Kahn's Reign and its Metaphors For Law -- A Critique in the Philosophy of Legal Culture

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KAHNS REIGN AND ITS METAPHORS FOR LAW – A CRITIQUE IN THE PHILOSOPHY OF LEGAL CULTURE

ALANI GOLANSKI*

I. INTRODUCTION

Paul Kahn, the Nicholas deB. Katzenbach Professor of Law at Yale Law School, explains how we come to believe in the rule of law, why the rule of law is a myth, and how the rhetoric of law sustains that myth.1 While Kahn concedes that “[m]ost scholarship is ignored by most courts most of the time,”2 influencing courts is not his goal, and he tries to set his scholarly approach apart from others. Methodology is important, he says, and we should avoid both the usual timid, reform-oriented approach that is little more than an apology for law, as well as the bold realist leap away from legal doctrine toward nonlegal sources of law.

Kahn’s project is to examine critically the rule of law as an expression of our political culture, looking at the ways legal beliefs shape a world of meaning. The Reign of Law is brilliant in setting up dichotomies to expose the structure of our legal imagination. The principal dichotomy, pronounced in Marbury v. Madison,3 is between “a government of laws, and [one] of men.”4 Kahn reformulates this as a tension between the rule of law and the realm of action, saying the conflict between law and action creates “the imaginative space of our political life.”5 Flowing from this primary dichotomy are several others, such as performance/authorization, opinion of the people/popular opinion, permanence/novelty, past/future,

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3 Id. at 133.
4 5 U.S. 137 (1803).
5 Id. at 163.
6 Kahn, supra note 1, at 32.
authority/authorship and anonymity/individuality, the prior terms being on the law side of the divide, the latter on the action side. The myth of law is perpetuated by rhetorical performances — legal opinions — that foster the appearance of a past located permanently in the present; opinions, appearing as the anonymous institutional voice of the courts, provide authority by summoning and interpreting a ceaselessly available past.

Meanwhile, the political culture as a whole, in which law and action compete, is characterized by further dual structures, such as expression/suppression, interpretation/faith and representation/instanation. The delicate balancing of these dualities stabilizes political culture by linking it to the people. In this process brimming with conflict and synthesis, the

[I]aw’s ambition is to suppress the appearance of action in every event so that we see only the law. Law suppresses the novelty of events and the presence of the unique subject; it makes a continuity of order appear. Political action has the opposite ambition. Action suppresses the continuity of historical experience, seeing instead novelty and unique subjects in political events.7

The logic of law’s appearance inheres in interpretation that moves toward a transparent accessing of law’s source, the people as sovereign, an object of faith; therefore, interpretation begins at faith’s borders and “would need to negate itself to accomplish its own end.”8

While law seeks to represent the opinion of the people, and action popular opinion tempered by fine moral insight, segments of the culture sometimes discount the representative model and regress to a pre-Reformation mind-set in which individuals or symbols are considered instantiations or incarnations of the sovereign. For example, the person of the president, like that of the monarch, may be venerated as the mystical body of the state, the judge revered unconditionally as the voice of law, or the flag exalted as an incarnation of the nation’s well-being requiring constitutional protection.

Kahn is at his best when contemplating the many dualities he perceives, and when he contemplates dualities he is speaking dialectically.

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6. Professor Kahn discusses many of the same ideas in his subsequent book, PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999), but The Reign of Law appears to be the fullest expression of his Weltanschauung so far.

7. Id. at 178.
8. Id. at 184.
Another passage illustrates his keen dialectical expression:

Ideally, under the rule of law, opinion's product is law and law's foundation is opinion... The permanence of law — and without permanence there is no law — depends on the possibility of the Court's opinion. But the possibility of an opinion of the Court, which is not another novel act of politics, depends on the appearance of a permanent opinion of the people. To stand within the law is to stand within this circle of opinion, law, opinion.9

But "Any damn fool or accurate machine./ Having a whole history on paper/ Authority, can spout a name and birthdate."10 "Any damn fool" can also summarize and praise. Professor Kahn would not approve of a fawning review, and maybe we can find an opening for criticism not where Kahn's argument is dialectical, but in its rhetorical maneuvers. Plato explained, or performed, the distinction in the Gorgias, in which Socrates says dialectic is "the discussion in the way we're having it right now, that of alternately asking questions and answering them."11 So while he may begin an explanation now and then, Socrates best defines dialectic not by what he says, but by how he says it.12 Rhetoric, on the other hand, was considered a form of oratory and the ability to persuade by speeches.13

Aristotle elevated rhetoric to "a kind of offshoot of dialectic,"14 the function of which is "not persuasion" but "the detection of the persuasive aspects of each matter...."15 In dialectics one demonstrates persuasiveness by logical induction and deduction, in rhetoric by example and en-

9. Id. at 214.
13. Plato, supra note 11, at 452, COMPLETE WORKS at 798; see also Robert J. Lukens, Comment, Discursing on Democracy and the Law — A Deconstructive Analysis, 70 TEMPLE L. REV. 587, 595 n.12 (1997) ("It is perhaps Plato’s method of presenting countervailing characterizations of an issue that epitomizes the distinction between the careful and deliberate analyses that can occur through the dialectical process and the expatriation on interlocking themes that is more common in rhetorical argumentation methods").
15. Id. at 69-70 (1355b) (translator's emphasis); see also id. at 74 (1355b) ("let rhetoric be the power to observe the persuasiveness of which any particular matter admits") (translator's emphasis).
thymeme (or relaxed syllogism from which a premise may be omitted).16 For Aristotle, rhetoric is a function of the listener’s ability to comprehend, and “the baseness of the audience”17 requires that rhetoric use certain stylistic devices as pedagogic tools. One is a metaphor.18 “Pericles, for example, said that the youth killed in the war had so disappeared from the city as if someone had taken the spring from the year.”19 Personally, I find Pericles’s metaphor (his B-term) presents a more complex image than his primary observation (A-term), but the comparison is striking.

In their important treatise The New Rhetoric, Perelman and Olbrechts-Tyteca describe dialectic in the more contemporary, Hegelian sense, as “‘opposing theses’” that are exposed to “‘the higher movement of reason in which these separate appearances pass into one another . . . and are exceeded’.”20 When I speak of Kahn’s dialectical analysis this is the sort of thing I mean, an expression of the dialectic between A and not-A, in which the opposing concepts have room to “pass through the successive stages”21 of legal meaning and myth.

But this article focuses on Kahn’s rhetorical reliance on metaphor, about which Perelman and Olbrechts-Tyteca say that.

[i]n the tradition of the masters of rhetoric, a metaphor is a trope, that is, "the artistic alteration of a word or phrase from its proper meaning to another." It would even be the trope par excellence. By the use of metaphor, according to Dumarsais, "we convert a noun’s proper meaning to another meaning, which it can only bear by virtue of a comparison that resides in the mind.”22

16. Id. at 77 (1357”). And, for Aristotle, “one’s conclusions should not only be from necessary premises but also from those holding for the most part.” Id. at 195 (1396”).
17. Id. at 217 (1404”).
18. Others Aristotle discusses include rhythm, clarity, simile, vividness, parity (e.g., speaking “good Greek”), proportionality to the subject matter, and suitability to the genre. Id. at 218-44 (1404”-1414”)..
19. Id. at 236 (1411”).
22. PERELMAN & OLBRECHTS-TYTECA, supra note 20, § 87, at 398-99 (emphasis in original) (quoting QUINTILIAN, THE INSTITUTIO ORATORIA OF QUINTILIAN VIII, vi, 1
In this sense, I discuss three principal metaphors through which Kahn constructs both a substantive picture of law’s appearance and his methodological thesis that nonlegal sources need not, and should not, be explored in explaining the rule of law. These metaphors are (1) law as language, (2) law as religion, and (3) law as legal artifact. Kahn explicitly sets up (1) and (2) as metaphors, often describing law according to parallel characteristics in language and religion. Regarding (3), Kahn’s likens his work in *The Reign of Law* to archaeology, and I derive law-as-legal-artifact from his proscription on explaining law by appeal to any nonlegal discipline.

This article argues that (1) and (2) are workable metaphors, but that they work better if treated differently. Part II demonstrates that Kahn’s view of language is imprecise, but that the rule of law is itself not in line with his assessment. Adjustments on each side of the analysis preserve the metaphor. Similarly, in Part III the article shows that Kahn’s perspective on religion discounts experience and theory, but the rigidity of his political and legal rhetoric is a comparable flaw. When it comes to Kahn’s law-as-legal-artifact metaphor, the article concludes, in Part IV, that the limitations entailed in the analogy, and in Kahn’s corresponding view of legal scholarship, are untenable.

II. LAW AS LANGUAGE

There is disagreement about the importance of metaphors and how they emerge. A traditional view privileges observation and invention: we get a clear idea of the thing from observation and then intuit, or invent, its analogue. Pericles’s life experience was in Athens, so he knew firsthand the scramble of young people in the shops, in the streets and parks. When they disappeared from the city, killed in the Peloponnesian War, he faced the absence itself, and only then imagined a year bereft of spring.

But lately cognitive scientists discount deliberation, and stress instead the metaphorical aspect of the embodied mind. Some find the architecture of our brains’ neural networks determines what concepts we

(H.E. Butler trans., 1921-1933); César Chesneau, sieur du Marsais Dumarsais, Des Tropes Ou Des Différents Sens Dans Lesquels on Peut Prendre un Même Langue 103 (1824) (other citations omitted); cf. George Lakoff & Mark Johnson, *Philosophy in the Flesh: The Embodied Mind and Its Challenge to Western Thought* 120 (1999) (arguing that “metaphor has been traditionally relegated to a theory of tropes, which is intended to handle uses of language in which truth is not thought to be at issue: poetry, rhetorical flourish, fictional discourse, and so on. The banishment of metaphor from the realm of truth explains why metaphor has traditionally been left to rhetoric and literary analysis, rather than being taken seriously by science, mathematics, and philosophy, which are seen as truth-seeking enterprises”).
have and hence the kind of reasoning we can do. So the infant feels warmth when held, learns to associate warmth with affection, and then later, his conceptual metaphor mapped, speaks of "a warm smile." Linking the subjective experience of intimacy with the sensorimotor experience of being physically close, he conceives of "a close friend." In this way, our biology predominant, we form hundreds of "primary" metaphors.

Strengthening the Lakoffian notion are studies showing that the same metaphors are often universally present, across linguistic and cultural boundaries. For example, from linguists examining Japanese metaphorical conceptions of inner life, we learn that the phrase Kare-wa dokuso-yo ware-o wasure-ta means "He lost himself in reading"; Kare-wa yooyoaku ware-ni kaet-ta means "He finally came to his senses," and so on. Or consider another cognitive scientist's findings that in one African language, Lugbara, spoken in parts of Zaire and Uganda, the metaphorical structure remains transparent, that is, the literal meanings in all cases reveal the motivation of the terms. For example, andr-aleru is the expression for "north," but literally means "down," owing to the northward flow of the Nile. Dri eji-aleru means "to the left," but literally signifies the side on which things are carried, the source fact being that the Lugbara people traditionally carry their bows in their left hand.

"Law as language" is a complex metaphor, and I think the most sensible view is that Kahn derives it in the Periclean manner, his immersion in law affording a clear assessment of its nature. The metaphor is Kahn's invention, not an archaeological find rooted in certain embodied life facts. What Kahn says about language he wants to say about law and, sometimes, the political order. So in this Part, I first look at Kahn's understanding of language and what sort of legal culture the analogy implies. I then ask whether a different description of language is plausible or preferable, and if so whether this means we should junk the law-as-language metaphor. If we arrive at an understanding of language different from Kahn's, and if the metaphor nevertheless retains its viability, then it follows that the rule of law is not quite the way Kahn says it is.

To the extent that any of the similarities Kahn discerns between law and language is uncontroversial, the law-as-language metaphor is stabilized. I think we can accept at least one of his comparisons at face value. This is where he explains that law and language can each be described as "a system of relations among elements," but neither is "the product of any

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23. LAKOFF & JOHNSON, supra note 22, at 16.
24. Id. at 50-54.
25. Id. at 264-87.
one person’s rational efforts.” But the overlap is nothing if not broad, and as much could be said of the economy, the Macy’s Thanksgiving Day parade, or the Kentucky Derby. If the metaphor is to carry any real instructive weight it will have to be interlaced more tightly. Unfortunately, the rest of Kahn’s weaving seems frayed.

For one thing, Kahn says of a second intersection between law and language that “language allows us to understand — to take as a discursive object — language itself,” which exposes “conscious and unconscious ideologies”;

“[s]imilarly, the political order gives meaning to every interaction of subjects,” and political analysis can “analyze[] and expose[]” the rule of law. But this is different from saying that the law takes itself as a discursive object. When writing The Reign of Law Kahn may have believed, rightly I think, that metadiscourse is not one of law’s special features.

While language may take law as its discursive object, it’s only remotely likely that law does this, except uneventfully, as in saying, “this opinion . . .”, “the law is clear that . . .”, “these rules . . .”, and so forth. So Rule 1 of the Federal Rules of Civil Procedure prescribes that “[t]hese rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”;

Rule 102 of the Federal Rules of Evidence mandates that “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.” Those nice provisions are typical entrées into a statutory or regulatory scheme.

In his more recent book The Cultural Study of Law: Reconstructing Legal Scholarship, however, Kahn develops a more compelling idea he calls “auto-theory,” by which the law theorizes about its own nature. Auto-theorizing manifests through paradigms of thought about constitutional analysis. For example, in the beginning the Founders constructed their constitutional model through the paradigm of political science. As the founding generation died out, a Kuhnian paradigm shift occurred and the court’s thinking turned toward originalism. An evolution out of the originalist paradigm, in turn, engendered belief in an unwritten, time- and

27. Kahn, supra note 1, at 36.
28. Id. at 37 (quoting David Tracy, Plurality and Ambiguity: Hermeneutics, Religion, Hope 61 (1987)).
29. Kahn, supra note 1, at 37-38.
place-sensitive constitution. More generally, auto-theory is practiced, says Kahn, through a second-order approach by which the operative norms are examined with a view toward justifying or reforming the rules.\textsuperscript{33}

But Kahn’s auto-theorizing is akin to language speaking of a lexical expansion (or reform) to include words and usages such as “globalatini-

zation,” “doggie bag” and “down-and-out.” Or language may speak about

the state of its syntax or grammar as law provides discourse on the sub-

stance of its constitutional approach. While the idea of auto-theory brings

a deeper view of law’s self-referential capacity than Kahn affords in The

Reign of Law, it is still not nearly as dynamic or manipulable as lan-

guage’s self-reflexivity can be.

Rules in law will not be as follows: \textbf{R}_1: These rules shall not be obeyed; \textbf{R}_2: Do x. This would not be uneventful, and the paradox en-
tailed would be: doing x, I violate \textbf{R}_1, which says I must not obey \textbf{R}_2; not doing x, I violate \textbf{R}_2, which means I also violate \textbf{R}_1, because I have obeyed \textbf{R}_1, though it tells me not to. This sort of thing does not appear in

law, but in language.

On the other hand, \textbf{R}_1 may be approximated in a colonial setting, where there may be competing indigenous and imperial codes. One of the

new regulations implemented by Lord Cornwallis’s government in colo-
nial India as an overlay upon the ongoing Mohommedan Law prescribed, in relevant part:

If the \textit{fatwa} [a decision of a council expert in Mohammedan law] of

the \textit{law officers} [being the ones comprising that Mohammedan council] of

the Nizamut Adawlut [a criminal court of appeal] declare any person con-
victed of wilful murder not liable to suffer death under the Mahomedan

law on the ground of . . . the Court of \textit{Nizamut Adawlut} shall notwithstanding sentence the prisoner to suffer death . . . \textsuperscript{34}

Anyway, Kahn himself assumes that we must “stand outside [law]
in order to take it as an object of thought,” and admits that most efforts to
do so “lose sight of law completely.”\textsuperscript{35} Elsewhere he says, “[i]n the end, the Court sees and speaks of what it sees[, which] entails a \textit{hiding of its

\begin{footnotesize} 
33. KAHN, \textit{supra} note 6, at 87-94.

34. Reg. VIII § 4 (1799), \textit{compiled} in \textit{REGULATIONS OF THE GOV’T OF FORT

WILLIAM IN FORCE AT THE END OF 1853, quoted} in \textit{COL. HENRY YULE \\& A.C. BURNELL,

HOBSON-JOBSON: A GLOSSARY OF COLLOQUIAL ANGOLO INDIAN WORDS AND PHRASES, AND

OF KINDRED TERMS, ETYMOLOGICAL, HISTORICAL, GEOGRAPHICAL AND DISCURSIVE 512

(William Crooke ed., The Bengal Chamber ed. (1886) (1886) (emphasis and ellipses by

Yule and Burnell)).

35. KAHN, \textit{supra} note 1, at 39.
\end{footnotesize}
own self-knowledge and a silencing of other voices."\textsuperscript{36} None of this seems to describe a system inclined to take itself as discursive object.

From the opposite vantage point, language "gives meaning" to the interaction of its variables, but this can occur in the first-order, observation language, where language doesn't talk about itself. Language discussing itself is a separate matter. When political analysis takes law as its object, it's one culture against another, language is doing the job, and the self-referential aspect is thin. Somewhat as revealing may be Auden's words:

Law, says the judge as he looks down his nose,
Speaking clearly and most severely,
Law is as I've told you before,
Law is as you know I suppose,
Law is but let me explain it once more,
Law is The Law.\textsuperscript{37}

Law looks at its prior texts, but this is law's work and not a second-order operation, more of a looking to. And while doing so, rather than exposing ideologies law hides them. Kahn himself says this over and over, sometimes sounding a bit like Peter Gabel, who states: "The objective of the Supreme Court is to pacify conflict through the mediation of a false social-meaning system, a set of ideas and images about the world which serve today as the secular equivalent of religious ideology in previous historical periods."\textsuperscript{38} Gabel elsewhere writes that "[t]he function of the law is to give each of us the impression that the system operates according to a normative law. . . . Through the law we tell ourselves . . . that what is, ought to be — that the system follows a law."\textsuperscript{39}

\textsuperscript{36} Id. at 162 (emphasis added).
\textsuperscript{39} Peter Gabel, Reification in Legal Reasoning, 3 RESEARCH IN LAW AND SOCIOLOGY 25, 29 (1980).
Relinquishing some subtlety, Gabel continues:

Thus, from the ontological point of view, we can say that the judicial or political "ideologist," as a social theorist of the imaginary, has an infinite variety of images available to him in the construction of his legitimating thought.

* * * *

As an historical figure, therefore, the ideologist is perhaps best seen as a kind of sleight-of-hand man or "bricoleur" (Levi-Strauss, 1966) who seeks to fuse these ontological, formal, and historical dimensions of legitimating thought in the fabrication of a perpetual illusion that everyone wants to believe. The group conspires to create him in order to maintain its collective repression in the face of a perpetual terror that there will be a "breakdown of law," which is to say a breakdown of even the imaginary forms of social cohesion.40

Gabel's afraid he'll too, would be seen as the sleight-of-hand man or bricoleur (not an unjustified paranoia, being a law professor). For instance, when renting an apartment he's been known to afford the landlord the benefit of all doubts, foregoing not only a lease but even a receipt for his deposit.41 Maybe to avoid the conundrum Stanley Fish expresses the idea at a greater remove, adding that "the law, in short, is continually engaged in effacing the ideological content of its mechanism so that it can present itself as a discourse which is context independent in its claims to universality and reason."42

So, to this point we've seen that Professor Kahn sets up a law-as-language metaphor, weakly sustains it by speaking of "relations among elements," and not much at all when he refers to language's self-referential capabilities. His important aim, though, is to use this metaphor to support his view that law appears to be a closed system that we can talk

40. Id. at 45-46 (citing CLAUDE LEVI-STRAUSS, THE SAVAGE MIND (1966)).
42. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH 175 (1994) (footnote omitted) (quoting PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS (1987)); see also William M. Schur, Adoption Procedure, in 1 ADOPTION LAW AND PRACTICE 4-10 (Joan H. Hollinger ed., 1992) (saying of the best interest standard that "[i]t may become a mere facade behind which social workers, lawyers and judges hide when making decisions based on intuition, personal likes and dislikes, armchair psychology and ideology, so deeply rooted that the decision makers are unaware that it is mere ideology").
about and understand "without participating" in the operations of law.\textsuperscript{43} Toward this end, Kahn says that the rule of law appears as "a comprehensive order" of the political sphere, and "[i]ust as no experience falls outside language, no event falls outside law's order."\textsuperscript{44} Developing the analogy he calls language "accessible to reason" because it is a system of regularities and exceptions that can be described.\textsuperscript{55}

Kahn is now back to discussing law's myth, its appearance. He is saying that law appears to be a closed and neutral system of reason, and that judges foster this appearance by suppressing their private selves and biases and even "the ordinary struggle of opinions in a world filled with doubt."\textsuperscript{46} And yet, for Kahn, "no event falls outside law's order," because "[t]here is no element of our communal life about which we cannot ask: 'Is it legal?';"\textsuperscript{47} and this too contributes to the myth. There may seem to be a conflation here: is the metaphor law as language or law's myth as language? For Kahn, however, "[t]he rule of law is a structure of beliefs . . . only a constructed appearance,"\textsuperscript{48} and "[t]he truth of the rule of law is its appearance."\textsuperscript{49}

Again, if Professor Kahn is wrong about language, then either his metaphor should be scrapped or the rule of law is different from what he says. A problem here is that Kahn's assertion that "no experience falls outside language" hardly seems right. Most conspicuously, animals, paradigmatically non-linguistic (though questions remain about dolphins\textsuperscript{50}), experience things. Hemingway conveyed this pretty well (however human his perspective):

\begin{quote}

\textsuperscript{43} Kahn, supra note 1, at 39.
\textsuperscript{44} Id. at 36 (emphasis added).
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 132.
\textsuperscript{47} Id. at 36.
\textsuperscript{48} Id. at 27 (emphasis added).
\textsuperscript{49} Id.
\textsuperscript{50} Dolphins are the only nonhuman mammals that seem capable of vocal learning and vocal mimicry. Diana Reiss, Cognition and Communication in Dolphins: A Question of Consciousness, in TOWARD A SCIENCE OF CONSCIOUSNESS II: THE SECOND TUCSON DISCUSSIONS AND DEBATES 551, 553 (Stuart R. Hameroff et al. eds., 1998) [hereinafter SECOND TUCSON DISCUSSIONS]; D.G. Richards et al., Vocal Mimicry of Computer-Generated Sounds and Vocal Labeling of Objects by a Bottlenose Dolphin, 98 J. COMP. PSYCHOL. 10 (1984). Comparing dolphin studies with studies of apes using sign sequences, researchers have found that dolphins, but not apes, show sensitivity to syntactic constraints and rules. Louis M. Herman & Palmer Morrel-Samuels, Knowledge Acquisition and Asymmetry between Language Comprehension and Production: Dolphins and Apes as General Models for Animals, in READINGS IN ANIMAL COGNITION 289, 299 (Marc Bekoff & Dale Jamieson eds., 1996).
\end{quote}
Macomber stepped out of the curved opening at the side of the front seat, onto the step and down onto the ground. The lion stood looking majestically and coolly toward this object that his eyes only showed in silhouette, bulking like some super-rhino. There was no man smell carried toward him and he watched the object, moving his great head a little from side to side. Then watching the object, not afraid, but hesitating before going down the bank to drink with such a thing opposite him, he saw a man figure detach itself from it and he turned his heavy head and swung away toward the cover of the trees as he heard a cracking crash and felt the slam of a .30-06 220-grain solid bullet that bit his flank and ripped in sudden hot scalding nausea through his stomach. He trotted, heavy, big-footed, swinging wounded full-bellied, through the trees toward the tall grass and cover, and the crash came again to go past him ripping the air apart. Then it crashed again and he felt the blow as it hit his lower ribs and ripped on through, blood sudden hot and frothy in his mouth, and he galloped toward the high grass where he could crouch and not be seen and make them bring the crashing thing close enough so he could make a rush and get the man that held it.51

And Darwin, advancing the idea that animals not only have experiences but learn from them, described an experiment in which he put a stuffed snake in the monkey house at the Kew Zoological Gardens:

After a time all the monkeys collected round it in a large circle, and . . . became extremely nervous; so that when a wooden ball . . . was accidentally moved in the straw, they all instantly started away. These monkeys behaved very differently when a dead fish, a mouse, a living turtle, and other new objects were placed in their cages; for though at first frightened, they soon approached, handled and examined them.52

To be fair, as a teenager Darwin had learned taxidermy from a John Edmonstone, a freed Guianese slave, whose teacher in turn had been eccentric Charles Waterton, "one of the best stuffers in the country,"53 so he was pretty good at it. Even so, when Darwin later used a live snake, dropped into a bag loosely closed, the monkeys' curiosity won out and, however charitably, they started opening the bag and peeping in.54 Researchers these days find fairly sophisticated cognitive achievements not


54. DARWIN, supra note 52, at 72.
only in apes but also in other mammals, "and all without the use of language."\textsuperscript{55}

Let's assume, however, that Kahn means \textit{human} experience. It's a closer call, and therefore more philosophically interesting, whether all human experience is either linguistic or accessible to language. Because \textit{no} non-human experience is linguistic, however, and because human experience likely overlaps to some extent with other animal experience — consider that chimpanzees differ from humans by only one percent in the DNA\textsuperscript{56} — it seems improbable that \textit{all} human experience is fundamentally different from \textit{all} other-animal experience by virtue of some linguistic divide. For one thing, can it be true that no experience of a baby, born months, days, hours or even just seconds ago, falls outside language? If it is true that some, most or all of a newborn's experience does indeed fall outside language, then on this fact alone Kahn must be wrong.

People who know about these things believe that consciousness, and thus conscious experience, begins well \textit{before} birth.\textsuperscript{57} It seems unlikely that the often fortuitous, and manipulable, moment of birth coincides precisely with some critical neurological leap to sensate existence. And for many months after being born and \textit{before acquiring language} babies have a rich mental life, performing such tasks as predicting trajectories of moving objects, determining the numerosities of arrays of things, computing simple additions to and subtractions from those arrays, and making causal inferences.\textsuperscript{58} Infants can also distinguish speech from nonspeech stimuli, and in their early progress learning their parents' language even lump any foreign languages heard with the nonlinguistic acoustic stimuli, dogs barking, telephones ringing, and the like.\textsuperscript{59} While humans may be genetically programmed to parse grammar and unscramble language,\textsuperscript{60} it seems not overly controversial that we have prelinguistic experience along the way.

\begin{thebibliography}{99}
\item 56. Susan A. Greenfield, \textit{A Rosetta Stone for Mind and Brain?}, in \textit{Second Tucson Discussions, supra} note 50, at 231, 232. Greenfield notes that some scientists, such as Gerald Edelman, believe consciousness ends with the lobster, \textit{id.}, but Edelman's obviously not dined at the Café on Clinton in the Cobble Hill section of Brooklyn on a Tuesday, being lobster, night.
\item 57. \textit{Id.}
\item 60. E. Sue Savage-Rumbaugh & Duane M. Rumbaugh, \textit{Perspectives on Consciousness, Language, and Other Emergent Processes in Apes and Humans}, in \textit{Second...}
\end{thebibliography}
So now let’s assume that Kahn means adult human experience. While the lack of any common ground between other-animal experience and pre-linguistic human experience seems unlikely, a complete disconnect between the human infant’s pre-linguistic experiencing and the adult’s experiencing is a fortiori improbable. The experts quibble, but none I know of posits some moment in our development at which we’ve learned so much language that all experience thenceforth falls within it. Nor, looked at from the other side, is it reasonable to believe that there is such a moment at which we somehow lose all ability to experience non-linguistically. Quine merits quoting here: “Translatability of a question into semantical terms is no indication that the question is linguistic. To see Naples is to bear a name which, when prefixed to the words ‘see Naples’, yields a true sentence; still there is nothing linguistic about seeing Naples.”

A final step must be to give Professor Kahn the strongest reading his words allow. Perhaps he means that as all language is accessible to reason because its devices can be described, so all adult human experience, even if not linguistic, is at least, as Quine puts it, translatable into semantical terms, or accessible to language and hence description. Even this, however, is doubtful. It may be true that the baby cannot yet connect ‘the dog is barking’ to the barking dog, while I can do that much. But I cannot linguistically conceive of or verbally communicate the actuality of the dog’s bark. I cannot explain that sound to someone who has never heard it in such a way that her hearing it later will add nothing new. And I cannot articulate Thelonious Monk’s Straight, No Chaser, or Jackson Pollock’s Number 1A, 1948, or the artistic content generally of any musical, visual, or tactile composition. Nor, I think, could an Auden or a Quine do so, or for that matter any linguistically ideal construct in full intellectual possession of the contents of the OED, Webster’s Third New International Dictionary, and all other linguistic and lexical resources.

The view that so much human experience is inaccessible to language was famously stressed by Wittgenstein in the Tractatus, though largely overlooked by its logical positivist devotees. In the Preface he said the book’s meaning “could be summed up somewhat as follows: What can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent. The book will, therefore, draw a limit to . . .

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the expression of thoughts ..."62 Well, if to that extent Wittgenstein violated his own injunction, he made his point again at the end of the Tractatus, saying there even if all expressible problems have been solved, "the problems of life have still not been touched at all."63

Also quite famously, Justice Potter Stewart concluded that obscenity was not definable, leastwise not by the far from lexically challenged Supreme Court. In his concurring opinion in Jacobellis v. Ohio,64 he said simply: "I know it when I see it."65 Had the court sustained Jacobellis's conviction for having shown The Lovers at his theater, Stewart would likely have felt more compelled to say why Louis Malle, the film's great director, was no pornographer. On the other hand, Saint Augustine tried his best to define time, his resignation paralleling Potter's at one point: "What, then, is time? I know well enough what it is, provided that nobody asks me; but if I am asked what it is and try to explain, I am baffled."66

Maybe most prolifically, religious and spiritual truth-seekers express the inexpressibility of their defining moments. Part of one mystic's journal entry for August 11, 1961, reads as follows:

On waking this morning, beyond all meditation and thought and the delusions that feelings create, there was an intense bright light at the very centre of the brain and beyond the brain at the very centre of consciousness, of one's being. It was a light that had no shadow nor was it set in any dimension. It was there without movement. With that light there was present that incalculable strength and beauty beyond thought and feeling.67

And another explains that "[w]ords strain, for the inwardly conducted does not present things or not-things, does not relate to words or concepts or images... [W]hat we identify does not possess the 'what' that we assign it."68 Even Kahn, in advancing his law-as-religion metaphor, says: "the religious mystic may continue to claim such an unmediated relation [to the sacred], but about this nothing can be said."69

63. Id. at 187.
64. 378 U.S. 184 (1964).
65. Id. at 197 (Stewart, J., concurring).
68. TARTHANG TULKU, DYNAMICS OF TIME AND SPACE: TRANSCENDING LIMITS ON KNOWLEDGE 155 (1994).
69. KAHN, supra note 1, at 185 (emphasis added).
So Kahn’s proposition that no experience falls outside language is probably false any way one looks at it. But, his idea that language is a metaphor for law strives to become a part of the legal culture he describes, and possibly a component of the myth of law. Though complex, and not the sort of concept that would flow from the collective structure of our brains’ neural networks, the metaphor may hold and condition our reasoning about law. This may more readily be described as the reification of an idea borne by our culture than the formulation of an embodied relation in the Lakoffian sense. Yet, either way the kind of reasoning we do would flow from the concept we have internalized. If we tend to share Kahn’s view of the rule of law, but not about language, then our notion of one or the other will shift to the extent that the analogy influences our thinking.

On the other hand, the law-as-language metaphor may make sense apart from the interpretations expressed by Kahn, because language as it is and law as it appears are already a close fit. If people compare law to language, but if their understanding of the language side of it is different from Kahn’s, the rule of law itself will not align with Kahn’s description. In other words, the rule of law may be different from what Kahn says and nevertheless analogous to language as described here but not by Kahn.

In this respect, I want to look only at Kahn’s presupposition that, “[j]ust as no experience falls outside language, [so t]here is no element of our communal life about which we cannot ask: ‘Is it legal?’”70 From what has been said, it seems fair to say that ‘no experience falls outside language’ is false, that at least some and probably much experience falls outside language, and therefore that experience is independent of, more complex and richer than, language. The question is whether the analogy can be framed in a way that accounts for our different understanding of language, retaining the form: “just as [language statement], so [law statement].” If so, the law-as-language metaphor will hold, but on terms quite unlike those Professor Kahn proffers.

On the law side of Kahn’s analogy, the proposition that there is no element of our communal life about which we cannot ask, “Is it legal?” The particularized way we experience law’s structure of meaning would be trivial if taken at face value. Of course we can ask such a question about each and every aspect of our communal life, and for that matter about anything we can speak of. We can ask whether our taking a drink of tap water is legal, whether that dog’s bark is legal, or even whether a grain of sand or the universe itself is legal.

So perhaps Kahn is saying that there is no element of our communal life about which we cannot meaningfully ask, “Is it legal?” But this

70. KAHN, supra note 1, at 36; see supra text accompanying notes 44-47.
doesn’t help, because as just shown, there are obviously many elements of communal life about which it would not be meaningful, but nonsense, to inquire about legality. In this case Kahn’s statement would itself be meaningful but false. Nor do we get much further if we interpret Kahn as saying there is no meaningful element of our communal life . . . . This assertion would be uninformative, tautologous, for we’d categorize any particular element as meaningful for which asking: “Is it legal?” would not be nonsense, any other element as not meaningful, and there would be no way to falsify the scheme.

It seems that Kahn’s assertion is itself meaningful and controversial, hence arguable, only if he is saying something like: Were we to ask: “Is it legal?” with reference to each communal element for which asking such question would not cause a reasonable citizen to pause in disbelief more than four seconds while eating her favorite meal, then we will have covered a substantial portion of our communal life (the “four second” principle). This, of course, is fuzzier than the way Kahn puts it, but it’s close to the way lawyers talk, and it avoids the problems caused by the previous interpretations of Kahn’s statement.

One objection, however, may be that Kahn says what he says, not what I say. If anyone knows how to apply the rhetoric of law it’s him, and if he’d intended to speak of the “reasonable” citizen and “substantial” portions, he would have done so. The reason Kahn does not speak in this qualified way is that Kahn is not qualifying his proposition. He is saying that law appears to be a closed system and a comprehensive order of our political world because every element of our communal life falls within its domain.

But let’s assume arguendo that the four second principle, if true, sufficiently describes a closed, comprehensive system. The remaining question is whether that principle is, indeed, a true statement. It seems not. We can first distinguish four general categories of communal elements: (1) things clearly illegal; (2) things that may or may not be illegal but probably are; (3) things that may or may not be legal but probably are; and (4) things not passing the four second test. It seems that (4), but not (1) + (2) + (3), will cover a substantial portion of all communal elements.

Falling within (1) are such events as putting arsenic trioxide into a visitor’s oatmeal, pistol whipping an innocent bystander, and entering over instead of through the subway turnstile. Although most or all of the elements of (1) should also be contained in (4), we separate them out because they fall by definition within Kahn’s closed system. The boundary between (2) and (3) can become quite hazy, a matter of opinion, but I would say within (2) falls such incidents of social life as adding onto one’s home without a permit, parachuting over Manhattan, and possibly
burning the American flag. Within (3) I'd put such things as painting one's home a different color, parachuting over Ekalaka, Montana, and possibly burning the American flag.

Other elements of our communal life fall within (4), and therefore outside Kahn's closed system even when viewed loosely under the four second principle. These include smiling at a neighbor, moving your chair closer to the dinner table, reading aloud to your three-year-old from Blanchot's *The Infinite Conversation*, and so forth *ad nauseam*. It would not be too risky to assert that the set of all elements within (4) is far greater than the set taken from the sum of (1), (2) and (3).

This all tends to show that the law side of Kahn's analogy, like the language side, is untenable, and this is without questioning other assumptions inhering in that analogy, that for instance contained within 'our communal life'. From the Continent Blanchot opines:

if the relation of man with man ceases to be that of the Same with the Same, but rather introduces the Other as irreducible and - given the equality between them - always in a situation of dissymmetry in relation to the one looking at that Other, then a completely different relationship imposes itself and imposes another form of society which one would hardly dare call a 'community.'

In the end, though, even at a remove from Kahn's view, law and language do tend to line up in important respects. We should now instantiate 'just as [language statement], so [law statement]' in a new way. Using the analysis developed in this Part, one possibility would be to say: just as language partially and imperfectly reflects or refers to our experience, so law casts a partial net over our communal life, imperfectly working its compromises, resolutions and efficiencies. I think this formulation is more accurate than Kahn's in revealing not only law's reality, but its appearance. Law does not set itself up as the arbiter of all issues large and small, complex and simple, legal and extralegal. The human beings who create law and foster its myth don't want to work quite that hard, nor do they want everyone to think or do law. Notwithstanding the legal community's rejection of traditional legalese, and even with New York alone licensing nearly 8,000 new lawyers in the past year, law wants to conserve the special (and generally inaccessible) nature of its discourse. Law is a business and its practice a livelihood; the unauthor-

ized practice of law probably falls within category (1), and not solely because law wants to ensure the people are competently represented.

And then there is the people's point of view. Citizens do not want a system in which asking: "Is it legal?" about every communal element is appropriate. They don't want law to appear so thoroughly present and will resist the rule of law to the extent that it does. In short, the people want a system that allows them to achieve Pareto optima as between the set of all things comprising (4) and the set of all legal facts affording a sense of community, security, and democracy. Political splits in our society exist at the periphery, and as between the most liberal Democrats and the most conservative Republicans the impact on (4) is barely perceptible. Of course we can conceive of extreme social contexts – perhaps maximum security prisons or military units in training or combat – in which the set of elements within (4) is greatly reduced. But there the rule of law is a brutal fact, not an ongoing dialogue, and each participant is tightly controlled both temporally and spatially, because she is monitored by the minute, and moving even inches in a particular direction may have severe or deadly consequences. In the everyday world, it would simply not make sense to ask about most elements of our communal life whether they are legal.

Before concluding this Part one caveat comes to mind. It would be a mistake to conclude that, because experience is richer than language, language is in no respect as rich or resourceful as its referent in experience. Quite the contrary, poets and writers generally (fine talkers, too) rest their craft on the assumption that language does or can enhance and enrich inarticulate experience and bring its significance into sharper focus. Consider, for example, a son's profound, often profoundly confused, feelings knowing his father is dying, and the gain in intuitive insight engendered by Dylan Thomas's villanelle Do Not Go Gentle Into That Good Night, the form and force of which demand a full recitation:

Do not go gentle into that good night,
Old age should burn and rave at close of day;
Rage, rage against the dying of the light.

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73. Exceptions abound. Professor Kahn dedicates his more recent book "To Catherine, Hannah, and Suzanne, who always asks 'Is that legal?'" KAHN, supra note 6, at v.
Though wise men at their end know dark is right,
Because their words had forked no lightning they
Do not go gentle into that good night.

Good men, the last wave by, crying how bright
Their frail deeds might have danced in a green bay,
Rage, rage against the dying of the light.

Wild men who caught and sang the sun in flight,
And learn, too late, they grieved it on its way,
Do not go gentle into that good night.

Grave men, near death, who see with blinding sight
Blind eyes could blaze like meteors and be gay,
Rage, rage against the dying of the light.

And you, my father, there on the sad height,
Curse, bless, me now with your fierce tears, I pray.
Do not go gentle into that good night.
Rage, rage against the dying of the light. 24

Also, poetry’s characteristic ambiguities and juxtapositions, while frustrating to many casual readers, enrich our appreciation for experience’s often concealed layers of meaning. In a dedicatory epigraph “To Christopher Isherwood” in his first book, Poems, for instance, Auden writes:

Let us honour if we can
The vertical man
Though we value none
But the horizontal one. 25

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Immediately, the parataxis helps us discern a criticism of the envious or begrudging norm by which we fail to give people their full due until they've died. But there is also a sense in which Auden may be dissenting from a discounting of the public person in favor of the private, a depreciation of the person active in the world as against the recumbent sexual partner.  

Nor do Thomas's or Auden's signifying words tend to become reified in the culture, serving to delimit the complexity of our experience. *Do Not Go Gentle* does not threaten to become a routine alchemy, through which the culture distills its experience or the emotional content of its resistance to death. These poets' words are too good, too finely tuned and too difficult, to afford some automatic retreat from the anguish of self, solitude and loss.

But none of this should imperil our reformed law-as-language metaphor. There are ways in which law enriches communal life in the nonlegal realm. When Hannah Arendt began writing of Eichmann in Jerusalem in the *New Yorker* in 1963, the public intellectual was big news:

The Kennedys invited professors to the White House and fumed on the rare occasions when their charm did not work its seductive magic on them. The new quality paperbacks brought abstract, erudite treatises on other-directedness and the death wish to thousands of eager readers. The high-cultural magazines, like *Partisan Review* and *Commentary*, provided a sense of intellectual community for thousands of readers who loved to watch their brilliant, aggressive writers argue. Alert New York editors scanned their closely printed pages for new talent; alert New York journalists made fun of their touchy, hyperarticulate editors. "He's the man who wrote the piece on the man who wrote the piece on David Riesman" — this jingle, quoted long ago by Norman Podhoretz, conveys something of the atmosphere, congested, sensitive, and irritable . . .

Even, or especially, in times when the public intellectual's role has diminished, legal opinions that affect the quality of communal life focus discussion at the dinner table, in cafés, and in other social settings. A new opinion on abortion, for instance, provokes thought and exchange on issues of having children, family life and "values," and a variety of other choice-making processes. A ruling about perjury in high places stirs friends and families to talk about everyday talk, the use of language in

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ordinary discourse, who said what to whom on the car ride home. These interactions starting in law likely enrich all sorts of our category (4) experiences.  

III. LAW AS RELIGION

While law speaks through language, the deity may speak through law: we may honor our parents, act charitably, pray sincerely, and so forth,

But the study of Torah is equal to them all

Metaphor reveals a sameness underlying disparate elements, as in: “The three-fold terror of love; a fallen flare/ Through the hollow of an ear/ Wings beating about the room/ The terror of all terrors that I bore/ The Heavens in my womb.” The metaphors of The Reign of Law are certainly not this poetic, both because each metaphoric term is abstract rather than imagistic, and because the interconnections between law, language and religion can appear without the use of metaphor. Law-as-religion, like law-as-language, does not contrast strikingly disparate elements. It takes the poet, though, to align love with flares, wings and the heavens.

Yet, unlike law-as-language, Kahn’s law-as-religion metaphor is a mainstay. In law as in religion, appearance and representation are kept separate from their source. Law’s sources, revolution and action by the sovereign, silence law. The sovereign looks to no authority apart from itself. Those to whom God speaks directly are beyond and apart from law. They are not bound by religious ritual or ceremony, their unmediated experience being a prelude to new rituals and observances. Because law and religion are removed from their sources and foundational experiences, they are appearances for which interpretation is always an issue. Interpretation, in turn, is always open for debate.

78. For a fine recent discussion of further parallels between law and language, as well some of their dissimilarities, in the context of a new examination of Hart’s view of “the internal aspect of rules,” see Thomas Morawetz, Law as Experience: Theory and the Internal Aspect of Law, 52 SMU L. REV. 27, 28, 31-40 (1999); see generally H.L.A. HART, THE CONCEPT OF LAW 88-91 (2d ed. 1994). See also a recent and contrasting approach to Professor Kahn’s work in Austin D. Sarat, BOOK REVIEW: Redirecting Legal Scholarship in Law Schools, 12 YALE J.L. & HUMAN. 129 (2000)


81. KAHN, supra note 1, at 181-83.
In *The Cultural Study of Law*, Kahn nurtures the analogy. A fine moment is his explanation of law’s provision for the possibility of action. Here, the concept of law as the product of action inverts so that law sets the bounds of action. This inversion sustains the culture: while revolution engenders law, law provides for abundant discretionary action — for example, appointments, pardons and vetoes, as well as, more prodigiously, entering into contracts, exchanging and holding property, bringing lawsuits, and so forth. The parallel in religion arises with the omnipotent deity who patterns a world under law, yet leaves an ample opening for moral choice by free agents.\(^{82}\)

In another exceptional respect, Kahn links the “sacrificial” communities under law and religion.\(^{83}\) In these communities, self-sacrifice is often an inversion of violence against others, with both the state and God demanding such an investment of one’s body. Under law people go to war and their scarred bodies provide the first record of the nation’s deeds and commitments. Lincoln thus labeled soldiers’ bodies a “history bearing the indubitable testimonies of [the Revolution’s] own authenticity, in the limbs mangled, in the scars of wounds received, in the midst of the very scenes related.”\(^{84}\) Analogously, Abraham, enjoined by God, must be ready to sacrifice his only son Isaac. The willingness to sacrifice rests on faith, “faith that God will overcome the paradox of sacrifice and faith that the law is a product of God’s will.”\(^{85}\) Weaving law’s appearance with God’s will, Kahn crosses from metaphor, but the compelling point, for him, is that faith takes law’s subjects and religion’s followers alike where reason cannot. And both God and the nation under law must respond by recognizing the faith shown, or else the sacrificial act “collapses into a violent, meaningless death.”\(^{86}\)

So Kahn’s metaphor has this central structure: Law and religion each begin. Then they become institutions, different and separate from their sources. Reasonable minds can differ about how well the institutions remain true to, reflect or represent, their sources. This is a question of interpretation. People interpret even while they continue to act. Continual action, though, should not signify perpetual revolution, because this would dissolve the institutions before they’d solidified or proved themselves unstable. Hence law and religion accommodate and often guide

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82. Kahn, supra note 6, at 75.
83. Id. at 95.
85. Kahn, supra note 6, at 95; see also Kahn, supra note 1, at 86.
86. Kahn, supra note 6, at 96.
action, and the institutions impart an even more profound mechanism for survival, namely, faith that warrants and compels sacrifice.

In the previous Part, I challenged Kahn’s assertion that there is no element of our communal life about which we cannot ask: “Is it legal?” That assertion encompasses too much. Kahn’s idea of the separation of law and religion from their sources is similar, in that it conveys a somewhat claustrophobic sense of our predicament, a perhaps too-drastic split between the creative originators of law and religion and their institutional adherents. Kahn says that for us, unlike the mystics or the founders, there is virtually no contact with the source — no unmediated interaction with God, no direct revolutionary experience. The discretion law and religion allow is just that, discretion they allow, and our freedom is mediated by the constraint imposed upon us always to consult, to ask, “Is it legal?”, to seek leave from authoritative interpreters.

That view seems mostly right. We are not free under law to engage in revolutionary political action. Nor are we likely to be in direct contact with a supernatural being. Nonetheless, this article submits that law and religion, in their most viable states, are supple enough to accommodate the individual’s free and direct experience of various spiritual and revolutionary conditions. Even Professor Kahn’s view is not absolute. He allows there are religious mystics who “may continue to claim such an unmediated relation to the sacred,” but “about this nothing can be said”; the mystics aside, “[f]or us” there is no sacred reality apart from what is “already represented in a text . . . .” Kahn’s view on the other side of the metaphor is more flexible, because there may be those of us who exist at the intersection of law and revolution. But only those of us who go to war, because “[i]n war, the present generation continues the sacrifice, first taken up by the founders.”

We discuss religion first. Auden surfaces once again, but not for his poetry. He had a keen intellect and acute psychological insight. These qualities were much in evidence, for instance, one day, probably 1939-ish, on a packed New York subway when he and his companion, Chester Kallman, had the following screaming spat:

AUDEN: I am not your father, I’m your mother!

KALLMAN: You’re not my mother! I’m your mother!

AUDEN: No, you’ve got it all wrong. I’m your mother!

87. KAHN, supra note 1, at 185.
88. Id. at 86. Professor Kahn does suggest in a footnote that there may be a further form “of sacrificial violence operative in the legal order as well: ‘the war against crime.’” Id. at 274 n.30.
KALLMAN: You’re not! You’re my father!

AUDEN: But you’ve got a father. I’m your bloody mother and that’s that, darling! You’ve been looking for a mother since the age of four.⁹⁹

Naturally, then, Auden needed more than a single medium to express all he bore, and, in addition to poems, he wrote prose, plays, librettos and essays. His introduction to Anne Freemantle’s compilation The Protestant Mystics is instructive. Auden identifies four distinct kinds of mystical experience: the vision of dame kind, the vision of eros, the vision of agape, and the vision of God.⁹⁰ These have several things in common, says Auden, one being that the experiences are given and cannot be summoned by an effort of will. Importantly, only the vision of God requires a long period of self-discipline and prayer, although the effort entailed does not ensure the result. Nor are any of the types of mystical experience contrary to Christian doctrine.⁹¹

Auden describes the vision of dame kind as an overwhelming conviction that the things confronting the subject — mountains, rivers, trees, abandoned shoes, and so forth, but usually not other people — have a numinous significance and are holy. He observes, “[i]n our culture, in various degrees of intensity, many persons experience it in childhood and adolescence, but its occurrence among adults is rare.”⁹² Adults, though, may have continuing access to the vision of dame kind, perhaps helped by alcohol or hallucinogenic drugs, the danger being that the vision characteristically accounts little for other people.⁹³

In contrast to the vision of dame kind, the vision of eros centers on an Other, albeit a single, human being. This state, imbued with awe and reverence for the sacred other, as well as a sense of unworthiness in comparison to the other, is neither simple lust nor a mutual attraction based on shared interests and values.⁹⁴ The vision of eros, which rarely survives if consummated sexually, is most famously signified by Dante’s love of Beatrice. When Beatrice appeared before Dante,

the glorious lady of my mind, . . . the vital spirit, the one that dwells in the most secret chamber of the heart, began to tremble so violently that even

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⁹⁹ Hecht, supra note 76, at 6 (emphases in original) (citing Harold Norse, Memoirs of a Bastard Angel).
⁹¹ Id. at 55-57.
⁹² Id. at 59-60.
⁹³ Id. at 62.
⁹⁴ Id. at 63-68.
the most minute veins of my body were strangely affected; and trembling, it spoke these words: *Ecce deus fortior me, qui veniens dominabitur michi* ["Here is a God stronger than I who comes to rule over me"]: At that point the animal spirit, the one abiding in the high chamber to which all the senses bring their perceptions, was stricken with amazement and, speaking directly to the spirits of sight, said these words: *Apparuit iam beatitudo vestra* ["Now your bliss has appeared"]: At that point the natural spirit, the one dwelling in that part where our food is digested, began to weep, and weeping said these words: *Heu miser, quia frequenter impeditus ero deinceps!* ["Alas, wretch, for I shall be disturbed often from now on!"]

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Although Auden cannot agree the vision of eros is or ought to be a universal one, it was reported frequently enough for the Church to convey its "utmost suspicion . . . . Knowing that marriage and the vision are not compatible, [the Church] has feared that it will be, as it very often is, used as an excuse for adultery." 96

The vision of agape, like the vision of dame kind, is of multiple entities, but in the case of agape those entities are human. Although the vision of agape resembles the vision of eros in its human constituency, it is different both because agape involves a multiplicity of humans, not just one, and because it does not bring a sense of unworthiness; instead, the vision of agape is of a relation between equals in which a profound love is experienced as mutual. 97

As an example, Auden quotes from an unpublished account, vouching for its authenticity:

One fine summer night in June 1933 I was sitting on a lawn after dinner with three colleagues, two women and one man. We liked each other well enough but we were certainly not intimate friends, nor had any one of us a sexual interest in another. Incidentally, we had not drunk any alcohol. We were talking casually about everyday matters when, quite suddenly and unexpectedly, something happened. I felt myself invaded by a power which, though I consented to it, was irresistible and certainly not mine. For the first time in my life I knew exactly – because, thanks to the power, I was doing it – what it means to love one's neighbor as oneself. I was also certain, though the conversation continued to be perfectly ordinary, that my three colleagues were having the same experience. (In the case of one of them, I was able later to confirm this) . . .

96. *Id.* at 70.
... I knew that, so long as I was possessed by this spirit, it would be literally impossible for me deliberately to injure another human being. ... And among the various factors which several years later brought me back to the Christian faith in which I had been brought up, the memory of this experience and asking myself what it could mean was one of the most crucial, though, at the time it occurred, I thought I had done with Christianity for good. 

Almost by its nature, the vision of agape has a mass component. Auden says “most of the experiences which are closest to it in mode, involving plurality, equality and mutuality of human persons, are clear cases of diabolic possession, as when thousands cheer hysterically for the Man-God, or cry bloodthirstily for the crucifixion of the God-Man. Still, without it, there might be no Church.” We may also wonder whether, without it, there might be no home team, no Carnegie Hall, no Memorial Day, and so forth, contemporary culture’s hallowed phenomena. The vision of agape, as Auden articulates it, seems to provide Kahn’s us with an occasional, and non-textual, sacred reality.

Finally, the vision of God, like the vision of eros, involves two entities, the soul and God, and like eros entails an unequal relation. Yet, like the vision of agape, the vision of God is a mutual one, because the soul is conscious of loving God and being loved in return. And it is this mystical experience that is particularly reserved for the few. Auden, being both sensually active and an Anglican, admitted his small surprise that he had never encountered the vision of God, which is restricted, as the Gospels say, to the pure in heart, and unlikely within institutional structures.

It seems fair to say that Professor Kahn, in denying to us any unmediated relation to the sacred, is referring only to one particular species of mystical experience, what Auden has described as the vision of God. While religion’s followers may believe that only the originators had direct contact with their God, they widely perceive sacred experience as accessible to them or their peers, apart from the texts and the interpretations of texts. At the least, the desire for such experience is widely latent.

Symptomatically, New Age spiritualism is predicated on the possibility of a mass involvement in direct mystical experience. This angle produces best sellers — Kahn’s view, after all, has to do with the appearance of things. In her recent book on Jewish mysticism, for example, Rabbi Shoni Labowitz urges that “it is possible to live a magical, mystical

98. Auden, supra note 90, quoted. at 69-70.
99. Id. at 70.
100. Id. at 71.
life filled with unconditional love and freedom."\textsuperscript{101} It's not the isolated mystic, a not-us existing in the lore, but we who may feel God's breath, become a conduit for miracles, and enter the state called devekut, a merging with the deity.\textsuperscript{102}

Less for popular consumption, yet available to all in the way that such things are, is what some post-modern philosophers call "the recovery of wonder" that may result when philosophy acknowledges the variety of its cultural vocabularies, and the attendant limits upon its totalizing discourse.\textsuperscript{103} In other words, they say, if philosophy accepts and listens to what is other, then it allows for the indistinction between what an entity is and what in the entity is without structure and stability,\textsuperscript{104} and represses "the instinct to take a position;"\textsuperscript{105} philosophical discourse may begin to realize some of its roots in religious experience. The comparable counsel within religion is to realize that the journey of religious experience is a return, but not a nostalgic one to some unmoving metaphysical foundation; rather, the return as process is itself an essential feature of religious experience and authenticity, coinciding with the dissolution of totalizing systems. "All this may be said far more simply by emphasizing that it is not by accident that religious experience is for us given as return."\textsuperscript{106}

At first glance, Kahn's perspective seems to align with the Continental view. Hermeneutics arises within the context of the Judeo-Christian tradition, and our religious experiencing flows through the historical consciousness inhering in the biblical text.\textsuperscript{107} But the presence of the religious text does not necessarily entail a separation from the source. As just stated, "the experience of return is already prefigured in the very sacred text — the Old and New Testaments — to which we find ourselves returning."\textsuperscript{108} Partaking of the interpretive structure of the text, we not

\textsuperscript{101} RABBI SHONI LABOWITZ, MIRACULOUS LIVING: A GUIDED JOURNEY IN KABBALAH THROUGH THE TEN GATES OF THE TREE OF LIFE 19 (1996).

\textsuperscript{102} Id. at 55, 77, 285.


\textsuperscript{104} "This is the measurelessness of the undifferentiatedness between what beings as beings are as a whole and that which presses forth as inconstant, formless, and carrying away, which means here at the same time what immediately withdraws." MARTIN HEIDEGGER, BASIC QUESTIONS OF PHILOSOPHY: SELECTED "PROBLEMS" OF "LOGIC" (STUDIES IN CONTINENTAL THOUGHT) § 37, at 139 (Richard Rojewicz & André Schuwer trans., Indiana Univ. Press 1994) (1984).

\textsuperscript{105} Gargani, supra note 103, at 127 (citing MARTIN HEIDEGGER, BASIC QUESTIONS OF PHILOSOPHY ch. 5 (Indiana Univ. Press 1996)).

\textsuperscript{106} Gianni Vattimo, The Trace of the Trace (David Webb trans.), in RELIGION, supra note 103, at 79, 84 (emphasis added).

\textsuperscript{107} Id. at 88.

\textsuperscript{108} Id.
only construe God’s communications to humanity, but experience, in Heideggerian terms, “the event-like character of Being,” and approach “the intimate life of God itself” (not an interpretive revelation that is merely a “subsequent’ episode and an accident, a *quo ad nos*”).

Vattimo explains that “the Trinitarian God is not one who calls us to return to the foundation in the metaphysical sense of the word, but, in the New Testament expression, calls us rather to read the signs of the times.”

On the law side, as described, Kahn sees war as the vehicle by which we have direct, not textually mediated, contact with the sovereign. War entails sacrifice for the political order, a test of whether law’s form is underwritten in substance. Bodily sacrifice is the manner by which war conjoins law and revolution, and law’s rule provides a continuity of meaning between revolution and war. “As Americans, we fight, if we fight, for the Constitution. There is a subtle substitution of text for body. War tests whether a government so conceived can endure.”

When individuals either reject self-sacrifice on behalf of constitutional ideas, or pursue new revolution standing for a different set of ideas, they abandon or overthrow the existing order. The revolutionary, acting in new ways, shapes the future through a direct experience of the presence of meaning. This experience, says Kahn, is available to us on the battlefield, which offers “an opportunity for individual fame [and] the direct, unmediated presence of the state in and through the self.” To put the self at risk for the polity by fighting in a war, to suffer so the state may endure, “is to experience a fullness of political meaning not present in ordinary life.”

I think Professor Kahn’s position here is both too broad and too narrow. It is overbroad to the extent that individuals may sacrifice their bodies at the state’s command even as they abandon the existing order. From a different angle, there is a sense, an historical and empirical one, in which individuals risk their lives fighting wars for the polity and in the process fully lose the experience of political meaning present in ordinary life. On the other hand, Kahn’s view is too narrow to the extent that individuals may experience “a fullness of political meaning,” unmediated contact with the sovereign, or the people, in circumstances apart from war. This may occur when they risk their bodies on a different battleground, not in war but in irenic government service, or not at the com-

109. Id. at 88-89, 91.
110. Id. at 90.
111. KAHN, supra note 1, at 86 (footnote omitted).
112. Id. at 85.
113. Id. at 32.
114. Id. at 30.
mand of the state at all but in demonstrative petition on behalf of the people. Requisite is that the risk of self comes in seeking to realize the ideas embodied in the Constitution, not in abandoning them.

Professor Kahn's view of war's appearance as the vehicle of sacrifice for the state, "an opportunity for individual fame," and the arena in which "to experience a fullness of political meaning," is repeatedly illustrated by Tom Brokaw in *The Greatest Generation*. A good example is the story of Joe Foss, who enlisted in the Marine Corps in 1940 and in 1942 shipped out to Guadalcanal. Brokaw relates:

The F4F-4 Wildcat was not as quick or as responsive as the Japanese Zero, so when Foss's plane was hit, he knew he was in trouble. He had three Zeroes on his tail as he went into a steep dive and then a big, wide turn, trying to get back to Henderson Field with a dead engine and his propeller free-wheeling. "The Zeroes stayed right behind me," he says, "and as I cleared the hill to land at Henderson they unloaded all their lead at me." Foss landed the plane at full speed, with no flaps and little control in what is called a "dead stick" landing. The F4F-4 careened across the runway and skidded to a stop just short of some palm trees. Later his ground crew counted more than two hundred bullet holes in the plane. Foss, then twenty-seven years old, sat in his cockpit, badly shaken, thinking. Why did I ever leave the farm? Suddenly, he heard the cheers of the ground crew, "Kids eighteen and nineteen years old who had watched it all," he recalls, "and I said to myself, Well, you're a leader, Joe. You're in it all the way now, and from that point on I was just a full blower." 115

Brokaw's stories relate war's official appearance. They are the sort of tales told during World War II, by means of systematic censorship, to the Allied and Axis publics alike. As John Steinbeck confessed in 1958, "We were all part of the war effort. We went along with it, and not only that, we abetted it. . . . I don't mean that the correspondents were liars. . . . It is in the things not mentioned that the untruth lies." 116 Brokaw, though, is himself an NBC news anchorman, writing more than fifty years after the fact, and yet, still apparently carrying on the "war effort" with which Steinbeck had come to terms forty years ago.

116. Quoted in Paul Fussell, Wartime: Understanding and Behavior in the Second World War 285 (1989). Regarding Germany's propaganda campaign, Fussell says, "Even more than the testimonies sent back by such as Steinbeck and [Ernie] Pyle, the narratives presented to the German people were nothing but fairy stories of total heroism, stamina, good-will, and cheerfulness." Id. at 288; see also Barry Bearak, Foes Report Plan to Begin Pullout in Kashmir Region, The New York Times, July 12, 1999, at A1 ("[t]he recent conflict has been depicted so differently in each country [i.e., India and Pakistan] that the citizens of one would barely recognize the war that their counterparts have been following in the news").
Even as people do battle to preserve the project established by the people, the meaning they express, experience or absorb may be one of utter meaninglessness. The young, who “have the two things fighting requires: physical stamina and innocence about their own mortality,” may imagine heroism, but the scene they encounter is of “pieces of human beings littering the beach. . . . headless bodies, . . . even shoes, ‘with feet in them’.” This relentless experience often leads, not to a heightened sense of meaningful sacrifice for law and constitution, but to psychic trauma at the other extreme. One Marine’s World War II memoirs speak of a weeklong stay alongside a ridge strewn with decomposing corpses and excrement:

If a Marine slipped and slid down the back slope of the muddy ridge, he was apt to reach the bottom vomiting. I saw more than one man lose his footing and slip and slide all the way to the bottom only to stand up horror-stricken as he watched in disbelief while fat maggots tumbled out of his muddy dungaree pockets, cartridge belt, legging lacings, and the like. . . .

We didn’t talk about such things. They were too horrible and obscene even for hardened veterans. . . . It is too preposterous to think that men could actually live and fight for days and nights on end under such terrible conditions and not be driven insane. . . . To me the war was insanity.

The experience of senselessness is likely accentuated for soldiers who view themselves as oppressed by the dominant culture, and whose stake in preserving the state is thus more tenuous. One African American, upon being inducted into the Army following the attack upon Pearl Harbor, asked that his epitaph read: “Here lies a black man killed fighting a yellow man for the protection of the white man.”

117. Fussell, supra note 116, at 52.
118. Id. at 271 (quoting Dieppe 1942: ECHOES OF DISASTER 144 (William Whitehead & Terence Macartney-Filgate eds., 1979)).
119. Eugene B. Sledge, With the Old Breed at Peleliu and Okinawa 260 (1981), quoted in Fussell, supra note 116, at 294. To one British officer the Second World War experience was similarly an “[a]nnihilation of the spirit, not worth the candle. . . . and to believe it is anything but a lot of people killing each other is to pretend it is something else, and to misread man’s instinct to commit murder.” Neil McCallum, Journey With a Pistol 106–07 (1959), quoted in Fussell, supra note 116, at 294-95; see also Michael C. C. Adams, The Best War Ever: America and World War II, at 95 (1994) (“for the average man of any class or temperament, prolonged exposure to combat is highly debilitating, physically and mentally. . . . The cruellest myth about combat stress is that cowards break down and heroes don’t”).
And when the state does not do a good job of articulating its reasons for war, soldiers’ alienation from the sovereign will also intensify. The Vietnam War has become a universal symbol of a meaningless call to arms, though many prefer to focus on the state’s tactical mistakes, or the supposedly debilitating effects of mass protest at home. One young poet, a soldier in the 198th Infantry Brigade, wrote not judgmentally but with controlled and understated precision:

School children walk by/ Some stare/ Some keep on walking/ Some adults stare too/ With handkerchiefs/ Over their nose/ A woman/ Sits on the pavement/ Beside/ Wails/ And pounds her fists/ On pavement/ Flies all over/ It is like made of wax/ No jaw/ Intestines poured/ Out of the stomach/ The penis in the air/ It won’t matter then to me/ But now/ I don’t want in death to be a/ Public obscenity like this.\(^{121}\)

At times, soldiers may not only be alienated from the sovereign’s war effort, but inclined to defy that effort. In 1971, the *New York Times* reported that some young soldiers in Vietnam “resist orders to risk their lives and resent the attitude of the ‘lifers’ — career officers and noncommissioned officers — who are impatient with a lack of discipline.”\(^{122}\) The soldiers’ alienation and occasional resistance may intensify when the factors discussed above combine with the sovereign’s own waning or equivocal commitment to the war campaign. As one military historian reports:

By 1969 the U.S. soldier in Vietnam usually represented the poorer and less educated segments of American society. He was often being led by middle-class officers and inexperienced sergeants, creating a wide gap between attitudes, abilities, and motivation. This combined with increased idleness — the result of lowered combat activity — and overall frustration with obscure national goals, to produce severe morale problems. Continuing personnel turbulence, resulting from the combat-tour rotational policy, destroyed any of the stiffening that wartime unit cohesion traditionally offered. Once America began to pull its troops out of Vietnam, the average soldier simply wanted to get home alive and cared little for the ultimate fate of his formation or the accomplishment of the country’s mission.\(^{123}\)


Professor Kahn undoubtedly is aware of all of this. Yet, he wants to emphasize "[t]he uncomfortable truth . . . that the virtues of the battlefield may offer a possibility for political meaning that otherwise fails to appear in modern experience." He cites Oliver Wendell Holmes's suggestion "that the pain of warfare is necessary and, indeed, laudable – as an alternative to the rootless individualism and hedonism of his age," and quotes Holmes's statement, ""We need [war] in this time of individualist negations, with its literature of French and American humor, revolting at discipline, loving flesh-pots, and denying that anything is worthy of reverence." Kahn then cites to J. Glenn Gray's classic study of life in battle for the similar proposition that "war expresses the fullest range of human potential through self-sacrifice." Gray, who received his doctorate in philosophy in 1941, the day he was inducted into the army, tries to explain why we go to war and what the soldier, a *homo furens*, gets out of it that may be exhilarating, specifically the delight in the grand spectacle, the delight in comradeship, and the delight in destruction.

Though Kahn relies on sources such as Holmes and Gray, these show that what soldiers often experience when they are experiencing something positive or transcendent is not necessarily the fulfillment of a "wish[] to be the embodiment of the state" and of its "history-creating power . . ." Gray himself writes that

[n]umberless soldiers have died, more or less willingly, not for country or honor or religious faith or for any other abstract good, but because they realized that by fleeing their posts and rescuing themselves, they would expose their companions to greater danger. Such loyalty to the group is the essence of fighting morale. . . . The feeling of loyalty, it is clear, is the result, and not the cause, of comradeship.

In her Introduction to Gray's book, Hannah Arendt emphasizes that one of its principal lessons, a lesson learned on the battlefield, is that "no ism, not nationalism and not even patriotism, no emotion in which men

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124. Kahn, supra note 1, at 32-33.
125. Id. at 265 n.26 (quoting Oliver Wendell Holmes, *The Soldier's Faith, in The Occasional Speeches of Justice Oliver Wendell Holmes* 73, 80 (M. Howe ed., 1962)).
129. Gray, supra note 127, at 40.
can be indoctrinated and then manipulated,” is the primary experience or motivating factor in war.  

Nor does it seem that war is the sole, primary, or best way of attaining the positive or transcendent experiences discussed by Kahn, Holmes and Gray. While adrenaline rushes and personal discipline may not be a part of “ordinary life,” they characterize such activities as Tae Kwon Do, car racing, paragliding and so forth. Alternatives to rootless individualism and hedonism may be available when studying for a trade or profession, as well as working on a construction crew or at a museum. Feelings of intense loyalty happen in families, when playing in a band and in many other settings. Nor does the quest for personal fame require a war – doubling with men on base will make a “full blower” out of any citizen, or even getting the neighbor’s cat out of a relatively tall or sinuous tree. In other words, Kahn’s position seems too narrow because there are so many other contexts in which citizens may experience much of what Kahn, Gray and Holmes find “laudable” about war.

Of course, risks are not as great in civilian life as in war, the rage to destroy not as mad, and the conditions not as Hobbesian and primal. For this reason, Gray was not able to answer “whether a peaceful society can be made attractive enough to wean men away from the appeals of battle.” But Gray is speaking of the competing impulses toward eros (union) and Thanatos (death) described by Freud, and of the opposing forces of Love and Strife, composition and decomposition explained by Empedocles.

So Kahn’s proposition that war allows us to fulfill a wish to embody the state and to achieve personal fame fighting for the Constitution, while doubtless true in at least some cases, is not as truly significant as The Reign of Law says. The position is too broad because there is generally no Abrahamic sense of sacrifice in war, no overriding impetus to act heroically to preserve the Constitution, leastwise not once the maturing soldier traumatically realizes that the heroes lie scattered about and the Constitution has proven ineffective in precluding such barbarism. The noble mobilization may become personalized as stupefaction over the apparent chaos and irrationality, the soldier at a loss to comprehend war’s godless culture, or like Job prone to cry, “He makes nations great, then destroys them . . .”. A caveat: None of this says anything about the necessity or advisability of going to war, and none of this casts any asper-

131. Gray, supra note 127, at 57.
sions on those who do risk their lives at the state’s request or command. This portion of the article is about meanings, motivations and, impliedly, whether we “need” war, as Holmes said, on any ground other than the situational logic confronting the nation at particular historical moments.

In another sense, the question remains whether we can experience unmediated contact with the sovereign – in a democracy, the people – in arenas other than war. Here I accept Kahn’s premise that it is the sacrificial act that allows us to embody the state and thereby experience the fullness of political meaning associated with a direct connection to the sovereign. But I assume arguendo that ‘fullness of political meaning’ refers to something separable from the Gray and Holmes factors, which, as seen, are arguably attainable apart from war. And my only expansion of Kahn’s premise, a slight one which I don’t think he would object to, is to say that sacrificial action may entail putting one’s self at risk not only in the defense, but also in the promotion, of law.

So Kahn’s position is challenged, by its own terms, if citizens may place their bodies at risk on behalf of the people in circumstances other than war. We must be careful, however, not to define ‘the people’ loosely. In other words, we must not conflate “mere popular opinion” with “the permanent opinion of the people.”133 In this respect, Kahn explains that, with Marbury v. Madison, “[t]he opinion of the people, represented by the Court, can now stand opposed to any other manifestation of popular opinion. Short of successful revolution, no one can make a stronger claim to political authority – although others may make an equal claim.”134

One example of non-military involvement that entails willingness to sacrifice the body on behalf of the state is volunteer service in the Peace Corps. The Peace Corps is a government agency established in 1961 by President Kennedy’s executive order. When citizens join the Peace Corps they serve the state and represent it around the world. As in war, they become the embodiment of the sovereign. But the Peace Corps’ mission is “altruistic,” and “it has done more to promote American values overseas than any other foreign program.”135 The structural catalyst is not critical here. The Peace Corps may signify a new sensibility encouraged by the Kennedy administration that weighed the life instincts and the interest in abolishing injustice more heavily than aggressiveness and domination.136 Alternatively, Kennedy’s action may be seen as a Cold War

133. Kahn, supra note 1, at 216.
134. Id. at 212.
tactic aimed at diffusing the potential for Communist advances in developing countries; after all, the Peace Corps was established under the Mutual Security Act,\textsuperscript{137} which was Cold War legislation.\textsuperscript{138}

Either way, the Corps’ peaceful work places the volunteer’s body at risk. For instance, the agency withdrew from Uganda in 1973 because of the dangers posed by Idi Amin’s “murderous rule,” and then again recently during fighting between rebels and President Museveni’s forces.\textsuperscript{139}

But there is no guarantee that the Peace Corps can or will avoid all hazards, and this is especially true in today’s international culture, Benjamin Barber has labeled Jihad vs. McWorld, in which global corporate demands compete against post-Cold War retribalization.\textsuperscript{140} As one newspaper commented, “[t]he job often is dangerous and pays practically nothing. In fact, more than 200 Peace Corps volunteers have died in the line of duty.”\textsuperscript{141} Another rhetorically asked, “Why risk one’s life, especially when war or revolution can break out – and often does – in developing nations where the Peace Corps typically places its people?”\textsuperscript{142}

On the other hand, the sacrifice sometimes necessary in Peace Corps work is not only a function of hostile human agents, but can result, as in war, from radically unfamiliar climates and terrains. One former volunteer described her service in the country of Burkina Faso, known in colonial Africa as Upper Volta, where persistent Saharan dusts caused severe respiratory problems. At the same time, this volunteer described her experience of personal fame within the village (likely a function of both her beneficial work and statuesque appearance), and the feeling of having “represented the United States” – a sense of embodying the American sovereign.\textsuperscript{143}

141. Editorial, supra note 135; see, e.g., Murderer of Peace Corps Volunteer Sentenced to Death, BRITISH BROADCASTING CORP., Mar. 22, 1999, at Part 1 Former USSR: Ukraine; Foreign Relations; SU/D3489/D.
To the extent, then, that public service in a nonmilitary government department or agency entails participants’ embodying the state while placing the self at risk, Kahn’s proposition that this only occurs in war must be seen as too narrow. Another question, however, is whether similar sacrifice on behalf of the people may occur even outside the employ of, and apart from, structured government. Remembering that we ought not conflate “mere popular opinion” with “the permanent opinion of the people,” the answer is still arguably yes; if so, Kahn’s formulation, that only the battlefield offers the opportunity for enhanced political meaning rooted in direct contact with the people, should be seen as all the more constricted.

To understand how some nongovernmental action may put us in direct contact with, and at the service of, the people and their permanent opinion, we may begin with Kahn himself. In his recent work, *The Cultural Study of Law*, he explains that by the rule of law “we create an order of daily life that gains its unity through the memory of the truth revealed by the sovereign people.”¹⁴⁴ The constitutional project is the “extraordinary, revelatory act of the sovereign” which the rule of law appears to maintain.¹⁴⁵ The components of that constitutional project, however, can only be known in retrospect. Kahn significantly says, “Indeed, without a constitution, what looked like revolution was not really revolution at all. The states that joined the Confederacy did not have a revolution. Rather, they engaged in an illegal act of rebellion. *We know this because their project of constitutional creation failed.*”¹⁴⁶ And it is only because the Confederacy’s project failed that Lincoln’s efforts “to deny that the war is the second coming of the people” succeeded.¹⁴⁷

Yet, once in a while, popular struggle succeeds in bringing about a change in law. This struggle may take the form of resistance to corporate or governmental actions or policies, may be in the name of constitutional or democratic ideals, and sometimes puts the resister’s body at risk. The citizens engaged in such resistance often experience the vision of agape, an intense bond with their compatriots, and this experience is especially intense when the collective choice entails sacrificing personal safety. An important factor unifying citizens and sustaining their struggle is the idea that their resistance transcends narrow needs or interests peculiar to the participants. Their action is usually on behalf of the people, and they see any potential gains as benefiting not just themselves but society generally, or at least a broadly imaged class of analogously oppressed individuals.

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¹⁴⁴. Kahn, supra note 6, at 48.
¹⁴⁵. Id.
¹⁴⁶. Id. (emphasis added).
¹⁴⁷. Kahn, supra note 1, at 70.
Looked at retrospectively, as Kahn’s own analysis suggests, a change in law that results from such struggle permits the view that the resistance did involve a direct expression of the people, not merely popular opinion. From the moment the law changes, the resisters’ platform, to the extent adopted, is redefined as the permanent opinion of the people. The change need not necessarily entail the formulation of a new or amended constitution, but may be legislative or common law adjustment in furtherance of an ideal attributable to the sovereign, whether constitutional or democratic.

As an example, in the 1950’s and 1960’s large groups of Americans, and particularly African Americans, committed themselves to prolonged and risky confrontation with other groups of citizens and local police in order to ensure that the state’s permanent opinion, as legislated, reflected their own voices. Though usually committed to nonviolent, Gandhisque resistance, demonstrators knew that they could and would, at times, be assaulted, even killed. An important target of protest was the literacy requisite to voting rights, widely acknowledged to be “the primary tool for black disenfranchisment in the South . . .”148 An outcome of the struggle was Congress’s passage of the Voting Rights Act of 1965,149 which outlawed the literacy test, as well as the similarly pernicious poll tax. As one expert on the period writes, “[t]he Selma-to-Montgomery March led by Martin Luther King in March 1965 was the high-water mark of integrationism. Its televised dignity, juxtaposed to racist violence, spurred Johnson to declare ‘We Shall Overcome,’ and push through an overdue Voting Rights Act.”150

Another example may be the struggle within the United States against the apartheid regime in South Africa. Protests got bigger and more militant in the mid-1980’s, mostly under the leadership of a lobbying group called Trans-Africa, which organized a broad coalition of clergy, students, trade unionists and civil rights activists. Between 1984 and 1986, thousands of people were arrested picketing the South African embassy and consulates, notwithstanding President Reagan’s sanguine announcement in 1985 that South Africa had “eliminated the segregation we once had in our own country.”151 Over Reagan’s veto, Congress

passed the Comprehensive Anti-Apartheid Act of 1986, and thereby made much of the protesters’ platform official, elevating it to the permanent opinion of the people. The Act banned all sorts of South African imports, prevented new financial dealings with South Africa, awarded the South African sugar import quota to the Philippines, and so forth. This is not to say that the ultimate adoption of legislation is the sine qua non of an unmediated contact with the sovereign. For Kahn, it is war, the experience of sacrificing the body, that strips away mediating devices. The significance of the legislation is to establish that placing the body at risk held an affirmative relation to the Constitution and constitutional ideals. In some cases, the Voting Rights Act, for instance, the legislation’s express purpose will be to enforce a constitutional amendment.

In war, as in Peace Corps work, this affirmative aspect appears automatically, because the state has requested or directed the sacrifice. But struggle to enforce or expand rights has a negative (vis-à-vis the established order) aspect that often initially emerges, and this subversive appearance prompts the state to contain or thwart the resistance, which is the very factor that puts the resister’s self at risk. When the tension is ultimately resolved legislatively, the state’s self-awareness of the people is reconfigured. Somewhat analogously, the artistic establishment, for example, redefined Jean-Michel Basquiat, formerly a graffiti anarchist, as an avant-garde artist when it “legislated” his work to exhibition status — in this way the museum culture realigned itself, as well.

So it seems that in law, as in religion, the source or sovereign is not quite as inaccessible as The Reign of Law suggests. In law, action by citizens may at times rise to the level of action by the people, and in religion, individuals may sometimes experience unmediated mystical contact with some version of the spiritual source. In law, as in religion, then, such experiences are not necessarily within the exclusive domain of the originators, the revolutionaries or prophets.

This Part has shown that, as with language, religion is not quite the way Kahn says. Yet, Kahn’s view of law also seems slightly skewed, and the law-as-religion metaphor, like law-as-language, remains viable. Mystical religious experience is more varied and more available than Kahn allows, and the people’s ability to mobilize and to sublimate popular

155. See Bryan Brumley, It’s in the Gallery, So It Must Be Art, Not Graffiti, CHICAGO TRIBUNE, Nov. 21, 1985, at 13A, Zone N.
opinion into the permanent opinion of the people more familiar. Individuals may experience revolutionary conditions and embody the sovereign without seeking or causing the overthrow of the government. Kahn says this happens on the battlefield. I have argued that it happens on the battlefield less than Kahn suggests, but otherwise more so. Whether citizens place the self at risk in public service in the pursuit of peace and dialogue, or in militant struggle to safeguard or realize constitutional or democratic ideals, they can engage in sacrifice and new expression that may be integrated into the permanent opinion of the people. Less significant in this particular context is the state’s underlying motivation, whether it is genuinely to welcome the vitalized democratic impulse or to neutralize its subversive potential by co-optation.

Before concluding this Part, we look at one further aspect of Kahn’s law-as-religion metaphor. We saw earlier that, in Kahn’s metaphorical analysis, law and religion may be linked by their overriding tendency to impart and depend upon faith that sustains sacrifice. Kahn’s understanding of ‘faith’ is key here. He says, for instance, that “faith in the political sovereign is a condition of legal interpretation, but it is not an event prior to interpretation... Faith is experienced within, not prior to, law.”156 Kahn’s thought flows along in a literary and nicely dialectical way in this portion of The Reign of Law, with citations to diverse voices such as Plato, Rousseau, de Tocqueville, Nietzsche, Freud, Barthes and Foucault.157

Yet, his further explanation of ‘faith’, as he derives it from religion, suffers from the lack of a dialectic. What he says is that

[interpretation begins only after the sovereign withdraws. Abraham does not interpret God’s command that he sacrifice Isaac. The silence of interpretation is filled by the presence of faith. Faith offers an immediate [and thus prior] relation to authority. Faith is a problem of the will, not of understanding. We cannot reason ourselves to a position of faith.158

But the relation between faith and reason must be seen as consistent across spheres of human interest, regardless of changes in content. Faith without reason, in any context, becomes an anomalous conception, and is no longer fully sustainable, after Auschwitz. That paradigm-shifting moment overthrows the prototypical military faith without reason, and at least motivates a reassessment of the philosophy of faith, generally.

156. Kahn, supra note 1, at 186.
157. Id. at 289-90 nn. 17-30.
158. Id. at 184-85 (emphases added).
While it seems difficult to refute the traditional leap-of-faith notion espoused by Kahn, who cites to Kierkegaard\textsuperscript{159} and the empiricist Hume (whose credo was anti-faith),\textsuperscript{160} one way around it might be to say that the leap-of-faith claim is itself a reason aspiring to convince us to wait no longer for further reason, but just to believe. While this seems the way things work in many cases, it may appear a bit linear, always locating reason ahead of faith, and causally so. While the reason-to-faith formulation would flip Kahn’s proposition, it may not be a significant improvement. Nor, as an empirical matter, would it necessarily be more accurate: often, reason may have nothing to do with faith — friends or acquaintances for whom the vision of agape simply happens, for instance, a crash victim too dazed to reason, and so forth.

Showing, instead, that faith and reason interrelate dialectically would be a more enduring solution to the crisis history has imposed on religion’s paradigms. One way of doing so may be to restructure the traditional model for explaining faith, which begins with the individual of no-faith, with a mind either doubting or \textit{tabula rasa}, and asks what it would take for her to acquire faith. If we begin instead by hypothesizing a person who has faith, not concerning ourselves with that faith’s origin, we can posit reason as a faith-shaking mechanism, and then better reason as a faith-restorer. In this manner, faith seeks reason and reason \textit{does} demonstrably engender faith. A new dialectical model, subverting the traditional view, may thereby emerge.

The best way to illustrate this process may be to provide a good argument from within religion that first cripples faith and then revitalizes it. One example derives from the paradox of the stone. In an elegant essay originally published in The Philosophical Review in 1967, C. Wade Savage examines the following paradox:

(1) Either God can create a stone which He cannot lift, or He cannot create a stone which He cannot lift.

(2) If God can create a stone which He cannot lift, then He is not omnipotent (since He cannot lift the stone in question).

(3) If God cannot create a stone which He cannot lift, then He is not omnipotent (since He cannot create the stone in question).

\textsuperscript{159} SOREN KIERKEGAARD, \textit{Fear and Trembling, in Fear and Trembling/ Repetition} (vi Kierkegaard’s writings) 1, 46-47 (iii 96-97) (Howard V. Hong & Edna H. Hong trans. & eds., Princeton Univ. Press 1983) (1843).

Therefore, God is not omnipotent.\textsuperscript{161}

Savage explains that this paradox is really trying to show that the existence of an omnipotent being is logically impossible. To make the paradox even more convincing, he recasts it in a way that knocks out the assumption that God exists.\textsuperscript{162} Where $x$ is any being:

1. Either $x$ can create a stone which $x$ cannot lift, or $x$ cannot create a stone which $x$ cannot lift.

2. If $x$ can create a stone which $x$ cannot lift, then, necessarily, there is at least one task which $x$ cannot perform (namely, lift the stone in question).

3. If $x$ cannot create a stone which $x$ cannot lift, then, necessarily, there is at least one task which $x$ cannot perform (namely, create the stone in question).

4. Hence, there is at least one task which $x$ cannot perform.

5. If $x$ is an omnipotent being, then $x$ can perform any task.

6. Therefore, $x$ is not omnipotent.\textsuperscript{163}

What this argument appears to establish, more elegantly than the earlier four-step formulation, is that, because $x$ is any being, the existence of an omnipotent being, God included, is logically impossible.

The paradox of the stone commands attention because it's efficient, compelling and, most importantly, faith shaking. To Kahn's proposition that we cannot reason ourselves to a position of faith the paradox responds that we can reason ourselves out of a position of faith. Reasons exist to convince those who may be convinced by logic. While many of the faithful will say that the deity is greater than and beyond logic, has itself created logic for humans to reason with in the human realm and not beyond, many others will strongly maintain that the spiritual and logical realms must be consistent. Religion says that scripture configures God's


\textsuperscript{162} Savage is here reacting against George Mavrodie's attempted resolution of the paradox in 1963, in which Mavrodies begins by expressly assuming the existence of God. George L. Mavrodie, \textit{Some Puzzles Concerning Omnipotence}, 72 Phil. Rev. 221 (1963).

\textsuperscript{163} Savage, supra note 161, at 10.
presence in our lives, and this provides human reason, which grapples with the word, with a certain cachet vis-à-vis the deity. Inhering in religion’s linguistic modality are the seeds of reason’s self-sufficiency, a basis on which reason, confronted with the logical impossibility of the existence of an omnipotent being, may break from faith.

We have now posited an individual who began from a position of faith, but whose faith has been shaken by the paradox of the stone (or by some other, equally convincing challenge). Religion credited and accommodated this individual’s reason, and, ironically, reason’s independent status fostered faith’s subversion. Yet, this hypothetical subject remains capable of, if not predisposed towards, a return to faith. For the person of no-faith, reason may (though Kahn denies this) or may not (as Kahn asserts) be a reason for faith. This may depend on the intensity of that person’s commitment to (or faith in?) her no-faith position. For the individual whose loss of faith results from a good reason, a better reason should often restore faith.

Whether to restore faith or simply to solve a philosophical puzzle, Savage provides a way out of the paradox of the stone. Doing so he must locate a fallacy in the paradox. He finds it in (3). While ‘x can create a stone which x cannot lift,’ in (2), does entail that there is a task that x cannot perform, and thus rules out x’s omnipotence, the same is not true for ‘x cannot create a stone which x cannot lift’ in (3). Although ‘cannot create a stone’ seems to imply the existence of a task that cannot be accomplished, this is an illusion that vanishes by construing the statement to mean: ‘If x can create a stone, then x cannot lift it.’ The revised statement doesn’t entail any limitation on x’s power.

The schematic representation of the second formulation of the paradox, as Savage shows, makes this even clearer. Where S = stone, C = can create, and L = can lift, (1) is represented as: \( (\exists y)(Sy \cdot Cxy \cdot \neg Lxy) \) \lor \( \neg(\exists y)(Sy \cdot Cxy \cdot \neg Lxy) \). Because ‘\( -(\exists y)(Sy \cdot Cxy \cdot \neg Lxy) \)’ is equivalent to \( \forall y [(Sy \cdot Cxy) \Rightarrow Lxy] \), we have logically derived the interpretation, “If x can create a stone, then x can lift it.” Now (2) is represented as: \( (\exists y)(Sy \cdot Cxy \cdot \neg Lxy) \Rightarrow (\exists y)(Sy \cdot \neg Lxy) \), and this is logically true. But (3) is not logically true, because ‘\( -(\exists y)(Sy \cdot Cxy \cdot \neg Lxy) \)’ does not logically imply ‘\( (\exists y)(Sy \cdot \neg Cxy) \)’; nor does it logically imply ‘\( (\exists y)(Sy \cdot \neg Lxy) \)’.

Savage concludes:

God’s inability to create a stone which He cannot lift is nothing more nor less than a necessary consequence of two facets of His omnipotence. For if God is omnipotent, then He can create stones of any poundage and lift stones of any poundage. And “God can create stones of any poundage,
and God can lift stones of any poundage” entails “God cannot create a
stone which He cannot lift.”164

Of course, none of this proves that Kahn’s proposition, that we
cannot reason ourselves to a position of faith, is wrong, but it explains
how a counterexample may occur or would be likely. Nor should the
counterexample be seen as applying only to loss-of-faith situations.
Someone who begins with a no-faith position may nonetheless identify
with the articulation that seems to sustain that view, here the paradox of
the stone. Upon learning of the resolution of the argument, she may
similarly experience the lifting of an obstacle to faith. This matter,
though, is psychological and for experts in that field to substantiate or not.

It seems, however, that faith’s receptivity to reason bolsters the
law-as-religion metaphor. As Professor Kahn says, faith in the political
sovereign, and thus on the law side of the metaphor, does not happen out-
side of interpretation, and is experienced within, not prior to, law. If my
argument here has been sensible, then faith — in the realm of religion, or
any other area of human interest — should no longer be seen as an event
prior to reason. Instead, faith in religion, as in law, arises within, and in
dialectical association with, reason.

IV. LAW AS LEGAL ARTIFACT

In his earlier work Legitimacy and History165 Kahn looked gene-
alogically at paradigm changes in American constitutional thinking. In
The Reign of Law he shifts to archaeology: “not Foucault’s idea of an
archaeology of discursive practice but the archaeological recovery of an
event.”166 Kahn’s paradigmatic event here is Marbury v. Madison and he
learnedly unpeels its layers of constitutive meaning. But this is illustra-
tive, and the methodology, more than Marbury’s deep structure, is the
thing he wants the reader permanently to absorb.

Kahn’s archaeology has a two-fold relation to law. On the one
hand it seeks to “expose the nature of the legal imagination without partic-
ipating in the functions of law.”167 Kahn wants an approach that neither
justifies law nor advocates reform, because these practices situate the

164. Id. at 11–12.
165. PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN
166. KAHN, supra note 1, at 40; see MICHEL FOUCAULT, THE ARCHAEOLOGY OF
167. KAHN, supra note 1, at 39. For a brief discussion of how this aspect of
Kahn’s project may be self-refuting, see Alani Golanski, Book Review, N.Y.L.J., June 25,
scholar within law. He objects to the usual sort of academic work in which scholars suggest reform and thereby participate in the very system they would assess. On the other hand, Kahn commits his archaeology to an excavation site wholly within law: though the scholar should approach law from the outside, like an anthropologist or archaeologist, she should meet law on its own terms, looking at its belief structures and its appearance in the political culture. In this way, Kahn wants his ideal scholar viewing law as an independent system “already at the origins of our perceptions rather than at the conclusion of an argument.”

This last clause reacts against legal realism, which “took a wrong turn” by mistaking law’s constructed appearance — thus at the conclusion of an argument — for the product of “nothing more than a distribution of power among particular interest groups and individuals” — thus at the origins of our perceptions. Kahn says rhetorically:

> If law can make no claims of its own, then the reform of law becomes a matter of applying the current insights of social science in order to reach the values articulated through the political process. The rule of law as an autonomous system of order must give way to expert management based on social sciences.

While the third metaphor Kahn sets up in *The Reign of Law* is legal scholarship as archaeology, in this Part, I translate the A- and B-terms by substituting the objects of legal scholarship and archaeology — law and artifacts, respectively. Although *Marbury* is the principal artifact examined in *The Reign of Law*, Kahn’s broader lesson is that the legal scholar’s artifacts should only be legal ones, not any of the nonlegal interests or disciplines that have preoccupied the legal realists. Scholars should not try to explain law by referring to nonlegal sources. They should abandon, for example, the sociologist’s critique of the law’s interaction with criminal defendants, the feminist’s critique of the courtroom treatment of rape victims, the economist’s critique of judicial analyses of business practices. These perspectives “purport[] to measure the judicially created appearances of the rule of law against an extralegal reality.” Instead, we should view law as the set of legal artifacts.

Professor Kahn interposes the law-as-religion metaphor here. On the one hand, scholars trying to reform the legal system resemble nineteenth century students of Christianity not free to engage in open-ended

168. Kahn, supra note 1, at 42.
169. Id. at 27, 42.
170. Id. at 42.
171. Id. at 45.
172. Id. at 130.
intellectual inquiry; the agenda in each instance overcomes, or prevents entirely, the discipline. On the other hand, the new legal realists who suppose the “rule of law has nothing to offer” are like “those who used the emergence of the social sciences a hundred years ago to proclaim the death of God,” and who explained religion’s false beliefs “by appealing to the new sciences of psychoanalysis, anthropology, or economics.” In other words, Kahn wants the lessons learned from religion to stabilize the law-as-legal-artifact metaphor.

If we accept Kahn’s analogy and his interpretation of the etiology of the “death of God” movement, one question is whether this turn was necessarily a bad thing for religion, or may ultimately have enriched it. Of course, arguments could start from the particular social sciences themselves. For instance, it seems reasonable that the relativism fostered by anthropological studies of world religions, while inducing doubts about the universality of one’s own religion, would ultimately lead to a good deal more tolerance returning the home-court religion to its compassionate roots. Or psychoanalysis, while offering nonreligious explanations for the human condition, may couple an acceptance of radical aloneness with enhanced feelings of self-worth that inspire greater religious immersion.

More interesting, however, is whether the death-of-God construct may itself have enriched religion’s self-understanding. Here, again, some Continental thought, from which Kahn derives his genealogical and archaeological approaches, may be instructive. Derrida speaks of Kant’s two families of religion: the religion of the cult [des blossen Cultus], which seeks God’s favors but does not oblige adherents to act or to become better; and moral [moralische] religion, concerned with the good conduct of life [die Religion des guten Lebenswandels] and subordinating knowledge to action. The latter defines Kant’s “reflecting faith” [reflektierende], which favors good will above understanding, does not depend upon historical revelation and so conforms to the rationality of purely practical reason. The paradox Derrida identifies is that, in locating ourselves within Kantian “reflecting faith,” we

must act as though God did not exist or no longer concerned himself with our salvation. . . . Is this not another way of saying that Christianity can only answer its moral calling and morality, to its Christian calling if it endures in this world, in phenomenal history, the death of God, well beyond the figures of the Passion? That Christianity is the death of God thus announced and recalled by Kant to the modernity of the Enlightenment? 175

173. Id. at x, 45.
175. Id. at 11-12.
Vitiello discusses a parallel in Judaism, which conceives of time in a way profoundly unlike the Greeks' "circular" conception or the Pauline and historical "linear" one. While the Judaic present is desert — a loss of home — and the past danger — Stephen Dedalus's "nightmare from which I am trying to awake" — its future is the realm of God's potential appearance, "always other and always beyond, of God as 'otherwise than Being'". Thus Judaism experiences the present as the absence, even the "negation," of God, and though "[n]o one has seen God, ... the steps of His death may be seen by us all." It is therefore arguable that, rather than demonstrating social science's imperial ambition, the death-of-God perspective keenly reveals one of religion's significant substructures. In other respects, too, Kahn seems to overstate the case for the law-as-legal-artifact metaphor. For him, as stated, "applying the current insights of social science" means that "law can make no claims of its own," and that "the rule of law has nothing unique to offer....." This point of view is difficult to comprehend, and seems unwarranted. For one thing, Kahn begins with the reasonable presupposition that "the courts have achieved a unique role in expressing the rule of law," and so law's appearance manifests in the judicial opinion. If the rule of law, as expressed in the judicial opinion, itself relies on "the current insights of social science" on occasion, then these other-disciplinary insights find new expression *within* law's rule. Applied and adopted by law, an insight's context shifts and its content builds authority within law, which in turn promotes law's evolution as "an integrated system ... developing in time ... to meet present and future needs." The disciplines don't merge but they do interrelate. The judicial opinion's intertextuality fosters what Kahn touts as law's "participation in a transgenerational historical project that promises endurance through time." Doublet courts turn to insights derived from nonlegal sources. In a recent essay, I argued that legal opinions implicitly and latently embody divers cultural and philosophical sources, that they tend to manifest ep-

178. *Id.* at 144.
181. *Id.* at 5.
ochal cultural shifts by constructing authority through the atypical and explicit use of texts across disciplines, and that the inherently intertextual nature of legal opinions helps explain and justify interdisciplinary legal scholarship. For instance, in the nineteenth century case of Sherwood v. Walker, decided during the epochal shift towards modernism, the court provided a model for resolving mutual mistake controversies in contract law by relying on Aristotelian language. To understand Sherwood, we have to understand some Aristotle. But that doesn't mean law has nothing unique to offer - Sherwood’s formulation is uniquely legal, it is cited in legal cases and discussed in law reviews.

At another epochal moment, Brown v. Board of Education reassessed the doctrine that separate but equal educational facilities afford equal and sufficient treatment. The court believed that to rule convincingly it had to incorporate new psychological insights. These, it concluded, established that to separate nonwhite students “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” Whatever, said the court, may have been the state of psychological learning at the time of Plessy v. Ferguson, “modern authority” requires another legal outcome. Then the court marshaled contemporary psychological authorities explaining the effects of discrimination and enforced segregation.

The court could have decided Brown without recourse to the “current insights of social science,” and solely on the basis of evolving sensibilities in constitutional interpretation, but it felt more was needed to reinforce its own position in the larger culture. Kahn doesn’t advise the courts to steer clear of social science; in fact, he emphasizes that his project “does not have the reform of any part of the rule of law — practical or theoretical — as its aim.” His work is directed at legal scholars, and

184. Alani Golanski, Nascent Modernity in the Case of Sherwood v. Walker — An Intertextual Proposition, 35 Willamette L. Rev. 101 (1999). That essay defines the term “epochal shift” by example, broadly including both cultural and societal transitions — e.g., the movements into modernism and postmodernism — and intradisciplinary phenomena — e.g., the shift from legal positivism to legal realism, and discrete discoveries in science and mathematics — that engender significant changes in perspective. Id. at 143-45.
185. 66 Mich. 568, 33 N.W. 919 (1887).
187. Id. at 494.
188. 163 U.S. 537 (1896).
189. 347 U.S. at 494.
190. Id. at 494 n.11.
191. Kahn, supra note 6, at 128.
assumes it is the academics, not judges, who are responsible for summoning nonlegal sources. It is the law schools, not the courts, that are "continually spawning new classes in 'law and —.'" 192

However, to the extent the courts tap into nonlegal insights, it is law's very nature, and not some peculiarity of its scholars, that warrants recourse to interdisciplinary study. Sherwood and Brown are not improbable anomalies. Creative querying in a legal database would disclose lots of decisions applying other-disciplinary findings or methods. While these would tend to appear at epoch-shifting moments, and in cases hinging on technical expertise, it is only natural that, even during mundane times, a variety of cultural and intellectual sources implicitly influence most judicial opinions. Kahn likes to speak of law's "suppression" of its unique subject and the novelty of events,193 but it's also apparent that courts work hard, their dockets are brimming, and judges privilege the efficiency of the ready legal precedent. Yet, courts also keep the insights and sensibilities of the social sciences in at least partial view, depending on individual judges' predilections and facility. While these sensibilities may otherwise inform legal reasoning subconsciously, simply because they permeate the culture, they surface as needed.

For instance, in Consorti v. Armstrong World Indus., Inc.,194 the Second Circuit considered whether an award of $12 million for Mr. Consorti's pain and suffering was excessive. While working as an insulator in a small family-owned business, Mr. Consorti had been exposed to asbestos-containing products marketed by defendants without warning. Asbestos fibers lodged in his lungs caused his mesothelioma, a malignant and extremely painful cancer. A tumor enveloped his spine over a two-year period and

[His pain grew worse as time passed, and was, of course, deepened by the certainty of imminent death. We take it as a given that reasonable people of his age, in good mental and physical health, would not have traded one-quarter of his suffering for a hundred million dollars, much less twelve.195

But the Second Circuit said "there are important reasons why courts cannot leave it to juries to set the limits of compensation for such injuries."196 Unsupervised jury verdicts, said the court, would "make it difficult for risk bearers to structure their behavior to efficiently manage

192. KAHN, supra note 1, at 133.
193. Id. at 178.
195. 72 F.3d at 1009.
196. Id.
risk.Overdeterrence would cause a reluctance to take beneficial risks, and increased insurance premiums “would inevitably raise the price of goods and services to the public.”

Clearly, the court is here engaging in “law and —”; in this case, economics. Yet, once announced, the court’s reasoning becomes legal reasoning. I choose Consorti rather than, let’s say, Vuyanich v. Republic National Bank, in which Judge Higginbotham says “Y = a + b1x1 + b2x2 + . . . + bnxn + u,” which also becomes legal reasoning but doesn’t look like law. Scholars explaining Consorti, however, would have to examine economic insights in assessing the opinion’s soundness, foundations, and cultural influences. An archaeology of the standard of review of jury verdicts would have to encompass nonlegal sources. This doesn’t mean, as Kahn fears, that reasoning about law, or this particular area of law, would become an effort having little connection to law’s unique culture and internal logic. It’s just that attaining a certain depth of study may entail looking not only at those who build up the rule of law from within, but also at those “who open up such communications between the different groups of builders as will facilitate a healthy interaction between them.”

As a further example of judicial reliance upon nonlegal sources, again arguably at an epoch-shifting moment in our cultural history, we may consider the famous opinion in Roe v. Wade. The court delved into medical historical texts to explain that the restrictive criminal abortion laws prevalent in 1973 were of “recent vintage,” and did not reflect ancient Greek and Roman mores, which allowed abortion to be “resorted to without scruple.” Although Plato and Aristotle “commended abortion,” this position was contrary to views held during the Persian Empire, by the Ephesian Soranos, and by the Pythagoreans, for whom the embryo was animate from conception. The court also discussed St. Augustine’s

197. Id. at 1010.
198. Id.
200. 505 F. Supp. at 270.
203. Id. at 129, 129 nn. 9-10 (quoting J. EDELESTEIN, THE HIPPOCRATIC OATH 10 (1943)).
theological distinction between *embryo inanimatus*, not yet endowed with a soul, and *embryo animatus*,205 Bracton's thirteenth century view that abortion was homicide "‘if the fetus be already formed and animated, and particularly if it be animated,”206 and other opinions. Making the turn toward the then-current insights of the medical and social sciences, the court reflected, *inter alia*, that abortion in early pregnancy had become relatively safe, and that, according to new embryological data, conception is a "‘process’" over time, rather than an event.207 And the court tapped sources within Stoicism, Judaism and Protestantism, each of which generally agreed that life begins with the live birth.208

Kahn is therefore being too restrictive when he tells legal scholars that "turn[ing] to nonlegal sources to explain" the rule of law entails that "[l]aw itself falls out of the equation."209 His resistance to explaining law *solely* "as an economic, psychological, or social anthropological phenomenon," and not "on its own terms,"210 seems right, but his assumption that turning to nonlegal sources accomplishes this doesn't. Kahn here cites to James Boyd White, who said that legal realism has tended "to disregard the opinion itself and to focus solely on the result, piercing the felt artificiality of the words to reach the ‘reality’ that lies behind the facade."211 Kahn agrees with White that the legal realists' idea "is that we can 'see through' the opinion . . . to the reality that lies behind it, which can best be talked about not in legal but in social, psychological, or economic terms."212 But Kahn, who also quotes White's further language, omits what I italicize: "The extreme step in this direction is to declare that there is, or ought to be, no discourse that is distinctively legal . . . . All is reduced to the level of policy or politics."213

White is a legal scholar who professes law and —. He is Hart Wright Professor of Law at the University of Michigan, but also a professor of English and adjunct professor of classical studies. What he tries to

205. 410 U.S. at 133 n.22 (citing AUGUSTINE, DE ORIGINE ANIMAE 4.4 (Pub.Law 44.527)).
206. 410 U.S. at 134 & n.23 (quoting 2 HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 279 (T. Twiss ed., 1879)).
207. 410 U.S. at 149, 161 & nn. 44, 62 (citations omitted).
208. Id. at 160 & nn. 56-58 (citing EDELSTEIN, supra note 203, at 16; DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 251-94 (1968); Immanuel Jakobovits, Jewish Views on Abortion, in ABORTION AND THE LAW 124 (D. Smith ed. 1967) (taking a stricter view); LAWRENCE LADER, ABORTION 97-101 (1966)).
209. KAHN, supra note 1, at 42, 45.
210. Id. at 42.
211. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 95 (1990).
212. Id.
213. Id. (emphasis added); KAHN, supra note 1, at 267 n.49.
do in his scholarship is "to work out a set of questions that will connect
texts, and their readers, across the lines of professionalism."214 White
links legal concerns to a study of Jane Austen's Mansfield Park, which "is
at its center about the authority of the culture, of the family -- especially
the father -- and of the self."215 And he shows how Emily Dickinson, who
"dances like a Bomb, abroad . . . ," overthrows "the hierarchy built into the
idea of poetry at work in her world."216

But White's mastery is not, for instance, of economics or analytic
philosophy. He is nicely interdisciplinary over the impressive area of his
expertise, but perceives in the discourse of any "conceptual" language an
"implicit imperialism, its erasure of other ways of talking."217 He fails to
consider, though, that economics' "implicit imperialism" may be a function
of its elegant problem-solving capabilities in certain circumstances.
Professor McCloskey, whose field is economics, notes White's "bumper
sticker" approach to the discipline:

White sneers at economic growth, "that is to say, the expansion of the
exchange system by the conversion of what is outside it into its terms. It
is a kind of steam shovel chewing away at the natural and social world" . . .

This misunderstands exchange in the usual way, taking it to be a zero
sum game. White cannot master his distaste for the vulgarity of economic
growth, which ruins the streams for fly fishing albeit turning the water
into (doubtless most vulgar) goods for the poor. I am sorry to report that
he misunderstands economics to almost the same degree that Posner mis-
understands literature.218

So Kahn's reliance on White for a critical perspective on economics
is suspect, and further erverages his claims against the use of nonlegal
sources. Whether to summon insights derived from the social sciences is
not even the viable issue. That interdisciplinarity is here, already in law
and important to the appearance of law. Kahn, as a matter of principle,
avoids the expertise developed in other fields, but he has constructed the
law-as-language and law-as-religion metaphors. Without that expertise he
must self-sufficiently manipulate his analogies even while suppressing
depth of study. If he builds genealogical and archaeological models for

214. James Boyd White, Acts of Hope: Creating Authority in Literature,
215. Id. at 190.
216. Id. at 242, 260.
217. White, supra note 211, at 40.
218. Donald N. McCloskey, The Essential Rhetoric of Law, Literature, and Lib-
McCloskey has been John F. Murray Professor of Economics, Professor of History, and
Director of the Project on Rhetoric of Inquiry at the University of Iowa.
legal scholarship, why counsel against a more probing inquiry into some of the difficult, "conceptual" questions addressed by those disciplines? Economic problem solving may pursue efficiency, but archaeology has systematically transformed people into "merely representations of the movements of things. Thus prehistorians documented such movements as 'the invasion of the black burnished pottery folk', or the rise of the 'jade axe peoples'. "219 And if the rule of law is "a structure of beliefs,"220 and the imaginative construction of a world of meaning, "221 then shouldn't legal scholars be open to learning of the ways we believe, and the ways we structure imagination, from those having mature and peer-reviewed understandings of these issues?

Kahn acknowledges that "[n]o scholar can claim that the discoveries of other disciplines are irrelevant," but he thinks perceiving those discoveries is within the peculiar province of scholarly work, which "has an open and unlimited access to a world outside of judicial appearances."222 The judge and the rule of law do not access the other disciplines, and if they do this is suppressed and excluded from law's appearance, so legal scholars, however aware of the other disciplines in their "unbiased pursuit of truth,"223 should not turn to them in explaining law. But we have already seen, in just a few exemplary cases, that courts do tap nonlegal sources, and that this way of building authority is often important to law's rule and its appearance.

Better than Kahn's proscription is Townsend's detailed understanding of the "complex and textured" environment nurturing the Western intellectual tradition.224 The following passage well reflects the essence of his counsel:

Few doubt Maxwell's assertion that interdisciplinary research is important.225 Such research sharpens the resolution of the intellectual picture by applying the perspectives of differing disciplines to the most interesting aspects of the environment. Moreover, interdisciplinary work has been, and continues to be, a major force in the creation and evolution of discipline. A major intellectual challenge today, however, is fostering such work in an information-rich era in which it is difficult to master even a small part of a given field. Much of the discussion in the legal literature

220. Kahn, supra note 1, at 27.
221. Id. at 45; Kahn, supra note 6, at 2, 39.
222. Kahn, supra note 1, at 132-33.
223. Id. at 133.
225. See supra text accompanying note 201.
of the current foundational crisis in mathematics illustrates two basic difficulties in doing meaningful interdisciplinary legal research: gaining a sufficient understanding of what is often a foreign discipline, and employing that discipline in a manner that reflects both its relevance to, and separateness from, law.226

The solution is either the suppression of the interdisciplinary impulse, or an openness to interdisciplinary scholarship that advances the dialogue and encourages the flow of remedial expertise. As Townsend says, interdisciplinary research “sharpens the resolution of the intellectual picture” and is “a major force in the creation and evolution of disciplines themselves.” This doesn’t sound like the sort of thing we should forego. Kahn himself relies on Freud, Erikson, Kuhn and other nonlegal thinkers, but, like White, wants us to restrict our sources by carving some line of demarcation between cultural and imperialist thought.

To be sure, mistakes are made when scholars use foreign disciplines. Townsend considers scholars’ other-disciplinary misunderstandings, explaining that these (thus not some inherent disciplinary feature) “can result in making the mistake of turning a ‘law and [discipline X]’ study into a ‘law as (a subset of) [discipline X]’ study.”227 One scholar, for instance, curiously writes, “‘The implications of Gödel’s Theorem for any theory of law have been ignored for too long. . . . Every theory of law is incomplete.’”228 The point applies reflexively: this essay likely errs, too.

But courts also go astray reasoning in extralegal realms. Legal opinions, which express law’s rule and structure the world of law’s appearance, are intertextual, not only because they apply the principle of stare decisis but also by implicitly and sometimes explicitly incorporating prior texts across disciplines. Mistakes are made because judges are human. Rightly or wrongly, the emerging cognitive approach suggests that the very nature of our humanness, the experiential and evolution-based programming of the “cognitive unconscious,” engender many of these mistakes.

226. Townsend, supra note 224, at 56.
227. Id. at 131.
In one well known study, statistically naive undergraduates and statistically very sophisticated graduate students in the decision science program at the Stanford Business School were alike given the following problem:

Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations. Please rank the following statements by their probability, using 1 for the most probable and 8 for the least probable.

(a) Linda is a teacher in elementary school. (5.2)
(b) Linda works in a bookstore and takes Yoga classes. (3.3)
(c) Linda is active in the feminist movement. (2.1)
(d) Linda is a psychiatric social worker. (3.1)
(e) Linda is a member of the League of Women Voters. (5.4)
(f) Linda is a bank teller. (6.2)
(g) Linda is an insurance salesperson. (6.4)
(h) Linda is a bank teller and is active in the feminist movement. (4.1)\textsuperscript{229}

The numbers in parentheses after the (a) through (h) statements show the mean rank assigned to the respective choice by all subjects. The startling result is that at least eighty-five percent of all the subjects, regardless of the level of their numerical savvy, judged the conjunctive event (h) more probable than its conjunct (f). Yet, this is mathematically impossible. For any two events A and B,

\[ P(A \& B) = P(A) \times P(B/A) = P(B) \times P(A/B). \]

A cognitive explanation for the violation of the conjunction rule is that humans use a "representativeness heuristic," which means we tend naturally to rank situations according to their representative character, rather than their statistical likelihood. Assessing representativeness may

\textsuperscript{229} JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 90-96 (D. Kahneman et al. eds. 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY], described in RONALD N. GIERE, EXPLAINING SCIENCE: A COGNITIVE APPROACH 151-52 (1988).
be our natural mechanism for judging probabilities. When a group of
naive subjects was asked to rank the same eight situations “by the degree
to which Linda resembles the typical member of that class,” the average
rankings were nearly identical to the probability estimations.230

Judges, like other humans, are not naturally Bayesian statistical
agents. But Kahn, who presupposes there’s nothing nonlegal happening
in a judicial opinion, says:

To accuse the Court of factual error in its representation of the opinion
of the people is to make a category mistake. There is nothing for it to be
mistaken about. Only the Court can correct its own errors, because until it
identifies a mistake, there is none. Opinions may be bad, even evil, but
they are not mistaken.231

Well, we know what Kahn means here, and in that way, rhetori-
cally, he’s right. The life of the law has not been logic, and the court’s
statements are interpretations not deductive propositions. Different inter-
pretations are possible, and while we can disagree with the court’s, the
court is not mistaken.

However, the court wants to give the best interpretation it can, be-
cause it labors under the obligation to convince the popular will of the
efficacy of its reason.232 Although the court doesn’t err in its interpretive
enterprise, it makes mistakes in a literal sense. True, these don’t matter in
resolving the parties’ specific controversies, what Holmes called “the
mannerless conflicts over often sordid interests”233, but can’t they wear
down the claim to reason upon which the court builds its authority? Then,
too, we get back to judges’ humanness — they’d prefer not to err, when
practicable.

Here I stick with probability exemplars because this area falls
within the “extralegal reality” Kahn eschews, and because error is fore-
seeable absent some level of what Kahn disdains in “expert management.”
But they are merely illustrative of law’s “complex and textured” setting.
The birthday matching problem, for instance, asks how many people must
be randomly selected for there to be a probability P(S) greater than one-
half that at least two of them share the same birthday. Of course, if 366
people are chosen, P(S) = 1 (assuming a 365-day year). The solution to

230. See GIERE, supra note 229, at 152-53.
231. KAHN, supra note 1, at 217.
232. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT
AT THE BAR OF POLITICS 239 (1986).
233. OLIVER WENDELL HOLMES, THE PROFESSION OF LAW (Feb. 17, 1886), IN THE
OCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 28, 28 (Mark DeWolfe
this problem is not intuitive. The Federal Rules of Evidence would usually entitle a party to call an expert to assist the jury, but sometimes even if the expert’s opinion “embrace[d] an ultimate issue to be decided by the trier of fact,” the jury being free to reject the opinion or to recast its significance. Court decisions are a different matter, and may interpret expert testimony, rely on lawyers’ briefs, or flow from judges’ understandings.

The intuitive or common sense solution to the birthday matching problem is likely 365/2, or 183 people. Mathematicians approach the problem by asking what P(S) (or S’s complement) is. Computing P(A) it is often easier to begin with $A^{c}$ What’s computed first is the probability $p_{n}$ that the nth person’s birthday is different from all other birthdays so far, assuming no matches through $n - 1$ choices. For $p_{1}$, the solution has to be 1. The probability that the second person’s birthday is different from the first is $p_{2} = 364/365$. Where $n = 3$, the probability is $p_{3} = 363/365$, and so on. The formula, calculating the probability that # n’s birthday is different from that of # # n - 1, n - 2, . . . n - (n - 1), is therefore $p_{n} = (365 - (n + 1))/365$.

It seems that the common sense solution intuitively responds to this sequence of probabilities, that # n’s birthday is different from the others’ collectively, but not to the birthday matching problem. The probability that each person’s birthday is different from each other person’s is the product of these probabilities. In the latter sequence, the 23rd person randomly chosen flips p from 52 to 49%. If the 23rd person chosen makes it less likely than not that each person’s birthday is different from each other’s, then 23 is the solution to the birthday matching problem, because at this number it is conversely more likely than not that two people share a birthday.

However, converse probabilities cannot be assumed across categories. While random error can be assessed from a collection of data, the

234. FED. R. EVID. 702.
235. FED. R. EVID. 704(a); see generally Mathie v. Fries, 935 F. Supp. 1284, 1295-96 (E.D.N.Y. 1996) (“a[though the Federal Rules of Evidence do not bar all expert testimony concerning an ultimate issue, see FED. R. EVID. 704, a district court may exclude ultimate issue testimony under Federal Rule of Evidence 702 when it is not helpful to the trier of facts or under Rule 403 when it would be unduly prejudicial”), aff’d, 121 F. 3d 808 (2d Cir. 1997).

236. But there isn’t really such a thing as the intuitive solution to a problem, because it all depends on who’s intuiting. Cantor and Dedekind, for example, intuited that the real numbers outnumbered the rationals. JOHN W. DAWSON, JR., LOGICAL DILEMMAS, THE LIFE AND WORK OF KURT GÖDEL 43 (1997). So the intuitive must itself be intuited as a norm.

data does not warrant an inference about the correctness of the hypothesis. That is, it cannot be assumed that \( P(\text{data}/H_0) \) yields the converse probability \( P(H_0/\text{data}) \). Given an hypothetically fair coin, the probability that it will land heads ten consecutive tosses is \( P(\text{data}/H_0) = (\frac{1}{2})^{10} = 1/1024 \). However, this information is not sufficient to figure the probability that the coin is fair given ten consecutive heads – \( P(H_0/\text{data}) \).

In discrimination cases, for example, the "null hypothesis" is that results in the total population are equal for compared groups, and therefore that differences between test groups are random. P-values are the probabilities of getting the test data given the null hypothesis is true, \( P(\text{data}/H_0) \). The higher the P-value, the less likely the disparate impact in the litigated case. But P presupposes the null hypothesis, so it cannot assess its correctness, too, i.e., give \( P(H_0/\text{data}) \).

Courts confuse this, and social science is clarifying. This may involve appeals to "bodies of knowledge outside of law," but so be it. The First Circuit said, "Widely accepted statistical techniques have been developed to determine the likelihood an observed disparity resulted from mere chance." The Fifth Circuit that "the highest probability of unbiased hiring was 5.367 x 10^{-20}." The Second Circuit stated that a finding of two standard deviations means "there is about one chance in 20 that the explanation for a deviation could be random ... ." As one recent treatise notes, "[s]uch statements confuse the probability of the kind of outcome observed, which is computed under some model of chance, with the probability that chance is the explanation for the outcome. ... [P]robabilities govern the samples, not the models and hypotheses."

Drawing inferences about the larger group from the sample data is the Bayesian project. Thomas Bayes was an eighteenth-century minister (and mathematician) who wanted to prove God existed based on the sample data that's the world. A classic contemporary Bayesian problem, taken from law, is this:

One night a cab was involved in a hit-and-run accident. There are two cab companies, Green and Blue, in the city. Assume the following:

1. 85% of the cabs in the city are Green, 15% are Blue.

238. Kahn, supra note 1, at 43.
239. Fudge v. Providence Fire Dep't, 766 F.2d 650, 658 (1st Cir. 1985).
(2) A witness identified the cab as Blue. Tested under the same circumstances that existed on the night of the accident, the witness correctly identified each of the two colors 80% of the time, and failed 20% of the time.

What is the probability that the cab involved in the accident was Blue rather than Green?243

The intuitive, and usual, answer to the cab problem is 80 percent, corresponding to the witness’s reliability rate.244 The Bayesian solution is otherwise. Under this method, the prior probability — prior, that is, to empirical observation — is P(A₁) = P(is Blue) = 0.15. And P(A₂) = P(is Green) = 0.85. Adding the witness (W) to the mix, and letting B denote the event “W identifies Blue cab,” then the conditional probability, a likelihood, that W identifies a Blue cab, given the cab is Blue, is P(B/A₁) = 0.8. And P(B/A₂) = 0.2.

Now what we want to determine is a posterior, or revised, probability, P(A₁/B), which accounts for the prior probability and the empirical observation data. Recall P(H/d). We first need the joint probability:

\[ P(A₁ \text{ and } B) = P(A₁) \cdot P(B/A₁). \]

Because we know P(A₁) = 0.15, and P(B/A₁) = 0.8, we compute the joint probability P(A₁) P(B/A₁) = 0.12. The Bayesian posterior probability is

\[ P(A₁/B) = P(A₁ \text{ and } B) / P(B). \]

So all we need now is to determine P(B). This must be the disjunctive P[(A₁ \text{ and } B) v (A₂ \text{ and } B)], which becomes P(A₁ and B) + (A₂ and B), because the joint events are mutually exclusive. Computed this way, P(B) = 0.12 + (0.2 \cdot 0.85) = 0.29. Thus, the probability that the cab involved in the accident was Blue, if W says so, is P(A₁/B) = P(A₁ and B) / P(B) = 0.12 / 0.29 = 0.41.245 This is significantly different from the intuitive, non-Bayesian outcome.

Being anthropological, though, Kahn describes the unspoken judicial commitment to suppress knowledge of any reality outside the courtroom.246 What’s gained is a culture of law independent and originary.

244. See Giere, supra note 229, at 155.
246. Kahn, supra note 1, at 122.
But in other respects this view, articulated as the law-as-legal-artifact metaphor and normative for legal scholarship, is problematic. Not only does Kahn’s prescription tend to stifle the discipline, but its premise seems inaccurate. For it seems the judicial commitment regarding extra-judicial reality is more porous than Kahn allows, and the courtroom is often as much agora as cloister.

V. CONCLUSION

We would expect an analysis of the “reign of law” and the “construction of America” to cover a lot of ground. Professor Kahn nicely shows how the new legal scholarship that pursues this project shall be an archaeology, or sometimes genealogy or anthropology. These link law’s rule and appearance to their sources, a return to origins in language, religion, and elsewhere. Because Kahn’s project has a literary, as well as analytic, aspect, he not only dissects but also juxtaposes these intellectual fields. Hence, Kahn seeks to assist us with metaphors that more profoundly convey his meaning and method. His rhetoric connects elements in nonlegal texts to those in legal texts, and other disciplines to our discipline. Yet, wary about condoning a new species of legal realism, he incongruously denies, for himself and to the new legal scholarship, any organic link to law’s immanent Other, the world outside the courtroom. This essay suggests we should probe these intertextual connections unfettered by anxiety about erasure of the legal culture, and that our concern, instead, should be for the precision of our inquiries.