

BOOK SYMPOSIUM

On engagement and distance in social analysis: a reply to my critics

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Abstract

The problem of ‘distance and engagement’ highlights the Weberian paradox that objectivity in the social sciences cannot be based on demonstrative proof; it has to take into account values as the constituents of our ‘interests’. Values should be explicit even if this ‘perspectivity’ cannot satisfy the criteria of necessity and universality. Allegedly, my skeptical approach to ‘social theory’ leaves researchers with insufficient ‘hope’, but one also learns from understanding that something is impossible or conceptually flawed. Moreover, deeper issues of analyzing social action, with existential and moral dimensions, should be considered. These involve our cognitive capacities, experiences, and emotions.

Keywords: Political virtue; practice; pragmatic heuristics; social knowledge; theory of action

Introduction

The Symposium on my *Status of Law* articulates criticisms, which I take as ‘friendly amendments’ rather than as dismissals or objections resulting from deep disagreement. In my response, I focus on two main issues that concern how we ‘get on’ with our research and with our practical choices as social animals. I explore issues of engagement and distance and their paradoxical implications for our lives. This discussion goes beyond the *Status of Law* and this Symposium, but both are helpful for understanding the broader context of acting.¹

We encounter the paradox of distance and engagement, when – as actors and as observers – we analyze (practical) problems. As actors we not only select but usually commit ourselves. As observers we realize that the theoretical ‘view from nowhere’ is unavailable. By communicating with others, justifying our choices, or tendering explanations for behavior, we do not want that our assertions are treated as just personal views, based on idiosyncratic reasons, but we demand recognition. Neither our commitments (choices) nor explanations of actions are simply empirical facts; they are powerfully shaped by values and emotions. The modern understanding of science has eschewed such inclusions in a ‘theory’ of action, even though partially the Enlightenment discourse had recognized their importance.²

¹See also Kratochwil 2018.

²See the Scottish Enlightenment and for example Smith 1757/2016.

Emotions create a dilemma for the modern 'scientific' agenda. On the one hand, the *constitutive role of values for our 'interests'* à la Weber justifies our *prima facie* skepticism regarding the possibility of a value-free scientific approach to *praxis*. On the other hand, we cannot show, pace Weber, that our take on the issues is 'demonstrably' the only possibility. Thus, the hope for a social science *more geometrico* evaporates; values and commitments cannot be sacrificed at the altar of scientific objectivity as otherwise we lose the 'object' we are supposed to study. Finally, definite answers based on universal epistemological criteria, as the model of a good theory demands, seem hopeless, if values are of constitutive importance for our choices, although they often make incommensurable demands on us, as Weber pointed out. Once the conflicts among them cannot be solved by a stable 'lexical ordering' – contrary to what Rawls and others have argued – this 'indeterminacy' has a downside: we must make decisions, for which we bear responsibility, although we cannot appeal to logic or to nature as the unshakable foundation for both cognition and justification.

Wittgenstein's two aphorisms in his *Philosophical Investigations* illustrate the same paradox.³ In paragraph 217, dealing with the issue of explaining action, he writes: 'If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do"'. Earlier, in paragraph 85, Wittgenstein argues: 'A rule stands there like a sign-post. Does the sign-post leave no doubt about the way I have to go?' These quotes hint at two contradictions. First, paragraph 217 seems to 'invalidate' the earlier point of paragraph 85, which identifies rules as an important part in making choices. Yet, Wittgenstein refers to unreflective habits or drills as the 'bedrock', that is, the last cause of our action. Second, Wittgenstein observes that signposts cannot 'make' me decide, despite their bedrock character, because their advice is always subject to revision and change of the goal I am pursuing. But if clear signposts cannot cause me to act in a certain way, why bother with them? Why not, instead, search for the true causes underlying our actions, be they invisible structures, natural drives, or tangible interests?

We encounter something similar (the same?) when we consider our supposedly free decisions that are based on a strange kind of freedom. Our decisions are not caused but brought about by our will, and yet we are not free from some sort of a cause, since we act 'in order to' (although we orient ourselves to the *future*, pursuing projects, not by looking *backward* to identify the antecedent cause).⁴ Finally, it is a freedom with an awareness that *we are not 'free' not to decide* and to opt out of the action game, since we would then lose our status as actors and become a subject to things which happen (to us) or a pawn to someone else's will.

I return to these issues later in this paper, but next I discuss briefly why being an actor is anxiety-producing before addressing the various contributions to this Symposium.

³Wittgenstein 1953.

⁴One could argue that in searching for a motive we do precisely this. This is right in a sense: the goal becomes via the motive that is antecedent to the deed that 'triggers' action. But this shows why the argument is incompatible with a classical causal imputation relying on efficient causes in which cause and outcome have to be defined independently: X at t1 causes Y at t2.

Usually our choices are not as simple as choosing between apples and oranges, or as comfortable as just following habits. Furthermore, being an actor also entails more than applying ‘tricks of the trade’ or blueprints to problematic situations, as if we were producing umbrellas or iPhones. At stake is also more than just complying with commands of the superior that relieves us from making choices and shelters us from responsibility. These kinds of shortcuts, which seem to ‘de-paradoxify’ the issues of choice, do so by claiming paradigmatic status for one particular shortcut which then serves to explain all of our choices. This comes at a price.

The steps of my argument are as follows.⁵ In the next section, I show that the unorthodox manner, in which my critics approached the *Status of Law*, ‘worked’ rather well. Their critique does justice to the notion that one cannot claim a ‘view from nowhere’ – but that one still needs criteria, although they are no longer self-justifying or allow one to test against the ‘world out there’. I then take up the issue of (the lack of) hope which allegedly characterizes my analysis. In this discussion, the concepts of distance and engagement serve as my focal points.

The pragmatics of work and criticism

At first, this collection of essays devoted to my *Status of Law* seems strange. Instead of traditional conventions for integral reviews, each chapter was assigned to a *different* author, but the Symposium as a whole took this logic even further. If critique is usually determined by the topics which interest the reviewer even in integral reviews, why not make the inevitable ‘perspectivity’ of any review an explicit virtue? In this review, each reviewer relates the criticisms to his or her own work and interests.

The conveners’ strategy did not rule out the possibility that the reviewers might just ride their hobbyhorses, but they minimized the risk of approaching the reviewed work via presumably ‘neutral’ or self-evident yardsticks, usually chosen quite uncritically from epistemology, ontology, metaphysics, or some ‘method’. Instead, the conveners’ strategy pushed the reviewers to practice their *reflective judgement*.

That the reviews raise, nevertheless, several philosophical and even metaphysical issues is evident in Onuf’s and Peltonen’s texts that flank the more practically oriented discussions of the others. Onuf places the *Status of Law* in the larger context of my intellectual career.⁶ He does a yeoman’s job in reading both my ‘words’ and in-between the lines, putting my arguments in their historical contexts. Such an exercise of showing the situatedness of my various interventions over the years (and their limitations) is absolutely necessary and appropriate. It exposes the gaps in the initial analysis, some of which were filled by later elaborations or by incorporating other ideas in my later works.

Yet, Onuf’s demand (in commenting on my take of rational choice theory) to tell the reader where the interesting problems lie that remain outside the rational choice framework is fair in a sense, but it neglects the fact that I had done so already in my dissertation.⁷ Following up on Schelling’s argument on focal points and salience,

⁵Since this is not a free-standing paper but a response to my critics, I develop my themes by engaging with their criticism.

⁶Onuf 2021.

⁷Kratochwil 1978.

I showed why and how ‘metaphors’, ‘historical analogies’, and ‘precedents’ enlarged the research agenda of signaling, which dominated the IR discussions at that time.⁸ Since then, ‘language’ and ‘historical reflection’ have preoccupied me, and both have directed me to study conventions, for which Hume provided much food for thought. Moreover, I thought that ‘communication’ was poorly modelled in IR (the sender-receiver model and its dubious arguments about the clarity of the message and of showing ‘resolve’, as e.g. in the bargaining literature). With the help of interactive construction of meaning, I approached communication more pragmatically, thus leaving behind both positivistic reference models of ‘truth’ as well as transcendental ideal-speech situations, or veils of ignorance.

Over the years, I moved toward a mode of analysis that took the Aristotelian *praxis* and the artificiality of the social world seriously by looking at concepts and their embeddedness in semantic fields but also at ordinary language philosophy. For me, speech acts played a role, albeit less than in Onuf’s case, as I drew on Wittgenstein and the more pragmatically oriented work of Anscombe, Grice, and Bratman. It remains to be seen whether I succeeded in proposing a viable new heuristics.⁹

Yet, even with these corrections, Onuf correctly shows how intensely ‘social’ such explorations are, even if one speaks more the ‘language of exile’ than that of the mainstream.¹⁰ His interpretation provides further support for my plea in the *Status of Law* for the need for inter-disciplinary research in spite of the risks involved in leaving the well-trodden paths of ‘normal social science’.

A counterpoint to Onuf’s analysis is Peltonen’s concluding essay, in which he highlights the unavoidable ‘existential’ dimension that characterizes any engagement with practical questions and their analysis.¹¹ He does so by drawing – with some imagination – on Buddhism. Such a leap of imagination is not just a fanciful attempt to catch the reader’s attention but surprisingly on target, even if we – in the way we carve up our world – sequester such insights frequently to ‘religion’ or ‘philosophy’.¹²

Whichever vocabulary we use, doing so involves a ‘transgression’ for us moderns, who usually think in terms of an evolution of the human mind – such as in biology’s tree of life – in which the scientific mode of knowledge supposedly sits on top of the knowledge pyramid. Everything else can at best be recognized as some previous attempt that has been overtaken by the progress of scientific knowledge. One problem with this way of thinking is that scientists are called upon to provide the solutions to our problems and anyone not delivering them, or even refusing to do so, becomes identified as incompetent and a party-pooper, whose negativity might even justify yanking his license to practice social science.

As a card-carrying skeptic, who often showed why certain ‘theories’ are deficient or flawed, I am a likely candidate for such charges. Even worse: I am ready to commit the sacrilege of claiming that attempts of pressing *praxis* into the Procrustean

⁸Schelling 1960, 1966.

⁹Kratochwil 2018.

¹⁰Onuf 2021, 526. I refer to one of the ‘theoretical’ debates in the field, resulting in a special issue of the *International Studies Quarterly*; Ashley and Walker 1990.

¹¹Peltonen 2021.

¹²See for example Habermas 2019.

bed of science are seriously mistaken. This comes through in my various objections to *ideal theory*, which I raise in the last chapter of the *Status of Law* and by objecting to Kantian speculations in an earlier chapter about mankind's destiny based on 'nature's design'.

Kant's trick is to assume a *telos* for humanity and then derive the various steps for this trajectory by backward induction. In this way, certain events appear as necessary and inevitable steps for reaching the pre-destined goal. Despite its popularity, this secularized 'prophesy' seems purely speculative and rather unscientific in its own terms, since we cannot know certain things – as Keynes among others pointed out. Moreover, it is also a dubious guide for action, even if the voicing of such a criticism might offend Kantian sensibilities, as Welsh's thoughtful critique of my skeptical take on the 'growth of law argument' notes.¹³ Nevertheless, it seems that much of the seductive persuasiveness of Kantian 'liberalism' results from the loss of a political language and of dissolving politics into ethics on the assumption that ethics can resolve the dilemmas of politics, while paying scant attention to the fact that even individual choices are more complicated than ends-means rationality suggests, and that collective choices raise additional dilemmas.

Kurowska's sensitive analysis lifts the debate out of the false dichotomies of 'positive/negative', both in the emotional and cognitive dimensions.¹⁴ She does so by pointing out that only by resorting to a non-existent 'view from nowhere' can we enjoy the comfort of abstractions that relieves us from making hard choices among conflicting values. Thus, finding one's way means, above all, having enough strength to leave behind the usual security blankets in order to face the puzzling situations that come about through our own (in)actions, or that are 'thrown' at us, as the safety net of habits and the normal has been rend.

Without that strength we probably just reproduce the *status quo*, in line with many future-oriented utopias which limit their 'innovation' to the promise that the new world will be like our present one, but better, more plentiful, and more 'inclusive'. All we need to do is to be 'on the right side'. Yet, critical reflection and experience tell us that such a scenario is the unlikeliest of all. Conceptually every inclusion creates a boundary and thereby an inside and an outside, even if that outside is provided by internal fissions and new differentiations rather than by an external enemy, as we see in the decay of empires.¹⁵ Consequently, any 'perpetual peace' – should it come about – will deviate from the dream of universal inclusion.

Kant saw this and warned us about imperial solutions. This does not mean that his league of republics is still a viable conception, in a time characterized by diverse organizational forms, the disaggregation of the state through various networks among state bureaucracies, the emergence of civil society, and corporations becoming actors. Moreover, attempts of counteracting for example the internationalization of crime not only by *ex post* punishment but by various *ex ante* measures have also become part of our social reality.

¹³Welsh 2021.

¹⁴Kurowska 2021.

¹⁵Regarding the dialectics of group solidarity and its conceptual and practical links, see Simmel 1955. For a further thoughtful discussion, see Lindahl 2018.

Here Bueger's and Westerwinter's studies on piracy and on blood diamonds are instructive.¹⁶ Yet, not all involvements of civil society and public/private partnerships have beneficial consequences, as unintended consequences abound. New markets for false certifications develop, co-optation of the controllers looms on the horizon, and spillover effects create new problems. For example, finding new ways of countering piracy has led to a case where a Somali pirate, convicted in a Hamburg court in 2011, becomes after a few years in jail a 'refugee' in Germany, because he cannot be sent back to Somalia due to the domestic conditions there. And if one needs stronger evidence of the frequent perversity of unintended consequences, the privatization of 'security' and of 'contracting out' in order to avoid state-responsibility, provides it. This does not mean that nothing should be done, but it means that before acting we must first situate a given case properly and then follow the proposed solutions through time. Subjecting them to a *post mortem* analysis of a kind by comparing the outcome to other possibilities becomes necessary. But as the sanctions debate shows, definite conclusions seldom emerge.

Moreover, caution is needed when dealing with arguments concerning historical trends. Certain conclusions can be reached in several cases, such as when we perceive the development of human rights in several Western countries or in Latin America, which seems to fit the pattern of 'justice cascades' – although such developments are hardly visible in other regions.¹⁷ Yet, a look at the Balkans and Africa could even buttress claims of a counter-trend.¹⁸ Besides, the International Criminal Court was not only disavowed by its main sponsor, but its statute was not ratified by most major powers, thus deflating claims of universal recognition. The issue is not 'who is right' in his assessment, since a commitment to international criminal justice is not refuted, even if it misfires. But there may be a need for a prudential judgment regarding whether being part of an international network and fighting the 'good fight' actually furthers one's own normative goals.

Other domains show a similar ambiguity. Even if we might believe that a vocal civil society, as part of the democratic project, should be free to receive help from abroad, we tend to judge differently when the shoe is on the other foot, for example, when 'help' intervenes in our domestic politics and distorts electoral competition. Thus, the issue of commitment is not the only thing to consider, and we should also note Weber's second reminder: we cannot claim that our commitments can be vindicated without further ado by theoretical arguments, by invoking the scientific method, or by pointing to empirical confirmatory evidence.

Put differently, while it is inadequate to begin with some form of ideal theorizing, as we are always 'in the middle of things', starting there and then choosing one's 'cases' is no guarantee for avoiding the dangers of confirmatory research, against which both Popper's and pragmatism's circumspection advise. The question is rather what to make out of our findings, and the answer depends crucially on the narrative in which the assessments appear. Which beginning do we select for our cases? Which end do we choose or postulate? What weight do we give to disconfirming evidence that may remain outside our current range of vision?

¹⁶Bueger 2021, 549–50; Westerwinter 2021, 563.

¹⁷Sikkink 2011.

¹⁸Rajkovic 2011; Subotic 2009. For a more detailed discussion, see Kratochwil 2018, ch. 7.

These considerations make it unlikely that we will be able to find ‘The Answer’ that ends all questions. It also clarifies why it is hardly useful to analyze problems of the social world by falling back on the traditional categorization of formal and informal norms of classical international law, thereby not paying too much attention to the differential patterns of organizational activity that characterize different sectors. Westerwinter recognizes a ‘gap’ in my work that would require some further elaboration in order to explain the variance of organizational forms.¹⁹ Yet, an even greater problem of the proliferation of organizational forms for politics may unfortunately lead to a frequently overlooked fallacy of composition: more order in one or several issue areas through a ‘free-standing regime’ might not result in greater order of the whole. What is true of the parts need not be true of the whole, as the fragmentation debate in International Law showed.

In this context it is worth remembering Foucault who put the problem of ‘steering’ in a wider context instead of entrusting it – as did much of sociological and political theory since Hobbes – solely to the sovereign and his government. Foucault’s focus on ‘governance’, that is, on the ‘disposition of things’, and on the transfer of the instruments developed within the state to the external realm are heuristically fruitful. Entirely new instruments of ordering were available to decision-makers by the end of modernity, which now inform also our practices outside of the state. Such a ‘disposing’ allowed for far more complex designs than the territorial orders exhibited during the state-building period; it even outflanked the later invention of ‘private international law’ within the statist order.²⁰ It also transcended the ordering, based on ‘bureaus’ and INGOs, by which states subsequently institutionalized cooperation.

Equally instructive in Foucault is the lack of a celebratory tone, familiar from the ‘functionalist discourse’, where everything fits like hand in glove if we just entrusted the problems to ‘experts’ and got rid of politics. Obviously, such a move would not end politics as such. Instead, it would hand over politics to a new but also restricted circle of expertocrats. It would certainly end a *politics of freedom* in which actors care about their individual and collective autonomy and are not satisfied with the ‘bread and circuses’ offered to them in exchange for their compliance with the law, made, applied, and enforced by those in the loop.

A governmentality by experts – perhaps ‘enhanced’ by some stakeholders – might be the wave of the future. This may be due to the paradox that the emergence of new sources of power, their proliferation and naturalization in autonomous systems make it difficult to direct collective action and effectively assign responsibilities, as the financial sector seems to demonstrate. Living with ‘irritations’ may become the norm, while new insurance schemes are touted as proper remedies, although the risks are actually less and less insurable.²¹

¹⁹Westerwinter 2021.

²⁰Koskenniemi, originally not known for his sympathies for traditional international law and its conceptual niceties, thought that private international law and its ‘bag of tricks’ could enable jurists in the future to counteract effectively the problem of the ‘fragmentation of the international legal order’ to which a danger of several ‘public international lawyers’ had pointed. Koskenniemi 2007.

²¹On ‘irritations’, see Fischer-Lescano and Teubner 2004, 1018. Consider also the law and economics approach, based on the identification of the ‘best’ cost avoider and the ‘willingness to pay’.

Other proposed alternatives are hardly more convincing. A ‘policy orientation’ in law à la McDougal suggests that one could substitute the utilitarian criterion (maximizing human dignity) for strict rule-following.²² A new form of ‘disenchanted professionalism’ à la Kennedy might provide new ways out of old dilemmas.²³ While I welcome their pragmatic focus on actual decisions and on cases rather than on formality, design, or universal criteria, I doubt their success since the solutions to practical problems are derived from a ‘theoretical’ framework in which Kennedy’s meanderings between the ideal type of an expert, who can claim some specific knowledge, and of a ‘professional’, who has to address the broader ethical problems of choice, show a severe tension.

Bentham’s *felicific calculus* becomes visible behind such proposals. This calculus was originally entrusted only to the legislator, but by now it has reached any judge or administrator who wields the instruments of law. Law has become a ‘universal hammer’ that allegedly flattens conceptual fault lines by trying to make them unrecognizable. Here I side more with Foucault than with the functionalists and their offspring in public management, or in policy-oriented theories of law. They can claim success only by making us ‘subjects’ and ‘customers’ rather than leaving us with the status of actors.

Traisbach and Vilaça criticize my insistence on ‘going on’ and on the ‘use of law’, because this part of my argument sits uneasily with my critical take of what actual jurists (must) do in their jobs.²⁴ Here, space limitations prevent a full answer to this criticism but to rephrase it briefly and bluntly (which neither critic does, probably due to politeness and academic *comment*): what good is an analysis, arguing for a pragmatic orientation of the inquiry, that fails to account for the actual doings of the people who as activists, judges, juristocrats, consultants, or disenchanted professionals work with legal concepts? Despite my denials, does my criticism not depend on some foundation or fixed point from which I argue? This criticism has a logical and a more practical form. The logical problem is a potential contradiction; the practical problem concerns the potentially disabling consequences that follow from debunking beliefs that keep our hopes alive so that we *can* ‘go on’.

Both potentially serious objections need unpacking. The logical problem (need for ‘stable’ criteria) is easily refuted. It is true that one cannot question everything simultaneously, and one needs to spell out one’s values directing an inquiry. But the inference that the latter must adduce stable ‘universal’ principles does not follow. It is enough if the point from which one argues is not moving during the analysis. Consider stars: they need not stay in place; they just need to be stable in relation to the planets that orbit them. Thus, stability is not an ontological property but a name for a particular *relationship*.

As to the question of ‘going on’, my earlier reference to Wittgenstein’s paragraph 85 suggested that this activity cannot be understood as a move toward a predetermined destiny, whereby law makes people move. Law is not an instrument like a bus, which brings us ‘there’. Rather, it is an assembly of doings, constituted and understood through rules, making our individual and collective lives possible,

²²McDougal 1966; McDougal and Lasswell 1966.

²³Kennedy 2016.

²⁴Traisbach 2021; Vilaça 2021.

and allowing us to get through life. That there is an end to life has nothing to do with either the end of producing something or with reaching a final destiny. The closure, which bestows meaning on our actions, is available to us only through reflection and through the vicarious experience of narratives provided by literature, biographies, or history. It cannot be just postulated or intuited *ex ante*, because it is simply not 'there' like the final end of all biological life: death.

What does this mean for 'the law'? The law, in its collective singular, is not just a sum of the legal transactions or decisions in which we participate as practitioners, judges, or administrators. It is also the result of *specific reflections on the activities in that domain*, and it matters whether they are conceived with an open horizon rather than as a *telos* or as a commodity to be maximized. To that extent, I agree with Traisbach that 'the law' is something different than just the doings of rule-handlers.²⁵ But it is important to recognize that this results from a particular reflection on praxis, and that 'law' and its integrity do not consist in reaching a final 'end' or provide the 'one right' answer.

Particularly in English Common Law, but also among legal pluralists, there is a long tradition of seeing in the often unsystematic character of law not a fault – to be cured by a legal theory – but a blessing. It allows for change and disorder while preserving some form of stability of expectations among its subjects. Hume, Oakeshott, and Nardin introduced the notion of a 'practical association' instead of a 'common purpose association' in order to make this point. Of course, legal orders also serve *purposes*, such as to minimize private violence through public repression, or overcoming coordination problems, but these purposes cannot be ordered once and for all, and they do not form a single, logically integrated system. The actual 'order' that emerges by telling us who can, must, or must not do what (and when) is brought into existence by the actions of both, the subjects, who the law addresses, and the collective 'we', which the rule-handlers invoke when closing the system through a decision.

In this conceptualization the emphasis shifts from a spatial representation of norms and institutions as a hierarchy, or as a system, to *processes* (plural!). These processes are not governed by some 'overall' *telos*, but the different processes of rule-following, rule-applying, and rule-making allow for the realization of individual and collective projects and of the drawing of boundaries. Who is, or is not part, and what it is that 'we' want in common, regulates not only the interactions among the actors but also constitutes the 'self' and 'society' and its political projects, thereby making possible a politics of freedom. This conceptualization – recently re-introduced in the globalization debate by Lindahl – differs from following a lodestar that points us to an ultimate destiny or 'source' of order, be it conceived as a past that never was, and that can never be re-enacted, or as a redemptory fantasy of a future that we cannot know.²⁶

The second, practical problem about 'hope' is more difficult to address. I have always stressed the importance of sentiments and insisted that practical questions involve not only cognitive issues, but they also require commitments. Acting involves a leap, to which Wittgenstein alludes in paragraph 85 of his *Philosophical*

²⁵Traisbach 2021, 531.

²⁶Lindahl 2018.

Investigations. This double entanglement, I have argued, requires a different way of thinking about ourselves and of deliberating about our choices, life plans, and their implementation.

McDougal's remarks, picked up by Traisbach, alert us to the problems of choice, which are more severe than traditional theories of action suggest. Where McDougal and I (and perhaps Traisbach) differ is in understanding that the selection among competing goals cannot be reduced to some cost-calculation, or to a simple maximization postulate (e.g. human dignity), precisely because – for good reasons – there is no currency mediating the incommensurability problem among different values. Only with such a medium could we assess in line with some felicific calculus and rely on a maximization criterion and its derivations (such as minimax). Decades ago Baldwin criticized the largely mistaken analogy of money and power, and nothing is gained by forgetting or belittling these well-taken criticisms, not even in the hope that 'big data' will free us from the necessity of choice and the anxieties that come with it.²⁷

In the next section, I continue with the issue of 'hope' by placing it in the wider semantic field of virtues and attitudes. I try to avoid the traps of rationalism, which leaves desires exogenous to the choice *problematique*, doing instead justice to the role of emotions and sentiments. Precisely because the latter are important for our commitments and for their acceptance by others (or for legitimating opposition to them), they are not to be conceived as purely idiosyncratic feelings, as some readings of Freud suggest.

Before proceeding, though, I address Sikkink's criticism of my approach to the human rights discourse and for not offering an alternative to all that I criticize.²⁸ As to the latter, she may be right but not for the reasons she offers, as my answer below and this article overall suggest. Sikkink is right to say that I leave the reader in the lurch concerning the 'application' of the human rights discourse, but she misunderstands my main point. It is exactly the narrowing of the problem of praxis to one of 'application' of norms and principles that I want to avoid by opting for a pragmatic approach. Praxis is not about the application of some overall theory, or of some principles, to some 'facts'. Not seeing this is to misunderstand the constitutive nature of norms, while obscuring the interaction between the normative and factual parts in legal reasoning, which does not follow deductive logic or normal inferences based on generalizations. Different from ideal theorizing, I argue that realizability issues cannot be left to the 'application' stage. One needs to assess the various ways in which we 'use' particular conceptual strategies to hide or disclose the problems which our choices entail. Finally, making everything desirable into a subjective 'right' is bound to fail. Some of the alleged human rights inevitably remain 'manifesto rights' or moral imperatives to be attended by existing institutions, both public and private, instead of being 'human' rights.

Utilizing moral standards that focus on *what is right* instead of what is *my* right comes at a cost, as emerges in Sikkink's own analysis. First, she invokes Hannah Arendt, although Arendt remained skeptical of the human rights discourse and

²⁷Baldwin 1989. A thorough treatment is impossible in just a few lines. For a further discussion on these points, please see Kratochwil 2018.

²⁸Sikkink 2021.

instead focused on the ‘right to have rights’, to be guaranteed by a state (or a similar institution) and having not only theoretical or moral, but actual pull. Second, Sikkink’s insistence that human rights have become part of domestic legal orders is true, but this fallback on the state sits uneasily with the wider conception of right and wrong or claims accruing to us as humans. Highly problematic conceptual stretches are bound to occur (such as the ‘right to democracy’ or the right to the ‘Internet’). Third, such rights are ‘discretionary’, as the contributor notes and in that discourse *no set of rules or method for deciding what to do are offered*. But this is precisely my argument; the concept of a subjective right is not as discretionary as other desirable goals are. If an alternative exists, it probably comes from a different conceptualization of politics and ethics, not from law (à la Dworkin), from a moral ideal ‘theory’ (à la Rawls), or from what people just happen to claim (social movements).

Hope, dreams, and distance

Debunking some notions in the academic discourse via the *topos* of ‘following one’s dream’ is an important part of education and part of my responsibility as a teacher, even if it sometimes creates discomfort, perhaps even resentment. In this final section, I discuss why criticism has gotten a bad name in the age of ‘positive thinking’ making instead needs and hope pivotal points. While I disagree with this move, I take seriously the task of avoiding the Scylla of amalgamating practical choices to the logic of production by giving ‘emotions’ their due, but I want to avoid the Charybdis of treating emotions as ‘primordial’, expressing purely idiosyncratic wishes or primal urges.

Koskenniemi’s argument about *Kitsch* in politics and law serves as my foil. It leads me to an examination of existential choices and to the role of ‘hope’, since we are often perplexed and feel lost when confronting such choice situations. We tend to think that *there must be* an answer and that someone has to provide it, because – at a rope’s end – we are unprepared to accept that some questions have no answers. We would *like* an answer that ends all questions and ‘finally’ puts us at rest, and of course religion and philosophy have tried to provide such answers by telling us what really ‘is’, by leading us to the fountain of truth or illumination, or by providing us with incontrovertible foundations of knowledge. But our needs, making ‘the wish the father of thought’, might not answer this misplaced hope. Rather, we might have to accept, as Hume avers, ‘that the errors in religion are dangerous, those in philosophy only ridiculous’.²⁹

These initial remarks of philosophical import provide the background for understanding what practical choices entail and how we analyze them (or fail to understand them). They lie behind such practical questions as what lawyers should do, which is only a variation of the more general question we all ask ourselves as actors. To that extent career choice seems of paramount importance in a rapidly changing world in which the past seems to cast little light on the future and in which market pressures, new knowledge claims, and close links between the state project and law become increasingly challenged; traditions fade and no longer provide the support

²⁹Hume 2011, 177.

they used to. In the case of a lawyer, this is particularly obvious. Paradoxically, it is the proliferation of laws and the ubiquity of law in all domains that leads to the demise of the *status* of the lawyer: traditionally they were appreciated as wise counselors in practical matters; cherished as administrators of justice; or served as experts in managing conflict and cooperation. Little of this has to do with the contemporary experience of 'lawyering' as an employee in a law firm, or with becoming a norm entrepreneur or a political activist. Governments and populations alike, albeit for different reasons, seem to prefer 'citizen-sheep' to a participatory citizenship, a dilemma which Vilaça addresses in his contribution.³⁰ He reminds us also of the privileges which we as lawyers, or as university professors of yesteryear, still enjoy when compared to the new generation of scholars who are evermore only 'university staff'. This disenchantment, already noticed by Weber, leads us right back to the issues of *Kitsch*, emotions, and hope.

Koskenniemi claims that *Kitsch* arises when the primacy of personal feelings drowns out all that we find unacceptable in human life and when the purity of the heart becomes the only measure.³¹ Pace Kundera, 'when the heart speaks, the mind finds it indecent to object'.³²

There is a totalitarian kitsch of the Grand March, exemplified in the May Day parade in Moscow, but also in the raised fists of European intellectuals at an anti-American rally.

International law is burdened by kitsch. What kind of kitsch? Well, for example, *jus cogens* and obligations *erga omnes*, two notions expressed in a dead European language that have no clear reference in this world but which invoke a longing for such reference and create a community out of such longing. Instead of a meaning, they invoke nostalgia for having such a meaning, or for a tradition, which we believe, still possessed such meaning. They are the second tear we shed for the warmth of our feelings, the tear on the cheek of the gypsy boy.³³

This 'privatization' of emotions by taking them out of a social interactive context and naturalizing them was rather unhelpful for understanding individual and collective social action. Bringing emotions back in has certainly benefited analyses of choice by enabling us to analyze decisions transcending purely cognitivist and instrumentalist frameworks. Note, though, that the new attempts of re-introducing emotions start again with the 'unencumbered' singular individual instead of focusing on the co-constitution of individuals and society through action. Thus, emotions are treated more or less like individual possessions. Consequently, they remain largely private, hiding their social character. This leaves little room for the training of passions into *sentiments* by learning the appropriate emotional responses to situations and actions, as Smith, Hume, and Hutcheson suggested.

³⁰Vilaça 2021.

³¹Koskenniemi 2005.

³²Kundera 1999, 248.

³³Koskenniemi 2005, 121–2.

Actors are at the mercy of their desires and resentments, which remain outside the rational action theory, and those rational actors quickly feel lost when their hopes get frustrated. They have to wait for relief to be delivered by sympathetic others, whereby this sympathy is also something personal, 'belonging' to the donor, even if it results in charitable action.

Consequently, to reduce sentiments to 'natural passions' – in the parlance of the Scottish Enlightenment – misses the boat for two interrelated reasons. One, passions have to be cultivated by 'commerce and conversation' into social sentiments. Two, because this cultivation is subject to social standards, not purely *personal*, feelings have to work in tandem with other sentiments and how we as actors present ourselves to others. Thus, severing the feeling of hope from all these other sentiments, which enable 'virtuous' action, comes at a stiff price, as Hume's discussion of justice as an artificial virtue shows.³⁴ By making hope freestanding, we end up with little more than the *need for comfort* by those who, for whatever reason, cannot help themselves – and have to appeal to designated 'helpers' or humanitarian virtuosos. As Blanche in Tennessee Williams's *A Streetcar Named Desire* puts it, this kind of hope makes us increasingly dependent on the 'kindness of strangers'. Significantly, this line comes at the end of the play when Blanche is committed to an 'institution', because she can no longer cope with life and make her own decisions.

Yet, hope *is* important. It enables a realization that our cognition *and* our emotions are involved when we make decisions, but considerably more is involved than just some balmy feelings or hurts. As Bach puts it: '*Herz und Mund und Tat und Leben*' must work in tandem when we choose and commit ourselves.³⁵ To that extent, 'hope' as the sole yardstick for evaluating one's actions in terms of whether we are 'following our dream' (without prudence, fortitude, or moderation), or for assessing someone else's actions solely in terms of how it issues from their mood, invites wishful thinking on the part of the claimant and pride on the part of the purveyor (how 'cool' one is, by being so 'sensitive'). In neither case, issues of special obligations, realizability, or experience seem to matter; nor is there much place for 'learning' *through failure*. While my feelings of hurt might have been misplaced, or my gift of 'sympathy' was not really generous but starry-eyed, a critical examination of the dilemmas of helping and of conflicting obligations cannot be neglected.³⁶

One might have reservations about Koskeniemi's language (above), but it highlights how critique as a stance is helpful precisely because taking others seriously is not like them somehow becoming 'my projects', due to the correlativity requirement of rights and duties. Yet, this criticism in no way prevents or discourages individual commitment and engagement to participate in the making and shaping of the social world. It only highlights that our engagements are not cost-free, that not everything desirable is possible, and that not all desires are well considered. It therefore raises issues regarding the comparison of different possibilities not

³⁴Hume 2011, book III, part 2.

³⁵Johann Sebastian Bach, Kantate BW 147, first part. The heart, speech (represented by 'Mund', mouth), deeds, and (leading one's) life are *all* involved, together.

³⁶For an elaboration, see Taylor 1985, ch. 2–3.

only in terms of fiddling with strategies but also in terms of selecting among competing goals.

As if that were not enough, criticism, as a mode of analyzing practical choices, has more bad news in store. If I took the cognitive road and relied on a different form of theory, I would soon discover that no theory can resolve the existential question of ‘what shall I do?’ Should I pursue a basketball career or in playing the violin? Or should I become an activist? But for which cause? At stake are whole life projects that cannot be taken from the shelf in neat packages. Each consists of numerous choices through which we form our character and identity. In short, yes, the question of ‘what shall I do?’ presumes an ‘I’, but it usually forgets that the ‘self’ is always in the process of becoming, since it is not a simple ‘idem’ (same), such as a Barbie or a Ken.³⁷ Consequently, this question cannot be ‘answered’ in one fell swoop. *Only reflection* makes it appear that everything can be bunched into a single existential decision. Instead, in the *lived life* we encounter only a sequence of choice-episodes, which seem to lack coherence and which we can establish, if at all, only through reflection. To that extent ‘happiness’ – as the ‘what for’ we act (Aristotle’s *hou heneka*) – is not some commodity that can be amassed like money. Instead, happiness results from ‘acting well’ in different situations over time, bringing satisfaction and respect.³⁸

Thus, ‘what shall I do?’ is unanswerable due to its free-standing nature and because it lacks a context that would allow for an answer. But this is not to dismiss the concerns this question tries to articulate. The question is not senseless, because *it can be pondered, reflected upon, and talked about with others*, and thereby it helps us find our way and to ‘go on’ with our lives. Put differently, even though no specific answer seems possible, we are not disabled thereby, and this is perhaps what Yeats tried to convey by his famous epitaph: ‘Cast a cold eye/ On life, on death/ Horseman, pass by’.

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³⁷The word ‘identity’ is somewhat misleading. It seems to stress the ‘sameness’ rather than the self of the actor who might have undergone significant changes.

³⁸This link was obvious for the Greeks of his time, since *eu prattein* (acting well) was also used for ‘being happy’, similar to the colloquial English expression ‘he is doing well’. Here, though, the accent is more on ‘succeeding’ than on the ethical dimension of our ‘doings’.

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