

**ADVANCING THE CULTURAL STUDY OF THE
LAWYER: DEVELOPING THREE
PHILOSOPHICAL CLAIMS AND INTRODUCING
A NEW COMPARATIVE NORMATIVE INQUIRY***

RAKESH K. ANAND[†]

ABSTRACT

In America, law is a cultural practice, a type of social activity that generates a complete world of meaning. As such, it makes behavioral demands on those who participate in its form of experience. That is, it requires that those who take up its way of life act in certain ways. This fact—that law has an innate normativity, or an inherent ethics—is the organizing principle of the cultural study of the lawyer, a project that considers the implications of this condition for our thinking about law and about the work of law’s most representative figures, namely lawyers. This Article builds upon previous writing in the project and pursues two natural consequent lines of inquiry. First, it provides a more detailed account of three philosophical claims that the cultural study of the lawyer has made, either explicitly or implicitly, the purpose of which is to clarify certain intellectual positions of the project. Second, moving forward from the cultural study of the lawyer’s earlier exploration of how, at the most basic level, the behavioral demands of law differ from those associated with the moral form of experience, this Article begins a parallel discourse, reflecting on the behavioral demands of law and those of the cultural practice of economics, again specifically focusing on fundamental principles and their differential character. As with the earlier consideration of legal and moral prescription, the aim of this analysis is to make clear the distinction between the two cultural practices’ requirements on conduct—an analysis that in

* ©Rakesh K. Anand. All rights reserved. Do not circulate without permission.

[†] Associate Professor of Law, Syracuse University College of Law. A.B. Stanford University; J.D. Yale Law School. I would like to thank Paul Kahn, David Luban, and David Driesen for helpful comments on my previous work. Those comments have informed various aspects of this paper. I would like to thank Michele Beardslee, Keith J. Bybee, Robin P. Malloy, Nancy Rapoport, and Mitt Regan, as well as participants in workshops at Syracuse University College of Law and William & Mary Law School, for helpful comments on this paper. I would also like to thank Jonathan Marshall for his research assistance.

turn shows that, at his or her core, a lawyer is not an economic person (and therefore not a businessperson). Because the cultural study of the lawyer may be unfamiliar to some, this Article begins with an overview of the project, emphasizing in particular its intellectual setting and genealogy.

INTRODUCTION

In America, law is at the center of political life.¹ Politics in America begins with the rule of law. As is the nature of fundamental political commitment, the American dedication to the rule of law expresses itself in a full range of political conduct. When the country looks abroad and engages the community of nations, it preaches the rule of law, a phenomenon that holds true whether its behavior takes the form of diplomacy² or war.³ Internally, Americans structure their lives and resolve their disputes according to law, and do so regardless of how mundane or profound the matter is.⁴ The rule of law tells Americans whether they may ship wine across state borders.⁵ It also decides the identity of the President.⁶

¹ This understanding of the place of law in American politics has a deep history. See, e.g., THOMAS PAINE, COMMON SENSE (1776), reprinted in COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 49 (Meridian Books 1984) (“[I]n America the Law is King.”); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 256 (Harvey C. Mansfield & Delba Winthrop trans., Univ. of Chi. Press 2000) (1835). For the important modern account, at least in law, see PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997) [hereinafter KAHN, THE REIGN OF LAW].

² For one discussion of the American promotion of democracy abroad, placed in the context of the Obama administration, see Peter Baker, *Quieter Approach to Spreading Democracy Abroad*, N.Y. TIMES, Feb. 21, 2009, at WK1.

³ The Bush administration famously used the rhetoric of the promise of democracy in the war with Iraq. See, e.g., 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) (President Bush speaking of freedom as “universal” and of “the idea of countries helping others become free” as simply “rational foreign policy”).

⁴ Supreme Court Justice Antonin Scalia has spoken of “our national obsession with the law.” ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997).

⁵ See *Granolm v. Heald*, 544 U.S. 460 (2005).

⁶ See *Bush v. Gore*, 531 U.S. 98 (2000). Former Vice President and Democratic nominee Al Gore’s statement concerning the Supreme Court

This circumstance—of a deep-seated devotion to the rule of law—points to a basic truth about the nature of law in the United States. It is a cultural form,⁷ no different in kind than religion, science, or art.⁸ Law represents an entire world of meaning, rich in significance for those who embrace its universe. The foundational tenet of this *modus vivendi* is immediately recognizable. Law is the voice of “We the People.”⁹ Other elements, which all draw forth from this first principle, include such additionally commonplace notions as the political order is self-governing,¹⁰ stands in contrast to a rule of men,¹¹ entitles everyone to due process,¹² and demands equal justice for all.¹³ In and through an extensive set of ideas, law defines an American way of knowing political life and is, correspondingly, a focal point for citizen political identity.

decision illustrates the national commitment to the rule of law. “Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the [C]ourt’s decision, I accept it.” See *THE 43rd PRESIDENT; In His Remarks, Gore Says He Will Help Bush “Bring American Together,”* N.Y. TIMES, Dec. 14, 2000, at A26.

⁷ See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999) [hereinafter KAHN, *CULTURAL STUDY*] and Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 YALE J.L. & HUMAN. 141 (2001) [hereinafter Kahn, *Freedom*].

⁸ For an introductory discussion of cultural forms, see ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* (1944) [hereinafter CASSIRER, *AN ESSAY ON MAN*]. See also, 1-3 ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (Ralph Manheim trans., Yale Univ. Press 1953-1957) (1923-1929) [hereinafter CASSIRER, *SYMBOLIC FORMS*].

⁹ U.S. CONST. pmbi.

¹⁰ “Popular sovereignty theory” reflects this understanding. See, e.g., BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991). A comparison of American constitutionalism with those of modern Western democratic orders helps illustrate the unique character of the American commitment to self-government. See generally Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003) [hereinafter Kahn, *Comparative Constitutionalism*].

¹¹ One significant expression of this sentiment lies in the comments of Chief Justice Roberts during his confirmation hearing. Chief Justice Roberts specifically referenced the maxim that “we are a Government of laws and not of men.” *Confirmation Hearings on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

¹² Robert Cover captured the depth of this commitment to process in referencing “the surreal epistemology of due process.” Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8-9 (1983).

¹³ A closely related phrase is “equal justice under law,” which is etched on the façade of the United States Supreme Court.

As a cultural form, law has its own integrity. It is an autonomous realm of experience.¹⁴ Law will always seek to maintain this existential character and to accomplish this end, which ultimately is one of indefinite self-perpetuation, law demands a behavioral practice from those who participate in its form of political experience. Specifically, it requires that they act in a manner that supports its universe of meaning. Necessarily, this obligation extends to all who take up a politics of the rule of law, but it particularly devolves onto law's representative figures. By definition, law is constitutive of their identity,¹⁵ and their work, therefore, must be to sustain law's symbolic form. If these individuals were to act otherwise,¹⁶ law would be unable to survive, and would die. Of course, the same circumstance holds true for these persons. That is, they too would not exist anymore, in their figurative mode, if they failed to maintain law's appearance in the world.

This account of the essential character of law, its behavioral demands, and the consequences associated with a lack of their

¹⁴ This conceptualization of law stands in marked contrast to the typical American view of law as instrumental only. See, e.g., Myers S. McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 YALE L.J. 827, 834–35 (1941) (“[L]aw is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves.”); 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*”); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 75 (1981) (describing law as “a system for altering incentives”); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567 (1983) (describing law as an instrument to achieve leftist aims); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982) (understanding law as a means to address “the needs and values of both sexes”); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 72 (1988) (understanding law as a means to achieving and sustaining a post-patriarchal world); 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 (1989) (understanding law as a means to achieve “the illusive goal of ending racism and patriarchy”).

¹⁵ See Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMP. L. REV. 737, 749–52 (2008) [hereinafter Anand, *Legal Ethics*].

¹⁶ For one example of just such a failure to take up this behavioral task, see Rakesh K. Anand, *Contemporary Civil Litigation and the Problem of Professional Meaning: A Jurisprudential Inquiry*, 13 GEO. J. LEGAL ETHICS 75 (1999) (explaining that contemporary civil litigators live a psychologically dissonant existence) [hereinafter Anand, *Contemporary Civil Litigation*].

satisfaction represents, in summary form, the intellectual platform for a series of papers that I am writing on the practice of law in the United States.¹⁷ At the core of my work is an emphasis on the above-referenced behavioral demands—or inherent normative character—of law, the acknowledgement of which has immediate implications for the two fields within which my scholarship locates itself: the cultural study of law¹⁸ and professional responsibility. With respect to the former, which is a distinct philosophical-anthropological approach to the study of law,¹⁹ highlighting law's normative character modifies one of the discipline's basic assumptions—specifically, that the cultural study of law can have no normative implications.²⁰ In adjusting the field's thinking in this way, my hope is to move the school of thought forward and open up a new intellectual horizon for those interested in the fundamental nature of the American legal order. On the side of the latter, focusing on law's intrinsic normativity, and thereby necessarily on the character of law as a cultural form, leads to a new way of thinking about professional responsibility in this country. Specifically, it points to an account of lawyer ethics rooted in the deepest political myths of the culture,²¹ what Plato termed a society's noble lie.²² Borrowing directly from the cultural study of law, I describe this project as the cultural study of the lawyer, and in advancing it thus far, my writing has focused on pointing the two discourses toward an appreciation for these foundational claims. More particularly, I have presented the basic theoretical grounding for this approach to the study of lawyering²³

¹⁷ For the presently published papers, see Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 *FORDHAM L. REV.* 1611 (2009) [hereinafter Anand, *The Role of the Lawyer*]; Anand, *Legal Ethics*, *supra* note 15; Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 *RUTGERS L. REV.* 653 (2006) [hereinafter Anand, *Toward an Interpretive Theory*]; Anand, *Contemporary Civil Litigation*, *supra* note 16.

¹⁸ For an introduction to the cultural study of law, see KAHN, *CULTURAL STUDY*, *supra* note 7, and Kahn, *Freedom*, *supra* note 7.

¹⁹ See Kahn, *Freedom*, *supra* note 7, at 159 (describing the genealogy of the cultural study of law as the philosophical tradition of Kant-Hegel-Cassirer).

²⁰ KAHN, *CULTURAL STUDY*, *supra* note 7, at 2 (“All questions of reform—the traditional end of legal study—are bracketed”).

²¹ In doing so, it also offers a response to the powerful work of David Luban. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

²² PLATO, *THE REPUBLIC* 414c-415d (Allan Bloom trans., Basic Books 1991) (1968).

²³ Anand, *Legal Ethics*, *supra* note 15. My emphasis on the normative character of a cultural form has implications beyond the study of lawyer ethics. Specifically, acknowledging the normative character of a cultural form has parallel implications for conduct associated with other cultural forms, and more

and have also directly engaged several concerns specific to professional responsibility, among other things.²⁴

As is to be expected with any introduction to a new way of thinking about things, the presentation of the cultural study of the lawyer to the two disciplines brings certain matters to the surface, in both intellectual directions. Specifically, extending the cultural study of law into the domain of professional responsibility raises a variety of questions about the exact nature of the philosophical claims that the cultural study of the lawyer makes. At the same time, acknowledging the propriety of its methodology reveals a range of possible investigations that can deepen understanding of what it means to practice law in this country. This Article begins the process of addressing these questions and pursuing these lines of inquiry. In doing so, it also begins the next stage in the development of the cultural study of the lawyer.

With respect to the philosophical claims that this Article discusses, each, not surprisingly, arises directly out of the project's engagement with the normative character of law. Significantly, each represents a principal point of uncertainty for those who have reflected on the arguments of the cultural study of the lawyer, at least as I have understood the reactions. In taking up the discussion of these particular positions, my goal is to refine and bring depth of understanding to the project. In doing so, I also hope to make the project's account of a lawyer's professional responsibility, which, as alluded to above, is dependent on the strength of the philosophical-anthropological approach to the study of the subject matter, more persuasive. The specific philosophical claims elaborated upon are (1) that law and morality are incommensurable and, correspondingly, that lawyer behavior is political, not moral, in character, (2) that the core tenets of law's universe preclude a range of behavior that is, at a minimum, not uncommon among today's practicing lawyers, and (3) that the cultural study of the lawyer is uniquely correct in its conceptualization of the self-referential terms of law—for example, what qualifies as being "legal." After introducing the reader, particularly he or she who is not familiar with the project, to the three claims, this Article attends to each one individually, in a self-contained discourse.

Concerning the specific examination of the practice of law that this Article undertakes, it begins with the recognition that the

broadly for academic thinking about normative ethics generally. *Id.* at 771-72. See also *infra* p. 28.

²⁴ Where appropriate, I have provided detailed prescriptions of what counts as appropriate lawyer action. Anand, *Legal Ethics*, *supra* note 15; Anand, *The Role of the Lawyer*, *supra* note 17.

normative demands of law do not exist in isolation, but rather subsist side-by-side with those of other cultural forms and indeed lie, at a basic level, in competition with them for the responsive behavior of individuals. Arguably, the most compelling challenge to law's normative demands comes from those associated with the moral form of experience²⁵ and, as the previous paragraph might suggest, this contest has been the subject of earlier work in the cultural study of the lawyer.²⁶ In this Article, I turn attention in a new direction, to the normative demands of a different cultural form—one whose presence in the life of the individual is steadily increasing in contemporary times. That cultural form is economics.²⁷ Today, economics is assuming more and more of a dominant place in American life. For the normative demands of law, this circumstance translates into an increased confrontation with economic normativity, and correspondingly, into a greater possibility of confusing the role of a lawyer with that of an economic person and, ultimately, of losing the lawyer to the economic way of life. This Article explores the rival normative demands that each cultural form puts forth at the foundational level.²⁸ In taking up this investigation, my goal is to make clear that being a lawyer and being an economic person are, fundamentally, two distinct forms of existence.

This focus—on the opposing behavioral requirements of each cultural form—suggests at least two appropriate ways to conceptualize the latter portion of this Article. First, it is an effort in comparative ethics. How do the behavioral demands of one cultural form—which carry as much normative force as those of any other cultural form—differ from those of another? Correspondingly, how is one way of living distinguished from that of another? Second, it represents a response to the historical

²⁵ The reference to the moral form of experience should be understood as deontological in form, which is the form that contemporary moral life takes at its base. The criminal law, and particularly its thinking about punishment, is illustrative. See, e.g., JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 95 (5th ed. 2004) (“Desert is a necessary condition of punishment.”).

²⁶ Law’s “other,” which Paul Kahn loosely terms “political action,” also offers a compelling challenge to law’s normative demands. For an overview of political action, see KAHN, *THE REIGN OF LAW*, *supra* note 1, at 27-34.

²⁷ The reference to economics and the economic form of experience should be understood in neo-classical terms. For a discussion of neo-classical economics as an economic theory, see *infra* note 137. On neo-classical economics as a cultural form, as distinguished from simply an economic theory, see *infra* pp. 29-30.

²⁸ This statement requires qualification. For the necessary limitation, see *infra* pp. 28-29.

question of whether the practice of law is correctly approached as a business (by which is meant a for-profit enterprise).²⁹ Thorstein Veblen long ago noted that the business enterprise is the “directing force” that animates the modern industrial system.³⁰ Put differently, the business enterprise—and/or the businessperson—is an actor, and indeed the representative figure, of the economic world.³¹ In arguing that, at the most basic level, the life of the lawyer and that of the economic person are separate modes of being, I am also claiming that, at their foundation, the lawyer is not a businessperson and the practice of law is not a business activity.

To be clear, the discourse presented here is limited in character. As indicated, my concern is with the most basic of obligations associated with participation in each cultural form, obligations that are, in large part, in tension with one another. At least two consequences follow from this circumstance. First, this focus results in an emphasis on difference, as opposed to similarity. As a general matter, the normativities of cultural forms do not always conflict. The demands of one form of experience can be entirely consistent with those of another (a state of affairs that, at times, holds true even at the relatively foundational level).³² In focusing on the most basic of obligations of law and of economics, and their innate friction, I am necessarily presenting a restricted discussion. Additional analyses are left to other papers. Second, concentrating on the core normative demands of each cultural form, and their inherent opposition, produces a discourse that is rudimentary, and narrow-ranging. As between the normativities of any cultural forms, the relationship between that of law and that of economics is a complex one. It is also one about which disagreement over its

²⁹ Typically, the question of whether law is a business is framed in juxtaposition to the understanding of law as a profession. Because of the ambiguity of the word “profession,” I decline to use the term. For an introduction to the law as profession versus law as business debate, see DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 38-46 (5th ed. 2009). For an additional source for reflection, see, e.g., A. Harrison Barnes, *Treating Your Legal Career Like a Small Business*, BCG ATTORNEY SEARCH, available at <http://www.bcgsearch.com/pdf/60766.pdf> (last visited Oct. 30, 2010).

³⁰ THORSTEIN VEBLLEN, *THE THEORY OF BUSINESS ENTERPRISE* 7-8 (Cosimo Classics 2005) (1904). It is perhaps necessary to note that Veblen did not subscribe to neo-classical economic theory but rather was an institutional economist. For further related comment, see *infra* note 137.

³¹ On the firm as an actor in the marketplace, see Ronald H. Coase, *The Nature of the Firm*, in R. H. COASE, *THE FIRM, THE MARKET AND THE LAW* 33 (1988).

³² Technically, the normative demands can overlap, incorporate one another, or merge. For a relevant discussion, see *infra* pp. 18-21 and accompanying notes.

character can legitimately be expected to exist.³³ In considering only the basic normative demands of each cultural form—the substantive natures of which are presumably beyond dispute—I necessarily leave a fair amount of detail to the side of the presentation. Further investigations, which naturally build from what I offer here, are again left to the future.

Before proceeding with the two sets of arguments described above, this Article offers an overview of the cultural study of law and the relationship of the cultural study of the lawyer to it, the purpose of which is to help locate the reader in the intellectual landscape within which this Article operates. This overview consists of three steps. Initially, the overview places the cultural study of law in the intellectual setting out of which it arises. Next, the overview presents a substantive sketch of the school of thought and its central insight that law in America is a cultural form. Finally, the summary discusses the progression from the cultural study of law to the cultural study of the lawyer.³⁴ After presenting these general ideas, this Article takes up its primary discussions in the order set out in this Introduction.

I. FROM THE CULTURAL STUDY OF LAW TO THE CULTURAL STUDY OF THE LAWYER

In America, legal inquiry typically takes the form of suggesting changes to current law in order to advance a social end.³⁵ Most

³³ For a related discussion, see Anand, *Legal Ethics*, *supra* note 15, at 772-74.

³⁴ As indicated, the shift in perspective of the cultural study of the lawyer represents an expansion of the understanding of the philosophical possibilities of a cultural study of law—specifically, that it can have normative implications. This broader understanding suggests the unique character—and hopefully the attractiveness—of the cultural study of the lawyer: on the one hand, its inquiry is critical, and therefore neutral. At the same time, it is also normative. *Infra* pp. 14-15.

³⁵ Of course, this phenomenon is consistent with the conventional American view of law as instrumental. *Supra* note 14. Additionally, this statement is obviously a generalization. A not insignificant amount of work in law is not of this character. See, e.g., James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1989-1990) (providing an empirical analysis of products liability cases); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1991-1992) (providing an empirical analysis of products liability cases); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998) (presenting an historical treatment of “legal classicism”).

scholars do not ground themselves within a particular theoretical orientation, at least not explicitly, and the promoted objective commonly reflects simply one discrete aspect of America's liberal values. Some scholars are more specifically rooted—for example, in neo-classical economics or a certain school of feminist thought—and in parallel with the field with which they associate, these individuals support a public agenda that reflects the respective discipline's more defined concerns. Accordingly, the standard legal academic encourages progress—in the life of the private citizen, the criminal, the family, the community, etc.—through, for example, the law's accommodation of a certain individual right, public interest, or specialized duty,³⁶ or alternatively, via its embrace of a social utility calculus,³⁷ a more acute sensitivity to the constraints of patriarchy,³⁸ or some other particularized standard of normative judgment.

As this description suggests, legal scholars appeal to a wide range of concerns in their efforts at social reform. Not surprisingly, these thinkers disagree about the degree of importance appropriately attached to those concerns and, relatedly, about the desirability of the various proposals for social rearrangement. Those who seek to modify the law in a particular direction “x” frequently challenge those who wish to see the law move in support of “y,” and vice-versa. Indeed, the conflicts among legal

³⁶ To the extent that this work is rooted in a theoretical orientation, that orientation is the legal process school. For an introduction to this school of thought—or perhaps, more accurately, this attitude toward law—see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1-9, 102-13, 158-61 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). On conceptualizing the legal process school as an attitude toward law, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 205-09 (1995).

³⁷ For the intellectual beginning of modern law and economics, see Ronald H. Coase, *The Problem of Social Cost*, in R. H. COASE, *THE FIRM, THE MARKET AND THE LAW* 157 (1988). For some introductory readings in modern law and economics, see, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); DANIEL H. COLE & PETER Z. GROSSMAN, *PRINCIPLES OF LAW AND ECONOMICS* (2005); A MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (3rd ed. 2003); NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POSTMODERNISM* 57-79 (1997).

³⁸ For some introductory readings in law and feminism, see, e.g., Williams, *supra* note 14; West, *supra* note 14; Crenshaw, *supra* note 14; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581 (1990); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 *COLUM. L. REV.* 181 (2001). For a provocative response to some feminist writings of the 1980s, see Richard Posner, *Conservative Feminism*, 1989 *U. CHI. LEGAL F.* 191 (1989).

scholars are as commonplace, and as defined, as those among the liberal citizenry in America.

Legal academics, then, operate in a world of internal discord, a state of disagreement, however, that has its limits. As much as legal scholars do argue about what the law should be, they do not challenge each other about a deeper dimension of their work—namely, its underlying character. That is, they do not disagree about what they are supposed to be doing. Rather, the opposite state of affairs holds true. At this more fundamental level, legal scholars function from a broadly shared understanding of what it means to take up legal analysis. For all of these individuals, the job of the legal scholar is as indicated: to address social problems and push the social order forward. Put differently, for the legal academic, to study law is to do law.³⁹

The cultural study of law is a school of legal thought that reacts to this engaged orientation of the legal scholar.⁴⁰ It begins with the traditional academic principle that to study something is to construct a critical distance from it and, from this position, to then take that something as an object of free inquiry.⁴¹ As is well-known, on this understanding of the nature of the academic enterprise, the normative commitments of the scholar are placed, as much as possible, to the side of the investigation, with the intention that they not impact the relevant analysis. Inquiry is to be detached, taken up without the interests of the interlocutor in mind. The purpose of this condition on inquiry is straightforward. Under the constraint of self-separation, the scholar is able to pursue the identified aim of study, which is the acquisition of knowledge in whatever direction it lies.

Quite naturally, this shift in approach to legal study leads to a variety of fresh questions for the scholar to pursue and, correspondingly, to an assortment of new understandings about law, knowledge that usefully supplements the legal academy's conventional discourse.⁴² While the range of learning is broad, and continues to expand, running throughout the school of thought's investigation is a foundational insight about the nature of law in

³⁹ KAHN, CULTURAL STUDY, *supra* note 7, at 27 (“Legal scholars are not studying law, they are doing it.”).

⁴⁰ *Id.* at 137.

⁴¹ *Id.* at 31-34.

⁴² Paul Kahn is the founder of this school of legal thought. For a sample of his work, see KAHN, CULTURAL STUDY, *supra* note 7; PAUL W. KAHN, LAW AND LOVE: THE TRIALS OF KING LEAR (2000); PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2005) [hereinafter KAHN, LIBERALISM]; PAUL W. KAHN, OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL 198 (2007).

the United States: it is a cultural form—a type of cultural activity that generates a complete world of meaning.⁴³ In this respect, law is no different than the social practice of religion, science, or art. In each sphere of experience, the participant internalizes a way of making sense of the world and in and through the embraced mode of living comes to a kind of objective understanding of the reality that surrounds him or her.⁴⁴

As is to be expected with this type of socially imaginative endeavor, its basic outline consists of a number of familiar ideas. They begin with the American belief in popular sovereignty, which, to be clear, is just that—a belief. We the People is a type of God in America's secular political order and is comprehensible only as an object of popular faith.⁴⁵ There is no identifiable actor in the world "We the People." We cannot point to this entity as a subject in physical time and space. We the People exists in a universe outside the temporal domain, and in a realm beyond us.⁴⁶ The remaining character of law's universe builds from this mythical point of political origin,⁴⁷ and if we ask what the other elementary beliefs involved in the cultural practice of law are, the examples include those already noted in the Introduction,⁴⁸ as well as such everyday notions as the rule of law is permanent until changed⁴⁹ and will resolve disputes through the force of the state, if necessary.⁵⁰ Taken together, these ideas, in conjunction with a myriad of additional concepts and other kinds of symbols, afford the entry point to political life in America, and in and through them, the American apprehends that aspect of his or her being.

⁴³ The fact that law is a cultural form does not diminish the reality of its functional character. Approaching law strictly in functional terms, however, fails to capture the truth of law in the United States, and thus represents a failure in observation. For a discussion of this point, see Anand, *Legal Ethics*, *supra* note 15, at 766.

⁴⁴ CASSIRER, *AN ESSAY ON MAN*, *supra* note 8, at 143 (describing art as one path to "an objective view of things and of human life").

⁴⁵ For an introduction to political theology, see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., MIT Press 1985) (1922).

⁴⁶ KAHN, *THE REIGN OF LAW*, *supra* note 1, at 27 ("Individuals exist; communities may exist. But 'the people' occupy a time and space of sovereignty that is not a place into which any individual can enter.").

⁴⁷ In jurisprudential terms, "We the People" can be understood along the lines of Kelsen's basic norm. See HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Cal. Press 1967) (1934).

⁴⁸ *Supra* p. 2.

⁴⁹ KAHN, *THE REIGN OF LAW*, *supra* note 1, at 19-21.

⁵⁰ For a discussion of law's violence, see Cover, *supra* note 12.

Importantly, if we explore the depth of that apprehension, we see the true richness of the American cultural practice of law. At this more profound level, law constructs the American experience of community, and therefore of history.⁵¹ What it means to be an American is inextricably linked to the cultural practice of law.⁵² The bedrock ideas of American identity—for example, freedom⁵³ and self-government—are bound up in, and realized through, this form of political experience.⁵⁴ Unsurprisingly, along this path of the experiential we also find the locus of American nationalism, which can only be civic, and not ethnic.⁵⁵

The insight that law is a cultural form lies at the core of the cultural study of law. The basic discussion of the insight is not complete, however, with only a statement of its fact and an accompanying sketch of its cosmology and its associated phenomenology. In addition, the discourse requires articulation of certain philosophical understandings, understandings that the observation of law as a cultural form itself reflects. That is, to see that law is a cultural form is at once to affirm some specifically philosophical teachings. More precisely, it is to affirm a theory of knowledge and an associated theory of meaning—one that is Neo-Kantian in nature.

In the *Critique of Pure Reason*, Kant explained that what we know and how we know it are products of the conceptual apparatus that we bring to bear on experience. It is in and through a conceptual framework that we construct an order of things. We have no access to an unmediated reality. We never know something purely or “in itself.” Rather, all objects of experience are understood in and through the interceding activity of our

⁵¹ KAHN, *THE REIGN OF LAW*, *supra* note 1.

⁵² See, e.g., KAHN, *CULTURAL STUDY*, *supra* note 7, at 9 (discussing the generally immigrant character of the American citizen and the dependency of his or her identity on law).

⁵³ Those who would locate American identity strictly in the concept “freedom” fail to recognize that concept’s inextricable link with law. For an example of such an error, see Richard A. Posner, *Cultural Studies and the Law*, 53 RARITAN, Fall 1999 (reviewing PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999)).

⁵⁴ In his well-known work on nationalism, Benedict Anderson makes a somewhat similar point in his generalized discussion of the relationship between freedom and sovereignty. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 7 (rev. ed. 1991).

⁵⁵ Not surprisingly, the central role of civic life in America has its roots at least as far back as the founding of the country, the core meaning of which was the creation of a republican community. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 46-90 (1969).

minds.⁵⁶ Put slightly differently, and in the vocabulary of more contemporary times, knowledge is largely constructed in character, and what we know exists, in significant part, only within ourselves. Kant was an intellectual figure of the modern age and, consistent with the thinking of his time, the world appeared a single way to him. Correspondingly, he universalized a reality that was an historically and experientially contingent one. Today, in the post-modern era, we recognize this limitation in thought and, in turn, acknowledge the variety of conceptual structures, both within and across time and dimensions of experience, that operate within the human imagination, and in and through which man makes sense of the external world.⁵⁷ Religious belief systems,⁵⁸ scientific theories,⁵⁹ and artistic images⁶⁰—as well as the collective symbols of law—represent just these structures in and through which we organize and comprehend experience. In its apprehension of law as a cultural form, the cultural study of law necessarily embraces this contemporary form of Kant's insight.

Furthermore, it does so explicitly. The cultural study of law consciously locates itself within the Neo-Kantian tradition of epistemology.⁶¹ And, this circumstance underscores a basic characteristic of the school of thought that should be made clear. Fundamentally, the cultural study of law is a philosophical inquiry. Its home is in the discipline of philosophy (and not, for example, in

⁵⁶ IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Müller trans., Anchor Books 1966) (1781). For an introductory discussion of this topic, see JUSTUS HARTNACK, *KANT'S THEORY OF KNOWLEDGE* (M. Holmes Hartshorne trans., Harcourt, Brace & World, Inc. 1967) (1965). For an excellent discussion of Kantian epistemology, one that also places his epistemological thinking in context with his other work, see ERNST CASSIRER, *KANT'S LIFE AND THOUGHT* (James Haden trans., Yale Univ. Press 1981) (1918).

⁵⁷ CASSIRER, *SYMBOLIC FORMS*, *supra* note 8.

⁵⁸ On religious belief systems as structures of the imagination, see generally PETER BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967).

⁵⁹ For a treatment 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) offers 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).

⁶⁰ For a discussion of art as a cultural form, see CASSIRER, *AN ESSAY ON MAN*, *supra* note 8, at 137-70.

⁶¹ Kahn, *Freedom*, *supra* note 7, at 159 (describing the genealogy of the cultural study of law as the philosophical tradition of Kant-Hegel-Cassirer).

anthropology or in one of the more conventionally understood forms of “cultural studies”).⁶²

This axis of intellectual orientation defines the broad character of the cultural study of law’s work. Correspondingly, it also directs the cultural study of law’s scholarly task, which, in light of the school of thought’s commitment to Neo-Kantianism, is directed at the imaginative structure of the American mind, and is, technically, a two-fold inquiry.⁶³ First, the project of the cultural study of law is to clarify the epistemic structure of the American legal experience. What is the set of beliefs around which the American cultural practice of law is organized? Second, the undertaking of the cultural study of law is to describe the experience of meaning associated with the internalization of these ideas.⁶⁴ What is the phenomenology that attaches to the American beliefs about law? Ultimately, in taking up this task, the cultural study of law makes a valuable contribution to the Academy, and to society, by providing an account of the American as a political citizen, among other things. In doing so, it also offers the American—or, more precisely, the individual who identifies him- or herself as an American—an understanding of who he or she is.⁶⁵

The cultural study of the lawyer is born out of the cultural study of law. It is an approach to law and lawyer ethics that accepts the cultural study of law’s basic organizing principles. It shares the understanding of what it means to study law, agrees that law is a cultural form, correspondingly locates itself within the Neo-Kantian tradition of epistemology, understands itself to be philosophical in character, and sees its task—and academic and social contribution—in terms somewhat similar to that of the cultural study of law (as explained below). As an offspring of the field, the cultural study of the lawyer locates itself within the cultural study of law and understands the school of thought to be its intellectual home.

At the same time as the cultural study of the lawyer is ground in the discipline, it does not, however, entirely embrace the intellectual psychology of the field. In one respect, the cultural

⁶² *Id.* (describing the cultural study of law as rooted in philosophy).

⁶³ KAHN, CULTURAL STUDY, *supra* note 7, at 141, n.2 (describing the cultural study of law as a hermeneutic inquiry that is both phenomenological and transcendental).

⁶⁴ On “thick description” of experiences of meaning, see CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in THE INTERPRETATION OF CULTURES 3 (1973).

⁶⁵ As Paul Kahn has explained, American political experience is contested. For a reference to law’s “other,” see *supra* note 26.

study of the lawyer operates outside the boundaries of the field's established thinking and this point of intellectual difference gives rise to a certain lack of harmony between the cultural study of the lawyer and the cultural study of law. In this dimension, the two sides exist in a tension, and they do so because in its turn away from the cultural study of law, the cultural study of the lawyer moves against one the school of thought's founding ideas. Specifically, it challenges one of the school of thought's premises about its own scholarly possibilities. That premise concerns the normative consequences of critical inquiry.

In line with traditional philosophical understandings about this form of investigation, the cultural study of law maintains that critical inquiry can have no normative implications of its own.⁶⁶ In making this argument, the cultural study of law stays within the bounds within which this claim is typically asserted—namely, as a commentary on the relationship of the scholar, and his or her preferences, to the scholarly project—and within these limits, the assertion is of course correct. The self-separation of the scholar from his or her object of study denies the possibility of investing one's own opinions in any scholarly analysis. With critical inquiry, one's own normative inclinations always lie outside the bounds of investigation.⁶⁷ While the cultural study of the lawyer readily acknowledges this fact, it ultimately sees this account of the normative implications of critical inquiry as incomplete. The reasoning is straightforward (although perhaps foreign to conventional sensibilities). The fact that critical inquiry precludes normative discourse in a self-grounded form does not exclude the possibility of normative analysis altogether. The normative implications of this type of study simply extend in a different direction than that of conventional philosophical focus. In particular, the cultural study of the lawyer recognizes that the object of inquiry *itself* may possess a normative character, and therefore critical inquiry can, at least at times, speak to normative issues. In the context of a cultural study—of whatever type of cultural form—just such a circumstance is present.⁶⁸

A cultural form is an autonomous realm of experience. It is a world in itself and, correspondingly, is an end in itself. Importantly, a cultural form is not indifferent to its existence and to sustain itself as a universe of meaning, it makes demands that

⁶⁶ See, e.g., KAHN, *CULTURAL STUDY*, *supra* note 7, at 2 (“All questions of reform . . . are bracketed.”).

⁶⁷ There is an obvious limitation to this statement, as we can never fully remove ourselves from the structures of our own experience.

⁶⁸ See generally Anand, *Legal Ethics*, *supra* note 15.

those who take up its form of meaning engage in a particular behavioral practice—one that supports the cultural form’s constituent character. Without this insistence on behavioral harmony, a cultural form dies, because it exists in and through the individuals who take up its practice and, therefore, exists only as long as individuals in fact do so.⁶⁹

Perhaps our most familiar examples of these behavioral demands lie in the psychological dynamics of religious and linguistic practice. Both religion and language insist that those who relate to the world in and through their respective mediums act in a manner consistent with the structural elements of each (e.g., the beliefs and rituals of religion, or the vocabulary and syntax of language). These claims on conduct manifest themselves as a psychological pressure placed on the individual to act in conformity with a cultural form’s way of being. Although this pressure is perhaps not always evident (specifically, if we focus on the circumstance where the individual is acting in accordance with the prescribed course of conduct), it is apparent when we look to those situations where an individual deviates, or attempts to deviate, from the religious or linguistic path. If an individual acts against his or her religious convictions or speaks his or her language incorrectly, he or she experiences a psychological tension in him- or herself, along with a “felt necessity” to act in the appropriate religious or linguistic fashion.⁷⁰

Similar psychological dynamics reside in other cultural forms, and in their ubiquity, these psychological dynamics help illustrate the demand for behavioral conformity that characterizes a cultural form. Because this insistence is a prescription to the individual of how he or she is to act, and because such prescribing is precisely what it means to be normative, a conclusion about the normative character of a cultural form is inescapable: a cultural form is *inherently* normative.

We can capture this understanding of the normative character of a cultural form in explicitly philosophical terms, and in light of the philosophical foundation of a cultural study, such an account is appropriate and necessary for a full appreciation of this idea. To return to Kant and the *Critique of Pure Reason*, we see that in his explanation of the constructed character of knowledge, Kant spoke of the “a priori” when referring to the conceptual apparatus that we

⁶⁹ History teaches us this lesson. As civilizations have died out, so too have their cultural practices.

⁷⁰ One can compare the statements made in this paragraph with that of Peter Berger, who notes that “[i]t is impossible to use language without participating in its order.” BERGER, *supra* note 58, at 20.

bring to bear on experience—because it exists prior to, or is a necessary condition of, our understanding of things.⁷¹ Consistent with today's post-modern thinking, the cultural study of law adjusts this vocabulary and conceives of the structures of our experience in the Foucauldian language of the “historical a priori.”⁷² With the recognition that the historical a priori has an inherent normativity, we can build upon the terminology of the cultural study of law and refer to the “normative character of the historical a priori.” In Neo-Kantian terms, the cultural study of the lawyer points to this phenomenon, and it is the consideration of this phenomenon that sets the cultural study of the lawyer apart—that defines its intellectual distance—from the cultural study of law. It is the same consideration that also points the cultural study of the lawyer to its scholarly agenda.

For the cultural study of the lawyer, the specific cultural form of interest is, of course, law, and within this intellectual setting—and following on from its appreciation of the normative character of the historical a priori—the project centers its attention on law's inherent normativity. Just as religion and language make psychological demands on those who take up their form of experience, so too does the cultural form of law. Law insists on a kind of “legal patriotism” from those who participate in its form of politics.⁷³ These individuals must devote themselves to its tenets, a dedication that is to manifest itself in action. If these demands fail to be adhered to, law does not survive as a universe of meaning.⁷⁴ To offer just one example of this phenomenon, law presents the political order as rule-governed and commands those who embrace its world to live by those rules. The individual who takes law seriously experiences the pull of these demands and the need to act accordingly. The phenomenology of judging offers a readily accessible illustration of this point. As judges tell us, they feel the demand to decide cases according to rules of law and to refrain from appealing to their own preferences in the course of

⁷¹ See generally KANT, *supra* note 56.

⁷² See, e.g., KAHN, CULTURAL STUDY, *supra* note 7, at 91. Accordingly, in technical terms, it is the historical a priori that is the object of a cultural study's critical inquiry. The scholarly task is to clarify *its* structures and describe the phenomenological experience associated with *it*.

⁷³ I owe this term to Paul Kahn.

⁷⁴ In this vein, one can consider the emphasis that former Supreme Court Justice David Souter has placed on the need for greater civic education. Tony Mauro, *Souter: Republic is Lost Unless Civic Education Improves*, BLOG OF LEGAL TIMES, May 20, 2009, available at <http://legaltimes.typepad.com/blt/2009/05/souter-republic-is-lost-unless-civic-education-improves-.html> (last visited Jan. 17, 2010).

adjudication.⁷⁵ A similar instance lies in the citizenry's experience of a judicial decision. When a ruling is announced, the citizens accept it, their taste for the substantive outcome notwithstanding.⁷⁶

The cultural study of the lawyer focuses on this normative reality, and against this backdrop—with the fact of law's normativity as its point of intellectual orientation—the cultural study of the lawyer moves forward and takes up its inquiry. This inquiry pushes in two intellectual directions. First, progressing along the line of the cultural study of law, the cultural study of the lawyer examines the nature of law's normativity and the philosophical consequences associated with that normativity. What is law trying to be, and what implications does the answer have for our thinking about related matters (for example, the relationship of law to morality,⁷⁷ the appropriate character of discourse,⁷⁸ or the existential state of lawyers⁷⁹)? Second, turning at a slight angle away from the cultural study of law, the cultural study of the lawyer builds from the discipline's work and investigates the implications of law's normativity for the behavior and conceptual identity of its most representative figures.⁸⁰ Given the understanding of law's world that the cultural study of law

⁷⁵ 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). Relatedly, citizen outcry is commonplace when a judge is perceived to have failed to adhere to the rule of law. Such outcry is captured, in part, in the phrase “activist judge,” which is understood to be a derogatory term. For an example of the non-complimentary use of this phrase, see *Hatch: Obama Using ‘Code’ for Activist Judge*, GEORGE’S BOTTOM LINE, May 3, 2009, available at <http://blogs.abcnews.com/george/2009/05/hatch-obama-usi.html>.

⁷⁶ The most pronounced example of this phenomenon lies in the American reaction to *Bush v. Gore*, 531 U.S. 98 (2000). See also *THE 43rd PRESIDENT: In His Remarks, Gore Says He Will Help Bush “Bring American Together,” supra* note 6. For an additional comment, see Anand, *Toward an Interpretive Theory, supra* note 17, at 681. See also JOSEPH G. ALLEGRETTI, *THE LAWYER’S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* 71 (1996) (“It is a quite extraordinary fact about our legal system . . . that unsuccessful litigants almost always accept a verdict even when they complain that it was wrong or unfair.”). Not unimportantly, psychological research has documented that Americans view the legitimacy of a legal outcome, at least in part, as a function of procedural fairness (with fairness including, in part, the opportunity to be heard). For an introduction to “procedural justice,” see TOM TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

⁷⁷ Anand, *Legal Ethics, supra* note 15, at 764–69.

⁷⁸ *Infra* Part IIC.

⁷⁹ See generally Anand, *Contemporary Civil Litigation, supra* note 16.

⁸⁰ Technically, the conclusions of the cultural study of the lawyer extend, at least in part, to the citizen.

provides, what obligations devolve onto the lawyer from his or her commitment to that world? Put differently, *how* is a lawyer? (For example, law presents itself as “not the rule of men.” What follows from this condition with respect to the practicing lawyer’s conduct?)⁸¹ Relatedly, what does a commitment to law’s world tell us about what it means to be a lawyer, in the first instance?

To be absolutely clear about the nature of this scholarly inquiry, and thereby of the cultural study of the lawyer, two comments should be made. On the one hand, it should be clear that this inquiry is a critical inquiry. It is a “detached” form of investigation. As indicated, the intellectual difference between the cultural study of the lawyer and the cultural study of law concerns the scholarly possibilities of their type of philosophical study, not what it means to study something. Accordingly, the analysis that the cultural study of the lawyer takes up maintains the disengaged attitude that is characteristic of the cultural study of law. On the other hand, both the discussion of the cultural study of the lawyer’s position on the scholarly possibilities of a cultural study and the description of its scholarly agenda make plain that this inquiry is explicitly normative—specifically, along its second path of investigation. In this intellectual direction, which is the domain of legal ethics, the analysis is prescriptive.⁸²

From the perspective of the cultural study of the lawyer, the fact that the investigation is critical speaks to the power of the normative analysis. It is a neutral one—or at least as neutral a one as possible.⁸³ The arguments that the cultural study of the lawyer presents concerning a lawyer’s professional responsibility, as well

⁸¹ See generally Anand, *The Role of the Lawyer*, *supra* note 17.

⁸² As the above discussion makes clear, philosophical inquiry *is* appropriately normative when taking up questions of lawyer ethics (as well as when considering issues of applied ethics more generally), at least in some circumstances. This understanding challenges Daniel Markovits’ recent claim that the contributions of philosophical inquiry to questions of ethical life are “primarily interpretive and reconstructive rather than directly regulative.” DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 19 (2008) (emphasis omitted). Importantly, the behavioral prescriptions that follow from a cultural study of the lawyer cannot fairly be said to concern “stylized” or “sensational” cases. For examples of the cultural study of the lawyer’s behavioral prescriptions, see Anand, *Legal Ethics* *supra* note 15, at 780-82 and Anand, *The Role of the Lawyer*, *supra* note 17, at 1628-32. For Markovits’ reference to “stylized” or “sensational” cases, see MARKOVITS, *supra* note, at 17-21.

⁸³ This neutral character of the project’s normative analysis points to the distinction between “understanding” and “experience.” For a short comment on this distinction, see Anand, *Contemporary Civil Litigation*, *supra* note 16, at 107, n. 168 and KAHN, *CULTURAL STUDY*, *supra* note 7, at 35.

as his or her identity, find their ground outside the individual preferences of the interlocutor and inside the claims of American culture. Of course, this circumstance contrasts sharply with the normative character of conventional legal scholarship, whose various “approaches” reflect, in significant part, the disposition of the scholar. For those who share the belief that what it means to study something is to construct a critical distance from it, the cultural study of the lawyer should represent a more convincing form of normative scholarship.⁸⁴

II. REFINING THE CULTURAL STUDY OF THE LAWYER: DEVELOPING THREE PHILOSOPHICAL CLAIMS

Part I described the scholarly agenda of the cultural study of the lawyer, at the center of which lies the recognition of the inherent normative character of law. Half of that agenda involves the push of the cultural study of law into the field of professional responsibility, and along this intellectual axis, the acknowledgment and consequent consideration of law’s normativity necessarily brings certain subject matters to the forefront of discourse. This Part considers three philosophical claims that lie in this intellectual terrain, claims that the cultural study of the lawyer has made in earlier work, but that require additional treatment for the reasons discussed below. More precisely, in this Introduction to Part II, I explain the context within which certain questions arise and what these questions presented are. I also provide a summary explanation of the answers to come. Subparts A, B, and C then take up the questions presented in detail.

The first philosophical claim that this Part addresses concerns the relationship between the cultural form of law and the cultural form of morality, and the consequences of this relationship for the conceptualization of lawyer behavior. Both legal and moral life speak directly to the question of how one should act in his or her relationship with others. In focusing on the normative character of law, the cultural study of the lawyer has been, almost immediately, forced to reflect on these overlapping demands, and, in taking up the analysis, the project has turned to an examination of first principles—that is, to an investigation of the nature of law and

⁸⁴ On the promise of the cultural study of the lawyer, see Anand, *Legal Ethics*, *supra* note 15, at 773-74. In addition to whatever practical benefits normative scholarship, as a general matter, might have, this form of normative scholarship offers benefits in the direction of self-understanding. *See, e.g.*, Anand, *Contemporary Civil Litigation*, *supra* note 16.

morality. This inquiry has led the study to acknowledge the integrity of each form of existence, and, with this understanding in hand, the cultural study of the lawyer has arrived at a basic conclusion: the two domains of experience are incommensurable, and, correspondingly, lawyer behavior is political, not moral, behavior.⁸⁵

These two points are central to the project. And, while the work in the cultural study of the lawyer has described the basic character of these ideas, it has not, thus far, articulated some of their more detailed aspects. Consequently, some important questions about the arguments remain unanswered, particularly with respect to how far these understandings extend themselves. Yes, law and morality are incommensurable. But to what extent does this irreducibility mean that they talk past, and operate outside of, each other? Likewise, how political—and how not moral—is lawyer conduct? Subpart A responds to both questions, explaining that (1) the distinction between the two cultural forms is complex, and one must be cautious in drawing out their differential character, and (2) in a similar vein, the political character of lawyer behavior is qualified in form.

Turning away from law's relationship to another cultural form and focusing inward on law itself, the second philosophical claim that this Part addresses concerns the self-presentation of the cultural form of law and its consequences for thinking about lawyering in America. As earlier described, the scholarly agenda of the cultural study of the lawyer is, in part, to take up the teachings of the cultural study of law and, in light of the fact of law's normativity, explore their implications for the lawyer's professional responsibility and identity. Thus far, in employing this approach to the analysis of lawyer ethics, the cultural study of the lawyer has appealed to certain core tenets of law and made a variety of corresponding claims about the practice of law and the concept of the lawyer. For example, the project has argued that, because the rule of law is an expression of popular sovereignty, the lawyer's primary obligation is to the People as opposed to the "client" traditionally conceived.⁸⁶ Relatedly, because the rule of law is not the rule of men, lawyers must respect the substantive character of rules of law and refrain from "muddy[ing] the

⁸⁵ Anand, *Legal Ethics*, *supra* note 15, at 737-72. For purposes of precision and depth of understanding, it should be noted that the incommensurability of law and morality means that a normative equality exists between the two domains of experience, as well as between their associated behaviors. For a discussion of this point, see *infra* p. 28.

⁸⁶ Anand, *Legal Ethics*, *supra* note 15, at 776-78.

headwaters”⁸⁷ of law practice (for example, by filing pleadings that have no chance of success on the merits or cross-examining the truth-telling witness).⁸⁸ As these examples begin to illustrate, many of the project’s assertions challenge conventional sensibilities, and although the project has been conscious of this state of affairs, in at least one dimension it has not fully accounted for the propriety of its positions. Specifically, the cultural study of the lawyer has not entirely explained why the core tenets lead to a displacement of a number of forms of familiar, or at least not unfamiliar, behavior. Why exactly do the core elements of law’s world effect a rejection of this type of conduct? Stated differently, and in the alternative, undoubtedly the core elements of law’s world have something to say about lawyer ethics, perhaps even a great deal in certain discrete circumstances, but what justifies the absolute status that the cultural study of the lawyer accords them? Why can’t lawyering take the form of a variety of differing activities—and, more precisely, a variety of differing activities in the manner that Wittgenstein describes the assorted uses of linguistic forms (i.e., as a family of social practices having no ultimate common ground and thus having no real coherence)?⁸⁹

Both of these sets of questions arise *internal* to law’s world. When we take them up, we engage the discourse on the terms of law. With considerations of Wittgenstein in mind, however, we can pause and, reflecting on this boundary of discourse, additionally challenge the project at its point of origin. The cultural study of the lawyer begins with the assertion that law is a cultural form built around We the People. But is a world of law rooted in We the People the only cultural form of law available to Americans? If not, doesn’t a philosophical-anthropological approach to “law” lead to a variety of cultural studies of law and, correspondingly, to multiple accounts of lawyer ethics in the first instance, including

⁸⁷ 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).

⁸⁸ Anand, *Legal Ethics*, *supra* note 15, at 780-82. Other examples include engaging in discovery abuse, counseling his or her client to take advantage of lax administrative agency enforcement practices arising out of budgetary constraints to evade legal requirements, and counseling his or her client to characterize tax filings so as to avoid negative financial consequences when no serious foundation for the representations exist.

⁸⁹ LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 1-242 (G.E.M. Anscombe trans., 2d ed. 1958). For an introduction to this text, see DAVID G. STERN, *WITTGENSTEIN’S PHILOSOPHICAL INVESTIGATIONS: AN INTRODUCTION* (2004); see also JOACHIM SCHULTE, *WITTGENSTEIN: AN INTRODUCTION* (William H. Brenner & John F. Holley trans., SUNY Press 1992).

the one pursued by the project, but also perhaps one that defends the lawyering practices known to us?

Subpart B flushes out the reasoning that supports the cultural study of the lawyer's analysis of lawyer professional responsibility and identity, and directly responds to each of the three categories of questions. At the center of the discussion is the concept of political authority—more specifically, law's perspective on the character of authority within the political order, and the extent to which legal authority under law's rule is the form of legal power to which the American responds—and relatedly, the concept of political meaning. Because political authority is at the root of political meaning, the character of the former shapes that of the latter. Equally, because political meaning attaches to political authority, we can identify legal experience—"register" legal phenomenologies—by observing which legal powers one follows. As Subpart B explains, in law's world, authority in the political order is unified and therefore, so is political meaning. Furthermore, law's world appears to be the sole legal form to which the American attaches him- or herself. Given this state of affairs, as Subpart B also explains, an account of appropriate lawyer behavior necessarily privileges the elementary characteristics of the cultural form of law, and such an account of lawyer ethics is the sole possible one for the cultural student of law.

Maintaining an inward focus on law, but broadening the relevant intellectual horizon, the third philosophical claim that this Part addresses concerns the implications for discourse that arise out of law's existential character—that is, out of the fact that law is a cultural form. More specifically, the third philosophical claim involves a linguistic position that the cultural study of the lawyer has taken in its investigation of lawyer ethics and identity. In building from Paul Kahn's insight that law is a cultural form and from the project's recognition that the cultural form has a normative character, the cultural study of the lawyer has made explicit assertions about the proper application of "law," "legal," and related terms. For example, the project has argued that its understanding of what practicing "law" looks like as well as its conceptualization of the field of "legal" ethics are, at one level, objectively correct. In turn, the project has criticized alternate orientations toward these issues—which claim the vocabulary but do not conform to the project's standard for the use of the terms—as misconceived. For example, the project has stated that contemporary civil litigators present themselves as practicing

“law,” but are not in fact doing so.⁹⁰ Similarly, conventional theorists of professional responsibility profess to be offering an account of “legal ethics,” but are actually doing something else (which is not to say that their work is without value).⁹¹ How does the project defend this argument—that it has a better claim to the definition of “legal” vocabulary?

Subpart C presents the relevant explanation, which, building from the fact of the existence and self-integrity of a cultural form, emphasizes the discursive limitations that are a necessary consequence of that condition. A cultural form always asserts an entitlement to the use of the relevant referential language, a statement of a sort of “linguistic jurisdiction” over the terminology. As subpart C describes, out of the fact of the existence and self-integrity of a cultural form comes a requirement for discourse to respect those linguistic claims and to operate within their boundaries. *Vis-à-vis* the cultural form of law, this circumstance means that law’s conceptualization of the referential language of concern establishes the correct use of the terms and provides a standard against which to measure and critique the employment of “legal” language. And, the upshot of this state of affairs is that the project is justified in its argument of linguistic privilege, and, correspondingly, in its criticism of those who embrace an alternate meaning of the vocabulary of law.

A. The Incommensurability of Law and Morality, and the Political Character of Lawyering

As indicated earlier, a cultural form is an autonomous realm of experience. It possesses its own self-integrity. One consequence of this condition is that cultural forms are not commensurable with one another—that is, they cannot be compared. For example, we cannot measure religious understanding against scientific fact or artistic practice against moral truth, or vice-versa. The terms of discourse of one are simply not reducible to those of the other.⁹² As foreign a thought as it may be to the conventional sensibilities of liberal society,⁹³ this state of affairs characterizes the

⁹⁰ Anand, *Contemporary Civil Litigation*, *supra* note 16.

⁹¹ Anand, *Legal Ethics*, *supra* note 15.

⁹² *Id.* at 761-62.

⁹³ For a treatment of the appropriate conceptualization of liberalism, see KAHN, *LIBERALISM*, *supra* note 42. *See also* Anand, *Legal Ethics*, *supra* note 15, at 753-63

relationship between politics and morality.⁹⁴ Like the experience associated with other cultural forms, political experience and moral experience are also not comparable. Political action—for example, the killing of an innocent individual in war—is not comprehensible in the conceptual vocabulary of moral life, nor is moral imperative—for example, the prohibition on killing innocent individuals—intelligible in the language of political existence. Each arena operates according to its own categories of understanding⁹⁵ and its own standards for evaluating behavior.⁹⁶

For the cultural study of the lawyer, the incommensurability of politics and morality collapses to the incommensurability of law and morality. And, as stated above, for purposes of this Subpart, the question of concern is what the relationship between these two spheres of experience specifically looks like. Legal and moral life may be incomparable,⁹⁷ but how exactly are we to understand this state of affairs? Is the claim that law and morality function wholly independently of one another? If so, how do we make sense of facts that seemingly suggest just the opposite circumstance? If not, what is the nature of the dynamic that exists between these two domains? To answer these questions requires a two-step discussion, one that preliminarily addresses the baseline character of the relationship between the two cultural forms, and then subsequently takes up a more complex issue: the quality of the border that delimits the two dimensions of experience.

Initially, it should be made clear that law and morality do not function wholly independently of one another. Put differently, incommensurability does not equal insularity (a point that the early writing in the cultural study of the lawyer has explicitly made).⁹⁸ Cultural forms are irreconcilable on each other's terms, but this condition does not mean that the different spheres of experience

⁹⁴ For a statement of the understanding of moral life that informs this Article, see *supra* note 25.

⁹⁵ The fundamental categories of understanding are “citizen-alien” in politics and “individual personhood” in moral life. 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). On the dominant place of deontological ethics in contemporary moral life, see *supra* note 25.

⁹⁶ *See, e.g.*, KAHN, CULTURAL STUDY, *supra* note 7, at 38; Kahn, *Freedom*, *supra* note 7, at 158 and Anand, *Legal Ethics*, *supra* note 15, at 767-68.

⁹⁷ A simple illustration lies with law's violence, which cannot be conceptualized in the terms of moral discourse and which cannot always be reconciled with demands of moral belief. For an introductory discussion of law's violence, see Cover, *supra* note 12.

⁹⁸ *See, e.g.*, Anand, *Legal Ethics*, *supra* note 15, at 769-70.

are necessarily isolated from one another. Rather, just the opposite can be true. One cultural form can influence another, and this circumstance is characteristic of the relationship between legal and moral life. More precisely, and as our commonplace observations and experiences tell us, the former is regularly affected by the latter. The making and application of law is illustrative. Although laws are composed and enforced according to their dictates, even when unjust, they are also commonly written with moral beliefs in mind.⁹⁹

Past this first point of emphasis—that law and morality do intersect—a more subtle topic for explanation concerns the manner and degree of their intersection. Law often defines and applies itself in light of moral commitments. But it does so in more than one way, and this varied manner of interfacing with morality has consequences for the relationship between the two spheres of experience. Specifically, at times, it affects the clarity of the line that might possibly divide them. In some circumstances, law's incorporation of morality is such that the distinction between the two forms of existence necessarily blurs, so much so that the domains of experience are essentially incapable of being distinguished. In these instances, the label “intersection” does not adequately capture the relationship between law and morality, because their dynamic moves beyond one of merely “morality impacting law” to a merger or fusion of sorts. The universe of one becomes the universe of the other. In this light, the first point of emphasis requires a slight refinement: law and morality do not simply “intersect”; sometimes, they are non-differentiable.

Not infrequently, law defines itself in a manner that not only takes account of moral sensibilities (as with, for example, a legal norm that codifies a discrete moral belief in a simple, direct manner)¹⁰⁰ but invites moral dispositions into the domain of legal judgment. In these circumstances, legal determinations are themselves moral ones, and consequently, the boundaries marking

⁹⁹ The law prohibiting murder is a simple example. It is defined to take into account the quality of the “guilty mind” of the offender. *See, e.g.*, MODEL PENAL CODE §§ 210.1-210.2 (1962) (indicating that one is guilty of murder “if he purposely . . . causes the death of another human being”); MODEL PENAL CODE § 2.02(2)(a)(i) (1962) (defining “purposely” as “conscious object to engage in conduct”). More broadly, as a general matter, we require a mens rea for the criminal punishment of homicide and do not recognize the strict liability offense. For a treatment of homicide offenses, see KAPLAN ET AL., *supra* note 25, at 291-427.

¹⁰⁰ For an example, see *supra* note 99. My point is to distinguish those legal norms that insulate legal judgment from moral considerations from those that do not.

off the two dimensions of experience are inexact. For example, with the Equal Protection Clause¹⁰¹ and the Eighth Amendment's prohibition on cruel and unusual punishment,¹⁰² the content of the legal norm is inextricably linked—is indeed a function of—moral understanding.¹⁰³ Put differently, the standard against which to measure a statute's conformity with the respective clauses, and therefore its legality, is a moral one.¹⁰⁴ Similarly, if we take a step down in the hierarchy of norms and look at statutes themselves, they are at times written with the same type of direct appeal to the moral form of life. That is, the standard against which to measure the consistency of individual action with the statute is, at least in part, moral in character.¹⁰⁵ When dealing with these types of legal

¹⁰¹ U.S. CONST. amend. XIV § 1.

¹⁰² U.S. CONST. amend. VIII.

¹⁰³ This circumstance remains true whether one subscribes to a textualist, originalist, or purposivist school of interpretation. For a discussion of textualism, see SCALIA, *supra* note 4. For a discussion of originalism, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). For a discussion of purposivism, see STEPHEN J. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005).

¹⁰⁴ Within the Anglo-American jurisprudential tradition, the work in inclusive legal positivism is on point here. Building from its tradition's understanding of what counts as a rule of recognition, this school of thought argues that "the criteria of legality" for a legal system can include the substantive morality of a norm. See JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 67-148 (2001). (Whether exclusive legal positivism, which distinguishes between what the law is and the propriety of its enforcement, ultimately also supports this statement is unclear. On exclusive legal positivism, see, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) and JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 193-237 (1994).) From the perspective of philosophical-anthropology, two caveats are appropriate. First, there is a limit to the propriety of any appeal to the analytic jurisprudential tradition. At least with respect to foundational principles, the Neo-Kantian orientation of Kelsen's jurisprudence is a more accurate account of the positive character of law. See KELSEN, *supra* note 47. Second, in America, law begins with a political act. The People ordained and established the Constitution. Law does not confront the moral form of life until after this authoritative undertaking. Accordingly, law is in the first instance a purely political phenomenon, and a sharp distinction between the legal and the moral dimensions of experience is manifest at its source. For a discussion of the political origins of law, see generally KAHN, *THE REIGN OF LAW*, *supra* note 1. For a statement of the sequential primacy of law over morality, see Kahn, *Freedom*, *supra* note 7 at 156 (describing the "relative priority of popular sovereignty over rights").

¹⁰⁵ The law prohibiting manslaughter is an example. In taking account of the quality of the "guilty mind," the law appeals to the moral beliefs of the community. See, e.g., MODEL PENAL CODE §§ 210.1, 210.3(1)(a) (1962)

norms, because legal judgment collapses to moral judgment, the separation of the legal and moral spheres of life is not crisp and well-defined. Rather, it is almost erased. And, this state of affairs forces us to acknowledge the above discussed phenomenological fact—that the distinctions by which one can characterize some legal experience stand alongside a more amorphous reality.

If we combine the general understanding that law and morality intersect with the awareness of this bleeding into each other that occurs between the two cultural forms, a conclusion about their incommensurability follows. It should be understood in modest terms. The distinction between the two forms of experience is genuine, as well as sharp at times. Legal and moral life, however, also overlap and in some instances are almost one in the same.

In parallel to this moderate account of the incommensurability of law and morality, the political character of lawyer behavior must also be carefully circumscribed. In the first instance, lawyer behavior is political behavior, a characteristic of lawyer action that will often be distinct. For example, when the prescriptions of legal norms conflict with moral standards of justice, lawyers are required to act in accordance with the mandates of law, and, accordingly, an understanding of lawyering as politics is sensible.¹⁰⁶ Similarly, when the demands of law are in accordance with moral requirements but do not invite moral dispositions into the domain of legal judgment, a phenomenology of “doing” law is intelligible. But, in line with the blurring of the legal and moral forms of existence that sometimes occurs, legal and moral behavior will also at times blend into each other. If legal norms bring morality into the field of legal reasoning, lawyers will inescapably be “doing” morality. In these circumstances, a distinct political character cannot be claimed. It follows from this series of conditions that although lawyer behavior is political behavior, it is not purely so.

(indicating that one is guilty of manslaughter “if he recklessly . . . causes the death of another human being”) and MODEL PENAL CODE § 2.02(2)(c) (1962) (defining “recklessly” in terms of “substantial and unjustifiably risk” and “gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation”).

¹⁰⁶ See, e.g., Anand, *Toward an Interpretive Theory*, *supra* note 17, at 695-97. Cf. W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004).

B. The Privileged Status of Law's Core Beliefs for the Account of the Lawyer's Professional Responsibility

Part I provided an overview of the structure of law's world. As stated therein, law begins as the voice of We the People. First and foremost, law makes manifest the People's will. Out of this foundational claim come other basic assertions, including that the rule of law is not the rule of men, is permanent, is violent, and applies to all.¹⁰⁷ These fundamental propositions, along with a variety of other legal paraphernalia, represent the architecture of the legal cosmos and define the apparatus in and through which law projects its universe of meaning.

Included among the other legal paraphernalia are at least two additional core building blocks of law's world. As with other fundamental elements of law, these two propositions go to the heart of the legal universe and help shape its basic character. The particular aspects of the political order that they organize are (1) the jurisdictional extent of law's rule within the political order and (2) the relationship, under the rule of law, among the variety of governing norms that exist within the political order. Taken together, these two building blocks speak to the nature of authority within the political order. They tell us that, from the perspective of law, authority in the political order is unified.

As a jurisdictional matter, law claims an ability to extend itself throughout the political order. Jurisdictionally, its reach is unlimited. There are no areas in which it cannot move or boundaries past which it cannot enter. Law is not cabined off from asserting its power over any type of individual or community behavior—for example, by an alternate political regime. Law makes contact with the entire political domain and the people of that domain are subject to its regulation in every space.¹⁰⁸

Additionally, and against the backdrop of this claim of universal jurisdiction, law presents the political landscape as hierarchically and systematically ordered. Under the rule of law, a graded system of norms governs the political order. The People set forth the Constitution. This instrument has normative priority over statutes and other constitutions. These devices in turn are scaled vis-à-vis each other and are normatively superior to common law

¹⁰⁷ See KAHN, *THE REIGN OF LAW*, *supra* note 1, at 19-27.

¹⁰⁸ For a summary treatment of the potential objection grounded in federalism (noting the ever-present possibility of constitutional amendment as well as the essentially unlimited reach of the Commerce Clause jurisprudence in the pre-*Lopez* era), see Anand, *Legal Ethics*, *supra* note 15, at 776 n.165.

rules (which themselves have normative precedence over custom). For purposes of the authoritative character of law's rule, the implementation of this taxonomy carries with it two important consequences. First, under this schema, every type of norm has an authoritative relationship with the other norms. The strength of the command of each norm relative to the others is defined. Second, and in parallel with its unencumbered jurisdictional reach, there is no "other" world (for example, "the common law")¹⁰⁹ that in some manner operates alongside it or to which it somehow must pay heed. Within this legal arrangement, law's world accounts for every type of "system." In sum, every type of norm is *organized*, and *every* type of norm is organized.

As remarked, these jurisdictional and normative ordering claims of law present it as a world in which authority is unified. Throughout the political order, a single "chain of command" is in place. Importantly for purposes of this Subpart, this circumstance in turn reveals an understanding of the character of political meaning within the political order—namely, that under the rule of law, where authority throughout the political order is unitary, a united political meaning reigns¹¹⁰ (because in the domain of politics, authority grounds meaning or, put differently, meaning attaches to authority and manifests itself in and through expressions of authority). Of course, at the center of law's universe lie the People and the most fundamental characteristics of their rule—for example, that the People's rule is not that of men. Because (i) these beliefs are primary ones and (ii) political meaning is wholly integrated in law's world, these core ideas always manifest themselves to those who participate in law's universe. In today's vernacular, we might say that they "go all the way down." There is no circumstance in which this set of legal meanings does not confront the legal actor in his or her experience of the political order. They are never absent from political practice. Law's basic tenets are at all times present in political experience. They are ubiquitous to political activity.

If we turn from this explication of law to its implications for what counts as appropriate lawyer behavior, we see that, according to law, "right action" requires lawyers to act in a manner that

¹⁰⁹ For some readings on the common law, see generally JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* (2009) and MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

¹¹⁰ This statement reflects law's self-presentation. There is no reason to believe that law's symbolic universe is in fact so coherent. See KAHN, *CULTURAL STUDY*, *supra* note 7, at 36.

reflects the ubiquity of law's primary beliefs (and, more broadly, the integrated nature of legal meanings). Put differently, they must always behave in accordance with law's basic tenets. The reasoning is straightforward. Law insists that those who participate in its form of political experience maintain a behavioral practice that supports its universe of meaning. The omnipresence of law's elementary beliefs characterizes that world. Individual behavior must mirror this feature. Therefore, at all times, individuals—and particularly its representative figures—must act consistent with these beliefs. From the perspective of law, any conduct that fails to adhere to this behavioral prescription is unacceptable.

Applying this conclusion to the variety of conventional modes of lawyering necessarily leads to the rejection of those practices that conflict with this demand of law. More broadly, the above account of law's self-presentation and its consequences for a lawyer's professional responsibility explains, in detail, why an analysis of lawyer conduct rooted in the core elements of law's world precludes a range of not uncommon, if not commonplace, behavior.¹¹¹ To summarize, in law's world, authority in the political order is unitary, which means that political meaning throughout the order is as well. If political meaning is singular, then the fundamental elements of law's universe are constitutive of all political experience. If the fundamental elements of law's universe are constitutive of all political experience, then law necessarily demands that those who take up its form of existence act in support of those ideas at all times. And, if law necessarily makes this demand, then behavior that does not satisfy this requirement is objectionable and prohibited.

At the same time as the above discourse explains, in step-by-step fashion, why an investigation of lawyer conduct grounded in

¹¹¹ It is perhaps useful to emphasize that, consistent with the philosophical-anthropological orientation of the cultural study of the lawyer, the account presented here focuses on the set of beliefs that constitute the cultural form of law and the behavioral demands associated with that set of beliefs. That is, the account presented here is anthropological, as opposed to historical. Not surprisingly, the history of the nation's founding—and particularly the emphasis on civic republicanism associated with the founding—supports this structure of belief and its consequent ethical requirements. On the history of the founding and the central place of civic republicanism in it, see WOOD, *supra* note 55. For a discussion of the relationship of the civic republican tradition to lawyer ethics, one that is both historical and normative, see Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 *FORDHAM L. REV.* 1339 (2006). See also Russell Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 *U. CHI. ROUNDTABLE* 381 (2001).

law's core beliefs denies a space for a variety of practices that are familiar to Americans, it also makes clear why it would be a mistake to attempt to defend those practices by analogizing to Wittgenstein and conceptualizing appropriate lawyer behavior in terms of a set of activities that have no underlying unity. If law requires all who participate in its way of being to act in conformity with its principal beliefs, then, by definition, ethical lawyer behavior will not, at its base, vary by context. Put differently, and a bit more expansively, law presents itself as a world in which political meaning is unified. Necessarily, then, the social practice of political meaning is fundamentally singular, not plural, in form. Given this fact, and law's demand for behavior that supports its way of being, the account of how a lawyer is to act must reflect the same characteristic. From the perspective of law, no other conceptualization of the basic shape that proper lawyering takes is possible.¹¹²

The statement that a lawyer's fundamental professional responsibility will always look the same is one that holds internal to law's world. Once we acknowledge this discursive limitation, however, the question of grounding various conventional behaviors in a Wittgensteinian-type account of lawyer ethics again presents itself, because we now confront the complete phenomenological landscape of the individual in America. If law's world is not the only form of law that makes a claim on him or her—if multiple forms of law exist for the American—then the philosophical-anthropology study of law presumably dictates that we approach "law" as a family of social practices. And, consistent with the methodology of the cultural study of the lawyer, such an orientation toward law would produce a conception of lawyer ethics that is plural in form.

From the perspective of the cultural study of the lawyer, the premise of the above line of reasoning appears to fail and, accordingly, the ability to conceive of appropriate lawyer behavior as a set of fundamentally diverse activities remains impossible. The basis for this conclusion lies in the consideration of the American experience of legal authority. If multiple forms of law exist for the American, then he or she should respond to various legal authorities in his or her experience of political life. If we reflect on the operation of "legal" authority in the American political order, however, we see that the legal authority associated

¹¹² Beyond the basic shape of lawyering, variation in the conceptualization of appropriate lawyer behavior is expected. See Anand, *Legal Ethics*, *supra* note 15, at 773.

with law's world appears to be the only form of legal authority that exists in a compelling manner for the individual in America.¹¹³ A pedagogic exercise helps illustrate this point. Imagine that one stands within a particular "legal area" within the American political order. If we inquire into the associated phenomenology, we find that regardless of where one is located—that is, regardless of the type of regime (state or federal), type of norm (constitutional, statutory, or common law), or type of subject matter (constitutional law, criminal law, private law)—the experience is one of the single, unified order of law's world. For the individual in America, the social practice of state or federal law, constitutional, statutory, or common law, or criminal or private law (or any other subject area) is always understood as part of the whole that is law's rule.¹¹⁴

The direction in which the individual in America looks for legal guidance supports this conclusion. In America, the final determination of legality always lies with the U.S. Supreme Court, which is understood to represent the voice of the People.¹¹⁵ Conversely, when the Court hands down a decision, the ruling is followed, a circumstance that holds true irrespective of the substance of the Court's dictate. There is no other locus of legal authority—for example, an alternate sovereign or reason itself—to whom one appeals for ultimate direction, and to whom one adheres. In America, law's rule reigns, and appears to do so by itself.¹¹⁶

¹¹³ This statement requires qualification. For the individual whose political self is organized around the terms of post-modern forms of politics, an alternate form of legal authority—particularly one grounded in the international legal order—may have currency. In reflecting on the nature of politics in a twenty-first century international legal order, one might consider the challenge presented by CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. Chi. Press 1996) (1927) (arguing that the friend-enemy distinction is the orienting category unique to political experience).

¹¹⁴ Cf. Kahn, *Freedom*, *supra* note 7, at 142 n.2. *But cf.* Posner, *supra* note 53, at 49-50 (arguing that a distinct Aristotelian conception of law informs American legal experience).

¹¹⁵ *But cf. id.* at 52-53 (arguing that the Court is not central to American political life). For one account of the problematic character of this analysis, see *supra* note 53.

¹¹⁶ An interesting illustration of the dominance of law's world on the American legal imagination lies in the work of Carla Pratt. At a basic level, Pratt convincingly argues for the application of the core principle of equal justice to requirements for admission to the bar. See Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003).

If this phenomenology is the only available experience of legal authority for the individual in America, then the appropriate conceptualization of law, in the first instance, is as a single cultural practice, and not as a manifold one. For the philosophical-anthropological study of law in America, there is in the end only one object of inquiry. It follows that the basic intellectual orientation of the project does not itself lead to an understanding of lawyer ethics that allows for fundamentally multiple ways of acting.¹¹⁷

C. *The Proper Use of “Legal” Vocabulary*

In its effort to maintain itself as an autonomous universe of meaning, law necessarily makes a claim of what counts as practicing “law” and as being “legal” in character. The appropriate use of the terms will always be one in which the referent is law’s set of beliefs. Those actions and ideas that harmonize with law’s world are properly understood in this vocabulary. Those actions and ideas that do not are correctly described using some other words. Of course, this position lies internal to law’s world. Within those boundaries, it has currency. But to what extent does this linguistic understanding hold at a more general level? From an outside perspective, does this definition of the terms sustain itself?

Perhaps surprisingly, the answer is yes. Law’s claim to the terms does have a privileged status in the descriptions of our observations and ideas. And it does so because of the fact of the existence and self-integrity of a cultural form. That fact constrains discourse to just the extent at issue. That is, it requires dialogue to

¹¹⁷ At this point, it is perhaps useful to comment on the relationship between the cultural study of the lawyer’s understanding of ethical lawyer conduct and adversarial lawyering, which is the basic form of law practice in the United States. While the project rejects a range of familiar action associated with adversarial lawyering, this denial does not translate into a preclusion of adversarial lawyering in a wholesale fashion. Rather, it represents a challenge to what adversarial lawyering looks like. Once we recognize that law is a cultural form and that law has an inherent normativity, then the architecture of law’s world frames the account of lawyer ethics in an adversarial context. Lawyers will still find themselves in opposing positions. (Adversarial advocacy is an institutionalized part of the American practice of law.) For the cultural study of the lawyer, the task is to explain how lawyers are to understand their professional responsibilities in such an environment. *See Anand, Legal Ethics, supra* note 15, at 751-52, 782-83. As noted in the Introduction to this Part, previous articles have provided various examples of what practicing law within the adversarial system looks like. I leave the more complete picture of practicing law within the adversarial system, including the detailed treatment of the lawyer’s relationship to his or her nominal “client,” to future work.

maintain consistency with the cultural form's own understanding of the appropriate use of derivative terms, at least within the discursive context within which the cultural form operates. A consideration of the proper use of language in our religious discourse is instructive.

From the perspective of the scholar, religion is a cultural form.¹¹⁸ In our thinking about religious matters, we acknowledge the existence and self-integrity of religious forms and, accordingly, understand that to legitimately describe a person or particular practice as "of a specific religion," the essential character of that religion must inhere in him, her, or it.¹¹⁹ To speak in disregard of this limitation is to engage in a mistaken, if not meaningless, discourse. Quite simply, if we did put forth such an account, what are we saying? (At best, such a nomination would represent a confusion of categories, namely "of the religion" versus "like the religion.")

We can see this point if we reflect on what valid discourse with respect to the dominant religious tradition in the West looks like. In our thoughts about Christianity, the basic beliefs of this religion necessarily constrain the understanding of what counts as practicing Christianity and as being Christian in character.¹²⁰ For

¹¹⁸ As indicated, this statement is from the perspective of the scholar. Such an orientation is not a challenge to the religious individual and is not intended to denigrate his or her beliefs in any way.

¹¹⁹ To be clear, in speaking of the essential character of a religion, my intention is not to embrace an idea of essentialism in religious forms and, correspondingly, to reject the arguments of prototype theory. My point is only that there is a substantive criterion that is basic to, and constitutive of, a religious form. For a discussion of prototype theory, see GEORGE LAKOFF, *WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987). For an appeal to prototype theory in the conceptualization of a specific religion, see GAVIN FLOOD, *AN INTRODUCTION TO HINDUISM* 6-8 (1996).

¹²⁰ My point here is not to argue for an essential definition of Christianity, although it is equally not to argue against a standard that goes beyond a mere instrumental agreement. Words may have no ontological grounding (concepts drive an understanding of reality, not the other way around), but the fact that they are, in this sense, a convention does not make them merely conventional, or at least not always. There are some "non-negotiables" that constrain application, at least some of the time. The examples presented above are illustrative. For a general discussion of essentialism in language, one might begin with Wittgenstein. See WITTGENSTEIN, *supra* note 89. For a not unimportant discussion of Wittgenstein's relation to Kant, see DAVID PEARS, *LUDWIG WITTGENSTEIN* (1969). Wittgenstein's account is hardly unproblematic, particularly its underlying claim that critique and description appropriately focus on use. To offer just one reason to question Wittgenstein's treatment of this subject, the construction of knowledge (and therefore meaning) occurs in and through a conceptual apparatus, i.e. "simultaneity in construction," not "use

example, in considering religious ethics, for an action to count as Christian, it has to reflect the principle of universal love.¹²¹ Similarly, in the context of religious identity, to rightfully label someone a Christian, he or she must believe in the theological significance of Jesus.¹²² In the absence of this limitation—that to deem a particular person or activity as “of Christianity,” the fundamental ideas around which Christianity is organized must be constitutive of him, her, or it—discussion is unintelligible.

In just the same way that a religious form sets boundaries to discourse, so too does the cultural form of law. The fact of law’s existence and self-integrity means that any serious use of the related terminology carries with it the meanings associated with law’s core tenets. For example, those things “legal” are necessarily tied to law’s world. Thus, in the context of legal identity, to be a member of the “legal” profession, an individual must be committed to *We the People*.¹²³ Similarly, in our thinking about legal ethics, “legal” action must manifest the basic principles of law’s world.

Because the cultural form of law does have an entitlement to “legal” vocabulary, we can justifiably criticize as misidentified those actions and ideas that claim the language but do not comport with the criteria for its utilization. In such instances, individuals are engaging in some other type of action or work, one that cannot be correctly designated as “of law.” For example, law maintains that it resolves disputes in a principled manner. Rules of law, not those of men, determine outcomes. At the same time, many individuals assert that they are “lawyers” and are “practicing law,” and simultaneously approach dispute resolution under law from a result-oriented perspective. In such a situation, it is correct to reject these individuals’ claims to the nomenclature. What they are doing

comes first,” is the appropriate characterization in our thinking about this topic. See KANT, *supra* note 56. (For a more contemporary form of Kantian epistemology that recognizes the diversity of epistemic structures, see, e.g., CASSIRER, *SYMBOLIC FORMS*, *supra* note 8).

¹²¹ Notably, Augustine rooted just war, in part, in love. See, e.g., ROLAND H. BAINTON, *CHRISTIAN ATTITUDES TOWARD WAR & PEACE: A HISTORICAL SURVEY AND CRITICAL RE-EVALUATION* 96-97 (1960).

¹²² Accordingly, it is not clear that an individual who accepted the conclusions of the Jesus Seminar could legitimately be called a Christian. For some literature associated with the Jesus Seminar, see ROBERT W. FUNK & ROY W. HOOVER, *THE FIVE GOSPELS: THE SEARCH FOR THE AUTHENTIC WORDS OF JESUS* (1993) and ROBERT W. FUNK, *THE ACTS OF JESUS: THE SEARCH FOR THE AUTHENTIC DEEDS OF JESUS* (1998).

¹²³ For the cultural study of the lawyer, lawyer identity is thick identity, not thin. This embrace of thickness stands in contrast to the turn to thinness that is reflected in Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

is not appropriately described in the language of law.¹²⁴ Likewise, law demands, as repeatedly stated, that those who take up its form of political existence embrace the tenets of its world. Meanwhile, many scholars describe their work as providing an account of “legal ethics” and concurrently interrogate the role of the lawyer without directly appealing to these ideas in the course of their study. Once again, we can rightly deny the characterization, because this scholarship is not properly represented in the terms of “legal” vocabulary.¹²⁵

While the argument presented here is likely challenging to some, it is perhaps uniquely provocative to the legal ethicist because of the opposition it presents to the nature of his or her work. In light of this circumstance, some additional discussion of the claim is useful to help crystallize the distinction that is being made here. This discussion involves a continuation of the analogy between the cultural form of Christianity and that of law.

Above we remarked that the basic beliefs of Christianity necessarily constrain the legitimate use of terms like “Christian.” If we apply this fact to the category of “Christian ethics,” it follows that for behavior to fall under this rubric, the core ideas of Christianity must be constitutive of it. Similarly, to qualify as the study of this subject, the relevant inquiry must focus on the same type of conduct. The label “the study of Christian ethics” operates under this same linguistic parameter. Moving forward with our reasoning, and with this understanding of what counts as “the study of Christian ethics” in mind, we can consider alternate forms of analysis of “Christian behavior” and ask about their appropriate characterization. For example, it is certainly possible to engage in an Islamic or Judaic interrogation of Christian practices and come to an understanding of what is and is not “right” behavior internal to that perspective. Such an account is entirely valid. But, what is its correct description? More precisely, can we supplement our understanding of what it means to study Christian ethics and

¹²⁴ The actions of these individuals are properly described in the language of “political action” (i.e. these individuals are “practicing political action”). For the treatment of this fairly nuanced matter, at least with respect to civil litigators, see Anand, *Contemporary Civil Litigation*, *supra* note 16. See also *supra* note 26.

¹²⁵ Typically, this scholarship is organized around the basic concepts of the American cultural form of morality, which is principally deontological in character and should be understood as providing an account of “moral ethics.” For the most powerful treatment of the role of the lawyer from a moral perspective, see LUBAN, *supra* note 21. On the deontological character of the American cultural form of morality, see *supra* note 25.

properly label such a treatment of the Christian role as also “the study of Christian ethics?”

The answer is no. This type of analysis does not qualify as the study of Christian ethics because it fails to adhere to the linguistic constraints that exist for discourse. As stated, to be appropriately considered “the study of Christian ethics,” the core beliefs of Christianity must be constitutive of the conduct of focus. With respect to an Islamic or Judaic interrogation of Christian practices, however, the central tenets of these religious forms inform the behavior of concern, not those of Christianity. Ultimately, with this type of analysis, the focus is on Islamic or Judaic conduct, and not Christian action. To categorize this form of inquiry as “of Christianity,” then, is an inapt use of language. The accurate characterization of such an investigation is in the terms of *critique*. This type of analysis is an assessment of Christian ethics from an alternate point of view.

By a parallel manner of reasoning, we can differentiate legal ethics—that is, the ethics of law’s world—from its assessment from any other perspective,¹²⁶ including the moral perspective.¹²⁷ As with the Islamic or Judaic inquiry into Christian practices, any such account of lawyer behavior is perfectly valid. Indeed, for those who internalize the norms of the particular disposition at issue, this type of investigation has affirmative value. But regardless of how legitimate or worthwhile this kind of pursuit is, we cannot justifiably attach the label “legal” to the endeavor. It is not properly described in the terms of law’s world. Rather, it is

¹²⁶ This state of affairs suggests the problematic character of Christian legal ethics scholarship. For some examples of the literature of this subfield, 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) and Joseph G. Allegretti, *Can Legal Ethics Be Christian?*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 453 (Michael W. McConnell et al. eds., 2001).

¹²⁷ As indicated in footnote 125, the standard form of “legal ethics” scholarship is as a moral approach to the role of the lawyer (hence the textual reference to the “moral assessment” of lawyer ethics). *Supra* note 125. It should be noted that, for the most part, in its consideration of the role of the lawyer, this scholarship does not acknowledge law as a cultural form (and thus, the moral assessment it provides is not, strictly speaking, a critique of lawyer ethics qua the ethics of law’s world).

properly described on its own terms (for example, in the language of the cultural form of morality).¹²⁸

* * * * *

The more detailed philosophical accounts presented here hopefully enhance the credibility of the cultural study of the lawyer's methodology and, accordingly, strengthen the persuasive character of the project's analyses of the lawyer's professional responsibility, which, as Part I described, represents the second half of the project's scholarly agenda. This Article now turns to one such analysis: a comparative inquiry into the normative demands of law and those of economics. To state again the qualifications to the discourse, the concern of Part III is with the most basic of these demands, which lie in significant part in conflict with one another. Consequently, the discourse (a) emphasizes difference and (b) is foundational and narrow-ranging. Additionally, to repeat the intention of the discussion, Part III has a defined purpose: to establish that, at the fundamental level, a lawyer is not an economic person.¹²⁹

III. LAW AND ECONOMICS: A COMPARATIVE NORMATIVE INQUIRY

The earlier discussion in Subpart IIA built from the fact of the incommensurability of cultural forms. The concern of that Subpart was to develop a more nuanced understanding of the phenomenon of incommensurability, particularly as presented in the relationship

¹²⁸ For this reason, it is a mistake to think that the question presented to the legal ethics scholar is "What are the moral obligations of a lawyer?" Rather, the question presented is "What are the legal obligations of a lawyer?" or, given that law is a cultural form of politics, "What are the political obligations of a lawyer?" For an expression of the former understanding of the question presented, see, e.g., RHODE & LUBAN, *supra* note 29, at 3 (stating that legal ethics "concerns the most fundamental moral aspects of our lives as lawyers").

An important qualification to this challenge to conventional legal ethics scholarship lies in the fact that the rule of law may very well be a dying set of meanings for the American citizen. Under an alternate understanding of law, which is presumably an instrumental one, the argument for legal ethics as the moral analysis of lawyering has currency.

¹²⁹ Consistent with this turn to the second-half of the cultural study of the lawyer's scholarly agenda, Part III does not take up a discourse on the incommensurability of the cultural forms of law and economics and its associated details. It should be noted, however, that for purposes of this paper, the assertion that law and economics are incommensurable is intended as a modest one, in line with the discussion on Subpart IIA.

between law and morality. Put differently, the focus was on improving the intelligibility of the phenomenon of incommensurability, again specifically with respect to the law-morality dynamic. If we turn away from a concern with the phenomenon's intelligibility and consider the philosophical implications associated with its fact, at least one important conclusion arises. There exists a normative equality among cultural forms. That is, no cultural form—be it religion, morality, science, art, law, or any other symbolic medium—holds a privileged place in our thinking about how we ought to live. The reasoning that drives this conclusion is straightforward. If, at their fundament, cultural forms cannot be compared, then the way of life of one can never be superior to that of another.¹³⁰

From an intellectual standpoint, this state of affairs is hardly trivial. Rather, it gives rise to a need to reorient our theoretical sensibilities. Specifically, it demands that we reconceptualize the field of ethics.¹³¹ Instead of understanding the moral form of experience as defining “right action,” we now must make sense of the discipline of ethics in more bounded terms—as taking up the question of how we are to live *internal to a cultural form*. More precisely, given the inherent normative character of a cultural form, we now must understand the subject of ethics to be an investigation of the manner by which one supports a particular form of meaning.¹³²

Naturally, this restructuring of the field of ethics lends itself to comparative study—how the behavioral demands of one cultural form differ from those of another—the importance of which this Article's conclusion will underscore. As indicated, this Part considers the competing demands that attach to participation in the cultural form of law and the cultural form of economics at the most basic level. To lay the groundwork for the discussion, a series of preliminary comments is necessary.

First, it is presumably clear to the reader that, as a general matter, a comparative normative inquiry requires a command of the elemental structure of the relevant cultural forms. As previously indicated, the substantive content of a normative demand is a direct function of a cultural form's conceptual architecture. For the comparative normative inquiry taken up here, which considers the core aspects of the relevant cultural forms, this

¹³⁰ See Anand, *Legal Ethics*, *supra* note 15, at 771-72.

¹³¹ More precisely, the concern here is with normative ethics. For a relevant comment, see Anand, *Legal Ethics*, *supra* note 15, at 771, n. 147.

¹³² Cf. KAHN, *LIBERALISM* *supra* note 42, at 149 (“Every metaphysics supports a moral and political practice that ‘makes sense’ within such a world.”).

requirement translates into a need to comprehend the principal concepts that are constitutive of the worlds of law and economics, or, more precisely, those principal concepts within which the tensions between the two worlds inhere. Of course, this Article has already made reference to a variety of the fundamental ideas of the cultural form of law, at various points and at different levels of detail. To appropriately engage the comparative inquiry, a degree of repeat presentation is required. Specifically, three concepts basic to law's world require reintroduction. As the above statement regarding the necessary objects for understanding suggests, these elements are the proper point of focus for the comparative analysis presented here, because they mark the critical points of contact with the core elemental structure of the cultural form of economics, and thus provide the natural axis of orientation for the comparative assessment of the two cultural forms' most basic competing claims on behavior. To note, in making the necessary repeat presentation, this Part briefly expands on the prior explication of the three fundamental propositions. And to be clear, in providing these descriptions, this Part relies on the work of the cultural study of law.

Second, with respect to the basic normative demands that arise out of these three core elements, two such directives have also been previously referenced (although not explicitly identified as basic normative demands of law), and in a similar vein, they too must be re-presented. This Part also introduces the reader to one more fundamental prescription for lawyer conduct.

Third, the three basic demands of law to be described, as well as that of economics (there is in fact only one), should not be construed to necessarily define an exhaustive list of each cultural form's fundamental commands on behavior. The prescriptions identified in what follows represent the end product of the current state of reflection. It is possible, and hopefully true, that additional understandings of the basic normative characters of law and economics will reveal themselves with future work. In this light, a basic claim of this Article—that it explores the rival normative demands that each cultural form puts forth, at the foundational level—requires a qualification. This Article does take up this task, in the sense that to do so is to clarify the distinction between being a lawyer and being an economic person (an undertaking for which the identified prescriptions are sufficient). This Article does not take up this task in a more comprehensive sense, or at least it does not purport to. Whether additional material to support its conclusion is available remains to be seen.

Fourth, with respect to the cultural form of economics, a consideration vis-à-vis its initial conceptualization presents itself. This Article has, throughout its discourse, consistently referred to economics as a “cultural form.” Economics *is* just that. It is an entry point into the world, a medium in and through which to make sense of things.¹³³ As with law, as well as other symbolic mediums, economics presents a complete ordering of reality, and in and through that experiential structure, provides the participant in its universe a rich way of being.¹³⁴ Importantly, this conceptualization is not a purely abstract one—for example, that economics is, *in theory*, a way of ordering reality. Rather, this conceptualization is tied to concrete action. The cultural form of economics is, like all cultural forms, actively practiced.¹³⁵ It is a manner by which individuals, at least in the United States, in fact relate to the world, as the examples presented in this Part help demonstrate.¹³⁶

Fifth, with respect to the structure of this cultural form, and more precisely, its substantive character, the conception of economics that informs this Article is, to be explicit, neo-classical economics. Neo-classical economics is the school of thought that

¹³³ Cf., Gary S. Becker, *The Economic Approach to Human Behavior*, in GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 3 (1976).

¹³⁴ For an interesting discussion that acknowledges economics as “a way of looking at the world,” but resists defining it as a form of knowledge, see RONALD H. COASE, *Economics and Contiguous Disciplines*, in *ESSAYS ON ECONOMICS AND ECONOMISTS* 34 (1994).

¹³⁵ An interesting example of this phenomenon is found in the study of legal ethics. In their casebook, Deborah Rhode and David Luban conceptualize the study of lawyer advertising, solicitation of clients, attorney’s fees, and related matters as “market regulation” and introduce the subject with an introduction to some basic economic terms. (To be clear, such packaging is pedagogically appropriate.) RHODE & LUBAN, *supra* note 29, at 756-57.

¹³⁶ As a matter of economic theory, neo-classicism (which, as indicated in the next paragraph of text, is the conception of economics that informs this Article) strives to be predictive, as opposed to descriptive, and indeed both acknowledges its limited descriptive accuracy and insists on the propriety of this character of its research. It also disclaims a normative dimension to its analysis. These tenets of neo-classicism imply a considered distance of the self vis-à-vis neo-classical economic research. However accurate such a characterization is, it does not hold with respect to the general member of American society, who in fact internalizes the terms of neo-classicism into a way of life. For the most well-known statement, and defense, of neo-classical economics’ predictive orientation, see MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953). For an important response, see Ronald H. Coase, *How Should Economists Choose?*, in COASE, *supra* note 134, at 15.

dominates American economic psychology.¹³⁷ In the Academy, it holds a privileged place in economics departments and is the representative school of thought for economic thinking that takes place in other disciplines.¹³⁸ Perhaps more importantly, in the formation of American public policy, when economic considerations are involved, the principles of neo-classical economic theory structure the terms of debate and often lie, at least ostensibly, at the foundation of legislation.¹³⁹ Because of the central place that neo-classical theory occupies in the American

¹³⁷ Neo-classical economics is, at present, the dominant economic theory in the United States, and one that supports a form of capitalism. Both capitalist and non-capitalist alternatives to neo-classical economic theory exist. Capitalist approaches to the economic order that are not neo-classical in form include that of traditional institutionalist economics. For an introduction to institutional economic theory, see, e.g., GEOFFREY M. HODGSON, *What is the Essence of Institutional Economics*, in THE PHILOSOPHY OF ECONOMICS: AN ANTHOLOGY 399 (David M. Hausman ed., 3d. ed. 2008) and Walter H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309-18 (Supplement 1919). See also THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS* (1899) and JOHN R. COMMONS, *INSTITUTIONAL ECONOMICS: ITS PLACE IN POLITICAL ECONOMY* (1934). It is perhaps worth noting that the capitalism of Adam Smith did not take the form that neo-classical economics supports, at least when understood in the context of Smith's moral orientation. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., Liberty Classics 1982) (6th ed. 1790); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Henry Regnery Co. 1953) (1776). Non-capitalist approaches to economic production include those grounded in a Marxist ideology, as well as rooted in the ideology of Gross National Happiness. For an introduction to the former, see THE MARX-ENGELS READER (Robert C. Tucker ed., 2d ed. 1978). For an introduction to the latter, see 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 (Karma Ura & Karma Galay eds., 2004).

¹³⁸ Typically, such thinking takes the label of "rational choice" analysis. See, e.g., GARY W. COX & MATTHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN* (2d ed. 2007); MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (2d ed. 1989); SAMUEL L. POPKIN, *THE RATIONAL PEASANT: THE POLITICAL ECONOMY OF RURAL SOCIETY IN VIETNAM* (1979) and KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* (1992).

¹³⁹ The deregulation of the California energy market in the 1990s was ostensibly rooted in the economic logic of neo-classicism. See, e.g., Spencer Michels, *Power Play*, ONLINE NEWSHOUR, Dec. 16, 1996, available at http://www.pbs.org/newshour/bb/economy/december96/power_12-16.html (last visited on Jan. 15, 2010) (discussing "California's plan to bring competition to the power industry").

economic imagination,¹⁴⁰ it is the appropriate focal point for analysis.

In what follows, this Part presents its discussion in three steps. Initially, it paints its picture of the cultural form of law and its normative demands, with the measure of repeat presentation described. Subsequently, it offers the analogous portrait of the cultural form of economics and its normative demand. Finally, it brings the two discussions together, offering the relevant comparison of the respective normative demands. Not surprisingly, this last discussion is succinct, due to its largely applied character.

A. The Cultural Form of Law and Its Basic Normative Demands

Three previously mentioned elements of law's world are central to the comparative study of the normative demands associated with the legal and economic ways of life, at the basic level. Those ideas structure an understanding of three aspects of the political order: (i) its origin, (ii) who governs the political order and who is governed under the political order, and (iii) the political order's temporal character. The ideas themselves are that the rule of law is a representation of popular sovereignty, is not the rule of men, and is permanent. Below, this Subpart presents an account of each concept, as well as examples of its cultural expression. Subsequently, this subpart delineates three basic demands that arise out of the concepts, along with relevant illustrations.

To begin, law's world is a representation of popular sovereignty.¹⁴¹ The political order manifests the People's will. The People are the sovereign authority, and, first and foremost, the political order signifies their voice. Its meaning is that it denotes

¹⁴⁰ In recent years, cognitive psychology has begun to present a challenge to the "rational actor" assumption of neo-classical economics. For an introduction to this work, see DANIEL KAHNEMAN, PAUL SLOVIC, & AMOS TVERSKY, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982) and; THOMAS GILOVICH, DALE W. GRIFFIN, & DANIEL KAHNEMAN, *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (2002). Behavioral law and economics is the school of thought that applies this work to law. For an introduction to behavioral law and economics, see Christine Jolls, Cass R. Sunstein and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). For some criticisms of behavioral law and economics, see Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) and Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein and Thaler*, 50 STAN. L. REV. 1577 (1998).

¹⁴¹ KAHN, *THE REIGN OF LAW*, *supra* note 1, at 23-24.

the People's will. This idea is reflected in the most prominent—or “first”—symbol of law's universe. “We the People” ordained and established the Constitution (out of which, as the earlier discourse on political authority and political meaning described, the entire political order flows).

Additionally, because the rule of law is a representation of popular sovereignty, it is not the rule of men.¹⁴² That is, law's world is the rule of no one. The political order operates independent of the interests of specific individuals or groups. Equally, it is indifferent to the impact of political activity on these concerns.¹⁴³ Politics is non-personal, and is stripped of the particularity of the self. This tenet of law's world finds expression in a variety of concrete understandings that Americans have about the political order, both formal and substantive. For example, with respect to the former, in America nobody is above the law and all have equal standing.¹⁴⁴ With respect to the latter, purely self-interested lawmaking is unacceptable,¹⁴⁵ as is judicial decision-making of this sort.¹⁴⁶

¹⁴² *Id.* at 21-23.

¹⁴³ *Id.* at 23 (noting that law “den(ies) that the source of meaning of an event lies in its novelty”).

¹⁴⁴ In hearings on “Wartime Executive Power and the NSA's Surveillance Authority,” Senator Patrick Leahy offered the following statement:

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 Leahy). Similarly, Senator John Kerry, in a statement approving the U.S. Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), asserted the following: “The Constitution and the rule of law bind all of us even in extraordinary times of war. No one is above the Constitution.” Press Release, Office of Senator John Kerry, *Kerry Responds to Supreme Court Decision on Habeas Corpus* (June 12, 2008), available at <http://kerry.senate.gov/press/release/?id=b186d877-ed56-4cc8-baa3-38d6ea62c3c5>.

¹⁴⁵ *Cf.* Unger, *supra* note 14, at 588 (“All contemporary versions of the democratic ideal . . . share a minimal core: the state must not fall permanently hostage to a faction, however broadly the term faction may be defined so as to include social classes, segments of the workforce, parties of opinion, or any other stable collective category.”).

¹⁴⁶ *See, e.g.,* Ian Urbina, *Despite Red Flags About Judges, A Kickback Scheme Flourished*, N.Y. TIMES, Mar. 28, 2009, at A1.

Finally, the rule of law is permanent.¹⁴⁷ The political order extends through time and can change only when the People reconstruct it.¹⁴⁸ In the absence of such a reassertion of will, the voice of the People, as given, governs. This understanding—of the enduring quality of law’s rule—represents itself in at least two aspects of American political life. At a relatively superficial level of experience, the permanent character of the rule of law grounds the American association of predictability and order with law. More deeply, this attribute is part of what makes possible American historical experience. As foreign a thought as it may be for some, the American experience of community—an inherently intergenerational concept—occurs in and through the rule of law. The American political narrative is a legal narrative (one which is, at a minimum, a story of the advancement of Enlightenment values in and through the rule of law). As Paul Kahn has correctly noted, “Without (law), what would link current citizens to past and future generations? Not blood, not language, not even a common heritage. This is a nation of immigrants, with deep differences in each of these areas.”¹⁴⁹ For the American citizen, the rule of law is the tie that binds across time.¹⁵⁰ In part, that tie is a product of law’s permanence.

The explication of these three constituent ideas of law gives rise to three fundamental behavioral claims that the cultural practice makes on the lawyer. These demands take the form of an overarching command for a definitive type of action, as well as two additional obligations. Together, they comprise the foundation of a lawyer’s professional responsibility.

As a matter of first principles, the belief that the People are sovereign prescribes a baseline for what counts as appropriate lawyer action. If law’s world begins as the manifestation of the People’s will, then, first and foremost, a lawyer’s conduct must

¹⁴⁷ KAHN, *THE REIGN OF LAW*, *supra* note 1, at 19-21.

¹⁴⁸ Constitutional amendment itself is not necessarily the mark of a new beginning, i.e. of a new republic. For a discussion of constitutional amendment as law reform versus constitutional amendment as reappearance of the People, see *id.* at 63-64.

¹⁴⁹ *Id.* at 213.

¹⁵⁰ It should be noted that in this age when modern forms of politics confront post-modern forms of politics, the rule of law may be a dying set of meanings. For an earlier comment in this same vein, see *supra* note 128. The contested character of American political experience should also again be noted. See *supra* note 65.

conform to that will. Whatever the lawyer does, his or her actions must reflect the voice of the People.¹⁵¹

Beyond this all-encompassing demand, the three beliefs operate in conjunction with one another to produce two further fundamental requirements for lawyer conduct. First, if the People are sovereign, not particular individuals or groups, and are so indefinitely, then a lawyer must respect particular rules of law—the express wishes of the People—and act in a manner that makes manifest the various norms’ purposes. Put succinctly, he or she must adhere to “the law,” a prescription that translates into a variety of concrete requirements for a lawyer. For example, he or she may not engage in acts of civil disobedience,¹⁵² must avoid filing pleadings that have no chance of success on their merits,¹⁵³ must otherwise refrain from conduct that corrupts the practice of law,¹⁵⁴ and must follow rules of law in his or her own more individualized behavior (for example, in filing his or her taxes).

Second, because the rule of law is that of the People, and not of anyone in particular, a lawyer must not concern him- or herself with the specific character of any self—either his or her own, or those of another person or other persons. This aspect of a lawyer’s professional responsibility—the duty to acknowledge the impersonal character of politics and deny the particularity of

¹⁵¹ For further elaboration on the basic structure of this ethical demand, including a general comment on distinctions between required and permitted behavior, as well as their variability, see Anand, *Legal Ethics*, *supra* note 15, at 773-74.

¹⁵² Anand, *Toward an Interpretive Theory*, *supra* note 17, at 695-97.

¹⁵³ Anand, *Legal Ethics*, *supra* note 15, at 780-81. For some writings of judges testifying to the determinate character of law, see, e.g., 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) (“[M]ost decisions of the [D.C. Circuit] court of appeals are rendered pursuant to well-established tenets of law and issued without dissent.”) and Edwards, *supra* note 75. See also, BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 20 (1921) (“*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.”) and AHARON BARAK, *JUDICIAL DISCRETION* 41 (Yadin Kaufmann trans., Yale Univ. Press 1989) (“The accepted view is that most of the cases that come before the courts are not hard cases.”). The jurisprudential account of the hard case is most closely associated with the work of H.L.A. Hart and Ronald Dworkin. See generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994) and RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

¹⁵⁴ Anand, *Legal Ethics*, *supra* note 15, at 780-82.

selves—similarly translates into specific obligations for the lawyer. Among other things, he or she cannot choose whom he or she represents based on normative considerations (as the concept is conventionally understood). That is, selective representation founded on normative grounds is prohibited.¹⁵⁵ Additionally, he or she cannot engage a controversial political or ideological issue beyond contributing his or her expertise.¹⁵⁶ Accordingly, it is inappropriate for a bar association to endorse a nuclear weapons freeze initiative, request Congress to refrain from enacting a guest-worker program, engage in conduct that is directed at the reform of law (beyond contributing its professional expertise), etc.¹⁵⁷

In the first instance, law's world demands that the lawyer serves the People. Moreover, he or she must respect particular rules of law and not concern him- or herself with the specific character of any self. These normative understandings define the basic set of practices to which a lawyer must adhere in order to fulfill his or her obligations associated with participation in the cultural form of law. If we place this normative arrangement to the side of our discussion, for a moment, we can explore the cultural form of economics, and the basic prescription on behavior that it sets forth for the economic person.

B. The Cultural Form of Economics and Its Basic Normative Demand

Three core elements of the conceptual architecture of economics are relevant to the comparative inquiry, each structuring an understanding of a particular aspect of the economic world. Those aspects are the nature of the economic individual, the reality that surrounds him or her, and a distinct, ontological fact that undergirds that reality. The corresponding tenets are that (1) the economic individual makes rational decisions that maximize his or her self-interest, (2) everything that he or she confronts is an object of interest, and (3) markets exist (and coordinate his or her interest-seeking behavior). As in Subpart A, this Subpart presents an account of each concept, as well as examples of its cultural expression. Additionally, this subpart explicates a specific orientation that lies behind this conceptual framework, and particularly behind the first conceptual element (an explication that is necessary for the desired account of the economic world).

¹⁵⁵ Anand, *The Role of the Lawyer*, *supra* note 17.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Finally, again in parallel with Subpart A, this Subpart delineates the basic normative demand that arises out of the core concepts, along with relevant illustrations. In doing so, the analysis makes clear why this cultural practice effects a single fundamental ethical principle.

To begin, the individual makes rational decisions that maximize his or her self-interest.¹⁵⁸ That is, in a given circumstance, he or she makes calculated choices that garner him or her the greatest personal utility.¹⁵⁹ This tenet of the economic universe manifests itself in the familiar American account of individual and collective behavior in terms of assessing opportunity costs,¹⁶⁰ performing cost-benefit analyses,¹⁶¹ acting efficiently,¹⁶² and creating and responding to incentives, among other things.

Next, everything that one confronts is an object of interest,¹⁶³ a state of affairs that is understood literally: all things are thought of

¹⁵⁸ Becker, *supra* note 133, at 5 (discussing the maximizing behavior of individuals); Posner, *supra* note 140, at 1551 (defining “rationality” as “choosing the best means to the chooser’s ends”). Neo-classical economic theory ascribes an additional characteristic to the individual: he or she has stable preferences, which are elementary desires such as health and sensual pleasure. Becker, *supra* note 133, at 5. The assumption of health as a stable preference appears to be a limiting, if not problematic, aspect of the economic understanding of the world. Not all individuals resist or fear death, but accept, if not embrace, it—for example, as a stage in life. That is, for some individuals, there is a “time to die.” For a starting point for reflection on this position, one might begin with the *Katha-Upanishad*. See 2 *THE UPANISHADS* 1-24 (F. Max Müller trans., Dover 1962) (1884). (It is perhaps necessary to note that the attitude toward death referenced here should not be confused with the existence of a preference that conflicts with an interest in health. For a discussion of the latter point, see Becker, *supra* note 133, at 9-10.)

¹⁵⁹ As a matter of neo-classical economic theory, at least in some forms, these choices need not be fully informed, nor need they be consciously made. Becker, *supra* note 133, at 6-7.

¹⁶⁰ See, e.g., Dr. Anita Dancs, *The Opportunity Cost of War*, TOMPAINE.COMMON SENSE, Sep. 28, 2006, http://www.tompaine.com/articles/2006/09/28/the_opportunity_cost_of_war.php (last visited Feb. 6, 2010).

¹⁶¹ See, e.g., Jonathan Cohn, *Cost Benefit: Will you pay more for health insurance under the current Senate Bill?*, THE NEW REPUBLIC, Dec. 8, 2009, <http://www.tnr.com/article/health-care/cost-benefit> (last visited Feb. 6, 2010).

¹⁶² A conspicuous example of the American embrace of efficiency arguably lies in its increased privatization of military engagement. For one news account of this phenomenon, see James Glanz, *Contractors Outnumber U.S. Troops in Afghanistan*, N.Y. TIMES, Sept. 2, 2009, at A10.

¹⁶³ Most, if not all, objects of interest are, in relative terms, scarce. Accordingly, the world is characterized by “scarce resources,” each of which, as such, has value to some individual or group of individuals. Relative scarcity

in terms of their interest-based value, and, accordingly, the range of things that fall into the category “objects of interest” is unlimited. This disposition is perhaps best reflected in what are, by traditional measures, rather unique understandings that Americans have about certain aspects of lived experience, as well as toward what counts as an appropriate article for attainment. For example, entering into and remaining in marriage is often approached in just this way.¹⁶⁴ Meanwhile, another’s bodily organ is arguably a “thing to be acquired,”¹⁶⁵ as is his or her body itself (regardless of the use to which it is to be put).¹⁶⁶ Indeed, another’s life is an item to be obtained, as Larry Summers somewhat famously noted.¹⁶⁷ Similarly, the elements of the natural environment are, without exception, potential articles for human intake.¹⁶⁸

Finally, markets exist.¹⁶⁹ Markets *are* and serve to coordinate the actions of rationally maximizing individuals, specifically via a

should not be confused with physical scarcity. For an introductory discussion of the economic conception of relative scarcity, see COLE & GROSSMAN, *supra* note 37, at 2. See also 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 253-54 (1987).

¹⁶⁴ For some academic treatments of marriage, and more broadly the family, in neo-classical terms, see, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY (1981) and POSNER, *supra* note 37, at 143-66.

¹⁶⁵ For a reading that explores, in part, a market-based approach to kidney exchange, see WHEN ALTRUISM ISN’T ENOUGH: THE CASE FOR COMPENSATING KIDNEY DONORS (Sally Satel ed., 2008). For a Congressional hearing that begins to explore a more market-based approach to the exchange of body organs, see *Assessing Initiatives to Increase Organ Donation: Hearing Before the H. Subcom. on Oversight and Investigations of the Comm. on Energy and Commerce*, 108th Cong. 51-57, 64-67 (2003) (statements of Rich DeVos, Dr. Robert Sade, and Dr. Francis Delmonico).

¹⁶⁶ Richard Posner has suggested the economic logic of medical experimentation on convicted felons in exchange for elimination of prison time. See Richard Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 778 (1975).

¹⁶⁷ *Let Them Eat Pollution*, THE ECONOMIST, Feb. 8-14, 1992, at 66 (reprinting memo of then World Bank Chief Economist Larry Summers stating that “the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable”).

¹⁶⁸ For a critique of the economic position vis-à-vis the natural environment, see MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (2d ed. 2008) (arguing that the application of economic concepts in the valuation of the natural environment is a category mistake).

¹⁶⁹ Becker, *supra* note 133, at 5. This is one point at which the traditional institutional economist is likely to object, emphasizing that the economy is inextricably linked to the state. For one expression of this position from an individual whose ideas have roots in traditional institutional economics, see ROBERT L. HALE, FREEDOM THROUGH LAW (1952). For an introduction to Hale’s thought, see Warren J. Samuels, *The Economy as a System of Power and*

“pricing mechanism” that assigns a “market value” to objects of interest.¹⁷⁰ Through this method of managing behavior, markets structure the interest-seeking behavior of individuals, and thus stabilize human action and interaction more generally. This element of the economic world finds its cultural expression in both generalized and detailed existential understandings that the individual in America embraces. On the side of the former, acknowledgement of the operation of the “invisible hand” is commonplace. On the side of the latter, markets are understood to be in place in a whole range of “sectors,” from consumer electronics, to medical services,¹⁷¹ to dating,¹⁷² to crime.¹⁷³

Taken together, these core concepts—(1) the individual makes rational decisions that maximize his or her self-interest, (2) everything is an object of interest, and (3) markets exist—paint a basic picture of the economic construction of the world. Before proceeding with a discussion of the normative demands that arise out this constellation of beliefs, however, a comment is necessary, both to better appreciate the foundational picture drawn and to help identify those normative demands. That comment concerns the economic conceptualization of the individual qua rational maximizer. More specifically, it pertains to a disposition toward the existential integrity of the individual that underlies this understanding of the acting subject and that has important consequences for the economic way of life. That disposition is characterized by a rejection of the ontological dignity of the self, at least in any appreciable sense.

Its Legal Bases: The Legal Economics of Robert Lee Hale, 27 U. MIAMI L. REV. 261 (1973).

¹⁷⁰ There is a limiting circumstance, which is the instance of market failure. In this situation, the government or the firm takes the place of the market as the mechanism for coordinating behavior. On the firm as an alternative to the market, see RONALD H. COASE, *The Nature of the Firm*, in *THE FIRM, THE MARKET AND THE LAW* 33 (1988).

¹⁷¹ See, e.g., Anemona Hartocollis, *Offer to Take Over Ailing Hospital Stirs Outcry*, N.Y. TIMES, Jan. 26, 2010 (quoting N.Y. State Department of Health official’s description of financially troubled hospital as “not competitive within its market”).

¹⁷² See, e.g., *The Dating Market*, THE ECONOMIST, Mar. 2, 2007, available at http://www.economist.com/blogs/freexchange/2007/03/the_dating_market (last visited Feb. 6, 2010) and Katherine Bindley, *Banker Seeks Beauty: Must Be Upbeat Like the Economy*, N.Y. TIMES, Aug. 7, 2009.

¹⁷³ See, e.g., Robert H. Frank, *A Smarter (and Cost-Efficient) Way to Fight Crime*, N.Y. TIMES, Oct. 3, 2009 (noting that “[law] enforcement policy in the United States rests implicitly on the ‘rational actor’ model of traditional economics, which holds that people take only those actions whose benefits exceed their costs”).

As the conceptual emphasis on the maximization of self-interest suggests, in the world of economics, what matters are interests themselves. Interests possess existential integrity. The individual is a sort of medium through which they gain expression. In this sense, the individual is epiphenomenal, defined by his or her inherently secondary nature. He or she does not stand on his or her own terms. He or she is not autonomous under any substantive understanding of the concept. The significance of the individual lies in his or her derivative relationship to the realization of desires. In the more technical vocabulary of the cultural practice, the individual is a “decision unit”¹⁷⁴—a locus of calculation—and nothing more substantial in the nature of his or her being (such as a citizen or someone with personhood and intrinsic rights).¹⁷⁵

By any measure, this orientation toward the individual is radically formal. And one consequence of this orientation is that in the world of economics, the individual is never part of something that is larger than him or herself. Put slightly differently, he or she is never involved in a movement beyond the self. Quite simply, if the individual lacks existential integrity—if there is no substantive character to the self—then there is no self with which to engage the other and to get past. This state of affairs marks a distinctive feature of the economic way of life, and carries with it a particular implication that demands highlighting. Specifically, the economic mode of living is necessarily acommunal, and correspondingly ahistorical. The individual in the economic sphere of experience does not participate in a synergistic relationship. Accordingly, “the collective” of the economic world is an aggregation of interests, not an inter-individual project.¹⁷⁶ Moreover, because the economic universe knows no space for community, its way of being has no historical dimension. Communities exist across time, and history is their story. Without the former, there cannot be the latter. In the world of economics, there can be, and is, only the present—a condition that the language of economics expresses quite well. For

¹⁷⁴ Becker, *supra* note 133, at 7.

¹⁷⁵ Paul Kahn captures the economic attitude toward the subject well when he describes its perspective on him or her as “a mere placeholder for interests, an intersection of vectors of desire.” KAHN, *THE REIGN OF LAW*, *supra* note 1, at 24. The vocabulary of “citizen” and “personhood” belong, respectively, to the political and moral forms of experience. *Supra* note 95.

¹⁷⁶ For this reason, in the world of economics, the measure of the public good is the “size of the pie.” See COLE & GROSSMAN, *supra* note 37, at 11. Relatedly, under the neo-classical form of capitalism, the public good is understood to be best served by each individual pursuing his or her ends.

this way of life, the past is “sunk cost,”¹⁷⁷ while the future is assessed in terms of its “present value.”¹⁷⁸

The insight into economics’ disposition toward the existential integrity of the individual, and its consequences for his or her form of living, helps further understanding of the basic portrait of the economic world. With this slightly more enhanced picture in hand, we can explicate the rudimentary normative demand that the cultural form of economics places on those who take up its form of being. That analysis centers around a fundamental difference among the three core elements, a difference that involves the fact of their prescriptive, and non-prescriptive, characters.

As an initial matter, the economic conception of the individual qua rational maximizer, understood in light of the underlying orientation toward him or her as epiphenomenal, makes manifest a general standard by which to measure the propriety of the economic person’s conduct. If the individual is fundamentally a secondary phenomenon—if he or she lacks autonomy and has no larger relationship to the world through which he or she moves—then the end of action for the economic person can only be to fulfill the purpose for which the individual does exist. That is, the end of action for him or her is just the rationally maximizing behavior that defines economic man. Put slightly differently, and in the form of a sort of creed, the work of the economic person is to rationally maximize his or her interests. Of course, such a normative account is entirely consistent with the counterpoint to economics’ orientation toward the individual as epiphenomenal—namely, its embrace of the existential integrity of interests. If in the world of economics, interests have primacy, then their satisfaction must be the measure of conduct.

At the same time as the economic conception of the individual qua rational maximizer gives rise to the broad demand to rationally-maximize interests, the other beliefs that lie at the core of the cultural form of economics do not provide additional behavioral prescriptions themselves. Rather, they define a sort of geography or landscape within which the economic person moves. The consequence of this circumstance is that the general instruction for action has no supplemental or sibling obligation.

¹⁷⁷ For a definition of sunk cost, see, e.g., THE MIT DICTIONARY OF MODERN ECONOMICS 415 (4th ed. 1991) (“[c]osts which cannot be recovered when a firm leaves an industry”).

¹⁷⁸ For a definition of present value, see *id.* at 340 (“[t]he worth of a future stream of returns or costs in terms of their value now”). For a more extended treatment of the concept, see 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 947-50 (John Eatwell et al. eds. 1987).

The result of this situation, in turn, is the collapse of the normative demand to rationally maximize interests into *the* normative demand of the economic world. The individual is to rationally maximize his or her self-interest, and nothing more.

In the context that the two other core beliefs define—that everything is an object of interest and that markets exist—this fundamental prescription leads to two concrete requirements, each of which is directed at one of the two stations that the economic person can occupy in an act of market exchange. As a buyer, the basic command to rationally maximize interests means just what it says: he or she is to attend to his or her desires—consume objects of interest—in the most optimal manner. Other considerations—for example, responsibility or loyalty—do not have relevance, at least to the extent that they conflict with interest maximization. As a seller, the normative demand takes on a slightly more complex character: he or she is to address the wants and needs of the buyer—to serve the person who is consuming—within the limits of his or her own interests. Again, other matters are not germane.¹⁷⁹

Economics dictates to the individual who embraces its form of living that he or she is to pursue self-interest in a rationally-maximizing way. Already, we can notice a contrast in fundamental ethical principles between the world of law and that of economics—between an emphasis on the People, rules of law and self-denial on the one hand, and the interests of the self on the other. To fully appreciate this difference in normative orientation, a specific discussion of the subject is useful.

C. The Basic Normative Demands of Law and Economics in Juxtaposition

A comparative inquiry into the basic normative demands of two cultural forms appropriately begins with a consideration of the “first” normative demand. Ultimately, internal to each cultural form, on whom or what is the focus of the participant’s actions?

¹⁷⁹ One might consider here the claim of Milton Friedman, who notably argued that the social responsibility of a corporation is, in essence, to increase profits. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962) (“In [a free] economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud.”). See also Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sep. 13, 1970, at SM17.

Whom or what is he or she to serve? This aspect of a cultural form's normative character—the starting point of its construction—defines its essence. Accordingly, this aspect of a cultural form's normative character, in comparative perspective, captures the heart of the contrast that inevitably exists between the normative characters of any two forms of experience. With respect to the normative demands of law and economics, the relevant first principles are, as we have seen, that one is to serve the People and that one is to serve the self, or more precisely, the self's interests. Interrogated in juxtaposition, the differential natures of the two principles' prescriptions, and thus of the normative characters of the two cultural orders, at their centers, become evident.

In terms of the behavior that each prescribes, and its associated character, the respective "first" normative demands differ in two principal ways. First, as a straightforward matter, the fact that (a) law demands that those who participate in its form of living adhere to the voice of We the People while (b) economics commands that those who embrace its mode of living address the interests of the self means that (c) the lawyer and the economic person have different objects of commitment. After all, the People and the interests of the self are hardly identical subjects of ethical focus. To be clear, this type of circumstance is not unique to the comparative assessment of legal and economic normativity. Participants in cultural practices will always have distinct objects of ultimate concern. Nonetheless, the existence of the differential normative condition highlights a bottom-line aspect of the contrast between legal and economic action: the lawyer and the economic person serve alternate masters.

Second, and relatedly, the erotic character of that service differs pointedly. For the lawyer, because he or she is to attend to the wishes of the People, he or she is necessarily serving an "other." Meanwhile, for the economic person, because he or she is to attend to the desires of the self, there is no other involved. This difference, between action that is other-regarding and action that is not other-regarding, speaks directly to the meaningful nature of the associated experience: the movement beyond the self is always more compelling than the embrace of the self, which, as the practice of economics demonstrates, is in the end a denial of a substantive self in any serious form.¹⁸⁰

¹⁸⁰ The economic denial of the self-integrity of other-regarding action is best exemplified in its understanding of altruism as epiphenomenal. For a brief explanation of the economic position, see Posner, *supra* note 140, at 1557 (appealing to "interdependent utilities" to explain altruism as a form of rational self-interest). For a summary discussion of "altruistic preferences and utilities,"

If we move past the juxtaposition of first principles and explore the two other basic normative demands of law vis-à-vis economics' injunction that the individual rationally maximize his or her self-interest,¹⁸¹ our appreciation of the differential normative characters of law and economics deepens. The appropriate locus of attention here is the concrete requirements associated with the respective normative demands. As we have seen, the prescription to respect particular rules of law translates into a variety of specific obligations for the lawyer, as does the command to not concern oneself with the specific character of any self. For the economic person, however, these same particular duties do not necessarily obtain. Indeed, with regard to each of the concrete requirements discussed in Subpart A—to not engage in acts of civil disobedience, to avoid filing pleadings that have no chance of success on their merits, to refrain from conduct that corrupts the practice of law, to follow rules of law in his or her own individualized behavior, to not choose one's clients, and to not engage a controversial political or ideological issue beyond contributing his or her expertise—the obligations on the economic person may, and sometimes always do, push in the opposite direction. Specifically, for him or her, appropriate behavior toward rules of law is a function of a cost-benefit analysis, which will dictate at times that he or she engage in civil disobedience, file meritless pleadings, corrupt the practice of law, and frustrate rules of law in his or her own behavior.¹⁸² Meanwhile, because the

in "mathematical" terms, see 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 85 (John Eatwell et al. eds. 1987).

¹⁸¹ Because economics' first principle captures its entire ethics, in basic form, its first principle is the only one of relevance for purposes of this Article.

¹⁸² At this point, a discussion of economics' orientation toward law is appropriate. From the perspective of economics, legal rules are prices for the individual actor. One breaks the law when the benefits outweigh the costs. The function of law is to establish prices that lead to efficient outcomes at the social-aggregate level. MERCURO & MEDEMA, *supra* note 37, at 58. It is perhaps worth noting that economics recognizes that posited law is not always capable of performing this function and that individuals, in filling the gaps in law, may agree to contracts that produce inefficient outcomes, at the social-aggregate level, if not breached. In this circumstance, which is one where transactions costs relevant to the analysis are high, economics understands the role of courts to be to provide efficient remedies—specifically, money damages qua expectation damages—for breaches of contracts. (When transaction costs relevant to the analysis are low, economics' prescribed remedy is specific performance, i.e. de facto no breach.) For a basic overview of efficient breach analysis, see *id.* at 74-79. For purposes of this paper, the approach to legal rules as prices is manifested in the lawyer's understanding of sanctions as a cost. It may also be reflected in the client's desire to engage in behavior that

economic person is to acknowledge the various selves, not deny them, he or she is to choose his or her clients, and engage whatever issues he or she wishes.

Ultimately, at the most basic level, the normative characters of law and economics are distinct. Necessarily then, the same condition holds true for the lawyer and the economic person. Fundamentally, to be one is not the same as being the other. For those who seek to understand the nature of legal practice, and lawyer identity, this state of affairs points to an important conclusion. If, at its core, the practice of law is not the practice of economics, then it is a mistake to understand the practice of law as a business. Similarly, if being a lawyer is not the same as being an economic person, then it is incorrect to approach him or her as a businessman or businesswoman.¹⁸³

IV. A FINAL COMMENT

Acknowledging the inherent normativity of law leads us to re-think our understanding of the fundamental nature of the legal order and our understanding of the lawyer's professional responsibility, a phenomenon that has given rise to the project of the cultural study of the lawyer. In addition to pointing us in these two intellectual directions, the recognition of law's normativity leads us along a third intellectual path, which involves the consideration of a particular quality of law, and more generally of any cultural form, that is associated with a cultural form's act of normative projection. That quality is a cultural form's "totalizing" approach to the self.

contravenes the law (e.g. file meritless pleadings, engage in discovery abuse, or engage in tax evasion).

¹⁸³ While the rule of law remains a vibrant set of meanings for the citizen, it may also be a dying set of meanings. At least one reason for this condition is the fact that the rule of law represents a modern form of politics and we live in an age when modern forms of politics confront post-modern forms of politics. In an important article, Russell Pearce offers the provocative argument that law is a business, grounding his position in a claim of a paradigm shift in the understanding of the nature of legal practice—specifically, in a claim of the demise of the "Professionalism Paradigm" and in a prediction of the emergence of a replacement paradigm, the "Business Paradigm." Russell G. Pearce, *The Professionalism Paradigm: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995). Pearce's argument appears tied to a post-modern form of politics and thus is not per se a challenge to the ideas expressed in this Article, but rather a location of the discourse in an alternate set of terms.

A cultural form maintains that it speaks to all aspects of human action and, seeking conformity with its ordering of behavior, a cultural form strives to make the individual who embraces its way of experience its own, in his or her entirety. That is, a cultural form makes a complete claim on the individual (and in this sense does not simply demand a behavioral practice from its adherent, as previously stated). This characteristic of a cultural form is hardly trivial. Rather, it points directly to the psychological and environmental forces that work on us, and, through those forces, to the great question of how we are to live our lives.¹⁸⁴ What, then, are we to make of this fact about a cultural form? How are we to think about it? And, how are we to respond to it?

At least one answer to this line of questions is that we must maintain self-awareness in the face of this reality. We must keep conscious of how a cultural institution operates on us, and thus what it does to us. If we lose sight of such understanding, we will inevitably lead an unhealthy life, because the totalizing character of a cultural form is also a pathology of a cultural form.¹⁸⁵ It distorts human experience, and thus is not true to that experience. This condition is a consequence of a cultural form's inherently singular constructive vision. Although a cultural form affords a complete ordering of life, such a construction is, by definition, one-dimensional. The ordering of life is necessarily of the type of the cultural form. If the cultural form is political in nature, then its structuring of experience is also political. Similarly, if the cultural form is scientific, then so is the nature of its way of being. Life, however, is not one-dimensional. Man is a multi-faceted creature: political, scientific, religious, artistic, etc. For the individual to embrace a way of being that speaks to only one axis of experience is for him or her to move within a world that does not track well with the reality of human existence. It is, in this way, to live only a partial life, and consequently to pervert the whole of life.

¹⁸⁴ PLATO, THE REPUBLIC, *supra* note 22, at 352d.

¹⁸⁵ As others have noted, ensuring that we maintain self-awareness is the ethical task of philosophy. See, e.g., ERNST CASSIRER, *The Concept of Philosophy as a Philosophical Problem*, in SYMBOL, MYTH, AND CULTURE: ESSAYS AND LECTURES OF ERNST CASSIRER 1935-1945, 49-63 (Donald Phillip Verene ed., 1979) and DONALD PHILLIP VERENE, *Introduction to THORA ILIN BAYER, CASSIRER'S METAPHYSICS OF SYMBOLIC FORMS* 28-37 (2001) (describing the normative dimension of Cassirer's *Philosophy of Symbolic Forms*). Recognizing this fact is one element of the response to those who argue that philosophy doesn't matter. For the claim of the inconsequential nature of philosophy, see Stanley Fish, *Truth but No Consequences: Why Philosophy Doesn't Matter*, 29 CRITICAL INQUIRY 389 (2003).

If we turn our attention to contemporary American society, just this type of circumstance appears to characterize its style of living. Today, the perspective of economics is more and more coming to dominate American psychology and, in so doing, to displace the American's appreciation for other dimensions of human experience. Increasingly, in traditionally non-economic sectors, Americans relate to the world through the framework of "the market." We see this condition manifest itself, for example, in the American approach to many of the country's important social institutions. Universities, health care establishments, and the press, to name just some of the relevant actors, are largely treated as economic players,¹⁸⁶ despite the fact that they should not be understood in this way. Fairly considered, these organizations do not engage in the production of commodities.¹⁸⁷ Their contributions to society lie in a direction other than that of economics—in the realm of art, science, politics, morality, etc. By orienting itself toward these social institutions via the conceptual vocabulary of economics, American society misconceives their basic purpose, and, accordingly, takes up a sort of "false" existence—a condition that is inherently destructive (and not only in non-material ways, as recent events in the American financial system highlight).

Ernst Cassirer notably stated that man is a symbolic creature.¹⁸⁸ Cultural forms are the medium through which human beings organize a broad reality for themselves. This fact of human existence allows, in part, for the possibility of an enriching and ultimately uplifting life. At the same time, however, it carries with it the potential for a more negative way of being. As a society, we must be mindful of undesirable possibilities, and guard against them. If we fail to do so, we are the ones who suffer.

¹⁸⁶ For some readings on the treatment of the university as an economic enterprise, see, e.g., DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2004); DAVID KIRP, *SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION* (2004) and FRANK DONOGHUE, *THE LAST PROFESSORS: THE CORPORATE UNIVERSITY AND THE FATE OF THE HUMANITIES* (2008). For reading on the press, see TOM FENTON, *BAD NEWS: THE DECLINE OF REPORTING, THE BUSINESS OF NEWS, AND THE DANGER TO US ALL* (2005).

¹⁸⁷ The term "commodity" should be understood in the Marxian sense. See *THE MARX-ENGELS READER*, *supra* note 137, at 302-29 (selected portions of KARL MARX, *CAPITAL* VOL. I).

¹⁸⁸ CASSIRER, *AN ESSAY ON MAN*, *supra* note 8, at 26 (defining man as "animal symbolicum").