

Transforming Disagreement: from Threat to Exercise of Democracy

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Joshua Holo: Welcome to the College Commons Podcast, passionate perspectives from Judaism's leading thinkers, brought to you by HUC Connect, the Hebrew Union College's online platform for continuing education. I'm Joshua Holo, your host. Welcome to this episode of the College Commons Podcast, and the conversation I'm really looking forward to with Professor John Inazu. John Inazu is the Sally D. Danforth Distinguished Professor of Law and Religion at Washington University in St. Louis. He is a constitutional scholar and former litigator, the author of three books, and he has contributed multiple pieces to the Washington Post, Atlantic, Chicago Tribune, LA Times, and others. Today, we're going to discuss his most recent book, Learning to Disagree. John Inazu, thank you for joining us on the College Commons Podcast.

John Inazu: Josh, it's great to be with you. Thanks for having me.

JH: Tish Harrison Warren wrote the foreword to your book, and she focused on polarization. And in general, it seems that the need for your book presupposes that you agree with her, that we're polarized today, and that we, moreover, communicate in ways that I think you would argue exacerbate the gaps that separate us. Still, I'd like to give you the opportunity to open up our conversation and to elaborate how you characterize the state of our public discourse in the US today.

JH: I think it's complicated. I worry a little bit about presentism, so we're not the most polarized we've ever been, and I sometimes hear that. It's just not true. We've had far greater episodes of violence, of discrimination, of turmoil in our country's history in the past, and to no small thing, we've overcome many of those challenges. So there's a good story to be told about past polarization that was much deeper and that we've gotten through. At the same time, I do worry about some of our contemporary discourse and the ways in which we're shaping our words and ourselves through social media, through our methods of engagement, surrounded by a context of lack of institutional trust and a collapse of expertise and authority, and these pieces of the puzzle seem worrisome in new kinds of ways.

JH: In the course of trying to get us to communicate better, you write of the importance of persuasion and the various dimensions of engagement that promote it. You say you don't always have to engage in a cultured fight. One of the ways we can connect with each other, I

think you argue, is that you don't have to call upon the most strident chords of a disagreement or the highest stakes of a disagreement at the outset or all the time.

JH: My concern and my question is to ask you if it's reasonable to ask of someone to back off from the culture fight or some other high stakes component of a disagreement if the ideas of their counterpart are not merely adversarial, but in fact threatening. I'm thinking of all kinds of aspects of the gender discussion today where people who are non-binary or gender non-conforming, for them, a disagreement about access to a bathroom or what have you may not be some legal theory, but it may really impinge on their sense of safety. Should they be so calm and not engage in the culture fight?

Jl: I think I want to distinguish a couple of concepts here. Let's think about the difference between safety and harm. So in a diverse democracy where we have lots of disagreements about fundamental norms and values, our laws and policies are always hashing out different moral norms that are going to benefit some people and harm others. And that's true. You mentioned the transgender bathrooms example, it's also true in religious freedom debates or speech debates or the limits of conduct where the law is always going to end up saying, in some instances, there will be limits on your freedom or your ability to do what you want that will harm you. And there's a way in which you could think of all of that as a threat to safety, but I think the safety discussion is a bit of a misleading path because safety often suggests the kind of eminence where the threat is immediate.

Jl: And usually when we're talking about substance and policies, there's not an imminent threat. There might be a downstream threat. You might be very worried about the people you're talking to. You might want to make sure as much as possible that your side wins, but there's not a threat to safety in words and discourse. And I think as probably you and I have both experienced on campuses these days, there's a sense in which some people want to say, we can't even have this discussion because the discussion itself threatens my safety. And I think in some instances, people will experience hurt and harm in a discussion, but I think that's different than an immediate threat to safety, and I would want to push back against that particular premise.

JH: So it does sound like you're saying sort of the social equivalent of what we encounter in economic debates and public policy where everybody on public radio acknowledges that a given policy will have "winners and losers," you seem to be acknowledging that any social policy or any potential law is likely to have harmed and benefited citizens on either side of it, but that we as interlocutors and citizens in a democratic society have to fundamentally be okay with the fact that in some percentage of the time, we're going to be harmed.

Jl: Well, I would say temporarily be okay with it, or be okay at least with the process that leads to those results, and then to fall back on the commitment to democracy as an ongoing conversation. So if you lose in the political process, go back to the process and win work for a different kind of law or a different kind of exemption. And I think the one maybe qualifier here is for all of this to work, we have to have a shared commitment to civil liberties. I sometimes say civil liberties are for losers.

Jl: And what I mean by that is if you are in the political majority, you're going to get the laws and policies that you want, or you're at least going to get exemptions to your own interests. It's when you're in the minority, when you lose in the political process, that's when you need the ability to push back and say, this conversation isn't over. Maybe we've lost for the day, but we want to continue to challenge the reigning orthodoxies, challenge the status quo. And that's why the protections of speech and assembly and the free exercise of religion are so important in a democracy, because of the necessity of that ongoing conversation.

JH: And also presumably why they're not subject to simple majority votes.

Jl: Yeah. And then of course, to reinforce their significance, we need to keep talking about them and narrating about their importance because once you get to the majority, once you get into control, it's very easy to dismiss civil liberties, to tell yourself that, "Well, now that we're in power, we're actually the good people, so we don't need these checks and balances," but that's just not true.

JH: Right. And it also seems to be implied by your argument that not only do we need to trust some kind of ground level shared commitment to civil liberties, we also have to be willing to renegotiate them generation after generation.

Jl: Say more about what you mean by that. I'm intrigued by the question.

JH: Well, as part of a society or any group of people changes, the categories that bind us shift. And the categories protected by a certain civil liberty may not actually describe or attend to categories that do not exist yet. But at some point in the future, they will emerge and they will force a rejiggering of all of the boundaries within society. And then there will be civil liberties questions that emerge anew testing old definitions and therefore the rights that flow from them.

Jl: That's interesting. I haven't thought of it in that, those terms before. I think I partially agree. So that when we think about words like speech, the meaning of that word changes over time. And speech today means online expression in ways the founders could never have dreamed of. So we do have to reimagine the category of speech. When we think whether speech should protect certain words or no longer protect certain words, that feels a little different to me where the tradition itself has at least until now reinforced the premise that we have to protect all words, even the really awful ones.

Jl: And even though the meaning and social significance of words changes over time, we have up to date a commitment to protect free speech, hate speech, all kinds of bad speech. Now, I think you're right conceptually is maybe we could renegotiate that. It seems to me that would be a pretty dangerous path to go down because we've shown over the last couple of hundred years that we really need those pretty absolute boundaries to speech. But conceptually, I suppose we could renegotiate maybe to our own risk.

JH: Maybe to our own risk, but maybe inevitably. I'm thinking of the free exercise of religion and the example you give. I think the neo-American church it's called that forced us to contend with drug use as a religious expression in ways that were, except for alcohol, probably not really entertained in the time of the 18th century.

Jl: The drug thing's interesting, right? 'Cause on the one hand, we have longstanding religious traditions that have engaged in use of substances other than alcohol that we might consider drugs today, like peyote by the Native American church for a long time. And on the other hand, in the case that you mentioned that I talk about in the book, when a relatively newish religious tradition wants to claim a religious exemption to use LSD, that seems like a kind of different category than a longstanding tradition. But we need to talk about it and ask why that should be prohibited and not something else.

JH: That's right. And we should talk about why the qualifier longstanding has become a stand-in for legitimacy. At some point, Abraham was a 90-year-old guy who believed that God spoke in his ear and told him to circumcise himself. That's pretty far out. And it was newfangled at the time, and yet now we call it legit.

Jl: Yeah. Well, and certainly in today's constitutional jurisprudence with the current Supreme Court and a focus on history, text, and tradition, I especially worry how that plays out in the context of the establishment clause, where most of the longstanding tradition is basically going to be a kind of white Protestantism in this country. And it doesn't make conceptual sense to me that we would be privileging Protestant monuments from 200 years ago over and against those that might have been recognized at later points in our country's history.

JH: I'd like to pick up on this really provocative catchphrase that you used a moment ago, civil liberties are for losers. I have often thought that to pick up on another theme of your book, pluralism is for winners, by which I mean the following. The way we use pluralism, I think preponderantly and colloquially today, what we mean is there is a grand societal benefit to having a plurality of voices in any given dimension. It could be religious, it could be racial, it could be linguistic, it could be social, economic, etcetera.

JH: But it's a majoritarian perspective that says my majority enfranchised worldview is enriched by pluralism. But I don't think that's what minorities necessarily mean when they say pluralism, for whom pluralism is closer to civil liberties. It's the principle whereby I am justified to, in the full and unfettered claims of my enfranchised citizenship. It feels much more existential from a minority perspective than it does from the grand philosophical comfort of majoritarian pluralism.

Jl: That's interesting. There are a couple limits to, I think, either claim for the majority or the minority, and they're contingent on what the relevant population looks like. So today in 2024 America, I don't think the majority or the minority would want to say the neo-Nazis are a relevant voice in our pluralistic society. I mean, those people exist in our society, but I think most other minority populations would say, no, we want to minimize that influence. And the majority would say, that's not actually good and helpful to our potpourri of ideas. We actually want to minimize that influence. But then the related point is I can imagine a society, it's not ours, but a society

that is much more homogenous, where people on their own accord come to share the same beliefs and views.

Jl: And in that instance, from the majority's perspective, at least some forms of pluralism might not be a good. If everybody on their own accord came to believe all of the key things that I think are important about the world, I would actually like that about the world. I wouldn't have any problem with the lack of difference. It's just, that's not the world we live in. So we have to, as a political reality, address the fact of pluralism. And I think in both cases, whether you're the majority or the minority, that's a fact you have to deal with and you set pragmatic or contingent limits on some perspectives that just are not going to be welcomed.

JH: You write very eloquently about the fact that at least on some level, it's really only the government's coercive power that has the ultimate capacity to cut through an insoluble problem that lacks an avenue for compromise. The adult in the room who cuts the Gordian knot ultimately has to force the issue. I find the argument compelling, but I wonder if in the democratic context in which we all live, and you specifically work as a constitutional scholar of the democratic society, do you find that people resist this argument or that it's very hard for them to be comfortable with it?

Jl: Yes, all the time. And it's not so much they resist it as I think they're just unaware of it. So I was speaking last week to some staffers on Capitol Hill, and I said to them, let's remember that you all are working in a system that depends upon coercion and violence. So you think you're just pushing papers, but you're actually helping the people you work for enact laws and policies that will be enforced by coercive law. And once they're enacted through the legitimate process, if people don't follow those laws, they go to jail. And if they don't comply with going to jail, they face violence and force. And that's true of law and legal practice as well.

Jl: It's what I tell my law students. That's a very weighty job to have, and it's a very weighty perspective to have. And when you are voting in that kind of a democracy, you're also voting in support of those kinds of actions. Having said that, this is about how I would want it. The alternative is much, much bleaker. The alternative is when we reach those situations of no compromise, we resort to street violence. And that often hurts the most vulnerable among us. So we have law, we have policy, we have procedures that rely on coercion and ultimately violence, but in the end, prevent even more coercion and violence.

JH: When you discuss the encounter and sometimes the zero-sum encounter between faith and patriotism, you talk about the Jehovah's Witnesses multiple court cases in relation to the Pledge of Allegiance. And if I can get personal, you speak about yourself and you say, "I no longer swear oaths." And this resonated a great deal with me. I'm a medieval Jewish historian, and there are cases in the Jewish middle ages where a judge has to make a decision without decisive evidence, ultimately relying on someone's word and choosing whom the judge or the rabbi believes better in a given case. On the surface, what the judge does is goes to one of the parties and says, "If you take an oath that your version is the accurate version, I will decide the case in your favor."

JH: And on the surface, that seems like the judge is in fact concluding in favor of this person. However, because of the social and religious sensibilities of the Jews of middle ages, it's actually the opposite. The judge is telling to this party, if you take an oath, you can win the case, knowing full well that the litigant will not take an oath, because as a matter of course, Jews of the middle ages would not take oaths to resolve a civil case. And so your reticence to take oaths yourself resonated with me a lot. And I wanted to give you an opportunity to share your kind of emotional as well as your intellectual relationships with taking oaths.

Jl: Yeah. And this for me has been an evolving process. As I mentioned in the book, I come from a military family and I myself served four years active duty with the Air Force. And so I've had lots of experience around patriotism and commitment to this country. And there's much that I really value and appreciate about this country. But over time and particularly through the influence of a theologian, Stanley Hauerwas, on my life, I began to question why for me as a Christian, I would take an oath that either in words or through my actions demonstrates or conveys an ultimate allegiance to this country when I don't actually believe that. So why would I put my hand over my heart during the pledge of allegiance when my allegiance is conditional? Or why would I take the oath of office that swears to defend the constitution against all enemies foreign and domestic when it's at least conceivable that my own faith would become an enemy foreign or domestic to this country.

Jl: And then when we look through the history of our constitution, we can point to numerous examples where the constitution is in deep conflict with what I would understand my faith commitments to be, whether it's the three fifths clause or the denial of women to vote or many other past errors of the constitution, which is to say that this human made positive law document is great, it's also deeply flawed and it doesn't deserve my ultimate commitment. So I try now in my own life to reflect this in my words and my actions. I will stand reverently when the pledge is being given or the national anthem is being sung, but I don't put my hand over my heart and I don't take oaths to the governments. I think this is something that I do for myself as a reminder of where my allegiances lie. It can be sometimes awkward in different social situations because it's not a common practice, but it's an important reminder to me.

JH: The College Commons Podcast belongs to HUC Connect, the online platform for continuing education from the Hebrew Union College. HUC Connect includes webinars, syllabi for community learning and masterclasses for HUC alumni with interviews, expert panels and classroom materials on topics ranging from the arts to civil society, Israel, and much more. Check us out at huc.edu/hucconnect. Now, back to our interview.

JH: In one of your chapters, you quite convincingly point out that we all have faith in something, even if it's not properly or classically what we would call religious. Do you think that's true even of those who adhere to science insofar as the very nature of science is only to affirm or believe that which you can perceive? And is that faith or is that something else?

Jl: I think it's still faith in that we can only get by with actions in the world based on our best bet of what is going to happen, which cannot be fully empirically verified. So let's say from a scientific perspective, you believe that airplanes for the most part fly successfully and you on

your next trip board the plane. Well, you don't have proof that that's all going to work. You're relying on lots of derivative claims from other people who have worked out the science and the physics, and you're relying on the judgment of the guy or the woman flying the plane and all kinds of people who've turned different knobs and made things happen.

Jl: Getting on an airplane requires a tremendous act of faith. You might not be thinking about that consciously, but you are absolutely placing faith in all kinds of people and ideas and processes. And you've got some evidence from the past that it's all going to work out, but it's still a leap of faith to get on that plane. And I think we could probably point to lots of other examples in our daily lives where we live out in the world relying on things not fully proven.

JH: Do you think that a hardcore adherent to science might respond, it's not actually faith, it's just probabilities and it's a risk reward and it's a rational, reasonable risk reward that I'm personally willing to take?

Jl: I buy that, but I think following probabilities is another way of redescribing what faith could be in some sense. Maybe for religious people, faith is an exercise in probability as well. I mean, it's increasingly difficult, I think, to adhere to a faith tradition that collapses entirely internally or whose probability does not seem very likely in the world as we find it. This actually makes me think of some of the controversies throughout different religious traditions over time. Not that these are all in the past either, but think about, for example, fundamentalist Christians that would argue vehemently on a literal seven-day creation against all evidence around them.

Jl: Those are also faith claims and we might say anti-science claims as well. But part of what makes the faith piece of it harder to understand is back to probabilities. It becomes increasingly unlikely that that's reflective of the state of the world given what we've discovered about the world. So I think for most people, whether you're into the science direction or into the faith direction, for most people living in the world, which I'm describing very intentionally as faith here, is a combination of the evidence you see around you, the experiences that you have, and then trusting in things unknown.

JH: I want to follow up on your observation about trusting in things unknown and particularly your seemingly mundane observation that you're trusting in a lot of people. You're trusting in the pilot, you're trusting in the God knows how many mechanics, you're trusting in a million things that depend really, really directly on human responsibility, good faith, incentives to get their paycheck. I mean, you're really trusting a lot. And I think one is aware of that when one puts one's child on the first school bus of their life and you're like, oh my gosh, my kid's fate depends on all of these people acting in good faith. I wonder if I could circle back to the top of our conversation and ask if the utter, total, all-encompassing ubiquity of our reliance on each other and our good faith could not be a starting point to serve as an antidote to the gaps, the mistrust, the political anger that seems to take center stage?

Jl: I would want that very much. And I think there are philosophical and theological resources that can point us there. I mean, even just our everyday lived experience, it's very hard to go through the world without any reliance on anyone else. It's very hard to go through the world

alone. I mean, at the very least, in most cases, as you age, you're dependent on other people and there's a sense in which that recognition of the world around us would be a good reminder of our shared humanity and need for each other. Where I worry the most though, is that we are increasingly distrustful of not only the people we know, but the people we used to trust by proxy. So I'm thinking about the collapse of trust and expertise and the confounding nature of online information. Today, when you hear one thing, you just Google for the alternative answer that you would like to hear more.

Jl: And that's often available to you. We are in a situation where it's even hard to know what the truthfulness around expertise is anymore. You can get your expert and I can get mine and we can duel it out. And then we've got experts veering out of their lanes and over-claiming. I'm thinking of the huge battles we had around COVID where you had both sides of that debate often over-claiming what the science was or conveying what was a very complex amalgam of fact and law and policy and experience into claims about this is all just science. And so that then helps lower credibility of experts. And I think you have a lot of ordinary people in the world who are distrustful of subject matter experts, of journalists, of people who used to be relied upon to hold this thing together. And so I very much like and admire your intuition about social trust among us, but I worry about how we find that today.

JH: It's a fair worry. And another difficult thing to find that I want to ask you about is your chapter on forgiveness. I think the law and religion, two areas of your expertise, are perhaps the most prominent forums in which we really think about forgiveness. How do they mutually inspire each other for the sake of forgiveness and how do they mutually undercut each other?

Jl: One of the things the law shows us is how the possibility of forgiveness might be all we have. What the law shows us is how imperfectly we respond to injustice and harm in the world. When we see this as human beings, most of us intuit, "This is not right. We need to right the wrong, we need to bring justice to the injustice." And in truth, that never fully happens. I mean, if you lose a loved one to violence, there's no amount of punishment or investigation or recompense that is going to remedy that situation or heal the wrong. There's no amount of justice that brings back that person or relieves you of the world of the injustice. So we're left with the proximate justice that the law can offer. That's very, very important.

Jl: And in a society of complex human beings, you still want proximate justice and you want institutions and people working toward that, but it's not justice. And in the absence of the possibility of justice in this world, something like forgiveness becomes a very powerful alternative that can re-imagine the future in ways not possible through the existing system. When Desmond Tutu writes that book, *No Future Without Forgiveness*, he's making a political claim that we as a people need this possibility in our lives. And I think religion and religious traditions offer very robust resources and possibilities for forgiveness through examples, through theology, through narratives that I think our society needs. Now, back to your question about how that might be intentioned with the laws. You can't really direct the law toward a specific religious framework in a pluralistic society like the one that we're in.

Jl: And so you have to figure out how to translate ideas. You can't really force forgiveness on anyone, nor can you force repentance for that matter. So you have to model it and you have to figure out ways to model it that are not coercive, that are not prescriptive, particularly outside of particular faith traditions, but might do the work of inspiring a community or a society to work toward this kind of idea. I mean, there's a very similar notion of mercy and grace that is related to this idea of forgiveness. And it doesn't come naturally for some people and again, you can't require it of anyone, but if you can model it and convey it, I think it's something just essential to keeping open the possibility of a shared future.

JH: And the first part of your answer, if I remember correctly, you described forgiveness as in the framework of the law, a potential alternative to the fact that the law can only offer proximate justice. I wonder if its real power is not as an alternative, but as a complement to proximate justice, that however close you get to justice is as far as you get and the gap between where you got and where justice might actually reside might be filled with forgiveness.

Jl: I think that's right in maybe the best case scenario. So forgiveness does not come at the exclusion of punishment, for example, you could have both, you can have the proximate justice and forgiveness in operation. Sometimes the law is not going to successfully punish and there the possibility of forgiveness still exists. Sometimes the wrongdoer is not going to repent. Maybe the wrongdoer is dead or is no longer capable of repentance and forgiveness is still possible. So even in the absence of proximate justice or reciprocity, forgiveness becomes a real possibility. But I think that you're right in the best case scenario and I think the one that reinforces a stable society, you would have both proximate justice and forgiveness working together.

JH: We all think about things with our ideas in mind motivating us, in your case, to write a book. But in the course of filling out our thoughts, we often surprise ourselves. What surprised you in the course of writing your book, *Learning to Disagree*?

Jl: Yeah, there's so much that I kind of felt like I learned in the writing process. I think part of it was realizing how important it was for me to both model and convey my own need to grow in these areas. You know, I'd be writing in the morning and then I'd go out in the afternoon, run an errand or encounter someone and be impatient or short or some other deficit. And I would think, "Oh, I just screwed up again what I've been writing about in the morning." And then I realized I could actually tell some of those stories in a way that would say, I'm not trying to be preachy in this book, what I'm trying to say is the act of verb learning in the title is something that we keep doing and we don't ever stop doing, including me. And so I think the reality of that in my own life, but also the possibility of saying that in the book itself was something surprising, but I think ultimately pretty exciting.

JH: And I would add successful and charming. It was fun to read and it humanized you and it brought the lessons to bear with particular meaning. So thank you for that.

Jl: I appreciate that. Yeah. And the fact that they happen to be true shortcomings is also probably a...

[laughter]

JH: Well, John Inazu, thank you so much for the conversation and the pleasure of your company and congratulations on your book, *Learning to Disagree: The Surprising Path to Navigating Differences with Empathy and Respect*. It was a real pleasure.

Jl: Josh, great to talk to you. Thanks for having me.

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