**“The Cultural Study of Law: Reconstructing Legal Scholarship”- Paul Kahn**

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Paul Kahn claims that legal studies in the United States are failing, since they occur alongside a constant call for reform and disconnected from modern cultural theories (on which he expands in the first chapter). Accordingly, the book is structured to provide a review of criticisms of current legal studies and suggest ways to deal with them: First, Prof. Kahn explains why the way in which law is taught in the United States should be changed; in the second chapter, he specifies the theoretical and practical advantages of incorporating cultural theories into legal studies; in the third chapter, he presents the methodologies and the sources that should inform academic reform; and finally, in the fourth chapter, he suggests additional directions for the discipline of law, after applying these new cultural lenses.

Kahn claims that we are all products of the rule of law, and as such we speak its cultural language. Therefore, he invites the jurist to study the object with the awareness of being a product of a cultural system called the rule of law. According to him, law students who learn about the rule of law speak this cultural language, and therefore academia is responsible for providing an overview of this system and demonstrate how we are defined within it. This process can be compared to the movie The Matrix, where taking the blue pill makes you see the lines of code, or to the difference between linguistics and language: the linguist focuses on the creation of the phenomenon of language, while the language specialist focuses on defending particular grammatical rules. Kahn uses these parallels as a basis to lay out his theoretical foundation, by which he seeks to bring to light the cultural way in which law is taught in the United States.

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Kahn’s reference to the religion department and the divinity school very much caught my attention. It made me reflect on the difference between theology and the study of religion. While theology attempts to understand the transcendent, religious studies tries to study religious beliefs from outside any particular religious viewpoint. To put it in other words – religious studies do not look at the religious text as a “sacred” or transcendent text in the spiritual sense, but first and foremost as a “text”. Theology, on the other hand, treats the religious text as a “sacred” text. Challenging it or asking questions about it are not acceptable practices. In a similar way, it could be said that legal studies, in the Unites States, treat the legal text as a “sacred” and transcendental text. Students learn how to accept it and how to become its agents. Perhaps as soon as we begin to treat the legal text not as a transcendent text, but one written by human beings, and therefore liable to questioning, the profound change that Kahn aspires to provoke will become possible.

What enabled the development of religious studies, away from theology? I would say that this shift began with the protestant Reformation, when Martin Luther challenged the status of the Catholic Church and its monopoly of the authority to interpret the sacred text, allowing regular individuals to begin to engage with it directly. The Reformation and the translation of the Bible into German allowed the layperson to touch the text, to feel it, to read it, to deal with it, without the need for mediation by the Church. Thus, the text ceased to be a transcendental text. However, the Reformation occurred only after a thousand years of rule by the Catholic Church, which had at some point become corrupt. This corruption of the Church gave rise to the need for a change. However, the American legal system is not yet widely regarded as harboring the same kind of corruption.

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Kahn's book raises a point that seems to be indisputable – that legal studies are not satisfactory and should be changed.

However, from this point on, the conflict expands: On one side, Kahn, as a pioneer in the academic legal field, crosses the disciplinary lines by seeking to develop legal methodology into new cultural methodologies. On the other side, jurists and cultural researchers who criticize his approach, or the way in which he implements it.

Kahn does not call for a reform, but he uses the verb "reconstruct" in the subtitle of the book to emphasize that he wishes to reconstruct, rather than reform, legal studies in the United States. At the center of his book is the new discipline he proposes, the cultural study of law, which employs cultural investigation – sociological, anthropological, philosophical, and historical – as the methodology by which the future jurist learns the cultural context of the rule of law. Such methodology frees the jurists from claims that up until today have led to endless inefficient reforms, and since the jurists and the legal system act within the cultural context, a cultural methodology will enable them to produce a cultural discourse which may be effectively implemented into the democratic rule of law in the United States and worldwide.

If we assume that the book falls within the postmodern tradition[[1]](#footnote-1), which foregrounded cultural analysis, the fact that the book was published almost two decades after postmodernism became established is a testimony of the delayed entry of legal scholars into this discourse. While the postmodernist movement began at the end of the 1960s (some even say that it had started after WWII) and developed within academia in the humanities and social sciences through philosophers such as Schmitt, Foucault, Arendt, Geertz and others (some of whom contributed to establishing the foundation of postmodernism), the book conveys the impression that legal studies have been impervious to postmodernism. Kahn's book relies on the theories of the abovementioned philosophers, making the reader think that Kahn is the first American jurist to discuss cultural methodology. In this review, I will not try to demonstrate that there have been jurists who have preceded him, but that his book suffers from their absence.

The main claim of this review does not challenge the ideas that stem from the book or the methodology it proposes, but it argues that the book misses a central and essential aspect of postmodern methodology – which is the context. In the postmodern sense, it refers to the discourse that constitutes, to a large degree, the cultural theories. When Kahn debates with his fellow jurists, he is in conversation with reformists, and in the debate about cultural theories as a theoretical and methodological tool, he is in conversation with philosophers from different disciplines. But the legal-cultural discussion is largely absent from the book, which therefore suffers from a lack of engagement with the discourse produced by fellow jurists who have already proposed legal-cultural approaches. Producing such a discourse in conversation with colleagues from the legal discipline is important, especially because of the complex task that Kahn is proposing in his book, i.e., uncovering the naturalization of the ideology of the rule of law. Such a task requires wingmen in the legal field. The complexity of the task stems from two main challenges: first, constructing a theoretical foundation and a new terminology to crack the axiom of the rule of law. Second, dealing with criticisms from the worlds of law and cultural research to establish the credibility of a legal-cultural approach among jurists, who form a closed group,[[2]](#footnote-2) developing a firm and worthy methodology, which will be validated with time. So it seems that at this stage of the journey to form a legal-cultural discipline, one should engage with interlocutors who share the same ambitions, rather than reformists.

Some of the criticisms of Kahn’s approach have claimed that there is an inherent contradiction in his book – it is impossible to study oneself. This is a problematic claim, even though it comes from jurists with sociological education[[3]](#footnote-3). It is important to keep in mind that researchers in humanities and social sciences interpret the cultural contexts of the culture from which they come, and even if their perspective may be biased, they are still responsible for providing convincing evidence for their interpretation.

I do agree with critics who have considered his book to be a manifest, rather than the result of comprehensive research[[4]](#footnote-4). Kahn’s argument challenges the discourse of legal realism and positivism, which allows him to declare that legal methodology is failing at the education of legal practice, since it deals with providing answers without first posing questions. And indeed, in the second chapter, Kahn shows that asking questions is the philosophic foundation to which legal thought should be anchored. This is, in essence, an anthropological objective, since it seeks to understand the meaning one gives to the legal system within which one exists. But when discussing this methodology, without referring to the claims laid out in front of him, he misses the opportunity to refine the issue.

For example, let us consider Marc Galanter's talk from 1974. This is an example of a law professor specializing in Indian law with a complex cultural perspective discussing the future of legal studies and making two claims that are also central in Kahn's book: First, that time will tell if we can establish an independent legal-cultural discipline, the purpose of which will be the localization and study of social phenomena, culturalism, and universality, stemming from the relationship between law and society[[5]](#footnote-5). Second, that it is essential to know how to ask "good" questions in a way that enables us to understand legal processes[[6]](#footnote-6). I believe that if Kahn had referred to Galanter’s talk, he would have been able to discuss the reasons why such a discipline had not been established yet, and how his proposed methodology would enable it to develop.

Kahn indeed raises one of the “good” guiding questions advocated by Galanter, when he claims that legal studies should start with the question: “What is the rule of law?” The academic's responsibility is thus to present the rule of law in the broad cultural perspective in which it operates, and assess how it constitutes, as well as serves, culture. In my opinion, this discussion about the rule of law as a cultural phenomenon, developed through the debate with reformists, allows Kahn to explain basic concepts concerning the relation between law and society, but a more advanced discourse about the advantages of creating a legal-cultural discipline is also in order.

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Last Note. While reading the book, I thought a lot about Andrew Abbot’s writing about the system of professions and how it works. Abbot builds a general theory of how and why professionals evolve. In his writing he indicated how important it is for professions to define their boundaries – who enters the profession and who exits it? What are the conditions that allow entry and exit? Entering the profession is a difficult task, but it seems that exiting it (in Kahn’s words – taking a distance) is no less difficult, because if the profession opens its gates to allow easy exit, it will endanger its own status. And perhaps this is the logic that drives law schools to remain a “professional” school.

In this context, one should remember John Stuart Mill’s words. Mill tells us that asking questions about the text, criticizing the text, in not a violation of its credibility. According to Mill, such a step is actually necessary to maintain the vitality of the text. A similar thing can be said about the law – in order for the law to retain its vitality and its legitimacy, it must be open to discussion and cease to be a closed autarkic text.

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Finally, it has been a long while since the book's publication in 1999, allowing a retrospective look at it. One might ask: has there been any fundamental change of the kind that Kahn advocated for? Was the book accepted among the legal community? Have pedagogical changes been made? Did the book make an impact?

Have interdisciplinary legal approaches – such as law and history, or law and feminism – realized part of their objectives? Feminism, for example, strongly criticizes the rule of law and its universal assumptions, revealing the way in which it hides existing power relations and establishes male legal superiority. In recent years, there has also been a burst of writings prompted by legalist populism, which attempted to think critically about the role of law in the destruction of democracies.

However, it seems that law remains primarily linked to a practice, and as such, it avoids critiquing basic assumptions of the discipline such as the rule of law. Unlike anthropology or humanities, legal studies are unable, and unwilling, to accept an external critical perspective – they do not only review a legal phenomenon, but they also teach students to become agents of the law.

I regard Kahn's book as one of the milestones in a necessary process of creating a legal-cultural discipline, leading to my notes through which I wished to shed light on the importance of a broader discussion focusing on the essentials – creating the foundations for such a discipline and developing them further into a methodology, without putting as much effort into convincing the reformists. In my opinion, this work – academic writing, educating new generations with integrated academic tools – will lead to change in the legal systems as well, because the lawyers and the judges themselves will form arguments using new tools and produce legal discourse that considers the cultural field in which they operate, thus better serving the democratic societies that are able to integrate the legal-cultural discipline within higher education institutions.

1. Culver, Kieth. The Review of Metaphysics, 54(4), (2001). 920-921. Retrieved from www.jstor.org/stable/20131636 [↑](#footnote-ref-1)
2. Stryker Robin defined them as Social fact(ness). See Stryker, Robin. Contemporary Sociology; Washington Vol. 30, Iss. 1, (Jan 2001): 82-83. [↑](#footnote-ref-2)
3. Janet Dolgin is also a trained sociologist, and her review demonstrates that she was not convinced by Kahn's book. She argues that his being an American citizen renders him incompetent to write on the subject. This is a rather strange claim, adding to another strange claim that his book is the product of his personal imagination. For further reading - Dolgin, Janet. American Anthropologist, 102(4), (2000). 964-965. Retrieved from [www.jstor.org/stable/684277](http://www.jstor.org/stable/684277). Another interesting claim was that Kahn's book characterizes the writing of a minority member with a tendency for legal writing outside the reformist limits. For further reading - Trevino, A Javier. Society; May/Jun 2001; 38, 4; ProQuest 95-96. [↑](#footnote-ref-3)
4. Culver, Keith. The Review of Metaphysics, 54(4), (2001). 920-921. Retrieved from [www.jstor.org/stable/20131636](http://www.jstor.org/stable/20131636). [↑](#footnote-ref-4)
5. Galanter, Marc. “The Future of Law and Social Sciences Research,” North Carolina Law Review 52 (1974). [↑](#footnote-ref-5)
6. Galanter, *supra note 8.* [↑](#footnote-ref-6)