

THE OBLIGATION OF LAWYERS TO HEAL CIVIC CULTURE:
CONFRONTING THE ORDEAL OF INCIVILITY¹ IN THE PRACTICE
OF LAW

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After the January 2011 shooting of Congresswoman Gabrielle Giffords and eighteen bystanders,² Pima County Sheriff Clarence Dupnik provoked a national debate on civility in public discourse with his comments that “[w]hen you look at unbalanced people, how they respond to the vitriol that comes out of certain mouths about tearing down the government. The anger, the hatred, the bigotry that goes on in this country is getting to be outrageous.”³

While a consensus soon emerged that the deranged shooter was probably not responding to harsh political rhetoric,⁴ Sheriff Dupnik’s words struck a chord. His comments reflected a sense that contemporary American public discourse is uncivil, angry, and counterproductive, and that it may affect how all of us act and engage with each other both in the public domain and in the private sphere. The Sheriff’s comments led to calls for

1. The phrase “Ordeal of Incivility” is a modification of John Murray Cuddihy’s phrase, the “Ordeal of Civility,” although Cuddihy uses it in a different context than we do. JOHN MURRAY CUDDIHY, *THE ORDEAL OF CIVILITY: FREUD, MARX, LEVI-STRAUSS, AND THE JEWISH STRUGGLE WITH MODERNITY* 13–14 (1974).

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2. Andrew Martin, *Tucson Shootings Add to Glock's Notoriety*, N.Y. TIMES, Jan. 15, 2011, at B1.

3. Andrew Malcolm, *Have Gun, Will Talk: Arizona Sheriff Clarence Dupnik Not Speechless over Tucson Shootings or Much Else*, L.A. TIMES (Jan. 11, 2011, 2:34 AM), <http://latimesblogs.latimes.com/washington/2011/01/clarence-dupnik-tucson-shootings-gabrielle-giffords.html>.

4. See, e.g., Dan Nowicki, *Why Gabrielle Giffords Shooting Struck Heart of Nation*, ARIZ. REPUBLIC (Jan. 25, 2011, 12:00 AM), <http://www.azcentral.com/news/articles/2011/01/25/20110125gabrielle-giffords-shooting-grips-the-nation.html> (describing “gun-man” as “twisted”).

greater civility in public discourse⁵ as well as debates regarding who was more at fault for the lack of civility⁶ and whether uncivil language was a problem at all.⁷

The context for this debate is the broader question of the importance of civility to public culture in a liberal democracy. Civility extends beyond individualized politeness and courtesy to encompass a norm of mutual respect that makes possible the long-term health of civil society.⁸ Understanding civility in these terms, many commentators have described a rise in incivility in the past few decades—a rise that is worrisome even in the historical context of cycles of increasing and decreasing civility.⁹ The commentators

5. For example, at a Tucson memorial, President Obama stated:

But what we cannot do is use this tragedy as one more occasion to turn on each other. . . . As we discuss these issues, let each of us do so with a good dose of humility. Rather than pointing fingers or assigning blame, let's use this occasion to expand our moral imaginations, to listen to each other more carefully, to sharpen our instincts for empathy and remind ourselves of all the ways that our hopes and dreams are bound together.

Barack Obama, President of the U.S., Remarks by the President at a Memorial Service for the Victims of the Shooting in Tucson, Arizona (Jan. 12, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/12/remarks-president-barack-obama-memorial-service-victims-shooting-tucson>. The University of Arizona has created a National Institute for Civil Discourse with former Presidents Bill Clinton and George H.W. Bush as honorary co-chairs. M. Amedeo Tumolillo, *University of Arizona Sets Up Civility Institute*, N. Y. TIMES, Feb. 21, 2011, at A11, available at <http://www.nytimes.com/2011/02/21/us/politics/21civility.html?partner=rss&emc=rss>.

6. See, e.g., Carrie Budoff Brown & Meredith Shiner, *Liberals Blame Sarah Palin in Wake of Tucson Shooting*, POLITICO (Jan. 8, 2011, 4:23 PM), <http://www.politico.com/news/stories/0111/47252.html>. Sarah Palin, in turn, rejected “the irresponsible statements from people attempting to apportion blame for this terrible event. . . . [E]specially within hours of a tragedy unfolding, journalists and pundits should not manufacture a blood libel that serves only to incite the very hatred and violence they purport to condemn. That is reprehensible.” NRO Staff, *Sarah Palin on ‘America’s Enduring Strength,’* THE CORNER (Jan. 12, 2011, 7:07 AM), <http://www.nationalreview.com/corner/256942/sarah-palin-americas-enduring-strength-nro-staff>.

7. For example, in response to concern with harsh rhetoric, Sarah Palin asserted: Vigorous and spirited public debates during elections are among our most cherished traditions. And after the election, we shake hands and get back to work, and often both sides find common ground back in D.C. and elsewhere. If you don’t like a person’s vision for the country, you’re free to debate that vision. If you don’t like their ideas, you’re free to propose better ideas.

NRO Staff, *supra* note 6. See generally SAMUEL HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1983).

8. Stephen Carter, for example, describes civility as “the sum of the many sacrifices we are called to make for the sake of living together.” STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* 11 (1998). While other commentators would emphasize the rewards, as well as the sacrifices, associated with civility, they share an understanding of the connection between civility and a flourishing community.

9. See *infra* pp. 10-13.

describe a rise in harsh rhetoric and polarization, and a decrease in civic participation.¹⁰

In this article, we argue that the current rise in incivility draws its strength from the increasing influence of perspectives grounded in an autonomous, as opposed to relational, view of personal and political self-interest. Where relational perspectives lead civic actors to understand their own well-being as connected to those of neighbors, communities, and government, autonomous perspectives focus on maximizing the ambitions of individuals and groups even at the expense of civility. Autonomous perspectives only find obligations to community and government compelling when they further political self-interest.¹¹

Following the 1960s, autonomous self-interest became dominant among the liberal and libertarian elite.¹² 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.¹³ Accordingly, adherents of the increasingly polar perspectives today do not seek to employ relational self-interest to heal our civic malaise.

Not surprisingly, the legal profession has faced a similar conundrum. Since the 1980s, the legal profession has faced a “crisis of professionalism” that includes reports of decreased civility and commitment to the public good.¹⁴ As is the case with incivility in American society, some commenta-

10. See, e.g., JUDITH RODIN & STEPHEN P. STEINBERG, Introduction: Incivility and Public Discourse, in PUBLIC DISCOURSE IN AMERICA: CONVERSATION AND COMMUNITY IN THE TWENTY-FIRST CENTURY 1, 5 (Judith Rodin & Stephen P. Steinberg eds., 2003); see also ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 55–57, 111–112 (2000).

11. See CHARLES TAYLOR, HEGEL AND MODERN SOCIETY 81 (1979); MAURIZIO PUGNO, CAPABILITIES, THE SELF, AND WELL-BEING, in CAPABILITIES AND HAPPINESS 231–33 (Luigino Bruni, Flavio Comim, & Maurizio Pugno eds., 2008) (citing Amartya Sen).

12. 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) [hereinafter *The Legal Profession as a Blue State*].

13. *Id.*

14. Warren E. Burger, Remarks, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949, 954 (1995); see also *Report of the Professionalism Committee: Teaching and Learning Professionalism*, 1996 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR § 1(B) (1996) (discussing the decline in professionalism and increased incivility); Sandra Day O'Connor, *Professionalism*, WYO. LAW., Apr. 27, 2004, at 12, 13 (noting the “growing incivility” among lawyers). See generally Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1253–57 (1995) [hereinafter *The Professionalism Paradigm Shift*].

tors argue that lawyers' increased incivility is a recent phenomenon,¹⁵ while others argue that the legal profession seems to be in a state of perpetual crisis,¹⁶ and that the current level of incivility is nothing more than one manifestation of this particular cycle of crisis.¹⁷ We argue that the current incivility crisis—whether unique or cyclical—tracks the shift in the legal profession from a “professional” conception of the lawyer’s role grounded in relational self-interest, which recognizes an obligation to the public good, to a neutral partisan—or hired gun—conception grounded in autonomous self-interest and rejecting a particular obligation to the public good. Given lawyers’ commitment to autonomous self-interest, the effort of bar leaders to restore civility and commitment to the public good has been largely unsuccessful.¹⁸

15. Some commentators have argued, for example, that the adoption of Federal Rule of Civil Procedure 11 authorizing sanctions against lawyers who file meritless claims has led to increased combativeness and incivility among lawyers. *See, e.g.*, Alex Elson & Edwin A. Rothschild, *Rule 11: Objectivity and Competence*, 123 F.R.D. 361, 365–66 (1988); Glen N. Lenhoff, *Some Negative Aspects of Rule 11*, 67 MICH. B.J. 522, 523 (1988); Mark S. Stein, *Rule 11 in the Real World: How the Dynamics of Litigation Defeat the Purpose of Imposing Attorney Fee Sanctions for the Assertion of Frivolous Legal Arguments*, 132 F.R.D. 309, 309–10 (1990); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 482 (1991). Others have blamed the contentious nature of corporate law and the use of aggressive litigation for the increase in lawyers’ incivility. *See, e.g.*, Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 536–37 (1994). And yet others have identified the exponential growth of the profession and the resulting competition as a cause of increased incivility. *See, e.g.*, Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177, 181–88 (1996); Lawrence R. Richard, *Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States*, 29 CAP. U. L. REV. 979, 980 (2002).

16. Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 283 (1998) (“Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the Bar.”).

17. *See, e.g.*, William J. Wernz, *Does Professionalism Literature Idealize the Past and Over-Rate Civility? Is Zeal a Vice or a Cardinal Virtue?* 13 NO. 1 PROF. LAW. 1, 3 (2001). Some have argued, for example, that the Socratic Method has been contributing to lawyer incivility since its widespread adoption by American law schools in the late nineteenth century. *See* Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 992–95 (2005) (exploring whether the Socratic Method leads to incivility between attorneys); Paul T. Hayden, *Applying Client-Lawyer Models in Legal Education*, 21 LEGAL STUD. FORUM 301, 303 (1997) (arguing that law students learn from a Socratic teacher that a “super-competent lawyer is brusque, dominating, and often condescending to those less competent (a category that certainly includes clients)”); Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367, 381 (1997) (asserting that a Socratic law professor “communicates an unspoken but nonetheless powerful message that rude or mean-spirited wise cracks, and even temper tantrums, are entirely appropriate behavior”).

18. Russell G. Pearce et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn From Rock and Roll*, 14 WIDENER L.J. 907, 913–15 (2005) [hereinafter *Revitalizing the Lawyer-Poet*].

Our main contention is that as neutral partisans, lawyers have contributed to the civic malaise, in and outside of the legal profession. No matter how lawyers view their role, they do serve as civics teachers who explain the appropriate responsibilities of citizenship both in their everyday practice and in their civic leadership.¹⁹ Available evidence suggests that many, if not most, lawyers today practice and teach the autonomous self-interest approach of the Holmesian bad man—the individual's obligations to the spirit of the law and the community are only what they can get away with within the bounds of the law. In this way, lawyers as civics teachers have promoted the commitment to autonomous self-interest not only in the private dealings of clients but in culturally manufacturing autonomous self-interest as the dominant paradigm of public discourse and in the resulting erosion of relational self-interest as a countervailing influence. We assert that lawyers should instead draw upon the relational tradition found in professionalism and the lawyer's historic role to encourage public dialogue, help repair our civic culture, and suggest to clients relational means of pursuing their interests.

Our proposal for lawyers as civics teachers seeks to change the cultural norms of lawyers and of civil society. It is not about mandatory professionalism rules,²⁰ increased enforcement of existing ethics rules, or hate speech codes.²¹ Neither is it about stifling dissent, in and outside of the legal profession.²² Indeed, Martin Luther King, Jr. is our prime example of a public actor who challenged the powerful while treating with respect those whose

19. Bruce A. Green & Russell G. Pearce, "Public Service Must Begin at Home": *The Lawyer as Civics Teacher in Everyday Practice*, 50 WM. & MARY L. REV. 1207, 1212 (2009); Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1364–65.

20. Compare Christopher J. Piazzola, Comment, *Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule*, 74 U. COLO. L. REV. 1197, 1200–02 (2003) (promoting civility codes), with Amy Mashburn, *Making Civility Democratic*, 47 HOUS. L. REV. 1147, 1219–26 (2011) (opposing civility codes).

21. Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751, 762–79 (1994) (surveying and criticizing the profession's typical responses to increased incivility).

22. Amy Mashburn has recently documented that the profession's preoccupation with incivility and enforcement of civility rules tends to spare powerful elite lawyers and focus on solo practitioners typically occupying the lower ranks of the profession, thus reflecting as much concern with sustaining the hierarchal status quo and stifling the dissent among the so-called lower strata of the Bar; than it is with genuinely dealing with instances of overly aggressive, rude and intolerant lawyering. See Mashburn, *supra* note 20, at 1220; see also, RICHARD L. ABEL, AMERICAN LAWYERS 144–45 (1989) (finding that the profession tends to disproportionately regulate and discipline solo practitioners and small firm lawyers and avoids and evades regulation of elite lawyers).

racism he found hateful.²³ Following his example, relational self-interest demands an ethic of mutual benefit and mutual respect, concepts that require respect for the human dignity of the powerless as well as the powerful. Last, relational self-interest rejects the extremes of either communitarianism or individualism. Grounded in human dignity and relationships, it values both the individual and the community.

Why would our appeal to relational self-interest work where the Bar's efforts to foster greater civility have failed? Relational self-interest employs language that is familiar to and accepted by modern lawyers, making it more likely that practicing attorneys would find it relevant to their work and persuasive. Yet the case for relational self-interest is far from being merely instrumental. Many lawyers view themselves relationally. They would appreciate a vocabulary of role that permits them to explain to themselves and others why they should value relational self-interest—and civility—in their everyday practice and in their civil leadership. Other lawyers, who understand their role and view themselves and their clients autonomously, report relatively high instances of substance abuse, professional unhappiness, and dissatisfaction.²⁴ We argue that the dominance of autonomous self-interest helps explain professional discontent and that a move toward a more relational self-interest perspective would be desirable for both lawyers and their clients. Finally, if lawyers accept the invitation to practice and pursue relational self-interest as a counterforce to autonomous self-interest, they would be able to help heal our civic malaise and thus “do great work for this country.”²⁵

I. THE ORDEAL OF INCIVILITY

A. Civility Defined

As Anthony Kronman has explained, the root meaning of civility is not etiquette, but rather “the art of civil government.”²⁶ Justice Warren Burger has added that civility is “the very glue that keeps an organized society from flying into pieces.”²⁷ In this part, we develop the connection between the inability to conduct civil dialogue regarding cultural and political differ-

23. A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 12 (James M. Washington ed., 1986) [hereinafter A TESTAMENT OF HOPE]. In this speech, King advocated for the strategy of non-violence. *Id.*

24. Pearce, *Revitalizing the Lawyer-Poet*, *supra* note 18, at 914 (collecting sources on lawyer unhappiness and dissatisfaction and discussing interpretations of this data).

25. LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 343 (1933).

26. Anthony T. Kronman, *Civility*, 26 CUMB. L. REV. 727, 729 (1995–1996).

27. Piazzola, *supra* note 20 at 1199 (quoting WARREN E. BURGER, DELIVERY OF JUSTICE: PROPOSALS FOR CHANGES TO IMPROVE THE ADMINISTRATION OF JUSTICE 172, 175 (1990)).

ences with harms to civil society and the inability to repair it. As Justice Burger explained:

Without civility no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought process if not the beginning of blows and combat. I hardly dare take the risk of adding that this may also be relevant to the news media.²⁸

We suggest that the conception of civility as the foundation of civil society relies on a relational conception of the self and self-interest. In civil society, each person and organization exists within a web of relationships. As we have written elsewhere, “‘relational self-interest’ [represents] the view that all actors are inter-connected, whether individuals or [groups] . . . [and] cannot maximize [their] own good in isolation. Rather, maximizing the good of the individual or [group] requires consideration of the good of the neighbor, the [constituent, the community] and of the public.”²⁹ While relational self-interest is consistent with diverse philosophical perspectives,³⁰ relational self-interest is inconsistent with extreme commitments to either individualism or communitarianism. As a matter of human dignity, relational self-interest requires not only basic courtesy but also a commitment to foster conditions and protect arenas of discourse that allow for meaningful substantive discussions. Relational self-interest requires respect for each person and an obligation to allow all to participate in the public discourse especially to voice disagreement, discontent, and dissent. At the same time, it recognizes that each person has the duties to respect, cooperate, trust, and tolerate their neighbors and community. These duties maintain the public sphere as a place of meaningful engagement, even when one wholeheartedly disagrees with the merits and content of particular statements and actions.

Civility in word and deed is a basic component of relational self-interest for individuals and organizations. In the context of civility, relational self-interest prescribes the norms of mutual benefit and mutual respect and avoids the dangers of civility serving only as etiquette³¹ or, even more

28. Warren E. Burger, Chief Justice, U.S. Supreme Court, *The Necessity of Civility*, Remarks at the Opening Session of the American Law Institute (May 18, 1971), in 52 F.R.D. 211, 212 (1971) (emphasis omitted).

29. Russell G. Pearce & Eli Wald, *Law Practice as a Morally Responsible Business: Reintegrating Values into Economics and Law* 5 (July 2010) (unpublished manuscript) (on file with author), available at <http://law2.fordham.edu/calfiles/flscal24523.doc>.

30. See, e.g., discussion *infra* at notes 39–47 (describing how commentators from a variety of philosophical perspectives support all or part of a conception of civility grounded in relational self-interest).

31. Kronman, *supra* note 26, at 727–28.

worrying, as a way to enforce deference to the powerful.³² Mutual benefit describes how people and organizations should pursue their relational self-interest. All actors participate in civil society with the understanding that “fulfilling” their own interests requires consideration of “participating in a combination of actions directed at the benefit” of all those whom the actions will impact.³³ Mutual benefit rejects the notion that politics is a zero-sum game.³⁴ It encourages individuals and groups to select strategies and goals that seek to maximize dialogue, cooperation, trust, and reconciliation in order to at best strengthen and at worst minimize harm to neighbors and communities. But even where the potential for dialogue and cooperation appears low, especially in instances where substantive agreement and cooperation appear unlikely, civility demands mutual respect for the human dignity of those whose opinions or actions we find deplorable. Martin Luther King, Jr. expressed this best. He counseled his followers to hate racism, not racists, and to indicate that they were always open to reconciliation.³⁵

Mutual benefit and mutual respect move far beyond etiquette and deference. Respectful language is a component of both mutual benefit and mutual respect, but it is only the beginning of dialogue, cooperation, trust, and reconciliation. As former Republican Congressman Jim Leach recently observed, “Civility is not simply or principally about manners. . . . What civility requires is a willingness to consider respectfully the views of others, with an understanding that we are all connected and rely on one another.”³⁶ Jim Taylor takes a similar approach regarding the politicosphere and blogosphere:

I draw the line between civil and uncivil political discourse when someone moves from a focus on substance to a focus on the person. I also draw the line when passion for an issue turns into anger and insult directed at the person (think of all the name calling that

32. Mashburn, *supra* note 20, at 1209–16.

33. Luigino Bruni & Robert Sugden, *Fraternity: Why the Market Need Not Be a Morally Free Zone*, 24 *ECON. & PHIL.* 35, 51 (2008). Bruni and Sugden define mutual benefit in terms of economic exchanges while arguing that it provides the basis of all relationships. *Id.* at 63.

34. See A TESTAMENT OF HOPE, *supra* note 23, at 18 (implying that autonomous self-interest promotes an understanding of civil society as a zero-sum game). Martin Luther King rejected the zero-sum game imagery of public discourse. *Id.* at 17–18.

35. *Id.* at 17–19.

36. Jim Leach, *Can We Restore Compromise and Civility to Politics?*, *CHRISTIAN SCIENCE MONITOR* (Dec. 15, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/1215/Can-we-restore-compromise-and-civility-to-politics>.

goes on in the politicosphere). The current politicosphere has lost respect, reason, and tolerance.³⁷

Similarly, mutual benefit and mutual respect reject the standard of civility as deference to the powerful and suppression of the weak. Indeed, they require that those with more power consider the benefit to and respect those with less power.³⁸ Human dignity places powerful and powerless on the same level with regard to benefit and respect. As an exemplar of civility grounded in relational self-interest, Martin Luther King, Jr. demonstrates how civility encompasses strong challenges to the status quo.

The understanding of civility as relational and as requiring mutual benefit and mutual respect accords with the views of numerous commentators who approach the topic from a variety of philosophical perspectives. They are found in the procedural perspectives of Jurgen Habermas³⁹ and John Rawls,⁴⁰ which implore citizens to abide by and promote certain ethics of deliberation that aim at making the political realm a place of mutual deference to competing moral outlooks. They are found in the natural law approaches of John Finnis⁴¹ and Alasdair MacIntyre,⁴² who approach the topic from the perspective of virtue ethics. Robert Pippin, from a Kantian perspective,⁴³ explains civility as having distinct ethical status with the practice of “being civil” consisting of more than merely being polite and different than moral righteousness in general.⁴⁴ Rather, Pippin contends that “civility in general involves a kind of enactment of mutuality ... [or] a way of acknowledging through social forms an open recognition that we are not wholly independent, a way of avoiding the dishonest pretense of solitary independence.”⁴⁵ In this sense, civility can be understood as a sort of habit of outwardly acknowledging that the self is not an isolated entity, but an interdependent member of a community. In law, Robert Araujo argues from a relational perspective that “[c]ivility revolves around the acceptance and

37. Jim Taylor, *Is the Anger in American Political Discourse Good or Bad?*, HUFFINGTON POST (June 1, 2010, 5:36 PM), http://www.huffingtonpost.com/dr-jim-taylor/is-the-anger-in-american_b_592844.html.

38. This is not to deny, of course, that norms of civility are often invoked by the powerful elites for the very purpose of protecting their status and maintaining the disenfranchised in their “proper” place. ABEL, *supra* note 22; Mashburn, *supra* note 20.

39. See William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of J. Degreesurgen Habermas*, 17 CARDOZO L. REV. 1147, 1148 (1996).

40. See Mashburn, *supra* note 20, at 1202.

41. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3 (1980).

42. ALASDAIR C. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 248 (2nd ed. 1984).

43. ROBERT B. PIPPIN, *THE PERSISTENCE OF SUBJECTIVITY: ON THE KANTIAN AFTERMATH* 232–36 (2005).

44. *Id.* at 226.

45. *Id.* at 230.

display of mutual respect.”⁴⁶ Even Amy Mashburn, who worries about the abuse of civility norms and their use to foster deference to the powerful and stifle dissent, acknowledges that “[c]ultural and political theorists have put forward a variety of definitions of civility, but most echo these notions of reciprocity and mutual respect.”⁴⁷

Last, our analysis of civility in this article is cultural and aspirational. We do not suggest that legislation enforces civility on lawyers and their clients, and we do not reach the question of whether and the extent to which hate speech legislation would be appropriate to mitigate incivility by lawyers.⁴⁸ Indeed, our analysis of the connection between the conception of the self and the level of civility in civic society underscores the importance of culture to the construction of law and legal norms. We argue that the dominance of autonomous self-interest helps explain increased polarization and incivility among lawyers and clients. By accepting and incorporating relational perspectives into their practice and in that sense modeling and teaching civility to their clients, lawyers can help build a robust and vibrant civic society that adheres to norms of mutual respect, cooperation, trust, and tolerance with a commitment to meaningful substantive discourse in the public sphere, especially when we find ourselves agreeing to disagree.

B. Incivility in Civic Culture

Uncivil conduct often occurs in two related, and sometimes, overlapping arenas—“culture wars” and “political wars.” James Davison Hunter popularized the term “culture wars” and described the opposing perspectives in the culture wars as orthodox and progressive.⁴⁹ These camps were divided into polar perspectives on social issues, such as abortion and gay rights.⁵⁰

The perceived “incompatible nature of the polarizing cultural impulses” led to negative strategies of “public ridicule, derision, and insult.”⁵¹ As Hunter explained, “in public discourse, ‘dialogue’ has largely been re-

46. Robert Araujo, *Humanitarian Justice: The Quest for Civility*, 40 ST. LOUIS U. L.J. 715, 718 (1996).

47. Mashburn, *supra* note 20, at 1217.

48. See Kenneth S. Gallant, *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*, 34 U. ARK. LITTLE ROCK L. REV. 113, 118 (2011).

49. See, e.g., JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 42–48 (1991) [hereinafter *CULTURE WARS*]. See generally JAMES DAVISON HUNTER & ALAN WOLFE, *IS THERE A CULTURE WAR? A DIALOGUE ON VALUES AND AMERICAN PUBLIC LIFE* (2006) (discussing the debate regarding the existence of the culture wars and ways to describe the opposing perspectives).

50. HUNTER, *CULTURE WARS*, *supra* note 49, at 42–48.

51. *Id.* at 136.

placed by name calling, denunciation, and even outright intolerance.”⁵² This negative strategy is “systematic”⁵³ with each side describing the other as evil, un-American, totalitarian, intolerant, and bigoted.⁵⁴

Among the many examples Hunter provides is Pat Robertson’s assertion “that ‘the 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.’”⁵⁵ People for the American Way’s Anthony Podesta said of Robertson, “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.”⁵⁶

In political discourse as well, “incivility reigns”⁵⁷ with adversaries relying on dehumanization, allegations of lack of patriotism, attacks on legitimacy, and description of opponents serving “special” as opposed to the public interest. Opponents of President Obama call him un-American, “a socialist who wants to impose tyranny,” a Nazi, an “impostor,” a “traitor,”⁵⁸ challenge his American citizenship, and mistakenly argue that he is a Muslim; or assert that he grew up in Kenya and therefore does not appreciate American values.⁵⁹ Similarly, foes of President Bush described him as stupid, a Nazi, and usurper of the Presidency.⁶⁰ Adversaries of Bill Clinton used similarly harsh rhetoric, such as Newt Gingrich’s characterization of

52. *Id.*

53. *Id.*

54. *Id.* at 156.

55. *Id.* at 147.

56. HUNTER, *CULTURE WARS*, *supra* note 49, at 147–48.

57. Will Bunch, *Hearing voices: Is political talk producing acts of hate?*, PHILLY.COM (Jan. 10, 2011), http://articles.philly.com/2011-01-10/news/27020193_1_political-theater-giffords-political-rhetoric/3 (quoting Michael Smerconish).

58. George Packer, *It Doesn’t Matter Why He Did It*, THE NEW YORKER (Jan. 9, 2011), <http://www.newyorker.com/online/blogs/georgepacker/2011/01/judging-from-his-internet-postings.html>; Jake Tapper, *Obama Derangement Syndrome*, POLITICAL PUNCH (Nov. 10, 2008, 3:42 PM), <http://blogs.abcnews.com/politicalpunch/2008/11/obama-derangement.html>; Jeffrey Weiss, *Make Our Ugly Discourse Better: Join the Civilogue*, POLITICS DAILY (MAR. 28, 2010), <http://www.politicsdaily.com/2010/03/28/you-can-make-our-disagreeable-discourse-better-join-the-civilog>.

59. David Horowitz, *Get over Obama derangement syndrome*, POLITICO (Dec. 8, 2008, 2:37 PM), <http://www.politico.com/news/stories/1208/16306.html>; Citizen of Chicago, Comment to *Obama Derangement Syndrome*, *supra* note 58; Weiss, *supra* note 58.

60. John Leo, *Nancy’s Nazi Shock: Did She Forget the Bush Years?*, REAL CLEAR POLITICS (Aug. 8, 2009), http://www.realclearpolitics.com/articles/2009/08/08/nancys_nazi_shock_did_she_forget_the_bush_years_97812.html; Jacob Weisberg, *The Misperceived Man: How Bush chose stupidity*, SLATE (May 7, 2004, 9:54 AM), <http://www.slate.com/id/2100064/>.

the Clinton “administration [as] the ‘enemy of normal Americans.’”⁶¹ The discourse with regard to the Presidency is emblematic of the public discourse generally,⁶² with members of Congress and local and state candidates employing similar rhetoric.⁶³ As Judith Rodin and Stephen Steinberg have observed, “[o]ur political leaders have certainly become trapped in a seemingly endless cycle of polarized and unproductive behavior, ever more constrained in their ability and willingness to affect the caliber of public discourse.”⁶⁴

This uncivil political discourse has resulted in deep suspicions of political figures. Rodin and Steinberg quote Bill Bradley’s observation that,

[c]itizens at a very gut level believe that politicians are controlled by special interests who give them money, by parties which crush their independence, by ambition for higher office that makes them hedge their positions rather than call it like they really see it, and by pollsters who convince them that only the focus group phrase can guarantee them victory.⁶⁵

Uncivil speech pervades rhetoric of ordinary Americans as well.⁶⁶ Campus radio shows pose questions to listeners asking, “How will you crush the Republicans in every way this semester?”⁶⁷ Tea Party members have declared, “I’m cleaning my guns and getting ready for the big show. And I’m serious about that, and I bet you are, too,”⁶⁸ or protested “the raping

61. RONALD BROWNSTEIN, *THE SECOND CIVIL WAR: HOW EXTREME PARTISANSHIP HAS PARALYZED WASHINGTON AND POLARIZED AMERICA* 152 (2007).

62. See Jennifer Rubin, *The uncivil left*, THE WASHINGTON POST (Jan. 31, 2011, 10:15 AM), http://voices.washingtonpost.com/right-turn/2011/01/the_uncivil_left.html.

63. See Anthony Shoemaker, *Sen. Brown compares anti-union governors to Hitler, Stalin*, DAYTON DAILY NEWS (Mar. 3, 2011, 5:19 PM), http://www.daytondailynews.com/blogs/content/sharedgen/blogs/dayton/ohiopoltics/entries/2011/03/03/sen_brown_compares_antiunion_g.html (Comparing anti-union believers to Hitler and Stalin.); Adam Smith, *Marco Rubio and the world ‘socialist’*, THE BUZZ, ST. PETERSBURG TIMES (Mar. 17, 2011, 10:37 AM), <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/marco-rubio-plays-socialist-card> (Describing Democrats as “socialists”); Daniel Tencer, *Grayson ad compares Florida religious fundamentalists to Taliban*, THE RAW STORY (Sept. 25, 2010, 9:06 PM), <http://www.rawstory.com/rs/2010/09/25/grayson-ad-taliban-dan/> (Describing opponent as American Taliban).

64. RODIN & STEINBERG, *supra* note 10, at 5.

65. *Id.* at 5–6 (quoting Bill Bradley, GOVERNMENT AND PUBLIC BEHAVIOR, *Plenary Presentation to the Penn National Commission on Society, Culture and Community* (Dec. 8, 1997), <http://www.upenn.edu/pnc/trans.html>).

66. See Ian Bauder, *Political discourse turns uncivil on campus*, THE WASHINGTON TIMES (Oct. 16, 2008, 4:45 AM), <http://www.washingtontimes.com/news/2008/oct/16/political-discourse-turns-uncivil-on-campuses/>.

67. *Id.*

68. Eric Kleefeld, *Tea Party Activist And Senate Candidate: ‘If We Don’t See New Faces, I’m Cleaning My Guns And Getting Ready For The Big Show’* (VIDEO), TPM (Jan. 26,

of America” by the Obama administration.⁶⁹ Newscasts, on both the left and the right,⁷⁰ enjoy high (polarized) ratings by abandoning objective reporting of the news and replacing it with programs fraught with name-calling and ridicule of the “other side.”⁷¹ Rodin and Steinberg have further noted that “the most significant consequence” of this polarization “is the apparent impact on citizens’ engagement with, and even interest in, the politics of their own government.”⁷² This harsh rhetoric creates a jaundiced perception of politics and government, and may help explain, in turn, declining rates of civic engagement and participation in active citizenry. For example, in *Bowling Alone*, Robert Putnam documented declining participation in civic institutions, from bowling leagues to parent-teacher associations.⁷³

Such cultural and political incivility which spills over, shapes and informs our private interactions and sensibilities threatens our civic culture. Incivility is meant to silence and stifle disagreement, and it attempts to allow its proponents to triumph in the public sphere not by engaging with opposing points of view and persuading dissenters of the strength of one’s substantive arguments but rather by delegitimizing dissent and dehumanizing opponents. Incivility undermines the space for the very pluralism of perspectives and diversity of opinions that has been one of the great strengths of America.⁷⁴

2010, 7:00 PM), <http://tpmdc.talkingpointsmemo.com/2010/01/tea-party-activist-and-senate-candidate-if-we-dont-see-new-faces-im-cleaning-my-guns-and-getting-rea.php>.

69. *Tea Party rally calls for limited government*, MID-HUDSON NEWS (July 12, 2010), <http://www.midhudsonnews.com/News/2010/July/12/TeaParty-12Jul10.html>.

70. Ken Tucker, *Jon Stewart to Chris Wallace on 'Fox News Sunday': 'You're insane'*, EW.COM (June 19, 2011, 6:31 PM), <http://watching-tv.ew.com/2011/06/19/jon-stewart-chris-wallace-fox-news-sunday/>; see also Joe Gandelman, *CNN Ratings Are Up But Big Cable Winner Remains Fox*, THE MODERATE VOICE (June 29, 2011), <http://themoderatevoice.com/115014/cnn-ratings-are-up-but-big-cable-winner-remains-fox/>.

71. See James Fallows, *Is There Anything to Do About 'Civility?'* THE ATLANTIC (June 13, 2011, 7:20 PM), <http://www.theatlantic.com/national/archive/2011/01/is-there-anything-to-do-about-civility/69457/>.

72. RODIN & STEINBERG, *supra* note 10, at 5.

73. PUTNAM, *supra* note 10, at 55–57, 111–12 (2000). Not surprisingly, Putnam observes that the previous low point of civic engagement was the Great Depression, the previous high point for polarized political culture. *Id.* at 54, 63; see also BROWNSTEIN, *supra* note 61, at 17 (describing the era between 1896–1938 as a “period of sharp party conflict”). Cf. Robert D. Putnam, *Bowling Together: The United State of America*, 3 THE AMERICAN PROSPECT 20 (2002) (“The closing decades of the twentieth century found Americans growing ever less connected with one another and with collective life. We voted less, joined less, gave less, trusted less, invested less time in public affairs, and engaged less with our friends, our neighbors, and even our families. Our ‘we’ steadily shriveled.”).

74. See PETER H. SCHUCK, DIVERSITY IN AMERICA 12 (2003).

C. Civility and Incivility Clarified

To the examples above, Ken Gallant, in his reply to this article, adds two others: “U.S. Supreme Court Justice James C. McReynolds’s refus[al] to sit next to Justice Louis D. Brandeis because Brandeis was a Jew,”⁷⁵ and the Westboro Baptist Church’s demonstrations at funerals and other sites with placards stating that “God Hates Fags.”⁷⁶ These examples help illustrate the boundaries of civility as mutual benefit and mutual respect. In particular, they demonstrate that civility includes both procedural and substantive elements, does not require agreement, and as an aspiration is very different than regulation of uncivil speech.

First, mutual benefit and mutual respect have both procedural and substantive elements. With regard to procedure, these egregious examples do not seek to promote cooperation, trust, and reconciliation. Robertson, Podesta, and the Westboro Baptists employ impolite and intemperate language that prevents dialogue. McReynolds prevented dialogue by refusing to sit next to Brandeis. With regard to substance, they dehumanize those with whom they disagree, failing to meet the floor of respect for human dignity. Robertson asserts that non-Christians and atheists are destroying the constitution, Podesta describes Robertson as a fanatic, McReynolds refuses to sit next to a Jew, and the Westboro Baptists declare that “God Hates Fags.”

Second, these examples of incivility also raise the question of whether civility interferes with disagreement and either requires, or exists only within, views held in common. As we noted above, the example of Martin Luther King’s powerful and zealous challenge to the established order demonstrates that passionate disagreement is consistent with civility. Indeed, as commentators note, liberal democracies need civility to promote the peaceful resolution of disputes.⁷⁷ By definition, disputes and disagreements occur where perspectives on a particular issue are not in agreement. But, given that today most of us agree with Martin Luther King’s perspective on racial equality, his example may be too easy. Civility would, of course, permit Robertson to criticize particular constitutional positions and Podesta to challenge Robertson’s views, while respecting the human dignity of non-Christians, atheists, and conservative Christians. The Westboro Baptist Church’s placard and McReynolds’s conduct are more problematic. By challenging the right of lesbians and gays, or Jews, to participate in our society as full, equal citizens, they fail the criteria of respect for basic human

75. Gallant, *supra* note 48; see MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 479 (2009) (citing many examples of McReynolds’s discourtesy).

76. Gallant, *supra* note 48; see Adam Liptak, *Justices Rule for Protestors at Military Funerals*, NEW YORK TIMES (Mar. 2, 2011), <http://www.nytimes.com/2011/03/03/us/03scotus.html>.

77. See *supra* note 26–38 and accompanying text.

dignity. They could challenge the extension of anti-discrimination laws to lesbians and gays, or Jews, so long as they treated individuals who were lesbian and gay, or Jewish, with respect. Admittedly, while substantive civility creates a boundary condition of basic respect for human dignity of those with whom we disagree, it does not resolve all the potential issues regarding the rights and responsibilities deriving from human dignity.

Third, the examples help illustrate the bounds between civility and legal regulation. Respect for human dignity allows for robust freedom of expression,⁷⁸ even of ideas that transgress the boundaries of civility. But the fact that views contravene respect for human dignity does not make them right or civil. As explained above, the more civility in a civic culture the better it will be able to manage disagreement and promote the public good. Moreover, when civility diminishes beyond a certain threshold, a society loses “the very glue that keeps an organized society from flying into pieces.”⁷⁹ We argue for civility as encompassing commitments to courtesy and cooperation, maintaining a vibrant public space in which meaningful substantive disagreements can take place, and respecting human dignity when such substantive disagreements do take place. These are the aspects of civility that an unreflective cultural adherence to autonomous self-interest undermines.

II. CIVILITY AND INCIVILITY IN HISTORICAL AND CULTURAL CONTEXT

American society has previously experienced cycles of civility and incivility. We identify the cultural shift from relational to autonomous self-interest as a key factor in catalyzing contemporary incivility and removing a tool for reviving civility.

Incivility is not a new phenomenon. While a commentator noted that “civility appears to have been buried some time ago in the blogosphere,”⁸⁰ and a post on Facebook declared that “Our Democracy [has] died . . . , funeral today on the White House lawn,”⁸¹ in previous periods of American history, there has been highly uncivil public discourse and a great degree of disenchantment with government and civic culture.⁸²

American history features ample moments of extreme public incivility and even outright violence. Although contemporary politicians certainly use

78. See *supra* note 28 and accompanying text.

79. See *supra* note 27 and accompanying text.

80. Jim Taylor, *The Blogosphere Jungle*, HUFFINGTON POST (Dec. 28, 2009, 11:22 AM), http://www.huffingtonpost.com/dr-jim-taylor/the-blogosphere-jungle_b_404529.html; see Weiss, *supra* note 58.

81. Weiss, *supra* note 58.

82. See, e.g., MARCUS DANIEL, SCANDAL & CIVILITY: JOURNALISM AND THE BIRTH OF AMERICAN DEMOCRACY 4–17 (2009); RODIN & STEINBERG, *supra* note 10, at 1–3.

harsh rhetoric, we have experienced much worse. In 1838, Representative William Graves, a Whig from Kentucky, challenged and killed Representative Jonathan Cilley, a Maine Democrat, in a duel after Cilley refused to accept a letter from Graves, not realizing that such a refusal constituted an offense likely to result in a duel.⁸³ In 1851, Representative Edward Stanly challenged Representative Samuel Inge to a duel precipitated by a Congressional debate on the internal improvements bill. Both suffered injuries from the duel and later recovered.⁸⁴ These were by no means unusual antics for politicians between the Revolution and the Civil War.⁸⁵

Cultural incivility was also quite common at times, for example, in disputes over declarations of war. Consider the fate of the *Federal Republican*, a Baltimore-based Federalist newspaper started by Alexander Hanson in 1808. On June 20, 1812, two days after a Republican-controlled U.S. government declared war on Britain, Hanson called the war “unnecessary” and warned against attempts to silence its critics by “terror.”⁸⁶ The very next day a mob of war supporters demolished the paper’s headquarters.⁸⁷ Hanson regrouped and on July 27, 1812, the *Federal Republican* reappeared, blasting local Republicans as “remorseless rabble.”⁸⁸

The critique caused “[t]he lid [to] bl[o]w off Baltimore:” a mob surrounded the new headquarters and charged the front door. The first Republican to break in was shot dead. A cavalry troop rescued the besieged Federalists and marched them to the local jail for their own protection, only to have the jailhouse overran by an angry mob later that evening. One Federalist died; others were tortured. Hanson escaped to Georgetown and published the *Federal Republican* there on August 3, 1812. When copies arrived in Baltimore, a mob threatened to destroy the post office if the copies were distributed. President James Madison refused to dispatch federal troops to Baltimore, and the post office was spared only after Mayor Edward Johnson called out the militia. The first dead of the War of 1812 were Americans killed by Americans, victims of incivility and intolerance, and of the refusal of some to allow public discourse and criticism of governmental policies.⁸⁹ Half a century later, the failure of American civil society to end the scourge of slavery led to a Civil War that tragically demonstrated the

83. Peter Carlson, *Pistols at Dawn*, AM. HISTORY, Feb. 2011, at 38–39.

84. *Id.* at 39.

85. *Id.* at 34. President Andrew Jackson, to name but one leading American politician, has the distinction of being the only American President to have killed a man in a duel. *Id.*

86. Richard Brookhiser, *Fighting Words Flew When the Nation Was New*, AM. HISTORY, June 2011, at 15, 15.

87. *Id.* at 15–16.

88. *Id.* at 15.

89. *See id.* at 15–16.

consequences of the collapse of civility, public discourse, and the political apparatus.

The complex causes of political and cultural incivility vary in different eras, and so do remedies and cures for social malaise. For purposes of this article, we do not offer a full explanation of these causes and cures. Rather, we wish to acknowledge that incivility has long been with us as we highlight the shift from a dominant culture of relational self-interest to one of autonomous self-interest as a significant source of contemporary incivility.

Prior to the 1960s, a dominant understanding of the public sphere, in politics as well as in law and business, relied on a perspective of the self and self-interest as relational. Relational self-interest recognizes that the public good sometimes exists independent of and in addition to collective self-interests 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. Relational self-interest calls upon members of a civic society to seek common ground when possible, and where people disagree, consideration of their relationships requires that they treat each other with respect. Cooperation, reconciliation, and dialogue are valuable objectives within the framework of relational self-interest.

The contrasting perspective, which has become more dominant in American culture, politics, law, and business is the perspective of autonomous self-interest.⁹⁰ According to this perspective, people and organizations are autonomous in civil society—they are “atomistic actors [that] seek to

90. Pearce & Wald, *supra* note 29, at 5. The comparison of autonomous and relational concepts of the self is not original to us. As explained in greater detail in Pearce & Wald, *supra*, a wide range of commentators have employed similar frameworks, including philosopher Charles Taylor, who wrote in his lecture on “The Malaise of Modernity” that theorists such as Locke and Hobbes, as well as modern political theorists such as Ronald Dworkin have neglected the social context in which individuals arise. *See generally* CHARLES TAYLOR, *THE MALAISE OF MODERNITY* (2003). Relational feminists such as Carol Gilligan, Nel Noddings, Eva Feder Kittay and Virginia Held have advanced a notion of the “ethics of care” which recognizes caring as ethically relevant to both the public and private spheres. *See* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); NEL NODDINGS, *CARING: A FEMINIST APPROACH TO ETHICS AND MORAL EDUCATION* (1984); VIRGINIA HELD, *ETHICS OF CARE: PERSONAL, POLITICAL, AND GLOBAL* 63–64 (2006); EVA FEDER KITTAY, *LOVE’S LABOR: ESSAYS ON WOMEN, EQUALITY AND DEPENDENCY* 20 (1998). Economists such as Amartya Sen, Luigino Bruni, and Robert Sugden have also cited various problems with a philosophy centered on the individual and self. *See* Robert Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 *ECON. J.* 772, 774 (1984) (discussing Margolis’ theory of “group interest” in relation to economic understandings of the self); Bruni & Sugden, *supra* note 33, at 35 (grounding economic theory in mutual benefit and not in material self-interest); *see generally* AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970) (arguing for the utility of social welfare in society).

maximize their own atomistic good.”⁹¹ Everyone and every organization is self-interested, basing their private and public conduct on the perspective of the Holmesian bad man—do whatever you can get away with to advance your goals⁹²—and believe that their opponents do the same. Mutual benefit and mutual respect play no role in autonomous self-interest.

Accordingly, those who believe in autonomous self-interest reject the idea that those with whom they disagree care about the public good.⁹³ People in the left, right, and center who follow this view describe their opponents as “special interest” groups, defining a “special interest” as a perspective contrary to their own.⁹⁴ Not surprisingly, when their group or party controls the government, they are especially supportive of the government.⁹⁵ When their opponents control the government, the government itself represents special interests and commands less respect, indeed to some becoming the enemy.⁹⁶

The perspective of autonomous self-interest is consistent with the “zero-sum” game mentality.⁹⁷ As William Galston describes it, “if they win,

91. Pearce & Wald, *supra* note 29, at 5.

92. *Id.* at 15–16.

93. See generally GENE M. GROSSMAN & ELHANAN HELPMAN, SPECIAL INTEREST POLITICS (2001) (arguing that individuals and groups are predominantly self-interested, and approach politics with a “game theory” attitude towards achieving equilibrium).

94. See, e.g., Meet the Republican Congress: New Chairs Put Corporate Special Interests Before Middle Class Jobs, available at http://dccc.org/blog/entry/meet_the_republican_congress_new_chairs_put_corporate_special_interests_bef/ (asserting that Congressional Republicans are pursuing the “agenda of Corporate special interests”); <http://washingtonexaminer.com/opinion/special-reports/2011/01/special-report-democrats-must-break-free-their-special-interest-str#ixzz1YmfMDmMk> (asserting that “power within the Democratic Party lies with . . . with the special interests on the left, including public employee unions, environmentalist groups and trial lawyers”). See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

95. Olson states that “political parties usually seek collective benefits: they strive for governmental policies which, as they say, will help all of the people (or at least a large number of them).” *Id.* at 163. As such, “most people feel they would be better off if their party were in power.” *Id.*

96. Olson describes the phenomenon of discomfort with the government in a “pressure group system” as such: “Even if such a pressure group system worked with perfect fairness to every group, it would still tend to work inefficiently Coherent, rational policies cannot be expected from a series of ad hoc concessions to diverse interest groups.” *Id.* at 124, n.52. He goes on to explain that in such a system, “there may be a sense in which the narrow ‘special interests’ of the small group tend to triumph over the [. . .] interests of ‘the people’ Often a relatively small group or industry will win a tariff, or a tax loophole, at the expense of millions of consumers or taxpayers in spite of the ostensible rule of the majority.” *Id.* at 144.

97. William A. Galston, *Can a Polarized American Party System Be “Healthy”?*, ISSUES IN GOVERNANCE STUDIES Apr. 2010, at 1, 17.

we lose.”⁹⁸ From the perspective of autonomous self-interest, uncivil rhetoric is both descriptively and normatively acceptable.⁹⁹ It reflects how people do behave and how they should behave in the public sphere.¹⁰⁰ Cooperation, dialogue, and reconciliation only have any value as a means to an end.

Until the 1960s, autonomous self-interest was a minority perspective in the public sphere. No matter the level of civic discord in America, a relational perspective and a belief in the potential for a shared public good offered a hope for eventual reconciliation and restoration of civility.¹⁰¹ Of course, relational perspectives and attitudes do not guarantee civil and peaceful outcomes, as evidenced by the collapse of American society into the Civil War, nor do they provide for a healthy and equal civil society, as

98. *Id.*

99. Patrick J. Deenan notes that “[i]n the wake of the tragic shooting in Tucson, Arizona . . . a chorus of voices . . . arose in denunciation of the decline of ‘civility’ in contemporary political life. Somewhat incredibly, some of the more prominent voices on the political Right—such as Rush Limbaugh and Mark Levin—denounced these calls for civility.” Patrick J. Deenan, *Who Owns Civility?*, THE WASHINGTON POST (Mar. 2, 2011, 9:44 AM), http://onfaith.washingtonpost.com/onfaith/georgetown/2011/03/civility_and_democracy.htm. Sarah Palin condemned such calls for more civil discourse in politics as an infringement on free speech. See Lance Bennett, *What’s Wrong with Incivility?: Civility as the New Censorship in American Politics* 3 (Ctr. for Comm’n and Civic Engagement, Working Paper No. 2011-1, 2011), available at http://ccce.com.washington.edu/projects/assets/working_papers/Bennett-What's-Wrong-with-Incivility-CCCE-WP-2011-1.pdf. Rush Limbaugh echoed her sentiment to defend incivility when he argued that civility was the “new censorship.” RUSH LIMBAUGH, *Civility is the New Censorship*, on THE RUSH LIMBAUGH SHOW (Jan. 13, 2011), http://www.rushlimbaugh.com/home/daily/site_011311/content/01125108.guest.html.

While such analogies between civility and censorship are arguably less visible on the left, remarks from liberal politicians and pundits are just as rife with examples of uncivil discourse, suggesting that they too view incivility as an acceptable form of debating opponents. Barney Frank, a House Democrat from Massachusetts, responded to a Tea Partier in an August 2010 town hall meeting equating Obama’s healthcare plan to Nazism by saying “On what planet do you spend most of your time? . . . Ma’am, trying to have a conversation with you would be like trying to argue with a dining room table, I have no interest in doing it.” Kasie Hunt, *Frank Debates Dining Room Table*, POLITICO (Sept. 7, 2010, 7:30 PM), <http://www.politico.com/news/stories/0910/41861.html>. President Obama also sparked controversy when he referred to members of the Tea Party as “teabaggers,” a term with sexual connotations that the Americans for Tax Reform President Grover Norquist says is “indefensible” and “the equivalent of using the ‘n’ word.” Jennifer Harper, *Strong Brew*, THE WASHINGTON TIMES (May 5, 2010, 4:00 AM), <http://www.washingtontimes.com/news/2010/may/5/strong-brew/>. The term is widely used on the Left, by commentators such as Bill Maher, Keith Olberman, Rachel Maddow, and even NPR. See Joe Sudbay, *Top Teabagger is mad: Don’t call us ‘an offensive sexual slur,’* AMERICA BLOG (Jan. 17, 2010, 10:30 AM), <http://www.americablog.com/2010/01/top-teabagger-is-mad-dont-call-us.html>; *NPR Apologizes, Denies Knowing ‘Teabagger’ Was Offensive*, THE FOX NATION (Jan. 8, 2010), <http://nation.foxnews.com/culture/2010/01/08/npr-apologizes-denies-knowing-teabagger-was-offensive>.

100. See Galston, *supra* note 97.

101. Pearce & Wald, *supra* note 29, at 5–6.

demonstrated by the persistence of slavery in America before the Civil War and racial inequality and discrimination subsequently. Relational perspectives dominated the American public and private spheres before the 1960s, but it was relational self-interest grounded in a society where hierarchies based on race, gender, and religion promoted discrimination and inequality.

The shift away from relational self-interest as the dominant perspective was gradual. Although the turn toward the dominance of autonomous self-interest began after the Civil War,¹⁰² it did not become dominant until after the 1960s.¹⁰³ In part, the growing heterogeneity of American society, and the increasing openness to that heterogeneity, destabilized the old (discriminatory and exclusionary) foundations of the old relational self-interest value system grounded in homogenous communities, as well as race, gender, and religious hierarchies. Helping fuel the challenge to these hierarchies was the construction of the self as autonomous – as independent from groups and communities.

Indeed, during the 1960s, elite liberals and libertarians challenged the notion that people had motivations other than autonomous self-interest. Anthony Kronman's analysis of challenges to the distinction between public good and private interest provides a framework for describing this shift.¹⁰⁴ First, commentators asserted that "appeals to the public interest are always and only disguised efforts to advance the private good of the person making the appeal."¹⁰⁵ For example, left intellectuals often argued that conceptions of the public good only mask the fact that people, particularly those with privilege, seek to maximize their power while libertarian intellectuals on the right claimed that people do—and should—maximize their financial self-interest and not the public good.¹⁰⁶ Second was the view "that every political judgment, like every aesthetic and (in the view of many) every moral judgment too, is always offered from a specific point of view or, as we are now accustomed to saying, from a particular perspective."¹⁰⁷ Accordingly,

102. Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1351–53. Norman Spaulding describes, for example, how the Civil War destroyed the American elite's faith that a shared conception of civic culture and the public good would maintain civil society. Norman Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2015 (2005).

103. Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1351–53.

104. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 85, 109 (1993) [hereinafter *LOST LAWYER*]. According to Plato and Aristotle, there are different concerns to which a person may reasonably devote himself. These concerns are rank-ordered in a hierarchy of objective worth. The lawyer-statesman stands for the value of public interest and the virtue of civic-mindedness associated with it. *Id.*

105. Kronman, *supra* note 26, at 731; Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1362.

106. Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1359.

107. Kronman, *supra* note 26, at 731.

Kronman writes, “[w]e have grown accustomed to the idea that every judgment about the public good is rendered from a vantage point which the person making the judgment occupies but others—whose social class, tastes, personal history and form of life are different—do not.”¹⁰⁸ From this perspective, the conception of a common public good beyond private goals, even goals that extend beyond private self-interest, is illusory.

These liberal and libertarian perspectives in turn shaped the dominant elite culture toward the public sphere. If the public interest is nothing more than an aggregate of private interests, then from the libertarian perspective one best serves and contributes to society by aggressively pursuing one’s autonomous self-interest.¹⁰⁹ From the left perspective as well, the public good was a sham and therefore the pursuit of power was the only subject matter of the public sphere.¹¹⁰ Under these conceptions, private actors owe nothing to the public good. At most, their duties in the public sphere consist of playing by the legal rules, and paying taxes, both of which, they are welcome to challenge and manipulate in their favor. People, of course, pursue their private interests and to some their private interest included charity, but as Kronman notes that private interest is generally not considered to consist of the public good.¹¹¹

This odd marriage of left and right among the elite has led to a gradual yet systematic decline in relational self-interest and a rise in autonomous self-interest among the general public, influencing and being affected by the following factors. First, the decline of institutions preaching and fostering relational approaches, such as the family, organized religion, and local communities.¹¹²

108. *Id.*

109. Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1358–64.

110. *Id.*

111. *Id.*; Kronman, *supra* note 26, at 730–2.

112. See generally PUTNAM, *supra* note 10, at 65–79 (2000) (discussing the effects of declining participation in organized religion in the U.S. as one of the factors contributing to broad distrust in governing institutions); BARRY KOSMIN, et al., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 12–13 (2001), available at <http://www.gc.cuny.edu/CUNY-Graduate-Center/PDF/ARIS/ARIS-PDF-version.pdf> (finding that those without any religious identification grew from 8% of the population in 1990 to over 14% in 2001.) Some have argued that lawyers and the legal profession have played a role in the decline of organized religion, by advocating an aggressive and expansive separation of church and state, thus limiting public interest in, and the space for organized religion in our society. See, e.g., BRUCE LEDEWITZ, AMERICAN RELIGIOUS DEMOCRACY: COMING TO TERMS WITH THE END OF SECULAR POLITICS 16–18 (2007). While we believe that lawyers have played a role in culturally manufacturing and elevating autonomous self-interest to its dominant position and are thus partly responsible for the incivility fostered by autonomous self-interest, see *infra* Part III, we take no position on the question of whether the legal profession contributed to the decline of organized religion in the United States.

Second, as the culture of autonomous self-interest has become more pervasive, American society has become more open to diversity.¹¹³ In part, the focus on autonomous self independent of community, race, gender, and religion helped break down the hierarchies that dominated American culture prior to the 1960s. Nonetheless, the absence of a relational culture following the 1960s has rendered it more challenging for a diverse society to develop agreement on conceptions of the public good. This failure reinforces the appeal of autonomous self-interest exactly because it does not require shared understandings and instead only expects individuals to pursue their interests aggressively without regard to the public good. It further fails to provide a framework for understanding and managing societal diversity in a way that promotes the good of all and that challenges racial and gender barriers that continue to exist.¹¹⁴

Finally, a third development magnified the influence of autonomous self-interest. The role of litigation in promoting progress in civil rights and civil liberties led to a growing legalization of public discourse. As Americans began to view the courts as a venue for addressing and resolving policy differences, they put more trust in judges and lawyers to resolve core disagreements.¹¹⁵ If the legal profession and legal system had retained a culture of relational self-interest, this development would not have had the same effect. But given that, as discussed below,¹¹⁶ the legal profession had embraced the culture of autonomous self-interest, the legalization of fundamental disputes meant placing them in the context of autonomous self-interest.

Both the form and the substance of modern American law promoted autonomous self-interest. Substantively, especially since the 1960s, Ameri-

113. See SCHUCK, DIVERSITY IN AMERICA, *supra* note 74. Or, if American society has not become more open to diversity, it has at least become inundated with “diversity talk”. Ironically, “diversity fatigue,” a backlash against diversity may be taking place while the underlying challenges of diversity have not been yet addressed. See Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1110–1 (2011) [hereinafter *A Primer on Diversity*].

114. See, e.g., Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081 (2005); Robin J. Ely & David A. Thomas, *Team Learning and the Radical Diversity-Performance*, (Harvard Bus. Sch. Working Paper No. 05-026, 2004); Wald, *A Primer on Diversity*, *supra* note 113, at 1093–119.

115. The literature on law and lawyers as social engineers is vast. For an instructive review, see Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493 (1996). On the legalization of social movements and the American tendency to seek social reform by means of legal reform, see Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 480 (2004); Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011); see generally Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2010); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (University of Chicago Press, 2nd ed. 2008).

116. See *infra* Part III.

ca has rested largely upon the framework of individual rights and autonomy. In terms of form, after the 1960s, the legal system has embraced an adversarial model of litigation grounded in autonomous self-interest (as opposed to an earlier relational notion that provided the foundation for that system). The post-1960s adversarial model shaped and framed our public discourse. The model legitimized a combative and adversarial approach as a primary way of resolving public disputes. Accordingly, the legalization of discourse has resulted from and further reinforced the culture of autonomous self-interest.¹¹⁷

In describing the contribution of autonomous self-interest to a culture of incivility, we conclude this part with a few caveats. First, we do not intend to suggest that pre-1960s America was a golden era of civic discourse.¹¹⁸ America was racially divided, in parts segregated and in others unequal, featuring overt and systematic discrimination. In addition, mainstream public and political spheres often dominated by white Protestant men, generally discriminated against women, as well as religious, ethnic, and sexual minorities.¹¹⁹ To the extent relational self-interest was common, it was in part a function of relationships resting on exclusion and homogeneity. The influence of autonomous self-interest deserves credit for its role in helping transform this system. At the same time, a reconceptualization of relational self-interest also contributed through the perspective of Martin Luther King, Jr., even though it did not gain the devotion of the libertarian and liberal elite. The pervasive and systematic discrimination that existed before the 1960s was not therefore a failure of relational self-interest. Indeed, not only does relational self-interest have no necessary or inherent connection to discrimination, today it provides a basis for facilitating a more open and equal society.

Second, as illustrated by the history described at the beginning of this part,¹²⁰ relational self-interest is by no means a full cure to incivility. It plays an important, but not outcome determining, role in fostering civility.

117. The turn to the courts has often placed public disputes into the box of “public interest law,” dominated by the liberal left between the 1960s and 1980s, and since then featuring both liberal and conservative voices with conservatives playing a more influential role in Supreme Court litigation. KRONMAN, *LOST LAWYER*, *supra* note 104, at 161. On the rise of conservative cause lawyering, see ANN SOUTHWORTH, *LAWYERS OF THE RIGHT – PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

118. Indeed, we share Marc Galanter’s general distrust of nostalgic pleas to so-called golden eras. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996).

119. See, e.g., E. DIGBY BALTZELL, *THE PROTESTANT ESTABLISHMENT, ARISTOCRACY & CASTE IN AMERICA* (Yale University Press ed., 1987). See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Routledge Classics ed., 2001).

120. See *supra* notes 83–89 and accompanying text.

Autonomous self-interest, on the other hand, necessarily undermines civility although additional causes may contribute as well.

In sum, incivility is certainly not a new phenomenon; autonomous self-interest is not an all-consuming evil solely responsible for fueling incivility; and relational self-interest is not a magical solution to civic tension and unrest. Nonetheless, relational self-interest has the potential to play a significant and positive role in fostering civility while autonomous self-interest generally breeds incivility. Thus, the decline of the former and rise of the latter helps explain the current state and manifestations of incivility.

These conceptions—and the full embrace of autonomous self-interest—are so powerful that even people who embrace relational self-interest to some degree adopt autonomous self-interest as the standard for conduct in the public sphere. For example, social conservatives have a relational understanding of their own religious and political institutions as well as a belief in the public good and a consequent relational duty of government with regard to social issues.¹²¹ Some political centrists advocate moderate perspectives from a relational view of a balanced society¹²² and political liberals often embrace a relational duty of government to its citizens with regard to economic regulation, social welfare, and civil rights.¹²³ Despite understanding their own causes and communities at least in part from a relational perspective, these political actors tend to adopt the perspective of autonomous self-interest in the public sphere. They dehumanize their adversaries through public ridicule, derision, and insult and describe them as captives of special interests, while treating disagreement as a zero-sum game.¹²⁴

121. See generally GINA WELCH, *IN THE LAND OF BELIEVERS: AN OUTSIDER'S EXTRAORDINARY JOURNEY INTO THE HEART OF THE EVANGELICAL CHURCH* (2010) (covering the author's two year undercover journey into Jerry Falwell's mega-church where she came to understand the empathy of Evangelicalism).

122. See, for example, the No Labels group, a bipartisan lobby whose slogan is "Not Left. Not Right. Forward.", which advocates for people who "want a less partisan, less ideological, more common sense approach to the nation's problems and crises." NO LABELS, <http://nolabels.org> (last visited Aug. 8, 2011). Also, consider John Stewart's "Rally to Restore Sanity" held in Washington, DC on October 30, 2010 in response to Glen Beck and the Tea Party's "Restoring Honor" rally in August. Stewart's event was billed as "not so much for the Silent Majority as the Busy Majority". Stewart's website called for people "who think shouting is annoying, counterproductive, and terrible for your throat; who feel that the loudest voices shouldn't be the only ones that get heard; and who believe that the only time it's appropriate to draw a Hitler mustache on someone is when that person is actually Hitler" to join him. RALLY TO RESTORE SANITY, <http://www.rallytorestoresanity.com> (last visited Aug. 8, 2011).

123. See, for example, the Daily Kos, an online community of liberal writers and commentators that "recognizes that Democrats run from left to right on the ideological spectrum, and yet we're all still in this fight together." *Memo to the World*, DAILY KOS (Nov. 15, 2004, 6:24 PM), <http://www.dailykos.com/story/2004/11/15/73807/-Memo-to-the-world>.

124. At a Philadelphia fundraiser in June 2008, Barack Obama stated in regards to Republican attacks that "If they bring a knife to the fight, we bring a gun." In reporting on the

At the same time, many leaders and commentators have sought to restore civility to the public sphere. Presidential candidates campaign as “un-itters, not dividers,”¹²⁵ but when elected, they fail to make progress in repairing our civic culture. Other political commentators and leaders have sought to restore civil rhetoric as well as to counter political polarization.¹²⁶ They too have not had great success.¹²⁷

To the extent that autonomous self-interest dominates American culture and informs the conduct of actors in both the public and private spheres (politicians, lawyers, and clients included), the failure of measures meant to restore civility is not surprising. As we have seen, autonomous self-interest is antagonistic to civility, and today, autonomous self-interest that promotes incivility is viewed as legitimate. Restoring civility must entail, therefore, a retreat from our cultural commitment to autonomous self-interest. We next turn to the role lawyers and the legal profession have played in elevating autonomous self-interest to its current position of dominance.

III. LAWYERS AND INCIVILITY

Not surprisingly, lawyers have themselves confronted a crisis of civility that tracks the crisis facing society generally. The legal profession has experienced a decline of civility in terms of commitment to the public good, as well as in the treatment of colleagues and adversaries with respect.¹²⁸

story, the Washington Post later added an editor’s note in the wake of the Tucson shooting about civility. See WSJ Staff, *Obama: ‘If They Bring a Knife to the Fight, We Bring a Gun,’* WALL ST. J. L. BLOG (June 14, 2008, 1:29 PM), <http://blogs.wsj.com/washwire/2008/06/14/obama-if-they-bring-a-knife-to-the-fight-we-bring-a-gun/>. A 2008 Republican candidate for the Senate, Richard Behney, told supporters in December 2008 that if midterms didn’t go well for him, he was going to be “cleaning my guns and getting ready for the big show”. John Prince, *The Party Isn’t Over Yet*, HARV. POL. REV. (FEB. 18, 2010), <http://hpronline.org/uncategorized/the-party-isnt-over-yet/>.

125. A commercial spot for George W. Bush’s 2000 presidential election aired just before the Republican National Convention described him as “a man of integrity who will ‘unite, not divide and let every American look at the White House and be proud.’” *Hotline*, ADWEEK (July 31, 2000), <http://www.adweek.com/news/advertising/hotline-50728>. In the 2004 presidential election, John Kerry chose John Edwards as his running mate and embraced his message of unity as well, pledging to bridge “the great divide” between “two Americas”. *Kerry Taps Fellow Senator Edwards as Running Mate*, THE CONGRESSIONAL QUARTERLY (July 6, 2004), <http://www.democraticwhip.gov/content/kerry-taps-fellow-senator-edwards-running-mate>. Unity was also frequent theme in Obama’s 2008 campaign, especially with regards to religion, as he remarked in June 2007 that faith should unite, not divide us in response to growing criticism from the Christian Coalition. Scott A. Giordano, *Obama: Faith should unite, not divide us* (June 24, 2007 10:31 AM), <http://my.barackobama.com/page/community/post/scottgiordano/CXVW>.

126. See Galston, *supra* note 97, at 14.

127. *Id.* at 2.

128. See *supra* notes 14–17 and accompanying text.

The perspective of autonomous self-interest has come to dominate the understanding of the lawyer's role just as it has come to dominate civil society.

A. The Rise of Autonomous Self-Interest and Decline of Relational Self-Interest in the Practice of Law

The dominant conception of the lawyer's role has shifted from a relational approach to an autonomous one.¹²⁹ Prior to the 1960s, the relational approach was dominant although not the exclusive professional account.¹³⁰ Both the republican conception of the early twentieth century¹³¹ and the professionalism ideal that originated in the late nineteenth century¹³² described the lawyer as simultaneously a zealous representative of clients and a guardian of the public good.¹³³ Justice Louis Brandeis, Jr., one famous exemplar of this approach, explained that lawyers "hold[] a position of independence, between the wealthy and the people, prepared to curb the excesses of either"¹³⁴ both in their legal work and their public leadership. Brandeis described representation of corporate clients as equivalent to "statesmanship" and "diplomacy"¹³⁵ and sought solutions to client problems that benefited all parties to the "situation."¹³⁶ With regard to legislation, he urged lawyers to

129. See Pearce & Wald, *supra* note 29.

130. See Galston, *supra* note 97, at 2.

131. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992). See generally GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1993).

132. See Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1342; Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 403 (2001) [hereinafter *Lawyers as America's Governing Class*]; see also Pearce, *The Professionalism Paradigm Shift*, *supra* note 14, at 1238; Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L. J. 909, 928-36 (2009) [hereinafter *Loyalty in Limbo*].

133. See Pearce, *Lawyers as America's Governing Class*, *supra* note 132, at 391; Pearce, *The Professionalism Paradigm Shift*, *supra* note 14, at 1241; Wald, *Loyalty in Limbo*, *supra* note 132 at 928-36.

134. BRANDEIS, *supra* note 25, at 337.

135. *Id.* at 335. In court, the lawyer's duty was to pursue the client's case "fairly and well," not to destroy the other side. In "the greater part of" lawyer's work, "advising men on important matters, and mainly in business affairs," lawyers deal with "questions of statesmanship" and "exercise . . . the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in . . . matters of state." Indeed, noted Brandeis, "[t]he relations between rival railroad systems are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to commoners or dependents." *Id.*

136. Pearce, *Lawyers as America's Governing Class*, *supra* note 132, at 402 n.194. Commentators identify the concept of "counsel for the situation" with Louis Brandeis. *Id.* In one famous instance, "Brandeis represented United Shoe in a dispute with its employees." *Id.* at 402. While "investigat[ing] the employees' complaints that they needed annual, rather

serve as the “people’s lawyer,”¹³⁷ to “fairly represent[]” the “public interest[,]”¹³⁸ and “to do a great work for this country.”¹³⁹ While some bar leaders criticized Brandeis for his political views and for his conception of “counsel for the situation,”¹⁴⁰ his relational understanding of the lawyer’s role was squarely in the mainstream of elite legal culture.

Relational approaches remained dominant until the 1960s. Sociologist Erwin Smigel’s famous study of Wall Street lawyers found that they considered themselves “guardians of the law” who advised their clients on the importance of respecting the spirit of the law and the public good.¹⁴¹ By the 1980s, surveys found that elite large law firm lawyers had abandoned this approach for the “neutral partisan[]” – or “hired gun” – perspective.¹⁴² For elite, large law firm lawyers practicing before the 1960s, a commitment to relational approaches and to the public good implicated two reinforcing conceptions. At the same time that these lawyers served the interests of corporate entities and of their powerful leaders, they understood those interests to be consistent with those of America and Americans. They conceived of their jobs as trusted advisors to corporate entities as entailing, in Elihu Root’s famous words, telling the clients that “they were damn fools and should stop,”¹⁴³ when they acted contrary to those interests. In other words, elite lawyers rejected autonomous self-interest and advised their clients in the spirit of relational self-interest.

At the same time, commitment to the public also meant actual public service. It was not uncommon for elite lawyers in the first half of the twentieth century to shuttle between high-level government positions in Washington, D.C. and private law practice in Wall Street’s large firms.¹⁴⁴ Being a lawyer thus meant believing in and working toward the public interest, which meant more than simply pursuing the interests of one’s clients.

Commitment to the public good informed by a relational approach was not limited to elite lawyers in large law firms. Many lawyers practicing both in large metropolitans and in rural areas thought of themselves as generalists and trusted advisors. Clients came to them not merely to solve legal problems, narrowly and technically defined. Rather, clients came to seek

than seasonal, employment[,]” Brandeis “determined that these claims were legitimate and worked with his client to revamp the plants’ manufacturing schedule in a manner Brandeis believed to be in the best interest of both his client and the employees.” *Id.* at 402.

137. *BRANDEIS*, *supra* note 25, at 337.

138. *Id.* at 341.

139. *Id.* at 343.

140. *Id.* at 402.

141. *See generally* ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964).

142. *See* DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 9 (2007).

143. 1 PHILIP C. JESSUP, *ELIHU ROOT* 133 (1938).

144. *See* Smigel, *supra* note 141.

advice and to solve problems. In this sense, lawyers were not merely advocates of clients' interests, they were trusted advisors, public citizens, and civic leaders. Clients sought holistic solutions from their lawyers-statesmen and expected their attorneys to exercise prudent practical wisdom. Lawyers in turn would offer advice that was more relational in nature.¹⁴⁵

In contrast, grounded in autonomous self-interest, the neutral partisan discarded relational self-interest and the public good. The lawyer's job was to maximize the client's autonomous self-interest subject only to the law,¹⁴⁶ and in so doing the lawyer faced no restraints on the client's or the lawyer's autonomous self-interest. According to commentators, the neutral partisan's role was to serve as an extreme partisan on behalf of the client and to have no moral accountability for the actions of the client, or of the lawyer, for pursuing the client's objectives within the bounds of the law.¹⁴⁷ Moreover, maximizing autonomous self-interest often discouraged lawyers from counseling clients on morality, the public good, and the spirit of the law.¹⁴⁸ For example, the Tennessee Supreme Court Board of Professional Responsibility advised a lawyer who believed abortion to be murder that it would be unprofessional to advise a teenage girl seeking court approval for an abortion without her parent's consent on either alternatives to abortion or the possibility of consulting her parents.¹⁴⁹

Similarly, for the neutral partisan, autonomous self-interest tended to discourage consideration of relational concerns, such as the impact on civil society, in the lawyer's conduct. Illustrating this function is Lord Henry Brougham's famous credo, a significant but minority view of the lawyer's

145. See JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* 13–34 (1967); DONALD D. LANDON, *COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE* 19–33 (1990).

146. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 115–16 (1978).

147. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 672–75 (1978); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617. See generally Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150–71 (David Luban ed., 1984); Russell G. Pearce, *Professional Responsibility for the Age of Obama: Reviewing David Luban, Legal Ethics and Human Dignity*, 22 GEO. J. LEGAL ETHICS 1594, 1600 (2009) [hereinafter *Age of Obama*]; Wald, *Loyalty in Limbo*, *supra* note 132 at 928–36.

148. Pearce, *Age of Obama*, *supra* note 147, at 1600. See generally LUBAN, *supra* note 142, at 9–11.

149. See Bd. of Prof'l Responsibility of the Sup. Ct. of Tenn., Formal Ethics Op. 96-F-140 (1996); see also Tenn. Code Ann. § 37-10-303(b) (Supp. 1997). Under § 37-10-303(b), “[i]f . . . the minor elects not to seek consent of the parent or legal guardian whose consent is required, then the minor may petition, on the minor's own behalf, or by next friend, the juvenile court of any county of this state for a waiver of the consent requirement”

role prior to the 1960s.¹⁵⁰ Described by commentators as the “famous statement” of zealous representation,¹⁵¹ Brougham’s credo straightforwardly rejected any responsibility for the public good. He expressly asserted that lawyers had a duty to promote the client’s autonomous self-interest even though it would bring “destruction . . . upon others[,]” and “[s]eparating the duty of a patriot from that of an advocate,” the lawyer would have to “involve his country in confusion.”¹⁵²

Although some commentators have argued that Lord Brougham’s comments were limited to the context of defending criminals,¹⁵³ others have built on the insights of autonomous self-interest to provide a more general theory of law practice. In his famous “amoral” account of a lawyer’s role, Stephen Pepper, for example, has argued that lawyers ought to serve the autonomous self-interest of their clients in order to allow clients to act as autonomous first-class-citizens in a highly regulated society.¹⁵⁴ To be fair, Pepper has also argued that lawyers ought to engage in a moral dialogue with their clients and attempt to dissuade clients from conduct that is harmful to others,¹⁵⁵ but has concluded that ultimately the preferable framework for client representation is that of the client autonomously pursuing autonomous self-interest as a Holmesian bad person. Given the dominance of autonomous self-interest, a perspective that permits autonomous self-interest

150. See Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1350.

151. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 71–73 (1990). See also Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991) (describing it as “the legal profession’s basic narrative”).

152. SHARSWOOD, *supra* note 131, at 87. Brougham’s entire statement strongly endorsed autonomous self-interest as the lawyer’s goal:

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.

Id. For a debate on Brougham’s views, compare Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 6 (2005) (arguing that lawyers’ duties of zealous advocacy to a client are limited by duties implicit in the lawyer’s professional role), with FREEDMAN, *supra* note 151, at 71–77 (emphasizing lawyers’ duties to zealously advocate for clients).

153. FREEDMAN, *supra* note 151, at 72. See generally Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470–74 (1966).

154. See Pepper, *supra* note 147, at 615–19.

155. *Id.*

only serves to foster it; producing lawyers (and clients) who are autonomously self-interested.¹⁵⁶

To be sure, old professional ideologies were not merely relational or solely about the public interest. First, under the guise of relational self-interest some lawyers adopted a paternalistic approach: their advice often reflected not their understanding and appreciation of their clients' relational interests, but rather their own commitments, values and judgments as to what the client ought to be doing.¹⁵⁷ Notably, while sometimes this may have been done to promote the lawyer's self-interest, it may also have served the lawyer's good faith understanding of the public good. Solo practitioners, for example, were often among the most educated people in their communities and their advice may have reflected paternalistic visions of what was good for their community.¹⁵⁸ Even elite lawyers, who often shared elevated ethnoreligious background, socioeconomic and cultural status with the elite corporate decision-makers they served, may have joined in exhibiting paternalism toward shareholders. These lawyers may have given advice that appeared relational but was actually paternalistic.¹⁵⁹

Second, lawyers' relational approach was arguably self-serving. It helped lawyers as an exclusive professional community to build and secure

156. Pepper is by no means alone among legal ethics theorists whose insightful analyses are influenced by autonomous self-interest. Bradley Wendel's powerful recent account of lawyers' fidelity to the law is equally subject to the criticism that the dominance of autonomous self-interest would lead lawyers, in good faith, to understand and interpret the law expansively to allow clients to pursue their narrow self-interest in disregard of the public good. *See, e.g.,* W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO THE LAW* (2011). Even critics of the hired gun ideology have been influenced by the dominance of autonomous self-interest. David Luban's celebrated rejection of the "standard conception" of lawyers' role morality and his insistence of the relevance of common morality to lawyers' practice is somewhat less compelling if autonomous self-interest forms not only lawyers' role morality but also our common morality. LUBAN, *supra* note 142, at 9. Similarly, William Simon's theory of lawyering based on a conception of justice is less compelling if lawyers' good faith construction and understanding of justice is framed by autonomous self-interest. The dominance of autonomous self-interest either undermines the appeal of these approaches or encourages lawyers to construe them consistent with autonomous self-interest.

157. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 96 (1974).

158. *See, e.g.,* Rosenthal, *supra* note 157; Jerome Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (1962).

159. Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 *STAN. L. REV.* 1803, 1822–23 (2008); *see also* David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES*, at 68 (1998) (exploring types of attorney-client relationships and situations in which lawyers treat their clients paternalistically). *See generally* PAUL D. CARRINGTON, *STEWARDS OF DEMOCRACY: LAW AS A PUBLIC PROFESSION* (1999) (arguing lawyers' exercise of elitist paternalism vis-à-vis a passive citizenry).

their role as the governing class of American society.¹⁶⁰ Generalist lawyers, by giving relational advice to clients, helped build their own status as civic leaders within their communities. Elite lawyers, by promoting client conduct which was relational and in the interest of both clients and society, earned the respect and cemented the standing that in turn would help them obtain appointment to public office. At the same time, for the many attorneys who truly believed that having members of the bar at the helm was good not only for lawyers but also for American society, their pursuit of relational self-interest appropriately served the goal of mutual benefit. It served the interests both of lawyers and of the community.¹⁶¹

Our point, therefore, is not to suggest that lawyers of the past were driven by relational self-interest alone or that they served their clients and communities selflessly. Indeed, the ethic of relational self-interest is not selflessness but rather mutual benefit. We argue instead that the neutral partisan ideology has made it less likely that lawyers would think that they should tell clients that they are “damn fools and should stop”¹⁶² when clients purport to act in a legal manner that disregards cooperation, trust, or causes harm to others. Conceiving of their clients as autonomously self-interested individuals and entities, lawyers are more likely to assume and facilitate their clients’ autonomous self-interest, or accept without comment and challenge client objectives that are decidedly non-relational.

Moreover, the advent of autonomous self-interest makes it more likely that lawyers would think of *themselves* as autonomously self-interested individuals and will be less likely to shuttle between the public and private spheres. As lawyers increasingly bought into the vision of autonomous self-interest and of the public interest as consisting as nothing more of the aggregate of clients’ private interests, they were less likely to be willing to serve in public office. When they did, they were less inclined to consider it an obligation to the public good and more inclined to view it as part of a “revolving door” strategy to increase their marketability in the private sector.¹⁶³

160. Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1879–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 51–74 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

161. Anthony Kronman’s otherwise powerful account of the decline of the lawyer-statesman and his ability to exercise practical wisdom on behalf of clients and society has been compellingly criticized for this very point – its failure to also note that lawyers’ exercise of practical wisdom as part of their role as lawyers-statesmen was not only beneficial to society but also quite beneficial to lawyers themselves. Compare KRONMAN, *LOST LAWYER*, *supra* note 104, at 161, with Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1179 (1995).

162. See HANDLER, *supra* note 145.

163. See, e.g., Jeremy Pelofsky, *AT&T, T-Mobile hire legal all-stars to save deal*, REUTERS (Sept. 22, 2011) <http://www.reuters.com/article/2011/09/22/us-att-tmobile-lawyers->

They also became less civil to each other and to nonlawyers, because civility was no longer a constitutive element of what it meant to be a lawyer. To the contrary, being an effective neutral advocate often called for being aggressive, even uncivil.

B. Lawyers' Embrace of Autonomous Self-Interest

As we have seen, the rise of autonomous self-interest and decline of relational self-interest has afflicted American culture at large, including members of the legal profession. Over time, autonomous self-interest has come to shape clients' expectations of their lawyers and lawyers' understanding of their professional roles. Several unique factors, however, help explain the particular hold autonomous self-interest has had on American lawyers.¹⁶⁴

First, the exponential growth in the size of the legal profession since the 1960s has fostered conditions hospitable to autonomously self-interested approaches.¹⁶⁵ The growing heterogeneity of the profession destabilized the shared vision and cultural understandings that formed the basis for the formation of relational approaches among a culturally homogenous elite, and the sheer size of the bar made it increasingly less likely that lawyers, even in specific locales and practice areas would get to know each other well enough to form relationships conducive to the development of relational

idUSTRE78L38Y20110922. See generally Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (criticizing the under-developed and narrow scope of contemporary understanding of lawyers' civic role as public citizens).

164. Some commentators have argued that law's masculine aggression and incivility are a reflection of the male identity of generations of lawyers and have speculated that as the number of women lawyers and their influences in the profession continues to increase, the Bar will become less combative and more civil. See Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897, 898 (1986); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 312–19 (1998); Susan Daicoff, *Lawyer, Be Thyself: An Empirical Investigation of the Relationship Between the Ethic of Care, the Feeling Decisionmaking Preference, and Lawyer Wellbeing*, 16 VA. J. SOC. POL'Y & L. 87, 115–18 (2008); Carrie Menkel-Meadow, Review Essay, *What's Gender Got to Do With It?: The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 285–89 (1996).

We leave exploring the relationship between lawyer incivility and a feminine-inspired and modeled ethic of care to another day. While history teaches us that male lawyers are clearly capable of practicing pursuant to relational attitudes and that the rise of autonomous self-interest within the profession, at least as of the mid-1980s, took place when female lawyers constituted a significant and increasing segment of the profession, the question remains whether female (and male) attorneys committed to the ethic of care are more likely to accept and practice relationally. See, e.g., RAND JACK AND DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

165. See Gee & Garner, *supra* note 15, at 181; Richard, *supra* note 15.

perspectives. No doubt, the growing diversity of the bar is vital to the realization of a just legal system, but absent a relational approach embracing diversity, the growth of the profession in overall size, in the identity and background of its members and their plurality of values, visions, and understandings of their role had the unintended and undesirable consequence of weakening relational perspectives grounded in homogeneity and enhancing autonomous self-interest.¹⁶⁶

Second, increased competition in the market for legal services has weakened long-lasting relationships between clients and law firms, both diminishing lawyers' opportunities to provide relational advice to clients and making attorneys less inclined to practice relationally when such opportunities do present themselves. Consider, for example, the case of elite large law firm lawyers. Large law firms once had stable, long-term relationships with their large institutional clients. Lawyers and clients both viewed these representations as relational, and lawyers were able to serve as trusted advisors who could, when appropriate, preach and teach relational self-interest. During the last quarter century, as autonomous self-interest became more important to clients and to lawyers, competition changed the nature of these attorney-client relationships. Large law firms no longer have exclusive longstanding relationships with large entity clients.¹⁶⁷ Clients typically employ a large number of law firms and require law firms to compete for their business. As a result, lawyers often represent their clients in a short-term engagement and in only a part of the entire deal or transaction.¹⁶⁸ In such a competitive environment, absent a countervailing culture of mutual benefit, lawyers are likely to feel less secure in offering relational advice and more inclined to offer aggressive advice in pursuit of the client's autonomous self-interest. To borrow again from Elihu Root, a lawyer who is competing for business in a culture of autonomous self-interest is less likely to tell the

166. As we note above, the rise of autonomous self-interest as a dominant cultural way of understanding one's role and legitimate conduct is not inconsistent with adopting relational approaches intra-group, while pursuing increasingly aggressive and uncivil approaches vis-à-vis individuals and groups perceived to be the "adversary" and not fellow human beings. See Gee & Garner, *supra* note 15. Similarly, while the growing diversity of the profession has resulted in the development of some relational approaches practiced by sub-groups within the Bar, overall the profession features greater stratification and polarization.

167. See KRONMAN, *LOST LAWYER*, *supra* note 104, at 282–91; David B. Wilkins, *Teams of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2080–85 (2010).

168. See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867, 1878 (2008); Wilkins, *supra* note 167.

client that he is a damn fool and more likely to do the client's bidding for fear of losing the client's business.¹⁶⁹

Similarly, competitive pressures, both the desire to please and retain existing clients and the need to expand one's client base by seeing more clients and billing more effectively, have resulted in incentives for solo practitioners to spend less time with clients, making them less likely to be able and willing to practice relationally.¹⁷⁰ This result was not inevitable. An ethic of mutual benefit is entirely consistent with competition. Yet, increasingly competitive practice realities have changed the lawyer-client relationship from a location that naturally encouraged mutual benefit and relational self-interest to one where autonomous self-interest appeared the easier strategy, diminishing the ability and willingness of lawyers to practice relationally and act as civics teachers.¹⁷¹ Of course, maintaining strong relationships with clients continues to be of great importance to lawyers. Indeed, the partners who succeed in bringing in business in today's competitive marketplace for legal services are the lawyers who understand the importance of behaving relationally toward clients.¹⁷² At the same time, the expectations of many clients regarding the meaning of their relationships with their lawyers have changed in a way that makes sustaining these relationships more challenging.

Third, the increased specialization of legal services has similarly complicated and constrained the ability of lawyers to act as trusted advisors. In historical context, the lawyer acting as a trusted advisor was a generalist. Lawyers' broad expertise often offered them the opportunity to develop an informed perspective and counsel their clients strategically on a wide range of issues. This tradition, however, did not prepare lawyers for finding a

169. See *supra* note 143; SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 4 (1994).

170. Leslie C. Levin's and Rick Abel's studies of immigration lawyers offer a vivid and striking account of the consequences of increased competition on the practice and lives of solo and small firm attorneys. Richard A. Abel, *Practicing Immigration Law in Filene's Basement*, 84 N. C. L. REV. 1449 (2006); Leslie C. Levin, *Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers*, 34 LAW & SOC. INQUIRY 399 (2009); see also Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309 (2004).

171. As is the case with the growth in the size of the profession, we are not making a normative judgment suggesting that increased competition is undesirable from lawyers', clients', and society's perspectives, nor do we mean to imply that but for increased competition relational approaches among lawyers would flourish. Rather, we note that increased competition in the market for legal services has served to undermine the foundation for relational perspectives among lawyers and to support the rise of autonomous self-interest.

172. See, e.g., Alan Feuer, *Trauma Surgeon of Wall Street*, N. Y. Times, Nov. 13, 2009, <http://www.nytimes.com/2009/11/15/nyregion/15cohen.html?pagewanted=all>; Renee Ciria-Cruz, *Getting Down to Business: Pressure grows to retain clients and find new ones*, *California Lawyer*, April 2010, <http://www.callawyer.com/story.cfm?eid=908794&evid=1>.

relational perspective in a legal world characterized by increased specialization. Specialization made the task of relational lawyering more challenging. From their increasingly narrow perspective, lawyers understandably viewed themselves as lacking the capacity to learn, understand and advise clients regarding the broad impact of the legal representation.¹⁷³ Although specialization, in and of itself, does not exclude relational lawyering, it does complicate the task, especially in a circumstance where autonomous self-interest has become the cultural default.

Fourth, the changing organization of law firms also challenged relational self-interest among and between lawyers. Lawyers had imbued the traditional law firm partnership with thick fiduciary duties and a relational aura. As law firms grew larger, increased mobility has become the norm and an “eat what you kill” culture had gradually replaced old notions of loyalty to the firm,¹⁷⁴ lawyers viewed changes away from that model as representing and validating autonomous self-interest. For example, as large law firms grew, it became impractical for the partners to manage the firms effectively as a committee of the whole. Large law firms became more bureaucratic as they transferred power and authority from individual lawyers to managing committees, replacing relational and more democratic managerial systems with more impersonal centralized procedures.¹⁷⁵

Firms also adopted risk management procedures that for better or worse also displaced the exercise of discretion by mutually respectful lawyers in the idealized partnerships of the past.¹⁷⁶ The point, to be clear, is not to naïvely suggest that the old systems of governance and risk management worked effectively or reflected relational commitments. To the contrary, as Nelson compellingly documented, informal collegial partnerships produced hierarchies in which powerful partners dominated weaker ones.¹⁷⁷ Nor is it to deny the importance and usefulness of risk management procedures properly implemented. Nonetheless, the new risk management landscape with its emphasis on bureaucracy and managed decision-making might be misunderstood by lawyers resenting the loss of their autonomy and decision-making authority vis-à-vis the firm as being less conducive toward relational approaches.

173. See KRONMAN, *LOST LAWYER*, *supra* note 104, at 288–91.

174. Galanter & Henderson, *supra* note 168; MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004).

175. Galanter & Henderson, *supra* note 168.

176. Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910 (2006); Stephan Landsman, *The Risk of Risk Management*, 78 FORDHAM L. REV. 2315, 2324–26 (2010); Wald, *A Primer on Diversity*, *supra* note 113, at 1125–29.

177. ROBERT L. NELSON, *PARTNERS WITH POWER, THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988).

Finally, where lawyers had traditionally contrasted profit seeking with relational professionalism,¹⁷⁸ the increased emphasis on the bottom-line of law practice across the legal profession, from large law firms' hyper-competitive "eat what you kill" ideology¹⁷⁹ to solo and small law firms' growing emphasis on fee collection,¹⁸⁰ tended to encourage lawyers to view themselves as autonomously self-interested. Law, of course, has always been essentially a for-profit endeavor, so we do not mean to evoke a naïve image of the profession in which money does not or should not play an important role. Rather, we observe that lawyers often found themselves unable and less willing to recognize and foster the relational elements that do exist in market relationships, vis-à-vis clients and colleagues alike.¹⁸¹

The growth of the profession, increased competition, increased specialization, the gradual shift of power and exercise of authority from individual lawyers to centralized decision-making processes, and changed professional ideologies are by no means negative developments. Rather, these profound changes are complex phenomena with many consequences for both lawyers and clients; some of which are positive, others negative. Yet two unintended consequences of these changes were the undermining of a traditional, relational, and professional ideology and the facilitation of autonomous self-interest. We argue that the rise of the "standard conception" and of a professional ideology that is grounded in autonomous self-interest is therefore not only a reflection of trends in American culture but also a product of specific changes to the practice realities of American lawyers. In the context of autonomous self-interest, when faced with increased competition, increased specialization, diminished ability to exercise professional judgment vis-à-vis increasingly powerful clients, centralized and institutionalized bureaucracy, and outside actors such as insurance companies, lawyers were susceptible to the ideology that dominated the general culture. The neutral partisan ideology, grounded in an understanding of both clients and lawyers as autonomous self-interested individuals, provided just that and proved to be popular with members of the bar.

178. Pearce, *The Professionalism Paradigm Shift*, *supra* note 14, at 1251.

179. REGAN, *supra* note 174, at 59–60. See generally Eli Wald, *Glass-ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245 (2010) (exploring the rise of hyper-competitive ideologies at large law firms).

180. American Bar Association, Commission on Professionalism, ' . . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism, reprinted in 112 F.R.D. 243, 259–60 (1986) (noting the increased emphasis on fee collection).

181. Bruni & Sugden, *supra* note 33.

C. Autonomous Self-Interest and Increased Lawyer Incivility

As the conception of the lawyer's role grounded in autonomous self-interest became dominant, bar leaders declared a "crisis of professionalism,"¹⁸² bemoaning lawyers' declining commitment to the public good.¹⁸³ Employing "apocalyptic" rhetoric, bar leaders complained that lawyers had abandoned professionalism's commitment to law "as a common calling in pursuit of public service"¹⁸⁴ and placed their financial interests above the public good.¹⁸⁵ They "asserted that lawyers, their ethics, and their professionalism are 'lost,' 'betrayed,' in 'decline,' in 'crisis,' facing 'demise,' near 'death,' and in need of 'redemption.'"¹⁸⁶ Explaining how lawyers "promote[d] private interests at the expense of the public good[,]""¹⁸⁷ commentators noted that lawyers advised clients "how to maximize material self-interest and ignore[] the public good because advising clients to avoid 'anti-social' conduct would undermine 'the marketing program.'"¹⁸⁸

And why would lawyers not place their own self-interest above all? As autonomously self-interested individuals, many lawyers came to understand their role as one that requires them to do nothing but aggressively help their clients pursue their own autonomous self-interest within the bounds of the law. Promoting private interests at the expense of the public good was not a problem—it was a job description. It became a way to advance the "public good" and to liberate lawyers from the duty to think seriously of themselves as public citizens.

A manifestation of the growing influence of autonomous self-interest on lawyers was their increasingly uncivil conduct. Lawyers treated practice

182. Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 62; see Pearce, *The Professionalism Paradigm Shift*, *supra* note 14, at 1256–63 (discussing how the unraveling of the Professionalism Paradigm "led leaders of an apprehensive legal community [to] fear[] for the profession's future."). See generally MARY A. GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); KRONMAN, *LOST LAWYER*, *supra* note 104; LINOWITZ & MAYER, *supra* note 169.

183. See American Bar Association, *supra* note 180.

184. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

185. Pearce, *The Professionalism Paradigm Shift*, *supra* note 14, at 1253 ("Instead of mediating between the interests of business and the public, lawyers promoted the interests of business . . .").

186. *Id.* at 1257.

187. Pearce, *Lawyers as America's Governing Class*, *supra* note 132, at 411.

188. *Id.* Commentators also note that "[N]obody ever lost a client by doing exactly what the fellow wanted, but much lucrative legal work has been sacrificed by lawyers who regretfully told prospective clients that this was something they were not willing to do." LINOWITZ & MAYER, *supra* note 169, at 18–19. See generally Austin Sarat, *Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation*, 67 *FORDHAM L. REV.* 809 (1998).

as a “zero-sum game”¹⁸⁹ and engaged in “public ridicule, derision, and insult.”¹⁹⁰ As a judge noted, “There must be a way to continue the spirit of the adversarial profession of law without the mentality of warfare and bitterness. We have lost sight of the fact that we are all brothers and sisters of a truly noble profession.”¹⁹¹ A study conducted with lawyers from Illinois, Indiana, and Wisconsin found that sixty-one percent of lawyers said “civility problems exist” and sixty-nine “percent of responding judges and [fifty-five] percent of lawyers s[aid] that current civility problems represent a change.”¹⁹² In a District of Columbia survey more than half of the lawyers and eighty percent of judges said they had witnessed incivility between lawyers.¹⁹³

Examples of uncivil behavior include discourtesy, use of insults, and growing intolerance displayed by attorneys toward opposing counsel, judges, court personnel and third parties.¹⁹⁴ A court described the conduct of a “successful trial lawyer” as “‘disrespectful and contumacious’ and ‘beyond the pale of civilized conduct’” for the frequent use of insults and profanity.¹⁹⁵ In another litigation between two large corporations, a prominent litigator said to opposing counsel, “‘Don’t ‘Joe’ me asshole. . . . I’m tired of you. You could gag a maggot off a meat wagon.’”¹⁹⁶ He added, “‘You don’t know what you’re doing. Obviously someone wrote out a long outline of stuff for you to ask. You have no concept of what you’re doing.’”¹⁹⁷ In yet another case, the court described as “‘demeaning and undignified’” a male attorney’s “reference to a younger female attorney as ‘little lady,’ ‘little mouse,’ ‘young girl,’ and ‘little girl[.]’”¹⁹⁸

In addition to insults, lawyer incivility meant treating relations with adversaries as a “zero-sum game,” in which one’s gain can only come at an opponent’s expense. As one judge noted, “[g]amesmanship is the norm in discovery” and lawyers viewed litigation as “‘set up to be a fight’ . . . in

189. HUNTER, *CULTURE WARS*, *supra* note 49, at 136.

190. *Id.*

191. Marvin E. Aspen, *Doing Something About Civility in Litigation*, LITIG., Winter 1992, at 4.

192. *Id.* at 3–4.

193. Sandra Torrey, *Disorder in the Court! New Codes Call for Good Behavior*, WASH. POST, June 24, 1996, at F7; *see generally* Kara Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815 (1999).

194. *Id.*

195. Piazzola, *supra* note 27, at 1203 (quoting *Saldana v. Kmart Corp.*, 84 F. Supp. 2d 629, 639–40 (D.V.I. 1999)).

196. *Id.* at 1206 (quoting *Paramount Commc’ns v. QVC Network*, 637 A.2d 34, 54 (Del. 1994)).

197. *Id.*

198. *Id.* at 1206 n.55 (citing *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 185 (Sup. Ct. 1992)).

which the norm is, ‘when in doubt be tough.’”¹⁹⁹ Many lawyers took this strategy to its logical extreme and engaged in “‘Rambo’-style discovery.”²⁰⁰

Bar leaders responded by exhorting lawyers to recommit themselves to civility and the public good; creating commissions, promulgating professionalism and civility codes; and instituting mandatory continuing legal education requirements to achieve these goals.²⁰¹ In times of crisis where the bar has faced mounting criticisms not only for its displays of incivility but also for pushing the autonomous self-interested ideology too far representing clients too aggressively at the expense of the public, the profession has even experimented with ideas about new professional paradigms and roles for lawyers, mostly to be abandoned as the storms of criticisms passed.²⁰² None of these strategies have succeeded in changing the dominant legal culture, in part because they did not directly address the dominant culture of autonomous self-interest, instead focusing on some of its symptoms and manifestations.²⁰³

199. Sarat, *supra* note 188, at 819.

200. Final Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 441, 445 (1992).

201. Piazzola, *supra* note 27, at 1200 n.27 (“Just three years after the Seventh Circuit’s adoption of its Final Report, nearly one hundred jurisdictions had adopted civility codes.”); *see, e.g.*, ABA TORT TRIAL AND INSURANCE PRACTICE SECTION, A LAWYER’S CREED OF PROFESSIONALISM (1988); ABA YOUNG LAWYERS DIVISION, LAWYER’S PLEDGE OF PROFESSIONALISM (1988); STATE BAR OF CALIFORNIA LITIGATION SECTION, MODEL CODE OF CIVILITY AND PROFESSIONALISM (2006); *see also* Bruce A. Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729, 729–30 (2001).

202. Most recently, in the aftermath of corporate scandals and criticisms of large corporate entities’ and their managers’ aggressive pursuit of autonomous self-interest to the great detriment of their shareholders and society, many have called for a new role for in-house lawyers and outside counsel as gate-keepers, in which they would be called upon to exhibit a more responsible—and possibly relational—approach. *See, e.g.*, JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 231–32, 348–51 (2006); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1204 (2003) (exploring the role of lawyers in the corporate meltdown of the 1990s). *See generally* William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003). *Cf.* Susan Daicoff, *Making Law Therapeutic For Lawyers: Therapeutic Jurisprudence, Preventive Law, and the Psychology of Lawyers*, 5 PSYCH., PUB. POL’Y. & LAW 811 (1999). As external criticisms of the profession declined, so did the profession’s willingness to seriously entertain reform. *See* Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 151–52 (2011).

203. Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1342; Susan Daicoff, *Asking Leopards to Change Their Spots: Can Lawyers Change? A Critique of Solutions to Professionalism by Reference to Empirically-Derived Attributes*, 11 GEO. J. LEGAL ETHICS 547 (1998).

IV. LAWYERS' DUTY TO BECOME MORE RELATIONAL AND HELP RESTORE CIVILITY

Lawyers play a major role in shaping civic culture both in their everyday practice and in their civic leadership. In this dual role, they have a responsibility as public citizens to help restore civility and facilitate a revival of a civic culture grounded in relational self-interest.²⁰⁴ In restoring civility, lawyers' emphasis should be on teaching and modeling it: not only in being civil toward opposing counsel, judges, court personnel and third parties, but also in at least discussing with clients, if not advising, relational solutions and avoiding fostering the culture of autonomous self-interest. Given the dominance of autonomous self-interest and the growing expectations of clients that lawyers serve their narrow interests aggressively, teaching, preaching and advising relational self-interest may not be easy and may come at a cost. Yet if lawyers fulfill this duty, they will assist healing both the legal profession and our civic culture.

A. Lawyers as Civics Teachers

Building on the work of Lon Fuller and David Luban, Bruce Green and Russell Pearce have explained that lawyers serve as "civics teachers."²⁰⁵ They play a disproportionately large role in political leadership and frequently serve as community leaders.²⁰⁶ In both this leadership role and in counseling clients in private practice, "lawyers invariably teach not only about the law and legal institutions, but also, for better or worse, about rights and obligations in a civil society that may not be established by enforceable law—including ideas about fair dealing, respect for others, and, generally, concern for the public good."²⁰⁷ In everyday practice, lawyers' teaching extends beyond client counseling to the model they present and the influence they have both directly and indirectly on their clients' family, friends, neighbors, and adversaries, as well as members of the general public.²⁰⁸

Accordingly, whether lawyers want to or not, they play an important role in educating their fellow citizens about civic obligations. Lawyers' role as civics teachers stems from the role law plays in American public life, public discourse, and even private life. Exactly because law is our social

204. Rhode, *supra* note 163.

205. Green & Pearce, *supra* note 19, at 1212.

206. Stephen Breyer, *The Legal Profession and Public Service*, 57 N.Y.U. ANN. SURV. AM. L. 403, 409–10 (2000).

207. Green & Pearce, *supra* note 19, at 1212.

208. *Id.* at 1214.

glue, capturing our common ground and our shared commitments,²⁰⁹ lawyers, as high priests of this civic religion, play a constitutive role in explaining and demonstrating the meaning of law, including civility, not only in the terms of being polite and courteous to each other, but more importantly in terms of creating the space to engage substantively, especially when we strongly disagree on the merits.

That lawyers serve as civics teachers—whether they like it or not—imposes on them specific obligations. To be sure, acting as civic teachers certainly has its perks: it sustains lawyers' status as influential actors in our public and private lives; and elevates attorneys' cultural and social standing. Yet the role also imposes costs on members of the profession. As we have seen, the decline of civility and rise of incivility are in part driven by practice conditions and clients' expectations of lawyers. Insisting on and persisting with civility might displease certain clients and might burden attorney-client relationships in a competitive era in which these very relationships are unstable and in which lawyers do not wish to further undermine these relationships. Yet as long as law plays such a constitutive role in our public and private lives, lawyers as lawyers must accept and act on their responsibility as civics teachers.

Indeed, lawyers cannot avoid being civics teachers because the task is inherent to the meaning of law practice and membership in the American legal profession. The question, therefore, is not whether lawyers model modes of communication and civic engagement to their clients, rather, it is what models of discourse attorneys do and should teach.

Moreover, when lawyers serve as civics teachers, they must strive to be good effective educators. We argue that lawyers have been poor civics teachers as of late, succumbing to and modeling incivility and unrestrained autonomous self-interest. Today, many lawyers teach a civic version of autonomous self-interest—the ethic of the Holmesian bad man who seeks to get away with what he can within the bounds of the law.²¹⁰ In the public sphere this has contributed to the current civic malaise. Lawyers have the opportunity instead to take an active role in reintroducing relational self-interest into our public and private conversations. When lawyers embrace a relational self-interest approach to their role, they are able to teach that citizens have an obligation to the spirit of the law and the public good.

209. Gordon, *supra* note 160.

210. See generally Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458–60 (1897) (address at the dedication of the New Hall of the Boston University School of Law on January 8, 1897).

B. What Lawyers Should Model as Civics Teachers

First and foremost, lawyers must model and teach civility. Lawyers must demonstrate mutual respect, courtesy, trust, and cooperation. Civility starts in lawyers' interactions with their own clients. It calls for effective communications with clients, for prompt return of client calls and requests for information, for reasonable updates regarding material developments in the case, and for respectful emails.²¹¹ Civility continues with polite and respectful exchanges with lawyers' own staff, opposing counsel, opposing parties, witnesses, court personnel, and other third parties.²¹² It necessitates refraining from the use of abusive language and tactics, such as name-calling and the imposition of strategic delays and costs in litigation and business negotiations.²¹³

Teaching civility also includes demonstrating a commitment to sustaining a space for communications and engagement, even in disagreement. It includes modeling to clients the ability to "agree to disagree" and the commitment to "keep talking" even when some substantive disagreements remain. Lawyers as lawyers can and should teach that public and private exchanges do not always have to become personal; rather, we ought to strive to treat substantive disagreements as such and not vilify the opposition. Some lawyers in various practice areas have long tried to preach and teach these very relational insights,²¹⁴ but the practice has come less common and less legitimate. Lawyers ought to demonstrate a commitment to civility in the sense of dignity and respect for others in all aspects of their practice and professional lives such as in litigation and business negotiating, especially when substantive disagreements abound and the parties are adversarial and bitter, an approach that would benefit clients both in the short run in terms of a more amicable resolution of particular disputes and in the long run in terms of adopting a more relational and civil habits of mind and action.

211. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 777 (2008).

212. Several jurisdictions, for example, have explicitly designated discriminatory talk as professional misconduct. See Wald, *A Primer on Diversity*, *supra* note 113 at 1113–15 (summarizing and assessing various states' approaches to regulating discriminatory talk and conduct in the practice of law).

213. See, e.g., W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895 (1996). For a recent and growing movement to encourage relational approaches in the discovery stage led by the Sedona Conference, see http://www.thesedonaconference.org/content/tsc_cooperation_proclamation.

214. LYNN MATHER ET AL., *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* 10–12 (2001) (examining relational perspectives among family law attorneys); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 56–58 (1963) (studying relational approaches in commercial law).

Finally, teaching civility should include a commitment to introducing and discussing relational self-interest perspectives when representing clients. To be clear, this does not mean imposing ideas, perspectives, or solutions on clients. But it does entail a commitment to pointing out, in context, the impact and dominance of autonomous self-interest and suggesting relational approaches. This is not going to be easy; clients have come to expect lawyers to champion autonomous self-interest and may reject relational self-interest. But it is a fight worth fighting. Some clients defer to their lawyers on some issues and may be willing to listen. And one should not underestimate the extent to which lawyers shape clients' expectations and conduct: aggressive, uncivil, autonomously self-interested lawyers tend to form and shape aggressive, uncivil, and autonomously self-interested clients. Courteous, civil, and relational lawyers may engage in conduct and dialogue that will encourage clients to be courteous, civil, and relational. Of course, some clients may insist on autonomously self-interested course of conduct, and lawyers will then normally abide by the clients' wishes, or in extreme situations may withdraw from such representations.

C. Lawyers as Civic Healers or Why Lawyers Should Advance Relational Self-Interest

A growing body of work in various disciplines shows that people tend to be cooperative and relational, naturally and intuitively understanding their own self-interest as related to and depending on the self-interest of others.²¹⁵ Moreover, relational self-interest is not only descriptively compelling, but normatively desirable. Mounting evidence, from mathematical and evolutionary biology²¹⁶ to cognitive psychology²¹⁷ and neuroscience²¹⁸ confirms that individuals tend to want to cooperate and are more successful when doing so.²¹⁹

Law's very essence – the peaceful resolution of disputes and the facilitation of cooperation – fits well within this relational perspective. That is not to suggest that autonomous self-interest has no plausible role to play in inform-

215. Pearce & Wald, *supra* note 29.

216. YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* 2–7 (2011) (asserting that evolution favors those driven to cooperate with other people).

217. MICHAEL TOMASELLO, *WHY WE COOPERATE* 4 (2009) (stating that children have a natural tendency to cooperate with others and that this tendency is something they do not learn from adults).

218. Daniel Siegel & Debra Pearce McCall, *Mindsight at work: an interpersonal neurobiology lens on leadership*, *NEUROLEADERSHIP JOURNAL*, 2009, at 1.

219. Legal scholarship lends further support to the desirability of relational perspectives. See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW, HOW NEIGHBORS SETTLE DISPUTES* (1991); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

ing some private and public discourse, rather, we argue that given the dominance of autonomous self-interest, lawyers should embrace and help restore relational self-interest as a meaningful counterforce. In particular, lawyers' duty to restore relational self-interest and heal our civic culture stems from the profession's past endorsement of autonomous self-interest and the role law and lawyers played in elevating autonomous self-interest to its current position of dominance. In sum, in their everyday practice lawyers should promote relational self-interest because it is good for clients and good for society (and, as we shall argue below, also good for lawyers).

D. Autonomous Self-interest, Relational Self-interest and Legal Ethics

While lawyers' professionalism and professional ethics is certainly consistent with autonomous self-interest, lawyers' ethics can also be read to support relational self-interest, transcend autonomous self-interest and allow lawyers to play a role in healing civil society. Roscoe Pound famously described a profession as "a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."²²⁰

This aspiration is at the core of legal ethics codes. The 1908 ABA Canons of Ethics explained that the "future of the Republic" depended upon lawyers' conduct²²¹ and the 1964 Model Code of Professional Responsibility declared that "lawyers, as guardians of the law, play a vital role in the preservation of society."²²² The ABA Model Rules of Professional Conduct, which form the basis of the codes that govern almost all jurisdictions today, similarly states that "[l]awyers play a vital role in the preservation of society."²²³ The Model Rules further note that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."²²⁴ Arguably rejecting an exclusive autonomously self-interested approach, the Rules assert that "a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service."²²⁵

While the dominant legal culture has changed with the decline of relational self-interest and the rise of autonomous self-interest, the goals and

220. POUND, *supra* note 184.

221. ABA CANONS OF ETHICS PREAMBLE (1908).

222. MODEL CODE OF PROF'L RESPONSIBILITY PREAMBLE (1964).

223. MODEL RULES OF PROF'L CONDUCT, PREAMBLE, Comment 13 (2010).

224. *Id.* at Comment 1.

225. *Id.* at Comment 7.

core commitments reflected in the ABA Canons, Model Code and Model Rules have remained intact for over a century. Put differently, the Model Rules are, and have always been, broad enough to encompass relational perspectives. What has changed is their narrow reading by lawyers, who celebrate autonomous self-interest by elevating their role as “representative[s] of clients,” to the exclusion of relational self-interest inherent in their role as “officer[s] of the legal system” and as “public citizen[s].”²²⁶

When lawyers teach relational self-interest in the public and private spheres, they fulfill these goals and commitments. They counsel clients to consider their association with a colleague or adversary as a relationship, to treat all people with respect, and to understand that their own self-interest ultimately requires obligations to the community and the law. Again, when lawyers do so, they will undoubtedly confront circumstances where their views differ from those of their clients. Here, lawyers would both teach and model respectful dialogue. Similarly, when interacting with colleagues, adversaries, and courts, as well as in their own civic activities, lawyers would employ relational self-interest to ground their actions in an ethic of mutual benefit that would exemplify civility. Relational self-interest does not discard self-interest or compromise the lawyer’s obligation to represent clients zealously. Rather, it grounds self-interest in the knowledge that the self is relational and that accordingly mutual benefit is both descriptively and normatively the preferred strategy.²²⁷

E. Are Lawyers Likely to Teach Civility and Promote Relational Self-Interest?

But why would an appeal to civility grounded in relational self-interest succeed? As noted above, efforts to promote civility in the public and private spheres and among lawyers have met with only very limited success. The bar’s reliance on assertions of a tradition of commitment to the public good are unpersuasive to lawyers who believe in autonomous self-interest and who reject as unpersuasive appeals that are not grounded in self-interest.²²⁸ For lawyers who believe in autonomous self-interest, appeals calling on them to “do the right thing,”²²⁹ pursue justice,²³⁰ or show fidelity

226. *Id.* at Comment 1; see Wald, *Loyalty in Limbo*, *supra* note 132, at 928–36.

227. *Cf.* Bruni & Sugden, *supra* note 33, at 35–64.

228. See Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1356–63; Daicoff, *supra* note 202.

229. David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 969 (1999).

230. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 54–62 (1998).

to the law,²³¹ are unpersuasive because they are understood as calling for giving legal advice that is inconsistent with clients' and lawyers' legitimate autonomous self-interests. Worse, they are understood as calling on lawyers to usurp the legitimate interests of their clients (and their own) in advancing their autonomy, and imply conceiving of lawyers as paternalistic philosopher kings who know better than their clients what is in their own self-interest. To begin with, because relational approaches take self-interest seriously, both in substance and in rhetoric, they are likely to be contemplated, or at least not quickly dismissed by a profession that has come to openly embrace aggressive pursuit of clients' and lawyers' self-interest as legitimate and desirable.

The first step toward becoming effective civics teachers in the spirit of relational self-interest is to educate lawyers about the value and desirability of relational self-interest. If lawyers do not embrace relational self-interest, they will not do a good job of teaching it, and will be more likely to succumb to pressures to abandon it in favor of autonomous self-interest. Elsewhere, we developed the claim that contemporary legal education has adopted the culture of autonomous self-interest, and we have called for reforms in legal education to encourage the formation of lawyers in the spirit of relational self-interest.²³² Here, suffice it to say that law students—who enter law schools as the product of American culture with its celebration of autonomous self-interest, who study law in institutions that explicitly and implicitly teach autonomous self-interest, and who enter a profession that has accepted a professional ethos built on the premise of autonomous self-interest—are more likely than not to end up as autonomously self-interested lawyers.²³³

231. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1341 (2009). See generally W. Bradley Wendel, *The Torture Memos and the Demands of Legality* (Cornell Law School, Research Paper No. 09-019, 2009), available at <http://ssrn.com/abstract=1422603>; WENDEL, *FIDELITY TO THE LAW*, *supra* note 156.

232. Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure to Advance Professional Values*, 23 *PACE L. REV.* 575, 591–95 (2003); see also WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 28–33 (2007); Roy Stuckey, Transcript, *Symposium: The Opportunity for Legal Education*, 59 *MERCER L. REV.* 859 (2007) (Stuckey is the lead author of ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007)). See also Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 *J. LEGAL EDUC.* 247 (1978).

233. See Pearce & Wald, *supra* note 29. We intend to explore these issues in greater detail in an article we are writing for a St. Thomas School of Law symposium on legal education and the formation of professional identity. Russell G. Pearce & Eli Wald, *Denial and Accountability in Legal Education: How Law Schools Fail to Meet Their Responsibility for the Formation of Professional Identity*, St. Thomas L. J. (forthcoming 2012).

The education of lawyers and the formation of professional identity are life-long processes.²³⁴ Law schools have a responsibility to advance relational self-interest as a meaningful alternative to autonomous self-interest, in partnership with bar associations, law firms and in conjunction with revised rules of professional conduct and regulatory enforcement. Bar associations, local and national, can foster relational perspectives by providing lawyers with opportunities to become involved in civic activities, educating the public about the law and offering training and mentoring. Law firms can attempt to combat the prevailing culture of autonomous self-interest by incentivizing their lawyers to act more relationally vis-à-vis opponents, clients, third-parties and the public. The organized bar can promulgate rules and clarifying comments explaining in greater detail the role of lawyers as “officers of the legal system” and as “public citizens,” and can encourage relational conduct by lawyers, for example, the provision of pro bono legal services and mentoring.²³⁵

If taught and advanced by all of these constituencies, civility grounded in relational self-interest has a chance to become once again a meaningful force in the lives of lawyers because it reflects what is good for clients, for society, and for lawyers. In the short-run, of course, avoiding dialogue with clients regarding their assertions of autonomous self-interest seems more consistent with lawyers’ own self-interest, especially in highly competitive times. Yet, both in the short and long-run relational self-interest is the better route. Not only are clients’ interests better served by advancing civility and suggesting relational self-interest approaches, but lawyers’ own careers are likely to become more meaningful and rewarding if members of the profession were to pursue relational self-interest.

The vast and complex literature on lawyers’ happiness and satisfaction suggests that two causes of dissatisfaction with the practice of law have to do with its harsh adversarial nature and lack of civility and with its amoral demands of serving clients who act as Holmesian bad men.²³⁶ A profession more accepting of and committed to relational self-interest is likely to experience less combative and abusive practices that its members complain

234. WILLIAM M SULLIVAN ET AL, EDUCATING LAWYERS – PREPARING FOR THE PROFESSION OF LAW (The Carnegie Foundation for the Advancement of Teaching, 2007); Verna E. Monson & Neil W. Hamilton, *Entering Law Students’ Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. LEGAL PROF. 385 (2011); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011). See also, Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982) (on the education of adult law students).

235. See Pearce & Wald, *supra* note 29.

236. See, e.g., NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

about. It is also less likely to experience the consequences of practicing law amorally, aggressively advocating on behalf of clients' autonomous self-interest with little regard to the consequences imposed on third parties and the public.

F. Are Lawyers Likely to Succeed in a Campaign to Heal Civic Discourse?

Just as efforts to promote civility among lawyers, clients and the public have failed to date for having not recognized and challenged the dominance of autonomous self-interest, so have similar attempts failed outside of the legal profession. Proponents of civility generally frame their arguments as if a binary exists between civility and self-interest. They rarely justify civility in terms of self-interest.²³⁷ In the culture of autonomous self-interest, a proposal that does not rely on self-interest is a non-starter. It appears naïve and disconnected from the reality of modern culture. From the perspective of autonomous self-interest, with its understanding of the public sphere as a zero-sum game, neither civility nor cooperation make sense other than in the instrumental way that would appeal to the Holmesian bad man. They would never be ends in themselves. Relational self-interest, however, which offers a vision of cooperation and respect while advancing self-interest, can become a meaningful part of how we think about and ultimately act, publically and privately.

To be sure, efforts to promote civility have failed for reasons that have little to do with autonomous self-interest. Arguments that link incivility with polarization often fail because of their internal inconsistency. Although civility and cooperation are relational values, some of their advocates take an autonomous self-interest approach to those with whom they disagree, labeling them as heretics.²³⁸ Similarly, in linking cooperation and civility with absence of polarization, they imply that disagreement itself is the source of the problem and that civility and cooperation will only emerge when a centrist position emerges.²³⁹ This approach does not reflect the reality of our political system where disagreement exists on many issues. Indeed, for issues like abortion and gay rights, or health care and collective bargaining rights, these differences are extremely contentious.²⁴⁰ More importantly, they simply confuse civility and the space for civic engagement with substantive agreement. The former simply does not require the latter.

237. Sarat, *supra* note 188.

238. See JOHN AVLON, *WINGNUTS: HOW THE LUNATIC FRINGE IS HIJACKING AMERICA* 167–84 (2010).

239. See, e.g., MORRIS P. FIORINA ET AL., *CULTURE WARS?: THE MYTH OF A POLARIZED AMERICA* 57–77 (3d ed. 2010).

240. See *id.*

Relational self-interest, in contrast, has a greater chance of succeeding in challenging the culture of autonomous self-interest and in promoting civility both because it accepts the reality of disagreement and views civility, the public good, and self-interest as inextricably connected. Civility and the public good are necessary to promote self-interest understood in relational terms. Relational self-interest, therefore, offers a way to begin a conversation with those who see the world through the lens of self-interest and seeks to challenge only their particular narrow understanding of self-interest. Faced with a challenge to their perspective of autonomous self-interest, most people, including many liberals, libertarians, and conservatives would have to admit that they live their lives in relational terms to a significant degree.²⁴¹ Indeed, successful political and community leaders have strong relational networks, even if they are limited to their own constituencies.²⁴²

Moreover, many in the public appear open to a relational perspective. The Presidential candidates that identified themselves as “unifiers, not dividers” won in 2000 and 2008, and an increasing number of commentators and organizations seek to restore civility. Even where the evidence indicated that uncivil rhetoric did not motivate the shooting of Congresswoman Giffords, many have responded with efforts to heal our civic culture.²⁴³

One objection that may arise to civility arguments grounded in relational self-interest is a practical one. From the perspective of autonomous self-interest, the public sphere is a zero-sum game where the most autonomously successful wins. It is a prisoner’s dilemma game where the non-cooperative, autonomous move generally provides the safest chance of winning.²⁴⁴ This perspective would not only justify the uncivil conduct, but it would also dictate that the proper response to incivility is further incivility. A civil response to an uncivil move would both look weak and be weak.²⁴⁵ Interestingly, even the prisoner’s dilemma game does not discard coopera-

241. See, e.g., Sugden, *supra* note 90.

242. See, e.g., BILL BISHOP, THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART 251 (2008).

243. See, e.g., the University of Arizona’s creation of a National Institute for Civil Discourse, *supra* note 5.

244. In game theory lingo, non-cooperation is a dominant strategy for each prisoner. Of course, the very point of the prisoners’ dilemma is to demonstrate that dominant strategies result in non-optimal outcomes for the prisoners and that cooperation would have yielded better results for both. See, e.g., Robert J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514–15 (1994).

245. Note that in the prisoner’s dilemma, both prisoners would be better off if they did not talk to the police and remained silent. But neither trusts the other, so both speak with the police and end up worse off. Put differently, in the absence of trust, both prisoners have a dominant strategy of not cooperating with each other, but the outcome for both is less than optimal. *Id.* at 514 n.15. Similarly, autonomous self-interest may be a dominant strategy, but it leads to sub-optimal outcomes.

tion. While it is the riskiest move, it also provides the greatest return if—and only if—the other player cooperates as well.

The answer to this objection from a relational perspective is that the autonomous perspective does not as a general matter reflect the reality of human relationships. If people are fundamentally relational, they will respond to relational appeals. In the prisoner's dilemma, the prisoners' core problem is a lack of trust and cooperation, the very conditions brought about by adherence to autonomous self-interest. Relational self-interest, on the other hand, is the very tool that may end up fostering sufficient trust and cooperation leading to better results for both prisoners. Assume that the prisoners had lawyers who could serve as teachers of relational approaches. Perhaps the prisoners would trust each other and avoid harsher penalties.²⁴⁶ As discussed in connection with Martin Luther King, Jr., a relational approach need neither look weak nor be weak.²⁴⁷

Another objection to relational approaches is that they are implausible—in a culture dominated by autonomous self-interest, lawyers and clients alike are simply going to reject appeals to relational self-interest. For example, assume that a lawyer attempts to model civility and also introduce relational insights in representing a client. The client rejects the teaching, insists that the lawyer adopts an aggressive adversarial posture on her behalf, and pursues an autonomously self-interested course of conduct. Should not the lawyer have to yield to the client's wishes?²⁴⁸ And would not the lawyer have every incentive to yield to the client, for fear of losing the client's business? In other words, the objection questions whether the attorney-client relationship, with its inherent power dynamics favoring principals-clients over lawyers-agents, is an arena in which lawyers can meaningfully and effectively teach and influence clients.

The example, we concede, is partly compelling on its own terms. While a lawyer should never conduct herself with incivility and clients should not be able to legitimately demand or insist on incivility, lawyers should ultimately yield to clients with regard to the objectives and the goals of the representation. And yet, the example completely misses the point of our argument. What we seek is a change in lawyers' and clients' dominant cultural perspective of autonomous self-interest. We argue for a change in the terms of and understanding of how people ought to interact with each other and specifically how lawyers ought to facilitate these exchanges. If lawyers were to adopt and pursue relational self-interest and were to effec-

246. Assuming, of course, that their lawyers will teach and advise relational conduct and not push their clients to act as autonomously self-interested actors.

247. A TESTAMENT OF HOPE, *supra* note 23.

248. ABA Model Rule 1.2 regarding the allocation of authority between attorney and client states that the client is ultimately responsible for setting the goals and objectives of the relationship. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2010).

tively teach and model it to clients, some clients would follow suit. Importantly, even a “failed” teaching moment, one in which a client insists on an autonomously self-interested course of conduct, is not a failure, but rather an opportunity to create the foundation for further dialogue in the future.²⁴⁹

Yet another objection is that intractable disagreements cannot be resolved relationally, and must be advocated by means of autonomous self-interest. People with fundamental views that conflict will not be able to engage in constructive dialogue—will never be able to make a difference in each other’s views. Therefore, some argue that these fundamental views should not properly be part of the public sphere,²⁵⁰ while others assert that the voting mechanism alone functions adequately to determine winners and losers on fundamental issues, regardless of the discord between opponents.²⁵¹ Relational self-interest, in contrast, posits that constructive dialogue and respectful relationships are possible and necessary for a well-functioning and healthy democracy even among, indeed, especially among, people with diametrically opposed views. Understood relationally, the ethic of mutual benefit becomes important to adversaries because it is necessary to maintain the civil society that permits this very disagreement. On the personal level, the reality of relationships makes one see an opponent as a human being with whom one is likely to share much in common at the same time as disagreement remains with regard to difficult issues. This contrasts with the zero-sum perspective of autonomous self-interest that collapses the political into the personal and seeks to erase all aspects of human interaction other than the focus of disagreement. The person who holds reprehensible views becomes a reprehensible person, rather than a human being deserving of respect, as the relational perspective requires.

Accordingly, the relational approach provides a framework for a civil approach to the most intractable and contentious conflicts, such as those involving abortion and gay rights. An illustration of how this would work is the model of Martin Luther King, Jr. In pursuit of equal rights for Black Americans, Martin Luther King, Jr. faced mobs of angry, hate-filled, and sometimes violent White people committed to denying Black people their

249. Not to mention that the reality of attorney-client relationships is much more complex than the one envisioned by Rule 1.2(a). While some clients are quite powerful vis-à-vis their attorneys, others often defer to their lawyers. See David B. Wilkins, *Everyday Practice is the Troubling Case*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68, 70–75 (Austin Sarat ed., 1998) (rejecting simplistic assumptions about the allocation of power and authority within the attorney-client relationship and exploring various contexts in which clients and lawyers interact); see also David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) (same).

250. See *supra* note 7.

251. See, e.g., Pearce, *The Legal Profession as a Blue State*, *supra* note 12, at 1341–43, 1359–60 (referring to public opinion polling data and to the commentary of political philosophers, including Michael Sandel and Ronald Dworkin).

fundamental human rights. Nonetheless, he sought “to attack the evil system rather than individuals who happen to be caught up in the system.”²⁵² King explained that “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.”²⁵³ He rejected the autonomous approach of a “zero sum game.”²⁵⁴ Seeing all people as connected relationally, King sought “reconciliation and the creation of a beloved community.”²⁵⁵

V. CONCLUSION

While it may be unrealistic to expect lawyers to accept relational self-interest, teach it to clients and the public and help heal civic culture in the near future, lawyers can indeed make a difference in helping to restore civility to our political culture. Rather than maintaining the current culture of incivility by acting as neutral partisans, a role grounded in an understanding of themselves, both as lawyers and as human beings, and of their clients as autonomously self-interested, lawyers have the opportunity and obligation to adopt a relational perspective in their work and in their civic leadership. By counseling and modeling relational self-interest, lawyers can play a powerful leadership role challenging the dominance of autonomous self-interest and, over time, help heal our civil society. If they do so, then the words of Louis Brandeis would appropriately describe the legal profession as having done “a great work for this country.”²⁵⁶

252. A TESTAMENT OF HOPE, *supra* note 23. In this speech, King advocated for the strategy of non-violence. *Id.*

253. *Id.*

254. *Id.*; see also Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U.L. REV. (forthcoming 2012) (draft on file with authors), at 3–4, 24–30 (applying King’s analysis to argue that cause lawyers would better serve their clients’ interests through “relational loyalty” that views clients, third parties, and adversaries from a relational perspective rather than through “hyper-loyalty” that requires viewing third-parties and adversaries as necessarily “friends” or “enemies”).

255. *Id.*

256. BRANDEIS, *supra* note 25.