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INTRODUCTION

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

Law and Political Imagination: The Perspective of Paul Kahn

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A. A Double Perspective

The German Law Journal and Paul Kahn are no strangers to one another. In 2020, the Journal published an extended and highly informative interview with Kahn by Daniel Bonilla Maldonado on the very idea of the Cultural Analysis of Law that is so central to Kahn's work.[1] This Special Issue takes a deeper dive into many of the topics raised in that earlier interview. Originating in a two day Workshop in Glasgow in April 2022,[2] the project brings together a number of scholars who either have a close scholarly connection with Kahn (as ex-students or academic interlocutors) or have been inspired by his work.

We make no claim to be comprehensive in what we have produced, or as to who has been involved in its production. Over more than 30 years Kahn's writings have been prodigious in quantity and dazzlingly diverse in their breadth.[3] In the fullness of time, there will surely be more and more rounded studies of his important and highly distinctive corpus. It is hoped that the present collection will supply a foundation for any such future work. Hopefully too, its key themes and stresses indicate something of what makes Kahn's work both important and distinctive.

What are these themes? To begin with, the overall composition of the Special Issue reflects the *double* sense in which we should be interested in "the perspective of Paul Kahn." For our editorial aim has been one both of detailed inquiry *into* the perspective of Kahn, and of the consideration and illumination of a number of topical questions on the relationship between law and political

[1]*See* Daniel Bonilla Maldonado, *The Cultural Analysis of Law: Questions and Answers with Paul Kahn*, 21 GERMAN L. J. 284 (2020).

[2]*Law and Political Imagination: Workshop on the Jurisprudence of Paul W. Kahn*, GLASGOW L. THEORY & EDINBURGH CENTRE L. THEORY (Apr. 7–8, 2022) available at: https://www.youtube.com/watch?v=Jg2E9h-Iqmw&ab_channel=GlasgowLegalTheory.

[3]Among his many publications are twelve scholarly monographs: PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992); PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA (1997); PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999); PAUL W. KAHN, LAW AND LOVE: THE TRIALS OF KING LEAR (2000); PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2004); PAUL W. KAHN, OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL (2006); PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2008); PAUL W. KAHN, POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (2011); PAUL W. KAHN, FINDING OURSELVES AT THE MOVIES: PHILOSOPHY FOR A NEW GENERATION (2013); PAUL W. KAHN, MAKING THE CASE: THE ART OF THE JUDICIAL OPINION (2016); PAUL W. KAHN, THE ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION (2019); PAUL W. KAHN, DEMOCRACY IN THIS AMERICA: CAN WE STILL GOVERN OURSELVES? (2023). *See also* his family memoir, PAUL W. KAHN, TESTIMONY (2021).

culture *from* a perspective that is inspired and informed by his work. The first of these aims is only to be expected in a project devoted to a specific author. The second is much less so, but nevertheless seems appropriate given our author's particular intellectual orientation. For Kahn has always treated his *Cultural Analysis of Law* not as an aspect of the social sciences—as is the more common way in which we study law apart from the study of doctrine—but as a humanistic inquiry.

In the most basic terms, the humanities—whose lineage refers back to the classical Roman idea of the set of skills appropriate to the liber or freeman, involve studying the products of human thought and feeling—of human culture in the round, and often in deep historical contemplation. The idea is to reveal the internal meaning of these products and what that might tell us about the human condition more generally. Their methods tend to be speculative, interpretive, and reflective. Indeed, as Kahn reminds us in his reply to the essays gathered in this Special Issue, the practice of philosophy—*the* master discipline of the humanities and the discipline that best describes his own work—is essentially autobiographical in focus. Its goal and purpose, as with the humanities in general, is one of enhanced appreciation of what it is to be human, and, in more applied mode, greater wisdom in practical judgment born of that enhanced appreciation.

The social sciences, certainly as originally conceived,[4] have a quite different history and focus. They began only in the late 18th and 19th centuries as an enterprise intended to extend the explanation of the material world increasingly available to the natural sciences to the study of the causes of human behavior. They are concerned with accounting for patterns of social belief and action in different settings. Their methods, at least as originally conceived, tend to be observational, explanatory and dispassionate. Their goal and purpose is the acquisition of greater knowledge of the causes and motivations of human behavior and, in more applied mode, consideration of how changes in the causal or motivational background might affect and alter human behavior.

In casting his vote for the humanities, Kahn is not intending to disparage the value of the social sciences, but only to correct what he sees as an imbalance in our appreciation of the world of law. For Kahn, law is neither a cause nor an effect of culture. Rather, it *is* culture, or at least an important domain of culture. It is a product of the human imagination, and like all such products—think of religion—it provides its own universe of knowledge—its own distinctive way of looking at the world. As cultural animals, in investigating law or any other cultural form we necessarily investigate the very contours and boundaries of what it is for us to think in and about the world. This has its own methodological limitations, but also considerable strength. Unlike the reductive methods of the quantitative social sciences, it is an approach that does not seek to explain as much as possible in as parsimonious terms as possible. Instead, for Kahn, the interpretive method of the humanistic inquiry into law

> tends to focus on the single legal artifact—for example, a legal opinion—rather than on aggregates of such artifacts. It seeks to construct the macrocosm of the legal imaginary out of the microcosm of the legal decision. Its interest is not in outcomes, but in bringing to light the way in which that outcome situates itself in an entire world of meaning.[5]

Over time, Kahn has extended his interest in such "artifacts" to cover not only leading opinions of judges but also scholarly work, film, plays, etc. Crudely, what may be lost in breadth of understanding through this approach should be compensated for in depth. More to the immediate point, what may be lost in persuading others of the expansive "truth" of a particular causal

[4]From the late 19th century, and in particular following the interpretive approach of Max Weber—often dubbed one of the Founding Fathers of Sociology—an important sub stream of the social sciences has pursued a qualitative methodology more in keeping with the humanities. For discussion of the overlap, *see e.g.* N. Walker, *The Jurist in a Global Age, in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 84–111 (Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin eds., 2017).

[5]Maldonado, *supra* note 1, at 289.

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explanation may be compensated for in the nurturing and offering of a method which others can use in pursuit of their own humanistic inquiries. In a nutshell, while Kahn's particular "findings" on a number of matters, perhaps most prominently the role of sacrifice and the sacred more generally in the conduct of American legal and political life, are interesting, original and provocative, just as important is the example he sets of how his particular style of meditation can yield deep insights.

If this helps explain why we are as interested in work that is influenced by Kahn's perspective as we are in the content of his own perspective, a second key theme of our collection has been to "cash out" that wider interest in a primarily European direction. It is noteworthy that some of the most engaging existing work on Kahn has come from Europe and has sought to apply his methods to and test his messages against recent European experience.[6] We could speculate why that is the case, and why some of our contributors were keen to follow this lead. In part, it is on account of an abiding interest amongst European public lawyers and legal theorists in the oldest surviving modern constitutional settlement on the other side of the Atlantic, and in particular in the peculiar standing of the US constitution as a kind of civil or secular religion—an insight pursued nowhere more penetratingly than in Kahn's work. In part too, it has to do with the apparent vividness of the contrast offered by the example of American constitutional nationalism, at least as portrayed by Kahn, to the supranational experiment that has preoccupied so much of European constitutional thought in recent years. Whatever the reasons, there is no doubting the freshness that the turn to Kahn brings to inquiry into some of the most longstanding questions surrounding the European political and constitutional imaginary.

B. The Contributions

Where do we find the balance between the two aspects of our double perspective, both inquiring i*nto* and drawing *from* Kahn? At one end of the spectrum the contributions of Martin Loughlin, Dennis Baranger, Marco Goldoni, and Benjamin Berger are mainly concerned with the exposition and interrogation of Kahn's own work. In an otherwise highly sympathetic account of Kahn's political jurisprudence, Loughlin questions how fully Kahn appreciates the transformation in our understanding of sovereignty from the personal authority of the mediaeval monarch to the depersonalised authority of the modern "people," and asks whether this leads him to overstate the cultural force and certainty of certain features of America's civil religion today. Baranger contrasts the political theology of Carl Schmitt and Paul Kahn. He concludes that Kahn's work is better considered and more fully appreciated not as theology at all, but as a form of philosophical anthropology. Goldoni insists upon an understanding of Kahn's idea of political sacrifice that, unlike other influential interpretations of sacrifice, is not based upon victimisation and scapegoating of the sacrificial subject. Instead, it is a conception of sacrifice that can accommodate agency, and can supply a more positive contribution to the making or remaking of political authority and community. Berger trains his analysis on Kahn's most recent monograph, his *Democracy in our America,* in which his "microcosmic" method takes the form of a post-Tocquevillian effort to read the political spirit of America from its local instantiation. In Kahn's case this is the Village of Killingworth where he and his wife—who was to become its longstanding mayor—first made their home more than a quarter century ago. Where the veteran soldier was once the most vivid marker of sacrifice in Kahn's work (through the willingness to kill or be killed), in the world of contemporary local politics the volunteer is the key placeholder of the sacrificial role. Yet as Kahn warns, and Berger reinforces, the increasing privatization of family life means that the ethics of care and commitment to the public good that fuels volunteering is ebbing, thereby eroding a broader commitment to an inclusive form of democratic self-rule.

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

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The articles by Maria Cahill and Or Bassok are situated on the middle of the spectrum, concerned both with detailed analysis of Kahn and with issues beyond Kahn's immediate interests. Like Berger, Cahill focuses on Kahn's experience based account of the practice of local self-government. But she does so in part in the service of an argument—inspired by her broader interest in the practical meaning of the legal concept of subsidiarity in the context of the European Union and elsewhere—that law is tendentially incapable of grasping and appreciating the non-fungible value of local association. The double perspective is even more to the fore in Bassok's article. On the one hand, he makes much of Kahn's methodological preference for the Thick Picture Approach over the more fashionable "Large-N" approach to constitutional analysis—a distinction that maps Kahn's humanities/social sciences binary. On the other hand, he draws on this distinction to showcase three qualitative studies of the development of modern German constitutional law, each by scholars who pursued their doctoral studies at Yale, that benefit from the kind of methodological principles that Kahn favours.

At the other end of the spectrum we encounter arguments by Signe Larsen, Toni Marzal, and Sabine Mair that look mainly to Kahn as a reference point and inspiration for their reflections on the European supranational experience. Larsen treats the political imagination of the European Union, informed by the constitutional orders of 27 states with quite different traditions, as a more composite and multi-faceted affair than Kahn's native United States. Yet the Russian invasion of Ukraine may have catalysed a transformation of this imagination around a new conception of European sovereignty and common European peoplehood suited to an emergent understanding of Europe as an autonomous geopolitical force. Marzal uses Kahn's analysis of the rule of law as a point of departure for the distinct understanding that notion has assumed in the European context. In particular, he indicates the way in which Europe has overcome Kahn's conception of the duality of law and political action to develop a form of 'lawful messianism' in which the rule of law, rather than a backward facing consolidation of impersonal order, is linked to the (political) telos of ever closer integration. And finally, what Larsen and Marzal do for sovereignty and the rule of law, Mair does for the prominent judicial ruling. With particular reference to the well-known Court of Justice decision in *Laval*, she shows how the Kahnian method of treating the judicial opinion as an exercise in persuasion in a wider political discourse can be applied to different effect in the European theatre. For the emphasis on that wider discourse can also reveal the court—especially a court in such a plural political space as the European Union, as an open site for the rehearsal of the quite different and mutually unresolved narratives of justification of the European project.

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