

34-APR Utah B.J. 20

Utah Bar Journal

March/April, 2021

Article

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ADVANCING THE CAUSE OF TRUTH AND CIVILITY: THE TWIN RESPONSIBILITIES OF EVERY ATTORNEY AT LAW

While serving as a Navy judge advocate in Washington, D.C., I was assigned to represent a senior officer who had made some mistakes and was facing a court-martial. In the Navy, prosecutorial power and discretion are vested solely in one's commanding officer. In this case, my client's commanding officer was the Commandant, Naval District Washington himself, an admiral with many years of Navy service and experience.

The evidence against my client was clear-cut and uncontested by my client. This did not leave us with a lot of options for his defense. The best angle I could think of taking was to somehow leverage my client's stellar career and the fact that his case had garnered the attention of some in Congress. The plan was to try to arrange an audience with the admiral and plead for him to give my client a second chance. This is what is known in technical parlance as the "please, pretty please" defense.

Working with the Commandant's staff judge advocate, I was able to arrange for an audience. The appointed day and time arrived, and I was shown into a spacious office on the grounds of the Washington Navy Yard, situated just blocks from the Capitol building. The admiral listened patiently as I stood before him, pleading my client's case. When I finished, the admiral looked at me and declared, "Lieutenant, I'm from Missouri. Do you know what that means?" I stood there in my Navy whites thinking, "You're from Missouri? *Am I supposed to know what that means?*" Then, I began to sweat. Finally, I confessed, "No, sir, I don't know what that means."

The admiral explained: "Missouri is the 'Show Me' state." "Talk is cheap," he said, "I want to see action." He went on to say that I had convinced him to stay the court-martial *temporarily*, but only my client's conduct over the next several months would determine whether the charges against him would ultimately be dropped.

The admiral's demand to "show me" has application to the twin responsibilities every attorney has not just to our profession but to our country: to advance the cause of truth and civility. This article will take each of these responsibilities in turn. The article will then be continued to the next issue of the *Utah Bar Journal*, where it will conclude with offering some practical suggestions from the members of the Utah Supreme Court on how we can better foster civility and therefore the cause of truth as attorneys and, more broadly, as fellow citizens.

The Cause of Truth

On January 6, 2021, we all witnessed a spectacle that most of us would never have believed could happen in the United States of America. Hundreds of rioters and insurrectionists, some armed with pipes, shields, body armor, plastic ties or "flex cuffs" (commonly used to handcuff large numbers of people), and other weapons, stormed the U.S. Capitol in pursuit of lawmakers in an attempt to prevent Congress from certifying a presidential election.

Shortly before having to be whisked out of the Senate chamber by Capitol police for his own safety, the Senate majority leader, Mitch McConnell, stood on the Senate floor to talk about truth. "Self-government," Mr. McConnell proclaimed, "requires a shared commitment to the truth." 167 CONG. REC. S14 (daily ed. Jan. 6, 2021) (statement of Sen. McConnell). He continued:

“We cannot keep drifting apart into two separate tribes with a separate set of facts and separate realities with nothing in common except hostility towards each other and mistrust for the few national institutions that we all still share.” *Id.*

Just two days before, Governor Spencer Cox used the occasion of ***21** his inaugural address also to talk about truth: “[A]t a time when we have more knowledge at our fingertips than any generation in history, we have somehow become more susceptible to disinformation, conspiracy theories, and lies as too often we all struggle to find accurate sources of truth and unbiased information.” Spencer Cox, Inaugural Address (Jan. 4, 2021), *transcript available at* https://docs.google.com/document/d/12n1HHAMW7t5-8Ra_mgiluXKyKbt_JvrZWhJxLz91n-c/edit.

Senator McConnell, Governor Cox, and the many others who have spoken out about truth, have good cause to be concerned. We are living in a time that has been described as the post-truth era. Post-truth describes a condition where truth is no longer established on shared objective standards but on subjective beliefs and “alternative facts” devoid of any evidentiary support. Indeed, with alternative facts abounding more and more as of late, the Oxford English Dictionary’s word of the year in 2016 was “post-truth.” OXFORD LANGUAGES, *Word of the Year 2016*, <https://languages.oup.com/word-of-the-year/2016/> (last visited Feb. 1, 2021).

Foremost among the reasons why this trend should concern us is that it is incompatible with freedom. Just as courts of law must operate on the basis of evidence, so too must a democratic society operate on the basis of evidence. Indeed, a free, democratic society can function in no other way. As has long been recognized, democracy depends on an informed citizenry. In addition to Thomas Jefferson’s well-known writings on this subject,¹ Ulysses S. Grant, perhaps our country’s most underrated president, opined that the relevant dividing line in the country’s future would not be the Mason-Dixon line but the line separating intelligence and patriotism on the one hand and superstition and ignorance on the other. Ron Chernow, *Grant* 811 (2017).

If democracy depends on an informed citizenry, then an informed citizenry depends on a collective commitment to truth. Herein lies an attorney’s first responsibility, which we each have accepted by oath. Each of us has sworn to “support, obey and defend the Constitution of the United States and the Constitution of Utah” and to “discharge [our] duties of attorney and counselor at law as an officer of the courts of this State with *honesty, fidelity, professionalism, and civility.*” Utah R. Pro. Conduct Preamble (emphasis added). There is no better way we can support, obey, and defend the Constitution and conduct ourselves with honesty and fidelity as officers of the court than through an unwavering commitment to the cause of truth.

We can do this first and foremost by adopting the admiral’s creed to “show me.” If there is any group that should insist on proof, it is attorneys. We are trained not to accept bald allegations but to rely only on facts supported by evidence. Courts could never form reliable opinions on the basis of unsupported assertions, conjecture, and subjective beliefs, and neither should we. Anytime we read or hear something, we should be in the habit of always asking ourselves, “Is there reliable evidence to support this?” When a friend or associate says something that does not pass the “smell test,” we can set the example of honest inquiry by asking respectfully and sincerely what the source of the information is.

In the same vein, we can set the example of doing no harm by never passing along “news” until we know that it is based in fact. This is especially important in the age of social media, where each of us has the ability to publish our opinions to the world. This, in turn, underscores the importance of ensuring that we obtain our information only from reliable sources.

Online news sources, particularly social media, pose a singular threat in this regard, as much of what is posted comes from unreliable and unaccountable sources. Even news sources that would not go so far as intentionally steering public opinion with untruths are often not above the temptation of increasing revenues by exploiting confirmation bias with targeted news feeds that ensure we see only stories that reinforce our ***22** preexisting beliefs and opinions.

Our commitment to truth must be paramount. However much passion we may feel about a particular cause, however much loyalty we may feel for a particular political party, however much interest we may have in a particular policy, we must always be willing to subordinate those interests to the cause of truth. The ends never justify the means, especially when the means will ultimately rot the fabric of the Republic on which we rely for the ends.

In short, attorneys can do much to stem the tide of alternative facts and false narratives simply by refusing to accept at face value all we read and hear and instead insisting, “Show me.” As the only private profession that swears to support, obey, and defend the Constitution, and one that is trained to rely only on credible evidence, we are uniquely responsible and uniquely positioned to lead out in this manner for the sake of our nation and our freedom.

Civility

We cannot advocate the cause of truth very far without being likewise committed to the cause of civility. A commitment to one engenders a natural commitment to the other. Likewise, disregard of one naturally quenches a commitment to the other. For example, when we hold in contempt those who disagree with us, it is all too easy to fall prey to unsupported facts and false narratives simply because they refute those we vilify. At the same time, the more we imbibe unsupported facts and false narratives, the more difficult it becomes to understand that someone could legitimately hold a different point of view. Soon, we run the risk of coming to see those with whom we disagree not as just being wrong but as being evil in one sense or another.

Attorneys are duty-bound to resist this. Just as we take an oath to carry out our responsibilities with honesty and fidelity, we also swear to act with “professionalism, and civility.” It says much about what our commitment should be to these two interrelated precepts that the only four words used in the oath to describe the manner in which we should conduct ourselves relate either to truth or civility.

The importance of our role in this regard cannot be overstated. “If destruction be our lot,” Abraham Lincoln famously warned, “we must ourselves be its author and finisher.” Abraham Lincoln, Lyceum Address (Jan. 27, 1838). As one U.S. Senator has written in a compelling book on this topic, “[c]ivil discord has always been the gravest threat to America's security,” the question being “whether the Republic could long endure if the house was divided internally.” Ben Sasse, *Them: Why We Hate Each Other - and How to Heal* 248 & 137 (2018).

In his Farewell Address, George Washington was the first to raise a voice of warning about the perils of disunion. “It is of infinite moment,” Washington exhorted, “that you should properly estimate the immense value of your national union to your collective and individual happiness; that you should cherish a cordial, habitual, and immovable attachment to it; accustoming yourselves to think and speak of it as of the palladium of your political safety and prosperity.” George Washington, Farewell Address (Sept. 19, 1796). Succumbing to political faction, Washington cautioned, “may now and then answer popular ends,” but would “in the course of time and things,” enable “cunning, ambitious, and unprincipled men” to “subvert the power of the people, and to usurp for themselves the reins of government.” *Id.*

In remarkably prescient manner, Washington then warned his fellow Americans “in the most solemn manner” against the “baneful” effects of the “spirit of party,” which spirit “agitates the Community with ill-founded jealousies and false alarms; kindles the animosity of one part against another,” and “foments occasionally riot and insurrection.” *Id.*

It must be emphasized that the unity urged here is not necessarily of opinion. As noted by Judge Thomas B. Griffith (retired) of the United States Court of Appeals for the District of Columbia Circuit, “[t]he Constitution's form of government not only allows spirited disagreement, it requires it. But the Constitution cannot withstand a citizenry whose debates are filled with contempt for one another.” Thomas B. Griffith, *Civic Charity and the Constitution*, 43 HARV. J. L. & PUB. POL'Y 633, 641 (2020). Thus, the unity sought for is one of commitment to our founding principles, a commitment that is fostered by civil discourse, and one that, in turn, engenders bonds of affection among those engaged in freedom's cause.

The importance of civility to the perpetuation of our freedom is so great that it caused one nineteenth-century observer to lament the decrease in civility that occasioned the cessation of the practice of dueling. As recorded by author Doris Kearns Goodwin:

Charles Gibson maintained that as wicked as the [dueling] code was, the vulgar public behavior following the demise of the practice was worse still. “The code preserved a dignity, justice and decorum that have since been lost,” he argued, “to the great detriment of the professions, the public and the government. The present generation will think me barbarous but I believe that some lives lost in protecting the tone of the bar and the press, on which the *23 Republic itself so largely depends, are well spent.”

Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 65 (2006).

If the country's collective commitment to civility has steadily decreased since the nineteenth century, it has begun to plummet in the age of alternative facts and fake news. Several former social media investors and executives have begun to sound the

alarm about the algorithms used by social media that result in everyone seeing a different version of the news based on their political and personal preferences. Michael V. Hayden, *The Assault on Intelligence: American National Security in the Age of Lies* 222-23 (2018); *The Social Dilemma* (Netflix 2020).

Michael Haydn, a retired United States Air Force four-star general and former Director of the National Security Agency, and former Director of the Central Intelligence Agency, writes in his book about the post-truth era's impact on national security that social media's algorithms specifically focus on negative, sensational stories, which are more apt to capture our attention, further entrenching our views and making it nearly impossible for us to understand another's point of view. Hayden, *The Assault on Intelligence* 222-23. General Haydn explains that Russia regularly inundates American social media in an effort to undermine democracy by sowing discord. Although sometimes Russia is attempting to influence a particular policy or election, it most often is simply trying to divide America, "playing both sides of the issue" with the aim of "pushing America to the extremes to both distract and weaken it." *Id.* at 234-36.

Most alarming is a dire prediction quoted by Judge Griffith in his article *Civic Charity and the Constitution* referenced above. In his article, Judge Griffith discusses the threat posed by today's political tribalism and quotes New York University's Professor Jonathan Haidt, as follows: "[T]here is a very good chance that in the next 30 years we will have a catastrophic failure of our democracy." Griffith, 43 HARV. J. OF L. & PUB. POL'Y at 634. The reason for his concern, Judge Griffith queries? "We just don't know what a democracy looks like when you drain all the trust out of the system." *Id.*

The good news, as Governor Cox noted in his inaugural address, is that it is not too late to fix this. Quoting the formula prescribed by Judge Griffith in another article on this topic, the Governor urged:

[I]f the Constitution of the United States as we know it is to survive, ... then we must inculcate the virtue of civic charity. We must seek to understand one another, to treat each other not as enemies but as friends and to secure justice for all without demonizing and ostracizing those with whom we disagree.

Spencer Cox, Inaugural Address (Jan. 4, 2021), *quoting* Thomas B. Griffith, *The Degradation of Civic Charity*, 134 HARV. L. REV. F. 119, 120.

As reflected in the Navy admiral's demand, however, some things are more easily said than done. In the spirit of "show me," this article will continue to the next issue of the *Utah Bar Journal*, in which members of the Utah Supreme Court will offer practical suggestions, short of reinstating the practice of dueling, that each of us can implement to promote a greater degree of civility and commitment to truth in our practice of law and our public discourse.

It may not be easy, but our country's future likely depends on it. The world is watching to see if America will continue to be, as Abraham Lincoln described her, "the last best hope of earth." Abraham Lincoln, Annual Message to Congress: Concluding Remarks (Dec. 1, 1862). Given our sworn obligation to support, obey, and defend the Constitution, coupled with our legal training, there is no one better than attorneys to lead out in this critical cause.

Footnotes

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¹ Letter from Thomas Jefferson to Richard Price (Jan. 8, 1789), available at <https://www.loc.gov/exhibits/jefferson/60.html>.

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