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### Learning to Disagree Agreeably

Allison Orr Larsen

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# VIRGINIA LAW REVIEW

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## IN TRIBUTE: JUDGE J. HARVIE WILKINSON III

On the occasion of Judge J. Harvie Wilkinson’s fortieth year on the bench, these Essays honor his contributions to the U.S. Court of Appeals for the Fourth Circuit, to American law, and to the lives of his clerks and colleagues.

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# VIRGINIA LAW REVIEW ONLINE

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## *ESSAY*

### LEARNING TO DISAGREE AGREEABLY

*Allison Orr Larsen\**

When I clerked for Judge Wilkinson in 2004, the most frequent guest in his Richmond chambers was Judge M. Blane Michael, a judge on the Fourth Circuit who we lost too soon and who was one of Judge Wilkinson’s closest friends. Judge Michael was appointed by President Bill Clinton, and Judge Wilkinson was appointed by President Ronald Reagan; the two men did not always see the law the same way, to say the least. I recall witnessing a stark juxtaposition in which they would disagree on the bench in the morning and then change from judicial robes to running clothes to jog around Monument Avenue together that same afternoon. Judge Michael would walk into the Wilkinson chambers casually—like an old friend who is invited to use the back door—and then gently tease Judge Wilkinson about his running apparel (particularly the socks the Judge wore on his hands to protect them from the cold). I also recall Judge Wilkinson greeting his friend with a warm smile and a genuine embrace before they started their afternoon jog.

Civility gets a bad rap these days. Technological change has ushered in an era of echo chambers and divided media, resulting in isolated teams

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\* Alfred Wilson and Mary I.W. Lee Professor of Law, William & Mary Law School. Law Clerk to the Honorable J. Harvie Wilkinson III, U.S. Court of Appeals for the Fourth Circuit, 2004–2005. Thanks to Will Burchett for top-notch research assistance and to the excellent editors of the *Virginia Law Review* for their professional and seamless collaboration on this symposium generally.

who reinforce mutually-held beliefs and vilify their enemies.<sup>1</sup> In a political environment like that—what Judge Wilkinson once called a “poison tangle”—the idea that we should attempt to bridge ideological divides seems naive at best and elitist at worst.<sup>2</sup>

But the most important lesson I learned from Judge Wilkinson—out of many important lessons—is the one brought home to me by witnessing his friendship with Judge Michael: the law works only when lawyers learn to “disagree agreeably.”<sup>3</sup> This is a phrase the Judge taught me—and he always attributed to people from whom he learned it—but for me it encapsulates the Judge in every way.<sup>4</sup> It is easy to talk about being collegial in the abstract, but Judge Wilkinson practices what he preaches.

In this brief Essay, on the occasion of celebrating a man who shaped my career and life in many significant ways, I will attempt to articulate (1) what the Judge actually meant by the phrase disagreeing agreeably, (2) why the concept is uniquely important to the legal profession, and (3) why it so desperately needs to be rediscovered by future generations of lawyers.

1. *“Being true to oneself should not mean  
being untrue to someone else.”*<sup>5</sup>

The Judge wrote the above words in a tribute to Justice Ruth Bader Ginsburg, a woman who is often lauded for not only being a champion of

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<sup>1</sup> See Jaime E. Settle, *Frenemies: How Social Media Polarizes America* 34, 72 (2018).

<sup>2</sup> For elaboration on the latter criticism, see Leila Fadel, *In These Divided Times, Is Civility Under Siege?*, NPR (Mar. 12, 2019, 5:49 PM), <https://www.npr.org/2019/03/12/702011061/in-these-divided-times-is-civility-under-siege> [<https://perma.cc/5ZKW-ZNHW>] (“Civility has been about making sure that the status quo, the hierarchy of the status quo at the moment, which means racial inequality, gender inequality, class inequality, stays permanent.”) (quoting Professor Lynn Itagaki). For the “poison tangle” quote, see email from Judge Wilkinson to Allison Larsen (Apr. 21, 2022) (on file with author).

<sup>3</sup> As mentioned above, Judge Wilkinson always attributed this phrase to others, but I learned it from—and associate it with—him. It is now a widely used phrase and was made popular by people as varied as Justice Ruth Bader Ginsburg and President Lyndon B. Johnson. See, e.g., Dahlia Lithwick, *Mourning the Way RBG Calmly Approached Opposition*, Slate (Sept. 25, 2020, 5:37 PM), <https://slate.com/news-and-politics/2020/09/mourning-rbg-calm-fury-injustice.html> [<https://perma.cc/6JRS-A3SN>]; see also Tom Wicker, *The Johnson Way With Congress*, N. Y. Times Mag., Mar. 8, 1964, at 9.

<sup>4</sup> As other law clerks will understand, I can’t help but refer to Judge Wilkinson as “the Judge”—now a term of endearment—and so I will continue to use that phrase to refer to him in this Essay.

<sup>5</sup> J. Harvie Wilkinson III, *RBG Has a New Stamp? We Had Our Differences, but I’ll Honor Her by Using It*, Wash. Post (Sept. 6, 2023, 6:15 AM), <https://www.washingtonpost.com/opini>

her vision of the law, but also doing so in a way that left room for friendship with those who disagreed. Sometimes we call this concept “collegiality.” When I talk about collegiality in my classroom, I suspect I sound very outdated to modern law students. The concept of collegiality or civility has been widely misunderstood as championing the view that we should stifle disagreement, “go along to get along,” and cement the status quo. But that is not at all what disagreeing agreeably means.

So, what does it mean?

To disagree agreeably one must commit to creating a culture in which repeat players both act in good faith and give each other the benefit of the doubt. Judge Wilkinson models this behavior for himself and for those around him on a daily basis. He not only hires law clerks with different ideological stripes—not the trend these days—but he then creates space for them to nurture lasting friendships with each other (on the running track, over lunch, at dinners and happy hours in Richmond).

In scheduling dinners with other judges in Richmond, Judge Wilkinson does not just pick from “his team,” but he makes a concerted effort to dine with colleagues appointed by presidents of both political parties . . . and he often brings his law clerks with him. This not only makes for a more enjoyable workday (which it does), but it also ensures that people who may not come from the same corners of the world see the humanity in each other. The Judge always avoided “case talk” at these meals with colleagues, choosing instead to ask about his colleagues’ children, their hobbies, and shared personal experiences.

It is a deliberate choice—and not just a social one. The Judge knows that in his profession disagreement is inevitable and the temptation is high to see one’s legal adversary as a caricature or a villain. The Judge fights that human tendency by committing himself to learning about his colleagues as multidimensional, and thus worth listening to and learning from in the future.

Relatedly, in order to disagree agreeably, we must recognize (in Judge Wilkinson’s words) “the difference between disagreement on substance and fraying the very understandings by which we operate.”<sup>6</sup> Process

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ons/2023/09/06/ruth-bader-ginsburg-stamp-honor-harvie-wilkinson/ [https://perma.cc/G9EM-JTAS].

<sup>6</sup> J. Harvie Wilkinson III, *Bipartisan Approval Lends a Sense of Balance to the Judiciary*, Wash. Post (Nov. 24, 2013, 7:52 PM), [https://www.washingtonpost.com/opinions/bipartisan-approval-lends-a-sense-of-balance-to-the-judiciary/2013/11/24/cc63de6a-53bc-11e3-9fe0-fd2ca728e67c\\_story.html](https://www.washingtonpost.com/opinions/bipartisan-approval-lends-a-sense-of-balance-to-the-judiciary/2013/11/24/cc63de6a-53bc-11e3-9fe0-fd2ca728e67c_story.html) [https://perma.cc/WD92-JEK6].

matters. Tone matters. Norms matter. To demonstrate that one sees the humanity and good faith in colleagues, one must honor the norms and traditions that bind one another together in the first place.

Ultimately, this takes a commitment to creating a safe space for disagreement to happen in a principled manner. In the words of Judge Pamela Harris, another Fourth Circuit colleague who admires Judge Wilkinson greatly even though they do not always see the world in the same way, collegiality means “‘leaning in’ to making decisions in active engagement with your colleagues: Knowing each other; really listening to and respecting each other’s views; being willing to be persuaded and also to persuade, to be part of that dialogue.”<sup>7</sup> Disagreeing agreeably, in other words, simply can’t happen without important background work to create the conditions necessary for people to trust, respect, and listen to each other. Judge Wilkinson’s commitment to that essential work is paramount.

2. “[F]or better and for worse, law and lawyers are central to America. And law is, after all, a profession of reason.”<sup>8</sup>

Learning to disagree agreeably is too often characterized as a kindergarten benchmark: “plays well with others.” But Judge Wilkinson knows the stakes are much higher than that, and they are particularly acute in his chosen field. The Judge has always emphasized that lawyers have great power, and consequently great responsibility, in our democracy. It is true that many of our country’s leaders are and have been lawyers, but that is not just what the Judge means when he says “law and lawyers are central to America.”

The currency of law is reason, not raw power. And lawyers are trained to speak to each other in a certain way—to persuade, not to shout. I am not naive enough to believe (and neither is the Judge) that reason explains all legal decisions or that all lawyers practice this art of persuasion equally faithfully. But the failings of the profession ought not define it. Now that I take part in the training of young lawyers, I understand more what unites them. All lawyers have been through a specific sort of education—one that marks them with the ability to take apart a puzzle methodically, to

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<sup>7</sup> Harry T. Edwards, Collegial Decision-Making in the US Courts of Appeals, in *Collective Judging*, in *Collective Judging in Comparative Perspective* 57, 76 (Birke Häcker & Wolfgang Ernst eds., 2020) (quoting Judge Pamela Harris).

<sup>8</sup> J. Harvie Wilkinson III, Building a Legal Culture of Affection, 99 *Nw. L. Rev.* 1235, 1236 (2005).

analyze it from all sides, and then to communicate the nuance in a way that can reach a broader audience. This is a superpower.

Indeed, the Judge has always stressed that the commitment to solving problems through legal analysis—to giving reasons as opposed to just ruling by brute force—is precious and essential to American democracy. In his words:

Our country, I fear, will not heal unless the legal profession does so first. If this sounds vain, it reflects only a recognition that, for better and for worse, law and lawyers are central to America. And law is, after all, a profession of reason. Reason, by its nature, is a temperate and calming force. A culture of affection in the most reasoned of all professions should not be out of reach.<sup>9</sup>

Anyone who has seen Judge Wilkinson ask penetrating questions from the bench knows that by emphasizing the “calm force of reason,” he does not mean lawyers should be meek or timid. On the contrary, the calm force of reason comes with great power to influence and ultimately get one’s way.

But the Judge also emphasizes that with this power also comes great responsibility, and it is a responsibility to listen as well as to persuade. In the same essay about the importance of affection to the legal profession the Judge explained, “Animosities do more than divert and consume energies. They make it more difficult to listen, to be open to the argument that may warrant an adjustment of one’s view. More fundamentally, personal antagonisms profoundly impede the search for common ground.”<sup>10</sup>

3. “[N]o society can function without the prospect of consensus and reconciliation that a culture of affection alone can achieve.”<sup>11</sup>

Common ground is an interesting concept in and of itself. In a tribute to his mentor, Justice Powell, Judge Wilkinson described Justice Powell’s style as using the “soft voice of persuasion” to “contribut[e] to consensus both within our body politic and our legal culture.”<sup>12</sup>

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<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> J. Harvie Wilkinson III, *The Powellian Virtues in A Polarized Age*, 49 Wash. & Lee L. Rev. 271, 272 (1992).

It is a characteristically thought-provoking turn of phrase: that the law's leaders should "contribute to consensus." Even when he wrote these words in the early 1990s, Judge Wilkinson anticipated criticism. So often retreating to common ground is seen as a sign of weakness—fleeing from a fight or from one's independent convictions. But in the Judge's own words (in a speech given at the University of Virginia School of Law): "Since when does independence . . . mean that we stop listening and learning . . . ?"<sup>13</sup> What the judge knows is that looking for common ground is actually a symbol of intellectual strength. It demonstrates humility, wisdom, maturity, and an ability to evolve.

But even more importantly, without common ground, what do we have left?

Judge Wilkinson artfully explained why Justice Powell was always looking for consensus:

It has been customary to speak of our "social fabric" and "our sense of community"—in fact, such expressions have become almost a cliché. But a fabric is made of interwoven strands, and our legal culture today is in danger of unravelling. There has never been a time when the legal profession was in greater need of Lewis Powells. There is a temptation now to think of hostility as the norm and of civility as a bygone thing.<sup>14</sup>

Banishing civility to an age of the past, the Judge taught me, is the most dangerous thing we can do if we want to keep the "interwoven strands" of our community intact. In a country as varied as the United States, disagreement is inevitable. Hot tempers are unavoidable. And indeed, sometimes political courage means fighting for what is right with all you've got. In those moments it is difficult—but essential—to follow advice the Judge once gave me personally: "I often have to remind myself that those with whom I differ approach the law with the same sense of conviction and dedication as I hope I do."<sup>15</sup> The lesson is not to lose the conviction and dedication, but to deploy them in a way that leaves room for peace.

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<sup>13</sup> Excerpts from the speech Judge Wilkinson gave on April 14, 2004, upon receiving the Thomas Jefferson Foundation Medal in Law. See Mary Wood, *Legal Profession's Breakdown in Camaraderie Could Send Wrong Message to Public, Wilkinson Says*, Univ. of Va. Sch. of L. (Apr. 19, 2004), <https://www.law.virginia.edu/news/200404/legal-professions-breakdown-camaraderie-could-send-wrong-message-public-wilkinson-says> [https://perma.cc/LZT2-5C5E].

<sup>14</sup> Wilkinson, *supra* note 12, at 273.

<sup>15</sup> Email from Judge Wilkinson to Allison Larsen (Apr. 22, 2002) (on file with author).



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Ultimately, I suppose the big question is: What is the end game if we vilify each other and retreat to our respective corners? Is that the world we want for ourselves and our children? I will be forever grateful for the biggest lesson that the Judge taught me: after the tangle, sometimes you just have to put those socks on your hands and go out and exercise with your fellow man.