

ARTICLE

Special Issue — Law and Political Imagination: The Perspective of Paul Kahn

A Scholarship of Engagement

Paul W. Kahn¹

¹Yale Law School, New Haven, USA
Email: Paul.kahn@yale.edu

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Abstract

This article introduces and comments on some of the themes raised by contributors to the special issue on my work. The contributions are divided into two categories. First, those delving into the sources and coherence of my many different projects. Second, those who try to apply to the law of the European Union the methods I have deployed to study American constitutionalism.

Keywords: Kahn; political theology; political jurisprudence; cultural study; social imaginary

It is both a pleasure and a shock to read the articles in this series. A pleasure because there is nothing a scholar appreciates more than being taken seriously. These articles are all serious efforts to enter a conversation with me through my work. Whenever and wherever we truly listen and respond to each other, we create again the free community that has had a special place in the West at least since Socrates. To sustain that community is the most important thing we do as scholars. The turn away from a scholarship of engagement, and toward a scholarship of counting, is the explicit scheme of Or Bassok's article. He tells us that this tradition of scholarship is losing its place in the academy today. This collection of articles takes a stand against the turn away from interpretation and humanistic engagement.

Along with the pleasure of “fighting back,” comes the shock of seeing just how long I have been exploring the same set of ideas. The articles remind me of the stages of my intellectual project—remind me that there has indeed been a project. This was a project without a plan; in Kant's phrase, “purposiveness without a purpose.”¹ I was not progressing toward a goal but seeking to enrich my interpretation of a core set ideas involving agency, meaning, and community. Running through my work, as well, is a reflection on American politics as the nation confronted one crisis after another over these decades: The Reagan Revolution and the conservative turn of the courts, the rise of neoliberalism, the attack of 9/11 and the American military response, globalization, and the threat of populist authoritarianism. Linking theory and practice was a particular philosophical approach, which always verged on, and sometimes became explicitly, memoir.

Contrary to a common view of the objective and universal character of philosophy, I believe that philosophy is autobiography. The fundamental questions, for me, have always been what, how, and why do I think, imagine, and experience as I do? I have tried to get to the root of how we

¹IMMANUEL KANT, CRITIQUE OF JUDGMENT § 10 (Werner Pluhar trans., Hackett Publishing, 1987).

occupy a world of meaning, but I have access to that question only through the interrogation of my own experience.² Philosophers have one fundamental obligation: They must be entirely honest. This has led me to introduce ways of speaking that are not ordinarily found in the disciplines of legal and political theory. I speak often of faith and love, of the experience of a political claim, of sacrifice, and of evil.

We do not live in a world of abstract norms—justice—or of material interests. We live in a world of meanings maintained by narratives. About all that we do and believe, we have a story to tell—often multiple stories. These narratives have histories, and they have common structures. These stories lead us to love and to violence, for we bear these meanings in our bodies. We give ourselves freely to others in order to bring these meanings into the world, and then to sustain them in that world.

This approach has led me to cross disciplinary boundaries. My home is the legal academy, but I have been claimed by philosophers, historians, anthropologists, theologians, and cultural theorists. It has been my good fortune not to have to choose and to have students and interlocutors from all these fields.

This interdisciplinarity arises from my earliest graduate work studying the dialogues of Plato. There, I learned that philosophy must be grounded in an interrogation of the self and that dialogue honestly pursued is the work of freedom. With Plato, I also started to explore the themes that would define my work: The contest between politics and philosophy, the nature of the political claim upon a life, the duty of care for a community, the competition of love and justice, the importance of narrative, and the relationship between metaphysics and politics. Only much later did I come to use terms like “social imaginary,” “political theology,” and “cultural study.”

The various authors in this collection focus on different themes from different periods of my work. Some are interested in the phenomenological aspects of my analysis, others in the structure of American political formations, and some in putting the ideas to work in a different context—the European Union. I can do no more than comment very briefly on these substantial articles, focusing on some points I find of particular interest. I note that the deepest questions directed to me come from those with the most abstract concerns. Because much of my work has challenged the foundations of liberal political theory, this is to be expected.

I. What is it all About?

Several of the articles offer synoptic views of my work. Interestingly, their authors write from very different intellectual traditions. For someone not familiar with my work, it would, for example, be difficult to see that Martin Loughlin and Ben Berger are talking about the same body of work.

Berger brings to his article his own interest in psychoanalysis—in particular, Freud’s concept of eros and method of interpretation. Berger is correct to see the importance of eros to my work and to identify its Platonic and Freudian origins. My very first scholarly essay—never published—was on Plato’s Symposium. Its subject was “Socrates’ failure as a pederast.” My concern was to examine Alcibiades’ charges against Socrates and to think about the relationship between pedagogy, responsibility, and eros. These themes endure in my work, particularly in my emphasis on family and polity as intertwined, erotic communities. Both are places of sacrifice. More particularly, there is no sacrifice for the state that is not also a sacrifice for family. This insistence on the connection of family and polity has always made liberal theorists quite wary of my work. That wariness has required multiple efforts on my part to distinguish a liberal political program from liberal political theory—a subject I extensively addressed in *Putting Liberalism in its Place* and sought to uncover in our popular political culture by looking at the place of family and state in *Finding Ourselves at the Movies*.³

²See generally, PAUL W. KAHN, FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION (2013).

³KAHN, *supra* note 2; see also PAUL W. KAHN PUTTING LIBERALISM IN ITS PLACE (2004); PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 28 (2011).

Berger perceptively sees that *Testimony* and *Democracy in Our America* form a pair of memoirs, linking the familial and the political.⁴ He finds in the latter a new concern with an “ethos of care,” which he links to my appreciation for the volunteer. He wonders about the connection of this new focus on the volunteer to my earlier work on sacrifice and citizenship. He is not quite right, however, in thinking that this book is the first time I have taken up the idea of an ethos of care. This was the theme of my essay in a book I co-edited during the pandemic, *Democracy in Times of Pandemic*.⁵ The pandemic forced me to turn to the linked topics of care and character, as I tried to understand the way in which the United States responded—and failed to respond—to the crisis of disease and death.

That crisis put in question the meaning of political friendship. I had long defended the idea that the possibility of the enemy is critical to the nature of the political, but the pandemic demanded a focus on friendship. The connection is as simple as this: If we do not care for each other, will we sacrifice for each other? The lack of care demonstrated in so much of our Covid politics led me to my current views on a new American Civil War, which Martin Loughlin discusses in his article.

These themes of care, sacrifice, love, and war are also at the heart of *Testimony*. While Berger does not discuss that work, his article makes me see that there I was exploring, within the small community that is the family, my own character as a volunteer bound to a community in peace and war, through life and death. I found myself responding to a claim for care despite the recognition of injustice. Love before justice, existence before essence, I have always argued.

In contrast to Berger, Martin Loughlin places my work within the intellectual tradition of political jurisprudence. His article helps me to understand better my own “friends” in the study of law and politics. Unfortunately, as he explains, there are very few such friends in the study of American constitutional law. Loughlin opened for me a European tradition that embraced the same sort of dual, political foundations that I had been exploring for a long time: Reason and will, in my earliest work, project and system, in my latest. Methodologically, this distinction showed up in my contrast of architecture and genealogy.⁶ These sets of paired terms are not synonymous but overlapping. They emphasize my sense that order does not form a single hierarchy but develops out of deep tensions at the very foundation—a point about my methodology that Bassok explores. My turn to the social imaginary is an aspect of these same reflections, for I needed a language that could embrace these tensions without being driven toward a single resolution.

Loughlin’s placing of my work in an intellectual tradition of political jurisprudence also helps me to understand my own experience of reading Carl Schmitt, which has generated some controversy. Although our politics are completely different, Schmitt saw something in the existential condition of the modern state that resonated with what I had been trying to articulate in books like *The Reign of Law* and *Law and Love*.⁷ Law may present itself as a system of norms, but it is simultaneously a force in the world that relies upon citizens continuing to will the state’s existence. They must decide for the state. They must do so not just at exceptional moments of sacrifice, but all the time. The exception only makes visible this constant force of affirmation.

My book, *Political Theology*, emerged out of my confrontation with Schmitt. I insisted that the book was not meant as an interpretation of Schmitt or even a contribution to the Schmitt literature, but rather an effort to think about popular sovereignty with Schmitt. To my surprise, that conversation forced me to move toward a fuller theory of freedom modeled less on the

⁴PAUL W. KAHN, *TESTIMONY: A MEMOIR* (2021); PAUL W. KAHN, *DEMOCRACY IN OUR AMERICA: CAN WE STILL GOVERN OURSELVES?* (2023).

⁵Paul W. Kahn, *Democracy, and the Obligations of Care: A Demos Worthy of Sacrifice*, in *DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED* (Miguel Maduro & Paul W. Kahn eds. 2020).

⁶See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

⁷PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997); PAUL W. KAHN, *LAW AND LOVE: THE TRIALS OF KING LEAR* (2000).

exceptional decision than on ordinary dialogue. At issue in both is the human capacity to surprise, to bring forth something new—what Arendt calls “natality.”⁸ My dialogue with Schmitt was an effort to model the very thing that I was theorizing. That is the very point of my fascination with the relationship between dialogue, speech, and freedom. It is what turns philosophy toward autobiography and creates the normative demand for honesty.

Here, it is worth noting Denis Baranger’s contribution, which pushes hard on the place of theology in “political theology.” I agree with his view that this is a theology that leaves no place for God. Indeed, I have argued that the “real” theologians are the least capable of pursuing political theology, for they reject the idea of analogy that is central to political theology.⁹ Baranger contends that political theology could be better described as metaphysics. Those were indeed the terms that I first used as I thought about “conceptual models of order.” Furthermore, I thought that the most famous work on American civil religion—that of Robert Bellah—was less than satisfactory precisely because it kept a Protestant God in the picture.¹⁰ Nevertheless, it would do no good to use the term “political metaphysics.” It is too late for that.

Baranger’s concerns do suggest something of the difficulty Europeans can have in understanding the existential depth of American political culture. Bassok offers some personal reflections on how difficult he found, at first, my insistence on the idea that constitutional interpretation is a “practice for citizens.” America’s civil religion appeals to ideas that do not resonate elsewhere. Tocqueville already noticed the analogical substitution of the people for God in so much of American political discourse. This is a nation that traces its roots to practices of Bible reading, sermonizing, and providential faith. Daily, Americans “pledge” themselves to the flag and a “nation under God.” These religious roots no longer operate, for most citizens, as sectarian faith in an omnipotent and omniscient God, but the structural analogies seem self-evident to the participant observer. So does the idea of “American exceptionalism,” not because America has a privileged position in the world, but because American law is understood as the unique product of the popular sovereign. So deep is that imaginative connection that Americans generally cannot see how law that has an alternative origin is law at all.

The need for a political theology is evident, for example, in some recent work I have pursued, exploring the ways in which American ideas of popular sovereignty reimagine trinitarianism. There is the popular sovereign as the author of the project of national creation. There is the popular sovereign as the spirit of the nation, bound to its history of practices and judicial decisions, moving in a providential direction of self-realization. And there is the popular sovereign as the contemporary body of the nation deciding its fate through the ballot and the bullet. When we ask who or where is the popular sovereign, we need to look in three directions at once. There is no hierarchy; only a range of imaginative resources, all of which are recognizable by, and persuasive to, citizens.

As Baranger says, this is theology without God, but it hard to imagine giving proper place to this social imaginary without noting its roots in religious beliefs and practices. One could write a systematic theology of the American imagination of the popular sovereign. Indeed, I have long wanted to do so.

At the end of his essay, Baranger appropriately brings up recent events in American political life that are hard to reconcile with my analysis of our civil religion. He is quite correct in noting the dissidence. As Loughlin writes, my most recent work has come close to proclaiming the death of the American political project that has so long occupied my attention. Events like the Kavanaugh hearings show just how far we have drifted from the “democratic” function I attribute to the Supreme Court in *Making the Case*.¹¹ The Court has come to be seen as just another partisan, political institution.

⁸HANNAH ARENDT, *THE HUMAN CONDITION* 9 (1958).

⁹See generally KAHN, *POLITICAL THEOLOGY*, *supra* note 3, at 91–122.

¹⁰Robert Bellah, *Civil Religion in America*, 96.1 *DÆDALUS*, J. AM. ACAD. ARTS & SCI. 1, 1–21 (1967).

¹¹PAUL W. KAHN, *MAKING THE CASE: THE ART OF THE JUDICIAL OPINION* 46–87 (2016).

Recently, I have been writing about our political crisis as one of Civil War.¹² My work has always put at its center an historically contingent formation of the social imaginary. Contingency means the possibility of death. Just as God died for many in the early decades of the 20th century, God's national successor—the popular sovereign—may be dying today. Whether that death will be violent or a slow drift toward new political formations is an open question. My own recent emphasis on localism, in *Democracy in our America*, is just the beginning of a response.

The unique political promise of localism is the theme of Maria Cahill's essay. She agrees that there is something both special and nonfungible about local political communities. They offer an experience of political vibrancy and of what Berger, following Arendt, calls public happiness. They are also critical to the formation of democratic character upon which politics at every level depends. *Democracy in our America* argues that the displacement of a local ethos of care by national, political polarization brings with it a new set of expectations about politics—expectations aligned with self-interest and markets.

Cahill goes further than I was willing to go in invoking the “spillover” effects of the experience at the local level on the character of national political life. I share that aspiration, but my work on the local political community begins from a fear that we are not only losing that experience, but we may even be losing the memory of it. What was self-evident to Tocqueville is now deeply contested, if visible at all. Nevertheless, I agree with one central suggestion of Cahill: There is no readily available alternative site from which we can imagine a regeneration of those character traits and commitments upon which self-government depends.

The sense that the American political project, and the social imaginary that sustained it, may be coming to an end is discussed by Marco Goldoni, who questions the continuing possibility of political sacrifice. Goldoni notes the difficulty of reaching any overall assessment, precisely because the difference between sacrifice and meaningless violence is always a function of narratives, which are themselves the grounds of political contention. No one in this debate is without a stake; no one is innocent when we argue about the foundations of politics.

Goldoni offers several contemporary examples to show the surprising, continuing strength of sacrifice as a formative political event. He does not mention the most significant: Ukraine. The war there has been a surprise, not because of the Russian invasion but because of the ethos of sacrifice that has driven Ukrainian citizens forward. The war looks like a phenomenon of the 20th century—a century characterized by political sacrifice on what had previously been an unimaginable scale. Contemporary Europe, most of us thought, was no longer a place of violent sacrifice for the nation. Certainly not in Ukraine, which was notorious for its levels of political corruption and now led by an actor whose previous experience had been playing a president on television. This surprising reemergence of an ethos of care and sacrifice raises for all Western nations the question of whether we, too, remain secret Ukrainians. The political question remains what it has long been throughout the modern era: What will you do when the state calls for your life? The moment when speech must give way to decision.

II. Beyond the United States

The Ukrainian response to the Russian invasion is very much at the center of Signe Larsen's reflections on a cultural study of European Union law. She is among the group of younger scholars participating in this collection, all of whom are interested in deploying some of the methods I have developed in the context of American law to the legal project of the European Union. All of them understand that my work is deeply tied to a particular culture, but all want to see whether it can be useful for understanding the very different context of European law.

¹²Paul W. Kahn, *America's New Civil War*, 198 *TELOS* 125 (2022).

Interesting to me, Larsen, Mair, and Marzal all refer to the work of Ulrich Haltern, particularly his article “Pathos and Patina,” which is now 20 years old.¹³ Haltern was one of the first European followers of my work. He had studied with me while doing graduate work at Yale Law School. Haltern was skeptical that the European Union had the sort of “thick” culture of law that had been the focus of my work. One way to understand the essays of these three contributors is as a response to Haltern’s skepticism. Ironically, they are turning to my work, which Haltern had earlier deployed, to defeat his claims. Nevertheless, they all insist that even as European legal culture has thickened, it has not simply become a European branch of American legal culture. In different ways, all emphasize pluralism. They deploy various elements of my work to develop ideas of pluralism—a concept that I do not think that I have ever addressed.

Larsen finds a comfortable fit with my work on the cultural study of law, for at the foundation of her work is the idea that there are at least three different legal imaginaries participating in the European project: The post-fascist, the post-communist, and the evolutionary. She offers a of genealogy of each of these forms, setting them forth as Weberian ideal types. Each sees the potential and the threat of European membership differently. On her view, Europe itself is a contested value; it can be seen as both internal promise and external threat. Despite this pluralism, Larsen is alert to the possibility that the war in Ukraine is the sort of exceptional event out of which a new European political imaginary might emerge. For me, the point is not to predict the future, but to understand the deep contingency of political and legal formations. Her conclusions serve as a warning that although the social imaginary may be our second nature, we are not bound to it as we are to our first nature. We remain free. One form of that freedom is our ability to decide to remake our political order when old forms are no longer adequate to our experience.

That Europe may be moving toward a unique form of unity grounded in its own pluralism is the central idea of Sabine Mair’s essay. Unlike Larsen, who thinks about constitutionalism as a political practice, Mair’s focus is on a judicial text. Accordingly, she draws not on *The Cultural Study of Law*, which argued for the broadest possible approach to sources and sites of a legal imaginary, but on *Making the Case*, which examined how the judicial opinion worked as a form of political rhetoric. The work of the Supreme Court, I argued, is to persuade. That rhetorical task generates norms by which we can evaluate the work of the Court, wholly apart from picking sides in the adjudicated disputes. The Court’s political role, and thus its rhetorical task, is to persuade us to see—that is, to imagine—the intersection of the rule of law and of popular sovereignty. That conjunction is democratic constitutionalism.

As Mair points out, there is no reason to think that there is a cross-cultural agreement on the substantive content of democratically persuasive narratives. They are contingent on time and place. Yet there is reason to think that courts face similar challenges wherever there is a need to affirm the democratic ground of political legitimacy. The European Union, grounded so deeply in an idea of the rule of law, faces a particularly steep democracy deficit. Mair suggests that the European Court of Justice faces similar problems. She uses the method I suggested in *Making the Case* to investigate the way in which the opinion may be doing more politically legitimating work than is suggested by asking only whether the Court sided with business or labor.

Interesting to me is the way in which Mair’s examination of a judicial opinion strikes the same chord of pluralism that Larsen sounded in her examination of constitutional genealogies. Mair too targets Haltern’s work, arguing that a thicker culture has now arrived in the work of the European Court of Justice. It has arrived, however, in the very form of multiple, possible narratives.

A culture is richer not when everyone agrees on a single narrative form, but when there are multiple accounts to which competing factions can turn. I tried to illustrate this point in *Making the Case*, by describing the different perspectives offered by the multiple accounts, including dissents and concurrences, within a single case. This is one of the reasons that we have a tradition

¹³U. Haltern, *Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination*, 9 EUR. L. J. 14, 14–44 (2003).

of dissent—to keep present to mind differing narratives. This is especially important to remember in a time of polarization. Difference is not a problem for a culture. It becomes a problem when the narratives offered by parties are no longer recognized as factually true or morally compelling by their opponents. A culture of law requires sameness across difference; unity through pluralism.

Finally, a word about Toni Marzal's interesting essay. Unlike the others, he draws support from Haltern's work. He finds there a fruitful suggestion of pluralism derived from my own work. In *The Cultural Study of Law*, I contrasted the imaginary of the rule of law with that of what I called "political action." No person or event is in itself one or the other. It becomes so as we construct a narrative. Haltern suggested that Europe may be better understood through the lens of action than law. Marzal now argues that it is more complicated: European Union law places action at its center. Not a choice, but a synergy.

To make this case, Marzal borrows the idea of "legal messianism" from my old teacher and colleague, Robert Cover. I am happy to be again in his company. I see no reason not to enthusiastically embrace the idea that what I had found separated in the political culture of the United States might be brought together in a new European project. There is no single type that is the rule of law. That was the message of Robert Cover. It is a message I have always tried to convey in my repeated warnings that a culture study of law is, of necessity, a study of a particular cultural formation with its own genealogy and architecture. Nevertheless, American legal culture does not come from nowhere. It sits within a family of legal cultures, all of which draw from common sources. They put those sources together in different ways and for different purposes. In these ideas of sameness and difference lies the possibility of comparative work, difficult as it may be for the reasons that Bassok describes.

It would be too much to say that the ambitions and methods I set forth for a cultural study of law some 30 years ago are leading to new discoveries about the nature and direction of European pluralism. It is not too much, however, for me to be pleased that my early work continues to provide a language and an approach to identifying both an object of study and a form of study that can be of some use to contemporary European legal scholarship. At least, I hope it will be useful as this new generation of European legal scholars confront not just the political battle to fix the imagination, as described by Goldoni, but an actual battle very close to their own homes.

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