

2022

Reasoning About Faith: On the Religious Lawyer

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Online ISSN: 2643-7759

Recommended Citation

Rakesh K. Anand, *Reasoning About Faith: On the Religious Lawyer*, 16 FIU L. Rev. 259 (2022).

DOI: <https://dx.doi.org/10.25148/lawrev.16.2.6>

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REASONING ABOUT FAITH: ON THE RELIGIOUS LAWYER*

Rakesh K. Anand†

The religious lawyer is an individual who understands his or her religious practice to be a way of life and who, within the context of a commitment to his or her religious practice as such, takes up the professional practice of law. Unquestionably, this individual is worthy of our respect, given the seriousness with which the individual approaches his or her faith. At the same time, it is precisely this seriousness that points us in a direction that is perhaps difficult for many to go. Specifically, because a way of life represents a total activity of the self from which one can never separate, this individual can never accept We the People as sovereign, which is a necessary condition for engaging in the professional practice of law in this country. Accordingly, as challenging as it might be for many to accept, this individual is in fact precluded from taking up the professional practice.

This Article offers a response to the various scholars who have promoted the concept of the religious lawyer since the late 1970s. In offering this response, this Article emphasizes the existential character of the life of the individual who understands his or her religious practice as a way of life, of the individual who takes up the practice of political life in the United States, and of the individual who takes up this country’s professional practice of law. Its goal is to begin a conversation with those who continue to promote the concept of the religious lawyer in the hope of advancing our understanding of both religious practice and professional legal practice in America.

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†Professor of Law, Syracuse University College of Law. A.B., Stanford University; J.D., Yale Law School. Principally, I would like to thank Mark Mancall for a series of conversations that helped me move this Article forward. I would also like to thank Andrew Greenberg, Paul Kahn, and Michael Stoianoff for a helpful conversation. In its early stages, the argument offered here was presented at the International Working Group on the Legal Professions that gathered in Frauenchiemsee, Germany in 2014 and the International Legal Ethics Conference VI held at the City University London in London, United Kingdom, also in 2014.

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INTRODUCTION

Among those whose religious beliefs lie within the Christian and Jewish religious traditions,¹ some understand their religious practice to be a way of life.² As such, it begins in the consciousness of the existence of a Creator.³ And, building from this awareness, it takes the form of living in a manner that is consistent with the fact of the Creator's existence, and of his corresponding sovereignty, and doing so completely and constantly—that is, doing so with respect to every activity, whether significant or mundane, every moment of every day.⁴

Those scholars who have been at the center of the work on religious lawyering fall within this group of religious believers.⁵ Indeed, for each, it is

¹ For a brief introduction to Christianity, see LINDA WOODHEAD, *CHRISTIANITY* (2004). For one introductory treatment of mainstream Christian thought, see ALISTER E. MCGRATH, *CHRISTIAN THEOLOGY: AN INTRODUCTION* (3d ed. 2001). For some treatments of the history of Christianity, see PAUL JOHNSON, *A HISTORY OF CHRISTIANITY* (1976); JUSTO L. GONZALEZ, *THE STORY OF CHRISTIANITY* 1–2 (1984). For a brief introduction to Judaism, see NORMAN SOLOMON, *JUDAISM: A VERY SHORT INTRODUCTION* (1996). For one introductory treatment of Jewish religious thought, see *CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS* (Cohen and Mendes-Flohr eds., 1988).

² For an introduction to the concept of a way of life, see PIERRE HADOT, *PHILOSOPHY AS A WAY OF LIFE: SPIRITUAL EXERCISES FROM SOCRATES TO FOUCAULT* 264–76 (Arnold I. Davidson ed., Michael Chase trans., 1995). For an initial treatment of the sacred as a way of life, see MIRCEA ELIADE, *THE SACRED AND THE PROFANE: THE NATURE OF RELIGION* (Willard R. Trask trans., 1957).

³ For a citation to theological consciousness as the starting point of at least Christian religious practice (and, correspondingly, to the Creator as the “transcendent norm” that organizes the practice), see RUDOLF OTTO, *THE IDEA OF THE HOLY* 173–74 (John W. Harvey trans., 1923).

⁴ The reader should understand the concept of a way of life presented here in a modest form. Specifically, the concept speaks to a manner of living that represents a framework within which the individual lives, and not a manner of living that strongly “determines” all aspects of how he or she lives, or at least not necessarily so. Correspondingly, the reader should understand the concepts of completeness and constancy in this light. For an initial comment on completeness, see ERNST CASSIRER, *THE MYTH OF THE STATE* 34 (1946).

⁵ For an introductory history to the work on religious lawyering, see Russell G. Pearce & Amelia J. Uelmen, *Religious Lawyering's Second Wave*, 21 J. L. & RELIGION 269 (2005). As noted later explicitly in the text, the referenced scholars are Thomas L. Shaffer, Joseph Allegritti, & Russell G. Pearce. *Infra* pp. 12–14. For each scholar's expression of his understanding of his religious practice as a way of life,

against the backdrop of an understanding of his religious practice as a way of life that he has defined his task, which is to explore how an individual—who is of the scholar's more particular religious persuasion and who apprehends his or her religious practice as a way of life—might engage in the professional practice of law, in its various aspects. For example, how might he or she initially conceptualize the endeavor,⁶ think about and resolve particular ethical dilemmas,⁷ or think about and resolve potential conflicts that exist between his or her religious practice and extant professional norms of behavior?⁸ The purpose of this Article is to explain an admittedly sensitive point. Each of these scholars is misguided. In light of the understanding that each has of his religious practice as a way of life, an understanding for which one surely must have sympathy, the task that he has set for himself is a non-starter.

As it happens, to see the truth of this point is a relatively straightforward undertaking. It largely requires an appreciation of a basic reality associated with the taking up of the professional practice of law in the United States. Notably, this reality is often overlooked in contemporary legal ethics discourse, as well as in that of the Bar more generally: In the United States, every individual who takes up the professional practice of law must acknowledge the existence of We the People, and live his or her professional

see e.g., Thomas L. Shaffer, *Maybe a Lawyer Can Be a Servant; If Not . . .*, in CAN A GOOD CHRISTIAN BE A GOOD LAWYER? HOMILIES, WITNESSES, AND REFLECTIONS 193–206 (Baker & Floyd eds. 1998) [hereinafter Shaffer]; JOSEPH G. ALLEGRETTI, THE LAWYER'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE 19 (1996) (“God is the God of *all* of life, and so God’s claim is on us always and everywhere.”); Russell G. Pearce, *The Jewish Lawyer’s Question*, 27 TEX. TECH. L. REV. 1259 (1996). Immediately, a comment is necessary. An important scholar who is arguably a second lead voice on religious lawyering within Pearce’s generation is Robert K. Vischer. Notably, his work has significant overlap with that of Pearce, at least with respect to the subject-matter of this Article. His omission from the main discourse of this Article is largely for convenience and not a suggestion of a lack of importance of his work. For a sample of Robert Vischer’s writing, see Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J. L. & RELIG. 427 (2003); Robert K. Vischer, *Pluralism and Professionalism: The Question of Authority*, 8 LEGAL ETHICS 35 (2005). In this context, one can also consider the work of Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996).

⁶ See, e.g., Thomas L. Shaffer, *On Religious Legal Ethics*, 35 CATH. LAW. 393, 396 (1991) [hereinafter Shaffer, *On Religious Legal Ethics*] (conceptualizing law practice as “religious ministry”); Shaffer, *supra* note 5, at 202 (conceptualizing law practice in terms of servanthood, attention to the oppressed, and attention to effectiveness); ALLEGRETTI, *supra* note 5, at 55 (conceptualizing law practice as prophetic ministry).

⁷ See, e.g., Russell G. Pearce, *To Save a Life: Why a Rabbi and a Jewish Lawyer Must Disclose a Client Confidence*, 29 LOY. L. A. L. REV. 1771 (1996).

⁸ See, e.g., Thomas L. Shaffer, *Faith Tends to Subvert Legal Order*, 66 FORDHAM L. REV. 1089 (1998) [hereinafter Shaffer, *Faith Tends to Subvert*] (describing Christianity as subversive politics that should encourage challenge to lawyer sensibilities); Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon’s Practice of Justice*, 51 STAN. L. REV. 903 (1999) [hereinafter Shaffer, *Should a Christian Lawyer Sign Up*] (emphasizing biblical justice and the countercultural heritage of Christianity in thinking about lawyering).

life in accordance with the fact of the People's existence and its corresponding sovereignty, completely and constantly.⁹ Only with this turn of the self can he or she make sense of his or her professional life, because only in this circumstance will the organizing terms of that life and that of the role that he or she occupies cohere. Whatever the more particular understanding he or she might have of his or her professional existence (for example, that he or she is a zealous advocate,¹⁰ counselor,¹¹ or poverty lawyer¹²), he or she must orient him- or herself in this manner.¹³

Once we appreciate this reality associated with the taking up of the professional practice of law in the United States, the ill-conceived quality of the task that each of the scholars has set for himself is apparent. Specifically, as he understands his religious practice, it precludes its practitioner from orienting him- or herself in the manner that engagement in professional lawyering in this country requires. A way of life *qua* Creator-centered, complete and constant exercise renders impossible such a movement of the self. In light of this state of affairs—that the religious practitioner of concern can never “go” where the lawyer in this country must—he or she can never be a candidate for the American professional practice of law, a fact that leaves each of these scholars without a place to begin.

Before proceeding with the discussion, a few preliminary comments are useful to make clear the nature of the argument presented here. To begin, as the above suggests, the argument presented here focuses on the understanding that each of these scholars has of his religious practice as a way of life. As such, the argument centers on the form that each understands his religious practice to take, and grounds itself in terms of that understanding. It follows from this fact that the argument itself is independent of the particular type of Christianity or Judaism that each practices, and the

⁹ Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMP. L. REV. 737 (2008) (describing lawyers as “the People’s people”).

¹⁰ The “zealous advocate” is the commonplace model of lawyering. For a classic, academic description of the model, see William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

¹¹ See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

¹² See, e.g., Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970).

¹³ An underlying theme of this Article is that one cannot practice law without a jurisprudence. For a similar claim, see, for example, RONALD DWORKIN, *LAW’S EMPIRE* 90 (1986). For a discussion of the importance of a jurisprudential philosophy rooted in *We the People*, at least with respect to the American civil litigator, see Rakesh K. Anand, *Contemporary Civil Litigation and the Problem of Professional Meaning: A Jurisprudential Inquiry*, 13 GEO. J. LEGAL ETHICS 75 (1999).

beliefs associated therewith.¹⁴ For the discussion at hand, this aspect of the religious practice of each is of only passing relevance.¹⁵

Next, that the argument presented here centers on the form that each understands his religious practice to take points to the argument's substantive character. It is an existential one. Foremost, it concerns matters of being. In this respect, it considers basic issues of the self, and presents itself in terms of these considerations.¹⁶

Not unimportantly, albeit derivatively, in doing so, the argument gives rise to a variety of lessons for us all. Put slightly differently, it has normative implications. Consistent with its existential character, its principal normative implication speaks to basic issues of the self as well—namely, that for precisely the same reason that the task that each of the scholars has set for himself is a non-starter, no one can *be* a Christian or Jew, at least in the rich sense that each of the scholars respectively comprehends him or her, and *be* a lawyer in the United States.¹⁷

Finally, as this general truth about any person's life indicates, the argument ultimately speaks to a larger set of individuals than the scholars themselves. Specifically, it speaks to all Christians and Jews who understand their religious practice to be a way of life and who would engage in the professional practice of law in this country. For this reason, the role that the scholars collectively play in the argument is not one of target *per se*. Rather,

¹⁴ Two points are noteworthy here. First, it is not possible to explicate these details of each of the scholar's religious practice, because the scholars do not provide this information in their writing. Second, the argument's focus on the form of each of the scholar's religious practice largely insulates it from the concern associated with generalizing about Christian and Jewish religious practice. For a brief reference to this concern more broadly, see WENDY DONIGER, *Foreword* to MIRCEA ELIADE, SHAMANISM: ARCHAIC TECHNIQUES OF ECSTASY xi–xv (Willard R. Trask trans., 1972). Parenthetically, for a notable point about generalization, specifically in terms of categorization, with respect to the study of Hinduism, see GAVIN FLOOD, AN INTRODUCTION TO HINDUISM 6–8 (1996).

¹⁵ The relevance lies in the central role that the type of Christianity or Judaism that each of the scholar's religious practice, and the beliefs associated therewith, plays in his work itself.

¹⁶ Notably, an existential orientation is not the only available discursive orientation through which to express the challenge to each of the scholar's work on religious lawyering that this Article presents. For example, the same point—that on its own terms, the project is a non-starter presumably can be made doctrinally: Both Christian and Jewish religious practice preclude idolatry and the professional practice of law is such an exercise. For one discussion of idolatry, see MOSHE HALBERTAL AND AVISHAI MARGALIT, *IDOLATRY* (Naomi Goldblum trans., 1992).

¹⁷ Naturally, embraced forms of being impact the look of daily life. Because of this fact, this Article does point to more narrow, concrete normative issues, which are the more typical subjects of legal scholarship. For example, at the institutional level, it questions the propriety of the “religious law school,” at least as a law school. *See, e.g.*, University of St. Thomas School of Law, <https://www.stthomas.edu/law/about/>; Pepperdine, Caruso School of Law, <https://law.pepperdine.edu/>; J. Reuben Clark Law School at Brigham Young University, <https://law.byu.edu/about-byu-law/>. With respect to the currently practicing attorney, it underscores the practical reality that the type of Christian or Jew who lies at the center of the each of the scholar's work is simply not able to take up the American professional practice of law in a manner that is consistent with his or her faith.

they stand as representative figures of a larger body of individuals who are subject to its critique.¹⁸

The Article proceeds in five Parts. Part I introduces the reader to the concept of religious practice as a way of life, as it presents itself to those whose religious beliefs lie within the Christian and Jewish religious traditions. To do so, Part I initially sketches the most basic organizing elements of this form of religious practice—that is, the overarching perspective on existence and the associated manner of living around which it constitutes itself, in the first instance. Part I then identifies a significant consequence that a commitment to this form of religious practice has for the Christian or Jew, which is that he or she must always maintain the commitment in his or her relationship with the other.

Having completed the introduction, Part I ends by asking a question that naturally presents itself. Presumably, every political community organizes its practice of political life around an overarching perspective on existence and associated manner of living, the embrace of which it demands from those who participate therein. On its face, then, the necessity to maintain the commitment appears to preclude the Christian or Jew from participating in the other's practice of political life. Given that each of the scholars pursues an inquiry that involves either the Christian or Jew in just this apparently prohibited engagement (the participation in the other's practice of political life taking the form of participating in the professional practice of law in the United States), how does each address this matter and establish the viability of his inquiry?

Part II explains the position of each of the scholars.¹⁹ That position begins with the understanding that each has of the type of political community that fundamentally defines this country, which is that it is liberal. Building from this understanding, each holds that, as a liberal political community, the American political community does not in fact organize its practice of political life around any overarching perspective on existence and associated manner of living, and thus it does not require any particular orientation of the self from the participant therein. Rather, the American

¹⁸ Not unrelatedly, as the work on religious lawyering has developed over time, those involved have projected a distinct openness to the range of individuals whose religious beliefs lie within the Christian and Jewish religious traditions and who embrace their religious practice as a way of life, as well as to those individuals whose religious beliefs lie outside the Christian and Jewish religious traditions and who approach their religious practice in a similar manner. See, e.g., Thomas E. Baker & Timothy W. Floyd, *A Symposium Précis*, 27 TEX. TECH. L. REV. 911 (1996). They have also projected a distinct openness to those who do not approach their religious practice as a way of life, as well as those who live a more secular life. See, e.g., Nancy B. Rapoport, *Living "Top-Down" in a "Bottom-Up" World: Musings on the Relationship Between Jewish Ethics and Legal Ethics*, 78 NEB. L. REV. 18 (1999); Bruce A. Green, *The Religious Lawyering Critique*, 21 J. L. & RELIGION 283 (2006).

¹⁹ As noted later in the Article, this position and its associated line of reasoning is largely implicit in the work of each of the scholars, but also evident. *Infra* p. 10.

political community offers the participant a practice of political life that is an existentially open exercise in which the participant is free to be whoever he or she wishes. Accordingly, the apparent preclusion on, respectively, the Christian or Jew does not sustain itself with respect to the political community of the United States, and the Christian or Jew who approaches his or her religious practice as a way of life is able to participate therein.²⁰ In light of the unfamiliarity that some, if not many, have with the writing on religious lawyering, Part II concludes with a short overview of the work of each of these scholars, work that collectively is approximately forty years old and runs across three generations.

Part III presents the critique of the position of each of the scholars. Its broad theme is that, in large measure, each has looked past history. As Part III explains, history teaches that the modern West has given rise to a distinct type of political community, which is the nation-state. Acknowledging this historical reality, Part III explicates the modern concept of the nation-state, in the course of which it explains that the modern nation-state is a political community that, unsurprisingly, conforms to our expectations, i.e., that organizes its practice of political life around an overarching perspective on existence and associated manner of living, and that demands from those who participate therein that they embrace these organizing elements. Indeed, its very existence depends upon its participants doing so. Part III also explains that the United States is a, if not *the*, paradigmatic example of the modern nation-state. Bringing the entire discussion together, Part III concludes that the American political community demands of its participant just the type of self-orientation that any political community demands and that we must, therefore, reject the position of each of the scholars.

At this moment in the discussion, an essential gap in understanding remains. Is there any ground upon which we can say that the Christian or Jew who approaches his or her religious practice as a way of life is able to participate in the American practice of political life? Necessarily, the complete answer to this question requires a sustained inquiry, one that is beyond the bounds of this Article. Staying tied to this Article's more particular concern with the American professional practice of law, however, Part IV provides a final answer to the question with respect to this specific point of expression of the American practice of political life.

It does not take much to provide the answer. In the course of the previous discussion, Part III explains that, for the American political community, the practice of political life begins in the consciousness of the existence of the nation—We the People—and takes the form of the individual accepting its facticity, acknowledging its sovereignty, and living under its rule, completely

²⁰ For one scholar, this position is to an extent tentative. See Shaffer, *infra* note 39.

and constantly. Part III also explains that living under the People's rule means living under the rule of law. In light of this reality, whatever we might expect of the relationship between the organizing form of the American practice of political life and that of its various points of expression, it is surely true that there is a coincidence between the former and the organizing form of the professional practice of law. The two must cohere for the straightforward reason that the very purpose of the professional practice of law is to sustain the American practice of political life. It follows inescapably that the professional practice of law demands a particular turn of the self from its participant—toward We the People and its rule. Because the Christian or Jew who approaches his or her religious practice as a way of life cannot make this turn, taking up the professional practice of law is not possible for him or her.

In light of the argument presented in this Article, Part V concludes the discussion by raising the question that almost inevitably arises in the mind of the reader. To what extent does contemporary society remain dedicated to the American practice of political life? In raising this question, Part V notes the incongruence between the present day behavior in society and that reflective of a commitment to the practice. In particular, Part V highlights the apparent distancing from the practice that we find in the recent decision-making of the U.S. Supreme Court, the ultimate guardian of the practice, and the apparent rejection of any practice of political life at all that we find in the current behavior of the general population, with its reverence of "the market." Although only time can offer a definitive answer to the question presented, Part V does point out that the extant reverence of the market cannot last.

Perhaps obviously, the goal of this Article is to make a point that, in the opinion of the author, is worth making. The discourse that this Article presents achieves that goal. Even so, there is a characteristic about the discourse that should be noted. It is lean. Certainly, there is much more to say about each of the subject-matters that this Article addresses. Furthermore, doing so is of undeniable value to the project of understanding. Unfortunately, this Article is not the place for taking up that richer engagement.

I. THE CONCEPT OF CHRISTIAN AND JEWISH RELIGIOUS PRACTICE AS A WAY OF LIFE

For the Christian and Jew, the concept of religious practice as a way of life speaks to a distinct type of religious exercise. On the terms of the concept, religious practice is not simply an activity in which an individual engages on a regular, or even irregular, basis, as it is for many. Rather, it is a form of existence, a mode of being in the universe that surrounds oneself. To grasp

the Christian and Jew's concept of religious practice as a way of life, then, requires an appreciation of the mode of being that it represents.²¹

Such an appreciation begins with the recognition that the mode of being has two organizing elements. The first serves as its foundation. Consistent with this foundational character, this organizing element expresses an overarching perspective on life. As such, it addresses both the basic metaphysical question, as well as the linked existential question, that many in the West confront.²² Is there a subject who lies beyond and above the world, and in whom the world, and all that is within it, originates? And, in light of the answer to this question, how can one live a genuine and hopeful life?²³

For the individual who embraces the mode of being, the answer to the initial question of the source of all things is yes.²⁴ There is a Creator.²⁵ Furthermore, the answer is an unequivocal yes.²⁶ The truth of the Creator's facticity is something that he or she knows.²⁷ Of course, he or she is aware that others might not share in this conviction. But, in his or her eyes, this

21 Perhaps the most familiar example in Western culture of a practice that takes the form of a way of life is that of philosophy in the ancient West. For a discussion of the practice of philosophy as a way of life, see HADOT, *supra* note 2, at 264–76.

22 We can note here that the concept of religion that the West embraces does not track well in the East. For some initial suggestions of this point, see FLOOD, *supra* note 14, at 8 (noting that understanding the term “religion” strictly in terms of belief is inadequate); DAMIEN KEOWN, BUDDHISM: A VERY SHORT INTRODUCTION 3–4 (noting that Buddhism does not qualify as a “religion” in the conventional Western sense of the term).

23 For a comment on the basic human desire to live a genuine and hopeful life, at least in the context of philosophical thought in antiquity, see HADOT, *supra* note 2, at 101–02.

24 On theological consciousness, at least within the Christian tradition, see, for example, OTTO, *supra* note 3, at 173–74. Certainly, the concept of Christian or Jewish religious practice as way of life is consistent with the notion that a way of life always grounds itself in some transcendent norm. Considering this latter point, we can question whether a “desacralized” way of life is possible, or at least what we might mean by such an idea. On the “desacralized”—or profane—way of life, see ELIADE, *supra* note 2.

25 For a brief discussion of the concept of the Creator in the Judeo-Christian religious tradition, see, for example, JOHN H. HICK, PHILOSOPHY OF RELIGION 9 (4th ed., 1990).

26 There is a limit to this certainty. On the risk associated with religious practice in the Judeo-Christian religious tradition, if not religious practice more generally, see PAUL TILLICH, DYNAMICS OF FAITH 16–22 (1957). For a recent comment on this subject in the context of Christian religious practice, see T.M. LUHRMAN, WHEN GOD TALKS BACK: UNDERSTANDING THE AMERICAN EVANGELICAL RELATIONSHIP WITH GOD xi–xxv (2012).

27 At least within the Christian tradition, knowledge of the existence of the Creator arises experientially. That is, it is a function of a felt condition. See, e.g., OTTO, *supra* note 3, at 173–74; WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE 59, 64 (1902). Writing within this context, William James offers a useful analogy that helps capture the essence of the phenomenon of the individual's feeling of the reality of the Creator. As James describes it, the individual's experience in this regard parallels the lover's experience with respect to his or her beloved when the beloved is not physically present. In the latter circumstance, the lover remains pointedly aware of the beloved's facticity, despite the beloved's material absence. Unequivocally, he or she senses the beloved. The individual's feeling of the reality of the Creator is a similarly powerful and unambiguous perception of the “materially absent.” JAMES, *supra* note 27, at 72.

circumstance is of no real consequence, at least in terms of his or her thinking about first principles.²⁸ The reality is that he or she sees well, while these other individuals unfortunately do not.

Additionally, for him or her, the fact that there is a Creator makes apparent the solution to the related existential question. Rather evidently, to live a genuine and hopeful life requires that he or she accept, and not deny, the fact of the Creator's existence and, in turn, orient him- or herself, psychologically and behaviorally, in a manner that places him or her, as much as possible, in union with Him. Importantly, this requirement of the self is unqualified. It is only if he or she takes up this path that he or she will be able to live a genuine and hopeful life.²⁹ Otherwise, the living of that life is not possible, and his or her existence will be a false and lost one.

The second organizing element builds from the first and represents, broadly speaking, the manner in which an individual affirmatively lives. Unsurprisingly, for the individual who embraces the mode of being, the defining characteristic of that manner of living is just the taking up of the identified path by which to live a genuine and hopeful life.³⁰ Moreover, as readily intelligible as the first step in that path—his or her actual acceptance of the Creator's existence—is, if we turn to the orientation of the self that accompanies that acceptance and ask what it looks like, we find that it has an inevitable look. Given the inherent nature of the Creator as he who represents the right and the true, it takes the form of an acknowledgement of the Creator

²⁸ This circumstance does have consequences for the Christian with respect to his or her duty to "spread the Word."

²⁹ Beyond satisfaction of the basic human desire to live a genuine and hopeful life, and the sense of "completeness" that accompanies it, the taking up of this path has other consequences for the individual. William James, for example, speaks of the state of assurance that comes with embracing the reality of the divine. JAMES, *supra* note 27, at 288. Not unrelatedly, within the Christian tradition, the taking up of this path is the route to salvation for the individual. For a brief introduction to the concept of salvation in Christianity, see WOODHEAD, *supra* note 1, at 40–45.

³⁰ Prayer is central to the embrace of this path. See generally PHILIP ZALESKI & CAROL ZALESKI, PRAYER: A HISTORY (2005) [hereinafter ZALESKI & ZALESKI]. See also THE PHENOMENOLOGY OF PRAYER (Bruce E. Benson & Norman Wirzba eds., 2005); FRIEDRICH HEILER, PRAYER: A STUDY IN THE HISTORY AND PSYCHOLOGY OF RELIGION (Samuel McComb ed. & trans., 1932). For some readings on prayer within the Christian tradition, see ANTHONY BLOOM, BEGINNING TO PRAY (1970); HANS URS VON BALTHASAR, PRAYER (A.V. Littledale trans., Sheed & Ward 1961) (1955). For an introduction to prayer within the Jewish tradition, see SOLOMON, *supra* note 1, at 70–74. For a further reading, see RABBI ADIN STEINSALTZ, A GUIDE TO JEWISH PRAYER (2000). For those who are new to the concept of prayer, both Zaleski & Zaleski and James, among others, offer useful initial descriptions. See ZALESKI & ZALESKI, *supra* note 30, at 4 (describing prayer as "applied religion"); JAMES, *supra* note 27, at 416 (describing prayer as "religion in act"). Additionally, James usefully speaks to the credibility of prayer to the believer. JAMES, *supra* note 27, at 415–17, 428. Finally, prayer is both a state of being in which communion with the Creator takes place and the instrument through which the individual realizes that communion. On the former, see, for example, ZALESKI & ZALESKI, *supra* note 30, at 6 ("Prayer is a state of being"). On the latter, see JAMES, *supra* note 27, at 416 (defining prayer as "the very movement itself of the soul, putting itself in a personal relation of contact with the mysterious power of which it feels its presence").

as his or her sovereign and, correspondingly, a subjection of him- or herself to the Creator's rule.

Immediately, an elaboration on this description is necessary. As much as the defining characteristic of the manner of living is, for him or her, the taking up of the identified path by which to live the genuine and hopeful life, it is, more precisely, the doing so with the whole of him- or herself,³¹ all of the time. The manner of living has this completeness and continuousness of self-engagement about it, because such completeness and continuousness are the necessary conditions for him or her to be a Christian or a Jew. By definition, without the engagement of the entirety of him- or herself, he or she is not being such a person. Similarly, the moment he or she fails to engage at all, he or she is again not being that person.³² Describing this state of affairs colloquially, we might say that, with respect to the requisite engagement of him- or herself, it goes "all the way down," and is "always on."³³

Quite naturally, for the individual who embraces the mode of being, the commitment to it has implications for his or her relationship with the "other" (the "other" understood not simply as an individual, but ultimately as the political community to which the individual belongs and of which the individual is a representative).³⁴ Most significantly, the demand that he or she takes up the identified path by which to live the genuine and hopeful life, and does so with complete and constant self-engagement, maintains itself to the fullest extent in that relationship. Completeness and constancy mean completeness and constancy. Accordingly, in the carrying on of the relationship, he or she can never separate him- or herself from this existential

³¹ On the complete character of this engagement of the self within the Christian tradition, see, for example, HICK, *supra* note 25, at 12. See also TILLICH, *supra* note 26, at 4–8, 105–17.

³² From the scholar's perspective, we can recognize a point of contact here with the famous maxim of existential philosophy that "existence precedes essence." For some introductory readings on existential philosophy, see BASIC WRITINGS OF EXISTENTIALISM (Gordon Marino ed., 2004).

³³ Corresponding to the complete character of the Creator's rule is the totalizing character of prayer, at least within the Christian tradition. On the latter, see, for example, THE PHENOMENOLOGY OF PRAYER 2 (Bruce E. Benson & Norman Wirzba eds., 2005) ("All of our capacities—reason, speech, volition, affection, and action—must be molded by the activity of prayer. Moreover, as prayer becomes central in our lives, all that we do becomes a part of prayer."). See also, ZALESKI & ZALESKI, *supra* note 30, at 24 ("one might say that while in Eden (Adam and Eve) lived in a state of constant prayer").

³⁴ In both the Christian and Jewish religious traditions, the Christian and Jew, respectively, are him- or herself members of a larger community. The Christian often refers to this community as the Church. For some statements of this concept of the Church, see DIARMAID MACCULLOCH, CHRISTIANITY, THE FIRST THREE THOUSAND YEARS 101 (2009); HANS KÜNG, ON BEING A CHRISTIAN 285–86 (Edward Quinn trans., 1976). Of note, one of the central scholars of the religious lawyering project explicitly invokes the idea of membership in a distinct community—one that contrasts with the other. See Shaffer, *supra* note 5, at 201 ("Christians are citizens of another *patria*, one that identifies them as strangers and aliens in this and all other nation-states through which they pass on their pilgrim journey" (quoting Michael J. Baxter, *Review Essay: The Non-Catholic Character of the "Public Church,"* 11 MOD. THEOLOGY, 243, 254 (1995))). The Jew commonly refers to him- or herself as a member of a people, to which the term "Israel" is at least one reference.

demand, nor can he or she ever compromise it. For example, he or she cannot stop being a Christian or Jew at certain places or times. Equally, he or she cannot balance the psychological and behavioral requirements of the mode of being with those that the other would place on him or her.³⁵

At first glance, the reality of this implication suggests an inevitable limitation for the individual who embraces the mode of being on his or her relationship with the other—and, more precisely, on the degree to which he or she can engage the other in the course of their relationship. Specifically, the demand to take up the identified path by which to live the genuine and hopeful life, and to do so completely and constantly, appears to preclude his or her participation in the practice of political life of the other, at least in any rich sense. After all, presumably every political community maintains an overarching perspective on existence, and an associated manner of living, that at least broadly parallels that which he or she does—that consists in some measure of a positive answer to the metaphysical question, a corresponding solution to the existential question, and a manner of living that embodies that solution.³⁶ Given this state of affairs, it is difficult to imagine a circumstance in which the existential demand to which he or she is subject lies in harmony with that to which the participant in the other's practice of political life is subject (whatever the particular nature of the latter might be).³⁷ Yet, just such harmony is necessary for him or her to engage in the other's practice of political life. Absent such harmony, he or she will have to stand apart from, if not against, that practice.³⁸

As we turn our attention to those scholars who have moved the work on religious lawyering forward across time, an initial question immediately presents itself. Given the nature of each of these scholar's inquiry—as one that concerns a Christian or Jew who at once conceptualizes his or her

³⁵ See, e.g., HICK, *supra* note 25, at 12 (“The divine commands come with the accent of absolute and unconditional claim, a claim that may not be set in the balance with any other interest whatever, not even life itself.”).

³⁶ This point is as old as the teachings of Plato. See PLATO, THE REPUBLIC OF PLATO 414c–415d (Allan Bloom trans., Basic Books 1968) (n.d.) (describing the “noble lie”).

³⁷ In this context, it is perhaps worth noting with respect to the Christian that the idea of the separation of church and state is an idea that is inherent in Christianity. Bernard Lewis has offered a relatively recent expression of this point. See BERNARD LEWIS, WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 96 (2002) (“Secularism in the modern political meaning—the idea that religion and political authority, church and state are different, and can or should be separated—is, in a profound sense, Christian.”).

³⁸ The Christian tradition conceptualizes the notion of standing against the other as “bearing witness.” For some readings on this concept, see JOHN HOWARD YODER, THE CHRISTIAN WITNESS TO THE STATE (1964); HANS ÜRS VON BALTHASAR, THE MOMENT OF CHRISTIAN WITNESS (Richard Beckley trans., 1969); ROBERT MCAFEE BROWN, SAYING YES AND SAYING NO: ON RENDERING TO GOD AND CAESAR (1986). For an exploration of the obligation to bear witness, as distinct from embracing membership in the Church, see SIMONE WEIL, LETTER TO A PRIEST (A.F. Wills trans., 1953); SIMONE WEIL, WAITING FOR GOD (Emma Craufurd trans., 1951).

religious practice as a way of life and participates in the practice of political life of another—how does each legitimate his project in the first instance? That is, how does each insulate himself from the seemingly evident fact that the existential demand to which the Christian or Jew is subject precludes him or her from participating in the form of engagement that is the focus of the scholar's attention?

As it happens, despite the presumed lack of viability of his project, each of the scholars surprisingly arrives at an alternate place in his thinking about whether the Christian or Jew can participate in the practice of political life of the other, at least where the other of concern is the United States. In the mind of each, the apparent fact of preclusion on such participation does not hold in this circumstance; rather, an opposite state of affairs does. Notwithstanding the existential demands to which the Christian or Jew is subject, he or she is able to participate in the practice of political life of this country, at least as a general matter.³⁹

II. LEGITIMIZING THE INQUIRY INTO THE RELIGIOUS LAWYER

If we ask why each of these scholars arrives at a rather unexpected place in his thinking about the legitimacy of his project, the answer lies in the understanding that each possess about the type of political community that defines the United States. Although the fact that each possesses this understanding is largely implicit in his work, it is evident. Not unrelatedly, it represents a viewpoint that will resonate with many in academia today. It is that the United States is a liberal political community.⁴⁰

For each of these scholars, to say that a political community is liberal is to say, first and foremost, that the organizing elements of its practice of political life do not conform to conventional expectations. That is, contrary to what we might presume, a liberal political community does not embrace

³⁹ For Thomas Shaffer, the maintenance of this position is at least to some extent tentative. That is, Shaffer acknowledges (and at times emphasizes) the tension that exists within his work. Ultimately though, he moves past the tension and concludes that an individual such as himself can engage in the professional practice of law in this country. For one example of his expression of the tension, see THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 32 (1981) [hereinafter, SHAFFER, ON BEING A CHRISTIAN].

⁴⁰ For an expression of Shaffer's orientation toward the American political community as liberal, see Thomas L. Shaffer, *The Tension Between Law in America and the Religious Tradition*, in THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION—A TRIBUTE TO HAROLD J. BERMAN 315–335 (John Witte, Jr. & Frank S. Alexander eds., 1988) [hereinafter Shaffer, *The Tension*]. Perhaps because Allegretti's work is so directly focused on the professional practice of law, his orientation toward the American political community as liberal is mostly implicit in his book. For an expression of Pearce's orientation toward the American political community as liberal, see Russell Pearce & Amelia Uelman, *Religious Lawyering in a Liberal Democracy: A Challenge and an Invitation*, 55 CASE W. RES. L. REV. 127 (2004).

an overarching perspective on existence and an associated manner of living. With respect to the former, certainly it does not maintain a positive answer to the metaphysical question. For it, there is no Creator or similar divine figure who lies beyond and above the world and in whom the world, and all that is within it, originates. Equally, there exists no type of deity who possesses such characteristics in a more limited, but nonetheless relevant, fashion.⁴¹ Moreover, because a liberal political community fails in this regard, it also fails to maintain a solution to the existential question. Absent a “god” whose facticity the participant in its practice of political life is to accept and toward whom he or she must orient him- or herself as much as possible, it presents to him or her no identified path to take up at all and, thus, no psychological and behavioral course of action to uphold. Of course, it follows from the fact that a liberal political community fails to embrace an overarching perspective on existence that it maintains no distinct manner of living. Without the internalization of a solution to the existential question, there is nothing for the participant in its practice of political life to embody.⁴²

Defying conventional expectations as they do, the organizing elements of its practice of political life are ultimately, for each of these scholars, not much of a set of organizing elements at all. Turning away from the embrace of an overarching perspective on existence and an associated manner of living, a liberal political community presents itself simply as one without any rich constituent features, a state of affairs that has real consequences for the nature of its practice of political life. Precisely because a liberal political community lacks any rich constituent features, its practice of political life is a generally open exercise in which the participant is to decide for him- or herself about the nature of the ultimate order of things and about the solution to the existential question, and thus is the one who defines for him- or herself any manner of living to which he or she might commit.⁴³

Obviously, with the understanding that the American political community is a liberal one in the sense just described, each of the scholars is

41 Thomas Shaffer alludes to this point in a notation about American law’s lack of character as an idol. Shaffer, *The Tension*, *supra* note 40, at 318 n.10. See also THOMAS L. SHAFFER & MARY M. SHAFFER, *AMERICAN LAWYERS AND THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION* 205–06 (1991) [hereinafter SHAFFER & SHAFFER].

42 With respect to liberal theory, one might consider here Rawls’ claim to be political, not metaphysical. John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223 (1985).

43 Each of the scholars indirectly references this idea of the practice of political life as an open exercise in their conceptualization of law in the United States as a governing instrument and nothing more rich. Shaffer expresses this viewpoint in his appeal to a Marxist analysis of law. See, e.g., Shaffer, *Faith Tends to Subvert*, *supra* note 8, at 1089. Both Allegretti and Pearce express this viewpoint implicitly in their work. To be clear, the conceptualization of law in the United States as a governing instrument is the commonplace position in the American legal academy. For a brief discussion of this point, see Anand, *supra* note 9, at 737, 739 n.6.

able to justify his thinking on the subject of the Christian or Jew's participation in the American practice of political life. Necessarily, the existential demands to which a Christian or Jew is subject lie in harmony with those to which the participant in the practice of political life of the United States is subject, because the latter are self-defined.⁴⁴ Accordingly, the Christian or Jew is free to adhere to the former without manifesting any tension associated with adherence to the latter—to be the religious person that he or she is and simultaneously “be” a participant.⁴⁵

It is with this justification for his thinking in mind that each of the scholars pursues his inquiry. Perhaps inevitably, any sustained inquiry that focuses on what the religious practice of a Christian or Jew (who conceptualizes it as a way of life) looks like involves a conceptualization of the religious practice that moves beyond its organizing form and into its deeper substance. At the same time, any sustained inquiry into how a Christian or Jew might participate in the practice of political life of another presumably involves a conceptualization of the political practice that entails a similar move. Understandably, then, the inquiry that each of the scholars pursues has this progression about it, with the progression rooted in his own ideas about the two matters.

To briefly summarize the work, in the late 1970s and early 1980s, Thomas Shaffer gave birth to the subject of religious lawyering with his book *On Being a Christian and a Lawyer*⁴⁶ and related scholarship,⁴⁷ and continued his inquiry for at least two decades.⁴⁸ Although Shaffer often refers to a “Christian” in his work, he is, more specifically, a Catholic. Consistent with the substantive terms of his Catholicism, he conceptualizes his religious practice as, in pertinent part, that of being a religious minister.⁴⁹ Importantly, he is a Catholic who has strong sympathy for the radical, counter-cultural

44 Within the terms of liberalism, this point is expressed in the position that the individual is sovereign. The historical roots of liberalism include John Locke and Immanuel Kant, and continue through John Rawls into contemporary times. For a sampling of the relevant literature, see generally, JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (H.J. Paton trans., Harper & Row 1964) (1785); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For a discussion of liberalism, emphasizing its ideological character, see Anand, *supra* note 9, at 737, 753–60.

45 Cf. Pearce & Uelman, *supra* note 40, at 127, 158 (“[A]s a practical matter, the United States continues as a liberal democracy only because the vast majority of religious Americans find liberal democratic values consonant with their religious values.”).

46 SHAFFER, *ON BEING A CHRISTIAN*, *supra* note 39.

47 See, e.g., Thomas Shaffer, *Advocacy as Moral Discourse*, 57 N.C. L. REV. 647 (1979).

48 See, e.g., Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Thomas Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988); SHAFFER & SHAFFER *supra* note 41; Shaffer, *Faith Tends to Subvert*, *supra* note 8; Shaffer, *Should a Christian Lawyer Sign Up*, *supra* note 8.

49 Shaffer, *On Religious Legal Ethics*, *supra* note 6.

heritage of Christianity and those religious communities that share in that heritage (e.g., early Christians, Anabaptists, liberation theologians).⁵⁰ Correspondingly, in his thinking about the practice of political life in this country, he moves beyond a conceptualization of it in terms of its organizing form and embraces a Marxist analysis of it.⁵¹ Thus, as much as he sees it as an open exercise for the individual, he sees it more deeply as an exercise rooted in, and supportive of, an economic ruling class, a state of affairs that in turn is, for him, unjust, and ultimately unacceptable.⁵² Combining his understanding of his religious practice with that of the American practice of political life, Shaffer arrives at a natural place in his thought about what it means to be a religious lawyer. To be so is to be a religious minister who seeks to disturb prevailing political sensibilities and undermine the extant practice of political life.⁵³ Seeing the religious lawyer in this way, he challenges prevailing professional practice in a variety of ways—for example, to rethink what justice looks like, and to act in a manner that goes against conventional understandings of ethical professional practice.⁵⁴

In the 1990s, Joseph Allegretti gave voice to a new generation with his project *A Lawyer's Calling: Christian Faith and Legal Practice*.⁵⁵ As with Shaffer, although he often refers to a “Christian” in his work, he is a Catholic. Consistent with the substantive terms of his Catholicism, he similarly conceptualizes his religious practice as, in pertinent part, that of being a religious minister.⁵⁶ Yet, while he too has sympathy for the radical, counter-cultural heritage of Christianity, his religious sensibilities ultimately lie in a different direction than those of Shaffer. Turning away from the embrace of that heritage, Allegretti finds his home in a more moderate tradition, one that highlights the transformative quality of faith in Christ and, in light of that transformative quality, embraces a model of Christian being that emphasizes

⁵⁰ See, e.g., Shaffer, *Faith Tends to Subvert*, *supra* note 8. For a brief introduction to early Christian history, see JOHNSON, *supra* note 1, at 43–63. For a well-known treatment of certain aspects of early Christian thought, see ELAINE PAGELS, *ADAM, EVE, AND THE SERPENT* (1988). For a discussion of liberation theology, see, for example, GUSTAVO GUTIÉRREZ, *A THEOLOGY OF LIBERATION* (1973).

⁵¹ For some readings of Marx, see *THE MARX-ENGELS READER* (Robert C. Tucker ed., 2d ed. 1978). For some specific discussions of Marx's orientation toward the state and the law, see HANS Kelsen, *THE COMMUNIST THEORY OF LAW* 1–50 (Fred B. Rothman & Co. 1998) (1955); CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 143–53 (2d ed. 1963).

⁵² See, e.g., Shaffer, *Faith Tends to Subvert*, *supra* note 8.

⁵³ *Id.*; see also Shaffer, *On Religious Legal Ethics*, *supra* note 6.

⁵⁴ See, e.g., Shaffer, *Should a Christian Lawyer Sign Up*, *supra* note 8; Shaffer, *supra* note 5; Shaffer, *Faith Tends to Subvert*, *supra* note 8.

⁵⁵ See ALLEGRETTI, *supra* note 5.

⁵⁶ *Id.*

direct engagement with the other.⁵⁷ Consistent with this religious sensibility, Allegretti does not turn toward Marxist analysis in his deeper thinking about the American practice of political life. Rather, he accepts the practice on the terms in which it presents itself. Coupling his understanding of his religious practice together with that of the American practice of political life, he comprehends the religious lawyer in modest, straightforward terms, namely as a religious minister who engages in god's calling to make over the status quo.⁵⁸ Accordingly, he promotes a vision of professional practice that emphasizes challenging the client in certain spaces (e.g., encouraging the client to engage in moral reflection and at times saying no to the client) and approaching conflict in terms of healing and peacemaking.⁵⁹

Building upon these, as well as others, writings, Russell Pearce has continued to push the scholarship on religious lawyering forward into today.⁶⁰ Pearce is a Reformed Jew.⁶¹ As such, he conceptualizes his religious practice in individualized terms, deciding its nature for himself.⁶² In line with this religious sensibility, as he moves beyond the conceptualization of the American practice of political life in terms of its organizing form, he does not see it in essentially conflicting terms, as does Shaffer and Allegretti. Instead, he sees the practice as an expression of value pluralism and, correspondingly, as a politico-existential space within which the religious individual is in significant measure at home.⁶³ Taking his understanding of his religious practice with this one of the American practice of political life, he models the religious lawyer in an individualized and self-affirming

⁵⁷ ALLEGRETTI, *supra* note 5, at 7–23. In his appeal to the transformative quality of faith, Allegretti relies on the well-known writing of H. Richard Niebuhr. See H. RICHARD NIEBUHR, *CHRIST AND CULTURE* (1951).

⁵⁸ See generally ALLEGRETTI, *supra* note 5.

⁵⁹ ALLEGRETTI, *supra* note 5, at 51–109. In the context of Allegretti's views, it is perhaps worth noting the existence of Christian alternative dispute resolution services. See, e.g., *Peacemaker Training*, PEACEMAKER MINISTRIES, <https://www.peacemakerministries.org/peacemaker-ministries-training?hsLang=en>; *Christian Conciliation Mediation*, CHRISTIAN LEGAL SOCIETY, <https://www.christianlegalsociety.org/resources/christian-conciliation>.

⁶⁰ For a sampling of Russell Pearce's writing, see Pearce, *supra* note 5; Pearce, *supra* note 7; Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1992–93) [hereinafter Pearce, *Jewish Lawyering*]; Russell G. Pearce, *Learning From the Unpleasant Truths of Interfaith Conversations: William Stringfellow's Lessons for the Jewish Lawyer*, 39 CATH. L. REV. 255 (1998); Russell G. Pearce, *Faith and the Lawyer's Practice*, 75 ST. JOHN'S L. REV. 277 (2001); Pearce & Uelmen, *supra* note 40; Russell G. Pearce, *Emancipation to Assimilation: Is Secular Liberalism Still Good for Jewish Lawyers?*, in *JEWS AND THE LAW* (Ari Mermelstein et al. eds., 2014); Russell G. Pearce, *A Jewish Perspective on Tom Shaffer: Zecher Tzadik Livracha (May the Memory of the Righteous be a Blessing)*, 10 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS LLIV (2020).

⁶¹ As noted earlier in note 5, a second important voice of Pearce's generation, whose work has significant overlap with that of Pearce, is Robert K. Vischer. Vischer writes from a generalized Christian perspective, although he himself is a Catholic.

⁶² Pearce, *supra* note 5, at 1267.

⁶³ Pearce & Uelmen, *supra* note 40.

manner, that is, as the individual who engages in a straightforward continuation of the self-defined practice of his or her religious life within this particular vocation. Thus, he embraces an understanding of professional practice as religious practice, including, where appropriate, a promotion of religious behavior that conflicts with extant ethical norms.⁶⁴

Of course, with respect to the work of each of the scholars, the question remains whether the reasoning upon which each relies to legitimate his inquiry is persuasive. How should we think about the argument that each of the scholars offers? Has each adequately addressed the initial question presented? Has he captured the reality of the type of political community that the United States represents? In turn, has he captured the reality of the character of its practice of political life? As we begin to reflect on the reasoning offered, we can already sense that something is amiss. We now turn to an examination of each's reasoning, and an explanation of what the error resident in it is.

III. THE LESSON OF HISTORY

As previously indicated, each of the scholars grounds the legitimacy of his project in a conception of the American political community as fundamentally liberal. That each scholar has this conception is understandable. Undoubtedly, the American political community is liberal in the sense that it is dedicated to the practice of liberal politics.⁶⁵ Furthermore, in many respects, liberal politics does place the individual at the heart of the political order. Consequently, each scholar's analysis of the organizing elements of the American practice of political life has an explicable logic about it, and his emphasis on the individual community member's freedom to decide for him- or herself about basic matters of existence has significant currency.

There is, then, a power that inheres in the argument that each of the scholars offers. Yet, despite this power, the argument ultimately lacks force. Although the American political community is liberal in the sense that it is dedicated to the practice of liberal politics, that dedication, in all of its normative depth, does not speak to the type of political community that defines this country, and in turn to the character of its practice of political life, in the first instance. The boundaries of the former do not extend to the subject of the latter. To come to terms with this reality, we need only look to

⁶⁴ Pearce, *supra* note 7 (arguing for the propriety of disclosing a client confidence, where prohibited by the ethics codes, to save a life).

⁶⁵ For a discussion of the ideology of liberalism, and its relation to the American legal order, see Anand, *supra* note 9, at 752–66.

history, and what it tells us about political community in the modern West and, in that context, about political community in the United States.⁶⁶

A. Political Community in the Modern West

At least in the West, history is approached in terms of ages, eras, and other markers of time. Readily familiar examples include the broad periods of the Middle Ages and the Age of Enlightenment, as well as the less extended period of time of the Cold War.⁶⁷ Within the framework of this approach to human experience, it is generally acknowledged that a distinct type of political community began to arise in the late 18th century and by approximately the middle of the 19th century defined the Western, and in time the world, political order, a state of affairs that continues into today. That distinct type of political community is the nation-state.⁶⁸

As is typical of the emergence of a new form of political community, the rise of the nation-state in the late 18th and 19th century was not a random happening. Rather, it was at least in part a product of history itself.⁶⁹ Scholars in a variety of disciplines have often remarked on this fact and, in turn, highlighted a central aspect of the extant historical condition that made possible the birth of the nation-state, an aspect that is not without relevance to the discussion at hand: the general decline in the importance of religious belief in Western society in the late pre-modern and early modern era.⁷⁰ As the logic of history dictates, this decline in the importance of religious belief in Western society left a void in it with respect to the manner of its erotic expression. It is with an awareness of this historical condition within which the nation-state arose that an explanation of its concept usefully takes place.

⁶⁶ For a brief introduction to the subject of history, one might read JOHN H. ARNOLD, *HISTORY: A VERY SHORT INTRODUCTION* (2000). For a series of reflections on the subject of history by historians, see FRITZ STERN, *THE VARIETIES OF HISTORY: FROM VOLTAIRE TO THE PRESENT* (1st ed. 1956). For one set of deeper reflections on certain aspects of the subject, see ERIC HOBBSBAWM, *ON HISTORY* (1998).

⁶⁷ For a basic overview of modern Western history, see R. R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* (8th ed. 1995).

⁶⁸ For some readings on the linked concepts of nations, nationalism, and nation-states, see E. J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* (2d ed. 1990); BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1991); HANS KOHN, *NATIONALISM: ITS MEANING AND HISTORY* (1965) [hereinafter KOHN, *NATIONALISM*]; HANS KOHN, *THE IDEA OF NATIONALISM* (Transaction Publishers ed., 2005) (1944) [hereinafter KOHN, *THE IDEA OF NATIONALISM*]; CARLTON J. H. HAYES, *THE HISTORICAL EVOLUTION OF MODERN NATIONALISM* (1st ed. 1931).

⁶⁹ For perhaps a starting point for thinking about “causation” in history, see EDWARD HALLETT CARR, *WHAT IS HISTORY?* 113–43 (1st ed. 1961).

⁷⁰ See, e.g., LOUIS L. SNYDER, *THE MEANING OF NATIONALISM* 22–24 (1954); ANDERSON, *supra* note 68, at 9–19; see also, CONOR CRUISE O’BRIEN, *GOD LAND: REFLECTIONS ON RELIGION AND NATIONALISM* 49 (1988); HAYES, *supra* note 68, at 1–12. Cf. THE ESSENTIAL REINHOLD NIEBUHR, *SELECTED ESSAYS AND ADDRESSES* 79–83 (1st ed. 1986) (rejecting secularism as secularism *per se*).

Such an explanation begins with a description of the elemental concept of the nation.⁷¹ At least as an initial matter, we can describe this concept in relatively straightforward terms. The nation is the subject around which the modern practice of political life has organized itself.⁷² Importantly, as we might expect in light of the historical condition within which the nation-state arose, the nation, as this subject, has that particular quality about it that is responsive to the human needs of its time.⁷³ Speaking to the erotic void that the general decline in the importance of religious belief left within Western society, the nation is a transcendent subject. It lies above and beyond the world, and not in it *per se*.

Scholars have long noted this fact of the transcendent quality of the nation. Indeed, in one the most influential early works on the subject, Ernst Renan made just this point in his famous 1882 essay “What is a nation?”⁷⁴ Confronting the question that the title of his essay presents, Renan boldly defined the nation as a “spiritual principle” (perhaps a slightly cumbersome term for the contemporary mind, but an apt one nonetheless).⁷⁵ Moving forward in time, other scholars, including theologians, similarly recognized this fact of the transcendent quality of the nation when they spoke of it in parallel terms in the 20th century.⁷⁶

⁷¹ As the fact of the birth of the nation-state in the late 18th century suggests, the concept of the nation, at least as it has been deployed in reference to modern times, originates in, and is inextricably linked to, the concept of the nation-state. HOBBSAWM, *supra* note 68, at 9–10. In this respect, the concept of the nation, at least as it has been deployed in reference to modern times, is a historical artifact and stands on its own terms. Correspondingly, it should not be confused with uses of the concept when speaking of political communities that pre-date the late 18th century. These latter uses of the concept are of a different category, whatever the propriety or impropriety of such use. *Id.*

⁷² See, e.g., R. R. PALMER & JOEL COLTON, *supra* note 67, at 543–44. See generally HOBBSAWM, *supra* note 68.

⁷³ To be clear, this responsiveness is, more specifically, with respect to the practice of political life. Political life represents one dimension of human experience, an experience that is inherently conflicted in character. See generally Anand, *supra* note 9.

⁷⁴ ERNST RENAN, WHAT IS A NATION?, in NATION AND NARRATION 8–22 (Homi K. Bhabha ed., 1990).

⁷⁵ *Id.* at 19.

⁷⁶ For some expressions of the transcendent quality of the nation by theologians, see TILlich, *supra* note 26, at 1–16 (describing nationalism as “idolatrous faith”); JOHN HOWARD YODER, THE CHRISTIAN WITNESS TO THE STATE 15 (1964) (describing the nation as an idol); ROBERT MCAFEE BROWN, SAYING YES AND SAYING NO: ON RENDERING TO GOD AND CAESAR 13 (1986) (describing nationalism as a “contemporary false god”). For some expressions of the transcendent quality of the nation by non-theologians, see FROM MAX WEBER: ESSAYS IN SOCIOLOGY 176 (H. H. Gerth & C. Wright Mills eds., 1946) (describing the nation as “a community of sentiment”); KOHN, NATIONALISM, *supra* note 68, at 10 (describing nationalism as “a living and active corporate will”). Finally, it is worth observing that Russell Pearce has commented on the power of nationalism, stating that nationalism, as an ideology, may exert as powerful a hold on the individual as religious belief. Pearce, *Jewish Lawyering*, *supra* note 60, at 1613.

As the transcendent subject around which the modern practice of political life has organized itself, the nation naturally has a specific identity associated with it. It is a particular transcendent subject, and not just any such subject (whatever such a notion might mean). This particularity of identity is represented in the concept of a people.

That a people is a transcendent subject already suggests that its essence is more than simply a collection of individuals, as conventional understanding might maintain. Certainly, a people involves a collection of individuals. This collection of individuals, however, is not a generic set of individuals; rather, it consists, more precisely, of a set of individuals who consciously understand themselves to share some point, or points, of unity and, thus, for whom there exists a common consciousness. Moreover, in and through this common consciousness, this collection of individuals realizes itself as a single body that is greater than the sum total of the collection of individuals. Necessarily, then, this single body lies outside of the ordinary world. Residing there as it does, it possesses an inherent sovereignty, which it exercises through an inherent will.⁷⁷ And, it exercises this sovereignty over a distinct group of persons, namely each of the individuals who helps constitute the single body, in his or her particularity. In sum, moving beyond the conventional understanding of some, a people is a single, numinous body—a transcendent subject—that a collection of individuals helps constitute and that possesses an inherent sovereignty over each of those individuals, in his or her unique personhood.

Ultimately, the concept of the nation speaks to the transcendent subject around which the modern practice of political life has organized itself and that is, more specifically, a people.⁷⁸ With this understanding of the concept in hand, we can continue the explanation of the concept of the nation-state with a turn to the elemental concept of the state. In the modern West, as the hybrid nature of the term nation-state indicates, the concept of the state is inextricably linked to the concept of the nation.⁷⁹ We cannot explain the concept of the state in isolation from the concept of the nation. We can only talk about it in terms of its relationship to the latter. Critically, the nature of that relationship is one of equation.⁸⁰

⁷⁷ The contemporary concept of a people has its historical roots, at least in part, in Rousseau. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (G.D.H. Cole trans., E.P. Dutton & Co. ed., 1913) (1762).

⁷⁸ For a treatment of the concept “people,” in its equation with the concept of the “nation,” consider HOBBSAWM, *supra* note 68, at 18–23.

⁷⁹ In the history of the West, the conceptualization of the political community—and, relatedly, that of law—have been variable ones. For an introduction to the history of these conceptualizations, see FRIEDRICH, *supra* note 51.

⁸⁰ HOBBSAWM, *supra* note 68, at 18–19.

Put succinctly, in the modern West, the concept of the state and the concept of the nation denote coincident subjects. No essential distinction between the state and the nation obtains. They share the same substantive space. In the modern West, then, the state is the nation, understood again as the transcendent subject around which the modern practice of political life has organized itself and that is, more specifically, a people.⁸¹ (Accordingly, the state is also a people.)⁸²

In light of this understanding of the concept of the state, we can now turn to a more direct discussion the concept of the nation-state, and usefully begin that discussion with a definition: a nation-state is a type of political community in which the nation *qua* people *qua* state is the transcendent subject around which the political community organizes its practice of political life.⁸³ To be clear, the statement of this definition is the beginning of the discussion, as there is a bit more about the concept of the nation-state to address in order to have a basic account of it. In particular, we need to address the subject of the conditions under which the political community of the nation-state arises.

As alluded to in the previous discussion, the transcendent subject that is the nation/people/state is not a transcendent subject in the conventional Western sense of the term. There is no real sense in which it IS. Rather, its origin lies in a distinct domain. Specifically, the nation/people/state is a construction of the human being, and more precisely, of the human imagination.⁸⁴ This distinct quality of the nation/people/state, which demands explicit acknowledgment, points directly to the first of the conditions under which the political community of the nation-state arises. It arises only to the extent that its members in fact imagine the nation/people/state into existence.

⁸¹ On the transcendent character of the state, see M. B. FOSTER, *THE POLITICAL PHILOSOPHIES OF PLATO AND HEGEL* 1–27 (1935).

⁸² HOBBSBAWM, *supra* note 68, at 18–19 (defining the nation as “the body of citizens whose collective sovereignty constituted them a state which was their political expression”).

⁸³ So defined, we can enhance the intelligibility of the concept of the nation-state by juxtaposing the type of political community it represents with other types of political communities with which we are historically familiar. For example, the nation-state represents a type of political community that stands in contrast to the fifteenth and sixteenth-century monarchy, in which the respective transcendent subject lay in the body of the king. See ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957).

⁸⁴ ANDERSON, *supra* note 68, at 5–6. That the imaginative character of the nation/people/state is rooted in the collective consciousness of the individuals who imagine its existence raises a point about the extent to which we can comment on the minds of individuals in this regard. Eric Hobsbawm offers useful words on this subject when he writes that “[w]e know too little about what went on, or for that matter what still goes on, in the minds of most relatively inarticulate men and women, to speak with any confidence about their thoughts and feelings towards the nationalities and nation-states which claim their loyalties.” HOBBSBAWM, *supra* note 68, at 78. Additionally, Ernst Renan famously commented on the imaginative act of construction and the forgetfulness that it entails. RENAN, *supra* note 74, at 11 (“Forgetting, I would even go so far as to say historical error, is a crucial factor in the creation of a nation . . .”).

Importantly, in engaging in this imaginative act of creation, the members of the political community simultaneously engage in a second such act, which is that of the creation of a norm of being for themselves. To make manifest the nation/people/state is, at the same time, to make manifest an overarching perspective on life.⁸⁵ For the members of the political community, with respect to the basic metaphysical question, the answer now is that there is a nation/people/state. On the linked existential question, the solution to the matter of how to live a genuine and hopeful life is to accept the facticity of the nation/people/state and orient themselves in a manner that places themselves, as much as possible, in union with it.⁸⁶

The second condition under which the political community of the nation-state arises follows naturally from the first. It arises only to the extent that its members, having engaged in the twin imaginative acts of creation, take up the practice of political life associated therewith. Unsurprisingly, what it means to do so is to take up the identified path by which to live the genuine and hopeful life, which involves, as indicated, affirmatively accepting the facticity of the nation/people/state and, in turn, acknowledging its sovereignty and subjecting themselves to its rule.⁸⁷ It also involves doing so with the whole of the self, all of the time.⁸⁸ If the members of the political community fail to fulfill this existential demand—if they fail to *be* members of the political community—the political community of the nation-state does not manifest itself.⁸⁹

⁸⁵ On the limits of this perspective to the political dimension of experience, see *supra* note 73.

⁸⁶ Cf. O'BRIEN, *supra* note 70, at 40 ("It seems impossible to conceive of organized society without nationalism, and even without holy nationalism, since any nationalism that failed to inspire reverence could not be an effective bonding force.").

⁸⁷ Cf. PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 185 (1997) ("The faith of citizens under a democratic rule of law includes the belief that subordination to the authority of the state is simultaneously a free expression of the self.").

⁸⁸ See, e.g., KOHN, THE IDEA OF NATIONALISM, *supra* note 68, at 13, 16 (speaking of nationality "as the center of [man's] political and cultural activity" and "as the source of all creative cultural energy and of economic well-being"). In this context, one should also consider Paul Tillich's idea that faith lies at the center of a person's life. TILlich, *supra* note 26, at 4–8, 105–17. As with the earlier remark regarding the concept of a way of life, as well as those of completeness and constancy, the reader should understand the ideas expressed here in modest form.

⁸⁹ See FOSTER, *supra* note 81, at 26 ("To define a State as that association which contains within itself the power to lay down its own constitution, means that, except in so far as it is real, it does not even fulfill the idea of a State."). In this context, one can consider Renan's famous statement that "[a] nation's existence is . . . a daily plebiscite . . ." RENAN, *supra* note 74, at 19. One can also consider two recent statements of political figures in the West. Recently, Emmanuel Macron, in discussing the Macron Doctrine and Westphalian sovereignty, argued that "I want to be able to choose every day, every time I am asked to vote, in fair elections, and in a system that can breathe." *The Macron Doctrine: A Conversation with the French President*, GROUPE D'ÉTUDES GÉOPOLITIQUES (Nov. 16, 2020), <https://geopolitique.eu/en/macron-grand-continent/>. A bit earlier in time, in an op-ed published after his death, former American Congressman John Lewis noted that "[d]emocracy is not a state. It is an act . . ." John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES, July 30, 2020.

Apprehending these conditions of possibility of the nation-state, we can quickly complete the discussion of the concept of the nation-state by making a brief, final point about the nation-state, one that these conditions of possibility imply, and one that is fundamental to an appreciation of its nature: Given the conditions under which the nation-state arises, it is only to the extent that its members are committed to its realization that it is in fact real. Borrowing from the classic language of the 20th century existentialists, albeit perhaps a bit loosely, we can say that its existence precedes its essence.⁹⁰

B. The Political Community of the United States

By its nature, the concept of the nation-state admits of differentiation in its specific expression. Perhaps most obviously, it does so with respect to its elemental concept of a people, which varies in look depending upon what point, or points, of unity the members of the political community, in imagining themselves as a collection of individuals that realizes itself as a people, consciously understand themselves to share. For example, the concept of the nation-state expresses itself as a type of political community in which the people has a purely political appearance when its members understand the unifying ground to be just the fact of their coming together to realize themselves as a people. Alternatively, it expresses itself as a type of political community in which the people has an ethnic appearance when its members understand the unifying ground to be descent or cultural tradition.

Less obviously, the concept of the nation-state admits of differentiation in its specific expression with respect to its elemental concepts of a nation and a state. These concepts vary in look depending upon the points in time at which the members of the political community imagine the creation of the nation and the state, respectively, to have taken place, points in time that are tied to the form in which the associated people appears.⁹¹ For example, the concept of the nation-state expresses itself as a type of political community in which the creation of the state appears to have preceded that of the nation, if only by a moment, when the people has a purely political look, as, in this circumstance, its members understand the genesis of the state to have occurred simultaneously with that of the people, in and through which that of the nation subsequently took place.⁹² Alternatively, the concept of the nation-state expresses itself as a type of political community in which the creation of the nation appears to have clearly preceded that of the state when the

⁹⁰ *Supra* note 32. On the existential character of the practice of political life in the nation-state, see, for example, CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 27–37 (George Schwab trans., Univ. Chi. Press 1996) (1927).

⁹¹ See HOBBSAWM, *supra* note 68, at 22.

⁹² Thus, in this type of political community, there is no “pre-existing” nation of which to speak.

people has an ethnic look, as, here, its members understand the genesis of the nation to have occurred with that of the people, which in turn led to that of the state at that later point in time when the political community was founded.⁹³

Although the concept of the nation-state admits of differentiation in its specific expression, it does have a paradigm form of expression in the modern West. Consistent with the revolutionary nature of the modern world, that paradigm form is the type of political community that reflects radical self-authorship, i.e., the type of political community in which the people takes on a purely political appearance and, correspondingly, the creation of the state appears to have preceded that of the nation.⁹⁴ Moreover, this paradigm form of expression has had significant influence on the modern Western political landscape and, as such, has its representative examples. One of these representative examples, and arguably the premier representative example, is the political community of the United States.⁹⁵

If we once again turn to history, it is clear that the United States was born of the modern period of the West. Broadly speaking, the political ideas associated with the modern West lay at the center of social thought in revolutionary America, and remained there through to the founding of the country.⁹⁶ Born of the modern period and its ideas, the United States naturally took the form of that type of a political community that a truly modern society was to inhabit. We see this fact in the manner in which the United States came into existence, which is just the manner in which a truly modern political community would arise.

⁹³ To be clear, we can speak of stateless nations. In modern times, however, such nations typically, if not always, seek to “achieve” statehood. *See, e.g.*, KOHN, *THE IDEA OF NATIONALISM*, *supra* note 68, at 19 (describing nationality as “a group seeking to find its expression in . . . a sovereign state” and describing the moment of that expression as a “moment of ‘liberation’”); *see also* WEBER, *supra* note 76, at 176 (defining the concept of a nation as “a community of sentiment which would adequately manifest itself in a state of its own; hence, a nation is a community which normally tends to produce a state of its own”).

⁹⁴ *See* HOBBSAWM, *supra* note 68, at 18 (describing the primary meaning of the “nation” in its equation with the “people” and the “state” in its revolutionary understanding).

⁹⁵ *See, e.g.*, HOBBSAWM, *supra* note 68, at 88 (“The revolutionary concept of the nation as constituted by the deliberate political option of its potential citizens is . . . still preserved in a pure form in the USA. Americans are those who wish to be.”); KOHN, *THE IDEA OF NATIONALISM*, *supra* note 68, at 289 (“American nationalism . . . has been primarily an ideological nationalism, the embodiment of an idea, which, though geographically and historically located in the United States, was a universal idea, the most vital and enduring legacy of the eighteenth century.”).

⁹⁶ *See generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1993) (1969). *See also* RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 3–21 (1973) (1948). For contemporaneous writing that expresses modern political ideas, *see* *THE FEDERALIST PAPERS* (Garry Wills ed., 1982). Finally, for a discussion of the modern character of pre-revolutionary America, *see* JON BUTLER, *BECOMING AMERICA* (2000).

As history teaches, Americans at the time of the founding embraced the idea of an American nation *qua* people *qua* state, and did so with respect to the truly modern sense of the term. Reflective of this mindset, these Americans imagined themselves as a collection of individuals that came together and coalesced into a people.⁹⁷ In doing so, they imagined themselves as a collection of individuals that was unified in just this coming together to realize themselves as such a people. They also imagined the genesis of themselves as a people to have effected the genesis of the state, which in turn effected the genesis of the nation. Indeed, for them, it could only be so.⁹⁸ Because, in their mind, they arose as a people in and through their coming together, the genesis of themselves as a people could not have taken place with that of the nation at a time prior to the establishment of the political community and the accompanying genesis of the state. Rather, the genesis of themselves as a people could only have taken place at the historical moment of the establishment of the political community, in turn effecting the corporate body of the state and then the nation.

Having imagined themselves and the consequences of their actions in this way, and thus having imagined a truly modern nation/people/state into existence, these Americans then, informed with the overarching perspective on existence that they concomitantly made manifest for themselves, actualized the American political community in a manner consistent with that perspective, i.e., by taking up political life in a manner organized around the nation/people/state to which they gave birth. With respect to the acceptance of its facticity and the acknowledgment of its sovereignty, the founding generation's identification of the nation/people/state—formally termed “We the People”—as the subject who “ordain[ed] and establish[ed]” the constitution of the political community and, accordingly, as the subject who defined its essential principles and values, makes clear the fact of this acceptance and acknowledgment.⁹⁹ Meanwhile, that the founding generation lived their political lives in light of their sovereign's commands—under “the rule of law”—testifies to the reality of their subjection of themselves to its

⁹⁷ WOOD, *supra* note 96, at 57–58.

⁹⁸ *Id.* at 58–59.

⁹⁹ U.S. CONST. pmbl. This turn of the self contrasts with the embrace of a different subject as sovereign, for example a king, a dictator or a conventional god. For a familiar example of political communities organized around a king, one can consider the various monarchies of fifteenth to eighteenth century Europe. For a series of readings on this period in European history, see generally EUGENE F. RICE, JR., *THE FOUNDATIONS OF EARLY MODERN EUROPE, 1460–1559* (1970); RICHARD S. DUNN, *THE AGE OF RELIGIOUS WARS, 1559–1689* (1970); LEONARD KRIEGER, *KINGS AND PHILOSOPHERS 1689–1789* (1970); ISSER WOLOCH, *EIGHTEENTH-CENTURY EUROPE: TRADITION AND PROGRESS 1715–1789* (1982). A contemporary example of a political community organized around a dictator is North Korea. For some introductory information about North Korea and its government, see *Korea, North*, CIA: THE WORLD FACTBOOK (Aug. 11, 2021), <https://www.cia.gov/the-world-factbook/countries/korea-north/>.

rule,¹⁰⁰ a subjection that took place with the whole of themselves, all of the time.¹⁰¹

Born of the modern period and its ideas, the United States has remained tied to its heritage throughout its history. In turn, since the initial era of the country, Americans have maintained that truly modern political community that the founding generation brought into being, doing so by walking the same path that the founding generation followed.¹⁰² Americans have continued to embrace the idea of an American nation *qua* people *qua* state, in the truly modern sense of the term. And, in this context, they have continued to see themselves as a part (or, more precisely, now a new part) of the collection of individuals that gives rise to the American people, to see that collection of individuals as unified in just the act of coming together to realize themselves as a people, and to comprehend the genesis of this people to effect that of the state and, in turn, that of the nation.¹⁰³ Moreover, imagining themselves and the consequences of their actions in this way, and thus continuing to imagine a truly modern nation/people/state into existence, these Americans, informed with the overarching perspective on existence that they continue to make manifest, have continued to actualize the American

¹⁰⁰ Of course, the U.S. Supreme Court's decision in *Marbury v. Madison* holds a central place in the organization of the American practice of political life around law. *Marbury v. Madison*, 5 U.S. 137 (1803). For a treatment of this topic, see KAHN, *supra* note 87.

¹⁰¹ For a classic expression of the central place of law in the American practice of political life at the founding, see, for example, COMMON SENSE, THE RIGHTS OF MAN, AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE 49 (Meridian publ'g., 1984) ("in America THE LAW IS KING"); see also, J. HECTOR ST. JOHN CRÉVECOEUR, LETTERS FROM AN AMERICAN FARMER AND SKETCHES OF EIGHTEENTH-CENTURY AMERICA 42 (1945) (1793) (discussing "what is an American" and the place of law with respect to that identity). Here, we might also mention, as scholars have noted, that Americans post-Founding kept copies of the Constitution on their person. See, e.g., DAVID RAY PAPKE, HERETICS IN THE TEMPLE: AMERICANS WHO REJECT THE NATION'S LEGAL FAITH 7 (1998). Again, the reader should understand the ideas expressed here in modest form. See *supra* text accompanying note 4.

¹⁰² We should be clear that the traditional American history referenced here is one that, in non-insignificant measure, talks past Black and Native-American history. For some introductory materials on Black history, one might consider HENRY LOUIS GATES, JR. & DONALD YACOVONE, THE AFRICAN AMERICANS: MANY RIVERS TO CROSS (2013); AFRICANA: THE ENCYCLOPEDIA OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., 2003). For an introductory reading on Native-American history, one might consider THEDA PERDUE & MICHAEL D. GREEN, NORTH AMERICAN INDIANS: A VERY SHORT INTRODUCTION (2010).

¹⁰³ HOBBSAWM, *supra* note 68; KOHN, THE IDEA OF NATIONALISM, *supra* note 68. To be clear, such an understanding has been the only possible one. Quite simply, what else would unify the Americans as a people? The conditions for an alternate possibility are not present. We can perhaps further illustrate the reality of the purely political character of the American people with a reference to the contemporary American political mind. For today's American, and quite possibly earlier generations as well, the concept of "civil society"—as a set of institutions and associations that operate as a counterweight to the institutional state, and perhaps the market as well—is a bit difficult to grasp, and one that is not regularly employed in popular political discourse. Presumably, the reason for this circumstance is, in part, that Americans do not divide the political landscape in this way. For a reading on the concept of civil society in its various scholarly understandings, understandings that move beyond that employed here, see THE CIVIL SOCIETY READER (Virginia A. Hodgkinson & Michael W. Foley eds., 2003).

political community in a manner consistent with that perspective¹⁰⁴—accepting the facticity of the We the People and acknowledging its sovereignty, and living their political lives in light of its commands.¹⁰⁵ That it is commonplace to describe the American practice of political life since the founding as one of living “under the rule of law” highlights this reality.¹⁰⁶ It also highlights the reality that this exercise has been at the center of the American practice of political life¹⁰⁷ and, correspondingly, a complete and constant one.¹⁰⁸

The modernist history of the United States, then, from the founding to the present, demonstrates that the type of political community that this country represents is the nation-state in its paradigm form of expression. As it happens, though, if we look closely at this history, we see that it actually demonstrates a deeper point about the United States that we should not overlook. In truth, the lesson of the modernist history of the United States is not simply that the country, as a political community, represents the nation-state in its paradigm form of expression. Rather, the lesson is, more acutely, that the United States is intelligible only as this type of political community.

¹⁰⁴ While not typically conceptualized as such, this manner of actualizing the political community—this form of practice of political life—can be thought of as a kind of prayer. See *supra* note 30 for a discussion of prayer. In this context, we can note that, at least in the post-World War II era, the American practice of political life has been at times described in certain religious terms, such as involving a “creed” or taking the form of a “civil religion.” With respect to the latter term, it is not clear the extent to which it is appropriately characterized in conventional religious terms, as Robert Bellah suggested. For some references to the American creed, see SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981); ANATOL LIEVIN, *AMERICA RIGHT OR WRONG: AN ANATOMY OF AMERICAN NATIONALISM* (2012). For a reference to American civil religion, see PETER GARDELLA, *AMERICAN CIVIL RELIGION: WHAT AMERICANS HOLD SACRED* (2014). For Robert Bellah’s well-known piece, see Robert N. Bellah, *Civil Religion in America*, in *THE ROBERT BELLAH READER* 225–45 (Robert N. Bellah & Steven M. Tipton eds., 2006). We can also note that the American practice of political life involves expression of the sacred in which We the People is the referent. Perhaps the most well-known sacred symbol for Americans is the flag. For a relevant discussion, see CAROLYN MARVIN & DAVID W. INGLE, *BLOOD SACRIFICE AND THE NATION: TOTEM RITUALS AND THE AMERICAN FLAG* (1999). The most well-known contemporary case in American law speaking to the historic importance of the flag to Americans is *Texas v. Johnson*, 491 U.S. 397 (1987). Another important sacred symbol, and more precisely sacred space, is Arlington National Cemetery. For some basic information about the cemetery, see *ARLINGTON NATIONAL CEMETERY*, <https://www.arlingtoncemetery.mil/#/> (last visited Aug. 27, 2021).

¹⁰⁵ For a discussion of the continuing nature of the American political project in the context of constitutional theoretic discourse, see PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* (1992).

¹⁰⁶ Ultimately, the American practice of political life is an imaginatively contested experience. See KAHN, *supra* note 87.

¹⁰⁷ On the central place of law in the history of the American practice of political life, see KAHN, *supra* note 87. Here, one might also note de Tocqueville’s statement that “[t]here is almost no political question in the United States that is not resolved sooner or later into a judicial question.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 257 (Harvey C. Mansfield & Delba Winthrop eds. & trans., The Univ. of Chi. Press 2002) (1835).

¹⁰⁸ Again, the reader should understand the ideas expressed here in modest form. See *supra* text accompanying note 4.

And, consequently, it exists only to the extent that its members remain committed to it as such (a fact that raises an important question about the future of the United States, a subject upon which this Article will comment in Part V).

C. The Unsustainability of the Legitimizing Reasoning

Reflecting back on the work of each of the principal scholars on religious lawyering and, in particular, the reasoning to which each appeals to legitimate his work, we can now see that the reasoning, despite its force, cannot sustain itself. Modern Western history, and in that context U.S. history, teaches that the United States is, and can only be, a nation-state, in its paradigm form of expression. As such, the United States is not a liberal political community in the first instance and the organizing elements of its practice of political life do conform to conventional expectations. Indeed, the embrace of an overarching perspective on existence and an associated manner of living is central to its practice of political life. It follows that the American practice of political life is subject to existential demands, and is not a generally open exercise. Contrary to the ultimate position of each of the scholars, as a participant in the American practice of political life, one cannot be whoever he or she wishes to be.

Necessarily, the failure of the reasoning of each of the scholars leaves us back in the place that originally prompted the inquiry into the manner in which each of them legitimates his work. Once again, then, we can note the seemingly inevitable limitation that the Christian or Jew who conceives of his or her religious practice as a way of life confronts in his or her relationship with the other, and, more precisely, in his or her relationship with the other *qua* the United States. Of course, this seemingly inevitable limitation represents only an initial impression. To establish the extent to which it holds true as a general matter, or whether an alternate line of reasoning exists to legitimate each of the scholar's work, requires an inquiry of its own. As it happens, as much as such an inquiry is undoubtedly worth pursuing, doing so is beyond the bounds of this Article.

In addition to pursuing such an inquiry, however, we can take up a more narrow investigation into whether the seemingly inevitable limitation holds true with respect to the Christian or Jew's ability to participate in a particular aspect of the American practice of political life. Can we confirm that reality at least conforms to our expectation here? Is the basic nature of this particular aspect such that the requirements for participation therein preclude him or her from participating? Acknowledging the possibility of this type of an investigation, we can explore whether the seemingly inevitable limitation

holds true when the particular aspect in question is the professional practice of law.

IV. THE PRECLUSION ON PARTICIPATION IN THE PROFESSIONAL PRACTICE OF LAW

The previous discussion demonstrates that the American practice of political life takes the form of the individual accepting the facticity of “We the People,” acknowledging its sovereignty, and living under its rule, which means living under the rule of law, and doing so with the whole of the self, all of the time. Naturally, the ability of the American political community to sustain this practice of political life requires a more particular political practice to support it—specifically, by representing to the American political community what it means to take up a practice of political life of the rule of law, so that its members can maintain the practice. That more particular political practice is the professional practice of law.¹⁰⁹

Right away, the fact of this distinct relationship tells us something important about the professional practice of law: the organizing form of the American practice of political life is also its organizing form.¹¹⁰ If circumstances were otherwise, the professional practice of law would not make any sense as a political practice and those who engage in it would lack the ability to fulfill its essential purpose.¹¹¹ They would not be “on the same page” as members of the American political community and, thus, would not be able to viably represent the meaning of the American practice of political life to them.¹¹²

We can help illuminate this reality of coincidence in organizing form by drawing upon the classic analogy of the professional practice of law to the “professional practice” of religion in the West.¹¹³ Although often unnoticed, the premise of the classic analogy is the fact of a practice of religious life that

¹⁰⁹ Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 *FORDHAM L. REV.* 1611, 1622–23 (2009) (explaining that “the work of a lawyer is to sustain a universe of political meaning that appears as the rule of law”).

¹¹⁰ On the inextricable link between the American practice of political life and the professional practice of law, see Anand, *supra* note 9.

¹¹¹ On the matter of his or her identity, the lawyer is the representative figure of We the People’s rule. Anand, *supra* note 9. It should be noted that, as such, the representative character of the lawyer includes a modelling of the practice of political life in his or her own professional self.

¹¹² One can compare the understanding of the lawyer as the representative figure of We the People’s rule with de Tocqueville’s understanding of the central place of the Bar in the American practice of political life. See *DE TOCQUEVILLE*, *supra* note 107, at 250–58.

¹¹³ For an historic, and often cited, expression of this analogy, see AM. BAR ASS’N, REPORT OF THE COMMITTEE ON [THE] CODE OF PROFESSIONAL ETHICS 600, 604 (1906) (describing lawyers as the “high priest[s] at the shrine of justice”). Robert Vischer has noted that “the story of the legal profession has been told through the religious imagery of the priesthood.” See Vischer, *supra* note 5, at 427.

appeals to a “professional practice”—that of the priesthood—to help sustain its universe of meaning. Within the terms of the premise, we do not imagine a disjunction between the organizing form of the referenced practice of religious life and that of the associated “professional practice.” Unthinkingly, we presume that the two coincide. We do so because we know that they must in order for the latter to have intelligibility, and for those who take it up to fulfill its *raison d’être*. What would it look like if the referenced practice of religious life and its professional practice were organized around different terms? As with the relationship between the former and the latter, so too with that of the organizing forms of the American practice of political life and the professional practice of law. They too stand together, and necessarily so.

Once we understand that the professional practice of law has the organizing form of the American practice of political life, we can glean something important about the requirements for participation in it. First and foremost, if an individual wishes to participate in the professional practice of law, the individual must turn his or her self and embrace this organizing form. Put slightly differently, he or she must commit to the state of being associated with the role of lawyer and exist in the specified manner. Moreover, there are no exceptions to this requirement. The demand to *be*, in the specified way, is a complete and constant requirement of the self. It is ever-present, at least as the initial, or background, condition within which he or she operates.¹¹⁴

Notably, in committing to the state of being, the individual finds him- or herself in an existentially coherent place. The world in which the role of the lawyer is embedded is the world that he or she inhabits. There is no distance between the two. Consequently, the role of the lawyer that the individual now occupies makes sense to him or her. He or she is able to see “correctly” and know what to do in the role, at least in the first instance.

To be clear, what it means to see “correctly” is not unfamiliar to us. Consistent with its organizing terms, internal to the role of a lawyer, We the People rules and it is within the terms of what We the People said that the American practice of political life, and in turn the practice of his or her professional life, takes place. This reality, correspondingly, defines the overarching boundaries within which a lawyer operates—the boundaries of “legality”—and it is with these overarching boundaries defined that a lawyer is able to begin to comprehend how to perform his or her role (and, building from this starting point, further define his or her role, a definition that might differ in its particulars from that of other lawyers, depending upon how each

¹¹⁴ In parallel to earlier statements about the limits of the claims made in this article, the claim here is limited to participation in the professional role. See *supra* notes 101 and 108.

lawyer sees his or her more specific role within the legal system).¹¹⁵ In committing to the state of being associated with the role of lawyer, the individual likewise maintains this initial perspective and thus understands things as a lawyer does, a circumstance that makes possible his or her ability to engage the role of the lawyer in a manner that helps realize its purpose.

While making the commitment to the state of being associated with the role of the lawyer locates the individual in an existentially coherent place, and thus allows the individual to make sense of the role that he or she occupies, the failure to make the commitment effects quite a different state of affairs. In contrast to the former circumstance, in this latter situation, the individual will not exist in the manner that is required of him or her. Rather, the individual will exist in some other mode that is required of someone else¹¹⁶—perhaps a moral agent, political actor or community leader.¹¹⁷ In so existing, the individual will find him- or herself in an existentially dissonant place. The world in which the role of the lawyer is embedded will not be the world that he or she inhabits; instead, he or she will be inhabiting some alternate world. Consequently, the role of the lawyer that he or she occupies will not really make sense to him or her. He or she will see “incorrectly” and not be at home within the role.

If we ask what this experience looks like, at least two possible circumstances present themselves. On the one hand, standing in a world other than that of the lawyer, the individual might, in recognition of the lawyer’s initial perspective, acknowledge that We the People ostensibly rules and that it is within the terms of what We the People said that the practice of political and professional life takes place, but understand that true sovereignty lies elsewhere and that it is what this true sovereign said that dictates the proper approach to political and professional life. Alternatively, he or she might not recognize the lawyer’s initial perspective at all, and only see this true sovereign and its commands, whatever those commands might be. In either circumstance, the reality that he or she maintains defines the overarching boundaries within which he or she operates and it is with these overarching boundaries defined that he or she is able to comprehend what to do—

¹¹⁵ In this context, one can consider Fuller & Randall’s description of the lawyer’s role in the adversary system. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

¹¹⁶ It is a mistake to think of a role in purely functional terms. A role is never just a functional phenomenon. Rather, it exists within a larger set of forms of knowledge and norms of meaning.

¹¹⁷ Modern legal ethics scholarship overwhelmingly approaches the individual in his or her role as a lawyer as a moral agent (a phenomenon that is rooted in its commitment to liberal theory). The most important philosophical expression of this position, in part because of its explicit acknowledgment of its position, is DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). For a critique of this work, see generally Rakesh K. Anand, *Toward an Interpretive Theory of Legal Ethics*, 58 RUTGERS L. REV. 653 (2006).

boundaries that are not those of “legality” and a comprehension of role performance that is not consistent with the understanding of how to take up the role of the lawyer, a circumstance that inhibits his or her ability to engage the role of the lawyer in a manner that helps realize its purpose.¹¹⁸

While often unnoticed in contemporary legal discourse, there is a basic truth that attaches to the professional practice of law in this country. Participation in it requires that the individual turn the self and embrace a distinct form of living. The fulfillment of this existential requirement is a, if not *the*, necessary condition for taking up the professional practice. It is only with the fulfillment of this existential requirement that the individual will *be* a lawyer and, therefore, be able to accomplish the objectives of the role. Unavoidably, then, all who wish to participate in the professional practice encounter this existential demand when considering the possibility of engaging in it.

Acknowledging these realities, we can answer the question presented. Does the seemingly inevitable limitation on the ability of the Christian or Jew, who conceives of his or her religious practice as a way of life, to participate in professional practice of law hold true? It does. Like all, he or she confronts the professional practice of law’s existential demand. And, encountering it, he or she cannot submit to it. The existential demand associated with his or her religious practice precludes him or her from doing so. A straightforward, if perhaps uncomfortable, deduction results. He or she cannot participate in the professional practice of law.

V. CONCLUSION: IS AMERICA DYING?

The American practice of political life expresses, in part, an understanding of what it means to live a genuine and hopeful life. It also exists only to the extent that the members of the American political community remain committed to it. Reflecting on the contemporary world, we can ask about the current state of the American populace. Are Americans still committed to their practice of political life? Or have they reached the point at which they will allow this exercise of higher meaning to fade from the world?¹¹⁹

¹¹⁸ For a discussion of such a state of affairs with respect to the contemporary civil litigator, see Anand, *supra* note 13. As noted earlier in note 17, embraced forms of being and identity impact the look of daily life. Among the more narrow, concrete normative issues that arise from the existence of such a state of affairs, in the context of civil litigation, is a condition of professional unhappiness. *Id.*

¹¹⁹ Unsurprisingly, the structure of existential inquiry presented in this Article—speaking to forms of knowledge, associated behavior, and hope—broadly parallels the three questions that Kant addresses in his famous critiques. The texts of the three critiques are IMMANUEL KANT, *CRITIQUE OF PURE REASON* (F. Max Muller trans., Anchor Books 1966) (1781); KANT, *supra* note 44; IMMANUEL KANT, *KRITIK OF JUDGMENT* (J. H. Bernard trans., London, MacMillan & Co. 1892). For a discussion of Kant’s work, and

If we are honest with ourselves, the practice of political life that we see in this country today less and less resembles that which it is supposed to be—in sum, a collective practice of popular sovereignty *qua* the rule of law. While we can look in a variety of directions for manifestations of this reality, quite poignantly, we do not have to look any further than at the behavior of the political institution that stands as the practice's ultimate representative figure. Carefully considered, the U.S. Supreme Court appears now to be turning away from its symbolic role and distancing itself from just this practice. This distancing takes the form of the adoption of a substantive understanding of the practice that contradicts its very nature.

Consistent with its modern heritage, the American practice of political life is inherently a practice of reason of some sort. In light of the historical context within which it arose, it cannot be something other than this type of exercise.¹²⁰ Yet, despite this fact, the Court, in its recent decision-making and in its suggestion of what is to come, has begun to mark a jurisprudential path that rejects any innate linkage between the practice of popular sovereignty *qua* the rule of law and that of reason. That is, the Court is increasingly denying an intrinsic place for the latter in the former.

The mark of the Court's move in this direction is its emphasis of late on the purely political character of certain disputes that come before it. In highlighting this aspect of these disputes, the Court makes at least two claims about what, in its mind, a practice of popular sovereignty *qua* the rule of law entails. On the one hand, the Court sees the practice as affirmatively accepting of outcomes that are a product of purely political controversies and decision-making (or non-decision-making), regardless of the nature of the outcomes themselves. On the other hand, the Court sees the practice as not affirmatively accepting of such outcomes, but rather as incapable of speaking to their affirmative acceptability. In either instance, from the perspective of the Court, the practice of popular sovereignty *qua* the rule of law is indifferent to the outcomes' consistency with reason. The outcomes might comport with reason. They also might not. In any event, the practice allows for the outcomes to stand.

The Court has expressed the first claim fairly directly in what is perhaps its most striking decision in relatively recent memory.¹²¹ Viewed in its most favorable light, the essence of the Court's decision in April 2020 pertaining to the rights of Wisconsin residents to vote during the pandemic is that those

of the importance of reading the three critiques together, see ERNST CASSIRER, *KANT'S LIFE AND THOUGHT* (James Haden trans., Yale Univ. Press 1981) (1918).

¹²⁰ This tie of a practice of popular sovereignty *qua* the rule of law with reason is crucial in rendering the practice an exercise of higher meaning. Self-governance in accordance with reason is a central aspect of hope in the modern tradition.

¹²¹ *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020).

disputes that simply amount to purely political controversies are just that—purely political controversies and nothing more—and that the practice of popular sovereignty *qua* the rule of law does not have a problem with the associated results, whatever their character.¹²² Straightforwardly for the Court, the purely political quality of such disputes is dispositive of the question of the associated results’ affirmative permissibility with respect to the practice, while the character of the results themselves are irrelevant to that question, a state of affairs that the Court in fact emphasizes in the particular situation before it,¹²³ and that a consideration of the character of the respective result rather conspicuously underscores. Surely, the nature of the result at issue here is a challenge to reason (and in turn the politico-normative sensibilities of most). Who thinks that requiring individuals to literally risk their health and lives, as well as the health and lives of others, in order to vote, despite the availability of a straightforward solution, is reasonable, even at the most minimal level of what qualifies under that concept?

The Court has expressed the second claim quite directly in its more general pronouncements of late that signal an intention to revive the historically controversial political question doctrine,¹²⁴ and in particular that branch of the doctrine that precludes justiciability of a dispute before the Court because its specific features render unavailable to the Court judicially manageable standards by which to resolve it.¹²⁵ In this instance, the essence of the Court’s position is that a certain set of disputes of a purely political nature are such that the practice of popular sovereignty *qua* the rule of law lacks any internal criteria by which to comment on them and, accordingly, can do nothing but tolerate the associated results, whatever their character. In rather elementary fashion for the Court, the specific quality of the disputes is dispositive of the question of the associated results’ permissibility, albeit a non-affirmative permissibility, with respect to the practice, while the character of the results has no pertinence to that question, a reality that consideration of the Court’s position makes clear. After all, to say that the practice lacks any internal criteria by which to speak to a dispute is to say that reason, or more precisely reasonableness even at its most basic level, is

¹²² Viewed in its less than most favorable light, the Court’s decision is a quite disturbing exercise of partisanship.

¹²³ *Republican Nat’l Comm.*, 140 S. Ct. at 1208 (“The Court’s decision on the narrow question before the Court should not be viewed as expressing an opinion on the broader question of whether to hold the election, or whether other reforms or modifications in election procedures in light of COVID–19 are appropriate. That point cannot be stressed enough.”).

¹²⁴ For an overview of the political question doctrine, see GERALD GUNTHER, *CONSTITUTIONAL LAW* 387–93, 1651–69 (12th ed. 1991). For perhaps a starting point for critique of the doctrine, see Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597 (1976).

¹²⁵ *See, e.g.,* *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

not a criteria of the practice *per se*. If circumstances were otherwise, the practice could readily subject these disputes to an inquiry as to the permissibility of their associated results.¹²⁶

As much as the Court's behavior of late helps highlight the lack of resemblance of the contemporary practice of political life with its proper expression, its behavior in this regard is not unique among the prominent political institutions of this country. The conduct of other important institutions shares in the expression of this dissimilarity.¹²⁷ Moreover, if we look beyond the conduct of those institutions, we see further evidence of this dissimilarity in the behavior of the populace as a whole. Notably, with respect to this behavior, we see a difference in the form that the associated distancing from the American practice of political life takes in comparison with that of the Court's behavior. At least in significant measure, it does not take the form of the adoption of a substantive understanding of the practice that belies its nature. Rather, it takes the form of an increased rejection of a commitment to any iteration of the practice itself. More precisely, it takes the form of an increased rejection of a commitment to any kind of a practice of political life at all.

If we ask where contemporary members of society locate sovereignty, the answer less and less appears to be in *We the People*. At least with respect to many in this country, if they locate sovereignty anywhere besides their individual selves, they do so in "the market." For a lot of individuals in this society today, the market has taken on the status of a kind of transcendent

¹²⁶ Cf. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 178–79 (2006) (rejecting the idea of normative non-justiciability).

¹²⁷ At least during portions of the recent administration, the Office of the Attorney General appeared to manifest a distancing from a practice of popular sovereignty qua the rule of law in its expression of a coincidence in identity between the President and the Executive branch, an expression that reminds one of the 15th and 16th century political thinking that located sovereignty in the king and suggests at least a partial challenge to the concept of popular sovereignty. See BILL BAR, MUELLER'S "OBSTRUCTION" THEORY 10 (2018), <https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf> (stating that the President "alone is the Executive branch. As such, he is the sole repository of *all Executive powers* conferred by the Constitution"). Additionally, responses to the actions of Donald Trump suggest a concern that the Office of the President, under his administration, does not accept popular sovereignty qua the rule of law. See, e.g., Ashton Carter, Dick Cheney, William Cohen, Mark Esper, Robert Gates, Chuck Hagel, James Mattis, Leon Panetta, William Perry Donald Rumsfeld, *Opinion: All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASHINGTON POST (Jan. 3, 2021, 5:00 PM), https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html; *Message from Joint Chiefs on U.S. Capitol Riot*, USNI NEWS (Jan. 12, 2021, 5:19 PM), <https://news.usni.org/2021/01/12/message-from-joint-chiefs-on-u-s-capitol-riot>; Impeaching Donald John Trump, President of the United States, for high crimes and misdemeanors, H.R. Res. 24, 117th Cong. (2021), <https://www.congress.gov/117/bills/hres24/BILLS-117hres24ih.pdf>. It is worth noting that the distancing from a practice of popular sovereignty qua the rule of law points to an apparent experience of many that contemporary America is increasingly governed according to power, a norm of governance that is not limited to political institutions, but includes various social institutions as well.

norm around which to organize social life, and correspondingly, in their eyes, it is in the recognition of the fact of the market that one finds insight into how to live a genuine and hopeful life, and thus what “right living” looks like—a reality that is hardly obscure to the open eye. Ultimately, it is in light of the market’s exalted status that many today conceive of the role of government as an instrument by which to support the market and defend the truly extraordinary action that the government now takes to do so.¹²⁸ It is also in light of the market’s exalted status that the country today approaches most of its social institutions—for example, universities, hospitals and other health care providers, and the press—as market participants, i.e., businesses.¹²⁹ Not unrelatedly, the essential deification of the market helps explain why those directly involved in the running of government and the management of social institutions are increasingly business people.

Necessarily, this present day locating of sovereignty in the market represents a turn away from an embrace of We the People as sovereign and a practice of political life as one of popular sovereignty qua the rule of law. At the same time, however, it represents something more deep, which is a turn away from any serious engagement in community living itself. By definition, to locate sovereignty in the market is to align sovereignty with that dimension of life associated with resource management and, as such, to express an understanding of that dimension of life as the primary space within which to devote the self. Doing so is to privilege the economic over the political, and to express an understanding of the latter as at best a secondary locus for any self-dedication.

Grasping this reality, a conclusion inevitably follows. Although many have internalized the current move past the political, this movement will fail. Simply put, a rejection of the political in favor of the economic makes no sense, and represents confused thinking about the world. Politics is basic, and is the starting point for reasoning about social living.¹³⁰ Relatedly, it is the

¹²⁸ The actions of the Federal Reserve Board are particularly noteworthy in this regard, including a lowering of the federal funds rate to zero, a program of quantitative easing, and a program of investment grade and “fallen angel” bond purchases. For a description of the latter, see *Secondary Market Corporate Credit Facility: Program Terms and Conditions*, FED. RSRV. BANK OF N.Y. (July 28, 2020), https://www.newyorkfed.org/markets/secondary-market-corporate-credit-facility/secondary-market-corporate-credit-facility-terms-and-conditions?source=content_type%3Areact%7Cfirst_level_url%3Aarticle%7Csection%3Amain_content%7Cbutton%3Abody_link (last visited Aug. 23, 2021). For just one expression of the Federal Reserve Board’s commitment to supporting the market, see James Politi & Colby Smith, *Powell Moves to Stamp out Market Fear of Exit from Loose Policy*, FIN. TIMES, (Jan. 14, 2021), <https://www.ft.com/content/21d89f6d-be8f-48dc-9085-1e9baabcbdbe>.

¹²⁹ See, e.g., TOM FENTON, *BAD NEWS: THE DECLINE OF REPORTING, THE BUSINESS OF NEWS, AND THE DANGER TO US ALL* (2005); DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003).

¹³⁰ Aristotle famously stated that “man is by nature a political animal.” See ARISTOTLE, *THE POLITICS* § 1253a (T.A. Sinclair trans., Penguin Books 1981) (n.d.).

political order that defines the landscape within which an economic order exists and operates.¹³¹ A market, then, cannot sustain itself as sovereign. Nor, as anyone with a basic understanding of contemporary economics knows, is there anything “natural” about a market order. Rather, the market order is “naturally” dependent upon the political order. Living to the contrary is incongruent, and represents a state of affairs that will eventually collapse.¹³²

While we can predict that the present day locating of sovereignty in the market will not last over time, we cannot know what lies ahead for this country.¹³³ Certainly, a practice of popular sovereignty qua the rule of law might reassert itself in the imagination of the populace. It is also possible that it will not, and that the practice of political life for those in this country will take another form. It is hardly novel today to suggest that we live in a time of real historical change and that the march of history, however one might comprehend that idea, is upon us. Time will tell if that suggestion is true.

¹³¹ See, e.g., 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 Its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIA. L. REV. 261 (1973).

¹³² Not unrelatedly, today some now ask whether the current market order is consistent with the capitalist principles on which it is supposed to rest. See, e.g., Stanley F. Druckenmiller, *Where’s the Invisible Hand When You Need it?*, WALL ST. J. (May 2, 2018, 9:40 PM), <https://www.wsj.com/articles/wheres-the-invisible-hand-when-you-need-it-1525311642>.

¹³³ Here, one might note a comment of the late Chief Justice Rehnquist who, in 1980, while dissenting in an important case involving commercial speech, stated that “in a democracy, the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence.” *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557, 599 (1980) (Rehnquist, J., dissenting).