Legal Performance and the Imagination of Sovereignty

Paul W. Kahn
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/321

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Performance and the law is not a small topic. Indeed, it is not a topic within the law at all. Rather, performance is a characterization of the whole of law. There is not more or less of it in certain areas of the law. There is nothing but performance, extending from judges, to parties, to ordinary citizens. Yet, while comprehensive, the idea of legal performance is not so broad as to be analytically unhelpful. It would be if there were only one way to understand the political order. But, in fact, law works on a highly contested symbolic field. The performativity of law is best understood as securing and stabilizing a position on this field.

To understand the rule of law, one must look to the competing understandings of self and polity actually in play for the citizens of a modern, democratic nation-state. (Variations across nations and groups are to be expected, and my examples come from the United States in particular.) There is nothing theoretical about the rule of law; it is, rather, a configuration of the imagination. As such, it is bound to historical contexts. Today, the rule of law must shape the imagination of citizens who maintain a myth of their own revolutionary origin, live in a world of multiple sovereign states, and confront the emerging pressures of globalization. These citizens imagine themselves in multiple relationships to the polity: private persons using law and politics to advance their own ends, rights-bearing subjects under legitimate law, and members of the popular sovereign.

As private persons, citizens have a conception of the self prior to law; as members of the sovereign, they intuit a politics of exception—of revolution and war—beyond the ordering capacity of law. The strains on the legal imagination come from both directions—markets and war. Law is tested, and the legal imagination is successful, when these dimensions, too, are perceived from within the rule of law. American legal and political theory is constantly confused over the relationships among these conflicting imaginaries of markets, law, and war—or market participants, rights bearers, and combatants. There is no ordered relationship to be found, only a constant competition fought out in the imagination.

The modern legal imagination brings two critical resources to this competition. First, law holds itself out as the product of the sovereign will. This belief is as old as the West. In its modern form, the people are the sovereign, and law expresses the will of the people. Second, law is the product of reason—an idea of Enlightenment origins. Accordingly, the rule of law is simultaneously the working out of reason in history and the working out of the truth of the people. The legal imagination works simultaneously in the dimensions of reason and will—ultimately, of truth and revelation. We cannot answer whether the legitimacy of law comes from a science of law or from the people’s self-revelation. We cannot decide whether we are liberals or republicans. Indeed, the very distinction comes from the theorist's narrowing of the imaginative sources of law.

Many of our obvious legal rituals are enactments of this intersection of public reason and the democratic will. Consider the foundational enactment of a constitution. Americans may know
that the creation of the Constitution required compromise across factional lines, yet they believe that constitutional government cannot be other than the rule of reason. When the Constitution seems to require irrational action, we confront a constitutional crisis, which must be resolved in favor of reason. (Slavery and the Civil War are the paradigm case of the inevitable movement toward reason). Simultaneously, the Constitution is understood as binding us, rather than some other group, because it expresses the will of the popular sovereign. Constitutional adjudication—and all political issues can rapidly become constitutional issues—is a rhetorical performance that cuts across the categories of reason and will. The court is simultaneously the forum of reason and the arbiter of history. Arguing before the court, one can equally appeal to John Rawls and to James Madison. Viewed abstractly, the court is not likely to be judged good at political theory or legal history, but it is wrong to ask of it such excellences. Its excellence, rather, lies in the domain of rhetorical performance. It succeeds when it maintains the belief in the rule of law.

Of course, we know that the Constitution was produced by a political process that excluded more Americans than it included, just as we know that reason is not independent of history and place. Indeed, much of our ordinary political process amounts to a contest among factions with competing understandings of the truth. The task of law's rule, however, is to displace all of this from our vision: in the Constitution we see only the sovereign people speaking in the voice of reason. So much is this so, that what might otherwise appear as political fact cannot even be said before a court. One cannot describe a law as the product of a powerful faction. Rather, law is always the popularly willed expression of a public policy that brings reason to bear on an issue of common governance. Similarly, one cannot dismiss a precedent as the idiosyncratic expression of the Justices' particular interests. Law succeeds when such private interests are literally no longer cognizable.

Constitution-making and litigation are important sites for the construction and maintenance of the legal imaginary. So, too, is the judicial confirmation process. Again, the order of law comes into contact with a popular politics of competing interest groups. We witness a rite of transformation by which a nominee chosen for purely factional reasons becomes a personification of the law. The nominee emerges stripped of his personal character and private interests. We all have a tremendous investment in this transformation because if we continue to see the judge as a political partisan, if we see the reasons for his selection by a particular president at a particular moment, we will collapse law into the ordinary politics of factions. Law will become an adjunct of markets: an alternative means of advancing private interests.

For Americans, the oath no longer accomplishes this transformation; rather, the performance at the confirmation hearing does so. (Nations without such a rite of transformation, I suspect, find their courts suffering an incurable democracy deficit.) Central to the hearing is a ritual of confession: an emptying of the soul of the private self and an opening up to that grace which flows from the sovereign people through the Constitution. The hearing is not about the exchange of views; it is not about an inquiry into legal ability. Rather, the nominee goes before the nation and swears to abandon her former self, her former beliefs, her former political connections and professional relations. She tells us that she will decide each case, looking only to the law. She will look neither backward to the personalities and connection of the parties before the court, nor forward to the factional implications of a decision. She will open herself only to the presence of the law. At this point, we are regularly retold stories of the transformative power of the law, of
how a Justice appointed with the expectations that he would carry out a particular political agenda becomes a "changed person" once he is on the bench. These are the saints of the law.

Of course, no one fully believes that the judge is born again, just as no one really believes that law is reason without interest. But everyone sort of believes. We believe it as a background assumption that sustains the rule of law. The suppression of the individual subjectivity of the judge is central to the judicial performance: the court, not the judge, speaks; the decision is always spoken in the name of the law, which appears to us as the will of the sovereign people. At the end of the confirmation process we are to see only the robes, not the particular person who bears the robes. Stripped of his particular personhood, the judge represents us by acting out who we are in our political being. Living in the law, we, too, are to overcome our own private nature through participation in the popular sovereign.

So far, I have spoken of the competition between a private and a public conception of the self that is at stake in the performance of law. The judge models an idea of citizenship as sacrifice: he gives himself over completely to the presence of the popular sovereign through law. Lincoln already saw that reverence for law is a sacrificial religion in the United States. He also saw that the sacrifice for law stands in an uneasy relationship to sacrifice on the field of battle. The soldier, he told us at Gettysburg, sacrifices for a nation dedicated to a proposition: just the model of will and reason that defines the rule of law.

As soon as law claims the power of sovereignty, it claims the power over life itself. This theme is as old as the sacrifice of Isaac: the sovereign power to pronounce the law is the power of life and death. Contemporary objections to the death penalty may obscure this connection, but they do not undermine it. In America, at least, this is a debate about the just administration—or even the morality—of death as a criminal penalty. This debate has little bearing on the sovereign's claim on the citizen's life. This was palpably evident during the Cold War, when entire nations were targeted for nuclear destruction. The "post-sovereignty" era of globalization lasted from the fall the Soviet Union to the fall of the World Trade Towers. Today, the threat to life that arises from political identity is again self-evident. The contemporary discourse of war—a "war on terror"—reminds us that we can be asked to kill and to be killed for the state.

The history of the modern nation-state combines a narrative of law's rule and a narrative of killing and being killed. The former we ordinarily think of as a narrative of life, and the latter of death. These are the two faces of popular sovereignty. In truth, however, both are narratives of sacrifice—of life achieved through death. Nevertheless, what is largely metaphoric in law—for example, the ritualized sacrifice of the citizen become judge—is very real in war. The point at which the state demands a real, and not a metaphoric, act of sacrifice is always politically dangerous. For here, a failed sacrifice can appear as an act of murder.

There is always a risk that the modern nation-state's pursuit of sacrifice will be re-imagined as mere death and torture. This has happened repeatedly in modern history—from the Russian front in the First World War to the Vietnam War. It threatens today with respect to the Iraq war, as families question whether the sacrifice of their children is an affirmation of the life of the popular sovereign or a senseless murder. (The same phenomenon can occur internally: for example, as the confirmation hearing of Justice Thomas threatened to fail, he accused his opponents of
engaging in a "high-tech lynching," reminding everyone that, to the black man, Jim Crow laws appeared as an instrumentality of death and torture.)

The performance of law acts on this contested field of sovereignty, sacrifice, and violence. The legal performance is critical for the normalization of sacrifice. We are to imagine that what is at stake in the deployment of violence is the state as the order of law: Lincoln's message. We are not to see the terror and tortured destruction of the battlefield. Rather, we are to imagine sacrifice for the sake of democracy and rights—the norms of the legal order. The soldier becomes an extension of the judge—and, as such, of everyman—giving himself to the maintenance of the rule of law as the will of the sovereign. In American life, this role was literally personified in Oliver Wendell Holmes, who was soldier and judge for what was then close to half of our national existence.

The legal imagination is a hegemonic force within the state, seeking to extend its conceptual order across the whole domain of the political. At stake in the legal performance is whether we will see the sacrifice of the revolutionary founder, the sacrifice of the judge, and the sacrifice of the combatant as one continuous expression of popular sovereignty. Much of what has been the unending American legal crisis since September 11 has been the consequence of this relentless effort at the juridification of sovereign violence: Does the legal regime extend to Guantanamo? Can the president legally engage in warrantless surveillance? Is there a category of unlawful combatants who are outside of the protection of law?

The list of sites of contestation is quite endless, but all question whether there are any limits on the reach of law within the modern state. One way or another, law must win every one of these confrontations. If it fails, if the sovereign does appear stripped of law, then we are in the crisis of the exception. As with the violence at Abu Ghraib, law will make every effort swiftly to recover its hegemonic position. We are witnessing today the inevitable movement of questions of life and death into an adjudicative form. The social imaginary of law cannot withstand even a little bit of lawlessness. The voice of the Supreme Court is to be final. Not only does the Court regularly claim this for itself, but it is almost impossible for us to imagine disagreement with this proposition.

At stake in the judicial performance is the character of the sovereign that demands sacrifice: the judge models sacrifice for the sovereign by taking onto himself the burden of killing and being killed for the state. That performance succeeds when we see law—and only law—in every direction: at the beginning, in the center, and at the periphery. Beyond the law are only torture and terror—attributes of violence we assign to the enemy. If law fails, we might turn on the state as immoral in its destruction of self and others. Alternatively, we might adopt a narrative of popular sovereignty unleashed from law. This would be a political narrative of revolutionary violence without constitutional form. Violence would be an expression of pure power. Creation and destruction would then be one and the same. We need not turn to the French Revolution to imagine this, for in our nuclear weapons we possess far more than a mere image of the sovereign as pure destruction. These weapons express the capacity of the sovereign to break free of law. In this contest of law to shape the social imagination, then, rests the very fate of the earth.