BATTLEGROUND 64 STUDY # 16354, at 1, 3 (2020), http://politics.georgetown.edu/civility-poll-tables-cross-tabs-questionnaire-april-2019/.

[3] THE TARRANCE GRP. & LAKE RESEARCH PARTNERS, BATTLEGROUND 65 FINAL STUDY #16440, at 1, 3 (2019), http://politics.georgetown.edu/full-cross-tabs-and-questionnaire-october-2019-2/. The Georgetown Institute of Politics and Public Service Battleground Civility Poll from April 4, 2019 showed a three percent decrease and one percent increase, respectively, again within the margin of error. *See* THE TARRANCE GRP. & LAKE RESEARCH PARTNERS, BATTLEGROUND 64 STUDY # 16354, at 1, 3 (2020), http://politics.georgetown.edu/civility-poll-tables-cross-tabs-questionnaire-april-2019/ (displaying results of the April 2019 poll).

[4] GU Politics, *New Poll: Voters Find Political Divisions So Bad, Believe U.S. Is Two-Thirds of the Way to "Edge of a Civil War"*, GEO. U. INST. POL. & PUB. SERV. (Oct. 23, 2019), http://politics.georgetown.edu/press-releases/civility-press-release-oct-2019/.

compromise and not wanting one's political leaders to compromise.[5] Mo Elleithee, Executive Director of the Georgetown Institute of Politics and Public Service, says that this contradiction "creates mixed messages for even the most skilled political leader trying to decide whether to be a fighter or a dealmaker."[6] But how could at least two-thirds, if not as many as three-quarters, of the same respondents say that they wanted these two contradictory things?[7]

This contradiction points to the benefits and drawbacks of civility, especially in terms of the promise of civil discourse and respectful debate it offers to many. The ostensible inconsistency with these two statements reflects one of the fundamental problems of civility and its "meaning clusters"[8] that go far beyond mere politeness, but rather activate its more obscure definitions of the citizenry and civilization. Assertions of civility rely on certain assumptions about to whom one owes civility.[9] For example, whether one should be civil to another individual or member of another group can depend on if one perceives these individuals or group members to share values and commitments to the nation.[10] The practices, tactics, and strategies for how we might achieve civility can require strong advocacy in and of themselves, as opposed to the most common demand to just be polite.

However, the increasing polarization of the U.S. electorate can lead to a more restrictive notion of civility, summoning the interrelated force of its archaic definitions of citizenry and civilization by limiting those to whom one should show civility. Consolidating this in-group and excluding others determine who is valued or disdained, a full citizen or second-class one, patriot or enemy.[11] Under these conditions, civility's flexible and wide-ranging definition may stretch to mean even its opposite. For example, Civility Poll respondents who wanted compromise and common ground might actually imply for respondents that those on the other side of the issue are responsible for reaching a compromise and finding common ground with their stated position. In other words, those on the other side of the debate should listen to me and to views like mine, expressed by my

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[5] Paul Bedard, *Battleground: 7 in 10 Say US 'On the edge of Civil War'*, WASH. EXAMINER (Oct. 23, 2019, 1:27 PM), https://www.washingtonexaminer.com/washington-secrets/battleground-7-in-10-say-us-on-the-edge-of-civil-war; Victor Westerkamp, *Americans Believe We're Two-Thirds of the Way to a Civil War*, NTD (Oct. 24, 2019), https://www.ntd.com/americans-believe-were-two-thirds-of-the-way-to-a-civil-war_396411.html.

[6] GU Politics, *supra* note 4 (alteration in original).

[7] *Id.* Given the margin of error, the number of respondents who agreed with both statements could be as high as seventy-seven, and as low as sixty-five, albeit the range clearly signals a distinct majority.

[8] Virginia Sapiro, Considering Political Civility Historically: A Case Study of the United States 2 (1999) (unpublished manuscript), http://blogs.bu.edu/vsapiro/files/2018/06/Considering-Civility.pdf.

[9] *Id.* at 5–6.

[10] *Id.* at 7.

[11] *Id.* at 9.

elected representative, but I and people who agree with me shouldn't have to. Compromise describes what others do, therefore I may listen to those other perspectives but I will not change my position, as that would compromise my own values. I could justify this redefinition of compromise to mean not compromising by identifying the other side as not worthy of compromise by labeling these antagonists as criminal, unpatriotic, evil, subhuman—i.e., not worthy of civility. Thus, I only need to find compromise and common ground among those I consider citizens, patriots, voters, humans—essentially people who think like me. Moreover, I categorize as "humans" only those who think like me, or those with whom I would not have to compromise my values.

Respondents could be reflecting a social desirability bias as "shy" anti-compromise and anti-common-ground citizens and voters who might not admit certain opinions to pollsters. Whites might be especially fearful of appearing racist in ways that might parallel women's and racial minorities' fears of being stereotyped,[12] and Moss-Racusin et al. posit a "compensatory egalitarianism" in which "individuals may reassure themselves that although they did not select a minority candidate, they 'repaid' this candidate with implicit antiprejudice attitudes on their behalf."[13] I posit that respondents might be sensitive to being perceived as not supporting democratic values or egalitarianism by being unwilling to find a compromise or common ground

This bias skews polls by small amounts that can alter expectations of close runs and flip anticipated results, as occurred in the 2016 presidential election outcome.[14] Known as the "Bradley effect,"[15] scholars and pundits named this phenomenon after the 1982 gubernatorial race of California in which African American mayor Tom Bradley led by a comfortable margin in the pre-election polls but eventually lost by fewer than 100,000 votes, or 1.2%.[16] Researchers identified respondents' concerns that they would be perceived as racist for not voting for Bradley, a candidate who could have

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[12] Phillip Atiba Goff, Claude M. Steele & Paul G. Davies, *The Space Between Us: Stereotype Threat and Distance in Interracial Contexts*, 94 J. PERSONALITY & SOC. PSYCHOL. 91, 92 (2008).

[13] Corinne Moss-Racusin, Julie Phelan & Laurie Rudman, *"I'm Not Prejudiced, but . . .": Compensatory Egalitarianism in the 2008 Democratic Presidential Primary*, 31 POL. PSYCHOL. 543, 546 (2010).

[14] Andrew Mercer et al., *Why 2016 Election Polls Missed Their Mark*, PEW RES. CTR.: FACT TANK (Nov. 9, 2016), https://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/; Joseph P. Williams, *The Trump Effect*, U.S. NEWS: REP. (July 1, 2016, 3:30 PM), https://www.usnews.com/news/articles/2016-07-01/are-voters-too-embarrassed-to-say-they-support-trump.

[15] Ronald J. Vogel & Phillip Ardoin, *Ask Me No Questions, I'll Tell You No Lies: Does the Bradley Effect Still Exist?*, 15 RACE GENDER & CLASS 65, 66 (2008).

[16] *Id.*; John Canalis, *Is the Bradley Effect Real? Deukmejian Says No*, LONG BEACH PRESS TELEGRAM (Oct. 28, 2008, 12:00 AM), https://www.presstelegram.com/2008/10/28/is-the-bradley-effect-real-deukmejian-says-no/.

been the first Black governor of California.[17] This statistical issue of how researchers and pollsters should most accurately factor in bias to avoid tipping the scales results from the phenomena of "covering," as Kenji Yoshino calls what he takes up from Erving Goffman's notion of hiding or downplaying a disfavored, stigmatized identity, in this case, an anti-Black racist one.[18] The generally unanticipated election of Donald J. Trump in 2016 and the 2015 surprising majority vote of the British to withdraw from the European Union are only the most recent spectacular examples of covering: the Shy Trump voter or the Shy Brexit voter whose answers reflected this bias, and for whom pollsters did not adequately account.[19]

Pollsters and jury selection consultants, among other experts, can attempt to ascertain more accurate opinions with indirect, rather than direct, questions. For example, in 2008 pollsters were confronted with the unprecedented question of whether registered Democrats would have a problem voting for a Black or female candidate, as was likely with Barack Obama and Hillary Clinton as the presidential nominee frontrunners. Pollsters had to ask indirect questions that more accurately predicted voting preferences. They knew they would get skewed results by asking participants directly if they were racist or sexist or even if they would support a qualified Black or female candidate, so instead pollsters had to develop versions of these questions that asked if "most of my neighbors"[20] or "most people they knew" would support these presidential candidates and if "America was ready" for them."[21] Pollsters need to work around a perceived norm, or what respondents might see as the more socially desirable or civil answer, because respondents are covering (hiding or toning down) what they think are disfavored political views and identities and ones that might generate hostility and conflict.

II. THE CULTURE WARS WERE CIVILITY WARS

I posit civility as not only a confidence trick played on the U.S. public for decades, but also as referencing the general confidence in civility as a universal solution for many contemporary political ills. This use of civility usually appears as a default strategy and non-legal remedy for leveling hierarchies and inequalities.[22] In this context, interpreting the above polls

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[17] Vogel & Ardoin, *supra* note 15, at 67.

[18] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 18 (2007).

[19] Nick O'Malley, *Donald Trump, Brexit, and the Shy Voter Theory*, SYDNEY MORNING HERALD (Oct. 26, 2016, 8:57 AM), https://www.smh.com.au/world/north-america/donald-trump-brexit-and-the-shy-voter-theory-20161026-gsao0a.html.

[20] Susan Page, *Call Her Madame President*, USA TODAY, Oct.10, 2005, at C1.

[21] Kathy Frankovic, *Race, Gender and Bias in the Electorate*, CBS NEWS (Mar. 17, 2008, 3:00 PM), https://www.cbsnews.com/news/race-gender-and-bias-in-the-electorate/.

[22] LYNN MIE ITAGAKI, CIVIL RACISM: THE 1992 LOS ANGELES REBELLION AND THE CRISIS OF RACIAL BURNOUT 19–22 (2016).

assumes that voters' frustrations with decreasing civility might change how they are voting or will vote.

Civility has multiple purposes evoked by its range of definitions—in short: citizenry, civil society, and civilization.[23] Political scientist Virginia Sapiro notes that "civility has been traditionally defined as civic virtues, community-building, and deliberative practices of good citizens."[24] Civility is often considered to be the foundation of deliberative democracies.[25] It is thus "a concept, political goal, and measure."[26] Civility is a strategy and may also be an obstacle to maintaining a vibrant democracy as it can be a tool of exclusion used against those who are not deemed "civil."[27]

All these definitions of civility are at play or are in crisis in the all-capitals topline of the GU Politics Civility Poll press release: "VOTERS FIND POLITICAL DIVISIONS SO BAD, BELIEVE U.S. IS TWO-THIRDS OF THE WAY TO 'EDGE OF A CIVIL WAR.'"[28] While polarization deepened during the Obama and Trump Administrations, the concern of an imminent civil war alludes to the cultural and historical backdrop of another era, of another allegedly impending race war. Following the 1989 fall of the Berlin Wall and 1991 collapse of the Soviet Union, "political upheavals and civil wars . . . instigated an anxious outpouring of U.S. research on civil society and its contribution to the durability and integrity of democratic states."[29] The post-cold war era saw that "new social and political forces were at play, both domestically and internationally" and largely superseded what legal scholar Derrick Bell and historian Mary Dudziak have argued is "the 'interest convergence' of cold war politics and the modern civil rights movement [that] contributed to more democratic racial practices."[30] And although capitalism had ostensibly triumphed over communism,[31] the 1992 violence in Los Angeles "punctured the illusion of [U.S.] exceptionalism"[32] and its invincibility from civil unrest—in this case, over police brutality and racial inequalities.

Paleoconservative Pat Buchanan referenced the 1992 Los Angeles "riots" as he concluded his serious challenge to the Republican presidential

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[23] *Id.* at 15.

[24] *Id.* at 28–29.

[25] Sapiro, *supra* note 8, at 3.

[26] ITAGAKI, *supra* note 22, at xv.

[27] *Id.* at 19–20.

[28] GU Politics, *supra* note 4.

[29] ITAGAKI, *supra* note 22, at 14.

[30] ITAGAKI, *supra* note 22, at 14. *See generally* Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518–33 (1980) (outlining the scholar's interest convergence argument). *See also* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 14, 258 (2000) (supporting Bell's interest convergence argument).

[31] *Id.*

[32] *Id.* at 15.

incumbent by conceding to President George H.W. Bush at the 1992 Republican National Convention in his famous "Culture War" speech:

> My friends, this election is about more than who gets what. It is about who we are. It is about what we believe, and what we stand for as Americans. There is a religious war going on in this country. It is a cultural war, as critical to the kind of nation we shall be as was the Cold War itself, for this war is for the soul of America.[33]

Buchanan arrayed both Bill and Hillary Clinton against Bush, who "is on our side."[34] Addressing his primary voters who posed a significant challenge within the Republican Party to then-President Bush's re-election campaign, Buchanan both describes and directs them in martial language: "And so, to the Buchanan Brigades out there, we have to come home and stand beside George Bush."[35] Emphasizing that this culture war is a physical one, and one "for the soul of America," Buchanan closes his speech with the martial image of teenaged National Guard troops who have returned from the 1991 Persian Gulf War to fight against "a mob" during the 1992 Los Angeles "riots": "And as those boys took back the streets of Los Angeles, block by block, my friends, we must take back our cities, and take back our culture, and take back our country."[36]

Civility was fueled by the master narrative of American progress, the exceptionalist *Bildungsroman* of the maturing nation adopting increasingly robust notions of democracy and equality. By calling that dominant perception of the nation into question, the 1992 Los Angeles Rebellion had a profound, though seldom acknowledged, influence on the way Americans thought of their country in the post-cold war, post-civil rights eras. For example, political scientist Robert Putnam's popular essay and bestselling book of the same title, *Bowling Alone*, warned of a civic culture in this country declining at the very moment when newly democratic governments in Eastern Europe and elsewhere were looking to the United States as a model:

> Many students of the new democracies that have emerged over the past decade and a half have emphasized the importance of a strong and active civil society to the consolidation of democracy. Especially with regard to the postcommunist countries, scholars and democratic activists alike have lamented the absence or obliteration of traditions

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[33] Patrick Joseph Buchanan, Culture War Speech: Address to the Republican National Convention (Aug. 17, 1992), https://voicesofdemocracy.umd.edu/buchanan-culture-war-speech-speech-text/.

[34] *Id.*

[35] *Id.*

[36] *Id.*

of independent civic engagement and a widespread tendency
toward passive reliance on the state. To those concerned with
the weakness of civil societies in the developing or
postcommunist world, the advanced Western democracies
and above all the United States have typically been taken as
models to be emulated. There is striking evidence, however,
that the vibrancy of American civil society has notably
declined over the past several decades.[37]

In the mid-1990s, the civility debates reached their peak in public
discourse among academics, politicians, journalists, and pundits; these
"unresolved differences of civic values and virtues have been blamed for
fracturing U.S. society, resulting in a so-called civility crisis."[38] The
civility crisis had its roots in the legacy of affirmative action, the promises
of President Johnson's Great Society policies, and the sociopolitical tumult
of the 1960s anti-war, anti-poverty, decolonial, lesbian and gay, feminist,
and anti-racist movements.[39] Historian Daryl Michael Scott identifies a
racial neoconservative perspective that perceived liberals as:

> too apologetic for what they viewed as the riotous behavior
> of urban blacks, and [neoconservatives] emphasized the need
> for law and order. More important here, [neoconservatives]
> also tended to have serious reservations about preferential
> programs such as affirmative action and efforts to promote
> integration such as school busing. They reasserted the
> traditional racial liberal call for a color-blind state, which
> would protect only the civil rights of individuals.[40]

Scott notes the perception of uncivil behavior, "riotous behavior," and
even the "serious reservations" over supporting equal opportunity as
outcomes rather than as processes.[41] The title of his study, *Contempt and
Pity*, taken from W.E.B. Du Bois's *The Souls of Black Folk* in its trenchant
explanation of anti-Black attitudes, identifies how the prevalent notion of
"pity" was Whites' implicit reason for changing public sentiment during
major civil rights landmarks, such as *Brown v. Board*, Great Society

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[37] Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65,
65 (1995); *see also* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF
AMERICAN COMMUNITY (2000).

[38] ITAGAKI, *supra* note 22, at 16.

[39] *Id.* at 9.

[40] DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE
DAMAGED BLACK PSYCHE, 1880–1996 xiv (1997).

[41] *Id.*

reforms, and civil rights acts. However, this feeling masked contempt for Black people, in what I posit was the civil face of hateful, racist feelings.[42]

Inequality will be more indirectly channeled through ostensibly race-neutral governmental and institutional practices as historian Carol Anderson documents.[43] The incivility of "white rage" is now diffused through structural discrimination, indirect rather than direct, hidden instead of overt:

> White rage is not about visible violence, but rather it works its way through the courts, the legislatures, and a range of government bureaucracies. It wreaks havoc subtly, almost imperceptibly. Too imperceptibly, certainly, for a nation consistently drawn to the spectacular—to what it can *see*. It's not the Klan. White rage doesn't have to wear sheets, burn crosses, or take to the streets. Working the halls of power, it can achieve its ends far more effectively, far more destructively.[44]

Anderson identifies the political logics of process and procedure that perpetuates inequalities more efficiently and pervasively. Critical ethnic studies scholars Jodi Byrd et al. echo Anderson's arguments in relation to economic inequality, exposing the presumed "apolitical" nature of bureaucratic, procedural, and administrative acts to facilitate "dispossession"; and this façade of being apolitical flourishes despite these acts' origins and maintenance "as the result of law and policy."[45] Moreover, non-enforcement of constitutional rights and legislation and the selective protections available to some but not all persons create further inequities. The failure of constitutional amendments such as the Fifth, Fourteenth, and Fifteenth exemplifies the failure of enforcement since the nation's founding alongside African chattel slavery, Indigenous genocide, and broken treaties. Civil rights acts of the 1960s have helped to close employment, educational, and voting gaps, among other things; however, it was the backlash against the laws that served to curtail their effectiveness and had a chilling effect on consistent enforcement. The racist destruction wrought by "halls of power" that Anderson references are not only political institutions, but also "still suffuse our social and economic system,

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[42] *Id.* at xi–xii, xviii. *See also* W.E.B. DU BOIS, *Of Our Spiritual Strivings*, *in* THE SOULS OF BLACK FOLK 37, 38 (David W. Blight & Robert Gooding-Williams eds., Bedford Books 1997) (1903) ("It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity." (footnote omitted)).

[43] CAROL ANDERSON, WHITE RAGE: THE UNSPOKEN TRUTH OF OUR RACIAL DIVIDE 3–4 (2016).

[44] *Id.* at 3.

[45] Jodi A. Byrd et al., *Predatory Value: Economies of Dispossession and Disturbed Relationalities*, SOC. TEXT, June 2018, at 10.

buttressed by the informal modes of social control even more powerful than the law," as historian William Chafe diagnoses the ultimately limited effects of the civil rights acts of the 1960s.[46] These informalities are often just as pernicious: "Although the means of keeping blacks in their place may now be implicit rather than explicit, they too often are just as effective as in the past."[47]

Philosopher Jonathan Schonsheck identifies a typology that helpfully disambiguates incivilities among individuals (rudeness) and groups (rasp), as well as the basic rejection of what Schonsheck posits are the "metavalues" (repudiation): toleration and mutual respect, the foundation of a democracy.[48]

> *Rasp* is the friction of jostling political, moral, religious, and ethnic groups that is inevitable in any multicultural "liberal democracy"—a system, or theory, or philosophy of government that cherishes the values of toleration and mutual respect. Not everyone, however, subscribes to toleration and mutual respect; the *repudiation* of these values generates the third, and most serious, category of incivility.[49]

Civility is also an appealing paradigm because of its admonitions of individual behavior rather than institutional changes that shape behavior through legal mandates such as affirmative action or antidiscrimination statutes. Civility can also normalize the violence of "repudiation": the "friction" and "jostling" of *in*tolerance and *dis*respect. In their "Eleven Theses on Civility," performance scholars Kyla Wanzana Tompkins and Tavia Nyong'o expose how this repudiation is hidden: "Civility discourse enforces a false equation between incivility and violence that works to mask everyday violence as a civic norm."[50] The problems with promoting civility as a panacea for political impasses are made more visible through an often unacknowledged subset of incivility—bullying—its normalization, and recent critiques of the research on this phenomenon.

In *Bully Nation: How the American Establishment Created a Bullying Society*, Charles Derber and Yale Magrass begin their wide-ranging study of the economic and militaristic institutions that implicitly and explicitly

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[46] WILLIAM H. CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM, at vii (1981).

[47] *Id.*

[48] Jonathan Schonsheck, *Rudeness, Rasp, and Repudiation, in* CIVILITY AND ITS DISCONTENTS: ESSAYS ON CIVIC VIRTUE, TOLERATION, AND CULTURAL FRAGMENTATION 169, 169–72 (Christine T. Sistare ed., 2004).

[49] *Id.* at 169.

[50] Tavia Nyong'o & Kyla Wazana Tompkins, *Eleven Theses on Civility*, SOCIAL TEXT (July 11, 2018), https://socialtextjournal.org/eleven-theses-on-civility/.

promote bullying behavior among Americans.[51] Derber and Magrass provide critiques of anti-bullying programs in their emphasis on what they call the "psychiatric paradigm."[52] I am not only interested in Derber and Magrass's research on bullying for its relationship to civility but also as a means of making civility's shortcomings also visible. Derber and Magrass are critical of how the psychiatric paradigm gives rise to the following popular beliefs: bullies are often misjudged as individuals acting alone and who are spontaneously maladjusted or troubled rather than organized and strategic in their harassment; the social ill of bullying is relegated to the realm of children, juvenile behavior, and immature development; bullying is not what adults do nor what venerable state apparatuses such as "the economy, military, culture, family, schools" facilitate which "all help create and perpetuate the bullying milieu."[53] Incivility is similarly simplified as performed by individuals who are bad or criminal rather than strategic in deploying incivility, and incivility is generally condemned rather than examined for what its manifestation might expose about the issue or institution affected.

III. INCIVILITIES, INEQUALITIES, INDIGNITIES, INHUMANITIES

I have more fully developed the concept of "civil racism" elsewhere in the context of the mid-1990s "civility debates" which promoted individual behaviors as leading to more effective community building, or, on the extreme other hand, the death of nations.[54] Civil racism acknowledges the growing field of civility studies that assesses the development or decline of our civil society in terms of social capital.[55] I argue that *civil racism* marks the cultural and legal shift from the modern civil rights movement to the post-civil rights era; "the goal of equality is portrayed as an ethical choice between the formal (legal) processes and empirical evaluations of the[ir] outcomes," so equal process versus equal outcomes.[56] As a marker that distinguishes the post-civil rights era from earlier times, racism's effects are "minimized" both in terms of its pervasive harm and its institutional purview: "Civil racism marks the ways in which racial discrimination has been allowed sanctuary in the private realms of individual, isolated behaviors."[57] Moreover, "discussions of remedies for racial discrimination

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[51] CHARLES DERBER & YALE R. MAGRASS, BULLY NATION: HOW THE AMERICAN ESTABLISHMENT CREATED A BULLYING SOCIETY 2 (2012).

[52] *Id.*

[53] *Id.*

[54] *See* ITAGAKI, *supra* note 22, at 15–16 (discussing the benefits of civility in dialogue and social behavior in deterring social anomie).

[55] *Id.* at 6.

[56] *Id.*

[57] *Id.* For "minimization of racism" as a "central frame of color-blind racism," see EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 142 (2001).

are marked as impolite and uncivil."[58] Civil racism emphasizes the racial character of civility: the hierarchy depends on what is considered appropriate racial behavior in life, at work, and in leisure.[59] Given civil racism, one's entitlement to rights and protections are based on one's perceived good or bad behaviors rather than *inalienable* or *natural* as inherent to one's humanity.[60]

I define "civil racism" as the preservation of civility at the expense of racial equality.[61] As an expression of structural racism, civil racism exhibits the active—though often unintentional—perpetuation of discrimination through one's everyday engagement with the state and society.[62] Thus, I am skeptical of the investment of time and resources in civility. I posit calls for civility as a heuristic that can often expose an individual's or group's investment in thwarting more equitable processes and outcomes. Oppressed individuals and groups call for full equality, dignity, and humanity—rarely civility.

However, civility might entice some resistant stakeholders, possibly racial conservatives, centrists, and moderates into conversation with others holding different views. This rationale is often promoted, and marginalized speakers are often exhorted to behave civilly. Philosopher Hannah Arendt has famously commented on the need for one's civil rights to be recognized before one has human rights, or the paradoxical right to have rights.[63] We can read this in a variety of ways. If one doesn't have equality, then there is no true civility (mutual respect or cooperation). In cultivating or exercising citizenship, civility only functions between and among equals. Otherwise it is condescension for the powerful and submission for the less powerful. Being civil has been used as a gatekeeper to equality: if one isn't civil then one doesn't *deserve* equality.

My concern with a racist civility that is pursued at the personal or even institutional level was that it did not cost much if anything at all. In other words, there would be no material redistribution or even worse, a redistribution that flowed upward, just a friendlier face or personable interactions whatever one's racist beliefs or society's racist inequities. The emotional labor of civility was more often extracted from vulnerable populations who had to repeatedly overlook microaggressions or be forced

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[58] *Id.*

[59] *See id.* at 24 (explaining how invisible forms of discrimination influence the structure of civil society).

[60] *See id.* at 21 (comparing proponents of civility and how they inadequately address existing social hierarchies).

[61] *See id.* at 6 (providing various definitions of civil racism).

[62] *Id.*

[63] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 296–97 (1976) (delineating the right to have rights and the right to belong to an organized community).

to "cover."[64] Kenji Yoshino interprets mainstream society, and indeed a number of court rulings, as failing to protect a mutable behavior that is not a protected civil right such as wearing no makeup, public affection between same-sex couples, or speaking Spanish at work when one is bilingual and hired for this fluency but the owners are not.[65] And given the three cases just taken up by the U.S. Supreme Court regarding employment discrimination against LGBTQ+ workers, these unprotected mutable behaviors in a number of states would also apply to gender performances not corresponding to the sex on one's birth certificate—as in the case of Aimee Stephens, who lived and dressed as a woman—or in actions such as joining a gay softball league or loving someone of the same gender and disclosing that identity or relationship in a conversation with a work client.[66]

Returning to Arendt's important description of cause-and-effect,[67] if one is not seen as having civil rights, then one does not have human rights.[68] If one is not perceived as being equal, then one can never be perceived as being civil. If one is not valued, then one can never be recognized or have a full self-expression that is respected and heard.[69] This tension between civility and equality appears in two Supreme Court cases in attempts to limit the extent to whom civility applies.

In *Robles v. Domino's Pizza LLC*, Guillermo Robles has a visual disability and must use a screen reader for his computer.[70] However, he cannot engage with some parts of Domino's Pizza's online interface since screen readers cannot translate all of its website.[71] The case questioned whether the accessibility of public spaces under the Americans with Disabilities Act applied to commercial websites.[72] To extrapolate this, one cannot fully participate in online exchanges, whether economic, social, or political in a cyberspace that is inaccessible because websites and platforms cannot be translated by a screen reader.[73] This structural inequality devalues Robles and others with disabilities by implying that Domino's does not consider this group of customers worth communicating with despite the relatively low cost of revamping its website to be fully

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[64] YOSHINO, *supra* note 18, at 90, 130–31, 191.

[65] *Id.*

[66] Nina Totenberg, *Showdown Over LGBTQ Employment Rights Hits Supreme Court*, NPR (Oct. 8, 2019, 5:00 AM ET), https://www.npr.org/2019/10/08/766386729/showdown-over-lgbtq-employment-rights-hits-supreme-court.

[67] ARENDT, *supra* note 63, at 3, 131, 156.

[68] *See supra* note 63 and accompanying text.

[69] *Id.*

[70] Robles v. Domino's Pizza LLC, 913 F.3d 898, 902 (9th Cir. 2019).

[71] *Id.*

[72] *Id.* at 904.

[73] Reply Brief for Plaintiff-Appellant at 16–17, 23, Robles v. Domino's Pizza LLC, 913 F.3d 898 (9th Cir. 2019) (No. 17-55504).

accessible—tens of thousands of dollars for a multi-billion dollar company.[74]

In *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes*, Harris Funeral Homes was probably quite civil when it fired Aimee Stephens after she explained she would live and work as a transgender woman although she had been hired initially as a cisgender man.[75] In fact, the civility and previous rapport between her and her employer, and the subsequent feelings of her employer betraying their civil relationship, was what encouraged her to pursue her employment discrimination case in the first place: "I'd given quite a few years to them, I had good reviews, we got along good—then all of a sudden it's 'We don't need you anymore.' I got mad enough to do something about it."[76] At trial, the defense for Harris Funeral Homes referred to Stephens's dead personal pronouns of "he" and "him."[77] On appeal, the defense insisted that the owner would have fired a woman for violating the company's dress code if she had worn pants instead of a skirt: one of the requirements of persuading the justices that the sex discrimination clause of Section VII of the 1964 Civil Rights Act does not apply.[78]

Trans+ activist and lawyer Richard Juang writes on the importance of recognition for trans+ individuals: "Being recognized within a liberal democracy means being valued, having one's dignity protected, and possessing some access to public self-expression. The struggle for recognition's key components—value, dignity, and self-expression—is a cornerstone of modern U.S. political, social, and cultural activity."[79] Connecting Juang's insights on trans+ rights to racial ones, "civil racism" that preserves civility over racial equality can also preclude dignity. The preservation of civility is also at the expense of human dignity. Given

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[74] Petition for a Writ of Certiorari at 28, Robles v. Domino's Pizza LLC, 913 F.3d 898 (9th Cir. 2019) (No. 17-55504); Kate Cox, *Accessibility, the Future, and Why* Domino's *Matters*, ARS TECHNICA (Oct. 20, 2019, 10:15 AM), https://arstechnica.com/tech-policy/2019/10/accessibility-the-future-and-why-dominos-matters/.

[75] EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560, 568–69 (6th Cir. 2018); Totenberg, *supra* note 66.

[76] Katelyn Burns, *The Supreme Court Is Finally Taking on Trans Rights. Here's the Woman Who Started It All*, VOX (Oct. 7, 2019, 4:40 PM), https://www.vox.com/latest-news/2019/10/7/20903503/trans-supreme-court-decision-employment-discrimination-aimee-stephens.

[77] *See* Defendant R.G. & G.R. Harris Funeral Homes, Inc.'s Motion to Dismiss at 11, EEOC v. R.G. & G.R. Harris Funeral Homes, 201 F. Supp. 3d 837 (E.D. Mich. 2016) (No. 2:14-cv-13710), 2014 WL 6805999 ("First, Anthony is not, in fact, a woman. As discussed above, *he* is biologically, anatomically and legally, a man. *He* may assert -- against all objective evidence -- that *he* is a woman, but there is no medical or legal authority that would support *him* in that assertion. *He* may intend to undergo therapy and surgery that might to some extent change *his* physical appearance to resemble a female. But doing so would not make *him* a female and, in any event, *he* has not done so yet." (emphasis added)).

[78] *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 567.

[79] Richard M. Juang, *Transgendering the Politics of Recognition*, *in* THE TRANSGENDER STUDIES READER 706, 706 (Susan Stryker & Stephen Whittle eds., 2006).

recent frustrations with the limited universality and applicability of human rights and even equality, secular political theories have renewed interest in the concept of dignity. Through Black freedom struggles as Vincent Lloyd posits, dignity, in this case Black dignity, is achieved through collective struggle against White supremacy.[80] Thinking civility, humanity, and dignity together reveals that dignity can be present or absent in contesting or conforming, respectively, to multiple vectors of oppression (racist, ableist, gender, cis-heteronormative, economic, religious, colonialist) in what Patricia Hill Collins constructs as the "matrix of domination."[81] In conceptualizing dignity, there is dignity through struggle against oppression, or where there is no struggle, there is no dignity. The presence or absence of dignity through struggle is unlike the hierarchies of human, in which even what constitutes the human is questioned from new materialist critiques, and has been historically hierarchized into what philosopher Sylvia Wynter terms "genres of being human,"[82] or value which also can be graduated or measured into more or less than.

CONCLUSION

Looking at violence—whether racist, gendered, queer/transphobic, or ableist—in relation to civility transforms notions of justice and fairness and compels us to reevaluate the responsibilities of the individual and the state to protect rights and foster democracy. Examining perceptions of civility in relation to protest often exposes the limits of inclusion and participation promised by the Constitution. Analyzing civility can change how we might try to align our behaviors with our understanding of democratic practices. The types of occasion in which we promote civility reveal the ways in which we think society and the state function best, as well as how individuals and institutions encourage or coerce us to facilitate or thwart structures that maintain civil society.

Civility is useful, but in a vastly limited sense that is little acknowledged by its proponents. If acts or people are called out for their incivility, then the incivilities reference—politely, of course—both the ugly acts of white supremacy, ableism, misogyny, or compulsory heterosexuality and the protest against them. Or the term incivility is used to weaken the claims of those accused of being uncivil. Civility can signal the demand to quell or ignore protest. Civility can also signal the obfuscation of an intent to silence or exclude. Thus, as popular terms in

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[80] Vincent Lloyd, *Black Dignity*, 68 CROSSCURRENTS 73, 76, 78, 89–90 (2018).

[81] PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 1, 299 (2d ed. 2000).

[82] Sylvia Wynter, *Unsettling the Coloniality of Being/Power/Truth/Freedom: Towards the Human, After Man, Its Overrepresentation—An Argument*, 3 CR: NEW CENTENNIAL REV. 257, 269, 316–17 (2003).

wide use, civility and incivility are moreso codewords, tools, or instruments that mask a political agenda separate from movements towards full citizenship, equality, dignity, and humanity.