

LEGAL ETHICS, JURISPRUDENCE, AND THE CULTURAL STUDY OF THE LAWYER*

Rakesh K. Anand†

In America, law is a cultural practice. Americans are dedicated to living as a community under “the rule of law.” This commitment to a legal way of life cannot be reduced to an equally strong devotion to a moral form of being. That is, the two dimensions of experience are incommensurable (which does not mean that they are wholly insulated or separate from one another). One consequence of this normative condition is that the demands arising from a commitment to law are not always reconcilable with those stemming from moral beliefs. At the same time, neither obligation has priority over the other. For the individual in his or her role as a lawyer, this indicates that he or she may be required to act in a manner that is not defensible on any moral ground, but is still capable of justification. As an analysis of the character of the lawyer’s life, these facts reveal a basic truth: the life of the lawyer is an inherently conflicted, and an absolutely meaningful, one.

This argument presents a direct challenge to contemporary legal ethics discourse, in its most essential aspects. In this Article, this argument takes the form of a defense of a new orientation toward our thinking about the practice of law, which is the cultural study of the lawyer (cultural study understood as a type of philosophical anthropology). An in-depth introduction to this line of reasoning is presented, an explanation that appeals to a variety of fields of knowledge, including jurisprudence, epistemology, political theory, and moral philosophy. The goal is to convince the reader of the propriety, and the power, of this form of inquiry into a lawyer’s professional responsibility. The benefit is an understanding of lawyer ethics that is both realistic and hopeful.

TABLE OF CONTENTS

INTRODUCTION.....	738
I. PRELIMINARY COMMENTS	743
II. OF LEGAL ETHICS AND JURISPRUDENCE	749
III. THREE STEPS TO A NEW CONCEPT OF LAW.....	752
A. <i>The First Step: Appreciating Liberalism as Ideology</i>	753

* © Rakesh K. Anand. All rights reserved.

† Assistant Professor of Law, Syracuse University College of Law. A.B., 1989, Stanford University; J.D., 1994, Yale Law School. I would like to thank Julie Cooper, Sam Donnelly, David Driesen, Robert Gordon, Eric Kades, Paul Kahn, Nancy Marder, Robin P. Malloy, W. Bradley Wendel, and participants in a junior faculty workshop at Syracuse University College of Law for providing comments on this article. I would also like to thank Jonathan Marshall for his research assistance. This paper was selected as the alternate in the 2008 AALS Section on New Law Professors scholarly competition.

	B.	<i>The Second Step: Appreciating Liberalism as a Cultural Practice of Political Life</i>	760
	C.	<i>The Third Step: What Is Law?</i>	763
IV.		A NEW WAY FOR LEGAL ETHICS	767
V.		HOW IS A LAWYER?	772
	A.	<i>The Groundwork of American Legal Society</i>	775
	B.	<i>The Initial Account of the Lawyer's Professional Responsibility</i>	776
VI.		CONCLUSION	784

INTRODUCTION

Contemporary thinking about legal ethics is fundamentally flawed. As a matter of course, legal ethicists assume that questions of how an individual should act in his or her role as a lawyer are moral questions. For example, in their casebook, Deborah Rhode and David Luban write that legal ethics “concerns the most fundamental moral aspects of our lives as lawyers,”¹ while Stephen Gillers describes a lawyer’s professional responsibility as a matter of “being a morally good person.”² Not surprisingly, scholarship follows this same path, with those who write in the field adopting, almost naturally, a moral orientation to their work.³ While the product of all this thinking may be good moral philosophy, this Article explains that that product is misplaced, and thus amounts to poor legal ethical philosophy.

To see the problem with today’s legal ethical thought is not an easy task. Quite the contrary, it requires a reorientation in the sensibilities prevailing in the legal academy today—i.e., not just those of legal ethicists, but those of legal academics more generally. And this shift must occur in two dimensions. First, it is necessary to recognize the inextricable link that exists between legal ethics and

1. DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 3 (4th ed. 2004).

2. STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS* xxiii (7th ed. 2005). Gillers adds that legal ethics is also about “being a professionally safe lawyer.” *Id.* One can look to other major figures in the field for a similar disposition. *See, e.g.*, GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 1 (4th ed. 2005) (“[T]he central problem in professional ethics can be described as the tension between the client’s preferred position resulting from the professional connection and the position of equality that everyone else is accorded by general principles of morality and legality.”).

3. *See, e.g.*, DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 *GEO. L.J.* 2665 (1993); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976); Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 *AM. B. FOUND. RES. J.* 613; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. REV.* 63 (1980); Deborah L. Rhode, *Ethics in Practice*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 3 (Deborah L. Rhode ed., 2000); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 *CAL. L. REV.* 669 (1978); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29; Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1 (1975); W. Bradley Wendel, *Civil Obedience*, 104 *COLUM. L. REV.* 363 (2004).

jurisprudence.⁴ Simply put, if we want to explain how an individual should act in his or her role as a lawyer, it stands to reason that we would want to know what law is. After all, the subject of our concern is *legal* ethics, and only a concept of law—and not, as is so often assumed, a procedural system—can provide content to that term. Unless we are going to take the position that there is nothing uniquely legal about legal ethics,⁵ we must have an operable definition of law from which to begin our thinking about lawyer behavior.

Second, it is necessary to broaden contemporary thinking about the nature of law itself. More specifically, it is necessary to turn to an integrated, interdisciplinary approach to the study of human behavior, one that recognizes that the various fields of the arts and sciences (e.g., philosophy, political theory, history, anthropology, psychology) all have a place in the process of enlightening our understanding of man, and consequently about law. From this perspective, the answer to the question “What is law?”—the question that should, but remarkably does not, lie at the foundation of all legal academic thinking—moves well beyond the bounds of conventional understanding. Specifically, from this perspective, law is not simply a governing instrument (as is generally supposed)⁶ and it is certainly not a normative order founded in reason (as traditional natural

4. For a jurisprudential consideration of the problem of professional discontent among practicing lawyers, see generally Rakesh K. Anand, *Contemporary Civil Litigation and the Problem of Professional Meaning: A Jurisprudential Inquiry*, 13 GEO. J. LEGAL ETHICS 75 (1999).

5. Notably, David Luban takes just this position. See generally LUBAN, *supra* note 3; David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 424–35 (1990). For the critique of Luban’s view, see generally Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653 (2006).

6. The idea that law is a governing instrument is central to American jurisprudential thought. Both the legal realists and their progeny, as well as the legal process school, subscribe to this view of law (although the legal process school also sees law as possessing an autonomous character). For the legal realist perspective, see, for example, Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834–35 (1941) (“Law is instrumental only, a means to an end, and is to be appraised only in the light of the ends it achieves.”). For the understanding of the legal process school, see, for example, HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 3–4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing law in functional vocabulary of “constitutive or procedural understandings or arrangements” and “institutionalized procedures”). For modern law and economics, see, for example, RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 75 (1981) (describing law as “a system for altering incentives”). For critical legal studies, see, for example, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567 (1983) (describing law as instrument to achieve leftist aims). For law and feminism, see, for example, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152 (understanding law as means to achieve “illusory goal of ending racism and patriarchy”); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 72 (1988) (understanding law as means to achieving and sustaining postpatriarchal world); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175, 175 (1982) (understanding law as means to address “needs and values of both sexes”). For an overview of American jurisprudence, see generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995). For a review of Duxbury’s work, one that offers additional insight into American jurisprudence, see generally Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493 (1996) (reviewing DUXBURY, *supra*).

law proponents argue).⁷ It is a cultural practice. More particularly, it is a cultural practice of sociopolitical—or simply political—life.⁸

Admittedly, the concept of a “cultural practice of political life” may be foreign to some, and while this Article will explain exactly how it is that law constitutes a cultural practice of political life, the unfamiliarity that some may have with this general idea renders an immediate, albeit brief, explanation appropriate. To begin, as used here and throughout this Article, the term “political” should be understood in its traditional sense (and not in, what some label, arguably incorrectly, its “modern” sense of elections, voting, Democrats, Republicans, and related terms). The word “politics” comes from the Greek “polis” which loosely translates to “community.”⁹ The question of politics is “How are we to govern ourselves, individually and collectively, as members of a community?” Those things “political”—e.g., political practices, political activity, political life¹⁰—speak to this question.¹¹ Building from this definition, living life “under law” represents a direct answer to this query. That is, law is a community’s method of “practicing politics”—or, put more literately, a culture’s way of practicing its political life.

7. See, e.g., Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859, 1861 (2000) (“Natural law theory is based on rational reflection on the nature, conditions, and experience of being a human being in a world with other such beings.”). For purposes of this Article, the discussion in Part III of liberalism qua ideology should suffice to explain the problematic character of the natural law claim.

8. The fact that law is a cultural practice is well recognized. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* vi–viii (1983); 2 ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* xiv–xv (Ralph Manheim trans., Yale Univ. Press 1955) (1925); CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 30 (1973). See generally PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

9. For a more full treatment of the Greek polis, see H.D.F. KITTO, *THE GREEKS* 64–79 (rev. ed. 1957).

10. Similarly, when we speak of “one’s politics,” it is the traditional sense of the term to which we refer.

11. This understanding of politics is the conception that underlies Western political theory, from classical Greece to modern times. See, e.g., SHELDON S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 4 (1960) (“[P]olitical philosophy has been taken to mean reflection on matters that concern the community as a whole.”). Wolin also notes the importance of the origins of political philosophy to its history. “In the case of political philosophy, its origins are so significant that one can say, with very little exaggeration, that the history of political thought is essentially a series of commentaries, sometimes favorable, often hostile, upon its beginnings.” *Id.* at 28. For those unfamiliar with this conception, it is worth noting that for the question of politics, all forms of human interaction are a matter of concern (i.e., formally rule-governed behavior, customary behavior, as well as “private” behavior—e.g., behavior “in the bedroom”) because all pertain to life as a member of a community. Indeed, for the question of politics, the only way human interaction could not pertain to life as a member of a community is if the human conduct were not “interaction” at all (i.e., if a person truly lived alone, perhaps as a lifelong hermit in the woods). See, e.g., ARISTOTLE, *THE POLITICS* (T.A. Sinclair trans., Penguin Books 1981) (n.d.). It is perhaps also worth noting that the term “public”—or even “civic”—is not an appropriate substitute for the term “political,” at least in contemporary liberal society, because “political” is a broader term than either, a fact made clear when we reflect on the nature of that term traditionally juxtaposed to “public”—i.e., “private.” What we see is that the “private”—like the “public”—is a political concept.

As a culture's way of practicing its political life, law stands in contrast to a culture's practice of its moral life. Where politics begins with a defined community and dictates action according to who is a member of that community ("citizen") and who is not ("alien"),¹² morality, at least in its modern Western sense, begins with a universal community and dictates action according to one's "personhood."¹³ These are hardly identical dimensions of human activity. Indeed, careful reflection reveals that they are incommensurable spheres of experience.¹⁴

It is just this realization of the incongruence of political and moral action that suggests the difficulty in contemporary thinking about legal ethics. At their core, questions of legal ethics are political questions, not moral questions, because lawyer behavior is political behavior, not moral behavior, and the former cannot be reduced to the latter. For legal ethics to adequately deal with the issues that face lawyers in their daily practice, the field must turn from its moral orientation toward a political one. Such a move begins with an appreciation for, and understanding of, the cultural practice of law. Building from this starting point, the question for legal ethics becomes how a lawyer should act so that his or her behavior affirmatively expresses the cultural practice. That is, the question for legal ethics becomes "How is a lawyer?"¹⁵

In what follows, this Article presents a detailed explanation of, and defense for, *legal ethics qua the cultural study of the lawyer* (cultural study understood as a form of philosophical anthropology).¹⁶ To do so, this Article is divided into six

12. The distinction between citizen and alien is reflected, for example, in immigration law. See, e.g., 8 U.S.C. § 1101(a)(3) (2006) (defining "alien" as noncitizen or nonnational of United States).

13. Contemporary moral discourse is principally deontological in character. See *infra* note 138 for further comment on, and refinement of, the deontological nature of contemporary moral discourse.

14. To be clear at the outset, the fact that politics and morality are incommensurable does not mean that the two are wholly insulated or separate dimensions of our lives. Incommensurability simply denotes that one is not reducible to the other. See *infra* pages 769–70 for discussion on this point.

15. Of course, for those instances where the first-order question does not dictate a lawyer's course of conduct, an important second-order question is how a lawyer may act so that his or her behavior is not inconsistent with the cultural practice.

16. For an introductory discussion of the type of cultural study embraced in this Article, see generally Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141 (2001). As indicated therein, this form of cultural study has its strongest roots in philosophy, particularly the line of thought that extends from Kant through Hegel to Cassirer. *Id.* at 159. The appeal to Kant is to his epistemological writing, the central text of which is IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Müller trans., Anchor Books 1966) (1781). For an introductory discussion of this topic, see generally JUSTUS HARTNACK, *KANT'S THEORY OF KNOWLEDGE* (M. Holmes Hartshorne trans., Harcourt, Brace & World 1967) (1965). For an excellent discussion of Kantian epistemology, one that also places his epistemological thinking in context with his other work, see generally ERNST CASSIRER, *KANT'S LIFE AND THOUGHT* (James Haden trans., Yale Univ. Press 1981) (1918) [hereinafter CASSIRER, *KANT'S LIFE AND THOUGHT*]. For Hegel, see generally, for example, G.W.F. HEGEL, *REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY* (Robert S. Hartman trans., Bobbs-Merrill Co. 1953) (1837). For Cassirer, see generally 1–3 ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (Ralph Manheim trans., Yale Univ. Press 1953–1957) (1923–1929).

Anyone familiar with Kahn's work will immediately see the strong influence of his scholarship on this Article. My hope is that I have sufficiently acknowledged that impact.

Parts. As this Introduction already suggests, this Article presents a number of ideas that may be new to the reader. Because of this circumstance, Part I offers some preliminary comments to help locate the discourse within the boundaries of contemporary legal thought and to help orient the reader to the framework of understanding that this Article brings to bear on the study of a lawyer's professional responsibility. Part II begins the more focused discussion of this Article's substantive claims. It demonstrates that legal ethics and jurisprudence are inherently connected. This discussion is not an extended one, because the point, perhaps surprisingly, proves to be a relatively simple and straightforward one. (Indeed, upon reflection, the fact should bear out as self-evident.) Acknowledging the implications of Part II—that an understanding of “what law is” is a necessary condition of ethical inquiry—Part III turns to the issue of law's definition and explains that law is, first and foremost, one way of coming at the world, a form of cultural activity in and through which we organize and provide meaning to experience. This fact of the ultimately epistemic character of law, and coincidentally of law as one aspect of man's self-expression, produces a discussion that is focused squarely on liberalism, which is the political ideology of America (ideology meant in the descriptive, not pejorative, sense of the term). To summarize Part III, it explains, in step-by-step fashion, that (a) liberalism is indeed an ideology (again, intended in the explanatory, not derisive, sense of the term) and not, as some suppose, a truth; (b) as an ideology of political life, liberalism is, more precisely, a cultural form; and (c) as that which actualizes the liberal political order, law too then is a cultural form. Part IV extends the inquiry into the nature of law with a discourse on politics as a sphere of human experience. It is in this Part that this Article demonstrates the incommensurability of the political and moral forms of cultural life. Coupled with the previous Parts' reasoning, Part IV's analysis points the study of lawyer ethics in a new direction, one that recognizes the fundamentally political, and not moral, basis of his or her conduct.

With the foundation for work in the discipline now in hand, Part V turns to the positive understanding of the lawyer. At the outset, it explores, albeit briefly, the value of a cultural study of the lawyer to the profession. It then takes up the question of the content of professional behavioral norms. Part V's treatment of this topic is necessarily limited. The foremost purpose of this Article is to present, in broad terms, the theoretical underpinning for the cultural study of the lawyer.¹⁷ Operating within these parameters of discourse, and proceeding directly from the framework presented, Part V describes the most basic of lawyer obligations. Other inquiries are left to other papers.¹⁸ In line with the restricted

17. This Article presents the theoretical groundwork of the cultural study of the lawyer because of comments received on earlier work. In light of the reactions, this Article appeared necessary. Additionally, as stated in the above text, this Article speaks in *broad* terms. For those who may find the discourse too concise, the Article attempts to address at least some anticipated questions in footnotes.

18. As footnote 17 indicates, some work in the cultural study of the lawyer has been completed. Thus, the “leaving of other inquiries to other papers” is not intended to carry an exclusively temporal

character of this discourse, Part V should prove largely uncontroversial. As indicated in the Part's preliminary discussion concerning the worth of the project pressed for here, there are undoubtedly disagreements, and well-founded ones, over what the cultural practice of law looks like in full form. At the same time, there exists a common ground around which all such interpretations coalesce, and necessarily so. Part V focuses on this locus of agreement, identifying this shared perspective (which is that a cultural practice of law means, minimally, living political life under the rule of law) and explicating its consequent demands on the lawyer.

This Article concludes with Part VI, which comments on the prescriptive limitations of legal ethics as the cultural study of the lawyer. This form of inquiry into a lawyer's professional responsibility explains how an individual should act in his or her role as a lawyer. It does not explain how an individual should act in other roles he or she occupies, for example moral agent. Equally, and perhaps more importantly, it also does not tell us how an individual should act when faced with a conflict between role obligations. Part VI addresses this circumstance and makes clear that in this situation one is simply left with a choice, and the consequences and responsibility associated with that choice.

In all of this, there is a discursive boundary to this Article that should be noted, if only to avoid any potential confusion. The reasoning in this Introduction, and in what follows, should be understood as specific to America, and to the American lawyer. None of it speaks to the nature or practice of law in other countries, at least not as a matter of necessity.¹⁹

I. PRELIMINARY COMMENTS

This Article embraces an interdisciplinary perspective on law. More specifically, this Article has its roots in the tradition of the liberal arts.²⁰ Anyone accustomed to that tradition will have at least a basic familiarity with the intellectual orientation of this Article. Moreover, those who find the liberal arts a source of enrichment for their scholarship will likely have sympathy with some, and perhaps much, of what is written here. For those whose intellectual grounding and interests lie elsewhere, this Article may appear to speak in a slightly, but certainly not wholly, foreign tongue. Because of this circumstance, these initial remarks are useful to help situate the discussion.

implication. Additionally, Part V's discussion of the positive conception of the lawyer does, at times, overlap with this earlier work. *See, e.g.,* Anand, *supra* note 4; Anand, *supra* note 5.

19. Today, the study of lawyer ethics in foreign jurisdictions is not uncommon. *See, e.g.,* GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* (2004); JOHN LEUBSDORF, *MAN IN HIS ORIGINAL DIGNITY: LEGAL ETHICS IN FRANCE* (2001).

20. Recently, scholars professionally housed largely outside the law school have discussed the relationship of law and the liberal arts. *See generally* *LAW IN THE LIBERAL ARTS* (Austin Sarat ed., 2004). Putting aside any comment on the claims therein made about the nature of the law school, this Article's intellectual orientation appears to be quite distinct from much of what is discussed in that text.

To begin, there are at least two significant points of contact between the conceptual substance of this Article and mainstream legal thought. First, and as is perhaps evident, this Article touches base with the field of jurisprudence and, more specifically, one of its basic questions: “What is law?”²¹ And with respect to this point of contact, this Article argues both for the importance of this question to the lawyer and for a particular answer to this question, which is that law is a “cultural practice of political life.” An awareness of this latter claim is particularly necessary to fully grasp what this Article is after, because the appeal to this specific concept of law lies at the heart of the argument for legal ethics as the cultural study of the lawyer. Parenthetically, but importantly, in asserting that law is a cultural practice of political life, this Article seeks to push a conception of law that is convincing on its own terms, indeed sufficiently so that it suggests, by those terms, the problematic character of competing understandings of law, at least to the extent they purport to offer a complete account of what law is. For this reason, although this Article necessarily moves in a different direction than, and in this respect presents a direct challenge to, the various, prevailing jurisprudential schools of thought, a group that makes manifest a powerful and fertile debate over the nature of law, this Article does not focus on these schools of thought per se, i.e., it does not present the sustained critique of each of their views (although it does address the relationship between epistemological and strictly functional understandings of law).²² Rather, it stays tied to its own positive project, believing that the discourse speaks for itself.²³

Second, this Article shares common ground with the work in popular sovereignty theory.²⁴ This school of thought understands the first principle of the American legal order to be that “the People” rule. This Article stands squarely within this tradition. When we ask how a lawyer should act so that his or her behavior affirmatively expresses the cultural practice of law, first and foremost, we are asking how a lawyer serves “the People.” Put differently, although the

21. More precisely, this Article connects up with jurisprudence, constitutional law, and constitutional theory, which all “merge at the top.”

22. See *infra* notes 130–34 and accompanying text for a discussion of the relationship between the epistemological and functional understandings of law. For an introduction to jurisprudence, see generally STEPHEN E. GOTTLIEB ET AL., *JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS* (2d ed. 2006); JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC JUSTICE AND SOCIAL CONTROL* (1946). For a nice introduction to the philosophy of law from a historical perspective, see generally CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* (2d ed. 1963).

23. Cf. Harold J. Berman, *The Historical Foundations of Law*, 54 *EMORY L.J.* 13 (2005).

24. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* (1992); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *COLUM. L. REV.* 457 (1994); Jed Rubenfeld, *Of Constitutional Self-Government*, 71 *FORDHAM L. REV.* 1749 (2003). The literature on popular sovereignty theory is not limited to legal scholars. See, e.g., JULIE MOSTOV, *POWER, PROCESS, AND POPULAR SOVEREIGNTY* (1992); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999). For an overview of popular sovereignty theory, see Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 *N.C. L. REV.* 585, 636–58 (1996).

concept of law as a cultural practice of political life is unfamiliar to some, its axis of orientation is not. It centers around an appreciation for, and emphasis on, an idea that is quite commonplace in America: “the rule of law,” which is the institution in and through which the People’s rule is made manifest. As the well-known saying declares, the rule of law is not the rule of men, but rule of, by, and for the People. Taking *this* idea seriously, and recognizing its importance to American life, is the starting point for legal ethics as the cultural study of the lawyer.²⁵

If we move beyond questions of intersection, we can ask, more broadly, what the framework of understanding is that this Article brings to bear on questions of a lawyer’s ethics. At the outset, this Article is organized according to the principle that theory and practice must go hand in hand. Put differently, this Article believes in the primacy of “humanizing” our thinking.²⁶ Reflection must begin with the nature of human experience. How does the world actually work? How do people really live their lives? If we take this disposition as our starting point, we immediately become aware of a basic fact of the human condition: that the world is not an ideal place, or even always a nice place.²⁷ Appreciation of this circumstance—of “the fallen state of man”—is hardly new to law. Grant Gilmore, himself paraphrasing Oliver Wendell Holmes, memorably told us that “[i]n Heaven there will be no law, and the lion will lie down with the lamb . . . [while] [i]n Hell there will be nothing but law, and due process will be meticulously observed.”²⁸ Scholarship must acknowledge this reality of human life, and organize its thinking around this position. What follows is an understanding that what counts as ethical conduct for an individual in his or her role as a lawyer, as well as for individuals in other aspects of their lives, is not always going to be what we might hope. The mistake is to assume that it always can be. Doing so is a misstep in thinking, and collapses to an embrace of denial, which does not help the soul. Real psychological peace, at least to the extent that such peace is possible, lies in the opposite direction: recognizing the difficulty, and ultimately conflicted character, of our lives.

To be clear, this demand for realism should not be confused with the embrace of an existential pessimism. Human experience is not perfect, but it remains uplifting. And, people want their lives to have this quality—meaning—

25. For a contrary position, see generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

26. One can compare the claims made in these couple of paragraphs with Roberto M. Unger’s promotion of the “divinization of humanity” (as well as his critique of “humanization” in political philosophy and legal thought). See generally ROBERTO MANGABEIRA UNGER, *WHAT SHOULD THE LEFT PROPOSE?* (2005).

27. Hobbes famously spoke of life in the imagined “state of nature” as, among other things, “nasty, brutish, and short.” THOMAS HOBBS, *LEVIATHAN* 186 (C. B. Macpherson ed., Penguin Books 1985) (1651).

28. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977). Beyond the boundaries of American law, the understanding of law as representative of man’s fallen state goes back to the New Testament (and even more remotely to the writing of Plato). For a beautiful work speaking to this matter, see generally PAUL W. KAHN, *LAW AND LOVE: THE TRIALS OF KING LEAR* (2000).

about them. If we return to Gilmore's statement, we see that his grasp of human circumstance simultaneously reflects a traditional understanding of the positive role of law in human society. Law is about order.²⁹ Taking account of the Greek concept eros—that there is a spiritual dimension to life—legal ethics as the cultural study of the lawyer moves, ever so slightly, to the side of this frame of reference, seeing that law, at least in America, is about more than simply order.³⁰ Law is about political identity.³¹ There is absolutely a locus of hope in law, and it lies in what law stands for—for example, living political life according to the will of the People and, relatedly, living a principled political existence.³² Fundamentally, law is an animating force, a generative factor for the self. It is, to repeat a basic tenet of this Article, a culture's practice of its political life.

Recognizing this political optimism inherent in law provides a useful segue to a discussion of the normative character of this Article and particularly Part V, which speaks to the positive conception of the lawyer. Law is a source of identity because it constructs a world of meaning, which it does through the deployment of symbols and, more specifically for present purposes, concepts.³³ It is in and

29. The understanding of law as order goes at least as far back as the writing of Saint Augustine. For a brief discussion of Augustine's orientation toward the political order, see FRIEDRICH, *supra* note 22, at 37–38.

30. As this sentence indicates, this Article's appeal to the concept eros is limited to its spiritual dimension. For some more general discussions of eros, as well as of the related concepts agape and philia, see generally EROS, AGAPE, AND PHILIA: READINGS IN THE PHILOSOPHY OF LOVE (Alan Soble ed., 1989).

31. No one has understood this point better than Paul Kahn, much of whose work centers around the insight that law is a cultural form of politics. See generally PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997). Importantly, Kahn explains that American political identity is contested. In addition to law, there exists a form of politics that Kahn loosely describes as "political action" (which itself contains a number of expressive forms). Law and political action are mutually incompatible and always compete for the American understanding of political experience. For a discussion of Kahn's work on this matter, see Anand, *supra* note 4, at 104–07.

In addition to understandings of law in terms of order and political identity, law is, of course, in contemporary times, also concerned with—that is, it is measured by a standard of—justice. Gilmore's complete phrase itself implies this fact:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

GILMORE, *supra* note 28, at 110–11.

32. I hardly mean to discount the practical, instrumental achievements of law, both in the directions of order and justice. For a comment on the relationship between this view and functional understandings of law, see *infra* notes 130–34 and accompanying text.

33. The theory of the symbol is closely aligned to the theory of the sign, as presented in the classic works of Ferdinand de Saussure and Roland Barthes. See generally FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., Philosophical Library 1959) (1916); ROLAND BARTHES, *ELEMENTS OF SEMIOLOGY* (Annette Lavers & Colin Smith trans., Hill and Wang 1973) (1964). For a discussion of the distinction between symbol and sign, at least as understood from the perspective of the philosophy of culture, see 1 ERNST

through a conceptual apparatus that we organize, and provide meaning to, “legal” experience. In approaching the discipline of legal ethics, this Article’s methodology is to acknowledge this epistemic structure and its constituent elements and ask what logically follows from, and what consequent responsibilities are rooted in, the commitments associated with this symbolic form of meaning. Accordingly, while this Article, and more broadly the project of the cultural study of the lawyer, is prescriptive—it does seek to explain how a lawyer should act, at least in some circumstances—this normative character is not rooted in subjective preferences or a particular “approach,” e.g., utilitarian, feminist, economic. Rather, the source of the normative character lies outside the bounds of this type of individual disposition. The claim here is that as a descriptive matter, American legal culture itself makes certain claims. What counts as ethical conduct for an individual in his or her role as a lawyer must derive therefrom.³⁴

The practical consequences of this type of normative orientation are several, impacting such spheres of professional life as ethical decision-making, integrity, self-understanding, and self-critique. But, perhaps the most important consequence (and from which the others derive) is the production of a concept of the lawyer that directly challenges prevailing understandings of him or her, especially the model of “zealous advocate,” which is the “dominant picture” among practitioners, if not academics as well.³⁵ Among contemporary legal ethicists, Robert Gordon’s arguments arguably come closest to the views presented in this Article. On numerous occasions, Gordon has eloquently defended the inherent public-regarding function associated with being a lawyer.³⁶ As already suggested, this Article shares this theme. Lawyers are not, and cannot be, “neutral partisans.”³⁷ Equally, they are not “moral activis[ts],”³⁸

CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* 73–114 (Ralph Manheim trans., Yale Univ. Press 1953) (1923).

34. As this paragraph indicates, the cultural study of the lawyer, or more precisely the school of thought out of which it grows, emphasizes the epistemological character of law. As indicated earlier, the orientation has its roots in the line of thought that extends from Kant, through Hegel, to Cassirer. See *supra* note 16 for a discussion of this idea. This tradition lies apart from, although certainly has points of contact with, those that Isaak Dore discusses in his recently published textbook on the epistemological foundations of law. See generally ISAAC I. DORE, *THE EPISTEMOLOGICAL FOUNDATIONS OF LAW* (2007).

35. For a discussion of the “dominant picture,” see LUBAN, *supra* note 3, at xix–xx.

36. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor after Enron*, 35 CONN. L. REV. 1185 (2003) [hereinafter Gordon, *New Role for Lawyers?*]; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) [hereinafter Gordon, *The Independence of Lawyers*]; Robert W. Gordon, *Why Lawyers Can’t Just Be Hired Guns*, in ETHICS IN PRACTICE, *supra* note 3, at 42.

37. For a discussion of the “neutral partisan” conception of the lawyer, see generally Simon, *supra* note 3; LUBAN, *supra* note 3.

38. LUBAN, *supra* note 3, at 160. William Simon’s “contextual judgment” approach to lawyer decision-making promotes a model similar to Luban’s “morally activist” lawyer. See generally WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998).

statesmen,³⁹ businessmen or businesswomen,⁴⁰ “caring” persons⁴¹ or even, at the most fundamental level, religious-oriented individuals.⁴² They are public—or, more precisely, political—servants, “the People’s people,” so to speak.⁴³

Focusing attention on this fact, that lawyers are “the People’s” representative, is a main goal of this Article. (Indeed, as will be explained in Part V, if we ask who the lawyer’s client is, the primary answer is “the People.”) To arrive at this point of understanding, a number of ideas involving legal ethics, jurisprudence, liberalism, and Western moral philosophy require presentation, a discourse that necessarily draws on a variety of sources and fields of knowledge to explicate the fundamental nature of law, its relationship to morality, and its function as *the* platform from which to build an understanding of how an individual should act in his or her role as a lawyer. This Article now turns to that discussion, with the consciousness that this last concern, correct lawyer behavior, is the driving force behind the presentation, as clarification of what counts as appropriate lawyer behavior, and, more deeply, what it means to be a lawyer, is the end point of legal ethical theory.

39. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

40. While the concept of the lawyer as businessman or businesswoman is not well developed in the theoretical literature, the orientation toward the practice of law as a business is resident in the contemporary psychology. See, e.g., A. Harrison Barnes, *Treating Your Legal Career Like a Small Business*, BCG ATTORNEY SEARCH, <http://www.bcgsearch.com/pdf/60766.pdf> (last visited Mar. 25, 2009); Martha Neil, *The Rainmaker Within*, A.B.A. J., July 2006, at 26, 26–27; Dan Binstock, *Don't Let Your Rising Billing Rate Push You Out the Door*, BCG ATTORNEY SEARCH, <http://www.bcgsearch.com/pdf/60359.pdf> (last visited Mar. 25, 2009). Over a decade ago, Richard Posner noted that “an accelerating accumulation of legal and especially economic changes over the past three decades has transformed the profession in the direction of competitive enterprise.” RICHARD A. POSNER, *OVERCOMING LAW* 64 (1995).

41. See, e.g., Ellmann, *supra* note 3; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, in *LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES* 25 (Stephen Parker & Charles Sampford eds., 1995).

42. The concept of lawyers as religiously oriented individuals is most developed in the scholarship on Christian legal ethics. For a sampling of that literature, see generally THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); CAN A GOOD CHRISTIAN BE A GOOD LAWYER? *HOMILIES, WITNESSES, AND REFLECTIONS* (Thomas E. Baker & Timothy W. Floyd eds., 1998); Joseph G. Allegritti, *Can Legal Ethics Be Christian?*, in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 453 (Michael W. McConnell et al. eds., 2001).

43. The concept of lawyers as “the People’s people” should not be confused with Louis Brandeis’ famous reference to the “people’s lawyer” in his address to the Harvard Ethical Society in 1905. LOUIS D. BRANDEIS, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 313, 321 (1914). Given the largely undeveloped character of his idea, it is difficult to fully address. But the disparity seems quite vast. Beyond the obvious difference between “the People” and “the people,” Brandeis appears to make a very limited claim—that, to some extent, in certain circumstances, lawyers should take account of the public interest. *Id.* at 321–27. As will become clear, Brandeis’ orientation toward the practice of law is hardly coincident with that which this Article defends.

II. OF LEGAL ETHICS AND JURISPRUDENCE

A traditional question of jurisprudence is “What is law?” In Western culture, this question has, historically, received a variety of responses. Among other things, law has been understood to be the will of God,⁴⁴ an expression of right reason,⁴⁵ an expression of a national will,⁴⁶ a positive system of norms,⁴⁷ and an epiphenomenon (e.g., an element of an ideological superstructure that supports a ruling economic class, a governing instrument whose substance is derived from extralegal sources).⁴⁸ Today, the question “What is law?” remains a rich subject of debate, with many of these same conceptions, surprisingly or unsurprisingly, maintaining their currency. While the answer to the jurisprudential question remains unsettled, its importance for the lawyer, whether as a member of the academy, judiciary, or practicing bar, cannot be overestimated.

To understand why the response to the jurisprudential question has such deep relevance for the lawyer does not require much effort; rather, one need only take up a simple pedagogic exercise. Imagine that a person is a biologist, and someone walks up to him or her and asks “What is biology?” As a society, we would expect that person to be able to answer the question. Similarly, if a person is a chemist, anthropologist, or architect (to choose three disciplines randomly) and someone walks up to him or her and asks “What is chemistry?,” “What is anthropology?,” or “What is architecture?,” we would, as a society, expect the person to be able to offer the relevant definition. The reason for our expectation is, of course, straightforward. The person’s professional identification cannot be understood outside the context of the subject matter of his or her occupation. Put differently, who one is, and what one “does,” as a

44. This is the Biblical conception of law expressed in the Old Testament. See generally THE JERUSALEM BIBLE.

45. THOMAS AQUINAS, TREATISE ON LAW (*SUMMA THEOLOGICA*, QUESTIONS 90–97) 44 (Regnery Publ’g, Inc. 1996) (n.d.).

46. See generally HEGEL’S PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

47. See generally HANS Kelsen, PURE THEORY OF LAW (Max Knight trans., Univ. of Cal. Press 1989) (1934).

48. The understanding of law as epiphenomenal is central both to Marxist legal thought and to legal realism and its progeny. For an introduction to the former, see HANS Kelsen, THE COMMUNIST THEORY OF LAW 1–50 (Fred B. Rothman & Co. 1988) (1955). Myres McDougal famously captured the essence of the legal realist view, stating that “law is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves.” McDougal, *supra* note 6, at 834–35. For some legal realist writings, see generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). The legal realist progeny’s embrace of the epiphenomenal character of law is reflected in their promotion of law reform. See generally Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975) (promoting law reform directed at efficiency); Unger, *supra* note 6, at 602 (promoting law reform directed at establishing “superliberalism”); Williams, *supra* note 6, at 175 (promoting law reform directed “to reflect the needs and values of both sexes”); West, *supra* note 6, at 71–72 (promoting law reform directed at “humanist jurisprudence”); Crenshaw, *supra* note 6, at 152 (promoting law reform directed at “ending racism and patriarchy”).

biologist, chemist, anthropologist, or architect is a direct function of the particular subject area at issue. The member of the academy, judiciary, or practicing bar, meanwhile, claims the title “lawyer.” If someone walks up to him or her and asks “What is law?,” wouldn’t we, as a society, expect the person to provide the relevant definition? That is, isn’t who a lawyer is, and what a lawyer “does,” a direct function of the field within which he or she operates?⁴⁹

Because any meaningful claim of being a lawyer cannot be separated from the law itself, the question “What is law?” is absolutely central to the lawyer’s life. It is also absolutely central to the more specific issues of professional responsibility. Just as a person’s professional identification cannot be understood outside the context of the subject matter of his or her occupation, so too a person’s professional ethics—how one should go about being “who one is” and doing “what one does”—cannot be understood outside the same context. Would we ever expect to be able to tell an individual how he or she should act in his or her role as a biologist,⁵⁰ chemist,⁵¹ anthropologist,⁵² or architect⁵³ without answering the question of what the respective subject matters are? How then can

49. For some, this discussion may bring to mind the opening pages of H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994). It is perhaps necessary to note that Hart does not argue for the irrelevance of questions such as “What is chemistry?” (He simply indicates that society devotes more attention to, and answers in a qualitatively different manner, the question “What is law?”) Indeed, his comments on the social expectations of the educated man vis-à-vis the question “What is law?” suggest a recognition of the relevance of all such questions to society.

50. Examples of ethical questions for the biologist include the social implications of research, e.g., the ethical implications of the human genome project, and the obligation to tell the “scientific truth.” The National Human Genome Research Institute provides information on the human genome project, including a reference to the ethical implications of such research. National Human Genome Research Institute, *NHGRI Policy for Release and Database Deposition of Sequence Data* (Dec. 21, 2000), <http://www.genome.gov/10000910>. The biologist Theodosius Dobzhansky refused to let political considerations inhibit him from speaking about scientific errors in the former Soviet Union. For a brief account of Dobzhansky’s actions, see R.C. LEWONTIN, *BIOLOGY AS IDEOLOGY: THE DOCTRINE OF DNA* 8 (1991). One might also note that designing and conducting a biological experiment is an ethical question. For one discussion of “scientific epistemology” and experimental process in the context of biological experimentation, see generally DAVID J. GLASS, *EXPERIMENTAL DESIGN FOR BIOLOGISTS* (2007).

51. For a discussion of ethics in chemistry, see generally JEFFREY KOVAC, *THE ETHICAL CHEMIST: PROFESSIONALISM AND ETHICS IN SCIENCE* (2004). The American Chemical Society has published *Ethical Guidelines to Publication of Chemical Research* and *The Chemical Professional’s Code of Conduct*. American Chemical Society, *Ethical Guidelines to Publication of Chemical Research* (2006), <http://pubs.acs.org/userimages/ContentEditor/1218054468605/ethics.pdf>; American Chemical Society, *The Chemical Professional’s Code of Conduct*, http://portal.acs.org:80/portal/acs/corg/content?_nfpb=true&_pageLabel=PP_ARTICLEMAIN&node_id=1095&content_id=CTP_004007&use_sec=true&sec_url_var=region1&__uuid= (last visited Mar. 25, 2009). The American Institute of Chemists has published a code of ethics. American Institute of Chemists, *Code of Ethics*, <http://www.theaic.org/DesktopDefault.aspx?tabid=46> (last visited Mar. 25, 2009).

52. The American Anthropological Association has published a code of ethics. American Anthropological Association, *Code of Ethics of the American Anthropological Association* (June 1998), <http://www.aaanet.org/committees/ethics/ethicscode.pdf>.

53. The American Institute of Architects has published a code of ethics. American Institute of Architects, *2007 Code of Ethics & Professional Conduct* (2007), <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aiap074122.pdf>.

we answer the question “How should an individual act in his or her role as a lawyer?” without answering the question “What is law?”

If one acknowledges this basic point, it follows that jurisprudence and legal ethics are inseparable disciplines, and accordingly, that legal ethicists must take up the jurisprudential question in their thinking about lawyer behavior. And yet, despite this seemingly obvious fact, legal academics, and, more importantly for present purposes, legal ethicists, have been oddly inattentive, if not closed, to the relationship between the two fields.⁵⁴ Few scholars of professional responsibility make a conscious attempt to define the theory of law that underpins their work, if there is one at all.⁵⁵ Moreover, some, including the most prominent scholar in legal ethical theory, surprisingly deny any place at all for law in our thinking about most matters of appropriate lawyer behavior.⁵⁶ Why this condition persists in the field is unclear, and while the fact of its circumstance is an important topic for investigation, that inquiry (which is necessarily a historical one) unfortunately lies beyond the bounds of this Article. But, whatever the explanation for this curious state of affairs, isn't it clear that one cannot talk about legal ethics unless one talks about jurisprudence?

Admittedly, an immediate reaction to this account of legal ethics' scholarship is to focus attention on the body of thought that locates the legal character of the lawyer's proper actions in the adversary system. After all, doesn't this line of thinking have it right? Isn't the lawyer's principal task to be a zealous advocate? Indeed, isn't that what it means to be a lawyer? And if so, isn't the legal process (understood as the adversary system) a sufficient substitute for the jurisprudential variable?⁵⁷ However understandable this argument may be,

54. In February 2006, Fordham Law School hosted a symposium on “The Internal Point of View in Law and Ethics,” which acknowledged, and was motivated in part by, the lack of engagement between the two fields. Symposium, *The Internal Point of View in Law and Ethics*, 75 FORDHAM L. REV. 1143 (2006).

Of course, the general claim is subject to various qualifications. For example, Ronald Dworkin has argued that practicing law is impossible without at least an assumed jurisprudential philosophy. RONALD DWORKIN, *LAW'S EMPIRE* 90 (1986). Robert Gordon has noted that “any legal ethics course has to be partly a course in jurisprudence.” Robert W. Gordon, *Foreword* to *LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* xiii, xv (Susan D. Carle ed., 2005). W. Bradley Wendel is an exception. His work explicitly deals with analytic jurisprudence. See generally W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005).

It is perhaps necessary to note that William Simon has argued for a jurisprudential approach to our thinking about lawyer ethics. But his “contextual judgment approach” cannot fairly be characterized as jurisprudential. For Simon's work, see generally SIMON, *supra* note 38. For the critique of Simon, see Anand, *supra* note 5, at 670–80.

55. Stephen Pepper has remarked on the relationship between a lawyer's ethics and legal realism. Pepper, *supra* note 3, at 624–33.

56. Luban, *supra* note 5, at 424–35. See generally LUBAN, *supra* note 3.

57. For a defense of the zealous advocacy model, see, for example, MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Pepper, *supra* note 3. The model of the lawyer as “zealous advocate” is at the heart of the positive conception of the lawyer to which practitioners subscribe. For a discussion of this “Dominant View,” see LUBAN, *supra* note 3, at xix–xx. For a comment on the centrality of the adversary system to

the rejoinder itself is ultimately confused. On its own terms, the theory represented here, which is a theory of partisanship, posits that the goal of a zealous advocate is to provide the best “legal” representation to the client. Yet on its own terms, the theory provides no definition of the operative concept. What is the standard by which to measure what counts as “legal” representation? The procedural system certainly does not provide the necessary criterion. Or, is the claim rather that there is nothing uniquely legal about the representation? For example, is the claim that legal argument is the same as moral argument, conventional political argument, or any other form of discourse? Presumably, that is not the opinion of the advocates of the theory of partisanship. In the end, those who seek to elide the jurisprudential question by looking to the adversarial nature of legal practice can never succeed because they can never get past the requirements of their conceptual framework. Once the legal character of legal representation is posited, the demand for a metric by which to define the term presents itself. That demand can only be met with a concept of law, i.e., a turn to jurisprudence.

Anyone who seriously thinks about legal ethics with an eye to the discipline’s practical value finds him- or herself appealing to the self-consciousness of the lawyer. To the extent that the lawyer in fact lives his or her life with that state of mind (a condition that hopefully manifests itself), he or she will necessarily face the question “Who am I as a lawyer?” This question cannot be answered without first answering the question “What is law?” because what it means to be a lawyer is a direct function of a conception of the law itself. It follows that to begin our thinking about how “a lawyer” is, we must first establish a strong account of what law is.

III. THREE STEPS TO A NEW CONCEPT OF LAW

To arrive at a compelling understanding about the nature of law, we need to begin with a “clean slate,” i.e., we need, to the extent possible, to put aside all convictions about what law is, instinctive or otherwise, and simply begin again. By performing this act, we create an opportune environment for theory building, an exercise that this Part takes up, and that takes place in three steps. First, this Part makes a critical inquiry into “liberalism,” which occupies a central place in American legal discourse.⁵⁸ America is a liberal state and embraces liberal values. Legal norms, and debates about those norms, necessarily reflect that condition. The analysis of liberalism presented here focuses on liberalism’s fundamental character, emphasizing what liberalism is and, importantly, what it

legal ethics discourse, see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 645–46.

58. In taking up the examination of liberalism, an inquiry that does challenge, and perhaps even disturb, prevailing sensibilities, this Article is not suggesting that liberalism is somehow bad or that the liberal state is not worth living under (although certainly this is a question that one must ask). Quite the contrary, a basic claim of this Article is that America’s commitment to “democracy and the rule of law” has direct consequences for how a lawyer must act. The point of the inquiry is simply to explain the inherent limits of any appeal to liberalism qua reason, an explanation that will ground a more rigorous understanding of what law is, at least in America.

is not. This first step provides the foundation from which to construct a concept of law. Second, this Part takes this discussion of liberalism and pushes it further, moving from a basic understanding to a richer way of thinking about the subject. This slight intellectual realignment enhances the groundwork laid in step one and, in doing so, points directly to knowledge of what law is. Third, this Part pointedly defines law, and presents an accompanying discussion that substantiates the assertion. With this third step, we arrive at a new concept of law.⁵⁹

A. *The First Step: Appreciating Liberalism as Ideology*

Liberalism is *the* politics of contemporary America. The conventional liberal-conservative spectrum is a continuum of liberalism. No serious voice exists in this country for the nonliberal state, in whatever form it might take.⁶⁰ Indeed, with the defeat of Nazi Germany in World War II and the end of the Cold War in the late twentieth century, it is not clear that anyone would take that voice seriously.⁶¹ In broad terms, liberalism is characterized by its emphasis on, if not reification of, the individual and the individual's natural rights (which, at a minimum, include freedom and property), a social order organized around principles of democratic constitutionalism, an economic order organized around principles of a free market, and a claim of universal applicability that accompanies a teleology of "progress."⁶² The project of defining a new concept of law begins with the appreciation for just how to think about this political disposition.

The answer is that liberalism is an ideology.⁶³ Like fascism and socialism (as well as Islamic fundamentalism), liberalism is a set of beliefs and values that lie at the foundation of, and make manifest, a political program. Furthermore, liberalism is only an ideology, and nothing more. It is not a "science" or the product of a science. Equally, it does not represent "truth" (despite its claim of

59. To avoid any confusion, the claim of a "new" concept of law is not a claim that the concept presented is my creation. Rather, it is new in the sense of being novel to American legal sensibilities. Hopefully, this point is already clear to the reader. For further comment, see *supra* note 8.

60. The Religious Right is perhaps an exception. For one discussion of the Religious Right, see generally WILLIAM MARTIN, *WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA* (1996).

61. This circumstance is not a cause for celebration. For insight into the problems of the contemporary American imagination, see generally ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

62. The historical roots of liberalism include John Locke and Immanuel Kant, and continue through John Rawls into contemporary times. For a sampling of the relevant literature, see generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., Harper & Row, Publ. 1964) (1785) [hereinafter KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS*]; IMMANUEL KANT, *KRITIK OF JUDGMENT* (J.H. Bernard trans., London, MacMillan 1892); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

63. Again, as stated in the Introduction, the use of the term "ideology" is meant strictly in its descriptive sense.

universality). It is one basis upon which to construct a political order, and a particularly Western basis at that.⁶⁴

Perhaps because liberalism is so engrained in contemporary legal academic thought, the reality of its strictly ideological character does not resonate with some. Indeed, as anyone familiar with the legal academy can attest, legal scholars at times seem to move, explicitly or implicitly, from the exact opposite position, i.e., that liberalism does speak a truth. Operating from a belief in a sort of metaphysics of reason,⁶⁵ these scholars tell us that careful reflection leads inexorably to liberalism's conclusions. For example, they tell us that individuals *are* self-determining and equal, and that freedom and choice *are* their absolute rights. These deductions are not contingent, nor are they challengeable. They are undeniable facts, from which we can continue the course of practical reasoning and arrive at an accurate understanding of "justice," which is the highest moral value.

Those who maintain these convictions do so with great force, and undoubtedly, their intentions are well meaning. Nevertheless, this claim of liberalism's truth is absolutely wrong. And there is a "bottom-line" answer here: You can't reason to values. Put differently, to place faith in reason's power to arrive at first principles and from which to build a singular conception of justice is to make a mistake. A series of critical observations—both general as well as more specific to the disciplines of psychology, philosophy, and history—proves this point, a demonstration that should cause great pause for those who espouse the primacy of liberalism.

To begin the critique of liberal politics, it is useful to introduce the German concept *Weltanschauung*. *Weltanschauung* is commonly interpreted as "worldview," a translation that is to be understood in its broadest sense.⁶⁶ A

64. Admittedly, the understanding of "ideology" employed here is a particular, and somewhat simplified, one. For a discussion of the term "ideology" and its various senses, see RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 4–26 (1981).

65. Perhaps the most useful method of demonstrating the foundational basis of legal scholarship in a claim of reason is to ask what legal theory underlies the work. While much legal scholarship does not typically identify the theoretical underpinnings of its arguments, such work generally appears to rest on an implicit allegiance with the legal process school. That school's reliance on reason and the "truth" of liberalism is well evidenced. See HART & SACKS, *supra* note 6, at 102–07 (arguing for truth of social problem qua "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of man" and speaking of, among other things, "the compulsive force of an increasing awareness of the individual worth of every human being" (internal quotation marks omitted)). Other contemporary American schools of legal thought—specifically law and economics, critical legal studies, and law and feminism—share a similar belief in reason and the associated tenets of liberalism, although the faith is less explicit. See generally POSNER, *supra* note 6 (arguing for scientific character of economics); West, *supra* note 6 (arguing for unmodified, humanist jurisprudence that acknowledges existential singularity, and distinctiveness, of all humans); Unger, *supra* note 6, at 584–85 (appealing to "the great secular doctrines of emancipation of the recent past" and promoting "the search for a social world that can better do justice to a being whose most remarkable quality is precisely the power to overcome and revise, with time, every social or mental structure in which he moves").

66. The Langenscheidt Standard Dictionary translates *Weltanschauung* as "philosophy (of life)," which is another conventional interpretation of the term, as well as "world-outlook" (although it

particular *Weltanschauung* speaks to a specific understanding about the nature of man, the nature of the world, and other related ideas. As the term itself implies, and as is perhaps immediately evident, a particular worldview is both historically and culturally contingent in character. Within particular cultures, the operative *Weltanschauung* has changed over time. Equally, different cultures have operated, and continue to operate, from very different understandings of “how the world works.” For example, the West has not always embraced “change,” as it does today. For a long time “things worked” according to tradition, not progress.⁶⁷ Cross-culturally, Judaic, Christian, and Hindu society all see the world in different ways, as an examination of their approaches to life, the self, and love illustrate.⁶⁸

Against this backdrop—that is, with the conceptual resource *Weltanschauung* in mind—we can turn to liberalism and inquire into its view of the world. What is the framework of understanding that liberalism brings to bear to make sense of things? The answer, as already referenced, is that liberalism begins with a belief in the primacy of the individual and in the goodness and inevitability of change. It is only within the context of this *Weltanschauung* that one can really take hold of liberalism’s various arguments and claims. For example, John Rawls’ *A Theory of Justice*,⁶⁹ one of the most revered texts of liberalism, is intelligible only if one assumes the liberal commitment to the individual as a truly autonomous subject and an accompanying political theoretic idealism. Without this perspective (which is certainly not shared by all), Rawls’ initial choice situation and his resulting principles of justice have limited intelligibility or appeal. If one grasps this state of affairs, one sees that liberalism is conditional, not objective, in nature. Its manifestation requires an epistemic commitment.⁷⁰

translates *Welt* as “world” and *Anschaung* as “view”). LANGENSCHIEDT’S STANDARD GERMAN DICTIONARY 719, 1263 (8th ed. 1983). The use of the term is not uncommon in American academia. See, e.g., ABRAHAM H. MASLOW, TOWARD A PSYCHOLOGY OF BEING iii (2d ed. 1968).

67. See, e.g., R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 314–15 (8th ed. 1995).

68. For one introductory treatment of Jewish religious thought, see generally CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS (Arthur A. Cohen & Paul Mendes-Flohr eds., 1987). For one introductory treatment of mainstream Christian thought, see generally ALISTER E. MCGRATH, CHRISTIAN THEOLOGY: AN INTRODUCTION (3d ed. 2001). For a discussion of Hindu religious traditions and thought, see generally GAVIN FLOOD, AN INTRODUCTION TO HINDUISM (1996).

69. RAWLS, *supra* note 62.

70. While not directly relevant to the point made here, it is perhaps worth noting that Rawls’ own claim, in his later work, to be “political, not metaphysical” is suspect. Rawls’ “political liberalism” remains committed to the privileged place of reason in structuring the political order (as well as, importantly, placing limits on “comprehensive doctrines”), a reason that supports the epistemic orientation originally expressed in *A Theory of Justice*, which he reaffirms, and that is understood to be universal in reach. See generally JOHN RAWLS, POLITICAL LIBERALISM (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. Moreover, while Rawls indicates that his argument locates itself within the historical and social conditions within which contemporary Western society finds itself (while making no claim, one way or the other, about its more general applicability), John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 225 (1985), his account of the genesis of this

The fact of liberalism's *Weltanschauung* underscores liberalism's subjectivity. So too does a sort of "psychoanalysis" of the *Weltanschauung* itself. That is, we can examine the liberal view of the world and ask whether it "stands to reason," a standard for which we demand that reasoning stays tied to the nature of experience. To the degree that the liberal *Weltanschauung* fails this test, i.e., to the extent that the liberal worldview does not translate well into the reality of our lives, its subject-specific (if not pathological) character is necessarily illuminated. When we analyze the liberal perspective, we immediately discover at least one basic problem. Liberalism fails in its understanding of the role that "the other" plays in human life. More specifically, it fails in its accounting of, if it accounts at all for, the erotic character of the soul.

At its fundament, liberalism approaches the individual as a free and rational person making choices in his or her own self-interest. While such a conception may accurately describe individual life in certain respects, individual lived experience, at least in its most significant aspects, can hardly be characterized in such terms. Any real meaning that one finds in life—e.g., religious, familial, communal—always involves a movement beyond the self. This dimension of experience is that of human spirituality. And here, the epistemic orientation of liberalism fails.⁷¹ The all-too-human experience of love perhaps illustrates this point best.⁷² We love an "other," not the self. And in and through love, we find a peace and completeness—or at least we almost do. Of love, however, liberalism really has nothing to say, because its conceptual framework simply cannot explain the phenomenon: Our actions in this realm are hardly a product of "rational self-interested choosing," as love's paradigmatic act—sacrifice—makes clear. Indeed, we don't even "choose" whom we love (whether that love is romantic, religious, or of some other kind), despite the popular misconception. Paul Kahn is correct in stating that "[l]iberalism is a political philosophy of a loveless world."⁷³ In privileging the language of the self, liberal discourse is mute in that dimension of life—the spiritual—that matters most.⁷⁴ It is difficult to

historical circumstance suggests a larger normative claim: from the perspective of political liberalism, "pluralism is . . . seen . . . as the natural outcome of the activities of human reason under enduring free institutions." RAWLS, *POLITICAL LIBERALISM*, *supra*, at xxiv. Indeed, Rawls states explicitly his belief that "a liberal constitutional democracy is, in fact, superior to other forms of society." JOHN RAWLS, *THE LAW OF PEOPLES* 62 (1999).

For an additional, and insightful, commentary on the claim to be political, not metaphysical, see PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 19 (2005) (noting that liberal culture is not actually practiced within limits of liberal theory and that liberal theory's failure to account for nonliberal political values is untenable).

71. See generally KAHN, *supra* note 70.

72. Some classic discussions of love include PLATO, *THE SYMPOSIUM* (Walter Hamilton trans., Penguin Books 1951) (n.d.) and PLATO, *Phaedrus*, in PLATO, *PHAEDRUS AND THE SEVENTH AND EIGHTH LETTERS* (Walter Hamilton trans., Penguin Books 1973) (n.d.).

73. KAHN, *supra* note 70, at 141.

74. An instinctive reaction to this account of liberalism may be to appeal to liberalism's division of the public and the private and argue that liberalism does acknowledge the erotic character of man, but simply cabins this dimension of our lives in the private domain. The difficulty with this argument is that liberalism's conceptual categories of "the public" and "the private" cannot sustain an adequate

imagine, then, that liberalism “has it right.” Quite the contrary, it is easy to see that liberalism is, at best, one way of coming at the world.⁷⁵

If we move from psychological to philosophical inquiry, the conditional character of liberalism reveals itself again, a circumstance that is true whether we consider the influence of Immanuel Kant or John Locke. Genealogically speaking, Kant lies at the foundation of liberalism’s moral theory (which is itself the foundation of liberal politics). The liberal moral discourse of personhood, common morality, and associated terms begins with Kant’s critical ethics, and his ideas of autonomy, individual moral worth, purposiveness, and related concepts.⁷⁶ If we examine Kant’s ethical philosophy, we see that Kant organized his ethical thinking around the conviction that a fundamental value lies in the universalizability of a rule. This belief is Kant’s first principle. That is, it is the point from which he argues. Importantly, then, it represents an assertion that remains undefended. As Cassirer accurately describes, “[c]ritical ethics affords us no answer as to why . . . free subordination to the universality of a self-given law [takes precedence] over arbitrariness of individual desires.”⁷⁷ Because the appeal to universality remains undefended, we can inquire into its persuasive force. And in the end, despite the power of the premise and derivative arguments, we are able to challenge Kant’s basic claim, and do so relatively easily. Is it absolutely clear that a fundamental value must lie in the universalizability of a rule? Why, for example, shouldn’t individual desire—or at least the actions of an unsubordinated will—trump a universal obligation?⁷⁸ There is, of course, no reason why they shouldn’t, which is why any argument for the pure objectivity of Kant’s critical ethics does not stand. Neither, then, does an argument for the objectivity of a moral framework rooted in it.

We move through a similar analysis when we look in the direction of Locke’s political philosophy. Two basic themes of Locke’s writing—themes that contemporary liberalism has continued—are that the right to property is a natural right of man⁷⁹ and that the individual pursuit of self-interest is

theory of meaning. For an overview of the explanation of this failure, see KAHN, *supra* note 70, at 139–42.

75. In the context of the thoughts expressed in this paragraph, one can consider the reflections of James Boyd White in his article *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1986).

76. See generally KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS*, *supra* note 62. For a very good discussion of Kant’s philosophy, and an emphasis on the importance of reading all of Kant’s critiques together, see CASSIRER, *KANT’S LIFE AND THOUGHT*, *supra* note 16.

77. CASSIRER, *KANT’S LIFE AND THOUGHT*, *supra* note 16, at 246.

78. For just one example of an argument organized around a metaphysics of the will, see KAHN, *supra* note 70.

79. Some may object to the characterization that contemporary liberalism embraces property as a natural right, arguing that the right to property does not exist prior to the state. This objection misunderstands the use of the term “natural” here. No contemporary liberal theorist would allow for absolute state control of property. All liberals, including those who fall under a social contract model, embrace a basic right of individuals to property. It is perhaps necessary to note, however, that Rawls is unclear on this point. See, e.g., RAWLS, *POLITICAL LIBERALISM*, *supra* note 70, at 298.

compatible with sound civil government.⁸⁰ As much as these positions have gained great prominence today, are we really beyond the point of challenging them? Is it absolutely certain that private property (unlimited or even limited) is a human right? More strikingly, is the public good really best served by each individual pursuing his or her own ends? Would a family, the military, or, ironically, a corporation—each of which is a form of association, even if not a traditional state—ever govern itself this way? Once we pose these questions, the reality of Locke's argument as nothing more than one disposition toward social governance becomes obvious. The liberal appeal to Locke as a source for its political program must be understood in this light.

A final illustration of liberalism's subject-specific character lies in the teachings of history. To put the lesson here succinctly, if we reflect on the world from the perspective of time and place, we see that liberal democracy is hardly an ahistorical phenomenon; rather, it is a historical artifact. In the past, political orders, including democracies, have taken an alternate form. The Biblical rule of King Solomon, the Greek polis,⁸¹ and the various monarchies of fifteenth- to eighteenth-century Europe⁸² are just some of the more familiar examples. Similarly, in more modern times, alternatives to the liberal state—e.g., fascist,⁸³ socialist,⁸⁴ monarchic,⁸⁵ and theocratic⁸⁶—have prevailed, and in some instances continue to prevail. Most recently, the promotion of “Gross National Happiness” as the ideology of a Bhutanese Buddhist state stands in striking contrast to liberalism and the liberal political order.⁸⁷ Given the remarkable

80. See generally LOCKE, *supra* note 62.

81. For an introduction to Classical Greek civilization, see generally KITTO, *supra* note 9.

82. For a series of readings on this period in European history, see generally EUGENE F. RICE, JR., *THE FOUNDATIONS OF EARLY MODERN EUROPE, 1460–1559* (1970); RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS, 1559–1689* (1970); LEONARD KRIEGER, *KINGS AND PHILOSOPHERS, 1689–1789* (1970); ISSER WOLOCH, *EIGHTEENTH-CENTURY EUROPE: TRADITION AND PROGRESS, 1715–1789* (1982).

83. Fascist Italy and Nazi Germany are the two most prominent examples. For some reading on fascist Italy, see generally ROY MACGREGOR-HASTIE, *THE DAY OF THE LION: THE LIFE AND DEATH OF FASCIST ITALY, 1922–1945* (1963); BENITO MUSSOLINI, *FASCISM: DOCTRINE AND INSTITUTIONS* (1935). For a treatment of Nazi Germany, see GORDON A. CRAIG, *GERMANY, 1866–1945*, at 569–764 (1978).

84. The former Soviet Union is a prominent example. For a discussion of the founding of the Soviet Union, see PALMER & COLTON, *supra* note 67, at 754–60.

85. Today, the Kingdom of Saudi Arabia governs under a monarchy. The Royal Embassy of Saudi Arabia, Saudi Arabia – Government, <http://www.saudiembassy.net/Country/Government/Gov.asp> (last visited Mar. 27, 2009). The Hashemite Kingdom of Jordan presently stands as a constitutional monarchy. The Hashemite Kingdom of Jordan, Jordan – The State, <http://www.kinghussein.gov.jo/government.html> (last visited Mar. 27, 2009).

86. The Islamic Republic of Iran is one example. For a short treatment of the overthrow of the Shah of Iran and the establishment of the Republic, see PETER MANSFIELD, *A HISTORY OF THE MIDDLE EAST* 326–30 (1991).

87. For an introduction to gross national happiness, see generally Mark Mancall, *Gross National Happiness and Development: An Essay*, in *GROSS NATIONAL HAPPINESS AND DEVELOPMENT: PROCEEDINGS OF THE FIRST INTERNATIONAL CONFERENCE ON OPERATIONALIZATION OF GROSS NATIONAL HAPPINESS* 1 (2004).

variety of ways in which man has, and continues to, organize himself, are we really prepared to say that liberalism is “correct”?

Admittedly, there are some who want to say just that—that the liberal political order is the most natural for man, and that history will bear this out.⁸⁸ But, this claim is at once both rather naïve and a poor interpretation of the nature of history. On the one hand, it is difficult to believe that cultures with absolutely no history of liberal values, institutions, or practices will somehow identify with these same values, institutions, and practices and internalize them as their own.⁸⁹ This is a bit like saying that the world will come to “see the light” of the truth of Christianity, or any other religion that claims universal appeal. Such claims are foolish because cultural dispositions begin with faith, not reason. Put differently, this type of argument wears its ignorance on its sleeve because, as is the point of this subsection, values are a priori (in the vernacular sense of the term).⁹⁰ They can only be reasoned from, not to. On the other hand, even if the liberal state were to “win” on the global stage that hardly means that it is “true.”⁹¹ Most likely, it means that the liberal political program had the most powerful backers. Carl J. Friedrich, the late professor of government at Harvard University, stated it aptly: “Battles do not decide the truth of an idea . . . and wars even less so. World history may well be the world court, but if it is, we finite mortals are not invited to the judgment table.”⁹²

Western society has a long history of proselytization and an accompanying belief that it holds “the truth.” Those who mistake liberalism for fact—who fail to see the inherently ideological character of liberal politics—share in this rather unfortunate tradition. As with any ideology, liberalism is “faith based” (perhaps not in the way that we normally understand this concept, but an accurate

88. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (2d ed. 2006). To be clear, Fukuyama’s historicist view is only weakly deterministic.

89. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996). For one discussion of the famous debate between Huntington and Fukuyama, see Stanley Kurtz, *The Future of “History:” Francis Fukuyama vs. Samuel P. Huntington*, 113 *POL’Y REV.* 43, 43–58 (2002).

90. Obviously, the point made here presents a direct challenge to the famous argument of the Bush Administration that in going to war with Iraq, America and its allies would implant democracy in that land, this despite the fact that Iraq is a country with no history of democracy, existing in a region with no history of democracy (Israel is clearly nonrepresentative), and whose main constituents are three religio-ethnic groups that fundamentally do not get along. The Bush Administration’s rhetoric in this regard continued throughout his presidency. For example, during a press conference with presidents of the Baltic states in May 2005, President Bush spoke of freedom as “universal” and of “the idea of countries helping others become free” as simply “rational foreign policy.” President’s News Conference with President Vaira Vike-Freiberga of Latvia, President Arnold Ruutel of Estonia, and President Valdas Adamkus of Lithuania in Riga, 41 *WKLY. COMP. PRES. DOC.* 767, 771 (May 7, 2005).

91. When referring to “winning” on the global stage, two caveats are immediately appropriate. First, the arguably infinite character of human history raises a serious challenge to any claim of a “win.” How can we know that the future will not look back and tell us that we were wrong? Second, there is the question of whether the “age of liberalism”—and perhaps even the age of the nation-state—is over, in which case the issue of a liberal political order “winning” simply evaporates.

92. Carl J. Friedrich, *Introduction* to *THE PHILOSOPHY OF HEGEL* x (Carl J. Friedrich ed., 1954).

description nonetheless). Only if we acknowledge this condition can we really make sense of liberalism. Once we do recognize that liberal politics begins with a belief system, however, we can push in the direction of an even richer understanding of liberalism, one that places it in the broad, anthropological context of human cultural activity. This picture of liberalism, which captures its essence, in turn generates a powerful account of law, one that, in parallel to the anthropological portrait drawn of liberalism, denotes its fundamental nature.⁹³

B. The Second Step: Appreciating Liberalism as a Cultural Practice of Political Life

Religion, art, science, and language are commonly recognized as major forms of cultural enterprise, i.e., it is a characteristic of most cultures that they practice religion, create art, pursue scientific inquiry, and speak a language.⁹⁴ The West, for example, has a long history of activity in all of these spheres (from Greek and Roman polytheism to Christian monotheism,⁹⁵ the twin traditions of representational and abstract art,⁹⁶ the movement from monophony to polyphony to harmony in music,⁹⁷ the progress from classical mechanics to relativity theory to quantum theory in physics⁹⁸). Of course, the same type of richness is characteristic of the many non-Western civilizations as well.

When we study a culture, or subculture as the case may be, our goal is to see how the people of a specific time and geographic space lived, a concern that focuses not simply on how the society at issue went about its day-to-day life, but, more deeply, on how it made sense of the world.⁹⁹ And we look to the society's religious, artistic, scientific, and linguistic activity to gain that insight because each of these cultural practices represents a distinct form of knowledge, a unique way of organizing and understanding experience. For example, today

93. More precisely, and not unimportantly, the descriptions are philosophical-anthropological in character. See *supra* note 16 and accompanying text for a statement of this point.

94. Religion, art, science, and language do not exhaust the list of cultural practices. History and myth are two other examples. For an introductory discussion of major forms of cultural activity, see generally ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* (1944).

95. For an introduction to religious practice in Classical Greece, see generally JON D. MIKALSON, *ANCIENT GREEK RELIGION* (2005). For a discussion of religion in the Roman Empire, see generally JAMES B. RIVES, *RELIGION IN THE ROMAN EMPIRE* (2007).

96. For an introduction to Western art, see generally BRUCE COLE & ADELHEID GEALT, *ART OF THE WESTERN WORLD: FROM ANCIENT GREECE TO POST-MODERNISM* (1989).

97. On the harmonic development of Western music, see generally HUGO LEICHTENTRITT, *MUSIC, HISTORY, AND IDEAS* (1938).

98. For an exploration of the intellectual history of physics, see generally ALBERT EINSTEIN & LEOPOLD INFELD, *THE EVOLUTION OF PHYSICS* (1938). Today, string theory (perhaps more specifically M-theory) claims a new alternative to both relativity theory and standard quantum theory. For an introduction to string theory, see generally BRIAN GREENE, *THE ELEGANT UNIVERSE: SUPERSTRINGS, HIDDEN DIMENSIONS, AND THE QUEST FOR THE ULTIMATE THEORY* (1999).

99. The ability to achieve this goal is always limited. See GEERTZ, *supra* note 8, at 15 (“[A]nthropological writings are themselves interpretations, and second and third order ones to boot.”).

Christianity remains the dominant religion of the West. If we explore its cultural practice,¹⁰⁰ we see quite immediately that faith in the teachings of Christ offers a distinct perspective on human behavior and, more generally, on humanity itself. For this reason, we can, and some do, speak of a Christian view of the world.¹⁰¹ Similarly, for a period of time, Newtonian mechanics was the foundation of Western scientific belief, affording a particular understanding of the physical universe. In parallel to the internalization of Christian norms, people in theory could, and in some contexts today still do, speak of the world of Newtonian mechanics.¹⁰² Art and language equally tell a story, a fact that we see when an idea to be expressed gets “lost in translation.”¹⁰³

When we reflect on this general transcendental quality inherent in cultural activity, at least three important characteristics present themselves, and any basic appreciation of the nature of cultural activity requires their emphasis. First, the form of knowledge that each cultural practice represents is complete, i.e., there is no phenomenon of which the practice is not able to make sense.¹⁰⁴ The Christian view of the world, for example, is truly a perspective on all actions and events. With respect to human behavior, we can always ask what the divine teaches (e.g., “What would Jesus do?”¹⁰⁵). Equally, with respect to occurrences in nature and other happenings (e.g., death of a loved one, professional opportunity presenting itself), we can always explain them with an eye toward God.¹⁰⁶ Second, these various forms of knowledge are not reducible to each other; rather, they are incommensurable, as the comparison of Christian and Western scientific approaches to the ultimate order of things illustrates. Specifically, Christianity is

100. From the perspective of the scholar, religious practice is a cultural practice. This orientation is not a challenge to the beliefs of the religious observer and is not to be understood to disparage those beliefs.

101. To the extent that it is not apparent from the character of this Article, which, to repeat an earlier statement, is written in broad terms, the reference to a Christian view of the world should be understood at a certain level of generality. Obviously, Christian denominations differ on their more specific world outlooks.

102. See, e.g., EINSTEIN & INFELD, *supra* note 98 (speaking of the rise and decline of the “mechanical view”).

103. In his well-known discussion of the Velázquez painting *Las Meninas*, Michel Foucault offers the following insight, on which it is worth reflecting:

[I]t is in vain that we say what we see; what we see never resides in what we say. And it is in vain that we attempt to show, by the use of images, metaphors, or similes, what we are saying; the space where they achieve their splendour is not that deployed by our eyes but that defined by the sequential elements of syntax.

MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 9 (Vintage Books 1973) (1966).

104. For a comment on completeness, see ERNST CASSIRER, *THE MYTH OF THE STATE* 34 (1946).

105. See, e.g., Bobby Ross Jr., *Religion Experts Ask How Jesus Would Vote*, ASSOCIATED PRESS, Aug. 18, 2004. Another example is the well-known question “What Would Jesus Drive?” What Would Jesus Drive?, <http://www.whatwouldjesusdrive.org> (last visited Mar. 27, 2009). Importantly, the views expressed on this website may be denomination specific.

106. See, e.g., Peter Graff, *Faiths Ask of Quake - “Why Did You Do This, God?”*, REUTERS, Dec. 30, 2004.

committed to an understanding that is rooted in the divine.¹⁰⁷ Western scientific inquiry, meanwhile, operates as a form of reason. These two perspectives are not reconcilable on the other's terms,¹⁰⁸ a fact that the current political debates over "intelligent design" and American childhood education begin to demonstrate.¹⁰⁹ Third, each form of knowledge is inherently contingent in character. That is, none is demonstrably true, but, quite the contrary, the viability of each depends on an individual's willingness to believe—or have faith—in the perspective generated. For this reason, we can describe these cultural practices as "fictions," which is not to say that they are false, but only that each presents a form of knowledge that is constructed.¹¹⁰

Against the background of this understanding of major forms of cultural enterprise, or simply "cultural forms," we can acknowledge that political life too is a cultural form. Man always takes up political life.¹¹¹ And this aspect of being is organized around a particular epistemic framework, one that offers a complete ordering of human experience. In the same way that we can always ask the question "What would Jesus do?," we can always ask whether our actions are consistent with the governing norms of social life. Furthermore, while other spheres of activity do influence political life, ultimately political life is incommensurable with those other dimensions of experience, as the discussion in Part IV of the irreducibility of political and moral life serves to point out. Finally, political life begins with faith. This is the old lesson of Plato's "noble lie"—that a

107. This commitment is expressed in the "Creation story," whether understood literally or metaphorically. The Creation story appears in the Book of Genesis. The Bible contains two stories of creation, which are found at *Genesis* 1:1–3:24 (Jerusalem).

108. David Hume made a somewhat similar point in his argument that Christian belief cannot be grounded in reason. DAVID HUME, *Of Miracles, in AN ENQUIRY CONCERNING HUMAN UNDERSTANDING* (1748), reprinted in DAVID HUME, *DIALOGUES CONCERNING NATURAL RELIGION* 107 (Richard H. Popkin ed., 2d ed. 1998).

109. See, e.g., Carey Gillam, *Evolution on Trial as Kansas Debates Adam vs Darwin*, REUTERS, May 2, 2005; Christoph Schönborn, Op-Ed., *Finding Design in Nature*, N.Y. TIMES, July 7, 2005, at A23. Some might object that not all Christian denominations understand themselves as incompatible with science (and specifically theories such as the Big Bang and evolution). The point here, however, is not to take a position on their possible complementarity, but only to note that the terms of discourse of one are not reducible to those of the other.

110. Clifford Geertz speaks indirectly to this point when he writes:

[A]nthropological writings are themselves interpretations, and second and third order ones to boot. (By definition, only a "native" makes first order ones: it's *his* culture.) They are, thus, fictions; fictions, in the sense that they are "something made," "something fashioned"—the original meaning of *ficti*—not that they are false, unfactual, or merely "as if" thought experiments.

GEERTZ, *supra* note 8, at 15 (footnote omitted). It is perhaps also useful to note Geertz's comment on the boundaries within which the interpretation of culture is legitimate:

I have never been impressed by the argument that, as complete objectivity is impossible in these matters (as, of course, it is), one might as well let one's sentiments run loose. As Robert Solow has remarked, that is like saying that as a perfectly aseptic environment is impossible, one might as well conduct surgery in a sewer.

Id. at 30.

111. Aristotle, of course, spoke famously that "man is by nature a political animal." ARISTOTLE, *supra* note 11, at 1253a1.

stable political order depends, in part, on the social internalization of a fundamental myth.¹¹²

If as a general matter political life is a cultural form, then specific instances of political life must also be cultural forms. A richer conceptualization of liberalism necessarily follows. Liberalism, which, as discussed in the previous section, speaks to political life, is a cultural practice.¹¹³

Any serious treatment of liberalism as a cultural practice necessarily turns to law, and, at a minimum, constitutional law.¹¹⁴ After all, constitutional law has its name precisely because of its constitutive function. With this body of norms, the foundation of the liberal state is constructed and thereby so too is liberal political life.¹¹⁵ This connection between liberalism and law suggests the need for a conception of law that incorporates into its self-understanding an account of liberalism as political culture. The dominant contemporary theories of jurisprudence fail in this respect.

C. *The Third Step: What Is Law?*

Law actualizes the liberal political order. It is the expression of liberalism as a political culture. This coincidence of identity between liberalism and law points to the answer to the question “What is law?” Namely, law is a cultural form. Like religion, art, science, and language, it is a cultural activity that offers its own way of knowing the world and generates its own world of meaning. Law offers “a legal view of the world.” As with religion, art, science, and language, this world is complete, incommensurable with other major cultural enterprises, and inherently contingent in character.¹¹⁶

To see that law affords a complete worldview is relatively easy, despite the initial skepticism. We need only move in line with the earlier discussions to appreciate this condition. There is a basic question that we can always ask from the perspective of law: Is a particular action or event “legal”?¹¹⁷ Whether the circumstance in question is a personal injury accident or a private conversation between two individuals over coffee, law can make sense, i.e., it can speak to the

112. PLATO, THE REPUBLIC OF PLATO 414c–415d (Allan Bloom trans., Basic Books 1968) (n.d.). Technically, for Plato himself, the first generation of guardians may not internalize the lie. But subsequent generations, who will be educated in the myths of the society, do. *Id.*

113. See *infra* notes 117–29 and accompanying text for a discussion of liberalism’s satisfaction of the criteria of completeness, incommensurability, and epistemic contingency.

114. For a basic treatment, qua casebook, of American constitutional law, see generally KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004). For some readings in American constitutional theory, see generally ACKERMAN, *supra* note 24; KAHN, *supra* note 24.

115. More precisely, the construction of the liberal state is a constitutive and dissolutive process that is constantly in motion.

116. I must again note that no one in the legal academy has understood this point better than Paul Kahn. See *supra* note 31 for a statement of this point.

117. For this reason, it is difficult to defend a doctrine of nonjusticiability. See Aharon Barak, *The Supreme Court, 2001 Term—Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 98 (2002).

legality, of this situation. And, to be clear, the fact of law's completeness is hardly trivial. A private conversation between two individuals over coffee takes place within a larger political order. Some such orders would not necessarily allow this type of activity, at least in the manner to which Americans have become accustomed. One need only think of the totalitarian state, whether secular or theocratic, to appreciate the inherently political (and, more precisely for present purposes, legal) character of "privacy," and the importance of our awareness of it.¹¹⁸

If the depth of this line of reasoning remains difficult to grasp, additional evidence demonstrating the seriousness with which we must take law's complete character, and ultimately the richness of law's world, is constantly before us, and indeed everywhere around us. If we look at the major issues confronting contemporary American society—for example, the detainment of "enemy combatants,"¹¹⁹ the right to die,¹²⁰ gay marriage,¹²¹ the appropriation of property¹²²—all are approached in terms of their legality.¹²³ Perhaps more tellingly, *even the Central Intelligence Agency* has lawyers and is expected to conform its actions to law (or at least be able to make a public showing that such is the situation).¹²⁴ Surely, this is a remarkable state of affairs. An organization responsible for gathering intelligence and conducting covert affairs must conform its actions to rules of law? There is a basic truth about American culture that each of these examples illustrates. Americans organize, and provide meaning to, political experience in and through law, and this experience is comprehensive of an American political self.¹²⁵

Of course, the fact of law's completeness does not mean that Americans always appeal to law to interpret actions and events. They do not, because competing conceptions of behavior are available and at times carry more interpretive necessity and force. Sometimes an American understands him- or herself to engage in aesthetic creation or scientific or religious activity. In these circumstances, a significant political consciousness may be absent. But this condition is of no consequence to the truth of law's completeness because the point is not that Americans do affirmatively always look to law for an explanation of the world surrounding them, it is only that they can (and, depending on future circumstances, might).

118. The most famous decision in American constitutional law construing the right to privacy is *Roe v. Wade*, 410 U.S. 113 (1973).

119. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

120. *E.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005).

121. *E.g.*, *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

122. *E.g.*, *Kelo v. City of New London*, 545 U.S. 469 (2005).

123. Of course, the quintessential illustration of law's richness, and concomitantly, the commitment of the American to law's world, is the wholesale American acceptance of law's resolution to the question, "Who is the President?" See generally *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

124. *E.g.*, 50 U.S.C. §§ 401–442a (2006). For related executive orders, see, for example, Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 401 (2006).

125. American political experience is, however, a contested one. See *supra* note 31 for a statement of this point.

Moving past the question of law's completeness, the cultural practice of law is also not capable of being reduced to other cultural forms as, again, the discussion in Part IV on the incomparability of political and moral life shows. Finally, turning to the inherently contingent character of cultural forms of knowledge, the cultural practice of law is built on myth. Specifically, it is constructed around the American belief in the "popular sovereign," which, as reflection makes evident, is a nonexistent entity. There is no actual acting subject "the People" operating in physical time and space.¹²⁶ "The People" themselves do not subsist in the temporal world. Quite the opposite, they are a "fiction," into which Americans buy. Belief in "the People" represents the great American political leap of faith, the psychological move that ultimately allows for the creation and maintenance of the American liberal political order.¹²⁷

And, we cannot overstate the depth of this commitment. As already indicated in this Article's Preliminary Comments, popular sovereignty is the first principle of the American political order. But to understand what this really means—to see just how powerful a hold this concept has on the American political imagination—we can appeal to the traditional Western categories reason and will and consider where they locate themselves in the context of American legal practice. As Paul Kahn has pointed out, in the United States, when assessing the legitimacy of law, *will takes priority over reason*.¹²⁸ Self-government precedes, and outweighs considerations of, justice. This is a striking characteristic for a political way of life. It is also a point of marked differentiation between the United States and many other contemporary democracies, as well as between the United States and the international community.¹²⁹

126. From a historical perspective, we see that "the People" is a secular form of God. *See, e.g.,* KAHN, *supra* note 31. For a discussion of the relationship between theological concepts and the modern conceptualization of the state, see generally CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., MIT Press 1985) (1922). Schmitt notably stated that

[a]ll significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.

Id. at 36.

127. The recognition of "the People" qua myth is a point of contact between the philosophical-anthropological approach to law and Kelsen's positivism (and more specifically, Kelsen's "basic norm"). *See generally* KELSEN, *supra* note 47.

128. *See generally* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

129. *Id.* As the discussion of law's completeness, incommensurability, and epistemic contingency indicates, the cultural form of law carries with it a deep set of meanings for the American citizen. Nonetheless, it is quite possible, but far from certain, that "the rule of law" represents a dying set of meanings. For one short commentary on this subject, see KAHN, *supra* note 70, at 25–26.

If in America law is a cultural form, what are we to make of the commonly held understanding of law qua governing instrument?¹³⁰ Surely, the functional conception of law carries force, and cannot be dismissed. As any self-conscious practitioner or judge will testify, law is indeed a governing instrument. It provides order. On occasion, it even effects justice. How then are we to reconcile these competing definitions of law? The answer is to recognize that these conceptions of law do not really stand in opposition; rather, the latter is better understood as a sort of impoverished iteration of the former. What the philosophical-anthropological study of law teaches is that one must move beyond the purely instrumental view of law and recognize that, first and foremost, law is a form of experience and thus a way of life for Americans. Law begins as a manner of relating to the world,¹³¹ a state of affairs that *only then* expresses itself, in part, in and through “working institutions.”¹³² Courts, legislatures, rules of law, and other “structures” are points of manifestation of a larger framework of understanding, not the end product of a “political science.” They convey a belief system ahead of any “operational” character they also possess. It is just this insight that the functional conception of law fails to grasp, at least with any sort of serious comprehension:¹³³ in sum, that law is a psychological phenomenon—a product of the mind—well before it is a mechanical one.¹³⁴

Understanding that law is a cultural form of politics is a prerequisite to any meaningful thinking about a lawyer’s professional responsibility. There is, however, a further fact that requires acknowledgement before the question of a lawyer’s ethics is taken up. This is the truth of the nature of the political itself. Part IV addresses this subject and, as indicated, speaks to the relationship of irreducibility that exists between the political and moral forms of human experience. When combined with the reasoning thus far presented, Part IV teaches a fundamentally reconstructive lesson. If we are to accurately describe the practice of law, we must readjust our thinking toward the study of appropriate lawyer behavior.

130. See *supra* note 6 and accompanying text for a discussion of the American instrumental view of law.

131. In one of his many works on German history, Gordon Craig comments on a contrasting German psychology of the nineteenth century, writing of “their suspicion that constitutional government was somehow un-German.” GORDON A. CRAIG, *THE GERMANS* 32 (1982). Taking note of this statement helps highlight the phenomenological character of law.

132. The priority spoken of here is strictly a conceptual, and not a temporal, one.

133. See, e.g., Richard A. Posner, *Cultural Studies and the Law*, RARITAN, Fall 1999, at 42 (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999)).

134. In this context, one can consider Paul Kahn’s statement that “[a]n account of political life that ignores the metaphysics of sovereignty will never confront the actual experience of life and death within the state.” PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* 198 (2007).

IV. A NEW WAY FOR LEGAL ETHICS

Political life is an autonomous realm of human experience. In the West, appreciation of this circumstance goes at least as far back as the writing of Machiavelli, whose pragmatic treatment of the requirements for successful political rule found no real space for “outside” considerations.¹³⁵ In more contemporary times, the recognition of the autonomy of the political is found perhaps most poignantly in the work of Carl Schmitt. His *The Concept of the Political*, and its explication of the “friend-enemy” distinction as the orienting category unique to political experience, emphasizes, at least in part, just this point.¹³⁶ That political life is its own distinct sphere of activity suggests, of course, that it is its “own world,” that it is, loosely speaking, a self-contained universe of action. And while such an understanding of political life—or, more accurately, of what it means to be autonomous—is not incorrect, it is incomplete because, in the context of a discourse on politics, autonomy carries with it a further implication: that the sphere of political life is not reducible to other dimensions of human experience. That is, when speaking of the political, autonomy means *incommensurability*.¹³⁷ Awareness of this fact is essential to any serious discussion about politics because the inability to compare political life to other forms of human experience lies at the heart of the relationship between politics and these other aspects of being. Importantly for a discourse on law, and more particularly, for present purposes, on legal ethics, this condition extends to the relationship of politics to morality.

We can look in a number of different directions to demonstrate that the political and moral dimensions of human life are incommensurable. Naturally, the most definitive evidence lies with epistemological considerations. As already suggested, if we inquire into the conceptual categories around which political life is organized, we see that politics begins with a division of self and other. Here, we speak of, and know individuals as, “citizens” and “aliens,” and relatedly, “friends” and “enemies.” There are those in our community—“us.” There are those outside our group—“them.” This orientation toward the world—this method of organizing and understanding experience—stands in contrast to the moral construction of life, at least in the contemporary West. Today, moral experience begins in a fundamentally different—and indeed, in precisely the opposite—way, with a collapse of the distinction of self and other. In Western moral life, one talks of “human dignity,” “human rights,” and “universal equality.” Meanwhile, one sees “persons.” There is no us versus them. There is

135. See generally NICCOLÒ MACHIAVELLI, *THE PRINCE* (Harvey C. Mansfield trans., Univ. Chi. Press 2d ed., 1998) (1532). As indicated in the Introduction, and as discussed further along in this Part, the position of this Article is not that politics is a wholly insulated dimension of human experience, only that it is incommensurable with other spheres of life, including morality. See *infra* pages 769–70 for a discussion of this point.

136. See generally CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. Chi. Press 1996) (1927).

137. There is a limit to this claim of a categorical distinction between various aspects of our lives. For example, politics and aesthetics can merge into each other.

“humanity.”¹³⁸ It does not take much effort to recognize the futility of trying to measure one of these ways of coming at the world against the other. They share no common ground. How can they be reconciled? In the end, there is no Archimedean point at which these competing visions can “meet.” There is only a conflict between perspectives.

Moving beyond the realm of the abstract question of knowledge (or, more precisely, of what counts as knowledge), a turn to the kingdom of action offers further illustrations of the incommensurability of the political and moral dimensions of human experience. The paradigmatic example here is the phenomenology of war. If we think about this behavior, this is political conduct through and through.¹³⁹ Furthermore, it is affirmatively *not* moral conduct. An exploration of our disposition toward the knowing killing of innocent people—“collateral damage” as it is strategically referred to today¹⁴⁰—makes this experiential disconnect clear.¹⁴¹

In war, we feel justified in taking the lives of the blameless. We try to limit these “casualties of war,” but if death of the innocent occurs, such a happening, however regrettable, is acceptable. These individuals are not members of our community and the nature of the world is such that “we have to do what we have to do.” At the same time, despite this satisfaction of our conscience, which is not an unreal appeasement, we cannot honestly reason away these deaths in moral

138. This description of contemporary moral discourse is, admittedly, a bit oversimplified. In addition to deontological forms of reasoning, the modern West also adopts the forms of reasoning of consequentialism and virtue ethics. Deontological theories, however, lie at the foundation of contemporary moral life. The criminal law, and particularly its thinking about punishment, is demonstrative. See, e.g., JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 95 (5th ed. 2004) (“Desert is a necessary condition of punishment.”). Anthony Kronman has made a similar observation concerning the primacy of the deontological viewpoint in his major writing on legal ethics and the legal profession, stating, “The belief that every person possesses a basic moral dignity on account of his or her humanity alone . . . is today one of the most widely held of all ethical beliefs.” KRONMAN, *supra* note 39, at 39–40. For some readings on the problem of multiple moral discourses, see generally, ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (2d ed. 1984); JEFFREY STOUT, *ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS* (1988).

As the discussion in this footnote and the accompanying text suggests, this Article’s consideration of contemporary Western moral life is vis-à-vis its secular form. While this discursive boundary perhaps represents a limitation of this Article, there is nothing to suggest that the claim of incommensurability does not extend to the relationship between American politics and religious moral life. I leave the treatment of this subject to the future.

139. One might juxtapose this statement against Clausewitz’s famous claim that “war is a mere continuation of policy by other means.” See KARL VON CLAUSEWITZ, *ON WAR* 16 (O.J. Matthijs Jolles trans., The Modern Library 1943) (1832).

140. The fact that the United States Department of Defense includes “collateral damage” in its dictionary of military and associated terms illustrates the term’s currency. DEPT OF DEF., *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 95 (as amended through Oct. 17, 2008). The Department of Defense defines collateral damage as the “[u]nintentional or incidental injury or damage to persons or objects that would not be lawful military targets in the circumstances ruling at the time.” *Id.* The Department of Defense further states that “[s]uch damage is not unlawful so long as it is not excessive in light of the overall military advantage anticipated from the attack.” *Id.*

141. *But cf.* MICHAEL WALZER, *JUST AND UNJUST WARS* (4th ed. 2006).

terms, however hard we may try.¹⁴² How can one legitimately claim to be respecting the “dignity,” the “personhood,” or the “rights” of the grocery store owner who is killed because his workplace happens to be located in the wrong place at the wrong time? From a political perspective, we can make sense of the death. But it is a mistake, albeit a very human one, to attempt to claim a moral ground for the action. A killing occurred. We can justify it politically. We cannot defend it morally.¹⁴³ That is the end of the story. If we are willing to be straightforward with ourselves, we cannot help but confront the truth of this circumstance. How, then, can we arrive at any conclusion other than the incommensurability of political and moral life?

If this reality of the divergent character of political and moral experience remains illusive, i.e., if it still does not resonate inside oneself, recognizing a tension resident in the immediate lives of many, if not all, of us may serve as a useful analogy. Most individuals have something in their life that is sufficiently dear to them that they would act against moral demands, if necessary, to defend it, *and would feel justified* in doing so. For many people, of course, that something is their children. In this type of circumstance, the discord is clear: the very fact that one is acting contrary to moral prescriptions means that the behavior is not moral. Yet one readily, and one believes defensibly, takes the positive action toward that which is loved. In this scenario, the truth of which no one is going to deny, there is an inescapable tug-of-war between two fundamentally different sources of value—the important “something” and “right action” (a present-day misnomer that will be discussed shortly). A parallel condition holds in the relationship of the political to the moral. Just as we cannot reconcile the contradiction present in the former dynamic, we equally cannot square the inconsistency manifest in the latter.

This discussion of the incommensurability of politics and morality undoubtedly disturbs the sensibilities of many, particularly those who find strong comfort in contemporary deontological reasoning. In appreciation of this state of affairs, a number of comments are in order. Preliminarily, the nature of the relationship between the two should not be misunderstood. Incommensurability means that politics and morality cannot be compared. It does not mean that one sphere of life does not influence the other. Indeed, quite the opposite is true.

142. The argument defending the knowing killing of innocent people appeals to the doctrine of double effect, which originates in Catholic thought. For a simple description grounded in Thomistic thinking, see KENNETH F. DOUGHERTY, *GENERAL ETHICS: AN INTRODUCTION TO THE BASIC PRINCIPLES OF THE MORAL LIFE ACCORDING TO ST. THOMAS AQUINAS* 65–70 (1959). Michael Walzer has offered a qualification to the original doctrine. WALZER, *supra* note 141, at 151–59.

The referenced example concerns the knowing, as distinguished from the deliberate, killing of innocent individuals. Walzer has also argued that the deliberate killing of noncombatants is justified to fight against “immeasurable evil” in circumstances where the consequences of the killing are “determinate” and the noncombatants are geographically proximate to those responsible, directly or indirectly, for perpetrating the evil. Michael Walzer, *World War II: Why Was This War Different?*, in *WAR AND MORAL RESPONSIBILITY* 85, 93–102 (Marshall Cohen et al. eds., 1974).

143. Presumably, one could readily offer a utilitarian argument to justify such killing. But contemporary moral discourse is fundamentally, although not exclusively, deontological. See *supra* note 138 for a discussion of this point.

Moral life constantly impacts political action. Equally, our political commitments routinely set boundaries on our moral conduct. The fact that we try to limit “collateral damage” while remaining willing to knowingly kill innocent people is evidence of this dynamic. In acknowledging the irreducibility of politics and morality, what we are saying is that one sphere of life is not wholly coincident with the other. We are not maintaining that the two dimensions of experience are entirely insulated from one another.

Admittedly, even with this understanding of the interplay between politics and morality, the disruption of conscience that the affirmation of their incommensurability engenders likely remains, at least for some. The most appropriate response now is an absolute demand for political maturity, and politically mature thinking. Stated candidly, politics is basic.¹⁴⁴ If one doesn’t grasp this, one simply doesn’t understand how the world works, the failure to perceive this condition indicating a problem in one’s capacity to observe. In orienting ourselves to the world—in clarifying our starting points for our judgments about man—we cannot deny the reality of politics, nor is it possible to reason politics away. We can only confront the fact of politics and move from there.

This nod toward the political character of life, as well as its integrity, leads to two further remarks, both of which make points that have already been alluded to in this Part, having informed the Part’s discourse on politics. First, at the outset of this discussion, this Part referenced Machiavelli and Schmitt, both of whom remain controversial figures in the West, albeit for different reasons—the former because of the ruthlessness of his advice, the latter because of his association with the National Socialist Party and the horror of its conduct in the first half of the twentieth century. For the conversation on politics, these authors are compelling, despite any questionable virtue, and their ideas must be taken seriously.¹⁴⁵ In her work on politics, and in her thinking about Schmitt, Chantal Mouffe writes that “it is the intellectual force of theorists, not their moral

144. One can compare this statement with that of Paul Kahn, who writes, correctly, that “[p]olitics, even the politics of a liberal state, remains a deeply erotic phenomenon.” KAHN, *supra* note 70, at 18.

145. Machiavelli’s *The Prince* is, of course, standard reading in a liberal arts curriculum. For some additional writing of Machiavelli, see generally NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* (Harvey C. Mansfield & Nathan Tarcov trans., Univ. Chi. Press 1996) (1531). For some discussions of Machiavelli and his work, see generally HARVEY C. MANSFIELD, *MACHIAVELLI’S VIRTUE* (1996); LEO STRAUSS, *THOUGHTS ON MACHIAVELLI* (1958). Schmitt’s work has had a renaissance in the United States, beginning roughly in the last quarter of the twentieth century. For some additional writing of Schmitt, see generally CARL SCHMITT, *POLITICAL ROMANTICISM* (Guy Oakes trans., MIT Press 1986) (1919); SCHMITT, *supra* note 126; CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* (Ellen Kennedy trans., MIT Press 1985) (1923). For some discussions of Schmitt and his work, see generally *LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM* (David Dyzenhaus ed., 1998); HEINRICH MEIER, *CARL SCHMITT & LEO STRAUSS: THE HIDDEN DIALOGUE* (J. Harvey Lomax trans., Univ. Chi. Press 1995) (1988); HEINRICH MEIER, *THE LESSON OF CARL SCHMITT* (Marcus Brainard trans., Univ. Chi. Press 1998) (1994); *THE CHALLENGE OF CARL SCHMITT* (Chantal Mouffe ed., 1999). These lists are hardly exhaustive.

qualities, that should be the decisive criteria in deciding whether we need to establish a dialogue with their work.”¹⁴⁶ This statement is correct.

Second, past this subject of the range of appropriately considered literature is an important philosophical matter that underlies the account of politics presented here, specifically the challenge to Western moral thought—and particularly, the discipline’s self-conception—that the account represents.¹⁴⁷ As is commonly recognized, Western moral philosophy understands itself to be dealing with the question of right action. The fact that politics and morality are incomparable, however, means that neither holds a privileged place vis-à-vis the other, i.e., that politics does not “trump” moral life *or vice-versa*. Put differently, the incommensurability of politics and morality denies the possibility of right action, at least in absolute terms. This opposition that a normative equality of politics presents to the self-perception of Western moral philosophy is unqualified, and consequently leaves a fundamental question hanging in the balance, namely whether we are really prepared to say that the discipline is wrong in its self-understanding and that right action is actually not “right.” Is this really what we are going to claim? Although such an assertion is quite bold, upon reflection we see that it describes precisely the state of affairs within which man finds himself.

The key to recognizing the truth of this circumstance is to ask the first question: What is morality? Once we make this inquiry, we see that morality, like politics, is a cultural practice. It generates a world of meaning that is complete (we can always ask if our conduct is “correct”), incommensurable (as demonstrated above), and inherently contingent in character (the contemporary moral world carries force only if we internalize its first principles). We also see that it is nothing more, and can make no claim of being so, i.e., the moral sphere of life is not a normative order grounded in reason, which is the foundational claim upon which Western moral philosophy’s self-conception is built.¹⁴⁸ Because of this nature of moral prescription—it is civilization dependent and civilization generative—the rejection of any claim of right action qua “right” action is readily maintained. It simply makes no sense to speak of conduct in truly absolute terms. What counts as morally correct behavior is a function of history and psychology, of time, place, and extant disposition. And none of this

146. CHANTAL MOUFFE, ON THE POLITICAL 4–5 (2005).

147. This reference to “Western moral thought” is imprecise. More technically, this Article is speaking of “normative ethics,” which is one branch of Western moral philosophy. The argument in these paragraphs, however, does have implications for “meta-ethics,” at least those theories—whether claiming that moral judgments can be true or false or claiming otherwise—that fail to acknowledge the fundamentally conflicted character of human experience. For an overview of both normative ethics and meta-ethics, see A COMPANION TO ETHICS 159–269, 397–487 (Peter Singer ed., 1991).

148. Technically, at least some normative ethical theories ground themselves in reason and intuition. But, the fundamental claim of normative ethics remains that its prescriptions are a product of reason. For one discussion of the nature of normative ethics and how normative theories are defended, see SHELLY KAGAN, NORMATIVE ETHICS 1–17 (1998). On the basic claim that normative ethics grounds itself in reason, see also Christopher Rowe, *Ethics in Ancient Greece*, in A COMPANION TO ETHICS, *supra* note 147, at 121 (describing tradition of Western ethical philosophy “as the search for a rational understanding of the principles of human conduct”).

suggests, or supports a contention, that moral life “wins” in its competition with politics.

An important consequence of this newfound understanding is that the field of ethics takes on an alternate construction. Specifically, the ethicist must now ask “what type of action” he or she is considering before grappling with any subsequent possibilities of right behavior. Within a particular sphere of life, we can still make judgments about behavior, which are assessments of coherence. We can examine the internal integrity between commitments and subsequent conduct in politics, morality—even art.¹⁴⁹ But the realization that moral life is a cultural form means that we cannot, at least as a matter of reason, make claims about action that simply “apply,” i.e., that are “true” and that pay no attention to, and thus de facto deny, the multidimensional character of human experience.¹⁵⁰

From the perspective of intellectual critique, the failure to recognize the inability to collapse political life into other aspects of being, and specifically moral life, marks the exact point where legal ethics scholarship errs in its reasoning. As a general matter, the central focus of the legal ethical theorist, even he or she who proposes “amoral” models of lawyering, is moral discourse.¹⁵¹ But law’s home is the field of politics, not morality, and the two are not the same worlds of action. Only after we acknowledge the truth of the autonomy of the political, *and consequently of the autonomy of law*,¹⁵² can we understand how to think correctly about a lawyer’s professional responsibility. Once this recognition occurs, the legal ethicist finds him- or herself in a new place. The fundamental question before the field is now a political one and is no longer tied to the traditional Western moral framework, at least not in the first instance. What the legal ethicist must ask is “How does one serve the cultural practice of law?”

V. HOW IS A LAWYER?

Ascertaining the demands that the cultural practice of law places on the lawyer requires an explication of its epistemic structure. It is the ideas that comprise, and make manifest, the legal form of meaning—the “conditions of possibility” of legal experience, to speak the language of Kant¹⁵³—that

149. In this context, one can consider the thoughts of Ernst Cassirer on the distinction between art and sentimentality. CASSIRER, *supra* note 94, at 142.

150. One can consider here the thoughts of Max Weber on the relationship of ethics to politics, at least as discussed in his famous lecture “Politics as a Vocation.” See MAX WEBER, *THE VOCATION LECTURES* 79–92 (David Owen & Tracy B. Strong eds., Rodney Livingstone trans., 2004). One might also consider Michael Walzer’s comments on Weber in Michael Walzer, *Political Action: The Problem of Dirty Hands*, in *WAR AND MORAL RESPONSIBILITY*, *supra* note 142, at 62, 78–82.

151. *E.g.*, Pepper, *supra* note 3.

152. This acknowledgment of the autonomy of law is a point of marked differentiation between the orientation of a cultural study of the lawyer and contemporary schools of American jurisprudence. See *supra* notes 6, 16 and accompanying text for statements on this point.

153. The philosophical orientation of the cultural study of the lawyer is neo-Kantian, having its roots in Kant’s theory of knowledge. See *supra* note 16 for a statement of this point.

determine any associated professional responsibility. Immediately, a clarification of the promise of this type of analysis is necessary. In exposing the constituent elements of a cultural form, multiple understandings of what those component parts prescribe inevitably will arise. The historical practice of Christianity affords an excellent example of this phenomenon. In this religious tradition, numerous denominations (and subdenominations) have been born over the course of time, reflecting differences in belief about the correct interpretation of the Bible and its theological concepts, the true nature of Christ, as well as other subject matters.¹⁵⁴ Given the various interpretations of law and its demands that one can legitimately expect to appear, what value does a cultural study of the lawyer hold out for the profession?

The answer is that it offers tremendous reward. To begin, a cultural study of the lawyer has the virtue of being methodologically sound, if not correct. If one accepts the reasoning put forth in the earlier Parts of this Article, then the propriety of this approach to the investigation of a lawyer's professional responsibility demonstrates itself. The fact that various interpretations of law's world are possible in no way denies this rightness. The circumstance of competing "schools of thought" simply is what it is, and nothing more. There is also nothing to suggest that this type of diversity of argument is inherently problematic, whatever that might mean. If the end result of a cultural study of the lawyer is the manifestation of various "legal denominations" operating within society, it is not at all clear that such a condition would somehow be unacceptable. Indeed, something like this state of affairs already appears in American society, in the debate over how to interpret the Constitution.¹⁵⁵

Beyond the value of methodological justifiability, a cultural study of the lawyer also has the merit of offering definitive answers, a characteristic that reveals itself in two dimensions. First, and perhaps most importantly, a cultural study of the lawyer promises unambiguous prescriptions for at least some significant areas of a lawyer's practice, regardless of interpretive viewpoint, as the epistemic structure of law is determinative, without interpretive qualification, albeit not for all ethical circumstances (as the discussion in this Part demonstrates). Put differently, while the possibility of a number of "legal denominations" manifesting themselves is real, there will, nonetheless, be a common "legal" core of understandings to which all of these potential branches subscribe, and which will place demands on conduct. It is this locus of interpretive agreement that is the foundation for a lawyer's ethics and is, at the most basic level, what is "legal" about a lawyer's professional responsibility. Once again, a look to the historical practice of Christianity is useful. For all of the proliferation of sects, there is a set of beliefs and values that unites them all

154. For some treatments of the history of Christianity, see generally PAUL JOHNSON, *A HISTORY OF CHRISTIANITY* (1976); 1-2 JUSTO L. GONZÁLEZ, *THE STORY OF CHRISTIANITY* (1984-1985).

155. For some readings on this subject, see generally AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (Sari Bashi trans., Princeton Univ. Press 2005); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

and that establishes each as Christian in character, and a part of Christendom, e.g., belief in the authority of the Bible, in, at least, the theological significance of Jesus (if not in Jesus as the Messiah), and in the ethic of love. To the extent that a variety of legal communities arises, a similar condition will prevail.

Second, in those circumstances where outcomes are a function of viewpoint, a cultural study of the lawyer should still be responsive to the needs of those who adhere to specific perspectives, as it does afford a framework for decision making. Presumably, such an approach will offer definitive answers to ethical questions internal to a particular orientation, at least in some instances. Equally, where a particular school of thought is unable to wholly determine a solution to an ethical problem, and thus moral convictions will impact conclusions about appropriate lawyer behavior, a cultural study of the lawyer will be able to define the boundaries within which the exercise of discretion can legitimately take place.¹⁵⁶

With this understanding of the worth of a cultural study of the lawyer, this Part takes up the initial stages of the project.¹⁵⁷ More specifically, this Part sets forth the baseline character of the lawyer's professional responsibility. The discussion is divided into two parts. Part V.A explicates the most rudimentary structure of law's world, i.e., that common "legal" core of understandings that parallels the set of belief and values that unites all Christian denominations. This is the aspect of a lawyer's ethics that establishes what it means to be a lawyer, at least in its most basic form, and without the commitment to which one simply cannot claim the title "lawyer." Because these dispositions are elemental, representing the foundation upon which any subsequent consideration of a lawyer's ethics will build, they mark the appropriate place to begin. Part V.B turns to the obligations that this set of legal beliefs necessarily imposes on the lawyer.

A common "legal" core is describable as such precisely because of its widespread undeniability. Naturally, then, this Part concerns itself with those components of law's epistemic structure for which there is substantial, if not universal, agreement about presence and interpretation (at least in minimum form). In thinking about the analysis below, it is important to maintain an awareness of this parameter of discourse because it underscores the limited character of the presentation. This Part focuses on those elements of law's world that really are irrefutable. For this reason, the discussion should prove uncontroversial, a circumstance which in turn hopefully suggests the argument's normative power.

156. The discretion that will reside with the practitioner will have an analog in judicial discretion. The seminal text on that subject is AHARON BARAK, *JUDICIAL DISCRETION* (Yadin Kaufmann trans., Yale Univ. Press 1989) (1987). The most important earlier treatment of this subject is Benjamin Cardozo's trilogy on the judicial process. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921) [hereinafter CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*]; BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* (1924); BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928).

157. The characterization of this stage of the project as "initial" is meant only in terms of logical progression.

A. *The Groundwork of American Legal Society*

What are the elements of law's world that lie at the foundation of a lawyer's identity? Whatever else a cultural practice of law might stand for, at a minimum it means living political life under the rule of law. While this concept itself is subject to different interpretations—it might be understood in formal, jurisprudential, or substantive terms¹⁵⁸—there is agreement on its most basic nature (even though some of these qualities are themselves not always explicitly acknowledged in discourse). Paul Kahn provides an excellent sketch of this set of ideas in his powerful book on the imaginative construction of America.¹⁵⁹ This Part takes its cue from Kahn's work and discusses this phenomenological nucleus of the rule of law.

Three characteristics of the rule of law carry widespread acceptance among those who reflect on its makeup. The first trait is likely the most familiar of all: that the rule of law is not the rule of men.¹⁶⁰ There is a cluster of meanings associated with this concept. On the most immediate interpretation of it, the idea that the rule of law is not the rule of men speaks to the question of *who* governs. In the American political community, it is the law, and not any particular individual or group of individuals, that rules.¹⁶¹ In addition to conveying an understanding of who the ruling subject is, the idea that the rule of law is not the rule of men further addresses *whom* the law rules. Law reaches everyone. A commonplace expression states this notion well. Americans routinely say that in the United States “nobody is above the law.”¹⁶² Finally, embedded in the concept that the rule of law is not the rule of men is an account of the *origin* of law. Law is representative of “the People,” and ultimately is simply expressing its will. The U.S. Constitution, which is the American political order's founding

158. For some jurisprudential considerations of the rule of law, see LON L. FULLER, *THE MORALITY OF LAW* 41–94 (1964); RAWLS, *supra* note 62, at 236–39. For a substantive conception of the rule of law, see AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 55–56 (2006).

159. See generally KAHN, *supra* note 31.

160. In the United States, this idea is formally expressed at least as early as 1803. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men.”). Justice John Paul Stevens has, relatively recently, offered a similar thought in the context of judicial decision making. See Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

161. This is at least one sentiment that appears to motivate Justice Scalia in his discussion of law that courts make. See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

162. In hearings on “Wartime Executive Power and the National Security Agency's Surveillance Authority,” Senator Patrick Leahy offered a powerful expression of this sentiment:

The President and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write the laws. They do not pass the laws. They do not have unchecked powers to decide what laws to follow, and . . . what laws to ignore. They cannot violate the law or the rights of ordinary Americans. . . . [I]n America . . . nobody is above the law, not even the President of the United States.

Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearings Before the S. Comm. on the Judiciary, 109th Cong. 8 (2006) (statement of Sen. Patrick J. Leahy) (emphasis added).

document, makes the fact of this underlying claim clear. On the question of its creation, the Constitution signals its source at the outset. “We the People” ordained and established the Constitution.¹⁶³

Beyond the quality of not being the rule of men, the rule of law is also generally acknowledged to be permanent. This concept means that the rule of law extends across time and is authoritative until changed. It is this permanency that explains why Americans use the language of order and certainty in the context of law. Lastly, the rule of law is violent—law governs by force.¹⁶⁴ It demands obedience and, if necessary, will effect that condition on its own. This use of power to establish conformity is the critical manner of law’s operation, a fact that should not be understated. Although law does rely on discursive persuasion to obtain compliance with its mandates, this dependence extends only up to a point. When its reasoning fails to convince, law does not “step aside” and allow disaffected individuals to simply act according to their will. Law resorts to force to realize its rule.

With this description of the beliefs and values that underpin American legal society in hand, we can move to the opening explanation of the lawyer’s professional responsibility. To state, again, this discussion is as characterized, i.e., an “opening” explanation. Because this section presents itself within defined boundaries of discourse, the picture of the lawyer’s ethics painted below is hardly complete. There is undoubtedly much more to say, perhaps even much on which many, if not all, thoughtful lawyers, and others, can agree. Those commentaries must be left for the future.

B. *The Initial Account of the Lawyer’s Professional Responsibility*

The core set of epistemic terms—the rule of law is not the rule of men, it is permanent, and it is violent—implicates a number of concerns of professional responsibility. At the outset lie two broad matters. The first is that of the object of the lawyer’s service: Who is the lawyer’s client? The second is the issue of the character of that action: What is the fundamental nature of the lawyer’s work? Not surprisingly, the appropriate answer to the former question suggests the correct response to the latter. These conclusions, in turn, provide the point of departure for a series of critical observations about the lawyer and his or her more specific duties.

As discussed above, in America, law is understood to be the creation of the People. The People ordained and established the Constitution, which rests at the top of the legal normative hierarchy.¹⁶⁵ This conception of law’s origin is the

163. U.S. CONST. pmb1.

164. For the classic discussion of law’s violence, see generally Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

165. For purposes of this Article, the ever-present possibility of constitutional amendment should sufficiently respond to any objection grounded in federalism. Of course, the Commerce Clause jurisprudence in the pre-*Lopez* era signifies the ever-potential reach of the People as well. For a discussion of the Supreme Court’s doctrine during this time period, see SULLIVAN & GUNTHER, *supra* note 114, at 141–53.

legal order's first principle and, therefore, represents the axis of orientation around which the American cultural practice of law is built. Consistent with this structuring role, the belief that the People founded law frames all answers to the question of what counts as properly serving the institution, while conclusively determining how to think about the lawyer's professional responsibility, in the first instance: If law is representative of the People, to serve the cultural practice of law is to attend to its will, a claim on behavior that holds true always and without qualification.

This understanding of the primary object of the lawyer's service—that the lawyer's most fundamental obligation is to assist the People—obviously challenges the disposition of many. To help drive home the reality of this state of affairs, we can reflect on the lessons of the earlier discussion concerning the relationship between legal ethics and jurisprudence as well as the account of what law is. In considering the connection between the question “Who am I as a lawyer?” and “What is law?,” we saw that law is the foundation of the lawyer's role. It is the *raison d'être* of the lawyer. An important conclusion follows from this existential dynamic, namely that, at all times, a lawyer's conduct must express the substantive character of law, which means, more precisely, that it must express the substantive character of the cultural practice of law. Any other behavioral situation would be inconsistent with the dependent relationship of the lawyer on law, and thus would represent an unacceptable deviation from a lawyer's inherent responsibility.

With this reasoning in hand, it should be clear that the generally held view of the identity of the lawyer's client lacks currency. According to this position, the lawyer, first and foremost, represents the particular person he or she advises, or on whose behalf he or she acts, in a matter. Thus, the lawyer is to privilege the interests of that specific legal person over those of all others, with some minor qualifications.¹⁶⁶ But this understanding of who the lawyer serves makes manifest exactly the type of incongruous behavior that the above logic repudiates. Once we acknowledge the inseparable link between the nature of law and the nature of the lawyer, the primacy of the People in our thinking about a lawyer's duty presents itself, and the fact of the People as the lawyer's true client follows. Quite simply, no other viable conception of the principal object of the lawyer's representation exists.¹⁶⁷

Turning to the matter of the fundamental nature of the lawyer's work, the answer to this issue requires only that we continue the reasoning just begun. Specifically, if the ethical question for the lawyer is how to serve the People, then the nature of the lawyer's activity is “People-centered.” The lawyer's work is

166. For some references to this notion, see, for example, Fried, *supra* note 3, at 1060, 1066 (defending morality of “the traditional conception of the lawyer's role” and stating that “[t]he lawyer is conventionally seen as a professional devoted to his client's interests”); Pepper, *supra* note 3, at 617 (“The lawyer is the means . . . to meaningful autonomy, for the client.”); Simon, *supra* note 3, at 36–37 (describing principle of partisanship).

167. Of course, a lawyer does represent an individual in the course of his or her activities. The point here is that the primary object of the lawyer's service is the People. Perhaps a useful analogy can be drawn to a Christian priest, who serves God above all else.

neither self-focused nor concentrated on the particular legal person on whose behalf he or she may act. Rather, it is fixed directly on the political community, which is the expression of the People's will. To play off a theme from other legal scholars, there is an inherent community-service orientation associated with being a lawyer.¹⁶⁸ To be clear, this community service orientation has its own particular look. The phrase "directly on the political community" is chosen for specific reasons. On the one hand, in describing the character of the lawyer's work in terms of the immediacy of its relation to the community, i.e., "directly," we can distinguish it from those types of behavior that can also be said to be "community-regarding," albeit in a more circuitous manner, e.g., the actions of the capitalist.¹⁶⁹ On the other hand, in acknowledging the type of community with which the lawyer is concerned, i.e., "political," we help emphasize the distinct nature of the lawyer's way of life. As noted in the conclusion to Part IV, the question "How does one serve the cultural practice of law?" is a political one, which means that the foundation of the lawyer's role lies in political, not moral, norms, i.e., that lawyer behavior is political behavior, not moral behavior. This understanding of the character of a lawyer's actions is, as also there stated, a point of marked differentiation from traditional accounts of a lawyer's ethics, which go wrong in viewing a lawyer's professional responsibility in fundamentally moral terms.

The lawyer's client is the People. The nature of the lawyer's work is People-centered. From these two facts, a number of important consequences follow for our thinking about lawyer ethics. Most immediately, these characteristics of being a lawyer suggest the problematic nature of prevailing concepts of him or her. Whether one focuses on the moral activist, the zealous advocate, the religious lawyer, or any other developed "model" that is championed today, one always arrives in the same place: all conceive of the lawyer in categorically mistaken ways. None recognizes the primary relation of the lawyer to the People or the necessarily political character of his or her ethics. As a result, each produces a vision of the lawyer that cannot sustain itself in theory or in practice, i.e., against critique or against lived experience. Transcendentally, none can account for the political demands placed on lawyers. Phenomenologically, each produces a psychologically dissonant legal life—a lawyer whose actions do not lie in harmony with law's own self-representation.¹⁷⁰ Only the lawyer qua People's person has intellectual and experiential viability. Anyone concerned with the integrity of lawyer behavior must confront this truth.

Beyond clarifying our thinking about the concept of a lawyer, we can elicit a very specific duty for him or her from the twin facts of focus here. Specifically, because the lawyer serves the People, and "the law" is an expression of it, the

168. Scholars such as Robert Gordon have used the term "public." See generally Gordon, *The Independence of Lawyers*, *supra* note 36. I prefer the term "community" to "public" because of its direct tie to the term "political" (which is a broader term than "public").

169. For a discussion of the basic tenets of capitalism, see generally ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Henry Regnery Co. 1953) (1776).

170. See generally Anand, *supra* note 4.

lawyer must respect particular rules of law. To act otherwise is to go against the will of the People.

At the most simple level, this demand to respect particular rules of law means that the lawyer must obey them and cannot engage in acts of civil disobedience.¹⁷¹ In this regard, a comment on a traditional problem in the field of legal ethics is appropriate. Specifically, the fact of this obligation—or, more precisely, the reasoning that supports it—puts to rest a longstanding question associated with pleading the statute of limitations. In 1836, in one of the earliest formulations of a lawyer’s professional responsibility to appear in the United States, David Hoffman wrote the following: “I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery.”¹⁷² Over a century and a half later, David Luban’s analysis brought him to a similar point in his important work *Lawyers and Justice: An Ethical Study*. After engaging in a rigorous exercise of moral reasoning, Luban concluded that defense counsel’s assertion of the statute of limitations to bar a plaintiff’s overall just claim is professionally unethical.¹⁷³ The force of Luban’s thought process remains indubitable and its net effect is to seemingly deny a basis for conventional beliefs about the propriety of claiming the affirmative defense in a variety of contexts. This circumstance—a sort of throwing down of the gauntlet to the profession—has left lawyers in an odd place. On the one hand, Luban’s argument is unquestionably powerful. On the other hand, his conclusion is not believable.

The recognition of the political foundation for the lawyer’s duty to respect rules of law, and for lawyer ethics more generally, allows us to see that Luban’s argument actually does lack currency—because it is misplaced. Luban’s broad ethical study, which provides the basis for his statute of limitations claim, understands the moral as the normative home of the lawyer, an assumed axis of orientation that accounts for both the claim’s, and more broadly much of the study’s, persuasiveness. From the perspective of moral philosophy, Luban appears to be correct.¹⁷⁴ But the moral is not the framework by which to engage questions of lawyer ethics, at least not in the first instance. Luban’s failure to

171. Both David Luban and William Simon have argued for the ethical propriety of lawyer civil disobedience. See generally LUBAN, *supra* note 3; SIMON, *supra* note 38. But cf. Wendel, *supra* note 3.

172. 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 752, 754 (2d ed. 1836).

173. *Lawyers and Justice: An Ethical Study* is a comprehensive treatment of legal ethics, of which the treatment of the statute of limitations hypothetical is but a tangential piece of the argument. LUBAN, *supra* note 3. In the book, Luban engages in an extended course of moral reasoning, ultimately offering the following conclusion, with respect to the civil matters: “Anything except the most trivial peccadillo that is morally wrong for a nonlawyer to do on behalf of another person is morally wrong for a lawyer to do as well. The lawyer’s role carries no special privileges and immunities.” *Id.* at 154. It follows that defense counsel’s assertion of the statute of limitations to bar a plaintiff’s overall just claim is professionally unethical. Luban himself takes up this statute of limitations problem in the text. *Id.* at 9–10, 47, 53.

174. Luban reaches different conclusions about a lawyer’s professional responsibility in civil and criminal matters. *Id.* at 63–66, 148, 156, 204–05. This claim of correctness is limited to Luban’s argument with respect to civil matters.

appreciate the political character of lawyer behavior undermines his analysis from the beginning¹⁷⁵ and it is precisely this awareness of Luban's normative confusion that relieves the disturbance to professional ethical sensibilities that his conclusion appears to pose.¹⁷⁶

While the most rudimentary understanding of the obligation to respect particular rules of law precludes lawyer civil disobedience, at a deeper level the duty carries with it more subtle, and equally if not more significant, implications for the practice of law. To begin, the demand that lawyers respect particular rules of law requires that lawyers acknowledge one of the most basic characteristics of these norms—namely, that they exhibit a high degree of clarity—and refrain from filing complaints and other pleadings that have no chance of success on the merits. If lawyers must show regard for the law, then denial of its substantive nature is necessarily problematic, as the very idea of what it means to demonstrate respect requires just this type of recognition.

Parenthetically, but quite importantly, the prevalence of such a disharmonious attitude toward law, and the corresponding filing of meritless pleadings, appears to be a not insignificant problem within contemporary American litigation. In both jurisprudential and judicial circles, there exists a commonly held distinction between easy and hard cases. The former defines those disputes for which there is one uniquely correct legal outcome. The latter defines those disputes for which there is more than one correct legal outcome (which does not mean that there are an infinite number of possible outcomes, only that there is more than one).¹⁷⁷ Furthermore, as Aharon Barak has

175. During the course of his ethical study, Luban does challenge those who view lawyering in political terms, but this is a very narrow understanding of the political, as Luban's argument makes clear. *Id.* at 321–23. As the referenced text demonstrates, Luban does not recognize the autonomy, and thus the incommensurability, of the political sphere of life.

176. For a more extended treatment of Luban's work, see generally Anand, *supra* note 5.

177. The jurisprudential account of the hard case is most closely associated with the work of H.L.A. Hart and Ronald Dworkin. See generally HART, *supra* note 49; DWORKIN, *supra* note 25. Judicial understandings of the phenomenon of the easy case, and its commonplace character, have a distinguished history. See BARAK, *supra* note 156, at 41 (“The accepted view is that most of the cases that come before the courts are not hard cases.”); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *supra* note 156, at 20 (“*Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more.”); GILMORE, *supra* note 28, at 76 (explaining that for Justice Cardozo, “[i]n the great majority of all cases . . . the outcome is foredoomed; the past has foreclosed the present”); Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths About the D.C. Circuit*, 56 U. COLO. L. REV. 619, 619 (1985) [hereinafter Edwards, *Public Misperceptions*] (“[M]ost decisions of the [D.C. Circuit] court of appeals are rendered pursuant to well-established tenets of law and issued without dissent”); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 44 (1983) (suggesting Justice Holmes' acknowledgment of the phenomenon, if not the commonplace character, of easy cases). See generally Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385 (1983–84) (observing that federal appellate judges do not feel permitted or required to exercise discretion in most cases).

Both Barak and Edwards offer a more refined approach to the discussion of easy versus hard

explicitly stated, “[t]he accepted view is that most of the cases that come before the courts are not hard cases.”¹⁷⁸ Unless we are prepared to say that this entire line of thought is descriptively inaccurate, this fact of easy case litigation, and its frequent occurrence, suggests that lawyers are filing a high number of pleadings that lack substance. And, unless we are willing to challenge the integrity of the litigating bar as a whole, the existence of this circumstance is not simply attributable to strategic behavior.¹⁷⁹

Focusing back on the discussion at hand, in addition to compelling lawyers to account for the definitive character of legal norms, the demand that lawyers respect particular rules of law also obliges lawyers to embrace the related act of abiding by, and helping make manifest, these norms’ intentions. Again, the concept of respect naturally generates this professional responsibility. Not surprisingly, the concrete requirements of this duty lie in continuity with those of the one just mentioned. Specifically, in line with the proscription on filing meritless pleadings, the lawyer must further avoid “muddy[ing] the headwaters”¹⁸⁰ of litigation as well as of other forms of law practice. For example, to address a couple of commonly discussed questions of professional ethics, a lawyer cannot cross-examine the truth-telling witness for purposes of discrediting him or her,¹⁸¹ nor can he or she engage in discovery tactics designed to harass or intimidate the opposing party or take part in other types of conduct which fairly qualify as “discovery abuse.”¹⁸² Similarly, a lawyer cannot counsel his or her client to take advantage of lax administrative agency enforcement

cases. Staying with the customary language of easy and hard cases, Barak identifies a third category of cases which he terms “intermediate” cases. Similar to easy cases, intermediate cases also have one uniquely correct outcome. However, unlike easy cases, for which disposition is almost effortless, intermediate cases involve a “conscious act of interpretation” prior to resolution. BARAK, *supra* note 156, at 39–40. Edwards offers a similar analysis, although he slightly strays from customary language, terming his categories of cases “easy,” “hard,” and “very hard.” Edwards, *Public Misperceptions*, *supra*, at 630–32.

178. BARAK, *supra* note 156, at 41. Although Aharon Barak is an Israeli judge, there is nothing to suggest that his comment is specific to his country. Indeed, in a review of Barak’s seminal work on judicial discretion, an American federal judge has argued that Barak’s book, while good, is not a new contribution to American jurisprudential thought. David B. Sentelle, *Judicial Discretion: Is One More of a Good Thing Too Much?*, 88 MICH. L. REV. 1828, 1829–30 (1990) (reviewing BARAK, *supra* note 156).

179. For the treatment of this entire subject, see generally Anand, *supra* note 4. Obviously, this circumstance of easy case litigation raises serious concerns beyond the more narrow terrain of professional responsibility. When we reflect on the sociopolitical impact of this state of affairs, resource allocation issues immediately arise. Meritless pleadings take up the time and money of the court, as well as of all individuals involved, directly and indirectly.

180. This phrase comes from Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958).

181. For some references to this question, see, for example, FREEDMAN, *supra* note 57, at 43–49 (discussing cross-examination of truthful witness in criminal law context); RHODE & LUBAN, *supra* note 1, at 336–40; Pepper, *supra* note 3, at 614 (discussing “generally accepted understanding within the profession of a lawyer’s proper function” and stating that “[t]hrough cross-examination, a lawyer may suggest to a jury that a witness is lying when the lawyer knows the witness is telling the truth”).

182. For a treatment of these types of conduct in discovery, see RHODE & LUBAN, *supra* note 1, at 146, 214–18.

practices arising out of budgetary constraints to evade legal requirements (e.g., regarding toxic emissions), nor can he or she counsel a client to characterize, or recharacterize, tax filings so as to avoid negative financial consequences when no serious foundation for the representations exist.¹⁸³

As this explanation of the lawyer's duty to respect particular rules of law suggests, legal ethics as the cultural study of the lawyer carries with it a distinct sensibility toward the practice of law. Specifically, it sees the practicing lawyer as very much on the same page as the judge, at least in the most basic respects.¹⁸⁴ Just as judges are required to respect the law and, where possible, decide cases according to it,¹⁸⁵ so too must the practicing lawyer accept the prescriptions of particular rules of law and act in a manner consistent with them.¹⁸⁶

This understanding of an ethical coincidence between practicing lawyers and judges¹⁸⁷ returns us to the opening discourse on the relationship between legal ethics and jurisprudence, particularly in light of the inevitable question that

183. For an ABA opinion concerning the role of the tax lawyer vis-à-vis client tax compliance, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985) (establishing "realistic possibility of success" as standard for measuring good faith belief in position).

184. It is perhaps worth noting here Brian Tamanaha's observation that if the rule of law is to function effectively . . . a necessary contribution is to be found within the attitudes and orientation of those trained in law. Judges, if not lawyers more generally, must be imbued with the sense that their special task and obligation is fidelity to the law. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 59 (2004).

185. To be clear, even in hard cases, judicial discretion is limited. In this sense, the law always restricts the judge. For a discussion of the limited character of judicial discretion, see BARAK, *supra* note 156, at 18-27.

186. One can compare this statement to Robert Gordon's prescription that lawyers in the corporate counseling role "adopt an independent, objective view of the corporate agents' conduct and plans and their legal validity." Gordon, *New Role for Lawyers?*, *supra* note 36, at 1210.

187. The earlier-discussed prohibition on lawyer civil disobedience points to a noteworthy example of the ethical coincidence between practicing lawyers and judges. Specifically, the demand on practicing lawyers to respect particular rules of law also applies to judges and conclusively establishes the professional irresponsibility of former Alabama Chief Justice Roy Moore when, in his well-known action in the summer of 2003, he refused a federal court order to remove a monument of the Ten Commandments from the rotunda of the Alabama Judicial Building. According to Justice Moore, his conscience, religious beliefs, and own interpretation of the Alabama Constitution required him to acknowledge God, disobey the federal court order, and keep the monument in place. Bob Johnson, *Ethics Trial of Alabama Judge to Begin*, ASSOCIATED PRESS, Nov. 11, 2003; Kyle Wingfield, *Ten Commandments Judge Removed From Bench*, ASSOCIATED PRESS, Nov. 13, 2003. While one may be sympathetic to Justice Moore's disposition (one also may not be), from the perspective of the cultural practice of law these factors are simply irrelevant to the question of ethical conduct. In this circumstance, Justice Moore had no choice but to accede to the federal court's ruling because his professional obligation required him to follow "the law." From the perspective of the cultural practice of law, that is the entire story—and the end of the story. There is just no question that Justice Moore acted improperly.

The Court of the Judiciary in Alabama ordered Justice Moore's removal from office. *In re Moore*, No. 33 (Ala. Ct. Judiciary Nov. 13, 2003), *aff'd sub nom. Moore v. Judicial Inquiry Comm'n*, 891 So. 2d 848 (Ala. 2004).

This fact of Justice Moore's professional irresponsibility lies strictly vis-à-vis legal ethics. Whether his actions were absolutely unethical is a different question. See *infra* Part VI for a discussion of this topic.

this disposition toward the practice of law gives rise to: Doesn't the adversary system place practicing lawyers and judges in quite different roles? As indicated in Part II, before one can speak of the ethical obligations associated with a particular "legal" role, one must first answer the jurisprudential question "What is law?" Only then can one make sense of the duties that attach to the particular position of concern. Given this fact, we should expect a significant overlap between the professional responsibilities of the practicing lawyer and those of the judge because both operate within the same field. As for the specific tasks assigned by the adversary system, they apply only after the subject matter of occupation is defined, and its conditions on behavior made clear. Indeed, the requirements stemming from the adversary system are made intelligible only in and through that background. A distinct structure of reasoning inheres in the thinking about legal ethics (understood broadly to include both the conduct of the practicing bar and the judiciary). The fundamental demands of the cultural form of law provide "the initial cut" of what counts as ethical conduct for both the practicing lawyer and the judge. They also provide the framework within which all secondary questions are answerable, and answered.

The follow-on consequences of the two facts of concern (again, the lawyer's client is the People and the nature of the lawyer's work is People-centered) also, and for purposes of this Article, finally, extend to the classic question of legal ethics: "Is the practice of law a profession or a business?" While this Article is not a practicable forum for a complete analysis of this issue, if we acknowledge the foundation of lawyer ethics in popular sovereignty, we can see that whatever else the practice of law may be, it is not, and cannot be, a business (by which legal ethicists mean a for-profit enterprise whose purpose is to increase shareholder value).¹⁸⁸ The critical insight revealing this fact of incongruence is the recognition of a fundamental disparity in the object of personal commitment. For the businessperson, the sovereign to whom one attends is the self, or perhaps "corporate ownership," neither of whom shares identity with the People. This failure of coincidence in the figures that one serves denies any possibility of an existential union between the lawyer and the businessperson. The two work for different masters.

Not surprisingly, the ethics of the two give concrete expression to this sovereign mismatch. The more specific examples of appropriate lawyer behavior discussed in this Part are themselves illustrative of this state of affairs. The lawyer must respect particular rules of law, but there is no obvious reason why the same duty holds for the businessperson. It may very well be good business practice to engage in acts of civil disobedience, to file meritless pleadings, to

188. This understanding represents, of course, a narrow use of the term. For a reading in line with this concept of a business, see generally Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at SM17. One can compare Friedman's orientation toward business activity with that of Peter F. Drucker. See, e.g., PETER F. DRUCKER, *THE ESSENTIAL DRUCKER* 20 (2001) ("There is only one valid definition of business purpose: *to create a customer.*"); PETER F. DRUCKER, *THE PRACTICE OF MANAGEMENT* 35 (1954) ("Profit is not the explanation, cause, or rationale of business behavior and business decisions, but the test of their validity.").

engage in discovery abuse or to counsel tax evasion. At a minimum, the benefits may outweigh the costs.¹⁸⁹

As this discussion of the distinction between the lawyer and the businessperson shows, to recognize that one is not the other is to return us to the beginning of this Part and to reinforce the understanding that a lawyer is a man or woman of the People and that his or her ethics build around this principle. There is no question that the People have spoken. A lawyer's professional responsibility is, first and foremost, to follow those commands.

VI. CONCLUSION

In a well-known article *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, Charles Fried asks a straightforward question: "Can a good lawyer be a good person?"¹⁹⁰ If we define a good person as a moral one (which is the meaning Fried ascribed to the phrase), then the answer is "not always." The inherent political character of a lawyer's behavior will preclude him or her from acting morally, at least some of the time. Given this condition, an important—a form of *the*—ethical question arises. What is an individual to do when the obligations of his or her role as a lawyer and those of his or her role as a moral person conflict?¹⁹¹

There is no correct answer to this query. Except perhaps in the circumstance where one demand appears trivial in light of the other, we cannot say that ethical conduct *per se* lies with a particular duty. Put differently, nothing follows from the state of affairs one is faced with here. When confronted with the incommensurability of legal and moral life, one simply faces a choice, and the consequences and responsibilities associated with that choice.¹⁹²

In this sense, discourse *ends*, only to be taken up again after one makes a decision. Continued dialogue will not "solve" the dilemma, because there is nothing more to talk about. We cannot "reason things out," despite our inclination to do just that. (This proclivity proves to be a sort of red herring.) We may wish the reality of our lives were otherwise, but it is not.

As for the consequences of choosing, they include, naturally, any type of penalty associated with turning against the particular sphere of life implicated. Inevitably, a cultural form of social life will prescribe the costs associated with transgression and those who participate in the cultural form will be subject to the relevant sanction. For example, opting to follow one's moral beliefs, perhaps to engage in acts of civil disobedience, means accepting whatever bar disciplinary

189. One can compare the thoughts expressed in this paragraph with Richard Posner's reflections on the impact of competitive markets on lawyer ethics. See POSNER, *supra* note 40, at 92–93.

190. Fried, *supra* note 3, at 1060.

191. *The* ethical question is more general in nature and concerns how to resolve a conflict between or among multiple obligations.

192. Max Weber offers a sentiment along these lines in his lecture "Science as a Vocation." WEBER, *supra* note 50, at 22–27.

action may follow.¹⁹³ One may have to pay other prices as well for the particular choice made. In our consideration of what follows from the making of a decision, however, we should not overlook a practical lesson for the individual, which is correctly understood as both a source of difficulty and of profit. The taking of a particular path translates into insight into the strengths and limits of one's commitments, and thus into the nature of one's self.¹⁹⁴ The substantive character of the decision speaks to one's normative landscape, helping to demarcate the boundaries within which one is willing to act, i.e., "how far one will go," which in turn aids one in understanding who he or she is in this world. This result of choosing—self-knowledge—is not always comfortable to live with. That is a cost. But, it is quite valuable for the self-conscious individual. That is a gain.¹⁹⁵

193. For a basic discussion of some types of disciplinary sanctions, see RHODE & LUBAN, *supra* note 1, at 956.

194. One can compare this point to Weber's discussion of "clarity" in his lecture "Science as a Vocation." See WEBER, *supra* note 150, at 26.

195. There is an additional practical lesson that is important to note, one that derives from the fact of the constructed character of knowledge and the lack of a unique correct answer to the ethical question. This is the lesson of humility. The recognition of the contingent character of beliefs should teach us a degree of caution and restraint in our activism, as opposed to pure zealous conviction.

