

2009

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Rakesh K. Anand

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Recommended Citation

Rakesh K. Anand, *The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, The Role of the Lawyer in the American Democracy*, 77 Fordham L. Rev. 1611 (2009).

Available at: <https://ir.lawnet.fordham.edu/flr/vol77/iss4/17>

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The Lawyer's Role in a Contemporary Democracy, Tensions Between Various Conceptions of the Lawyer's Role, The Role of the Lawyer in the American Democracy

Cover Page Footnote

Assistant Professor of Law, Syracuse University College of Law. A.B., 1989, Stanford University; J.D., 1994, Yale Law School. I would like to thank attendees at the Fordham Law School Symposium on The Lawyer's Role in a Contemporary Democracy, as well as participants in a junior faculty workshop at Syracuse University College of Law, for providing comments on this essay. I would also like to thank Jonathan Marshall and Ryan Maness for their research assistance.

THE ROLE OF THE LAWYER IN THE AMERICAN DEMOCRACY

*Rakesh K. Anand**

INTRODUCTION

Today, the question of the relationship of democracy to global affairs—its place in how nations deal with each other—demands the attention of politically conscious individuals. Although much disagreement about this subject exists,¹ no one can fail to contend with democracy in his or her thinking about international relations, at least if such thinking is to be taken seriously. Certainly, the leaders of nation-states cannot turn a blind eye to the present force of democracy. They have no choice but to confront the political phenomenon.

At the center of this current historical condition lies the United States, for reasons that include, but are not limited to, its own history of democracy, its leadership role in the cold war and that war's outcome, its present status as the most powerful country in the world, and its extant policy of actively promoting democracy around the world. In light of this circumstance, of America positioned at the heart of a world confrontation with democracy (and it as protagonist), it is only natural that American academics have been

* Assistant Professor of Law, Syracuse University College of Law. A.B., 1989, Stanford University; J.D., 1994, Yale Law School. I would like to thank attendees at the Fordham Law School Symposium on The Lawyer's Role in a Contemporary Democracy, as well as participants in a junior faculty workshop at Syracuse University College of Law, for providing comments on this essay. I would also like to thank Jonathan Marshall and Ryan Maness for their research assistance.

1. This disagreement extends to the most basic issues. For example, individuals disagree over the best definition of democracy, as well as over its desirability in the first instance. On the former subject, see, for example, SAMUEL P. HUNTINGTON, *THE THIRD WAVE* 9 (1991) ("Elections, open, free, and fair, are the essence of democracy, the inescapable sine qua non."); Amartya Sen, *Democracy and Its Global Roots: Why Democratization Is Not the Same as Westernization*, *NEW REPUBLIC*, Oct. 6, 2003, at 28 (arguing that the Huntington definition is conceptually defective and that a broader conceptualization of democracy as public reasoning is required). *But cf.* John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, *FOREIGN AFF.*, Jan./Feb. 2008, at 2 (discussing the present generation of Chinese leaders' understanding of democracy, which is an understanding outside the bounds of conventional usage). On the latter subject, see, for example, Thornton, *supra*; Mark Mancall, *Gross National Happiness and Development: An Essay*, in *GROSS NATIONAL HAPPINESS AND DEVELOPMENT: PROCEEDINGS OF THE FIRST INTERNATIONAL SEMINAR ON OPERATIONALIZATION OF GROSS NATIONAL HAPPINESS 1* (Karma Ura & Karma Galay eds., 2004), available at <http://www.grossinternationalhappiness.org/downloads/Book-GNH-1-1.pdf>.

focusing significant attention in recent years on thinking about democracy. In a country that inextricably links this type of political order with the rule of law, those academics of course include legal scholars. Understandably, then, perhaps particularly given the Bush administration's controversial actions in its "war on terror," the American legal ethics community is now asking about, or perhaps more accurately revisiting the question of, the role of the lawyer in a contemporary democracy.²

The subject is obviously a broad one and invites inquiry into a variety of areas. In engaging the debate over the role of the lawyer in a contemporary democracy, this essay concentrates on two matters. First, it focuses on the starting points of such a conversation. The goal here is an admittedly ambitious one: to structure the basic discourse. Parts I and II are devoted to this end. Part I stresses an important, initial consideration for the discussion. Reflecting on the substantive character of contemporary democracies,³ Part I speaks to the propriety of treating these democracies in an essentially categorical manner, i.e., as mutual equivalents. As the opening paragraph to this essay has perhaps already suggested, all democratic states are not the same. More importantly, this state of affairs holds true not only between nonliberal and liberal democracies, but, as Part I explains, among Western liberal democracies themselves and particularly between the United States and modern Western democratic countries. One consequence of this circumstance is that any discussion about the role of a lawyer in a contemporary democracy must be qualified: To the extent that one is concerned with the American lawyer, which presumably the participants in this debate are, one must account for the unique nature of the American democracy in one's thinking about associated issues of professional responsibility.

Heeding this warning to acknowledge the distinctive national quality of America's democracy and to be judicious in thought, Part II narrows the boundaries of discourse to the American democracy and explains what it means to be a lawyer in this country—namely, that lawyers, rightly conceived, are the People's people. Because I have explicated this concept of the lawyer—that his or her role is to serve the popular sovereign—in a previous writing, I have consciously limited Part II to a basic sketch of this idea.⁴

2. Symposium, *The Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1229 (2009).

3. As stated explicitly in the opening paragraph of Part I, I employ the minimal definition of democracy—"free and fair" elections. See *infra* text accompanying note 7.

4. See Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMP. L. REV. (forthcoming Fall 2008) (on file with author). The understanding of lawyers as the People's people is hardly mainstream and indeed stands in marked contrast both to those concepts of the lawyer that inform today's academic legal ethics discourse as well as to the dominant model in contemporary practice. Some examples falling in the former category include the "moral activist," the "statesman," the "caring person," and the religious-oriented individual. For the presentation of the moral activist, see generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). For the presentation of the lawyer-statesman, see generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING*

The second matter continues the focus on fundamental topics. Using the understanding of lawyers as the People's people as a platform from which to engage specific questions of the American lawyer's professional responsibility, this essay turns to an issue that lies at the heart of any thinking about the role of the lawyer in the American democracy and is of traditional concern in American legal ethics discourse. May a lawyer choose whom he or she represents? Part III explains that a lawyer is never permitted to select his or her client, at least not based on normative considerations (which is the conventional focus of reflection on the question).⁵ Indeed, the deep lesson of the explanation is that the occurrence of this behavior—of a lawyer choosing his or her client—represents the end of American democracy.⁶

IDEALS OF THE LEGAL PROFESSION (1993). On the caring person, see, for example, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, in LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES 25 (Stephen Parker & Charles Sampford eds., 1995). The religious-oriented lawyer is first and foremost (although certainly not exclusively) associated with the writing in Christian legal ethics. For some examples of the literature in this field, see generally THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); CAN A GOOD CHRISTIAN BE A GOOD LAWYER? HOMILIES, WITNESSES, AND REFLECTIONS (Thomas E. Baker & Timothy W. Floyd eds., 1998); Joseph Allegretti, *Can Legal Ethics Be Christian?*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 453 (Michael W. McConnell et al. eds., 2001). The dominant model in contemporary practice is the zealous advocate. For a presentation of this concept of the lawyer, see generally MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 29–39. It should be noted that William Simon does not defend this model (but rather affirmatively challenges it).

5. For further qualification on the concept “normative considerations,” as used here, see *infra* note 72 and accompanying text.

6. As anyone familiar with the relevant literature will recognize, this argument directly challenges the essential range of generally accepted belief about this subject matter. Specifically, it challenges conventional wisdom, which suggests that a lawyer generally has license to choose whom he or she represents, and also opposes more recent scholarship that supports a general prohibition on lawyers selecting clients but defends the lawyer doing so in exceptional circumstances. For examples of the conventional position, see Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1078 (1976) (“The lawyer’s liberty . . . to take up or decline what clients he will is an aspect of the moral liberty of self to enter into personal relations freely.”); Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 634 (stating that “the lawyer has the choice of whether or not to accept a person as a client,” although noting the troubling character of this ability). Additionally, as a matter of current positive norms, a lawyer is generally free to choose whom he or she represents. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. b (2000) (“Lawyers generally are as free as other persons to decide with whom to deal”); MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 72–75 (3d ed. 2004). For an argument falling in the latter category of scholarship, see W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 1013–14 (2006) (supporting an exception for specialization and cause lawyering). In *Reinterpreting Professional Identity*, Norman Spaulding promotes a general norm precluding lawyers from choosing their clients.

Following on from the conclusion that a lawyer is prohibited from selecting whom he or she represents, Part III next highlights two secondary implications of this proscription (both of which concern matters of import to the legal ethics community). It is inappropriate for a lawyer to practice as a “cause lawyer.” Equally, it is inappropriate for a lawyer to base a decision to represent a person on his or her “repugnance” for or “fundamental disagreement” with the person or the person’s behavior or goals. Part III concludes with a slight turn away from its central focus, explaining that the same reasoning that supports a prohibition on selective representation also grounds an obligation to refrain from engaging a controversial political or ideological issue beyond the contribution of professional expertise (for example, taking a position on currency exchange rates or on specific pieces of legislation that enact contentious social policy).

Before proceeding with the discussion, a parenthetical remark is required. As indicated, an organizing principle of my argument is that the American democracy is, at its core, unique and that this fact must be recognized when reflecting on lawyer ethics in this country. To be clear, in emphasizing this constraint on what counts as appropriate conduct for an American lawyer, I am not suggesting that his or her obligations will not overlap with those who practice law in other contemporary democratic societies. They will. I am asserting, however, that American legal ethicists must be circumspect in their thinking about lawyering in contemporary democratic society and be acutely aware of the fundamentally American character of this democracy and consequently the deeply American character of the practice of law in the United States. Translated into a methodology, this demand for a strict attentiveness means that for the American legal ethicist, discourse must begin with the nature of this democracy (which will set limits on the possibilities for normative prescriptions, sometimes dictating what is required of a lawyer and at other times defining the boundaries within which discretionary conduct takes place). From this position, his or her reasoning follows.

I. DEMOCRACY IN AMERICA

An inquiry into the role of the lawyer in a contemporary democracy appropriately begins with a consideration of the set of political orders that is the object of discourse. After all, some preliminary knowledge about that which one is talking is necessary for any serious discussion of associated issues of professional responsibility. Immediately, a comment is necessary. Democracy is a contested term. It has a range of meanings. This part limits itself to the minimal definition, which is a formal one—“free and fair”

It is not clear, however, how far Spaulding would extend the rule. His acknowledgement of a “repugnance” exemption as well as his discussion of a “cause lawyering exemption” suggest a limit on the prescription. Norman Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 93, 101–02 (2003).

elections.⁷ This is the conventional understanding, at least as measured by transnational academic discourse, in which a country counts as “democratic” if its government is popularly elected (“popularly elected” understood to include only those governments whose election is generally acknowledged to be legitimate).⁸ For purposes of convenience, this part adheres to this generally accepted discursive practice.

Considering the set of democratic countries (or territories) that exist in 2008, if one reflects on the associated popularly elected governments, at least one feature about these regimes is readily apparent: they are grounded in a variety of substantive ideologies. While Western governments may, as a general matter, be rooted in, and indeed understand themselves to be a product of, liberal society, popularly elected governments outside the West do not necessarily embrace liberalism.⁹ The Venezuelan government of Hugo Chávez,¹⁰ the Hamas majority in the Palestinian parliament,¹¹ and the new government of Bhutan¹² are examples of this fact.¹³

This differential character between liberal and nonliberal democracies is widely acknowledged. Indeed, it is at times a source of consternation in the West, a reflection of the proverbial inability to have one's cake and eat it

7. See HUNTINGTON, *supra* note 1, at 9. Some may reject even this minimal definition, but this rejection appears to be outside the bounds of contemporary, conventional use of the term, both within and without the West, at least as a matter of transnational discourse. For one example of such a rejection, see the discussion of the present generation of Chinese leaders' understanding of democracy in Thornton, *supra* note 1.

8. As suggested, for many individuals, the strictly essentialist conception is insufficient. For this group, the concept necessarily has a more substantive denotation, the content over which there is disagreement. See, e.g., Sen, *supra* note 1. Also, the minimalist definition itself carries with it a demand for certain substantive rights that establish the necessary conditions for “free and fair” elections. See, e.g., HUNTINGTON, *supra* note 1, at 7 (“[Democracy] implies the existence of those civil and political freedoms to speak, publish, assemble, and organize that are necessary to political debate and the conduct of electoral campaigns.”).

9. I hardly mean to suggest that this diversity is strictly a current phenomenon. For a more general discussion, see Fareed Zakaria, *The Rise of Illiberal Democracy*, FOREIGN AFF., Nov./Dec. 1997, at 22.

10. For a news account of Hugo Chávez's 2006 election, see *Chavez Wins Venezuelan Re-election*, BBC NEWS, Dec. 4, 2006, <http://news.bbc.co.uk/2/hi/americas/6205128.stm>.

11. For a news account of Hamas's 2006 election victory, see *Hamas Sweeps to Election Victory*, BBC NEWS, Jan. 26, 2006, http://news.bbc.co.uk/2/hi/middle_east/4650788.stm.

12. For short accounts of recent Bhutanese elections, see Robin Forestier, *Bhutan Holds Its First Elections*, BBC NEWS, Dec. 31, 2007, http://news.bbc.co.uk/2/hi/south_asia/7165709.stm, and *Bhutanese Vote in Historic Poll*, BBC NEWS, Mar. 24, 2008, http://news.bbc.co.uk/2/hi/south_asia/7310832.stm.

13. A high-profile, but perhaps more controversial, example might be the Islamist-based AK government in Turkey. For a news account of the AK party's overwhelming 2002 election victory, see *Turkey's Old Guard Routed in Elections*, BBC NEWS, Nov. 4, 2002, <http://news.bbc.co.uk/2/hi/europe/2392717.stm>. Additionally, United Russia and Vladimir Putin's 2004 election appears illustrative. For a news account, see David Filipov & Anna Dolgov, *Putin Cruises to a Second Term, Vows to Bring Economic Reforms*, BOSTON GLOBE, Mar. 15, 2004, at A10. The more recent 2007 election is more controversial (because of the challenges to its legitimacy). For a news account, see *Monitors Denounce Russia Election*, BBC NEWS, Dec. 3, 2007, <http://news.bbc.co.uk/2/hi/europe/7124585.stm>.

too.¹⁴ What often goes unnoticed, however, is the disparate quality of liberal democracies themselves, and particularly, a fundamental chasm that exists between the United States and more modern Western democratic orders. As much as a cultural ocean may lie between “the West and the rest,”¹⁵ there is almost an equally profound gulf that subsists between the United States and its European brethren. This distance is in the phenomenological experience of law. It is, at least in significant part, a product of each side’s understanding of the nature of the constitutional state.¹⁶

In the United States, the Constitution lies at the center of the political order. “We the People” locates itself here.¹⁷ As the ultimate manifestation of popular self-expression, the Constitution, along with the state it actualizes, is an organizing axis, if not *the* organizing axis, for American political identity.¹⁸ Put simply, where we find the People is where we learn who Americans are as a people. This inextricable link between Constitution, politics, and political identity produces a constitutionalism that is fundamentally existential in character. As foreign a thought as it may be to conventional legal sensibilities, American constitutionalism is in truth an erotic phenomenon.¹⁹ The American commitment to the rule of law is a practice of ultimate meanings (although, importantly, it may be a dying set of meanings).

The imaginative apprehension of law naturally reflects this condition, i.e., the religious quality of its practice. Specifically, in the United States, at least two fundamental properties attach to law. First, law is a locus of faith and a domain of the holy. More specifically, it represents an expression of sovereign will.²⁰ Law makes manifest the voice of the People, who is the

14. See, e.g., Zakaria, *supra* note 9, at 22 (describing ruminations of Richard Holbrooke prior to 1996 Bosnian elections); *Meet the Press* (NBC television broadcast Dec. 7, 2003), available at <http://www.msnbc.msn.com/id/3660558/> (interview by Tim Russert of Senator Hillary Clinton and former Speaker of the House Newt Gingrich).

15. For a use of this conceptual division, see, for example, Kishore Mahbubani, *The Dangers of Decadence: What the Rest Can Teach the West*, FOREIGN AFF., Sept./Oct. 1993, at 10.

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

17. U.S. CONST. pmb1.

18. See generally PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

19. See, e.g., PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* 18 (2005) (“Politics, even the politics of a liberal state, remains a deeply erotic phenomenon.”).

20. “Popular sovereignty theory” is the branch of legal discourse that reflects this belief. See, e.g., BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991). Paul Kahn recognizes the very unintelligibility of the People as such. See, e.g., KAHN, *supra* note 18, at 27. It should be noted that the literature on popular sovereignty theory is not limited to legal scholars. See, e.g., JULIE MOSTOV, *POWER, PROCESS, AND POPULAR SOVEREIGNTY* (1992); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999).

god of all who live under law.²¹ Second, the political practice of law is an autonomous realm of experience. It defines a world unto itself, and in this way is an end in itself.²² In this respect, law is no different from religion, science, art, or language. Each represents a cultural practice that affords a complete ordering and understanding of experience.²³

In contrast to this experience of constitutionalism stands that of citizens of modern Western democratic states.²⁴ For these individuals, the constitutional state is a sort of institutional overlay on society. It is not a reflection of political self-identity, and consequently is not a locus of existential experience. Similarly, the constitutionalism it effects is not a practice of something larger than the self. It is much more mundane. Constitutions are purely architectural documents—a tool used to structure institutions and define substantive rights. Constitutionalism is simply the putting of the design into place.

In parallel, the appearance of law to these citizens is just the opposite of that to the American. In the modern democratic state, law is ordinary. It is

21. See KAHN, *supra* note 18, 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.”).

22. It is hopefully clear that this conception of law as autonomous has nothing to do with Langdellianism. At the same time, this understanding of law stands in marked contrast to the typical American view of law as instrumental only. For a discussion of Christopher Columbus Langdell’s “science,” see generally Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). For some illustrations of the American instrumental approach to law, see, for example, 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 (1994) (describing law in the 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, 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 postpatriarchal 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 (understanding law as a means to achieve “the illusive goal of ending racism and patriarchy”). For a discussion of why the American instrumental view of law is an impoverished one, see Anand, *supra* note 4.

23. The more technical vocabulary to describe these various cultural practices is “symbolic form.” Ernst Cassirer is the central figure in this neo-Kantian philosophical orientation. See, e.g., 1–3 ERNST CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (Ralph Manheim trans., Yale Univ. Press 1953–1957) (1923–1929); ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* (1944).

24. Kahn, *supra* note 16, at 2697. One might compare this argument with Fareed Zakaria’s distinction between democracy and constitutional liberalism, the former associated with the process of selecting government and the latter with the goals of government. While he notes that, “[s]ince 1945 Western governments have, for the most part, embodied both democracy and constitutional liberalism,” we can ask how each tradition plays out in the political imagination of the various citizenries. See Zakaria, *supra* note 9, at 25–27.

nothing more. Accordingly, it is not first and foremost associated with a sovereign will. Rather, it primarily reflects a type of practical reason, an enlightened, pragmatic voice dealing with the problems of society. Moreover, law is not a comprehensive social practice. It is very different from religion, science, art, and language. Specifically, law is only a governing instrument, and makes sense only in instrumental terms.²⁵

These two facts about democratic states—that they embrace widely differing ideologies and that, within liberal democracies, a basic phenomenological gap exists between the citizen of the United States' experience of law and that of citizens of modern Western democracies—teach a cautionary lesson to American legal ethicists, as well as the American legal community more generally. In our thinking about the role of the lawyer in a contemporary democracy, we need to be attentive to the unique quality of the American democracy and careful about extending any claims or prescriptions beyond the American lawyer. The combined liberal and spiritual character of the American state sets it apart from other countries. Moreover, it does so in a manner that strongly suggests both the propriety of focusing our thoughts on, and building our understanding from, that character, and the wisdom of taking care when the audience broadens to non-Americans. If we fail to adhere to these twin principles of guidance, we will necessarily misconstrue the professional responsibility of the American lawyer. We will also make the same error with respect to foreign lawyers.

In this light, a brief observation about existing normative habits is appropriate. Today, there exists a tendency, at least in the American legal community, to approach lawyering as a largely transnational activity. As a general matter, however, the American legal community makes a mistake in assuming that the cultural practice of law in other countries means the same thing as it does in the United States. The recent bar association activities to support lawyers in Pakistan are illustrative.²⁶ Implicit in these claims of support has been an assumed cross-cultural identification with professional,

25. We should not be surprised to find a similar emphasis on reason, as opposed to a sovereign will, in international law. *See, e.g.*, Kahn, *supra* note 16, at 2699.

26. On Nov. 3, 2007, the New York State Bar Association House of Delegates passed a resolution expressing its "solidarity with, and support for, the Pakistani Bar" and urging the prompt "restoration of the rule of law in Pakistan." Press Release, N.Y. State Bar Ass'n, New York State Bar Association Supports Pakistani Lawyers: Association's House of Delegates Adopts Resolution Showing Solidarity (Nov. 6, 2007), *available at* http://www.nysba.org/AM/Template.cfm?Section=News_Center&CONTENTID=11598&TEMPLATE=/CM/ContentDisplay.cfm. On Nov. 14, 2007, upon the recommendation of the New York State Bar Association, the American Bar Association (ABA) House of Delegates passed a similar resolution. *See* Press Release, N.Y. State Bar Ass'n, New York State Bar Association Wins National Support from ABA on Key Recommendation: Support for Pakistani Bar and Bench Approved (Feb. 12, 2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=News_Center&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=16496. Other bar associations expressed similar sentiments. A selection of such statements and resolutions is available at American Bar Association, The Bar Association Community Responds to the Crisis in Pakistan, <http://www.abanet.org/barserv/resource/pages/pakistanresponse.shtml> (last visited Feb. 9, 2009).

and ultimately political, siblings. Undoubtedly, there are similarities—even overlaps—in each side's understanding of the rule of law. But it is hardly clear that the rule of law means the same thing to Pakistanis as it does to Americans.²⁷ Along a variety of lines (prenational, national, religious, and otherwise), their history is markedly different.²⁸

The American organization “Lawyers Without Borders” seems to operate from this same false assumption of political kinship.²⁹ In collectively pooling the world's lawyers to further, among other things, “rule of law” projects, Lawyers Without Borders implicitly denies any unique character to individual democratic legal orders. While the organization and many of its lawyers may themselves identify more with modern Western democratic states, as well as an emerging global legal order, than with the American nation-state, there is nothing to suggest that such a condition describes the political psychology of American lawyers generally.³⁰ And yet despite this cultural divide, there does not appear to be restrictions on, or focused targets for, membership. Indeed, the list of supporters and partners reflects quite a broad base.³¹

If we must approach the question of the role of the lawyer in a contemporary democracy with an appreciation for the distinctive American cultural practice of this form of politics, then the question for American legal ethicists becomes, first and foremost, one of the role of the lawyer in the *American* democracy. Principally, what is the concept of the lawyer that appropriately informs his or her work in the United States? If we take up this normative inquiry—into the core understanding of the American lawyer and his or her professional responsibility—we establish the critical

27. The points expressed in this paragraph require qualification. The professional psychology of some American lawyers does not lie in harmony with the American commitment to the rule of law (which does not mean that it is in accord with the political commitments in other countries embracing “the rule of law”). For the discussion of the problematic psychology of contemporary civil litigators, see Rakesh K. Anand, *Contemporary Civil Litigation and the Problem of Professional Meaning: A Jurisprudential Inquiry*, 13 GEO. J. LEGAL ETHICS 75 (1999).

28. For an initial treatment, see generally STANLEY WOLPERT, *A NEW HISTORY OF INDIA* (7th ed. 2004) (1977), and LAWRENCE ZIRING, *PAKISTAN IN THE TWENTIETH CENTURY: A POLITICAL HISTORY* (1997).

29. A variety of information on this organization is available at Lawyers Without Borders, <http://www.lawyerswithoutborders.org> (last visited Feb. 9, 2009).

30. For an important qualification, see *supra* note 27. Taking account of what is stated therein, in this age of tension between modern and postmodern politics, however, it is undoubtedly true that some lawyers in the United States share the legal sensibilities of Lawyers Without Borders and have moved beyond any serious attachment to the United States as a nation-state.

31. See Lawyers Without Borders, Our Partners, <http://www.lawyerswithoutborders.org/> (follow “About Us” hyperlink; then follow “Our Partners” hyperlink) (last visited Feb. 9, 2009); Lawyers Without Borders, Financial Supporters, <http://www.lawyerswithoutborders.org/> (follow “About Us” hyperlink; then follow “Our Partners” hyperlink; then follow “Financial Supporters” hyperlink) (last visited Feb. 9, 2009); Lawyers Without Borders, Project Supporters, <http://www.lawyerswithoutborders.org/> (follow “About Us” hyperlink; then follow “Our Partners” hyperlink; then follow “Project Supporters” hyperlink) (last visited Feb. 9, 2009).

element for achieving the discourse-structuring goal of this essay: the axis of orientation around which to build the larger project.

II. THE PEOPLE'S PEOPLE

Three elements of Part I's discussion of the American experience of law mark the point of departure for an understanding of what it means to be a lawyer in this democracy. First, at the broad cultural level, the practice of law in America is a type of religious practice. It speaks to the deeper meaning of American life and marks an activity in and through which Americans move beyond themselves. Americans are a community committed to self-government under the rule of law. That commitment is as serious as any.³² Second, this particularly American way of being is organized around the People, which is the concept of god that lies at the center of the cultural form. "We the People" ordained and established the Constitution (the highest posited norm in the American legal normative hierarchy³³). Third, law in America is an autonomous realm of experience. Phenomenologically, it is a distinct world of its own, different from, and incapable of being reduced to, other domains of life.

With this set of facts as a starting point for reasoning about lawyer identity, a concept of the American lawyer naturally, and quite readily, follows. If in America law is a cultural practice, then "the lawyer" is the individual who serves that way of life (because his or her identity and substantive character is, by definition, a direct function of the field within which he or she operates).³⁴ Given that this *modus vivendi* is built around the People, lawyers, correctly understood, are "the People's people." First and foremost, the role of the lawyer in the American democracy is to function as *their* representative. Elsewhere, I have described in detail this conception of lawyer identity and it would be inappropriate (for, at a minimum, contextual reasons) to repeat that presentation here.³⁵ Because the lawyer qua "People's person" remains largely foreign to conventional legal sensibilities, at least a basic sketch of what it looks like is, however, necessary to re-present.

As noted above, the law is the *raison d'être* of the lawyer. Both who a lawyer is and how he or she is to act is inextricably linked to its existence and substantive character. Not surprisingly, then, drawing the outline of "the People's person" requires a return to a discussion of the cultural practice of law. More specifically, it requires a further description of this way of life. That additional explication most fruitfully takes place through

32. One of the most dramatic examples of this commitment is the unhesitating, national acceptance of the U.S. Supreme Court's determination of the identity of the U.S. President. See *Bush v. Gore*, 531 U.S. 98 (2000).

33. For a jurisprudential treatment of the relationship between presupposed and posited legal norms, see HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., Univ. of Calif. Press 1967) (1934).

34. Anand, *supra* note 4, at 9–13.

35. *Id. passim*.

the identification of the most basic conceptual elements of law's world (at least one of which has already been appealed to in the repeated referencing of "the People"). Because these "building blocks"—or conditions of possibility of law³⁶—lie at the foundation of the American experience of law, they provide the most appropriate entry point for a deeper image of the cultural practice.

At a very primary level, at least four propositions structure "legal" meaning in America—or what it means to the American citizen to live his or her life "under the rule of law." They are that the rule of law is (1) a system of representation of popular sovereignty, (2) not the rule of men, (3) permanent, and (4) violent.³⁷ In and through this set of beliefs, the American world of political meaning emerges.³⁸

A brief tour of the constructive experience is illustrative. To begin, as their elemental character suggests, in and through these concepts, the American citizen comes to an understanding of the fundamental construction of the political order. He or she comprehends its origin and source of authority (the People), who governs and whom is governed (no one and everyone), the temporal character of "the rule of law" (indefinite), and the manner of its self-manifestation, if necessary (force).³⁹ Additionally, in and through this epistemological scheme, he or she makes sense of specific actions and events, as well as other aspects of political life (a self-explanation, of course, that always remains consistent with the fundamental construction of the political order). For example, to again return to the central figure of the People, seeing the rule of law as an expression of popular sovereignty causes him or her to experience a court decision as the People's voice, and not that of the particular judges involved, a condition that extends to the most important of verdicts.⁴⁰ Similarly, belief that the rule of law is not the rule of men leads to the forceful recitation by, and deep resonance within, him or her of statements like "nobody is above the law, not even the President of the United States."⁴¹ Meanwhile, the internalization of this complete set of beliefs

36. This phrase is famously the language of Immanuel Kant. IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* (F. Max Müller trans., Anchor Books 1966) (1787).

37. KAHN, *supra* note 18, at 19–27. The classic discussion of law's violence is Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

38. American political experience is a contested experience. For a discussion of law's "other," see KAHN, *supra* note 18, at 27–34.

39. *Id.* at 19–27.

40. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000).

41. 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.

produces his or her strong commitment to the “legality” of communal affairs—a concern that, in parallel to the ubiquitous nature of the experience of the People’s voice, reaches the most deeply felt of social issues (e.g., the appropriation of property,⁴² the right to die,⁴³ gay marriage,⁴⁴ the detainment of enemy combatants⁴⁵) as well as other critical matters of society (e.g., the manner by which the government gathers intelligence and conducts covert operations⁴⁶)—while also generating a related, and equally robust, dedication to “process.”⁴⁷

This further account of the American cultural practice of law (which for purposes of this essay must be limited in its “thickness”⁴⁸) highlights the critical role of its organizing tenets, which create a way of knowing the world that results in the particular intensity with which law operates on the American mind. These beliefs also mark the point of departure from which to sketch the lawyer qua “People’s person.” As already stated, if law in America is a cultural practice, then the lawyer is the individual who serves this way of life. Against the backdrop of the more informed understanding of the cultural form, we can begin to flush out this concept of “serving.” How specifically is a lawyer to act? In and through his or her behavior, he or she is to represent and reaffirm the conceptual structure, and more broadly the symbolic form, of law’s world. Put differently, *the work of a*

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*, 128 S. Ct. 2229 (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/cfm/record.cfm?id=299057>.

42. See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).

43. See, e.g., *Schiavo ex rel. Schindler v. Schiavo*, 544 U.S. 957 (2005).

44. Political advocacy for an amendment to the U.S. Constitution that establishes marriage as a union between a man and a woman exists. Members of both the U.S. House of Representatives and the U.S. Senate have introduced bills in support of a federal marriage amendment on repeated occasions. See, e.g., H.R.J. Res. 89, 110th Cong. (2008); S.J. Res. 43, 110th Cong. (2008); S.J. Res. 1, 109th Cong. (2005); H.R.J. Res. 106, 108th Cong. (2004); H.R.J. Res. 56, 108th Cong. (2003); S.J. Res. 26, 108th Cong. (2003); H.R.J. Res. 93, 107th Cong. (2002). Members of the general public have also voiced support for such an amendment. See, e.g., Robert P. George, *The 28th Amendment: It Is Time to Protect Marriage, and Democracy, in America*, NAT’L REV., July 23, 2001, at 32; Focus on the Family Issue Analysts, Focus on the Family, Our Position (Marriage), http://www.focusonthefamily.com/socialissues/marriage_and_family/marriage/our_position.aspx (last visited Feb. 9, 2009).

45. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

46. See, e.g., 50 U.S.C. § 401 (2000). For related executive orders, see, for example, Exec. Order No. 12,333, 3 C.F.R. 200 (1982), amended by Exec. Order No. 13,284, 68 Fed. Reg. 4075 (Jan. 23, 2003), Exec. Order No. 13,355, 69 Fed. Reg. 53,593 (Aug. 27, 2004), Exec. Order No. 13,470, 73 Fed. Reg. 45,325 (Aug. 4, 2008).

47. Robert Cover captured this phenomenon of devotion well in referencing “the surreal epistemology of due process.” Cover, *supra* note 37, at 8–9.

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

lawyer is to sustain a universe of political meaning that appears as the rule of law (which includes, among other things, the appearance of law as a system of representation of popular sovereignty, not the rule of men, permanent, and, when necessary, violent).⁴⁹

It is precisely this approach to a lawyer's professional responsibility that frames the discussion in the remaining part of this essay, which, as indicated in the Introduction, focuses principally on the question of client selection. More specifically, the part isolates attention on the proposition "the rule of law is not the rule of men," exploring its meaning in American society and identifying the consequent obligations on the American lawyer so that he or she sustains that meaning. That analysis, in turn, dictates the answer to the normative question. Before proceeding with the argument, however, two comments are appropriate.

In describing American democracy in Part I, I made explicit reference to the religious character of American political society. Additionally, speaking of lawyers as "serving" the People obviously carries with it connotations of the holy and the sacred. To provide additional insight into the concept of lawyers as the People's people, we can explicitly continue along this line of thought. In a recent paper, Paul Kahn has explored the relationship between the U.S. Supreme Court Justice and the charismatic, as the term was traditionally understood—a gifted individual who stands between the divine and the mundane.⁵⁰ Kahn explains that the Justices' authority rests on their ability to carry themselves with the charismatic's power (which, in context, means to be understood as a location of the sacred voice of the popular sovereign). Without this self-grounding in charisma, the Justices cannot get past—either in their own eyes or those of the citizen—their essentially antidemocratic function (if we understand democracy in terms of extant popular rule), which in turn serves to undermine the rule of law as a politically meaningful world. Although Kahn limits his analysis to the Justices of the U.S. Supreme Court, just this orientation toward their role seems applicable to that of other judges and, for purposes of this essay, to that of the lawyer as well. If his or her task is to sustain a universe of political meaning that appears as the rule of law, then the model for the lawyer appears to be the charismatic. To state the professional responsibility of the lawyer in language appropriate to the analogy, the lawyer is to act in a fashion that reveals "the truth" of, and sustains the faith in, the People (a circumstance without which neither the lawyer nor the client will be able to get past the inherent antidemocratic character of the American rule of law). Ultimately, the full exploration of this topic—the lawyer as charismatic—is appropriately left for another occasion and, with this in mind, I can comfortably only suggest the

49. For a very different account of the lawyer's role that appeals to the language of "service," see generally Spaulding, *supra* note 6.

50. Paul W. Kahn, *Charisma and the Foundation of Judicial Authority* (2007) (unpublished manuscript, on file with author).

propriety of this specific theological parallel.⁵¹ But regardless of whatever substantive limitations to the analogy may exist, approaching the lawyer qua People's person through this religious term appears illuminating.

Turning to a final matter, this essay has emphasized the autonomy of the American cultural practice of law and, in doing so, categorized law with other cultural forms of experience (religion, art, and science), indicating the distinct, and irreducible, character of each. Importantly, and to emphasize a point that is a necessary supplement to this discussion, this quality of irreducibility—or incommensurability—applies to the relationship between the cultural practice of law and that of morality (the cultural practice of morality understood as organized around the terms of deontological ethics). The former and the latter are not identical and it is a mistake of many Western scholars that they attempt to collapse a cultural practice of politics into a cultural practice of morality.⁵² Politics is its own dimension of experience, with its own categories of understanding and erotic expression. Accordingly, it holds a position of normative equality vis-à-vis morality, not one of lesser privilege.⁵³ (To be clear, incommensurability does not mean insularity. Political and moral life are not wholly divorced from one another. Indeed, quite the opposite is true. Moral beliefs constantly impact, and constrain, political conduct, and vice versa. The claim of incommensurability is one of behavioral limitation and of normative authority. To repeat, we cannot reduce politics to morality and the commitment to, and consequent demands of, the former are as normatively compelling as that to, and of, the latter.)⁵⁴

One consequence of this fact of the autonomy of the political is that the phenomenological circumstance grounds—and in so doing constrains—the prescriptive analysis of the lawyer. Specifically, because the cultural practice of law represents a unique domain of experience, the most basic claim upon his or her behavior is an unqualified one. Internal to the cultural practice of law, the demands of representing the People, as well as those which necessarily follow from it, are absolute. In today's vernacular, they go "all the way down." The upshot of this normative condition is straightforward. From the perspective of law's world, the fundamental requirements of being a lawyer are not subject to concession to moral considerations (or normative concerns arising from alternate spheres of

51. It is no surprise that a concept of a political actor follows that of a religious one. The modern secular conceptualization of the state is rooted in theological terms. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Mass. Inst. of Tech. 1985) (1922).

52. See, e.g., LUBAN, *supra* note 4. I understand from a recent communication with Professor David Luban that he does not accept this type of criticism as valid. Accordingly, I offer this citation with a degree of caution.

53. Anand, *supra* note 4.

54. *Id.* at 26–31.

experience).⁵⁵ An inquiry into what counts as appropriate lawyer conduct always operates against the background of this state of affairs.⁵⁶

III. SERVING THE PEOPLE

One of the most fundamental questions concerning how a lawyer is to serve the People focuses on the relationship between the lawyer and the nonlawyer individual or association (political, business, religious, or of some other kind). Specifically, is it permissible for a lawyer to choose whom he or she represents? Methodologically, the inquiry into the American lawyer's professional responsibility draws from the conceptual elements of law's world and reasons to specific conclusions about him or her, including, of course, what counts as appropriate lawyer behavior in various circumstances.⁵⁷ To answer the choice-of-client question, we must, as previously suggested, explore the meaning that inheres in one particular legal belief: that the rule of law is not the rule of men.⁵⁸

At least as early as 1803, American legal culture gave concrete political expression to this now commonplace proposition, which, at its core, makes a claim to a politics that is nonpersonal.⁵⁹ Living life under the rule of law means inhabiting a political order that operates independently of any particular individual. A politics of the rule of law manifests itself in a manner wholly divorced from the specialized concerns of those subject to its authority and altogether indifferent to the impact of "the law" on them.⁶⁰ In the world of the rule of law, a normative distance exists between sovereignty and specific citizen, because the rule of law is not the rule of anyone.⁶¹

This condition of functional autonomy holds true both formally and substantively. With respect to the former, the normative universe of the rule of law attaches to everyone. As referenced earlier, jurisdictionally "nobody is above the law." Conversely, all have equal standing. With

55. Similarly, but moving beyond a strict understanding of moral practice (as organized around the terms of deontological ethics) to acknowledge that form of today's all-things-considered judgment that claims no grounding in any one particular moral discourse, from the perspective of law, these basic demands on a lawyer's behavior are not one "factor" to be "weighed" in such a judgment.

56. As indicated, the absolute character of the basic demands on a lawyer's behavior is internal to the perspective of law. From a moral perspective, appropriate lawyer conduct will look different. For the most comprehensive moral analysis of a lawyer's professional responsibility, see generally LUBAN, *supra* note 4.

57. Anand, *supra* note 4; Anand, *supra* note 27; Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653 (2006).

58. The discussion here follows that of Paul Kahn. See KAHN, *supra* note 18, at 21–23.

59. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

60. For a related point, see *infra* note 70.

61. The *Washington Post* captured something along these lines in its support for Samuel Alito's confirmation. Editorial, *Confirm Samuel Alito*, WASH. POST, Jan. 15, 2006, at B6 (arguing that "a Democratic law and a Republican law" are "repugnant to the ideal of the rule of law").

respect to the latter, this form of political organization precludes official action—the exercise of power—that fails to move beyond the self. A judicial decision is pernicious if it reflects the bare preferences of the judge. Likewise, a specific piece of legislation, a particular executive order, or an individual administrative regulation is a failure of the rule of law if it represents purely self-interested lawmaking.⁶²

The notion that politics is instrumentally free of any one person or group is the essence of the idea that the rule of law is not the rule of men. It is perhaps necessary to emphasize once again, however, that the belief that “the rule of law is not the rule of men” is just that—a belief. It is a narrative or a story that the adherent tells him- or herself (which is not to say that it is false, but only to recognize that knowledge is largely constructed). An alternate account of events is readily available. That is, we can see the rule of law as precisely that of men. We can, for example, just as easily experience this form of political order as the machinery of the powerful at work in maintaining their status as the privileged class as we can understand it as rule-governed.⁶³ Similarly, we know that particularity inevitably enters into the actions of those who manage the political order, at least some of the time. The unprincipled political actor—the “bad” judge or politician—is hardly beyond our consciousness.

Perhaps even more problematic than the existence of alternative explanations, the rule of law is itself limited in its ability to sustain the appearance of a nonpersonal politics. The fact of the hard case precludes it from doing so in at least some instances. Today, no one really doubts that for some questions of law there is more than one right answer. This reality is incontrovertible.⁶⁴ One consequence of this condition is that judicial discretion, however limited, exists. In some cases, the outcome does come down to the worldview of the judge.⁶⁵ Against this background, it is not possible for the rule of law to sincerely maintain its appearance at all times. If the disposition of the decision maker determines the final adjudication of the merits of a dispute, then in those instances the political order is not one of the rule of law. Rather, it is the rule of men.

Pushing still further in the direction of questioning belief in the rule of law as not the rule of men, instead of challenging the intelligibility of a politics unconnected to unique subjects, we can accept the lucidity of the

62. Cf. Unger, *supra* note 22, 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.”).

63. The Marxist view of law is one representation of this position. For a discussion of the Marx-Engels theory of state and law, see HANS Kelsen, *THE COMMUNIST THEORY OF LAW* 1–50 (George W. Keeton & Georg Schwarzenberger eds., Scientia Verlag Aalen 1976) (1955).

64. Ronald Dworkin’s “one right answer” thesis is judge-specific in character. RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 81–130 (1977).

65. The seminal contemporary work on judicial discretion is AHARON BARAK, *JUDICIAL DISCRETION* (Yadin Kaufmann trans., Yale Univ. Press 1989) (1987). *But cf.* DWORGIN, *supra* note 64.

claim and simply contest this very approach to communal governance. Politics as a domain *for* the rule of men is a highly attractive idea.⁶⁶ We know that in life action matters and some individuals are particularly well-suited to produce desired political results (whether by virtue of circumstances, natural abilities, or both). Recognizing this fact, we are oriented accordingly. For example, we encourage the appropriate individual (who is sometimes oneself) to act in support of a preferred end. In the same way, we embrace the politician who we believe will reorganize the political order and effect change. Indeed, at times we demand him or her.⁶⁷ When taking up politics from this perspective, we are not concerned with “the law.” On this view, being focused on “what the law is” is simply misguided. Who really cares? What matters are results achieved, not a principled existence. If a particular person gets us to where we want to go, that is absolutely fine.⁶⁸

This entire line of reasoning credibly opposes the belief that the rule of law is not the rule of men. Nonetheless, the proposition—and more broadly, “the rule of law”—remains a vibrant source of meaning to the citizen. As discussed earlier, the relationship between the American and the rule of law is fundamentally one of erotic attachment.⁶⁹ It is a spiritual connection, law defining for the participant a political community—and therefore, a history and an identity. “Democracy and the rule of law” speaks to who one is as an American—American nationalism is civic nationalism—and therefore lies at the core of his or her relationship to the world. Such a powerful circumstance of significance does not die out lightly, not in the face of an equally attractive alternative conception of politics and never because of a reasoned discourse, which is simply no match for a commitment of faith.

This embrace of the rule of law, and, to return to the focus of this part, of the proposition that the rule of law is not the rule of men, translates into twin obligations for those who speak in its name. On the one hand, they must deny the particularity of their individual selves. If law’s reign is a nonpersonal one, then its representatives’ own values, commitments, and desires do not have a place in the world. Personhood is literally, and

66. For the relevant overview of this and related points, see KAHN, *supra* note 18, at 27–34 (discussing “political action” as law’s “other”).

67. A central theme of Barack Obama’s 2008 presidential campaign was “change.” See, e.g., BLUEPRINT FOR CHANGE: OBAMA AND BIDEN’S PLAN FOR AMERICA (2008), available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

68. Technically, this account stands in juxtaposition to two elements of the rule of law operating together: the rule of law is not the rule of men and the rule of law is permanent. Additionally, Kahn’s account of the form of politics that stands in juxtaposition to “the rule of law is not the rule of men” emphasizes the psychology of the political actor and his or her desire for individual distinction. See KAHN, *supra* note 18, at 27–34.

69. This condition explains the observations of individuals such as Antonin Scalia and Roberto Unger, who speak of, respectively, “our national obsession with the law” and “the cult of the Constitution.” ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997); ROBERTO MANGABEIRA UNGER, WHAT SHOULD THE LEFT PROPOSE? 103 (2005).

necessarily, irrelevant, because of the need for normative coincidence. Without such harmony, the rule of law is destabilized, and ultimately undermined. On the other hand, those who stand for the law must also reject—that is, they must not attach importance to—the individual attributes of all with whom they come in contact, i.e., the “legal person.” The reasoning is the same. If the rule of law is truly not a personal form of governance, then the particularity of this group is also not germane and rendering it so likewise serves only to subvert the rule of law.⁷⁰ The self-suppression of law’s principals and subjects goes hand in hand.⁷¹

The demand to deny the unique character of particular selves speaks directly to the question of selective representation. At least with respect to strictly normative considerations, the lawyer is precluded from choosing whom he or she represents.⁷² The logic is straightforward. To act in this manner—to choose one’s client—is to embrace the self and the distinctive personhood of the individual. Specifically, it is to take up the particularity of the lawyer, the client, or both. As just discussed, in the world of the rule of law, this is unacceptable. More poignantly, and as further dealt with in this essay’s conclusion, the manifestation of such concrete action marks the death of law (and, accordingly, the death of the lawyer).

Importantly, and as the earlier discussion about the unqualified character of the basic claims upon a lawyer’s behavior suggests, the requirement to represent all is an absolute one. There are no exceptions to the charge to forswear the particularity of personality. From the perspective of law, any acknowledgement of personhood makes no sense. For this reason, law does not, nor can it, allow for the recognition of distinct individuality in special circumstances where particularly strong individual attachments are

70. Cf. KAHN, *supra* note 18, at 22–23 (“Law does not deny the possibility of novelty or the fact that novel events occur. But it does deny that the source of meaning of an event lies in its novelty.”).

71. A well-known illustration of this demand for self-suppression lies in the confirmation hearing of the federal judge, during which he or she disclaims any allegiance to past opinions or practices and promises to dispassionately resolve the disputes that come before him or her. Looking inward, the judge leaves all of him- or herself behind (indeed, going forward, he or she is to be clothed in a black robe). Turning outward, the particular character of the plaintiff or defendant is acknowledged as irrelevant. No space exists for personality in the decision making that lies at the heart of the judicial function. As Chief Justice John Roberts recently told us, the judge is without an agenda. His or her professional responsibility is only “to call balls and strikes.” For Chief Justice Roberts’ comments, see *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). It is worth noting that in these same comments, Chief Justice Roberts specifically, and admirably, references the American maxim that “we are a Government of laws and not of men.” *Id.* For some further discussion of the confirmation process as ritual, see KAHN, *supra* note 18, at 116–18.

72. I limit the scope of this analysis to normative considerations, conventionally understood, and thus make no comment on other factors that might impact the treatment of the choice-of-client question (e.g., financial, professional specialty/competence, etc.).

implicated.⁷³ In fact, if any significance is to lie in these types of circumstances, it rests in the opposite direction. That unique and deeply held attachments (on the part of the lawyer, client, or both) are in play is not an instance for law's normative compromise but a true test of the lawyer's commitment to the rule of law. Denial of the unique character of the self is at the core of the meaning of a politics of law. Because of this condition, law can never give up this demand.⁷⁴

The lawyer is categorically prohibited from choosing his or her client.⁷⁵ With this answer in hand, we can continue our reasoning and explore some of the secondary implications of this conclusion for a lawyer's professional responsibility. Specifically, the resolution of the choice-of-client question impels at least two further observations about what appropriate lawyer behavior looks like.

At the outset, a lawyer cannot be a "cause lawyer." He or she cannot take up a practice of law that is organized around a political or ideological goal and grounded in the lawyer's personal moral commitment to that end.⁷⁶ After all, this type of legal practice is premised on the ability to pick whom one represents. Moreover, that selection is rooted precisely in the particularity of the persons involved (lawyer, client, and/or larger political constituency). Indeed, this individuality, specifically the normative values associated with the distinct personalities, is the motivating force for engaging in, as well as the reason for the celebration among some of, this form of lawyering.⁷⁷ Permitting a lawyer to adopt this kind of practice cannot be squared with the proscription on client selection and its

73. *Contra* Wendel, *supra* note 6, at 1013–14. W. Bradley Wendel has in mind the example of Judith Nathanson, a Massachusetts lawyer who testified at a hearing on a discrimination claim filed against her that "she represented only women in divorce cases, in part, because she sought to devote her expertise to eliminating gender bias in the court system." See *Stropnick v. Nathanson*, 19 Mass. Discrimination L. Rep. 39, 40 (Comm'n Against Discrimination 1997), *aff'd sub nom. Nathanson v. Mass. Comm'n Against Discrim.*, 16 Mass. L. Rptr. 761 (Super. Ct. 2003) (quoting Hearing Commissioner's finding of fact). As indicated in the text above, the analysis presented in this essay rejects such action as unacceptable.

74. Carla Pratt has focused on the core value of equal justice to consider the question of who should, and should not, be allowed to practice law—specifically focusing on members of the Ku Klux Klan and supporting the Illinois Bar's denial of admission to Matthew Hale. Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857 (2003). Pratt's important discussion has some basic points of contact with the argument presented in this part.

75. One consequence of this conclusion is that the question of the "last lawyer in town" goes away. For some discussions of this subject, see, for example, Fried, *supra* note 6, at 1086–87; Teresa Stanton Collett, *The Common Good and the Duty to Represent: Must the Last Lawyer in Town Take Any Case?*, 40 S. TEX. L. REV. 137 (1999).

76. I understand this statement to be a basic definition of cause lawyering. See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998).

77. For an introduction to cause lawyering, see STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004).

underlying reasoning—the obligation to suppress the unique quality of the self. How could it? Ultimately, the concept of the cause lawyer stands opposed to law's world, not in harmony with it. (More precisely, the cause lawyer embraces one or more of the previously discussed forms of psychology that challenge the rule of law qua belief.) As a matter of lawyer ethics, his or her existence is unacceptable.

A second natural corollary to the bar on client selection is the rejection of any ability of a lawyer to base his or her decision to represent a person on the tasteful or acceptable character of the person or the person's actions or ends. Again, the prerequisite for any such power is the capacity to choose clients based on the individual attributes of particular selves, which law rejects. There is no space in the universe of the rule of law for representation decisions founded on a lawyer's "repugnance" for, or "fundamental disagreement" with, a person or that person's behavior or goals.⁷⁸ Accordingly, any generalized norm permitting client selection based on this type of disposition is inappropriate.⁷⁹

While the issue of choice-of-client is the point of emphasis of this part⁸⁰ (and fundamental matters are the point of emphasis of this essay), if we pause to reflect on the reasoning that drives our conclusion about client selection—that a lawyer deny the particularity of selves—a further insight is available. Specifically, the obligation directs an answer to an additional question about a lawyer's professional responsibility. That query is whether it is appropriate for a lawyer to engage a controversial political or ideological issue. The conclusion is no—or more precisely a qualified no. A lawyer cannot engage a controversial political or ideological issue beyond contributing his or her professional expertise. Not surprisingly, the argument parallels that which compels the prohibition on client selection. If, or in today's environment when, a lawyer takes up this behavior, he or

78. For an example of a lawyer's expression of repugnance, see *Stropnicki*, 19 Mass. Discrim. L. Rep. at 40 (stating that the lawyer testified "[s]he would not represent women whose positions in divorce litigation were repugnant to her personal values" (quoting Hearing Commissioner's finding of fact)).

79. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (2008) (permitting lawyer to avoid appointment by tribunal because repugnancy of client or cause is likely to impair client-lawyer relationship or lawyer's ability to represent client); *id.* R. 1.16(b)(4) (permitting lawyer to withdraw when client insists on taking action lawyer considers repugnant or with which lawyer fundamentally disagrees); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. b (2000) ("A lawyer . . . may decline to undertake a representation that the lawyer finds . . . repugnant."); *id.* § 32 cmt. j ("[I]f the client asks for action that the lawyer considers repugnant . . . the lawyer may withdraw . . .").

80. For the same reasons that support a prohibition on lawyers selecting their clients, being cause lawyers, and making representation decisions based on the tasteful or acceptable character of the client or the client's actions or ends, the American politics of the rule of law cannot recognize a normative conflict of interest. Accordingly, ethical proscriptions on lawyer representation based on his or her personal normative interests are unintelligible. An American lawyer cannot be an "I don't believe in gay couples having kids" lawyer. For an argument to acknowledge the individual attachments of the lawyer and correspondingly establish a moral conflicts-of-interest standard for professional ethical decision making, see Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005).

she embraces a personal politics, acknowledging and valuing the unique individuality of selves. As with the cause lawyer, this "politics as personal" lawyer lives outside the bounds of law's world. Since law cannot comprehend this conduct (at least not as an expression of itself), law can never sanction it.

Immediately, the question of what this exclusion looks like presents itself. Exactly who falls within the bounds of this proscription? Equally, precisely what behavior is forbidden? Because the conclusion that a lawyer cannot engage a controversial political or ideological issue beyond contributing his or her professional expertise potentially disturbs (and, as will be seen, ultimately does disturb) prevailing legal ethical sensibilities, some brief elaboration, in both directions, is required.

With respect to the first matter—the qualifying acting subject—one member of this category is readily intelligible. A clear example of the type of actor relevant to this discourse is a bar. Moreover, whether the actor is an integrated bar or a voluntary bar association is immaterial to the ethical question.⁸¹ The prohibition on engaging controversial political or ideological issues applies regardless of the structure of the organization, because in either of these associational arrangements, the actor is a lawyer in some form.

The individual lawyer is also subject to the prohibition. The application of the exclusion to him or her, however, involves a complicated analysis, one that is beyond the scope of this essay. For this reason, it is necessary to cabin any concern with the individual lawyer and leave the relevant inquiry to the side of this discussion. To be clear, though, the proscription on this type of behavior does attach to the individual lawyer.⁸² (The presence of a simple and uncontroversial example of the acting subject presumably maintains the argument's intellectual currency, despite this restricted character.)

Turning to the second issue—the clarification of the sorts of conduct that the prohibition captures—the starting point for explication is the easy case, which is the purely extralegal engagement of controversial political or ideological issues⁸³ (e.g., endorsing a nuclear weapons freeze initiative or

81. The distinction between an integrated bar and a voluntary bar association is central to the U.S. Supreme Court's opinion in *Keller v. State Bar of California*, 496 U.S. 1 (1990). I make no comment on the constitutional analysis presented therein.

82. The complication to the application of the exclusion to the individual lawyer arises when we try to distinguish an individual acting in his or her role as a lawyer from an individual acting in his or her role as a simple citizen. From the perspective of law, this conduct qua citizen may be acceptable. It certainly is vis-à-vis the nonlawyer citizen. Both how law would make, and in its eyes the acceptability of making, this distinction are the questions I leave for another paper.

83. In an article critical of *Keller*, David Luban offers a taxonomy of the activities of a unified bar. See David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of Cal.*, 1990 SUP. CT. REV. 163. The classification scheme describes a series of concentric circles radiating outward from the purely regulatory functions of non-integrated state bars, to the lawyer-improvement function (continuing education, informing the bar about new developments, etc.), to the narrow law reform

requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries⁸⁴). Taking up this form of action represents an unambiguous expression of personhood.⁸⁵ As such, i.e., as “politics as personal” behavior through and through, it is impermissible.⁸⁶

A more complicated matter for analysis involves conduct that is directed at the reform of substantive law (whether caselaw, legislation, or constitutional amendment). In this circumstance, the realms of the legal and the extralegal are deeply intertwined and a credible dividing line may not be easy to draw. For example, where does legal knowledge or expertise end and personal knowledge or expertise begin?⁸⁷ This difficulty must be acknowledged. Nevertheless, at least as we move toward the ends of the legal-extralegal spectrum, the content of each category is ascertainable. What counts as legal advice is, at least some of the time, clear. The same is true with respect to personal worldview.⁸⁸ With this understanding in mind, we can arrive at a conclusion. Action aimed at reforming substantive law that moves beyond the contribution of professional knowledge or expertise is proscribed.⁸⁹ Once again, this type of conduct represents “politics as personal” behavior, which cannot manifest itself in the world of law.⁹⁰

function of advising the courts about procedural law and the administration of justice, to the wide law reform function of deliberating and commenting about substantive law . . . to the political function of attempting to influence public debate on controversial issues of the day.

Id. at 168. While my focus is not limited to unified bars, I borrow directly from this scheme.

84. These examples are taken from *Keller*, 496 U.S. at 5 n.2.

85. Some may object to the characterization of these examples as “purely extralegal.” While that objection is not unimportant, the legal-extralegal distinction is practicable. For some further comment, see *infra* note 88 and accompanying text.

86. For an opposite view, at least with respect to voluntary bar associations, see Luban, *supra* note 83, at 198 (“[A]s a general proposition there is nothing wrong with lawyers organizing as a pressure group, and thus there is no particular reason for a voluntary bar association to refrain from taking political positions . . .”).

87. Loosely speaking, the Court in *Keller* embraces a similar sensitivity to this type of complexity. See 496 U.S. at 15. As David Luban correctly argues, however, the Court’s understanding of appropriate lawyer behavior is problematic. Luban, *supra* note 83, at 199 (“What is striking in *Keller* is how many of the bar activities that [the Court seemingly disapproves of] . . . have obviously legal aspects . . .”).

88. David Luban has similarly acknowledged both the difficulty of line drawing and the ultimate viability of a legal-extralegal distinction. Luban, *supra* note 83, at 199.

89. With this conclusion in mind, the answer to the sensitive question of ABA support for a woman’s constitutional right to abortion comes into focus. At this time in American history, it is appropriate for the ABA to explain the legal landscape to the citizenry. (For example, maintaining the right to abortion established by *Roe v. Wade*, 410 U.S. 113 (1973), precludes any state from denying that right to a woman and therefore insulates her from having to rely on a particular state to recognize any such right. Equally, overturning *Roe v. Wade* would not automatically preclude a woman from being able to have an abortion, but rather would make any right to or prohibition of an abortion an issue of state law.) Assuming that the question of a woman’s constitutional right to an abortion is, again at this time in American history, a “hard case” (i.e., there is no one determinate legal answer to this question), it is not appropriate for the ABA to take a position on the issue itself. For a short discussion of the history of the ABA vis-à-vis this question, see DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 109–10 (4th ed. 2004).

In the same manner that we consider conduct that is directed at the change of substantive law, we can approach other relevant types of lawyer action and address their ethical propriety.⁹¹ In this way, a basic picture of permissible and impermissible behavior, vis-à-vis the engagement of controversial political or ideological issues, draws itself out. In turn, and with the observations on the acting subject in mind, a richer sense of the general rule—that a lawyer cannot engage a controversial political or ideological issue beyond contributing his or her professional expertise—is now manifest.

CONCLUSION

American democracy has a unique character, which lies in the religious quality of its political practice of law. Several values lie at the core of this activity, one of which is the proposition that the rule of law is not the rule of men. Because this belief is a fundamental one, the failure of its expression (as well as the affirmation of its other) signals the beginning of the end of the cultural form, along with the conception of identity that is tied to that form—the lawyer. The nature of a basic tenet drives this consequence. If an essential element of a particular set of beliefs is no longer vibrant, but rather is undermined, then the set of beliefs itself, along with the world of meaning it effects, necessarily gives way.

As stated in the Introduction, this fact of the ultimate erasure of law is the warning to those who would embrace a regime of client selection. What is at stake with the choice-of-client question is nothing other than the American cultural practice of law itself. In our thinking about lawyers choosing clients, we should not lose sight of the implication of this type of behavior for the rule of law. In the instance of client selection, in particular, the actions of lawyers have fundamental consequences for the American political order.

Of course, one implication of this answer is that a lawyer accepts inaction in the face of moral injustice. As much as this may be an affront to an individual's moral sensibilities, this acceptance is precisely the demand of the world of the rule of law as distinguished from the normative universe of moral life (or that of an action-oriented conception of politics). For further discussion of this point, see Anand, *supra* note 4, at 42–43, and Anand, *supra* note 57, at 697.

90. Cf. KAHN, *supra* note 18, at 120–21 (“The only everyday knowledge that is admitted into this world of law is *common* knowledge—*common* in both senses of the word. It is knowledge that all judges hold in common: there can be nothing unique or personal to the judge in the taking of ‘judicial notice.’ And it must be truly common knowledge: knowledge so universal as not to be contested by anyone either within or outside the court.” (citing FED. R. EVID. 201(b))).

91. To offer just one example, a recognized function of bar associations is to comment on procedural or process-related reforms pertaining to the “administration of justice.” See, e.g., American Bar Association, ABA Mission and Goals (Aug. 2008), <http://www.abanet.org/about/goals.html> (listing one of its objectives as “work[ing] for . . . a fair legal process”). Undoubtedly, the ethical assessment of this behavior confronts grey areas. (The problematic character of the traditional substance-procedure divide suggests the difficulty of applying the legal-extralegal distinction, at least some of the time.) Black-and-white circumstances, though, will exist.

Of course, today, conventional ethical norms, as well as the extant law of lawyering, permit lawyers to choose whom they represent.⁹² Furthermore, it seems clear that lawyers in fact do choose their clients based on normative considerations, at least some of the time. What this state of affairs says about the American cultural practice of law is not positive, and while the conclusion that follows from this circumstance may be dramatic, it should not be denied: The bar is not really practicing law, nor is it playing its role in fulfilling the promise of American democracy. Indeed, given the central role of lawyers in this political order, America is not practicing American democracy either.

The inquiry into the permissibility of client selection is at bottom an investigation of one's dedication to a form of politics. Because of this condition, the analysis of the propriety of selective representation starts with more basic queries. How committed is one to the rule of law? Will one act for its survival or contribute to its demise? These are the ethical questions that anyone taking up the issue of client selection must confront. The answers matter.

92. *See supra* note 6.