Response: Debating Weber and Kelsen in the 21st Century: The Relative Autonomy of Democracy, Law, and Administration

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Crises bring about the conditions for rethinking fundamental problems, if only because they expose intellectual conflicts that have been concealed or submerged, or in which older concepts had to be extended in ways that required them to be articulated in new forms. Such periods are better understood in retrospect, and rarely by their participants. They are nevertheless intellectually fruitful ones, where things are said openly, with a more direct but partial understanding, that reveal deeper issues. Whether we are in such a period now is an open question. But it is one in which long stable political arrangements, including divisions between traditional parties and administrative systems with well-defined limits and roles are seemingly breaking down. Particularly relevant for this discussion is the fact that discretionary and emergency powers are being invoked on the basis of expert knowledge rather than deliberation. Bruce Wearne's reflections on the opening pages of the book capture the sense, which we share, that present circumstances do call into question some fundamental aspects of what we think of as democracy, law and legality. These call for, as he takes us to be suggesting, political education, at least the kind of political education that gets past ideologists talking past each other, as he notes.

Max Weber and Hans Kelsen wrote in periods of rapid change. Both had similar responses: they embarked on an intellectual project of purification or de-ideologization. In the conclusion we will make some metaphilosophical comments on this kind of project. The book was itself also an exercise in de-ideologization, an attempt at framing the relevant relationships in a way that the ideological or partial character of certain responses could be made evident. So it is perhaps no surprise that Weber and Kelsen, the authors of their own projects of de-ideologization, should serve as a starting point for and also provide a contrast to what passes today for democratic theory, as well as for current defenses of the administrative state and accounts of the rule of law. The comments collected here are testimony to the importance and complexity of the issues, and also to their character as fundamental theoretical questions about political life and the law.

THE PROBLEM OF ADMINISTRATION

Recent major works on administration and the executive have appeared which recognize something that has been largely ignored in the decades of discussion concentrating on deliberative democracy and representation: the fact that governing is not only different but increasingly separated from electoral, deliberative, and legislative politics. Both Pierre Rosanvallon (2006, 2018) and James Heath (2020) have produced major works on the topic of governance, its normative principles, and the merits and demerits of bureaucratic governance and the controls on it. Within US constitutional law, Philip Hamburger has asked the question, is *Administrative Law Unlawful?* (2014). The claims made by Carl Schmitt to the effect that the bureaucratic state rested on its own legitimacy apart from parliaments and the legal procedures that make up the rest of the constitution (Schmitt 2008) has in this way been revived. The idea of output legitimacy (Scharpf 1999), applied especially to institutions like the EU which are largely insulated from intervention by popular movements, has become a standard surrogate for deliberative democracy, and fear of "populism" and a moral panic over the declining trust in institutions has become a staple of academic thinking. If anything has made these issues apparent, it was government action against Covid-19, which involved, as it now appears, little evidence-based deliberation and less democracy.

This body of work and contestation raises many interesting issues. But abstracting from it also allows for a reconsideration of fundamentals that is removed from present opinions. A disadvantage of abstraction is that it can create the illusion of understanding where in fact the devil is in the details. And richness is lost: thus Agostino Carrino is correct to point to the earlier and less abstract writings of Kelsen on democracy in the 1920's, and of Hubert Treiber more recently to point to the German legal context (2020). But these writings of Kelsen which, as Thomas Olechowski points out, equated democracy with parliamentarianism. They also assume things, for example, about parties, which may no longer be applicable. This is an issue taken up elsewhere: the Frankfurt School legal thinker Otto Kirchheimer complained bitterly about the American party system, and valorized the solidaristic *Weltanschauung* parties of Europe as disalienating (Turner 2011). And some of the figures in the history of legal theory who may have been salient for Weber and Kelsen from an exegetical or historical point of view may no longer have much relevance, or may not translate well into different legal and philosophical traditions. Treiber notes the role of co-operation in the German bureaucratic system, something discussed by us elsewhere in relation to expertise (Turner 2004a, 2014) under the heading of stakeholder involvement. But as Sara Lagi points out, the forms of the administrative state's rule vary enormously, and it can be added that administrative traditions, the class character, their internal cultures, the incentives internal to the organizations, and much else also varies. This makes abstraction both risky and necessary.

The loss of applicability in new circumstances of a conceptual understanding designed to account for a given historical practice is a central motivation for theorizing (Turner 2004b). Doubtless this was a large part of the motivation for Kelsen's revision of his earlier work on democracy in his papers from the 1920s, later published in *Ethics* (1955). He made it more general and abstract. *Making Democratic Theory Democratic* is also an attempt to go to a higher level of abstraction. It reflects Weber and Kelsen in a key way: they were part of what we have elsewhere called the project of de-ideologization (Turner and Mazur 2014). But to do this it was also useful, and necessary, to step back historically to the figures of Weber and Kelsen and, in both cases based on a long historical record, their attempts at abstraction. But there is also a need to go beyond them, which will be explained shortly. The book stayed at this abstract level, and relied on their texts and their achievements in this larger project, without dealing with more narrow philosophical and exegetical questions of a kind we have dealt with elsewhere. It also presented cases and explications of relevant concepts. But it did not attempt to engage in detailed histories, except where the history could serve as illustrations of more general issues, or were clues to the origins of present-day ideological tropes. There are, of course, costs to this strategy, which the comments reflect. Their additions, such as Christopher Adair-Toteff's discussion of Jellinek, are valuable.

The book nevertheless had a different aim: of seeing the various procedures and mechanisms that have developed—particularly in law, administration, and in democratic control of law and administration—in terms of this higher-level interpretation. It was framed in the Preface and Introduction to the chapters in terms of principal-agent theory, with an emphasis on what Kelsen called metamorphosis. The term applies to the change by which democratic "will" by its expression through the legal procedure of voting turns into legal representation, which through legislative procedures produces law. Law is interpreted by judges and lawyers and transformed in the process. And there is another, major, transformation into administrative rules, and another into actual administrative practice with its inevitable discretionary power and possible abuse of this power. At each point of metamorphosis there is a human element: a potential conflict between each "principal" and the agent carrying out its aims. The point of principal-agent theory is to identify and recognize the significance of the recursive processes by which the principals rein in and surveille the agent, and also the ways in which the agent sometimes evades this control. This is a pervasive process: agents invent new ways to evade, or are presented with them by new circumstances, and principals invent new ways to control and surveille. The topic of these relations poses its own challenge to "democratic theory": it raises the basic question of "who rules?" and of where governance occurs.

The principal-agent model treats law and administration, for democracies at least, as instruments, but instruments that have, so to speak, minds and discretionary powers of their own. They harbor people or groups with their own motivations. They create the possibility of failure, transform the goals they are used for, and need to be subject to controls, controls which are themselves instruments with the same kinds of problematic properties. Moreover, among these controls are self-binding ones that are part of law itself, in the form of constitutions, systems of representation, requirements for supermajorities, restrictions on judges and administrators, requirements of transparency, and on and on. And there are interests that lead in the same self-limiting direction: rulers, judges, and administrators can avoid trouble and resistance by not pushing their powers too far. R. von Ihering, about whom more will be said, wrote about the auto-limitation of force as a key feature of legal evolution (cf. Stone 1950, pp. 712-3). In the law of the United States there are two particularly problematic examples of this that are part of judicial doctrine rather than law: rules governing legal "standing" and tests of causality which limit the capacity of people to sue the government for violating its own laws unless there is a provable personal injury, and "qualified immunity," which protects state officials who violate the law but for which there is no direct precedent for enforcement. These excuse the courts from acting and empower administrators and law enforcement officers with enormous discretion.

This way of thinking is central to the book: what it problematized was uses of discretion and the mechanisms for protecting against what might be taken as abuses and the inevitable flaws of translation, or metamorphosis as Kelsen calls it, from the open political process to law, administration, and administrative actions. Why is this such an important theoretical issue? It is certainly neglected in standard democratic theory and in civics education, although there is an important literature on implementation (Pressman and Wildavsky 1984). The facts involved in administration are arcane, and specific to situations and administrative traditions, which vary significantly between governments. Moreover, the reality of administrative secrecy and the obscurity of bureaucratic practices and decision-making makes generalization difficult. Case studies show the complexities, the errors that are obvious in retrospect, the personal interests and quirks that appear with discretionary acts, biases, and so forth, without providing much basis for generalization. And of course the means of evasion and control evolve in unpredictable ways that do not reflect internal political changes but changes in the environment, in technology, and culture, incentives, political judicial and bureaucratic personalities, and so forth.

This set of relationships generates ideologies. Kelsen made this point about the English doctrine of judicial independence: it was presented as a general principle, but in fact it was the case that the judges were appointed by the monarch and thus were not truly independent. Examples like this abound in the relations between democracy, law, and administration. James Heath's recent book in praise of the administrative state praises the morality of the bureaucracy and their normative commitment to neutrality through

their commitment to Pareto optimality. As an ideology, this serves its purposes: it reassures the public and provides bureaucrats with a convenient vocabulary to justify their discretionary acts. In an earlier generation Dwight Waldo (1948/1984) and Carl Friedrich (1937) gave analogous ideological justifications, not surprisingly in different terms than the one elaborated by Heath (see also Turner 2024, forthcoming 2026). Carl Friedrich preached "responsible bureaucracy" and insisted on the superior rationality and morality of bureaucrats (Friedrich and Cole 1932); Waldo portrayed them as governed by a democratic morality (1948/1984, p. 160), meaning something different than democracy itself, and he also cites a raft of other thinkers insisting on a basis for their morality in the higher law, meritocracy, efficiency and so on. He quotes the reformer Charles Bonaparte as saying:

> All men who have sufficiently reflected and are sufficiently informed to entertain an intelligent opinion must and do think alike on the subject; …no one who has any claim on public attention really doubts that the principle of civil service reform is just and benevolent (Quoted in Waldo (1948/1984, p. 161)

Typically, these ideologies are constructed to finesse the question of whether administration and democracy are at odds. And they are generated by, and are denials of, the problems of the principal-agent relations discussed in the theoretical preface.

Friedrich was embarrassed to have to admit that the supremely moral and rational German bureaucrats he praised did not, as he had confidently predicted, resist and foil National Socialism. Every one of the ideologies generated by this set of relations, such as the idea of the rule of law, judicial independence, superior rationality and morality, fidelity to informed opinion, and so forth of bureaucrats, and so on, has analogous embarrassments. As Kelsen would have pointed out, the agents in these cases were actual human beings, not mechanical devices embodying the ideology, or an abstract "state." What principal-agent thinking does here is to highlight the pervasive process of evading, controlling, assuring, correcting, and failing to correct the failures of execution that inevitably arise through the complex processes of governance, "implementation," the substitution of law for justice, in the face of the conflicting interests and beliefs of everyone involved, but especially those of principals and their agents.

But there is a larger target here as well: democratic theory. Much ink has been spilled over the idea of democratic deliberation, the conditions for genuine democracy, whether a given constitutional order is sufficiently democratic, metrics for evaluating democracy, and so forth. The idea behind this is that there is a theoretical object here, democracy, that can be separated from the preferences, wishes, and desires of actual persons living in actual practical situations, and further that there is an important role for the state in bringing about changes in these preferences in the direction of genuine democracy or democratic deliberation as conceived by the theorist. Challenges to these ideas, such as the challenge of accommodating the intrinsically inegalitarian fact of expert knowledge into the presumably egalitarian process of deliberation are routinely ignored, or ideologized—for example into the idea of the purity of expert opinion or the elitist notion that deliberation should be done by the best deliberators with the people as an audience to be transformed by them. This topic that has been dealt with elsewhere, at length (Turner 2003), but is increasing in importance, as indicated by the appearance or reappearance of the idea of epistocracy. But it was not the topic of this book, which is the problematic relation between democracy, law, and administration.

Kelsen did not think that courts alone could save the rule of law, but that the support of the people was also needed. We can translate this into the lesson that the kinds of measures which principals impose on their agents can always be evaded, that trust in the agents can temporarily be re-established, but that it is always in question, because the agents—representatives, the executive, courts, and administrators—always transform the aims of the principals because their actions take a different form, and because this difference produces a space for discretionary power. But so does the ambiguity of the measures, such as a piece of legislation. Thus there is always a problem of accountability and also a potential gap that arises between the people to whom accountability is owed and the user of discretionary power.

APPLICATIONS

This is a barebones summary of the argument of the book. But the various chapters deal with other related topics. The commentaries here touch on and elaborate its theme in various ways. Robert Shuett's contribution focuses on an exemplary case of the core issue of the book, which also shows the value of the principal-agent framing: intelligence agencies. They are given exceptional discretion, can operate secretly and with the most muted kind of accountability, but are essential to the preservation of "democracy" however it is understood, because they have the agential role of protecting the state and the people from adversaries. But they go on to take advantage of their discretion and secrecy. They are the metamorphosed instrument of democracy. But the notions of democracy, responsibility, abuse of power, and much else is metamorphosed with it. Who are they "responsible" to: the transient and ill-informed preferences of the people who occasionally vote, an idealized version of these voters or citizens, humanity generally, the alliances in which they have ongoing relations of trust, the future persons who will be affected by their actions, or the knowledge-limited incentives and constraints of their place in the bureaucracy and its hierarchy, or to the organizational culture of the agency in question?

It is worth noting that Carl Friedrich, an ideologist of bureaucracy, found it necessary to defend this kind of power on the grounds that bureaucrats were not elites with different values than their subjects, but merely more talented users of the same common sense (Friedrich 1942/1950; Turner 2024). This points to the core problem for democracy and the status of agent: there is always a question of whether they represent the principal and are thus merely instruments. These are issues that democratic theory brackets or idealizes out of existence but are central to the phenomenon of governance itself, and especially in the case of intelligence services.

Mikayla Novak's contribution, on Don Lavoie, focuses on the phenomenon of non-comprehensive economic planning. One can add that this is a far more pervasive phenomenon than it appears. There is a current controversy in the US over state licensing requirements for occupations, which vary enormously, and in some states include such categories as "Interior Designers" and "Hair Braiders." These requirements, and a great many others that are not as absurd, are typically burdened with problems of enforcement and the meaning of the regulations is left to the regulators, which in turn raises questions of discrimination and arbitrariness. The rule is that the more intrusive the state is into new domains, the greater the degree of discretion and arbitrariness, not to mention the likelihood of corruption. But it is difficult in many cases to put these kinds of regulatory interventions under democratic control or to make them subject to accountability and transparency because they are concealed under other headings with other ostensible motivations. It is clear, for example, that drug regulation in the US has "economic planning" effects and that the effects are very large. But they are nominally about safety, just as the regulation concerning hair braiding is.[1] The issue here is not over intervention itself, or its democratic basis: it is over the administration and possibility of accountability for administration, and the fact that economically interested stakeholders dominate the non-transparent processes that are able to harness state power for their benefit.

Proceduralism, as Lagi's comments also suggest, is a weak reed on which to rest protections against abuse. It metamorphoses into law, to courts which interpret and apply the law, then to administrative procedures, then into tacit practices or agencies governed by internal and hidden incentives, then to individual judgements and actions on cases of regulation that provide vast opportunities for results that are non-neutral, arbitrary, or reflective of interests or hidden ideological commitments and also non-democratic, in any sense of the term.

Treiber comments on the differences between German and American modes of public administration, a large topic that cannot be taken up here in any detail. But in fact there are many cases of something like co-operative solutions in American administrative law, especially labor law, employment law, and in the history of reform. If the American model appears on the surface to be more legalistic and the German model more co-operative, this reflects many other differences—in culture, in organizational culture, in geopolitical circumstance, in cultural patterns of deference to the state and collectivism, in the role of the

state in the economy, and so forth. His references to co-operation as a mode of governance reflect the limitations of procedural solutions, and "co-operation" or stakeholder compromise focused on particular interventions and decisions may seem like a preferable alternative to a proceduralist, legalistic, method. But the same principal-agent model applies, just with different mechanisms, and the same issues appear, typically in even more concealed and less accountable forms, in these solutions, which are sometimes, as evidenced by the Hamburg cholera epidemic (discussed in Turner 2004a), catastrophic.

It is difficult to see the current moral panic among elites over trust, conspiracy theories, mal-, mis-, and dis-information, and the response, of secret monitoring and censorship of social media as unconnected to the abuses of discretion, secrecy, and deception that have been evident to ordinary citizens over policies they see as having failed. We have been here before: the propaganda efforts of all involved nations in the First World War created a loss of trust that persisted after the war was over. But solutions, such as Woodrow Wilson's plea for open covenants, openly arrived at, are impossible, by definition, to enforce: secrets are secret from the enforcers. And one only needs to call a secret treaty something different, such as a gentlemen's agreement, to avoid violating the rule against secret treaties. The list of techniques of evasion of this sort is astonishing (Donaldson 2017). Attempts to abolish the practice in the US in the 1950s with the Bricker Amendment (Grant 1985) failed. But one could easily find analogues to the pattern of evasion in every domain of administration, especially those that purport to rely on expert knowledge, and in every administrative system.

One concern, which appears implicitly in Agostino Carrino's comment, and more explicitly in Lagi's and Olechowski's concerns, is the machinery of representation, parties, and voting, notably proportional representation. This was not addressed directly in the book, but a few comments are appropriate. Systems of representation, and rules for voting, are themselves the subject of democratic legal processes of revision and acceptance in a dynamic legal order. They in turn reflect the culture and situations in which they are adopted and revised. A simple example in current US voting law can make the point: there is a voting rights act which assures that districts are not designed to prevent a race—implicitly Blacks—from electing representatives reflecting their identity. This has been interpreted, however, to mean other minorities, implicitly Hispanics, can be incorporated into the same district to produce coalitions.

What would a Kelsenian response to this be? First, that the idea of using identity politics to produce what is called a "majority- minority," or non-white majority, that functions as a coalition is a political ideology and aim. Second, there are indeed legal devices for dealing with minorities and fundamental cultural and political conflicts. In his Harvard Tricentennial lectures of 1936 Kelsen explained federalism in these terms (Kelsen 1942). To be sure, dividing political units is not a solution to the problem of minorities as such, but it changes the problem: it creates new minorities within the new units, and thus new political possibilities. When the US Supreme Court reversed Roe v. Wade, it returned the problem to the states, in which the same conflicts arose, but could be resolved in different ways in each state. "Democracy" requires subjecting such questions to democratic procedures, governed by law. There is no magical match between these procedures, constructed and decided for in particular circumstances and "genuine democracy": these are political questions, which have to be resolved by turning answers into laws and judicial and administrative actions.

The same reasoning applies to such topics as proportional representation. The Frankfurt School legal thinker Otto Kirchheimer was dismissive of the American two-party system, which he regarded as producing parties which were mere interest coalitions with no inner spirit, and therefore alienating, unlike the solidaristic *Weltanschauung* parties of central Europe. As discussed in Chapter 5, the diversity of American religious groups produced a culture of a certain kind of tolerance, and a political system which had the effect of encouraging shifting coalitions among groups, whose memberships were changeable, based on interests and a more or less shared idea of fair play rather than solidaristic feeling. This was a gift of history. But as with proportional representation, the party system that developed was a political choice which reflected a culture and worked because of that culture. This was a kind of reality Kelsen was attuned to (Kelsen 1973, pp. 95-113). One of the aims of our book, as the title implied, was to remove such questions from the cat-

egory of "the definition of genuine democracy." But that does not make them disappear: they remain as problems of democracy of the kind that a dynamic aspect of a legal order can address.

It may be noted that while Weber and Kelsen both valued freedom, they interpreted the concept in different ways. As his assistant Melchior Palyi wrote of his mentors Weber and Lujo Brentano,

> As true Liberals, they stood in matters of labor policy for trade unionism, the eight-hour day, and for factory legislation, as far as compatible with domestic free enterprise and international free trade. They were opposed to dogmatic laissez-faire—which meant paternalism in labor relations—as well as to paternalism in government (1949, p. 15).

But for Weber, there were few people free in the sense of not being subject to the suffocating demands of employment in large organizations. Political freedom, on the other hand, consisted in the ability to participate in the selection of leaders who could exercise some power over the large organization of state bureaucracy. This was a political value, based on the experience of a certain culture: what Joseph Schumpeter described as the bureaucratic rule of the impecunious sons of Prussian nobles. Their culture was distinctive. But Weber's response was similarly rooted in culture. It is no accident that he described the leader in terms of the saying of Martin Luther that "here I stand and can do no other." To go beyond Weber and Kelsen requires us to acknowledge these differences, and to see that freedom is a culturally entangled concept. This kind of cultural dependence or entanglement with political traditions holds throughout, as well as for bureaucratic and legal traditions.[2]

THE PROJECT OF DE-MYSTIFICATION

To fit the comments and our response into a more or less coherent whole, it may be useful to place them in a larger intellectual context, an arc, in the manner of David Dyzenhaus's *The Long Arc of Legality: Hobbes, Kelsen, Hart* (2022). The general direction of the arc is toward disenchantment, de-ideologization, and demystification. The methods employed in this process are purification, Occam's razor, reductivism, and so forth. These methods are contested at the moment they are applied, as they are today in contemporary philosophy, where defenders of "normativism" against "naturalism" insist on the limits to naturalistic explanation in the moral realm, and call for re-enchantment to avoid the reduction of the normative to the natural. What follows here is a necessarily superficial account, in the manner of the history given in Weber's *Wissenschaft als Beruf*, and partly following it. The arc we are considering covers the bulk of the Western intellectual tradition, both in the form of progressing with it, in groping along it, and in the form of resisting it. And the forms of resistance often invoked powers and forces that themselves needed to be disenchanted and discarded. It could be written in many ways, such as the way Nietzsche wrote it, which disenchanted the Christian tradition but led to the enchanted figure of the *Ubermensch*, or as Hegel's historicization of thought which led to the mystery of the absolute idea. But there is a strand that goes directly to the problems of law and the state, which is the strand that will concern us. One set of links in this strand of demythologizing was the subject of chapter 8, in which Rudolf Ihering plays a large role, which deserves some explanation, as it puzzles Treiber.

De-ideologizing notions like the rule of law, democracy, and state, and removing the language and ideological heritage of monarchism and natural law from constitutional thinking are projects with a long history, and large and complex literature. But this project is part of the larger project of disenchantment and demystification that concerned both Kelsen and Weber, and many others as well. Kelsen's *Society and Nature* (1946) located a major form of it in the rise of the dualism of nature and society among the ancient Greeks, and comments that

> There were periods in the history of human thought where men did not think causally—that means, that man connected the facts perceived by his senses not according to the principle of causality but according to the same concepts that regulated his conduct to other men (1946, p.vii).

These were prominently notions of retribution, and a mental world in which objects were alive (1946, p. 31). Causal thinking grew out of "the freeing of the interpretation of nature from the principle of retribution" (Kelsen 1947, p. 246). Aristotle's attempt to distinguish convention and nature in the Nicomachean Ethics is a key instance of dualization:

> Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g., that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed, and gain all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas, and the provisions of decrees. Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but is true in a sense; or rather, with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature (Aristotle 1925/1954, Nicomachean Ethics Book 5, Chap. 7, p. 124 [1134b]).

One form of mystification was natural law: the demystifying solution was to apply a dualism between positive law and natural "law." But the teleological concept became a new mystification.

The early modern philosophers, such as Descartes, overthrew the teleological view of the cosmos by applying a dualism of cause and teleology and then discarding teleology. The predictive and regular part was natural law; the teleological part was a matter of faith. Farther along the arc of demystification we find Kant: he was an enlightenment de-mystifier himself. In a famous passage, Kant divided these things in an epistemic way. Teleology was not in the things themselves, but was something we imposed on them in the course of interpreting them. Kant's contribution in ethics was to separate morality from religion. The reasoning involved the assertion of a dualism where there had previously been a unity, where morality was taken to be obedience to God and faith and morality had been one. The moral law, for Kant, could be separated from religion, universalized, and thus de-mystified: it is not merely a formula, but it is part of reason itself.

Ihering had a central role in the next stage of this demystifying story. Ihering rejects Kant on the grounds that to act on the moral law requires more motivation than the supposed authority of the moral law, which by itself motivates nothing. It needs an interest to motivate action. For Ihering, normativity does not exist as a force: that is a mystification to be rejected, a concept that needs demystification. What motivates us are interests, which are also purposes. Utilitarianism provides a theory of interests that mimics teleology, but with a worldly teleology. But the motivating story of utilitarianism also does not work. We are motivated by many purposes, and some of them are worldly and some are not. So it also is a mystification, if we treat it as an explanatory theory. Otherwise it is just another expression of a purpose.

Treiber's criticism requires some discussion. He is committed to the idea that *The Spirit of Roman Law* (*Geist des römischen Rechts* 1852–1865) was Ihering's *magnum opus*, appealing to a general summary discussion by Joachim R**ü**ckert of his early work on *The Spirit of the Roman Law* which Rückert takes to be especially influential. Treiber takes this to represent Ihering's deepest intentions, and claims that our account fails to match up with them. In fact, as Stone explained, Ihering not only changed his approach to the law, "he never finished his Geist because of this change of approach" (1950, p. 300n6). Strangely, Treiber ignores Ihering's later and more influential work, which rejected his earlier affection for legal conceptualism, as well as the standard scholarship on the subject (e.g., Stone 1950, pp. 299-316). As Stone explains "Law in

Ihering's conception, then, was the sphere in which the factors of power and ethical conviction in the interplay of conflicting interests were adjusted" (1950, p. 666). The relevance to Weber is obvious. Treiber uses an equivocal quotation from Gerhard Dilcher and Susanne Lepsius to the effect that the relationship between Ihering and Weber has not been clarified to suggest that the topic of Ihering and Weber is a personal peculiarity of Turner's. But it is not. Many others either discuss the relationship, for example Coutu (2018), or call for more study of it, such as Wilhelm Hennis (1987, p. 53).

This is an important point of disagreement. Chapter 8 in the book quotes extensively from Ihering, Weber's contemporary, friend, and ally Gustav Radbruch, and important major commentators in support of the importance of Ihering: there is no need to rehash the evidence here. In any case it is beside the point. The paper and book in question (Turner 1991; Turner and Factor 1994) are about a topic Treiber ignores: Weber's basic theory of action, interests, and ideas, which is what he builds his account of social regularities on, ultimately including the normative regularity of law. Ihering's *Zweck im Recht* starts from a teleological conception of human action from which he derives a teleological account of law; Weber replaces it with a non-teleological account of action, from which he derives a non-teleological account of law as regularity. These are parallel and conflicting projects. But they have something important in common. Ihering's was a demystifying one, a kind of realism against conceptualism; Weber was a further demystification which eliminated the mystification of teleology. This is the "intention" normally attributed to Ihering.

Treiber's assertions do require a methodological comment. In the history of ideas and especially the history of concepts, there are many ways of establishing the kinds of relationships in question: the similarity of ideas, terms, and themes; direct citations; the logical dependence of a concept on a previous concept; context; climate of opinion; the general regard in which a major thinker is held which allows the interpreter to assume some intellectual acquaintance; relations of teachers and students, including lectures on a person; the diffuse climate of opinion shared by the people, common knowledge; and so on. The relation of Ihering to Weber checks most if not all of these boxes. The fact that we lack proof in the form of page citations that Weber read the passages of Ihering's book that he did not directly reference is not evidence that he did not, nor is it ground for denying the relationships, and differences, between their ideas as historical facts. As Adair-Toteff notes, we run into similar difficulties in the relation of Kelsen to Jellinek: many of the boxes are checked, but not all of them. And Treiber himself does not follow the rule of only using direct citations to the exact page of the relevant texts, referring to indirect "clues" (Treiber 2020, p. 19).

In any case, Ihering was, for the German legal tradition, similar to what Herbert Spencer was for the Anglosphere. His thinking was a point of reference and background even if not acknowledged—and for much the same reason, namely that they developed a coherent account of the evolution of society and its institutions that undermined all atemporal absolutisms. The range of his influence as an interlocutor was astonishing, including Nietzsche, Durkheim, Pound, Lon Fuller, and Paul Vinogradoff. William Grossman, in an essay on Roscoe Pound, comments that

> The title of Ihering's best known work, *Der Zweck im Recht* (1833, 1877), indicates the jurisprudential revolution that he represents and which he, more than any other single man, brought about. Hitherto, nineteenth century philosophy of law had inquired primarily into the nature of law. Ihering sought also the end or ends of law (Grossman 1935, p. 606)

One could go on at length in this vein. It would be a real mystery if Weber had not engaged with Ihering, or with this central work, which closely paralleled his own account of action and regularities. But he did.

The same kind of demystifying logic used by these thinkers applies to the metaphysical theory of the state, to sovereignty, and so forth. Weber demystified the state by characterizing it in terms of means: holding a monopoly of legitimate violence made something a state rather than a mere organization. The state as Weber defined it was not a metaphysical entity but an arrangement between people. Kelsen repeated this: "The modern state is the most perfect type of social order establishing a community monopoly of force" (1944, p. 4). This is a matter of dispute. Weber rejected the "reality" of the state as a sociological, that is to

say explanatory, concept, but conceded its use as a matter of conveniently representing a set of individual activities. He rejected the will of the people as a fiction. Kelsen's account of the identity of state and law was itself a demystification which he seems to think went ever farther than Weber by eliminating any residual notion of the state as something distinct from law: this was his identity theory of state and law. Weber's was a demystification in the domain of explanation; Kelsen's in the domain of norms.

The kind of analysis we gave in the book of democracy, state, law, and administration was an extension of this project of demystification. The terms are abstractions, but they are abstractions from the activities of people, who have interests, roles that they are constantly defining and redefining in particular relationships which are in constant dynamic flux, and objects, like law books, jails, and police batons as well as maps and borders. These activities are subject to ideological interpretation: mystification, in terms of such concepts as representation. Making sense of these relationships and the ideologies they generated was the aim of the book. The method was similar to what Kelsen did in his account of representation (1955). We interpreted the relations between democracy, law and administration as principal-agent relations. Treating these intrinsically problematic relations as the core and motivator of this vast set of ideologized concepts enabled us to do a kind of *Ideologiekritik* analogous to Weber's and Kelsen's. We introduced a dualism, separating the ideological construction of these relationships from their principal-agent core. Weber was careful not to absolutize his substantive concepts, which he understood as ideal-types. He did not want to introduce a new mystery. Neither do we.

NOTES

1 And just as subject to abuse. A recent case actually concerned a hair braiding salon that was denied a permit to open by a municipality because it would provide too much competition for existing salons. Needless to say this was not a licit reason for denial, as the courts affirmed. https://ij.org/press-release/city-of-south-fulton-sued-for-anti-competitive-action-blocking-business-application-city-claims-new-business-would-provide-too-much-competition-with-existing-shops/, But economically consequential abuses of this kind are endemic to permitting processes, which often involve personal relations and antagonisms, not to mention extralegal policy preferences of bureaucrats.

2 The varying bureaucratic traditions of Europe are astonishingly stable and resilient. The case of expertise was discussed at length in (Turner 2004a, 2008), which fits with Treiber's idea of a co-operative German model.

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