

# THE GLOBAL FLOCK AND THE BEAUTIFUL SOUL

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## I. LEGAL SCHOLARSHIP AT ITS BEST

Lindahl’s work exemplifies what legal scholarship can be if it lives up to its full potential. *Authority and the Globalisation of Inclusion and Exclusion*<sup>1</sup> is a core contribution to the theory of law in general. This is the case even though—and perhaps on the ground that—it has been written in response to the perplexities that have arisen in recent decades within private and public international law. Against this backdrop the book demonstrates how legal scholarship is able to make progress, namely, by exploring how certain fields of law have outgrown a received conceptual framework guiding their apprehension by both practitioners and scholars. So-called “theoretical” reflection emerges from a doctrinal context when attempts are made to account for the limitations inherent in the vocabulary with which legal thought links sets of facts with sources of law. The widespread distinction

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1. HANS LINDAHL, *AUTHORITY AND THE GLOBALISATION OF INCLUSION AND EXCLUSION* (Cambridge University Press, 2018).

between theoretical and straightforward legal scholarship is just as arbitrary as many other social divisions that segregate people and their pursuits into different groups or strata of society.<sup>2</sup>

The book also shows beautifully what global legal scholarship can *and* should be under conditions of Anglo-American cultural hegemony. Whoever comes from a different tradition—be it European, Asian or Latin American—invariably needs, in order to make him or herself heard, to cast some less dominant philosophical vernacular in the idiom of analytic legal philosophy (or law and economics, for that matter). This is why we encounter, in Lindahl’s work, the repeated attempt to let the ideas of Husserl, Heidegger and possibly even Sartre pass as the philosophies of, say, Margaret Gilbert or Michael Bratman. This is important, for it promises to transform hegemonic discourses in the course of their appropriation. As will be seen below, in this respect the book in fact reflects its dialogue. It engages in a struggle for recognition under conditions of asymmetry. On a performative level, its message is thus remarkably consistent.

## II. THE CORE QUESTION

At the outset, in taking up themes that—on the surface—have been on our agenda for decades, namely “law without borders” or law that cuts across territorial jurisdictions,<sup>3</sup> the book appears to be about *spatial* borders. But it soon reveals that what is driving the project is “space” in a Heideggerian sense<sup>4</sup> and not space as understood by Cartesian dummies (positions on a map – pshaw!). The Heideggerian space again turns out to be a world<sup>5</sup> in the Husserlian sense of a ‘life world’.<sup>6</sup> Such a world recognizes places where objects and actions are invested with practical meanings, creating a *Bewandtniszusammenhang*,<sup>7</sup> and these meanings reflect a particular situated perspective on interpreting, ordering and evaluating human conduct (the taking of something *as* something).<sup>8</sup> Hence, the more Lindahl’s project unfolds, the more the focus shifts from *borders* to *bounds of sense* that are constituted in

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2. I have made this claim before that the distinction between “pedestrian” legal scholarship and “detached” legal theory is only a social one. See ALEXANDER SOMEK, *RECHTLICHES WISSEN* (Suhrkamp, 2006).

3. LINDAHL, *supra* note 1, at 10–11.

4. *Id.* at 19–20, 48, 66.

5. *Id.* at 35–36.

6. See EDMUND HUSSERL, *DIE KRISIS DER EUROPÄISCHEN WISSENSCHAFTEN UND DIE TRANSCENDENTALE PHÄNOMENOLOGIE: EINE EINLEITUNG IN DIE PHÄNOMENOLOGISCHE PHILOSOPHIE* 52–58 (E. Ströker ed., 2d ed. 1982).

7. See MARTIN HEIDEGGER, *SEIN UND ZEIT* 84 (Max Niemeyer Verlag ed., 14th ed. 1977).

8. See MARTIN HEIDEGGER, *DIE GRUNDBEGRIFFE DER METAPHYSIK: WELT – ENDLICHKEIT – EINSAMKEIT* 397 (Vittorio Klostermann, 1983).

the course of engaging in common action. The trajectory leads, hence, from spaces in a Cartesian sense—empty rooms in which one encounters merely “positions”<sup>9</sup>—to spaces in the Heideggerian sense, which are replete with practical significance in virtue of providing the indispensable locales for living as human beings in a world.<sup>10</sup> In a like manner, the emphasis shifts from “borders” to “limits.”<sup>11</sup> Hence, the study of globalization is essentially about the creation, collision and transformation of various legal worlds:

[...] [L]egal globalizations attest to the entwinement of worlds, where entwinement means both interference and interconnection.<sup>12</sup>

The project is therefore strongly reminiscent of Teubner’s and Fischer-Lescano’s “regime collisions.”<sup>13</sup> The book speaks incessantly about how not only vis-à-vis one another but also with regard to their putative constituents fragmentary legal systems create their own conceptual schemes (Davidson’s “third dogma”)<sup>14</sup> that feed into shared practices.<sup>15</sup> They are pluralistic and contingent. It is the cognitive and practical bounds of these worlds that underlie what Lindahl repeatedly presents to be the core question of this book:

[...] [I]s a global legal order possible, even if not actual, which could include without excluding?<sup>16</sup>

As is well known by now, Lindahl does not answer this question in the affirmative. Yet, while his work is all about the particularity and contingency of bounds of sense—of limits of “fields of sense,” using the language of Markus Gabriel’s<sup>17</sup>—it culminates in a critical discussion of two different ways of addressing such particularity: mutual symmetrical and asymmetrical recognition. While the former promises to give rise to—in the virtual sense of a Kantian regulative idea—an ever more inclusive legal system that grows by integrating formerly excluded worlds,<sup>18</sup> the latter recognizes the ineradicable asymmetry of inside and outside.<sup>19</sup> This alternative invites our atten-

9. LINDAHL, *supra* note 1, at 36–37.

10. *Id.* at 35, 39, 43, 63. The boundaries in the Cartesian sense are included only trivially, by stating that they have to be manifest somewhere in space. *Id.* at 157.

11. *Id.* at 26, 36, 64, 157. Never mind that Lindahl talks of “boundaries” too. *Id.* at 140.

12. *Id.* at 36.

13. See generally Andreas Fischer-Lescano & Gunther Teubner, *Regime-collisions: the Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999 (Michelle Everson trans.) (2004).

14. See DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* 189 (Oxford University Press ed. 2001) (1984).

15. See generally Fischer-Lescano & Teubner, *supra* note 13.

16. LINDAHL, *supra* note 1, at 267–68. See *id.* at 163, 177, 186, 198.

17. See MARKUS GABRIEL, *FIELDS OF SENSE: A NEW REALIST ONTOLOGY* (2015).

18. LINDAHL, *supra* note 1, at 263, 267.

19. *Id.* at 275–76.

tion to meta-fields of sense-making that do battle in the process of globalization.

### III. TWO FRIENDLY AMENDMENTS

In what follows, I would like to focus on two basic strategies of this remarkable work that nonetheless strike me as problematic. I would like to propose a friendly amendment to each. The first is intended to draw out more clearly the authoritarian deep structure of global regulation and adjudication, while the second calls for greater caution with regard to embracing any jargon of authenticity<sup>20</sup> in the context of recognizing the somewhat wearisome “otherness of the other.”

The first strategy consists of viewing legal orders, which are set in legal “worlds” or legal “spaces,” as systems of collective action. Lindahl elaborates this idea in what he calls the IACA model of law (“institutionalized and authoritatively mediated collective action”).<sup>21</sup> I am afraid that the model is generally misleading, by which I mean that it is confusing not only in the context of global legal orders, but as a legal theory *tout court*. The reason is, plainly and simply, that the model must perceive collective agency where there in fact is none. The misattribution of such agency is, therefore, the chief demerit of theories of this type. As shall be further explained below, in cases that are referred to as “massively shared”<sup>22</sup> or “massively alienated”<sup>23</sup> agency, the collective agency model becomes grossly overstretched to a point at which it becomes utterly implausible. At the end of the day, the model appears to betray an organized vision of collective agency that imputes to individuals participation in common action regardless of whether they intend it or not. The suggested friendly amendment attempts to avoid this pitfall.

The second strategy consists of suggesting that mutual recognition, either in its symmetrical or asymmetrical form, is at the heart of legitimate authority. Lindahl puzzles his readers with a beautifully circular way of characterizing this relation, whereby the gaze of recognition is mirrored back to the person recognizing another. Hence, any misrecognition of the other results in misrecognizing what might have been oneself.<sup>24</sup> In reply to such phenomenological intricacy the second amendment emphasizes that in the case

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20. See THEODOR W. ADORNO, *THE JARGON OF AUTHENTICITY* (Knut Tamowski & Frederic Will, trans., 1973) (1964).

21. IACA stands for “institutionalized and authoritatively mediated collective action.” LINDAHL, *supra* note 1, at 54–60.

22. *Id.* at 57–58, 103.

23. *Id.* at 108, 158.

24. *Id.* at 341.

of law recognizing people as “legal subjects” is already a way of addressing the internally tangled relation of recognition and misrecognition.

#### IV. THE GEOLOGY OF THE “WE”

It is the most fundamental premise of Lindahl’s work that legal orders are “a species of collective action.”<sup>25</sup> Following Margaret Gilbert,<sup>26</sup> he explains that in order to account for such action a distinction needs to be made between “we together” and “we as each.” While “we together” stands for participants in a joint action, the latter designates *us* as unconnected and unrelated individuals. Lindahl’s analysis of inclusion and exclusion relies—exclusively, I add tongue in cheek—on the first version of “wehood” (apologies for polluting English with the German penchant for nouns), which is usually denoted with an asterisk added (“we\*”).

We together (we\*)

We each

The existence of such wehood is manifest, as Lindahl himself explains, in the mutual commitment to work towards the attainment of shared ends.<sup>27</sup> Not only do the participants in joint action intend to contribute with their own acts to some joint venture, they are also considered to be under an obligation to step in and to secure the venture’s success if something seems to go wrong or if the plan of action needs to be amended on the go.<sup>28</sup> While each participant is primarily responsible for contributing his or her bit to what might eventually add up to a collective act, all participants also bear a residual responsibility to do whatever is necessary to make the joint action possible or, at any rate, to abstain from conduct that would subvert it. It is worth keeping this in mind, for it is this idea that is irreconcilable with other claims that are made in this book.

Intriguingly, in order to explain how legal systems of a global scope necessarily exclude when they include, Lindahl disaggregates, following Bert van Roermund’s lead,<sup>29</sup> the domain of “we\* together” into the “we\*

25. *Id.* at 47.

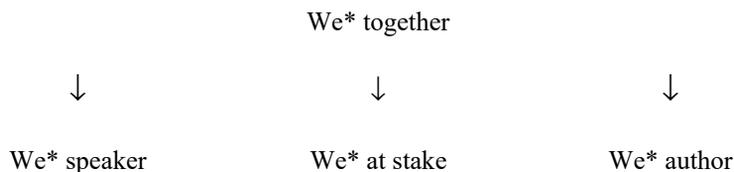
26. See MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* 146 (2006).

27. LINDAHL, *supra* note 1, at 48–49.

28. See *id.* The example used by Lindahl is that of people preparing a meal together in the kitchen. If the person tasked with peeling the potatoes realizes that the soup is boiling over that person is obligated to take the soup off the burner even though her primary responsibility lies elsewhere. There is a residual responsibility on the part of all to do whatever they can do in order to make the project succeed.

29. See Bert van Roermund, *First Person Plural Legislature: Political Reflexivity and Representation*, 6 *PHILOSOPHICAL EXPLORATIONS* 235 (2006).

speaker” and the “we\* at stake” (eventually, he adds also the “we\* author”).<sup>30</sup>



The point of these more fine grained distinctions is to provide an account of such systems as collectives, *i.e.*, as subjects of a transpersonal scale that are created in processes of representing a putative unity attributed to them by those taking action on their behalf. While the “we\* as agent” designates regulators or overseers,<sup>31</sup> the “we\* at stake” stands for the regulated, understood as those who in virtue of their compliance with the rules laid down by the regulators contribute to some common action. Only if the self-understandings and, more importantly, the intentions of the first and the second we\* sufficiently overlap can it be said that the we\* is self-determining. Quoting from Lindahl:

Insofar as each of the . . . governance networks claims to act on behalf of a global collective qua unity of interest, hence not merely as the aggregate of the interests of a range of agents, each of those networks claims a certain *autonomy* for itself and for the global collective that it regulates . . .

Indeed, the first-person plural perspective of a global collective has correlative faces: on the one hand, a claim by a governance network to regulatory autonomy vis-à-vis states; on the other, the presupposition of a global we\*, with a distinct interest irreducible to that of state collectives, and which the network claims to represent. If, by and large, the addressees of regulation by a global governance network act in accordance with its rules, it is warranted to assert that a collective *self*—the hallmark of collective unity—has emerged and, with it, autonomy as *collective self-rule*.<sup>32</sup>

Now, remarkably, Lindahl cautions us that we shouldn’t assume that voluntary compliance by the folks on the ground bestows democratic legitimacy on the collective self. There is no equivalence between collective self-determination and democracy. If there were, the “we\* at stake” would without anything further coincide with the “we\* author.” But this, according to Lindahl, is decidedly not the case.<sup>33</sup> The “we\* at stake” are those for the sake

30. LINDAHL, *supra* note 1, at 98.

31. *See id.* at 54, 57, 59, 88. The reference to regulators is too narrow, of course. Using Lindahl’s parlance, one had better refer to those who articulate, monitor and uphold the default setting of action.

32. *Id.* at 104–05.

33. *Id.* at 105–06.

of whose interests the rules are set, monitored and modified considered as a group. A we\* of this type—and the requisite collective autonomy—exists, Lindahl claims, also when we are confronted with a theocracy or an autocracy.<sup>34</sup> This implies that in order to exist the “we\* at stake” does not require any identification on the part of agents “on the ground”—the addressees—with the legal order that the “we\* as agent” sets up on their behalf. Rather, it is fair to conclude that the “we\* at stake” is *what* it is, and *exists*, in virtue of what the “we\* as agents” fancy it to be. The “we\* at stake” is the imaginary focus of the activity of the regulators as a group.

This idea—accurate as it may seem, indeed, with an eye to the rhetoric employed by those talking from the commanding heights of global regulation of a “community” in whose interest they purportedly act—cannot be reconciled with the collective action model of the legal system. Indeed, it demonstrates that the whole social ontology developed in the work accounts for realities in a rather misleading way.

For the purpose of constituting collective action not only the regulators must intend to act on behalf of a collective “we\*,” but also the regulated when they comply with the rules that the former have laid down for them. The regulated need to comply with the intent to contribute to the success of what “we\*” are doing. The regulated, passive we\* is the “we\* at stake”. If such a we\* is merely fancied by the regulators, the link between the actions of the regulators and the actions of the regulated is broken. No collective action can emerge if the “we\* at stake” is merely imagined by the regulators while the regulated behave in fact as “we each,” that is, as an aggregate of individuals whose acts are not tied to the pursuit of a common plan.

## V. A FIRST OBJECTION: LEGALITY NEGLECTED

Puzzlingly, however, Lindahl claims that the link connecting the acts of the regulators and the regulated is intact. In Lindahl’s work, the “we\* at stake” is always taken to be some global community. Global merchants are the “we\* at stake” in the case of the *lex mercatoria*, the global banking community—or, owing to “nesting,”<sup>35</sup> the global community of bank customers—is the “we\* at stake” in the case of the Basel Committee. In virtue of the regulators fancying these “communities” the obedient folk become complicit in global collective action. But this begs the question. Indeed, it involves a *petitio principii*. It is implausible to suggest that we are even confronted with collectives. *A fortiori*, the question of exclusion and inclusion does not arise in the first place.

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34. *See id.* at 105.

35. *See id.* at 50.

In order to make sense of the detached manner in which many of the regulated act, Lindahl borrows a category from Scott Shapiro.<sup>36</sup> This is the category of “massively shared agency.”<sup>37</sup> According to this view, whoever contributes to collective action does not have to be necessarily concerned about its success. This raises the question, of course, whether there would still be collective action if none of the persons involved cared about the outcome. Are we confronted, that is, with collective action where the sovereign commander sets the rules and threatens his subjects into impotence? Clearly not, and this may be the reason why Shapiro suggests that for there to be collective action at least “most” have to act in accordance with the plan voluntarily while only a few others may not.<sup>38</sup> But if that were true, one important component of collective action would still be conspicuous by its absence. Lindahl considers it, correctly, essential for its existence, namely the shared commitment to its success. It is the component that explains why we reprimand participants for doing nothing and remaining inactive in the event that something goes wrong or a plan needs to be amended on the go. If people are free to remain indifferent to the project and to stay uninvolved it is plainly wrong to describe their conduct as participation in the realization of a plan. This is even worse in the case of what Lindahl calls, building upon Shapiro’s idea, “massively alienated agency.”<sup>39</sup> Such can be found in cases where participants not only do not share the goal, but rather do not even understand it.<sup>40</sup> Lindahl thereby attributes collective agency to all kinds of dupes, in particular, the global flock that goes with the crowd or simply does as it has been told to do for whichever reason or maybe for none at all. Nobody can intend to contribute to a goal of which he or she is not even aware. As a description of collective action this must strike one as wrong-headed.

What both Shapiro and Lindahl discover in this context is, quite interestingly, the legality of law, that is, the detached attitude with which legal rules are complied. But it is exactly the legality of law that explains why the legal system is not, decidedly not, a system of collective action.<sup>41</sup> Law leaves it to the addressees to comply in any manner, and with any attitude, they see fit.

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36. See Scott J. Shapiro, *Massively Shared Agency*, in *RATIONAL AND SOCIAL AGENCY: THE PHILOSOPHY OF MICHAEL BRATMAN* 257, 257–92 (Manuel Vargas & Gideon Yaffe eds., 2014).

37. LINDAHL, *supra* note 1, at 57–58. See SCOTT J. SHAPIRO, *LEGALITY* 142–50 (2011).

38. See LINDAHL, *supra* note 1, at 104.

39. *Id.* at 108.

40. *Id.* at 157.

41. It is ironic, to say the least, that the author of the book on *Legality* ignores what it means in the understanding in which we have inherited the idea from Kant. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (M. Gregor, trans., 1996).

## VI. A SECOND OBJECTION: ORGANIZISM

The consequence of Shapiro's and Lindahl's approach should not elude us. Their way of conceiving of collective action assumes that whoever enters into a contractual agreement, relying on the rules that the regulators have provided for such an occasion, thereby contributes to the realization of contract law as a legal institution. This implies that their action *means* participating in the realization of legal institutions no matter to what it may have been that they have set their mind. Such an account of human action would be accurate only if it were right to view persons that avail themselves of the law of contracts for their private ends as the organs of the system of private law. This, at any rate, appears to have been the view of nineteenth century jurists of the romanticist historical school.<sup>42</sup> Such a view presupposes, thus understood, an emphatically organicistic social ontology.

Organicists believe that the unexamined and not reflected consequences of individual acts demonstrate that these acts are *truly* the acts of the social organism of which the individuals are part. Using an obvious example, the act of sexual intercourse, even though intended by individuals to satisfy their sexual urges, is an act directed at reproducing the species. That's what this act *essentially* is from a biological perspective, for individuals are *essentially* specimens of a species. One is an "organ" regardless of whether one intends to be one.

It emerges clearly, however, that the organicistic view of action does not view action as joint action. The individuals in question are who they are in virtue of being part of an organic whole. The relevant act is not commonly coordinated.

The important conclusion to be drawn at this point is the following: the "we\* at stake" exists only in the imagined form in which it is envisaged from the commanding heights of the administrators. It does not exist, that is, from the perspective of the folks on the ground. From their perspective this "we\*" actually is an ideological distortion of social realities. They—the folks on the ground—exist for one another only as "we each." With that we arrive at the accurate picture. The "putative unity" of the "we\* at stake" exists only for the regulators. The regulated are "we each." Lindahl's theory is prone to fall prey to the ideological claims of the regulators for the reason of failing to scrutinize their pretensions. The theory does not examine the ontologically precarious status of the "we\* at stake."<sup>43</sup> Indeed, it takes almost naively for granted that any claim of someone to act in the interest of all persons globally

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42. See ALEXANDER SOMEK, *RECHTSSYSTEM UND REPUBLIK: ÜBER DIE POLITISCHE FUNKTION DES SYSTEMATISCHEN RECHTSDENKENS* (1992).

43. LINDAHL, *supra* note 1, at 117.

affected is tantamount to claiming that the bearer of this interest *is* a collectively acting we\*.<sup>44</sup> This is the root of the organicistic fallacy. It is beautifully revealed in the following sentence:

[...][W]ho enacts rules claims to reaffirm a collective's identity, such that the addressees of those rules can recognize themselves as a group and they are/ought to be as a group.<sup>45</sup>

But this is a non sequitur. Whoever enacts rules in the interest of all claims to enact rules in the interest of all and does not make any assertions concerning the ontological status of the persons affected.

## VII. FORWARDS BACK TO VOEGELIN

Viewing “massively shared” and “massively alienated” agency as instances of collective action is terribly implausible. Nevertheless, classifying human agency in these terms reveals as much as it conceals. It conceals what is really going on. But it also reveals a bit of it. Membership is something that *happens to* individuals. It is imposed from above. They become enlisted. The global regulators have the power to imagine communities and, potentially, the authority to bring them about.

Lindahl's work is, therefore, apt to reveal as well as to conceal. Far too quickly it moves past the juncture at which the author could have explained that the processes that we encounter in the era of globalization are authoritarian at heart. But once we pause, we can catch a glimpse of the matter. We merely have to take our cue from the “existential” concept of representation developed by Eric Voegelin in his, admittedly, somewhat esoteric *New Science of Politics*.<sup>46</sup> The parallels are particularly striking not least because Voegelin, like Lindahl, also uses the concept of “representation” in order to account for the “articulation” of collectives.

In this slim volume, Voegelin takes up ideas that he had developed in his early work *The Authoritarian State* (written as an apology of the so-called Austro-Fascist government).<sup>47</sup> According to Voegelin, who draws heavily on the work by Maurice Hauriou, the representative brings an institution into being in light of what he or she believes to be its leading idea.<sup>48</sup> It is thereby that he or she moulds the hearts and minds of the people supposed to accept the order—to consent to it routinely. Existentially, Voegelin adds, the authority of the representative precedes any effort to rein in his or her conduct

44. *Id.* at 107, 117.

45. *Id.* at 111.

46. See ERIC VOEGELIN, *THE NEW SCIENCE OF POLITICS: AN INTRODUCTION* (1952).

47. See ERIC VOEGELIN, *DER AUTORITÄRE STAAT: EIN VERSUCH ÜBER DAS ÖSTERREICHISCHE STAATSPROBLEM* (1936).

48. See VOEGELIN, *supra* note 46, at 48–49.

by constitutional means. This matches how Lindahl conceives of representation:

[...] [T]he claim that we\* are a unity and what it is that joins us together as a unity is always a representational claim. This might sound innocuous; it isn't: collectives emerge by way of acts of representation that include and exclude without a prior authorization to do so by their addressees. Representational acts include by establishing the boundaries of (il)legality, and exclude by banishing all other possible configurations of legal order to the domain of what is deemed inconsequential for collective action.

[...] [A]uthority is the capacity to articulate a representation—a vision—of who we\* really are/ought to be that, in hindsight and for the time being, gains wide allegiance among its addressees and motivates them to act as a group that can deal with challenges to its contingent existence.<sup>49</sup>

Voegelin's work, particularly if read in juxtaposition with *The Authoritarian State*, is useful to determine more clearly the authoritarian element in representation that is also key to Lindahl's analysis of inclusion and exclusion. Lindahl speaks of the necessarily and irretrievably "representative" way in which agents attribute a "putative," and *a fortiori* tentative, unity to the collective for which they establish a default framework of action in light of what they take to be its point.<sup>50</sup> He also suggests contestability inheres in how representatives create closure. What Voegelin allows us to perceive, however, is that what the agents fancy to be the "we\* at stake" sets the terms for interactions with folks on the ground and anticipates at least the contours of the institution—the default setting of action—that is to be created in their wake.<sup>51</sup> Voegelin allows us to perceive most clearly that the mere anticipation of a "we\* at stake" is an authoritarian pretension.<sup>52</sup> This pretension can be encountered variously in the regulatory processes happening on the global level, such as the Basel Committee or the decentralized systems of international arbitration.

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49. LINDAHL, *supra* note 1, at 232–33, 329 (emphasis in original).

50. *Id.* at 109–12.

51. *See id.* at 343 ("If collectives emerge through representational acts, so also representational acts mark the emergence of authority in the sense indicated earlier: the capacity to articulate a representation—a vision—of who we\* really are/ought to be that, in hindsight and for the time being, gains wide allegiance among its addressees and motivates them to act as a group that can deal with challenges to its contingent existence.").

52. Compare this with LINDAHL, *supra* note 1, at 233: "Representational acts include by establishing the boundaries of (il)legality, and exclude by banishing all other possible configurations of legal order to the domain of what is deemed inconsequential for collective action. Notice, moreover, that it is not just practical possibilities *excluded* from the domain of law that lack prior authorisation; the practical possibilities concerning who ought to do what, where and when *included* by representational acts also lack *ex ante* authorisation. [...] Both sides of the closure wrought by representational acts (representation as), as well as the *attribution* of the act to a collective (representation of), the prior existence of which the act of *re*-presentation takes for granted, are always contestable and premature."

### VIII. A SYSTEMIC CONTEXT OF ACTION

Even though Lindahl is aware of the authoritarian element inherent in establishing boundaries, his account still remains to be somewhat idyllic. It is idyllic because by embracing the Heideggerian account of “space” and “world” he locates the law principally in the life-world as the “transcendental place” at which we are jointly planning our actions and using reasons in order to explain or to justify our doings.<sup>53</sup> The law is viewed as embedded in a context in which it can be debated with an eye to—and this is of particular importance to Lindahl—the point of what is supposed to be common action or the self-image of a community. The world of law making is, putting it in Habermasian terms, the world of communicative action. Such action is manifest in the coordination of conduct by means of communicative exchanges concerning its purpose and means.

Famously, in 1981—in his *Theory of Communicative Action*—Habermas distinguished, however, between law as an institution and law as a medium of communication<sup>54</sup> (the distinction that created quite a stir back then). While the former is manifest in sets of norms that emerge against the background of moral norms inherent in our life worlds and, hence, are subject to debate and readjustment in the course of communicative action, law as a medium functions by means of linking normative claims with money and power. Once the law is coupled with these media of communication it can rely on signals (notably, prices and sanctions) to impart the desired results. Those signals—costs and adverse consequences—are relevant in contexts of strategic interaction in which participants attempt to influence each other’s behavior by means of incentives or threats, and not with arguments concerning the moral merits of legal norms. Law as a medium of communication is what we encounter if law comes attached with the strings of coercion or if it owes its efficacy to the expected economic gains that accrue from compliance. In this format, the law is not viewed as lending expression to a legitimate institutional ordering but seen through the lens of power and money as media of communication. Legal norms merely signal how one ought to behave because of constraints that are beyond one’s control.

It is totally irrelevant for the addresses of law as a medium whether they are considered to be part of a “we\* at stake.” They have no interest in representation and whatnot. What they attempt to do is to adapt shrewdly to circumstances that they would be able to control if they offered incentives or issued threats themselves. In Gilbert’s words, they act as “we each”. National

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53. See JÜRGEN HABERMAS, *DER PHILOSOPHISCHE DISKURS DER MODERNE* 408–09 (Suhrkamp, 1985).

54. See JÜRGEN HABERMAS, *THEORIE DES KOMMUNIKATIVEN HANDELNS*, VOL. 2: *ZUR KRITIK DER FUNKTIONALISTISCHEN VERNUNFT* 536 (1981).

regulators in smaller countries adopt the banking standards established by the Basel Committee, for that is necessary to secure the success of their national banking system. They have economic incentives to do so. National legislatures take the recommendations of the Codex Alimentarius Commission to heart, for this is what promises to keep them and their local producers out of trouble before the Dispute Settlement Body when it comes to the application of the Agreement on Sanitary and Phytosanitary Measures. This is what happens from a sociological point of view. Nothing could be more removed from our experience than a “community” of traders in foodstuffs. It is far more plausible to view law from the perspective of contexts that are marked by asymmetries of powers and to see it debated, if at all, under conditions of “distorted communication.” The phenomenological approach does not seem to fit well enough the realities of banking regulation or international investment arbitration. Clearly, the world of commercial dispute settlement may have its own way of romanticizing itself. But this does not alter the fact that we are confronted with a systemic context of strategic interaction.

#### IX. AUTHORITY, AUTHORIAL AND DEFERENTIAL

If there is no collective agency, then the situation is such that there is just regulating, monitoring and upholding, on the one hand, and regulation-taking for a variety of reasons, on the other. One of these reasons may give rise to what I call “pure cosmopolitan self-determination”.<sup>55</sup> It is a pathological form of autonomy, for it transforms passivity into an irrational resolution of the conflict between autonomy and dependence on the knowledge of others. But this need not detain us here.<sup>56</sup>

Yet, Lindahl’s rich ontology of agency presents us with a way of overcoming the disconnect between what regulators imagine to be a collective (“we\* at stake”) and the folks on the ground (“we each”). The community projected by the regulators could be connected with the regulated by giving a say to the folks on the ground. In such a case a “we\* author” would emerge:

Democratic collectivity [...] requires that, by and large, the members of this group can view themselves as jointly *authoring* (the default setting of) what their group action is/ought to be about. This requires, in turn, that such members can view a global governance network as authorized by them to act in their interest by articulating, monitoring and upholding the point of their joint action.<sup>57</sup>

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55. See ALEXANDER SOMEK, *THE COSMOPOLITAN CONSTITUTION* 32, 247 (2014).

56. See Alexander Somek, *Accidental Cosmopolitanism*, 3 *TRANSNAT’L LEGAL THEORY* 371 (2012).

57. LINDAHL, *supra* note 1, at 107.

Evidently, Lindahl's not merely functional,<sup>58</sup> but normative concept of authority is all about common authorship. This explains why, in addition to the "we\* speaker" and the "we\* at stake," which is the we\* envisaged by the regulators, he adds the "we\* author."<sup>59</sup> The latter is necessary to account for authority in the sense of common authorship.<sup>60</sup> Authority, normatively understood, is, indeed, about those having some sort of input or impact on decisions who consider themselves to be part of a "we\* at stake." But since processes of authorization are mediated by representation (the unity of the collective is always a represented unity)<sup>61</sup> it is, again, highly implausible to assume that something like genuine collective self-determination, let alone collective action, could result from it. An ineradicably authoritarian element is bound to remain.

But perhaps it would have been more advisable to work with a concept of authority that is less poetic and more focused on the elementary fact of "yielding to someone" or, for that matter, "surrendering one's judgment."<sup>62</sup> Such a concept dissociates "doing as another tells one to do" from the idea of one's own authorship. Lindahl's social imaginary suggests that "democraticizations" or authorizations work in a manner in which the "we\* at stake" is first imagined by the regulators and then challenged and transformed from below, that is, by those capable of providing authorization. Yet, the regulation of international trade is hardly ever about the "global trade community"; it is about tunas and dolphins and hormone beef. It is not the case that authority can be legitimate only if it is articulated from within the correctly shaped community and sufficiently animated by the voices speaking from below. Ever since John Locke perceived the origin of authority to lie, vis-à-vis right holders, in the supreme ability of adjudicative institutions to make sure that in the resolution of disputes the law is observed,<sup>63</sup> authority has been about surrendering one's own judgement to those who can credibly claim to know and to judge better than oneself.

Actually, the construction of the conditions of autonomous agency does not have to adopt at all the poetic image of authorship. We do x because y has said so. This is the basic relation of authority. We follow authoritative directives and still regard ourselves as autonomous in the sense of being susceptible to reasons—right reasons, that is—as long as yielding the x issued

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58. According to the functional concept of authority, authorities are what authorities do, namely, agents articulating, monitoring and upholding the default structure of common action. *Id.* at 59–60.

59. *Id.* at 106.

60. *Id.* at 107.

61. *Id.* at 109, 133, 181.

62. Yes, the reference is of course to JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

63. See JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* (Peter Laslett ed., 1988).

by *y* is a reasonable thing to do. There may well be good political grounds for yielding to the judgment of others in the face of disagreement. This is a road that Lindahl has not taken owing to his preoccupation with matters of collective identity.

This observation concludes my first amendment. It proposes to shift the emphasis of the project from the construction of collective identities and agency towards an analysis of the authoritarian core of global regulation. In addition it suggests that authority is, where it exists, not a matter of authorship but a question of exploring whether one has good reasons to do as another tells one to do.

## X. INTEGRITY INSTEAD OF IDENTITY

The organicistic fallacy, identified above, is merely the symptom of another difficulty. Obviously, Lindahl puts much emphasis on collective unity or identity. Owing to the significance he attributes to it, the identity must appear to be constantly at risk. He thereby gives us, I am afraid, a misleading image of our political world. Why this is the case can perhaps best be explained with an eye to how we cope with the demands of our personal identity.

Is it really the case that my identity as a person is at stake when I commit a single act that is not consistent with my practical identity, that is, with the type of person I take myself to be, at any rate, for certain purposes?<sup>64</sup> Assume, for the sake of the argument, that owing to some strange affliction I listen to Elvis Presley rather than to string quartet music from the Viennese classic. Listening to Haydn, Mozart, and Beethoven would, from the perspective of Lindahl's theoretical grid, fit my "default setting" of action and allow me to pass as traditional, perhaps somewhat stuffy, Viennese urbanite. The appeal that *Love me Tender* has to me would, in Lindahl's universe, be the equivalent of an a-legal challenge to a legal system's identity. Allowing the challenge to go forward I lend the limits of my practical identity susceptible to redefinition:

[...][A]-legal behaviour has the form of a demand for what is due or deserved, which calls into question – disputes – the justness and validity of the limits of the legal order, thereby unleashing a struggle about the boundaries of (il)legality in which the collective identity and the identity of who raises the demand are put to the proof.<sup>65</sup>

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64. On the concept of "practical identity," see CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* 101 (1996), where a practical identity is characterized as "description under which you value yourself, a description under which you find your life to be worth living and your actions to be worth undertaking."

65. LINDAHL, *supra* note 1, at 311.

From this perspective, listening to what has hitherto appeared to me to be non-music requires a realignment of my musical taste that forces me to refine the terms and limits of my identity as a musical connoisseur.

But there is an alternative and possibly more plausible description of what listening to Elvis entails. While I am listening to his song I am pushing into the background my admiration for the *largo cantabile e mesto* of Haydn's g-minor string quartet called "The Rider". I hold my admiration in abeyance until the next *proper* occasion arises to express it. My listening to Elvis neither affects nor engages my identity as a musical connoisseur since I am thereby simply taking a leave of absence from the strictures of my self-image. I am still a sophisticated city dweller even if I am on one or the other occasion listening to bits and pieces of cheesy pop music. As is well known, legal systems operate in a very similar manner. Courts tacitly depart from established precedents by permitting all kinds of modifications to go forward until, of course, they slowly realize that a field of law has fallen into disarray.<sup>66</sup> This is the challenge to identity that is of relevance, namely, the threat of operating arbitrarily. The question of inclusion and exclusion is secondary. It arises in the context of a quest for coherence or, putting it in Dworkinian terms, in the course of aiming at integrity.<sup>67</sup> It is not, at any rate, a given.

## XI. UBIQUITOUS REINVENTION EFFACES IDENTITY

And yet, my identity is contingent. It is just as contingent as legal orders are.<sup>68</sup> While, according to Lindahl, legal orders remain questionable and responsive with regard to the practical possibilities that they exclude, their limits can be corrected. Nevertheless, their very limitedness cannot be overcome. It is with regard to such limitedness that Lindahl claims that limits have to be regarded also as "fault lines."<sup>69</sup> The boundaries of a legal order have to be viewed as fault lines inasmuch as any expansion or contraction of limits invariably relies on a blind spot that circumscribes a collective's practical possibilities.<sup>70</sup> This *non plus ultra* of transformative action cannot be overcome by legal systems.

It stands to reason whether this claim, were it to amount to an insight, could ever be of any relevance to a legal system. For two reasons, I am afraid that it might not be. The first is that it makes reinvention into a quotidian

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66. See MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1991).

67. See RONALD DWORKIN, *LAW'S EMPIRE* 225-75 (1986).

68. LINDAHL, *supra* note 1, at 282.

69. *Id.* at 282, 299.

70. *Id.* at 299-300, n.18. See generally GÜNTER SCHULTE, *DER BLINDE FLECK IN LUHMANN'S SYSTEMTHEORIE* (1993).

affair. The second is that it tacitly rests on a romantic view of selfhood that renders individual and collective selves as devoid of content. With that I arrive at my second amendment that proposes to drop the “beautiful soul”.

According to the thoroughly contingent nature of legal orders<sup>71</sup> any legal system invariably may touch base with what it excludes in every single operation. Hence, from the perspective of a-legality<sup>72</sup> any adjustment that is made in light of the “questionability” and “responsiveness” of joint action gives rise to ruptures from which new legal systems emerge. The constituent power – *potentia* – of a-legality is present<sup>73</sup> in every single act. Arguably, this is just like imagining that one becomes a new person in every single moment in which one is breaking out of established routines. I am listening to Elvis. I am thereby taking on a new practical identity. This is implausible. But even if the idea were sound, I could treat it with great indifference. If reinventing myself becomes a quotidian affair it loses any significance for my life. This demonstrates that an overemphasis on identity transforms identity into a triviality.

Overemphasizing identity comes at an additional cost. Lindahl’s analysis repeatedly suggests that, for example, there is an incommensurability in the relation between the clashing worldviews of the WTO and of Indian farmers. But perhaps the world-views are perfectly translatable—they are all about production and gain—and it is merely the interests that clash. There is a strange tendency in this book—and it is the tendency of our time—to conflate conflicts of interest with conflicts of *Weltanschauungen*.

## XII. UNIVERSAL MISRECOGNITION IMPLIES AN EMPTY SELF

A similar problem arises with regard to the unresolved internal contradiction of recognition. Purportedly, any recognition is also misrecognition:

To recognise the ‘other as one of us’ is always, to a lesser or greater extent, to assimilate the other. *Recognition is also always misrecognition*. And because recognition of the other is a self-recognition, recognition is always also misrecognition of the other *and the self*.<sup>74</sup>

Wow. If we say to someone else “you are one of us” then we can be sure there is something that we have ignored about this other. We recognize someone *as* one of us. The recognition of the other thereby also sets the terms

71. LINDAHL, *supra* note 1, at 282.

72. A-legality is the perspective on the legal order that challenges how legal orders draw the distinction between what is legal and illegal. Existing legal systems experience a-legality as “strange”. Its impact gives rise to new ways of drawing the distinction and hence to alternative forms of inclusion and exclusion. See LINDAHL, *supra* note 1, at 196–98, 228, 296, 311. See also HANS LINDAHL, *FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY* 37–38, 156–57, 159–61 (2013).

73. LINDAHL, *supra* note 1, at 196, 199, 299.

74. *Id.* at 283.

for who we are. In not recognizing what the other is, beyond and aside of our terms of recognition, we also misrecognize unrealized possibilities of who we might be or might become.<sup>75</sup> Boundaries, therefore, also exclude what they include.<sup>76</sup> Thus understood, the other is, just as we are ourselves, even if recognized, an infinite resource of unrecognized difference—a *reserve army of difference*, as it were.<sup>77</sup> By recognizing the other we force him to appear to us on our own terms. Each act of healing inflicts new wounds.

In reversing this process, a-legality supposedly reveals the radical contingency of collective identity:

A-legality is political, in this strong sense, by dint of bringing the contingency of collectives out into the open in a twofold sense: *that we\** are a collective and *what we\** are as a collective.<sup>78</sup>

Relatively solid compounds of unity are cracked open through acts of a-legality.

Underlying this idea are two asymmetries, which are introduced by Lindahl in reverse order.

*Asymmetry 2* is the preference that every collective action necessarily has for the inside,<sup>79</sup> a matter that is confirmed, as Lindahl correctly observes, indirectly by how the “all affected” and the “all subjected” principle selectively focus on *important* excluded interests only.<sup>80</sup> The interests of outsiders have to be significant enough to pass a threshold of relevance. This attests to the priority of the inside, which is unavoidable for without it there would be no collective action at all. The priority is, however, also manifest in the fact that claims to recognition have to be cast in the language of the collective. The existing collective sets the terms of recognition. *Asymmetry 2*, therefore, tilts recognition towards the inside.

*Asymmetry 1*, by contrast, reverses this asymmetry and tilts it towards the outside, for it points to the fact that demands for recognition reveal limits as “fault-lines”. Any existing collective experiences demands for recognition as irritating, as something that appears to come out of nothing:

Demands for recognition are prior to joint action because they catch the collective by surprise, evincing practical possibilities for acting together that it had not and could not have anticipated, hence as a future which comes *in advance* of the future for which we\* were prepared and had already rendered present through our joint action.<sup>81</sup>

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75. *Id.* at 341.

76. *Id.* at 230, 284, 306.

77. *Id.* at 327.

78. *Id.* at 308.

79. *Id.* at 280.

80. *Id.* at 273–77.

81. *Id.* at 281.

*Asymmetry 1* looks at legal systems from the perspective of the reserve army of practical possibilities that is bound to remain forever excluded. No matter which attempt is undertaken to recognize the unrecognized, something will remain out there falling victim to misrecognition, not least of all the selfhood of all insiders. *Asymmetry 1*, hence, introduces a perspective of universal victimhood, whereas *Asymmetry 2* is the perspective of authoritarian orderings trampling upon the sentiments and aspirations of those whom it excludes through acts of inclusion.

The perspective of universal victimhood—which is nothing short of the default position of our social existence—suggests, of course, that there is something out there that is infinitely rich and, indeed, so rich and nuanced that it must necessarily elude any attempt at recognition and inclusion. It is so infinitely rich that no collective ordering is ever able to embrace it. Nobody can state what accounts for this richness for any attempt to state that rich something would already amount to an act of misrecognition.

It follows that owing to its elusiveness that which is infinitely rich is supposedly also indefinitely indeterminate. Yes, that's right, Hegel's *Science of Logic* has introduced us to this idea. Pure being in all its fullness is tantamount to nothingness.<sup>82</sup> If there is no way of avoiding misrecognition then there is indeed nothing to recognize. The omnipresent reserve army of victims comprises a set of empty selves.<sup>83</sup> They are specimens of what Hegel derided, with an eye to Rousseau possibly, as “beautiful souls”. Pinkard reconstructs this way of conceiving of the self as follows:

Deprived of all social content, it has nothing to it. In his search for the truly authentic as being the absolutely personal, the “beautiful soul” finds that there is no “core” to himself; he finds that searching for the self in the purely subjective parts of one's life is like peeling away the rings of the onion only to find that when all the rings have been peeled away, there is nothing there, that there is in fact no “core” to the self that supposedly lies at the end of such an activity of “paring down” to the “core.”<sup>84</sup>

### XIII. VAIN AND EMPTY SUBJECTIVITY MISREPRESENTS FREEDOM OF CHOICE

The belief that recognition cannot fully capture the alterity of the other is the idol on the philosophical altar of the phenomenological movement,

82. See G.W.F. HEGEL, *WERKE IN ZWANZIG BÄNDEN*, VOL. 8, 183 (E. Moldenhauer & K.M. Michel eds., Suhrkamp 1969-1971) [Encyclopedia of Philosophical Sciences].

83. In a similar vein on “subjectless selves,” see JULIANE REBENTISCH, *DIE KUNST DER FREIHEIT: ZUR DIALEKTIK DEMOKRATISCHER EXISTENZ* 278 (2012).

84. TERRY PINKARD, *HEGEL'S PHENOMENOLOGY: THE SOCIALITY OF REASON* 214 (1994).

another movement to which Lindahl seems to profess his allegiance.<sup>85</sup> Hegel, as the reader may have guessed, debunked this idea as the pretension of “vain” and “empty” subjectivity.<sup>86</sup>

But this conflict of philosophical perspectives does not even have to be settled here. For it is the case that within a legal context we are cast not as individuals—not, that is, in our particularity, which is, at any rate, at the center of love—but as *personae* exercising freedom of choice in the pursuit of various ends. We enter a *legal* relation with one another as soon as our personhood is recognized in the abstract.<sup>87</sup>

Conceiving of us as mere choosers provides the ultimate template of accounting for the selectivity of various “legal worlds”. Inclusion and exclusion are rendered as choices that are contingent and amenable to revision. In other words, the battles over the substance of our social arrangements (our social “worlds” and “legal systems”) are part of our social experience only because we have always and already mutually constituted ourselves as choosers. This is what we take ourselves to be within the legal relation.

More importantly, it is not some misrecognised individual or collective selfhood, but freedom of choice that accounts for the contingency and contestability of legal regimes. The political struggles over the substance of law can be cast as collisions between and among legal systems only by falsely placing some indefinitely rich selfhood behind our mutually recognized capacity to choose. Yet, already Nietzsche cautioned us against making more of the subject than a fantasy that is supplemented by thought: *Das Subjekt ist etwas Hinzu-Erdichtetes*.<sup>88</sup> The indefinite reserve army of purportedly misrecognised selves is but a guise—a spectre, perhaps—of the freedom attributed to legal *personae*.

Admittedly, what we attribute as a choice to legal *personae* is not a natural fact. It is a social construct (“yeah!”). The construct emerges from the legal relation.<sup>89</sup> Paying attention to the significance of this relation, then, is what I propose as my second amendment.

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85. LINDAHL, *supra* note 1, at 36, 93–96, 110. For introductions, see DAN ZAHAVI, SELF AND OTHER: EXPLORING SUBJECTIVITY, EMPATHY, AND SHAME (2014); BARBARA MERKER, SELBSTTÄUSCHUNG UND SELBSTERKENNTNIS: ZUR HEIDEGGERS TRANSFORMATION DER PHÄNOMENOLOGIE HUSSERLS (1988).

86. See HEGEL, *supra* note 82, VOL. 13, at 96 [Lectures on Aesthetics, vol. 1].

87. See MICHAEL OAKESHOTT, ON HUMAN CONDUCT 122, 203 (1972); MICHAEL OAKESHOTT, *The Rule of Law*, in ON HISTORY AND OTHER ESSAYS 129–79 (1999).

88. “Es ist alles *subjektiv*’ sagt ihr: aber das ist schon *Auslegung*. Das ‚Subjekt‘ ist nichts Gegebenes, sondern etwas Hinzu-Erdichtetes, Dahinter-Gestecktes. – Ist es zuletzt nötig, den Interpreten noch hinter die Interpretation zu setzen? Schon das ist Dichtung, Hypothese.” FRIEDRICH NIETZSCHE, ‚AUS DEM NACHLASS DER ACHTZIGERJAHRE,‘ WERKE IN DREI BÄNDEN, VOL. 3, 903 (1956).

89. See ALEXANDER SOMEK, THE LEGAL RELATION: LEGAL THEORY AFTER LEGAL POSITIVISM (2017).