Idealism and Self-Authorship: A Note on Paul Kahn's *Making the Case*

By Amnon Lev*

Abstract: The article examines the notion of self-authorship through judicial review in Paul Kahn's book Making the Case. It argues that, for Kahn, the primary function of the court is to bring the people to see the law as something they have themselves authored, and that we can only open up this dimension to study by looking at the universe of meaning to which the law makes reference. The article ties Kahn's cultural analysis of law back to his earlier work on body politics in a liberal polity. It shows how law and culture intertwine in Kahn's work, law being the same time a limit to and a product of culture. Finally, the article problematizes Kahn's use of culture as a means to destabilize liberalism. It argues that, despite his avowed concern with liberty (which self-authorship translates into constitutional parlance), his efforts to transcend liberal theory lead him to adopt basic political conceptions that leave no room for liberty in political life.

***

Making the Case does many things. It presents the reader with a detailed, carefully worked through analysis of the judicial opinion that brings out the intricacies, many of them unsuspected, of this pivotal but nevertheless somewhat overlooked element of public law. It continues the author's longstanding exploration of the American political imaginary, and it engages, more so than any of his other works, with the question of liberty. The remarks that follow focus on how a concern with liberty informs Paul Kahn's analysis of the implication of law and culture. At the heart of *Making the Case* is the notion of *self-authorship*, the idea that the specific function of the judicial opinion is to persuade us that, as a collective, we are accountable for the law as it is laid down by the Court. In what follows, self-authorship will be analysed on two levels: In the first part, I consider how self-authorship structures what we might call the methodology of the judicial opinion. I show that Kahn's notion of self-authorship revolves around the claim that *rule of law* and *popular sovereignty* – the most fundamental concepts of public law theory – serve much the same function, to the point that the former can stand in for the latter. I go on to examine how this claim informs Kahn's text, and in what way it involves, and commits, the reader in relation to the polity that law governs. The key argument I make is that, to Kahn, we can only make ourselves the authors of the law if we engage with the world of meanings that inform it, in the final analysis, with the world in which we are as subjects of law. In considering how we do that,

* Associate Professor, University of Copenhagen, Faculty of Law. E-Mail: amnon.lev@jur.ku.dk.

we are led to question how law and culture condition each other, culture acting as a *limit* to law while at the same time being a *product* of it.

The second part takes the analysis of self-authorship further, exploring its foundations in a politics of the body that aligns the sphere of the intimate on the order of the polity. The shift from the judicial opinion to body politics, which also shifts the exposition from *Making the Case* to Kahn's earlier work on liberalism, is abrupt, but it is dictated by the internal logic of his thought. What leads Kahn to the cultural study of law is the discovery of the role of the body in organising a liberal polity. The butt of his critique of liberalism is that, by leaving out essential aspects of how we relate to each other as bodies, it glosses over whole dimensions of meaning that inform, and make sense of, the law. As we shall see, his investigations into the erotic uncover another politics of the body, one that revolves around sacrifice which he understands as the way for subjects to connect to the law. I argue that Kahn's alternative body politics is sustained by, and in turn generates, tension, between the institutions of liberal social order. Building on that analysis, the third and final part brings the analysis back to the question of culture. It argues that the tension in Kahn's theory of the law leads him to press into service culture in very specific ways that place him at odds with contemporary liberal political theory.

At a general level, the question, or the concern, I raise is whether Kahn, precisely for showing the rule of law to generate worlds of law that are also worlds of liberty, does not commit himself to generating life worlds that are not worlds of liberty. At stake is what we might call Kahn's *idealism about the law*, his belief that a theory of law should show law to be a means of our liberty. This, to Kahn, constitutes the essence of self-authorship. We shall thus want to say that, as a theory about law and political life, Kahn's idealism is aporetic. One might object that there are other, more effective, ways of critiquing idealism. After all, law is never pure, and it might therefore appear that our critique of Kahn's work concedes points that should be contested. This may be so. But surely Kahn is right that to *think* about the law, to see it as a distinct form of authority that is not reducible to power, we must think in idealist terms; not because, as a matter of conscience, we want to show the law in an edifying light to those we introduce to it, but because they will not understand what the law is if they are not shown how it operates when it does what it is meant to do.[1]

A final preliminary: while *Making the Case* is the focus of this note, I shall be reading it in the context of Kahn's other works. One might question this choice on at least two grounds: first, it entails introducing into the analysis elements of theory he has kept out of the self-contained whole he has written as an introduction for students, and, second, it entails the risk of glossing over differences in substance and tonality between his works. Of

1 To this, we might add another consideration, viz. that only by taking idealism at face value, and working through it, can we come to understand how law solicits the world it inhabits, tailoring the world to its own needs. Idealism about law is an antidote to the naïveté of positivism about law that might reduce law to the power claims of specific actors, but holds steadfastly to the belief that, in itself, law is uncontaminated by, and unreceptive to, the power claims between which it secures a precarious equilibrium.

these, the second objection seems to me the most serious one. To be sure, there are rough and even jagged edges in Kahn's *œuvre* that a comprehensive reading cannot ignore. For one, in *Making the Case* he seems much more amenable to (a certain) liberalism than he does in earlier work. Equally, the fascination with violence that comes through in other works is absent from this work. However, these differences are, to my mind, ultimately secondary in comparison with the continuity of his engagement with a set of core problems relating to how we, institutionally and existentially, individually and collectively, construct and make sense of a world in which what we should do is given to us in the form of law. If we want to understand *Making the Case*, or indeed any other work by Kahn, we must discover the resorts of this unceasing engagement. Only thus can we gauge the significance of the differences, and the tensions, between different parts of his work.

A.

Making the Case is about liberty. Kahn ends his book with a plea for the place of humanist studies in law, but what compels him to consider these questions of methodology is, I would argue, a concern with liberty. As he tells us, humanist methodologies are appropriate in law, as a supplement to the quantitative tools of the social scientist, because the law does not operate by automation. Facts do not exist the way that lawyers are wont to suppose, as so much raw material to which the law, itself pure, is then applied. Facts and law are inextricably linked. The former exists only in interpretations that cannot be separated from the determination of the relevant law. Only in retrospect, as we work backward from the judgement to the case, can we distinguish facts and law.

What this means is that the judgement is separated from the facts by a hiatus, which is the site of judicial deliberation and determination. If we want to understand how law works, we need tools that have purchase on what makes arguments persuasive and so can shed light on how deliberation moves from facts to judgement. This is why we need humanist methodologies to study law; they, and they alone, have some traction on a form of discourse that works by persuasion.

The fact that the Court takes pains to persuade us, that it does not simply lay down the law but insists that we must be persuaded that the law has been upheld, warrants that power is not unfettered but constrained by the ability to offer compelling arguments. This, in turn, implies that the way law is received by those to whom it is addressed bears on its validity. In other words, law is not directed to automatons but to agents capable of directing themselves. What Kahn calls the *relative autonomy* of the law, the fact that its application is not automatic, is an institutional warrant of liberty. How far forth that liberty extends, whether it extends to the power to undo a sovereign command, is immaterial. Because the judicial opinion is accessorial, not strictly speaking necessary to the settlement of the dispute, the giving of an opinion shows that the subjects of law are not slaves – famously, the meaning Hobbes attributed to the status of being a subject – but must, in some sense, be free agents.

On this very Kantian view, liberty exists only within the space circumscribed by law. What liberty is, we cannot say. We cannot even say that liberty is existent. All we can do is to show that the conditions under which it would be, are the exact conditions under which the concepts we use to make sense of the world mean something. As in Kant, the discourse on liberty is a discourse on the *possibility* of liberty. The antinomy between law as sovereign command and as persuasion, which is the antinomy between subjection and agency, is resolved by making agency a logical presupposition of law's operation. Liberty fuels that which is, or seems to be, directed against it. It bears saying that this way of seeing the judicial opinion links up with Kahn's claim that the Court is the conduit through which the sacred shows itself within the polity; as we shall see, a key notion in Kahn's work.[2]

The conduit for the resolution of the antinomy of the two modes of law – command and persuasion – is the idea of *self-authorship*. The sovereign people should recognise itself as the authors of the law that is set forth by the Court in the judicial opinion. In attributing authorship to ourselves, we see ourselves as free. Being subject to command does not limit our liberty because we are the authors of that command. This was of course the argument, or rather belief, that sustained modern political philosophy. But Kahn is making a more ambitious claim . The rule of law is not merely a means of resolving the tension between ruler and ruled; it is constitutive of who we are as a collective. Kahn insists that the rule of law is a collective enterprise ('… the rule of law is something we have been doing together for a very long time'[3]). Taking government and the foundation/constitution of the polity back to a single source – the rule of law – commits Kahn to the claim that *rule of law* and *popular sovereignty mean, or rather do, the same thing*. This constitutes the key philosopheme of the book, the core claim it attempts to substantiate.

Intuitively, the connection that Kahn establishes between popular sovereignty and rule of law makes sense. We know that, outside the limiting case of society that is the state of nature, popular sovereignty and rule of law must be about the same thing. And yet, the claim that they are the same is puzzling, as Kahn recognises.[4] Irrespective of how we approach the equation, it is not obvious that the two terms, on the meaning we standardly attribute to them, are in fact interchangeable.

Taking the rule of law first, it is not clear how, and to what extent, it engages the people as the sovereign. A consideration of Dicey's canonical definition of the rule of law will perhaps make clearer wherein my puzzlement consists. As defined by Dicey, establishing the rule of law involves meeting three criteria: 1) punishment should be imposed only for distinct breaches of the law established in an ordinary procedure before the ordinary courts of the land; 2) no man should be exempt from the law or from the jurisdiction of the ordinary courts because of his rank or condition; and 3) rather than trust in general constitutional principles, safeguarding individual rights should be left to the ordinary courts, as part of

2 *P.W. Kahn*, Making the Case: The Art of the Judicial Opinion, New Haven 2016, pp. 84 – 85.

3 *Ibid*, pp. xvi, cf. p. 85.

4 *Ibid,* p. 85.

their determination of the cases that happen to be brought before them.[5] What Dicey calls the predominance of the legal spirit reduces to a belief that law's empire is tied to the ordinary workings of the institutions that have grown up around law, not to extraordinary political events that might shape or reshape a polity. On this understanding, the rule of law operates *within* the constitution, itself seen as a closed, self-contained system. To be sure, that system presupposes the existence of a people, but the rule of law is not tied to the way the people is involved, or not, in governing the polity. In fact, leading up to his treatment of the rule of law, Dicey takes Tocqueville, whose work on the American constitution he otherwise lauds, to task for his failure to distinguish between the rule of law and self-government.[6]

It might be objected that Dicey is here engaging in a definitional exercise, and that such exercises involve abstracting the *definiendum* from whatever conceptual nodes it ties into. On this view, we should be careful of taking Dicey to mean anything very determinate about how rule of law and popular sovereignty relate to each other. This may be so. Nonetheless, his text suggests that, as a concept, the rule of law can function at a high level of abstraction from political reality, to the point, it seems, of obviating any reference to the people.

To understand the extent, and the nature, of the disconnect between the rule of law and the people, we need to examine the other term of Kahn's equation: sovereignty. As we consider the operations involved in the genesis of this concept, we find that what situates the rule of law at a remove from the people is not law but rule. The terms on which sovereign power is established do not settle the question of who carries that power. In other words, if sovereignty is always *popular* sovereignty, it is never clear who gets to speak in the name of the people, which throws the identity of the collective *We* into doubt.

Understanding sovereignty takes us back to the beginning of public law, to the two-tier operation by which Hobbes laid the foundations for power. This dual operation consists in, on the one hand, re-defining the origin of authority so as to bring it back to a single source and, on the other hand, introducing a generalised state of radical uncertainty. Of these, the second operation – the introduction of a state of nature – has by far attracted the most attention. The radical uncertainty of life in the state of nature acts as a solvent of pre-existing social ties and is an enabling condition of the creation of a single source of authority. For foundation to succeed, it must be a *creatio ex nihilo*, an act of creation that is wholly contained within the moment of creation (even if it is not wholly immanent as political subjection leaves intact man's relationship to God).

The mechanism of this *creatio ex nihilo* is authorisation. Each man covenants with every other man to subject his will to the will of the sovereign and make himself the author of his every act, provided all others do the same. The medieval forms of authorisation re-

5 *A.V. Dicey*, Introduction to the Study of the Law of the Constitution, London 1960, pp. 202 – 203.

6 *Ibid,* p. 187; Tellingly, the only form of sovereignty that Dicey considers in this work is parliamentary sovereignty.

volved around the notion of a transfer between self-standing equals. The novelty of Hobbes' conception is that he ties the subject's alienation of liberty to his integration into the people. Authorisation marks the 'generation of the great Leviathan, or rather (to speak more reverently) of that *Mortal God* to which we owe, under the *Immortal God*, our peace and defence.'[7] As creation happens through, and cannot outlast, the act of authorisation, the elements out of which the commonwealth is fashioned – the subjects, the sovereign, and the people – are kept in a state of continuous implication. Paradoxically, this is what allows Hobbes to detach the exercise of the power created – sovereignty – from the will of its constituent parts. In this triadic structure where every part makes reference to every other, the several subjects and the people they make up is present only in the endlessly repeated act of giving themselves over to their new master. Only the artificial person of the sovereign is *manifestly* present.

The nexus Hobbes establishes around this triadic structure has a series of implications, of which two are particularly relevant for our purposes. First, if sovereignty is always *popular* sovereignty, the people, the source of sovereignty, does not govern. As the body politic being constituted in and through its authorisation by the subjects, its capacity for action, indeed its very existence, is tied to the artificial person of the sovereign. Absent subjection, they are but a multitude.[8] The genesis of the people as a collective entity coincides with its eclipse as a subject capable of agency. The people therefore never establish a firm presence within the constitutional order with which it only intersects at the moment of foundation.

Second, it is wholly indeterminate where, that is, with whom, sovereign power lies. We know that the people cannot govern, but it is not clear on whom the power of which the people is the sole source devolves. To whom should it fall to incarnate the artefact that is the Leviathan? Given the historico-political context of Hobbes' theory of commonwealth, we should not be surprised at the preference he shows for monarchic rule. Crucially, the terms of his theory do not settle the matter. Hobbes is unequivocal that democracy is the format of all forms of commonwealth ('When men have met to erect a commonwealth, they are, almost by the very fact that they have met, a *Democracy*'[9]), but it is equally clear that, within the commonwealth, no one distribution of power is indicated by the terms on which the social compact is concluded. What distributions are possible is a question of arithmetic:

> *The difference of commonwealths consisteth in the difference of the sovereign, or in the person representative of all and every one of the multitude … For the representative must needs be one man or more; and if more, then it is the assembly of all or but of a part. When the representative is one man, then is the commonwealth a MONARCHY; when an assembly of all that will come together, then it is a DEMOCRACY, or*

7 *Thomas Hobbes,* Leviathan, Indianapolis 1994, p. 109.

8 Hobbes, note 7, p. 104.

9 *Thomas Hobbes*, On the Citizen, Cambridge 1998, p. 94.

> *popular commonwealth; when an assembly of a part only, then it is called an ARISTOCRACY. Other kind of commonwealth there can be none ....*[10]

The agnosticism of Hobbes' theory of commonwealth to the question of constitutional form has a determinate cause which we need to be clear about. If Hobbes does not commit to a specific constitutional form, it is because he needs to prevent the crystallisation of an entity capable of agency which, in turn, means that he must maintain the constant implication of the people, the several subjects, and the sovereign. In other words, the agnosticism is a function of the fact that, at the level of sovereignty, no one agent is able to affirm himself as the carrier of power. The theory of sovereignty, as developed by Hobbes, only establishes a *form* into which somebody must step. This fact ties back to our consideration of the rule of law. If public law can function in abstraction from the people, as we saw in Dicey's work, it is because *the theory of sovereignty is designed to avoid the affirmation of a self*, which it does by endlessly deferring the moment when someone steps into and fills out the form.

It is of course inevitable that someone will step into the void, but it is an open question whether this fact about the world solves what is first and foremost a problem of theory, viz. how to get from popular sovereignty to the rule of law. More specifically, the fact that the void at the heart of power does not long remain open does not warrant that the transition from popular sovereignty to the rule of law engages *us*. The canons of statutory interpretation may, as Kahn notes, construe the statutory arrangement of power as a form of self-organisation, but if it is inevitable that law comes together around a self, it is by no means certain that *we* are that self.[11]

Kahn does not directly address the question, but it is abundantly clear from this work, and from other works, how he would do respond. He would, I submit, argue that this is a problem in, and for, certain forms of theory but not for the theory he is proposing. His is not a general or universal theory, applicable to all polities; it is a theory of the American polity, the existence, or vitality, of which serves to warrant the existence of its enabling conditions. Polities may disintegrate but a polity in which the forces of persuasion do not underpin the laws would not long survive. This is the point of Kahn's observation that we are in a 'potentially revolutionary' situation when the sovereign people no longer recognise their authorship of the law.[12]

10 *Hobbes,* note 7, p. 118.

11 *Kahn,* note 2, p. 69; The impersonal, or rather pre-personal, nature of public law is reflected in the way the Court points away from itself, to an "authority, which always lies elsewhere", a point we shall return to.

12 *Kahn,* note 2, pp. 59 – 60; Two analytically distinct claims, both of which Kahn makes at different points in his *œuvre*, are being run together here: first, that the filling out of the form happened at a distinct point in time (the American Revolution) and, second, that the existence/vitality of a polity is an indication that the law is underpinned by forces of persuasion. For our purposes, the second claim subsumes the first. The act by which the people asserts itself as a political actor is successful only if institutes the possibility of its re-enactment. Seen in this light, the very existence of the polity is proof positive that its constitutional agents have carried on the revolutionary demarche

The point in drawing attention to this particular aspect of *Making the Case* is not to critique the work in the sense of finding fault with it. In saying that the terms of Kahn's equation – popular sovereignty/rule of law – do not match up, I am not saying that his argument is inconclusive. The point I am making is to do with how his text works, with the resources it taps into and what it does with them. What, we might ask, is Kahn doing in bringing together two master concepts of public law that theory has kept apart, to the point of defining one by separation from the other? It is trivial to say that, in bringing together rule of law and popular sovereignty, Kahn is using concepts in a non-standard way. It is perhaps less trivial to say that this turn of language conditions American departmentalism inasmuch as it warrants that a particular branch of government – the Court – can speak in the name of the people. Ultimately, however, to get at what Kahn is doing, we must look at the text differently, not as document that contains information but as an act which, like the judicial opinions it studies, works by persuasion. In putting before the subject that is engaging with his text the juxtaposition of rule of law and popular sovereignty, Kahn is putting a task to him/her. He requires the subject to perform a leap of faith that engages the entire world of meanings from which he would have us read the opinions. It is not enough that the subject believes that there is a *We the people* at the heart of the American constitution; he/she must also believe that *we* are it. Only then will Kahn have succeeded in bringing rule of law and popular sovereignty together at the level of the text.

Making that, seemingly minimal, commitment engages the individual. It also has implications for how we study the law. In taking on this commitment, the individual situates the judicial opinion in the life of the law which is also the life of the polity that it governs. To read or, rather, to understand an opinion, the student/subject must immerse him in the world of meanings to which it makes reference. This entails a commitment that goes beyond accepting this web of meanings as a possible belief system, as an option among others. One cannot hope to understand the law without believing that the world of meanings within which it moves is a world we share. That is not to say that we must agree with the judgement or with the specific reasons given by the Court. We must, however, believe that they are the *right sort* of reasons. We must believe that the web of meanings to which the judicial opinion makes reference constitutes the ultimate horizon of normative disagreement in our society. This belief grounds Kahn's faith that law can continue to serve as the idiom through which we, as a polity, work out the conditions of our life in common.

We should not be surprised at what is going on in Kahn's text. Introductions invariably proceed by reference to a preconception of that which they introduce which they then flesh out and substantiate as they go through the processing of raising up the neophyte to the level of those who have been initiated. Indeed, even at the level of the analysis of case-law,

within the constitution in such a way as to pre-empt a revolution outside it. Closer readings reveal slight variations in Kahn's conviction that law can intercept and accommodate all the aspirations of the popular sovereign (*P.W. Kahn*, Putting Liberalism in Its Place, Princeton 2005, pp. 202-21; *P.W. Kahn*, The Reign of Law: *Marbury v. Madison* and the Construction of America, New Haven 1997, p. 73).

Kahn relies on and exploits this possibility of positing that which is the object of demonstration. His enquiry is predicated on a belief, constitutive of all forms of hermeneutics, that the circle involved in this operation is a virtuous one; something we should commit to rather than want to exit.

It is nevertheless worthwhile to pursue the question of methodology further as it presents us with an angle in which we see how liberty and culture link up in Kahn's work. They do so on levels that are analytically distinct but so closely intertwined as to seem at times indistinguishable. At the level of the law, culture is an essential but unrecognised point of reference. As its members are not elected, the Court cannot stray too far from what would be the object of an overlapping social consensus, on pain of being seen to usurp a power that rightfully belongs to the people. At the level of theory, the implication of law and culture is rendered explicit in two ways that complement each other: first, as a point about methodology. Cultural study of law is premised on the belief that it is only by taking into consideration the culture in which the law is embedded that we gain access to the map of points of overlapping consensus from which the Court takes its bearing when it is called to decide novel points of law. Second, as a point about political agency or identity. It is only by supplementing doctrinal analysis by the study of culture that we can cash out the theoretico-political claim that *we* are the authors of the law.

On this view, culture is at the heart of both the theory and the practice of law. On the description that we have given, the primary direction of determination would seem to be from culture to law. Law would be the dependent variable. The yardstick by which we should measure the judicial opinion would be whether it succeeds in aligning law on the thicket of concepts and implicit meanings that make up a society's culture. Culture, thus understood, is a constraint on law. This may sound like, but need not be, a reactionary view. A judgement can fail for not rising to the level of the culture it purports to govern. *Dred Scott* is an example of such failure. It constitutes a travesty of justice because it does not even attempt to persuade us.[13] It does not identify points of convergence around which it could articulate the differences between the claims that are being adjudicated.[14]

But the implication of law and culture does not only operate in one direction. If culture is a constraint on law, law will also configure the culture it governs. In a sense, this is obvious. For the reasons given above, it is also an inconvenient truth. Creating law that is not reflective of what is already a social fact is controversial as it invites the objection that the Court is acting outside its sphere of competence; that it is usurping a power that rightfully belongs to the people. Where the Court is breaking new ground, it must therefore proceed with caution. It must situate its judgement in proximity to the points of overlapping consensus that together make up a culture, which means that the Court can fail in one of two ways:

13 *Kahn,* note 2, p. 45.

14 The predicament, if you like, is that in relation to certain conflicts, there may be no overarching points of convergence, which is not a revolutionary situation, not because self-authorship of the law is not in doubt – it is – but because there is nobody to make that determination.

either by not rising to the level of those points or by pushing too far beyond them. As noted, *Dred Scott* was a travesty of justice because it did not do the first. At the time, an opinion that extended the franchise to women would have failed by doing the latter. Reading Kahn, one comes away with the feeling that, much as he agrees with the result, *Roe v. Wade* may well have failed in the same way.

The spirit of the law, as it is presented to us by Kahn, is that of a prudential liberalism which guards over and constantly pushes at the limits of the impersonal narrative of how, subject to what conditions, we live together as a collective. This involves art, the art to which Kahn makes reference in the subtitle of his work, because there are no set criteria by reference to which the determination can be made. How we actually live is not irrelevant to the determination of law, but the grounds on which the judge determines what analogies are appropriate to the case at hand – is a same-sex couple more like consenting heterosexual adults or more like a family? – cannot be established by taking a headcount or by conducting in-depth qualitative studies. It requires balancing the sources of law against shifts in the social equilibrium. This is why the determination of this question, and others like it, requires a judicial opinion.

The art of the judicial opinion involves a form of agency which, when successful, is not visible in its products. When the judicial opinion succeeds in persuading us, it lets us see the determination of law as an act that *We the people* performs on ourselves in order to realise what we are as a collective. Consequently, it hides from view the independent agency of law. That agency comes to the fore in the destructive mode of the opinion, in its overturning of past judgements – acts we did as a collective, but which we no longer recognise as truthful accounts of what we (really) were. These past judgements continue to exist as historical documents, but while they may reveal something about what we were, they no longer count as constitutive moments in the coming into being of what we are. They are historical in the trivial sense of having been, not in the sense of being with us at all times as the reference point from which we view, and judge, the acts by which our collective self is carried forward in time.[15]

Kahn is more interested in what is introduced into law in these moments of 'natality' that the Court will, more often than not, cast as continuous with its earlier case-law. This is understandable in a book written as a propaedeutic and so focused on what law does first and foremost. But arguably, the rare moments in which the Courts disavows its case-law is more revealing of law's agency. They reveal, if only implicitly, that law is not just reflective of culture; it is also *generative of world(s)* which, despite being fashioned from law (which is form before it is anything else) equal other cultural artifacts as to its capacity to carry meaning. In creating meaning, an opinion will not always create new law, but no determination of law could persuade us, were we not also persuaded that it had its place within a world of meaning we could accept as our own.

15 See *Kahn*, note 2, p. 118, for the Aristotelian distinction between posteriority in time and in substance.

With the creation of meaning, we have arrived at the most fundamental level of the art that concerns us here. It is also at this point that I should voice the most serious reservation I have about the way Kahn ties liberty to law through culture, more precisely the way he conjugates liberty and law across social spheres. My concern is that *precisely for generating worlds (of law) that are worlds of liberty, he generates life worlds that are not*. To bring to light this dialectic of law and liberty, we have to push the analysis one step further, to the body politics that keeps in place the reign of law.

B.

The judicial opinion seems far removed from the body and the drives that emanate from it. However, the body of the citizen is the foundation on which the world of law rests. It, Kahn tells us, is the only material support of the popular sovereign.[16] Non-compelled actions of the body are performative demonstrations that we are persuaded by law. The body is the ultimate basis for the *self-authorship* of the judicial opinion and for the *auto-theory* of the cultural study of law.[17] What we must discover is, first, how, and in support of which theory of law, liberalism has pressed the body into service, and, second, how, and to what end, Kahn proposes to disengage the body from the dispositifs in which liberal theory embedded it. As we shall see, the dispute is one over love, but the problem is one of ends. Kahn makes light work of the liberal conception of love, which ties it to the institutions of liberal order, chief among them the family, but it is not clear that love thus liberated contains the resources needed to seriously challenge the liberal theory of law. This is why Kahn is led from love to a heightened kind of love – sacrifice – that brings us from the sphere of the intimate to the sphere of the city. What we need to understand in this passage is how the indeterminacy of love conditions the way Kahn situates the individual in relation to the state. This, in turn, will determine how he uses culture to make sense of law.

The implication of body and self is key to Kahn's critique of liberalism. Dominant politico-legal theory would not acknowledge the affiliation, seeing the existence of a determinate and historically situated collective self as a function of choice, and therefore of reason. But as Kahn notes, taking the existence of the polity back to an act of reason will not get us what we want. Because it refers back to a free act, the foundation reason can offer is far too weak to support a collective self. Whatever our past choices were, as free agents we are always free to undo them again at any point in time.

In what are among the philosophically most rewarding pages of his *œuvre*, Kahn shows how liberal theory is led to the body in order to find a ground of free choice that would be immune to the corrosive work of reason. The interest of Kahn's analysis is that he does not simply juxtapose body and reason in order to celebrate the former and reveal the unfound-

16 *Kahn,* 2005, note 11, p. 272.

17 *P.W. Kahn,* The Cultural Study of Law: Reconstructing Legal Scholarship, Chicago 1999, pp. 86 – 90, 104.

edness of the latter. It is clear that in moving from reason to body, liberalism is just kicking the can down the road: 'The body itself offers no firm foundation; it too is the subject of the critique of reason. The body is no less a social formation than the church.'[18] The object of Kahn's analysis are the social formations that organise the body and purport to render it subservient to, and supportive of, reason. Chief among them is the family. It is the primary site for the production of meaning through the body: 'Before any other set of meanings appears, one finds oneself already within a world of family, attached through the body itself'.[19] As family and body are co-original, there is no hope of finding an Archimedian point for theory in either. The family, Kahn tells us, 'may appear to be natural, but that naturalness is itself a product of political power. […] There is no escape from the political to the natural family.'[20]

The family organises the body through sexuality. The distinction between the public and the private compartmentalises the body as an independent source of meaning. It confines the body within the realm of the private and its creation of meaning to the act of reproduction, making it doubly reproductive of liberal social order. The primary objective of Kahn's critique is therefore to get beyond the distinction of public and private. He tells us that what organises body politics in liberal society is, in fact, not the distinction public/private, but the distinction between love, on the one hand, and pornography, on the other.[21] At first glance, it might seem that Kahn is simply replacing one dichotomy by another, but that is not the entire story. Although love and pornography are in some ways opposed to one another, they are, as we shall see, also implicated in ways that do not hold for the opposition of public and private.

For Kahn, the interest of pornography is that it shows us the body as an independent source of meaning; meaning that is not a function of its embeddedness in the institutions of liberal social order.[22] As such, it reveals the messy truth of the implication of self and body that liberal theory glosses over. Seen in this light, pornography is the opposite of romantic love which embeds the body's strivings, its urges and desires, within the institutions of liberal society and condemns the ways and means of their nonconventional satisfaction. But as Kahn shows, pornography and romance are not simply opposed to one another; they are, to use a questionable metaphor, also joined at the hip. Both are fueled by the illusion that a fullness of meaning can be attained 'in and through the singular experience of the physical presence of the other.'[23] Both reference a source of meaning that is outside the institutions of liberal social order. Equally, both end up confirming that same order.

18 *Kahn*, 2005, note 11, p. 131.
19 *Ibid*, p. 183, cf. P. 197.
20 *Kahn*, 2005, note 11, p. 191.
21 *Ibid,* p. 202.
22 *Ibid,* p. 205 – 206.
23 *Ibid,* p. 210.

In pointing to pornography's inherent tendency towards edification, Kahn is not bemoaning the loss of some liberatory potential. The domesticity of pornography is what allows him to connect it to liberal theory's conception of romantic love and so to see it as revelatory of the carnal mess on which liberal institutions attempt to impose some order. But this methodological option is not without its problems. Notwithstanding the provocative allure of the argument, the isomorphism that Kahn suggests between love and the pornographic is not of a nature to challenge liberal body politics. It shows up the limitations of that politics, but it does not offer an alternative to the teleology that informs it. While consonant with the task of internal critique that Kahn sets himself, this demarche leaves suspended key aspects of the overall project. If the body's strivings invariably end up where liberal theory says they should, even if they follow a different trajectory, we might well ask wherein the difference lies between life as imagined in liberal theory and the 'meaningful' dedicated to 'love and sacrifice' that Kahn would have us realise.[24] Taking the body as our vantage point, where would we find a *discrimen* to tell these two forms of love apart?

The problem of which we are beginning to perceive the outline engages the very idea of a critique of liberalism. If critique resources itself from an experience of love, we would at the very least expect it to give an account of how that love differs from love that has already been pressed into service by and laid out according to the schemata of liberal theory. Kahn is clearly aware of the problem. The distinction he will sometimes make, but does not develop in a systematic way, between love and 'romantic' love is an indication that he is attempting to recover for theory a pure existential meaning, that is, a meaning that is grounded in the body but which has not been domesticated by liberal theory.

We would argue that if Kahn does not develop the distinction between love and romantic love, it is because love is not organised around, indeed overflows, the distinction public/private. Kahn is obviously right that modern liberal theory consigns love to the private sphere, but liberal theory is better equipped to deal with love than would appear from his work which engages only with contemporary liberal theorists of public reason. What is perhaps not given due consideration in his critique is that contemporary liberal theory is heir to a tradition going back to John Locke in which love plays a key part. The reasons why Kahn turns to love are not those of liberal theory, classical or contemporary, but as we shall see, the fact that liberal theory has already mapped out love bears on the way he conceives of love, and of the relationship of body and polity. It also means that we will have to proceed indirectly, by showing that the liberal theory of love so closely tracks what Kahn needs a body politics to be that only one specific venue for critique is left to him. This way of presenting the argument might be thought unnecessarily ponderous, but it is a reflection of how body politics and methodology are implicated in Kahn's analysis.

Turning to the work of John Locke, we find that love, or something very much like it, is what allows him to steer clear of the pitfalls of Hobbesian sovereignty. Hobbes, it will be remembered, tied his theory of the commonwealth to a limiting case of social interaction

24 *Kahn*, 2005, note 11, p. 18.

where no pre-political bonds held. Locke avoids that impasse by taking power back into the family. The alignment of family and polity serves as a warrant of the goodness of government. Transposing the characteristics of pre-political, familial authority onto the relationship of subject and prince enables him to replace Hobbes' question of how to adjudicate mutually exclusive rights claim with the question of how men interact in the absence of legitimate governmental authority.[25] On the supposition of fatherly authority, men need not relate to each other in an adversarial process that, for want of a power of adjudication, invariably ends in violence. Instead they do what members of a family do. Time does the rest, and habituation carries familial forms of authority over into political society:

> *Thus 'twas easie, and almost natural for Children by a tacit, and scarce avoidable consent to make for the Father's Authority and Government. They had been accustomed in their Childhood to follow his Direction, and to refer their little differences to him, and when they were Men, who fitter to rule them?*[26]

So strong is the authority of the father that the transition from the family to political society is seamless and imperceptible. '[By] an insensible change,' fathers came to be also '*politick Monarchs*' of their family and, with successive generations continuing their work, eventually laid the foundations of kingdoms, hereditary and elective.[27]

Trust, the key concept in Locke's political theory, refers back to this primordial relationship of care. The extent to which power is a trust is a function of the capacity of the ruler to look after society as if it were a child left to his care. In 'the Infancies of Commonwealths,' Locke tells us, those entrusted with rule "commonly" used their power so. Had they failed in their paternal duties, their off-spring would not have grown to maturity: 'without such nursing Fathers tender and careful of the public weale, all Governments would have sunk under the Weakness and Infirmities of their Infancy; and the Prince and the People had soon perished together.'[28]

Locke, ultimately, takes a dim view of the capacity of trust to ground power. As society grows, it becomes less and less credible that familial forms of authority grounded in care can rein in power. This is a function of a change in scale, but it is also a function of a more general change in the nature of social relations, most significantly the change wrought by

25 See *J. Dunn*, The concept of 'trust' in the politics of John Locke: In Richard Rorty, Jerome B. Schneewind & Quentin Skinner (eds.), Philosophy in History: Essays in the Historiography of Philosophy, Cambridge 1984, p. 290. For a brilliant analysis of the pivotal role Locke played in moving public law theory from Hobbes' "anti-constitutionalism" to what would become the format of British public law theory, see *D. Baranger*, Écrire la constitution non-écrite. Une introduction au droit politique britannique, Paris 2008, pp. 80-93.

26 *John Locke,* Second Treatise*,* in Peter Laslett (ed.), John Locke. Two Treatises of Government, Cambridge 1960, p. 317.

27 *Ibid,* p. 318.

28 *Ibid,* p. 342.

the introduction of money.[29] In the 'poor but vertuous Age' in which governments were begun, the familial analogy held, but with the advent of money, ambition and luxury would drive a wedge between the prince and his people, teaching the former to have 'distinct and separate interests' from those of his subjects and impressing upon the latter the need to 'examine more carefully the *Original* and Rights of *Government*.'[30]

Locke's reservations aside, it remains that liberal theory is steeped in love (even if the neglect of love in later liberal theory is prefigured in his understanding of trust as a non-renewable stock left over from before the beginnings of political history). In taking the meaning of life back to love, Kahn is, one might say, taking liberal theory back to the source from which it drew (even if liberal theory, in all its forms, lacks the words to express the manifold *aspects of love* that hold his attention).

Returning to Kahn's text, I submit that the history love has in, and with, liberal theory makes sense of why he is driven to look beyond love to find a more potent source of meaning. Love is too docile, too indeterminate to act as a support for his critique of liberalism. The determinacy he needs he finds in *sacrifice*. Sacrifice confers determinacy upon the body's strivings in a way that love could not, to the point of imposing itself as the basic modality or criterion of existential meaning or, indeed, of love itself. It is by the willingness to sacrifice that we recognise love. Love is sacrifice, at least for the purposes of law: 'The paradigmatic act of reading the loved body is sacrifice.'[31]

In seguing from love to sacrifice, Kahn ups the ante. Love may be sacrifice, but it is clear that the stakes of sacrifice outweigh the stakes of non-sacrificial love. So far so good. The question, however, is what those stakes are, and whether a theory of law that could compete with the liberal account could be fashioned around them. To find an answer, we need to delineate the space of sacrifice.

If we consider where it sits in the architectonic of Kahn's text, we find that it is a counterpoint to the pornographic. They are opposites; Kahn even defines the symbolic death we suffer in orgasm as an anti-sacrifice. Where sacrifice sublimates the body, transforming it into a sign, the erotic denies the symbolic nature of the body.[32] But in dialectic terms, sacrifice and the erotic are the same. They are the only two points at which the body is *consummated as meaning*. They are the liminal experiences between which we conduct meaningful lives. As such, they bound a determinate locus, a site or *place* to which something that has no inherent principle of demarcation – liberalism – can be referred or confined.

Sacrifice is primary because it confounds the utilitarian calculus by which liberal theory determines the value, and ultimately the meaning, of all things. Obviously, sacrifice is not alone in that regard. Kahn notes that liberal theory is unable to give an adequate account of

29 On this point, see the brilliant analysis in J. Tully, A Discourse on Property: John Locke and his Adversaries, Cambridge 1980, pp. 135-147, 153-154.

30 *Locke*, note 25, p. 343.

31 *Kahn,* 2005, note 11, p. 223.

32 *Ibid,* p. 204, cf. p. 224.

the family and of altruism, but the stakes involved in sacrifice mean that the inadequacy of liberal theory is most keenly felt here. Indeed, one might say that it is only really felt here. Liberal theory may not understand any form of self-abnegation, but only sacrifice troubles it because sacrifice involves possession, and consummation, of the body.

The implication of sacrifice and body makes sense of why sacrifice entails the abdication of speech. When a citizen is called to sacrifice himself for the state, there 'are no excuses to be made, no reconsiderations of the justice or legitimacy of the claim. There is only silence and then the act itself'.[33] For Kahn, sacrifice is, first and foremost, a change of register, a sign that, through the body of the individual, transcendent meaning has entered into the finite universe of the polity. This change of register explains how he can put on a par the act by which a citizen sacrifices himself and the act by which a state tortures an individual.[34] This equivalence runs counter to our most basic moral intuitions, but in both cases, a body is sublimated as a means of rendering transcendence present within the finite.

The willingness to sacrifice oneself marks the point at which a theory of political life that taps into the same sources as liberal theory and is embedded in the institutions of liberal order constitutes itself as a world beyond liberalism. This explains why Kahn takes this as a sign that we have entered the realm of the political. The political, he tells us, 'begins when I can imagine myself sacrificing myself and killing others to maintain the state.'[35]The political begins beyond the world of liberalism that it supports and keeps in existence.

This is the crux of Kahn's critique of liberalism: that it cannot give an account of that which grounds it. Sacrifice is the bedrock of Kahn's theory of how we live together as a collective, and how we give the law to ourselves. The existence of a determinate collective entity capable of self-authorship is, in the final analysis, only verifiable through the willingness to self-sacrifice of its citizens. The community to which the judicial opinion refers – the community that *We the people* are – is a *sacrificial community*.

It bears saying that, in grounding the community in sacrifice, Kahn is not only going beyond liberal theory. He also goes beyond the theory of sovereignty that had no place for sacrifice. Its primary concern was to inculcate citizens with social mores that would make them well-suited to live in in a community founded on subjection. Consequently, it championed a bourgeois ethics of self-interest over aristocratic honour and Christian martyrdom; the two grounds on which an individual might decide to stake his life.[36] In making meaning the foundation of social order, and the medium of social life, Kahn introduces into the polity a state of heightened tension and vigilance.

33 Funnily enough, one would have to say that liberal theory, which Kahn lambasts for remaining "speechless" in the face of sacrifice, acts in a manner befitting what has transpired; *Kahn,* 2005, note 11, p. 224, 250.

34 *P.W. Kahn,* Sacred Violence: Torture, Terror, and Sovereignty, Ann Arbor 2008, p. 134.

35 *Kahn,* 2005, note 11, pp. 233, 240.

36 On this point, see A. Lev, Sovereignty and Liberty: A Study of the Foundations of Power, Abdingdon 2014, pp. 135-137.

The effect of this tension is to obliterate the dimension of the intimate. In itself, it is not surprising that Kahn should focus on the potential for conflict between family and polity. It is remarkable, however, that he is drawn to examples where conflict between moral and political imperatives, or indeed the irrational nature of love itself, ends up destroying the family. This is equally true of his readings of King Lear, Antigone, and of the story of Abraham and Isaac. Like Kierkegaard, he sees in the latter only a demand to which one cannot accede through reason or desire. Nothing but faith will make sense of this act that is foundational of a political community and of an intergenerational family because, in consummating Isaac's body as meaning, it accedes to the realm of the political.[37] What gets lost in this account is the moment of grace by which the Biblical story ends. This is the moment where God refuses to accept Abraham's sacrifice in the form in which it is offered up, transforming it in such a way as to take it out of the realm that any liberal body politics could hope to order. The paradox is that Kahn's blindness to these aspects of the Biblical account, which is a blindness to the possibility of grace, follows directly from his belief that, if called, we should sacrifice everything for love.[38]

C.

The arc we have described goes from Kahn's reconstructive analysis of the judicial opinion over his critique of liberal theory to his notion of sacrifice as the epitome of love, the *how* of how we should live, as citizens, lovers, and parents. What we have proposed is a genealogy. We have peeled off layers of Kahn's work as tensions within a work revealed a reliance on theorems that have their place in layers that were anterior if not in time, then according to the concept, as Aristotle would say. The world-making or world-generating power of the opinion to which Kahn makes discrete reference in his analysis led us to his earlier critique of liberalism in which he examines where existential meanings arise, and how, through which conduits, they pass into the law so that we may recognise ourselves as its authors. The question is where Kahn ends up, as we bring his analysis back to law, and to the cultural study of it. What understanding of law does sacrifice allow for?

Liberal theory is not unfamiliar with this state of heightened tension and vigilance, which it would tie to the creation of the polity, as a *constitutional* or *revolutionary moment*, limiting the time in which agency is thrown open. For reasons that should be clear by now, this cannot be Kahn's approach. Indeed, one wonders whether his long-standing fascination

37 *Kahn,* 2005, note 11, pp. 186 – 187.

38 The foreclosure of grace finds an echo in Kahn's consideration of the analogy that holds between God and the English king whose court – the Chancery – mixed mercy with justice where other courts adjudicated according to the law (*P.W. Kahn*, Political Theology: Four New Chapters on Sovereignty, New York 2011, p. 36). If grace is a royal prerogative, it is because only he who is God's *lieu-tenant* can abrogate a rule without rendering himself suspect. Where power has become wholly immanent, as it must be where citizens decide on the ultimate sacrifice, there grace has no meaning. The popular sovereign knows only itself (*Kahn*, 2005, note 11, p. 230), and its complete presence unto itself does not leave it sufficient room to show mercy.

with the practice of judicial review is not to do with the fact that, for being *ordinary*, it resists the moves by which theorists of constitutionalism standardly transform popular sovereignty into constituent power, effectively placing the people outside the theatre of action. On Kahn's reading, the people maintain a presence *within* the constitution as the collective author of the law. But there is a cost to keeping the people within the constitution. Within the confines of this present work, we cannot determine the nature and extent of that cost, but the intuition is that the identity of popular sovereignty and rule of law around which Kahn organises his work commits him to sustaining a sense of blind urgency in political life that mirrors that sacrifice we are called to make for love.

One of the aspects of Kahn's work we would need to interrogate further to unpack that intuition is how his theory of self-authorship ties into the question of representation. We find that because the presence of the people within the constitution is tied to an ordinary power, that presence is only weakly representational or, rather, representation is only weakly incarnated. The Court is the voice of the people, not its image. This is not an accident, or something that could remedied. Only if the Court is not seen to exercise agency in speaking for the collective subject that we are, can it point us towards ourselves as the real author of the authoritative text (from which the opinion, where it succeeds in persuading us, is henceforth inseparable).[39] Consequently, the act of identification required to attribute self-authorship has very little to go on; in fact, it has only the mechanism of authorisation. Formally speaking, this is no different from Hobbes' conception of representation, according to which the several subjects agree to '*authorize and give up my right* of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in *like manner*.'[40] But this formal similarity is misleading. As Hobbes knew, representation is always about more than delegating power. It is also, and primarily, about the way meaning is rendered manifest. In saying that the Leviathan is a person – *persona* being a *mask* – Hobbes is not only saying that we can, for the purposes of law, treat an inanimate object on a par with a human being. He is saying that, to truly come into existence, the Leviathan must appear in distinct and recognisable form. His preference for monarchy over other constitutional forms is, at least in part, explained by the intuition that power is rendered more manifestly present, more incarnate if you will, in the body of an individual than it is in the body of a collective.

A public law theory that is configured on the idea of constitutional moments is well-placed to exploit these aesthetic options. For being tied to a determinate sequence of supposedly extraordinary events, it is easily mapped onto political history. Perhaps more importantly, it operates on the supposition that whatever action is taken within the relevant interactional context is significant. This supposition may invite contestation, but it facilitates the representation of law by enabling its association with political agency. Ordinary power, to which Kahn ties the presence of the people within the constitution, does not enjoy the

39 *Kahn,* note 2, pp. 62 - -64, 75.

40 *Hobbes*, note 7, p. 109; Kahn notes the similarity to Hobbes, *Kahn,* note 2, pp. 60-61.

same good fortune. It would take us too far a-field to consider why these aesthetic strategies that gave high art in Europe many of its distinctive features do not operate in relation to a power like Kahn's Court that constantly effaces itself. Suffice it to say that the obstacle lies not in the Court's evasive presence but in its foregrounding of law as an *already settled* form which closes many of the venues through which sovereignty was rendered manifest as meaning. Being already settled, the (ordinary) agency of law is normatively indistinct and does not easily map onto political history.

Representation – a requirement for the attribution of self-authorship – therefore turns from the *agency* of the collective subject we are to the *substance* of what we, the collective subject, are. This we see reflected in the rise of *culture as a supplement to representation*. There are precedents in the history of public law theory of culture serving as a supplement to the aesthetic representation of law's indistinct agency. A significant precedent is found in the work of Friedrich-Julius Stahl that would determine the course of German public law theory from the mid-nineteenth century through to the Weimar period. Like Kahn, Stahl identifies the people as the authors of the law, an attribution that he underpins by references to the defining features of the national community. This reference, which is directed at the elitism of constitutional theory, is tendentially conservative as law's agency, being indistinct, can only be seen as reflective of forces that operate within, and in confirmation of, the most basic layers of the social formation.

The cultural turn sets the scene for what is perhaps the most fundamental of the binaries that structure Kahn's universe. Faceless, silent agency of the almost archaic is juxtaposed to a sense of crisis (*krinein*), one of the primary meanings of which is *decision*. Just as he was in his analysis of body politics, Kahn is led to posit a sovereign act that cannot be reduced to it circumstances as the resolution and truth of law. The task of the Court is to negotiate the conflicting imperatives that arise when what is essentially human (intimacy/love) passes into what is more than human (sacrifice) or inhuman (torture). This strangely bipolar world is the world within which the judicial opinion moves.

Saying that a world of meaning is conflicted is not to say that it lacks meaning; nor is it to say that it is marred by inconsistency. The contradictions of Kahn's work are, in a fundamental sense, those of the law, and are only realised by those who have the audacity to remain faithful to the ideal of law's idealism, and the acuity of vision to work through its every last implication. But as theorists of law, it is for us to interrogate how the methodologies we use to study law commit us to specific aesthetic and political trajectories. Kahn is wont to dodge the question by a modest disclaimer that his work is only ever about the American polity. We submit that the conflict which is at the heart of his work originates at a level that is prior to determinate political experience. Kahn might argue that this conflict is somehow definitively rendered in and through the political experience of the American nation, but while this would displace the question, I am not sure it would provide an answer to it.

It is pointless to discuss whether the world that *Making The Case* opens up to can still be described as *liberal*. Rather, we should focus on what Kahn shows us about the workings of law. He is not alone in having followed an idealist star to the edge of liberalism. But

there were some that lost themselves on the way. One who went to the edge, and beyond, is Carl Schmitt whose political theology Kahn has revisited in one of his most recent, and most beautiful, books. The case of Schmitt illustrates that the enterprise is fraught with danger. This is the price we pay for working through the implications of idealism about law. We cannot do without it, as a heuristic tool and as an element of civility. The question remains how we are to live with it.