ARTICLES

A Tale of Two Civilities

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ABSTRACT

The movement for civility in American law led by Chief Justice Warren Burger in the early 1970s was aimed at containing radical legal practice—not, initially, at taming excessively adversarial litigation or at facilitating mutual understanding, the typical concerns of legal civility initiatives today. The history of legal civility complicates contemporary calls for civility and civil discourse as solutions to political polarization and distrust of institutions, even as it reinforces the significance of the questions posed by competing ideals of civility.

This article revisits the historical roots of civility discourse in law during the 1970s and explains how Burger promoted civility in legal practice to strengthen the legitimacy of legal institutions against critique. This formulation of civility advanced an ethos of restraint to preserve social order. Critics of Burger's initiatives offered alternative formulations of legal civility that were committed to mutual understanding and to building connection across fundamental differences.

The article argues that the coexistence of the two forms of civility that emerged in the 1970s—Burger's formulation of civility as way to use decorum to reinforce the legitimacy of legal institutions, and alternative formulations of civility as ways of fostering mutual understanding amidst skepticism of institutions—has generated incoherence. Neither Burger's model of civility nor its relational alternatives can mend our social and political fractures. The article concludes by offering a reimagined civility—that not only balances care with critique but also offers a path forward for legal institutions protecting their legitimacy in a deeply polarized society.

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INTRODUCTION

The movement for civility in contemporary American law, led by Chief Justice Warren Burger, was aimed at containing radical legal practice—not at taming excessively adversarial litigation or facilitating mutual understanding.[1] This history is important today, given the ubiquity of calls for civility and civil dialogue in this moment of political polarization and institutional distrust.[2] Proponents of civility claim that it fosters mutual understanding across social and political divides while strengthening respect for the public institutions—such as courts—tasked with addressing society's most contentious issues. Critics of civility assert that it preserves hierarchies by silencing dissent. These general arguments about civility ignore how these principles responded to specific legal and political controversies in the 1970s that reshaped the profession's understanding of its role in society.

This article revisits the history of law's relationship with civility to uncover a more complex story than the one offered by contemporary proponents of civility.[3] It makes three interrelated points.

First, concern with civility in the law arose circa 1971 in response to two distinct tensions within law: young lawyers challenged the institutional structure of law by using trials to make arguments about the nature of justice in American law, and transformations in the market for legal services yielded increasingly aggressive practices that challenged lawyers' sense of genteel professionalism. Interest in civility was motivated by specific legal conduct, but the distinction between stylistic concerns and concerns about justice became increasingly blurred.

Second, these concerns generated two distinct responses: Burger and his allies understood civility as an ethic of restraint, in which lawyers would sustain the legal process by keeping their practices "within bounds," while Burger's critics took foundational disagreement as their starting point and developed an

1. Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971).

2. Harvard University, for example, has launched several initiatives to promote civil discourse. *See, e.g.*, *Dialogue Across Differences*, HARV. UNIV., https://www.harvard.edu/in-focus/discourse-across-differences/ [https://perma.cc/9YBW-B3N7] (last visited Oct. 26, 2025); *see also*, *Report of Harvard University's Open Inquiry and Constructive Dialogue Working Group,* HARV. UNIV., https://provost.harvard.edu/sites/hwpi.harvard.edu/files/provost/files/open_inquiry_constructive_dialogue_report_october_2024.pdf [https://perma.cc/K2FB-WLNS] (last visited Oct. 26, 2025).

3. As an example of a contemporary analyst of civility citing Burger, *see, e.g.*, Melissa Mortazavi, *Incivility as Identity*, 2020 MICH. ST. L. REV. 939, 941 n.6 (2020). This history was already lost during the brief flurry of legal studies of civility in the 1990s. *See generally* Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727 (1996) (describing the concern that civility was being eroded amidst a coarsening of public discourse); STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY (1998) (describing civility as a moral obligation under threat). While insightful, these authors' diagnoses of incivility in the 1990s are at odds with the manifestations of incivility today. Kronman, for example, identified the cause of incivility as an extreme form of self-interest that yields a "loss of political appetite, . . . a diminishment of the love of political action for its own sake." Kronman, *supra*, at 742. As this article explains, the motivation for theorizing civility in the 1970s was to address the highly political stakes of law, as it is today.

alternative model for building community through substantive engagements with difference. Ideas of civility responded to concrete concerns.

Third, these two distinct visions became confounded as lawyers invoked them in such domains as legal education, legal ethics, and dispute resolution. Appeals to civility today reflect these two legacies, sometimes framed as preserving the integrity of some pre-existing community, and sometimes framed as forging connections across fundamental differences. We cannot address our own concerns about the relationship between legal institutions and social cohesion without understanding this tension within civility.

In the early 1970s, concerns about incivility in legal practice captured the attention of the legal profession. Chief Justice Warren Burger, lower court judges,[4] law school deans,[5] and leaders of bar associations[6] all warned that radical approaches to trial advocacy—those making structural critiques of the legal system—undermined the legitimacy of legal rules and institutions.[7] Civility discourse initially targeted disruptive trial practice, such as in the Chicago Eight or Black Panther trials, as acts of political praxis that lay beyond the pale of proper—i.e., "civil"—lawyering. But the concern with incivility soon broadened to encompass rudeness, aggressiveness, and general "bad behavior" in legal advocacy amidst broader social changes.[8]

Efforts to promote civility as a foundation for legal practice reinforced the conceptual boundaries between law and politics. By conflating radical praxis with uncivil style, elite lawyers dismissed fundamental critiques of the law's role in addressing inequality and social discontent. Far from addressing the substantive concerns raised by radical lawyers, civility discourse made the political stakes of law both harder to discern and easier to dismiss.[9] Radical trial practice—using legal processes to challenge the legitimacy of legal institutions from within—was excluded from the realm of trial advocacy proper, *necessarily* uncivil because it was out of bounds and indecorous.

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4. *See, e.g.*, Irving R. Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175 (1974).

5. *See, e.g.*, Thomas Ehrlich, *Manners, Morals and Legal Education*, 58 A.B.A. J. 1175 (1972).

6. *See, e.g.*, *American College of Trial Lawyers Report and Recommendation on Disruption of the Judicial Process*, 16 CATH. LAW. 242 (1970); A. Harold Frost, *Civility in the Courts*, 7 INTL. SOC'Y BARRISTERS Q. 15, 15 (1972).

7. *See, e.g.*, NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON COURTROOM CONDUCT 5 (Pantheon Books eds., 1st ed. 1973).

8. *See, e.g.*, Burke Marshall, *Preface* to NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REPORT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPECIAL COMMITTEE ON COURTROOM CONDUCT, at xiii–xiv (1st ed. 1973).

9. This dynamic was not limited to the legal profession; institutional critique in the art world, such as by Hans Haacke, exposed similar processes. *See* Howard S. Becker & John Walton, *Social Science and the Work of Hans Haacke*, *in* FRAMING AND BEING FRAMED: 7 WORKS 1970–75 145, 151 (Hans Haacke ed., 1975) ("Defining a challenge to power as a lapse in taste is a way of denying its political import. Conversely, such a definition makes it possible to make a political statement out of an act of bad taste.").

Alternatives to civility (which I label civility' (i.e., "civility-prime"), an admittedly clunky term for a concept that began its life as the *inverse* of civility and gradually *replaced* it to a large degree[10]) emerged in the 1970s to engage with the substance of the critiques that legal civility initiatives were designed to circumvent. These alternatives sought to peacefully address conflict by cutting through civility's concern with style, manners, and procedural regularity to reach the substantive human stakes of conflict. Where the model of civility endorsed by Burger aimed at the preservation of public institutions through the means of decorous communication, civility' aimed at the cultivation of mutual understanding, forging community out of difference.

The term "civility" in the law today describes a conceptual cloud clustered around the two distinct projects that took shape in the 1970s: one directed toward the protection of institutional legitimacy through good manners and decorum, and one directed toward advancing mutual understanding amidst a suspicion of institutions. The ambiguity has rendered civility discourse incoherent. My goal is not to define "civility" in the law, but to situate it within legal and political questions of the 1970s in order to identify its possibilities and limitations today.

Part I gives an overview of civility in American legal and political thought. It explains how civility functions as a procedural value that facilitates communication between contending parties within a shared order. It does so by channeling communication within established limits, regardless of the validity of those limits. As such, it is as capable of preserving unjust social orders as it is of preserving just ones. Left unaddressed is whether the boundaries of civility can be changed through civil means.

Part II traces how civility became a contested concept circa 1971. It examines how radical lawyering practices—such as those used in the Chicago Eight and Black Panther trials—challenged institutional legitimacy and tested the limits of civility. This section distinguishes between two forms of legal incivility: *incivility-as-praxis*, with which radical lawyers deliberately challenged institutions to expose systemic injustices; and *incivility-as-style*, characterized by aggressive, excessively adversarial lawyering within a changing market for legal services. Civility discourse became associated with questions of style, distancing civility from its political foundations.

Part III analyzes the legal establishment's efforts to address rising incivility in the '70s. Chief Justice Burger and others framed civility as essential for maintaining trust in legal institutions, emphasizing the role of decorum in strengthening the legitimacy of the legal system. Yet, these efforts faced immediate challenges from those who questioned the goal of preserving an institutional structure they found unjust, and who prioritized building connection and understanding across fundamental differences.

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10. Readers who find the ideal of civility elaborated by Burger to be alien to their own understanding of civility may find that their view is more aligned with the dialogical civility'.

Part IV examines how these competing visions of civility played out within three domains in the '70s: legal education, legal ethics, and dispute resolution. It explores how some initiatives aimed to reinforce Burger's vision of civility—promoting respectful conduct to protect the legitimacy of institutions that maintained public order—while others embraced alternative approaches that emphasized interpersonal connection and critique.

Part V brings the discussion to the present day, showing how the tension between competing visions of civility continues to shape legal and political discourse. It argues that contemporary calls for civility fail to address the deeper challenges to institutional legitimacy. The article concludes by suggesting that neither civility nor its relational alternatives are sufficient for addressing today's conflicts. A new model is needed—one that balances care with critique, fosters genuine engagement, and acknowledges the contested nature of institutional authority.

I. THE IDEA OF CIVILITY

It can be hard to tell whether the concept of civility is meaningful at all. Consider two recent analyses of Martin Luther King Jr.'s 1963 *Letter from Birmingham City Jail*, a key text of the civil rights movement.[11] In this letter, King forcefully responded to the white clergy of Birmingham, Alabama, who had labeled his activism "unwise and untimely."[12] Two contemporary scholars of civility, Alexandra Hudson and Alex Zamalin, both praise King's letter as a profound statement on racial equality and a powerful condemnation of Jim Crow.[13] Yet they locate its power in starkly opposing ways: Hudson finds the power of King's letter in its *exemplification* of principles of civility,[14] while Zamalin finds the power of King's letter in its *rejection* of principles of civility.[15] How can two

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11. MARTIN LUTHER KING JR., *Letter from Birmingham City Jail*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES 289 (James M. Washington ed. 1986).

12. *Id.*

13. ALEXANDRA HUDSON, THE SOUL OF CIVILITY: TIMELESS PRINCIPLES TO HEAL SOCIETY AND OURSELVES 214–16 (2023); ALEX ZAMALIN, AGAINST CIVILITY: THE HIDDEN RACISM IN OUR OBSESSION WITH CIVILITY 74 (2021).

14. HUDSON, *supra* note 13, at 13. As examples of civility, King underscores the connectedness of Southerners (and Americans and, most generally, all the peoples of the world) across racial lines: "We are caught in an inescapable network of mutuality, tied in a single garment of destiny." KING, *supra* note 11, at 290. He emphasizes his desire for peaceful, mutually agreeable resolution: "You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action." *Id.* at 291. He has the courage to argue for "the need for nonviolent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood." *Id.* His aim in combatting segregation is to confront "an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness" in an appeal to mutual recognition. *Id.* at 294. His letter, while strongly worded, appeals to what he holds in common with his interlocutors: "I hope this letter finds you strong in the faith. I also hope that circumstances will soon make it possible for me to meet each of you, not as an integrationist or a civil-rights leader but as a fellow clergyman and a Christian brother." *Id.* at 302.

15. ZAMALIN, *supra* note 13. King identifies the limits of the civility preached by authorities in Birmingham: "You warmly commended the Birmingham police force for keeping 'order' and 'preventing

thoughtful readers interpret the relationship between King's words and principles of civility so differently, and what does their disagreement mean for the invocation of civility as a response to social conflict?

This disagreement reflects a larger debate about the nature of civility. Zamalin rightly critiques the sanitization of King's radicalism, arguing that King's posthumous transformation into a symbol of civility and unity obscures the forcefulness of his message.[16] Hudson, by contrast, emphasizes King's reliance on the language of love and respect, suggesting that they are the source of his letter's power.[17] But is love a manifestation of civility, or does it belong to a different moral framework?[18]

At its core, civility concerns the conditions for participation in civil society.[19] It requires adherence to shared rules of conduct, including those defined by law and by basic social norms.[20] Sociologist Edward Shils defined it in 1980 as "a belief in the community of contending parties within a morally valid unity of society" and "a belief in the validity or legitimacy of the governmental institutions which lay down rules and resolve conflicts."[21] Civility concerns relations between contending parties—but always with reference to some larger social or institutional structure whose legitimacy is assumed. What happens to those relations between contending parties when the legitimacy of that larger structure is questioned?

Unlike substantive ideals of justice or equality, civility is fundamentally procedural. It focuses on *how* we engage with others, not *why*; it emphasizes rule-following rather than rule-questioning.[22] But demonstrating adherence to rules and shared norms requires navigating contradictory commands. The practice of "civil disobedience," understood as willing disobedience to specific laws through an

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violence.' I don't believe you would have so warmly commended the police force if you had seen its angry violent dogs literally biting six unarmed, nonviolent Negroes." KING, *supra* note 11, at 301. He denies that the possibility of violence discredits the righteousness of the civil rights movement: "We must come to see, as the federal courts have consistently affirmed, that it is wrong to urge an individual to withdraw his efforts to gain his basic constitutional rights because the quest may precipitate violence." *Id.* at 296. He rejects the notion that the preservation of social order is the supreme value: "I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen's Counciler or the Ku Klux Klanner, but the white moderate who is more devoted to 'order' than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, 'I agree with you in the goal you seek, but I can't agree with your methods of direct action'; who paternalistically feels that he can set the timetable for another man's freedom." *Id.* at 295.

16. ZAMALIN, *supra* note 13, at 72.

17. HUDSON, *supra* note 13, at 223.

18. *See* TERESA BEJAN, MERE CIVILITY: DISAGREEMENT AND THE LIMITS OF TOLERATION 14 (2017).

19. *See, e.g.*, Laurel Rigertas, *Demonstrating Civility: A Law School Learning Outcome*, 112 KY. L.J. 413, 419–20 (2023–24); Cheshire Calhoun, *The Virtue of Civility*, 29 PHIL. & PUB. AFF. 251, 252 (2000).

20. *See* Rigertas, *supra* note 19; Calhoun, *supra* note 19.

21. EDWARD SHILS, *Observations on Some Tribulations of Civility*, *in* THE VIRTUE OF CIVILITY: SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY 3, 4 (Steven Grosby ed. 1997).

22. *See* Calhoun, *supra* note 19.

appeal to some higher law, for example, remains "civil" if grounded in shared commitments but risks "incivility" if decoupled from them.[23]

Civility differs from values like respect and tolerance.[24] It requires the outward *performance* of actions demonstrating respect or tolerance, regardless of one's subjective inner feelings or beliefs.[25] The display of socially approved markers of respect enables individuals to navigate social and civic spaces.[26] Proponents of civility argue that this outward demonstration of respect establishes the social foundation for dialogue and the rule of law, even in the absence of a more demanding requirement of genuine mutual respect.[27]

Civility is concerned with surfaces rather than with the underlying substance of private conduct or belief.[28] For example, Cheshire Calhoun argues that an adulterer who hides his infidelity may be *inconsiderate* but is not necessarily *uncivil*; likewise, someone who privately harbors racist or sexist views may be *disrespectful* but is not *uncivil* unless those views are expressed publicly.[29] While we may condemn infidelity or private expressions of hatred or prejudice on moral grounds, those judgments fall outside the domain of civility.

Critics of civility dismiss it for its concern with appearances rather than with authenticity and substantive justice.[30] Civility does not demand genuine respect or fellowship; it is satisfied by its facsimile.[31] For example, social norms may require heightened demonstrations of respect toward authority figures, even when critical inquiry suggests such respect is undeserved.[32] Critics contend that this emphasis on appearances obscures deeper injustices. Civility, they argue,

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23. Harris Wofford Jr., *Comment* on Peter Gay, *Law, Order, and Enlightenment*, *in* IS LAW DEAD? 32, 36 (Eugene V. Rostow ed. 1971) ("By specifying and emphasizing the *civility*, that is, nonviolence and respectful—Gandhi insisted cheerful—acceptance of the law's sanction, [civil disobedience] seeks not to abolish the law but to fulfill it. The voluntary suffering of such jail-going is undertaken as a hopefully potent form of persuasion within the pale of our legal system.").

24. Calhoun, *supra* note 19, at 254–55.

25. *See* BEJAN, *supra* note 18, at 6; AUSTIN SARAT, *The Meanings and Uses of Civility*, *in* CIVILITY, LEGALITY, AND JUSTICE IN AMERICA 1, 4 (Austin Sarat ed. 2014).

26. Calhoun, *supra* note 19, at 260; Keith J. Bybee, *The Rise of Trump and the Death of Civility*, 16 L., CULTURE & HUMANITIES 6, 9 (2020).

27. *See* Calhoun, *supra* note 19, at 260.

28. Jeremy Waldron, *Civility and Formality*, *in* CIVILITY, LEGALITY, AND JUSTICE IN AMERICA, *supra* note 25, at 46, 52 (explaining that civility "involves a willingness to respect the formalities of an interaction and to put one's feelings toward the person you are dealing with—whether they are warm feelings, hostile feelings, or feelings of indifference—to one side, at least in the sense of subordinating them to and disciplining them with the rules prescribed for the interaction").

29. Calhoun, *supra* note 19, at 262.

30. ZAMALIN, *supra* note 13, at 9; *see also* SHILS, *The Virtue of Civility*, *in* THE VIRTUE OF CIVILITY, *supra* note 21, at 320, 339.

31. Calhoun, *supra* note 19, at 263–64.

32. *See, e.g.*, Bernard E. Harcourt, *The Politics of Incivility*, 54 ARIZ. L. REV. 345, 370 (2012) (explaining how seemingly civil conduct can be coupled with extreme outcomes); *see also* SHILS, *The Virtue of Civility*, *supra* note 21, at 338 ("The dignity which is accorded to a person who is the object of civil conduct or good manners is dignity of moral worth. . . . It makes no reference to his merit or dignity in general, in all other situations.").

preserves peace and order at the expense of truth and justice.[33] The veneer of civility masks the ugly truth of the status quo.

Yet it is civility's superficiality that gives it power as a communicative virtue. By requiring outward demonstrations of respect, civility enables individuals to coexist with those whose beliefs they find deeply objectionable.[34] Civility norms come into play amidst differing perspectives on a given problem and therefore *cannot* reflect the private moral framework of any individual parties; they only function because they are held in common.[35] Mutual adherence to civility norms shields individuals from experiencing the psychic discomfort of confronting others' unvarnished views of them, creating a shared space where dialogue and reasoning remain possible, provided they remain within established bounds.[36] Civility, in this sense, is not about unmasking injustice but about providing a protective mask that allows individuals to engage in the social and civic world while limiting the extent of the injuries they can experience. It "creates an environment where citizens are able to behave justly, but it is not justice itself."[37]

Civility norms set protective boundaries to facilitate dialogue. These norms can help sustain discussion among parties who might otherwise withdraw in the face of strong disagreement.[38] Civility focuses attention on the arguments being made rather than on extreme or socially foreclosed views.[39] But as we have seen in recent years, many perspectives that were foreclosed in polite company have been reopened; the boundaries containing civil dialogue are rarely clear or settled.[40] Civility enables us to work through genuine controversies, but only within the limited scope of legitimate debate; controversies that exceed the scope of legitimate debate are *per se* uncivil, and contesting the boundaries of legitimate debate may require exceeding the bounds of civility.

Ultimately, civility's role as a process-oriented, communicative value both enables and constrains dialogue. It creates space for engagement but does so by prioritizing appearances over substance. Civility does not equip us to unmask injustice—it is itself a mask. But this mask serves as a form of personal protective equipment, allowing us to navigate interactions that might otherwise expose us to

33. ZAMALIN, *supra* note 13, at 10.

34. Calhoun, *supra* note 19, at 272.

35. *Id*. at 271.

36. *Id*. at 266; *see also* SHILS, *supra* note 21, at 339.

37. Amy R. Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1219 (2011).

38. Calhoun, *supra* note 19, at 269; Waldron, *supra* note 28, at 59.

39. Calhoun, *supra* note 19, at 272; J.P. Messina, *Ethics in Conversation: Why "Mere" Civility Is Not Enough*, 20 GEO. J.L. & PUB. POL'Y 1033, 1044 (2022).

40. Barak Orbach, *On Hubris, Civility, and Incivility*, 54 ARIZ. L. REV. 443, 448 (2012); *see also* Calhoun, *supra* note 19, at 275 ("While it is true that in morally imperfect social worlds civility norms fail to protect the disesteemed, the problem is not that civility is overvalued; and the solution is not to care less about being civil. The problem is in the shared understandings embedded in our norms of civility."). Unclear in Calhoun's defense of civility is whether this contestation of shared understandings can occur within the bounds of civility.

harm while enabling participation in formal legal and civic spaces. Civility's artifice, then, is the source of both its strength and its enduring critique.

II. CIVILITY AND ITS DISCONTENTS: THE EMERGENCE OF CIVILITY AS AN ORGANIZING PRINCIPLE IN LAW

Civility promises to hold society together when social bonds are tested—even when those bonds are unjust.[41] During the 1950s and '60s, as American society grappled with the meaning of equality and sought remedies to heal deep racial divisions without further exacerbating them, civility emerged as a critical framework for navigating these tensions.[42] How does one fight for fundamental rights within a legal system defined by formal inequality? Which planks of the existing system could be salvaged and repurposed, and which were fundamentally rotten? As cracks formed in the foundation of Jim Crow, how hard should one push to demolish the system entirely? These questions lie at the heart of the civil rights movement, exposing both the potential and the limits of civility as a tool for social change.

The optimism of postwar America—the dream of achieving a harmonious society built on equality, economic growth, and social progress—was tested to its breaking point by the late 1960s and early 1970s. Political assassinations, social unrest, economic strain, and cultural upheaval marked a period when the seemingly boundless horizon of postwar prosperity suddenly contracted. Vietnam veterans struggled to reintegrate into society, the social safety net began to fray, and inflation sapped confidence in the possibility of economic growth.[43] The tawdriness of Watergate exposed both the fragility of political institutions and the lawlessness at the pinnacle of American government,[44] while movements for racial and gender equality exposed the fragility of foundational assumptions about the social order.[45] We can only understand the emergence of civility as a key concern for legal practice in the 1970s against this backdrop.

Challenges to the legal and cultural foundations of social order exposed the limits of civility as a framework for holding society together. Incivility in legal practice manifested in two distinct forms: principled actors intentionally disrupted norms to challenge systemic inequality through a form of *incivility-as-praxis*; and growing adversarialism within legal practice generally, heightened by structural changes in the market for legal services, transformed law into a more cutthroat and combative arena, leading to a form of *incivility-as-style*. Incivility-as-praxis challenged the boundary between law and politics, raising questions about the very meaning of the rule of law. The transformations in the legal market

41. ZAMALIN, *supra* note 13, at 6.

42. *Id.* at 71.

43. *See* KATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 2–8, 32–34 (2018).

44. *Id.* at 2.

45. *Id.* at 35–36.

that incentivized incivility-as-style posed a different threat to the legitimacy of legal institutions as spaces for reasoned problem-solving. The concern with both forms of incivility revealed a profession struggling to reconcile the promise of justice with the constraints of existing systems.

A. CONTESTING CIVILITY AND CIVIL RIGHTS

Although Martin Luther King Jr. is often celebrated today as a unifying and "civil" figure, he was seen as anything but in his own time.[46] King's advocacy unsettled entrenched norms, revealing the fragility of the appeals to public order that upheld segregation and inequality. His commitment to non-violence was not passive; it was a strategic response to the inevitability of state violence.[47] By exposing himself and his followers to the brutality of the forces upholding segregation, King revealed the hollowness of the appeals to public order that perpetuated Jim Crow.[48] For this reason, Alex Zamalin views King as an exemplar of the value of being *uncivil*—of refusing to abide by norms that protect the status quo.[49] At the same time, King's insistence on non-violence, rooted in love and a deep sense of interconnectedness, underscores how his advocacy was grounded in the search for a shared moral framework.[50] This is the foundation for Alexandra Hudson's claim that King's work exemplifies civility.[51] These contrasting readings reveal civility to be both a bridge and a battleground, fostering dialogue and forging connections while setting boundaries on permissible dissent.

The civil rights movement of the 1950s and '60s addressed the question of what it meant to be an equal member of American society. The movement had always been heavily lawyered, with landmark cases like *Brown v. Board of Education* using constitutional principles to challenge institutionalized segregation.[52] But the broader fight for civil rights extended far beyond courtrooms, involving legislative advocacy, grassroots organizing, and direct action—the stuff of politics.[53] As progress stalled in legislatures amidst a backlash to early victories,[54] attention shifted to executive agencies and courts, which were often more insulated from public sentiment and more willing to articulate expansive

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46. ZAMALIN, *supra* note 13, at 72.

47. *Id*. at 73–74.

48. KING, *supra* note 11, at 301.

49. ZAMALIN, *supra* note 13, at 72.

50. Martha Nussbaum explains that, for King, it was not enough to simply refrain from violence; rather, "[i]t is only through the inner transformation involved in replacing resentment by love and generosity that nonviolence can ever become creative." MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE 218 (2016).

51. HUDSON, *supra* note 13, at 214–16.

52. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

53. *See, e.g.*, TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT (2011).

54. *See* JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 648–51 (1996).

visions of rights.[55] Legal advocacy increasingly became a tool for advancing the project of ending segregation, as lawyers invoked rights to push for structural change.[56] The centrality of law to this struggle attracted a more diverse pool of lawyers, with strong commitments to matters of social justice.[57] As courtrooms became central battlegrounds for civil rights, critics warned that they were being transformed into sites of political contestation rather than neutral adjudication—a critique that would become central to the civility debates of the 1970s.[58]

By the mid-1960s, the movement evolved in new directions. The invocation of "Black Power" by leaders like Stokely Carmichael signaled a shift away from the non-violence and interracial cooperation championed by King.[59] Activists argued that civility had failed to produce meaningful change. This period also saw reevaluations of earlier victories like *Brown*, as Black communities grappled with the consequences of school desegregation, including the loss of Black educators and community control.[60] Controversies over busing and the broader political complexity of desegregation further complicated the push for racial justice.[61] The foundational constitutional principles invoked by civil rights advocates were more contested than the movement's early victories had suggested.

At the same time, other racial and ethnic groups organized to demand recognition and rights. The American Indian Movement, Cesar Chavez's efforts organizing farmworkers, and the burgeoning Asian American movement reflected the growing diversity of rights advocacy—as did movements to organize white ethnic groups.[62]

Women's rights movements also gained momentum, drawing on the experiences of women who had entered the workforce during and after World War II, as well as the experiences of a younger generation who had worked in civil rights and anti-war efforts and seen their contributions marginalized.[63] The push for women's equality took many forms, from combating workplace harassment[64] to fighting for the Equal Rights Amendment.[65] The explication of women's experiences as part of a strategy of consciousness-raising was core to the creation of

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55. *Id*. at 641.

56. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

57. PATTERSON, *supra* note 54, at 641.

58. *See, e.g*., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959). For the significance of these arguments in later decades, *see infra* Section IV.A.

59. PATTERSON, *supra* note 54, at 656–57.

60. *See, e.g*., Howard Moore, Jr., Brown v Board of Education: *The Court's Relationship to Black Liberation*, *in* LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW, ORDER AND THE COURTS 55, 58–59 (Robert Lefcourt ed., 1971).

61. *See* DANIEL T. RODGERS, AGE OF FRACTURE 113 (Harv. Univ. Press 2011).

62. *Id*. at 126.

63. PATTERSON, *supra* note 54, at 645–46.

64. *Id*. at 644–46.

65. RODGERS, *supra* note 61, at 149–51; *see also* PATTERSON, *supra* note 54, at 788.

these movements.[66] These movements were hardly monolithic, reflecting tensions between middle-class, white feminists and women of color, working-class women, and radicals.[67]

Alongside these efforts, the war on poverty became a critical front in the expansion of rights. Programs from Johnson's Great Society extended substantive guarantees to the poor, on the basis of a redefinition of social benefits as grounded in property interests.[68] This vision of the state as a guarantor of opportunity and basic dignity reflected the hope of a more inclusive and equal society. Of course, this story of a consolidated liberal moment stretching from the New Deal through the Great Society obscures the deep opposition that simmered outside of the spotlight.[69]

The civil rights movement and its offshoots revealed both the potential and the limits of civility as a tool for advancing justice. On the one hand, civility norms provided a common language for appealing to principles enshrined in the Constitution, such as equality and liberty, across divisions of race, gender, or class.[70] On the other hand, these same norms constrained advocacy by reinforcing assumptions about shared commitments to the institutions that had long marginalized certain groups on the basis of race, gender, or class.[71] Where did this leave civility? Even as John Lennon invited us to join him in dreaming of a world where we would "be as one"[72] and Marvin Gaye pleaded for others to "talk to me so you can see, oh, what's going on" because "we've got to find a way to bring some understanding here today,"[73] Gil Scott-Heron warned of a revolution in which no one would "be able to plug in, turn on, and cop out."[74]

By the early 1970s, the cracks that had begun to emerge in the civil rights movement's strategies and alliances had widened into fractures, reflecting a broader disintegration of the shared assumptions that civility presupposed.[75] This shift marked the transition from civility as a contested yet functional concept to civility as a site of conflict over the nature of justice itself.

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66. RODGERS, *supra* note 61, at 148.

67. PATTERSON, *supra* note 54, at 646–48; *see also* RODGERS, *supra* note 61, at 149.

68. *See* William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 26 (1985).

69. *See generally* LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT (Princeton Univ. Press 2001) (describing the history of the conservative movement).

70. ROBERT LEFCOURT, *Introduction to* LAW AGAINST THE PEOPLE, *supra* note 60, at 1, 11.

71. *Id.*

72. JOHN LENNON, *Imagine*, *on* IMAGINE (EMI Recs. Ltd., 1971).

73. AL CLEVELAND, RENALDO BENSON, & MARVIN GAYE, *What's Going On, on* WHAT'S GOING ON (UMG Recordings, Inc., 1971).

74. GIL SCOTT-HERON, *The Revolution Will Not be Televised, on* PIECES OF A MAN (Ace Recs., 1971).

75. *See generally* RODGERS, *supra* note 61 (describing the period beginning in the 1970s as a fracturing of social reality); *see also* LEFCOURT, *supra* note 70, at 11.

B. CRISES OF INCIVILITY

The late 1960s were marked by profound social, political, and economic unrest that exposed the limits of postwar optimism and deepened existing fractures in American society. The promise of a harmonious, prosperous society began to collapse under the weight of growing divisions, shifting cultural norms, and disillusionment with institutional power, as the national economy entered a period of stagnation.

Central to this sense of disorder was the question of the proper role of law. In his 1969 Cardozo Lecture to the Association of the Bar of the City of New York (ABCNY), Edward Levi, then President of the University of Chicago, noted that "[t]he times question the idea of law and its administration . . . to what extent has law contributed significantly to basic unrest; to what extent has it contributed significantly to tactics of disorder? At issue is the very purpose of law—its function and service as a social institution."[76] Similar points were also made by the National Commission on the Causes and Prevention of Violence: "By condoning and following such policies (as high bail) the courts contribute to the 'breakdown of law' and to the establishment of an 'order' based on force without justice."[77]

Could law remain a resource for preserving social order? Eugene Rostow, former Dean of Yale Law School, convened a conference in 1970 under the auspices of the ABCNY on the theme "Is Law Dead?", noting that

> "in many sectors of our national life angry men say the pace of change is too slow. The peaceful methods of law and of democratic politics, these protesters assert, have failed as an instrument for the ordering of progress. Some deny the idea of law itself as the compass of our social system."[78]

Michael Harrington, perhaps the most prominent socialist in America, pithily summarized the mood in 1970: "how did America change its image of itself in the matter of a few years from one of consensus and cooperation to this anti-Utopia of the Violence Commission?"[79] Both establishment lawyers and more radical figures understood this as a moment of crisis in civil order.

But they differed in their diagnoses of the causes of incivility, each viewing the other as the true source of lawlessness, each seeking to return to some mythic ideal of American principles. For the legal and political establishment, radicalism, protest, and countercultural upheaval represented a collapse of order; civility required demonstrations of commitment to institutions and mutual respect. For

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76. EDWARD H. LEVI, THE CRISIS IN THE NATURE OF LAW: TWENTY-SIXTH ANNUAL BENJAMIN N. CARDOZO LECTURE BEFORE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 9 (Ass'n of the Bar of the City of N.Y. 1969).

77. LEFCOURT, *supra* note 70, at 10 (quoting JEROME H. SKOLNICK, THE POLITICS OF PROTEST: TASK FORCE ON VIOLENT ASPECTS OF PROTEST AND CONFRONTATION OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 318 (1969)).

78. Eugene V. Rostow, *Introduction to* IS LAW DEAD?, *supra* note 23, at 9, 11.

79. Michael Harrington, *Revolution*, *in* IS LAW DEAD?, *supra* note 23, at 336, 342.

activists and radicals, the crisis of incivility came from those in power, who abused their authority, suppressed dissident movements, and corrupted institutions; as law professor Edgar Cahn put it, "[t]his is a lawless society, and it is the executive branch that is acting lawlessly."[80] Appeal to the loftiest shared ideals of the U.S. Constitution had driven the civil rights movement to its victories; had the legal system now become the source of social disorder? This section outlines the growth of social conflict in the late 1960s before identifying how this conflict manifested in concerns with incivility within the courts and legal practice.

1. THE BACKDROP OF SOCIAL CONFLICT

There were many examples of incivility and disorder in the late 1960s, even if there was disagreement on its causes. The national homicide rate doubled between 1963 and 1970, emblematic of a broader sense of disorder and decline in American cities.[81] Conservatives seized upon urban unrest as evidence of moral and societal decay, while liberals, such as the authors of the Kerner Report, framed these challenges as calls for greater government intervention to address racial and economic inequality.[82] These competing interpretations reflected deeper ideological rifts that culminated in the upheavals of 1968. The assassinations of Martin Luther King Jr. in April and Robert F. Kennedy in June, along with student protests at universities around the country, most prominently at Columbia University, revealed the fragility of the social fabric.[83] The fissures were on full display at the 1968 Democratic National Convention in Chicago, where the incumbent president declined to seek re-election, as anti-war protests and clashes with police exposed the party's internal fractures and the broader public's disillusionment with the Vietnam War.[84] The draft intensified class divisions, with John Fogerty memorably declaring that he "ain't no fortunate son."[85] Groups like the Weathermen turned to violence to protest the war, bombing buildings throughout 1969 and 1970.[86] On the right, paramilitary groups emerged, reflecting a narrative of unending resistance to the state that fused the legacy of older right-wing movements with newer forms of white-power activism.[87] This polarization fueled a cycle of radical action and conservative backlash, intensifying fears of societal collapse.[88]

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80. Edgar S. Cahn, *Comment* on Hannah Arendt, *Civil Disobedience*, *in* IS LAW DEAD?, *supra* note 23, at 243, 246.

81. PATTERSON, *supra* note 54, at 665.

82. *Id.* at 664–68.

83. *Id.* at 449, 686–87.

84. *Id.* at 694–97.

85. CREEDENCE CLEARWATER REVIVAL, *Fortunate Son*, *on* WILLY AND THE POOR BOYS (Fantasy Records, 1969).

86. PATTERSON, *supra* note 54, at 716–17.

87. BELEW, *supra* note 43, at 32; *see also id.* at 63 ("although the Vietnam War had also impacted the left, the militarization of the left never matched that of the paramilitary right").

88. *Id.* at 9.

Cultural transformations, particularly those involving gender and sexuality, added to the sense of instability. Conservative reactions to these transformations framed challenges to traditional notions of social order as inherently uncivil.[89] The gay rights movement gained momentum after the 1969 Stonewall Riots,[90] challenging traditional norms and sparking a backlash that sought to reinforce traditional notions of family and masculinity.[91] Feminist movements, too, pushed for structural changes, including workplace protections and reproductive rights, with the decision in *Roe v. Wade* in 1973 becoming a flashpoint for conservative resistance.[92] These perceived threats to established gender roles deepened anxieties about the erosion of social order.[93]

The revelation of atrocities like the My Lai massacre and the expansion of the Vietnam War into Cambodia fueled massive protests that could escalate into violence.[94] At a protest held at Kent State University in Ohio in 1970, National Guardsmen killed four students.[95] The event polarized public opinion, as some mourned the loss of young lives while others celebrated the crackdown on protesters.[96] When New York City Mayor John Lindsey held a vigil for the students killed at Kent State, construction workers bludgeoned participants with their hard hats—and then presented one to President Nixon a week later.[97] The struggles of returning veterans, combined with nativist hostility toward Vietnamese refugees, further exemplified the fraying of solidarity within the nation.[98]

The economic optimism of the postwar years gave way to stagnation and crisis. Political corruption eroded trust in leadership. To Harris Wofford, it was the "contempt for law, abuse of office, and arrogance of power" coming from Vice-President Spiro Agnew "that is turning off and deeply alienating so many of the best minds of the younger generation."[99] The resignations of Agnew in 1973,[100] and President Richard Nixon in 1974, amid the Watergate scandal, symbolized the collapse of public confidence in the executive branch, further exacerbated by the ignominious end to the Vietnam War in 1975.[101] The OPEC oil embargo and soaring inflation transformed the global economy,[102] marking the beginning of a

89. *See generally* Heather Elliott & Gerald Lunn, *Civility and the Politics of Sexuality*, *in* CIVILITY, LEGALITY, AND JUSTICE IN AMERICA, *supra* note 25, at 132.

90. PATTERSON, *supra* note 54, at 711.

91. BELEW, *supra* note 43, at 9; *see also* RODGERS, *supra* note 61, at 145–46, 149.

92. RODGERS, *supra* note 61, at 165.

93. *Id*. at 170–71.

94. PATTERSON, *supra* note 54, at 756.

95. *Id*. at 754.

96. *Id*. at 755. The shooting was memorialized by Neil Young in CROSBY, STILLS, NASH & YOUNG, *Ohio*, *on* SO FAR (Atlantic, 1971).

97. PATTERSON, *supra* note 54, at 755–56.

98. BELEW, *supra* note 43, at 42.

99. Wofford, *supra* note 23, at 32–33.

100. PATTERSON, *supra* note 54, at 776.

101. *Id*. at 778.

102. RODGERS, *supra* note 61, at 9.

decade-long economic malaise.[103] The optimism of mid-century liberalism gave way to disillusionment.[104] Many heard themselves reflected in Howard Beale's cry: "I'm mad as hell and I'm not going to take this anymore!"[105] A promise of growth and opportunity yielded to retrenchment.

These ruptures in politics, culture, and the economy revealed the limits of the shared "civil religion" that had underpinned mid-century American identity.[106] The focus on collective progress gave way to a more individualistic ethos, reflecting the broader disintegration of consensus.[107] The new frontier of opportunity that had defined the postwar era seemed to close, leaving in its wake a deeper crisis of incivility. The tensions and contradictions of the 1960s had set the stage for a reorganization of social, economic, and legal life, one increasingly defined by polarization and competition.[108]

Defenders of traditional values saw the foundations of society under attack, while those challenging traditional values appealed to higher sources of shared values that they believed conservatives had abandoned. Those conflicts would play out in the courts.

2. COURTROOMS AS SITES OF SOCIAL CONFLICT

Addressing disorder through the mechanisms of the legal process raised troubling questions about the sources of this disorder and the power of the law to resolve it.[109] Federal prosecutors indicted eight leaders of the Chicago DNC protests for conspiracy and incitement to riot in March 1969, and the resulting trial became a national spectacle.[110] This spectacle could be seen from two different perspectives: for the state, the defendants and their attorneys exemplified an uncivil attitude through their mockery of a legal proceeding; for the defendants, the court itself behaved uncivilly through its treatment of them (including ordering that Bobby Seale, chairman of the Black Panther Party, be bound and gagged in court), and their responses were aimed at restoring the court's commitment to principles of justice.[111]

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103. PATTERSON, *supra* note 54, at 785.

104. *See* BELEW, *supra* note 43, at 9.

105. NETWORK (Metro-Goldwyn-Mayer 1976).

106. Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967); *see also* RODGERS, *supra* note 61, at 212, 229.

107. BELEW, *supra* note 43, at 4–5.

108. *Id*. at 4.

109. Edgar Cahn argued that "rules of fault and liability designed for application in one and only one forum, the courts" were "fundamentally the wrong forum and the wrong set of rules with which to deal with major and sustained outbreaks of protest or dissent where large segments of the population are demanding a fundamental restructuring of the ground rules which have disenfranchised or oppressed them." Cahn, *supra* note 80, at 244.

110. Jon Wiener, *Introduction: The Sixties on Trial*, *in* CONSPIRACY IN THE STREETS 1–2 (Jon Wiener ed., 2006).

111. *Id*. at 2. Edward Shils had explained that "the judiciary—if it behaved civilly—applied the law without concern for the primordial properties of kinship or race or locality but only with concern for the actions the defendants have performed and to which the rule of law is to be applied." Edward Shils, *Civility and Civil*

At trial, the defendants disagreed on strategy. Tom Hayden wanted to use the trial as an opportunity to make anti-war arguments before a national audience, explaining the motivations of the protesters at the DNC, while Abbie Hoffman, Jerry Rubin, and Dave Dellinger wanted to use the trial to "desanctify" the court.[112] For Gerald Lefcourt, an attorney sympathetic to the defendants,

> "the road chosen by the lawyers and their clients in the case was one of education, not premeditated disruption. Throughout the prosecution, before, during, and after, the defendants and their lawyers swept the country with speeches and rallies in a massive attempt to educate the young as to what was at stake and what the case was all about."[113]

The trial had shone a spotlight on them, and they would use the publicity to make moral arguments.

For Lefcourt, the spectacle demonstrated that "the trial had nothing to do with the law, nor with what happened in the streets at the Democratic Convention in August of 1968."[114] To him,

> "[i]t was clear from the evidence presented, from the treatment the case was given by the government, as well as the media coverage of the events, that the defendants were on trial because of who they were, what they advocated politically, what they wore, how they looked, and the challenge they posed to government policy."[115]

Lefcourt argued that the state, rather than the defendants, had politicized the trial as part of a *Kulturkampf*; public "criticisms of disruptive defendants and their 'unruly lawyers' did not get to the heart of the problem at that trial—the law and the legal system had become overt instruments of repression."[116]

Judge Hoffman sentenced the eight defendants and two attorneys for contempt, citing 175 distinct incidents.[117] While this suggested a defense strategy of pervasive trial disruption, a study by Harry Kalven of the University of Chicago showed that nearly all the citations stemmed from a few key moments, most notably the defense's protests against Bobby Seale being bound and gagged in court.[118] Upon retrial, only thirteen citations of contempt were upheld.[119] Hayden denied that the defendants intended to be disruptive, arguing that "[t]o the extent

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Society: Good Manners between Persons and Concern for the Common Good in Public Affairs, *in* SHILS, *supra* note 21, at 63, 72. The defendants argued that this basic principle was being violated.

112. Wiener, *supra* note 110, at 24–25.

113. Gerald B. Lefcourt, *The Radical Lawyer Under Attack*, *in* LAW AGAINST THE PEOPLE, *supra* note 60, at 253, 260.

114. *Id.*

115. *Id.*

116. *Id.* at 261.

117. Wiener, *supra* note 110, at 27.

118. *Id.* at 29.

119. *Id.* at 30.

that the judge suspended our courtroom rights . . . we affirmed a right to dissent . . . ."[120] Bill Kunstler, one of the defense attorneys charged with contempt, challenged the notion that the defendants had been disruptive, asking "what are honest and sensitive people—whether they be lawyers or laymen—supposed to do when confronted with an 'ultimate outrage' except to register, in their own way, their reaction to what is going on before their shocked eyes?"[121]

Bobby Seale, who had been ordered to be bound and gagged by Judge Hoffman in the Chicago Eight case, faced trial for murder in New Haven, Connecticut in 1970.[122] Protests of the trial in New Haven coincided with the conference organized by Dean Rostow of Yale Law School on the theme of "Is Law Dead?" Rostow observed of the protests that "[o]therwise serious scholars wondered whether it is wise or moral to try men duly charged with murder, and whether possible error on the part of a judge warranted burning a few buildings, or jail delivery."[123] Historian C. Vann Woodward, also of Yale University, noted that the scenes of protest in New Haven revealed "a crisis of confidence in the rule of law."[124] Kingman Brewster, president of the university, had issued a statement one week earlier, saying that he was "appalled and ashamed that things should have come to such a pass that I am skeptical of the ability of black revolutionaries to achieve a fair trial anywhere in the United States."[125]

Elsewhere in the United States, the Black Panthers continued to face trials. In New York, twenty-one members of the Black Panther Party (the "Panther 21") had been arrested in April 1969 and charged with conspiring to kill police officers and bomb buildings.[126] The judge set bail for the defendants at $100,000, which they argued was excessive and discriminatory when compared with bail set for others, including members of predominantly white radical groups.[127] Many on the left saw the treatment of the Panther 21 as an attack on civil liberties and raised funds for their defense.[128]

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120. Tom Hayden, *Afterword to* CONSPIRACY IN THE STREETS, *supra* note 110, at 253, 270.

121. William M. Kunstler, *Open Resistance: In Defense of the Movement*, *in* LAW AGAINST THE PEOPLE, *supra* note 60, at 267, 269.

122. *See generally* DONALD FREED, AGONY IN NEW HAVEN: THE TRIAL OF BOBBY SEALE, ERICKA HUGGINS, AND THE BLACK PANTHER PARTY (1973) (describing the Black Panther trials in New Haven).

123. Rostow, *supra* note 78, at 10.

124. C. Vann Woodward, *Comment*, *in* IS LAW DEAD?, *supra* note 23, at 285, 287.

125. Kingman Brewster, Jr., *Statement of Kingman Brester, Jr.*, YALE UNIV. LIBRARY, https://onlineexhibits.library.yale.edu/s/-free-the-new-haven-panthers-the-new-haven-nine-yale-and-the-may-day-1970-protests-that-brought-them-together/item/13061#?cv=&c=&m=&s=&xywh=-228%2C-1%2C2119%2C2119 [https://perma.cc/7SWF-HMDB] (last visited Nov. 4, 2025).

126. *See* MURRAY KEMPTON, THE BRIAR PATCH 13–14 (1973).

127. *See The Panther 21: To Judge Murtagh*, *in* LAW AGAINST THE PEOPLE, *supra* note 60, at 185, 186.

128. LUCA FALCIOLA, UP AGAINST THE LAW: RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S–1970S 110 (2022). One such fundraiser was hosted by Leonard and Felicia Bernstein—the basis for Tom Wolfe's scathing depiction of "radical chic." *See* Tom Wolfe, *Radical Chic: That Party at Lenny's*, N.Y. MAG. (June 8, 1970), https://nymag.com/docs/07/05/070529radical_chic.pdf [https://perma.cc/PB3D-55LY]. Documents from the FBI later showed that much of the harassment directed at Bernstein for his support of the Panther 21 had been instigated by the FBI itself. *See* Leonard Bernstein, *Conspiracy of Hatred*, N.Y. DAILY NEWS

The presiding judge ordered an indefinite suspension of the trial, stating that "[t]he defendants are resorting to contemptuous conduct to obstruct a fair trial. In view of their conduct to date, the defendants must give the court reliable assurance that they are prepared to accept a trial—and a fair trial."[129] The defendants responded forcefully, asking

> "[h]ow can we be in contempt of a court that is in contempt of its own laws? How can you be responsible for 'maintaining respect and dispensing justice,' when you have dispensed with justice, and you do not maintain respect for your own Constitution? How can you expect us to respect your laws, when you do not respect them yourself?"[130]

The defendants challenged the judge's implication that their lawyer had encouraged incivility, instead arguing: "The injustices we have been accorded over the past year incite us, the injustice in these hearings incites us, racism incites us, fascism incites us, in short—when we reflect back over history, its continuation up until today, you and your courts incite us."[131] The sources of incivility, they alleged, were the civil institutions of the state. At trial, one of the defendants, a pregnant Afeni Shakur, successfully revealed through cross-examination that undercover police officers had been the ones to incite violence.[132] The defendants were acquitted in May 1971.[133]

In 1974, concurrent with the Watergate hearings, Dennis Banks and Russell Means faced trial for their participation in the occupation of Wounded Knee, on the Pine Ridge reservation, by the American Indian Movement (AIM).[134] Banks and Means used the occupation and their trial to publicize the history of the federal government's treatment of the Oglala Lakota, garnering public support for their aims, including federal policy changes that responded to some of AIM's demands.[135] The spectacle of their defense paid off—particularly as prosecutorial misconduct led the judge to dismiss the charges against Banks and Means.[136] But the defense strategy also challenged the existing leadership of the Oglala Lakota as being complicit with the federal government in ways that may have undermined the community's ability to rely upon Lakota legal understandings to challenge the application of American law.[137] This foundational challenge to the

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(Oct. 19, 1980), https://www.loc.gov/resource/music.musbernstein-100020175/?sp=16&st=image [https://perma.cc/QN3N-YEXS].

129. Panther 21, *supra* note 127, at 187–88.

130. *Id.* at 202.

131. *Id.*

132. KEMPTON, *supra* note 126, at 196–240. One month after the trial, Afeni Shakur gave birth to her son, Tupac Shakur. *Id.* at 281.

133. *Id.* at 278–80.

134. Carole Goldberg, *A Law of Their Own: Native Challenges to American Law*, 25 LAW & SOC. INQUIRY 263, 268–70 (2000).

135. *Id.* at 270–71.

136. *Id.* at 269–70.

137. *Id.* at 277–80.

existing leadership structure had significant institutional costs, even as it publicized the claims of the AIM.

Edward Levi had asked whether law was the cause of social unrest, and Eugene Rostow had asked whether law was dead. By the mid-1970s, both those at the center of the legal establishment and those on its periphery were concerned with lawlessness, each seeing it manifested in the conduct of the other. Legal victories seen on the left as repudiations of repressive state tactics were seen by others as evidence that the courts were failing to discipline law breakers.[138] Public confidence in the judicial system was in decline.[139] Yale historian Peter Gay aptly captured the sentiment: "Whatever may divide Americans today, . . . all define 'law and order' as a code phrase concealing, or rather all too plainly revealing, its opposite: illegality and chaos. This is a deeply troubling state of affairs."[140] This profound disillusionment set the stage for a new civility discourse in law.

C. INCIVILITY AS PRAXIS

By the late 1960s and early 1970s, certain forms of radical lawyering had come to epitomize what critics described as "incivility" in legal practice.[141] Radical lawyers did more than zealously argue on behalf of individual clients; they challenged the very legitimacy of legal institutions themselves.[142] Through courtroom disruptions, refusals to abide by procedural norms, and overt political critiques of the legal system, radical lawyers argued that legal institutions were incapable of delivering justice to their clients.[143] The very form of advocacy was intended as a substantive argument about the limits of law.[144] This form of incivility functioned as a form of political praxis.[145] This section explains how institutionalist voices, such as Chief Justice Burger, defined radical practices as forms of incivility before explaining how these practices were aimed at giving life to foundational principles of justice. The section concludes with examples of how

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138. The opening scene of the film The Godfather, for example, begins with the declaration "I believe in America," before Amerigo Bonasera recounts to Don Corleone how the courts failed to give him justice. THE GODFATHER (Paramount Pictures 1972).

139. DORSEN & FRIEDMAN, *supra* note 7, at 5.

140. Peter Gay, *Law, Order, and Enlightenment*, *in* IS LAW DEAD?, *supra* note 23, at 21.

141. Burger, *supra* note 1, at 213.

142. Lefcourt, *supra* note 113, at 263 ("People's lawyers do not go into the courtroom to try to prevent or disrupt the process. They represent a plea for truth and an end to subterfuge, political retribution, and camouflaged legal destruction.").

143. *See, e.g.*, *id.* at 261.

144. Kunstler, *supra* note 121, at 269 ("Even an officer of the court cannot be precluded from resorting to any approach for the 'redress of grievances' available to his fellow citizens. If he firmly believes that the Black and the poor, the activists and the militants, the students and the radicals who are being crushed by laws that, on their face or as applied, violate every tenet of equality and fair play, then how can he pretend to his clients or himself that his only legitimate function is to play out the string?").

145. The question of the effectiveness of this political strategy is distinct from the question of its civility, and one I do not address in this article.

actors within the legal system made sense of these critiques within institutional constraints.

High-profile trials, such as those of the Chicago Eight and the Black Panthers, exemplified this mode of incivility-as-praxis. These trials were not merely venues for presenting evidence and legal arguments.[146] Instead, they became platforms to critique the structural injustices of the legal system.[147] Lawyers and defendants in these cases did not accept the legitimacy of the courts as neutral arbiters of justice; rather, they argued that the courts had sided with the state and had become vehicles for injustice.[148] They treated the courtroom as a stage for exposing systemic biases within legal institutions. And while critics concerned with incivility and disruption focused on the conduct of defendants and defense counsel, many mainstream observers agreed that the conduct of some judges and prosecutors also crossed lines.[149]

Incivility-as-praxis was a rejection of the procedural norms that underpinned traditional legal advocacy. By refusing to play by the established rules, radical lawyers sought to make a substantive point: that the law itself, and the institutions charged with enforcing it, were complicit in perpetuating injustice.[150] This charge was, for many, intended to force legal institutions to live up to their promise.[151]

Institutionalist critics of radical lawyers drew different distinctions, framing radicals' strategies as subordinating the neutral operations of legal process to subjective or inflammatory political values. As one critic described it, the radical strategy was to argue that:

> "(1) the nature of the trial is one which is 'political' in character and thus courtroom disruption is justified to arouse the public to the 'baneful' and 'unconstitutional' character of the proceedings, and
>
> (2) the defendant, his attorney or spectators, aggrieved by the proceedings, have felt impelled to say and do things in order to demonstrate to the courts, trial and/or appellate, their horror at the prosecutor's 'persecution.'"[152]

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146. FALCIOLA, *supra* note 128, at 97.

147. *Id*. Charles L. Black noted the centrality of racial justice to the question of law's legitimacy in observing "how the question whether 'law is dead' so easily becomes the question whether law has enough life in it to do justice to black people." Charles L. Black, Jr., *Comment*, *in* IS LAW DEAD?, *supra* note 23, at 332.

148. FALCIOLA, *supra* note 128, at 283 (explaining that "radical lawyers held firm an ontological distinction between law and justice, whereby the law is the ratification of unfair economic and social relations, and justice is an ideal of equity. While they went up against the law, radical lawyers saw justice as a horizon to aim for—a tension that could never be fully resolved, an approximation that always deserved criticism.").

149. *See, e.g*., Leon Jaworski, *Judicial Intimidation: A Threat to the Advocate's Independence*, 1 LITIG. 11, 11 (1975); Paul R. Connolly, *Civility in the Courtroom: The Judge's Obligation*, 1 LITIG. 14, 14 (1975).

150. Lefcourt, *supra* note 113, at 261.

151. Kunstler said that he was "convinced . . . that the Anglo-American legal system is, in theory at least, a generally satisfactory institution. It contains all of the ingredients necessary to insure the equitable and egalitarian resolution of conflicts among citizens and between citizens and the state." The problem, as he saw it, was that "in order to achieve the equal justice it proclaims as its essential goal, it depends wholly on the reasonable approximation of practice to preachment." Kunstler, *supra* note 121, at 271.

152. Frost, *supra* note 6, at 16 (emphasis omitted).

This strategy provoked sharp criticism from judges and established members of the legal profession. The annual meeting of the American Bar Association in St. Louis in 1970 featured four panels devoted to trial disruption, with Chief Justice Warren Burger attacking "spectacles that are undermining public confidence in the whole system."[153] The next year, Burger, speaking at the American Law Institute, decried such tactics as an existential threat to the legal system: "[a]t the drop of a hat—or less—we find adrenalin-fueled lawyers cry out that theirs is a 'political trial.' This seems to mean in today's context . . . that rules of evidence, canons of ethics and codes of professional conduct—the necessity for civility—all become irrelevant."[154] Burger's complaint was not limited to criminal trials; it also extended to claims involving "the rights of the whole of society, or claims of so-called 'new property,' or new constitutional theories."[155]

For Burger, these tactics eroded the boundaries that insulated the judicial process from political pressures, transforming trials into combat and undermining the legitimacy of legal institutions. As he explained,

> [w]hether in private negotiation or public discourse, in the legislative process or the exchanges among leaders, in the debate of parties, or the relatively simple matter of a trial in the courts, the necessity for civility is imperative. Without civility no private discussion, no public debate, no legislative process, no political campaign, *no trial of any case*, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat.[156]

Burger insisted "that good manners, disciplined behavior and civility—by whatever name—are the lubricants that prevent lawsuits from turning into combat," implying that the political use of litigation would result in disputes being resolved by force.[157] Ultimately, civility, for Burger, was nothing less than the foundation for orderly judicial process:

> The essence of the matter is that if the rights of individuals or society as a whole are to be protected, it can be accomplished only in a judicial environment of calm, orderly civility. This is true, as we know, whether the action be a simple private claim for debt or damages, a class action for a large group or an effort to control pollution of natural resources.[158]

Harold Frost, Dean of the International Academy of Trial Lawyers, argued that political trials not only "diminished the dignity of the courtroom" but also undermined public faith in the authority of the law itself.[159] Even granting the sincerity

153. DORSEN & FRIEDMAN, *supra* note 7, at 4.
154. Burger, *supra* note 1, at 213.
155. *Id.*
156. *Id.* at 212.
157. *Id.* at 214.
158. *Id.* at 216.
159. Frost, *supra* note 6, at 20.

of radical lawyers and the significance of the questions they posed, he viewed radical lawyering as an invitation to "anarchy,"[160] asserting that courts were institutionally ill-equipped to resolve broad social and political issues.[161] These issues, Frost insisted, belonged to the legislative and executive branches of government.[162] Judges such as W. Arthur Garrity and scholars like Elliott Cheatham argued that radical lawyers' defiance of procedural norms threatened the core principles of the common law itself.[163] The process of developing the law through litigation required adherence to principles of civility, they believed.

Thomas Ehrlich, Dean of Stanford Law School, attributed the rise of incivility to a generational shift, observing that many younger lawyers inspired to study law by the civil rights movement had come to view the legal profession as "positively immoral."[164] Robert Lefcourt explained that even as the legal profession "offers legal services to the upper classes for every conceivable reason . . . it generally assumes that the problems of the poor are basically nonlegal and essentially economic, social, or psychological in character."[165] This crabbed view of the problems of poverty as fundamentally nonlegal "makes impossible any affirmative use of the law to protect the economic needs of the poor."[166] For young and idealistic lawyers, the appeal of radical lawyering reflected their disillusionment with a legal system that failed to provide essential services to the indigent.[167]

Robert Borosage, writing as a law student at Yale in 1970 amidst the protests of the Black Panther trials in New Haven, explained the gap between the optimism of law students during the civil rights movements of the 1950s and early '60s and his own experience: "For the new generation of students, the war and the surfacing of terrible societal inequities have been central formative experiences."[168] Students

> "came to the law school unwilling to accept its limited channeling function. They sought instead answers to larger questions: about the just ordering of a society, about the relation of legal tools to social change, and about the relation of the law to basic concepts of fairness. They wished to address the moral implications of making policy for a government of questionable legitimacy.

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160. *See id.* at 16.

161. *Id.* at 20. Frost's view offers an interesting contrast to that of Edgar Cahn: While Frost argued for narrowing the issues addressed by courts, Cahn suggested that the nature of these social questions meant that courts were not the right forums to address these issues. *See* Cahn, *supra* note 80, at 244.

162. *See* Frost, *supra* note 6, at 20.

163. *See* W. Arthur Garrity, Jr., *The Rule of Law is Not Self-Sustaining*, 1 B. LEADER 2, 2–3 (1975); Elliott E. Cheatham, *Professional Privilege Brings Professional Responsibility*, 58 A.B.A. J. 805, 808 (1972).

164. *See* Ehrlich, *supra* note 5, at 1176.

165. Robert Lefcourt, *Lawyers for the Poor Can't Win*, *in* LAW AGAINST THE PEOPLE, *supra* note 60, at 123, 127.

166. *Id.*

167. *See* Ehrlich, *supra* note 5, at 1176–77.

168. Robert Borosage, *Can the Law School Succeed? A Proposal*, 1 YALE REV. L. & SOC. ACTION 92, 94 (1970).

> Many wanted to learn legal skills in order to use the law for the benefit of people at the bottom of the social scale."[169]

Civilitarian appeals to the fundamental righteousness of the legal system simply missed the point by failing to acknowledge the profound skepticism of legal institutions.

While genuine campus radicals were few in number, Duncan Kennedy, writing as a law student in this moment, argued that "they are practically the only people in the school who have brought into some kind of conscious focus the conflicts and currents of change" at the law school.[170] "They are aware of a fundamental problem and committed to using all of their faculties to solve it as best they can," he wrote.[171] "They tend to accept their own psychic reality, and the burden of defining themselves in a world made up of other psychically real people. For this reason, they are likely to be more perceptive than their fellow students, both about themselves and about the people around them."[172] As Kennedy described it, what distinguished the radical few was their emphasis on the human reality of the situation.

Critics of radical lawyering strategies, however, viewed efforts to question the domain of the law as a dangerous departure from the traditional role of the lawyer as a neutral advocate bound by procedural discipline. William Stanmeyer, a professor at Georgetown, recognized the radicals as "sensitive, intelligent young people who find the faceless 'establishment' cold and unresponsive."[173] He suggested that, with proper guidance, these lawyers might channel their idealism into more conventional legal roles.[174] Derek Bok, who had become President of Harvard University after serving as Dean of Harvard Law School, told law school alumni that they "have reason to be concerned about the aims and activities of those who will so soon be entering the profession, particularly when they read that students at leading institutions are deserting the established firms to work in a variety of enterprises to serve the poor and the public interest."[175] But, Bok argued, the low pay and high frustrations of working in the public interest meant that "the alternatives to the law firm are unlikely to attract them in the end."[176] The young attorneys' discontent would be defused by their being diffused throughout the profession.[177]

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169. *Id.*

170. Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 80 (1970).

171. *Id.* at 81.

172. *Id.*

173. William A. Stanmeyer, *The New Left and the Old Law*, 55 A.B.A. J. 319, 322 (1969).

174. *See id.*

175. Derek C. Bok, *New Lawyers in Old Firms*, N.Y. TIMES, Feb. 3, 1971, at 37, https://www.nytimes.com/1971/02/03/archives/new-lawyers-in-old-firms-harvards-president-sees-publicservice.html [https://perma.cc/QAE6-JQJ6].

176. *Id.*

177. *See id.*

Advancing the cause of civility in the face of student skepticism required law school administrators to practice what they preached. Student critiques provided "[t]hose of us who value civility and rationality" with opportunities to "be resourceful and flexible in channeling a potential for disruption into some useful and creative educational experience."[178] Critics needed to "be persuaded that the best way to bring about change is through careful inquiry, reasoned analysis and persuasion—the same techniques used by lawyers."[179] As Lawrence Blades, Dean of the University of Kansas School of Law, argued, "[i]f we, as lawyers, place great stock in these techniques, our faith ought to induce us to do everything possible to cultivate this approach and convince as many young people as possible that results can be achieved through this approach."[180] By demonstrating their own commitment to certain forms of argumentation, rather than resorting to force, law school faculties and administrations could demonstrate civility towards student protesters and try to show that strategic incivility was unnecessary and counterproductive.

Even those broadly sympathetic to the goals of radical lawyers expressed some concern with their tactics. They could be counterproductive, draining the energy from reformist movements while alienating the public.[181] Norman Dorsen and Leon Friedman expressed ambivalence, explaining that "as lawyers we cannot endorse any form of courtroom disruption because we believe orderly justice is vitally important for an open and free society" even as they "recognize the force of the contrary arguments," citing how prison reforms only occurred after violent confrontations.[182] Harris Wofford Jr. observed that "the Panthers and other would-be revolutionaries by their actions are raising an important point, and we cannot simply rest content with pride in the creative role that courts have played in this whole area in the past twenty years."[183] He admitted that he did not know how to deal with disruptive trial tactics, but believed that "to keep our law alive I think we must give new vitality to political dialogue, and new demonstrations of the affirmative, ennobling role of law. If we believe in a civilization of dialogue, we must accept a law that teaches by posing questions and being questioned."[184] Uncivil though this advocacy may have been, it raised important questions that resisted facile answers invoking the remedial power of litigation.

Incivility-as-praxis did not necessarily mean the rejection of civility in general. The power of strategically violating civility norms depended upon it being an intentional transgression of generally applicable civility norms that signaled the

178. Lawrence E. Blades, *The Troubled Campus*, 39 J. KAN. B. ASS'N 357, 359 (1970).
179. *Id.*
180. *Id.*
181. *See* DORSEN & FRIEDMAN, *supra* note 7, at 16–17.
182. *Id.* at 23.
183. Wofford, *supra* note 23, at 37.
184. *Id.*

seriousness of the message being conveyed.[185] That is, the strategic transgression of civility norms mattered because it was *localized*.[186] Such transgressions could be made in the service of forging a new basis for civility.[187] Transgressions of civility norms could redistribute socially accorded respect or redefine the scope of civil argumentation in ways that aligned more closely with moral arguments.[188] Challenges to existing civility norms, such as those posed by King's *Letter from Birmingham City Jail*, strove to redefine the boundaries of civility.[189]

Incivility-as-praxis raised profound questions about the role of the legal profession in addressing societal injustice. While radical lawyers argued that incivility was necessary to expose the failures of the legal system, their critics insisted that such tactics undermined the foundations of the rule of law that protected their clients.[190] For defenders of civility, the courtroom was a space for resolving disputes within the framework of shared norms, not a battleground for contesting those norms. The debate over incivility-as-praxis thus reflected a deeper struggle over the meaning of justice and the boundaries of legitimate trial advocacy.

D. INCIVILITY AS STYLE

Trial advocacy that raised political questions was not the only form of incivility that concerned the legal establishment in the 1970s. Alongside the radical lawyering of incivility-as-praxis, a distinct form of incivility emerged—one driven less by political aims than by structural changes within the profession itself. This "incivility-as-style" arose not from principled defiance but from market forces, shifting client expectations, and changing social dynamics. It manifested as an increasingly aggressive and excessively adversarial style of advocacy—celebrated by some as zealous representation, but corrosive to professional norms, interpersonal respect, and the integrity of the legal system.

The postwar expansion of the legal profession introduced intense competitive pressures. The number of practicing lawyers grew substantially, leading to

185. *See* Bybee, *supra* note 26, at 12.
186. *See id.*
187. *See id.* at 18.
188. *See* Calhoun, *supra* note 19.
189. *See* Bybee, *supra* note 26, at 23.
190. William Simon helpfully distinguishes between the "rule of law" and the "ideal of law":

> "While the ideal of law suggests that the primary obligation of officials is to secure justice in society, the rule of law suggests that their primary obligation is to safeguard the integrity of institutions. While the ideal of law emphasizes the active role of the citizen in interpreting and applying the law, the rule of law emphasizes the passive role of the citizen in respecting and acquiescing in the commands of legally constituted authority. The rule of law is a conception of legality far more compatible with stability than the ideal of law."

William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 123 (1978).

increased competition for clients.[191] Lawyer incomes declined through the 1970s and into the 1980s, eroding lawyers' financial stability.[192] Long-term client loyalty diminished, as clients demanded visible signs of vigorous advocacy. Lawyers responded by specializing in efficiently delivering expert guidance on narrow issues,[193] or by adopting aggressive tactics, equating combative postures with zealous representation. Demonstrating toughness became a marketing tool in an increasingly crowded field.[194]

Law firm culture was also changing. Loyalty to firms weakened as attorneys became "free agents," driven by personal advancement rather than commitment to a larger practice.[195] The collegial cultures of genteel firms gave way to environments where aggressive behavior was not only tolerated but often rewarded. The gradual diversification of the legal profession—particularly the increase in women and racial minorities entering law—also unsettled the old boys' networks that had enforced informal codes of conduct. By 1980, women made up over twelve percent of the legal workforce, up from just four percent in 1970,[196] while racial minorities saw similar, though slower, gains.[197] While these demographic shifts were positive steps toward diversifying the profession, they also heightened feelings of "otherness" among practitioners and uncertainty about how to act respectfully towards those from different social backgrounds, further fraying the social bonds that had previously restrained incivility.[198]

The changing nature of legal disputes further heightened adversarialism. A broader client base—spurred by economic growth, expanded legal aid programs, and the expansion of robust rights—meant more people and organizations could bring legal claims, even as fewer cases ever made it to trial.[199] The legal system saw a "liability explosion," with more cases filed and higher financial stakes.[200]

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191. The number of lawyers sharply increased from one lawyer per 700 Americans in 1960, to one lawyer per 600 Americans in 1970, to one lawyer per 410 Americans in 1980. *See* Wm. Reece Smith, Jr., *Are There Too Many Lawyers?*, 6 CAN.-U.S. L. J. 186, 187 (1983).

192. Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L. J. 671, 673 (2019).

193. 193. *See id.* at 675.

194. *See id.* at 675–76.

195. *See id.* at 675–77.

196. Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 15 (2009). Measured in terms of legal education, the percentage of women grew from 3.4% of JDs granted in 1961, to 8.6% in 1971, and to 34.2% in 1981. *See* Steve Knopper, *The Doors Were Opening*, SUPER LAWS. (Mar. 31, 2021), https://www.superlawyers.com/articles/california/the-doors-were-opening/ [https://perma.cc/78NJ-D9NU].

197. Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 286 (2014).

198. One judge noted, as late as 2000, that "some attorneys still do not understand what constitutes proper conduct when opposing counsel is a member of the opposite sex or of another race." Marvin E. Aspen, *Overcoming Barriers to Civility in Litigation*, 69 MISS. L. J. 1049, 1050 (2000).

199. *See* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255–1258 (2005) (discussing the decline in cases that terminate in trial).

200. *See* LAWRENCE M. FRIEDMAN, *THE LITIGATION REVOLUTION*, *IN* THE CAMBRIDGE HISTORY OF LAW IN AMERICA, 182–185 (Michael Grossberg & Christopher Tomlins eds., 3rd ed. 2008).

Discovery processes became lengthier and more contentious, with widespread complaints of discovery abuse.[201] Many of these disputes no longer stemmed from ongoing social or commercial relationships but were zero-sum contests of rights, where compromise was harder to achieve, and legal outcomes had political and moral stakes, with lawyers seen as defenders of a just social order.[202]

Cultural forces outside the courtroom reflected this growing adversarialism, which would become known as "Rambo litigation."[203] The figure of the lawyer as a "gladiator" became a celebrated archetype, embodying strength, aggression, and fearlessness in the courtroom.[204] This hyper-masculine ideal—rooted in broader cultural backlash against feminist movements and changing gender norms—framed litigation as a battle to be won at all costs.[205]

This combative style was not purely performative. It reflected deep anxieties about class, gender, and professional identity.[206] The aggressive posture was often framed as a defense of clients—especially those perceived as disadvantaged—against powerful adversaries.[207] Some working-class lawyers embraced the "brawler" identity as a way to signal loyalty to their clients and to distance themselves from the genteel image of the elite bar.[208]

The persistence of this adversarial style demands explanation, given the existence of alternative models of lawyering. By the 1970s, intellectual movements like law and economics offered efficiency-driven approaches to dispute resolution,[209] while feminist legal theorists promoted ethics of care and connection.[210] Countercultural movements advocated for more authentic, less combative legal processes,[211] and critical race theorists explored the law's role in perpetuating systemic injustices.[212] Yet the aggressive, gladiatorial vision of litigation

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201. *See* Ariens, *supra* note 192, at 700.

202. *See id*. at 684–85.

203. *See generally* Thomas M. Reavley, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637 (1990) (describing the rise of aggressive "Rambo" litigation tactics as harmful to the health of the legal system).

204. *See* Ariens, *supra* note 192, at 703–04; *see also* Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 551 (2000).

205. *See* Mortazavi, *supra* note 3, at 943–44.

206. *See id.*

207. *See id.*

208. *See id*.; *see also* Marvin W. Mindes, *Trickster, Hero, Helper: Do Lawyers Want to Be Liked - or Would They Rather be Feared and Hated?*, 8 B. LEADER 14, 17 (1983) (describing incivility as "protest masculinity").

209. *See, e.g*., William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

210. *See, e.g*., Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9 (1989).

211. *See, e.g*., CHARLES A. REICH, THE GREENING OF AMERICA (1970). For an argument that Reich's description of "Consciousness II" was inspired by a rejection of law firm practice as a "hired knife-thrower," *see* Rodger D. Citron, *Charles Reich's Journey from the Yale Law Journal to the New York Times Bestseller List: The Personal History of* the Greening of America, 58 N.Y.L. SCH. L. REV. 387, 397, 408–09 (2007-2008).

212. *See, e.g*., Derrick A. Bell, Jr., *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 CALIF. L. REV. 165 (1973). The article was prepared for the Dorsen & Friedman report. DORSEN & FRIEDMAN, *supra* note 7.

endured, drawing strength from its alignment with traditional masculine ideals, market incentives, and its perceived efficacy in a highly competitive legal marketplace.

Lawyers understood the long-term risks of scorched-earth tactics. Rampant adversarialism strained the legal system, corroded professional relationships, and undermined the possibility of finding cooperative solutions.[213] But the structural pressures incentivizing incivility were powerful. The short-term rewards of aggressive tactics often outweighed concerns about long-term harm to the legal system. The costs of incivility were diffuse and systemic, while the benefits were immediate and personal.

By the end of the 1970s, incivility-as-style had become a defining feature of legal practice. It was not a deliberate rejection of civility's ideals, as with incivility-as-praxis, but a consequence of market dynamics, cultural shifts, and professional anxieties. This form of incivility raised a troubling question about the future of the legal profession: Could an increasingly adversarial system still fulfill its promise of reasoned, peaceful dispute resolution?

III. CONTESTING CIVILITY

Leaders of the legal profession responded to these perceptions of incivility (both incivility-as-praxis and incivility-as-style) by working to restore a sense of civility, understood as a communicative virtue that intermediates both among individuals and between individuals and the state, enabling society to manage conflict without tearing itself apart.[214] Adherence to norms of civility, in this view, would allow individuals to demonstrate both their shared membership within society and their recognition of others as members of that society; collective adherence to institutional order would be strengthened through demonstrations of interpersonal respect.

But not everyone believed that the solution was to reinforce adherence to institutions. Amidst the growing distrust of institutions circa 1970, alternatives to civility would provide different ways to think about the preservation of social order amidst difference by prioritizing direct interpersonal connections.

A. THE MODEL OF LEGAL CIVILITY

Chief Justice Burger and other defenders of institutional stability described civility as essential to preserving the legitimacy of the legal system.[215] For them, radical lawyers' disruptive tactics undermined this legitimacy by rejecting the authority of legal procedures and institutions themselves.[216] Burger argued that

213. Mindes, *supra* note 208, at 16.

214. SHILS, *supra* note 21, at 322 ("Civility regulates conduct between individuals and between individuals and the state; it regulates the conduct of individuals towards society.").

215. DORSEN & FRIEDMAN, *supra* note 7, at 4.

216. *See, e.g.*, Frost, *supra* note 6, at 20.

the courtroom was no place to address broad questions of social justice; such matters, he asserted, belonged in the political branches, governed by the legislative process and subject to the will of voters.[217] This view was grounded in prevailing theories of Legal Process.[218]

Although Burger invoked the idea of civility in response to high-profile instances of trial disruption, he did not engage with the *substance* of the radicals' critiques. He focused instead on the *manner* of advocacy, emphasizing the need for decorum, restraint, and adherence to procedural norms.[219] Civility, in this view, functioned as a bridge: it affirmed a shared commitment to procedural fairness across deeper chasms concerning whether the system itself was just or equitable.

Civility required demonstrating adherence to a shared institutional order, offering reassurance that participation within a legal process was meaningful, even when outcomes would not advance their immediate interests.[220] This conception of civility was consistent with a liberal view of justice as fair play within agreed-upon rules and institutions, ensuring that individuals could see themselves as part of a larger social project governed by rules that apply equally to all.

Civility also operated as a tool for interpersonal engagement. This dimension of civility enabled individuals to navigate conflicts constructively and to coexist peacefully, even across deep divisions.[221] Shils described the significance of a "society of refined manners" as being "one in which the members acted with consideration towards each other, with an acknowledgement, institutionally embodied and assured, of the dignity of the individual, derived from his humanity and from his membership in the political community."[222] This individual-oriented element of civility was made possible by—and reinforced the strength of—the social element of civility.[223] But this interpersonal element could not be the full extent of civility itself.[224]

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217. Burger, *supra* note 1, at 216.

218. *See* Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 10–11 (2013).

219. *See generally* Burger, *supra* note 1 (describing the Chief Justice's belief in the need for civility at the heart of legal practice).

220. *See, e.g.*, LEVI, *supra* note 76, at 136 ("Many actions of the law find their greatest, sometimes their only, importance in symbolizing the relationship between the individual and the government. They express a standard of civility and respect, or the lack of these qualities, which can be highly influential upon conduct within the community. They have unusual consequences in a society ready to assume mistreatment by officialdom, quick to respond to the situation of the accused, doubtful whether proper recognition has been given to the citizen as a person.").

221. *See, e.g.*, *Remarks of Warren E. Burger, Chief Justice of the United States Supreme Court*, 3 UTAH B.J. 10, 10 (1975).

222. SHILS, *supra* note 21, at 326.

223. *See* Edward Shils, *Nation, Nationality, Nationalism and Civil Society*, *in* SHILS, *supra* note 21, at 214–15 ("The civil collective self-consciousness, shared by various sectors of society, inhibits conflict between those sectors . . . The civil collective self-consciousness, drawing its support from the national collective self-consciousness, imposes the norm of the internal solidarity of the collectivity.").

224. Shils, *supra* note 111, at 80 ("Good manners, courtesy, temperate speech in relationships face-to-face, cannot be identical with the civility which is a part of civil society.").

1. CIVILITY AS THE APPEAL TO A SHARED ORDER

The ideal of a civil legal system, understood as one characterized by a mutual commitment to a shared set of rules and institutions, finds a particularly lucid articulation in John Rawls's *A Theory of Justice*.[225] Rawls's text was published in 1971, at a moment when concerns about civility in law were becoming increasingly pronounced.[226] While Rawls did not write explicitly about civility, his vision of justice informed the notion that demonstrating adherence to shared norms and rules was the basis for collective coexistence and cooperation.[227] Indeed, lawyers advocating for civility in the law explicitly drew upon his work.[228]

At the heart of Rawls's project was the challenge of reconciling the ideal of a fair and stable social order with the reality of deep social, political, and economic inequalities, the challenge that had animated the civil rights movements of the preceding decades.[229] To achieve this reconciliation, Rawls imagined a framework for rational deliberation in which individuals, stripped of their contingent identities and interests, deliberated behind a "veil of ignorance."[230] Behind this veil, participants would not know their place in society—their class, race, gender, abilities, religious affiliations, or even their personal values—and would therefore be incentivized to design a system of rules that could accommodate everyone's interests fairly.[231]

While Rawls's actors behind the veil of ignorance are highly abstracted,[232] his framework was designed to govern real-world interactions among diverse, unequal, and often conflicting individuals and groups with partisan affiliations and passionate commitments.[233] The shared rules and institutions envisioned in *A Theory of Justice* provided the structure necessary for a pluralistic society to function peacefully, allowing individuals to live their own lives while coexisting and interacting with others who might hold radically different beliefs.[234] In this sense, Rawls's theory offered a model of civility as a communicative virtue that

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225. *See* JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1971).

226. *See generally* KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019) (explaining the context of Rawls's work).

227. *Id.* at 11.

228. *See, e.g.*, Eugene V. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, *in* Is Law Dead?, *supra* note 23, at 39.

229. FORRESTER, *supra* note 226, at 42.

230. RAWLS, *supra* note 225, at 136–42.

231. *Id.* at 137.

232. *See generally* Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613 (1986) (critiquing the method of abstraction in Rawls's analysis).

233. FORRESTER, *supra* note 226, at 17.

234. As Rawls wrote in the early 1950s, "It is true . . . that men, to live together, must agree on something . . . All they need agree upon . . . is in taking common action, via the state and other general rule mechanisms, to foster the necessary and fostering conditions for any form of life at all." *Id.* at 18.

supported the shared commitment to rules and institutions—rather than love or affection[235]—as the foundation of collective life.

Central to Rawls's vision of justice was the principle of *fair play*: the idea that individuals living within a just society are bound by a duty to obey the rules and institutions that enable collective life, even when (perhaps especially when) those rules do not favor their immediate interests.[236] For Rawls, this duty extended even to cases where individuals might perceive certain rules as unjust.[237] As Eugene Rostow summarized it in response to concerns about trial disruption, a shared social order required "a commitment on the part of each citizen to play the game according to the moral code of the community as a whole, and to respect the equal rights of all his fellow citizens."[238] The assumption underlying the duty of fair play was that, on balance, the system as a whole was sufficiently just to warrant individual sacrifices for its maintenance, and that injustices could be addressed and remedied within a self-regulating system.

This principle of fair play also defined Rawls's narrow conception of justified civil disobedience. Acts of disobedience, in his view, could only be justified as civil if they sought to remedy injustice in ways that ultimately preserved and strengthened the legitimacy of the broader system.[239] This was a tall order. In emphasizing the need for "widespread personal willingness to submit to [the Law's] governance," Edward Levi had warned of "the pernicious effects upon the whole system when a habit for violation is permitted or encouraged."[240] But Peter Gay described how radicals engaging in civil disobedience "respect form while challenging it, and thus they participate in the life of reason: They act, vigorously but sadly, and accept the consequences of their actions. Thus, they preserve an order they feel compelled to improve, and keep open the way to further orderly improvement."[241] For Rawls, civil disobedience was justified as a stabilizing force rather than a revolutionary one, a way to restore balance rather than to remake the system entirely.[242]

By the time *A Theory of Justice* was published in 1971, the social conditions that had shaped Rawls's work had changed considerably.[243] The postwar consensus, built on broad-based prosperity and a shared faith in institutional legitimacy, was giving way to deeper political divisions and economic uncertainty.[244] The liberal ideal of equality through institutional fairness came under attack from

235. *See id.* at 8; *see also infra* Section III.C.
236. RAWLS, *supra* note 225, at 108–14.
237. FORRESTER, *supra* note 226, at 47.
238. Rostow, *supra* note 228, at 49.
239. FORRESTER, *supra* note 226, at 65.
240. LEVI, *supra* note 76, at 134.
241. Gay, *supra* note 140, at 30.
242. FORRESTER, *supra* note 226, at 69.
243. RODGERS, *supra* note 61, at 198–99. *See also supra* Section II.B.
244. FORRESTER, *supra* note 226, at 39.

both the left and the right.[245] On the left, critics questioned whether liberal institutions could ever deliver true justice, highlighting the structural inequities that Rawls's theory seemed to downplay.[246] From this perspective, Rawls's insistence on maintaining the integrity of shared institutions seemed to foreclose the possibility of more transformative forms of resistance or reimagining the community itself.[247] On the right, the rise of market-based social theories further undermined the vision of a cohesive civil society, emphasizing individual competition over collective solidarity.[248]

Appeals to civility in the early 1970s sought to rebuild trust in institutions that were increasingly viewed as unjust or inadequate to the task before them. These appeals risked reinforcing the status quo, privileging institutional stability over the substantive justice sought by those challenging the system.

2. CIVILITY AS THE APPEAL TO INTERPERSONAL DECENCY

For leaders of the legal community, civility was a means of tempering the adversarial nature of litigation, ensuring that advocacy remained within bounds. This ideal of civility, however, could conflict with the ideal of zealous advocacy. From the perspective of practicing attorneys, aggressive tactics might be justified as serving clients' interests, while the value of civility was more apparent to those who viewed the legal system from a broader, non-partisan, vantage point. As a result of experiencing aggressive advocacy from the bench, Judge Marvin Frankel observed that from that perspective, "[t]he skills of the advocate seem less noble, and the place of the judge, which once looked so high, is lowered in consequence."[249] Civility, in this sense, was a principle whose value was most clearly recognized by those who approached law as a system of reasoned decision-making rather than as an arena for strategic, partisan maneuvering.

Judges and bar leaders argued that civility was not an empty formality—it was foundational to ensuring that courts remained welcoming to all parties and that judges could reach reasoned decisions. Chief Justice Burger, for example, acknowledged that some lawyers might "scoff at the idea that manners and etiquette form any part of the necessary equipment of the courtroom advocate."[250] But, in his view, the greatest advocates all understood civility as a strategic asset,

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245. RODGERS, *supra* note 61, at 185 ("Neither liberals nor conservatives abandoned the notion of a common, mutually bonded culture. For many conservatives, in particular, dreams of cultural consensus remained intensely alive. But the pressure of their own imagination ran toward disaggregation, toward a more gated image of the social, with its multiple neighborhoods of cultures and identities, its nonintersecting lines of parallel experiences, punctuated by fierce skirmishes over values.").

246. FORRESTER, *supra* note 226, at 248–49.

247. *Id*. at 69.

248. *Id*. at 239–40; RODGERS, *supra* note 61, at 183–84.

249. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1034 (1975).

250. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our Systems of Justice?*, 42 FORDHAM L. REV. 227, 235–36 (1973).

employing "coolness, poise and graphic clarity, without shouting or ranting, without baiting witnesses, opponents or the judge."[251]

Even as lawyers were bound by a duty of loyalty to their clients, the ideal of civility demanded some distance from the client.[252] The American College of Trial Lawyers Report and Recommendation on Disruption of the Judicial Process of 1970 rejected the theory that a lawyer could function "as an agent permitted, and perhaps even obliged, to do for [their client] everything he would do for himself if only he possessed the necessary skills and training in the law" on the grounds that such a theory would "gravely demean the advocate" and "undermine the integrity of our system of justice."[253] Civility in the courtroom depended upon counsel having "an emotional detachment which permits him to make a more dispassionate appraisal" of the dispute.[254] An appropriately dispassionate attorney "channels the controversy into the established mode of legal procedure and deals with the other participants in the process . . . on the level of professional understanding of the rules and their respective roles."[255] This model assumed that "strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client."[256] Likening trial advocacy and judicial reasoning to "a surgical operation," the report's authors argued that a dignified, decorous, and courteous demeanor in the courts was necessary to sustain civil order.[257] They insisted that this decorum required the lawyer's detachment from the client's interests.[258]

Judges explained that it was their duty to enforce civility norms when zealous advocacy crossed ethical lines. Judge Kaufman, for instance, reminded lawyers that they were not only advocates but also "officers of the court" obligated to conduct themselves with dignity.[259] He warned that those who "abuse the adversary system and infect court proceedings with the tactics of street brawlers cast doubt upon their fitness as responsible advocates and betray a trust with which they are

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251. *Id*. at 236.

252. William Simon described four elements of an "ideology of advocacy" as being neutrality (a professional detachment from the client), partisanship, commitment to procedural justice, and professionalism (the idea that "the law is an apolitical and specialized discipline and that its proper development and application require that legal ethics be elaborated collectively by lawyers in accordance with criteria derived from their discipline."). Simon, *supra* note 190, at 36–38.

253. Hicks Epton et al., *American College of Trial Lawyers Report and Recommendation on Disruption of the Judicial Process*, 16 CATH. LAW. 242, 246–47 (1970).

254. *Id*. at 247.

255. *Id*.

256. *Id*. This sense that it is the lawyer's prerogative to make strategic and tactical decisions concerning litigation for the client animated Judge Murtagh's question to the Panther 21 that their actions had been orchestrated by their attorneys. *See The Panther 21*, *supra* note 131 and accompanying text.

257. Epton, *supra* note 253, at 244.

258. *Id*. at 247.

259. Van Iderstine Co. v. RGJ Contracting Co., Inc., 480 F.2d 454, 459 (2d Cir. 1973).

invested by the court and public."[260] For Kaufman, civility as formal courtroom decorum was essential to the legitimacy of the legal process itself.[261]

The obligation to practice civility extended beyond the courtroom. As Edward Shils argued, decorum and politesse were necessary throughout society, but they were particularly vital among those charged with resolving conflicts within an ordered system.[262] As Justice Burger explained, "lawyers and judges will be necessary wherever men and women are gathered together in villages, towns and cities where they must rub shoulders, share boundaries, and deal with each other daily."[263] Lawyers, in their highest role, were "the healers of conflicts," helping to "lubricate" social relationships to "permit the diverse parts of a social order to function with a minimum of friction."[264] Thus, legal professionalism required "the inculcation of strict standards of civility and decorum."[265] Civility, he argued, allowed legal disputes to be addressed through reasoned, institutionalized processes. Without it, the law could not function as a tool for social cohesion.

B. CHALLENGING CIVILITY

Burger's civility was fundamentally a procedural value: it enabled legal mechanisms to constrain argumentation so that individuals could navigate substantive disagreements without exposing the innermost sources of conflict and unraveling the social fabric.

As radical lawyers and activists openly questioned the legitimacy of legal institutions in the late 1960s and early 1970s, appeals to civility were wielded to reinforce the authority of those very institutions, framing dissent as disruptive and uncivil. At the same time, structural forces within the legal profession fueled a more aggressive and adversarial style of legal practice, which heightened concerns about interpersonal respect within the profession.

These two pressures—radical challenges to institutional legitimacy and an increasingly adversarial legal culture—forced civility into an untenable position. Efforts to promote civility as a tool for institutional trust translated into demands for deference from dissidents, severing ideals of civility from any meaningful network of reciprocity. Conversely, emphasizing civility purely as an ethic of interpersonal respect risked undermining the very idea of collective adherence to shared institutions.

Yet this tension also underscored civility's enduring appeal. Living together in a pluralistic society seemed to require both a recognition of our direct obligations to one another and a shared commitment to something greater. Burger's

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260. *Id.*

261. *Id.* ("Such conduct diminishes the integrity of an institution whose usefulness depends upon the respect in which it is held by the public, and by the lawyers who practice in it.")

262. SHILS, *supra* note 21, at 348–50.

263. Burger, *supra* note 221, at 10.

264. *Id.*

265. *Id.* at 13.

arguments for civility remained appealing for many, even as his critics sought to articulate their own vision of civil order by questioning the assumptions that litigation advanced shared public values and the foundations of the attorney-client relationship.

1. RETHINKING THE SOCIAL ELEMENT OF CIVILITY

Challenges to the ideal of civility in the law took shape in two ways: first, through changes in the role of litigation, which increasingly emphasized social policy rather than dispute resolution; and second, through growing skepticism of universalistic appeals to the "public good."

Despite Burger's insistence that civil litigation should remain limited to resolving concrete disputes rather than shaping policy, by the late 1960s, courts had become vital sites for addressing broad social conflicts.[266] Owen Fiss described how structural reform in adjudication grew during the Warren Court years and into the beginning of the Burger Court, before narrowing.[267] At stake was whether the law would be primarily concerned with resolving discrete disputes or with addressing broad social conditions.[268] In Fiss's view, litigation was not principally about resolving disputes at all; disputes were merely occasions for courts to articulate principles and values.[269]

Looking back on this era, Justice Clarence Thomas attributed the decline in civility to the dynamic described by Fiss: "a broader, more intellectual change in our vision of the law's role in our society."[270] As Thomas put it, "[l]awsuits started to challenge unconstitutional social conditions; private parties were replaced by interest groups or large class action plaintiffs, with public institutions and governments as defendants; the role of judges was transformed from impartial umpire to manager of an ongoing process to reform the institution."[271] Thomas agreed with Fiss's description that litigation was no longer principally about resolving discrete legal disputes but had become "a tool to achieve social change"—except that Thomas, unlike Fiss, disapproved of this development.[272] Rather than engaging in the traditional give-and-take of political action, which would require building coalitions, striking deals, and making compromises, policy decisions were increasingly being made within spaces insulated from majoritarian politics.[273]

This shift fundamentally altered the function of litigation and, in turn, the function of civility within legal practice. Civility in this era, as described by Thomas,

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266. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–4 (1979).
267. *Id.* at 5.
268. *Id.* at 18–19.
269. *Id.* at 29–30.
270. Clarence Thomas, *Civility*, 39 S. TEX. L. REV. 655, 659 (1998).
271. *Id.*
272. *Id.*
273. *Id.*

was premised on the neutrality of legal principles and the notion that adversaries, regardless of their substantive differences, could participate in legal processes in good faith.[274] But as litigation was increasingly understood as a battleground for defining rights rather than adjudicating violations of existing rules, the procedural commitments that civility was meant to reinforce came under strain. For Thomas, this instrumentalization of law eroded civility in two ways. First, it subordinated legal process to political ends, transforming civility from a shared commitment to fairness into an obstacle to achieving uncompromising political goals.[275] Second, it displaced the shared search for a legally correct outcome with a contest to define the rules of the game itself.[276] This change, claimed Thomas, risked destroying "civility and the integrity of the law itself."[277] Litigation, as he saw it, was no longer about fair play within a stable procedural framework; it was about rewriting the rules mid-game.

At the same time, a deeper skepticism toward universalistic appeals to the "public welfare" further eroded the ideal of civility. Even when legal elites invoked the common good as a rationale for reinforcing shared commitments to legal institutions, such appeals could no longer be accepted as universally valid. Even if an appeal to the common good was made in good faith (and it often was not[278]), any such claim now had to be understood, at best, as the perspective of a particular group, rather than as genuinely universal.[279]

Skepticism toward the universality of appeals to public welfare was well-founded. The civil rights movement, for example, had exposed how appeals to "law and order" were used to justify state violence against Black communities, while women's rights activists demonstrated how legal systems failed to recognize, much less remedy, sexual harassment or workplace discrimination.[280] In place of universal claims, skeptics sought more situated, particularized foundations for action: consciousness-raising looked inward to find a basis for political action; standpoint theories rooted normative claims in particular, situated perspectives; and the use of narrative grounded arguments in direct personal experience rather than in abstract universals. While this shift was crucial for challenging entrenched inequalities, it also destabilized the possibility of civility, which relied on the presumption of common ground. Edward Shils defended civility against these attacks by arguing that the ambiguity of claims to advance public welfare did not undermine the essential "difference between parochial

274. *Id.*

275. *Id.* at 659–60.

276. *Id.* at 660.

277. *Id.* at 661.

278. SHILS, *supra* note 21, at 351 (arguing that concepts like "the common good" are "frequently invoked with the intention to deceive"); *see also* Kronman, *supra* note 3, at 731.

279. Kronman, *supra* note 3, at 731–32 ("We have grown used to translating every statement of the form, 'the public good requires thus and such,' into a perspectival claim: 'the public good, as so-and-so conceives it from his point of view, requires thus and such.'").

280. *See supra* Section II.B.

interests and the interests of more inclusive collectivities."[281] But even those more inclusive interests remained partial. Ultimately, the challenge boiled down to whether, as David Potter put it, "the communities and counter-communities of America in the 1970's may be able to hold such a balanced view in the heat of the antagonisms and extremisms that now prevail[.]"[282] The challenge, for Potter, was not to protect social order but to find new foundations for it.

2. RETHINKING THE INDIVIDUAL ELEMENT OF CIVILITY

Challenges to the ideal of civility in the law also addressed the direct interpersonal relationships among lawyers and between lawyers and clients within an adversarial system. Critics of civility embraced more holistic understandings of client problems and rejected the narrowly legal framings that civility advocates demanded. At the same time, they recast the perceived threat to legal civility by the identification of lawyers with outsider clients as an elitist concern that masked an existing class-based identification between lawyers and their clients.

Burger, Shils, and others described the interpersonal element of civility as an essential foundation for the social element of civility. Lawyers, they argued, were not merely representatives of private clients but, fundamentally, officers of the court who facilitated structured processes of working through conflict in accordance with shared procedural and substantive principles.[283] They created opportunities to resolve conflict peaceably, through state institutions when necessary. While lawyers were hired to protect private interests, their advocacy ultimately contributed to the broader public good. The legitimacy of legal institutions depended on parties being treated fairly and with dignity, and the obligation of civility toward opposing counsel, the court, and the public derived from the lawyer's dual role as both advocate and officer of the court.[284] The interpersonal demands of civility served the primary obligation of sustaining a societal commitment to shared institutions.

However, this conception of civility as interpersonal decency faced significant challenges. These challenges did not reject the value of politeness or respect outright but instead emphasized a competing professional ethos—one that prioritized zealous client advocacy over broader commitments to institutional legitimacy.[285]

The case for civility made by Burger rested on an ideal of the adversarial system that framed private advocacy as a means to reach reasoned decisions that advanced public values: by making the strongest case for each side, identifying weaknesses in opposing arguments, and following established procedural norms,

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281. SHILS, *supra* note 21, at 351.

282. DAVID M. POTTER, *Changing Patterns of Social Cohesion and the Crisis of Law Under a System of Government by Consent*, *in* IS LAW DEAD?, *supra* note 23, at 260, 285.

283. *See supra* Section III.A.

284. *See supra* Section II.C.

285. *See supra* Section II.D.

lawyers helped courts reach sound, reasoned decisions that reinforced the rule of law. In this model, zealous advocacy was valuable not because it advanced individual interests but because it contributed to a process that ultimately served the public good. The civil rights movement, for example, used litigation to articulate fundamental legal principles while adhering to the procedural norms that sustained institutional legitimacy.

Yet, as skepticism toward the idea of a shared public good deepened—whether from the left, which saw judges as enforcers of the existing social order, or from the right, which saw courts as agents of social transformation—this justification for civility weakened. If legal institutions were not perceived as neutral forums for reasoned dispute resolution but as mere battlegrounds for confronting systems of oppression, then civility as a professional ideal lost much of its appeal, as explained above.

The ideal of zealous advocacy, when mobilized on behalf of socially disfavored parties, responded to such concerns. Reliance on institutional gatekeepers compromised too much, and lawyers who saw clients purely as opportunities for working through legal principles denied the human stakes of conflict.[286] There was thus a curious symmetry: leaders of the legal profession characterized radical lawyers as uncivil for using their clients as vehicles to advance political arguments, instead of defending them according to recognized procedures; the new client-centered lawyers argued that the practice of viewing clients principally through the lens of legal problems denied them their full humanity and failed to understand the true nature of problems.[287]

The relationship between lawyers and their clients was being renegotiated. The model of civility advanced by Burger and his allies assumed that the lawyer's role was to channel the arguments of radical clients into traditional forms of advocacy, based upon the lawyer's professional detachment from their clients' concerns. But radical lawyers challenged this separation. Bill Kunstler, for example, was seen by judges as having "identif[ied] himself . . . so totally with the client that he removed the possibility" of making arguments as an independent professional,[288] while Lefcourt was so closely identified with his clients that he was reputed "almost of being a coconspirator."[289] Robert Lefcourt argued that the most threatening part of radical lawyering was the creation of "a relationship in which political convictions and the exposition of a political program and beliefs

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286. *See, e.g.*, Gary Bellow, *The Limits of Humanistic Law Teaching,* 53 N.Y.U. L. REV. 644, 644–45 (1978) ("I find it puzzling that we have done so little to understand law as modified, structured, altered, changed and lied about in relationships between people.").

287. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369, 381–82 (2006). Exemplifying this humanistic turn, Carrie Menkel-Meadow described "the most controversial answer" to the question of "What is it that lawyers do?" to be that "lawyers interact with other people." Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 CLEV. ST. L. REV. 555, 565 (1980).

288. Victor S. Navasky, *Right On! With Lawyer William Kunstler*, N.Y. TIMES, Apr. 19, 1970, at 217.

289. KEMPTON, *supra* note 126, at 141–42.

are not outside the lawyer's province and not reserved for comment by the client alone."[290]

At the same time, competitive pressures transformed law into an increasingly transactional enterprise, further eroding civility's role in private legal practice. The rise of a "hired gun" mentality, in which lawyers prioritized the aggressive pursuit of client interests over any obligation to civility or institutional legitimacy, signaled a shift from a profession rooted in social responsibility to one oriented around adversarial competition.[291] As Russell Pearce and Eli Wald argue, this transformation reflected an ongoing migration away from the vision of law as a public service toward a model in which lawyers saw themselves as instruments for achieving client objectives.[292] Civility, in this model, was no longer about fostering a fair and reasoned legal process but rather about maintaining a professional veneer while advancing uncompromising client-centered goals.

Being seen as a "hired gun" was no calumny, according to leaders of the bar. The traditional view of the attorney-client relationship insisted on the attorney's detachment from client concerns, even if many elite lawyers identified strongly with their clients.[293] The ideal of professional detachment allowed the bar to maintain professional respectability even when representing disfavored clients; the threat to legal professionalism, bar leaders argued, was for a lawyer to be *too close* to disfavored clients,[294] and the danger to socially disfavored clients was to have their potential representation limited to the few attorneys who were personally committed to their cause rather than to the larger pool of attorneys who would take up such representation as a professional duty.[295]

The difference between the attorney-client relationships of elite and non-elite legal practitioners was growing. Elite lawyers, who often represented businesses and sophisticated parties, were more insulated from the pressures of a hyper-

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290. LEFCOURT, *supra* note 70, at 4.

291. Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 3–4 (2011).

292. *See id.* at 5.

293. Navasky, *supra* note 288, at 248 ("[T]he downtown Wall Street lawyers who represent Ford, General Motors and other big corporations . . . identify emotionally with their clients. They do their clients' bidding. They are servants more than masters. They defend their clients' right to pollute the air not because they approve of air pollution, but because they are in harmony with their clients' larger corporate objectives.").

294. The editors of the *ABA Journal* responded to Kunstler's claim that he was "not a lawyer for hire" and would "only defend those I love" by declaring that "to a lawyer the statement is antiprofessional because it scorns the 'lawyer for hire' and suggests that it is noble for a lawyer to limit his clientele to those he 'loves.'" The ABA recognized that "[m]ost lawyers prefer to represent popular causes and prosperous clients," but that "with respect to representing unpopular persons . . . to be a 'lawyer for hire' is a badge of honor." *A Lawyer for Hire*, 56 A.B.A. J. 552, 552 (1970) (quoting Navasky, *supra* note 288, at 93).

295. Describing a different historical context, Norman Spaulding explains that "the problem was not the prevalence of an amoral, client-centered ideology, but just the opposite—decisions about representation and professional responsibility driven by personal moral convictions and community prejudices about the rights, humanity, and capabilities of freed blacks." Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2107 (2005).

competitive market, while their non-elite brethren tended to represent individual clients whose problems tended to blur legal and nonlegal concerns.[296] Elite lawyers often framed concerns about incivility as problems of individual misconduct rather than as symptoms of broader structural changes.[297] In practice, civility codes functioned less as mechanisms for promoting respectful interactions and more as tools for maintaining professional hierarchy.[298] Disciplinary measures were disproportionately used to police the conduct of non-elite practitioners, reinforcing barriers to entry and preserving the social status of the legal establishment[299] and the profession's public image.[300] Identification with one's clients was a problem for lawyers if those clients were low-status, but not if they were reputable participants in the market.

C. ALTERNATIVES TO CIVILITY

Without a shared foundational commitment to address conflict through common institutions, conflicting parties could still address conflict without relying on the mechanisms of the state. But if principles of civility no longer reinforced a shared commitment to institutions (as Burger, Shils, and others had envisioned), could its function of *smoothing over differences in order to channel them to civil institutions* truly help in *resolving differences directly*? What would motivate individuals to adhere to norms of interpersonal decency and mutual recognition amidst the deepening skepticism that others would abide by such principles? In the absence of strong commitments to institutions, the procedural virtue of civility as the decorum that facilitated recourse to legal institutions was profoundly in tension with the need to get to the heart of the matter. Alternative forms of dispute resolution required alternative forms of civility—grounded not in a commitment to the procedural neutrality of common institutions but in deeper ethical commitments to authentic encounters or reconciliation.

1. THE LEFT ALTERNATIVE: OVERCOMING ALIENATION THROUGH AUTHENTIC ENCOUNTER

Some efforts to redefine civility drew upon a framework that prioritized relational and empathetic encounters. This perspective rejected the value of civility as mere adherence to rules for managing conflict and instead sought a means of

296. Indeed, contrary to Burger's appeal to the courts as a civil space for preventing the resolution of disputes through violence, studies of how low-income people used courts revealed that often "the court serves as a sanction, a way of harassing an enemy, rather than as a mode of airing and resolving disputes." Sally Engle Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 L. & SOC'Y REV. 891, 919 (1979).

297. *See* Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 661 (1994).

298. *See id.* at 663.

299. *See id.* at 668–69.

300. *See id.* at 676–79.

fostering genuine understanding and connection. Rooted in the countercultural movements of the 1960s and '70s (and earlier), this ethical vision of civility emphasized direct, unmediated interactions—encounters that revealed shared humanity by recognizing similarity-within-difference.[301] This was a kind of civility insofar as it foregrounded the relational dimension of conflict and the healing possibility of mutual recognition.

Civility, in this sense, was not about upholding and performing rituals but about cultivating authentic relationships. This perspective assumed that interpersonal conflicts stemmed from misunderstandings or alienation, and that open dialogue and mutual recognition could resolve them. Thinkers influenced by existentialism and humanistic psychology, such as Carl Rogers,[302] worked to create the conditions for authentic encounters, enabling individuals to see each other not as abstractions or adversaries but as fellow human beings.[303] It addressed the concerns raised by incivility-as-praxis by creating opportunities to have hard discussions that got to the heart of the matter, as Harris Wofford had urged.[304] And it addressed the concerns raised by incivility-as-style by challenging the inauthenticity of market relations; aggressiveness and rudeness were postures that could be set aside by seeing others as fully human, with conflict as a natural and healthy response to living together in society.[305]

This alternative vision of civility was reinforced by the left's growing suspicion of the state; sharing stories and perspectives within spaces designed to promote listening was thought to accomplish what legal and political institutions could not, while avoiding false claims of universalism. But this ideal stood in tension with traditional notions of civility—such as decorum, politeness, restraint—not only because those values tended to have a conservative tenor, but because they functioned to smooth over rather than embrace conflict. Where civility minimized friction, this vision understood conflict as a path to mutual recognition and respect. Discomfort meant that hard messages were being communicated and processed.[306]

Yet this assumption—that direct engagement with conflict could be healing—rested on a certain optimism, one that critics noted might presume a degree of

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301. *See, e.g.*, Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

302. An important concept from Rogers was that of the "encounter group" as a person-centered space for people to interact. Carl Rogers, *Carl Rogers Describes His Way of Facilitating Encounter Groups*, 71 AM. J. NURSING 275 (1971).

303. *See, e.g.*, Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. REV. 514, 545 (1978). For the impact of Rogers, *see* Kruse, *supra* note 287, at 378–79.

304. Rostow, *supra* note 228, at 35.

305. *See, e.g.*, Carl R. Rogers, *Communication: Its Blocking and Its Facilitation*, 9 ETC: A REV. OF GEN. SEMANTICS 83 (1952).

306. *See* PATRICIA ROBERTS HARRIS, *Comment* on Eugene V. Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, *in* IS LAW DEAD?, *supra* note 23, at 103, 105. *Cf.* Calhoun, *supra* note 19, at 266 (describing how the traditional notion of civility avoids experiences of discomfort).

homogeneity among the participants.[307] While empathetic interactions could resolve some conflicts, they were ill-equipped to address systemic injustices or entrenched power dynamics, as critical race theorists recognized.[308] In prioritizing authenticity and connection, this model of civility risked overlooking the need for institutional mechanisms to mediate disputes that could not be resolved through personal engagement alone.

2. THE CHRISTIAN ALTERNATIVE: MORAL DISCOURSE GROUNDED IN LOVE

Another perspective emerged from Christian moral and theological traditions, particularly those associated with thinkers like Thomas Shaffer, Dean of Notre Dame Law School. This vision was grounded in the Christian ethic of love, emphasizing the moral obligations that individuals have toward one another. The goal was not merely to identify a set of behaviors that could maintain peace but to cultivate a moral practice rooted in the recognition of each person's inherent dignity and worth. It, too, was a kind of civility insofar as it foregrounded the relational element of conflict and the possibility of reconciliation.

Where traditional civility aimed to preserve order by substituting reasoned processes for combat, this Christian conception was "more private (even intimate), quiet, and personal," turning "less on principles than on the story of the individual or the enterprise on whom moral claims are made."[309] Shaffer identified four key elements distinguishing moral from adversarial discourse: "(1) Moral discourse is interpersonal; (2) Moral discourse argues from the person of the client; (3) Moral discourse is addressed to the conscience of those who hear it; (4) Moral discourse, because it is a form of reconciliation, binds the community together."[310] Rather than civilizing conflict by channeling it through legal frameworks, this approach used joint moral reasoning to create a foundation for reconciliation. Shaffer explained that "the religious tradition seeks not *resolution* . . . but *reconciliation* of brother to brother, sister to sister, sister to brother, child to parent, neighbor to neighbor, buyer to seller, defendant to plaintiff, *and judge to both*."[311]

This shift from civility as decorum to moral discourse required individuals to act with compassion, humility, and self-sacrifice. It involved "a process of reconciliation in which the anger of broken relationships is to be confronted rather than avoided, and in which healing demands not a truce but confrontation."[312] In doing

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307. *See* BEJAN, *supra* note 18, at 143 (describing a Lockean model of civility which "called for a communion and mutual affection between citizens only possible through an agreement more fundamental than the disagreements that divided them").

308. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,* 22 HARV. C.R.-C.L. L. REV. 401, 404–05 (1987).

309. Thomas L. Shaffer, *Advocacy as Moral Discourse*, 57 N.C. L. REV. 647, 656 (1979).

310. *Id.* at 661–62.

311. Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L. J. 1660, 1666 (1985).

312. *Id.* at 1664.

so, it addressed the concerns raised by *incivility-as-praxis* by recognizing that radical critique could spur humility and curiosity about the experiences of others.[313] Likewise, it responded to *incivility-as-style* by offering an alternative form of advocacy that worked "through exalting care over professionalism, through arguing to the consciences of those it addresses, and through arguing from the persons of those it advocates."[314] This vision of civility called for encounters that built relationships and sought reconciliation, even in the face of profound disagreement.

Contrary to the faith in legal process articulated earlier by Owen Fiss, Shaffer argued that "[j]ustice is not usually something people get from the government. And courts . . . are not the only or even the most important places that dispense justice."[315] Instead, he explained, "[j]ustice is what we discover . . . when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."[316] If traditional civility offered a way to resolve differences under shared institutional principles, moral discourse demanded a far more substantive and personal engagement between conflicting parties.

The strength of this Christian conception of civility lay in its moral depth, offering a vision that was both practical and aspirational. It was, after all, central to Martin Luther King Jr.'s advocacy, which Hudson identified as "the soul of civility."[317] However, its theological foundations made it less attractive in a pluralistic and secularizing society, and its emphasis on moral accountability placed heavy demands on individuals, requiring a high degree of openness and humility.[318]

D. TWO FORMS OF CIVILITY

As the crises of incivility in the early 1970s threatened the legitimacy of legal institutions, legal elites articulated a vision of civility as a foundation of legal practice. This vision, however, faced significant opposition. Critics challenged the premise that legal practice was a shared project of reasoned advocacy before neutral judges who would resolve disputes by reference to foundational principles. They argued that legal institutions frequently failed to uphold those principles in practice and that the ideal of civility advanced a narrow vision of the common good that did not account for the experiences of marginalized groups. Further, they rejected the idea that private advocacy necessarily served public ends, instead contending that vigorous, even confrontational, advocacy was

313. Shaffer, *supra* note 309, at 662–63.
314. *Id*. at 661.
315. McThenia & Shaffer, *supra* note 311, at 1664–65.
316. *Id*. at 1665.
317. HUDSON, *supra* note 13, at 8–13.
318. *See* BEJAN, *supra* note 18, at 135–37.

essential precisely because public institutions failed to address—or even understand—systemic injustice.[319]

Despite being defined by their opposition to traditional civility norms, and despite being grounded in distinct principles, these critiques shared a coherent alternative vision—one rooted not in institutional order but in the fundamental aspects of human existence. Whether framed in terms of authentic encounter or moral responsibility, these perspectives emphasized conflict resolution as a process of repairing interpersonal relationships rather than reinforcing a bounded political or legal order and collapsed the professional distance between attorney and client. This alternative to civility, which I will label as civility' to distinguish it from Burger's ideal of civility, was not about preserving institutional legitimacy but about fostering human connection, with the defense of institutions seen as secondary, if not entirely suspect.

IV. THE CIVILITY AGENDA

Legal elites, such as Burger, responded to the challenges posed by incivility with concrete programs for advancing civility in the terms sketched out in this article, in such areas as legal education, professional ethics, and forms of dispute resolution. The proponents of civility' responded to those same challenges by advancing other programs that would address social cohesion on their own terms.

A. EDUCATING THE CIVIL LAWYER

For Chief Justice Burger, civility established boundaries to the adversarial process so that disputes could be resolved peacefully. Yet, in his view, those boundaries were collapsing due to the politicization of legal proceedings and the increasing aggressiveness of trial practice.

Burger saw law schools as the primary sites for reinforcing law's boundaries. He argued that law professors "have the first and best chance to inculcate in young students of the Law the realization that in a very hard sense the hackneyed phrase 'order in the court' articulates something very basic to the mechanisms of justice."[320] Burger understood that promoting civility had not typically been a concern for law professors, that the professors understood their task to be "teaching students to think" and "not running a trade school."[321] But civility, for Burger, was not merely about politeness but about instilling a commitment to the legal system's processes, rules, and principles, however imperfect. The courtroom trial, as a venue for resolving disputes through evidence and legal argumentation, according to reasoned procedures, was a stage for demonstrating this commitment.[322]

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319. *See* Cahn, *supra* note 109.
320. Burger, *supra* note 1, at 214.
321. *Id*. at 215.
322. *Id*.

According to Burger, the state of trial advocacy was dismal.[323] The most striking problem, for him, was the disruptiveness of political lawyers, but rudeness and aggressiveness also undermined the courts' abilities to work through the relevant facts and legal arguments to reach reasoned results.[324] This ultimately compromised the quality of justice available through the American legal system.[325]

Burger's solution was to make trial advocacy a distinct concentration within legal education, with the goal of acculturating law students to a specific vision of the trial as a site for resolving disputes within the bounds of civility.[326] Trial advocacy programs would not merely teach technical skills; they would also cultivate a commitment to the idea that the legal system, while imperfect, was fundamentally just and capable of resolving conflicts without recourse to violence or disruption.[327]

Burger's drive to elevate trial advocacy within legal education was a deliberate effort to promote a vision of litigation as a disciplined, depoliticized process grounded in civility that would reinforce the authority of legal institutions and the legitimacy of shared laws.[328] This vision, he believed, was necessary when the legitimacy of courts and other institutions was under intense scrutiny from litigants seeking to use trials as forums for advancing broader social or political critiques.[329]

This focus on neutrality and proceduralism at the center of Burger's project reflected the Legal Process theories that prevailed in legal education and that were frequently cited by the Warren and Burger Courts.[330] Legal Process situated courts within an institutional network that included legislatures and agencies, in which adjudication performed certain roles both in the reasoned resolution of disputes according to established laws and in the definition of those laws.[331] Critics saw it as valorizing a kind of retrograde neutrality, based on a sharp distinction between law as the neutral mechanics of adjudication and politics as the contested definition of rules and institutions.[332] A more generous reading of Legal Process understood it as deeply concerned with the interaction of fact and values, and with the practical question of how institutional mechanics could advance principled commitments.[333]

By emphasizing the importance of adhering to established procedures and the proper decorum of courtroom conduct, Burger believed that trial advocacy

323. *See* Burger, *supra* note 250, at 234–35.
324. *See* Frankel, *supra* note 249, at 1034.
325. *Id*. at 1047.
326. Burger, *supra* note 250, at 232.
327. *See id*. at 236.
328. *Id*. at 229–30.
329. Burger, *supra* note 1, at 213.
330. *See* Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 10–11 (2013).
331. *Id*. at 9.
332. *See* Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J. L. REFORM 561, 589 (1988).
333. Barzun, *supra* note 330, at 45–46.

education would instill in students a deep respect for the legal process.[334] The advocate's role was to argue on behalf of their client within the bounds of established rules and neutral principles, not to challenge the legitimacy of those rules or the institutions enforcing them. Trial advocacy programs were not simply about preparing students to be effective litigators in a technical sense; they were about binding advocates to an ideal of civility that reinforced the authority of the legal system as a whole.[335]

The pragmatism at the heart of Legal Process assumed a kind of institutional settlement in which trials occurred in certain ways—not with the kind of disruptiveness that had struck such fear into the legal establishment. The problem for proponents of the theory was that lawyers and law students who were enflamed by the injustices gripping American society had little faith in the ability of Legal Process to resolve those deep problems, or even to give guidance in understanding them.[336] Legal education grounded in Legal Process had generated, in Duncan Kennedy's words, "a decline in student interest in the law as taught, a sort of spreading indifference to the whole enterprise, a deadness in every classroom discussion."[337]

The alternative ideal of civility' grounded models of legal education that explicitly questioned the discursive boundaries of civility, as invoked by Burger. Even if legal education were geared narrowly toward the "solid lawyer types, contributing to the community through legal and business skills" who constituted "the 'human infrastructure' essential for the smooth operation and orderly progress of a great industrial nation-state," Burger's ideal would still be insufficient, Kennedy argued.[338] The success of legal education had be measured in terms of cultivating "the underlying qualities of self-awareness and empathy without which the exercise of power is likely to be arbitrary and destructive, no matter how 'rational'."[339] Empathy and self-awareness were not simply the means for lubricating the gears of the industrial nation-state's legal infrastructure. Even "conventionally successful lawyers perform professional functions that go far beyond the technicalities of their practice" and had to confront abstract questions if they were to demonstrate the self-awareness that is a precondition for ethical advocacy.[340]

David Trubek described the publication of Kennedy's critique of legal education amidst the upheavals in New Haven surrounding the Black Panther trials in

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334. Burger, *supra* note 250, at 235.

335. *Id*. at 236.

336. *See, e.g*., Duncan Kennedy, *Utopian Rationalism in American Legal Thought: A Critique of the Hart & Sacks Legal Process Materials*, Harv. Pub. L. Working Paper No. 23–44 (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233370.

337. Kennedy, *supra* note 170, at 74.

338. *Id*. at 82.

339. *Id*.

340. *Id*. at 83.

1970 as being "like throwing a match into a pile of tinder."[341] Civil it was not, even as it appealed to values of empathy, self-awareness, and moral reasoning. The critical vision of civility' was distinctly different.

Integrating this critical vision with the realities of practice motivated the early theories of clinical lawyering. Clinical lawyers, who were gaining a foothold within law schools in the early 1970s, used legal skills and legal problems as vehicles for questioning the legal system while helping clients.[342] The earliest clinical teaching materials downplayed the goal of skills training in favor of critiquing existing legal practice.[343] The point was *not* to do things because "this is the way we do it here."[344] Rather than teaching law students to accept the institutional structure of the law, the earliest clinicians tended to share an understanding that the structure was rife with injustices.[345]

The distinction between Burger and the clinicians was not sharp. Burger endorsed clinics as ways of shaping students into advocates.[346] And clinicians understood their work to involve training advocates—especially future legal aid lawyers.[347] But the earliest clinicians understood that when it came to legal practice, "issues of craft cannot be separated from issues of value."[348] Training a cadre of lawyers "to focus on the practice of law for ordinary people" in ways that "might inform public and bar policies on access to legal services as well as advance the quality and availability of legal advice and assistance to low and moderate-income people" involved a fundamentally different perspective on legal education than Burger's vision of civility allowed.[349]

Today, amidst the resurgent interest in civility, many law schools have adopted or considered formal invocations of civility in learning outcomes and mission statements.[350] These contemporary invocations of civility raise familiar tensions.

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341. David M. Trubek, *Duncan Kennedy and My Worst Nightmare*, 10 UNBOUND 56, 57 (2015).

342. Susan Bryant & Elliott S. Milstein, *Reflections Upon the 25th Anniversary of the Lawyering Process: An Introduction to the Symposium*, 10 CLINICAL L. REV. 1, 6 (2003).

343. *Id.* at 15; Bea Moulton, *Looking Back at the Lawyering Process*, 10 CLINICAL L. REV. 33, 38–39 (2003).

344. Moulton, *supra* note 343, at 40.

345. Bryant & Milstein, *supra* note 342, at 7. But clinical theory was in conversation with the broader streams of the Legal Process school, as reflected in the title of the seminal clinical text, *The Lawyering Process*. *See* Gary Bellow, *In Memoriam: Albert M. Sacks,* 105 HARV. L. REV. 14, 15 (1991).

346. Burger, *supra* note 250, at 232–33; Jeffrey B. Morris, *Warren E. Burger and Change in Legal Education*, 11 COLONIAL L. 1, 15 (1981).

347. Moulton, *supra* note 343, at 43–49.

348. Jeanne Charn, *Service and Learning: Reflections on Three Decades of the Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75, 83 (2003).

349. *Id.* at 89.

350. Laurel Rigertas provides a working definition of civility for legal educators:

> "Civility helps democracy and the legal system work. Civility is demonstrated in communicative behaviors toward individuals and institutions, whether written, verbal, or non-verbal. Politeness is an aspect of civility, but the hallmark of civility is respect for others, based on a belief in the inherent worthiness of all human beings, even when we are in a state of disagreement."

Rigertas, *supra* note 19, at 431.

Do they echo Burger's effort to reinforce faith in legal institutions in the face of student discontent with the status quo, or do they reflect the ideal of civility' as an interpersonal virtue that enables critique while promoting dialogue? Without a clear articulation of what civility is meant to accomplish, today's calls for civility risk recapitulating old debates without addressing the underlying concerns that have shaped them.

B. DISCIPLINING THE UNCIVIL LAWYER

The rising concern with incivility in the legal profession coincided with profound shifts in the regulation of legal ethics. In 1965, a Special Committee on Evaluation of Ethical Standards within the American Bar Association (ABA) began work on a new *Code of Professional Responsibility* to replace the ABA *Canons of Professional Ethics*.[351] The Code was unanimously adopted by the ABA House of Delegates on August 12, 1969, effective January 1, 1970.[352] It was designed to "appeal to the reason and understanding of the lawyer" while also providing a basis for professional discipline.[353] One scholar describes the *Code*'s adoption as "a high water mark in the profession's sense of its social worth."[354]

By 1977, the President of the ABA called for the Code to be replaced,[355] leading to the drafting of the *Model Rules of Professional Conduct*, which were adopted in the 1980s.[356] The remarkable speed with which the *Code* fell out of favor suggests a deeper instability in the profession's understanding of legal ethics during the 1970s.[357] The *Model Rules* abandoned the *Code*'s lofty ethical aspirations[358] in favor of a "law of lawyering"[359]—a regulatory framework that treated legal ethics as a set of professional obligations rather than an appeal to moral reasoning. This shift reflected the broader transformation in legal thought away from public-mindedness towards a view of lawyering as a fundamentally private practice.[360]

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351. Michael Ariens, *The Agony of Modern Legal Ethics, 1970–1985*, 5 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 134, 152 (2014).

352. John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 255 (1970).

353. *Id*. at 258 (quoting John F. Sutton, Jr., *Re-evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132, 133 (1966)).

354. Ariens, *supra* note 192, at 671.

355. William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, 3 B. LEADER 2, 2–3 (1977).

356. *See generally* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689 (2016) (explaining the context of the drafting of the Model Rules of Professional Conduct).

357. *See* Ariens, *supra* note 351, at 139.

358. Sutton, *supra* note 352, at 258.

359. Robert J. Kutak, *The Next Step in Legal Ethics: Some Observations About the Proposed Model Rules of Professional Conduct*, 30 CATH. U. L. REV. 1, 3 (1980).

360. Ariens, *supra* note 356, at 692.

Ethics rules had long sought to balance two competing obligations: the lawyer's partisan duty to advocate for their client, and their responsibility as an "officer of the court" to uphold the integrity of legal institutions.[361] Principles of civility functioned to identify the right balance by constraining zealous advocacy.[362] The *Code* attempted to collapse the distinction between the lawyer's obligations to the client and to the legal system by defining both as zealous partisan advocacy within the constraints of law, guided by principles of reason.[363] Incivility existed in the perceived gap between zealous partisan advocacy and public reason; as much as the drafters of the *Code* tried to will this gap away, they could not.

Partisanship was the heart of legal advocacy. Irving Kaufman, Chief Judge of the Second Circuit, argued that "the quality of justice dispensed by the courts is ultimately dependent on the quality of advocacy provided by the bar" within an adversary system, and that this system "is not threatened by overzealous advocates but by complacent ones."[364] For Kaufman, lawyers who failed to press their clients' cases were greater threats to the legal system than were those who pressed for every legal advantage.

But Judge Kaufman also recognized that, even within legal limits, zealous advocacy could be pressed so far as to raise concerns about incivility.[365] The adversary system depended on each side forcefully pressing its arguments, with a judge or jury deciding the stronger case. Yet, at what point did zealous advocacy cross into incivility that undermined the integrity of the system? The bounds of proper conduct were mostly undefined.[366]

Even those skeptical of the adversary system, such as Judge Frankel, worried about having the bar too closely tied to questions of truth and public good and regulated by the state. Instead, he argued, even as ethics rules identified "lawyers as 'officers of the court' and as 'public' people," that framing was in tension with "our basic conception of the office [as] one essentially *private*—private in politico-economic, ideological terms—congruent with a system of private ownership, enterprise, and competition, however modified the system has come over time to be."[367] Protecting clients' liberty, he argued, required a bar that was fundamentally private.

Civility, as Burger described it, involved no deep contradiction between the roles of partisan advocate and officer of the court. But that faith was beginning to fail. A system of legal ethics imagined as a set of logical deductions from foundational axioms[368] could no longer provide adequate guidance when the foundations had been called into question.[369]

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361. E. Wayne Thode, *Canons 6 and 7: The Lawyer-Client Relationship*, 48 TEX. L. REV. 367, 371 (1970).
362. *See supra* Section III.A.
363. Thode, *supra* note 361, at 371.
364. Kaufman, *supra* note 4, at 175–76.
365. Van Iderstine Co. v. RGJ Contracting Co., Inc., 480 F.2d 454, 459 (2d Cir. 1973).
366. DORSEN & FRIEDMAN, *supra* note 7, at 139.
367. Frankel, *supra* note 249, at 1059 (emphasis added).
368. Sutton, *supra* note 352, at 259.
369. *See supra* Section III.B.

The dissatisfaction with the *Code*, less than a decade after it went into effect, arose from "the fiction that ethical problems for lawyers are matters of ethics rather than law."[370] For L. Ray Patterson, Dean of Emory University School of Law, lawyers would manipulate law as far as possible to serve client ends, and therefore principles of legal ethics (now understood as a law of lawyering) needed to give attorneys the broader perspective on legal problems in order "to view the lawyer primarily as an administrator of law rather than as an advocate for his client."[371] Ethics rules were not a matter of fundamental premises, but a set of commands issued by the leadership of the bench and bar to constrain increasingly partisan attorneys.

The *Model Rules* explicitly turned away from a purely client-centered vision of lawyering, generating significant resistance within the legal profession.[372] James Stark described the Model Rules as expressing "the drafters' deep concern, their overriding skepticism about the adversary system—about the capacity of courts, as presently structured, to achieve substantial justice, about the social costs of litigation, and above all about the image of trial lawyers as 'streetfighters,' owing only limited obligations to those not their clients."[373] But the ideal of zealous advocacy, he argued, was more than just an invitation to uncivil combat:

> Lawyer as 'mouthpiece,' lawyer as champion—these are but two sides of the same coin. The warrior lawyer, advocating his client's case against all odds . . .—this lawyer remains a powerful, evocative figure . . . to whom many citizens and lawyers can be expected to be deeply, even angrily committed.[374]

Notwithstanding the elite bar's ideal of the lawyer as "an administrator of law," the ideal of the lawyer as advocate remained compelling to many. The *Model Rules'* concern with tempering overzealous advocacy did not yield a positive vision of civility, but rather a system of discipline.[375]

Legal ethicists have returned to the question of whether principles of civility should be explicitly codified into ethics rules.[376] But these proposals tend to focus on combatting overzealous advocacy without addressing the question of whether this requires adherence to shared norms—as with the defunct *Code*—or whether it is a matter of professional discipline. While civility continues to be invoked as

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370. L. Ray Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639, 639 (1977).

371. *Id.* at 642.

372. W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIA. L. REV. 739, 745–48 (1981).

373. James H. Stark, *Review Essay, the Model Rules of Professional Conduct*, 12 CONN. L. REV. 948, 965 (1980).

374. *Id.* at 977.

375. Burger's concern with trial disruption has survived as Model Rule 3.5(d). MODEL RULE OF PROF'L CONDUCT 3.5(d) (2023).

376. *See, e.g.*, David A. Grenardo, *Civility Rules: Debunking the Major Myths Surrounding Mandatory Civility for Lawyers and Five Mandatory Civility Rules that will Work*, 37 GEO. J. LEGAL ETHICS 167 *passim* (2024).

an aspirational professional value, its function has increasingly been reduced to a regulatory mechanism, reinforcing control rather than fostering a shared professional identity.[377]

C. PROCEDURES FOR THE CIVIL LAWYER

The rise of procedural innovations in dispute resolution during the 1970s was framed by two competing visions informed by principles of civility: one that sought to integrate alternative dispute resolution (ADR) processes into the legal system to facilitate efficiency and conserve judicial resources, and another that viewed ADR processes as alternatives for resolving disputes in ways that fostered interpersonal connection and engagement in the face of deep-seated conflict. These two purposes have shaped the ways in which civility functions within dispute resolution practices.[378]

By the mid-1970s, litigation was increasingly seen as inefficient, costly, and adversarial in ways that undermined its ability to provide meaningful justice. These concerns gave rise to efforts to promote alternatives to reduce court congestion and provide litigants with faster, less expensive ways to resolve conflicts. The concept of the "multi-door courthouse," proposed by Frank Sander at the 1976 Pound Conference, exemplified this vision by suggesting that different disputes called for different processes—some suited to trial, others to mediation, arbitration, etc.[379] In this model, ADR was a tool for triaging disputes, for achieving, in Burger's words at the Pound Conference, "the most satisfactory, the speediest and the least expensive means of meeting the legitimate needs of the people in resolving disputes."[380] Cases where parties could reach agreement would be diverted from the courts, conserving judicial resources for novel legal questions or cases where structural inequalities or intransigence made settlement impossible.[381] In this way, ADR processes could advance Burger's broader civility agenda: they promoted cooperation, facilitated amicable resolution, and reinforced the legitimacy of legal institutions by demonstrating their capacity to handle disputes without adversarial litigation.[382] Even in criminal law, community

377. Mashburn, *supra* note 37, at 1166.

378. Robert Cover contrasted the ways in which "the interesting work with an institutional focus emphasizes the complex interplay among the many functions of an institution" against the ways in which "the most interesting work in dispute resolution stresses the complex interplay among institutions performing the function." Robert M. Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 912 (1979).

379. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113, 131–32 (1976).

380. Warren E. Burger, *Agenda for 2000 A.D.:A Need for Systematic Anticipation*, 15 JUDGES J. 27, 32 (1976).

381. Alternatively, less formal mechanisms could be built into courts. *See* John C. Cratsley, *Community Courts: Offering Alternative Dispute Resolution Within the Judicial System*, 3 VT. L. REV. 1 (1978).

382. Andrew B. Mamo, *Three Ways of Looking at Dispute Resolution*, 54 WAKE FOREST L. REV. 1399, 1411–26 (2019).

moots could provide informal spaces to address crime before resorting to courts.[383]

Informal processes such as mediation could preserve relationships and enable mutual recognition. Parties and their attorneys had incentives to moderate their advocacy to build towards agreement. In contrast to litigation, where parties often became entrenched in adversarial positions, mediation encouraged active listening, perspective-taking, and collaborative problem-solving.[384] This procedural innovation was in line with the broader effort to cultivate civility by reducing antagonism and emphasizing the role of legal actors as facilitators of dialogue rather than warriors for their clients.

However, the drive to incorporate ADR into formal legal institutions also led to critiques that ADR masked structural inequalities by compelling settlement—even when one party held a significant power advantage over the other.[385] A weaker party might feel pressured to accept an unfair resolution due to the perceived costs and risks of continuing litigation. In such instances, the capability of ADR to promote civility could be seen as imposing harmony in ways that suppressed legitimate grievances.[386]

The kinds of processes advanced by the dispute resolution movement could also be seen as providing a genuine alternative to the legal system's adversarial model or to dispute resolution through state institutions.[387] For some, mediation's strength lay precisely in its ability to create spaces for dialogue between parties with deeply conflicting perspectives—an approach that viewed conflict not as a problem to be avoided but as a phenomenon that required meaningful engagement, consistent with civility'.[388]

This perspective saw mediation as particularly valuable for those conflicts that were *unlikely* to reach agreement. In contrast to the efficiency-oriented vision of ADR, the vision of mediation grounded in civility' saw mediation as a space for

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383. *See generally* Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973) (describing a decentralized complement to the criminal justice system). Amy Cohen describes this as an effort "to relegitimate state institutions by shifting particular social control functions to communities" rather than sidelining courts entirely. Amy J. Cohen, *The Rise and Fall and Rise Again of Informal Justice and the Death of ADR*, 54 CONN. L. REV. 197, 206 (2022).

384. Consequently, it fell outside of "the lawyer's standard philosophical map." Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43–48 (1982).

385. *See, e.g.*, Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 1006, 1008, 1013 (1979).

386. Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture,* 15 L. & SOC'Y REV. 525, 527 (1980) ("Dispute processing research has thus acquired its own ideology which . . . denies, implicitly, that disputes and disputing are normal components of human association.").

387. *See* Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 339 (1971), noting that there was a strong "tendency . . . to convert every form of social ordering into an exercise of the authority of the state" but that "mediation seems to resist this tendency to subsume every kind of ordering under the rubric of 'power' or 'authority.'"

388. *See* Mamo, *supra* note 382, at 1426–40.

parties to engage in transformative dialogue.[389] The emphasis was on the possibility of working through disputes in ways that acknowledged fundamental differences without demanding consensus.

Some theorists in this tradition drew from feminist ethics of care and other relational approaches to conflict resolution, arguing that mediation allowed disputants to articulate their experiences in ways that litigation did not.[390] Rather than reducing disputes to legal claims and counterclaims, mediation could provide space for parties to express their underlying concerns, emotions, and narratives. For example, Carrie Menkel-Meadow built models of problem-solving negotiation and mediation upon a foundation of feminist theory, particularly Carol Gilligan's ethic of care, which prioritized understanding the needs of self and others in ways that legal formalism often obscured.[391]

Similarly, some Christian legal scholars viewed mediation as an opportunity to integrate principles of reconciliation and moral responsibility into legal practice. Thomas Shaffer, for example, saw mediation as a means of addressing disputes through a framework of love and mutual understanding, rather than through adversarial combat.[392] From this perspective, mediation was an alternative not only to litigation but to the very foundations of the adversarial legal system.

However, this alternative vision of mediation raised its own set of concerns. Critics noted that models of conflict engagement built upon principles of empathy and critique could not be expected to resolve conflicts within an impersonal society in any meaningful sense.[393]

The tension between these perspectives on dispute resolution remains unresolved. On the one hand, ADR has been successfully integrated into legal practice, with mediation and arbitration now commonplace in a wide range of disputes, from commercial contracts to family law.[394] This integration reflects the triumph of Burger's vision, in which ADR serves as a mechanism for efficient dispute resolution.

On the other hand, the potential of ADR as a space for deeper engagement with conflict remains. Some contemporary initiatives, such as restorative justice programs, seek to build on the transformative potential of mediation by creating structured processes that allow parties to explore the roots of their conflicts and

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389. For an example of a community activist explaining uses of arbitration and mediation, *see* John P. Adams, *Community Activist Views the Advantages of Mediation and Arbitration*, 29 BUS. LAW. 1031, 1031–33 (1974).

390. *See* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1601–05 (1991).

391. *See* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754, 763 n.28 (1984).

392. McThenia & Shaffer, *supra* note 311.

393. David Luban, *Difference Made Legal: The Court and Dr. King,* 87 MICH. L. REV. 2152, 2205 (1989).

394. *See* Deborah Thompson Eisenberg, *Beyond Settlement: Reconceptualizing ADR as "Conflict Process Strategy,"* 35 OHIO ST. J. ON DISP. RESOL. 705, 706 (2020) (describing ADR as "both ubiquitous and at risk of extinction as a distinct concept").

work toward meaningful resolutions. These programs largely (though not entirely) reject the efficiency-driven logic of dispute resolution in favor of a more expansive vision of dispute resolution as a means of social transformation.[395]

The procedural innovations that reshaped dispute resolution in the 1970s reflect competing understandings of civility's role in legal practice. Understood as a part of legal process, mediation and arbitration were valuable tools for fostering efficiency, minimizing adversarial conflict, and conserving judicial resources. For those who sought to create spaces for engaging with conflict in ways that questioned foundational premises of the legal system, these processes offered opportunities to engage with disputes in ways that centered human connection, moral responsibility, and transformative dialogue. While mediation and other ADR mechanisms are now deeply embedded in the legal system, the question remains: is their primary function to smooth the gears of institutional efficiency, or do they still hold the potential to create alternative spaces for working through conflict in ways that go beyond traditional legal norms?

V. THE STATE OF CIVILITY TODAY

The previous section showed how contemporary civility initiatives in legal education, in professional ethics, and in dispute resolution remain ambivalent about which version of civility motivates them. With the benefit of the history sketched in this article, we can see how contemporary problems reproduce the dynamics within which civility has been contested.

Let us briefly recap the argument. Radical lawyers challenged the premise that legal institutions were broadly accepted as legitimate. To Chief Justice Burger and the legal establishment, this signaled a crisis for maintaining legal order. Civility, as they defined it, was not simply about decorum—it was about securing public faith in legal institutions through demonstrations of mutual respect and adherence to procedural norms.[396]

But, to many, those legal institutions had already compromised their legitimacy.[397] Critics argued that legal institutions limited the ability of lawyers to challenge systemic injustices, while insisting on their own neutrality. Civility in Burger's terms was a red herring because, to the critics, legal institutions were themselves the primary sources of incivility.[398]

Critics of civility offered an alternative, grounded in direct encounter rather than institutional legitimacy.[399] This model of civility'—whether based in human

395. Cohen, *supra* note 383, at 233–40.

396. *See supra* Section II.C.

397. A warning from the 1973 report *Disorder in the Courts* rings as true today as it did then: "Those who feel strongly about what they see as injustice in the courts or in society are not likely to be impressed by the dangers of disruption. From their perspective, the system does not deserve their respect." DORSEN & FRIEDMAN, *supra* note 7, at 22.

398. *See supra* Section III.B.

399. Stephen Carter, for example, has argued that "[t]he key to reconstructing civility . . . is for all of us to

recognition or moral responsibility—sought to publicly assert and defend the humanity and dignity of the marginalized.

The two visions of civility that have shaped the last fifty years have coexisted uneasily. One appealed to interpersonal decency to strengthen trust in institutions; the other sought to forge interpersonal connections independent of institutions. That uneasy coexistence is untenable today, amidst political violence and hollowed-out institutions.[400]

Appeals to institutional civility, such as Chief Justice Roberts's outrage at criticisms of Supreme Court justices,[401] mirror Burger's argument that questioning the good faith of legal institutions is inherently uncivil by threatening institutional order. But such appeals to civility ring hollow because they presume an institutional legitimacy that no longer holds as judicial appointments and litigation strategies have become explicitly partisan.[402] (It is notable that Justice Thomas, one of the intellectual leaders of the Court's right wing, had earlier criticized, as a driver of incivility, the use of the courts to achieve broad social change.[403]) An insistence on civility—demonstrating respect for institutions and public figures, channeling conflicts into the stylized forms of legal combat—cannot restore trust in institutions that have already lost it. Civility in Burger's sense, as an effort to maintain institutional trust, comes too late; that trust is already gone.

At the same time, civic groups and bipartisan initiatives promote a civility' rooted in interpersonal connection, emphasizing that we have more in common.[404] These efforts acknowledge profound social and political divides and then seek to foster human relationships across these divides to rebuild connection and community in ways that emphasize the belongingness of the marginalized and disesteemed. This approach has the virtue of not assuming social cohesion, but rather working to bring it into being.

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learn anew the virtue of acting with love toward our neighbors." CARTER, *supra* note 3, at 18. Striking a similar note, Hudson describes civility as "promot[ing] the rigorous debate that might on the surface *seem* impolite but, nevertheless, authentically respects others." HUDSON, *supra* note 13, at 17. For an argument that connects the critical theory tradition with the spiritual one, *see* Peter Gabel, *Critical Legal Studies as a Spiritual Practice,* 36 PEPP. L. REV. 515 (2009).

400. *See generally* Bybee, *supra* note 26, at 13 (describing a crisis of civility in the Trump era).

401. *See* Joan Biskupic, *Analysis: John Roberts Doesn't Want to Hear Any Dissent About His Supreme Court*, CNN (July 2, 2023), https://www.cnn.com/2023/07/02/politics/john-roberts-scotus-dissent/index.html [https://perma.cc/MWJ5-JQD2]. This was also a major theme of Roberts's 2024 Year End Report on the Federal Judiciary.

402. *See, e.g.*, Adam Liptak, *Confidence in U.S. Courts Plummets to Rate Far Below Peer Nations*, N.Y. TIMES (Dec. 17, 2024), https://www.nytimes.com/2024/12/17/us/gallup-poll-judiciary-courts.html [https://perma.cc/2BKG-ENNM].

403. *See supra* notes 270–277, and accompanying text.

404. *See, e.g.*, Jonathan Weisman, *Is the Partisan Divide Too Big to Be Bridged?*, N.Y. TIMES (June 16, 2024), https://www.nytimes.com/2024/06/16/us/politics/national-divisions.html [https://perma.cc/R937-TJT4].

But this vision of civility', too, falls short. It assumes that social cohesion can be rebuilt through interpersonal dialogue, without confronting the public institutions that shape our lives.[405] A politics of interpersonal harmony without an articulable notion of justice or an institutional structure is not a politics at all—it is an avoidance of politics.[406] It presumes the recognition of a shared future, even if there is disagreement on what it looks like or how to get there.

Civility', as a mode of inclusive dialogue that embraces conflict but lacks a clear institutional grounding, remains principally an elite project in the absence of social spaces to engage in this work and institutions to support it.[407] Civility' cannot undo the fragmentation of American society or the epidemic of isolation without a more robust commitment to revitalizing the institutions that it has decentered. Civility', as an effort to forge interpersonal connection, comes too early; it is oriented toward a shared future before the terms of equal membership in society have been defined.

Both civility and civility' are inadequate to the challenges of the present moment. Civility will not restore the optimism of the early 1960s (nor should we want it to, knowing how much was excluded from that vision of social order). Civility' will not lead us into the utopia of universal fellowship (nor could it ever do so). But efforts to deny both in the name of some autochthonic unity that brooks no dissent, as is the case with populists today, only underscores the importance of having *some* kind of civility.

What is the path forward? What we require is:

- An ethic of respectful contestation rather than restraint, that values conflict rather than suppressing it.
- A public practice that distinguishes between good-faith disagreement and bad-faith manipulation.
- A commitment to institutions that accepts their inherent fallibility and invites their continual critique.
- A recognition that, in a diverse and fragmented society, belonging is something we must cultivate together, not something given.

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405. Waldron notes "the strong possibility [] that the things that divide us and the divisions that seem deepest and most bitter may be what matter above all to those who participate in politics." Waldron, *supra* note 28, at 58.

406. *See* Lynn Mie Itagaki, *The Long Con of Civility*, 52 CONN. L. REV. 1169, 1175 (2021) (describing civility as "a confidence trick played on the U.S. public for decades . . . as a universal solution for many contemporary political ills"). Hudson is explicit about civility being an ethical, rather than a political, project in the first instance: "We can't change society, but we can change ourselves and how we operate in the world around us. And if enough of us decide to change ourselves, we might be able to change the world we live in, too." HUDSON, *supra* note 13, at 177.

407. *See* Alex Bronzini-Vender, *Arguing Alone: On Alexandra Hudson's "The Soul of Civility,"* L.A. REV. OF BOOKS (Jan. 1, 2014), https://lareviewofbooks.org/article/arguing-alone-on-alexandra-hudsons-the-soul-of-civility/ [https://perma.cc/GT5U-FWPW].

In other words, we need a mode of engagement that cannot be grounded in politeness, avoidance, or deference, but instead must be rooted in a practice of respectful conflict, committed to real contestation, real accountability, and real stakes. This posture would be a demanding one: extending the benefit of the doubt while remaining vigilant for its abuse; accepting the necessity of treating legal institutions as fundamentally legitimate while also embracing the necessity of their continual critique. This would resemble the approach King took toward his interlocutors, which does not fit neatly into our existing analytical categories of civility.[408]

In practice, this would mean that courts deciding controversial issues (gun control, abortion, etc., take your pick) would not pretend that the outcome is *compelled* by legal sources, but rather would own up to the result representing the best efforts of judges, fallible and idiosyncratic human beings who have each been granted certain authority and discretion by virtue of their institutional positions, to resolve the issue in a principled way—and that the matter of the quality of the reasoning of any one of them is unrelated to the matter of which voices constitute a majority. And this would mean acknowledging that denying the legal authority of a court entails denying the entire structure that gives it that authority—not something to be taken lightly. Legal institutions would not only tolerate substantive dissent but invite it, even as they unapologetically exercise their authority—acknowledging, rather than avoiding, the contestability of their actions and the inherent fallibility of the good-faith reasoning that justifies them.

In practice, this would also mean challenging those in positions of authority by neither deferring to their status nor ignoring it altogether, but by directing dissent to what they do with their position of public trust; challenging a judge's decisions as unprincipled is not the same as challenging a judge as unprincipled. And for those in positions of authority who are accustomed to deference, this would mean respecting the validity of vigorous disagreement that accepts their institutional authority; again, challenging a judge's decisions as unprincipled is not the same as challenging a judge as unprincipled. Such a stance requires neither deference to institutional authority nor a commitment to empathetic connection alone.

If civility is to be more than an elegy for lost institutions or a naïve plea for common ground, it must be a means of engaging in public struggle, openly acknowledging that institutional legitimacy demands both care and critique, and that interpersonal belonging requires the hard work of continually forging and reforging our social bonds.

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408. *See supra* notes 11–18, and accompanying text.