

## **The Grace of God is in Courtesy?**

**Lecture in memory of John Gilling**

**St Mary's Bourne Street, London**

**Lord Neuberger**

**22 June 2016**

1. I went up to Oxford to read chemistry in 1966. In those days, my college, Christ Church, was rather grand. Not just architecturally as it still is of course. But it was also grand in terms of the undergraduate population. It would be an exaggeration to say that my name stood out on the board at the bottom of my staircase because I was simply “Mister” David Neuberger”, rather than The Hon David Neuberger, Lord David Neuberger, Lord Neuberger or even The Neuberger of Neuberger. Nonetheless, like most caricatures, that has a germ of truth. So too was the suggestion that Christ Church had the cream of Oxford – rich and thick.
2. I think the college was very much in a period of transition. Historically, it had been stuffed full of public schoolboys, a disproportionate number of whom had aristocratic origins, as I have mentioned. And many of them were on closed scholarships (i.e. scholarships which were only available to boys – and then it was only boys - from a particular school), an arrangement which seems outrageous today, but then just seemed quaint (although my generous view of closed scholarships may very well be affected by the fact that I had one). Christ Church was starting to set out to attract more boys from state schools, but I think that some of the dons were still keen on taking public schoolboys, preferably with titles. The difference of view between the Old Harrovian senior history tutor and the grammar school educated junior history tutor was plain even to a first year chemistry undergraduate.
3. Looking back, this friction was typical of the 1960s, which was very much a decade of transition; indeed, I think many of us were aware of that at the time. The conventional and sober world of the 1940s and 1950s was being transmogrified into the questioning and irreverent world of the 1960s, and the change was happening very quickly. My parents and many of their friends had been shocked when, in 1962, the staid BBC had permitted the broadcasting of the stinging satire and merciless lampooning of senior politicians, churchmen and others in the television programme *That Was the Week That Was* - TW3. That programme was accurately described by a subsequent historian of the period: “Every

hypocrisy was highlighted and each contradiction was held up for sardonic inspection. No target was deemed out of bounds”<sup>1</sup>. We had no television at home, but I recall watching the programme when on a short walking holiday with my father in 1963, and feeling mixed emotions of parentally encouraged disapproval and shock and adolescently induced glee and fascination. And, of course, TW3 was going out weekly against the background of the Profumo affair, which seemed such a sensational, even cataclysmic, event at the time, and now seems somewhat pallid and overblown. A Government minister having an affair with a prostitute and telling a lie to the House of Commons; no doubt, not very edifying, but neither event can be said to be exactly unheard of – before or since. However, for better or worse, the 1960s marked a signal decline in respect for those in authority.

4. The Profumo affair helped to end 13 years of Conservative government and to produce the second Labour post-World War II government, which many people thought would revolutionise society, making it more equal and more fair – and, while “revolutionary” would be a massive overstatement, it made some very significant and long-lasting changes. During the second half of the 1960s, homosexuality was decriminalised, abortion was legalised, racial and other prejudice started to become illegal, top rates of tax were raised, and the rights of employees and residential tenants were considerably expanded. It was against that background that I was at Christ Church for what I always think of as four enjoyable, if rather self-indulgent, years between 1966 and 1970 – or, if I remove my retrospective rose-tinted spectacles, three enjoyable, if rather self-indulgent, years and one transitional year. In the first three years, I got by with the minimum to keep my tutors and, in due course, my examiners well, not happy, but not very unhappy, and I learned some science. In my fourth year of research, in the course of which I learned that I was no scientist.
5. But, at the risk of sounding like a Miss World contestant, I have to say that I met a lot of interesting people, read a lot of excellent books, and learned a great deal in those four years. One of the interesting people I met was John Gilling, who was the College chaplain for the whole time I was at Christ Church. As a Jew with very limited if any religious leanings, I was not an obvious candidate for an ordinary Anglican chaplain’s intellectual interest or pastoral attention. But John was by no means an ordinary Anglican or an ordinary chaplain. He was virtuous and devout, without being priggish or preachy. He was intellectually interested in many things, particularly painting, music, literature, religion and humanity. He was also a very kind man, generous in thought and deed, and he really cared about people. And he was an excellent gossip – not only well-informed and amusing, but, unusually in my experience of

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<sup>1</sup> Graham McCann, *Spike & Co.* (2006) pp. 313–314

gossips, neither malicious nor prurient. While his paintings were not to my taste, I admired his talent.

6. John was quite multi-faceted. He had a strong flavour of a late 18<sup>th</sup> Anglican priest about him – a less choleric, more tolerant, but perhaps equally rotund, version of Thomas Love Peacock’s “learned and jolly” Reverend Dr Folliot<sup>2</sup>. But he also had something of the 19<sup>th</sup> century divine, having some of the sweetness of character of Anthony Trollope’s Warden Harding with more than a splash of the intellect and asperity of his Archdeacon Grantly, but John certainly had no trace of the indecisive hen-pecked Bishop Proudie<sup>3</sup>. There was also a bit, but not much more than a dash, of Rose Macaulay’s mid-20<sup>th</sup> century high church Father Hugh Chantrey-Pigg<sup>4</sup> about John.
7. I remember many happy afternoon teas, early evening sherrys and late night drinks, normally with other undergraduates and the occasional don, in his rooms in Tom Quad, more or less under Christopher Wren’s Tom Tower. I had two particular friends who were favourites of John. One of these friends was a girl; I think he was quite struck by her, often referring to her with the epithet “dishy” – along with “very good”, the highest praise in the Gilling lexicon. Unlike me, the two friends were both communicating members of the Church of England, and, between the two of them and John, they would get me to go to evensong in Oxford Cathedral from time to time. (I referred to Christ Church being a grand college; well, you can’t get much grander than having a cathedral for your college chapel). I remember going off on a sort of retreat with John and a number of other undergraduates to the Gower Peninsular in South Wales. Although there was quite a lot of reading and quite a lot of serious discussion, those of you who knew John will be unsurprised to hear that there was also quite a lot of good food, but there was not that much walking, despite the beauty of the countryside.
8. John did not strike me as a man who exerted himself physically - unless he had to do so. As many of you will recall, when he came to St Mary’s Bourne Street, he lived in a flat on the third floor of the Presbytery, which did not then have the benefit of an entryphone at street level. On one occasion, he invited the then-Bishop of Truro, Graham Leonard, to preach, and to stay at the Presbytery. When the Bishop arrived, he rang the bell, and John looked out

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<sup>2</sup> Thomas Love Peacock, *Crotchet Castle* (the quote is from chapter 1), although the book was published in 1831, the character of Dr Folliot has always seemed to me to be of a generation or two earlier – an opinion which he would have taken as a compliment, I think.

<sup>3</sup> Anthony Trollope, *The Warden* (1855) and *Barchester Towers* (1857)

<sup>4</sup> Rose Macaulay, *The Towers of Trebizond* (1956)

of his third floor window to see who it was, and shouted down “Hang on”. While the bishop waited in the street for what he not unreasonably expected to be John opening the front door, he was hit on the head by a bunch of keys which John had thrown out of his window.

9. In fact, the image of John as a lazy man may be rather unfair. I am reliably told that, when staying with friends near Lake Orta in Northern Italy, a rather portly but not unfit figure in a bathing costume could be seen every Sunday rowing a boat across the lake, shipping oars and nimbly jumping out, and, after donning a pair of smart trousers, smartly walking up the hill to church for Sunday Mass.
10. Theologically speaking John was, of course, always of the high church persuasion. Indeed, many of you will have known him as Father Gilling, but for me he will always be “John”. I recall him early on in my days at Christ Church telling me approvingly of a sign which was at that time prominently displayed in what was then Oxford’s highest church, St Mary Magdalene. The sign read simply: “The Church of England is not a Protestant church”. In that connection, shortly after he came to St Mary’s Bourne Street, he became chaplain to Frances Holland School across the road from the church. There was a school service in the church one day which was attended by Princess Alexandra who had a daughter at the school at that time. After the service, Her Royal Highness asked John “Is this the highest church in England?”, and he replied: “No ma'am there are some that are a teeny bit higher”.
11. John always gave good, normally rather spiritual, sermons, but he also often got other interesting people to give them. I remember going to hear a rather aged W H Auden coming to preach, and being in a group of undergraduates who were introduced to him by John after his sermon. It was an exciting moment for me as I got (and still get) great pleasure from Auden’s poetry. On meeting me, Auden said “Ah .... Neuberger”, and then after a pause he asked “Do you think that there is a strong correlation between Mariolatory and anti-semitism?” Even at the age of nineteen, I was not normally tongue-tied, but I fear that my answer to this question from out of left field was very lame – as far as I recollect, it was along the lines that that was a very interesting question. I was rather ashamed that I could not have come up with something better, and felt a bit shown up in front of my fellow undergraduates.
12. Now I don’t think that John would have asked a callow undergraduate such a question out of the blue when surrounded by other people. He would have been quite clever enough to think

of the question, but there was a kindness, as I have said a sweetness, about John which would have precluded him risking showing someone up – unless he considered that it was for some specific reason merited. Indeed, he was a great believer in courtesy, in good manners, which he considered to be far more than the oil in the machinery of social relations. He would have agreed with Arthur Schopenhauer<sup>5</sup> that “Politeness is to human nature what warmth is to wax”. John believed that courtesy was not just a pleasant facilitator of a more pleasant life. He believed it was an essential virtue. And he acted on it, whether to undergraduates, parishioners, friends or strangers – in conversation, he did not differentiate in his approach between the young and the old or between the privileged and the less fortunate. But he never forgot peoples’ needs. More than one person recalls how, when John came to stay, he would always leave money for the helpers. He practised what he preached, and he preached what he believed – that courtesy and respect were due to every human being.

13. And, of course, he was right in this belief. Just as style and substance cannot be separated when it comes to a good novel, or any other piece of writing or a speech, so one cannot detach the contents of any discourse from the style, and courtesy is very much part of the style. Indeed, some idea close to the notion that style and substance are indissolubly connected was brilliantly and memorably conveyed in a phrase coined very much around the time that I met John Gilling, namely Marshall McLuhan’s statement that “the medium is the message”<sup>6</sup>.
14. Whatever the area of dialogue one is concerned with, political, religious, legal or academic, at home or at work, courtesy plays an important part. If one is courteous to another person, it connotes respect for that person, and mutual respect as between individual human beings seems to me to be an important contributor to a successful society generally and an important contributor to a successful personal relationship in particular. In the end, society has a greater potential for harmony and peace if people generally respect each other, and so too is a particular relationship more likely to be successful if those in the relationship are mutually courteous. Even when one does not have respect for a person or his views, there is often much to be said for courtesy. It may appear to be hypocritical if one expresses or implies respect for a person for whom you have no respect, but there is sometimes something to be said for hypocrisy; as Rochefoucauld famously put it, hypocrisy is the tribute which vice pays to virtue<sup>7</sup>.

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<sup>5</sup> *Counsels and Maxims* (1851) trans T B Saunders, Section 36

<sup>6</sup> Marshall McLuhan *Understanding Media: The Extensions of Man* (1964)

<sup>7</sup> François de La Rochefoucauld, *Maximes* (1665–1678), p 218.

15. Debate, discussion, exchange of views, plays a fundamental part in every area of our society - three obvious areas are political, legal and theological. In purely practical terms, absence of courtesy will normally detract from the quality of the debate, as it will mean that the debaters and any listeners will concentrate as much, or even more, on the insults than on the actual issue and argument. Of course, there may be occasions when you consider that the argument or opinion of an opponent is so wrong, so shocking, so improper that your disgust or disapproval overcomes or discharges the need for courtesy; indeed, you may reasonably conclude that courtesy would undermine the moral force of your rebuttal of the opponent's argument. That is fine in principle, but there is much to be said for the notion that human beings are far too ready to turn every argument into one of such fundamental principle, so that, in almost any public debate, courtesy and respect go by the board almost as a matter of course.
16. There is an element of heads we lose tails they win about this. Where the issues really are important, there is, at least objectively speaking, a stronger case for saying that courtesy goes by the board, or at least that it is more understandable that courtesy disappears. On the other hand, human nature is such that so-called Sayre's law applies – "In any dispute the intensity of feeling is inversely proportional to the value of the issues at stake"<sup>8</sup> (and of course a corollary of Sayre's law is that it is because of this that arguments between academics are so bitter<sup>9</sup>). However, as a consumer, whether as a citizen reading newspapers and listening to the news, or as Judge, listening to the arguments in a legal case, I have no doubt but that insults and rudeness detract from the quality of the argument and therefore from the reliability of the outcome. And as a former barrister, and thus as a participant rather than a consumer, I felt similarly. It made for a smoother running of the case and for greater concentration of the essential substantive and procedural issues involved in the case, if there was mutual cooperation and respect between all the lawyers, and the judge, involved in the case.
17. I remember John explaining the importance of courtesy in a sermon in an original and attractive, if slightly strained, way by reference to the Annunciation. Many a virgin, he suggested, faced with a visit from a supposed Angel who told her that she would conceive and become the mother of the son of God would have greeted the visit and the information with derision, scepticism or terror. Had the Virgin Mary reacted in such a way, John

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<sup>8</sup> Per William Sayre (1905-1972) quoted by Carles Issawi, *Issawi's Laws of Social Motion* (1973), p. 178

<sup>9</sup> A dictum claimed by Henry Kissinger in his speech at the Ashbrook Memorial Dinner, 11 September 1997

suggested, maybe the whole venture would have been cancelled. However, having appeared rather alarmingly, Gabriel, suggested John, was properly courteous, in that he was anxious to put Mary at her ease. Thus, according to Saint Luke, he greeted her with the words, “Hail, thou that art highly favoured, the Lord is with thee: blessed art thou among women”<sup>10</sup>, and then added: “Fear not, Mary: for thou hast found favour with God”<sup>11</sup>. Mary, said John, returned courtesy with courtesy. She was initially properly humble, and felt “troubled at his saying, and cast in her mind what manner of salutation this should be”<sup>12</sup>; she was then sensibly anxious to understand when told of her future role, asking “How shall this be, seeing I know not a man?”<sup>13</sup>; and finally she was properly accommodating, saying “Behold the handmaid of the Lord; be it unto me according to thy word”<sup>14</sup>.

18. Accordingly, said John, it was only because the Angel Gabriel behaved with thoughtful consideration for Mary, and the Virgin received him, together with the information which he imparted, with such exemplary civility and humility, and thus showed that she was worthy of the role of Jesus’s mother, that the birth of Christ could occur. I accept that there may be some theological, indeed some logical, problems with this view. Indeed, some might call it far-fetched but it has whimsicality, originality and charm - and it undoubtedly strikes a chord. Indeed, the very fact that I remember this sermon nearly fifty years after it was given speaks for itself.
19. The often more raunchy, more uncompromising, more militant Old Testament, with its killings, smitings and begettings may be thought to be less promising territory for courtesy than the New Testament. However, Abraham’s combination of courtesy, charity and persistence, as recorded in Genesis Chapter 18 in negotiating with the Lord to persuade him not to destroy Sodom and Gomorrah never fails to impress<sup>15</sup>. Having heard that Sodom and Gomorrah were to be destroyed, Abraham asked whether the Lord “would also destroy the righteous with the wicked?” He added: “Suppose there were fifty righteous within the city; would You also destroy the place and not spare it for the fifty righteous that were in it?” The Lord agreed that he would not. Chancing his arm, and with a bit of abasement, Abraham said this “Indeed now, I who am but dust and ashes have taken it upon myself to speak to the Lord: Suppose there were five less than the fifty righteous; would You destroy all of the city for lack of five?” The Lord accepted this, and, following similarly honeyed words, he was

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<sup>10</sup> The Gospel according to St Luke Chap 1 v 28

<sup>11</sup> *Ibid*, 1:30

<sup>12</sup> *Ibid*, 1:29

<sup>13</sup> *ibid* 1:34

<sup>14</sup> *ibid* 1:38

<sup>15</sup> Genesis chapter 18 verses 16-33

beaten down to forty. Abraham pushed his luck “Let not the Lord be angry, and I will speak: Suppose thirty should be found there?” The Lord agreed, and he also agreed to twenty, and Abraham then said “Let not the Lord be angry, and I will speak but once more: Suppose ten should be found there?” When God agreed to that, Abraham decided he had got as much as he could and stuck at ten. Sadly, it turned out to be too many.

20. Actually, Genesis Chapter 18 also contains an example of discourtesy to God, not on the part of Abraham, but on the part of his wife Sarah<sup>16</sup>. On being told by the Lord that she and Abraham (who was then apparently aged 99) would have a son, “Sarah laughed to herself, saying, ‘After I have become old, shall I have pleasure, my lord being old also?’”. God noticed her laughing and asked Abraham why she was laughing. Genesis tells us that “Sarah denied it however, saying, ‘I did not laugh’; for she was afraid”. But God was not having this; “He said, ‘No, but you did laugh’”. So, I am afraid Sarah was doubly discourteous: she laughed at God and then lied to him. But even in the Old Testament, the Lord could be forgiving, and he forgave Sarah, who then did indeed have a child with Abraham.
21. Of course, as John Gilling would have been the first to agree, courtesy is not the most important of all virtues or qualities. As Hilaire Belloc wrote, “Of Courtesy, it is much less/ Than Courage of Heart or Holiness”. However, as he immediately went on to add “Yet in my Walks it seems to me/ That the Grace of God is in Courtesy”. Belloc then went on to explain that he had visited a monastery where he “saw Three Pictures on a wall/ And Courtesy was in them all”. And the first of those pictures chimed very well with John’s sermon which I have just mentioned, as it was Fra Filippo Lippi’s Annunciation<sup>17</sup> (which itself is fitting as I recall that John was fond of Florentine Renaissance painting). Describing the painting, Belloc said of Gabriel that “as he went upon one knee/ He shone with Heavenly Courtesy”; as for Mary, Belloc described her face as “both great and kind/ For Courtesy was in Her Mind”<sup>18</sup>.
22. The role of courtesy in theological debate has not always been apparent. In the famous dispute at the 325 AD Council of Nicea, called by Emperor Constantine to resolve the long-running dispute between the Arians and the Athanasians, which concerned the issue of whether or not God the Father and God the Son were of the same substance, debate became so heated that at one point, Nicholas of Myra slapped the eponymous Bishop Arius in the

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<sup>16</sup> *Ibid* verses 13-15

<sup>17</sup> Per <http://thehilairebellocblog.blogspot.co.uk/2013/09/hilaire-bellocs-verse-on-our-lady-and.html>

<sup>18</sup> Hilaire Belloc, *Songs of the South Country* (1951), p 26



face<sup>19</sup>. Arius lost the debate and was then exiled, while Nicholas helped substantially win the debate for the Athanasians, became the model for Father Christmas (Santa Claus)<sup>20</sup> and was subsequently canonised, which shows, alas, that discourtesy sometimes pays off in spades.

23. And if one spools forward 1200 years, the Reformation debate was not noted for its courtesy.

Martin Luther wrote of the Roman Catholic church “May God punish you, I say, you shameless, barefaced liar, devil’s mouthpiece, who dares to spit out, before God, before all the angels, before the dear sun, before all the world, your devil’s filth”<sup>21</sup>. Thomas de Vio Cajetan, the Dominican Cardinal entrusted with Martin Luther’s trial for heresy was described by Luther as “a man no more fit to handle the case than an ass is fit to play a harp”. And de Vio Cajetan wrote to the Vatican of Luther “What an animal!”<sup>22</sup>. And from the Vatican Pope Leo X referred to Luther as “that son of iniquity”<sup>23</sup>. With these insults having been traded, it is not surprising that the Reformation and Counter-reformation with all their violence and deaths ensued.

24. Insults are never far away when it comes to politics, but they vary between the clever and memorable and the downright rude. Examples of the clever and memorable include the late Dennis Healey’s comment that being attacked in the House of Commons by Geoffrey Howe was like being savaged by a dead sheep<sup>24</sup>, and Vince Cable’s suggestion to Gordon Brown that he had suffered a “remarkable transformation ... from Stalin to Mr Bean”<sup>25</sup>. At the risk of being accused of subjectivity, I would suggest that, such remarks do not amount to discourtesy, because they are genuinely witty. Different considerations may well apply where the insult is simply abusive, such as Health Minister Simon Burns MP’s description of House of Commons Speaker John Bercow as “a sanctimonious dwarf”. Apart from being simply rude, it was unwise as, perhaps inevitably, it led to a headline in the next day’s newspaper: “Minister apologises to dwarves”<sup>26</sup>. No apologies were needed from Dennis Healey to dead sheep or from or Vince Cable to Mr Bean.

25. As a short aside, let me tell you a bit more about the dead sheep. Many people may have thought that Geoffrey Howe would have carried the comment on his back for the rest of his

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<sup>19</sup> <http://www.stnicholascenter.org/pages/my-kind-of-santa/>; and In this corner, St. Nicholas!. Catholic Exchange (2012).

<sup>20</sup> Louise Carus, *The Real St. Nicholas* (2002).

<sup>21</sup> M. Luther *Against the Roman Papacy, an Institution of the Devil*, Luther’s Works, Vol. 41, p 349

<sup>22</sup> <http://hisbarkingdog.blogspot.co.uk/2006/03/ruminations-on-abc-crisis-while.html>

<sup>23</sup> Pope Leo X, *Letter to Frederic, Elector of Saxony*, 8 July, 1520

<sup>24</sup> HC Deb 14 June 1978 vol 951 col 1027

<sup>25</sup> HC Deb 28 November 2007 vol 468 col 275

<sup>26</sup> <http://www.telegraph.co.uk/news/politics/7864301/Simon-Burns-apologises-to-dwarves-following-insult-aimed-at-John-Bercow.html>

life, and as you know he died late last year. In a way, that view was correct, but not perhaps in a way that most people would have expected. When he retired from front-line politics and became a Peer, Lord Howe of Aberavon, and prominent on the coat of arms which he designed is a dead sheep. You can see it on a panel in Middle Temple Hall, along with the coats of arms of other distinguished lawyers going back over the centuries. Geoffrey Howe was a man of real courtesy in public life. Dennis Healey, by contrast, was more rumbustious, and occasionally did tread over the line – for instance saying that Mrs Thatcher “glories in slaughter”<sup>27</sup>, but his description of her as a “virago intacta”<sup>28</sup> was brilliant (if not original<sup>29</sup>).

26. One has to accept that a degree of incivility is inevitable in politics, and it is worth remembering in that connection that it is political discussion which ranks first in the hierarchy of topics when it comes to freedom of expression. Political discussion is intense and tense, and the focus of the media, both print and electronic on the sayings and doings of politicians serves to increase the pressure, particularly with 24/7 coverage. As I have already suggested, the 1960s marked the start of a decline in respect for public figures, and I think that that decline has been reflected in a less respectful, more aggressive, approach to public debate, not only by politicians, but also by the media, and indeed the public generally. As a serving judge, it would not be appropriate to comment on current political debate in this country, or maybe elsewhere, but some people may with concern at developments across the Atlantic. You may recall how, during the 2008 Presidential election, John McCain, the republican candidate was told at a rally that his rival, Barack Obama, was a “traitor”, to which he replied that he was “a decent person”, whom he would “fight” but “you have to be respectful”<sup>30</sup>. Things are rather different when it comes to the 2016 presumptive Presidential candidates, or at least one of them, who might, I suppose, point out that McCain lost – to which I would reply that Obama was equally polite and won. In the eyes of the public, vituperation and insults lower the standing of political debate, and they lower the standing of politicians generally. Inevitably, this injures democracy and risks undermining the whole democratic process, and it also risks undermining the rule of law. And it is only right to acknowledge that views can reasonably differ as to the location of the fuzzy line between the desirable healthy and lively debate and the undesirable name-calling and rudeness.

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<sup>27</sup> *The Guardian*, 2 June, 1983

<sup>28</sup> I cannot source it directly, but see <http://www.independent.co.uk/news/people/denis-healey-dies-the-best-quotes-and-quipps-from-the-labour-giant-a6678361.html>

<sup>29</sup> Apparently, the originator of the joke was Humbert Wolfe, the polymathic humourist, who famously wrote “You cannot hope to bribe or twist/ Thank God, the British journalist/ But, seeing what the man will do/ Unbribed, there’s no occasion to”.

<sup>30</sup> <http://www.cbsnews.com/news/mccain-sticks-up-for-obama-at-rally/>

27. When it comes to courtesy and the law, it is appropriate to start with courtesy in court because there is of course an etymological link between the word *court* and the word *courtesy*, although you might not always guess it when you listen to some cases. Both words derive from the old French word *courteis*, which in turn derives from the Latin *cobors*, a yard or retinue – as in courtyard, which I suppose can be said to be tautological word as each of its two syllables means the same thing. But, coming back to court of law and courtesy, both derive from *corteis* via the court of the King. The word *courtesy* developed in Middle English as referring to manners fit for the King's court. A court of law is called a court because justice in this country was dispensed by the King (sometimes personally a la King Solomon), increasingly often through his judges. Those judges were His (or Her) Majesty's Judges (as they still are) and the courts in which they sit originate from the Court of the King. The court of law was indeed originally the King's court.

28. Despite the common link of courtesy and court, exchanges between advocates in court, between cross-examining advocate and witness, even between advocate and judge are not always the occasion for politeness or consideration. That is not surprising. Conducting a case in court is an inherently tense and confrontational exercise. Our common law involves, of course, an adversarial system, a description which for present purposes speaks for itself. The opposing advocates are adversaries, for whom a case in court can be compared with a trial by battle, with the weapons being deployed by the brain rather than by the body. The nature of a trial is such that it is often necessary for the advocates to be required to make split-second decisions – do I dare to ask this question?, do I object to this question being asked?, how do I answer the question the judge has just asked?, should I take the point that has just occurred to me?, how do I answer my opponent's unexpected new point? etc etc. The inherently tense nature of a trial renders life difficult for advocates. And sometimes an advocate may feel that it actually helps to be confrontational, indeed downright insulting.

29. One has to search a long way in order to find a more insulting performance than the cross-examination of Sir Walter Raleigh in his trial for high treason in the early 17<sup>th</sup> century by the then Attorney General, Sir Edward Coke. During the course of his no-holds-barred questioning, Coke put to Raleigh: "Thou art the most vile and execrable traitor that ever lived", to which Raleigh not unreasonably responded: "You speak indiscreetly, barbarously and uncivilly". Apparently having exhausted his vocabulary of insults, Coke rejoined: "I want words sufficient to express thy viperous treasons". Raleigh rather coolly replied: "I think you want words indeed, for you have spoken one thing half a dozen times". It is worth remembering that this was the Edward Coke who was being lauded all last year as the

promoter and revivifier of Magna Carta in the 17<sup>th</sup> century, who subsequently lost his post as Lord Chief Justice for standing out against James I's absolutist tendencies, and who then codified English law. I am sorry to say that the jury convicted Raleigh, who was, of course, in due course beheaded, but only 15 years later, after leading a failed expedition to the New World.

30. Rudeness by advocates to judges has to be more subtle for two reasons. First, rudeness to judges in court can amount to contempt of court, so anyone who wishes to be rude to a judge in court has to be careful. Secondly, most advocates want to win their cases, and alienating the judge is not a sensible thing to do. So, when the judge makes what the advocate thinks is a stupid point, the advocate will often begin his answer with the words, "My Lord, with great respect ..."; if he thinks the point is particularly stupid, the advocate may begin his answer by saying, "My Lord, with the greatest respect ...". I leave it to your imagination as to what an advocate thought of a point I once made to him in argument when he started his answer with the words, "My Lord, with the very greatest respect possible ...".
31. But some advocates are less tactful. An example may be found in the criminal case of *R v Farooqi* in 2013<sup>31</sup>. In his closing speech to the jury, counsel for Farooqi, one of four defendants in a terrorist trial, had his conduct described in crisp terms by the Lord Chief Justice in the Court of Appeal. In counsel's three-day closing speech, he "encouraged the jury to regard the judge as a salesman of worthless goods", depicted "the judge and the Crown ... as the agents of a repressive state", and as being guilty of racism and seeking to stop free speech, and accused counsel for the other defendants of "sucking up to the Crown and the court"<sup>32</sup>.
32. The most famous putter-down of judges from the bar was FE Smith, a barrister who like Sir Edward Coke, went on to become Attorney General and then Lord Chancellor. His son wrote a biography of his father which included two exchanges between a judge and FE Smith which are worth repeating. The first was early on in Smith's career, when, after crossing swords with him, the judge said: "You are extremely offensive, young man", to which Smith replied: "As a matter of fact we both are; and the only difference between us is that I am trying to be, and you can't help it."<sup>33</sup> A bit later in the Smith career, he was appearing in front of a judge whose view on the law he challenged. The judge said: "What do you suppose I am

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<sup>31</sup> *R v Farooqi and others* [2013] EWCA Crim 1649

<sup>32</sup> *Ibid*, paras 73-75

<sup>33</sup> Frederick Second Earl of Birkenhead, *F.E. : The Life of F. E. Smith First Earl of Birkenhead* (1933), Ch 9

on the bench for?”), to which Smith’s reply was “It is not for me, Your Honour, to attempt to fathom the inscrutable workings of Providence”<sup>34</sup>. Another remark recorded elsewhere was in answer to a judge who said to him “I have listened to you for an hour and I am none wiser”, to which the reply was “None the wiser, perhaps, my Lord but no doubt better informed”<sup>35</sup>.

33. Rudeness by judges is much more unforgivable, but alas it is not unknown. There are a number of stories of small-minded unpleasantness and worse by judges, but I am glad to say that the judges concerned are almost all retired or dead. The reduction in respect to which I referred earlier has the merit of emphasising to those in authority that respect is to be earned by conduct, rather than being automatically accorded by position. The standout rude judge in UK history is probably the Scot, Lord Braxfield, who “tauntingly repel[ed] the last despairing claim of a wretched culprit, ... sending him to ... the gallows with an insulting jest”<sup>36</sup>. In somewhat more recent times, and less horribly, Lord Thankerton, a Law Lord in the 1930s and 1940s, “irritated some counsel by practising his hobby of knitting while on the bench”<sup>37</sup>, showing that rudeness can be inactions as much as in words. According to one of his judicial colleagues, who complained to the Lord Chancellor of the time, Thankerton also made himself “a veritable nuisance by excessive talking”<sup>38</sup>. But examples of judicial rudeness are far more numerous on the other side of the Atlantic, where, indeed, some judges are quite prepared to be rude about their colleagues. The best known example was the late Antonin Scalia, a brilliant and witty man, whose insults of his colleagues in the US Supreme Court were frequent and notorious. In a dissenting judgment, he referred to the majority judgments as “pure applesauce” and “jiggery-pokery”<sup>39</sup>, and he referred to the majority decision in the same-sex marriage case as a “judicial putsch”<sup>40</sup>. As result his influence among his colleagues was, at least according to one authoritative source substantially less than it would otherwise have been<sup>41</sup> - perhaps a lesson for those who would be discourteous?

34. While the law has plenty of stories about courtesy and rudeness in court, substantive law very sensibly steers clear of making rudeness an offence. In general, you can be as offensive as you like, and it will not give rise to a claim. That is an essential feature of the fundamental and

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<sup>34</sup> *ibid*

<sup>35</sup> Francis Cowper’s *London Letter* in NYLJ of 28 August 1961, p. 4.p 279n

<sup>36</sup> Lord Cockburn, *memorials of his Time* (1945 ed) p 83

<sup>37</sup> Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979)

<sup>38</sup> Lord Dunedin, writing to Lord Hailsham, RFV Heuston *Lives of the Lord Chancellors 1885-1940* (1964) p 481

<sup>39</sup> *King v Burnell* 576 US \_ (2015)

<sup>40</sup> *Obergefell v Hodges* 576 US \_ (2015)

<sup>41</sup> see eg Jeffrey Toobin, *The Nine* (2008 edition) pp 65-67

very important right of freedom of expression. As Lord Justice Stephen Sedley said in one case, “[f]reedom only to speak inoffensively is not worth having”<sup>42</sup>.

35. The law of course has long treated damaging untruths as giving rise to a cause of action, namely in defamation, libel and slander. But vulgar abuse, or general abuse, is not defamation. Thus, it was decided in one case in the 1690s<sup>43</sup>, that saying to the plaintiff “Thou art an impudent brazen-faced Beelzebub” did not give rise to a claim in the ecclesiastical courts, because although Beelzebub was a Biblical word, the insult was “general abuse” and not actionable. And, in an earlier 17<sup>th</sup> century case it was held that to say of a practising lawyer that “he has as much law as a monkey” could not be slander, because and I quote “it could mean he had as much *and more*”<sup>44</sup>. More recently, it has been held that it is not defamatory as a matter of law to overstate a person’s age<sup>45</sup>, to use someone’s family grave as the setting for a scene in a ‘comedy horror’ film<sup>46</sup>, or to describe a professional tennis player as “the world’s worst tennis professional tennis player” who “did not win a single match during his first three years on the circuit”<sup>47</sup>.

36. As that great judge, Lord Atkin said eighty years ago: “That juries should be free to award damages for injuries to reputation is one of the safeguards of liberty. But the protection is undermined when exhibitions of bad manners or discourtesy are placed on the same level as attacks on character and are treated as actionable wrongs.”<sup>48</sup> There was a difference of opinion in a more recent case, twenty years ago<sup>49</sup>. The journalist Julie Burchill wrote a review of a film called *The Creature*, in which she said that “... film directors, from Hitchcock to Berkoff, are notoriously hideous-looking people”, and explained that “the Creature is ... rejected in disgust [because of the way it looks]; it’s a lot like Stephen Berkoff, only marginally better-looking.” In Berkoff’s claim for defamation, two judges, Neill and Phillips LJ, thought that the statements were capable of being defamatory, whereas one, Millett LJ, disagreed saying that “a decision that it is an actionable wrong to describe a man as “hideously ugly” would be an unwarranted restriction on free speech”.

37. Although offensiveness is not a ground for objecting to a statement as a matter of general law not least because of the importance which the law attaches to freedom of expression,

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<sup>42</sup> *Redmond-Bates v DPP* (1999) 163 JP 789.

<sup>43</sup> *Smith v Wood* Ld Raym 397, 2 Salk 692

<sup>44</sup> 1 March pl 93; 1 Rolle Ab 58

<sup>45</sup> *Van Baggen v Nichol* (1963) 28 DLR (2d) 654

<sup>46</sup> *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415

<sup>47</sup> *Dee v Telegraph Media Group Limited* [2010] EWHC 924 (QB)

<sup>48</sup> *Sim v Stretch* (1937) 52 TLR 669, 672

<sup>49</sup> *Berkoff v Burchill and Another* [1997] E.M.L.R. 139

there must of course be exceptions in a modern society. Obvious examples are statements which incite racial hatred or violence, but in the end they are not unlawful simply because they are offensive: they have some other ingredient which makes them unlawful. On the other hand, pure offensiveness, if I may put it that way, can be objected to e.g. in the regulatory world. Thus, in one case which I heard on appeal<sup>50</sup>, OFCOM, the broadcasting regulator, had concluded that a radio interviewer had breached the rules against offensiveness when interviewing a representative of a local authority which had decided not to place children with foster parents who smoked. The interviewer (who, it should be recorded, very quickly apologised) constantly interrupted and barracked the representative, and accused him of being a Nazi, a health Nazi and an “ignorant pig”. We held that he had been rightly censored. Article 10.1 of the European Convention records freedom of expression as a fundamental right, but article 10.2 reminds us that it is a right which carries “duties and responsibilities”, and therefore can involve a degree of self-restraint. While the law should not get involved in stopping rudeness in ordinary discourse, different considerations apply when a person is broadcasting his views generally, although the state must even there take care not to be too constraining or prescriptive.

38. Talking of self-restraint, you may have noticed that I have just referred to a case which I decided; that is often a reliable sign to a judge that he has been talking long enough. I quoted from Belloc’s poem *On Courtesy* earlier, and indeed, one of the lines I cited forms the basis of the title to this talk. So it seems fitting to end this talk with the last couplet of the poem. The poem ends, as do I this evening, with these words, “Go bless you, People, one by one/ My Rhyme is written, my work is done”.

David Neuberger

St Mary’s Bourne Street, 22<sup>nd</sup> June 2016

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<sup>50</sup> R (*on the application of Gaunt*) v *The Office of Communications* [2011] 1 WLR 2355