

# ON HUBRIS, CIVILITY, AND INCIVILITY

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*Hubris, excessive confidence in one's own views and conclusions, is a dominant human trait. It comes in many guises and defines common patterns of mistakes. This Essay examines several potential meanings of the terms "civility" and "incivility" when hubris influences decisionmaking. Groups in society primarily use the labels "civility" and "incivility" to determine participation in decisionmaking processes. The labels effectively function as exclusion instruments, although they create the appearance of inclusiveness and openness to contrarian views. The Essay describes the role of hubris in establishing conformity in groups through the use of "civility" and "incivility" norms. The Essay argues that reliance on the labels "civility" and "incivility" could exacerbate group vulnerability to follow the hubris of individuals, and therefore to err.*

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*When the music stops, . . . things will be complicated. But as long as the music is playing, you've got to get up and dance. We're still dancing.*

—Chuck Prince, Citigroup CEO<sup>1</sup>

*Man is weak and his judgment is at best fallible.*

—Louis Brandeis<sup>2</sup>

*The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.*

—Louis Brandeis<sup>3</sup>

## INTRODUCTION

*Do we know civility when we see it? Do we know incivility when we see it?* "Civility" and "incivility" defy close circumscription, although some occasionally define them for particular purposes.<sup>4</sup> People cannot "see" them. They

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1. Michiyo Nakamoto & David Wighton, *Bullish Citigroup Is 'Still Dancing' to the Beat of the Buy-Out Boom*, FIN. TIMES, July 10, 2007, at 1. In November 2007, Prince resigned as Citigroup began absorbing substantial losses. Robin Sidel et al., *Citigroup CEO Plans to Resign as Losses Grow*, WALL ST. J., Nov. 3, 2007, at A1; see also Editorial, *Ex-Prince of the Citi*, WALL ST. J., Nov. 6, 2007, at A18. The Great Recession began in 2007, but the music stopped playing long before that.

2. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932).

3. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Friedrich Hayek endorsed the quotation in *The Constitution of Liberty*. F.A. HAYEK, THE CONSTITUTION OF LIBERTY 253 (1960). Milton and Rose Friedman also used this quotation to open their book, *Free to Choose*. MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT (1980). Friedman and Hayek's regulatory philosophy was remarkably inconsistent with Brandeis's philosophy.

4. See, e.g., Warren E. Burger, *The Necessity for Civility*, 52 F.R.D. 211, 215 (1971) (defining civility as "the very glue that keeps an organized society from flying apart"); William H. Rehnquist, *Civility and Freedom of Speech*, 49 IND. L.J. 1, 1 (1973) ("The word civility, as we think of it today, suggests courtesy or politeness."); Clarence

may see what they want to see, or believe that what they see is seen by others. They may believe that the civilized public shares a consensus that some actions are categorically civil or categorically uncivil.<sup>5</sup> However, “seeing is believing,” but rarely, if ever, in the objective sense. Our views and beliefs influence what we see and do not see.<sup>6</sup> As Francis Bacon observed:

The human understanding when it has once adopted an opinion . . . draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects; in order that by this great and pernicious predetermination the authority of its former conclusions may remain inviolate.<sup>7</sup>

The words “civility” and “incivility” mostly have the meanings that people attribute to them. One common meaning includes tolerance (or intolerance) of different views.<sup>8</sup> Because people tend to reject views inconsistent with their own, we should be skeptical of their ability to apply such meaning of “civility” even when they advocate for it.

This Essay examines the use of “civility” and “incivility” in light of the human tendency to adhere to existing beliefs and expectations. In some contexts, people take pride in adhering to beliefs and positions. Politicians follow this pattern. They risk political capital if they change positions about substantial issues, and tend to brag about their consistent record. Nevertheless, politicians are central actors in the public discourse. In other contexts, people act as if they are open to

Thomas, *Civility and Public Discourse*, 31 NEW ENG. L. REV. 515, 517 (1997) (arguing that civility is a social mechanism that reduces the need of government control). Various scholars have also attempted to provide meaning to these terms. See, e.g., STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 11 (1998) (defining civility as the ethic of cooperation, or otherwise “the sum of the many sacrifices we are called to make for the sake of living together”); Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 CONN. L. REV. 1, 5 (2011) (defining “incivility” as an externality of debates, controversies, and discourse).

5. See, e.g., Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 406–07 (2012); Kenji Yoshino, *The “Civil” Courts: The Case of Same-Sex Marriage*, 54 ARIZ. L. REV. 469, 470 (2012) (quoting a 2008 Civility Pledge that states, “I will stand against incivility when I see it”).

6. See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954) (evaluating the various interpretations of a single social event—namely, a college football game); John Heil, *Seeing Is Believing*, 19 AM. PHIL. Q. 229 (1982); Dan M. Kahan et al., *“They Saw a Protest”: Cognitive Illiberalism and the Speech–Conduct Distinction*, 64 STAN. L. REV. (forthcoming 2012).

7. FRANCIS BACON, NOVUM ORGANUM § 46 (1620), reprinted in 8 THE WORKS OF FRANCIS BACON 59, 79 (James Spedding et al. eds., Hurd & Houghton 1869) (footnote omitted).

8. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (“[F]undamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular.”).

input, but no information changes their minds. This Essay asks what “civility” and “incivility” may mean in public discourse or private debates (“group deliberation”) when many participants only advocate for their positions, and others tend to make poor decisions.

To a large extent, “*I Know It When I See It*” (“IKI-WISI”) rules symbolize the risky self-confidence that this Essay addresses. IKI-WISI rules are principally used when the concept—obscenity, civility, incivility, or another—cannot be properly defined. Justice Potter Stewart, who contributed the IKI-WISI rule to the American legal pantheon, framed the definitional problem as follows: “I shall not today attempt . . . to define the [concept]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.”<sup>9</sup> IKI-WISI rules empower hubris. Under these rules, the decision-maker’s confidence in the validity of her views may determine legal outcomes in certain circumstances. In practice, personal motives, fallibility, cognitive biases, and heuristics influence our perceptions of reality and what we “see.”<sup>10</sup> Attempts to enforce civility and incivility norms often turn into “thought control.”<sup>11</sup> These are the positions each one of us contributes to group deliberation.

Groups, therefore, “see” what their members want or expect to see. Justice Oliver Wendell Holmes formulated the “marketplace of ideas,” which supposedly suggests that inclusiveness of views may eliminate problems of conformity and error: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”<sup>12</sup> The marketplace of ideas, therefore, offers an implicit promise to correct biases, unconscious influences, and hubris that may dominate it. Correspondingly, one of the promises of “civility” is tolerance of and openness to contrarians, which, if it happens, could mitigate group conformity. This Essay revisits these promises and argues that the labels “civility” and “incivility” are often used to enforce conformity and regulate social values.<sup>13</sup>

The Essay makes two related normative claims. First, Part I explains that although “civility” is a concept of inclusiveness, it determines participation and therefore it has exclusionary effects. Second, Part II addresses the use of “civility”

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9. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to “hard-core pornography”). See generally Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023 (1996). At retirement, Justice Stewart expressed regrets for “writing the phrase” that “is far from deathless.” Press Conference with Potter Stewart, Assoc. Justice, U.S. Supreme Court, in the Supreme Court Building, Washington, D.C. (June 19, 1981), in 55 TENN. L. REV. 21, 25 (1987).

10. See Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853 (1995).

11. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986).

12. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The academic literature on Holmes’s analysis is abundant. See, e.g., Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

13. For a general discussion of regulation of social values, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

and “incivility” as rules of engagements in group deliberations and stresses concerns regarding conformity and increased likelihood of costly mistakes.

### I. (IN)CIVILITY AS A PREFERENCE

Civility and incivility do not refer only to tolerance of other views. They also refer to individual preferences.<sup>14</sup> Specifically, incivility is often associated with rejected preferences. For example, bigotry, hatred, racism, vulgarity, and indecency are generally regarded as uncivil.<sup>15</sup> Bigotry, hatred, and racism are preferences that represent strong forms of intolerance. By contrast, vulgarity and indecency are more about preferences than intolerance.<sup>16</sup> Similarly, some associate politeness with civility and impoliteness with incivility. These meanings tend to be about preferences, as well.

This Part examines our likely use of civility and incivility as social instruments for allocation of participation rights in group deliberation processes and exclusion.

#### A. *The Liberal Paradox*

Society is not tolerant of all preferences. It is tolerant of certain preferences and, under certain circumstances, would attempt to deny or modify other preferences. For example, informed-consent statutes that require providing women who are interested in abortion with vivid information about the fetus are intended to reverse their decisions.<sup>17</sup> Similarly, society attempts to discourage smoking.<sup>18</sup> Decisions of intolerance toward certain preferences are regularly made in the course of civil group deliberation.

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14. The word “preferences” in this Essay means revealed preferences. That is, the word refers to what the person does when she faces a choice, even if she would like to act differently. Some individual preferences may change over time, and some are wired in us. See P. A. Samuelson, *A Note on the Pure Theory of Consumer’s Behaviour*, 5 *ECONOMICA* 61, 61–62 (1938); Amartya Sen, *Behaviour and the Concept of Preference*, 40 *ECONOMICA* 241, 258–59 (1973).

15. See, e.g., *Johnson v. Atlantic Cnty.*, Civil No. 07-4212 (RBK/AMD), 2010 WL 2629033, at \*3 (D.N.J. June 28, 2010) (“[U]sing a racial slur . . . [is] clearly uncivil . . . .”); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 216 (D. Conn. 2007) (referring to vulgar blogs as “uncivil”); *Turner v. State*, 131 So. 2d 428, 430 (Ala. Ct. App. 1961) (noting that “[i]ndecency is within the meaning of rudeness,” and citing cases that equated indecency with “uncivil” conduct); *Justices of the Appellate Div., First Dep’t v. Erdmann*, 301 N.E.2d 426, 427 (N.Y. 1973) (per curium) (expressing that “vulgar and insulting words” constitute an act of incivility).

16. Civility, lack of civility, and incivility often refer also to careless disorderly conduct, rather than to preferred course of action. For example, people may use words of civility to express dissatisfaction with their neighbor’s dog. See, e.g., Bob Morris, *Civility on the Way Out? Add Dogs to That List*, N.Y. TIMES, Apr. 28, 2011, at E1.

17. See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012) (upholding Texas informed consent statute).

18. See, e.g., *R.J. Reynolds Tobacco Co. v. U.S. Food & Drug Admin.*, Civil No. 11-1482 (RJL), 2012 WL 653828, at \*6–8 (D.D.C. Feb. 29, 2012) (holding that regulations that required color graphics depicting the negative health consequences of smoking were unconstitutional).

To examine the “intolerance” toward certain preferences, consider Amartya Sen’s Paretian Liberal Paradox, which explores the relationship between personal liberties and the public interest.<sup>19</sup> The Liberal Paradox illuminates that, in a diverse society, unqualified state protection of one’s preferences would compromise preferences of others and may not promote public interests.<sup>20</sup> To see that, assume that Alexis and Raphael like the color black—for their outfit, homes, cars, and everything else. Alexis and Raphael express their individualism and style with color. Alas, everyone else in society finds the color black terribly depressing. Should society protect the freedom of color? Should society protect the color sensitivity of the overwhelming majority? Should society honor Alexis’s and Raphael’s “right to be let alone”?<sup>21</sup> Should society adopt an IKI-WISI rule that bans “depressing colors”? Should society regard the use of black as an uncivil act and color diversity as civility?

Now, substitute expressions of bigotry, vulgarity, racism, or other terrible things for the “use of black.” Then, flip the contrasting preferences; namely, imagine that all members of society are fans of the “use of black,” or whatever the frame could represent, while Alexis and Raphael find the “use of black,” or whatever the frame could represent terribly depressing. As the hypothetical illustrates, one aspect of diversity of preferences in society is inconsistency and conflict among preference groups.

The intuitive point of the Liberal Paradox is that a social choice of respecting each other’s personal choices is unstable because individual choices tend to conflict with each other; some constraints and restrictions are necessary to preserve and promote public interests.<sup>22</sup> Specifically, the argument for exclusion is that certain expressions cause “harm.”<sup>23</sup> Civility as a preference also excludes certain forms of expressions for their potential harm. Being a poorly defined abstract social norm, distinctions between legitimate and illegitimate exclusions become rather arbitrary.<sup>24</sup>

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19. See Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

20. Sen defined the principle of “[a]cceptance of personal liberty”: “[C]ertain personal matters in which each person should be free to decide what should happen, and in choices over these things whatever he or she thinks is better must be taken to be better for the society as a whole, no matter what others think.” Amartya Sen, *Liberty, Unanimity and Rights*, 43 *ECONOMICA* 217, 217 (1976).

21. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

22. Amartya Sen, *Freedom of Choice: Concept and Content*, 32 *EUR. ECON. REV.* 269, 272–76 (1988).

23. See generally JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. REV.* 133 (1982).

24. See, e.g., Hadley Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 *SUP. CT. REV.* 281, 282 (“When we speak of civility, . . . we speak . . . about the fostering of moral codes and about the kind of life, the manners, even the modes of making a living that we hold up for emulation . . .”).

### B. Reciprocal Incivility

The Liberal Paradox underscores that harm may be a matter of perspective (or preference). If we determine that A inflicted harm on B, a remedy is supposedly warranted. But as we already saw, the concept of harm is *often* a function of diversity of interests. It reflects a reciprocal problem, rather than a unilateral consequence of one's action.<sup>25</sup> To illustrate this point, consider Ronald Coase's classic railway hypothetical:

Suppose a railway is considering whether to run an additional train or to increase the speed of an existing train or to install spark-preventing devices on its engines. If the railway were not liable for fire damage, then, when making these decisions, it would not take into account as a cost the increase in damage resulting from the additional train or the faster train or the failure to install spark-preventing devices.<sup>26</sup>

It is a public interest to have railway traffic, but the level of operation should justify the damage by fires caused by sparks from its engines. The legal system provides cost internalization mechanisms that intend to calibrate incentives, so that activity levels would be "optimal." Coase proposed that, under certain conditions, private bargaining could calibrate incentives more effectively.

Similar reciprocal problems arise when civility and incivility represent social preferences. To see that, assume that the Coasean railway "sparks" are the use of the F-word and S-word on television networks. Activity choices of television networks and the use of "spark-preventing devices" influence levels of "fire" in some American homes. When an artist on a live broadcast blurts out "this is really f\*\*\*ing brilliant!" to express his excitement for winning a prestigious music award, some are offended and their concerns for their kids skyrocket.<sup>27</sup> For them, the use of the F-word and S-word on network television is equivalent to the use of the color black in our earlier hypothetical. Such verbal sparks led concerned individuals associated with Parents Television Council ("PTC")<sup>28</sup> and the Federal Communications Commission ("FCC") to maintain that the use of F-word or S-word "in any shape, form or meaning on broadcast network television" is "patently offensive" or simply "clearly the kind of vulgar and coarse language that is commonly understood to fall within the definition of 'profanity.'"<sup>29</sup> That is, the

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25. See Orbach & Sjoberg, *supra* note 4, at 13–14. This is one corollary of the Coase Theorem. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

26. Coase, *supra* note 25, at 31.

27. See Jess Bravin & Amy Schatz, *Don't Read His Lips—You Might Be Offended*, WALL ST. J., Nov. 4, 2008, at A14 (describing the events surrounding Bono's use of this expletive during the 2003 Golden Globe Awards and other similar incidents).

28. PTC is a private organization whose "primary mission is to promote and restore responsibility and decency to the entertainment industry in answer to America's demand for positive, family-oriented television programming." *Frequently Asked Questions*, PARENTS TELEVISION COUNCIL, <http://www.parentstv.org/PTC/faqs/main.asp#What is the PTCs mission> (last visited Apr. 1, 2012).

29. Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 FCC Rcd. 4975, 4981 (2004) [hereinafter *Golden Globes Order*]; see also *Complaints Regarding Various Television Broads. Between Feb. 2,*

argument was that the use of the F-word or S-word, “to the extent such language is broadcast between 6 a.m. and 10 p.m.,”<sup>30</sup> is necessarily an uncivil act. The sparks of the word hit American households. “Railways,” namely, television networks, defended their operation. Both parties used the word “harm” in this dispute. The defenders of morality considered the invasion of profanity into American households as harmful. The television networks considered censorship as harmful. Regardless of one’s position, this problem has a reciprocal nature. Both parties had firm views about the meaning of civility and incivility.

Another example of reciprocal incivility is the fairness doctrine, an FCC rule that relied on the premise that the broadcasting of an unbalanced view could cause harm. The doctrine’s origin is a 1929 ruling of the Federal Radio Commission, the FCC predecessor, which concluded that a licensed broadcaster’s failure to present “a well-rounded program” would “not be fair” and “would not be good service.”<sup>31</sup> Specifically, the Commission adopted the marketplace of ideas concept as a rule, declaring that “public interest requires ample play for the free and fair competition of opposing views . . . [in] issues of public importance.”<sup>32</sup> In 1949, the FCC formalized the fairness doctrine and imposed two “affirmative responsibilities” on licensed broadcasters: (1) “to provide reasonable amount of time for the presentation over their facilities of programs devoted to the discussion and consideration of public issues;”<sup>33</sup> and (2) “to encourage and implement the broadcast of all sides of controversial public issues.”<sup>34</sup> The fairness doctrine, therefore, used procedural rules to protect “civilized private speech.”<sup>35</sup> In 1987, the FCC abandoned the doctrine on the grounds that it was contrary to the public interest and First Amendment.<sup>36</sup> The fairness doctrine was abandoned but did not die until 2011. Over the years Congress debated bills aimed to restore the doctrine and bills aimed to prevent the FCC from resurrecting it.<sup>37</sup> The January 2011 shooting in Tucson sparked a national debate over civility and incivility norms in the United States.<sup>38</sup> A new “Broadcaster Freedom Act” bill was introduced in

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2002 & Mar. 8, 2005, 21 FCC Rcd. 2664, 2665 (2006) (“In these decisions, we address hundreds of thousands of complaints alleging that various broadcast television programs aired between February 2002 and March 2005 are indecent, profane, and/or obscene.”). *But see* Fox Television Stations, Inc. v. FCC (*Fox II*), 613 F.3d 317 (2d Cir. 2010) (striking down the FCC’s indecency policy), *cert. granted*, 131 S. Ct. 3065 (2011).

30. Golden Globes Order, *supra* note 29, at 4981.

31. Great Lakes Broad. Co., 3 F.R.C. 32, 33 (1929), *aff’d in part, rev’d in part*, 37 F.2d 993 (D.C. Cir. 1930). For the history of the fairness doctrine until 1977, see STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* (1978).

32. *Great Lakes Broad. Co.*, 3 F.R.C. at 33.

33. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1249 (1949).

34. *Id.* at 1251.

35. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387 (1969) (upholding the fairness doctrine).

36. *In re Syracuse Peace Council*, 2 FCC Rcd. 5043 (1987).

37. *See, e.g.*, Broadcaster Freedom Act of 2011, H.R. 642, 112th Cong. (2011); Broadcaster Freedom Act of 2009, S. 34, 111th Cong. (2009); Broadcaster Freedom Act of 2007, H.R. 2905, 110th Cong. (2007); Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. § 2(4) (2005).

38. *See, e.g.*, Matt Bai, *A Turning Point in the Discourse, But in Which Direction?*, N.Y. TIMES, Jan. 9, 2011, at A20; Carl Hules & Kate Zernike, *Bloodshed Puts*



Congress.<sup>39</sup> In response, the FCC declared once again that it had abandoned the fairness doctrine and that it was unenforceable without affirmative rulemaking of the doctrine.<sup>40</sup> The fairness doctrine endorsed defined preferences for the public discourse and, inevitably excluded other preferences. It did so by acknowledging that harm may be reciprocal and enforcing a particular code of civility.

The practical implication of the reciprocal nature of perceptions of “harm,” incivility, and lack of civility is that coercive norms merely reflect a preference, or a point of view. Thus, coercive civility norms can exclude valid contrarian views in group deliberation.<sup>41</sup> When the music plays—that is, conformity emerges—groups often seek to maintain the trend and exclude contrarians.<sup>42</sup> No one likes “party crashers.”<sup>43</sup>

### C. Self-Censorship

The conformity and exclusionary effects of “civility” and “incivility” may be powerful. They need not be direct, explicit, or formal. Once norms of “civility” and “incivility” receive some meaning in a group, they tend to enforce themselves. These norms project on a person’s status in the group. Who would like to be “uncivil”? When an activity acquires the “uncivil” status because of a dominant preference, at least some people who hold a preference for this activity will refrain in order to avoid social stigma.<sup>44</sup>

To illustrate this point, consider Glenn Loury’s analysis of political correctness.<sup>45</sup> Loury argued that political correctness fosters “voluntary limitation on speech that a climate of social conformity encourages.”<sup>46</sup> He stressed that “[i]t is not the iron fist of repression, but the velvet glove of seduction that is the real

*New Focus on Vitriol in Politics*, N.Y. TIMES, Jan. 9, 2011, at A1; Jonathan Weisman & Naftali Bendavid, *The Arizona Shootings: Both Parties Urge Security, Civility*, WALL ST. J., Jan. 10, 2011, at A6.

39. Broadcaster Freedom Act of 2011, H.R. 642, 112th Cong. (2011).

40. Letter from Julius Genachowski, Chairman of the FCC, to Fred Upton, Chairman of the Comm. on Energy and Commerce (June 6, 2011) (on file with author).

41. Not all harms are reciprocal. Expressions of bigotry and racism are in the form of “A inflicts harm on B.” However, the argument is that harm is sometimes reciprocal, not always.

42. See *supra* note 1 and accompanying text.

43. See, e.g., Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992 (1992); Geoffrey M. Hodgson, *The Ubiquity of Habits and Rules*, 21 CAMBRIDGE J. ECON. 663 (1997); Clare Leaver, *Bureaucratic Minimal Squawk Behavior: Theory and Evidence from Regulatory Agencies*, 99 AM. ECON. REV. 572 (2009); Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197 (1986); Raaj K. Sah, *Fallibility in Human Organizations and Political Systems*, 5 J. ECON. PERSP. 67 (1991); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988).

44. See B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994).

45. Glenn C. Loury, *Self-Censorship in Public Discourse: A Theory of “Political Correctness” and Related Phenomena*, 6 RATIONALITY & SOC’Y 428 (1994).

46. *Id.* at 430.

problem.”<sup>47</sup> He thus defined “political correctness” as “*an implicit social convention of restraint on public expression, operating within a given community.*”<sup>48</sup> Further, Loury illustrated the self-censorship effect with a hypothetical:

- (a) within a given community the people who are most faithful to communal values are by-and-large also those who want most to remain in good standing with their fellows and;
- (b) the practice has been well established in this community that those speaking in ways that offend communal values are excluded from good standing. Then,
- (c) when a speaker is observed to express himself offensively the odds that the speaker is not in fact faithful to communal values, as estimated by a listener otherwise uninformed about his views, are increased.<sup>49</sup>

To summarize this point, under some conditions, the labels “civility” and “incivility” may, perhaps, function in a neutral manner; however, in ordinary circumstances because of the diversity of preferences in groups and society they may enforce conformity and exclude diversity of opinions.<sup>50</sup>

## II. “SEEING” THE FUTURE

“Civility” and “incivility,” as concepts related to group deliberation, have significance because of their potential impact on future outcomes.<sup>51</sup> This Part examines whether civility and incivility as rules of engagement could correct or foster bad group decisions.<sup>52</sup>

### A. Talking About the Future

Groups engage in discourse and debates for a wide range of reasons, but the primary reason is some disagreement (or potential disagreement) over the future. Debates about the past also have future effects. They may determine fault, liability, or status of “being right about the past.”

47. *Id.*

48. *Id.*

49. *Id.* at 437.

50. See Peter F. Drucker, *Political Correctness and American Academe*, 32 SOCIETY 58 (1994); Stephen Morris, *Political Correctness*, 109 J. POL. ECON. 231 (2001).

51. In disputes, civility and incivility influence the “negotiation” or other aspects of the administrations of the dispute. See, e.g., Yoshino, *supra* note 5, at 475 (arguing that civility influenced the Proposition 8 trial).

52. A “bad group decision” in this Essay is a decision that harms the group interests. That is, the harm does not refer to pure distributive effects, such as wealth transfer from one group to another. In the corporate world, poor managerial decisions reduce the value of the firm and affect all shareholders. See Randall Morck et al., *Do Managerial Objectives Drive Bad Acquisitions?*, 45 J. FIN. 31, 32–33 (1990).

In any group deliberation, participants conceptualize future implications in various ways, but all do so very imperfectly.<sup>53</sup> People tend to make mistakes in their evaluations of the future, not only because the future is unknown, but because of their cognitive biases and heuristics.<sup>54</sup> And although people are generally inconsistent in their approach toward risk, they tend to consistently and grossly underestimate ordinary risks,<sup>55</sup> are unrealistically optimistic about future events and their ability to influence them,<sup>56</sup> and are overconfident about their relative abilities.<sup>57</sup> Nevertheless, and perhaps consistent with that, people tend to seek or interpret information in ways that are partial to their existing beliefs and expectations.<sup>58</sup> That is, despite the tendency to make mistakes, people tend to exhibit excessive confidence with respect to their views and positions. Hubris is a very common trait.<sup>59</sup> In addition to hubris, fallibility and self-interest have some effect on every individual, although the degree of influence may vary considerably from one person to another.<sup>60</sup> These human limitations and others establish patterns of costly mistakes among individuals and groups.

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53. See Daniel Kahneman & Dan Lovallo, *Timid Choices and Bold Forecasts: A Cognitive Perspective on Risk Taking*, 39 MGMT. SCI. 17 (1993); Daniel Read et al., *Choice Bracketing*, 19 J. RISK & UNCERTAINTY 171 (1999).

54. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

55. See DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982); Colin Camerer, *Individual Decision Making*, in THE HANDBOOK OF EXPERIMENTAL ECONOMICS 587 (John H. Kagel & Alvin E. Roth eds., 1995); Hodgson, *supra* note 43; Robin M. Hogarth & Howard Kunreuther, *Decision Making Under Ignorance: Arguing with Yourself*, 10 J. RISK & UNCERTAINTY 15 (1995); W. Kip Viscusi et al., *Measures of Mortality Risks*, 14 J. RISK & UNCERTAINTY 213 (1997).

56. See Rachel Croson & James Sundali, *The Gambler's Fallacy and the Hot Hand: Empirical Data from Casinos*, 30 J. RISK & UNCERTAINTY 195 (2005); Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975); Dan Lovallo & Daniel Kahneman, *Delusions of Success: How Optimism Undermines Executives' Decisions*, HARV. BUS. REV., July 2003, at 56; Frank P. McKenna, *It Won't Happen to Me: Unrealistic Optimism or Illusion of Control?*, 84 BRIT. J. PSYCHOL. 39 (1993).

57. See Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143 (1981); Shelly E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 PSYCHOL. BULL., 193 (1988); Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980); Neil D. Weinstein, *Unrealistic Optimism About Susceptibility to Health Problems*, 5 J. BEHAV. MED. 441 (1982).

58. See JONATHAN ST. B.T. EVANS, BIAS IN HUMAN REASONING: CAUSES AND CONSEQUENCES 41 (1989); Peter Lamont, *The Making of Extraordinary Psychological Phenomena*, 48 J. HIST. BEHAV. SCI. 1 (2012); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

59. See Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109 (1997); see also Mark J. Kroll et al., *Napoleon's Tragic March Home from Moscow: Lessons in Hubris*, 14 ACAD. MGMT. EXECUTIVE 117 (2000) (discussing the sources of hubris, along with the costs associated with succumbing to it).

60. See Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 493 (1990) ("For example, cognitive accounts may require the assumption that people with different backgrounds differ in their prior beliefs about a particular issue when no

### B. Group Delusions

Consider financial bubbles. In his 1841 classic, *Memoirs of Extraordinary Popular Delusions*, Charles Mackay observed: “When men wish to construct or support a theory, how they torture facts into their service!”<sup>61</sup> This is one way to say: IKI-WISI, although it is not the meaning Justice Potter Stewart had in mind when he wrote his concurring opinion in *Jacobellis v. Ohio*.<sup>62</sup> Robert Shiller famously defined a “speculative bubble” as

a situation in which news of price increases spurs investor enthusiasm, which spreads by psychological contagion from person to person, in the process amplifying stories that might justify the price increases and bringing in a larger and larger class of investors, who, despite doubts about the real value of an investment, are drawn to it partly through envy of others’ successes and partly through a gambler’s excitement.<sup>63</sup>

Shiller argued that “irrational exuberance” explains the “psychological basis of a speculative bubble.”<sup>64</sup> We all know about speculative bubbles, when they happen we often tend to know that there is a bubble, yet speculative bubbles grow because many people follow an implausible fad. When a bubble bursts, the shock may cause some people to change their views, but many still “torture facts into their service.” For example, in the aftermath of the Great Recession, the Financial Crisis Inquiry Commission that studied the causes of the crisis divided along the party lines of its members. One group of experts saw a lack of and lax regulation,<sup>65</sup> and another saw poor regulations and global factors.<sup>66</sup>

We have relatively good instruments to evaluate future financial implications of present decisions. Nevertheless, people regularly ignore these instruments or deny their predictions. Sophisticated boards fall victim to “groupthink” and fail to see obvious problems around the corner.<sup>67</sup> People do not act more systematically in domains in which evaluative instruments are more complex or less precise. Examples of such domains include possession of firearms,

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evidence or plausible grounds for such differences exist.”); Sah, *supra* note 43, at 67 (“One aspect of fallibility is that an individual typically can extract only part of the decision-relevant information from the limited raw data available.”); Raaj Kumar Sah & Joseph E. Stiglitz, *Human Fallibility and Economic Organization*, 75 AM. ECON. REV. 292, 296 (1985) (“[O]rganizations may perform badly, not only because of misguided intentions . . . , but also from human fallibility.”).

61. 2 CHARLES MACKAY, *MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS* 304 (1841).

62. See *supra* note 9 and accompanying text.

63. ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* 2 (2d ed. 2005).

64. *Id.*; see also CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009).

65. FIN. CRISIS INQUIRY COMM’N, *THE FINANCIAL CRISIS INQUIRY REPORT*, at xvii (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

66. *Id.* at 444.

67. See, e.g., *In re Walt Disney Co. Derivative Litig.* 907 A.2d 693 (Del. Ch. 2005); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003).

abortion, same-sex marriage, regulation, and academic merit.<sup>68</sup> Bounded rationality impede our decisionmaking in all dimensions of life.<sup>69</sup> We tend to be convinced in the validity of our initial positions, to see only information that confirms these positions, and to deny the validity of any contradictory information.<sup>70</sup>

What are the likely effects of civility and incivility on mistakes, misperceptions, delusions, and herd behavior? As long as IKI-WISI rules define civility and incivility, perceptions of civility and incivility are likely to align with all other perceptions and misperceptions. Utilization of civility and incivility as norms for group deliberation can amplify misperceptions and prevent corrections of mistakes: the labels enforce conformity and sanction deviations, such as suggestions to correct errors.<sup>71</sup> George Akerlof examined “‘pathological’ modes of individual and group behavior: procrastination in decision making, undue obedience to authority, membership of seemingly normal individuals in deviant cult groups, and escalation of commitment to courses of action that are clearly unwise.”<sup>72</sup> He argued that ordinary challenges in intertemporal decisionmaking tend to lead to such pathologies. The pathologies he identified build on group conformity that civility and incivility norms can enforce.<sup>73</sup>

Moreover, by enforcing conformity within a group, civility and incivility norms may contribute to polarization between groups (or subgroups). Internal conformity within groups means greater disparity among groups. Thus, when civility and incivility norms increase conformity within a group, they can increase polarization among groups. For example, in the United States, groups with opposite views regarding firearms, abortion, same-sex marriage, and regulation share the pattern of internal conformity and branding other groups with “uncivil colors.”<sup>74</sup> The promise of civility norms to group deliberation is supposedly

68. For example, several articles discuss the conformity that arises in academic scholarship and science. See, e.g., Mohammadreza Hojat et al., *Impartial Judgment by the “Gatekeepers” of Science: Fallibility and Accountability in the Peer Review Process*, 8 ADVANCES HEALTH SCI. EDUC. 75 (2003); Robert K. Merton, *The Matthew Effect in Science*, 159 SCIENCE 56 (1968).

69. See generally Colin Camerer, *Bounded Rationality in Individual Decision Making*, 1 EXPERIMENTAL ECON. 163 (1998) (reviewing the research on bounded rationality and discussing its effect on individual decisionmaking); KAHNEMAN, *supra* note 54 (discussing the cognitive systems involved in the human thought process).

70. The confirmation bias and related ones identify the tendency to absorb information to be consistent with existing views and expectations. See generally Nickerson, *supra* note 58.

71. For additional discussion of conformity, see Bernheim, *supra* note 44, and Morris, *supra* note 50.

72. George A. Akerlof, *Procrastination and Obedience*, 81 AM. ECON. REV. (PAPERS & PROC.) 1, 1 (1991).

73. *Id.*; see also George Akerlof, *The Economics of Caste and of the Rat Race and Other Woeful Tales*, 90 Q.J. ECON. 599 (1976) (showing that social customs may fail to promote economic efficiency).

74. See, e.g., Barak Orbach, Kathleen S. Callahan & Lisa M. Lindemann, *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161 (2010).

tolerance and openness to different views. However, when individual preferences do not accommodate each other,<sup>75</sup> groups may and do use available tools to promote their preferences rather than evaluate them.<sup>76</sup> Civility and incivility may be such tools.

### CONCLUSION

Our collective well-being depends on productive public discourse and private debates in many ways. Gridlocks and distracting messages do not serve the collective. However, groups of all types deal with opportunism and uncontrolled conduct that cause gridlocks and disrupt group deliberation with distracting messages.<sup>77</sup> Thus, groups adopt formal rules of engagement and develop social norms to reduce the value of such opportunism and isolate uncontrolled conduct. “Civility” and “incivility” are sometimes proposed as instruments to improve group deliberation.

This Essay raises several concerns regarding the actual use of “civility” and “incivility” as labels or norms. The common meaning of civility is tolerance toward different views. Intolerance is the seed of many misunderstandings and conflicts. However, it is unclear that the use of “civility” and “incivility” always encourage tolerance of and openness to different views. References to “civility” and “incivility” can enforce conformity, oppress contrarian views, and serve hubris and other unconscious influences. Once the music plays, and the rules of civility force us to keep dancing, we cannot always choose the tune.<sup>78</sup> We all like “civility,” dislike “incivility,” and tend to know what they mean. This is the source of the risk their utilization poses; we know too much about them. IKI-WISI.

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75. See *supra* Part I. Again, the word “preferences” in this Essay refers to the economic term “revealed preferences.” See *supra* note 14.

76. See Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 *BEHAV. & BRAIN SCI.* 57 (2011).

77. See Orbach & Sjoberg, *supra* note 4.

78. See generally CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003).