

# Mercer Law Review

---

Volume 63  
Number 3 *Lead Articles Edition - Citizenship  
and Civility in a Divided Democracy: Political,  
Religious, and Legal Concerns*

---

Article 2

5-2012

## Introducing a Surprising Conversation about Conversation

Mark L. Jones  
jones\_ml@law.mercer.edu

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Civil Rights and Discrimination Commons](#), and the [Law and Society Commons](#)

---

### Recommended Citation

Mark L. Jones, *Introducing a Surprising Conversation about Conversation*, 63 Mercer L. Rev. 793 (2012).

This Front Matter is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# Introducing a Surprising Conversation about Conversation

by Mark L. Jones\*

It has been my distinct privilege and pleasure to serve as the Faculty Coordinator for this year's Mercer Law Review Symposium, which was held at the Law School on Friday, October 7, 2011, on the topic "Citizenship and Civility in a Divided Democracy: Political, Religious, and Legal Concerns."<sup>1</sup> The Symposium brought together a distinguished group of panelists—Marianne Constable, Eugene Garver, David Gushee, David Lyons, Steven Smith, and Jeremy Waldron—and the discussions were conducted under the masterful guidance of our distinguished moderator and commentator Robert Audi.<sup>2</sup> As the Symposium title and the background of the participants suggest, the event was interdisciplinary in nature. It involved, moreover, a greater collaboration across Mercer University than perhaps any previous Mercer Law Review Symposium. Thus, it included among its co-sponsors not only the Law Review but also the Mercer Center for Theology and Public Life, the Mercer Center for the Teaching of America's Western Foundations, and

---

\* Professor of Law, Mercer University, Walter F. George School of Law. Oxford University (M.A.); The University of Michigan Law School (LL.M.).

1. I would like to express special thanks to Jack Sammons, both for his steadfast friendship over many years and for contributing to the concept and execution of this Symposium in so many different and essential ways, only some of which will emerge as the reader proceeds. I would also like to thank both him and Dean Gary Simson for their very thoughtful and helpful comments upon earlier drafts of this Introduction.

2. Special thanks are due to Robert Audi for many reasons—for his invaluable advice throughout the planning of the project, for agreeing to take the helm at the Symposium itself as moderator and commentator and for characteristically doing it so well, and for being such a good friend and intellectual inspiration to so many of us at Mercer over the years. Indeed the inspiration for the Symposium is due in no small part to his own thinking about the relevant issues. *See, e.g.*, ROBERT AUDI, RELIGIOUS COMMITMENT AND SECULAR REASON (2000) [hereinafter RELIGIOUS COMMITMENT]; ROBERT AUDI, DEMOCRATIC AUTHORITY AND THE SEPARATION OF CHURCH AND STATE (2011) [hereinafter DEMOCRATIC AUTHORITY].

the Phronesis Project for the Exploration of Character, Practical Wisdom, and Professional Formation. The Symposium was also adopted by Mercer's Lyceum Program, which was launched this year and which has taken the theme "Rebuilding Democracy" as its focus for 2011-2013.<sup>3</sup>

It has also been a distinct privilege and pleasure to work with those colleagues who represented the various co-sponsors on the planning committee—David Gushee, Will Jordan, Paul Lewis, Jack Sammons, Yonna Shaw, Dean Gary Simson, and Brandon Veasey. I am grateful to each of them for their vital contributions as we moved forward with planning and organizing the Symposium over the course of a year.<sup>4</sup>

In a very real sense, the Symposium was in gestation for more than a year and a half, originating in conversations among the three University Centers about a possible conference on democratic virtue. However, we could only move forward after we approached the Law Review, following the inspired suggestion of Dean Gary Simson, and secured its agreement to co-sponsor the event as the Law Review Symposium for academic year 2011-2012. It was only by working together and pooling our collective resources that such an interdisciplinary event of the kind we were contemplating became feasible, and this is a further demonstration of the powerful potential for productive synergies resulting from collaboration across the University.

As we moved forward with the planning process, and in particular with our efforts to define the focus of the Symposium, it became clear that the co-sponsors were united by common worries about the state of our political conversation and about how the incivility of that conversation might be related to other symptoms of perceived disease in our body politic, such as extreme partisanship and the apparent inability or unwillingness on the part of so many of our political leaders to seek

---

3. See *University Chapel, Lyceum and Interfaith Challenge Share Tie-Ins This Fall*, NEWS & FEATURES, MERCER UNIVERSITY (Aug. 22, 2011), [http://www2.mercer.edu/News/Articles/2011/110818\\_Chapel.htm](http://www2.mercer.edu/News/Articles/2011/110818_Chapel.htm).

4. More specifically, David Gushee (McAfee School of Theology) is director of the Mercer Center for Theology and Public Life and the Mercer Lyceum Program; Will Jordan and Paul Lewis (College of Liberal Arts) are co-directors of the Mercer Center for the Teaching of America's Western Foundations and the Phronesis Project respectively; Jack Sammons and Dean Gary Simson (Mercer University, Walter F. George School of Law) represented the Law School, and Yonna Shaw and Brandon Veasey (also of the Mercer University, Walter F. George School of Law) represented the Law Review, Yonna as our Law Review Administrator and Publishing Coordinator and Brandon as Lead Articles Editor. My own hats were varied and included representative of the Law School, co-director of the Phronesis Project, and a collaborating faculty member for the Western Foundations Center. I am also most grateful for the steady advice and guidance along the way of Hal Lewis, Faculty Advisor to the Law Review.

compromise.<sup>5</sup> It occurred to us that we might be able to make better sense of our current predicament, and perhaps even begin to see a way forward in trying to overcome it, if we did two things. First, we thought that it would be helpful to focus especially on the nature of the political conversation itself. Second, we thought that further illumination could be provided by taking an interdisciplinary and comparative approach that would explore the religious and the legal conversations as well as the political one. Such an approach would bring the additional benefit of *mutual* illumination—illuminating not only the political conversation but the others too.

Our unspoken premise regarding all three conversations is that we inhabit language as language inhabits us, and thus it is through language that we know ourselves and our world.<sup>6</sup> And the project was motivated by deeper concerns and goals than a desire to find some panacea that would enable us all to “get along” and “be nice to one another.” The concept of civility is so much more capacious, robust, and profound than that. Moreover, incivility may sometimes be entirely appropriate; indeed, uncivil speech and action may be the only way for those who have been hitherto (uncivilly) excluded from the conversation to be heard. Wisdom consists, as Aristotle would say, in knowing when, and how, and to whom one should be civil or uncivil.<sup>7</sup>

With this understanding of the foundational role of language, and with these deeper concerns and goals, we produced a program description that formulated our overall theme and goals as follows:

---

5. Clearly, we are not alone in this, as is exemplified by such initiatives as Krista Tippett’s Civil Conversations Project and the National Constitution Center’s March 2011 symposium on Civility and Democracy in America. See Krista Tippett, *The Civil Conversations Project*, ON BEING, <http://being.publicradio.org/first-person/civil-conversations/> (last visited Feb. 16, 2012); National Constitution Center, *Can We Talk: A Conversation About Civility and Democracy in America* (Mar. 26-27, 2011); see also the recently launched website <http://civilpolitics.org/> directed by Jonathan Haidt, Matt Motyl, and Ravi Iger (last visited Apr. 1, 2012), whose mission is “to find and promote evidence-based methods for increasing political civility.” These various initiatives offer a wealth of resources.

6. The language arts are not the only arts that concern language, broadly understood. A cursory consideration of political campaign advertisements, with their use of video and music, readily attests to the power of these other forms of symbolic communication.

7. See ARISTOTLE, *NICOMACHEAN ETHICS*. The preceding observations should not in any way be understood as denigrating or minimizing needed efforts to arrest the current “race to the bottom” by articulating appropriate ground rules for civil discourse and conduct. They should be understood, rather, as acknowledging the complexity involved both in understanding the reasons for incivility and our current discontents as well as the forms and modes of civility itself, and the value of bringing such understanding to bear in our responses, including when fashioning and maintaining any such ground rules.

Whether or not the state of our political conversation can reasonably be said to have contributed to the tragic events in Tucson, Arizona in early January 2011, the Symposium organizers identify the deterioration of the political conversation as a central problem faced by our Republic today. This deterioration reflects deep political, economic, and religious divisions in society and is exacerbated by the corruption of the political conversation through its effective displacement by the administration of economics. This interdisciplinary Symposium explores the nature of this problem and the resources that are available to us to help confront it.<sup>8</sup>

We decided to undertake these explorations through three separate panels, which we described as follows:

Three separate panels will explore the nature of three different kinds of traditions and conversations (political, religious, and legal), how they can illuminate and mutually enrich one another, and how the resources available to us in all three traditions can help restore and sustain the virtues required for democratic citizenship and civil political conversation. . . .

The first panel will address the questions: What are the virtues required for our common life as citizens in a democracy and for civil democratic conversation? How and why have these virtues been eroded in our Republic as we enter the second decade of the twenty-first century? What resources exist within political thought and our American political tradition for confronting this erosion? If the problem, then, is erosion of these virtues and how to restore them, the second panel will address the questions: How are our religious traditions and religious conversation implicated in our common life as citizens and in our political conversation, and what can they contribute towards a restoration of the virtues required for democratic citizenship and for civil political conversation? The third panel will ask similar questions regarding our American legal tradition and the legal conversation.<sup>9</sup>

---

8. *Purpose Statement, Mercer Law Review Symposium 2011, Citizenship and Civility in a Divided Democracy: Political, Religious, and Legal Concerns*, MERCER LAW (Oct. 7, 2011), <http://www.law.mercer.edu/content/law-review-symposium-2011> [hereinafter *Mercer Law Review Symposium Purpose Statement*].

9. *Id.* The program description reproduced here is the description as formulated in the final program distributed at the Law Review Symposium itself. The program description sent to the panelists was slightly different. The changes were made in light of the draft papers we received from the panelists before the Symposium. The most significant changes concern our phrasing of the questions in the final paragraph. In particular, in light of the papers received for the panel on politics, we added the language “political thought” to “American political tradition” when asking about resources available for confronting erosion. Regarding the panels on religion and law, we added language explicitly asking how the respective traditions and conversations are implicated in our common life as citizens

Building upon experience gained in using a case study to explore the nature of practical wisdom in the Phronesis Project, we decided to conclude the Symposium with a roundtable discussion of a case study, drafted by Jack Sammons, presenting a complex factual scenario based loosely on a well-known case involving the free exercise of religion in the public schools.<sup>10</sup> The roundtable discussion, which was expertly moderated by another Mercer Law School colleague, Daisy Floyd, involved all the panelists and two expert practitioners and was followed by comments from two "observers."<sup>11</sup> The case study was sent to the discussants several days in advance but was given to the audience at the beginning of the Symposium with a request that they read it before, and not during, the roundtable discussion. The program described our objectives regarding this segment of the Symposium as follows: "By bringing the three different types of perspectives (political, religious, and legal) into conversation with each other in the context of a simulated real world scenario, the roundtable discussion will further illuminate and extend the insights from the panel presentations and discussions."<sup>12</sup> One major way in which this occurred, of course, was in modeling a civil conversation on a controversial issue. No more will be said about the case study and the roundtable discussion here.<sup>13</sup>

Returning, then, to the three panels described above, each panel included a principal speaker and a respondent. The principal speakers were asked to present and write, at greater length, than the respondents. The respondents were given a free hand regarding the type of response they wished to give. In addition, we supposed that all of the speakers would feel free, and clearly some of them did feel free, to express doubts about or even quarrel with the terms of reference set out in the program description we sent them and the premises behind our questions. The speakers were also invited to incorporate comments made

---

and in our political conversation, not just how they can contribute to a restoration of necessary virtues. This language was added to reflect the content of the draft papers we received for the panel on religion. However, it also provided an opening for some additional discussion that occurred at the Symposium itself in connection with the panel on law.

10. See *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

11. The two expert practitioners were Maggie Glennon, former Assistant Superintendent for the Monroe County School District, and Sam Harben, an attorney who has extensive experience representing public school districts. The two observers were Jack Sammons and Robert Audi, our Symposium moderator and commentator.

12. *Mercer Law Review Symposium Purpose Statement*, *supra* note 8.

13. However, further details and the text of the case study itself are available upon request. Also available upon request is an Annotated Bibliography on issues of civility that was prepared for the Symposium by John Perkins and Jim Walsh, Reference Services Librarians at Mercer Law School.

during the intra-panel discussions and the audience Q&A in their final papers if they so wished. All this resulted in something truly exceptional, both at the Symposium itself and in the papers collected here.

The written submissions of the six panelists and Jack Sammons's concluding reflections are extraordinarily rich in the content they provide. All of the papers offer interesting and original insights, and they took us in some surprising directions. Although each paper is written from a viewpoint that is necessarily subjective—more so perhaps than is usually the case in a law review symposium—and although none of the panelists had any advance knowledge of the contributions of the others beyond their own particular panel, all of the papers fit together well and complement each other nicely. We are confident that they will give readers a coherent set of concepts, insights, and perspectives that will enable them to make better sense of our current predicament and begin to see a way forward in trying to overcome it (our primary goal), as well as a greater understanding of each of the three conversations through their mutual illumination (our secondary goal).

What each reader will take away from these papers more precisely, however, will doubtless vary depending on personal background, interest, and inclination. In a very real sense, it might perhaps be more in keeping with the spirit of the Symposium if I provided no commentary of my own but rather let each paper speak for itself as its author engages in conversation with the reader (and with one or more of the other contributors). Although that was indeed my initial inclination, I have concluded that it may be of some benefit to readers if I shared with them some of the central concepts, insights, and perspectives that I have gained from the experience of reading these contributions. These comments are offered with considerable diffidence, together with the caveats that the papers are much richer than my sparse commentary might suggest and that the focus and reactions of other readers may very well be different from my own.

The first pair of papers, by Eugene Garver and David Lyons, was prepared for the opening panel on politics, which we entitled "Our Divided Democracy: The Fracturing of the Republic and The Deterioration of Political Conversation." Given the questions we set out in the original program description, one might have expected an extended examination of the concept of democratic virtue and associated norms of

civility, and of their erosion and potential restoration.<sup>14</sup> Instead, the authors take us in some novel, but very fruitful, directions.

Eugene Garver's paper "The Way We Live Now: Rhetorical Persuasion and Democratic Conversation" draws extensively upon the Western political and rhetorical traditions. The author explicates a fundamental distinction between three different forms of rhetoric—deliberative (aiming at "future advantages"), forensic or judicial (aiming at "justice or injustice, guilt or innocence for past acts"), and epideictic or demonstrative (aiming at "a celebration of present and timeless values").<sup>15</sup> He seeks to understand and address our current predicament by exploring the abuses, as well as the appropriate uses, of deliberative and epideictic rhetoric in a contemporary political context that engages a world of such complexity that it frequently results in a felt inability to know what to do or in a reductionist flight to expertise, particularly of the economic variety. This in turn has resulted in a decreased use of deliberative rhetoric and a concomitant increase in the use of a degraded epideictic rhetoric that celebrates identity and casts blame. This explication of the different forms of rhetoric and their use in contemporary American politics clearly resonated with those attending the Symposium. Indeed, I suspect that most, if not all, of us experienced a kind of epiphany as we suddenly began to understand more clearly why political conversation so often seems dysfunctional with participants talking at cross purposes past one another as they practice differing forms of rhetoric expressing

---

14. For some fine examples of books analyzing the concept civic virtue, see AUDI, *RELIGIOUS COMMITMENT* and AUDI, *DEMOCRATIC AUTHORITY*, *supra* note 2. JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2004). On civility, see, for example, STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (1998). See also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 53-62, 93-101 (1993) (examining the nature of statesmanship in politics and emphasizing the statesman's twin virtues of practical wisdom and civic-mindedness, including the central role of the statesman's capacity for "sympathetic detachment" in maintaining the condition of "political fraternity" among members of the political community). Kronman explains that in addition to implying "a commitment to noninterference, in the way that any regime of tolerance does," political fraternity also entails the statesman's same capacity for sympathetic detachment "diffused throughout the community," i.e., "a willingness to entertain the views of others, to make the positive effort that is required to see their values in the best possible light, the light in which they appear to their own defenders, even when one rejects these values and the political consequences flowing from them." *Id.* at 93-101.

15. Eugene Garver, *The Way We Live Now: Rhetorical Persuasion and Democratic Conversation*, 63 *MERCER L. REV.* 807, 818 (2012). Clearly, it would be a mistake to see deliberative rhetoric as being the appropriately exclusive mark of political conversation, epideictic rhetoric as that of religious conversation, and judicial rhetoric as that of legal conversation. To be sure, they *are* marks of these conversations, perhaps even the predominant ones, but all three forms of rhetoric have their appropriate place in all three types of conversations.



different types of political imagination. In a very real sense, they are often speaking quite different languages. At the end of his paper, Garver also raises some intriguing questions about the potential for appropriate and effective use of epideictic rhetoric.

As the title of his paper, "Violence and Political Incivility," might suggest, David Lyons chose to offer a response that is profoundly critical in the analysis it provides and rousingly prophetic in tone. His historical survey of the numerous episodes of unlawful violence and oppression sanctioned by public policies in America is shocking and does not make for cheerful reading. However, the author sees this review as essential for a proper understanding of the deep, and continuing, divisions that have resulted from such historical violence and oppression, especially divisions of race and class, and that find contemporary expression in a degeneration of political discourse practiced by those who are "embittered, politically alienated, and confused."<sup>16</sup> It is through Lyons's paper, perhaps more than any other, that one may come to look upon at least some instances of uncivil discourse and behavior—including, in Garver's terminology, the apparently inappropriate use of a degraded epideictic rhetoric that blames—with greater understanding and compassion as one gains a greater insight into some of the reasons for what Garver describes (but for which he gives little account) as "the passions involved" in political conflict that can even lead to "enmity and hatred."<sup>17</sup>

The second pair of papers, by Jeremy Waldron and David Gushee, was prepared for our panel on religion, which we entitled "Restoring Democratic Citizenship and Civil Political Conversation: The Role of Our Religious Traditions." Once again, given the wording of our questions in the original program description, one might have expected an account of how our religious traditions contain warrants for civil discourse<sup>18</sup> or how religious conversation, especially interfaith dialogue, can exemplify and model such discourse.<sup>19</sup> And once again the authors surprise us, this time by drawing upon a deep and difficult personal engagement in urgent matters of more immediately serious political consequence. Thus, they both approach the topic of their panel through the lens of a practical case study, namely, a 2007 document entitled *An Evangelical Declaration Against Torture: Protecting Human Rights in An Age of*

---

16. David Lyons, *Violence and Political Incivility*, 63 *MERCER L. REV.* 835, 844 (2012).

17. Garver, *supra* note 15, at 827.

18. For one example, exploring the warrants within Christianity, see RICHARD MOUW, *UNCOMMON DECENCY: CHRISTIAN CIVILITY IN AN UNCIVIL WORLD* (1992).

19. For a lovely recent discussion urging such interfaith dialogue, see R. KIRBY GODSEY, *IS GOD A CHRISTIAN?: CREATING A COMMUNITY OF CONVERSATION* (2011).

Terror.<sup>20</sup> This religious intervention in politics affords a dramatic illustration of Garver's forms of rhetoric at work in political conversation and continues the prophetic theme, already begun by Lyons, of speaking truth to power.

In his paper entitled "Two-Way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation," Jeremy Waldron writes as a self-declared sympathetic admirer and public supporter of the position taken in the Evangelical Declaration Against Torture, who is concerned to evaluate the legitimacy of, and appropriate responses to, these kinds of religious interventions in political discourse. In undertaking this ethical evaluation, Waldron draws a critical distinction between unacceptable practical or ecclesiastical political authority on the one hand and acceptable theoretical or biblical authority on the other (addressing a concern about the imposition of explicit or implicit theocracy); considers the prospects of, and resources available for, mutual intelligibility (addressing a concern about incivility); and contextualizes the ethically and theologically based moral absolutism of the Declaration (addressing a related concern about immoderation). He concludes that such interventions as the Evangelical Declaration pose no theocratic threat; nor are they uncivil or inappropriately immoderate.

David Gushee's response, "Religious Reason-Giving in the Torture Debate: A Response to Jeremy Waldron" is an autobiographical account from someone who has been centrally involved in the torture debate since 2005 and who was a principal author of the 2007 Evangelical Declaration Against Torture. Gushee recounts his personal experience that religiously grounded arguments against torture, such as those in the Declaration, have proved significantly more rhetorically effective in the secular setting of public policy debate than they have in shaping the views of the religious audience for whom they were primarily intended; the religious audience was moved far more by secular arguments against torture. In seeking to make sense of this paradoxical result, Gushee asks whether "the best discourse strategy may be to bring secular arguments to bear in Christian settings, and to bring Christian arguments to bear in secular settings" because "unsettling fixed patterns of discourse

---

20. Evangelicals for Human Rights, *An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror* (Mar. 2007), reprinted in DAVID GUSHEE, *THE FUTURE OF FAITH IN AMERICAN POLITICS: THE PUBLIC WITNESS OF THE EVANGELICAL CENTER* 253-70 (2008). In his paper Jeremy Waldron explains that the Declaration was issued in March 2007 by the organization Evangelicals for Human Rights and adopted at the same time by the Board of the National Association of Evangelicals.

actually helps both audiences think in a fresh way about the issues that all of us must face."<sup>21</sup>

As noted above, at the end of his paper Eugene Garver raises some intriguing questions about the potential for appropriate and effective use of epideictic rhetoric. Although neither Waldron nor Gushee amended their original paper after the Symposium and neither, therefore, explicitly uses Garver's terminology, religiously-based rhetoric that bears witness to "timeless values" is, surely, epideictic rhetoric *par excellence*. In addition, then, to illustrating religiously-based epideictic rhetoric at work in political conversation (and deliberative rhetoric at work in religious conversation), the particular illustration they chose expands Garver's final inquiry in some fascinating directions. Moreover, if Lyons demonstrates that uncivil discourse on the part of those who have been hitherto (uncivily) excluded from the political conversation is sometimes warranted, Waldron and Gushee demonstrate that the concept of civility is more capacious and robust than we sometimes might suppose.

The third pair of papers, by Marianne Constable and Steven Smith, was prepared in connection with our panel on law, which we entitled "Restoring Democratic Citizenship and Civil Political Conversation: The Role of Our American Legal Tradition." As with the panel on religion, one might have expected an account of how the American legal profession defines, and seeks to uphold, standards of civility and associated virtues in the face of the pressures of legal practice and what lessons this might hold for improving the political conversation.<sup>22</sup> And yet again, such an expectation would have discounted the originality of the authors. Here the authors surprise us, however, not in the way Waldron and Gushee surprise—by exploring the nature and effect of legal interventions in political conversation<sup>23</sup>—but by using the law as a lens through which to view the very thing that is at the heart of all three types of conversations and all three types of rhetoric, namely the nature and use of language itself.

---

21. David Gushee, *Religious Reason—Giving in the Torture Debate: A Response to Jeremy Waldron*, 63 MERCER L. REV. 869, 875 (2012).

22. For examples of this type of resource, see [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_codes.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html) (website of the American Bar Association (ABA) Center for Professional Responsibility collecting many of the codes of conduct and civility adopted by courts and bar associations since the mid-1980s).

23. As discussed *supra* note 9, the pertinent "implication" language was only explicitly added in the final program description to reflect the content of the draft papers we received for the panel on religion. However, as also noted there, this language did provide an opening for relevant discussion at the Symposium itself. It is also briefly acknowledged at the beginning of Marianne Constable's paper.

Marianne Constable's paper "Democratic Citizenship and Civil Political Conversation: What's Law Got to Do with It?" is based on the premise that language "constitutes the shelter from which we know the world and act in it."<sup>24</sup> Consequently, we relate to one another through language, and carefulness about language is essential not only for our democratic politics but for all our relations with one another. Indeed, the author considers that carelessness about language poses even worse dangers than ignorance and lies, which can always be challenged. Focusing on law more as a matter of language than a matter of rules or power, she argues that, although the law suffers from its own pathologies, carelessness about language is not one of them. She does this by examining the episode in which President Obama re-took the oath of office because one word was out of sequence the first time and by reviewing several different ways in which the law recognizes that language matters—statutory interpretation, the transformative effect given to various kinds of speech acts, the law's concern for the integrity of its own processes, and the dialogue and exchange that establishes our collective identity and embodies our appeals that the world deliver justice (and here she nods explicitly towards epideictic and deliberative speech). The implication, of course, is that law's careful attention to language offers important lessons for our politics.

In his response entitled "Law as Language?," Steven Smith personifies this very quality of carefulness about language in his close reading and tentative critique of the descriptive and normative claims he understands Marianne Constable to be making. In the course of critically analyzing her text, he variously accepts, sharpens, qualifies, or disputes these claims. In particular, Smith resists any apparent reduction of law to language because an undue emphasis on the linguistic character of law can make us forget that, in the words of Robert Cover, "[l]egal interpretation takes place in a field of pain and death."<sup>25</sup> It can also make us overlook that legal language always points to something that is assumed by lawyers and judges to have independent reality, including criteria of justice or morality. Smith also questions whether lawyers are, in practice, especially and characteristically careful about language. For example, he argues that our invocation of "the Constitution" is "a euphemistic fiction that performs a function of diplomatic obfuscation" enabling us to "create and maintain an 'imagined community.'"<sup>26</sup>

---

24. Marianne Constable, *Democratic Citizenship and Civil Political Conversation: What's Law Got to Do With It?*, 63 *MERCER L. REV.* 877, 877 (2012).

25. Robert Cover, *Violence and the Word*, in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 203 (Martha Minow et al. eds., 1992) (footnote omitted).

26. Steven D. Smith, *Law as Language?*, 63 *MERCER L. REV.* 891, 895 (2012).

Moreover, he is doubtful about the relevance of carelessness, and thus the value of carefulness, regarding the use of language in political conversation.

Like the panels on politics and religion, the panel on law reminds us that human activity always happens against a backdrop of potential violence. In other words, all of it—politics, religion, and law—is dreadfully serious business. The panel on law has also taken us to language itself and has raised the question of what if anything might lie beyond language in our “imagined community.”<sup>27</sup> In his concluding reflections, prepared after the Symposium and subtitled “Recovering the Political: The Problem with Our Political Conversations,” Jack Sammons echoes the seriousness, grapples with the question, and pursues the theme of “imagined communities”; and, yet again, the author surprises us by the direction he takes in all this.

If Constable and Smith have taken us to the heart of all three conversations in their consideration of the use of language itself, Sammons takes us to their soul. For Sammons, all three conversations in their essence are about our identity, about “who we are,” however different the “imagined community” or “polity” of each may be. The problem with our politics is that politics, unlike religion and law, has for various reasons (including those mentioned by Garver) forgotten this elementary fact. Incivility is a symptom of this forgetting and of the resulting flight into inauthentic identities that are “false and incomplete.” The solution, then, is for us to talk with each other about political matters that are truly “serious” in that they take us to the place where, as can still happen in the case of religion and law, the conversation will point beyond itself to the “ordinary mystery and silence that surrounds us,” the “mysteriousness of our being” which “is not us, but defines us.”<sup>28</sup> By engaging in such “serious” conversations (for which Sammons offers a concrete procedure) in which we trust, and listen for, what this mystery might reveal, we will recover the art of rhetoric, discover more of the truth about ourselves leading to a more authentic identity, and thus find our way to an honest and genuine civility.

But the reader may ask: What about the specific virtues, old or new, required for democratic citizenship and civil political conversation? The reader will find them readily enough in the course of reading these contributions, as each of the authors addresses those virtues that he or she sees as relevant for the particular perspective presented. Moreover, the reader can engage in conversation with these contributions, and in conversation with others about them, exercising those specific virtues

---

27. See *id.* at 895 (internal quotation marks and footnotes omitted).

28. Jack L. Sammons, *Recovering the Political*, 63 *MERCER L. REV.* 899, 904, 912 (2012).

that Jack Sammons suggests we need—a particular kind of humility, faith, hope, and, dare I say, love—and using what Robert Audi calls our “civic voice,”<sup>29</sup> as our participants did at the Symposium. The reader may then discover, as I suspect many of us attending the Symposium discovered, that one’s previous certainties and received verities about our predicament and what to do about it are put into question.

Readers may also discover that additional questions and lines of inquiry emerge in the course of these conversations. For example: What is the precise significance, and what is the inter-relationship, of the various manifestations and more immediate causes of our current predicament the authors have identified? What other manifestations and more immediate causes are there?<sup>30</sup> What is the particular relationship of these various manifestations and more immediate causes to the deeper structural causes of division rooted in historical violence and oppression? What other structural causes might there be?<sup>31</sup> How should these structural causes be appropriately addressed? When, exactly, do religious interventions in politics become theocratic, or uncivil, or inappropriately immoderate? When should a rhetoric that destabilizes be employed? In what specific circumstances, and to what extent, is incivility justified? What precisely is the role of the various specific

---

29. See AUDI, *DEMOCRATIC AUTHORITY*, *supra* note 2, at 147-48:

I believe that cultivation of a civic voice is one aspect of following the commandment to love our neighbors in our lives as citizens. One element in civic virtue consists in [sic] having and using, often enough, and publicly as well as privately, an appropriate civic voice. Part of civic harmony in a pluralistic democracy consists in enough citizens using that voice as their primary mode of communication in debating issues important for citizens. . . . Being genuinely motivated by the reasons we offer, religious or secular, conduces to sincerity . . . [which] is an important element in a civic voice.

30. For example, many have cited the ignorance of the electorate as a major factor evidencing and contributing to our current woes. For one rousing jeremiad addressing this alleged factor, see RICK SHENKMAN, *JUST HOW STUPID ARE WE?: FACING THE TRUTH ABOUT THE AMERICAN VOTER* (2008), summarized at <http://libertyprosperity.files.wordpress.com/2008/09/how-stupid-are-we-summary.pdf>.

31. For an illuminating discussion of some potential candidates, see Fareed Zakaria, *A Way Out of Our Dysfunctional Politics*, *WASH. POST*, July 20, 2011, [http://www.washingtonpost.com/opinions/a-way-out-of-our-dysfunctional-politics/2011/07/20/gIQATEQcQL\\_story.html](http://www.washingtonpost.com/opinions/a-way-out-of-our-dysfunctional-politics/2011/07/20/gIQATEQcQL_story.html) (discussing how the “structure of politics” has changed over the last three or four decades “making it more beholden to narrow, specialized interests—including ideological ones—rather than broader national ones,” and identifying such factors as: the creation of safe seats through redistricting; the take-over of party primaries by small groups of activists; changes in Congressional rules making it much more difficult to enact large, compromise legislation by allowing lobbyists, money, and special interests far greater access to and influence over the legislative process; and the presence of a new narrowcast media that fuels polarization).

virtues identified by the authors in finding our way back or, perhaps more accurately, forward to a more reasonable politics? Do we need additional, or other, virtues? Do we even need to talk about all these questions, or do we just need to get on and talk about more "serious" matters in the way Jack Sammons urges upon us? However we answer this last question, our appropriate response is more conversation of the sort exemplified by the participants' creative and thoughtful contributions to this Symposium.