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2012

# Why Political Theology Again? Reviewing Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty and Sacred Violence: Torture, Terror, and Sovereignty*

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## WHY POLITICAL THEOLOGY AGAIN?

John Wolfe Ackerman\*

PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011). Pp. 224. Paperback \$25.00.

PAUL W. KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* (2008). Pp. 248. Paperback \$24.95.

In one of Paul Kahn's several recent works devoted to his project of theorizing a political theology for modernity, Kahn explains: "The popular sovereign . . . remains a hungry god, and we remain willing to feed it our children."<sup>1</sup> It is precisely the task of describing this "god" and its enduring significance to our politics that Kahn understands as requiring the specific efforts of political theology. Indeed, Carl Schmitt, whose 1922 book *Political Theology: Four Chapters on the Concept of Sovereignty*<sup>2</sup> stands behind the contemporary resurgence of interest in this term and which Kahn rereads in his own latest book, *Political Theology: Four New Chapters on the Concept of Sovereignty*,<sup>3</sup> similarly identified political theology with sovereignty: in the analogy between a sovereign, Creator God who intervenes in the world and a unitary political sovereign who decides on the legal state of exception.<sup>4</sup> Kahn's focus, one might say, is somewhat more democratic, if also much looser, in its apparent use of analogy: we need a "political theology" to properly assess contemporary American politics, because politics (at least in America) is a matter of "the sacred."<sup>5</sup> The sacred, for Americans, in Kahn's telling, is to be found in the sacrifices we offer up to our (popular) sovereign in the willingness to kill and be killed on its behalf, in a meaning-giving violence that represents the "most intense"<sup>6</sup> experience of politics.

Kahn's explicit attempts to explain "why political theology again"<sup>7</sup> take various, slightly shifting forms. Where others would distinguish between different phenomena by

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1. PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* 210 (2007).

2. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. Chi. Press 2005) (1922).

3. PAUL W. KAHN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011).

4. SCHMITT, *supra* note 2, at 5, 36, 38, 47.

5. KAHN, *supra* note 3, at 3, 23.

6. *Id.* at 23.

7. *Id.* at 1.

referring to “political religion” or “civil religion” in distinction from “political theology,” Kahn generally seems to understand “theology,” “the sacred,” and “religion” to refer roughly to the same object.<sup>8</sup> Thus, he argues:

[A] contemporary political theology . . . becomes interesting just to the degree that [theological] concepts continue to support an actual theological dimension in our political practices. Political theology as a form of inquiry is compelling only to the degree that it helps us recognize that our political practices remain embedded in forms of belief and practice that touch upon the sacred.<sup>9</sup>

Put simply, “theology,” as Kahn understands it, refers to giving an account of the sacred, the registering of sacralization as it manifests itself in a community of faith. *Political* theology, then, is the theology of the god held sacred by the particular political community. This means that “political theology” also simply describes what Kahn refers to as the “intertwined character of the political and the religious — the political-theological.”<sup>10</sup> As witnessed in American practices of what is often referred to as “civil religion,” from the “Pledge of Allegiance” to the “memorialization of citizen sacrifice,” Kahn argues, political-theological questions need to be pursued in order to “understand the way in which the modern nation-state — particularly our nation-state — has occupied the place of the sacred for its citizens.”<sup>11</sup> Further, “[f]or [a modern, democratic] political theology, the state begins and ends with a belief in the sacred character of the popular sovereign.”<sup>12</sup> In the American political theological worldview, the American state and the sovereign people occupy the place of a collective but unitary — and exclusive — God who, precisely as (a) God, can command the unquestioning sacrifice of its citizens as well as their enemies.<sup>13</sup>

Why political theology again? Because, above all, it is necessary for “putting liberalism in its place,” as the title of the first volume in Kahn’s series of works on political theology reads.<sup>14</sup> In the liberalism dominant in American political and legal theory, noth-

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8. Indeed, Kahn rejects Robert Bellah’s influential description of an American “civil religion” — despite its considerable affinities with his political theology:

Bellah, the sociologist, does not really understand theology. . . . We have to take far more seriously than he does the object of sacralization in a civil religion. It is not enough to point toward a sort of undifferentiated belief in God. . . . Theologically, our civil religion is not a thin remnant of our Christian faith. It is itself a thick practice of faith attached to its own experience of the sacred.

Paul W. Kahn, *A Civil Religion of Human Rights?*, in *CIVIL RELIGION, HUMAN RIGHTS AND INTERNATIONAL RELATIONS: CONNECTING PEOPLE ACROSS CULTURES AND TRADITIONS* 42, 47 (Helle Porsdam ed., 2012). *Cf.* Robert N. Bellah, *Civil Religion in America*, 96 *DAEDALUS* 1 (1967). On the differences between political theology, political religion, civil religion, and civil theology, see Miguel Vatter, *Introduction* to *CREDITING GOD: SOVEREIGNTY AND RELIGION IN THE AGE OF GLOBAL CAPITALISM*, 6–11 (Miguel Vatter ed., 2011).

9. KAHN, *supra* note 3, at 3.

10. PAUL W. KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* 114 (2008).

11. KAHN, *supra* note 3, at 2.

12. *Id.* at 147.

13. “My god is not just an instance of gods. None of us really believes in the possibility of foreign gods.” Kahn, *supra* note 8, at 56.

14. PAUL W. KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2005).

ing is *sacred*<sup>15</sup> — and so liberalism cannot make sense of any of our deepest beliefs and commitments nor of our (state’s) readiness to take recourse to violence on behalf of them. Liberalism is, in Kahn’s view, congenitally incapable of grasping the circumstances that define our contemporary political condition: sacrificial violence, terror, torture, sovereignty.<sup>16</sup> Here, Kahn joins the parade of commentators who have turned, often grimly, to Carl Schmitt — the brilliant, authoritarian German legal thinker who did his (ultimately insufficient) best to adapt his Weimar-era legal theories into support for the new National Socialist regime<sup>17</sup> — to understand the post-9/11 world. In the face of the extraordinary security measures implemented by the U.S. government in the wake of 9/11, Schmitt’s argument that the ultimate decision that constitutes the sovereign authority as such is the decision on the state of exception<sup>18</sup> seemed to many to offer an appropriate model for decoding contemporary formations of political power.

But Kahn goes further than others, both those who affirm Schmittian political theology as a useful resource for thinking the connection between contemporary political sovereignty and the theological roots of modern politics and those for whom “political theology” captures the key contemporary trend that democratic politics would need to be defended against. First, Kahn insists (both with and beyond Schmitt) that politics have always been grounded upon a potential for extreme (“total”) state violence.<sup>19</sup> Such violence, Kahn argues, must be understood as sacred and is thus unspeakable from the perspective of the liberalism that, ironically, was so dominant in the Cold War period — precisely when the prospect of mutual, complete annihilation loomed most large.<sup>20</sup> Second, as he argues at great length in his next most recent book, *Sacred Violence: Torture, Terror, and Sovereignty*, there is very little separating this most fundamental aspect of all politics from that other special form of state violence that has taken on a new visibility since the start of the “war on terror.”<sup>21</sup> “[T]ak[ing] up arms in defense of the state” is *always*, Kahn declares, a “first step toward torture.”<sup>22</sup> Like other forms of political sacrifice, “[t]orture is, first of all, a form of sacrifice that inscribes on the body a sacred presence.”<sup>23</sup> “Citizens who believe that they embody the popular sovereign” — which is to say, all Americans who have not lost the faith — “will pursue a politics of violent sacri-

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15. Unless we follow Hans Joas and accept that the individual person now occupies the place of the sacred, according to a genealogy of human rights with a religious lineage. See HANS JOAS, *DIE SAKRALITÄT DER PERSON: EINE NEUE GENEALOGIE DER MENSCHENRECHTE* (2011); HANS JOAS, *THE SACREDNESS OF THE PERSON: A NEW GENEALOGY OF HUMAN RIGHTS* (forthcoming Georgetown Univ. Press 2013).

16. KAHN, *supra* note 10, *passim*.

17. See, e.g., CARL SCHMITT, *STAAT, BEWEGUNG, VOLK: DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT* (1933); CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* (Hanseatische Verlagsanstalt rev. ed. 1933) (the revised 1933 edition of his *THE CONCEPT OF THE POLITICAL*); CARL SCHMITT, *ON THE THREE TYPES OF JURISTIC THOUGHT* (Joseph W. Bendersky trans., Praeger Publishers 2004) (1934); CARL SCHMITT, *Der Führer schützt das Recht*, in *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR – GENÈVE – VERSAILLES 1923–1939*, at 227 (Duncker & Humblot 1994). Compare also the new 1934 preface in SCHMITT *supra* note 2, at 1–4.

18. See SCHMITT, *supra* note 2, at 5.

19. See PAUL W. KAHN, *Torture and Democratic Violence*, 22 *RATIO JURIS* 244, 251–52 (2009).

20. See KAHN, *supra* note 14, at 19–20, 241, 278, 281.

21. See KAHN, *supra* note 10, at 14.

22. *Id.*

23. *Id.* at 25.

fice quite independent of the rules of humanitarian law;<sup>24</sup> torture is the “inevitable” response to terror.<sup>25</sup> In fact, as others have suggested in appealing to Schmitt, the world has become decisively more political-theological in the face of contemporary global terrorism, for its advent “represents the point at which conscription” — that is, the call to sacrifice for the sovereign, to kill and be killed for the state — “becomes truly universal, escaping even the formal structures of juridification . . . . It is [now] just a matter of finding oneself on the wrong airplane at the wrong time.”<sup>26</sup>

Kahn has long argued for a revived focus on the centrality of sacrifice to political life. In *Legitimacy and History: Self-Government in American Constitutional Theory*,<sup>27</sup> he highlighted the role of Lincoln and the Civil War in foregrounding sacrifice in the American political imagination: sacrificing his body on the battlefield, “[t]he individual transcends the temporal boundaries of the self by merging with the state.”<sup>28</sup> In *The Reign of Law: Marbury v. Madison and the Construction of America*,<sup>29</sup> he argued that revolutions found enduring communities of law by inscribing a text on the bodies of their participants, which come to literally embody the revolution’s truths: “Law is the text read out of past acts of political sacrifice. The rule of law is the system of political order founded on the interpretation of those texts.”<sup>30</sup> In *Putting Liberalism in Its Place*,<sup>31</sup> he charged that liberalism remains “speechless in the face of sacrifice”<sup>32</sup> even though modern nation-states arose and persist as “grand institutional structures for the sacrifice of their citizens to the idea of the necessity of the state’s continued existence.”<sup>33</sup> In *Political Theology*, he takes up this discussion again in conversation with Schmitt.<sup>34</sup> To the extent that Kahn construes political sacrifice (for the state) in analogy to theological sacrifice (on the cross), this indeed represents an instance of what Schmitt calls political theology;<sup>35</sup> even if there is nothing of this particular equation to be found in Schmitt, the structure of analogy between political and theological concepts is, in Schmitt’s argument, what makes political theology historically and theoretically relevant.<sup>36</sup> For Kahn, the sacrificial character of statist politics means that, to put a new twist on a formulation famously mocked by Schmitt, “political theology . . . begins,” in Kahn’s understanding,

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24. *Id.* at 64.

25. *Id.* at 13; *but cf. id.* at 172 (“[W]e intuitively know that torture is virtually inevitable.”).

26. KAHN, *supra* note 3, at 156.

27. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* (1992).

28. *Id.* at 53.

29. PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

30. *Id.* at 88–89.

31. KAHN, *supra* note 14.

32. *Id.* at 224.

33. *Id.* at 92.

34. *See* KAHN, *supra* note 3, at 2.

35. *Id.* at 51; KAHN, *supra* note 1.

36. SCHMITT, *supra* note 2, at 36–37.

“where law ends”<sup>37</sup> — that is, with “sacrifice as the archetype of political behavior that is beyond law.”<sup>38</sup>

Here, Kahn begins to mark his distance from Schmitt, who appeals to political theology precisely for the purpose of explaining law and, above all, what he calls legal form (*Rechtsform*).<sup>39</sup> In prior work, Kahn consistently defended law as the proper manifestation of order — the necessary “other” to moments of political action — but the elevation of the significance of political theology in his work seems to correspond to a demotion of law’s standing in his view.<sup>40</sup> Whereas sacrifice, for example, was earlier construed chiefly — via theological analogies — in terms of its role in founding and sustaining law,<sup>41</sup> *Political Theology* seems to institute a new autonomy for action, inspired apparently by Schmitt’s emphasis on the state of exception, or the possibility of, as Kahn puts it, “sovereign action beyond the rule of law.”<sup>42</sup> This is on the face of it puzzling, since Schmitt’s own theorization of the legal state of exception, as Kahn recognizes, was meant to counter legal theories that had no room for such action and thus had to conceive it as simply “beyond law.”<sup>43</sup> Kahn, however, now seems less interested in the difference law might make and more interested in what he imagines as the pure freedom of the sovereign will: “A politics of the exception . . . is also an experience of freedom.”<sup>44</sup> The point of politics is to produce ultimate meaning, Kahn proclaims, and such meaning is to be found in the sacrifices we freely make: “If sovereignty is grounded in sacrifice, then public life is as much about the realization of a transcendent truth of the self as it is about the maintenance of a just legal order.”<sup>45</sup> All this exceeds the perspective of law, even if sacrificial violence may, when not in vain, leave law in its wake — as in the constitutional law of the modern nation-state.<sup>46</sup> Since such sacrifices are made only on behalf of that which we hold sacred — and, moreover, entail a becoming-sacred of the self that is sacrificed<sup>47</sup> — only political theology is equipped to capture them. Politics is, by its very nature, theological.

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37. KAHN, *supra* note 3, at 2. Cf. SCHMITT, *supra* note 2, at 4, 15 (quoting Anschütz: “There is not only a gap in the law [*im Gesetz*] . . . but moreover in law as a whole [*im Recht*] which in no way can be filled by juristic conceptual operations. Here is where public law [*Staatsrecht*] stops.” (internal quotation marks omitted)). See *infra* note 73.

38. KAHN, *supra* note 10, at 179 n.2.

39. See SCHMITT, *supra* note 2, at 16, 28–35. On the tendency in recent scholarship to avoid the specifically juridical character of Schmitt’s writings, and for a reading of Schmitt’s political theology countering this trend, see REINHARD MEHRING, *Macht im Recht: Carl Schmitts Rechtsbegriff in seiner Entwicklung*, 43 DER STAAT 1 (2004). Jean-Claude Monod rightly notes that Schmitt’s Nazi-era writings commit “a form of juridical suicide.” See JEAN-CLAUDE MONOD, *LA QUERELLE DE LA SÉCULARISATION: THÉOLOGIE POLITIQUE ET PHILOSOPHIES DE L’HISTOIRE DE HEGEL À BLUMENBERG* 190 (2d ed. 2012).

40. See KAHN, *supra* note 29, at 32–34.

41. See, e.g., *id.* at 86.

42. KAHN, *supra* note 3, at 16.

43. See SCHMITT, *supra* note 2, at 13, 15, 28–35.

44. KAHN, *supra* note 3, at 157.

45. *Id.* at 24.

46. KAHN, *supra* note 10, at 98.

47. *Id.* at 108–09.

Not reason but decision describes *that most characteristic of all political acts: killing and being killed for the state*. . . . Just at the point that discourse ends and the act remains, we need to move from political theory to political theology. This is the point of Schmittian exception: beyond law is the act.<sup>48</sup>

Kahn's book is not, he clarifies, an exegesis of Schmitt's earlier book,<sup>49</sup> and indeed it would perhaps be less interesting if it was. It is something more like an inspired rewriting of Schmitt's project, and it would be unfair to simply complain that the work Kahn produces in dialogue (often only nominally) with Schmitt departs radically from Schmitt. There is certainly room to depart from Schmitt, and this can be done productively (*contra* those who would see Schmitt's thinking as uniformly contaminated by his association with National Socialism and thus off limits). But this limited and indeed relatively uncritical engagement with Schmitt's *Political Theology* opens up several possible avenues for critique of Kahn's own work. First, Schmitt's text can itself be read to offer a critical perspective on Kahn's attempt to engage political theology in what he depicts as a neutral description of America's singular political culture.<sup>50</sup> Second, other versions of political theology also contest the depiction offered by Kahn, and they have done so at least since Schmitt advanced his political theological thesis. Ironically, Schmitt's particular account of political theology was perhaps more contested then than it is now, a point that has been lost in part because Schmitt's usage has lately achieved a near-monopoly on the term — so that alternatives no longer seem to look like political theology at all.

## II.

Schmitt's political theology, as Kahn recognizes, revolves around the claim that modern human political powers are analogous to those once ascribed to an all-powerful creator God.<sup>51</sup> Kahn's own political theology also resembles Schmitt's position, articulated in *The Concept of the Political*,<sup>52</sup> that politics only exists where the possibility exists that it will issue in the killing and being killed of war, either international or civil.<sup>53</sup> "Politics," Kahn never ceases to repeat, is most fundamentally a matter of "killing and being killed for the state,"<sup>54</sup> "the fundamentals of political grammar" take the form of

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48. KAHN, *supra* note 3, at 157 (emphasis added).

49. *Id.* at 27–28.

50. See, e.g., KAHN, *supra* note 3, at 18, 25–26, 126. See also Paul W. Kahn, *Political Theology: A Response (Part One: The Disciplinary Divide)*, POL. THEOLOGY BLOG (Nov. 28, 2011), <http://www.politicaltheology.com/blog/?p=1288>.

51. See KAHN, *supra* note 3, at 91.

52. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. Chi. Press 1996) (1932).

53. See *id.* at 32–33.

54. KAHN, *supra* note 10, at 89; KAHN, *supra* note 3, at 157. See also KAHN, *supra* note 10, at 14, 35, 43, 79, 86, 104, 119, 124–30, 132, 136–37, 143, 144, 150–51, 153, 156, 163, 173; KAHN, *supra* note 3, at 23, 28.



“self-sacrifice through the violent act.”<sup>55</sup> When this involves “killing and being killed for the state” — for the popular sovereign, that “hungry god” who demands our sacrifices — then it is a “sacred violence,” as in the title of Kahn’s previous book, which does not rely on Schmitt in any systematic way.<sup>56</sup> Indeed, reading Kahn’s last two books together illuminates his turn to Schmitt by clarifying a crucial difference between their respective positions: whereas Schmitt insists (questionably) that politics only exists where the extreme possibility of violent death in war also exists (as the most extreme form of political conflict),<sup>57</sup> Kahn maintains that politics *is*, most fundamentally and in its very grammar, such violence.<sup>58</sup> For Kahn, political theology describes the sacralization of violence carried out in the state’s name. This is no longer analogy but the real displacement of an earlier theistic worldview, the becoming-god of man:

[S]acrifice is about the transformation of the profane character of the self into an instantiation of the sacred. . . . The first moment of sacrifice is always a dying of the self; the second is sacred presence. The third, or synthetic, moment is a showing forth of the sacred presence in and through the exercise of a power to destroy: the sacrificed becomes the sacrificer. Man becomes god.<sup>59</sup>

Although it is tempting to see this aspect of Kahn’s argument as “Schmittian,” it is not. Indeed, in *Political Theology*, Schmitt shows little to no interest whatsoever in the question of “the sacred.” Take the respective discussions of miracle in Schmitt and Kahn’s books. For Schmitt, the main service performed by political theological argument is to locate political sovereignty in a unitary instance with the power of ultimate decision, i.e., in an analogy to a sovereign God: a power that is not granted by a legal rule or overseen by a legal structure but simply exercised.<sup>60</sup> The theological concept of the miracle thus represents the possibility of the kind of exceptional intervention — which suspends the rule in order to maintain the larger order — that modern scientific metaphysics and the modern constitutional state, in non-accidental parallel, have banished from the world.<sup>61</sup> The explanatory value of this kind of “systematic analogy” between metaphysical-theological worldview and conception of political-legal order is what Schmitt’s mode of political theology seeks to foreground.<sup>62</sup> Kahn’s parsing of Schmitt’s discussion of miracle, in contrast, goes far beyond Schmitt’s formal analogy, focusing instead on the (theological) miracle’s substantively “sacred” character and its implications: “The mira-

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55. KAHN, *supra* note 10, at 89.

56. See generally KAHN, *supra* note 10; KAHN, *supra* note 1, at 210.

57. SCHMITT, *supra* note 52, at 33–39.

58. KAHN, *supra* note 3, at 157; KAHN, *supra* note 10, at 89.

59. KAHN, *supra* note 10, at 108–09.

60. See SCHMITT, *supra* note 2, at 5–6. *But cf.* Vatter, *supra* note 8, at 3 (“That the analogy between God and sovereignty can be questioned and is questionable is reflected by the fact that God needs to be credited with sovereignty.”); as well as Jan Assmann’s counter-thesis on the historical theologization of originally secular, political power. See JAN ASSMANN, HERRSCHAFT UND HEIL: POLITISCHE THEOLOGIE IN ALTÄGYPTEN, ISRAEL UND EUROPA 29 (2000).

61. SCHMITT, *supra* note 2, at 36.

62. *Id.* at 36, 42, 46.

cle announces a relationship to a sacred, caring God.”<sup>63</sup> “Establishing a site of sacred appearance, it reorders history and space.”<sup>64</sup> “The miracle touches on the idea of sacrifice, for the presence of the sacred always destroys some element of the finite.”<sup>65</sup> Likewise, political revolution “is always miraculous. To be as a part of the revolution is to experience the mystical corpus of the sovereign.”<sup>66</sup>

Indeed, Kahn wants to claim a broader, quasi-universal meaning for this kind of “sacredness” that, in his view, extends across time and Western culture and necessitates political theology.<sup>67</sup> This explodes Schmitt’s argument about analogy (despite Kahn’s claim to the contrary<sup>68</sup>); instead of drawing on theology to explain politics, political theology in Kahn’s sense is necessary to identify that “actual theological dimension in our political practices.”<sup>69</sup> Kahn recognizes that this leads him to “part company from Schmitt” — suggesting, in so doing, that the problem is that Schmitt’s view of order, so central to his thought, is not “postmodern” enough.<sup>70</sup> Kahn seems to think that postmodern diversity — multiple sources of belief — plus a bit of bricolage can license his more liberal application of the sacred in place of Schmitt’s “single theoretical model,” which privileges one metaphysics or theology and places it at the top of a hierarchy of social imaginaries.<sup>71</sup> Kahn wants to keep Schmitt’s conception of unitary sovereignty and its theological mooring but then use that link to underscore the persistently sacred character of the modern state, whatever its form, irrespective of the particular theological convictions of its citizens.<sup>72</sup> But the effect of this transformation is to eliminate any sense of politics as Schmitt had tried to illuminate it through appeal to theology.

The point of Schmitt’s attempt to reinfuse a grasp of sovereignty into political and legal theory by mobilizing theological analogy was to insist that, in concrete and unforeseen situations of conflict with a political opponent, a decision must be made that cannot be accounted for by any pre-given legal apparatus. Against the evasion of this problem in the German theory of public law of the time, which suggested that such decisions simply lie beyond the compass of law — “Here is where public law stops,”<sup>73</sup> — Schmitt insisted that such a decision was properly fundamental to law — provided that law could be (re)conceived dynamically and politically.<sup>74</sup> But Schmitt’s conservative, authoritarian inclination to preserve the existing order at all costs (undoubtedly partly a reflection of the precariousness of the German Weimar Republic in which he wrote), regardless of the

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63. KAHN, *supra* note 3, at 109.

64. *Id.*

65. *Id.*

66. *Id.* at 139.

67. *See, e.g., id.* at 138–41, 147, 157; KAHN, *supra* note 10, at 114, 134, 136–38, 153, 173–74.

68. *See, e.g.,* Paul W. Kahn, *Political Theology: A Response (Part Two: The Autochthonous State)*, POLITICAL THEOLOGY BLOG (Dec. 1, 2011), <http://www.politicaltheology.com/blog/?p=1298> (“I assert ‘only’ an analogy between the traditional religious use and the political use of these categories.”).

69. KAHN, *supra* note 3, at 3.

70. *Id.* at 115.

71. *Id.* at 115, 118.

72. *See id.* at 120–22.

73. *See* SCHMITT, *supra* note 2, at 4, 15 (quoting Gerhard Anschütz in GEORG MEYER, 3 LEHRBUCH DES DEUTSCHEN STAATSRECHTS 906 (G. Anschütz ed., 7th ed. 1919)).

74. *See id.* at 10–15, 30–35, 52.

altered form it might assume — here Kahn’s criticism is not entirely off the mark — led him to undermine the force of his own thinking, obstructing the kind of political encounter with difference — in which the possibility of an existential conflict could never be ruled out in advance — that his theory was supposed to accommodate.<sup>75</sup> Kahn’s alternative, however, seeks to locate “politics” “beyond law” all over again, precisely where no encounter whatsoever is needed: in the self-realization of an existing state (unreflectively) believed sacred and worthy of being defended, violently, by virtue of that belief.<sup>76</sup>

Kahn concludes his version of chapter three (in Schmitt’s book, this is the chapter that argues for the correspondence between an era’s metaphysical picture and its conception of political order, in order to explain the disappearance of the personalistic understanding of juridical form qua sovereign decision<sup>77</sup>), improbably: “A politics that is complete in itself, that wants only to realize its own truth, touches on the sacred.”<sup>78</sup> But this idea of “a politics that is complete in itself” is, Schmitt tells us, a dangerous, deeply antipolitical illusion; Schmitt dispenses with this kind of illusory self-absorption elsewhere under the name “political romanticism.”<sup>79</sup> Schmitt is rightly contemptuous of the kind of self-sacralization Kahn’s political theology describes. A state that aspires to such a politics will inevitably be incapable of distinguishing friend from enemy, in Schmitt’s terms; its efforts to realize itself autonomously cannot but hasten its self-destruction.<sup>80</sup> In Schmitt’s view, nothing but the concrete “case of conflict [*Konfliktsfall*]” can call for killing and being killed; there is no other possible justification beyond the actually threatened negation of one’s form of existence.<sup>81</sup>

On such questions, the key Schmittian text of reference is not *Political Theology* but *The Concept of the Political*.<sup>82</sup> There, Schmitt defines politics in terms of the possibility of distinguishing between friend and enemy and the potential for war or revolution contained in this opposition.<sup>83</sup> Schmitt juxtaposes his definition to liberalism’s inability to provide a theory of politics.<sup>84</sup> This is of course congenial to Kahn, but the affinity is limited. Schmitt’s critique of liberalism is always a critique of liberal individualism and its preoccupation with the freedom of individual selves and the pursuit of their interests at the expense of politics.<sup>85</sup> Freedom of any stripe is never among his central concerns.

75. See JOHN WOLFE ACKERMAN, *The Memory of Politics: Arendt, Schmitt and the Possibility of Encounter*, in CONCENTRATORY MEMORIES: POLITICS OF REPRESENTATION 1945-1985 (Griselda Pollock & Max Silverman eds., forthcoming 2013).

76. KAHN, *supra* note 3, at 157.

77. SCHMITT, *supra* note 2, at 36–52.

78. KAHN, *supra* note 3, at 122.

79. See generally CARL SCHMITT, *POLITICAL ROMANTICISM* (Guy Oakes trans., Mass. Inst. Tech. Press 1986) (1919).

80. See, e.g., SCHMITT, *supra* note 52, at 38.

81. *Id.* at 27, 39. Cf. CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN: TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* 27, 39 (Duncker & Humblot 1991).

82. SCHMITT, *supra* note 52.

83. *Id.* at 26, 30.

84. *Id.* at 69–70.

85. See *id.* (“The negation of the political, which is inherent in every consistent individualism, leads necessarily to a political practice of distrust toward all conceivable political forces and forms of state and government, but never produces on its own a positive theory of state, government, and politics. As a result, there exists a liberal policy [*Politik*] in the form of a polemical antithesis against state, church, or other institutions

Kahn presents his own critique of liberalism as, above all, a defense of freedom and goes so far as to read Schmitt's *Political Theology* as itself a treatise on the possibility of free action and free thought.<sup>86</sup> Kahn's aim is to show that freedom, like Schmitt's sovereignty, is necessarily decisionistic, not a product of reason or the elaboration of rights but a practice of autonomous will: "the realization of *the self's* freedom."<sup>87</sup> This quest, Kahn suggests, reaches a kind of apotheosis through the free choice to sacrifice oneself on behalf of the state and in the expectation of a transfiguration by way of which the finite, individual body merges with the infinite, mystical corpus of the state.<sup>88</sup> The personalistic character of Schmitt's sovereign decision, in contrast, is a reflection of his view of the need for a particular authority capable of deciding in the face of a concrete threat to the state and the legal order for the continued existence of that order: "What matters for the reality of legal life is who decides."<sup>89</sup> Paradoxically, Kahn's political-theological alternative to liberal freedom intensifies liberalism's tendency toward atomism; his focus on the (now "political") promise of individual salvation may be lent a corporate mien by his statist Christology, but it is not thereby displaced.<sup>90</sup> Indeed, out of disdain for liberalism's commitment to public reason — which, for liberalism, admittedly, is arrived at only apolitically, by aggregation — Kahn, *contra* Schmitt, privatizes and depoliticizes freedom even further.

Schmitt is similarly disdainful of the kind of vague, mystical theologizing in which Kahn indulges. Schmitt is unflinching in his insistence that the problem of sovereignty for law, which theology is called upon to address, is an emphatically juridical, formal problem.<sup>91</sup> His *Political Theology* is concerned, above all, with the role played by the exception to the legal order in the "constitution" of the legal order, that is, in the creation of the situation in which a legal order can be valid, and with the effect the case of the exception has on the character of the legal order as a whole.<sup>92</sup> The problem of sovereignty is thus, for Schmitt, the problem of legal or juridical form (*Rechtsform*) itself, "the problem of law as a substantial form."<sup>93</sup> Sovereignty, Schmitt declares, is a "basic concept (*Grundbegriff*) of jurisprudence," and the task of defining it is one of "stating with greater precision the juridically essential."<sup>94</sup> In this task, Schmitt refuses both "mythology" (accusing Kelsen of practicing it<sup>95</sup>) and mysticism, defending the structural, systematic character of his theological analogy against Preuß's charge that sovereignty theory is necessarily, problematically theologico-metaphysical and "mystical."<sup>96</sup> Schmitt's turn to

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which restrict individual freedom. . . . but absolutely no liberal politics [*Politik schlechthin*] [i.e., politics as such] . . ."). Cf. SCHMITT, *supra* note 81, at 69.

86. See KAHN, *supra* note 3, at 125.

87. *Id.* at 131 (emphasis added).

88. See *id.* at 139.

89. SCHMITT, *supra* note 2, at 34.

90. See, e.g., KAHN, *supra* note 3, at 51, 86.

91. See SCHMITT, *supra* note 2, at 16–35.

92. See *id.* at 5–10, 31–32.

93. *Id.* at 23. Cf. CARL SCHMITT, *POLITISCHE THEOLOGIE: VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT* 31 (Duncker & Humblot 2004) (1922) [hereinafter *POLITISCHE THEOLOGIE*].

94. *POLITISCHE THEOLOGIE*, *supra* note 93, at 26. Cf. SCHMITT, *supra* note 2, at 18 (translation modified).

95. *POLITISCHE THEOLOGIE*, *supra* note 93, at 28.

96. *Id.* at 45. Cf. SCHMITT, *supra* note 2, at 39.

the theism of the counter-revolutionary thinkers of the Restoration period, especially Donoso Cortés, is meant to offer evidence for the validity of this analogy as well as for the necessarily personalistic and decisionistic character of political sovereignty.<sup>97</sup> This is a lesson drawn from the counter-revolutionaries' theology, to the extent that their philosophy of the state corresponded to their metaphysics. Yet, even Donoso Cortés, Schmitt underscores, "saw only the theology of the foe. He did not 'theologize' in the least; there were no ambiguous, mystical combinations and analogies, no Orphic oracle."<sup>98</sup> Kahn, in contrast, imbibes theatrically theological language and wields it freely to describe the civil religious worship of and tribute paid to the American popular sovereign "god" by its faith community, the nation.<sup>99</sup>

In assuming that "political theology" describes a force that shores up the state, granting it a supplement of authority that approaches to politics ignorant of theology cannot approximate, Kahn roughly follows Schmitt.<sup>100</sup> Kahn seems to think that by emphasizing that, in his perspective, it is the *popular* sovereign that is now sacred, he, unlike Schmitt, can give an account of a democratic political theology appropriate for our time.<sup>101</sup> In fact, Kahn is mistaken in thinking that this focus distinguishes him sharply from Schmitt, who also formulates an account of the democratic popular sovereign corresponding to his political theology;<sup>102</sup> indeed, the politics Kahn describes remains, like Schmitt's, fundamentally authoritarian. Kahn attempts to describe away this impression by appeal to an extended analogy between political decision and artistic creation meant to underscore the theme of political freedom:

The more radical the creative act, the more likely it will be condemned by many as mere destruction. We intuitively grasp that freedom has costs. Aesthetic production is never just 'fun'; it always has an element of suffering. . . . the suffering that comes with the constant need to decide.<sup>103</sup>

Kahn's effort to read Schmitt's essay as a treatise on freedom may be unexpected, but it is not, finally, completely unjustified. It has to rest on extending the analogy between God and modern political man to cover all aspects of human life: if God is (or was) absolutely free, and modern man has assumed God's powers, then man must be just as free as God. What Kahn does not openly acknowledge is Schmitt's key insight, with which his

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97. See SCHMITT, *supra* note 2, at 51–66.

98. *Id.* at 62. Cf. POLITISCHE THEOLOGIE, *supra* note 93, at 66.

99. See, e.g., KAHN, *supra* note 3, at 25–26; KAHN, *supra* note 10, at 153–54, 164, 176.

100. See generally KAHN, *supra* note 3.

101. See *id.* at 1–2, 9–10.

102. See especially Schmitt's discussion of the constitution-making, or constituent, power in CARL SCHMITT, CONSTITUTIONAL THEORY 125–35, 268–71 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928). Compare with CARL SCHMITT, VERFASSUNGSLEHRE 75–87, 238 (Duncker & Humblot 2003) (1928) and the reference to revolution in SCHMITT, *supra* note 52, at 30. Compare also ANDREAS KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 88–126 (2008) as well as John Wolfe Ackerman, Book Review, 86 GERMANIC REV. 320–24 (2011).

103. KAHN, *supra* note 3, at 130.

*Political Theology* concludes, that this kind of “freedom,” or free sovereign decision, can only assume the form of dictatorship in a modern world that no longer recognizes a divine right of kings.<sup>104</sup>

### III.

There has been a resurgence of interest in political theology of late, not all of it sympathetic to Schmitt, and some of it distinctly anti-authoritarian.<sup>105</sup> This range of texts should serve as an easy reminder that there is not just one political theology; rather, there are many different possible interpretations of the resources to be found in theology for thinking and speaking — critically — about politics and for acting politically. This is, it is worth emphasizing, not new: at the time Schmitt staked his claim to the term, in the tumultuous early years of the Weimar Republic, others were also working out the political implications of theology, but in the name of other understandings of politics.<sup>106</sup> The dominance of the Schmittian frame has, however, made it difficult to perceive other political theologies as such. Hannah Arendt, for example, is one of Schmitt’s most incisive critics. She engages Schmitt’s political theology critically throughout her career, from her own Weimar-era dissertation on Augustine and love of neighbor<sup>107</sup> to her theory of a constitutionalism of new beginnings in *On Revolution*.<sup>108</sup> In her work, this engagement gives rise to an emphatically pluralistic political theory that, though it is rarely noted, is also a political theology — one that takes its orientation not from unitary, sovereign de-

104. See SCHMITT, *supra* note 2, at 51–52, 66. The discussion of Donoso Cortés and dictatorship closes the third chapter of *Political Theology* and continues through all of chapter four, to the book’s pointed conclusion. Kahn describes Schmitt’s last chapter as “obscure” and seems to see it as outdated, especially the discussion of Donoso Cortés, the hero of Schmitt’s text, to whose claims Kahn pays no attention, apparently thinking, *pace* Schmitt, that time has indeed passed him by. KAHN, *supra* note 3, at 123.

105. See, e.g., GIORGIO AGAMBEN, *THE TIME THAT REMAINS: A COMMENTARY ON THE LETTER TO THE ROMANS* (Patricia Dailey trans., 2005) (2000); ALAIN BADIOU, *SAINT PAUL: THE FOUNDATION OF UNIVERSALISM* (Ray Brassier trans., 2003) (1997); SIMON CRITCHLEY, *THE FAITH OF THE FAITHLESS: EXPERIMENTS IN POLITICAL THEOLOGY* (2012); CLAYTON CROCKETT, *RADICAL POLITICAL THEOLOGY: RELIGION AND POLITICS AFTER LIBERALISM* (2011); VINCENT W. LLOYD, *THE PROBLEM WITH GRACE: RECONFIGURING POLITICAL THEOLOGY* (2011); DAVID NOVAK, *THE JEWISH SOCIAL CONTRACT: AN ESSAY IN POLITICAL THEOLOGY* (2005); *POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD* (Hent de Vries & Lawrence E. Sullivan eds., 2006); JEFFREY W. ROBBINS, *RADICAL DEMOCRACY AND POLITICAL THEOLOGY* (2011); JACOB TAUBES, *THE POLITICAL THEOLOGY OF PAUL* (Aleida Assmann et al. eds., Dana Hollander trans., 2004) (1993); SLAVOJ ŽIŽEK, ERIC L. SANTNER, & KENNETH REINHARD, *THE NEIGHBOR: THREE INQUIRES IN POLITICAL THEOLOGY* (2005).

106. See, e.g., KARL BARTH, *DER RÖMERBRIEF* (2d ed. 1922); WALTER BENJAMIN, *The Critique of Violence* (1921), I SELECTED WRITINGS 236 (Marcus Bullock & Michael W. Jennings eds., 1996); MARTIN BUBER, *I AND THOU* (Walter Kaufmann trans., Charles Scribner’s Sons 1970) (1922); FRANZ ROSENZWEIG, *THE STAR OF REDEMPTION* (Barbara E. Galli trans., Univ. Wis. Press 2005) (1921). See also *THE WEIMAR MOMENT: LIBERALISM, POLITICAL THEOLOGY, AND LAW* (Leonard V. Kaplan & Rudy Koshar eds., 2012). For one more recent, now (in the United States, at least) partly forgotten debate over the possibilities for non-Schmittian political theologies, see *CIVIL RELIGION AND POLITICAL THEOLOGY* (Leroy S. Rouner ed., 1986), which includes contributions by the two leading German “new political theologians,” Johann Baptist Metz and Jürgen Moltmann.

107. See generally HANNAH ARENDT, *DER LIEBESBEGRIFF BEI AUGUSTIN: VERSUCH EINER PHILOSOPHISCHEN INTERPRETATION* (1929).

108. See generally HANNAH ARENDT, *ON REVOLUTION* (rev. ed. 1965).

cision but from plural encounter with the neighbor.<sup>109</sup> Others, too, have found resources in political theology for a radically pluralistic politics.

Kahn's choice of political theology — which he so insistently maintains is merely a neutral, non-normative effort at description of American “political culture” — rules out other more critical possibilities. It is also not necessarily a good description: American society is far too pluralistic to be adequately captured by an account of the American sovereign's power to conscript citizens into the work of killing, even if this power is an awesome one. Its location is also more ambiguous than Kahn would have it: his appeal to the hijacked passenger plane as an example of the realization of universal conscription,<sup>110</sup> for example, hardly attests to a unified state or nation-centered sovereignty. And one could argue against Kahn that America's continual worldwide recourse to armed and deadly military intervention is evidence not of the sacredness with which such killing is endowed, but rather of the all too profane combination of normalization, disinterest, and profit-seeking that makes such “operations” continuously possible in the first place and makes it possible to overlook the lasting consequences for those involved in the killing “on both sides.” Rather than simply providing the American soldiers who kill and get killed (over ever-repeated “tours of duty” — the banality of this language is telling) with the kind of “ultimate meaning” that Kahn romantically anticipates (by, albeit, reducing what they do to “killing and being killed,” in his refrain), it leaves many of those who are not killed instead searching for ways to get on at all as members of an American society from which they remain alienated, even after a return to civilian life (and which for the extremely high number of veteran suicides finds a futile and very unsacred end).<sup>111</sup> It is not that Kahn does not see this aspect of war — *Sacred Violence* contains a lucid analysis of what the returning soldier must be prevented from speaking about and of how he or she will be turned into a scapegoat to preserve the war's symbolism if necessary<sup>112</sup> — but that he thinks there can be, quite simply, no state, no sovereignty, no politics that does not entail successfully covering it up.<sup>113</sup> In this case, “political theology” of the Kahnian variety would at least have the distinct merit of revealing what “politics” itself necessarily disguises.

“[N]ot law, but exception; not judge, but sovereign; not reason, but decision. The inversion is so extreme that we might think of political theology as the dialectical negation of liberal political theory,” Kahn declares, somewhat triumphantly, in opening his discussion of Schmitt's *Political Theology* — following his series of attempts, in prior books, to formulate his own modern political theology as the antipode to liberalism

109. See generally ACKERMAN, *supra* note 75; John Wolfe Ackerman, *The Politics of Political Theology* (unpublished Ph.D. dissertation, Northwestern University) (on file with author).

110. KAHN, *supra* note 3, at 156.

111. And this is not new either: despite Lincoln's rhetorically triumphal effort to sacralize (by theologizing) the deaths at Gettysburg, the scale and horror of Civil War death, as Drew Gilpin Faust has recently illustrated, stubbornly defied efforts to endow it with a higher meaning. See DREW GILPIN FAUST, *THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR* (2008). As Faust also notes, the mammoth scale of death did, however, generate real initiatives to reorder the polity it had so shaken, helping to bring about a newly centralized nation-state. See *id.* at xiii. Cf. KAHN, *supra* note 10, at 109; KAHN, *supra* note 3, at 121.

112. See KAHN, *supra* note 10, at 159–67.

113. See *id.*

without much help from Schmitt.<sup>114</sup> Indeed, the inversion Kahn proclaims is far *too* extreme to illuminate either Schmitt's *Political Theology* or political theology in general. It is undermined, not strengthened, by Kahn's partial encounter with Schmitt, and another political theology, one that, like Arendt's, proceeds critically from the insights offered by Schmitt and his political theology, might well draw on theology to productively erode all of these distinctions even further. Still, Kahn's critiques of many contemporary ("liberal") pieties are welcome, often precisely when he brazenly rejects reigning binary distinctions that are supposed to reassure us that there is nothing theological about our politics: the distinction between the American penal system and Islamic *Shari'a* law,<sup>115</sup> between combat and torture,<sup>116</sup> between soldier and torture victim.<sup>117</sup>

A crude version of Schmitt's conception of "political theology" has dominated political theory discussions in recent years, obscuring the possibility of political-theological alternatives and distorting discussion of the potential implications of theology for politics. Kahn's unorthodox appeal to Schmitt partly bucks this trend and, in doing so, provides some new and unawaited insights into American politics and jurisprudence that go beyond the Schmitt discussion of recent years. Still, it would be a distinct loss for the American legal community — and a handicap for efforts to address the real challenges posed today for dominant, "secular" legal systems by a multiplicity of religiously and theologically motivated practices and ways of life — if Kahn's peculiar understanding of "political theology" was accepted as adequately capturing the possible meanings of this term, especially at a time when it is all too easy to believe that appeals to theology or religion can only have authoritarian implications for politics. Indeed, the relevance of political theology for law today may well lie not in its ability to account for a "beyond" to law, beginning "where law ends," but rather in its potential to call forth alternative understandings of law that are political in ways that the appeal to theology makes newly visible. Kahn's recent writings, in contrast, may in fact provide a revealing diagnosis of a specifically American tendency to look beyond law in order to *avoid* political engagement by means of a self-sacralization that is also deeply irreligious. If they do, however, then it is precisely in so doing that the so-called "political theology" he articulates has little to say about theology and — if politics entails, most characteristically, *not* killing *but* the negotiation of encounters across lines of difference, including in the face of potential risks to one's own well-being — has even less to say about politics.

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114. KAHN, *supra* note 3, at 31 (citation omitted).

115. KAHN, *supra* note 10, at 45, though in the process reproducing a typical caricature of the latter ("[T]here is no universal moral calculus by which we can measure a lifetime in an American prison against an amputation.").

116. *Id.* at 46 ("Combat so deeply denies recognition of the dignity of the other that torture never begins because dignity is never glimpsed.") (citation omitted).

117. *Id.* at 47 ("In between the moment when combatants take up the task of self-sacrifice and that in which they effectively surrender, their situation is one of 'being sacrificed.' In this in-between period, they are very close — politically and phenomenologically — to the classic victim of torture: each is made to bear the presence of the sovereign in and through the destruction of his or her body.").