The Concept of Culture and the Cultural Study of Law. An Essay

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Abstract: Law is culture, not its consequence. This is one of the fundamental premises of the cultural analysis of law. The content of the category 'culture', however, is one of the most elusive in the humanities: it is not easy to specify its limits or make explicit its fundamental components. It is not easy to specify either what should be the most fruitful way to approach the academic study of legal culture. There is no consensus on the premises and methods with which cultural studies of law should espouse. In this essay I would like to examine two ways of understanding legal culture and the cultural analysis of law. The first perspective is what I would call a monist cultural analysis; the second is what I would like to call a pluralist cultural analysis. More precisely, in this essay I would like to examine the concept of culture with which the monist cultural analysis of law is committed to, the methodological consequences that this concept generates and the limits that these concept and method have to accurately describe modern legal cultures. In this essay, I would also like to explore the concept of culture offered by the pluralist cultural analysis of law and the conceptual and methodological contributions that this perspective could make to the understanding of modern legal cultures.

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Law is culture, not its consequence[1]. This is one of the fundamental premises of the cultural analysis of law. The content of the category 'culture', however, is one of the most elusive in the humanities: it is not easy to specify its limits or make explicit its fundamental components. It is not easy either to specify what should be the most fruitful way to approach the academic study of legal culture. There is no consensus on the premises and methods that the cultural studies of law should espouse. Moreover, these two themes, the concept of culture and its study, intersect. The concept of culture defended by the cultural scholar has substantive and methodological consequences for cultural studies, among others, which are the sources of culture that should be examined, and the research methods that would give proper account of these sources. Similarly, the way in which the cultural analysis of law is conceived, generates effects on legal culture, for example, by establishing the contents of a le-

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1 *Paul W. Kahn*, Comparative Constitutionalism in a New Key, Michigan Law Review 101 (2003), p. 2677.

gal culture through the examination of certain types of practices only, cultural analysis reproduces and legitimizes the idea that culture is composed only of the materials that these sources produce.

In this essay I would like to examine two ways of understanding legal culture and the cultural analysis of law. The first perspective is what I would like to call 'monistic cultural analysis'; the second is what I would like to call 'pluralist cultural analysis'. The monistic cultural analysis is identified in this essay with the work of Paul Kahn. This way of understanding the cultural study of law has been remarkably influential in the field[2]. Consequently, to analyze Kahn's work is to analyze a paradigmatic version of the monist interpretation of this academic field. In this essay, more precisely, I would like to analyze the concept of culture used by monist cultural analysis of law as well as the methodological consequences that this concept generates.

In monistic cultural analysis there are two concepts of culture: one explicit and one implicit. The first conceives culture as a web of meanings that human beings both create and receive as a legacy[3]. In addition, for monist cultural analysis, we come to understand the symbolic structures that constitute culture by understanding its members' internal point of view[4]. The cultural scholar should understand legal culture through the categories that the members of the practice use to make sense of it. The cultural scholar does not seek to describe and analyze patterns of behavior that are observed from outside legal culture. Rather, she wants to describe and analyze the way those who are immersed in a particular culture understand and experience it[5]. To understand these symbolic structures, the cultural scholar must also take distance from her object of study[6]. If the scholarship is to be a free practice, it is necessary for the scholar to distance herself from the practice she wants to examine. Finally, for cultural analysis, culture is a polysemic practice: subjects use webs of meaning to understand and act in the world, and, to do so, they interpret them in various ways.[7] Cul-

2 *Benjamin L. Berger*, Narratives of Self-Government in Making the Case, J. App. Prac. & Process18 (2017), p. 90.

3 *Paul W. Kahn*, The Reign of Law: Marbury v. Madison and the Construction of America, New Haven 1997, pp. 34-41.

4 *Paul W. Kahn*, The Cultural Study of Law: Reconstructing Legal Scholarship, Chicago 1999, p. 52.

5 In this essay, the concept of the 'internal point of view' is used in a sense different from that widely disseminated in the legal academy by H.L.A. Hart. The 'internal point of view' does not refer to the relationship between subject, legal rules and the obedience of the law (Hart, 1963). It refers to the way in which the members of a culture understand the practice in which they are immersed. The meaning of the concept that is used here, therefore, comes from interpretive anthropology and not from analytic legal philosophy. In some brief passages of section B of this essay the concept of the 'internal point of view' is connected with the idea of the obedience of law. The connection is made only to show that there are some members of the legal culture who interact with legal mandates for reasons other than a normative commitment to these mandates.

6 *Paul W. Kahn*, Freedom, Autonomy, and the Cultural Study of Law*,* Yale Journal of Law and the Humanities 13 (2001), pp. 141, 165-171.

7 *Kahn*, note 4, pp. 137, 143.

ture from this perspective is also understood as contingent. The contents interpreted by the members of the practice can be transformed; the contents of the legal culture are not static.

In contrast, the implicit concept offers a different perspective on culture. This implicit concept is what appears between the lines of the thick descriptions that the monist cultural analysis offers of its objects of study. It is also the concept that supports these thick descriptions. From this perspective, culture is a unit with uniform contents and members[8]. The cultures that are described and analyzed by monistic cultural studies appear as entities without fractures, units without any fragmentation. Unity appears as a necessary condition for the existence of culture. This homogeneity goes hand in hand with a reduction in the conceptual and practical spaces that monist cultural analysis names with the category 'culture'. Legal culture is understood as contained by the boundaries of the nation-state. The unity of the nation-state corresponds to the unity of legal culture. For this type of cultural analysis, legal culture is really equivalent to the legal culture of lawyers, primarily judges and law professors[9]. In monist cultural analysis, the cultural practice of lawyers is equated with the texts that some lawyers create. Cultural practice is equated with the production of legal texts (statutes, opinions, and books, primarily)[10].

The task of the cultural scholar, therefore, is reduced to the interpretation of written legal materials. By interpreting these legal materials, monistic cultural analysis believes that the cultural scholar can give proper account of the legal culture of a community. The monist cultural scholar recognizes that legal culture is not only composed of legal texts. However, the thick descriptions he offers, in its vast majority, revolve around texts produced by formal legal operators. This way of conceiving culture unnecessarily limits the methods by which we can approach the study of legal culture. In addition, for monist cultural analysis, lawyers always accept and regularly obey these legal documents[11]. Finally, this implicit concept of culture can dissolve the distance that would allow the cultural scholar to engage in a free scholarship[12]. In the thick descriptions he provides, the cultural scholar is sometimes normatively committed to one of various interpretations that members of the practice have with respect to the web of meanings in which they are immersed. This implicit concept of culture, I argue, collides with the experience we have with modern legal cultures. This concept is not capable of giving account of the fragmentation of the products, contents, and members that characterize many of the modern cultures we are familiar with. Nor can it give an account of the various ways that members of these cultures relate to their practice.

8 *Kahn*, note 4, p. 15; *Paul W. Kahn*, Law and Love: The Trials of King Lear, New Haven 2000; and *Paul W. Kahn*, Construir el Caso: El Arte de la Jurisprudencia, Bogotá, Buenos Aires y México D.F. 2017, pp. 115-65.

9 *Kahn*, note 6, pp. 141-142; *Daniel Bonilla*, El Análisis Cultural del Derecho. Entrevista a Paul Kahn, ISONOMÍA 46 (2017), p.150.

10 *Kahn*, note 4, pp. 47-122.

11 *Ibid,* p. 40.

12 *Kahn*, note 8 (2017), pp. 115 -165.

The second way of understanding the cultural studies of law, the pluralist cultural analysis, on the contrary, can account for the fragmentation of modern cultures. This perspective understands that the legal cultures of modern nation-states are not characterized by their unity. Rather, they are characterized by their fracture. In these cultures, there is no consensus on the elements that constitute them. There is no center on which culture rests peacefully. The contingent and contested content of culture, in addition, admits diverse interpretations and, therefore, allows for continuous debates about its meaning. The modern cultures that we know seem better described if we appeal to one of the following two images. On the one hand, the image of three intersecting circles of different sizes. The culture of this State would not be composed only of the common space that the three circles share; it would also be constituted by the spaces that only two of these circles share and the spaces that are not present but in one of them. In this culture there is a continuous debate about what are the elements that constitute the legal culture, and their meaning, although there might be a consensus on the existence or scope of some of them. All individuals in the debate, however, are understood as part of the same cultural practice. This would be a weak pluralistic legal culture.

On the other hand, I would like to offer the image of three autonomous groups of intersecting circles of different sizes. In the first group there are only two circles; in the second three; and in the third four. In this nation-state, different legal cultures coexist, each of which advances a continuous internal debate about the elements that constitutes it, as well as about their meaning. However, the members of each of these cultures do not feel part of the other two. This would be a strong pluralist culture. The image that synthesizes this type of culture could be made more complex by adding a small circle that coexists autonomously with the three groups of circles mentioned above. Within this strong pluralistic legal culture there would be, therefore, a unitary legal culture. In theory, of course, it is possible to conceive legal culture in a monistic way. It is possible to think about the existence of cultural practices that have a substantive unit and a homogeneous set of members. However, this type of culture would seem likely only in small communities with very close moral and political ties among their members. The moral, political, and legal plurality that characterizes contemporary nation-states makes it unlikely that their legal cultures can be adequately described as monistic.

The concept of culture espoused by pluralist cultural analysis also has consequences for the interpretation of the sources from which cultural practices emanate and for the ways in which cultural scholars should interact with these practices to interpret them. Legal culture, from this perspective, is understood to be composed not only of the production of texts practice that judges, law professors or other formal legal operators are involved with. It is also understood to be composed of the other practices in which these operators are immersed, for example, what they do and say in oral hearings, the ways in which they interact with their clients, the processes through which legal texts are created, and the informal exchanges these legal operators have among them. The contents of these practices do not necessarily coincide with the contents of legal texts; all of these practices, however, can pro-

duce materials that are understood as part of the legal culture. Likewise, the pluralist cultural analysis considers that the legal culture is also constituted by citizens' legal practices. Formal legal operators and citizens do not necessarily agree on what are the constitutive elements of legal culture and citizens are understood as an autonomous source of cultural content.

The concept of culture defended by pluralistic cultural analysis also has consequences on methodological matters. This perspective does not privilege the description and interpretation of legal texts. This is just one of the methodological tools that is available for a cultural scholar. The pluralist cultural analysis considers that to give an adequate account of the complexity of modern legal cultures, scholars should appeal to other qualitative methods such as legal ethnography and observation as well. These qualitative research tools would contribute to the thick description of practices that are part of legal culture but that are different from the production of legal texts.

The examination of monistic and pluralistic cultural studies that is offered in this essay aims to contribute to refining the concept of culture used by in the field, as well as to specify the different sources and methods that must be analyzed and put into operation to account for a phenomenon as complex as that of legal culture. The cultural analysis of law provides some of the key conceptual tools that I use in my work. These tools, I am convinced, have the possibility of interpreting the law in rich and novel ways. However, it is precisely its use that has shown me the limits that weaken the monistic interpretations of cultural studies. These limits, nonetheless, do not have a necessary relationship with the premises and method of the cultural study of law. In fact, a monist scholar could argue that the monist cultural analysis' explicit concept of culture is compatible with the concept of culture offered by pluralistic cultural analysis. The explicit monist concept recognizes the contingent character of legal culture and admits that the symbolic structures that constitute it can be interpreted in different ways. This explicit concept, the monist scholar would add, also recognizes that culture is composed of multiple sources, not only of the production of texts by lawyers. Likewise, the scholar would argue that monistic cultural analysis could also accept the use of methodological tools that come, among other disciplines, from interpretive anthropology.

However, this interpretation does not hit the target for empirical and theoretical reasons. Empirically, all the thick descriptions offered by the monist cultural analysis of law present a culture that does not have any kind of fragmentation. Judicial opinions, sovereignty, sacrifice, and the relationship of law with its other, for example, are presented as unitary cultural practices[13]. The legal culture described by monist cultural analysis is presented as if there was a consensus on the elements that compose it and on their meaning. Likewise, the vast majority of thick descriptions offered by the monistic cultural analysis of law examine one source of culture only: texts produced by lawyers and law or philosophy professors[14]. Con-

13 *Kahn*, note 8 (2017); *Kahn* note 4; and *Kahn,* note 8 (2000).

14 *Kahn*, note 3; *Kahn*, note 4.

sequently, the method that cultural monism privileges is the thick description of written texts, mainly legal norms and legal and political philosophy books. The cultural practices of citizens do not appear in these descriptions, nor do other informal or formal cultural practices espoused by lawyers and law professors.

The monist cultural scholar could counter-argue, however, that monism's implicit concept of culture is a consequence not of a theoretical commitment to this way of understanding legal culture but of the description of a particular legal culture, the US legal culture, which is uniquely homogeneous. The unitary concept of culture, therefore, is contingent and not necessary for the monistic cultural analysis. The description and analysis of other legal cultures could generate different, pluralistic results. I think this argument is not persuasive for the following two reasons. Empirically, as will be shown below, it does not seem that US legal culture can be properly described as a unit with homogeneous contents and members. Theoretically, as will also be argued below, the monistic cultural analysis assumes that a legal culture, as the horizon of understanding of the subjects that inhabit the nation-state where it is practiced, cannot be anything other than a closed unit shared by all its members. If not, it would not really be a culture.

To develop and substantiate these arguments I divide the essay into two parts. In the first part I examine two of the elements of the implicit concept of culture with which monist cultural analysis of law is committed to: the alleged substantive unity of culture and the presumed unity of the members that practice it. In the second part, I examine three central arguments for the monist cultural analysis of law. The first two are the identification of legal culture with the culture of lawyers and with the texts created by lawyers. The third one is the links between the implicit concept of culture and the ideas of academic freedom and distance defended by this way of understanding the cultural analysis of law. The five arguments, however, are closely interrelated - one argument leads to the other, the five reinforce each other. The five arguments constitute a conceptual network that shows the limits of the concept of culture implicitly assumed by the monist cultural analysis of law. These arguments also show the contributions that pluralist cultural analysis could make to the understanding of modern legal cultures. These contributions, however, appear only in the margins of the analysis of monistic cultural studies. The main objective of the essay, it is important to reiterate, is to discuss monist cultural analysis of law and the work of Paul Kahn as a paradigmatic example of this way of understanding the cultural studies of law.

A. The Unity of the Concept of Culture

Monist cultural studies of law, I argue, understand legal culture as a unit constituted by homogeneous normative content that all members of the culture share. This concept of culture is implicit in the thick descriptions that cultural studies provide on their objects of study. In these descriptions, monist cultural analysis conceives legal culture as a web of meanings that is constructed by and simultaneously constructs *all* of the subjects of a legal and politi-

cal community[15]. Understanding this web of meanings involves understanding it from the internal point of view of the members of the practice[16]. The rule of law is understood by monist cultural analysis as self-government through law[17]. If all citizens are equal and part of the sovereign people, cultural analysis presupposes, they all assume the same internal point of view with respect to their legal culture. Cultural analysis assumes that all members of the practice, i.e., all subjects of the political community, share this internal point of view.

This way of conceiving culture is problematic from two perspectives: first, legal cultures in general and the US legal culture in particular are normatively heterogeneous and their contents are therefore usually fragmented; second, the fragmentation of the contents of legal cultures is closely tied to the fragmentation of the members of the practice. In sum, the legal culture does not have substantive unity or unity in the subjects that practice it.

I will develop each of these two objections below. These arguments question both the general concept of culture that cultural analysis implicitly assumes and its application to US legal culture. Theoretical reflections on legal culture and analysis of the US legal culture always go hand in hand in this form of legal scholarship. The thick description of its object of study, which the monist cultural analysis takes from interpretative anthropology, discourages separating the practice's description and the theoretical arguments that are inferred from it.

B. The Legal culture and Fragmentation of its Contents

The unity, the substantive non-fracture of legal culture that is implicit in monist cultural studies can be examined from two perspectives: one external and one internal. The internal perspective of analysis of the implicit concept of culture shows the fragmentation of legal cultures – it seeks to clarify the divisions that exist within this type of culture. The external perspective makes explicit the unity of legal culture when contrasted with the "other" of law: love and revolution, for example[18]. This external perspective of analysis shows how the law and its "other" are understood in monist cultural studies as homogeneous units that are always in conflict.[19]

I. Internal Perspective: The Fragmentation of Cultures

The internal is the first perspective that the unitary concept of the legal culture can be analyzed from. Legal culture may be fragmented for two reasons: members of the practice are

15 *Kahn*, note 4, p.15; *Kahn*, note 8 (2000); *Kahn*, note 8 (2017), pp. 115-165.

16 *Kahn*, note 4, p. 52.

17 *Paul W. Kahn*, Una Nueva Perspectiva Para el Constitucionalismo Comparado: El Análisis Cultural del Estado de Derecho Occidental, Revista de Derecho Valdivia 24 (1), p. 241; *Kahn*, note 8 (2017), pp. 271, 279.

18 *Bonilla*, note 9, p. 138.

19 *Kahn*, note 4, pp. 165-170.

not in agreement on which concepts constitute the web of meanings in their legal culture or members of the practice have different interpretations of the meaning of the symbolic structures that constitute their legal culture. US judicial practice is an example of these two types of fragmentation. Nevertheless, in *Making the Case* the meaning of judicial opinions is presented as univocal. In *Making the Case,* Kahn argues that judicial opinions in US legal culture are a rhetorical tool that aims to maintain the belief in self-government through law.[20] He does not argue that judges disagree on what their cultural practice requires of them. Rather, Kahn argues that the description he offers gives a precise account of what the members of the US legal culture believe that judicial opinions should be and therefore usually 'are'[21]. In as much as law is a normative cultural practice, those who believe in this practice generally act in conformity with what the practice orders them to do. What judges believe that they should do when writing an opinion is what they usually do when writing it.

I have no doubt that some members of the US political community agree with the description and analysis of judicial opinions that Kahn offers. However, I doubt that all members agree with it. Think about the description offered by realist and formalist judges of what US judicial practice requires of them. The former argue that judicial opinions are a space of political conflict – a space where power is always at play. The contradictions that exist in complex legal orders, the vagueness and ambiguity of their norms, their voids, and the distance between legal norms and facts make the political character of judicial opinions inevitable.[22] Judicial opinions are not a practice that is determined by rules and principles, at least not in hard cases[23]. Judges must therefore interpret the law by calling upon extralegal elements. In hard cases, judicial decisions always include a volitive element.[24] Judges are then understood (and should be understood) as political actors in the community.

This is why, the realist judge argues, federal judges are appointed by means of a process where his or her political commitments are examined[25]. Although this is denied in political discourse, judges represent the political positions defended by the president and the senate majorities.[26] However, given the characteristics of complex legal orders and the process of

20 *Kahn*, note 8 (2017), pp. 271, 279.

21 *Ibid,* p. 104.

22 See *Richard Posner,* How Judges Think*,* Cambridge 2010; *O.W. Holmes*, The Common Law, Toronto 2011, p. 5; *F. Sullivan, F. Vidik & S. Evans*, Three Views from the Bench*,* in: C. G Geyh (ed.), What's Law Got to Do With It?: What Judges Do, Why They Do It, and What's at Stake, Stanford 2011, pp. 328, 330, 334.

23 *J. Hutcheson*, Judgment Intuitive: The Function of the Hunch in Judicial Decision, Cornell Law Quarterly 14 (3), p. 278.

24 See *J. Frank & Brian Biz*, Law and the Modern Mind, New York 2009.

25 *E. Klein*, Of Course the Supreme Court is political, The Washington Post, <https://www.washingtonpost.com/news/wonk/wp/2012/06/21/of-course-the-supreme-court-is-political/> (last accessed on 15 November 2018).

26 The influence that both realism and formalism have on US judges is summarized by Judge Sarah Evans, from the U.S. District Court for the Southern District of Indiana, in *Sullivan, Vaidik & Evans*, note 22, p. 338.

appointing judges, judicial practice requires that judges be transparent with respect to the political character of their arguments and requires them to base their decisions by calling upon the social sciences[27]. For the realist judge, legal culture requires judges to recognize that they are not speaking on behalf of the people, understood as a homogeneous entity, but on behalf of a part of the people – those who appointed them and share their political positions[28]. Nevertheless, judicial discretion is not absolute. US legal culture requires that the social sciences, scientific knowledge about the community and the individual, limit judges' discretion[29]. Social sciences and political transparency must complement each other in judicial decisions. In addition, they both allow for the social control of judges. The US legal culture considers it desirable for citizens to be able to critique judicial opinions.[30] Citizens' critiques will moderate the positions of the judges/political actors and remind them continually about the plural character of the political community they serve.

The latter, formalist judges, argue that the judicial decision is a regulated practice in which judges have no discretion.[31] Therefore, the judge is (and should be) a neutral mediator between facts and law – an argument that is continuously repeated in mass media[32]. The judicial decision is therefore understood as a realization of reason.[33] Judicial opinions are analogous to mathematical demonstration, not to persuasion.[34] Judicial decisions are legitimate not because they persuade citizens that they express the will of the people. They are legitimate because they are a product of reason[35]. Any citizen who uses reason adequately could therefore recognize that the case could not be decided differently than it was in the ruling. Formalist judges argue that the belief that US legal practice requires a judge to be neutral, to be the voice of reason, is overwhelmingly shown in the fact that most opinions have the structure of syllogism: major premise (legal norm), minor premise (facts), and conclusion (decision).[36] If judges write their rulings in this manner, it is because they believe that this is what the law requires. They do not write them in this way, they add, be-

27 The Federalist Society Online Database Series, The Sotomayor Nomination, Part II, <https://fedsoc.org/commentary/publications/the-sotomayor-nomination-part-ii> (last accessed on 15 November 2018).

28 *R. Posner & L. Epstein*, Supreme Court Justices' Loyalty to the President, 2015, pp. 26-27, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2702144 (last accessed 06 August 2018).

29 *Margaret Marshall*, The promise of neutrality: Reflections on Judicial Independence, American Bar Association Journal 36 (4) (2009), p. 3 f.

30 *Ibid*.

31 *Sullivan, Vaidik & Evans*, note 22, p. 328.

32 CNN, Sotomayor Pledges 'Fidelity to The Law', http://edition.cnn.com/2009/POLITICS/07/13/sotomayor.hearing/index.html?iref=nextin (last accessed on 15 November 2018).

33 *Sullivan, Vaidik & Evans*, note 22, pp. 330-332.

34 *Sullivan, Vaidik & Evans*, note 22, p. 334.

35 *B. Leiter*, Legal Formalism and Legal Realism: What Is The Issue?, Legal Theory Journal 16 (2010), pp. 111, 115.

36 *Ibid,* 111.

cause they want to maintain their legitimacy. This is what they believe they should do[37]. The internal point of view of the member of the practice is expressed in what she does, in this case, in how judges draft their opinions.[38]

It is important to note that the positions I just presented are descriptions made by some judges of their own work; they are descriptions made by some judges of the judge's internal point of view in US legal culture. They are not descriptions of legal practice that realist or formalist legal theorists would provide. If this were the case, the objection would be irrelevant. The description that Kahn offers would be another of the various descriptions that could be presented on the internal point of view of a member of the legal practice. The description that Kahn presents of judges and judicial opinions would be in competition with the descriptions offered by realist and formalist theorists. The strength of each of these descriptions would be based on its power of persuasion[39]. The triumph of one description or another will depend on its acceptance by the members of the political community[40].

Nevertheless, the objection is relevant if we understand that cultural analysis of law seeks to describe the internal point of view of those who are part of the legal culture.[41] If this is the case, it would seem that in the US case, Kahn would have to recognize that the meaning of the judicial decision and judges in US legal culture is fragmented. Kahn would have to account for the fact that the three perspectives, realist, formalist, and culturalist, coexist within the US legal community. The meaning of the legal practice is not homogeneous, and Kahn, if he is consistent with the premises of his approach to the study of law, should not privilege one interpretation of the members of the practice over the others. He should not state that one is the best interpretation of US legal culture. He could not argue that there is music in judicial opinions.[42] He would have to argue that judicial opinions do not produce one but several melodies.

The same type of argument can be offered with respect to what citizens believe is the meaning of judicial opinions and judges in the US legal culture. Even if we suppose that all US judges agree that the judicial decision is a rhetorical instrument to maintain the belief in self-government through law[43], there still remain many questions regarding whether citizens are also in agreement with this interpretation. That judges, experts on the matter, believe this, does not mean that citizens, who do not usually have specialized legal knowledge, do so as well. It can be argued that some US citizens are convinced, for example, of the realist interpretation and others of the formalist interpretation of the judicial decision.

37 *T. Halper*, Logic in Judicial Reasoning, Indiana Law Journal 44 (1968), pp. 33, 40; and *Posner* note 22.

38 CNN, Roberts: 'My job is to call balls and strikes and not to pitch or bat, http://edition.cnn.com/2005/POLITICS/09/12/roberts.statement/ (last accessed on 15 November 2018).

39 *Kahn*, note 8, p. 103.

40 *Ibid*, p. 58.

41 *Kahn*, note 4, p. 52.

42 *Ibid.*

43 *Kahn*, note 4, p. 54.

Cann and Yates made a series of estimates, based on data from the 2010 and 2012 CCES survey, that describe the beliefs of US citizens regarding the formalism or realism of judges. According to the results of the study, 25% of respondents defend legal formalism, 43% defend realism and the remaining 32% consider that judicial decisions are a mixture between these two positions.[44] Similar studies show the split among US citizens in the way they perceive judicial decisions, although the percentage of persons defending realism or formalism vary among these studies[45].

Realist citizens are skeptical of the idea that the law is neutral or that public officials seek to interpret the voice of the people by means of the interpretation of the law.[46] The daily experience they have with state power shows them not only that the law is a political instrument but that it cannot cease to be so.[47] The political election of federal judges by the executive and legislative branches also confirms this. Election of many state judges by means of popular vote reinforces this idea. There does not seem to be any evidence that citizens believe that federal judges are different from state judges in relation to this structural element. Realist citizens therefore believe that legal culture requires the judge to be a transparent political agent. Judges must openly understand themselves as representatives of the partial political positions that brought them to the bench.[48]

44 *D. Cann and J. Yates*, These Estimable Courts, Oxford 2016.

45 See, for example: *Richard Brisbin*, Slaying the Dragon: Segal, Spaeth and the Function of Law in Supreme Court Decision Making, American Journal of Political Science 40 (1996), p. 1004 ff.; *G. Casey*, The Supreme Court and Myth: An Empirical Investigation, Law and Society Review 8 (1974), p. 385 ff.; *Dean Jaros & Robert Roper*, The Supreme Court, Myth, Diffuse Support, Specific Support, and Legitimacy, American Politics Quarterly 8 (1980), p. 85 ff.; *Harry Stumpf*, The Political Efficacy of Judicial Symbolism, Western Political Quarterly 19 (1967), p. 293 ff.; *Ronald Fiscus*, Of Constitutions & Constitutional Interpretation, Polity 24 (1991), p. 313 ff.; *J. Gibson & G. Caldeira*, Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?, Law and Society Review 45 (2011), p. 195 ff.; *John Scheb & William Lyons*, The Myth of Legality and Public Evaluation of the Supreme Court, Social Science Quarterly 81 (2000), p. 928 ff.; *John Scheb & William Lyons*, Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions, Political Behavior 23 (2001), p. 181 ff.; and *Cann & Yates*, note 44, p. 59.

46 *W. Marshall*, Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor, Duke Journal of Constitutional Law and Public Policy 6 (2011), p. 1 ff.

47 *E. Voeten*, Judges as principled politicians, https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/20/judges-as-principled-politicians/ (last accessed on 15 November 2018).

48 *Gibson y Caldeira* conducted a series of interviews with a representative sample of citizens from the U.S. and found that 61.9% of persons interviewed perceived judges as supporting their decisions in personal beliefs, while 51.8% think that political values and ideas influence judicial decisions. However, 52.6% of respondents rejected the idea that judges are 'politicians with robes'. According to the authors, this fact reinforces the hypothesis that citizens trust judges more than they trust politicians because the law is a more serious boundary for judges. See *Gibson & Caldeira*, note, 46, pp. 11-13, 18-19.

In contrast, formalist citizens argue that judges and judicial decisions are (and should be) vehicles of reason[49]. For these citizens, the law can guarantee peace and prosperity in society only if it is univocal. The law can meet these objectives if any member of the political community can recognize it and if judges can apply it neutrally. There can be no order and prosperity without legal certainty, and there can be no legal certainty without equating the law with reason[50]. Again, if this is true, it is not clear why Kahn can equate judges' internal point of view, supposing that there is unanimity between them, with the internal point of view defended by the legal culture[51]. Citizens are a central part of this culture. Monist cultural analysis must account for how citizens interpret the web of meanings that constitute their legal culture.

II. The External Perspective

The external is the second perspective of analysis of the implicit concept of culture. When we examine how the monist cultural analysis of law presents the relationship between the law and its 'other', the legal culture appears as a homogeneous unit that is in conflict with what is outside of it[52]. The law and its other are presented as always in conflict.[53] The legal culture always appears to be a unit in which its members concur on its meaning – concur on the interpretation of the conceptual web that constitutes their culture. The same happens with what constitutes the 'other' of law, love or revolution, for example[54]. The collective character of the webs of meaning require this homogeneity. If it did not exist, they would not really be common; there would be no agreement about the symbolic structures that sustain collective life. Legal culture or that of love are therefore presented in the thick descriptions that monist cultural analysis of law provides as requiring the same things of all of its members[55]. The meaning of the symbolic structures that constitute law and its 'other' is one and only one. In *Law and Love*, for example, Kahn compares the demands that love and the State make on the subject and finds that they are incommensurable. Law and love cannot

49 *K. Bybee & J. Stone Cash,* All Judges are Political Actors – Except When They Aren't, https://www.maxwell.syr.edu/uploadedFiles/campbell/data_sources/BybeeOped.pdf. (last accessed on 15 November 2018).

50 *B. McDonald*, Supreme Court justices: Are they supposed to be politicians in black robes?, CNN (2016). Available at https://edition.cnn.com/2016/10/27/opinions/supreme-court-role-shouldnt-be-political-mcdonald/index.html.
(last accessed on 15 November 2018).

51 *Kahn*, note 4, p. 52; *Kahn*, note 17, p. 236; *Kahn*, note 8, p. 90.

52 *Kahn*, note 4, pp. 160-165.

53 *Ibid,* pp. 165-170.

54 *Ibid,* p. 165.

55 *Ibid*, pp. 163-165; *Kahn*, note 8.

include each other; they are always in conflict[56]. However, one cannot exist without the other.[57]

The substantive unity of legal culture that appears when contrasted with its 'other' is not only shown in extraordinary moments like those represented by the trials of King Lear[58]. This substantive unity appears particularly acute in the daily interactions between the law and its 'other'; it is made insightfully explicit in the description that monist cultural analysis provides of the process by which human beings make decisions on a daily basis. Legal culture, Kahn argues, enters into daily conflict with other webs of meaning[59]. Human beings are always committed to a series of values that are not ranked a priori.[60] Human decisions are therefore not the application of a set of abstract moral or legal principles to particular circumstances.[61] Rather, they are consequence of the contextual balance that people create between all of the values that are at play in a specific case.[62] Sometimes, for example, they choose love over justice or law over beauty. Other times they may make completely contrary decisions. Nevertheless, these characterizations of how human beings make decisions start from the premise that there is unity within each of the symbolic systems that come into conflict. In each system, there is an agreement both on what the legal culture requires of its members and on what the webs of meaning they compete with claim of theirs.

A literary example analogous to *King Lear* may help me to explain the argument. Antigone is one of the paradigmatic Greek tragedies. It is a tragedy because law confronts love in a way in which a synthesis is not possible. Thesis and antithesis cannot create a new reality in which the two coexist peacefully. What the law of the city requires is in irresolvable conflict with what filial love claims. Theban law mandates that Polynices' body not be subject to funeral rites. Polynices is a traitor, having attacked Thebes with a foreign army. Love, in contrast, requires sisters to collect and honor the body of their brothers who died on the battlefield. Antigone, Polynices' sister, is in the middle of the symbolic orders she is committed to: she is a loyal citizen of Thebes and is a sister who loves her brothers. Deciding whether she should leave Polynices' body on the battlefield involves giving priority to one of the values she believes in. For Antigone, the hierarchy of these values is not determined a priori. The subordination of one value to another is a product of the decision made in a particular moment[63].

However, Sophocles' tragedy is successful as a literary product because Antigone is an archetype of all citizens of Thebes. All members of the polis share what law and love man-

56 *Kahn*, note 4, p. 163.
57 *Ibid.*
58 *William Shakespeare*, King Lear, London 1989.
59 *Kahn*, note 4, p. 161.
60 *Kahn*, note 8, p. 98.
61 *Ibid,* pp. 83-85.
62 *Kahn*, note 4, p. 168.
63 *Sophocles*, Antigone, Madison 2013.

date. In the play, Antigone is the one who faces the conflict of values. Nevertheless, all other members of the city recognize that they could also face the same situation. Furthermore, the tragedy is part of the contemporary Western literary canon because there are still a lot of us who can recognize ourselves in the character. Many of us imagine ourselves in a position analogous to what Antigone experiences in the play. Of course, we do not imagine ourselves in a situation in which we must opt between being loyal to our city, which has been attacked by a foreign army led by our brother and collecting the body of our brother – heir to the throne and traitor who died in combat. Rather, we can imagine ourselves in multiple situations where the world of meanings of love comes into conflict with the world of meanings of law.

The strength of Sophocles' tragedy, the immense literary value it has, is rooted in the fact that its narrative is concentrated on a single facet of the relationship between law and love. The reader cannot imagine that there are other interpretations of the Theban world of meanings on love and law -- interpretations where, for example, it can be argued in the case that Antigone is facing that there is no real conflict between these two webs of meanings. For the tragedy to be effective as literature, thesis and antithesis must have clear, precise, and homogeneous limits and meanings. Only in this way will it have the dramatic force necessary to persuade the reader or the theater audience.

However, the tragedy is problematic if it is presented as a description of the concept of culture and its relationship with the 'other' of law. The situation that Antigone represents paradigmatically would seem to be only a part of the legal culture, a particular situation within the multiple specific situations that form a complex practice like cultural practice. We can imagine, for example, that not all citizens of Thebes are in agreement with the assertion that filial love requires the bodies of brothers who are traitors to be rescued by their sisters. It could be said that this could be confusing love with emotional blindness. For this group of citizens, love is not equated with irrational impulses. The members of the practice do not have a homogeneous point of view of the culture they are part of. The difference among the Thebans would then not be if love, understood properly, is applicable to the case of Antigone and Polynices. Rather, the difference would be in the meaning of love and what it requires of people.

Likewise, we cannot imagine that for some of its citizens, Theban law does not require leaving the body of a traitor on the battlefield. The issue is not that there are different interpretations of the same legal norm that regulates the problem. The issue is that this group of citizens understands that death and funeral rites, even those of traitors, are a private sphere issue, which is not (and should not be) regulated by law. For these citizens, law does not regulate (and should not regulate) funeral rites. The cultures of law and love in Thebes do not have a homogeneous character and absolute unity in these examples. Rather, they are fragmented. These examples related to an imagined Thebes are analogous to the experience we have with the legal cultures we are immersed in. We do not perceive that there is always homogeneity in the internal point of view of the members of the practice, as shown by the arguments I presented in the section immediately above.

C. Legal culture and the Unity of the 'We' that Practices It

The second problem with the homogeneous concept of culture that the cultural analysis of law is committed to is that it supposes the unity of those who practice it. Monist cultural analysis does not only assume the homogeneity of its contents but assumes the unity of those who practice these uniform contents. In the thick descriptions offered by the monist cultural analysis of law it is argued that a homogeneous 'we' practices culture.[64] The web of meanings is shared by an undifferentiated set of individuals that is named with the first-person plural: culture is practiced by a 'we'[65]. For cultural analysis, the members of the practice are interchangeable if the object of analysis is the meaning of the horizon of perspectives that they create and that constitute them simultaneously[66]. The two points, the contents and the members of culture, are linked, of course: if culture is a collective experience and the contents of culture are homogeneous, its members are indistinguishable in as much as participants of that legal culture.

However, this seems to be an interpretation of the collective subject that constitutes the cultural practice that collides with the experience we usually have with the collective subjects of contemporary cultures. These subjects are also fragmented. This fracture can first be seen when we recognize the cultural diversity of the political communities we live in. The multicultural character of contemporary states calls the supposed unity of the collective cultural subject into question. Cultural minorities – indigenous groups, for example – do not always share the web of meanings of the majority culture, or, given their hybrid character, share only a part of it.[67] This also happens with immigrants that become citizens who are recent arrivals in a political community, or with immigrants that become citizens who remain culturally isolated even though they have been in the receiving country for a long time. It also happens with undocumented immigrants who come from cultures that are very different from the culture of the receiving State.[68] All of these groups call the unity of the cultural 'we' into question. Arguing that you are describing US culture, for example, and excluding hybrid perspectives of national minorities and immigrant communities that have not been assimilated seems problematic. US culture certainly has a particularly strong centripetal force: it has the capacity to assimilate its new members quickly. Still, deriving the cultural unity of all of its members from this fact seems an exaggeration. When monist cultural analysis describes US culture it does not distinguish between the dominant culture and

64 *Kahn*, note 4, pp. 124-125; *Kahn*, note 8, pp. 125-126.

65 *Kahn*, note 8, pp. 122-130.

66 *Kahn*, note 3, pp. 34-41.

67 See, for example, *Daniel Bonilla*, La Constitución Multicultural, Bogotá 2006, Ch. 3.

68 A paradigmatic example is Chinese immigrant communities in the US. Some of its members are committed to Confucionist ideas about law that are in conflict with US legal culture. See *B. Zinzius*, Chinese America: stereotype and reality: history, present, and future of the Chinese Americans, Bern 2005.

other hybrid minority cultures. Monist cultural analysis argues that it is describing *the* US culture[69].

Other examples related to US legal culture can help me substantiate the argument. I wonder, for example, if the idea that law is an autonomous, closed field clearly distinguishable from other normative orders like the moral order – an idea that characterizes the dominant legal culture – is shared by the hybrid legal culture of some indigenous communities in the United States, where the line between the moral realm and the law is notably porous.[70] I also wonder if the Asian immigrant communities that believe in Confucianism share the idea that the legal subject is fundamentally a subject of rights or if they understand it as a subject characterized primarily by its obligations.[71] If the indigenous groups and non-assimilated Asian immigrant communities do not fully share US legal culture, for example, cultural analysis must then accept that there are various legal cultures within the State. If these minorities understand themselves as part of the State's legal culture, monist cultural analysis must accept the fragmentation of the members of the US legal culture, as well as the fragmentation of its contents.

However, the challenge posed by cultural minorities could be reinterpreted by monist cultural analysis by calling upon argumentative strategies like that of the cultural center and cultural periphery. Monist cultural analysis could argue that the center of the legal culture is effectively homogeneous and that a unitary collective subject implements this center. It could add that only on the margins of cultural practice are there any 'dissident' foci, which are irrelevant for understanding the core of the US legal culture. Nevertheless, the problems with the implicit concept of culture defended by the monist cultural analysis of law do not decrease but rather increase if we examine the dominant legal culture. The fragmentation of the collective cultural subject becomes even more evident when the fragmentation that exists within the dominant legal culture is made explicit. In the case of the United States, the collective subject of the dominant legal culture is divided along lines of race, religion, and ethnicity. These categories determine that social groups have different positions with regard to the social imaginary. I believe that the following two examples can help me show this fragmentation.

69 *Kahn*, note 4, pp. 13-14; *Kahn*, note 17, pp. 228-229; *Kahn*, note 8, pp. 68-69.

70 See *A. Wilkinson*, A Framework for Understanding Tribal Courts and the Application of Fundamental Law: Through the Voices of Scholars in the Field of Tribal Justice, Tribal Law Journal 15 (2015), p. 85; *T. Tso*, Moral principles, traditions, and fairness in the Navajo Nation Code of Judicial Conduct, Judicature 76 (1992), pp.16-20; and NCAI, NCAI Urges Senate to Consider Judge Kavanaugh's Views on Federal Indian Law and the Governmental Status of Tribal Nations During Upcoming Confirmation Process, http://www.ncai.org/news/articles/2018/07/10/ncai-urges-senate-to-consider-judge-kavanaugh-s-views-on-federal-indian-law-and-the-governmental-status-of-tribal-nations-during-upcoming-confirmation-process (last accessed on 15 November 2018).

71 *Zinzius*, note 68, p. 187.

The first example is related to the principle of separation of church and State. This principle is one of the pillars of the US rule of law.[72] The conceptual architecture of this principle revolves around key categories in the modern social imagination: the basic equality of human beings that is translated into the basic equality of all citizens, individual autonomy, the separation between the private sphere and the public sphere; and the principle stating that the State must treat all of its citizens with the same consideration and respect.[73] These categories would construct a political community where religious diversity is expressed in the private sphere, and where the State, to allow this, is not identified with any religion. Nevertheless, these categories do not seem to be shared by a significant part of the US conservative evangelical groups.[74] These evangelical groups think that the United States is a Christian political community[75] and that the State must actively defend and protect their values.[76] They argue that Christian values are the basis of the US political community[77].

Some of the public discussions that these groups have fostered make their direct conflict with central elements of the modern social imagination explicit. Issues like the use of crucifixes in public spaces[78], the publication of the ten commandments in state offices,[79] state promotion of Christmas,[80] and the suggestion that the construction of mosques should

72 See the First Amendment of the United States Constitution and *T. Jefferson*, Jefferson's Letter to the Danbury Baptists, https://www.loc.gov/loc/lcib/9806/danpre.html (last accessed on 15 November 2018).

73 *H. Shiffrin*, Liberalism and the establishment clause, Chicago-Kent Law Review 78 (2003), pp. 717, 719 and *P. Hamburger*, Separation of Church and State, Cambridge 2002, Ch. 8.

74 *M. Chapman*, Santorum: 'Separation of Church and State' Was in Soviet Constitution Not U.S. Constitution, https://www.cnsnews.com/news/article/michael-w-chapman/santorum-separation-church-and-state-was-soviet-constitution-not-us. (last accessed on 15 November 2018).

75 *D. Gushee,* The Future of Faith in American Politics. The Public Witness of the Evangelical Center, Waco 2008, pp. 41-44.

76 *W. Russell*, God's country?, Foreign Affairs 85-5 (2006), pp. 35-37.

77 *C. Grossman*, Franklin Graham wants to make U.S. a Christian nation, http://www.kansascity.com/living/religion/article64034697.html;

J. Brooke & S. Feld, America as a "Christian Nation"? Understanding Religious Boundaries of National Identity in the United States, 71 SOCIOLOGY OF RELIGION 290-297 (2010); S. Ramet, Fighting for the Christian Nation: The Christian Right and American politics, 7 JOURNAL OF HUMAN RIGHTS (2005). (last accessed on 15 Nov. 2018).

78 *F. Newport*, Americans Approve of Public Displays of Religious Symbols*,* http://news.gallup.com/poll/9391/americans-approve-public-displays-religious-symbols.aspx; *T. Ascik*, Should Religious Symbols Be Banned on Public Lands? THE IMAGINATIVE CONSERVATIVE (2017), http://www.theimaginativeconservative.org/2017/11/peace-cross-religious-symbols-banned-public-lands-thomas-ascik.html, (last accessed on 15 November 2018).

79 *J. Roh*, Supreme Court Bars Commandments From Courthouses, http://www.foxnews.com/story/2005/06/28/supreme-court-bars-commandments-from-courthouses.html (last accessed on 15 November 2018).

80 *M. W. Brown*, Christmas Trees, Carols and Santa Claus: The Dichotomy of the First Amendment in the Public Schools and How the Implementation of Religion Policy Affected Community, Jour-

not be permitted in US cities[81] make it clear that these organized political groups that are relevant in US public life – we cannot forget, for example, that they constitute one of the political bases of President Trump[82]– do not share some central elements of the modern social imagination. The arguments of conservative Christians obscure the lines between the public and private spheres, distinguish between first- and second-class human beings and citizens, and break with the state neutrality with respect to religion. Formally, of course, these groups do not question the principle of separation of church and State; or the right to freedom of religion. Nevertheless, their discourse promotes the view that it is correct to distinguish between the State church, which provides the values that support the State, and other religions[83]. The US State is (and should be) a Christian State[84]. In US legal culture, then, there is a notable conflict between the modern imagination that is realized in its legal texts and the pre-modern imagination of the conservative Christians. The contents and members of US legal practice are fragmented.

The second example is directly related to racial equality. The US social imagination has the equality of all human beings and the equality of all citizens as another of its pillars. Race cannot be a criterion for determining human dignity or for determining the rights of members of the political community. The conceptual architecture of the principle of racial equality calls upon one of the most important elements of the modern social imagination: the abstract rational and autonomous liberal subject[85]. Nevertheless, this element does not seem to be shared by a segment of the conservative groups that support President Trump. This sector argues that the Unites States is (and should be) not only a Christian nation but a

nal of Law Education 28 (2), pp. 162-163; *J. M. Hartenstein*, A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools Is an Establishment of Religion, California Law Review 80, pp. 1022-1024.

81 *N. Gass*, Trump: 'Absolutely no choice' but to close mosques', https://www.politico.com/story/2015/11/trump-close-mosques-216008, (last accessed on 15 November 2018) and *S. McCammon,* Conservative Christians Grapple With Whether 'Religious Freedom' Includes Muslims, https://www.npr.org/2016/06/29/483901761/conservative-christians-grapple-with-what-religious-freedom-means-for-muslims, (last accessed on 15 Nov. 2018).

82 Trump won 80 % of the votes among white evangelicals, according to data of the Pew Research Center. *G. Smith & J. Martínez*, How The Faithful Voted: A Preliminary 2016 Analysis*,* http://www.pewresearch.org/fact-tank/2016/11/09/how-the-faithful-voted-a-preliminary-2016-analysis/ (last accessed on 15 November 2018).

83 *Los Angeles Times*, In Theory: Was America ever a Christian nation?, http://www.latimes.com/social/burbank-leader/opinion/tn-blr-me-0629-intheory-20160628-story.html,
(last accessed on 15 November 2018).

84 *C. Pearlston*, Is America a Christian Nation?, https://www.catholiceducation.org/en/controversy/politics-and-the-church/is-america-a-christian-nation.html (last accessed on 15 November 2018).

85 *T. Shelby*, Race and Social Justice: Rawlsian Considerations, Fordham Law Review 72 (2004), pp. 1701-1704; *S. Foster*, Rawls, Race, and Reason, Fordham Law Review 72 (2004), pp. 1716-1717.

white nation.[86] This argument has had a significant impact on the discussion on immigration, for example. President Trump himself has indicated that the United States should promote immigration from countries like Norway and not from Africa or Latin America[87]. The discussion about the wall in the border with Mexico also has racial notes.[88] The dangerous nature of Latin Americans is in part related to their skin color.[89]

Finally, the proposal of some conservative sectors that whites and blacks should live separately, made visible recently by the mayor of a town in New Hampshire, shows the conservative sectors' profound questioning of the principle of racial equality.[90] These conservative groups believe that we can (and should) make distinctions between human beings by calling upon race[91]. The liberal subject is no longer an abstract subject; rather, it is a colored subject. Again, however, this questioning does not stem from elements external to the symbolic structure that sustains US legal and political culture. These conservative groups think that this is what the symbolic structure requires of all citizens. Ta-Nehisi Coates powerfully synthesizes this argument in *Between the World and Me* – book that won the national book award in the year of its publication. In this book, Coates argues that the US legal, political, and cultural model, what he calls the 'Dream', is based on racism. He argues that, normatively, the project of nation in the United States has as a pillar the supremacy of whites over blacks. Racism is not, Coates argues, an error of a few morally

86 *C. Anderson*, America is hooked on the drug of white supremacy. We're paying for that today, https://www.theguardian.com/commentisfree/2017/aug/13/america-white-supremacy-hooked-drug-charlottesville-virginia (last accessed on 15 November 2018); *D. Mosbergen*, Majority Of White Americans Believe White People Face Discrimination, https://www.huffingtonpost.com/entry/white-americans-discrimination-poll-npr_us_59f03071e4b04917c594209a, (last accessed on 15 Nov. 2018); *C. Savage*, Justice Dept. to Take On Affirmative Action in College Admissions, https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html (last accessed on 15 November 2018).

87 *J. Dawsey*, Trump derides protections for immigrants from 'shithole' countries, https://www.washingtonpost.com/politics/trump-attacks-protections-for-immigrants-from-shithole-countries-in-oval-office-meeting/2018/01/11/bfc0725c-f711-11e7-91af-31ac729add94_story.html?utm_term=.c12995df9df7 (last accessed on 15 November 2018).

88 *K. Reilly*, Here Are All the Times Donald Trump Insulted Mexico, http://time.com/4473972/donald-trump-mexico-meeting-insult/ (last accessed on 15 November 2018);
TIME, Here's Donald Trump's Presidential Announcement Speech, http://time.com/3923128/donald-trump-announcement-speech/ (last accessed on 15 November 2018).

89 *BBC NEWS*, Maine Governor Paul LePage Criticised for 'Racist' Remarks, http://www.bbc.com/news/world-us-canada-37204837 (last accessed on 15 November 2018).

90 *K. D'Onofrio*, Racist Pro-White Town Manager Calls For Races To 'Voluntarily Separate', https://www.diversityinc.com/news/racist-pro-white-town-manager-calls-races-voluntarily-separate (last accessed on 15 November 2018).

91 *D. Horowitz*, How Identity Politics Is Made to Destroy Us, https://amgreatness.com/2018/02/25/identity-politics-made-destroy-us/, (last accessed on 15 November 2018).

questionable individuals; it is rather the expression of the normative commitments of the 'American' people[92].

It is important to note that these two cases do not describe a conjunctural political situation. Rather, they are an iteration of dynamics that cut across US history. The idea that the United States is (and should be) a white, Christian nation is not new. Institutionalized racism, the state defense of Christianity, and the idea of a homogeneous white, Christian nation have been part of the legal and political imagination of a part of US society since its emergence as an independent political community.[93] These two cases show that the legal culture of the United States could be described more precisely if the perspective of pluralist cultural studies is adopted. The positions described are not a violation of the true normative commitments of the people who defend them. They are not an example of the moral inconsistencies of human beings. They are not a reproduction of the typical tension between the principles we defend and practice. These arguments describe the normative commitments of conservative Christian groups. These arguments constitute a part of the US social imagination, are part of its political and legal culture. As such, if you want to describe the culture of the rule of law in the US, you have to accept that its contents are not homogeneous and that its members are fragmented.[94]

D. The Legal Culture of Lawyers, Legal Texts, and Freedom

I. The Legal culture or the Legal culture of lawyers

As mentioned above, the monist cultural analysis of law states that its object of study is legal culture. In the United States in particular and in Western democracies in general, this legal culture is identified with the rule of law. For monist cultural analysis, this legal culture is also understood as a normative practice that includes all members of the political community[95]. Therefore, the legal culture is not the legal culture of lawyers. The legal culture is

92 This issue cuts across Coates's book. See, for example, *Ta-Nehisi Coates*, Between the World and Me, New York 2015, pp. 6-7, 103.

93 *F. Jacobson,* 'Whiteness of A Different Color' European Immigrants and the Alchemy of Race, Cambridge 1998.

94 The United States has changed its ethnic and cultural composition over time. In the 2010 census there were 60 race options, not counting the different ethnic groups. About 3% of Americans did not feel identified with a single race or ethnicity and chose more than one category to describe themselves. In 1970, only 1% of children born in the United States were multiracial, but the 2010 census showed that this percentage increased to 10%. Regarding religion, the Muslim and Jewish population has increased, although most citizens consider themselves Christians. See *M. Kupra,* America is Changing. Bigoted Slurs, Immigration Bans and Racist Rallies Can't Change That, https://edition.cnn.com/2018/01/12/health/changing-face-of-america-trnd/index.html (last accessed on 15 November 2018).

These racial, ethnic, and religious differences are sometimes reflected in differences over the contents of US legal culture, as argued in this essay.

95 *Kahn*, note 17, pp. 241-242; *Kahn*, note 8, p. 82.

a broad practice that includes lawyers but extends beyond them. Nevertheless, Kahn's examination of the legal culture is actually the description and analysis of the legal culture of lawyers, particularly that of judges and law professors[96].

With the exception of *Finding Ourselves at The Movies*, Kahn's work aims to study the internal point of view of US judges and law professors.[97] In most of his work, the central object of study is the culture of jurists – not the legal culture of citizens. Kahn basically approaches the legal culture through the examination of opinions, laws, decrees, and books by legal theorists. Nevertheless, Kahn does not differentiate between the legal culture of lawyers and the legal culture. He assumes that they are identical. He extrapolates the conclusions he reaches on the internal point of view of lawyers to the internal point of view of all members of the political community[98].

However, in as much as there is no necessary relationship between what lawyers believe about the social imagination and what the rest of the population believes about this web of meanings, this extrapolation is problematic. The arguments I presented in the sections above show that lawyers and citizens do not always agree with respect to the contents and interpretation of the symbolic structures that constitute the US legal culture.

Making the Case is a good example of how Kahn equates the meaning of the rule of law with the meaning that lawyers give to the symbolic structures that constitute it. In this book, the space occupied by judicial opinions and judges in the US legal culture is equated with the space that judges think both occupy[99]. The meaning of judicial opinions and judges in the US web of meanings is a description and analysis of the meaning that judges give to what they do[100]. It is also argued in *Making the Case* that this meaning appears in the rulings they produce[101]. Putting aside the problem that there is no unity in what judges believe about themselves and their products either, I wonder if citizens derive the meaning of judicial opinions and judges from rulings or from what law professors say about them. I wonder, for example, if citizens articulate their interpretations on the United States Supreme Court by means of an interpretation of *Marbury vs. Madison,* or the meaning of jurisprudence by means of an interpretation of the books by law professors like Kahn, Llewellyn, or Langbein.

96 *Kahn*, note 4, pp. 16-46; *Bonilla*, note 9, p. 150.

97 In *Finding Ourselves*, Kahn examines the ideas of family, faith, and sovereignty that are part of the modern social imagination by examining popular films in the United States. *Paul W. Kahn*, Finding Ourselves at the Movies, New York 2013.

98 *Kahn*, note 3, pp. 1-6, 9-46; *Kahn* note 4, pp. 47-122; *Kahn*, note 8, pp. 79-113, 115-165.

99 *Kahn*, note 8, pp. 57-77.

100 *Ibid,* pp. 61-64.

101 *Ibid,* pp. 65-67.

The great majority of citizens do not read federal court rulings or the academic publications that examine them.[102] Nevertheless, part of the meaning that citizens give to judges likely derives from what institutions with ample social influence, like the media or public education, communicate about judges.[103] It is also likely that what these institutions say about judges is derived from judicial opinions. However, not everything these institutions say is equated with the 'official' interpretation that opinions offer. These institutions continually turn to other sources of information, such as what the social sciences say on judges and jurisprudence. Citizens also have other sources of information on the meaning of law that do not necessarily agree with the way judges describe themselves. What churches, unions, social organizations, among others, tell citizens about the legal culture does not necessarily align with the contents of the legal culture of lawyers. The examples I presented above on the principle of separation of church and State and equality illustrate this argument very well. Again, it would seem that this fragmentation of the US legal culture could only be described and adequately analyzed if the perspective of the pluralist cultural analysis is assumed.

The examples on formalist and realist citizens reinforce this interpretation. Returning to these examples, I wonder if citizens understand judicial opinions as a rhetorical mechanism that aims at persuasion, as Kahn states[104]. Do citizens really believe that the law is a largely malleable instrument that can be used by judges to achieve various political purposes? Is persuasion by means of rhetoric what allows an opinion to be understood as the creation of the people? Rather, this would seem to be the negative description (not the normative description) of what citizens believe about lawyers and the law. For many citizens, lawyers are mercenaries[105] and illegitimately convert the law into a weapon for the defense of particular interests.[106] They convince citizens because they are demagogues – they are the sophists of

102 US citizens know very little about their legal system. In a survey conducted by the Center for Public Policy of the University of Pennsylvania, only 1 in 4 US citizens surveyed can name the three branches of power, 1 in 3 cannot name any right protected by the First Amendment to the Constitution and 3 out of 10 know the name of the president of the Supreme Court of Justice. See *APPC*, Americans Are Poorly Informed About Basic Constitutional Provisions, https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions?utm_source=news-release&utm_medium=email&utm_campaign=2017_civics_survey&utm_term=survey&utm_source=Media&utm_campaign=e5f213892a-Civics_survey_2017_2017_09_12&utm_medium=email&utm_term=0_9e3d9bcd8a-e5f213892a-425997897 (last accessed on 15 November 2018).

103 *H. Enten*, What Americans Think of the Supreme Court, https://www.theguardian.com/commentisfree/2012/jun/27/what-americans-think-supreme-court(last accessed on 15 November 2018).

104 *Kahn*, note 8, pp. 57-58.

105 *R. Post*, On the popular image of the lawyer: Reflections in dark glass, California Law Review 75 (1987).

106 *M. Galanter*, The faces of mistrust: The image of lawyers in public opinion, jokes, and political discourse, University of Cincinnati Law Review 66 (1998), p. 805 ff.; and *M. Asimov*, Bad lawyers in the movies, Nova Law Review 24 (2000), p. 533 ff.

modern liberal democracies[107]. Equating these arguments with the internal point of view that citizens adopt with respect to legal culture would seem problematic. For many citizens, Kahn's description and analysis of judges and their products would be close to a postmodern description and analysis that they would be deeply suspicious of.

Some of these citizens argue that judges should not be like lawyers. That is not what legal culture requires of them. If judges were only lawyers in robes, US democracy would be lost[108]. For these citizens, judges and the law, understood properly, are the voice and materialization of reason[109]. In order to meet its objectives, the law can be one and only one. The mandates of law cannot depend on the interpreter. If this were the case, citizens would not know how to act according to the law. The conditions for order and prosperity would not be guaranteed. The black robe that annuls the judge's subjectivity, the blindfold that covers the eyes of the paradigmatic images of justice, the syllogistic form in which opinions are typically written, the long history of equating logos and law in the West, and the crimes that punish judges for violating the law with their opinions confirm and nurture the positions of these formalist citizens.[110]

In contrast, realist citizens would accept the description that Kahn offers of judges as interpreters that have a high degree of discretion and that use rhetoric to persuade their audiences[111]. However, realist citizens would argue that legal culture requires judges to be transparent in their argumentation and that they do not hide their political character in the syllogistic structures that they construct their opinions with a posteriori.[112] They would likewise argue that judges should make use of scientific knowledge to guide and limit their decisions.[113]

107 *M. Bohmer*, Equalizers and translators: Lawyers' ethics in constitutional democracy, Fordham Law Review 77 (2009), pp. 1372-1375.

108 *J. Fuller,* Have American politics killed the impartial Supreme Court?, https://www.washingtonpost.com/news/the-fix/wp/2014/05/08/have-american-politics-killed-the-impartial-supreme-court/ (last accessed on 15 November 2018).

109 *S. Odland*, Why judges should be appointed, not elected, https://www.cnbc.com/2016/06/16/why-judges-should-be-appointed-not-elected-commentary.html (last accessed on 15 November 2018).

110 Gibson and Caldeira present the results of a survey made to US citizens about the legitimacy of courts. These results show that 29.9% of respondents believe that judges only apply the law and see case law as a mechanical exercise. See *supra* nota 46. This perspective confirms the studies by *Cann and Yates* mentioned above. See note 44.

111 *E. Klein*, Of Course the Supreme Court is Political, https://www.washingtonpost.com/news/wonk/wp/2012/06/21/of-course-the-supreme-court-is-political/ (last accessed on 15 November 2018).

112 *C. Arbogast*, In Trump's America, is the Supreme Court still seen as legitimate?, https://theconversation.com/in-trumps-america-is-the-supreme-court-still-seen-as-legitimate-84242(last accessed on 15 November 2018).

113 In the U.S. popular culture, TV shows often promote the idea that judges are not neutral. Rather, they present judges as political actors. Series such as *Judge Judy, Law and Order* and *Suits*, highlight the perspectival nature of judges—Judge Judy, for instance, is tough with crime and advo-

II. Legal Culture as Text and Legal Culture as Practice

Monist cultural analysis of law assumes that the normative meaning of culture is equated with legal texts. The legal culture's central locus is statutes, jurisprudence, decrees, and doctrine[114]. Kahn defines culture as a practice.[115] Nevertheless, he also understands that what law *does*, what the members of the practice *do*, is produce legal texts[116]. What culture does is equated with the production of writings that concentrate the meanings of legal culture. As a consequence, describing and analyzing these texts is the path to understanding the symbolic structures of the legal culture[117]. This concept of culture as textual practice is problematic from two perspectives. First, because the members of the practice do not only produce texts; the internal point of view of the members of the practice does not have legal texts as its only manifestation.

What judges do in hearings, for example, can be more telling on what they believe that the legal culture requires of them than what they write in opinions[118]. Oral procedures can say a lot more about the symbolic structures of law than what is written at the end of a cycle of hearings[119]. The spoken word does not necessarily reflect the written word. However, both are part of legal culture. The two can coincide, of course. In this case, however, the description would lose nuance and facets of the practice that are compatible and that only materialize verbally. However, the internal point of view that the members of the practice are effectively committed to does not always coincide with the contents of the written legal product. In some liberal democracies with Catholic majorities, for example, it is common for the courts to consult the Church when they are going to decide morally polemic cases.[120] These consultations are not usually mentioned in opinions. Judges understand these consultations as a means of respecting democratic majorities, as a means of recognizing society's moral conventions. It would therefore seem that if you want to study the conceptual architecture of the principle of separation of church and State in those countries, you must

cates for women, while judges from other reality court shows do not. What legal culture asks Judy is to be clear about her political agenda, as she does every week in her show.

114 *Kahn*, note 4, pp. 47-122.

115 *Ibid*, pp. 9-10, 15.

116 *Kahn*, note 8, pp. 115-135.

117 *Ibid,* pp. 50-51.

118 *O. Chase & J. Thong*, Judging judges: The effect of courtroom ceremony on participant evaluation of process fairness-related factors*,* Yale Journal of Law and the Humanities, 24 (2012), pp. 221-223.

119 *G. Miller*, The legal function of ritual, Chicago-Kent Law Review 80 (2005), p. 1181 ff.; *J. Allen*, Theory of Adjudication: Law As Magic*,* Suffolk University Law Review 41 (2008), pp. 810-811.

120 The Colombian Constitutional Court consulted the Episcopal Conference of Colombia while the case about the constitutionality of the law that criminalized abortion was being decided (Corte Constitucional de Colombia, sentencia C-355, 2006). In Chile, several Christian organizations took part in the case that decriminalized abortion in the country. (Tribunal Constitucional de Chile, sentencia 37293751-17, 2017).

not only examine the Constitution, statutes that regulate religious freedom, and the judicial opinions that interpret both. You would also have to examine what judges do with these consultations before drafting their opinions.

Continuing with the examples and returning to the meaning of opinions to illustrate the difference between writing and other forms of judicial work: why should we privilege what opinions say implicitly or between the lines, i.e., that jurisprudence is a rhetorical mechanism that maintains the belief in self-government through law, to determine their meaning? No opinion presents this argument explicitly. Why should we not privilege what they say explicitly by means of their syllogistic structure? Most rulings have this structure. Why not specify the meaning of jurisprudence by means of what judges say they do with opinions but that leaves no explicit mark in them? There are multiple reports in which judges describe their work as interlaced with hunches – Judge Hutcheson's report is perhaps the best known.[121] These intuitions arise from the political and moral commitments of judges. These political commitments are what really justify their decisions.

We could respond to this objection by arguing that cultural analysis is an interpretative enterprise. The scholar must always choose what should be interpreted and how to do so. This is true, of course. Nevertheless, if all of these facets of the practice materialize different internal points of view of the members of the practice, the scholar could not choose one of them as the best interpretation of the practice. The scholar could not do so if she wants to give an account of the legal culture that she has as an object of study. We might then want to argue that no legal scholar could simultaneously explore all of the dimensions of a legal culture. Furthermore, we could say that a scholar could not even examine all the facets of a single dimension of a legal culture. This is also true. However, one could answer that the scholar's time and energy should be invested more wisely: she should address fewer aspects of the legal culture and elaborate on some of them. The scholar could thus examine everything said and done in each of the dimensions examined. More persuasively, given the scholar's limits, she should explicitly recognize that her conclusions do not describe and analyze the legal culture but the texts of law – the legal culture of lawyers.

The second problem that emerges when equating legal culture with legal texts is that this equates culture with its members' internal point of view[122]. Cultural analysis starts from the premise that the members of the practice feel obligated by the mandates of legal texts[123]. Cultural analysis of law's object of study therefore excludes those participants who do not always relate to the system's norms from an internal point of view[124]. The concept of legal culture again seems to be needlessly reduced. On one hand, this concept of culture excludes the members of the cultural practice who obey the law due to habit, fear, or for strategic reasons. All legal systems include subjects who obey the law without feeling obli-

121 *Hutcheson*, note 23.

122 *Kahn,* note 4, p. 52.

123 *Kahn*, note 3, pp. 1-6; *Kahn*, note 8, pp. 124-126.

124 *Kahn*, note 8, p. 130.

gated by its norms. Frequently, these subjects adopt a dual position towards law: sometimes they obey the law because they feel obligated, and other times they do so for different reasons. It is true that studying this type of subject would not give an account of the symbolic structures that sustain law's mandates. Nevertheless, it is also true that these subjects are part of the legal culture. The legal culture practice includes different types of members. Not all relate to the law in the same way. Giving an account of the legal culture practice in a political community should include this type of subject. What do these subjects tell us about the autonomy or heteronomy of the political community, for example? Or, what do they tell us about the relationship between popular sovereignty and the law? Do these subjects understand that the law of the community is also their law? With their particular form of understanding what complying with the law means, these subjects also contribute to creating the archetypes of the legal culture they belong to.

Including the members of the practice who do not always assume an internal point of view with respect to the law as an object of study would also be useful for understanding the legal culture in postcolonial societies. In some of these societies, the law of the metropolis coexists with the native law. Nevertheless, this law is not formally understood as part of the legal system of the political community. In part, citizens obey the law of the metropolis due to fear, habit, or for strategic reasons. In part, these same citizens obey the native law because they feel obligated by it. Giving an account of the legal culture in this postcolonial society should include the different relationships that the subjects have with both the law of the metropolis and their own law. Understanding the symbolic structures that give meaning to the cultural practice of that postcolonial society requires this to be so.

On the other hand, the restrictive concept of cultural practice that cultural analysis assumes excludes another type of subject from its object of study: those who violate the mandates of law partially but systematically. Consider, for example, the prosecutors in a political community like Colombia, who do not have freedom to determine what cases should be processed. On principle, prosecutors should pursue all conducts that breach criminal law. Despite this clear legal mandate, Colombian prosecutors have historically not investigated or processed certain types of crimes like abortion, which is illegal in Colombia except for three particular circumstances.[125] Prosecutors are violating the law partially but systematically. They violate the law in this case for different reasons, because they think the typification of the crime of abortion unjust, for example, or because processing these cases causes disproportionate harm to women and their families. Shouldn't this part of legal practice be studied to understand the Colombian legal culture?

The argument I intend to illustrate with these examples is not that the scholar committed to cultural analysis should examine all of the dimensions of a cultural practice I have described above simultaneously. The argument is that the restrictive concept of culture that

125 *Revista Semana*, Suspenden imputación a Carolina Sabino por presunto delito de aborto, http://www.semana.com/nacion/articulo/carolina-sabino-fiscal-reconoce-manejo-inadecuado-del-caso/442443-3 (last accessed on 15 November 2018).

appears in the thick descriptions offered by the monist cultural analysis of law excludes aspects that are part of the culture and that should be examined to understand it. The members of the practice illustrated with the example of prosecutors base their actions on symbolic structures that are part of the culture but do not coincide with those that support the subject's internal point of view with regard to the culture's legal texts.

Finally, the concept of the legal culture assumed by monist cultural analysis equates the law with State law, with the texts produced by the State[126]. This restriction in the concept of the legal culture would be problematic from two perspectives. First, State law does not only constitute the law of a political community. Citizens regulate their behavior by calling upon other normative systems that they also perceive as part of their law. Legal pluralism is not the exception but the rule in contemporary liberal democracies. The rules that regulate informal property in most cities of the Global South[127], those that regulate communal land use in the Midwestern United States[128], the rules for water use among Bolivian farmers[129], or those that resolve problems between cattle ranchers in certain areas of the Western United States are good examples of this argument.[130]

For the citizens who recognize and apply them, this set of rules generally has a greater impact than state legal norms. Classifying this set of norms as non-legal is only a consequence of using the dominant criteria in liberal modernity to identify what the law is. Understanding legal culture as consisting of more than lawyers' legal texts allows us to account for the complexity of the legal world in culturally-diverse and socially-plural societies. I understand, however, that this strong legal pluralist perspective is problematic. This perspective broadens the set of norms that should be described as 'law' too much. Nevertheless, a form of legal scholarship that equates legal culture with lawyers' texts would lose sight of the fact that at least a part of society understands that those sets of norms are 'their' law.

Second, a less radical version of the legal pluralist argument would also call into question the restrictive concept of culture that appears in the thick descriptions provided by cultural studies of law. This argument accepts that it is not analytically useful to classify non-state norms as legal norms. These norms are not part of the legal culture. Nevertheless, this perspective also accepts that normative pluralism is an inescapable fact of contempo-

126 *Kahn*, note 3, pp. 1-6; *Kahn*, note 4, pp. 47-122; *Kahn*, note 8, pp. 122-125.

127 *R. Boelens*, Luchas y Defensas Escondidas. Pluralismo Legal y Cultural como una Práctica de Resistencia Creativa en la Gestión Local del Agua en los Andes, Anuario de Estudios Americanos 68 (2011), p. 673 ff.; *Glenn Matthews*, Informal Law in Informal Settlements, in Holder, J. & Harrison, C. (eds.) Law and Geography, Oxford 2003.

128 *D. Engel*, Legal pluralism in an American Community: Perspectives on a Civil Trial Court, Law and Social Inquiry 5 (1980), pp. 437-444.

129 *R. Boelens*, note 127, pp. 684-687.

130 *R. Ellickson*, Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County, Stanford Law Review 38 (1986), p. 623 ff.; *R. Ellickson,* Order Without Law: How Neighbors Settle Disputes, Cambridge 1991, pp. 40-65.

rary liberal democracies. It also admits that subjects constantly act by calling upon both law and other normative systems that they feel obligated to. State and non-state normative systems are also in constant interaction: they collide and consciously complement and ignore each other. For a citizen from the informal neighborhoods of Bogotá, Cape Town, or New Delhi, for example, the informal rules that regulate property are more important than the state rules on property[131].

Nevertheless, these informal rules are molded in part in image and likeness to state rules; within the informal system, there is talk of promises to sell or transfer of property, for example. The two systems also continually interact. The cities levy property taxes on people using the distribution of informal property made by neighbors. Cities bring utilities to informal neighborhoods, accepting the non-state rules that indicate who the 'owner' of each dwelling is. Family court judges keep these rules in mind when couples ask for a division of joint property or a divorce to distribute the couple's goods. Neighbors authenticate their informal promises of sale at the state notary offices in order to make them valid within the neighborhood, or they ask the State to protect their informal property. Excluding these practices from cultural analysis' object of study is excluding an important part of the legal culture. Understanding the web of meanings of modern law includes, for example, understanding the notions of time, space, and subject created by legal monism. Understanding the web of meanings of modern law also includes understanding how legal pluralism calls into question the framework of meanings that monism constructs.

E. Fragmentation of Legal Culture, Distance, and Freedom

Monist cultural analysis of law argues that if we want to approach scholarship as a free practice, we should take some distance from our object of study[132]. Cultural analysis therefore seeks to distance itself from the most common form of legal scholarship: reform[133]. For monist cultural analysis, legal academia is typically organized in cycles of critique and transformation. The reformist professor describes the law, evaluates it negatively, and offers a normative proposal that would solve the problems she found in law. As a consequence, this type of legal scholarship is a form of legal practice. The law professor is no different from the judge or the attorney. These three types of legal actors are committed to the legal system, are committed to reproducing it. They try to get the law that "is" to approach the law that should be[134]. They do not try to change the law by calling upon extralegal elements. They try to get the law to show the best version of itself.

131 Glenn Matthews, note 127, p. 281.

132 *Kahn*, note 4, pp. 11-12.

133 *Ibid*, p. 9.

134 *Kahn*, note 17, p.234.

Monist cultural analysis of law seeks to distance itself from its object of study in order to understand it[135]. This form of legal scholarship would be analogous to theology; reformist scholarship would be analogous to homily. Scholarship as a legal practice limits the scholar's freedom. Commitment to her object of study obligates the scholar to reproduce law's internal dynamics. In contrast, cultural analysis seeks to understand the world of meaning that law constructs. It does not seek to transform this world of meaning. The cultural studies scholar is analogous to the interpretative anthropology ethnographer: she wants to understand cultural practices from members' internal point of view and wants to do so by means of a thick description of these practices.

If the culturalist scholar has a homogeneous cultural practice as an object of study, examining the perspective offered by a single member of the practice would be sufficient for understanding it. The interpretation that the scholar offers on the meaning of the practice could be in competition with the interpretations that other scholars offer, of course. Each scholar presents what he or she considers the best version of the internal point of view of the members of a cultural practice. For example, two culturalist scholars could disagree on the notion of time constructed by the modern principle of separation of powers. One could argue that the principle articulates a linear notion of time that is a product of the modern commitment to the values of reason and will. The tripartite structure of public power is constantly redefined as a consequence of the interaction of these two values. Each attempt is also understood as a step towards an end where it is possible to strike a balance between the two conflicting values.

Another scholar could argue that the principle of separation of powers creates a circular notion of time. The principle assumes a collective subject, the State, that abuses its power by nature. The creations of reason will never modify the nature of the State. The time of the principle is therefore that of eternal return, not that which supposes the traditional concept of progress. In this example, the two scholars take distance from their object of study. Nevertheless, given the perspectival character of interpretation, the meaning of the principles varies depending on the subject of knowledge. This does not necessarily mean that the two interpretations have the same value. The two scholars, and their readers, may debate what the best interpretation of the cultural practice is, what the most persuasive interpretation is.

The situation changes when the cultural practice that the culturalist scholar examines is heterogeneous. If the thick description of the cultural practice shows that there is disagreement between the members of the practice on what this means, the scholar could not choose one of these interpretations as the best interpretation of the cultural practice. This decision would eliminate the distance that the scholar wants to maintain with her object of study. This situation would be analogous to that of the ethnographer who, after studying the religion of an indigenous community and finding that there is a dispute between its members on the meaning of the symbolic structures that constitute it, concludes that one of these is

135 *Kahn*, note 8, pp. 165-171.

the best interpretation of the cultural practice. In this case, the ethnographer crosses the border that separates the descriptive and the normative planes.

This problem becomes even more acute if the ethnographer is also a member of the indigenous community. On one hand, the ethnographer wants to distance herself from a practice that she is a member of in order to understand it. To do so, the ethnographer suspends her commitment to the practice. On the other hand, however, the ethnographer takes sides by saying that one of the competing interpretations is the best interpretation of the religion of her community. The criterion that the scholar uses to evaluate the competing interpretations would have to be a criterion external or internal to the practice. If the scholar uses an external criterion, she would be distorting the practice; if she uses an internal criterion, the scholar becomes another member of the practice – one committed to what she considers the best possible version of the practice.

In *Making the Case*, Kahn's position towards judicial opinions and judges is analogous to that of this ethnographer. Kahn is a member of the cultural practice that is his object of study. To examine the practice, and to be consistent with the premises of the cultural analysis of law, he must suspend his commitment to the US legal culture. Nevertheless, this distance is lost when he chooses one of the various descriptions offered by members of the practice on his object of study as the best. This distance is lost when he equates the internal point of view of judicial practice with the idea that jurisprudence is a rhetorical mechanism that aims to maintain the belief in self-government through law[136]. This description is tremendously attractive. Nevertheless, it is one among the various descriptions that members of US legal culture offer. It is also an interpretation that aligns very well with Kahn's theoretical commitments. I am not sure that the combination of Cassirer, Socrates, Foucault and New Rhetoric that nurtures the conclusions that Kahn reaches on jurisprudence describe, as I mentioned above, the internal point of view of all members of the practice, whether they are judges or citizens[137]. The description and analysis of jurisprudence as a form of neo-Kantism for postmodern times does not seem to coincide with what many judges and citizens believe about jurisprudence.

F. Conclusions

Monist cultural analysis of law defends an explicit and an implicit concept of culture. These concepts are notably different. The explicit concept understands legal culture as a horizon of understandings that human beings both construct and receive as a legacy. Both its members and those who want to describe it in a thick manner can interpret this web of meanings in various ways; it has multiple meanings. However, the cultural scholar who wants to describe and analyze this cultural practice must understand it from the internal point of view of those immersed in it. The scholar must also take distance from the cultural practice that

136 *Kahn*, note 8, pp. 271, 279.

137 *Kahn*, note 4, p. 34.

is her object of study. The implicit concept offers a different interpretation of culture: legal culture is described as a homogeneous unit both in its contents and with respect to the members that practice it. This implicit concept also equates legal culture with the legal culture of lawyers and with the texts they produce. In addition, this concept of culture does not allow the monist cultural scholar to be consistent with two categories that are central for her academic enterprise: freedom and distance. Unfortunately, this implicit concept of culture does now allow us to give a precise account of modern legal cultures. It does not allow us to account for their fragmentation and the complexities that characterize their practice. This division and complexities could only be adequately described if we appeal to pluralistic cultural analysis - a perspective that broadens the elements that should be considered as part of a legal culture, the sources of culture, and the methods by which these sources should be described and analyzed.