34 U. ARK. LITTLE ROCK L. REV. 113 (2011).

NO PARADISE TO REGAIN: COMMENTS ON RUSSELL G. PEARCE AND ELI WALD, THE OBLIGATION OF LAWYERS TO HEAL CIVIC CULTURE: CONFRONTING THE ORDEAL OF INCIVILITY IN THE PRACTICE OF LAW

*Kenneth S. Gallant**

Pearce and Wald present a brilliant piece. You have to hear that up front because my task is a very difficult one—to respond to a piece calling for civility. Essentially, I have been asked to argue against civility. While I will not exactly do that (except once),[1] I will at least question whether "incivility" is a unitary concept and, in the footnotes, question whether what I am saying here is civil.[2]

In order to place the work of Pearce and Wald within two of the more important streams of thought of recent decades, I want to highlight a few important figures. First, Amitai Etzioni is the public intellectual most associated with "communitarianism." Communitarianism is the idea that connections between people and groups have been undervalued in modern political and social discourse and that these connections need to be given a more prominent place in policymaking and moral thought.[3] Second, Roger Fisher and William Ury, who wrote *Getting to Yes*,[4] popularized the school of so-called principled negotiation, which mirrors many of the things that Pearce and Wald say that lawyers should be doing in their practice.

One of Pearce's and Wald's important contributions is to bring together these two streams: the idea that the "relationality" of human beings is a key to understanding human interests (Etzioni and the communitarians); and a specific means for negotiating substantive differences that promotes civility, both in legal practice and in the larger community (Fisher and Ury and the negotiation theorists).

There are two points by Pearce and Wald I want to critique. Both may have more to do with the way they tell their story than with the substance of their approach. First, I think it is useful to separate out two problems in defining "civility."[5] The first problem deals with the fact that "civility" and "incivility" are complex concepts.[6] On the one hand, we have words and actions that are, in ordinary language "uncivil," i.e., impolite, insulting, or aimed at destroying the person rather than attacking a problem. On the other hand, Pearce and Wald, following a long intellectual tradition, extend civility "beyond individualized politeness and courtesy to encompass a norm of mutual respect that makes possible the long-term health of civil society."[7] "Incivility," in this broader view of the subject, includes those fundamental views and patterns of action, such as religious intolerance and racism, that make the achievement of a society in which all persons and groups can pur-

sue their "relational self-interests"[8] very difficult or impossible. These latter issues are not merely about politeness or individual interactions but go much deeper.[9]

Secondly, I disagree with Pearce and Wald's description of where we (both as members of society generally and as lawyers specifically) have been, and what this says about where we need to go.[10] They argue that following the 1960s, autonomous self-interest became dominant among the liberal and libertarian elite.[11] It then began to shape the habits of mind and conduct of ordinary Americans and to extend its influence even to social conservatives, and some political liberals, who embrace a relational perspective with regard to their own communities of interest, but adopt autonomous self-interest as their approach to political debate and civic culture.[12] Accordingly, adherents of the increasingly polar perspectives today do not seek to employ relational self-interest to heal our civic malaise. [13]

They go on to assert that there have been periods of civic discord, but in each case, the tools of relational self-interest were available to heal the discord. This, they say, is no longer the case.[14]

The narrative and argument Pearce and Wald present makes their theory of civility seem a nostalgic call to a former, better time.[15] Their theory of civility is actually much more valuable than that, even though there never was such a civic paradise, in America or anywhere else.

I. WHAT IS INCIVILITY AND WHAT IS SOMETHING ELSE TOO

Incivility, in the broad sense that Pearce and Wald use the term, has several sources. Not all of the discord in our current public conversations comes solely from the impoliteness or personal insult types of incivility. Take for example this statement of the Reverend Pat Robertson: "[T]he minute you turn the [Constitution of the United States] into the hands of non-Christian people and atheistic people, they can use it to destroy the very foundation of our society and that's what's been happening."[16]

When United States Supreme Court Justice James C. McReynolds refused to sit next to Justice Louis D. Brandeis because Brandeis was a Jew[17]—that was incivility, in ordinary language. It was a personal insult and affront to Brandeis. What Robertson says is something different.

Robertson advocates a doctrine that would have excluded Brandeis (as well as Russell Pearce and myself) from office in the United States because we are Jewish. He argues that non-Christians, which covers a wide variety of folks, have been using public office "to destroy the very foundation of our society."[18] That is a substantive view of the proper place of many of us in American society, not a mere insult to us. It cannot be said in a less insulting way. It is uncivil in the sense of seeking to exclude us from the right to participate in American governance, from being part of the group of

Americans to whom one "relates" when we talk about "relational self-interest." It is evil.[19]

Views like Robertson's can remain unsaid and squirreled away in the heart; public discourse might seem fairer. But we must ask whether this would be an improvement. The French, for example, officially believe so, having outlawed "genocide denial" and advocacy of Nazi ideas.[20] The official United States position, based on the First Amendment to our Constitution (and which I agree with) is to permit the voicing of this type of position, as evidenced by the recent holding that permits people to publicly announce that "God Hates Fags" without being liable for the content of the speech or the emotional distress it might intentionally cause.[21]

Contrast the quotation from James Podesta that Pearce and Wald also take from Hunter. Hunter and Pearce and Wald see it as the left wing response, in kind, to Robertson's comment: "Beneath the superficial impression of a friendly television personality who loves America, lurks the reality of a fanatic who hates our nation's courts, its public schools, its system of social insurance and even much of its Constitution."[22]

This bears the ordinary-language marks of incivility as impoliteness and personal invective. Podesta calls Robertson a "fanatic" and describes Robertson's feelings as "hate."[23] These are public insults aimed at Robertson. They raise the temperature of the debate without clarifying anything. And, as Pearce and Wald and Hunter argue, this sort of thing is all too common in current American public debate. It needs to be pointed out, attacked, and eliminated.[24]

On the other hand, what about the truth of the matter asserted by Podesta? For example, Podesta's claim that Robertson disagrees with (bowdlerizing "hates") "much of [our nation's] Constitution."[25] It appears that Robertson would not implement the portion of United States Constitution, which states that "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States[.]"[26]

One might also reasonably infer from Robertson's statement that he also disagrees with the First Amendment to the extent that it prohibits the establishment of Christianity as the national religion of the United States, as well as the Fourteenth Amendment to the extent that it has been applied to prohibit the same thing by the States.[27] You can decide for yourselves whether these parts of Article VI, Amendment I, and Amendment XIV constitute "much" of our Constitution. In any case, Podesta must be able to say that Robertson's statements indicate that he holds these views and that Podesta strongly disagrees with those views, if civil public discourse is to have any content.

In order to address the problems of public and professional discourse today, one must separate out the problem of civility as impoliteness and personal insult from the problem of incivility as exclusion from the ability to participate in civic discourse. We see this when we parse out Podesta's un-

civil remarks, i.e., those remarks insulting, unpleasant, and tending to delegitimize the other, but at least partly correct regarding their substance. It is also true that incivility of the personal insult sometimes springs from evil thought, as one could infer from McReynolds's insults to Brandeis. Conversely, civility would be advanced if, for whatever reason, members of the Westboro Baptist Church would not protest using signs saying "God Hates Fags" at the funerals of American soldiers killed in action (although this alone would not solve most of the problem of discrimination against homosexuals). In sum, the statements of Robertson and Podesta demonstrate two very different ills of public discourse and, as I will suggest, separating them out may aid the cure of both.

Hunter, Pearce, and Wald would agree that both Robertson and Podesta are both being uncivil.[28] This is because certain substantive views, particularly religious intolerance (i.e., Robertson) and racism (i.e., Pearce and Wald's use of Martin Luther King's opponents[29]), make a fully civil society extremely difficult or impossible to achieve. This would explain why Hunter, Pearce, and Wald characterize Robertson as "uncivil." Essentially, in Pearce and Wald's model, intolerance is a refusal to recognize common interests in relation to the other, and is an aspect of incivility.[30]

My examples of McReynolds (i.e., religious intolerance) and the Westboro Baptists (i.e., discrimination against homosexuals) would actually fit within this model—I insist on the wrongness of their substantive arguments, but admit also the incivility of some specific words and actions. McReynolds was refusing to recognize the relationality of American society (as Pearce and Wald suggest)[31] by refusing to recognize Jews as having a legitimate place in it, and doing so in a personally insulting way. The Westboro Baptists similarly refuse to recognize the legitimate place of people who are homosexual in our society, but their means of expressing it—picketing with signs that say "God Hates Fags" at the funerals of heterosexual persons who gave their lives for their country—is very peculiar.

Though the examples of intolerance and racism that Pearce and Wald and I use come from the right, that is merely an accident. Two examples from the left would be the Stalinist mass starvation of Ukrainian *kulaks* (slightly wealthier than average peasants)[32] and the Khmer Rouge decimation of Cambodia's intellectuals. In both of those cases, it was the dehumanization of the other which allowed the mass killings to go forward.

Here, I am arguing that we need to tolerate incivility in general society; I have said that the United States, by explicitly permitting expression of hateful and intolerant views (through the First Amendment), has the better model than France, which outlaws some of it. I believe—perhaps on insufficient evidence, but I believe it nonetheless—that permitting open expression of these views, with the opportunity to openly combat them, is more likely to produce a genuinely tolerant society than driving these views underground.

Yes, Robertson is uncivil, but with a very different basis for his incivility than Podesta's. Podesta's incivility is a political—and perhaps a fundraising—tactic, which he can choose to change. It is wrong if he does not. The use of explicit demonization of the adversary is a relatively new—and thoroughly deplorable—means of mass appeal for fundraisers for nonprofits engaged in advocacy. I try very hard not to respond to such appeals, but I have not terminated my membership in all organizations that do it.[33]

The incivility of Robertson, McReynolds, the Westboro Baptists, and the opponents of King did not come from tactics. It came from their most ingrained beliefs and motives for actions and cannot be changed without, as King knew, a change in their souls. The two are not equivalent, so they must be addressed in different ways.[34]

II. RELATIONAL SELF-INTEREST AND HOW WE GOT TO WHERE WE ARE

I agree with Pearce and Wald's description and most of their application of "relational self-interest." They argue that the interests of individuals and groups in society are largely defined by their (our) relationships with other individuals and groups. They contrast this with the idea they call "autonomous self-interest" (I prefer the word "atomistic" instead of "autonomous"[35]—and I will slip between these two usages in the rest of this article) which would hold that the interests of an individual can wholly be defined in terms of that individual.

The idea of "relational self-interest" describes actual human interests better than the idea of "autonomous self-interest." We all live in relationship to each other and the good of each is generally the good of each other. If you don't believe that, try living in a society where a significant portion of the population is truly illiterate, and you will see how much the ability of other people to read benefits you. There are only a few people who truly don't accept that we live in relationship to other human beings. These days we call them "sociopaths."[36]

It is generally better, as they suggest, for people (including lawyers) to act on the idea that human interests are relational rather than atomistic. I generally base this conclusion on the utilitarian grounds that the results are, on average, better. However, I would not exclude other moral grounds for reaching this result.

Finally, their extension of the ideas of "relational" and "autonomous (atomistic)" self-interest into the realm of describing interactions between groups works up to a point. It is the case that groups can often be seen as acting either as though they have interests largely in relation to the interests of other groups ("relational self-interest" among groups), or as though the group only has interests for itself and within itself ("autonomous [or atomistic] self-interest" of groups"). As they put it: "Relational self-interest

recognizes that the public good sometimes exists independent of and in addition to collective self-interest and that government institutions as well as private actors have the capacity to promote the public good in ways other than merely clearing the way for the unconstrained exercise of naked autonomous self-interest."[37]

My first point of disagreement with them is that they push this last idea further than their current formulation will carry them. My issue is the human relations problem of in-group and out-group and when and how they act relationally—this needs much greater development in a theory of group relational vs. atomistic self-interest. Their system fully works only where all persons and groups are actually and fairly included in the governing polity. That is not always so.

Specifically, they claim that before the 1960s groups in America generally accepted that relational self-interest was used as a means of coming together after periods of conflict. But this is true only if the definition of the relevant society excludes certain groups (who today we would call "disempowered"). For example, before the 1960s, black people were utterly excluded from civic participation in the South and to a large degree elsewhere. Perhaps one can see a group of whites who used ideas of relational self-interest to solve problems among themselves in these areas. But one can call this "Southern society as a whole" only by allowing the in-group's exclusion of black people from the category of "fully human"[38] to define the society. While they admit that Southern society was exclusionary in this sense, they continue to insist on the claim that relational self-interest was the dominant political strategy of the society.[39]

This is one point where their theory of group self-interest as a cure for the ills of public discourse needs more development. Specifically, the problem appears to involve identifying relevant "communities of interest" involved in the entire society in question. It also involves determining when appeals to "autonomous self-interest" are simply based in promoting that interest above another; and when they are based in a belief that would genuinely exclude the other from participation in the society. Pearce and Wald want to show that, until the 1960s, relational self-interest was the predominant strategy of American political and societal interaction. For that purpose, they need to consider claims of exclusion, because those claims were justified and to that extent the American strategy was not truly relational. Thus I respectfully but very deeply disagree with Pearce and Wald's suggestion that issues of exclusion are raised mostly by the left to argue that there is no such thing as the public interest, only autonomous group interests.[40]

My second point of disagreement is that they attribute to certain groups (liberals and libertarians) ideas of autonomous group self-interest that do not fully reflect what these groups have actually done. For example, it is liberals (in the modern political sense) who have promoted the relational idea

that the natural environment presents some problems (e.g., the ozone hole; global warming) that can only be solved by global action. By contrast it has usually been conservatives, often those with strong ideas of local or national social cohesion, who have opposed these developments, on the ground of local or national economic or other interests; or indeed on the idea that the autonomy[41] of nation-states needs to be preserved.

Similarly, it is economic libertarians of the right who have promoted ideas of free trade—that the relevant community of interest for the benefits of economic freedom is the entire world. Interestingly, their opponents have sometimes been the same people who promote internationalization of environmental issues. In some cases, this is because they believe national environmental and labor issues require that nation-states preserve autonomy. In others it is because they see the worldwide free-trade community as not truly being inclusive—specifically, they see free trade as promoting capital, management, and commercial interests[42] to the disadvantage, and even to the exclusion, of the interests of labor and farmers and the environment.

My third point of disagreement is that I question the historical narrative that says political discourse has become drastically less civil since the 1960s. I cannot deny that we are living in a contentious political time. On the other hand, Abraham ("The Original Gorilla") Lincoln, James G. Blaine ("The Continental Liar from the State of Maine"),[43] Franklin D. ("Traitor to His Class") Roosevelt, and Barry ("Warmonger") Goldwater[44] would probably deny that things have changed that much.

The modern examples of bare-knuckle politics and name calling that Pearce and Wald cite are real. Fortunately, modern American politics is mostly not about statements like Robertson's, quoted above.

Modern political disputing displays a very odd sort of contentiousness. Most of it, unlike the Robertson quote, is based in polarizing people over small—or at least relatively small—differences. The debates today are largely more and more about less and less.[45] So, let me give you an example that shows that Pearce and Wald are right about the contentiousness but need to reconsider whether and how times have changed.

The example comes from the debates about health insurance in the mid-twentieth century, before the alleged decline in civility, and today. There was a great debate, from the 1940s through the 1960s, which resulted in the creation of Medicare.[46] Similarly, there was a great debate between about 1989 and the present, which has resulted in so-called Obamacare.[47] The more recent debate was much louder, one might say, in terms of advertising and other media of persuasion. It was mean, going back to the commercials about the so-called Hillarycare proposals in 1993-94. Throughout both debates, the proponents of healthcare reform through legal changes have described the opponents as "hard-hearted." Opponents of reform have described the proponents as "socialists." Thus far, the two groups act in terms of opposition rather than relational self-interest to each other.

However, the difference between the existing system in the 1940s, essentially *laissez faire*, and Medicare, a single-payer, mandatory, tax-financed system for old people,[48] was a huge change. It was a far bigger change, in both theory of government and in practice, than the tinkering with a private insurance system that is so-called Obamacare—even when the "individual mandate" is included. More arguments about a smaller change.[49]

Moreover, the charges brought by the adversaries in the quarrels, were at least as harsh then as they are now. Specifically, the charge of "socialism" from the right—with its hidden, and often not so hidden, implication of pinkness (softness on Communism, for those who don't remember when "red" was a fightin' word to most Republicans)[50] was a much worse charge during the height of the Cold War than it is now. And even the charge of "hard-heartedness" from the left was much more immediate and powerful in the days when most adults could still remember the Great Depression.

The American Medical Association's (AMA) opposition to Medicare in the 1950s was based in their autonomous self-interest (in Pearce and Wald's term), despite the fact that the 1960s had not happened yet. Today, many groups, whether the AARP (their whole name these days), groups of health insurers, the AMA itself, patient and consumer advocacy groups, etc., act from motives similar in Pearce and Wald's typology to the AMA's in the 1950s.

What about the volume of the debate? It's true that the recent debate was much louder and more expensive and more annoying to the average listener than the similar length debate over Medicare. But in one way, the loudness of the new debate was not necessarily a bad thing. Back in the day, Congress was led by people such as Sen. Henry "Scoop" Jackson (D-Wash.), liberal on domestic issues, conservative anti-Communist lion on foreign affairs, but perhaps most to our point, the Senator from Boeing. Today, single interests, even Boeing Aircraft, do not usually have Senators. Today, there are innumerable advocacy groups arguing for the interests of many different groups of people. Today, they carry out the debate by advertising, by mobilizing people (sometimes the grassroots, often the Astroturf roots) as well as by meeting with legislators in (what used to be) smoke-filled rooms. Some of these advocates may represent your views. A few of them even represent mine. It leads to more cacophony, but for a democracy, this is not such a bad thing. It should eventually lead to a greater recognition of the relationality of interests, as more interest groups come into a relevant relation to any given issue.

What cured the divisions engendered by the Medicare debate? In the 1960s, most doctors, represented by the AMA, eventually realized that Medicare gave them a lot of new patients. They had a human interest in being able to provide health care for those who would not otherwise receive it. Medicare also gave them a greater economic interest in health for the old. My disagreement with Pearce and Wald is this: I see nothing special in the

way that people related at the time that allowed these rifts to be healed. They were healed because the substance of what came out was good for both doctors and patients—it aligned their interests.

In the current debate, the divisions have not healed, but I suspect that is because we do not yet know how the new system will work—whether it will actually improve things, and specifically, whether it will align the interests of those involved in the fight, so that they no longer disagree to the same extent as they do now.

I am ignoring one important group in my description of the healing (or not) of the wounds in the debates over medical care: members of Congress, who actually made the choices. By most accounts, Congress is a much less pleasant place to be now than it was then because of the meanness of these fights and an unwillingness to get past them.[51] To this extent, Pearce and Wald may have a point that civility has deteriorated over time.[52]

Even here, though, not everything is as obvious as it seems.[53] Former Speaker of the House Newt Gingrich deserves considerable credit, in my view, for restoring some national party discipline to the Republican delegation in the House of Representatives. Since he garnered their support for the so-called Contract with America as a candidate and then as Speaker in 1994–95, the House Republicans have acted much more like a unified parliamentary political party. Despite Gingrich's swift fall from grace in the House, this discipline has persisted. This gives the party the opportunity, which it has sometimes taken, to advance its autonomous self-interest, in opposition to the Democrats. But it also means that Republicans must, among themselves, work out the issues of the national public interest to the best of their ability before they advance their positions. At the same time, the House Democrats have remained the party of Will Rogers.[54] As a result, the House Republicans have become generally more effective as a party in advancing their views of what is in the public interest. Are they supposed to apologize for this?

The idea that there were, in the past, more tools of relational self-interest, which could rebuild the community of civility after discord,[55] is appealing. And yes, in each case of civil conflict in the past, it fortunately turned out that a new community was built. However, the idea that there were obvious tools to dig ourselves out then is largely an artifact of hindsight. The appearance that there are no such tools today is an artifact of our current failure to rescue ourselves—yet.

It would not have been clear to an observer in mid-1861, at the beginning of the American Civil War, that the American community would ever be rebuilt. Yet it was, and with the end of slavery it was rebuilt on better terms (except for 621,000 or so dead and about 400,000 wounded)[56] than it was originally. It may seem now that there are no tools to rebuild civility, but surely that was a much worse time. Our debates now are in general far less fundamental than those of 1861, or even 1961.

III. RELATIONAL SELF-INTEREST AND THE PRACTICE OF LAW: NOT QUITE BROUGHAM VERSUS BRANDEIS

I absolutely agree with Pearce and Wald that the idea of relational self-interest can and should be applied to us as lawyers and to the tasks we do, both for our clients and when we engage in larger civic discourse.[57] When working on behalf of a client, we must realize that the client's interests are not solely autonomous or atomistic, but reflect his or her connection to others and the value of those connections. This is most readily apparent in the process of negotiating deals and resolutions to disputes. This explains the centrality of the ideas of Fisher and Ury and their predecessor Brandeis, to the maintenance of civility in the practice of law, and to the advancement of the relational, rather than just the atomistic, interests of clients.[58]

As lawyers, we need to be civil. In our legal work and our civic work, we should attack the problem, not insult the people on the other side of a case, negotiation, or issue.[59]

Pearce and Wald are also correct that, in doing so, lawyers can model vigorous but honest disputing for other lawyers and for the public.[60] If, as they and I believe, focusing on relational self-interest generally produces better results for clients, this practice can help persuade others to act civilly.

Indeed, there is one point as to which I would go further than Pearce and Wald do in identifying a recent source for the abandonment of relational self-interest among lawyers as a group—and to some extent this supports their claim of a relatively recent increase in incivility.[61] This is the break-up of legal specialties into groups of lawyers who only practice on one side of the specialty—most easily seen in tort and criminal litigation.[62]

A lawyer who specializes in tort law for plaintiffs represents only one set of interests on a day to day basis. It is not surprising that such a lawyer might come to identify with those interests, given both the human proclivity to identify in this way, and the financial interest of the lawyer generated by the contingent fee system. A lawyer who specializes in tort law defense sees another set of interests—but interestingly, not exactly the opposite interests. The retained tort defense lawyer, usually paid by the hour, has a personal interest in being able to fight fiercely for a client and has the human interest in identifying with the tort defendants and insurance companies represented. However, this lawyer does not have the financial interest in keeping verdicts and settlements as a whole low, or even in keeping clients and insurers from being sued. He or she only has an interest in doing better than other tort defense lawyers do, which increases the likelihood of being retained again.

So, it is not surprising that the real phenomenon of discovery abuse is seen very differently by these two groups: "'Rambo'-style"[63] discovery does not mean the same thing to each of them. Tort defense lawyers see it as huge discovery requests which will bring a great deal of information—irrelevant to the case but expensive to produce or personally embarrassing to

defendants or their employees. Lawyers for plaintiffs tend to see it as delaying discovery by forcing discovery motions, making bad faith claims of excessive burden or privilege, etc. Thus, to solve the problem of Rambo discovery, one must understand how persons with different interests view discovery abuse, and develop means to address the problems.

However, it is virtually impossible to come up with a bright-line rule which would separate excessive requests from broad but useful requests for information; and any effort to come up with a nuanced, case-sensitive rule allows a lawyer who wants to impose costs on the other side by litigating the issue to do so. The same thing is true from the other side—the side that wants to prevent discovery.

So, do I disagree with Pearce and Wald concerning the practice of law? The short answer is: not usually. I have just two quibbles, and a third point on which I would like to put in a good word for their chosen adversary, Lord Brougham. There are some times—not many, but important ones—where lawyers, no matter how civil we are among each other, must appear to be uncivil to others, usually non-lawyers.

Quibble one: I see a similar issue with the timing of the narrative as discussed above. Almost all of the techniques of the uncivil practice of law are old;[64] even if they have been somewhat magnified by one-sided specialization. Oscar Wilde, who lived and died well before the 1960s, was not the first person to sue, only to see his life destroyed by the normal legal tactics of the opposition.[65] Charles Dickens was not the first writer to satirize the waste wrought by extended legal proceedings.[66] Brandeis' nomination to the Supreme Court was attacked by many who opposed his views about the practice of law, including his handling of some cases *pro bono*.[67]

However, I do believe one issue of timing related to the growth and hyper-specialization of the legal profession supports Pearce and Wald. Surely it was much easier for local communities of lawyers to recognize their own interests as linked to those of other lawyers when they rode circuit together, or all clustered around the same courthouse. Today, when working in a large firm, the new associate may actually know more lawyers, but may associate principally among lawyers with the same firm, or the same side of the same field of practice. It is much easier to be uncivil to those with whom you do not personally interact on a day-to-day basis, or whom you always see on the opposite side of the same issues from yourself.

I do not know what to do about this, other than adopt the British barristers' practice of taking any side of cases offered—especially the practice of taking both the prosecution and defense of criminal cases, which allows the barrister to understand the interests involved on both sides. I have no illusion that this will be done in the United States.

Quibble two: Pearce and Wald argue that lawyers now are much more likely to answer the "Holmesian bad man's question:"[68] "How do I do X while staying within the letter of the law?" and to see this as their only job,

rather than including a discussion of what is right or fair in advising clients. Pearce and Wald do cite surveys suggesting a change in lawyer attitudes since 1964.[69] I suspect that this is largely an accident of our times, and that the reality is not so bad. Over the past century and a half, both businesses, and the law that applies to them, have become vastly more complicated. Thus the question, "How do I do X legally?," is far more likely to be asked of a lawyer now than in the old days, whether or not the questioner is a Holmesian bad man. Even the non-bad business person needs to ask it about thousands of transactions.

I don't deny for a minute that there are lawyers who defend polluters in federal agencies against very just charges of violation of environmental laws. However, the question, "How do I build batteries while staying within the laws on heavy metal pollution?," is actually likely to yield advice which reduces pollution from the levels there would be if the manufacturer never bothered to ask the question. Certainly house counsel who answers this question is part of a team whose job it is to comply with the law at the cheapest practicable rate, but never before has there been a class of lawyers devoted to helping their clients reduce environmental pollution. So, even if they think they are only doing their client's bidding and have no conscious regard for public interest, they may be doing good. However, I have heard corporate environmental lawyers talk about their roles and seem honestly (and justly) proud of what they are doing. That suggests—though does not prove—that there is more going on than the growth of a class of lawyers who do not care about the public interest.

Moreover, if there is a difference in the actual advice that lawyers give to clients, it is very difficult to tell from the results. Certainly there are companies today that pollute because they can get away with it. On the other hand, can one really say that the ethics of today's business people, advised by today's lawyers, are any worse than those of the robber barons[70] of the late nineteenth and early twentieth century, advised by Brandeis and his contemporaries?

Third, I disagree a bit with Pearce and Wald concerning the "debate" between the views of Lord Brougham and Brandeis.[71] Specifically, I do not see them as being quite as incompatible as they are often made out to be. To start with, I agree with their characterization of Brandeis' views, such as his idea of the "lawyer for the situation" among others, and with their praise for those views as important for the development of the civil practice of law.[72]

Brougham made the following claim in a speech:

> An advocate, in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring

> upon others. Separating the duty of a patriot from that of advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.[73]

Note that Brougham himself limits this dictum to the advocacy function of lawyering, and I suspect to the litigation aspect of advocacy (rather than, say, the public relations or lobbying aspects, which need not be done by lawyers).

Brougham does not address the issue of advising clients or negotiating on their behalf, where Brandeis' position is of tremendous value. Finally, Brougham does not address negotiating, mediating and settling cases which are in litigation. Again, in the area of dispute settlement, pursuing self-interest relationally is likely to produce better results on average than pursuing self-interest atomistically, without considering the interests of the other party or parties that must agree to the settlement.

I would like to suggest that, in an adversary system of litigation, and outside the context of what can be settled, Brougham's model has great value. To illustrate, I would like to give you three examples, each of which illustrates a part of Brougham's quote. The first is an example of a lawyer attempting to "save the client by all [lawful] means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself,"[74] [bracketed material added], even where this brings destruction on another human being, and might have on his children and himself. It is from fiction, but is typical of what may happen in an adversarial system where witness honesty is at issue in a criminal case. The second is from the news, where a lawyer again must try to "save the client by all [lawful] means and expedients" even though he may be compelled to expose information that will probably damage the image of his country.[75] The third is from history, where a lawyer who did great good brought "confusion" to a large part of America.[76]

My first example is from the most beloved fictional lawyer of twentieth century America, Atticus Finch.[77] He was assigned to defend Tom Robinson, a black man, against an accusation of rape by a white woman and her father, Mayella and Bob Ewell. Most descriptions of the book say an "innocent" black man, but in Harper Lee's story Finch knew only that his client said he was innocent, that the Ewells had powerful motives to lie, and that the daughter had an injury more consistent with being struck by her father than the defendant. Finch's cross-examination utterly destroyed Mayella Ewell,[78] and humiliated Bob Ewell.[79] At the end, Miss Ewell, the apparent victim of an abusive father, has no future whatsoever in Maycomb.[80]

Can one, however, imagine any honorable lawyer acting differently? Could it be supposed that Finch should let Robinson go to the electric chair without the humiliating cross-examination and hard closing argument necessary to convince jurors that the two Ewells are lying? So he must ask,

"'What did your father see in the window, the crime of rape or the best defense to it [i.e., consent]?'"[81] though the question "gave him no pleasure."[82] As Brougham said, Finch "must not regard . . . the torments, the destruction he may bring upon others."[83]

There is a good reason for his behavior. As Finch says, "[M]y pity [for the abused victim] does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt."[84]

Specifically, that is the point where the consideration of the relational interests falls away. Even George Sharswood, who Pearce shows was a pioneer in recognizing the interests of others in the practice of law, agreed that Brougham was correct concerning the defense of criminal cases.[85]

Finch is, for the most part, the essence of civility. That is his leading characteristic. Yet, what he did to Mayella Ewell and her father was, in ordinary language, very uncivil. At the same time we admit the necessity of Finch's professional conduct, we must not avoid admitting what it is. This aspect of litigation is the one place where I am truly defending incivility, as opposed to merely tolerating it.[86]

I understand, however, why many non-lawyers find this sort of incivility from lawyers to be a special problem. Non-lawyers often have no legitimate way to defend against it. A witness who is not a party to litigation generally has no one to speak in his or her defense. Even a party who is a witness has no real ability to talk back to the opposing lawyer. The lawyer makes the record, and the party effectively has no recourse. Indeed the functional immunity of the lawyer from suit for questions asked and arguments made in court is necessary to the functioning of the system.[87] I have no way to fix this problem. Finch must be allowed to ask his questions and make his arguments.

Now, my second example will call upon the duty of a defense lawyer to throw his country into confusion: The United States government has brought capital charges of "murder, terrorism and other violations of the laws of war" against Abd al-Rahim al-Nashiri, the alleged mastermind of the bombing of the U.S.S. Cole, which killed seventeen American sailors.[88] The case will go in front of a military commission. Evidence shows that al-Nashiri was "waterboarded,"[89] an interrogation tactic that the United States government officially treated as torture during the second half of the twentieth century, after it was used on American soldiers in World War II.[90] Evidence also shows that tapes of al-Nashiri's treatment were destroyed by the CIA.[91]

Defense counsel for al-Nashiri may have a duty to present this material in court. The torture evidence may be relevant to what statements may be used against al-Nashiri, and if he is convicted, what his penalty should be. The tape-destruction evidence may be relevant to whether the trial can go forward at all, if testimony indicates that the tape contained exculpatory evidence.[92]

Unfortunately, the raising of issues concerning torture and destruction of evidence will be embarrassing to the United States. It can reasonably be seen as against the interests of this nation. Fortunately for due process of law, counsel for al-Nashiri accepts the wisdom of Brougham,"[a]nyone who approved or participated in the torture of my client should be prepared to take the witness stand, Navy Lt. Cmdr. Stephen Reyes said."[93] I would question any view of professional civility by which Lieutenant Commander Reyes would be forced to act differently than he proposes.

As discussed in the Atticus Finch example,[94] there sometimes comes a point where the relationality of all interests cannot be maintained and where the lawyer has the duty to promote a client's interests not just above those of others, but to the detriment of others. Any theory of the practice of law, including the civility of practice, in any society remotely like the one we have today, must take this into account.

My third and last example is the greatest American lawyer of the twentieth century, Thurgood Marshall.[95] He and his colleagues at the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund built a legal strategy to end legal segregation, climaxing, but not ending, with *Brown v. Board of Education*.[96] It was Marshall's duty as a lawyer to seek his clients' interests, though as Brougham might have said, it involved a great deal of his country in confusion—my characterization of the years of so-called "massive resistance" to integration. And, going beyond Brougham (who said that involving one's country in confusion would be an "unhappy lot"), I would say that this was a necessary and morally correct lot. "Confusion" was inevitable, but the outcome was a more just society than before.

Some of you may, however, say this is not an example of pursuing the autonomous self-interest of a client. Marshall's commitment was to the greater goal of desegregation, and not just to single clients. Marshall's commitment was also to a greater civic good as he, his colleagues, his clients, and those in the civil rights movement saw it. That is true. However, Marshall kept his commitment regardless of the "confusion" it brought to many in his country during the period of massive resistance. Those opponents certainly thought that Marshall was advancing "the Negro interest" at the expense of Southern society "as a whole"—i.e., Southern white society.[97]

In sum, on behalf of Brougham, I would say this: In litigation, "civility in the practice of law" should be defined so as to allow a lawyer to make all arguments on the facts arising from the evidence. This will on occasion require lawyers to do things at trial which would be deemed in ordinary language "uncivil" (such as embarrassing cross-examination and closing argument).[98] This includes (subject to limitations based on freedom from state intrusion, freedom from being the victim of lies, and rights of privacy) the use of lawful means to investigate the facts of cases. It also means that a

"civil" lawyer must be able to make any colorable substantive and procedural arguments of law.

IV. KING'S MESSAGE TO LAWYERS

Finally, Pearce and Wald's exhortation to follow Dr. Martin Luther King is absolutely right.[99] King was the great American political and moral figure of the 20th century.[100] His message, as they lay it out and as King lived it, is progressive, and does not fit any model of restored civility.

King's moral appeal was indeed civil. It refused to insult even those who saw him as less than fully human. Instead, as Pearce and Wald quote, King said, "our aim is not to defeat the white community, not to humiliate the white community, but to win the friendship of all of the persons who had perpetrated this system in the past."[101] As Fisher and Ury might say, King's appeal separated the people (those who opposed him) from the problem (the idea and practice of racism, in the particular American form of racial segregation). While being soft on the opposition as people, King was absolutely intransigent on attacking the problem.

King's appeal to those who believed in and practiced racism was not to restore some nostalgic former community. There was no such community. The pre-existing community was one in which he and those with him were assigned inferior roles, or from which they were excluded entirely. His appeal was to build a truly new set of connections based in mutual recognition of equal humanity, "the creation [not 'the restoration'] of a beloved community."[102]

And that is where we are left. We must solve our substantive problems civilly, but without any illusions as to their depth. We must go forward and not back.

---

* Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law. This paper is a revised version of a response, at the 2011 Altheimer Symposium, Reframing Public Service Law, to a speech by Russell G. Pearce, based on the paper in this issue by Pearce and Eli Wald. I received very useful comments on a draft of this paper from Teresa Beiner and Joshua Silverstein, and I have learned immensely from my discussions with Russell Pearce during and after the Symposium.

1. *See infra* text accompanying notes 29–35 (urging tolerance of the advancement of intolerant ideas).

2. A few of the footnotes and some bits of the text contain jokes about the subject of civility. The reader is free to ignore them.

3. *See, e.g.*, Amitai Etzioni, *Communitarianism*, *in* THE CAMBRIDGE DICTIONARY OF SOCIOLOGY 81–83 (Bryan S. Turner ed. 2006); Amitai Etzioni, *A Communitarian Perspective on Privacy*, 32 CONN. L. REV. 897, 902–03 (2000); Amitai Etzioni, *A Moderate Communitarian Proposal*, 32 SOC. IMAGINATION, no. 2, 1995 at 67–78. Pearce and Wald point out that they are not fully communitarian, in that they do not always place the values of the community above those of the individual. Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK.

LITTLE ROCK L. REV. 1, 6 (2011). I agree with this characterization of their work. Yet, I do see their desire to restore community values and public interest to a proper place as having likely been influenced, consciously or unconsciously, by communitarian thought, and see their ultimate goal as an integration of values of community and of individualism. *Id.*

4. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 150–55 (2d ed. 1991) (originally published in 1981). The economist Howard Raiffa provided a good deal of the basis for their work. *See id*. at xi.

5. *See* discussion *infra* Part I.

6. *See* Pearce & Wald, *supra* note 3, at 6–15.

7. *Id.*

8. *Id.*

9. *See* Part I below.

10. *See* discussion *infra* Parts II, III.

11. *See* Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1351–53 (2006).

12. *Id.*

13. Pearce & Wald, *supra* note 3, at 3.

14. *Id*.

15. Here, I am attributing to the article a thought that Pearce and Wald explicitly deny. *Id.* ("[W]e do not suggest that pre-1960s America was a golden era"). Both the Pearce and Wald piece and my own thinking have evolved greatly as a result of our exchanges at and since the Altheimer Symposium. It may be that I am failing to give full credit to their present discussion of pre-1960s incivility. Yet I still feel a tone of wistfulness and nostalgia in their article.

16. JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 147 (Basic Books ed., 1991) (quoting Pat Robertson).

17. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 479 (Pantheon Books ed. 2009) (citing many other examples of McReynolds's discourtesy); *see also* PEARCE & WALD, *supra* note 3, at 26–27 (discussing the views of Brandeis).

18. HUNTER, *supra* note 16, at 147 (quoting Pat Robertson).

19. Is there any more civil way I can say this? Note that I do not say that Robertson is evil. That is proper, in the view of Fisher and Ury, separating the people from the problem, and in the words of some religious people, hating the sin while loving the sinner. However, a human reaction to what I am saying is not to believe me fully. I am expressing a view with very strong emotional content. This suggests I have a personal animus towards Robertson and I want you to share that animus. The fact that people can learn to say things properly while implications of something different remain (often called "coded speech") is one reason it is so hard to work on this issue. On the other hand, as Pearce and Wald and I agree at the end of our pieces, Martin Luther King thought and acted as though it can be done.

20. *See, e.g*., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, (Fr.) *translated and edited in* DAVID P. CURRIE ET AL., CONFLICT OF LAWS 298 (West Publishing Co. ed., 8th ed., 2006) (applying France, Penal Code, arts. R.645-1, R.645-2). A number of other nations have similar provisions. *Cf.* International Covenant on Civil and Political Rights, art. 20 ("Any propaganda for war shall be prohibited").

21. Snyder v. Phelps, ___ U.S. ___, 131 S. Ct. 1207, 179 L. Ed.2d 172 (2011).

22. HUNTER, *supra* note 16, at 147 (quoting James Podesta) (internal citations omitted).

23. *Id.*

24. Eliminated by persuasion, not by law, as such a law would violate the principle of free expression embodied in the First Amendment. I agree with Pearce and Wald, see *supra* note 3, that what we are doing in both of these pieces is discussing aspirations.

Note again that I am not suggesting that Podesta be attacked or eliminated—I am only saying that one rhetorical device that I have seen him use only once should be. Nonetheless, one might question whether the sentence is civil.

25. HUNTER, *supra* note 16, at 147.

26. U.S. CONST. art. VI, cl. 3.

27. U.S. CONST. amend. I; U.S. CONST. amend XIV.

28. *See* Pearce & Wald, *supra* note 3, at 11.

29. *See id*.

30. *Id*.

31. *Id*.

32. I have been thinking about this lately since a student wrote a paper on the subject for the Mass Violence seminar that I co-teach with Professor Adjoa Aiyetoro. *See* Jeffery Thomas, *The Great Famine* (2010) (on file at University of Arkansas at Little Rock William H. Bowen School of Law).

33. My bad?

34. "Everything is what it is, and not another thing." G.E. MOORE, PRINCIPIA ETHICA 206 (1959 ed., 1903) (quote attributed to Bishop [Joseph] Butler); "Everything is what it is and not another thing, unless it is another thing, and even then, it is what it is." W. K. Frankena, *The Naturalistic Fallacy*, 48 MIND 464, 472 (1939). These quotations are a semi-well-known joke among philosophy students. They aptly describe my treatment of Robertson, McReynolds and the Westboro Baptists. Fundamentally, the problem with their views is unwillingness to accept certain others as wholly part of the social contract (one aspect of incivility), but on certain days, it expresses itself as personal insult (another aspect, but that doesn't change the first).

35. Using "atomistic" here to describe an aspect of human isolation allows the use of "autonomous" and its relatives to describe aspects of the idea of human freedom. *Cf.* Pearce & Wald, *supra* note 3, at 17–18 (using "atomistic" as part of the description of autonomous actors).

36. After saying something like this in class, I will frequently tell my students, "As usual, this is sort of a joke and sort of not a joke." To the extent that it is a joke, one may ask if it is uncivilly stigmatizing the mentally ill. Criminal lawyers like myself will note that sociopathy might in fact be a mental illness, even though in most jurisdictions it is not recognized as the sort of mental disease or defect which supports the legal construct of the insanity defense. *See, e.g.*, MODEL PENAL CODE, § 4.01(2) ("terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct").

37. Pearce & Wald, *supra* note 3, at 17.

38. I could use the less-angry phrases "fully citizens" or "fully part of the governing polity" here. Am I being uncivil in using the phrase that I do, risking re-opening the deepest of the old wounds? Or am I accurately describing the problem as it was? Or, on the third hand, is it possible that I am accurately describing the problem and being uncivil at the same time? I think I am accurately describing the problem, but you can decide for yourself.

39. *See* Pearce & Wald, *supra* note 3, at 17–18, 20.

40. *Id*.

41. In the senses both of liberty of action and protection of a single nation's interest.

42. Technically, it should be "the interests of those persons with capital, management, and commercial interests" or something similar, but that sounds too clunky.

43. The Republican who lost the Presidential Election of 1884 to Grover Cleveland. NEIL ROLDE, CONTINENTAL LIAR FROM THE STATE OF MAINE: JAMES G. BLAINE 259–82 (2006).

44. I personally plead guilty to this one, at age thirteen or so. You may ask whether anything in this piece suggests I have changed at all.

45. Paraphrasing the set-up line from an old joke about specialization in science: Each of us knows more and more about less and less. Pretty soon someone will know everything about nothing. There is one major exception to the claim that we are arguing more about less. For those who believe that an abortion is the killing of a human being, and those who believe that abortion is not a killing but a sometimes necessary procedure to save a woman's life or health, the substantive debate is probably more profound than it was when abortion was generally illegal and before the movement to legalize it.

46. 42 U.S.C. §§ 1395–1395kk (1964).

47. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

48. I am rapidly becoming an old person, and I still prefer this term to the unintentionally uncivil "senior citizen." The nature of my citizenship will not change when and if I become sixty-five, the way it did when I became twenty-one (which was the old eighteen).

49. And a slap on the wrist for a sentence fragment, from the ghost of my 12th grade English teacher, Sylvia Wubnig, who recently died at age 100. Another way times have changed is that, in high school, I wondered if I would ever personally know anyone who lived to be 100. Medicare probably had something to do with that change.

50. Before about 1996, or fairly recently in geological, if not internet, time.

51. Jocelyn Noveck, *Political incivility: A weekend of ugly discourse preceded historic health vote*, CLEVELAND.COM (March 22, 2010, 7:29 PM), http://www.cleveland.com/nation/index.ssf/2010/03/political_incivility_a_weekend.html.

52. Pearce & Wald, *supra* note 3, at 10–13.

53. *E.g.*, Norman Ornstein, *Foul Mouths in Congress? Big (Expletive) Deal*, WASH. POST (March 25, 2010), http://www.washingtonpost.com/wpdyn/content/article/2010/03/25/AR2010032500943.html (providing many historical examples of incivility in Congress).

54. "I am not a member of any *organized* party—I am a Democrat." Attributed to Will Rogers *in* P.J. O'BRIEN, WILL ROGERS: AMBASSADOR OF GOOD WILL: PRINCE OF WIT AND WISDOM 162 (1935). Is this too uncivil?

55. *See* Pearce & Wald, *supra* note 3, at 19–20.

56. *See* SHELBY FOOTE, 3 THE CIVIL WAR: A NARRATIVE 1040 (1974).

57. Pearce & Wald, *surpa* note 4, at 40–45.

58. FISHER & URY, *supra* note 4, at 152.

59. FISHER & URY, *supra* note 4, at 18, 54 (a paraphrase of two of Fisher and Ury's more famous slogans—"separate the people from the problem" and "be hard on the problem, soft on the people").

60. Pearce & Wald, *supra* note 3, at 42–43.

61. *Id.*

62. This split exists in many other litigation and non-litigation areas. Labor lawyers generally represent only unions or only management; many bankruptcy lawyers represent either debtors or creditors and so on.

63. Pearce & Wald, *supra* note 3, at 38–39 (quoting Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit, 143 F.R.D. 441, 445 (1992)). As is often the case in discussion of so-called Rambo discovery, the Committee did not identify the specific abuse about which they were talking. This makes it very difficult to make progress on the issue.

64. Discovery abuse is an exception since extensive discovery is a modern creation.

65. Some might argue that Wilde's imprisonment for perjury is not a usual result. Perhaps so. But all the rules of law that resulted in him going to prison existed and were known (presumably) by his solicitor, his barrister, and very likely him, and hence my characterization of the result as "normal." *See generally* RICHARD ELLMANN, OSCAR WILDE 505–26 (First Vintage Books ed. 1988).

66. *See* CHARLES DICKENS, BLEAK HOUSE 357–75 (Stephen Gill ed., 1998).

67. *See* UROFSKY, *supra* note 17, at 455.

68. *See* Pearce & Wald, *supra* note 3, at 41. For Holmes' own use of the "bad man," see Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458–60 (1897).

69. Pearce & Wald, *supra* note 3, at 27.

70. Is the use of this epithet any more acceptable in civil public discourse because I am speaking of persons who have mostly been dead for about a century or because it has become common, recognizable shorthand for an identifiable group of persons?

71. Pearce & Wald, *supra* note 3, 26–29.

72. Whether Brandeis himself always followed them is a different question. For example, he was known for not agreeing to case continuances, when courtesy dictated that he should, on the ground that he must serve the interests of his clients. UROFSKY, *supra* note 17, at 451, 831(based on Memoir of Charles C. Burlingham, a supporter of Brandeis).

73. GEORGE SHARSWOOD, PROFESSIONAL ETHICS 87 (5th ed. 1993), *quoted in* Pearce & Wald, *supra* note 6, at 29 (quoting Lord Brougham at the trial of Queen Caroline).

74. LORD BROUGHAM, 2 THE TRIAL OF QUEEN CAROLINE 8 (1821), *quoted in* D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 188–89 (1973).

75. This example comes from the recent history of a terrorism prosecution, as described in Peter Finn, *Capital Charges Brought Against Guantanamo Detainee Abd-al-Rahim al-Nashiri in USS Cole Attack*, WASH. POST (Apr. 20, 2011), http://www.washingtonpost.com/world/capital-charges-brought-against-guantanamo-detainee-in-uss-cole attack/2011/04/20/AFEeHQDE_story.html.

76. This example comes from the legal career of Thurgood Marshall. *See, e.g.*, JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 174–86 (1998); *see also* Thurgood Marshall, *An Evaluation of Recent Efforts to Achieve Racial Integration in Education Through Resort to the Courts*, 21 J. NEGRO EDUC. 316, 316–27 (1952); Thurgood Marshall, *Equal Justice Under Law*, 46 THE CRISIS 199, 199–202 (1939).

77. HARPER LEE, TO KILL A MOCKINGBIRD 208–75 (35th anniversary ed. 1995). Some folks who know my tendencies may call me hypocritical for using a fictional example here. I generally will not use fictional (including TV or movie) examples of lawyering in my classes because the author, as artist, always remains in control of the consequences of lawyers' actions. I plead guilty. Now let's move on.

78. *See id.* at 251.

79. *See id.* at 250 (Finch knew what he had done to the father).

80. Is it too uncivil to suggest that the only Southern home Mayella Ewell might be welcome in at the end of the book is New Orleans' House of the Rising Sun? Harper Lee does not narrate her fate.

81. *Id.* at 251.

82. *Id.* at 252.

83. BROUGHAM, *supra* note 74.

84. *Id.* at 271.

85. SHARSWOOD, *supra* note 73, at 90–93. His views on civil defense practice are not quite as uncompromising. *Id.* at 95–100, 103–07*; see also* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 256–58 (1992) (expounding upon the role of lawyers in the adversarial system). Sharswood's view on criminal prosecution—that is, that the prosecutor should actually believe the guilt of the defendant—is one I, as a former prosecutor, have great sympathy with.

86. *Cf. supra* notes 37–43 and accompanying text (on tolerance of intolerant ideas).

87. *Cf.* Josh Kron, *Panel Seeks Release of U.S. Lawyer in Rwanda*, N.Y. TIMES (June 16, 2010), http://www.nytimes.com/2010/06/17/world/africa/17rwanda.html?ref=diplomaticimmunity

(describing the arrest of Peter Erlinder in Rwanda on charges of genocide denial for advancing defense theories before the International Criminal Tribunal).

88. Finn, *supra* note 75.

89. *Id*.

90. *See generally* Walter Pinkus, *Waterboarding Historically Controversial*, WASH. POST. (Oct. 5, 2006), http://www.washingtonpost.com/wpdyn/content/article/2006/10/04/AR2006100402005.html (discussing conflicting views of its legality).

91. Finn, *supra* note 75.

92. *Id*.

93. *Id*.

94. *See supra* text accompanying notes 84–85.

95. *See supra* note 76. In my opinion, Thurgood Marshall was the greatest American lawyer of the 20th century (counting judging as a separate career). If Pearce and Wald were to suggest Brandeis, I would only say that much of his service as a lawyer was in the wrong century.

96. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

97. Note here that I am characterizing only the motives of the opponents of integration, not the motives of every individual Southern white person—though many of those opponents believed they were advancing the interests of every Southern white person. Once again, this shows the difficulty of teasing out who the relevant groups are for analyzing group self-interests, whether relationally or atomistically.

98. The view expressed here of what a lawyer may do in an adversary system is quite minimal. For a discussion of views that would require or permit a lawyer to ask such uncivil questions (so long as there is some good faith basis for them), whether or not the lawyer actually believes in the client's case, see generally Lawrence M. Solan, Lawyers as Insincere (but Truthful) Actors (2011), *available at* http://ssrn.com/abstract=1873359.

99. Pearce & Wald, *supra* note 3, at 51.

100. As with my naming of Thurgood Marshall as the great American lawyer, you may think someone else was even greater. My choice might seem a bit clearer if we eliminate Presidents, whose political power is of a different order from other leaders in our system.

101. MARTIN LUTHER KING, JR., *The Power of Nonviolence*, *in* A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 12, 12 (James M. Washington, ed., 1986).

102. *Id*. (alteration in original).