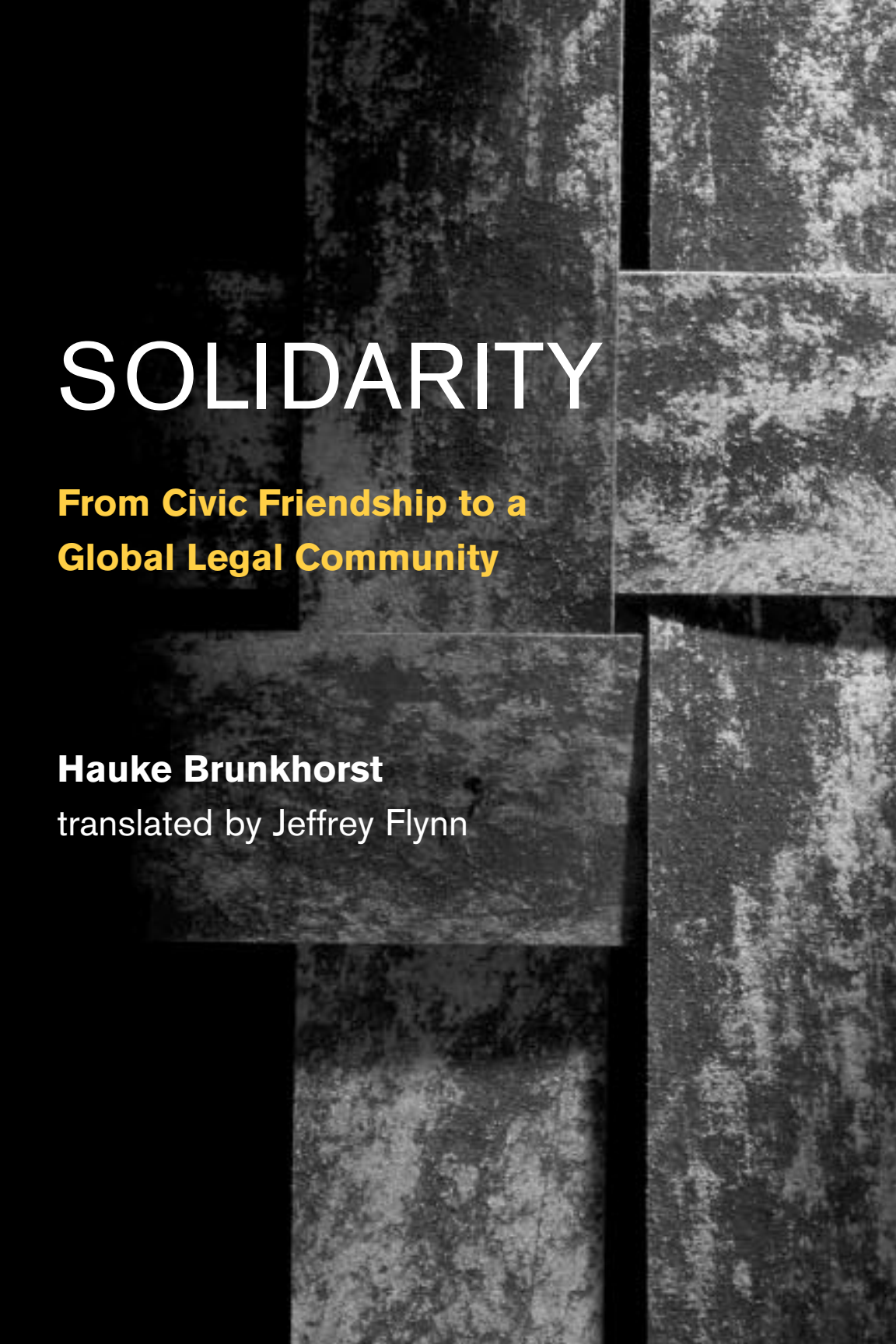

SOLIDARITY

From Civic Friendship to a Global Legal Community

Hauke Brunkhorst
translated by Jeffrey Flynn

Solidarity

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From Civic Friendship to a Global Legal Community

Hauke Brunkhorst

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Translator's Introduction

The ideal of democratic citizenship was expressed during the French Revolution with the motto *liberté, egalité, fraternité*. The subject of this highly original work, the modern concept of democratic solidarity, can be traced back to the third element in the triad. Of the three, fraternity has in many ways received the least attention, whereas the concepts of liberty and equality each have a long and distinguished literature within modern and contemporary political thought. As for liberty, Constant distinguished the "liberties of the ancients" from the "liberties of the moderns," which Isaiah Berlin contrasted in terms of "positive" and "negative" liberty. And neo-republicans such as Philip Pettit and Quentin Skinner have recently revived a third concept of liberty in terms of freedom as non-domination. As for equality, the answers to the question "equality of what?" have included equality of welfare, resources, opportunity, status, and capabilities, with important recent contributions from Bernard Williams, Thomas Nagel, Amartya Sen, and Ronald Dworkin, among others.

But "fraternity" or solidarity has not received comparable treatment, perhaps because it defies the language of rights and principles that is typical of contemporary political philosophy.[1] Indeed, John Rawls remarked upon the relative neglect of the concept of fraternity in *A Theory of Justice* (1971): "In comparison with liberty and equality, the idea of fraternity has had a lesser place in democratic theory. It is thought to be less specifically a political concept, not in itself defining any of the democratic rights but conveying instead certain attitudes of mind and norms of conduct without which we would lose sight of the values expressed by these rights."[2] As a kind of "equality of social esteem," fraternity does not yield a "definite requirement." But Rawls then

maintains that the principle of distributive justice that he defends (the difference principle) corresponds to "a natural meaning of fraternity: namely, to the idea of not wanting to have greater advantages unless this is to the benefit of others who are less well off."[3] Thus, he takes the difference principle to express the "fundamental meaning" of fraternity "from the standpoint of social justice."[4] It is interesting that Rawls raised this issue in *A Theory of Justice,* since one of the main communitarian lines of criticism against him was, in the words of Charles Taylor, that "Rawls's egalitarian difference principle, which involves treating the endowment of each as part of the jointly held resources for the benefit of society as a whole, presupposes a high degree of solidarity among the participants."[5] And the growing influence of communitarians has placed the themes of solidarity, community, political trust, and civic virtue back on the theoretical landscape.

In this work, by contrast, Hauke Brunkhorst attempts to delineate a conception of solidarity that is not heavily tied to strong conceptions of community. The central normative concept of the book is "democratic solidarity," the bond among free and equal citizens, who in modern democracies are not identical in any ascriptive characteristics. Furthermore, in the trajectory of Emile Durkheim, Brunkhorst develops a conception of solidarity suited to a democratic society that is a modern society, that is, one characterized by functional differentiation, pluralism, and difference. Solidarity, in this case, must be a "solidarity among strangers." Moreover, it is intended to be universalist, insofar as it is rooted in a "patriotism of human rights" central to modern constitutional democracy.

Brunkhorst's distinctive approach to the concept of solidarity combines history, normative theory, and political sociology in an innovative contribution to social and political thought. The first part of the book provides a historical account of the development of this modern egalitarian idea of democratic solidarity out of, and in contrast to, the less egalitarian notions of civic friendship in the Greco-Roman world and brotherliness in the Judeo-Christian tradition. Part II analyzes the modernization of Western societies, which destroyed the older solidarities that depended on the hierarchical structures of premodern societies. This process gave rise to problems of exclusion that modern societies could solve only with the help of democratic solidarity. Democratic constitutions aimed to bring social forces under the control of a politically constituted people; constitutions served as the "institutional embodiment" of democratic solidarity. In the third part, the focus is on the return of inclusion problems at

the level of a globally modernized society—a result, Brunkhorst maintains, of the one-sided globalization of power, law, and money, without a corresponding globalization of democratic solidarity. There will be no such global solidarity, however, without the development of forms of democratic self-governance beyond the confines of the nation-state. Much of the third part of the book is an attempt to analyze the possibilities for such self-governance. Part III culminates in a discussion of the most significant attempt to develop a supranational form of government, the European Union, and a post-national European people.

In this introduction, I will first relate the central themes of the book to familiar themes in recent Anglo-American political theory: civic nationalism, civic republicanism, and deliberative democracy. Then I will explain Brunkhorst's powerful combination of theoretical perspectives, usually disjoined in sociology and normative political theory, and conclude with some remarks on his approach to globalization.

Civic Solidarity and Civic Nationalism

One of the book's chief aims is to analyze the prospects for developing democratic solidarity at the global level, within a global community under law. The modern ideal of egalitarian democratic solidarity has its origins within the confines of the nation-state; Brunkhorst locates it in the revolutions of the late eighteenth century, especially in the "ideas of 1789." Those ideas envisioned a form of solidarity conceived not in terms of ethnicity or culture but in terms of universal citizenship.

In the literature on nationalism, it is common to distinguish "civic nationalism" from "ethnic nationalism." An "ethnic" nation is defined in terms of a prepolitical community rooted in common ancestry, race, or ethnicity, while a "civic" nation is defined in terms of citizens' allegiance to a set of civic values or ideals, political principles or procedures. While this distinction has become quite prominent in the literature, a number of scholars have recently challenged the empirical basis for it, questioning whether a purely "civic" nation has ever really existed.[6] They claim that all nations have been based on particularistic commitments and identities and that no nation could be based solely on rational consent to principles. Ethnocultural ideals of nationalism no doubt played a large historical role in the formation of modern nation-states; but versions of "civic nationalism" are put forward by normative theorists as

ideal models. Among the advocates of "liberal nationalism" (Yael Tamir), "republican solidarity" (Charles Taylor), or "constitutional patriotism" (Jürgen Habermas), the point is not simply to give an empirical description of affective allegiance to political community, but to provide a normative alternative to the varieties of ethnic nationalism that have led to so much internal exclusion and external belligerence.[7]

Brunkhorst considers both empirical and normative dimensions of the question. He is attentive to the "stories of peoplehood" that have played such an important role in the formation and maintenance of nations.[8] Thus, in part I, he discusses the role of the Exodus story and the story of the law giving by Moses in establishing the Jewish people, as well as the role such stories played in the French and American revolutions. And he documents the continual significance of questions regarding the creation and maintenance of a people in the context of the European Union. In the end, however, Brunkhorst defends a normative ideal of peoplehood as an "inclusive community of the affected," who are connected to one another by communication, will, and action. On this approach, the concept of a people is "detached from any natural or historical, racial, ethnic, cultural, or linguistic determinants and defined in purely legal terms as the totality of those who are subject to the law" (71).

Because civic nationalism is supposed to be a form of solidarity based on allegiance to principles, the conception of democratic solidarity that Brunkhorst develops here is founded on a "patriotism of human rights." This may sound paradoxical, insofar as patriotism refers to the love of one's country and human rights refer to the universal set of human beings. But the form of solidarity at issue is an abstract form of solidarity among strangers. It is neither civic friendship nor brotherliness among fellow believers. It is solidarity among legal subjects who participate in a common polity. Charles Taylor describes "solidarity among strangers" in the following way: "I may not know most of my compatriots, and may not particularly want them as friends when I do meet them. . . . my bond to these people passes through our participation in a common political entity."[9] He is referring here to the idea of a republic in which citizens are bound together by their common participation. One question this book addresses is whether such common participation can be extended beyond the patriotism of particular republics to the republic of humanity. The abstract, legal conception of peoplehood it proposes is the kind of flexible conception required to conceive a European or a global people. Being subject to laws over which one has no say is a potent source of protest in

the modern world, and joining together in common action against the proliferation of law that lacks democratic legitimacy (what Brunkhorst refers to as "hegemonic law") is an obvious source of solidarity. If a people is constituted by those subject to the law, and all the world's inhabitants are subject to many forms of global law, then we incipiently constitute a people in that sense. This is why Brunkhorst views global protest movements as the vanguard of a transnational people, since the "patriotism of human rights" that was once expressed in the French Revolution can now be heard from global protestors as well.

Civic Republicanism: Freedom and Domination

Brunkhorst contrasts the idea of democratic solidarity with the typical understanding of freedom and democracy within liberalism. Thus, he goes beyond freedom as non-interference to a conception of freedom as autonomy or self-governance, and beyond the idea of democracy as majority rule to a more participatory ideal of democracy. I will deal with the latter in the next section. As for the former, it is important to see how Brunkhorst's conception of freedom, along with a number of other themes in this work, relates to the concerns of the recent "republican revival" in political and legal theory. Contemporary theorists find support for their ideas in a diverse variety of republican and civic humanist sources, including Aristotle, Roman authors such as Cicero, early modern authors such as Machiavelli, modern thinkers such as Rousseau, and neo-Roman theorists of seventeenth- and eighteenth-century America, England, and France. The renewal of the republican tradition has sparked a conflict of interpretations, as does any living tradition with active adherents.

In a recent book critical of the ascendancy of procedural liberalism over republicanism as the dominant "public philosophy" within the United States, Michael Sandel identifies the republican conception of freedom with self-government: "Republican political theory teaches that to be free is to share in governing a political community that controls its own fate. Self-government in this sense requires political communities that control their destinies."[10] By contrast, Philip Pettit, another leader in the revival of republicanism, argues that this emphasis on understanding liberty in terms of democratic participation simply reinforces the dichotomy between positive and negative liberty, which has obscured the classic republican ideal from view: the ideal of freedom as non-domination. He defines this idea of freedom in terms of the "absence of depend-

ence upon the will of another and the absence of vulnerability to interference at the will of that other. The antonym of freedom for the republican conception is not restraint as such but rather slavery and, more generally, the position of subjection. A person is free, and a person acts freely, just to the extent that she is not exposed, in the way a slave is exposed, to the arbitrary interference of another."[11] The question of whether democratic participation should be viewed as intrinsic or instrumental to liberty need not be decided here, but it is important to keep the distinction between the two versions in mind.[12] Jürgen Habermas has recently formulated a third version, which he calls "Kantian republicanism." Focusing on freedom as autonomy, he argues for a conception that is intended to overcome the dichotomy between classic liberalism and civic republicanism by articulating the internal connection between private autonomy (negative liberty) and public autonomy (positive liberty).[13]

Whatever the proposed connection between liberty and democratic governance, a recurring theme within the republican tradition is the opposition between the citizen and the slave. As Pettit puts it, explaining the "liberty-versus-slavery theme,"

> the condition of liberty is explicated as the status of someone who, unlike the slave, is not subject to the arbitrary power of another: that is, someone who is not dominated by anyone else. . . . This opposition between slavery or servitude on the one hand and freedom on the other is probably the single most characteristic feature of the long rhetoric of liberty to which the experience of the Roman republic gave rise.[14]

This theme of freedom as contrasted with slavery, servitude, and domination is prominent in Brunkhorst's account as well. He returns to these themes repeatedly in the first three chapters of the book, discussing it in several different historical contexts: the status of slaves in Greece and Rome, the political economy of ancient Greece, and Greece's dependence on an extensive slave economy; the status of slaves in Israelite society, the Exodus from slavery in Egypt, and the critique of domination associated with prophetic monotheism; the strand of Christianity that is against all slavery—since all humans are "children of God"—as well as the strand that accommodates slavery and makes freedom dependent upon otherworldly redemption. The Exodus narrative also played a key part in the rhetoric of the French Revolution and the spirit of American pilgrims. He even suggests that "Europe began in Jerusalem with the mythic story of the Exodus of the slaves from Egypt, in which the political course was first negatively set against foreign domination" (30).

These are not all traditional sources for republican thought. But when Brunkhorst identifies modern democracy with the "project of overcoming every form of servitude" (73), he relies on the modern republicanism of Rousseau and Kant. In a republic, the citizens are subject only to law; this is the definition of a "free people." Rousseau declares that "the worst of Laws is worth even more than the best master."[15] But Rousseau defines liberty *both* in terms of not being subject to the will of another *and* in terms of not ruling over another: "Liberty consists less in doing one's will than in not being subject to someone else's; it also consists in not subjecting someone else's will to ours. Whoever is master cannot be free, and to rule is to obey."[16] With this move, Brunkhorst argues, "Rousseau climbs out of [the] premodern circle of freedom and servitude—and with him come Kant, Hegel, the French Revolution, and the Western constitutions" (72). Another distinguishing feature of this modern version of republicanism is that, as an "order of freedom," it breaks with the classic republics, which were "orders of virtue" that went beyond law to determine many of the details of everyday life. Brunkhorst's approach maintains the connection between republicanism and modern law, which permits whatever is not explicitly forbidden and thereby protects the sphere of private autonomy.

Economic dependence is another issue that is clearly related to freedom as opposed to domination and servitude. The virtue of a free man in ancient Greece, Brunkhorst notes, consisted in his ruling over the household. Thus, the underside of virtuous freedom, the very condition of its possibility, was the economic dependence and servitude of the women and slaves within the Greek household. In contrast, universal freedom from economic dependence is a central theme of modern republicanism. It was certainly important to Rousseau's conception of the social contract, in which "no citizen shall be rich enough to buy another and none so poor as to be forced to sell himself."[17] And Quentin Skinner has noted that while the "neo-Roman" theory of freedom became less prominent during the nineteenth century, elements of it are still evident in Mill's account of the subjection of women and in Marx's critique of capitalism in terms of wage slavery, alienation, and dictatorship.[18] In the same vein, Michael Sandel takes up the issue of the "political economy of citizenship" and recalls nineteenth-century American debates over whether wage labor could produce independent citizens capable of self-government. He emphasizes the republican conviction that economic dependence is contrary to citizenship, an argument that was voiced in nineteenth-century

America but eventually gave way to voluntarist ideas about labor in terms of freedom of contract.[19] For Brunkhorst, after the political revolutions of the eighteenth century, it was the social movements of the nineteenth and twentieth centuries that were central to the expansion of democratic solidarity. In that context, domination took on a more economic than political sense.

Deliberative Democracy and the Public Sphere

Brunkhorst relies not only on a conception of freedom that goes beyond the liberal ideal of non-interference, but also on a conception of democracy that goes beyond the liberal model of aggregation of preferences and majority rule. This puts him in line with a recent trend in democratic theory toward deliberative democracy. One of the primary concerns of deliberative models is with "the public use of reason," as Kant called it. Thus, theorists have focused on the extent to which public deliberations and procedures for legitimating political decisions are or could become guided by reason. In contrast to liberal models of democracy that focus on the aggregation of preferences or interests transmitted to the political apparatus through voting, deliberative models emphasize the potential for transforming preferences in light of public deliberation. The basic idea was put forward by John Dewey in *The Public and Its Problems:*

> Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . "The means by which a majority comes to be a majority is the more important thing": antecedent debates, modification of views to meet the opinions of minorities . . . The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion.[20]

Deliberative theorists also emphasize the effect of democratic discussion on political decision making. It might be thought that such an ideal of deliberation, however well-suited to the small, face-to-face democracy of Athens or to the democracies advocated by Rousseau, simply has no place within modern societies characterized by social complexity and cultural pluralism. How could such an ideal be institutionalized?

Brunkhorst focuses on the central importance of the public sphere as the locus for deliberation within modern democracies and, in the third part of the book, on an emerging global public sphere as the site for developing democratic legitimacy beyond the nation-state. Following Nancy Fraser and Jürgen

Habermas, he distinguishes between strong and weak publics. A public sphere is weak insofar as its deliberations shape opinion formation but have no power to make binding political decisions. This includes communication and deliberation that take place through various mass media, that are developed by nongovernmental organizations (NGOs) in civil society, and so forth. A strong public sphere, on the other hand, is authorized to make binding decisions—for example, parliaments and legislatures whose deliberations result in decisions enforced by state administrations.

Brunkhorst attempts to render this model more flexible and less closely attached to the particular institutions of the nation-state by not defining strong public spheres strictly in terms of their authority to make binding decisions. Rather, "where there is a normatively effective constitution, *any* autonomous public sphere is a strong public, as long as it excludes no one from discourse and contributes to binding decisions in a legally secured way" (138). He explains that a "normatively effective constitution" has two key parts: the part concerned with basic rights and the organizational part that establishes procedural norms and organizational powers (such as the branches and powers of government, the ways they interact, a system of checks and balances, etc.). In short, in this view a strong public can be established by rights to participation together with a constitutionally secured pathway for public deliberations to contribute to decisions. The possibility of institutionalizing these two aspects of a constitution at the global level is central to Brunkhorst's account of establishing legitimate decision making within global politics.

The principle of inclusion is essential to deliberative democracy, both for normative and for epistemic reasons. Following Dewey and Habermas, Brunkhorst emphasizes that "the people are sovereign only as a *learning sovereign,* which exposes itself to a risky experimental practice of trial and error and continually includes those voices that have been excluded, the dissent that has been ignored, and the minorities that have been silenced" (140). Only decisions that emerge from a wide and open spectrum of opinions, in a democratic public sphere that is secured through basic rights, can carry "the presumption of rationality" (Habermas). Autonomous public spheres play a central role in legitimating the decisions that emerge from deliberative politics; they are where the organizations and actors of civil society put forward new proposals and solutions to problems, uncover new issues, and develop arguments. The problem-solving capacity of the democratic constitutional state is not limited to addressing everyday political problems. The full scope of this capacity only

becomes apparent when we combine two methodological perspectives—the functional and the normative—and understand how the development of constitutional democracy was a solution to problems of both types.

Evolution and Revolution

Thus far, I have considered Brunkhorst's account primarily from the normative perspective of political theory. But one of the major strengths of this book lies in its combining different methodological perspectives in the analysis of solidarity, joining sociological insights to normative political theory. The sociological perspective comes to the fore primarily in part II of the book, as Brunkhorst focuses on the transition from premodern to modern society and the distinctive characteristics of the latter. Part I of the book concludes with a normative account highlighting the universalist content of the modern principle of democracy, grounded as it is in human rights. But if these normative ideals are not simply to fall flat when confronted with "social reality," and in particular with the forces of unconstrained processes of globalization, then normative requirements must be systematically attuned with conditions of social reality. Brunkhorst calls his two perspectives on social transformation "evolution" and "revolution." The former refers to the "evolutionary emergence" of new social forms, a process that is by and large unplanned and unconscious, and that is visible from the "external" perspective of the sociological observer. Revolution, on the other hand, refers to the "revolutionary implementation" of new ideas, which is visible from the "internal" perspective of participants in social change. Thus, it highlights the normative self-understanding of modern individuals and social struggles for revolutionary change. An account that systematically mediates both perspectives is able to keep the complexity of modern society in view without simply abandoning normative ideals in the face of social facts.[21]

The story of the social transformations associated with modernity has been told in numerous ways, with different combinations of evolution and revolution: the supplanting of "mechanical solidarity" by an "organic solidarity" based on the division of labor (Emile Durkheim); the "change in form of servitude" from feudal exploitation to capitalist exploitation (Karl Marx); the rise of the "Protestant ethic" and the origin of modern capitalism within Europe (Max Weber); the "great transformation" that involved the "disembedding" of the modern economy from society (Karl Polanyi); and the functional differen-

tiation of various social subsystems (Talcott Parsons and Niklas Luhmann).[22] Brunkhorst draws on aspects of each of these, but especially on the functional differentiation of modern society as developed by systems theorists such as Luhmann. The basic idea here is to view society neither as an aggregation of individuals nor as an organic whole, but primarily in terms of the subsystems of modern society that are specialized according to function, such as the economy, law, politics, science, religion, and so forth. Each system "creates order out of chaos," forming a closed system that functions primarily in terms of its own internal logic.[23] The logic of each system is determined by its specific "code"; or, following Parsons, one can say that each system functions according to its own "steering media," such as money, law, power, and so forth. For example, the economic subsystem is said to function according to a logic determined by money, which coordinates the aggregate consequences of individual action "behind the backs" of participants rather than as a result of their conscious control.

Combining the perspectives of evolution and revolution, Brunkhorst argues that the process of functional differentiation within modern societies (evolution) led to two "structural inclusion problems" that could not be dealt with solely by norm-free steering media. Rather, their solution required the (revolutionary) development of the normative resource of democratic solidarity. This argument draws attention to both the limits of functional differentiation and the limits of strictly functional analysis.

The first inclusion problem involves what he calls the "de-socialization of the individual" as a result of the growing individualization that accompanied functional differentiation. Traditional forms of solidarity that were organized around hierarchical structures were undermined as modern social life was reorganized in terms of functional roles. As the premodern social structures in which individuals were tightly integrated gave way, the modern isolated individual emerged as a being separated from society. Whereas normative political theory often starts with and presupposes free and equal individuals, from a sociological perspective modern individualism was the result of a long process of social evolution. How can such individuals be integrated into society? From a sociological perspective, this appears as the problem of order: How can society be constituted by asocial individuals? From a normative perspective, this appears as the challenge of reconciling individual freedom with social order: How can free and equal individuals enter into society with other such individuals without diminishing their freedom? Combining normative and

sociological perspectives, modern constitutional democracy can be viewed both as a way of legitimately coordinating individual freedom and as a way of productively institutionalizing individualism. The normative dimension is captured by Kant and Rousseau in terms of autonomy: We obey only the laws that we give to ourselves. Universal inclusion of individuals also provided the solution to the functional problems: Individual freedom provides the constant variation that functional systems require.

The second inclusion problem was created by the exclusion of entire segments of the population from the achievements of the functionally differentiated society. Brunkhorst refers to the "pauperization" or "proletarianization" of segments of society excluded from enjoying the gains of modern society as a whole. For them, political inclusion through civil rights had little value. As Brunkhorst puts it, "For those who are denied access to the achievements of the economic system, inclusion through political and human rights is practically worthless" (98). The solution to this inclusion problem, which came only after the social and revolutionary movements of the nineteenth and early twentieth century, required that the realization of political inclusion also include social rights. As John Rawls put it, there must be some means of securing the "fair value of equal political liberties."[24]

Globalization

In the relatively successful democracies of the North Atlantic region, then, universal political inclusion was the solution to the first problem, while the development of social rights was the solution to the second. The third part of the book focuses on the return of these inclusion problems at the level of global society and asks whether there could be a successful response that involves bringing global society under a "constitution," suitably reconceived. In recent years, the term *globalization* has come to refer to a congeries of social, economic, political, and cultural changes that have resulted in an increasingly interconnected world. Thus, all of the following have come to be discussed as aspects of globalization: increases in the flow of goods, capital, and people across borders; the rise and increasing power of multinational corporations; the declining power of the nation-state in relation to external political and economic forces; and the homogenization of global popular culture, to name only a few.[25] Some of these trends have also led to an increase in threats to well-being and security that take a global form: environmental catastrophes,

diseases, and epidemics; global networks of terrorists, criminals, and drug traffickers. The potential of such dangers to affect people throughout the world has led some to claim that global society is constituted as a global "risk society" (Ulrich Beck).

In Brunkhorst's view, functional differentiation has affected all societies to such an extent that we can now speak of a "world society." But this world society comprises a center, the Western democracies with their highly developed functional differentiation and normatively effective constitutions, and a periphery, in which much of the world lives under merely "symbolic" constitutions and the population is largely excluded from the achievements at the center. Indeed, Brunkhorst argues that inclusion problems similar to those that marked Western modernization have now reappeared at the global level: The "de-socialization of the individual" is now well-advanced throughout the world and has resulted in various forms of fundamentalism, civil wars, and regional secession; and the "social exclusion" characteristic of European modernity now arises in a more pernicious global form. Within national economies there was still some degree of dependence upon the inexpensive labor of the "industrial reserve army" (Marx), and democratic constitutions made it at least possible for social movements to succeed. But the current exclusion problem has generated a global population at the periphery of global society that is so thoroughly excluded—economically, socioculturally, and legally—that it is becoming entirely superfluous from the point of view of the center of global society. Combining functional and normative perspectives, Brunkhorst argues that the solution to both problems will require the extension of constitutional democracy.

What are the prospects for more democracy at the global level? The principle of democracy states that all those affected by or subject to the law must have a say in its creation. But, as Brunkhorst notes, there has been a significant growth in the "hegemonic global law" that is generated by a variety of non-state sources such as supranational decision-making authorities (e.g., WTO) and even multinational corporations, which are increasingly becoming autonomous sources of law. These developments have created a situation in which more and more decisions are made with less and less inclusion of the voices of those affected. Thus, such decisions and the resulting regulations and laws are only loosely tied, if at all, to democratic chains of legitimation.

There are two aspects of Brunkhorst's account that are especially relevant here: the significance of the global public sphere and the role of human rights.

The phenomenon of an emerging transnational public sphere has become increasingly visible in recent years. One of the trends associated with globalization is the increase in the number of NGOs and social movements operating across borders and the amount of political activity carried out at a global level. Technological innovation has made it possible for transnational civil society to develop, thus making it increasingly possible to counteract the other two main actors at the global level: international business and government. Brunkhorst remarks on the successes achieved by the protesters who have attempted to shape the agendas of WTO and G8 meetings ever since the 1999 Seattle protests against the WTO. And Jürgen Habermas has suggested that the mass demonstrations of February 15, 2003, against the U.S.-led invasion of Iraq "may well, in hindsight, go down in history as a sign of the birth of a European public sphere."[26] He was referring to the simultaneous demonstrations in the capitals of Western Europe. But *The New York Times* went a step further, referring to the demonstrations that occurred in over three hundred cities around the world as "reminders that there may still be two superpowers on the planet: the United States and world public opinion."[27] Brunkhorst sees this type of activity as the beginning of a "globalization of civic solidarity." Indeed, he goes so far as to refer to global protest organizations as "the vanguard of a slowly developing transnational 'people'" (159). But because the global public sphere is not "constitutionally" authorized to make binding decisions, it is limited to the "politics of appeal." It can try, as in the anti-war protest leading up to the U.S. invasion of Iraq, to obstruct power, to raise consciousness, to open debates, but it cannot contribute directly to authorized decision making.

It can also speak the "language of human rights" and, in so doing, rely on the gains that have been made in international law in the last fifty years toward making human rights valid as global law. While the organizations of global civil society form the organizational core of a "strong public-in-the-making," human rights correspond to the basic-rights element of a constitution. Brunkhorst views human rights as a "placeholder for democratic legitimation" that comes into play whenever the members of the "actual people" are not represented by those who are authorized to make decisions, an increasingly common situation in both nation-states and global society. In the absence of a strong global public sphere that is constitutionally connected to decision-making authorities, human rights can be appealed to as the placeholder for democracy. Specifically, NGOs and other international actors can

appeal to communicative and social rights, for instance, by calling attention to violations of political rights, demanding that labor and environmental standards be addressed by the WTO, or bringing attention to debt relief for poor countries, AIDS, and global climate issues. Of course, these are at most the first steps on the way to establishing civic solidarity among all the members of a global community under law, or, as Brunkhorst puts it, on the way to realizing at a global level the "constitutional project of 1789."[28]

Preface

In the standard liberal understanding, democracy is a procedure for majority rule. And solidarity is, according to political persuasion, either superfluous or a supplementary social or socialist achievement of the general welfare. I would like to dispute that understanding and instead defend the thesis that, in modern societies, solidarity coincides with the concept of democracy (chapter 3). In this way, the modern understanding of a republic and of democracy differs from its premodern precursors, which identified solidarity with the bonds of friendship among an elite citizenry (chapter 1). For the form of democracy created in the constitutional revolutions of the eighteenth century, the egalitarian understanding of solidarity stemming from the Judeo-Christian tradition of Europe is fundamental (chapter 2). The ideas of 1789, to which no alternatives have emerged to this day, gave to the Christian postulate of brotherliness the political form of the active inclusion of all those subject to power in the exercise of power. In an entirely secularized context, brotherliness became self-legislation. Everything—general welfare, justice, brotherhood and sisterhood, solidarity—is to come from the one concept of freedom. It is the "last hinge, on which humanity turns" (G. W. F. Hegel).

While I sketch a normative concept of democratic solidarity in the first part, differentiating it from *and* following on the premodern self-understanding, in the second part, I highlight the historical problem-solving potential that could only be unleashed by the democratic self-constitution of a functionally differentiated society. Democracy proved itself through the solution of both of the inclusion problems that this form of society could not solve on

its own. The first is the problem of the "socially produced" (Marx) separation of individual and society, which has become undeniable ever since the civil wars of religion. Democracy is the single, practically proven response to the individualization of separate atoms of consciousness, which are socially constituted as individuals via the exclusion from the community [*Gemeinschaft*]—a process that is co-original with functional differentiation. The productive potential of individualism can only be recovered without massive repression and individualism permanently institutionalized by means of democracy.

But democracy proved itself again, normatively and functionally, with the solution of the second inclusion problem, which became undeniable with the so-called social question in the nineteenth century. Only through political inclusion (expanding, universal suffrage, etc.) could the problem of pauperization and proletarization of the working classes, who were market-dependent but excluded from the wealth of the capitalist mode of production, be permanently resolved. This impressive achievement by egalitarian democracy remained, however, limited to Europe and North America, and was bound to the political form of the nation-state. Today, the functionally differentiated society has been completely globalized. There is no longer any "island of bliss," and every culture must live with individualization, labor markets, and education systems that have massive exclusion effects, which are only further reinforced by means of autonomous science, autonomous law, autonomous world politics, and so forth.

Both inclusion problems of early European modernity have been globalized with the society of functional systems. The question that must then be raised, and is taken up in the third part, is quite simply whether the solidarity potential of modern democracy is also sufficient to resolve—at the level of global society—the return of the problems that it was once able to solve within the regional framework of European nation-states. The thesis by which I am guided is that there will be no solution without a globalization of democratic solidarity.

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comments on earlier versions of parts of the manuscript. Jürgen Habermas encouraged me, at a conference in Sofia, to elaborate on the theses I presented there. I thank him for that. Danika Maleska helped me obtain the literature and construct the index. That facilitated the quick completion of the text as did the precise and reliable recording of the handwritten lecture notes and endless corrections by Ingrid Gößmann and Monika Pareike.

Introduction: On the Concept of Solidarity

On October 28, 1789, Mirabeau spoke to the French National Assembly of the importance for morals that a solidarity—*solidarité*—be formed between public and private faith, and on April 1, 1793, Danton declared to the National Convention: "We are all 'solidary' through the identity of our behavior."[1] Solidarity is a thoroughly modern concept. It is just as tightly bound up with the juridical concept of equality as with the political concept of democracy. Its origin is in the French Revolution.[2] During the Revolution, however, it was not yet *solidarité* but *fraternité* that was on everyone's lips. After 1792, fraternity became, together with the freedom and equality of the Declaration of 1789, the slogan of the Jacobin Revolution: *liberté, egalité, fraternité*. Then, in the course of the nineteenth century, the concept of solidarity continued alongside that of fraternity initially, only to replace it after the European Revolution of 1848—at first in the workers' movement under the influence of Marx and Lassalle, then at the end of the century in sociology and jurisprudence, and today even in the texts of constitutions and international human rights pacts.[3] Thus, in the Preamble of the Maastricht Treaty on European Union there is talk of "solidarity" among the "peoples" who are signatories, and Article A of the treaty says: The Union's "task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and between their peoples" (Par. 3, Cl. 2).

The history of solidarity is, however, older than the egalitarian and democratic definition of the term. The word itself has Latin origins, where it refers to cooperative liability [*Haftungsgenossenschaft*] within civil law.[4] Unlike brotherliness, which was originally familial but had already been detached from

blood relations by Christianity and extended to the brotherhood of all Christians/human beings, solidarity is "originally a legal concept."[5] Solidarity is solid. *Solidus* is dense and firm. The Roman legal concept *in solidum* means an obligation for the whole, joint liability [*Gesamthaftung*], common debt, solidary obligation: *obligation in solidum.* One for all, all for one. Everyone assumes responsibility for anyone who cannot pay his debt, and he is conversely responsible for everyone else. Free riding is ruled out legally, without appealing to morality. The bond of solidarity is solid not only for the debtor community itself but also for the creditor, who can, if necessary, turn to the surrogate who is able to pay. Thus, *obligatio in solidum* already binds together unfamiliar persons, complementary rolls, and heterogeneous interests in the medium of abstract law.

In the revolutionary Constitution of 1793, the Roman civil law idea of solidarity is generalized and combined with the republican principle of public life, in which the downfall of one citizen is the downfall of all citizens: "There is oppression against the social body when a single one of its members is oppressed" (Article 34). The second half of Article 34 unites this classic republican principle with the struggle for human rights against any heteronomous authority or oppression: "There is oppression against each member when the social body is oppressed."[6] That goes back to the *Contrat social,* published in 1762 in liberal Amsterdam. In that text, a citizen of Geneva, Jean-Jacques Rousseau, had fused the republican idea of the self-organized solidarity of free citizens with the early Christian prophetic hope that the last would be first and all would be equal in the democratic popular assembly into a fundamental principle of the new constitutional law—*Principes du droit politique* is the subtitle of the *Contrat social:* "Once the populace is legitimately assembled as a sovereign body. . . the person of the humblest citizen is as sacred and inviolable as that of the first magistrate."[7]

This illustrates how the semantics of our concept of solidarity nourishes itself from two further sources in European history besides Roman law, reshaping and further developing earlier stages of solidarity (chapter 1). One arises from pagan-republican harmony (Gr. *harmonia*, Lat. *concordia*) and civic friendship (Gr. *philia,* Lat. *amicitia*), the other from Christian brotherliness (*fraternitas*) and love of neighbor (*caritas*). Whereas harmony and friendship in the civic bond of the ancient and late medieval city-republics embody a form of solidarity that is urbancentric and compatible with traditionally stabilized, socially exclusive hierarchy and class formation (chapter 1), the *solidarité républicain* that arises out of the constitutional revolutions of the eighteenth century

transforms the old aristocratic-elite form of civic solidarity into a democratic-egalitarian form. The latter can no longer fixate on the ethos of city life, but encompasses the "large solidary community of the nation" (Ernest Renan), in America even an unbounded, communicatively expanding "Great Community" (Dewey). While the ethical universalism of Christian brotherliness and love of neighbor was transformed into the ideological superstructure of a political class-rule charity in the historic aristocratic societies of premodern Europe (chapter 2), the emancipatory movements that were spurred on by the ideas of the French Revolution—as an event "that will not be forgotten" (Kant)—took the Christian message at its word: from the "fraternity" of 1789 through the "workers' brotherhood" and the "international solidarity" of 1848 and 1871 up to the Catholic-syndicalist *Solidarność* of 1989. Thus, the "concept of political equality in the bourgeois democracy" of 1792 turned into "a guiding concept of the social emancipation of the proletariat" around the middle of the nineteenth century.[8] The Polish union movement of the 1980s reunited both aspects of its meaning, which had become independent of one another in the twentieth century: social emancipation *and* political equality. What already "was and is still revolutionary" in the Christian message that all men are brothers, which finds its secular political form in the freedom-equality-fraternity triad, "is the idea that strangers are bound to one another by a universal bond of civility and can be brought into relations of reciprocity."[9]

Of course, the modern constitutional revolution has a highly selective attitude toward its Christian heritage. Only reciprocal relations are compatible with its postulate of autonomy. Fraternity is not compassion, and solidarity is not mercy but a right.[10] Unlike the classical political concepts of (substantial) justice, of the good life, and of the common good, the revolutionary slogans of fraternity and solidarity refer directly to the specifically modern combination of freedom and politics.[11] Solidarity is not the other of justice. Rather, it is nothing but the democratic realization of individual freedom.[12] If the classic republican formula of the common good refers to an objectively recognizable collective good, "solidarity" has from the start an individualistic quality.[13] But fraternity and solidarity, as the quoted passages from the *Contrat social* and the Constitution of 1793 show, are supposed to guarantee the equal enjoyment of individual rights within the medium of the political equality of every subject under the law, along with the "participation of each individual in public affairs."[14] Thus, in the equality of public freedom, which is required for "preserving the potential for social self-change," there also lies the only foundation

in constitutional theory for the social-welfare state.[15] In the modern constitutional regime, common good, justice, and solidarity coincide with the democratic legitimation of normatively binding decisions. There is in the constitutional state neither a common good nor a justice beyond democratic legislation and, therefore, also no constitutional state without democracy.

That idea is closely connected, as I try to demonstrate in the pivotal, third chapter of this book, with the human-rights status of the modern concept of democracy, which normatively identifies the human being and the citizen and distances itself from the older understanding of democracy, which was based on the rule of a particular majority. In terms of constitutional theory, democracy is not majority rule, but rather an *identity* of the rulers and the ruled, together with a simultaneous *difference* between legal subjects and their social forms of organization. Only an understanding of democracy that is identitarian in this sense (chapter 3) adequately expresses the moment of a radical critique of domination, which—as an heir of prophetic monotheism (chapter 2)—is constitutive of modern democracy. In democracy, all those subject to the law should be the authors of the law and thereby autonomous subjects. The legal-normative universalism that is inherent in the concept of a people in democratic constitutions already contains the rejection, in terms of human rights, of any domination by some people over others. In the words of Michael Walzer: "The aim of political egalitarianism is a society free from domination. This is the lively hope named by the word equality: no more bowing and scraping, fawning and toadying; no more fearful trembling; no more high-and-mightiness; no masters, no more slaves."[16] To this day, there is no serious alternative to the groundbreaking political idea of the Revolution of 1789: that self-legislation is a right of each and every person.[17]

The modern sense of democratic solidarity goes back to the slogan of fraternity of the Jacobin Revolution. But unlike the concept of fraternity, the concept of solidarity far exceeds the mere "conjuring of a sense of a common bond."[18] Solidarity is limited neither to Adorno's "sense of solidarity with what Brecht called 'tormentable bodies,'" nor to Dewey's concept of a democratically expanding "Great Community," which he imagined—not unlike Tönnies—as a counteridea to the capitalist-bureaucratic "Great Society," nor to Rorty's subsequent definition of solidarity as a "flexible" feeling of "sympathy *for each other*" that extends a "community of communication to anyone at all."[19] Rather, the concept of solidarity—and here we connect to Durkheim—is rooted "not in *community* [*Gemeinschaft*], but is an inherent element of *society*

[*Gesellschaft*]."[20] Solidarity dialectically combines opposites, contradictions, and differences. The difference, heterogeneity, and fragmentation that "*can still be held together*" are the "criterion for solidarity."[21] Solidarity is not just solid; solidarity is also robust and is, therefore, suited like no other concept to provide the bridge between the different modes of social and systemic integration of society.[22] It "is nurtured by the sources of the lifeworld, but is realized through the principal media of system integration, namely bureaucracy and law. In other words, solidarity is one of the few concepts of moral thought that has proven to be fully compatible with the statist model of the political community."[23] Thus, the hope that this concept, which arises from the communicative lifeworld, could also be fit for the abstract processes of global systemic integration is not unfounded.

To begin with, democratic solidarity has proven itself only in the successful constitutional revolutions of the North Atlantic–Western hemisphere. From these revolutions came constitutional states. They have the solidarity resources of the spheres of freedom, which modern society can unleash, develop, and successfully mobilize toward solving two basic problems of inclusion. These problems arose during the course of the conversion of society from social stratification to functional differentiation, and they cannot be resolved internally by functional systems—such as law, politics, economy, science, art, family, or religion—that are specialized in only one function.[24] As I explain in part II, the first problem is the *exclusion of individuals,* which threatened society with religious civil wars. The second problem is the *social exclusion* of the market-dependent classes of society, who were separated from all means of production and reduced to their own labor capacity. Mass poverty, proletarianization, and alienation subsequently undermined the institutional and cultural prerequisites for the market economy and the other functional spheres.[25] The exchange of equivalents turned into exploitation, the equality of law into class justice, the popular sovereignty of the parliamentary republic into the domination of the bourgeoisie over the proletariat, the human right to freedom (Articles 2 and 6 of the Constitution of 1793) into the "human right to *private property*," general legal security into the "*assurance* of egoism," and the "ruling ideas" proved to be the "ideas of the ruling class."[26]

However, constitutions that transformed the human-rights patriotism of the revolution into coercive law were far more than a topping of cream on the "immense superstructure" that arose on the "real" "economic foundation" of society (Marx). The *Declaration of the Rights of Man and Citizen* cannot be

reduced, as has been claimed from Marx to Luhmann, to its system-integrating function.[27] The revolution is not the "midwife" (Marx) for a developmental-historical necessity. Luhmann's derision of the "illusions of powerfulness," "ceremonial declarations," and "songs" also misses the normative obstinacy of revolutionary events.[28] Revolution not only consummates evolution, but also corrects its course. As an institutional embodiment of organic solidarity, constitutions only become effective if they can be understood by a politically active citizenry as products of a revolutionary consciousness, which transforms the contingent results of social evolution into something also willed, expressing generalizable interests— the element of truth in a *volonté générale*.[29]

The practical-revolutionary interpretation of the evolutionary achievement of democratic constitutions was successful initially only in the western part of the world. Only in the course of globalization—the theme of part III—has occidental rationalism become fully decentered and removed from its European origin. Of course, for the time being, despite the impressive increase in *nominally* democratic constitutional regimes, especially after 1989, this has led only to a globalization of power, law, and money. The evolution of the undoubtedly robust but "scarce resource" (Habermas) of solidarity can no longer keep pace with the dramatically accelerated evolution of the most important functional systems. A "disembedding" of capitalism from cultural life-worlds (Polanyi) and its regression to a "robber capitalism" (Weber) can be observed all over again.[30] Democratic solidarity is still more effectively organized *within* the state boundaries of western democracies and *between* them than in the normatively weak, and for the most part only nominal, constitutional states of broad parts of Eastern Europe, Asia, Africa, and Central and South America. For this reason, the streams of solidarity that could connect poor countries with each other and the poor with the rich countries remain dry.[31] The one-sided, system-integrative development of globalization is bringing about the return at the "global level" of both of the inclusion problems that had once plunged Europe into crises and disasters. Even as the now-global processes of individualization strike back at systemically integrated global society in the form of fundamentalism and threaten to destroy its differentiations, the problems of social integration, which followed the accumulation of capital in nineteenth-century Europe like a long shadow, reproduce themselves today in the form of the communicative exclusion of a global surplus population. While cosmopolitan democracy is only weakly developed if at all, the gloomy image of a global apartheid is clearly arising on the horizon of social reality.[32]

Power, law, and money are globalized, so it seems, at the expense of democratic solidarity. Democracy has suddenly been put on the defensive.[33] Still, the globalization of the late twentieth century differs remarkably from its imperialist forerunner at the end of the nineteenth century, which drove Europe toward the globalization of war and genocide in the first half of the twentieth century. Above all, what is remarkable is the development of a global legal order, which, for some time now, has overlaid the law set by the state and forced its way deep into national legal orders. That has led to global and regional processes of constitutionalization between and above states, a process quite advanced in Europe. But the solidification of postnational constitutional law is largely the result of a natural evolution. What has been lacking until now is even the equivalent of a revolutionary consciousness that could help the emerging European and global civil society to constitute themselves democratically and turn the defensive position in which democracies even *within* the Western nation-states have been placed into a new offensive.

The new constitutional regimes that emerged in recent decades, as the law of the European Community and international and global law became independent, are evolutionary accomplishments *without* revolutionary consciousness. They negatively integrate society with a minimum of solidarity, but as for positive integration they lack politically inclusive, democratic solidarity. They are effective, but not democratically so.[34] What they accomplish is the simultaneous separation and coupling of politics and law, law and economy. But in the constitution-like, functional complexes of structural couplings, the democratic founding ideas vanish. The evolution consumes their revolutionary substance. Even as contracts gain constitutional status, constitutions are assimilated to contracts. The emphasis shifts in the transnational constitutional regimes from the structural coupling of politics and law to the structural coupling of law and economy, and the constitutional revolution within nation-states also follows the global trend.[35] But the economy cannot be democratized in the same sense as the state and politics.[36] Its freedom is that of private contract, not that of public constitutionalization. To be sure, the new constitutional regimes thereby satisfy the growing "need for interconnection" [*Verknüpfungsbedarf*] (Luhmann) produced by the globalization of functionally separate social systems, but they lose democratic legitimacy to the extent that their public autonomy is only a façade for private autonomy. Although it is bound neither through constitutional theory nor through a law of nature to the present form of the state, democracy has functioned until now only within

the framework of the nation-state. On the other hand, some say that the democracy of "open states" cannot permanently survive without a democratization of the public law of transnational and international organizations.

The more rare cases become in which a general will, developed from below, is effectively brought to bear within the developed welfare states and their supranational and international organizations, the more frequently the latter become the prey of particular powers. If the founding legal texts from the GATT Agreement to the treaties on the European Union and the European Community achieve only the structural coupling of bureaucracy, law, and economy—that is, "constitution" only as system integration—but no longer the "structural coupling of individual consciousnesses and social communication"—which cannot be technically manipulated but only produced in public processes of reaching understanding—then globalized law might, as Luhmann himself is forced to realize in the end, "lose the certainty of being able to mobilize consciousness for legal purposes when it needed to, for instance if there were a political need."[37] Or, in the words of Hannah Arendt: Political institutions "petrify and decay" into grand, coercive apparatuses "as soon as the living power of the people ceases to uphold them."[38]

Nevertheless, in recent years, a global protest movement has expressed itself for the first time in the language of a new human-rights patriotism. Even as Tony Blair, following the summit of the eight most powerful industrial states (G8)—with the generous inclusion of the Russian president—declared in front of CNN's running cameras that this peculiar, highly selective gathering on the luxury ship off Genoa was globally representative—"We are the democratic leaders of the world"—the demonstrators, who traveled from all parts of the world and whom Prime Minister Silvio Berlusconi's police-state had clubbed to the ground, chanted in the name of the global people: "*Voi G8, Noi 6,000,000,000*" (You are G8, we are 6 billion). There they were again—hardly representative, but anticipating—the voice of Rousseau shouting out to the assembled executives of the richest nations the Jacobin slogan of the Leipzig demonstrators of 1989: "We are the people."

I

Stages of Solidarity

1

Civic Friendship

Our friendship, wrote Montaigne about his relationship with Étienne de La Boétie, "has no other model than itself, and can be compared only with itself."[1] The concept of romantic friendship that appears here for the first time in early modernity, a good two centuries before it would turn into a sentimental movement, is "rousing," "perfect," "indivisible,"[2] a self-referentially closed relationship between two people that does not tolerate a third and declares itself to be a state of exception, without equal and with no model. The immediate, sovereign unity of one soul in two bodies appears to friends so incomparably "rare," "that certainly you will hardly read of the like, and among men of today you see no trace of it in practice."[3] It is friendship as a closed, self-producing system.[4] The "secret" of sovereign friendship is anticivic: a rift in the bond of the ancient, friendly solidarity that—from Aristotle up to Lorenzetti's famous *Allegory of the Good Government* in the city hall of Siena—united the citizenry. Montaigne lets the secret out. Friends are "friends more than citizens, friends [with each other] more than friends or enemies of their country or friends of ambition and disturbance."[5] The break with premodern political thought occurs in one sentence: "Friendship dissolves all other obligations."[6]

In contrast, within the republican tradition of European antiquity, the highest and first definition (telos) of all friendship was to make these political-ethical "obligations" of communal life discernible and recognizable within intimate friendships, as their innermost bond. That is entirely different from Montaigne's bold anticipation of the ideal of romantic friendship. Romantic friendship "is kept together by nothing but a single point of contact," and on

this point the secluded ways of the exclusive and identitarian relationship between two people part with the well-trodden path of a community of virtuoso citizens. Montaigne's concept of friendship is already as "worldless" as the later romantic love. The model is not the heroic virtuosos, the "citizen pair" (Derrida) whose soldierly friendship rescues the fatherland, but more like Bonnie and Clyde, the criminal lovers who set the entire community against them: friendship not as unity, but as a rupture in communal ethics. While "love as passion" defined the relationship between Shakespeare's Romeo and Juliet in an entirely modern and anti-civic manner, the life of the protagonists is nonetheless destroyed by the insurmountable walls of a still-ancient morality (in the northern Italian republics of the Renaissance), which permits no love or friendship outside the world of the city: "There is no world without Verona's walls."[7] When it comes to the oath, Romeo must bitterly recognize the impossibility of fleeing. This permission, which discloses for love a single world "outside Verona's walls," is precisely what is missing for the "citizen of the polis." It will only be there for the "man of rights" of the modern, functionally differentiated society.[8]

While, in modern times, friendship and love distance themselves from the ethical community of citizens, such distance, the break between friendship and community, is foreign and undesirable to the ancients. It violates the nature of things. "Where there's no [comprehensive-political—H.B.] community," claims Plato, "there's no [individual—H.B.] friendship."[9] Man is—according to his (true) nature—a political animal *(zoon politikon)*.[10] Friendship as an end in itself is part of performatively carrying out the political life *(bios politicos)*. According to Aristotle, "Friendship would seem to hold cities together."[11] For pagan antiquity, the highest form of living together in the city community, structured toward "completion" and "self-sufficiency," is "the result of friendship."[12]

Philia—friendship—is defined by Aristotle as a freely chosen relationship between free citizens and distinguished from the domestic bonds of clan and family: "For we pass our days with our family or relations or comrades, children, parents or wife. And our private right conduct towards our friends depends only on ourselves, whereas right actions in relation to the rest of men are established by law and do not depend on us."[13] The small community of friends, just like the large polis-community, is based on "the deliberative choice of living together."[14] In friendship and in politics, the citizens must, in a double sense, be free. They must find one another of their own free will, and

they must be just as free from the cares of daily survival—thus, from labor—as they are from the will and commands of a master. Therefore, they can be neither slaves nor women. Only on the basis of manhood, affection, and property is a "complete," "good," and "self-sufficient life" possible.[15]

Free friendship among friends is—even as an intimate relationship—a public matter: It represents only one thing, and that is the individual elementary form of the collective harmony of a citizenry. While harmony within the community unites all citizens, "no one can have complete friendship for many people."[16] But there are many networks, and through closely meshed networks, the various individual friendships make the bond of harmony among *all* citizens more and more resistant to being torn. The field of possible friendships is extremely wide, does not exclude sexual relations, and is by no means restricted to the relationship of two persons that was already a model for Aristotle. Love, camaraderie, neighborliness, childhood friendship, personal intimacy, acquaintances made while traveling, hospitality, associations and clubs, political friendship (but also friendship with oneself) and self-acceptance: All fall under the concept of *philia,* which first took on this new significance in the city-states of ancient Greece.[17] Harmony *(homonoia)* and friendship *(philia)* are supposed to remove the "hostile discord" from the polis and from the soul of the individual—"each part pulls in a different direction, as though they were tearing [the vicious person] apart."[18] Harmony is generalized friendship, extended to the polis as a whole: "Concord [or harmony], then, is apparently political friendship *(philia politike),* as indeed it is said to be; for it is concerned with advantage and with what affects life [as a whole]."[19]

Networked, individual, and overlapping generalized civic friendship is the Aristotelian solution to the Platonic problem of social integration. How can the city, the *polis,* or the political community be held together harmoniously without having to fall back on the bonds of blood and tribal relations? Tragic literature refers to some extremely bad experiences with such relations. The orgies of revenge between hostile clans devastated and divided the life of the community.[20] No altogether good life was to be made with blood relations and familial bonds—despite the strengths of the social bond. Plato's proposal, which he submitted in *The Republic,* stemmed from irresistible revolutionary logic. If children are taken away from their parents immediately after birth, made unrecognizable to them, and brought up publicly, no one knows in the end whether the hand he raises against a fellow citizen might be hitting his

own child or his own brother.[21] Making family relations anonymous generalizes the familial bonding. But that was, as Plato himself knew, too revolutionary and not feasible. Instead, in the realistic and reformist version of the polis-community in Plato's later work, the friendship of free citizens replaces the state's authoritarian generalization of relations. But this is spelled out politically only by his master pupil, Aristotle.

Networks of civic friendship among men, as it is aesthetically reflected by Aeschylus in the sequence from the *Orestes* to the *Eumenides,* are supposed to neutralize the mafialike bonds of clan and family, secure the peace, and promote the common good. Friendship decenters the family-centered self-interest of the *oikos*-despot—the master of the household. So Aristotle defines "being a friend" as commitment to the friend "not for your own sake but for his."[22] Not even the family can separate one from a true friend. The gods of vengeance, who turn familial bonds against one another, are criminalized, socially downgraded, and removed from the center of public life. Henceforth, Athena resides there, the goddess of the new city ethos of civic harmony and justice.[23] Far removed, its normative obligations cancelled—as in Montaigne—individual friendship produces the very first ethical community. "Holy chains of friendship" (Fries/Hegel) hold together the premodern "civic association" (Rousseau/Kant) and carry the ethos of city life.[24] All of the model friendships of classic republican antiquity are "citizen couples . . . . whose *virile virtue* . . . tends . . . to the harmonization of the measure of friendship—unconditional union or affection—with the equally imperative reason of state."[25] Even Montaigne recoils from the "indefinite prodigiousness" (Marx) of his own subversive definition of friendship, quickly adding, "there never was a better citizen" than the deceased de La Boétie, whose uncivic friendship with the author of the essay, however, was romantically transfigured into an absolute that would no longer submit to the imperatives of reason of state.[26] But, in its old meaning, *philia* was a political, public, and legal concept.

In ancient thinking, friendship had an eminently epistemic function.[27] The friend with whom one shares everything is, as Aristotle says, "another oneself," in whom one can objectively recognize, viewing from the outside, what is good and right for oneself.[28] Friends are strictly reciprocal models [*Vor-Bilder*] for each other. They represent one's own self-ideal in a form that is, while highly intimate, still separated from one's own body and person and therefore visible, objectively perceivable.[29] Of course, the other recognizes the

ethical good in the friend only if the friend also has the features of an ethically virtuous character. But then one sees, as in a mirror, the value and the dignity of one's own life, which one could never really perceive in oneself alone because one is too close to oneself and could not see oneself objectively without the mirror of the *alter ego*. For the people of ancient Greece, a gaze inward was still just as unimaginable as an object of pure knowledge separated from a subject or a soul separated from the material world.[30] To see something is to come in contact with something to which one is always already related. As Vernant puts it, "it was always by looking, not within one's soul, but outside it, at another being related to it, that one's soul could know itself."[31]

What is so very fascinating about the good and virtuous friend is the affirmation of one's own excellence. In modern terms, the self-consciousness of the ancient citizen is formed in the medium of engaged knowledge of another self-consciousness, which is observed in its perfection and is directed toward the self-consciousness facing him with the same feelings and epistemic curiosity. It is the excellence of the friend—only recognizable from the standpoint of the respective other—which the one loves and admires in the other for the sake of the excellence of the other and not merely for the sake of usefulness or pleasure. That is, however, in the view of the Greek and Roman philosophers, no different than the good and useful as such, for the citizenry as a whole—what one calls in English *the common good*. A negative integration through conflict, something after the pattern of the Hegelian struggle to the death for recognition, was foreign to pagan-republican antiquity. The life and death struggle (war) did not lead—for instance, via a complex dialectic of lordship and servitude as with Hegel—to a reciprocally equalized recognition, but at best into slavery. For the loser that was the path, instead of death, into the legally exclusive status of a living death or a "living instrument" (Aristotle). This going from the relation to a thing (*res* in Roman law), did not result in a problem of reciprocal recognition for the winner.[32]

To recognize and to love the common good in the perfect form of male friendship is precisely what virtue is (Gr. *arête,* Lat. *virtus*). That is the final end *(telos)* toward which every human striving for pleasure and utility, for a good and satisfied existence, is directed.[33] Virtue is not just some good, but the unparalleled best that one can achieve—as a man and a prosperous citizen. Because, as Cicero writes, there is "nothing more lovable than virtue," in the friend, the friend loves his country.[34] The best friend is also the best citizen. Because the good for which friends strive is ultimately identical to the good for

the polis, there can be no perfect form of friendship that would be, as in Montaigne and in Romanticism, contrary to the civic world and the ethos of civic life. When the subjectively experienced good is not yet in "agreement" with the objective good, then, according to the circumstances, soft or hard political and pedagogical tricks are required in order to "bring about" the true good "in cases where it does not yet exist."[35] In ancient Greece and in Rome, the public, virtuous upbringing of citizens was a repressive everyday matter and was directed with particular suspicion toward curbing private conduct.

Slaves, of course, had no rights. Because they lacked any legal personality, they could not testify in court. They were, however, most welcome by the political community as informers on their masters—as *instrumentum vocale*—having such privileged access to their "private" domestic morals. Slaves were the perfect informal collaborators with the "virtue police" in all of the domestic affairs of the *oikos*-despots. When collaborators did not volunteer, torture was a proven means of legal redress, to which not only slaves, but even the wife—under stricter conditions than with slaves—could be submitted.[36] For the everyday social control of private life, however, "talk" was the best means. Gossip, chatter, and permanent, seething, rumormongering are certainly protodemocratic, but in a society without mass media and legal citizenship, they are indistinguishable from the daily "terrorism of virtue" by the neighborhood horde. One must always bear in mind that in the ancient city-republics it was a short path from rumor to the legal power executed by the neighborhood (and not "the state"). Short proceedings circumventing politically institutionalized judicial authority were common-law practice. The death penalty permitted a husband who convicted his neighbor of adultery to carry it out immediately.[37]

In the polis, according to Plato, the "prize for virtue" is due to the one who "makes every effort to assist the authorities in checking" the inappropriate conduct of his fellow citizens.[38] Athens did not differ in this respect from Rome. Paul Veyne writes:

> Public censure of private conduct was heard everywhere, and reminders of the rules of conduct were ubiquitous. The air was heavy with calls to order, with an insistence on respect for the rules. . . . The Romans burned enough incense to virtue to kill an ox. . . . Skeletons were eagerly let out of the closets. When it came to countering vice with virtue, the slogan was, "anything goes." . . . The collective conscience commented, as shamelessly as it pleased, on anyone's life. . . . No one was exempt from justifying his private life before the bar of public opinion.[39]

There was as little private life separate from the public sphere as there was friendship separate from civicmindedness.

In this society, the friendship of men was both a medium of the ubiquitous censor and a safeguard of individuals against their sudden access. Friendship protected the friend through half-public precensorship against public hostilities. In the old families of the Roman upper class, the council of friends, which Cicero pathetically invoked, "had something of a formal quality," which saved one in all private decisions from putting one's foot in one's mouth.[40] If suicide—an eminently public matter in Athens and Rome—was approved by friends, it could not then be construed as cowardice. The identification of friendly affection and attachment with the imperatives of raison d'état showed the classic republic to be a didactic dictatorship.[41] A friendship that regards the friend as more than the citizen remained as unthinkable as a friendship that could be emancipated from social stratification and class.

"Friendship," as Aristotle begins his famous treatment in Book Eight of *The Nicomachean Ethics,* "is a virtue, or involves virtue."[42] And it is "most necessary for our life. For no one would choose to live without friends even if he had all the other goods. Indeed rich people and holders of powerful positions, even more than other people, seem to need friends."[43] Moreover, friendship is "not only necessary, but also fine."[44]

As a virtue ("excellence"), the concept of friendship is tightly integrated into the precisely stratified hierarchy of perfection of the ancient city-republic. Friendship is not just necessary, but is also, in terms of ordinally scaled concepts that can be extended up to the limits of the absolute ideal, "beautiful" and "something lordly."[45] It is clear from the start for Plato and Aristotle that the ethos of friendship is an affair of the city's upper class, since "friendship between [a master and his slave] is inherently impossible. The same applies to the relations between an honest man and a scoundrel. Indiscriminate equality for all amounts to *in*equality."[46] The hierarchy of virtue is mirrored in the social hierarchy. For the upper class of wealth and excellence, moreover, friendship is particularly necessary. The first level in the civic association is "friendship based on utility."[47] Those who rule and own things have many enemies and people who are envious of them. This forms a bond. But the cultivation of "lordly" friendship is also required; the highest level of a "friendship of virtue" requires a work-free existence: "The friendship of good people insofar as they are good is friendship primarily and fully, but the other friendships are friendships by similarity."[48] The first is the best, and good people are

also the wealthy. The others, who must work in order to live, are only capable of "necessary" friendship and are therefore "only together accidentally."[49] They are like "base people" who are never able to embody the essence ("essence" vs. "accident") of *philia* completely. With them one is only friendly "for pleasure or utility."[50] In the "pensionopolis" (Max Weber), the contempt for work is deepseated.[51] Only among equals at the top of a hierarchy of the wealthy and the good is true friendship possible. This is also true for law.

Law, justice, and friendship form a unity of concepts in Greek thought that have a family resemblance. They mean "either the same or nearly the same thing."[52] Friendship and justice coincide in the cognitive-epistemic ideal of an intrinsically valuable, self-sufficient practice. As a perfection of justice, friendship is synonymous with the harmony of the classes in the aristocratic republic and the cardinal virtues in the soul of man.[53] Friendship constitutes a legal relationship, because legal relationships presuppose equality. True friendship is the original image of law and justice, since "friendship," along with "right" and "justice," are relational concepts that represent a relation of equality.[54] Repay like with like, that is the law. The great idea of a just equality appears here, only to disappear again quickly into the class society. For those who do not show enough "in common" (equality) with the rulers, there could be no justice. That is the classic origin of Carl Schmitt's restriction of the legal community to "homogeneity" and "the same race." *Quod licet Jovi, non licet bovi.* Everyone gets what they deserve. Plato writes, "and we surely haven't forgotten that the city was just because each of the three classes in it was doing its own work."[55] No one, warns Cicero, should be "led into the error of thinking that because Socrates or Aristippus did or said something contrary to custom and civic practice, that is something he can do himself. For those men acquired such freedom on account of great, indeed, divine, goodness"—the license of Jupiter.[56] That is also law.

Law is "Janus-faced" (Habermas). Thus, no justice for inanimate tools, animals, and slaves: "There is neither friendship nor justice toward inanimate things. Nor is there any toward a horse or cow, or toward a slave, insofar as he is a slave. For master and slave have nothing in common, since a slave is a tool with a soul, while a tool is a slave without a soul. Insofar as he is a slave, then, there is no friendship with him" (1161b NE). That is fitting, in light of the fact that Greek culture was the first to use slaves on a large scale. Within Greek culture, according to Egon Flaig, "the slave sinks into a rightlessness that one does not find in the Orient."[57] Toward the slave, "insofar as he is a slave,"

writes Aristotle, "there is neither friendship nor justice."[58] The word *as* means that one must differentiate here—at least within practical philosophy. The slave is a complex thing. On the one hand, he is a tool, and on the other hand, a human being. "Insofar as he is a human being," there is also "friendship" with slaves and even "some relation of justice."[59] For as a human being the slave also belongs to that type of animal "who is capable of community in law and agreement."[60] Of course, only a minor share, since although the slave is a man, he is after all neither a free housemaster nor an *oikos*-despot. With him, there is therefore only friendship of an "inferior" type: unequal friendship for pleasure or utility and unequal justice, dictated by the master. Thus, justice as an instrument for securing the lordship of the affluent man over "his own"—women, slaves, and so forth.[61] This is class justice, just as it was strictly executed in Rome according to the letter of the law.[62]

Legal class justice was, however, always better than the lawless version. At least since the second century, still in the pre-Christian era of the Roman Empire, the status of slaves was internally juridified and based on the philosophical principle that the slave is not *just* an instrument, but *also* a man; it was decided to revoke the right over life and death from the master, to prevent excesses of violence, to recognize slave marriages, and to enable slaves' own wealth creation.[63] But these legal provisions did not make slaves into legal subjects. They only had the status of policing provisions for the master and were no more than a kind of animal protection. Motivated for humanitarian reasons by the stoic intellectual culture, those provisions were still primarily viewed economically and aimed at avoiding a revolt. They were never aimed at the abolition of slavery as an institution, but only toward individual freedom and revenge. The instrumental meaning of slave marriage is particularly significant. The slave markets had suffered since the second century under structural scarcity and increase in prices. Therefore, the slaveholders had to resort to breeding, and slave families achieved the best results. Hence, here as well, there is no trace of an idea of solidarity in terms of human rights.

True virtue befits only the highest form of friendship, which is sought for its own sake.[64] As we have seen, Aristotle distinguished many levels of friendship, but, above all, he separates intrinsic or virtuous from extrinsic or useful friendship—whereby "useful" must not be confused with instrumental or calculating. The former has its purpose in itself, the latter outside itself—without excluding mutual use or common (sexual or nonsexual) pleasure, as in the ethics of Immanuel Kant, virtue is still the highest pleasure.[65] Besides political

friendship, the friendship of philosophers plays an independent role in the ancient city cultures: *Philosophia* is friendship or love that, in the communally practiced wisdom, consisted in the perfection of a life devoted to theory *(bios theoretikos)*. In sociological terms, it is a form of "ascetic flight from the world."[66] Hannah Arendt criticized the philosophers for that reason: because they simply slip out of public affairs in order to live outside the gates of the city like "idiots."[67] *Idios,* they are those for whom there is something better than the common good. Richard Rorty calls this "private irony" (which always has an individualistic-idiosyncratic, foreign-to-public-opinion, normatively nonconformist aspect) and distinguishes it from "public solidarity"—something that is a public matter, the *res publica*.[68] Ultimately, this amounts to a functional differentiation between theory and practice, science and politics, which was already suggested by Aristotle in Book Ten of *The Nicomachean Ethics*. But Aristotle wavered. He had difficulties with the hierarchy, for human practice can be ordered only according to levels of perfection and cannot be represented as an order of functional spheres or discourses with equal rank and rights. On the one hand, the self-sufficient life of the truthseeing philosopher is the most complete form of practical happiness; on the other hand, for politics (the self-sufficient sphere of public appearances in which the *telos* of political beings is fulfilled) it is unusable, even impractical, and in this respect deficient. Does it stand above or beneath politics, then? If it were to stand next to it, it would no longer fit within the horizon of classic metaphysics. In contrast to Arendt, Rorty praises the philosophers for their ironic existence outside of political life, but as a typical liberal he insists that they must also be content and not try to impose their theories on the citizens of the city as eternal truth. Plato had tried that and implemented it with the help of the tyrants of Syracuse. He failed. So much for the *bios theoretikos*.

Whether it is applied to the unchangeable being of philosophical knowledge or to the fleeting and changeable world of political existence, the perfect form of solidarity within a classic, republican civic community is bound to the upper class and urbancentric. The price that is to be paid for the ethos of city life, the civilization of the "public happiness" (Arendt) of a ruling class, consists in the exclusion of the "infamous people" (Foucault): the barbarians, foreigners, women, and slaves.[69] To be sure, from Hannah Arendt to Christian Meier the political shines "as a field of equality and fraternity," but the "difference between Athenians" becomes unimportant and their isonomy, their civic order of equality, is realized "only to the extent that and insofar as the boundary

around the entire citizenry is drastically intensified in relation to all of the non-citizens."[70] Nonetheless, the republican ideal has, in humanistic and universalist terms, gone beyond the mere ideology of a ruling class. In sum,

1. Republican civic solidarity is bound to the requirement of *mutual freedom*—Martha Nussbaum aptly speaks of "separate centers of choice and action."[71]

2. It is *emancipated* from the mafioso domination of family bonds and blood relations. Even the pre-political—in that respect inferior—friendship of the home (*oikos*), which is at least possible inside the clan association, between man and woman, master and slave, father and son, or between brothers, is founded *as* friendship not on marriage and blood relations or—as in the case of the slaves—on elementary power relations, but comes from free affection.

3. Moreover, the intimate friendship that is primary and is always among just a few men is *generalized* toward civic friendship, toward *philia politike*—patriotism.

4. And within the network of free civic friendship, the *universal essence of man* is realized. According to his potentiality as a member of the species, each man is a political being.

Of course, the universalism of this species essence must not hide the fact that classic humanism is structurally (meaning precisely because of the species universalism) designed in an elitist manner and must presuppose unequal rights. The normative claim of *all* human beings to live according to their political nature is not only fulfilled sufficiently by the few fine specimens at the pinnacle and in the center of the social hierarchy, but is already presupposed in the theoretical self-description that says that the others, as tools that serve their noble or citizen masters, do the labor. In practical terms, it is true of democracy in Athens that it "would have survived not one month without mass-slavery."[72]

Even the Roman Stoics, with their seemingly utopian sketch of a cosmopolis, changed nothing about these basic findings regarding a structurally elitist self-description. Certainly, the (fictitious) cosmopolis makes all human beings into (fictitious) world citizens for the first time, and that set off an extraordinarily progressive "effective history" [*Wirkungsgeschichte*]—just think of Kant's perpetual peace.[73] As rational beings, all humans are free members of the cosmopolitan order of nature. At the same time, however, the cosmopolis is a more unpolitical idea than the Aristotelian *philia politike*. The polis of world citizens is not a political program, nor even a regulative idea.[74] It is just the logi-

cal conclusion of an altogether reasonably conceived order of nature, and has practical significance only for the current form of life and happiness of the philosophers. A cosmopolitan *bios theoretikos* represents hardly anything more than an ideological glorification of a superstructure suitable for the Roman Empire. There did not even exist an intellectual contradiction to the hegemony of Rome (*urbs*) over the peripheral peoples of the "globe" (*orbis*). The social structure of the cosmopolis is the same as that of the real polis of Rome: "Do we not see that the best people are given the right to rule by nature herself, with the greatest benefit to the weak?"[75] This is pure ideology, and it functions as a method of ruling through agreement only in the fictitious cosmopolis while in the real *imperium romanum* the usual methods of *leges pacis imponere* supervene: execution, deportation, and mass enslavement.[76]

Women certainly fared better with the Roman Stoics than with the Greeks, but even there the real value of the new ideals of the loving couple were hardly higher than the "edifying style" of its philosophical and poetic champions; according to Paul Veyne:

> When Seneca and Pliny speak of their married lives, they do so in a sentimental style that exudes virtue and deliberately aims to be exemplary. One consequence was that the place of the wife ceased to be what it had been. Under the old moral code she had been classed among the servants, who were placed in her charge by delegation of her husband's authority. Under the new code she was raised to the same status as her husband's friends. . . . For Seneca the marriage bond was comparable in every way to the pact of friendship. What were the practical consequences of this? I doubt there were many. What changed was more than likely the manner in which husbands spoke of their wives in general conversation or addressed them in the presence of others.[77]

2

Europe Began in Jerusalem: Brotherliness

And he looked for justice, but behold, bloodshed.
Isaiah 5:7

Love of neighbor, or *caritas,* which was radicalized by Christianity to include love of enemies and strangers, is constituted quite differently than republican civic solidarity. It is apolitical, or better, meta-political, and according to Tertullian (155–220 CE), it is "foreign to . . . affairs of state."[1] No wonder that the Christians in Rome were viewed suspiciously, as enemies of the state or as public enemies.[2] The real locus of the community of love is not the *civitas terrana,* but the *civitas dei.* The sharp opposition between religion and politics separates the individual believer from his fellow citizens, friends, and relatives more radically than Aristotelian *philia* or Cicero's *amicitia.*[3] In Matthew 10:34–38, Jesus preaches with unmistakable militancy the priority of the spontaneously formed discipleship above all natural blood relations: "Do not think that I have come to bring peace on earth; I have not come to bring peace, but a sword. For I have come to set a man against his father, and a daughter against her mother, and a daughter-in-law against her mother-in-law; and a man's foes will be those of his own household. He who loves father or mother more than me is not worthy of me; and he who loves son or daughter more than me is not worthy of me."[4] Matthew 23:9 reveals the dimension of universal brotherliness through the anti-paternalistic negation of the role of the natural father: "And call no man your father on earth, for you have one Father, who is in heaven." In terms of radicalism, this equals in every way Plato's critique of the bonds of family (see chapter 1). However, it is not only directed against the particularism of the family, but it opposes with the same force the particularism of the

political community. Jesus was supposed to be—according to the prosecution—a Jewish revolutionary in the struggle against Roman rule. He was ultimately condemned and executed by the Romans as a Zealot, on a Roman cross, with the grounds for the judgment referred to in the *titulus*—the inscription on the cross: breaking the *pax romana* as "King of the Jews." Indeed, a string of Jesus' followers were Zealots, and the attraction of Jesus' movement among the people was greatest among the militant, zealous underclass, but smallest among the Sadducean upper class who were "faithful to the state." The preacher of love for one's enemy again referred to the sword shortly before his arrest, but on this occasion ordered its use to resist the Roman Republic's attack upon the messenger of the kingdom of God. He even directed his companions, if necessary, to sell their belongings: "Let him who has no sword sell his mantle and buy one" (Luke 22:36). If Jesus occasionally criticized the militancy of the Zealots and was not one himself, he still stood at about the same distance as they in opposition to the Roman Empire, and he by no means ruled out armed struggle under all circumstances.[5]

A civic friendship like that *and* an ethics that equally neutralized kinship had to come into conflict with the republican structure of the Roman Empire, even when it was conscious enough of power to appear as statesmanlike as in Tertullian's famous apology.[6] As it emancipated itself from the holy bonds of the family and neighborly relations, the Christian ethic of brotherliness succeeded in devoting itself to the other, which was universalized to all of humanity but was still concrete, in the sense of the brotherly sharing of divine filiation. The believing Jew or Christian owes respect and care not to the abstract principle, to the Kantian "humanity" in us, but to each concrete countenance (Levinas) that is in the image of God, that of any neighbor at all. In a philosophically radical move, Paul reduces the entire Decalogue of the Ten Commandments and all legal prescriptions that make the Decalogue concrete to the principle of love of neighbor:

> Owe no one anything, except to love one another; for he who loves his neighbor has fulfilled the law. The commandments, "You shall not commit adultery, You shall not kill, You shall not steal, You shall not covet," and any other commandment, are summed up in this sentence, "You shall love your neighbor as yourself." Love does no wrong to a neighbor; therefore love is the fulfilling of the law (Romans 13:8–10).[7]

In sociological terms, the Judeo-Christian ethic of brotherliness has at the same time an affirmative and a critical function. The preceding passage from

Paul, which requires that love be uncompromising and thus thoroughly anti-state and anti-law, is preceded by these sentences: "Let every person be subject to the governing authorities. For there is no authority except from God, and those that exist have been instituted by God" (Romans 13:1). To be sure, Paul does not also require the "state" or the authorities to love *as* authorities. That would be the betrayal of the kingdom of God. But the ambivalence is deep-seated. "Christ," writes Slavoj Žižek, "calls on his followers to obey and respect their superiors in accordance with established customs *and* to hate and disobey them."[8] The affirmative character, which is more pronounced in the Christian copy of the commandment to love than in the Jewish original, is a consequence of the increasingly ascetic flight from the world within the Christian idea of love of neighbor. In the future world, everything will be different, but in the present, much remains of the old. Still, the flight from the world refers "only" to the disdain for the body and the downgrading of mere bodily suffering in comparison with the harm that the unbeliever and the disobedient do to their souls.

In a thoroughly affirmative sense, the early Christians are also already turned toward the world. For them—as for all monotheistic religions—the earthly world is one in which they must prove themselves socially. "We," wrote Tertullian in the year 197 CE, as he indignantly rejected the accusation of a total pacifist renunciation, "are neither Brahmins nor Indian gymnosophists, dwellers in the forests, and exiles from ordinary life. . . . Consequently we cannot dwell together in the world, without the marketplace, without the shambles, without your baths, shops, factories, taverns, fairs and other places of resort. We also sail with you and serve in the army and we till the ground and engage in trade as you do, we join our crafts, we lend our services to the public for your profit."[9] Although they are directed entirely toward the salvation of the divine world, they still keep both feet on the ground of this world, and their moral rigorousness is by no means detrimental to business success: One can be sure that the members of the Christian community "pay down what they owe."[10] The true world of the Christians is surely not of this world, but their moralism of "innerworldly asceticism" (Weber) makes humanity, determined by the Fall, into a suitable instrument of God, which certainly does not hinder the fall of the earthly world, but can and should delay it, even as a political actor. So Tertullian presents his Christians to the Roman Emperor as those who delay "the end itself of world history" and favor "the long continuance of Rome."[11]

Given the universalistic and egalitarian quality of God's commandments, however, the affirmative character of Christianity was quickly negated, and a critical tension to the existing relations of domination and servitude developed. The divine law categorically demands kindness and forbids retaliation: "For we are forbidden to wish evil, to do evil" against "anyone without distinction. Whatsoever is not permitted against the emperor, neither is it permitted against any one."[12] In their deficient form as suffering creatures, all those created in the image of God (Genesis 1:27) are equally in need of divine grace and redemption.[13] Thus, inclusion stands right at the top of the Christian agenda, as Tertullian writes: "No benefit that we accomplish pays any regard to special individuals."[14] This returns to the Pauline concept of the "new man," according to which, in the community of Christians "there cannot be Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave, free man," but "Christ is all, and in all" (Colossians 3:10–11). In addition, the stark differentiation between the citizenry of God and the earthly citizenry, which is reflected in the tension between God's love and love of neighbor, facilitated the transition from a still strongly mechanical form of solidarity (Athenian popular assembly and popular court—Max Weber: "civil actions before hundreds of jury members who are ignorant of the law") to a stronger, organic form of solidarity that is based on the "division of labor" (Durkheim) and institutionally bound (paradigmatically in the Papal States of the High Middle Ages).[15]

The monotheistic concept of God (Judeo-Christian as well as later Islamic) requires a unified and negative conception of human beings.[16] God is the creator of all humans, and in being created in the image of God, all humans differ, without exception, from all other creatures. In the Bible, the deficient nature of the suffering and mortal human is emphasized above all in view of the all-powerful and eternal God.[17] The Greek philosophers also had a concept of the unified essence of man, but as we have seen, Plato and the pre-Christian humanists were of the opinion that this essence could and should be perfectly represented only by a few. Humanity realizes its essence in the few perfect specimens—Nietzsche's "*Übermenschen*"—who look down with contempt on the less successful specimens—the "*Untermenschen*." For the prophets, who lived and preached in ancient Israel a few centuries before the Greek philosophers, the matter looked quite different. The concept of the human being had been unified and given a radically egalitarian sense for the first time there. The negativity of human suffering was seen as the same for all, and the idea that things

should be better for some at a cost to the many was no longer valid as a sign of ethical perfection, but instead further nourished the suspicion of exceptional malice and wickedness.

For the Old Testament commandment to love—"You should love your neighbor as yourself" (Leviticus 19:18)—quoted by the legal critic Saint Paul as the law of all laws, three ideas are fundamental. First is the liberation theology of the Exodus story. Exodus is simultaneously beginning and end, the political creation and political redemption of Israel. The God who "makes a way in the sea" and lets the "army and warrior" of the Pharaoh be "extinguished, quenched like a wick" is "the Creator of Israel" (Isaiah 43:15–17), and the one who made "the depths of the sea a way," by which those who were "redeemed" from servitude could "pass over" (Isaiah 51:10). In the hymn of Moses, the mythical events of the Exodus of the slaves out of Egypt became the first hymn of a social revolution; it threateningly placed the fate of the Pharaoh before the eyes of all human masters who would put themselves between God and his people in laying claim to power *over* the people. The effects of this impetus toward a critique of domination go far beyond the boundaries of Israel: "The peoples have heard, they tremble; pangs have seized on the inhabitants of Philistia. Now are the chiefs of Edom dismayed; the leaders of Moab, trembling seizes them; all the inhabitants of Canaan have melted away. Terror and dread fall upon them; because of the greatness of thy arm, they are as still as a stone" (Exodus 15:14–16). At the end of the eighteenth century, the princes of Europe did not react much differently to the news from Paris. When Moses and the people concluded their hymn to the victorious revolution with lines that assigned God to the empty place of the King, the prophetess Miriam, like the woman in *La Liberté guidant le people* by Delacroix, seized "the timbrel" and began singing the hymn of Moses: "and all the women went out after her with timbrels and dancing. And Miriam sang to them: 'Sing to the Lord, for he has triumphed gloriously; the horse and his rider he has thrown into the sea'" (Exodus 15:20–21). The Biblical texts repeatedly recall and exhort the Israelites never to forget that they themselves were once slaves in Egypt. This negative "countermemory" (Jan Assmann) warns against the daily danger of falling back into servitude and slavery and—as one might say, echoing a later prophet Karl Marx—"*to overthrow all those conditions* in which man is an abased, enslaved, abandoned, contemptible being."[18] In their best times, the Israelites held on to these maxims and to a large extent deprived their kings and priests of power or even

drove them away.[19] They owed their freedom from Egyptian slavery to neither king nor military leader, but solely to God's love for his people and his leadership.

Connected with that is the second idea that is decisive for the theology of the covenant. On Mount Sinai, the people, happily rescued from the domination of the Egyptians, entered into a vassal contract, not with an earthly lord or king, however—and this was the real revolution—but directly with God. An entirely new type of contract thereby comes into being, through which the earthly lord's claim to rule is radically devalued and placed under a restriction, and monotheism—the divine almighty—is first constituted.[20] All of the power that was part of the vassal contracts customary at that time in the Near East was deducted from the account of the king and completely transferred to the account of God.[21] Monotheism is the product of this transfer. God alone shall rule, and every offense against that rule—hence, every rule of humans over humans—must, from the perspective of Jewish servitude under God, appear as an evil to be overcome. The covenant with God constitutes a fundamental form of social association that is part of a critique of domination.[22]

In the Jotham fable from the book of Judges, it says: "The trees once went forth to anoint a king over them; and they said to the olive tree, 'Reign over us.' But the olive tree said to them, 'Shall I leave my fatness, by which gods and men are honored, and go to sway over the trees?'" (Judges 9: 8–9) The king is a ridiculous figure, a wavering form, since it is surely better to work and to produce olive oil. This is the groundbreaking argument against monarchy: It is unproductive.[23] But the dumb trees instead wanted a king, and in distress turned to a fig tree: "But the fig tree said to them, 'Shall I leave my sweetness and my good fruit, and go to sway over the trees?'" When the vine also prefers to continue producing wine, "which cheers gods and men," the subjugation-seeking trees turn in their desperation to the horrible, useless thornbush: "Then all the trees said to the bramble, 'Come you, and reign over us.' And the bramble said to the trees, 'If in good faith you are anointing me king over you, then come and take refuge in my shade, but if not, let fire come out of the bramble and devour the cedars of Lebanon'" (Judges 9:10–15). No state is to be made with the crown of thorns. Kingship leads only to violence and destruction, fire and scorched earth.[24] That state power as such can become a source of the greatest horrors is an ancient Jewish insight.

Above all, however, the allusion to the deficient protective function of monarchy (it provides no shade and is easily inflamed), together with the pro-

ductivity argument (productive trees decline anointing and crowns because they would lose their fruitfulness), make the radical and principled critique of the monarchy perfectly.[25] Martin Buber strikingly called the Jotham fable "the strongest anti-monarchical poem of world literature."[26] The only thing comparably radical is its counterpart, Gideon's rejection of royal dignity (also in the book of Judges 8:22–23), and, later, Samuel's categorical condemnation of kingship. After a victorious battle, the people want to make Gideon (the savior of Israel sent by God) into their ruler, but he laconically refuses with an argument critical of kings and hostile to dynasty: "I will not rule over you, and my son will not rule over you; the Lord will rule over you."[27] That is not put forward as a play to strengthen the informal power of the charismatic military leader in place of formal leadership; nor is it merely rejection *ad personam,* restricted to Gideon and his descendants. Rather, as Buber shows, it is "an unconditional No for all times and historical conditions" to the rule of one part of the people over another.[28]

When the people—who repeatedly recall the allure of the Egyptian fleshpots, forgetting the servitude with which they paid for it—demand that Samuel appoint a king, he portrays the rule of kings in the dark colors of exploitation, of bureaucratic and Pharaonic despotism:

> He will take your sons and appoint them to his chariots and to be his horsemen, and to run before his chariots . . . and some to plow his ground and to reap his harvest, and to make his implements of war and the equipment of his chariots. He will take your daughters to be perfumers and cooks and bakers. He will take the best of your fields and vineyards and olive orchards and give them to his servants. He will take the tenth of your grain and of your vineyards and give it to his officers and to his servants. He will take you menservants and maidservants, and the best of your cattle and your asses, and put them to his work. . . . and you shall be his slaves. (I Samuel 8:11–17)

There had not been any principled critique of kingship, a "fundamental no" to monarchy *as* an institution, in the Orient or in the entire world at that time.[29] Even the Greek philosophers and the democratic intellectuals and politicians of Athens at no point condemned the institution of monarchy as such, only its degenerate form, tyranny. There is a principled critique of monarchy within pagan antiquity only in republican Rome. But even there it was never combined with a principled critique of slavery and the glorification of a slave rebellion.

According to Christian Meier, Europe began in Salamis with the victory of the Greeks over the Persians because there, at least in the self-description of

Europe, the political course was set in favor of a republic—whether the republic be democratic as in Pericles, aristocratic as in Cicero, or monarchical as in Aquinas—and against despotism. If Meier is correct, then it is equally apt to claim that Europe began in Jerusalem with the mythic story of the Exodus of the slaves from Egypt, in which the political course was first negatively set against foreign domination.[30] One should add that the much-praised, "radical" democracy of Athens could not withstand for long the growing complexity of a society divided and fissured into classes, strata, and autonomous spheres of action, whereas the anti-despotism of monotheism has proven itself as extraordinarily suitable for complexity.

In this manner, the prophets succeeded in sustaining fundamental opposition to the domination and kingship characteristic of the ancient Israelite democratic confederacy of peasants, even during the age of kingly rule and class division, and in transforming the abstract negation of kingship into its immanent critique.[31] It was precisely because they were obstinately religious and insisted upon the irreconcilable difference between the rule of God and all human relations of domination that they could lead political opposition within the complex organization of urban society—"the political mouthpiece of an anti-monarchical faction," for Graham Maddox the absolute paradigm of political opposition, a kind of pre-adaptive advance of the modern exchange of government and opposition.[32] In the role of the radical opposition, they succeeded in replicating the difference between regulated anarchy (Gideon, Jotham fable, the book of Judges) and monarchy, between "confederacy [*Eidgenossenschaft*]" and "city domination [*Stadtherrschaft*]" (Weber), within the society of kingly rule. The prophets could thereby delegitimize the monarchy as a source of independent sovereignty and demand from the ruling classes of big landowners the strict and literal following of the covenant that God had concluded not just with them, but with the whole people.

The democratic confederacy of peasants of the early days of the Israelites, which moved into the utopian distance during the time of the kings, became the standard for a permanently institutionalized critique that exposed the dominant culture as a culture of domination through a critique of ideology. Much like Rousseau in the first *Discourse,* the prophet Amos condemned the arts, which were cultivated "ad nauseam" (Kant), for casting a cloud over and distorting the impartial view of the everflowing stream of justice: "I hate, I despise your feasts, and I take no delight in your solemn assemblies. . . . Take

away from me the noise of your songs; to the melody of your harps I will not listen. But let justice roll down like waters, and righteousness like an ever-flowing stream" (Amos 5:21, 23–24). The prophets unrelentingly held the rich and ruling responsible for the creation of a landless and miserable proletariat (Isaiah 5:8; Hosea 5:10; Amos 3:9–10, 4:1–3; Jeremiah 21:11–12, 22:13, 17; Micah 2:1–5, 6:9–12), for the profiteering of urban class justice (Isaiah 10:1–2; Amos 5:7, 10–15), and for the economic exploitation of wage-labor: Amos condemns the rich, who "sell . . . the needy for a pair of shoes." They "trample the head of the poor into the dust of the earth" and "sell the refuse of the wheat." The prophet will "send a fire" that will "devour the strongholds of Jerusalem" (Amos 2:5–7, 8:4–6). Those are the revolutionary phrases to which Büchner and Weidig's *The Hessian Messenger* (1834) was directly connected: "Peace to the huts! War on the palaces!"[33] Similarly, Büchner's contemporary, Heinrich Heine, whose poem "King David" ironically mirrors the biblical critic of kings:

Smiling still a despot dies,
For he knows, on his demise,
New hands wield the tyrant's power–
It is not yet freedom's hour.

Like the horse or ox, poor folk
Still stay harnessed to the yoke,
And that neck is broken faster
That's not bowed before the master.

On the deathbed, David told
His son Solomon: "Behold,
You must rid me, in all candor,
Of this Joab, my commander."

"Captain Joab's brave and tough
But he's irked me long enough;
Yet, however I detest him,
I have never dared arrest him."

"You, my son, are wise, devout,
Pious—and your arm is stout;
You should have no trouble sending
Joab to a sticky ending.[34]

The corresponding Bible verse is found in the devastating judgment, driven by pity and rage, of the prophet Nathan over the exploitative rule of David:

And the Lord sent Nathan to David. He came to him, and said to him, "There were two men in a certain city, the one rich and the other poor. The rich man had very many flocks and herds; but the poor man had nothing but one little ewe lamb, which he had bought. And he brought it up, and it grew up with him and with his children; it used to eat of his morsel, and drink from his cup, and lie in his bosom, and it was like a daughter to him. Now there came a traveler to the rich man, and he was unwilling to take one of his own flock or herd to prepare for the wayfarer who had come to him, but he took the poor man's lamb, and prepared it for the man who had come to him." Then David's anger was greatly kindled against the man; and he said to Nathan, "As the Lord lives, the man who has done this deserves to die; and he shall restore the lamb fourfold, because he did this thing, because he had no pity." Nathan said to David, "You are the man." (II Samuel 12:1–7)

The idea of equal human rights and freedom from domination, which is so central to the normative self-understanding of modern democracy (see chapter 1), has its roots in the Jewish insight—reinterpreted in Christian terms by Augustine in the doctrine of two citizenries—that "liberation from slave-states pronounced once and for all that the rule of God had nothing to do with physical oppression."[35] Therefore, the only weapon of the prophets is the weapon of critique: the word, which did not wish to evoke (nor to predict) the wholly other [*Ganz Andere*], but rather "to set a particular course" for the "history that was already taking place."[36] That is, by the way, exactly the role that Max Weber attributed to ideas in history: to set the course in whose tracks interests move the flow of things.

The third idea that is central to the Old Testament commandment to love is the practical character of love. Love is not to be separated from intervening action, but is rather—just like the "practical-sensuous activity" in Marx, or the speech act in John Austin—a performative concept.[37] In the Bible, what is meant is always an action defined by love. Love of neighbor is carrying out divine law, an "aspect" of every law-conforming action.[38] "Love your neighbor as yourself" is, in the Old Testament much as it is later in Paul, the "sum and goal" of all laws.[39] Love is the realization of social justice in the entire breadth of human dealings with the world.[40] In Leviticus (19:11–18), it says:

You shall not steal, nor deal falsely, nor lie to one another. And you shall not swear by my name falsely, and so profane the name of your God: I am the Lord. You shall not oppress your neighbor or rob him. The wages of a hired servant shall not remain with you all night until morning. You shall not curse the deaf or put a stumbling block before the blind, but you shall fear your God: I am the Lord. You shall do no injustice

in judgment; you shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor. You shall not go up and down as a slanderer among your people, and you shall not stand forth against the life of your neighbor: I am the Lord. You shall not hate your brother in your heart, but you shall reason with your neighbor, lest you bear sin because of him. You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the Lord.

This passage already contains the core of the command to love one's enemy that was later claimed by the Christians; it is included here in the principled ban on vengeance against enemies. Even the foreigner, the member of other peoples and tribes, is in many places in the Old Testament explicitly included in the human community of solidarity.[41] The judge, as it says in Exodus 23:6–9, must not just not break the law, not be bribed, and not pass any arbitrary judgments, but also must not oppress foreigners, hence non-Jews living among the Jews.[42] Structurally, this is a necessary implication of personal monotheism, which must start from the equal proximity of all humans to God, regardless of whether they belong to His people or another people. Love of neighbor was already egalitarian and universalistic in the Old Testament.

In reality, that only had consequences for the social association of the ancient Israelite confederation.[43] There were also slaves in Israel, as there were everywhere in the ancient world: conquered enemies and compatriots caught in debtor's servitude. But the prick of bad conscience was strong, and the countermemory of the house of slavery in Egypt resulted in better treatment for slaves in ancient Israel than was typical in the ancient world. The laws on slavery were supposed to contribute to the abolition of the status of slave: "We were Pharaoh's slaves in Egypt; and the Lord brought us out of Egypt with a mighty hand" (Deuteronomy 6:21) . . . "and the Lord commanded us to do all these statutes, to fear the Lord our God, for our good always, that he might preserve us alive, as at this day" (Deuteronomy 6:24). Accordingly, a firm penalty for aiding escape was missing in Hebrew law. After six years, owners had to free their slaves and pay them some money to tide them over (Deuteronomy 15:12–15). Runaway slaves had to be granted asylum wherever they went. They could begin a new life unmolested in new surroundings. Deuteronomy 12:15–16 explicitly stipulates: "You shall not give up to his master a slave who has escaped from his master to you; he shall dwell with you, in your midst, in the place which he shall choose within one of your towns, where it pleases him best; you shall not oppress him." Whoever killed a

slave had to reckon with the blood revenge of his relatives. That was valid law. Whoever seriously injured his slaves had to free them. "That is," writes Uwe Wesel, "without precedent in all of antiquity."[44] The slave legislation of the Israelites had de facto brought the status of the slave into line with that of the wage-laborer (Deuteronomy 15:18), which is confirmed by the permission to escape and the ban on mistreatment.[45]

Ancient Israel also had the most progressive social-welfare legislation at that time. In the seventh century, the backbone of the monarchy was economically broken by the elimination of state taxes; the flow of taxes (grain, oil, wine, meat) was instead directed toward God as a fixed contribution, which was consumed for the most part by the contributor himself or, like a poor tax, went directly to the needy, and so was not for the benefit of the priestly caste. The principle of helping one's neighbor replaced the central distribution of goods and taxes. The regular remission of guilt every seven years (Deuteronomy 15:1–2, 7–10) made indebtedness calculable, the danger of falling into debt slavery decreased, and the lending of money and property, which only served to plunge the needy into dependence and debt, was made considerably more difficult. "The only one who has a chance to get his money back is someone who lends generously, so that there is an effective change of situation for needy people until the next Sabbath year," during which the debt had to be forgiven.[46] The social function of a broadly structured network of social legislation was to lessen and equalize the social differences between landowners and the propertyless. With the Exodus from Egypt, freedom and land was promised to all families. The politically radical prophets of the Assyrian period (750–400 BCE) repeatedly refer to this above all in order to demand from the upper class and the rich the equal participation of all the members of the covenant on the soil of the promised land, as was ordered by God.[47] The prophetic call of the day ran: "They oppress a man and his house, a man and his inheritance" (Micah 2:2).

The notion of the brother or brotherliness was used by the Israelites to bridge the gap between the legal subjects addressed by the law (the landowners with a duty to pay tax and assistance) and the mere legal objects (the propertyless and slaves). The stranger, the slave, or the pauper is always also a brother, and in this relationship subject to equal rights.[48] That differs from Aristotle, who excludes the slaves from the legal community (see chapter 1), while the Christian Church Father Tertullian, at the end of the second century, follows the Jewish concept of brotherliness, uniting it with the universal-

ism of the Stoic natural law. We "call one another brethren," he writes, because not only those who have "recognized" the fatherhood of God are brothers, but also all other human beings "by right of nature."[49] Brotherliness, not civic friendship, is the oppositional concept to slavery.

The New Testament of the Christians is the new covenant of the people with God, and that is, at first, no more than the renewal, called for many times by the prophets (e.g., Isaiah 55:3), of the old covenant with God made in the Sinai. Jesus directly refers to the semantics of the Exodus events and continually draws parallels between the early Israelites and his own social movement. He sees himself and his disciples on the path to a new Exodus and at the foot of a new Mount Sinai. His followers saw in him a second Moses. Again, it is a matter of freedom from slavery. The last shall be first. The addressees of the message of the new community, free from domination and made of "trust and commitment alone," are the same ones the prophets spoke of: the "widowed and fatherless," "the cheated, the poor, the dispossessed, the accused, the enslaved."[50] Jesus, who promised a "kingdom of outcasts" and in his words and deeds (at least as his contemporaries saw it) broke the laws of Rome and of the Temple, united the fate of slaves, outsiders, outlaws, and the poor directly with the sovereignty of God.[51] With his favorite prophet Zechariah, he saw (if one believes the reporters who came later) his Mosaic role in defeating the horses and chariots of the new Pharaohs: "Rejoice greatly, O daughter of Zion! Shout aloud, O daughter of Jerusalem! Lo, your king comes to you; triumphant and victorious is he, humble and riding on an ass, on a colt the foal of an ass. I will cut off the chariot from Ephraim and the war horse from Jerusalem; and the battle bow shall be cut off, and he shall command peace to the nations" (Zechariah 9:9–10). All of that is the prophetic-orthodox semantics of Exodus.

However, the intellectual operation through which those intellectual figures who follow the Messiah, Jesus Christ, want to burst open the logic of the old covenant and found a new one is the construction of an earthly son of God, that is, the fatherhood of God. That is the new idea of Christianity, connecting to the son metaphor of the Old Testament (Psalms 2:7) and developing it further, so that the difference within the unity of Moses and Jesus becomes discernible. While Moses was still a servant of God, Jesus throws off this servitude as his son. While Moses—according to the central argument of Paul (or whomever was the author of the Letter to the Hebrews)—was "faithful" to God as "a servant" "*in* God's house," Jesus was "faithful as a son" whom God had

appointed *over* His house—and that house is His people, His community ("we" as Paul says) (Hebrews 3:2, 5–6, italics added). But because Jesus himself is a man like any other, the occupants of his house are at the same time—here again, entirely in the Old Testament sense—his brothers (Matthew 23:8). All members of the voluntary and inclusive community of Christians who participate in its divine "spirit" are, in brotherhood with Jesus, children of God and as such are "kings" like Jesus and not "slaves": "We are children of God, and if children, then heirs, heirs of God and fellow heirs with Christ" (Romans 8:14–17; see also Galatians 4:6–7). With that vanishes the last remaining hierarchy of the Israelite prophets, and the rule of God *over* his people is broken up into an unbounded community of communication. At the same time, however, it must not be forgotten that, as we have seen, already in the Old Testament the rule of God "once and for all" had nothing to do with "physical oppression" (Maddox). Every form of rule by humans over humans, from the first moment on, and hence since the constitutionalization of God by means of the covenant, was radically opposed.

On the one hand, the entire, highly speculative construction of Christianity—from a *material* incarnation of God as the Son of Man, from a *social* filiation to God and an unlimited brotherliness, and from a *temporal* redemption that was initiated (with the sacrificial death of Jesus) but not yet completed—disclosed totally new and undreamt-of opportunities for realization and institutionalization to the prophetic project of egalitarian solidarity. On the other hand, the price for the universal unconstraining of egalitarian solidarity in a pretechnological civilization (which was not a very functionally specialized traditional class society) was the degeneration of monotheism into ideology. The prophet's concrete project of political emancipation was spiritualized, internalized, and dispersed by Christianity. The appropriate philosophy for making universal brotherliness into an ideology already existed in Platonism. The Church Fathers only had to take it up and—against the explicit objection of Tertullian—reconcile Athens with Jerusalem and the prophets with the philosophers: a reconciliation extracted through the pressure of powerful social relations.

Like Judaism, Christianity essentially understands love of neighbor apolitically and that makes it almost limitlessly exploitable from an ideological perspective. To be sure, love of neighbor is, in Christianity as in Judaism, a practical activity and not an idea whose perfection can only be attained by elite virtuosos in fulfilling the theoretic-ascetic life (*bios theoretikos*) or in political

action (*bios politicos*). But Christian love has a strong tendency to add to the Old Testament orientation toward the deficient form of humanity a new form of ascetic perfectionism, and, since Augustine, to fuse it with philosophical knowledge to the *bios theoretikos*.

For Augustine (354–430 CE), love is a desire that aims at gaining happiness. In that, Augustine follows the Platonic and Stoic doctrine of the good and happy life (*Eudaemonia*). Whether striving for happiness, or human love, is good or bad depends on the *bonum*—the type of good at which its longing aims. For Augustine there are only two possibilities: One can seek the good either in God or in the world, with the flesh or with the soul. The flesh is transient like the world; God, like the soul, is lasting, eternal, and indestructible. If one favors the flesh and loves the transitory world, if one lives only for the sake of oneself and one's neighbors instead of God, then one has fallen into certain damnation—to the devil, just like the princes of this world. If one loves God with all one's soul, however, then that love will include strangers, enemies, neighbors, one's own self—in short, the world—as God's creation. But here the love is fixed directly on God—like the eyes of the philosophers on the eternal form—and no longer toward neighbors as a mere fulfillment of divine laws for their own sake. Led by divine grace, one must recognize this distinction between love toward the world (mediated by law) and the (direct) love of God. The medium for the cosmological universalization of love is the earthly Platonic reflection of God in human beings: the spiritual eyes of the soul. God is the highest good and, at the same time, pure reason, and the human soul has the capacity for rational knowledge of the divine good. The knowledge of God is, therefore, the highest form of the carrying out (performance) of Christian love of neighbor. At this point, the practical-active love of God of the Jews and the early Christians unites with the theoretical knowledge of the Greek philosophers to form the *bios theoretikos*.

To be sure, the primacy of the love of God, which forbids loving oneself or other humans for its own sake, is not just increased self-love or sublimated friendship of men as in the Greek doctrine of the *bios theoretikos,* but rather is always practical-egalitarian *caritas:* "the loving care for the suffering, the poor, and the weak beyond all existing boundaries."[52] The Old Testament brotherliness that Tertullian demanded from Christians is not supposed to stop, like that of the pagan Romans, with "a kind of treasury."[53] The Christians collect their taxes, and the inner-world asceticism transforms the Church taxes into "a pension for their confession," which is "disbursed

not on banquets nor drinking bouts nor unwillingly on eating-houses, but on the supporting and burying of the poor, and on boys and girls deprived of property and parents, and on aged servants of the house, also on shipwrecked persons."[54] In renewing the prophetic polemic, Tertullian (and Augustine and many others would follow this path) played every trump card against the pagan religion of the Romans, whose archaic polytheism for a long time had no longer fit the social structure of the enormous empire—an empire with, on the one hand, ominously growing social class contradictions and, on the other hand, secularized politics, a profane bureaucracy, and rational law decoupled from religion. It is "foolish," says Tertullian in a wholly prophetic-materialistic manner, to attribute the greatness of Rome "to the deserts" of its religiosity, since the religion "has developed since the time of the Empire."[55] "Rome in her rude state is older than certain of its gods, it ruled before it raised such a wide circuit as the Capital [with the statues of the gods—H.B.]."[56] Pagan religion was only founded later, carved in stone, and provided with transparent legitimations afterward: "Consequently the Romans were not religious before they were great, and therefore their religion was not the cause of their greatness." In order to declare Roman rule, a heaven of Gods is not necessary; the robust realism of its senators, dictators, and military commanders is sufficient, "for unless I am mistaken, every kingdom or empire is gained by wars and extended by victories."[57] A world empire like Rome could, therefore, in the last instance only be declared in virtue of the grace of an all-powerful God, who remains invisible and sentences humanity to the freedom to do its works with the means of a profane politics. But there appear to be no alternatives to monotheism in its role as a religion that takes the side of the growing masses of miserable people in the enormous empire. Neither Jupiter's lightning nor Plato's ideas have anything to offer the masses in their desperation. *Caritas* is a practically active "materialism within Christianity" (Ernst Bloch). In the critique of pagan idolatry—from Isaiah to Tertullian—the disenchantment of the world is combined with an egalitarian social politics: "We are not able to bring help both to men and to your gods when they beg, nor do we think that we ought to share with others than those who ask. So, let Jupiter himself hold out his hand and receive his share."[58] One sees, by the way, that Tertullian does not talk like the martyred lamb that can be led without struggle to the slaughter, but rather aggressively and conscious of power, like the coming victor of history.

However, the combination of Biblical love with Platonic metaphysical reason, which was above all the work of Augustine, is exactly what allowed the Christians to reconcile their ethic of brotherliness with the hierarchical constitution of the Roman Empire and all subsequent empires and class societies. Because knowledge is essential, if not also sufficient for the earthly perfection of the love of God (faith and grace must always be supplemented), mere faith is downgraded by Augustine to the second-best solution. Faith is egalitarian, while knowledge is elitist, but there is no cause for narcissistic pride in being a member of the master race since, ultimately, knowledge of the truth is deficient without the right faith, and impossible without grace. That certainly breaks the pride of the elites and is supposed to compel them toward egalitarian humility, but it also privileges the educated and propertied upper classes. With regard to grace and faith, all Christians—and potentially all human beings—are equal, but the upper classes have privileged access to knowledge because of their better education. They are not just an object, but also a subject of reason. Because the educated are capable of philosophical knowledge, their path to salvation is mediated by their own insight. In their grace-mediated love, they determine even God himself. The believer with knowledge is granted at least a moment of autonomy. But that is not true for the underprivileged and uneducated classes of society. They have only faith, and the Church as an authoritarian institution gives them a helping hand, an external push if necessary through every conceivable act of heteronomy: compulsory mission, forced baptism, death penalty, forced labor, slavery, torture, inquisition, soft and hard pedagogy, and whatever reprisals are conceivable and doable in the theater of cruelty. Knowledge, which remains the privilege of the few, ultimately decides on the content of the true faith and, with the help of the Church organization—the *disciplina catholica*—and its earthly branch that leads the weak, ensures the transmission of reason to the masses who are incapable of knowledge. In this world of earthly citizens, "obedience" becomes the "mother . . . of all virtues"—the *mater omnium virtutum*—at least for those who labor and are heavily laden.[59]

Certainly, Augustine criticized at many points the pagan philosophers for their lack of egalitarian compassion. The "books of the Platonists," he wrote in the spirit of the prophets, were flawed because "no one there" heard the "calling" of the Lord Jesus Christ: "*Come unto me all ye that labour!*" For Jesus "hid those things from the wise and prudent, and hast revealed them unto babes."[60] What Jesus had concealed from the great, the wise, and the clever—

who had read the Platonic books but not the Bible—is the egalitarian message of the coming kingdom of God: "May it be averted that in Thy tabernacle the persons of the rich should be accepted before the poor, or the noble before the ignoble; since rather"—and here he quotes the Church Father of the New Testament—"Thou hast chosen the weak things of the world to confound the things which are mighty; and base things of the world, and things which are despised, hast Thou chosen, yea, and things which are not, to bring to naught things that are."[61] Accordingly, Augustine held it against the pagan philosophers that they were incapable of imparting their doctrine of the rational life (*bios theoretikos*), correct as it was, to the masses of those who labor and are heavily laden: "Philosophy promised reason, and only with difficulty liberated a very few."[62] But the price of this liberation was high, and it was surely always too high when the ones bestowed with such liberation did not even want to be freed, but had to be forced into the truth that is the life with fire, the wheel, and the sword.[63]

The Christian denaturalizing and spiritualizing of the human solidarity that is mediated by God's love is deeply ambivalent. To be sure, the denaturalization extends the Jewish and early Christian universalism to the outermost extreme of a community of abstract souls directly before God who, like immaterial things, are no longer recognizable in their social, ethnic, and cultural origins (just like the people behind the Rawlsian veil of ignorance in contemporary political philosophy). The Greek *philia* was so fixed on the concrete, bodily existence that one could not, according to Aristotle, be friends with someone who is "evil-smelling." By contrast, in the spiritualized light of the Christian community, the "stench"—or other categories of natural ties such as relatives, birth, or gender—no longer mattered.[64] In this respect, the "natural schema" (Derrida) "survived," at least in the "ideal theory" (Rawls) of Christianity, as little as it did later with Kant or Rawls.[65] In addition, the Platonic separation of soul and body in connection with the ethically domineering authority of the personal God led to a moralization of motives for action and thereby to the internalization and individualization of conscience. Augustine's example of the theft of the pear trees is groundbreaking here. In the second book of his *Confessions,* he tells the story that he, together with a few of his friends, came up with the idea one day to steal pear trees, even though neither he nor his friends had a particular appetite for pears, and the pears they had selected were not yet particularly good. Why, then, the theft? Out of pure malice, for the sake of stealing: law breaking out of principle. Radical evil

was discovered and was attributed to a perversion of conscience. The act did not make the theft reprehensible, but rather the motive.

However, the really powerful point of the Augustinian doctrine of the two citizenries, the *civitas dei* and the *civitas terrana,* is the Biblical requirement of justice against *any* ruling power, since no matter how good it is, it can never measure up to the eternal justice of the *civitas dei:* "All government must be kept under surveillance."[66] The state, the *res publica,* is nothing final or perfect, and the Christians, from whom their apostle and their philosopher demand obedience toward the authorities willed by God, remain like pilgrims in this world ("foreign residents"), who never tire of judging the will to power by the will to egalitarian community and—with Benjamin—the state-organized power by divine power.[67] "The 'Augustinian moment'," Maddox writes, "set up a constant pressure of criticism of all things, including government, in the temporal order."[68] The agreement with the establishment is—as far as it is also brought into the individual—always only a conditional one. Individualization emphasizes exactly that: Here I stand, I can do no other.

But the rule of the permanently distancing, simultaneous universalization, and individualization of morality, because it was purchased with the dualistic coins of the radical spiritualization of intersubjective relations, had a high price. What philosophers—for the sake of their true happiness—autonomously determine through their own knowledge, and what ordinary mortals must heteronomously learn and practice by way of authoritarian indoctrination and beating with sticks, is the rigid asceticism of Christian hostility toward the body and sexuality. What Augustine expected from the striving of the soul toward true being was, above all, its detachment from the "bird-lime of that pleasure."[69] The philosopher's soul, liberated from the body, is thereby supposed to participate in the kingdom of God already in this life, at least for a fleeting moment. The soul, freed from "carnal custom," arrives "with the flash of a trembling glance . . . at that which is."[70] Despite the bodily oriented talk of the "flash of a trembling glance"—almost anticipating Adorno and Benjamin—what is meant here is not the sensory perception of a form, but the intellectual intuition of God, a "sight" that "was not derived from the flesh."[71] Such a sight is at the same time a liberation, but—in contrast to the Exodus events of the Old Testament—a purely spiritual, inner liberation that can coexist with external slavery. The true overcoming of slavery for Augustine is liberation from the "bonds of carnal desire" and the "drudgery of worldly business."[72] Exodus from Egyptian slavery now means

cleansing from the "filth of concupiscence," exodus from "the hell of lustfulness," while the "huge tides of loathsome lusts" descend upon the agitating legions of the inner Pharaoh.[73] No less rigid (and homophobic) is Tertullian: "A Christian remembers his sex when thinking of his wife alone." While Democritus blinded himself so that the sight of a woman would not lead to the rule of the desires over reason, this is no longer necessary for Christians. Tertullian writes, "the Christian, though he preserve his sight, sees no women, because he is blinded against lust in his heart." On the other hand, if any Christians deviate from "the rule of discipline," they cease to be "regarded as Christians among us."[74] The system of self-cleansing is closed. Where the ascetic techniques of the "inner master" (Hegel) fail, the club of the external one still remains.

The love of the Christian philosophers for God is a rejection of the many, of the confusing swarm within the world of appearances. What true love strives for is a complete reduction of the complexity of the world to the "One," the undifferentiated unity of Being in God.[75] In addition, God's love is reflexive. Since God *is* love, in God one loves love itself, and Augustine makes his confessions "for love of Thy (God's) love."[76] But a new difference is thereby created: the difference between the one and the many, between the fully complete love for God and all other types of mere striving for particular happiness. The love of God is the dialectical unity of this difference. One could say with functionalist sociology that the system of God's love, religion, self-referentially closes itself off from its worldly environment and, with the help of the self-produced difference from the profane world, builds its own complexity and reality. This increases its power over human beings and meaning. Through the self-referential closure of the system, the truly real, "pure affection"—the *delectio*—is detached from the carnal-sensual "unholy desire"—the *libido*.[77] Sociologically, the differentiation of religion is thereby completed. The boundary is very entirely sharply drawn here. Delectio, the completely sublimated love of the creator-God, is—in a direct inversion of Freudian psychoanalysis—the real love, while the libido represents a merely apparent, fantasy-inspired aberration of love's striving, a projection. The repression and forgetting of the delicate love of God (a forgetting of God and the Ideas in one: Biblical and Platonic at the same time) results in loving not God, who is the origin and the real life, but instead His creation, the particulars, the unreal things—in short: the fetish, the merely created, produced life. Augustine is turning Freud on his head. He is a mirror-turning psychoanalyst: "When my father, seeing me at the baths"—so

reports the Church Father—"perceived that I was becoming a man, and was stirred with a restless youthfulness, he, as if from this anticipating future descendents, joyfully told it to my mother; rejoicing in that intoxication wherein the world so often forgets Thee, its Creator, and *falls in love with Thy creature* instead of Thee, from the invisible wine of its own perversity turning and bowing down to the most infamous things."[78]

To be sure, Augustine still informs Christian compassion by the model of Greek *philia* or Roman *amicitia*. But the substitution of the political community in the teleological heart of friendship through the striving of the soul toward God again has the double effect of an emancipatory, egalitarianizing universalism, with stench, birth, and gender no longer playing a role and a highly repressive deadening of the body and the senses: Love and friendship are wrong as long as they orient one's thoughts *libidinously* toward "corporeal brightness."[79] As long as friendship is wholly attraction and is motivated "by the fervor of similar studies," it is not "true friendship," for the true is only supposed to be given by God.[80] But that is like a delicate love of the soul—"in Thee," insofar as it concerns the good soul of the friend, "for Thy sake," insofar as it concerns the evil soul of the enemy—purified of every personal, sympathizing relation to the destiny of the concrete friend.[81] The transformation of a sensuous, "attractive" friendship into a pure love "in God"—which pulled Augustine's feet "out of the net" of "uncleanness" which had "fettered" him to "the friendship of perishable things"—had to be paid for in the hard currency of indifference. When the transformation is carried out, every longing and every pain in view of the dead friend disappears and the philosopher, now a completely purified Christian, recognizes the pain that his friend's death had caused as the result of a "monstrous fable and protracted lie" that consisted in "loving one who must die as if he were never to die."[82] The same is true with the death of his mother. Only the philosophical "truth" can serve as the "salve" that allows the son to dry his tears, to view "this life" as contemptible, and to recognize the "blessing of death" as a door to true life. Augustinian reason is manly and repressive: "I, too, felt that I wanted to cry like a child, but a more mature voice within me, the voice of my heart, bade me keep my sobs in check, and I remained silent."[83]

The price for the complete internalization of the liberation-theological motive from the Old Testament is the radical devaluation of this worldly life and, in the final analysis, a trivializing of the other person in his or her concrete, bodily suffering. The fact that human beings have "tormentable

bodies"—as Adorno says with Brecht—is secondary in comparison with the future destiny of souls in need of redemption. The tendency of Augustinian Christianity to subordinate faith to knowledge and love to reason and to sacrifice the libido to the completely spiritualized delectio has, politically speaking, affirmative and ideological consequences. If one is supposed to love one's friend not as a living being but as a rational being, as Augustine taught, then naturally that goes as well for the enemy and the particular Christian kind of love for one's enemy that lets the libidinously distorted body annihilate the enemy of Christ in order to delight exclusively in the soul that is freed in such a way.[84] The executioner carries the sword; the priest prays for the salvation of the souls of the delinquents: love of neighbor *for the sake of* God.

In the same way, the spiritualization of the theology of liberation in connection with the doctrine of original sin provides the best service to the lords and princes of this world, "for it is with justice . . . that the condition of slavery is the result of sin."[85] "By nature . . . no one is the slave either of man or of sin" (here Augustine follows Stoic natural law), but since the historical Fall of Man, sin, and with it the law—*ius gentium*—of slavery, has become part of the human heritage, not biologically, but in the sense of a legal legacy. "And therefore" writes Augustine, "the apostle admonishes slaves to be subject to their masters, and to serve them heartily and with good-will."[86] Like the flock to the shepherd, the children to the parents, the woman to the man, so is the slave subject to the master. After the inner exodus from the realm of desires, there exists a kind of freedom that external servitude can no longer harm. Jesus Christ does not make slaves into free citizens, but bad slaves into good slaves. This is the freedom of a Christian: "If they cannot be freed by their masters, they may themselves make their slavery in some way free, by serving not in scheming fear, but in faithful love, until all righteousness passes away, and all principality and every human power be brought to nothing, and God be all in all."[87] This is a theory that fit the "material conditions" (Marx) of an age in which Christianity had long since become a state religion and the Empire, after the conquest of Rome by the Huns, had sunk into an apocalyptic mood. Whereas the connection with worldly power obliges subjection to the authorities, the expectation of imminent divine justice, for which the fall of Rome was the external sign, made slavery bearable.

Even more so than with slavery, the ideological character of Augustinian Christianity emerges wherever there is a question regarding the role of women

in society. Augustine's mother Monica, transfigured into the virgin *mater dolorosa*, bore every injustice and every unfaithfulness without complaint in the certainty of the coming mercy. Her husband was prone to infidelity, but that was no cause for Monica to quarrel or even repay like with like: "For she bore the wronging of her bed as never to have any dissension with her husband on account of it. For she waited for Thy mercy upon him, that by believing in Thee he might become chaste."[88] When friends of Monica bitterly complained about the beatings by their husbands, Monica "would blame their tongues, admonishing them gravely, as if in jest: 'That from the hour they heard what are called the matrimonial tablets read to them, they should think of them as instruments whereby they were made servants; so, being always mindful of their condition, they ought not to set themselves in opposition to their lords.'"[89] The harsh core of the good news of the "light burden" and the "easy yoke" (Matthew 11:30) is the imperative of this world: "Obey and Suffer!" (John Knox).

Despite its transparently ideological character, mainstream, orthodox Augustinian Christianity remains an ideology in the double sense of a numbing "opium of the people," on the one hand, and, on the other hand, as a "sigh of the oppressed creature," the "protest" against its socially induced poverty (Marx). But these are closely connected—when viewed sociologically—with the differentiation of religion in the course of Christianization. Aside from its functional side, which makes it submissive to existing relations of domination and to the interests in their continued existence, it also has a normative internal logic, which puts it at a tense distance from all relations "in which man is an abased, enslaved, abandoned, contemptible being."[90] The denaturalizing achievement of Christian solidarity is ambivalent. It destroys or relativizes the solidarities of the natural kin community as well as those of the polis community. But that is precisely what enables the construction of the general and abstract solidarity of a "new social community" on "purely religious foundations."[91] Its paradigm is Biblical prophecy as well as the discipleship of Jesus.[92]

The formation of a community based on the foundation of a messianic prophecy of redemption is described by Max Weber as eliminating, through a postconventional ethic of principles, the boundaries of the dualism of in-group and out-group morality, as well as the simple reciprocity of in-group exchange relations. This overwhelms the mechanism of moral exclusion on behalf of the brotherly equality of all human beings and replaces basic exchange reciprocity

with postconventional principles of universalization (the moral point of view). At this point, the better, progressive characteristic of the Augustinian spiritualization of Christianity becomes recognizable again: "The more that imperatives issued from the ethic of reciprocity among neighbors were raised, the more rational the conception of salvation became, and the more it was sublimated into an ethics of absolute ends. Externally, such commands rose to a communism of loving brethren; internally they rose to the attitude of *caritas*, love for the sufferer *per se*, for one's neighbor, for man, and finally for the enemy."[93] Under the functional exterior of the Augustinian *disciplina catholica*, which is specialized for the social system, the internal logic of an autonomous value sphere also developed, and it repeatedly conflicted with the worldly and clerical realities of its own time:

> But [the] ethical demand [of the prophetic religion of salvation] has always lain in the direction of a universalist brotherhood, which goes beyond all barriers of societal associations, often including that of one's own faith.
>
> The religion of brotherliness has always clashed with the orders and values of this world, and the more consistently its demands have been carried through, the sharper the clash has been. The split has usually become wider the more the values of the world have been rationalized and sublimated in terms of their own laws. And that is what matters here.[94]

Religion, as a functional system, separates from and comes into normative conflict with the other value spheres of economy, politics, and art.[95] Pure goods ("simply not to condone or compromise with evil"[96]) can, as the examples from Jesus to Melville's Billy Budd show, make the armed rulers livid with rage, such that they can be provoked to act, bringing ruin upon themselves. As Hannah Arendt keenly observed, Billy Budd's behavior bursts the limits of every existing "political realm."[97]

As realistically as the Christian community struggled over power within the state (already at the time of Tertullian), and as much as it represented the interests of the state at the time of Augustine, it still remained the inner enemy of the political community (as an always present *civitas dei* acting in the world). Indeed, this is because it deprives all temporal entities—thus, all earthly political communities and empires, and their symbols and representatives, princes, Caesars, and ultimately even ecclesiastical dignitaries—of every autocratic claim to be absolute. No historical power measures up to grace-mediated, individual self-determination according to timeless laws. Insofar as they lack

"justice," empires like Rome are "great robberies,"[98] and for Augustine there is no doubt that this is so. Even if they secure "the earthly peace in the service of heaven," this changes nothing about the fact that they are condemned to ruin in the light of divine justice.[99] Therefore, Augustine gives the pirate who was seized by a king wide latitude to defend himself with the retort, "Because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor."[100] "In this world," better communities can certainly be distinguished from worse and, thus, better times from worse; but every *civitas terrana* is without exception a *corpus permixtum*—a body mixed from hope and desperation—in which "both cities,"—the divine and the earthly, are "entangled together" and "intermixed."[101] That is also true, of course, for the earthly Church of Christ. To repeatedly separate the true from the false remains the task of a radical critique of domination, which continues the prophetic tradition of immanent critique in an increasingly complex society. In the real history of Christianity and its secularization, the sharply drawn opposition of both citizenries or realms—the divine and the earthly—led repeatedly to considerable and insoluble tensions between churches and sects, orthodoxy and reformism, Catholicism and Protestantism. To put it crudely, there are always two versions: a Platonic-orthodox, authoritarian, and affirmative interpretation, and a Judeo–early Christian, prophetic, and heterodox interpretation of the Christian message. Richard Rorty has quite vividly expressed this in terms of a confrontation between the Heideggerian and Deweyan interpretations of Christianity. But one can also see it quite plainly by comparing Joseph Ratzinger's defense and Herbert Schnädelbach's condemnation of Christianity in the *Frankfurter Allgemeine Zeitschrift* of January 8, 2000, and *Die Zeit* of May 11, 2000, respectively. I quote Rorty's version of the two interpretations:

> For Heidegger, the same epistemological self-deception prevails in Plato's philosophy and in Christianity, as a result of which we are all one because we share in the same truth and possess a criterion that enables us to understand correct speech when we hear it. For Dewey, however, the difference between Christianity and Platonism lies in the fact that Christianity is based more on love than on knowledge, while making the hunger and death of the other a concern for us, even though there is *no* absolute ground for our community in eternity. Heidegger was never able to see in Christianity anything other than a footnote to Plato; for Dewey, it signified a new beginning, a new poem that one must grasp *as* new, not as a further metaphysical foundation *of* the community, but quite simply as a call *to* community.[102]

There is also a fitting quote from Augustine—and this shows how deep the tension between both interpretations lies in the orthodox core of Christianity itself—and it was, not by chance, Hannah Arendt's favorite quote, with which she wanted to grab hold of and tear out the Platonism already at its root in Augustinian Christianity: *Initium ut esset, creatus est homo:* "That a beginning be made, man was created."[103] There is no alternative even after the worst catastrophe—according to Rorty's objection to postmodern intellectuals—to the attempt to make a new beginning and to continue the project of the Enlightenment.

But it is made too easy if one, like Rorty (in spite of the justified critique of the philosophical absolutism), simply plays love off against reason, or like Rorty *and* Schnädelbach, decides that now one interpretation is good and the other is bad. Good and evil cannot be separated as easily as both of these agnostic Protestants believe. For the transformation of an early Christian "mechanical," sect-based solidarity into the far more abstract and efficient "organic" solidarity of the division of labor between offices and hierarchies, functional spheres and professions, is also part of the logic of the differentiation of religion, law, and politics that was only completed six centuries after Augustine by the Christian legal revolution of the High Middle Ages, at the end of the eleventh century in the new beginning of the church-state or *Kirchenstaat* (a rational-institutional Church).[104] The transformation elevated both the power and the misuse of power by those who had ended up in the upper ranks of the ecclesiastic and intellectual authority, but also heightened the effective organization of a Europewide solidarity among dispersed members of the same faith for the first time. It is precisely the differentiations between *civitas terrana* and *civitas dei*, between knowledge and faith, and between natural weaknesses and legal culpability that prove to be not only socially and psychically repressive, but also institutionally productive: They are useful for the project of reforming this world in light of the regulative principles of an otherworldly state of non-domination. One can clarify the institution-forming power of the basic Christian distinctions according to the Luhmannian dialectical model of the Spencer-Brownian "re-entry." The distinction between the kingdom of God and worldly empire is projected into the *civitas terrana*, and the papal Church realizes this projection in the moment in which it acts against the princely powers as a de facto equal authority.

Ideas and interests overlap. In order to impose and fortify its self-given authority against the bearers (or really over the bearer) of the earthly-princely

power, in the late eleventh and early twelfth centuries, the Roman Church had to mobilize the people and the lesser nobility, the masses of the "laborious and burdened, the degraded and insulted" (Ernst Bloch). In the Peace of God movement, which became increasingly strong after the turn of the millennium, the Church—organized by the pan-European administrative network of the cloisters—established itself as a peaceful power against the peace-violating power of the earthly princes. Peace Councils gathered the simple people and the paupers, who were not necessarily poor but who were defenseless and at the mercy of the lawless violence of the robber barons, and formed them into an ecclesial counterpower.[105] In order to make the new alliance of the Church with the people credible, the papal party of Gregory VII felt obliged to give the ethic of brotherliness that it propagated a profane, thisworldly, political and social meaning beyond the mere promise of salvation. The Peace of God was to be more or less implemented in this world. The phrase "the law protects the weak" became the saying of the papal party in the Investiture Struggle. The Pope, just like Caesar or Napoleon, entered into a short and organized cultural revolution with the masses that did not even spare the Church. With the permission of and at the behest of the Pope, subordinates were allowed—in sharp contrast to the established hierarchical order of the rigorously stratified society—to denounce and drive out of office the ecclesial authorities on the spot. The lower clergy could monitor the bishops.[106] In the canon law of the twelfth century (Gratian), this was put into concrete form through positive law.[107] The Papal Revolution was both an instrumentalization of the people by the Church in the struggle for the land and a redistribution of landholdings in favor of the upper clergy, a struggle from which the people came away emptyhanded.[108] But, at the same time, it was also a democratization of the new church-state that should not be underestimated.[109] When the revolutionary events intensified at the end of the eleventh century, the most important Roman jurist of his time, Azo (1150–1230 CE), derived the authority of emperors, kings, princes, and city leaders (understood pluralistically and autonomously by him) from the single source of the corporately (*corpus, universitas, communitas*) constituted community, hence, from the juridically defined people. It was understood as the ultimate source of all earthly sovereignty. At that point, the *civitas dei* was made to coincide with the *res publica,* in which the ultimate source of power lies in the people (*protestas in populo*).[110] This had far-reaching consequences, as in the council movement, which for the first time politicized and used as a means

of legitimation of council majority decisions this principle of Roman law: What concerns everyone should also be commonly decided by everyone (*quod omnes similiter tangit, ab omnibus comprebetur*).[111]

In the course of the eleventh and twelfth centuries, the difference between knowledge and belief, the natural and the supernatural, which had initially confirmed only the *social* stratification of the old Europe, was institutionalized and juridified as a *functional* difference between worldly and ecclesial power. This had the double effect of a legal relativizing of the actually existing social stratification in light of egalitarian legal principles, and a breaking up of the princely and papal power in the internal logic of the legal system, which was professionalized and had an autonomous culture of argumentation. The move in the direction of organic solidarity, completed in the legal revolution of the High Middle Ages, can be understood as a "juridification of the sacred."

With the shift in the twelfth century from the "legal order" to the "legal system" (Berman), there developed a "legal culture that forced its way into social life, permeating it and regulating it." This made possible—probably for the first time in history—the self-organization of society in the medium of law.[112] The legal revolution of the Middle Ages produced—long before the Protestant Revolution—an internal connection between the redemptive meaning of the Christian faith and the spirit of a not just world-oriented, but inner-worldly solidarity. In contrast to the later Protestant ethic, what was at issue was not an ethic of capitalist "un-brotherliness" (Weber), but rather an ethic of institutionalized brotherliness.

Through the papal revolution, law became the medium for changing, improving, and reforming this world in light of a redemption that was, for the first time, put off into the most distant future. A long period was inserted between the present and the redemption on the Day of Judgment, a period in which human beings themselves are put in the position of already realizing a portion of the promise of redemption here today in their own society, by means of law. "The Papal Revolution," according to Berman, "transformed" an otherworldly faith into a "political and legal program."[113] The early-christian, Augustinian metaphysics of history as decay was replaced by an image of progress in time, which was symbolized in the dynamic, striving Gothic architecture of the great cathedrals. Their construction was often planned over generations and centuries, and expressed the new time consciousness of a project of thisworldly reform, just as the new contract law and

commercial law made possible longterm credit for the first time, stretching far beyond the deaths of the contracting parties.

Out of the doctrine of the incarnation, the scholastic philosophers and the canon lawyers made a doctrine of the feasible, gradual, reformist internalization of the world beyond into this world. Such an interpretation of the doctrine of incarnation, which nearly led to the secularization of Christianity, would have appeared to Augustine as heresy. For him, the *saeculum*—the temporal world—could be rescued only through divine grace, complemented with religious contemplation and selective, caring intervention, and was irrevocably destined to decay in the passing of time. After the eleventh century, however, the incarnation was understood differently than in ancient Christianity, in Islam, or in Judaism, "as the process by which the transcendent becomes immanent."[114] According to Berman, the strong emphasis on the incarnation within Western Christianity, and only there, produced "an enormous energy for the redemption of the world," and precisely because of that it "split the legal from the spiritual, the political from the ideological."[115] The complete separation made it possible to view the law of this world as incomplete but perfectible in the light of the transcendental. The idea of a legal reform within the normative horizon of a Last Judgment that supercedes every injustice of this world was just as foreign to the Romans and Greeks as the idea of a gradual, melioristic realization of the Messianic program *through* the abstract medium of positive law was to the ancient Jews and Christians.

This had massive legal and practical consequences that went far beyond the High Middle Ages and has had effects up to the present. Law, understood as a medium of Christian solidarity, transformed Roman law into a system that was stamped by universalistic legal principles like those found in constitutions and human rights codifications today. From the right to asylum of the Old Testament (Numbers 35:10), the canonists made a general legal protection for refugees; from the reception of Paul by the early Christians was derived the principle of double jeopardy; the old case law made way for the newly systematizing and generalizing statutory law; from a letter of Gregory the Great, the exclusion of retroactive effects was derived and positivized by means of Roman law. The legal circumscribing of the state of emergency also began with the canonists; the invalidity of immoral promises was legally defined; and the judge was to administer justice without respect of person and *in dubio pro reo*.[116] The *Mirror of Saxon Law* [*Sachsenspiegel*], which advanced to a "law book of European standing," defines the egalitarian freedom of the *civitas dei* as law

and takes up again the ancient Israelite tradition of the release of serfs in every Sabbath year. It was reduced through a game with the number seven, however, to a law that only designates a release of serfs in every forty-ninth year.[117] Furthermore, the *Sachsenspiegel* dictated equality before the law, which fixed within canon procedural law a claim to due process of law and several other principles that are valid today in every constitutional state.[118]

The philosophers and jurists of the Middle Ages were convinced that, through the system of legislation and adjudication, the apocalyptic transcendence, which breaks in from the outside, could be transformed into a practical-active transcendence from within, which could be produced by reform or revolution. For Augustine, the scope of human autonomy was still limited to the achievement of knowledge, subservient to faith, by an educated, upper-class subject. But scholastic philosophy opened up the horizon of freedom. For Thomas Aquinas (1225?–1274 CE), the binding force of legal and moral norms, which he clearly differentiates, is an achievement of autonomous reason, which as such can tolerate no divine master *over* it.[119] "Whoever refrains from evil acts, not because they are evil, but (only) because God has forbidden them, is not free."[120] Norms are no longer valid in virtue of their divine origin; instead they are worthy of recognition due to their inherent reason. The natural law no longer needs an educated, upper-class subject nor Christian faith; it can "be recognized by anyone. . . , independent of whether he believes or not."[121] The "new law" of the Christians is interpreted by Aquinas "as the fulfillment of the autonomy and freedom laid down in the natural law."[122] That overcomes the dualism between the realistic worldly ethos and the evangelistic utopia, of creation and promise, and "expects the redemption of the promise" from the cooperative practice of the awakening, self-conscious individual.[123] Organic solidarity among strangers requires both of the following: with Thomas against Augustine, the egalitarianizing individualization of practical reason, and with Gratian and the faculty of jurists in Bologna against Pope and Emperor, the autonomy of the legal system.

The apocalyptic element that accompanies all great Western revolutions (the Papal as well as the French, the American as well as the Protestant) is not part of a chiliastic, withdrawn, revolutionary millenarianism, but rather a restricted, politically and legally organized apocalypse. The "great *successful* revolutions" of Western history were "both boundless and bounded; their aims were not only universal and unlimited but also specific and limited. They were millenarian but they were also well-organized and politically sophisti-

cated."[124] Sacrament, confession, the image of Purgatory as a postmortal court before the ultimate, served the ecclesial just as much as the worldly adjudication of the temporalization of the eternal. Utopia was broken down into small pieces and then put back into the horizon of human practice without giving up its claim to absoluteness. In the medium of its juridification, it turns into the "concrete utopia" (Ernst Bloch) of organic solidarity, which is based on the division of labor in society and is in that respect "cold." To be sure, the Church of the Middle Ages was still understood as the "mystical body of Christ," but also as something with a "visible, legal, corporate identity and an earthly mission to reform the world."[125] Tertullian already viewed the community of Christians as a "corporation" with its own law in the second century.[126] With regard to modernity, the new element in world history, or the "special position" of the Papal Revolution of the eleventh century, was the dissemination of the belief "that the reformation and redemption of the secular order had to take place by the continual progressive development of legal institutions and periodic revision of laws."[127] The point of Christian reformism consists in the connection of the belief in redemption with an innerworldly practice that is not only granted to human beings, but must also prove itself in the world in its solidary, "other-including" (Habermas) completion. Berman writes, "law was seen as a way of fulfilling the mission of Western Christendom to begin achieving the kingdom of God on earth."[128]

In the European legal revolution of the eleventh and twelfth centuries, the institutional consequences were dialectically drawn from the apocryphal early Christian message, that "His Kingdom" be *present in* history. Jesus the Son of God is clearly *not* of this world, but Jesus the Son of Man is present, singular, and contingent *in* this world. The latent institution-forming power of this idea, which could be manifested only in the medium of Roman law and under conditions of intensified class struggles,[129] turned the Church into an authoritarian state *within* the authoritarian state. But that could only succeed because it had simultaneously transformed the message of the true Church—to respond with mistrust to all authoritarian states, including itself—into objective spirit. An institutional development, which was made possible by the irrevocable difference, under Christian signs, between *civitas dei* and *civitas terrana*, had to become the self-referential institutionalization of the negation of the negation. In the first European revolution, the "Augustinian moment" produced a permanent pressure toward reform of all earthly institutions. But that works only if the institutions "are fashioned to accommodate change."[130] From there, a

line can be drawn from the Papal Revolution of the eleventh and twelfth centuries to the French Revolution of the eighteenth century, because the constitutional institutions that came out of the latter rest on the principle of a "permanent legal revolution" (Justus Fröbel), which can only remain true to itself by transcending itself.

3

The Ideas of 1789: Patriotism of Human Rights

The modern conception of democracy is the heir of two traditions: Judeo-Christian brotherly solidarity and Greco-Roman civic solidarity. Both of these early forms of premodern communal integration were already interwoven in various ways in the church-state, in the city culture of the High Middle Ages, and in the northern Italian Renaissance republics, but the institutional framework of cities—extolled early on for their civic freedom ("city air makes one free")—remained bound by the structures of the hierarchically stratified society. There was no open, inclusive access to the guild and occupational systems, nor was there anywhere even a first sign of political self-determination according to principles of democratic equality. Christian equality among human beings, which was in fact limited to their own faith community, was still viewed as basically compatible with the growing inequality within the Church, just as legal inequality among citizens, in the form of privileged liberties, was an irrevocable qualification on equal rights within the respective associations of aristocrats, citizens, and guilds.[1] Even the highly modern legal principles of the canonists and their worldly pupils, which were supposed to guarantee universal, status-neutral equality, did little to change that. They were pre-adaptive advances, which could be effectively asserted against neither the overpowering social structure nor the cultural hegemony of the legitimation of religious authority. It was only with the modern idea of solidarity that it become possible to break with the Christian idealism that made equality otherworldly, and the aristocratic particularism that restricted civic freedom to the few fine specimens in the center and at the top of urban society. The modern idea of solidarity originated in the constitutional revolutions of

the eighteenth century. It was politically institutionalized in the republican nation-state, and within that framework it was taken up by the social movements of the nineteenth century, extended, and put into concrete form in the social welfare state.

Semantically, this required the "freeing of the idea of brotherliness from earlier conceptions," the "deflation of the Christian sense of brotherliness," and the egalitarian juridification of republican citizenship.[2] When Rousseau vehemently opposed all forms of intermediate authority (which were exclusively *privileged* corporations at that time), and the revolutionary law of Le Chapelier (June 14, 1791) prohibited all of the old, privileged associations of feudal society (the guilds, the journeyman's associations, etc.) in order to unleash the productive force of the new, egalitarian freedom, it was entirely in the sense of the new, abstract constitutional concept of fraternity.[3] Just as the universal brotherly community of Christians once had to be asserted against family and civic friendship (see chapter 2), so the new political equality had to be asserted against the "established feudal" (Marx) associations of the stratified society of premodern Europe. Only the struggle of the Great Revolution (1789–1814) against the intermediate authorities of premodern Europe—nostalgically idealized time and again from Tocqueville to Hannah Arendt[4]—enabled the establishment of the new principle, conceptualized by Sieyès, of the representation of the entire people and its changing interests.[5] Only when the hierarchical organization of social solidarity was abolished could the various (class) interests of all the citizens be asserted—as Marx puts it—"in their own name, whether through a Parliament or through a convention." Modern parliamentarianism means that the citizens "represent *themselves*" and need no longer "*be* represented."[6] This distinguishes the parliamentary self-consciousness of the modern "legal citizen" (Jean-Pierre Vernant) from all premodern forms of political representation, according to which the better part always represents the whole.[7]

Initially, the talk was of *fraternité*, first in 1792 in the Paris of the Jacobins and then emphatically in the revolutionary year of 1848. As a result of the unrestricted freedom of opinion, Paris was overrun by a network of newspapers, clubs, reading rooms, cafés, and gatherings that continued to expand daily beginning in July 1789. Societies of the Brothers and Friends of the Enlightenment, of the People, and of the Constitution, and journals with similar titles (*Journal des amis de la constitution; L'ami du people*) sprang up and grew rapidly.[8] Even before the outbreak of the Revolution, urban public opinion—

long since mediated through widely disseminated books, brochures, leaflets, and weekly and daily newspapers—had become a countervailing power to the "good society" of the royal court and could hardly be controlled by the censors or national borders.[9] Obsequious reporting from the court had gradually shifted toward coverage of social conflicts, from the glorification of the royal and ecclesial authority toward informal portrayal of the everyday lifeworld.[10] The Parisian daily newspapers, whose number grew from one to twenty-three between January and December 1789 and which—for the first time in history—served a mass public, were printed at night in order to distribute the news on the streets and in the public squares of the city in the morning.[11] The "rapid intensification, acceleration, democratization, and politicization of the press in 1789" was simultaneously a reflex of and a driving force of the revolutionary acceleration of social processes.[12] "What is the Third Estate?," asked Sieyès during the cold winter of 1789, only to answer: "Everything—a complete nation." And what is the nation?—"It is a body of associates living under a *common* law, represented by the same *legislature*"[13] Only a few months later, it was constituted as a *National Assembly*. Those who sided with the new, constructively designed, unprecedented nation that was born out of nothing expressed "a single, coherent public opinion" in "the pamphlets printed in thousands," and the great ideas of the Enlightenment achieved material power in being "thought through to the last detail" by "thousands of secondary authors whom nobody recognizes anymore today."[14]

Early on, and supported by many prominent names (among others, Mirabeau and Talleyrand), protest against the slave trade was stirred in the Society of the Friends of Blacks. Depriving the rights of minorities contradicted the brotherly spirit of the rights of man. First the Protestants received all of the political rights of citizens at the end of 1789, then the Jews in southern and southwestern France in January 1790, and finally the Alsatian Jews in September 1791.[15] Those compiling the jury for a departmental court "took care to assure that besides Catholics, also Protestants and Jews, even a nonwhite was represented."[16] From the beginning, women were also included in the Jacobin *societés fraternelles*. The first Parisian people's society called itself the "Fraternal Society of Patriots of Both Sexes," and one year later there was a popular women's movement and the first independent association of politically engaged women.[17] The Jacobin Constitution of 1793, which would of course never be applied, granted everyone who lived and worked for at least one year in France all civil rights, including the right to vote, and in 1795 the

Jacobin Tallien declared the credo of the new constitutional state: "The only stranger in France is the bad citizen."[18] The Jacobin human-rights patriotism generated normative expectations that—according to Kant's famous formulation—"will not be forgotten" and have remained on the political agenda until today.[19]

Under the slogan of fraternity, the Jacobins politicized equality. If everyone is born with equal rights and liberties, then everyone should also participate in public affairs. *Fraternité* was identified with *république,* and then both identified with democracy and oriented toward an institutional, legal anchoring.[20] The course of the revolution confirmed the claim of the Declaration of the Rights of Man and Citizen of 1789 and of the first French Constitution of 1791 to no longer exclude anyone. Human rights in the modern sense of the word have existed only since that time. They are by no means merely a positivization of classic natural rights, nor are they a mere expansion of the prohibition on arbitrary arrest (something that the Magna Carta had already assured to the barons in 1215) to all citizens of the country, like the Habeas Corpus Act of 1679 during the English Revolution; rather, human rights "emerged—in a qualitative leap—only when individual legal guarantees intersected with the principle of equal freedom."[21] In that respect, the ideas of 1789, which were then institutionally embodied in positive constitutional law, were the "course-setting ideas" (M. Weber) of the entire political discourse of the centuries that followed.

In the concept of the "constitution"—which, like "fraternity" and "freedom," turns a plurality of constitutions, brotherhoods, and freedoms with the most varied and for the most part privileged meanings into a political-juridical "collective singular" (R. Koselleck)—all of the hopes of the century are concentrated on happiness, reason, humanity, the rule of law, and individual rights.[22] Since the late eighteenth century, the idea of a constitution has been almost religiously transformed, and the impact continues to the present—consider the semantics of human rights. "A constitution is the object of every longing," it was written in the weekly *Révolutions de Paris* in its twentieth edition on November 21, 1789.[23] While every longing of the devout Christians had ultimately been directed toward the salvation of the soul in the otherworldly kingdom of heaven, at that point all yearnings were withdrawn from the kingdom of heaven and transferred to the republican constitution of this world.[24] Thus, in the years of the Jacobin rule (1793–94), one could read: "A constitution—that must be the catechism of the human race." Or, "In the future, the

married priests will, recognizing the mistakes that they had earlier preached, declare the sacred constitution as the gospel of the day."[25] It is by no means merely an instrumentalization of the language of the sacred for the purpose of political propaganda that is behind this, but rather a "complete reorientation of the worldview" from God to humanity.[26] In the eighteenth century, long before the Revolution, the more-than-thousand-year-old unity of philosophy and Christianity was broken. Philosophy became anti-clerical, and the Roman Church terminated its long, crumbling alliance (Galileo) with the Enlightenment. The Church turned into a leading power of counter-revolution and counter-Enlightenment. With that, a premodern tradition that had consisted, since Augustine, of the unity of reason and belief in God, became alien to both philosophy and Catholic Christianity. On the streets of Paris in the 1790s, the old Christian slogan of brotherly love of neighbor turned into the political longing for a kind of *fraternité* that would disband all the clerical brotherhoods of premodern Europe and overturn the altars.

Decades after the Great Revolution, first with the early French socialists, then in the workers' movement—increasingly influenced by Marx and Lassalle—the concept of solidarity took the place of fraternity. Whereas "fraternity" originally had Christian connotations, "solidarity" was from Roman law and so had republican connotations. But *both* concepts were transplanted into a new context and radically re-interpreted. With fraternity, this could already be seen in the battle cry of the revolution: "*liberté, egalité, fraternité.*" *Fraternité,* the third concept in the new association of citizens, was then no longer regarded as the fulfillment of the divine command to love, but was understood in socially immanent terms as the realization of the political freedom of all citizens. The objective aim of the use of civic freedom no longer consisted in the establishment of a brotherly community; instead, fraternity was a means for establishing equal political freedom. Even the brotherly community of communists, in which the surplus product is justly distributed, had the sole aim of realizing the individualistically understood freedom of the subject. Thus, it is explicit in *The Communist Manifesto* of Marx and Engels: "In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all."[27] But that by no means goes beyond the ideas of 1789; rather, it only reformulates them in the context of the new worker's solidarity. No different than Locke, Rousseau, Sieyès, Kant, or Fichte, it is also the case with Marx that "freedom is the last hinge on which

man turns."[28] Neither the brotherly caring nor the political-civic nature of humanity is realized in the "association," whether it be one of citizens or of producers, but instead their indefinite freedom ("the indefinite prodigiousness of their own ends"[29]) determines its own content.

Just as the concept of fraternity was detached from Christian idealism and combined with individual freedom and democratic equality, so, conversely, the concept of solidarity broke out of its Roman legal context and was reinterpreted (initially by early socialists such as Saint-Simon [1760–1825 CE] and Charles Fourier [1772–1830 CE]) in the sense of a *secularized* Christian love of neighbor. From the original solidary liability [*Solidarhaftung*] of the many for the debt of the individual, from an asymmetrical legal concept as well as from the asymmetrical ethic of brotherly care for the poor and weak, comes a single symmetrical concept that expresses the reciprocal duty of everyone to everyone.[30] The abstract character, which is distinguished from the concept of brotherliness in the Roman legal concept, is of course preserved. One sees this not only in its continual legal use in the context of the social welfare state, but also in its connection with the political organization of social classes by Marx, Lassalle, Bernstein, or Kautsky; or in its sociological use by Emile Durkheim, for whom the concept of organic solidarity signifies the integration of a complex society *through* its division and differentiation into functional spheres ("social division of labor"). The morality of organic solidarity can only be "a morality of freedom."[31] No freedom without alienation, mechanization, mediatization. As Marx and Engels asked, what promotes the solidary "union of workers"? Not the local sympathy of communal relations or the friendly affection of equally situated citizens of a tightly structured polis, but rather the "railways," the "intercourse in every direction," and "the improved means of communication that are created by modern industry and that place the workers of different localities in contact with one another. . . . And that union, to attain which the burghers of the Middle Ages, with their miserable highways, required centuries, the modern proletarians, thanks to railways, achieve in a few years."[32]

One can informally understand this type of radical reinterpretation of political concepts as a dialectical superceding [*Aufhebung*] in the famous threefold Hegelian sense. One part of the old meaning is canceled out, another part is preserved, but raised to a new level—for Hegel it was always a higher level—and thus, it is newly interpreted in a changed context. What was renewed in the revolutions that erupted in 1776 in North America and in 1789 in Paris

was the political and public-law idea of republican civic friendship, of *concordia,* of the "association of citizens" (Rousseau, Kant), of *citoyenneté,* citizenship, and civil society. What fell by the wayside was the aristocratic virtuoso-ethos of city life, and it was replaced by the wholly secularized legacy of Christian brotherliness, which, for its part, became detached from religious contexts. The moment of freedom within the old civic association was *preserved,* its unequal distribution was *canceled,* and from Christian brotherliness, equality *remained,* while its otherworldly focus *disappeared.* And so brotherly equality is realized at the new level of the constitutional state as civic freedom.

The dialectical superceding of the pagan civic bond and Christian brotherhood became manifest in the symbols, images, metaphors—the "names, battle cries, and costumes" of the Revolution.[33] The red caps of the Jacobins are a highly significant historical reference; they signify the headgear of the freed Roman slaves, but they also refer, at least implicitly, to the Exodus of God's people from slavery in ancient Egypt. Revolutionary rhetoric merged the Roman-republican heritage with the Judeo-Christian. The red caps—and then later the red colors of the workers' movement—summoned up a Roman symbol that, as a symbol of freedom from slavery, referred to the Exodus events of the Bible. For the revolt and exodus of the slaves from the Pharaoh's realm was far more familiar to the majority of the population of France at that time than Roman republicanism, which was only familiar to intellectuals. Every illiterate person—and that was the overwhelming majority—knew the stories of the Bible, but what person who did not have a private tutor or could not study at the Sorbonne (like the Abbé Sieyès) knew anything about the Latin writers and the struggles between Brutus and Caesar over the fate of the Republic?

Despite the hostile stance of the French Revolution toward Christianity and the biblical conception of history, the images and metaphors of the Exodus were invoked repeatedly throughout the course of the Revolution: the burning of all bridges that lead into the dark past; the hardship of the long march through the desert; the forty years of privation that separated the house of slavery from the Promised Land in the Bible; and finally, the promise of a land in which the law rules, slaves become free, and milk and honey flow as a reward.[34] In his "Observations on the Government of Poland" (1772), Rousseau praises Moses' political lifework in terms of Roman republicanism. Moses, he writes, managed—by virtue of his implementation of the rule of law—to form "a swarm of wretched fugitives . . . who, without an inch of

territory to call their own, were truly a troop of outcasts upon the face of the earth," into a people and "to transform this herd of servile emigrants into a political society, a free people."[35] For the author of the *Contrat social*, ancient Egypt and the flight of the Israelites turned into the last, decadent phase of the state of nature, and the ancient covenant became a modern social contract. Rousseau declares the giving of the law by Moses as the paradigm of a pure rule of law, which makes the re-establishment of the good old, autocratic rule impossible. The utopian, placeless rule of law coincides with the new, future-oriented concept of revolution within the revolutions of 1776 (America) and 1789 (Paris).[36] Separated from any natural tie to preconstitutional concepts of homeland, membership in a tribe, ethnos, race, land, lordship, and soil, the law is the sole bond that holds the consociates together.

> But it is an amazing and truly unique spectacle to see an expatriate people, without either location or land for nearly two thousand years; a people that has been modified, oppressed, and mingled with foreigners for even longer; . . . and yet preserving its customs, its laws, its morals, its patriotic love, and its initial social union when all its links appear broken. The Jews give us this amazing spectacle. The laws of Solon, of Numa, of Lycurgus are dead; those of Moses, far more ancient, are still alive. Athens, Sparta, Rome have perished and have no longer left any children on the earth. Zion, destroyed, did not lose hers; they are preserved, they multiply, spread throughout the world, and always recognize each other. They mingle among all peoples and never become confounded with them. They no longer have leaders, and are still a people; they no longer have a fatherland, and all are citizens.
>
> How strong must a legislation be to be capable of producing such marvels.[37]

Rousseau takes the lawmaking on Mt. Sinai to be the original model for all modern constitutional revolutions because it brought forth the Jewish people only by virtue of the law, and, therefore, "despite the hatred and persecution directed against it by all other men, [it] will live on and on until the end of the world itself."[38] Europe began not with Salamis, but in Jerusalem.

The biblical images were the mass media through which the republican rhetoric of the intellectuals reached the people. *The Friend of the People*—Marat's newspaper was called *Ami de Peuple*—argued and thought in republican terms, but it spoke and agitated in biblical metaphors. In the Catholic country of France, Marat was treated like the "sans-culotte Jesus," and the Catholic cult of the Sacred Heart of Jesus carried directly over to him. The Parisians then sang their psalms in honor of both hearts: "O cœur Jésus, O cœur Marat"[39] The reference of the American Revolution to the biblical

ethic and the Exodus events was direct and undisguised. The Puritans had always understood the emigration from England as an exodus, the crossing as a passage through the desert, the new beginning as a covenant with God, and America as God's new Israel. In the imagination of the Puritan preachers, the wilderness that was New England in the seventeenth century became the biblical desert through which God's people wandered in its flight from the English monarchy. Always nearby, and before their eyes with each founding of a new settlement, was the coming Jerusalem: the city upon the hill—New England, that is the New Israel.[40] In 1776, Benjamin Franklin proposed that Moses, with raised staff and the Egyptian army drowning in the sea, be depicted on the official seal of the new federation of states, while the enlightened agnostic Thomas Jefferson recommended a motif from the biblical march of the people through the desert, led by God's column of clouds and fire.[41]

Modern revolutions have repeatedly conjured up Biblical images, as if they wanted to draw air from them for the long breath of a progress that only realizes itself in the succession of generations. Just as Moses saw the promised land and died, so also the crowd of rebels in the years 1776, 1789, 1830, and 1848 did not themselves achieve the goal. In 1850, looking back at the Revolution of 1848, Marx wrote: "The revolution, which finds here, not its end, but its organizational beginning, is no short-lived revolution. The present generation is like the Jews, whom Moses led through the wilderness. It has not only a new world to conquer, it must go under in order to make room for the men who are fit for a new world."[42] Even the failure of the Revolution of 1848 in France, with the ultimate triumph of the Bonapartist counter-revolution in the coup d'état of December 2, 1851, is explained by Marx with the freedom-forgetting longing of the former slaves for the comforts of Egypt, which the ascetic revolutionaries overcame in the years of privation in the desert: "They hankered to return from the perils of revolution to the fleshpots of Egypt, and December 2, 1851 was the answer."[43] On December 30, 1864, Marx wrote a message of greeting in the newspaper *Der Sozialdemokrat* in the name of the *International Working Men's Association* to President Lincoln on the occasion of his successful re-election; in the letter Marx compares the freeing of the slaves with the destruction of the Pharaoh's army in the torrent of the Red Sea: "While the workingmen, the true political powers of the North, allowed slavery to defile their own republic . . . they were unable to attain the true freedom of labor, or to support their European brethren in their struggle for

emancipation; but this barrier to progress has been swept off by the red sea of civil war."[44]

In sum, in the Western revolutions of 1776, 1789, and 1848, the Christian ethic of brotherliness was politicized, and republican civic solidarity was egalitarianized. The politicization superceded [*aufheben*] the ideological-affirmative character of love of neighbor. The dualism of *civitas dei* and *civitas terrana* was overcome, and along with it the hierarchical form of organic solidarity that was represented by the church-state and the feudal state [*Ständestaat*]. Conversely, by connecting with the compassionate ethic of brotherliness, the meaning of equal civic freedom shifted away from elitist particularism toward egalitarian universalism. The normative horizon of a self-governing civic elite, free from domination, was expanded in the "Jacobin patriotism, for which human rights were always part of the glory of the nation," toward the equal freedom of all human beings.[45] The Jacobin patriotism of human rights was the first egalitarian form of organic solidarity: "Those assets and advantages that serve to differentiate citizens among themselves fall *beyond* the quality and character of citizenship. Inequalities of property and industry are like inequalities of age, sex, height, color, etc. These do not infringe upon civic *equality,* because rights of citizenship cannot be attached to such differences."[46] Of course the Abbé Sieyès knew the Apostle Paul: "[You] have put on the new nature . . . Here there cannot be Greek and Jew, circumcised and uncircumcised, barbarian, Scythian, slave, free man" (Colossians 3:10–11)—but only equal consociates under law.

On September 3, 1791, the revolutionary National Assembly in Paris adopted a constitution that was preceded by the Declaration of the Rights of Man and Citizen of 1789. What was immediately striking was that the Declaration did not distinguish between human beings and citizens. In that, the character of its theoretical doctrine—boldly deduced from the doctrine of the social contract and unique to the French Declaration—is revealed, distinguishing it sharply from its North American predecessors.[47] Human beings are simply citizens in the state of nature. Kant calls it the condition of "private right" (*Privatrecht*). It is private *right* because humans in nature do not exist as biological, but as rational subjects of right. That is what Rousseau, Sieyès, and Kant understood by "nature": the rational nature of human beings. The people [*Volk*] in the state of nature, the *pouvoir constitutant* of Emmanuel Joseph Sieyès, is the people in the state of natural *right.*[48] But this "private right" has the flaw of being only privately valid. If one of the contracting parties does not

abide by the presupposed rule of nature—*pacta sunt servanda* (contracts must be respected)—then the betrayed one must himself see how he can enforce his right. Therefore, Kant calls the private right within the state of nature a "provisional right." It is valid only as long as everyone holds to it, but there is no public authority, no "public right" (Kant) that could guarantee its observance and provide for a lack of respect for the law through legally coercive force. In this condition—according to Kant, in full agreement with Rousseau and Sieyès—there is only one innate right, the human right to equal freedom: "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity."[49] That explains man and his right—in the French Revolutionary understanding and in its Kantian interpretation. What then are citizens? Citizens are—for Rousseau, for Sieyès, in the Declaration, and for Kant—none other than human beings in the state of society. State-codified civil rights are valid for all human beings *as* citizens. The only difference lies in the guarantee of "natural rights" (Articles 1, 2, and 4 of the Constitution of September 3, 1791) by means of the democratically produced "law" (Article 5) as the "expression of the general will" (*l'expression de la volunté générale*).[50]

However, a wide gap between human rights and citizens' rights soon became evident as did gaps between citizens with equal rights: between men and women, those with property and those without, citizens eligible to vote and those not, those representing and those represented. On September 3, 1791, when the Constitution came into effect, all men became Frenchmen. But already on the morning of September 4, it was clear that the number of "men"—every "song" and "ceremonial declaration" (Luhmann) to the contrary—far exceeded that of Frenchmen; and that among the French, the number of represented far exceeded the number of representatives; and among the represented, the number of those who were born with and remained equal in rights (Article 1, Constitution of September 3, 1791) far exceeded the number of independent, participating men with the right to vote. The entire people was sovereign lawgiver, and "all citizens" were supposed to "take part" in lawmaking (Article 6), but *not* "all of the citizens" (Article 6) were allowed to choose the representatives, and the real decisions were made by a representative body in the name of the people—the people were only "ascribed" to the representative bodies (F. Müller). Often the parliamentary legislature was itself the lawmaker in name only, while the real

decisions were made behind closed doors by an executive whom the people—in the time of the Terror, of the Directory, and of the Napoleonic despot—treated like a silent and stationary "icon" (F. Müller). Thus, a gap opened between the printed paper—the "nominalist" constitution—and the legally valid, "normative" constitution.[51] Within political-legal practice, it became evident that a constitution—which, apart from declared rights, contains above all legal norms defining jurisdictions, and a system of checks and balances for civic self-organization—is a legal text that has an address in the particular state, binds the validity of most of its norms to a border (a national border), and must instantiate every general letter of the law in particular interpretations and decisions. Standing in the way of the universal claim of the legal text was the form of the actually effective norms, which were restricted by national, class, and gender boundaries.[52] The constative norm in the text contradicted the performative force of law, without which the constitution is not worth any more than the paper on which it is written.[53] The semantic "information" in its wording was contradicted by the pragmatic, "communicative" effect of the constitutional norms in the world; the constitution as a "forum for public speech" by all human beings was contradicted by the constitution as an "instrument of the politics" of a state.[54]

One is not, however, forced into resignation or toward the tragic insight of Derrida into the unavoidability of the contradiction, which admits politics only as deconstruction, as postmodern, aesthetic play with the paradox. On the contrary. The "progress in the consciousness of freedom" (Hegel), which became possible with the ideas of 1789 (and up to now nothing new has emerged in politics) lies precisely in the fact that the normative content of the principle of democracy, constituted by human rights, opens the boundaries of every particular community to the often criticized "democracy of humanity." This progress can be measured by a whole series of criteria such as, for example, the universality of voting rights. After the first revolutionary constitution of 1791, there were already at least four million voters. In the constitutional regime of the July monarchy before the Revolution of 1848, the number had shrunk to 200,000 members of the financial aristocracy—an enormous step backward. Just as clear was the progress toward direct, universal suffrage for males, with its introduction by the constituent National Assembly in 1848, but it was again ruined by the abolition of universal suffrage on May 31, 1850, through which the Parisian proletariat was excluded from the vote. It was again mocked by the apparent re-introduction, merely for the purpose of

acclamation, after the coup d'état of Louis Bonaparte on December 2, 1851.[55] A constitution can include more or less persons or groups at every level of its concretization (constitutional law, ordinary law, administrative regulation, private contract, judicial verdict, police order) and at every level of status (foreigner, citizen of the European Community, citizen of a state, citizens with voting rights). And this inclusion can, as in the former German Democratic Republic, be under the direction of the Party (instrumental constitution), or, as in Brazil today, be legally non-effective (nominalist constitution), or, as in France today, be legally effective (normative constitution). The progress in solidarity among strangers is proportionate here to well observable and scalable criteria. As a "legal text" (Müller), as a "constative norm" (Derrida), or as a "forum of public speech" (Vismann), the constitution is the "existence of freedom" (Hegel) in that place where it becomes valid, with boundaries and an address. It is *the same* equality of the constitutional text that Lincoln, in the struggle against slavery, Roosevelt in the struggle for the welfare state, and the women's movement in the struggle for the rights of women, turned into a performative instrument of politics.[56]

To be sure, the deconstructive insight persists: that every transformation from texts into norms, that every legal instantiation of the constitution repeatedly forgets and excludes someone all over again, and never includes everyone in every legally relevant respect. But this unavoidable fact carries little weight in view of the real progress that contributes to diminishing or bridging the gaps between declared and positively effective norms. Such progress is made possible through the world-disclosing and normative force of a concept of democracy that—in contrast to the classic concept of the Greek polis—is structured from the start by human rights. As an example, take Article 20, Paragraphs 1–3, of the German Basic Law. About the "constitutional principles" of the democratic constitutional state, it says:

1. The Federal Republic of Germany is a democratic and social federal state.

2. All state authority emanates from the people. It is exercised by the people through elections and voting and by specific organs of the legislature, the executive power, and the judiciary.

3. Legislation is subject to the constitutional order; the executive and the judiciary are bound by law and justice.

What does "democratic" mean here? The word is composed of two Greek words *demos* and *kratein*, "people" and "rule." But who rules over whom here?

Ruling (*Herrschaft*) in the original sense of the word is always rule of one over another, a rule-exercising subject over an object that endures the ruling.[57] So the Greeks also understood the word *democracy* as one of three basic types of political rule. In the polis, either the one rules over all the others (monarchy/tyranny), the one rules over most of the others (aristocracy/oligarchy), or the many rule over the few (democracy). Hence, democracy is always rule of one particularity over another: of the people over the aristocracy; of the less sophisticated (from the bird's-eye view of those on top), mostly propertyless masses over the nobility and the philosophers; or in the "people's republics" of the recent past: rule of the proletariat *as* a people (represented, substituted, and demoted to "icons" [F. Müller] by the Communist Party) over the bourgeoisie; or simply, as in the Western self-understanding: rule of the group with the largest number of votes over the defeated smaller group, that is, rule of the current majority over the current minority. Democracy as majority rule is still the standard definition in politics and political science. This definition is based on a conservative-liberal reading of basic rights. Human rights and civil rights are placed in the care of the state, and the state is separated, as a constitutional state, from democracy. Rights exist in this reading, which goes back to Benjamin Constant, Alexis de Tocqueville, and John Stuart Mill, in order to protect the minority from the tyranny of the majority.[58] They are not intended to protect democracy from the state apparatus, but to protect the constitutional state *from democracy:* the state as rein and bridle of the people.[59]

But the liberal opposition of the constitutional state to democracy is only meaningful if we understand democracy as the Greeks: as rule of the people *over* an object different from the people, or as divided rule of the larger part of the people over the smaller part of the people, and not, as in all Western constitutions, as self-legislation by the people—as autonomy of the *demos*.[60] In modern democracies, legitimacy is conferred on legal norms only by self-imposed obligation and not by externally imposed obligation—whether it is human rights, international legal norms, constitutional norms or ordinary laws, contracts, or court judgments: "Rule can only be justified if it is rule by the ruled [*Herrschaft Beherrschter*] or can be represented as such."[61] As rule by the ruled, however, the concept of rulership [*Herrschaft*] is itself superseded through a self-contradiction (entirely in the sense of the Hegelian dialectic). Democracy is, as a constitutional norm, a self-imposed obligation free from rulership or domination.[62]

This applies in particular to parliamentary democracy, since the modern understanding of representation differs from the medieval understanding only in the feature of self-obligation. In the modern understanding of representation, the logic of part and whole (which had dominated the political thought of Europe since the Aristotle's *Politics*) was broken. From Hobbes through Locke and Sieyès up to the German Basic Law (GBL), the following becomes the case: "According to the modern conception, the people are a whole having no ruling part. Everyone belongs to the people. The people themselves are not a ruling part, and they cannot be divided into ruling and ruled parts."[63] The modern representative no longer represents the entire people as a particular part of the people but "is made entirely by his constituents."[64] Democratic representation is based, therefore, on the strict "identification" of "the interests of the governors . . . with those of the governed."[65] In the modern parliament, writes Marx in *The 18th Brumaire of Louis Bonaparte,* the citizens "represent themselves" and no longer have to "be represented" by a ruler.[66] Representing themselves versus being represented: this is the distinction that makes the difference between democratic and predemocratic representation. Only when the rule of law constitutes the *identity* of the ruling and the ruled, and can be methodologically understood and publicly represented as such a unity, is the universal validity of positive law—that is, validity through participative universality—guaranteed.[67] The "democratic realization" of the law is, after the irreversibly implemented, full positivization of law, the sole remaining opportunity to confirm it "as fundamentally just."[68] Therefore, the political "legislator," not "the law," is the "addressee of justice claims."[69] Within democracy, all justice and the common good[70] spring from one source: the general will (*volunté générale*). Since even constitutional norms, including human rights, can gain legitimacy only from the deliberative procedure of democratic self-legislation, all material justice disappears, in modern, fully positivized law, in favor of exclusively democratic legitimation.[71] There is democratic legitimation, or none at all.

Article 20, Paragraph 2, of the German Basic Law, which legally dictates the emanation of *all* state authority from the people and the exercise of this authority through the actual people and its bodies, does not address "the people" as the ruling part of the people, but as a complete sovereign entity.[72] The *identity principle,* which in legal-normative terms identifies ruling and ruled, governing and governed, separates the modern concept of popular sovereignty from the ancient one of rule of the people. Whereas "rule of the people"

[*Volksherrschaft*] means that someone is free and the others are at least at times restricted in their freedom, the term "popular sovereignty" [*Volkssouveränität*] expresses the permanence of the equal freedom of all legal subjects. If each and every person is always supposed to be equally free and not the one part ruling over the other, then popular sovereignty is indivisible.[73] The people that are appealed to in Article 20, Paragraph 2, as the subject of legitimation and rule are never just a part of the people (such as the citizens with voting rights, the winner of the election, the representatives), but are the undivided, "whole people," to whom its representatives are also obliged (Article 38, Paragraph 1, Clause 2 of GBL). If the majority were to "rule" in a democracy, then that would amount to heteronomy over the minority by the *volunté des touts* (= ancient democracy = rule of the people), and would not be the self-imposed obligation of all, that is, of each one of those affected by the norms, through the *volunté générale* (= modern democracy = popular sovereignty).[74]

Popular sovereignty is indivisible, but not unbounded.[75] Even for Bodin and Hobbes, the main function of sovereignty was legislation and guaranteeing the rule of law, and with Hobbes, legalism completely replaced the rule of one particularity over the other. Indeed, the many citizens within the body of the powerful Leviathan are those to whom all sovereignty must be transferred and who, therefore, *themselves* cause whatever is done to them by the rule of law.[76] But only in Rousseau's concept of popular sovereignty is the function of the sovereign power specialized entirely for legislation. The legislative will of the people, which emerges from the individual, independent voices of the citizens—their opinions and votes—is sovereign.[77] Rousseau combines the internal connection of popular sovereignty to abstract-general law in the concept of the republic, and this simultaneously distinguishes the modern republicanism referred to in Article 20, Paragraph 1, of the GBL (and also in the name "federal republic") or in Article 1, Sentence 1, of the Weimar Constitution, from its premodern forerunners.[78] "The right which the social compact gives the sovereign over the subjects does not," writes Rousseau, "go beyond the limits of public utility," and he adds (citing the Marquis d'Argenson): " 'In the Republic . . . each man is perfectly free with respect to what does not harm others.' This is the invariable boundary. It cannot be expressed more precisely."[79] This boundary, which is supposed to guarantee the *difference* of individuals—Mill's right to lead a different life—is the law.[80] If one, correcting for the naturalistic individualism that Rousseau shares with Hobbes, Locke, Kant, and the entire early bourgeois era, assumes that human individuals are not

"individuated" by nature, but are only individuated *through* socialization, then the difference (the pluralism) of interest groups, parties, organizations, cultures, and functional systems is always already a part of the social substance of individual freedom.[81] Popular sovereignty, undivided but restricted through the rule of law (in contrast to divided but unlimited rule of the people) is, therefore

1. *identity,* namely, no difference between the ruling and the ruled, with simultaneous
2. *difference,* namely, no identity among individuals, groups, parties, organizations, cultures, and functional systems.

Popular sovereignty, which integrates the principle of difference from republican rule of law with the principle of identity from democratic self-obligation, consists in nothing other than the equal freedom of each one of the persons affected by legal norms to do anything that the self-given law does not forbid. The decisive course-setting idea here lies not so much in the dissociation from monarchy—following the Roman or northern Italian traditions—but in the definition of the republic as a lawmaking state, which has three important aspects. *First,* the concept of the people *as* citizens of the state (*demos*) is established and detached from any natural or historical, racial, ethnic, cultural, or linguistic determinants, and defined in purely legal terms as the totality of those who are subject to the law—just what Rousseau had so much admired about Moses and the Jewish people.[82]

A totality, which is subject only to the law, is what Rousseau calls a "free people," for "a free people *obeys,* but it does not *serve;* . . . it obeys the Laws, but it obeys only the Laws and it is from the force of the Laws that it does not obey men."[83] Obedience, and this is the *second* point, is for Rousseau—in sharp opposition to Christianity and to Augustine (see chapter 2)—obedience to the law, detached from domination: "The worst of Laws is worth even more than the best master."[84] A more radical break with the ancient utopia of the good ruler is hard to imagine. Because Augustinian Christianity, as we have seen, is based on a categorial mixture of serving the lord and obeying the law, it could not, Rousseau concluded, be preached in any other way than as "servitude and dependence."[85] But freedom is only guaranteed when no one stands "above the Laws."[86] Even the law, to which all citizens owe obedience, does not stand strictly speaking *above,* but rather *between* the citizens. As in the image of Abbé Sieyès: "I like to conceive of the law as if it is at the center of an

immense globe. Every citizen, without exception, is at an equal distance from it on the circumference of the globe, and each individual occupies an equal place."[87] The citizens are eye-to-eye with the law; law has—just as in ancient Rome—lost every sacred, unapproachable bewitching force over them. The lawmaking republic is no more and no less than the ordering of the citizens' own freedom.[88]

But this order, and this is the *third* point, is in Rousseau and in the Western constitutional tradition now an entirely different order than that found in the ancient city-republics. In the classic republics of Athens and Rome as well as Florence and Venice, it was always an order of virtue as well, oriented toward the totality, that dictated what was not explicitly required by law. In contrast, in the modern republicanism of Rousseau and Kant, it is only a *selective* legal association, which permits everything that is not expressly forbidden.[89] The function of the law consists only in the egalitarian coordination of reciprocal spheres of choice [*Willkür*]. Freedom is individual "*independence* from being constrained by another's choice" and right [*Recht*] is "the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."[90] This essentially means that the freedom of one must no longer be purchased through the servitude of another, whereas civic freedom in antiquity generally rested on the dialectical entanglement of lordship and servitude. When Aristotle talked about Athens' democratic model of rotation, saying that first the one ruled while the other was ruled, and after that the latter ruled the former, he is literally describing limited-term despotism. To be at home in both roles, the dominant as well as the submissive, constituted the virtue of the good polis-citizen.[91] Moreover, everywhere in the ancient city-republics, virtue was not just negatively tied to the real existence of unfree slaves (the master of the household was, as a rule, himself a slaveholder, since only a slaveholder could afford to participate in public affairs), but what is more, the virtue of the free man consisted in the *rule over them*—in no way intended metaphorically—such that the desiring-passive parts of the soul, by nature inferior, served the higher, active-rational parts in the body of the master. Thus, virtuous freedom went hand in hand with "ruling" and "serving."[92]

Rousseau climbs out of this premodern circle of freedom and servitude—and with him come Kant, Hegel, the French Revolution, and the Western constitutions. Freedom consists in a double negation of the negation: first, "in not being subject to someone else's [will]" and, second, "in not subjecting

someone else's will to ours. Whoever is master cannot be free."[93] Legally ordered freedom is intersubjective and negative. As Rousseau never tires of repeating, only under these conditions can the citizens form a common legislative will that makes majority decisions binding and acceptable for all, even for the defeated minority.[94] In order to exercise their sovereignty, the citizens must always be able to exercise their negative freedom to put all legal norms at their disposal, at any time and unhampered—either through opinions or votes, directly or through representatives.[95] The freedom of the despot is not deficient because he does not realize the eudaemonistic telos of his rational nature—as in Plato—but because his freedom is based on the servitude of another.[96] There is no freedom without inclusive equality, which utterly rules out servitude. Modern democracy is nothing more than the project of overcoming [*Aufhebung*] every form of servitude.

Simply because democracy normatively consists of the strict identity of the ruling and the ruled, it requires the exceptionless inclusion of all persons affected by the law in the process of legislation. At least since globalization, all of the addressees of norms, in the *status negativus,* include all human beings, and no longer just *virtually*—"everyone who is somehow subject to the realm of authority of the modern state" is a "bearer of rights"—but also *in reality*.[97] As a human right, democracy is thereby a "positive right of each human being."[98] If civil liberties that adequately secured the independence of will formation (opinions and votes), and procedural norms that guaranteed equal opportunities for participation, could sufficiently assure that "each decides the same thing for all and all for each," then there would be no need whatsoever for rights that go beyond the right to democratic self-legislation in order to realize universal freedom from servitude in every legal community.[99] The economical principle of self-legislation, which makes do with the negative justice of "*volenti non fit iniuria,*" would be sufficient.[100] Rights in turn would be nothing but the reflexive and circular conditions of possibility of democratic self-legislation, created by their bearers themselves and institutionalized through positive law.[101]

But the function of rights is not exhausted by that. For the "whole people," as all of the addressees of norms (Article 38, Paragraph 1, Clause 2, GBL)—and from whom "all state power" emanates within a parliamentary democracy and by whom it should be "exercised" directly or (primarily) in its "organs" (representative bodies) (Article 20, Paragraph 2, GBL)—is, as we have seen, under no circumstances congruent with the people from whom

"legal power" actually emanates and is exercised. After all, those who belong to the legally specified *"actual people"* (F. Müller) of all addressees include not only foreigners passing through, but also babies, coma patients, prisoners, committed mental patients, foreign residents who are affected by the country's customs regulations, and, in an age of globalization, all those who are confronted with the consequences of global private contracts, obligations of international law, human-rights duties, global criminal law, and so forth. This totality of addressees could never, in any democracy (national, subnational, or transnational), actively exercise its sovereignty rights. In the gap, difference, or *différance* between the actual people and the true authors of the laws, between the democratic human right and its legal concretization—in short, between validity and facticity, a democratically illegitimate form of rule (*Herrschaft*) is lodged within real democracy.

Since the principle of democracy now demands precisely that every single member of the "actual people" "be taken seriously as a legitimating factor of state action and be treated as significant," human rights must step into the gap.[102] They are a placeholder for democratic autonomy. They refer to the categorical imperative of popular sovereignty: There shall be no ruling [*Herrschaft*]! They bind any spontaneously expanding domination [*Herrschaft*] to the practical project of minimizing domination through full political inclusion. In the modern understanding of democracy, derived from the ideas of 1789—and only derivable from these ideas—democracy demands, as a legitimation principle for all positive law, the general overcoming of heteronomy (*Aufhebung von Fremdbestimmung*), and therefore it can also no longer simply be defined as in antiquity (or by Joseph Schumpeter) "in relation to its own demos," but only "in relation to everyone subject to its rules."[103] Democracy must, therefore, "always ensure that the circle of those people 'subject to its rule,' who are essentially affected by its decisions, and the circle of voting citizens participating in these decisions—as far as possible—be kept congruent."[104] Minimizing domination through a "rule by the ruled" (Möllers) that supercedes domination is the highest constitutional task in a democracy. In terms of concrete reforms like the case of voting rights for foreigners, this implies that the right to citizenship within a democracy has "to keep the gap between the standing population, as the sum total of permanent 'subjects of its rule,' and the active citizenry as small as possible."[105] But even here a difference remains, which in other cases (that of babies, the mentally handicapped, foreigners passing through, or those affected by globalization) and in the rela-

tionship of the voting "active people" to the elected "legitimating people" (Müller) is of much stronger and principal importance. These gaps, insofar as they cannot be closed by an expansion of the effective and not just nominal *status negativus,* must be bridged by human rights. Human rights have a place wherever the democratic legitimation of state power breaks down or is suppressed. Undemocratic rule [*Herrschaft*], which destroys solidarity, arises not only in "nominal" (Loewenstein), but also in normatively effective constitutional regimes. Basic communicative and social rights primarily serve as a placeholder for democracy at two critical points:

1. First, wherever the difference between a people and bodies of authority leads to the organs of the people becoming independent and estranged bodies of domination over the people. Wheras the function of democratic representation—in particular, of parliament—is the guarantee of the deliberative rationality (or universality) of the legislative will formation of the people, an independent and estranged representative authority is a form of rational domination by a particular authority over the people.[106] That is the classic case of bureaucratic domination: class domination in parliament, expertocracy of the courts, class justice, or the executive branch becoming autonomous through oligarchic systems of negotiation or through more overt means such as a putsch or a dictatorship. The experience of all authoritarian regimes of the last two centuries shows that none could bear public contradiction. (That shows, by the way, that Rawls's assumption that there would be an overlapping consensus in constitutional questions between "well-ordered" hierarchical and "well-ordered" egalitarian regimes is false. In the modern, primarily functionally differentiated society, there can no longer be a constitutionally well-ordered, hierarchical regime.[107]) Communicative human rights are a strong weapon against all forms of autonomous, bureaucratic, and authoritarian domination. They are a placeholder for democratic legitimation wherever political force is exercised in a manner that cannot be represented or justified as legal self-constraint. Democratic legitimacy demands that all of the actions of state agencies—parliamentary decisions as well as police actions, court judgments as well as ministerial ordinances—not only accord with the "central normative texts and structural principles" of positive constitutional law, but must also "on top of that, permit an open, legal, and free debate over the legitimating reasons and arguments." Hence, even "after the legal force of normative texts, the legal validity of administrative acts, and the legal force of judicial verdicts, they must still remain positively plus legally plus legitimately

disputable."[108]—Even when the verdict is 'final,' "the discourse goes on: criticism by those affected, commentary by science, proposals for changes through (legal) policy." Even "coups and dictatorships" are projected into the discourse running through the semantically disputed space.[109]

2. The difference between authors and addressees of the law, between a particular "people" in *status negativus* and a universal "people," not only implies the possibility of a lapsing into a premodern majority *rule* or into modern, economic class domination, but beyond that calls to mind the very immediate danger, strengthened by globalization, of the self-destruction of democracy through social exclusion.[110] The human-rights content of popular sovereignty demands that everyone, even citizens in *status negativus* (and that includes, since there have been modern states, *virtually* every person, and since the globalization of law and politics, *actually* every person) have the right to be treated as if they were members of the sovereign.[111] This makes basic social rights a placeholder for democratic autonomy wherever the *status activus* cannot be exercised. Social rights make it possible for those who are not, are not yet, or—for whatever reason—cannot be active participants to experience socially the certainty that the participative universality of the laws at least counterfactually includes them as their authors. Through human rights, the conceptions of republicanism and democracy that restricted citizenship were transformed into the idea of an expanding community, permanently widening through self-revision, and gradually including all others and strangers. Inserted into the non-differentiation of the legal subjectivity of persons and citizens in the French Declarations of 1789, 1791, and 1793, is the principle that all persons should be regarded as if they were fellow citizens and all those who are not yet should be made into citizens in the future.

Since 1789, the normative horizon of the state citizen has been the status of world citizen, which transforms the old ideas of civic solidarity and love of neighbor into the practical project of an egalitarian and self-determined solidarity among strangers. Legal subjects who organize their public affairs through the medium of positive law are required no longer to be attached to one another as friendly citizens of the polis, nor to love one another as Christians. It is a profane legal community, not a sacred association of friends; constitutional patriotism, not service to God;[112] obedience to law, not service to the people and the state. In the institutionalized discourse of a democratic legal community, solidarity loses "that character of forced willingness to sacri-

fice oneself for a collective system of self-assertion that is always present in premodern forms of solidarity."[113] Community parts with fealty and obedience.

In every democratic constitutional document, the principle of democracy has this universalistic quality. It results from the principle of democratic participation by the affected. The addressees of the law should be its authors. If law is not to be unjust, then the compulsory force that proceeds from it is justified if and only if no one is excluded on the input side of the law. With the claim to universal human rights within the principle of democracy, the problem of the globalization of egalitarian solidarity is normatively solved—admittedly only normatively. How and whether the normative is mediated with "norm-free social reality" (Luhmann) is a matter for the next chapter.

II

Social Integration without Solidarity

4

The Dual Inclusion Problem of Modern Society

As Durkheim and Parsons have shown, the political and institutional implementation of specifically modern forms of abstract, organic solidarity was closely connected to the evolutionary emergence of the functionally differentiated society. But this form of solidarity was in no way co-original with the invention of the functionally differentiated society; rather, it was extracted from it in long social struggles and revolutions. The *evolutionary* emergence of a new "social formation" (Marx)—with differentiated markets, value-neutral science, positive law, religiosity in the form of sects and an ethics of conviction, romantic love, education outside the family, autonomous art, professional politics, and individualized self-consciousness—was a process just as spontaneous as it was improbable, largely unconscious and unplanned, and whose development was entirely unforeseeable. The *revolutionary* implementation of new ideas such as human rights and democracy, however, is different. To be sure, revolutions are often accompanied by "false" consciousness; they describe themselves with the semantics of yesterday, aim at the restoration of the old morality, and, as Marx writes, in view of the "indefinite prodigiousness of their own aims," "anxiously" take refuge in the "spirits of the past," borrowing their "names, battle cries, and costumes." In short, they assume a "time-honoured disguise . . . : Thus Luther donned the mask of the Apostle Paul, the Revolution of 1789 to 1814 draped itself alternately as the Roman republic and the Roman empire, and the Revolution of 1848 knew nothing better to do than to parody, now 1789, now the revolutionary tradition of 1793 to 1795."[1]

But as they ran their course and in their historical influence, modern revolutions developed a progressive, future-oriented consciousness of freedom and

recognized themselves in their "incomparability" (Luhmann) and "unprecedented nature" (Habermas) as "the new time" (Hegel), ultimately defining themselves as "modern" (Baudelaire). Revolutionary consciousness, at least retrospectively, transformed the achievements of social evolution into something *also* chosen. But this result did not arise automatically. It first had to be wrung from the evolutionary process in the form of institutions in which the new ideas were embodied. Whether, for example, the structural feasibility of the functionally differentiated society requires or does not require the democratic constitutional state, or socialism, or some egalitarian form of organic solidarity is a "practical question" (Marx) that can only be answered through extremely risky "experiments" (Dewey).

Initially, however, the old order of things—the stratified society together with the hierarchical form of organic solidarity bound up with it—was destroyed by the differentiation of functional systems. In the course of the highly specialized self-production of social systems for the economy, law, transportation, technology, education, politics, intimate affairs, art, mass communication, medicine, sport, and now even sexuality, there is no longer an automatic reproduction of solidarities, civic friendship, participation in public life, and charitable care toward neighbors. Systems use human substance without replacing it. They are just as blind to the damages they cause in their "environment" as they are to the normative desolation of the social "lifeworld" and the fate of human individuals external to system-specific communications: the "cultural catastrophes" (Polanyi) of modern capitalism.[2] In the hierarchical Christian society of the European Middle Ages, persons were integrated into the prevailing status groups as whole human beings for their entire lives and across many generations, and conversely, the status groups (class, estate) were at least jointly responsible for the fate of the single individual over a lifetime and not just when he or she ran into difficulties. In modern societies, however, persons are only intermittently and partially included in function-specific communications as part of a role. They are responsible for their own fate. Teachers do not take care of or worry about the professional careers of their students after they leave school. Neither do doctors worry about the financial difficulties of their patients; nor do lovers worry about public affairs (see chapter 1); nor managers about the family problems of their coworkers; nor artists about the consequences their novels or songs have on the suicide rate of their young fans; nor do judges consider the anarchistic attitudes of the parties to a dispute in any admonishing, punitive, or supportive

manner. And they must not as long as they act as bearers of a role—"on pain of going under" (Marx). All traditional forms of civic and brotherly solidarity are eventually undermined in the aftermath of functional differentiation. To be sure, the process of destruction liberates the individual person from all "established, feudal" [*ständische und stehende*] (Marx) relations of dependence, but it does not by itself establish new solidarities through, for instance, the market mechanism. Quite the opposite. Functional systems like the market economy or sovereign state power, taken in themselves, represent new forms of social integration without solidarity. Radical de-solidarization is the dark side of the "magnificent one-sidedness" (Habermas) and "enormous productivity" (Marx) of functional systems. The evolution of modern society could therefore be described, bemoaned, or celebrated by authors such as Marx or Polanyi on the economy, Foucault on power, Bourdieu on education, and Adorno on art, as a progressive erosion of hierarchically organized solidarity.

Marginalization and pauperization are partly the conditions for, and partly the consequence of, the process of system formation, which tore itself away from all lifeworld contexts and embeddedness and became independent.[3] The poor population, which grew regularly with the crises of underproduction and political-religious conflicts of late medieval and early modern society, dropped out of the order of estates [*Ständeordnung*] and was absorbed by the emerging functional systems with their new organizations—manufacturers and firms, non-hereditary state offices and juridified administration, hospitals and quartered military—and individuals were reintegrated as individual role bearers.[4] But the new organizations, which had to succeed in the market, collect taxes, win wars, and be proven in science (medicine, psychiatry), created new forms of marginalization and pauperization: a process that was at first largely spontaneous and violent, and, at best, paternalistically softened by "good police."[5] There were wars and civil wars wherever confessional programs (Reformation) or institutional reforms (directors and commissioners always on call, an administration bound by directives) accommodated the centralization of power, which was the midwife of the process of differentiation of a political system with a modern state based on taxation and administered bureaucratically.[6] Other forms of violence emerged. Functional differentiation was accompanied everywhere by the combined "dull compulsion of economic relations" (Marx), the "sweet violence" (Bourdieu) of ideological crystallizing, and the brutal assault by prison guards, soldiers, and officials on the bodies of the insane, the poor, tax dodgers, and the uprooted.[7] In every case, the

consequences for the losers in the new game of markets, powers, and discourses were dramatic and menacing, threatening their existence and often enough destroying their lives. Polanyi writes, "the traditional unity of a Christian society was [with the differentiation of the market system—H.B.] giving place to a denial of responsibility on the part of the well-to-do for the condition of their fellows. The Two Nations were taking shape. To the bewilderment of thinking minds, unheard-of wealth turned out to be inseparable from unheard-of poverty."[8]

The transformation of labor power into a commodity, which completed the autopoetic closure and differentiation of the economic subsystem, gave rise to a situation in which every price reduction almost automatically led to a reduction in the resources of solidarity because the free labor market "could serve its purpose only if wages fell together with prices. In human terms such a postulate implied for the worker extreme instability of earnings, utter absence of professional standards, abject readiness to be shoved and pushed about indiscriminately, complete dependence on the whims of the market."[9] Marx described this dialectic of economic emancipation as a "change in form of servitude," which resulted in a transformation of feudal exploitation into capitalist exploitation:

> The immediate producer, the worker, could dispose of his own person only after he had ceased to be bound to the soil, and ceased to be the slave or serf of another. To become a free seller of labour-power, who carries his commodity wherever he can find a market for it, he must further have escaped from the regime of the guilds, their rules for apprentices and journeymen, and their restrictive labour regulations. Hence the historical movement which changes the producers into wage-labourers appears, on the one hand, as their emancipation from serfdom and from the fetters of the guilds . . . But, on the other hand, these newly freed men became sellers of themselves only after they had been robbed of all their own means of production, and all the guarantees of existence afforded by the old feudal arrangements. And this history, the history of their expropriation, is written in the annals of mankind in letters of blood and fire.[10]

The market and money cannot replace with new solidarities the solidarities consumed by the destruction of feudal [*ständische*] associations. In the market, the strength of the social bond—its resistance to being torn—is reduced to the strength of reciprocal interests:

> The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn asunder the motley feudal ties that bound man to his "natural superiors," and has left remaining no other nexus between

man and man than naked self-interest, than callous "cash payment." It has drowned the most heavenly ecstasies of religious fervour, of chivalrous enthusiasm, of philistine sentimentalism, in the icy water of egoistic calculation. It has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade.[11]

In the market society, privileged "status" is replaced by the egalitarian "contract" of equal legal persons.[12] Law is individualized and instead of being attributed to families, descent, or status-based groups, it is attributed to self-responsible individual persons. Emile Durkheim asked whether this "giant system of private contracts" is sufficient to integrate the functionally differentiated society—the society of the "division of labor"—as a whole and permanently, and not just in the market and during the moment of the transaction:

Is this indeed the nature of societies whose unity is brought about by the division of labour? If this were so, one might reasonably doubt their stability. For if mutual interest draws men closer, it is never more than for a few moments. It can only create between them an external bond. In the fact of exchange the various agents involved remain apart from one another and once the operation is over, each one finds himself again 'reassuming his self' in its entirety. The different consciousnesses are only superficially in contact: they neither interpenetrate nor do they cleave closely to one another. Indeed, if we look to the heart of the matter we shall see that every harmony of interests conceals a latent conflict, or one that is simply deferred. For where interest alone reigns, as nothing arises to check the egoisms confronting one another, each self finds itself in relation to the other on a war footing, and any truce in this perpetual antagonism cannot be of long duration. Self-interest is, in fact, the least constant thing in the world.[13]

This disregard for solidarity, which is responsible for the integrative weakness of the social bond within functionally specialized systems such as the market, positive law, power politics, value-free science, and so forth, is nevertheless also the foundation of its revolutionary ability to unleash the forces of production, to "sweep away" all "fixed, fast-frozen relations," and to let all "new-formed ones become antiquated before they can ossify."[14] Functional systems constantly transform stability into variability, past into future, tradition into contingency. Under the "regime of functional differentiation," according to Luhmann, "the difference between stabilization and variation collapses."[15] Knowledge becomes obsolete, laws change, the opposition comes to power, old occupations disappear, new ones are created, money loses its value overnight, needs change according to fashion, virtue becomes secondary, and educational knowledge dissolves into the process of lifelong learning. The

zero-option becomes a utopia.[16] Functional systems, according to Claus Offe, "open up all options, but simultaneously close the options for all relevant time-horizons, once they can do without them."[17] Capital, knowledge, law, power, and education must move, must "constantly revolutionize" (Marx), in order to expand prices: "The bourgeoisie cannot exist without constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society."[18] This is not just the evolutionary principle of the capitalist economic system, but that of all functional systems. The bourgeoisie does not produce differentiation; rather, differentiation produces the bourgeoisie.

Functional specialization rests on a reflexive mechanism that can be described, following Hannah Arendt, as an unbounded "expansion for the sake of expansion," which determines the dynamics of growth in all areas: distribution technologies, information, the capitalist economy, imperial power politics, expanding education policy, increasing traffic, technology, juridification, scientization, and so forth. So, for example, the system of political power, detached from its ties to morality, law, and religion, can be described as "becoming reflexive." Power is sought for the sake of power and thereby becomes independent of all restrictions based on brotherly or civic solidarity, national interests, and so forth.[19] Power appears as "a kind of dematerialized mechanism whose every move generates power."[20] This is true not only—as Arendt believed—of imperial and totalitarian power, which transcends even the territorial limitation of power through the nation-state, but also of state power, which from the time of absolutism, has tended to reduce all limitations on state authority to the single limitation of the territorial boundary. Luhmann writes, "Now *only* territorial boundaries are accepted. . . . All other limitations are dropped."[21] Since the end of the Thirty Years' War, that has meant *raison d'état.* The reason of state—its *raison*—is no longer comprehensive, but instead specializes in "continually orientating itself" toward the function of self-preservation of political power.[22] The differentiation of the political system in early modernity turned active, participating citizens of cities into passive, unmediated citizens of the state. In the absolutist state, *civis* was "one who is subject to no one other than the state, but to it practically without reservation."[23] Even here, then, in the course of the dissolution of hierarchically organized solidarity, a process equally emancipatory and repressive, is a "change in form of servitude" (Marx), which is accompanied by the simultaneous "de-christianizing"—the

dissolution of brotherly solidarity—and "de-politicizing"—the dissolution of civic solidarity—of the concept of citizen.[24] Power thereby became increasable in immensity, and even the constitutional state, which had replaced the absolute state by the end of the eighteenth century, changed nothing about this fact. Shared and legally ordered, abstract-anonymous power is not inferior, but far greater than the personal power of princes or later dictators, which is always inherently less than absolute. A driving force of the reflexive self-augmentation of power *is* its self-limitation.[25]

A similar "reflexive mechanism" (Luhmann) drives the expansion of the economy toward unbounded expansion for the sake of expansion. Karl Marx defined the process of valorization [*Verwertungsprozess*] of capital as a reflexive "self-valorization" [*Selbstverwertung*] of "value." Through the transformation of money into living and dead capital, into labor power and machines, the value of the originally staked money turns into "the subject of a process," in which value, "while constantly assuming the form in turn of money and commodities, changes its own magnitude, throws off surplus-value from itself considered as original value, and thus valorizes itself independently."[26] In contrast to the use value-oriented simple circulation of commodities—commodity-money-commodity (C-M-C)—in which someone sells shoes (C) *in order to* use the money (M) to buy bread and butter (C), the self-valorization of capital does not end (*telos*) with the consumption of the concrete use value as the final cause (*telos*) of the exchange operation, but instead bursts open the system of the Aristotelian teleology. Money (M) is used to valorize [*verwerten*] capital and labor, machines and labor power, dead and living capital (C), in the process of production and then to transform the product into more money (M′) in the market. The realized profit is then, in the form of new investments in dead and living labor (C), added to the process of production again and valorized again (M″)—ad infinitum, as long as the process remains profitable.

> The path C-M-C proceeds from the extreme constituted by one commodity, and ends with the extreme constituted by another, which falls out of circulation and into consumption. Consumption, the satisfaction of needs, in short use-value, is therefore its final goal. The path M-C-M, however, commences from the extreme of money and finally returns to the same extreme. Its driving and motivating force, its determining purpose, is therefore exchange-value.[27]

The movement of the self-valorization of capital (M-C-M) is, as Marx says, "endless." The capitalist buys machines and labor at a particular value. Then,

in order to extract more value with the sale of the products, something is produced and the surplus value is then put back into the process of production. Only under the condition of its endless continuation—M-C-M′ (in which M′ > M)—can the capitalist production of commodities be sustained. Production oriented toward the self-valorization of value circles back into itself again and again in order to widen and expand with every turn:

> The simple circulation of commodities—selling in order to buy—is a means to a final goal which lies outside circulation, namely the appropriation of use-values, the satisfaction of needs. As against this, the circulation of money as capital is an end in itself, for the valorization of value takes place only within this constantly renewed movement. The movement of capital is therefore limitless.[28]

The capitalist, functionally differentiated economy closes itself into a self-producing—autopoetic—system. It is oriented only toward exchange value and thereby toward more and more new opportunities for the consumption of its products (machines, tanks, toothpastes, etc.): "This detaches the *increase* of economic performance from external directives; above all, from the resource-needs of the upper class or from periodically expected famines, raids, and wars."[29] Production becomes independent of status-bound, local, or basic life-sustaining use value, and the entire population gains access—independent of social class—to the consumption of any and every product. Access is dependent only on one's buying power within the economy, the increase of which is taken care of by boundlessly expanding capital itself, stimulated and accelerated by credit, wage increases, infusions of capital by the state, and so forth. "More and more," Luhmann argues, "the entire society is caught up in the wave of inclusion into its functional systems."[30] And the wave of inclusion into the differentiated systems of mass communication, education, economy, politics, intimacy, and so forth, devours the old status hierarchies [*Standeshierarchien*].

With help from special codes (true/untrue, having/not having, being loved/not being loved, passing tests/not passing, etc.), systems close themselves off from their environment and carry out their own unbounded universalization, related to a specific totality. Specialization and universalization are two sides of the same coin—an old insight of Talcott Parsons. The codes "prevent the system from running aground upon achieving a goal (end, telos), and then ceasing to operate."[31] Every truth can be doubted and any and all knowledge transformed into ignorance. Nothing is more secure or protected against

falsification, and at the same time everything can, in principle, be made into an object of science (consider gene research), but always only under the specific code of true/untrue. Science, at least as a functional system coded in terms of truth, recognizes no internal moral, political, or financial limits. These limits can, of course, be drawn from outside, but they are no longer permanently produced and internally grounded on a priori ethical or cognitive knowledge. Just as for the capitalist everything that catches his eye turns into a calculable expression of money, so for the romantic lover "the entire world turns into a theme of communication in the reflection of love."[32] The limits, which are nonetheless externally forced on system-specific and function-specific communications, themselves fall under the Marxist law of the permanent revolution of all social relations. These limits are drawn by positive, hence *changeable* law, which forbids today and permits tomorrow the modification of the human gene in science, or the trafficking of drugs in the economy; or they are drawn by the economy or politics, which open the money supply when, due to inexplicable causes, the treasury overflows, and close it again when, due to equally inexplicable, or at least highly controversial causes, the flow of taxes and profits suddenly dries up or the opposition comes to power with a different economic program. Without power and money, no economy, but without purely scientific (thus, controversial) argumentation, no true sentence.

Systems are, as one could say following Parsons, dependent on external supplies of energy and are, in that respect, open. But they must produce the information they communicate internally and are, in that respect, closed.[33] They can certainly be destroyed from outside, but they can no longer be steered from outside. They can no longer stipulate what and with whom they communicate. Luhmann writes, "in the relations of functional systems to each other, destruction is possible, depending on how dependent they are on one another, but not instruction."[34] Expanding according to their internal logic, or autopoetically, functional systems are blind to their environment (this is the dark side of their autonomy) and therefore particularly threatened by self-produced crises. They operate in unknown terrain. They reduce complexity through system formation, establish security, and increase their performance capabilities. But every system formation produces new complexity, new insecurity, new performance deficits. This forces the system to constantly expand, differentiate, form subsystems, and reconstruct new, inscrutable inner complexity. According to Luhmann "operative closure produces restlessness, and

restlessness produces strategic closure."[35] Without restlessness, the operative closure cannot continue, and the only source of this unrest is the communicative productivity of human subjects—a source just as unpredictable and dangerous as it is necessary for the system. It cannot be produced by highly specialized social systems themselves.[36]

Consequently, the rapid growth of complex systems inevitably leads to problems in the social structure. These are problems that systems cannot solve using their own means, but that nonetheless threaten their ability to function. Heterarchically structured functional systems presuppose individualization on a massive scale: in the ideal case, the full inclusion of the population and a high level of individual productivity. The inclusion of a constantly growing number of individually produced, diverging, and unpredictable pieces of communication is necessary for functional reasons if the constantly accelerating internal evolution of the subsystem is to continue. The selection pressure weighing on the system, forcing it first to reduce incessant environmental complexity by building up internal complexity and then to reduce its own overwhelming internal complexity through system formation, can only be decreased through constantly growing variation. But variation increases with the number and individual productivity of human individuals, who are included in functional systems via social roles, and only in this way can it meet the needs of each specific system for dissenting statements and behaviors. When large segments of the population remain permanently excluded, function-specific operations run dry, for they depend on the reliable, large-scale distinction between assenting and dissenting voices, passing and failing tests, ownership and non-ownership, right and wrong. They become functionless. The media of communication—power, money, and law—lose their generalizing force, political decisions are no longer generally binding, and the legal immune system collapses. And if the number of active voters sinks below a certain percentage, democracy descends into crisis.

At the same time, after the conversion from hierarchy to heterarchy and the destruction and decentering of the accompanying worldview by the Renaissance and the Reformation, popular enlightenment and de-Christianization, there are no longer any normatively convincing reasons available for denying access to markets, courts, schools, marriage, ballot boxes, political parties, highways, hospitals, armies, and so forth to anyone who can pay or has something to sell, has cause for an action, is a citizen or has acquired the necessary qualifications, has achieved a certain age, is sick

or in love, can drive a car, or wants to be a politician. Everyone must be able to participate effectively in the achievements of the economy, transportation, law, politics, education, medicine, and so forth. The "social bond" (Durkheim), which provides all persons equal access to the achievements of the functional systems on which they are dependent, must not be torn. Otherwise, when only a minority of the "overintegrated" participates in the game of highly specialized communications, and a growing majority of "underintegrated" is denied access to political power, mechanisms for making legal claims, opportunities for consumption, work and profession, health care, and so forth, expansion grinds to a halt and the system falls at full speed into the lethal wake of a regressive phase.[37] Variation subsides, the tempo of innovation sinks dramatically, the boundaries that separate the functional spheres from each other can no longer be stabilized, systems collapse, and their well-ordered inner complexity is discharged into the diffuse and chaotic complexity of the world. The phenomena of regression and impoverishment, typical today for developing countries, can then be observed everywhere.[38]

This is no accident since autopoetically closed systems such as the market and power produce the (at least partial) exclusion of a large part of the population through their own operations. They have regularly dysfunctional exclusionary effects, through which dependencies and opportunities for access are distributed in a highly unequal manner.[39] As a means of understanding this dialectic of progress, the Marxist analysis of the capitalist crisis cycle is still exemplary. With the inclusion problem, functionalist sociology is expelled from itself, that is, from its own internal perspective on the "normal functioning of functional systems"—and in this respect toward a similar path as that of Marx with the immanent critique of the capitalist system—toward the problem of solidarity, for which systems cannot create a substitute.[40] One might call this, in Freudo-Marxian terms, the symptomatic truth of the crisis.[41] If broad portions of the population remain excluded from accessing the most important functional systems, then, along with their social integration, the functional integration of systems, their "operative closure," fails.[42] The "insufficient integration of a large portion of the population in the communication of the functional systems," or rather, an overly "sharp difference between inclusion and exclusion," which is "produced *by* functional differentiation," is "incompatible with it in its outcome" and "undermines" "the normal functioning of functional systems."[43]

With law, this is particularly striking. It fails *as* a legal system as soon as the difference between legal and illegal, which is constitutive for its normal functioning, no longer makes any difference to the excluded population groups.[44] The consequence is that the legal system collapses and takes other systems (in the end the entire society) with it into the abyss. Using the terms of systems theory, the function of law is to produce a certainty of expectations through the congruent generalization of behavioral expectations.[45] If a rich person were to sleep under a bridge, he would be punished exactly like the poor person, provided the law forbids sleeping under bridges. That is class justice. But in addition, if a rich man kills a poor man or a white man kills a black man, he has to expect the same punishment as in the reverse case. In this respect, *class* law is always also class *law*, such that the systemic "autonomy [*Eigengesetzlichkeit*] of the legal form," as Gustave Radbruch had already formulated it before World War I, compels the "ruling class" "not to nakedly put" its class interests "on show, but to dress them in law," and this compulsion toward the juristic form of the rule of law (see chapter 3)—"the content of the law being what it will"—"always serves the oppressed in particular."[46] But law can "only adequately fulfill the function of congruent generalization of behavioral expectations provided that the principles of inclusion *and* of functional differentiation, therefore the social . . . and basic rights related to civic freedom and political participation"—and that means an egalitarian model of organic solidarity— "are institutionalized."[47] Where that is not the case, and entire segments of the population are hindered from bringing their legal disputes before the courts in general (and if they turn up in court at all, then only as the accused, never as a plaintiff) there is not yet even class justice.

At this point, I would like to distinguish between two structural inclusion problems that the functionally differentiated society cannot cope with on its own. The first is a consequence of individualization and concerns the *de-socialization of the individual* (1). The second is a consequence of the formation of classes of people wholly dependent on the market and the educational system and concerns the *proletarianization of society* (2). While de-socialization (or individualization) is a (permanent) requirement of functional differentiation, proletarianization (to the degree of excluding entire segments of the population) is one of its disastrous consequences.

1. The differentiation of individual and society, which came increasingly to the forefront beginning in the early modern period, shattered and pluralized

the religious conception of the world. Individuals were thrown back toward their own personal consciousness and given a strong push toward autonomy. The human being became the environment to the social system, and the unattainability of consciousness through communication was recognized, initially as a fact, later also as a law, and stylized by philosophy as the source of all knowledge and morality. Above all, the Protestant thrust of individualization turned religious consciousness over to a power external to and prior to society, and hostile to community: the pure individual conscience. The Calvinist interpretation of the Augustinian doctrine of predestination permitted only a single path to salvation for believing Christians—the direct connection of individual souls with the almighty God—and categorically excluded any paths mediated by social institutions, clerical figures, human assistance, or brotherly love.

> In its extreme inhumanity this doctrine must above all have had one consequence for the life of a generation which surrendered to its magnificent consistency. That was a feeling of unprecedented inner loneliness of the single individual. In what was for the man of the age of the Reformation the most important thing in life, his eternal salvation, he was forced to follow his path alone to meet a destiny which had been decreed for him from eternity. No one could help him. No priest, . . . no sacraments, . . . no Church, . . . no God.[48]

In an extremely radical way, the Protestant "ethic of un-brotherliness" separated the believer from his fellow believers, the human being from fellow human beings, the individual from the community. The new ethic committed each and every person to the "deepest mistrust of even one's closest friend."[49] Isolated individuals could and should emerge from the fallen state of their own sin-corrupted nature only through their own efforts, through self-observation, self-control, and self-discipline: "Only a life guided by constant thought . . . could be regarded as overcoming the state of nature. Descartes' cogito ergo sum was taken over by the contemporary Puritans with this ethical reinterpretation."[50]

Stable institutions, enduring classes, estates [*Stände*], churches, and states could no longer be founded on such an un-brotherly ethic, which was just as anti-authoritarian as it was anti-social, anti-political, and anti-civic. On that, one could found only ascetic convents and sects, "voluntaristic" communities established on the basis of purely instrumental reciprocity, which forced individuals to permanently "hold their own in the circle of their associates."[51]

The Puritans replaced the "authoritarian moral discipline of the Established Churches" with the "moral discipline within the sects, which rested on voluntary submission."[52] Not only must such an uncompromising exclusion of the individual from all firmly institutionalized social bonds have amounted to a "radical break" from the traditional order for the clerical and patriarchal powers of the old, stratified society of Europe; it also appeared openly "seditious" in the newly emerging, worldly regimes of sovereign princes.[53] With individualization, which everywhere accompanied the newly developing society and only took on its distinctly radical and avant-garde character in Protestantism, "trust in the superiority of the higher classes" generally dwindled.[54] The Protestant de-socialization of individuals broke up the "a priori perfect" of an "always already" integrated collective consciousness. It drove the fragmented worldviews and voluntaristic sects first into fundamentalism and then toward exodus in the wilderness of the American forests or into religious civil war, which literally transplanted the isolated individual into the highly artificial—that is to say, socially produced—state of nature: a war of all against all.

Protestant self-consciousness, isolated from society, was a reflection of the objective process of functional differentiation as well as a subjective, ideational propellant of this very process, consciously and intentionally directed at the separation of the individual from society. The hierarchically layered, socially stratified society of premodern Europe had assigned individuals, with their families, wholly to one class. "Ancient law," wrote Henry S. Maine in his classic study on the theme, "knows next to nothing of individuals. It is concerned not with Individuals, but with Families, not with single human beings, but with groups."[55] Outside the family, there was no life. Today, after a centuries-long process of functional differentiation, the family is "one of the few functional systems that the individual can do without."[56] In premodern society, individuality was nothing but the individual expression—more or less perfect, or else more or less corrupt—of the already recognized, or at least always recognizable, ideal essence of a corresponding status (ideal warrior, nobleman, farmer, townsman, executioner, cobbler, etc.). In the premodern ideal of individualization in terms of the essence of a species [*Gattungswesen*], the "inner structure, with which the better self asserts itself against the lower self," remains "hierarchical. The model for this is the household," and is hence, as we have seen (chapter 3), the personal relation between master and servant.[57] In ancient times, the solitary life was regarded as just as incomplete as

the ungovernable self. But since the middle of the eighteenth century, self-legislation free from domination, the "standardization of the I by the I" (Georg Simmel), on the one hand, and deliberate unsociability, the norm-free, aesthetic game of the inner powers and energies of the subject with itself and the objects of its sensory perception, on the other hand, have been heroically or romantically transfigured. *As* a subject, the individual is not a solitary thing, but is at first completely with itself or, in the negative case, is outside itself and requiring therapy "and, parallel with it, loses that which now (becomes) visible as modern society: the characteristic of sociability."[58] Modern society "no longer offers the individual a place where he can exist as 'a social being.' He can only live outside of the society, reproducing himself as a kind of system in which society is for him a necessary environment."[59] But the inclusion of the individual *as* an individual thereby becomes just as much a problem as the essence of the individual as an unwritten book, an unknown quantity, which must first "make itself, what it is" (Sartre).

For the individual, society becomes either a hostile environment or simply a sphere of activity for instrumental self-realization, a piece of workable nature, an objectified object of subjective reflections, contemplations, wishes, interests. But for society the individual becomes unpredictable, an inexhaustible source of always suspicious, subversive spontaneity. The new social structure is reflected in the modern natural law that arose a good hundred years after the Reformation. It is egalitarian and individualistic, and for the first time locates the natural human being outside social communication in the environment of the social system: as Robinson Crusoe on an isolated island (Defoe); as a human wolf who, unlike an animal wolf, hunts his own kind and rejects living in packs (Hobbes); as an owner of the private property of his own body, labor, and landholdings (Locke); as a happy, solitary being, unmanipulated by cultural knowledge or afflicted by any thoughts (Rousseau). How a state, that is to say, a social union, is to be formed with such isolated individuals—indeed, with a race of egotistical devils (Kant)—now becomes a problem for both theory and practice. Of its own accord, anyway—and on this point the skeptical scientist Hobbes and the fanatically faithful Puritan agree—no state is to be formed with those individuals excluded from society as human beings. According to his natural proclivity, the modern human being is a being hostile to the state and society.

Thus, the first structural inclusion problem is individualization through exclusion of the individual subject of consciousness from all social communi-

cations. It appears to society as a problem of latent civil war. The question is, how can society solve the "Hobbesian problem of order" (Parsons) that is thereby placed on the agenda, and institutionalize modern individualism without a loss of freedom? The Hobbesian answer was, through the rule of law [*Rechtsstaat*]. The answer of the French Revolution went further: through the *democratic* constitutional state [*Rechtsstaat*], which moves toward the inclusion of all human beings as citizens. Individualism became institutionalized through private and public liberties.[60] Only in that way could there be a reentry of the difference between the individual and society *within* society, according to which "the human being," without sacrificing "a *part* of his innate outer freedom for the sake of an end," relinquishes "entirely his wild, lawless freedom, in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will."[61]

Undiminished is the key word that pushes toward the core of the modern understanding of freedom. How can freedom and order be simultaneously increased? This problem is posed for Kant and Rousseau as normative, for Durkheim as normative and functional, and for Luhmann only as functional.[62] The solution of the normative problem of "well-ordered freedom" is, for Kant and Rousseau, democratic self-legislation (see chapter 3).[63] But the democratic constitutional state is also the solution of the functional problem (posed by Marx), unleashing, through the political inclusion of the entire population, the freedom potential of the subjects that the system needs for increasing its internal complexity. Democracy replaces the communicative solidarity of premodern class society that was destroyed in the process of functional differentiation. It makes solidarity egalitarian, expands it, *and* unleashes, by guaranteeing basic rights, the freedom potential of subjective productivity, which satisfies the insatiable selection requirements of functional systems by supplying the necessary variety.[64]

2. This also points the way toward the solution of the second, no less threatening, inclusion problem, which closely followed the process of unbridled accumulation of capital and which, since the middle of the nineteenth century, has been reinforced by the expansion of the educational system. In the market and in the schools, small differences suddenly became large. Minute differences in property, intelligence, ability to sit still, mental agility, and starting position were, after just a few exchange operations and the first serious achievement tests, transformed in the schools and in the market into huge differences in the symbolic and material capital of individuals.[65] The

differences are not already there, like dormant beings, but are actually produced only by the evolutionarily highly improbable and conditional functional systems of the economy and education. Careers and market opportunities determine the fate of one's life. In the economy only two positions remain: the owners of capital, who buy machines and labor power, and the sellers of labor power. There is a polarization of capital and labor.[66] Through education-dependent careers and employment-dependent class formation, the "a priori perfect" of an "always already" hierarchically ordered society is dissolved, along with the forms of civic and brotherly solidarity bound up in it. What arises in the course of pauperization and proletarianization Marx described as a class of the excluded persons, included in society.[67] This class still depends on the functional capacity of the economic system, while access to its achievements is blocked.

Instead of increasing the wealth of the entire society in the common wealth (Adam Smith's expectation), the capitalist market economy, which advanced to the "primary factor determining human destiny" long before the educational system, "simultaneously increases wealth and poverty."[68] The age-old, originally class-specific difference between poor and rich is no longer defined in class-specific terms, but in function-specific terms, as an economic difference between capital and labor. According to Luhmann, "Wealth is no longer seen as a requirement of a status-dependent lifestyle and also no longer as luxury. . . , but instead as mastery over another's labor."[69] The concept of domination [*Herrschaft*] thereby loses its old, political sense and is understood primarily in economic terms (as economic calculability) and technically (as domination through calculation of objectified processes).[70]

With regard to the functionally differentiated society, the question arises as to why this society, though dependent on the egalitarian-individual inclusion of the entire population, produces and reproduces itself *as* a class society. The answer is simple. The market mechanism functions only if it does *not* regulate the question of distribution of money and opportunities for consumption.[71] But that immediately produces a sharp differentiation among the new "commercial classes" (Weber), cutting off those classes dependent on the sale of their labor power from nearly all consumer opportunities and plunging them into poverty. Consumptive exclusion threatens the productive inclusion of the working classes, which is necessary for the continually expanding reproduction of capital, driving the system into crisis.[72] It is hardly any different with the education system. It functions as a mechanism for distributing

life chances only if it does not predetermine the individual careers of the population passing through it and leaves the distribution to chance, that is, to examinations. In this way, knowledge and ignorance, over- and underqualification, are always increased simultaneously. If the system is left to its own devices, and the unmediated force of the selection mechanism of the school system is not offset by equalizing education measures, remedial education, and so forth, then there is also a danger here of a system crash owing to the exclusion of a growing, sub-proletarian underclass or outer class from all career opportunities.[73] Through functional differentiation, according to Luhmann, "distinctions in stratification are produced and perhaps even sharpened. . . , although they are functionally insignificant, perhaps even negatively reacting upon society."[74] Therefore, Luhmann attests to a "perverse selectivity" in the functional systems of both capitalist economy and public education, because they produce permanently functionless social inequality.[75] As long as labor-intensive industries expand, the competitive pressure toward deregulated labor markets simultaneously creates inclusion in production and exclusion from consumption: a pauperized working class together with an "industrial reserve army" (Marx), which, as a whole, represents a class of excluded persons that is included in society and forms, in the overproduction crises of the economic system, the living substrate of system-threatening class struggles and revolutionary upheaval. For those who are denied access to the achievements of the economic system, inclusion through political and human rights is practically worthless. So it is no accident that since the European revolutions of 1848, the struggle for universal and equal suffrage (at first for men) has been intertwined everywhere with the social class struggle of the proletariat.[76] Only the realization of political inclusion in the social-welfare state, obtained in the nineteenth and twentieth centuries, solved the second structural inclusion problem of modern society. Class struggle was domesticated "by the juridification of the labor struggle."[77] Wherever universal suffrage was implemented, the social question was on the agenda. Its solution involved effectively institutionalizing and giving concrete legal form to social rights. They are supposed to guarantee the "security" of freedom, as it was already demanded in the French Revolutionary constitutions of 1791 (Article 2 of the Declaration of Rights) and 1793 (Articles 1 and 2 of the Declaration of Rights), for this security lies solely "in protecting the potential for social self-change."[78]

The two inclusion problems, that of individual inclusion and that of social inclusion, which broke out first in early modernity and then in more acute form in the nineteenth-century religious civil wars and social-class struggles, were solved by the democratic constitutional state. In historic hindsight, its revolutionary success against the natural course of evolution is impressive. It is true that the complete positivization of law, carried out under the sign of absolutism and conceptualized by Hobbes, along with the strict separation of *ius* and *iustum,* of law and morality, of power, knowledge, and faith, revealed the complementarity of positive law and subjective rights, and thereby facilitated the legal institutionalization of that pluralism of worldviews that was produced by the thrust of Protestant individualization.[79] But only the egalitarian, politically inclusive principle of democratic self-legislation, which could be effectively institutionalized in the course of the constitutional revolutions and class struggles of the eighteenth, nineteenth, and twentieth centuries in Western Europe and North America—and still chiefly there—first, produced a stable solution to the problem of pluralism, one that can be extended, achieve consensus, and is capable of learning and, second, led to the political participation of ever wider segments of the population and thereby made the realization of democracy in terms of the welfare state into a permanent topic of politics.[80] That is, without a doubt, the historic achievement of democratic constitutions.[81] They were so successful, at least within the "center" of the present world society, because they brought forth the evolutionary achievement of a "structural coupling" (Luhmann) of law, politics, and economy out of the revolutionary event of egalitarian self-legislation.

The constitution within the democratic constitutional state is simultaneously the evolutionary solution of functional problems—coordinating the achievements of heterarchical functional systems with one another and with their human environment—and the revolutionary solution of normative problems—renewing through political self-determination the solidarities consumed in the course of functional differentiation. Certainly all evolution is also revolution, but revolution—bringing political power under a constitution, putting human rights into positive law, and transforming state sovereignty into popular sovereignty—is, in contrast to the natural evolution of functional systems, an achievement dependent upon the enlightenment of socialized subjects; with Max Weber, it is a guiding spirit for new ideas, in whose course interests move history. The revolutionary events are something that "will not be

forgotten"—according to Kant's famous formulation—not because they exist in the institutional memory, recorded in the files, but because they are buried deep in the normative memory of a mass public [*Publikum*], which must be stirred up by a revolutionary public sphere [*Öffentlichkeit*]—through the press, philosophy, and poetry—again and again toward a new life and the daily plebiscite, and must be transformed into communicative power. "The *parliamentary regime*," wrote Marx in 1851, when there was still no unlimited universal suffrage, "is the *regime of unrest*." It

> lives by discussion; how shall it forbid discussion? Every interest, every social institution, is here transformed into general ideas, debated as ideas; how shall any interest, any institution, sustain itself above thought and impose itself as an article of faith? The struggle of the orators on the platform evokes the struggle of the scribblers of the press; the debating club in parliament is necessarily supplemented by debating clubs in the salons and the pubs; the representatives, who constantly appeal to public opinion, give public opinion the right to speak its real mind in petitions. The parliamentary regime leaves everything to the decision of majorities; how shall the great majorities outside parliament not want to decide? When you play the fiddle at the top of the state, what else is to be expected but that those down below dance?[82]

Constitutions are not just a filing system [*Aktenzeichen*], they are also the "record of our own will" (Rousseau). Their normative content cannot be reduced to possessive individualism, "illusions of powerfulness," "songs," and "ceremonial declarations."[83]

To be sure, as an evolutionary achievement, the constitution, achieved through revolution, expresses a "complete separation" of law and politics and an objective "reaction" "to the need for interconnection that arises with it."[84] While law and politics are at first torn apart into functional systems that are internally foreign to one another, both sides lack the order-achieving accomplishments that generalize politically acceptable decisions into legally binding norms and, conversely, give legislative and judicial decisions administrative force. Only through constitutional law is power legally codifiable—Luhmann speaks of a "second-coding of power through law"—and law politically legitimated—Habermas speaks of "legitimacy through legality."[85] Only thus, *through* the well-ordered exchange of reciprocal achievements, can the borders between systems be stabilized and the border violations (which were characteristic of preconstitutional conditions and were perceived, depending on one's perspective, as either a dominating despotism or political rebellion) be avoided.[86] But structural coupling does not solve the problem of solidarity.

The desire for fraternity and political equality appeared on the agenda of constitutional struggles only once the "simultaneous separation and coupling of law and politics" was recognized as a revolutionary achievement that politically constituted the people as a state.[87] It is only in the exercise of popular sovereignty, made possible by the constitution, that the mere consequences of a blind evolutionary occurrence are transformed into a story worthy of recognition by the actors and, at least retrospectively, chosen, and that the filing system [*Aktenzeichen*] of evolution is transformed into the record of our will.

III

Solidarity in the Global Legal Community

In 1948, it appeared to Hannah Arendt that little remained of the Jacobin substance of the European nation-state following the Second World War. At the time, this was anything but a reason for celebration for Arendt; she had not yet developed her revisionist theory of the two revolutions—the good American one and the bad French one—but she was certain that "the national state has so far been the strongest defense against the unlimited thirst for power created by bourgeois society . . . and the integration of imperialist policies in the structure of Western states. But the sovereignty of the state, which was once supposed to express the sovereignty of the people, is today threatened from all sides."[1] She believed that only a republic in which the spirit of the Jacobin Revolution were still alive would have been capable of effective resistance against Hitler's troops in 1940, when she herself was fleeing from the Nazis and into exile in Paris. That spirit which Clemenceau and the Dreyfusards had renewed at the turn of the century could, so it seemed to Arendt, be mobilized for the last time in the First World War: "The First World War could still be won by the Jacobin appeal of Clemenceau, France's last son of the Revolution."[2] After that it was gone, and with the nation-state it went rapidly downhill. Imperialism seemed to have triumphed worldwide.[3]

This thesis, however, had the tenor of a theory of decline. It was a quality that certainly fit the Central and Southern Europe of the inter-war period, the end of France's Third Republic in 1940, as well as the later westward expansion of the Soviet empire, but as with most theories of decline, the generalization hardly withstood scrutiny. The disintegration of the nation-state into authoritarian-imperialist blocks, evident in continental Europe (in spite of

its own involvement in imperialism), applied neither to England nor to the United States, which really first became a nation during the time of Roosevelt's New Deal. But the democratic state of the postwar period received a second chance, in all of Central and Western Europe and, in the end, also in the East, which was totally unexpected and not just by Arendt. Europe during the postwar period was not only more economically stable and prosperous than ever before, there was also an undreamt-of triumph of the social-democratic model. And in the 1950s and 1960s, despite the predicted triumph of imperialist politics over the nation-state, there was nearly complete de-colonization, followed by the implementation of the European constitutional model in more and more countries of the "Third World." And then on top of that, in 1989, last great empire collapsed, which had attempted to seal itself off from the global society. As a result of this collapse there came, in turn, the founding and democratization of a whole series of republican nation-states in Eastern Europe and also on the African continent. Between 1986 and 1996, the percentage of democratically elected governments worldwide rose from 42 percent to 61 percent.[4]

In the meantime, the nation-state has once again come under pressure, but this time the pressure comes from a globalization that is no longer imperialist. At the same time, in the recent drive toward globalization the state was by no means driven; it was more likely the driving element. Only states appear capable of guaranteeing "the conditions of possibility for those developments which are supposed to initiate the end of the state-form."[5] It was almost exclusively through active, state policies of globalization (tariff and trade agreements, interstate organizations, approval and provision of necessary resources, etc.) that the rapid and increasingly thick networking of the world economy was set in motion and accelerated.[6] Nation-states also play a decisive role in interpreting the norms of global institutions and giving them a concrete shape. Despite growing international networks (and occasional dramatic slides toward a breakdown of state control: civil war armies, corrupt and undisciplined armies like Russia's, etc.) many functional systems, such as educational systems and the military, are still organized almost exclusively by national sovereignty. The "high degree of organizational and curricular uniformity that marks the educational system of world society (is) a result of national policies."[7] In order to become effective, global law must be implemented nationally—administratively applied and socially embedded by states. The same goes for the global economy, science, transportation, military organization,

and so forth. When it comes to confrontation (which is avoided as a rule, but not always, through the many newly created authorities for regulating substate and suprastate conflict), state institutions must monitor and enforce privately contracted product standards, manufacturing guidelines, work regulations, and so forth. Without this enforceability and interpretation of transnational law in and by national courts, there would be, for example, no autonomous European law. Conversely, the highest national courts see their function notably as interpreters, suppliers, and advisors of international courts, especially of the European Court of Justice. The "denationalizing" takes place not exclusively, but to a considerable extent "inside national states."[8] States form a pluralistic "legal context" for law that is privately, internationally, and supranationally established, or produced through the international adoption of national "parliamentary law" (above all by the U.S. Congress): "The state is turning into the central interpretive community for non-state law."[9] In the end, even the enforcement of international law, the UN Charter, and the upholding of human rights against aggressors, regimes of state terrorism, or failed states, depends on the cooperative military and police power of the segmentarily differentiated world of separate states. States no longer have a monopoly on legislation, interpretation, or force [*Gewalt*], but they together form—whether they want to or not—one (although not the only) cooperative community of interpretation and enforcement of globalized and denationalized legal norms.

After the Second World War, it was precisely the rich social welfare states of the North Atlantic region that were more than any others the real winners in the process of globalization. Without global economic interconnection, they were barely able to cope with the problems that grew rapidly, beginning in the 1960s, of a capitalism energized by state intervention, which rationalized more rapidly than ever, producing more and more, better and better products with less and less labor.[10] But now the evolution of the functionally differentiated global society itself threatens the organic solidarity that is embodied in the democratic, constitutional, welfare state. It is like the spirits that, once called up, will no longer go away. Just like "imperialist politics," now the less violent but still blind evolution of the politically and legally restrained but economically dominant globalization is also unable to reproduce *on its own* the egalitarian solidarities that once had to be revolutionarily wrung from the functional systems. It is still the case that the evolution of functional systems consumes the solidarities that it requires for its own self-production

(autopoiesis) without renewing them. What once destroyed the hierarchical powers of rank and status now threatens the modern status of the egalitarian republic, the democratic state. In the end, it could turn out that democracy itself is the price paid for the co-evolution of de-nationalized global systems for economy, politics, and law.[11] The one-sided functional, and thus highly partial, integration of global society leads, as we will see (chapter 6), to national disintegration and thereby places "the democratic citizen and the implementation of popular sovereignty fundamentally in question."[12] Even in Europe (see chapter 7), the "post-national constellation" (Habermas) of a de-nationalized European legal community could have the paradoxical, undesired consequence of sealing the fate of democracy.

At the same time, until now the only normatively *and* functionally convincing model for a globalization in which the "scarce resource of solidarity" (Habermas) is not only consumed, but also renewed and extended beyond all boundaries of status and states, is the democratic constitutional state. With the republican nation-state, for the first time in history (as we saw in chapter 3), an egalitarian form of solidarity that crossed the boundaries of urban civil societies and courtly aristocratic societies, became politically organizable. It was not just an abstract idea that lost its ground at the first sight of the interests standing in its way, but rather—with Marx and Hegel—a social reality, an objective spirit [*Geist*], a substantial ethical life [*Sittlichkeit*], and the only *existing* idea of self-organized freedom. It was by no means a particularist idea, limited from the start to the boundaries of the prevailing states and in league with aggressive nationalism and imperialism. Rather, on the normative horizon of the Jacobin human-rights patriotism appeared a model for a global solidarity of republics with equal rights that was much more concrete and political than all the utopias of perpetual peace that were repeatedly devised from the Stoic philosophers up through Christianity. And the idea of an "association of nations" [*Völkerbund*], which opens up the boundaries of each particular "association of citizens" [*Bürgerbund*] without eliminating them, far exceeded the old, absolutist doctrine of international law associated with *Pax Westphalia.*[13]

5

Decentering Eurocentrism

The "Westphalian Order" of sovereign states, which was established after the Thirty Years' War (1618–1648) and grounded in legal philosophy by Hugo Grotius (1583–1645), was also authoritative for the theory of law and state in Bismarck's empire and is still influential in Germany today. In contrast, within the republican self-consciousness of the eighteenth century, state boundaries did not specify an "impermeable" (Laband/Jellinek) substance, through which the state was reified as an impenetrable legal person within which no other legal personality could be found.[1] Even Hegel, the firmly realistic critic of the Enlightenment who rejected Kant's "idea of a *perpetual peace*" and insisted on the natural right of states to conduct wars (especially if a state possesses a "strong individuality"), assumed that only recognition by other states constituted the state as an "actual individual." Indeed, in order to secure the "guarantee" of such recognition, the state "cannot be indifferent" to whatever goes on inside of every other state, and that fact conditions from the start the principle of non-intervention into their internal affairs.[2] All limits, according to Hegel, are "first *finite* and secondly *alterable,*" and they do not constitute themselves alone, but rather by *including* their other by exclusion, *mediated* by separation.[3] "Otherness" [*Anderssein*] is to "being-there" [*Dasein*], which is separated from it by a boundary, "not something indifferent outside it, but its own moment."[4]

Attaching the legal order of the state to a fixed "national territory" (Jellinek) is a concretist fallacy that misses from the outset the level of abstraction at which the legal community is constituted.[5] With Rousseau and Kant, and in the constitutional debates of the French Revolution, the boundary-transcending

determination of boundaries does not consist only in the principle of recognition in international law, as it does with Hegel, for whom the ideas of 1789 were for a long time tied up with the Napoleonic code. Rather, a republic constituted by human rights must be "permeable to anyone, who recognizes the prevailing legal and constitutional order."[6] In the constitutional state, the rule of law takes the place of territorial rule, and the "unbinding of social mobility," enabled by sovereign lawmaking, makes up the "innermost structure of modern law."[7] As territorial presuppositions of a boundary-transcending freedom, boundaries are also just positive law. Therefore, their legitimacy is dependent upon the principle of democracy. And in this case the principle of democracy requires—precisely because it presupposes, as we have seen, the identity of the ruling and the ruled (chapter 3)—that the borders of a democratic legal community may only be determined or altered in accordance with a legislative will that includes those affected on both sides of the boundary: "Drawing the boundary for one *legal* system always (means) drawing the one for the other adjoining legal system as well."[8]

Contrary to the doctrine of the impermeability of the sovereign state, the inclusion of the other is part of the legal concept of the modern state from the start.[9] Not only do the boundaries of a state as legally ascribed limits transcend the particular people of that state and join it with the neighboring people to form one people as addressee, but basic rights, which are explicitly reserved for their respective citizenries, also have an internal cosmopolitan content such that, as we have seen with the principle of democracy (chapter 3), the distinction between human rights and civil rights cannot be maintained. Civil rights, for the sake of their own continued legal existence, press for inclusion based on human rights. Alexander Meikeljohn demonstrated this in 1948 with the example of freedom of speech and freedom of the press, which the American Constitution guaranteed in its First Amendment and which, until then, particularly in the pursuit of communists after the Second World War, was understood as an exclusive right of American citizens. Even if it were correct that the First Amendment has legal validity only for American citizens, they would still acquire with it not only the right to hear the opinions of their own fellow citizens, but also the right to hear all foreigners. But that in turn assumes that *every* person, whether citizen or not, must have the right to say and to write whatever he wants to in America: "The freedom in question is ours."[10]

From the beginning, the modern, democratic idea of freedom certainly aimed at an inclusive community, but it was, at its start, a highly exclusive

European idea whose application was restricted to Europe and North America. Functional differentiation, although global in sweep from the outset and scattered over the entire world by roving media such as the printing press and money, was also implemented initially only in Europe. To be sure, the prediction of *one* global society—of the global village—is nearly as old as the "marvelous discoveries" of "printing," "gunpowder," and the "compass," which Campanella had already praised around 1600 as "wonderful signs" of the "unification of all the inhabitants of earth in one stable."[11] But the world of Campanella was entirely European, and for the authors of the eighteenth and early nineteenth centuries such as Rousseau, Kant, or Hegel, the political world was still identical with Europe. In Hegel's work, America appears only marginally as a land of the future—but a future whose essence was supposed to be fully determined by the history of the European central powers of Prussia, England, and France, and seemed to have come to completion in that history. From Hegel to Adorno, members of Europe's educated class expected undreamt-of quantity from America, but no new quality.[12] Even though Rousseau and Kant condemned imperialism and colonialism (in contrast to Locke before them and Hegel after), all master thinkers of the Enlightenment era agreed that the civilized world, and with it the republican idea of the state, was permanently centered in Europe; and that all around it, apart from a few savage peoples and plenty of mineral resources, the earth—in terms of civilization—was desolate and empty. The image was defined by the trauma of the Pilgrim fathers who, when they landed on the coast of present-day Massachusetts, had before their eyes only impenetrable forest, a wilderness not yet romanticized, and the coming winter.[13] Even the romanticization of the "savages" established by Rousseau (Johann Gottfried Seume: "We savages are still better men") changed nothing in the projective Eurocentrism; only the judgment was revaluated. This is just like what is found on the old Roman maps: The world ended where there were only lions (*Hinc sunt leones*).[14]

In the middle of the nineteenth century, Marx declared the Hegelian world spirit without further ado as the world market and conjured up world revolution and proletarian internationalism. As an impoverished author in exile in London, he regularly published for American newspapers and he celebrated Abraham Lincoln as a revolutionary hero of the proletariat. In the forward of his magnum opus *Capital,* he wrote that he expected revolutionary upheavals from the American presidential elections and signals for Europe and, because he had consistently detached it from the superstructure of the European spirit

[*Geist*], he could just as consistently globalize the perspective of his evolutionary theory of society. With the "discovery of America" and the "rounding of the Cape," wrote Marx and Engels in *The Communist Manifesto,* the universal interdependence of nations was achieved and the new technologies, not least the "electric telegraph," which "immensely facilitated means of communication," ultimately had to "draw all, even the most barbarian, nations into civilization" and "rescued a considerable part of the population from the idiocy of rural life."[15] With growing insight into global interdependence, the European perspective on the world was decentered: "In the place of old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal interdependence of nations. And as in material, so also in intellectual production. The intellectual creations of individual nations become common property. National one-sidedness and narrow-mindedness become more and more impossible, and from the numerous national and local literatures, there arises a world literature."[16]

But even Marx's perspective, which broke the spell of provincialism within the Enlightenment, remained a Eurocentric perspective on the world. England, not the still far-off America (from which he had already made a living and whose rapid development he followed attentively ever since devouring de Tocqueville's travel report), is for Marx the final form of modern capitalism. And despite all his anticipatory insight into capitalism's global character, it is self-evident to Marx (still quite Hegelian) that the European nations—with the unsurpassable high point in Greek art: "the historic childhood of humanity"—are the civilized peoples and the others the barbarian peoples.[17] Of course, this Eurocentrism is no longer an unbroken triumphalism; rather, through the description of the gloomy dialectic of a civilization that includes within itself its other *as* barbarism, it is once again—at least negatively—decentered.[18]

Just as the intellectual horizon of Europe up to the First World War was entirely fixed on England and the old continent, so also the republican constitutional state could maintain its hold only in parts of Western Europe and North America. While it certainly became increasingly powerful (as was apparent as early as the First World War) and, with America, turned into a world power, as a state form the republican constitutional state remained regionally restricted. In the end, the solidarity demanded by human rights and democracy, propagated in the public forum by "songs" and "ceremonial declarations" (Luhmann), could only become effective within the borders of

particular nations. A solidarity with universal intentions was reduced in reality merely to national solidarity, and often enough combined with its opposite: aggressively exclusive nationalism. Even the border-transcending networks of international law or the labor movement were not just subordinated to national interests of self-preservation—again, as the First World War taught—but remained Eurocentrically restricted to the North Atlantic region. The "social bond" (Durkheim), stretching across nations, was, despite all interdependencies, thin and fractured. The international law of the nineteenth century, which polemically distinguished between the rights of civilized and uncivilized peoples, specifically served openly imperial interests.[19] But that changed dramatically in the last decades of the twentieth century.

Today, at the beginning of the twenty first century, functional differentiation shapes—for better and for worse—the character of global society in *all* countries. The functionally differentiated society, invented in the West, has globalized toward a single society set in motion by revolutions in dissemination media and transportation technology. It was a European project, but it is no longer. Freed from the "special position" (Weber) of occidental rationalism, it has expanded toward global society, losing every locally privileged position and becoming completely decentered. It stopped being something specifically European or Western; only its history is Western. Every single person, without exception, must live today in one and the same society, and truly *as* an individual, whether they want that or not. Not even in India, where the castes still hold enormous power, can the individual be assigned completely, day and night, and all one's life, to one and only one class. Around the world, the fate of the individual depends, at least negatively, on individual careers and contingent market opportunities. The structure of society (functional differentiation) is the same everywhere, even if the *social* differences are immense and the *cultural* manifestations of the one global society are extremely diverse, with others around every corner. While the number of cultures shoots up at an almost alarming rate—there are old, new, newly invented old-culture, multicultural, and class culture; everyday culture; culture of origin; a new ancient land in every war of secession; in every season a remolded people; for every *façon* (way) a new religion—the number of societies is, with monotheistic grandeur, one.

For the sake of its own continued existence (see above chapter 4), the functionally differentiated structure of the world society seems to depend on constitutionalization—that is, on the "structural coupling" of law and politics into

normatively effective, democratic constitutions.[20] But the structure by no means forces democratization; that still depends, for its part, on the mobilization of *cultural* motives (revolution) and the fulfillment and (possibly revolutionary) establishment of *social* constraints.[21] A uniform culture, or one becoming uniform in the process of revolution, can contribute to the establishment of democracy just as much as the multiculturalism of a legally institutionalized civil society does for its continued existence, its learning capacity, and its extension—but neither is necessarily the case. A homogeneous culture can always be transformed into a culturally exclusive, xenophobic, and antidemocratic movement (nationalism, fascism, etc.), just as a merely symbolically constitutionalized multiculturalism can always be transformed into fragmentation, violence, terror, or fundamentalism. The same is true for social fragmentation with a simultaneous exploitation, oppression, and impoverishment of the subordinate working classes. Class struggle can become the lever of democratization, but also the motor of authoritarian developments.

6

Center and Periphery

As globalization progresses, networks of communication are becoming increasingly thick and cultures are fading away and coming into being all over. But global society is socially divided into *center* and *periphery;* the face of modernity is a landscape of light and shadows. One lives either in the center or in "peripheral modernity" (Marcelo Neves), where life is infinitely more difficult than in the brightly lit cities of the "first world." There are *nominally* democratic constitutions almost everywhere, but in most countries of Eastern Europe, Asia, Latin America, and Africa, these constitutions function much worse than those in North America or the countries of the European Union. The division of global society into center and periphery, along with the accompanying, simultaneous processes of globalization and fragmentation, returns to the agenda the old inclusion problems of European modernity for which the democratic constitutional state had found a solution at least *within* its territorial boundaries. The problem of religious civil war seems to be reemerging within the world society in the form of cultural fundamentalism (religious, ethnic, or racist), and the pauperization and proletarianization by capitalist accumulation seems to be coming back in the form of social exclusion of a huge "surplus population" (Arendt).

6.1 Globalization of Old Problems

6.1.1 Fundamentalism

The globalization of modern capitalism has led to the destruction of the remaining household-based economies and with that has made the fate of

the entire world population dependent upon individual educational careers and individual market opportunities.[1] The "tremendous homogenizing power" of the universal consumer culture by no means counteracts that.[2] Jeans and designer suits, techno and pop, fast food and nouvelle cuisine, soap operas and talk shows turn everyone who consumes them into individual participants in global processes of communication. The reaction is likewise individualistic. Instead of a new culture of uniformity, the global culture industry requires endlessly new modes of appropriation, lifestyles, and identities. For better and for worse, productive appropriation always proceeds from the "individualized individual" produced "in society," and it diversifies and fragments the mass culture into ever more new forms of local, sectoral, and class-specific communities of communication, which build themselves up just as quickly as they fall apart again.[3] On the whole, this is a result of new media for electronic distribution. The standardization of printing presented the early modern period with the paradoxical result of an explosion of individual variation.[4] Economically compelled individualization, mediatization, and the culture industry led always and everywhere to fragmentation, pluralization, and diversification of worldviews and cultures.

As during the early modern period, the current religious fanaticism, fundamentalism, and increase in religious-ethnic civil war are a consequence of the de-socialization of the individual. The negative interaction between individualization and poverty is transforming the entire peripheral modernity into a "zone of turmoil," which Singer and Wildavsky distinguish from the "zone of peace" that stretches far into the Pacific region, as the OECD (Organization for Economic Cooperation and Development) world covers the North Atlantic region from Finland to the United States and Canada along with Japan, Australia, and New Zealand.[5] This is not *merely* a Western projection. The zone of peace is actually a zone of internal and external peace founded on law [*Rechtsfrieden*], in which individualism can be productively institutionalized. The constitutional presuppositions for achieving this institutionalization—which essentially consist of effective civil liberties, a clear separation of law and morality, the full positivization and enforceability of law, and the political inclusion of the entire population—are for the most part highly inadequate, if fulfilled at all, in the countries of the peripheral modernity. Under conditions of "nominalist" (Loewenstein), or rather "symbolic" (Neves), constitutionalization and "delegative democracy" (O'Donnell), the growing pressure of individualization intensifies cul-

tural fragmentation and violent conflicts motivated by fundamentalism increase.[6]

Fundamentalism is not a matter of deep-seated religious worldviews or a thousand-year-old "clash of civilizations" (Huntington). Rather, it emerges from the mobilization of individuals who, as a result of the change from stratification to functional differentiation, have lost their place and status in society and have become suddenly poor or suddenly rich. Just as the skinhead cynically uses the sociological theory of social workers to justify his misdeeds (deficient socialization, psychosocially stultified families, bad neighborhood, etc.), so Islamic fundamentalists are also a long way from renewing or even restoring the tradition of an old high religion.[7] On the contrary, they are inventing Islam anew. To that end, they consciously or unconsciously fall back on an invented image of "Orientalism" (Edward Said), which, together with the myth of the "impossibility" of separating the Islamic religion from the state, arose out of the colonial-racist projections of European intellectuals. This image is emulated by the young conservative Orientalists, who today sit not in Berlin, Heidelberg, Oxford, or Paris, but in Baghdad, Tehran, and the mountains of Afghanistan, living in a society *with* computers, high-tech medicine, sophisticated military hardware, mafia, and functional systems.[8] They cut off the hand of their victim but then look after the wound in the high-tech ward of a modern hospital. Islam is, at most, *one* element of "Islamic" fundamentalism—just like the pseudo-Christian "theology of the *Reich*" of Carl Schmitt, Moeller van den Brink, Oswald Spengler, Ernst Niekisch, or Othmar Spann during the Weimar Republic. Other, highly heterogeneous elements, fully independent from the religion, are added: the macho ideology of war, the extreme misogyny of male bonding, the quite obviously modern anti-Americanism, anti-urbanism, racism, national-ethic chauvinism, and so forth. These elements conflict not just with secularized, Western rationalism, but also with the internal level of ethical rationality of *all* monotheistic religions (analyzed by Weber).

Even hitherto harmless cases owe something to the projective appropriation and transformation of old images of the enemy. Consider the characteristic contrast effected by Sioux Indians or aborigines who dance and protest in archaic war paint in front of skyscrapers, while at the same time following a Western-inspired mixture of wide-screen myths and postmodern New Age, and also allow their interests to be represented by international lawyers in Armani suits, expertly demanding rights, compensations, and property claims

in front of magistrates courts. Don't the Protestant fundamentalists of the Bible Belt in the United States act as if they had read Max Weber's *The Protestant Ethic* and Nathaniel Hawthorne's *The Scarlet Letter* and are now attempting a literal and made-for-television rendering of a sociological-literary ideal type? And doesn't the childish and literalist conception of paradise held by Christian and Muslim fundamentalists, in which one can bomb oneself into heaven through instrumental manipulation of one's own martyrdom, seem more like a product of heathenism or animism rather than monotheistic rationalism? Is it not more a matter of reenchantment than of disenchantment [*Entzauberung*]? In every case evil is banal: Just think of the properly settled accounts, the absurd wills, and the conventional lives of the attackers of September 11, 2001. The holy war against the Satan America is clearly a mistaken interpretation of the Koran, but a highly characteristic one: Indeed, the devil is regarded by Islam not as an enemy of God, but only as an enemy of human beings. Because humans must themselves cope with the devil, he can certainly become an opponent in a highly human struggle, but never in a *jihad,* a struggle for God.[9] Secularization long ago caught up with the fundamentalists of every persuasion. Historians and ethnologists invented their image, not the authors of the Bible or the Koran.

Sometimes a vulgar Marxist explanation functions better than a complicated, deconstructive theory of the Other and the 'difference' that is just as elusive as it is unavoidable. In many regions affected by civil war, fundamentalism is the ideal legitimating cover under which the predatory interests of those who are instigating it can best hide. And the first generation for whom war, weapons, and the drug trade become a way of life then has neither economic nor ideological alternatives.[10] When Yugoslavia fell apart, the "professional thieves and hostage-takers" were the first ones who picked up on the legend (disseminated by the hegemonic, Western media) of the ethnic causes of a conflict, primarily motivated by economics and power politics, and spread it among their own followers and armed groups.[11] National historians and philosophers, who invented thousand-year histories of the Croat, Bosnian, and Serbian people, their heroic leaders, and autochthonous philosophy, were immediately on hand. The truth is that war and exploitative capitalism force the few big winners and the many losers, because nothing else remains for their survival, into permanent armed conflict. Fundamentalism is just what is needed: It confers on civil war, as an economic form of life, the uncompromising quality necessary to permanently stabilize it and dismiss all alternatives.

Fundamentalism is superficial and constructive, not deep-seated and substantial, and, therefore, just as instrumental as it is dangerous.

Whether an authentic reeducation and rearranging, rationalization, or "reformation" of a traditional high religion will one day arise from the enormous variety of fundamentalist currents—Max Weber's "powerful rebirth of old ideas"—or whether it sticks to the observable regressive phenomena can hardly be decided from the perspective of the present.[12] The strong dominance of an identity politics that appears almost postmodern by taking a plundering attitude toward cultural tradition—more manipulative than innovative—points, for the time being, to regression. The characteristically rigid image of an identity politics operative within dress regulations and so forth recalls Hegel's tenet: A person finds his identity only on his deathbed. The fundamentalist, who finds his identity before that, often seems, therefore, like the living dead: a sleeper, a suicide bomber on call. If one seeks historical examples, they should hardly be taken from the isolated battles for glory by the assassins of the eleventh century; a better example is the extremely dismal suicide attack of the "total war" staged by Joseph Goebbels and his accomplices after the Allied landing in Europe. Of course, in order to break through the "vicious cycle of globalization-with-particularization" (Žižek), in order to transform the cultural differences that are exploding in the course of the global de-socialization of the individual into low-violent conflicts, an effective, legal organization of reciprocal spheres of freedom is required, or at least a functional equivalent to the civilizing achievements of the modern state.[13]

Even the North Atlantic "zones of peace" have long been included in the process of cultural fragmentation.[14] Despite NATO, despite the Schengen Agreement, despite the strongly guarded Mediterranean coasts and the shameful deportation camps at European airports, despite the Mexican wall that separates, from coast to coast, rich North America from the poor South, the West is no fortress. In September 2001, the final proof came out, if proof was still needed, that no place in the world is beyond the reach of global terrorism. This had been known even longer with regard to environmental contamination, ecological risks, and diseases (e.g., AIDS). The United Nations High Commission on Refugees counts 20 to 30 million refugees yearly. In 1993, the number of illegal immigrants in Europe was estimated at 2.6 million, while the United States marks a yearly increase of a million from Asia and Latin America.[15] At the same time, in the sectors that are left unprotected from the pressures of the world market (e.g., the auto industry), globalization

produces structural unemployment everywhere, regardless of whether the prescribed remedy is neo-liberal, as in Great Britain and the United States, or social-democratic, as in Sweden and France.[16] The economic and technological crisis cycles of modern capitalism, which are just as creative as they are socioculturally disastrous, could be managed in the decades after the Second World War by the social-welfare state, such that the "public goods" of the market could be largely separated from its "public bads" and the former were no longer offset by the latter. But that required not only the nation-state, but also a national economy with verifiable external relations, worldwide foreign trade, and so forth, which could be nationally embedded, democratically monitored, and subjected to the authority of sovereign law. The global economy, driven by the differentiated financial system, is completely different. It has outgrown the bed of the nation-state. Since the beginning of the enormous boom in the global capital markets in the 1960s, a Keynesian politics of state intervention has literally had no object at which to aim. Under the pressure of globalization and the neo-liberal episteme—"there is no alternative" (Margaret Thatcher)—national solidarities have decayed. The European social-welfare state is certainly still strong—even in Great Britain—but it is in a "state of siege."[17] With "positive integration" becoming weaker, the social-welfare state is declining or stagnating; at the same time, ever since the days of the "bloody legislation" of the English during the time of the "original accumulation of capital" (Marx), the security state has been growing beyond all measure. It is a showpiece for "negative integration."[18] Not only has crime been globalized in its many variations of gangster organizations trafficking in people, drugs, and weapons; the fear of crime, independent of the reality of the threat, has also increased globally. It rises in Finland when a stunning murder takes place in California, and that in turn is a pretext and welcome occasion for "getting tough policies" all over the world.[19] The "war on terror," now proceeding globally, could quickly lead to a re-introduction of the death penalty even in Western Europe, along with various other restrictions of basic rights.

National de-democratization *without* international democratization, however, has the dangerous consequence, above all, that the "manifold aspects of the national spirit" (Marx), which the parliamentary system of representation had reflected in itself and had concentrated in the legislative power, disintegrates into provinces that are hostile to one another.[20] While the global economy is freeing itself from the reach of the legislative power of the people, the

spirit of the people is shriveling into regional demons. Rich, northern Italians or Spaniards withdraw their solidarity from those of the poor south. The commonly formed will of the people wanes, the realization of legislation grinds to a halt, and the flow of resources that unites the rich and the poor regions of the country subsides. In the end, the heterogeneous risk community of the democratically organized state also falls apart in the Western democracies—just as in countries like Argentina and Brazil—"in favor of smaller and more specialized risk-communities."[21] And that always burdens the weakest, who lack not only economic capital, but also the "social capital" (Robert Putnam) to be able to survive in free competition with the historically more fortunate regions. Regional as well as sectoral secession, combined with partly ethnic, partly neo-liberal fundamentalism, and the separation of Catalonia from the poorer parts of Spain, just as much as the migration of mobile capital into countries with low-wage economies and tax havens: Both strike the nerve of the democratic principle of the affected.[22]

Moves toward segregation are legal acts. If rich sectors or regions want to detach themselves from poor ones, then *everyone*—the poor just as much as the rich—must consent. It affects all citizens when a large corporation changes location, and it affects everyone when a region wants to detach itself from the respective federation or union. The principle of democracy forbids unilateral declarations of withdrawal. But the normativity of the constitution shatters against the hard facticity of centrifugal forces. Ethno-regionalism and neo-liberalism can under these conditions join forces, like the examples of Haider, Berlusconi, and so forth in Europe, to form a "new form of totalitarianism."[23] Since the "trans-nationalization of trade policy and foreign policy" is obviously irreversible, the resource of democratic solidarity, which "contributes to legitimation," would become more scarce *if* no "trans-national equivalent" emerges for the "national procedures of securing the legitimacy *and* effectiveness of politics"—procedures that are threatened, from above, by the deregulated global economy and, from below, by sectoral and regional segregation.[24] In the end, the gaps in legitimation would have to be filled, as in Latin America, by leaders who are big on decisions, but weak on implementation (Berlusconi, Cardoso, Menem), and through whom, as Marx had already analyzed it with the example of Louis Bonaparte, a populistically delegated executive frees itself from the control of the parliament—while out in the country the fragmentation continues growing.[25] Instead of the westernization of the Balkans, we have the Balkanization of the West. Or as Slavoj Žižek puts it: "In

the long term, we shall all not only wear Banana Republic shirts but also live in banana republics."[26]

6.1.2 Social Exclusion

With the achievement of a global society, the other inclusion problem of European modernity has also returned in a more dismal form. The global differentiation of center and periphery means that, without exception, the entire world population is dependent on the achievements of the functional systems of the economy, transport, technology, law, military, and schools, but only a minority has effective access to these achievements. The international constitution of the economy, consisting of GATT (General Agreement on Tariffs and Trade), the WTO (World Trade Organization), and the laws of the European Community, accomplishes no more than a negative integration of global society, though in comparison with all earlier epochs of border-transcending free trade it is remarkably heavily regulated.[27] Regulated deregulation is better than unregulated deregulation; it is, after all, market-creating, but not market-correcting.[28] It makes available to free trade the enormous productive powers of new communication and transportation technology, but it solves none of the social problems created by new markets en passant. Since the 1947 GATT agreement and the founding of the European Coal and Steel Community in 1952 and the European Economic Community in 1957, the negative integration of Europe and the global society has advanced rapidly, generating as it progresses a greater need for market-correcting interventions. This demand cannot be met, however, because of the weaknesses of transnational, positive integration.

The elimination of trade barriers, tariffs, and impediments to competition that occurs in the course of creating intergovernmental contract law (which is necessarily written by top political executives) can be pushed through even without democratic self-legislation. But in order for market-correcting, interventionist, redistributive, socially equalizing policies to appear, the solidarity reserves of democratic legitimation must be mobilized. Where they are not present, the "institutional capacities for realizing" free trade's power of negative integration are far greater than the capacity for interventionist correction of the socially disastrous effects of free markets.[29] Through economic rationalization and structural unemployment, incomplete, negative integration produces world wide pressure on the wages of the lower-income brackets, driving

their wages further downward. At the same time, in developing countries, the wages of the highly qualified, scientifically professionalized labor force are driven upward more and more quickly. Globalization between 1960 and 1998 drove up the average per capita income from $950 to $1,250, and in developing countries the literacy rate (from 46% to 73%) and the average life expectancy (from 46 to 64.4 years) rose significantly. But these enormous achievements are distributed more and more unequally, not only between the rich and poor countries, but also within the rich ones and particularly drastically *between* the poor countries (fast-developing nations vs. LDCs, or less developed countries), and *within* the poor and poorest countries. The disparity of income between the 20 percent at the top and the 20 percent at the bottom of the world population increased from 30:1 in 1960 to 78:1 in 1994. Even within the OECD countries, where the per capita income is around $20,000, one hundred million people live below the poverty line. Social expenditures are falling almost everywhere. But while they can still record a weak (absolute) growth in Europe and they only went down slightly in England even under the Thatcher government, the poorer the country and region of the world is, the more severe the losses are. The emigration of functional elites abroad or into internal high-security zones has led to the devastation of the educational and health-care systems in the periphery, and to the social fragmenting of culture into a global culture of elites and a local culture of poverty.[30] Social and communicative segregation (the second inclusion problem) is joining sectoral and regional segregation (the first inclusion problem).

The divide between the winners and losers of globalization is growing everywhere. While the flow of trade and communication within the OECD world becomes more and more dense, the bulk of goods and words flow right past the regions of poverty. It is the reverse with the widespread flow of immigrants, of whom 95 percent cross the border from one have-not state to another, made up of just as large a number of displaced persons (approximately 20 to 30 million): exiles and deportees who are running from aggressive industrializing elites, regionally dominating ethnic groups, or intolerant religious majorities in their own country, or who are simply fleeing from civil wars, drought, hunger, or floods.[31] Persons, groups, classes of workers, regions, peoples, and states who have historically had bad luck and are less richly blessed today with economic, cultural, and social capital than Western Europe and North America fall out of the global networks of communications, trade, and production through holes that are always becoming bigger.

The stronger the functional, systemic integration of global society, the weaker the social integration of its regions becomes.[32] And again, this decrease in social integration hits the weakest first. As one can observe in the *favelas* of Rio de Janeiro, or in Calcutta, or in any of the impoverished ghettos of Africa, Asia, and Latin America, "the effective exclusion from one functional system" is often sufficient to put *all* functional systems out of reach: "No work, no income, no identity card, no stable intimate relations, no access to contracts and judicial protection of rights, no possibility of distinguishing election campaigns from carnival events, illiteracy, and underserved medically as well as nutritionally."[33]

Even the "reinforcement of difference," the accumulation of exclusionary effects, is a

> direct consequence of functional differentiation. . . . Whoever has no address, cannot be registered for school (India). Whoever cannot read and write hardly has any prospects in the labor market, and one can seriously discuss excluding them from the right to vote (Brazil). Whoever finds no other opportunities for lodging than on the illegally occupied land of the *favelas* has no legal protection in case of emergency; but the owner also cannot assert his rights when an eviction would generate too much unrest in those areas.[34]

Law becomes functionless here. It produces hardly any security of expectations. The voices of entire regions are bought with public funds. State- and industry-sponsored murder goes systematically unpunished; charges are not even filed, and the impoverished themselves live within a lawless culture of violence. Law degenerates into an instrument of power and of those who possess land and capital. General laws and individual case law are replaced by particular laws aimed at individual persons—as in the scandalous Lex Senhor Presidente, which was expressly supposed to secure the reelection of the ruling Brazilian president. Instead of *ius cogens,* the constitution of the state organization is *ius dispositivum.*[35]

As soon as law within peripheral countries gets caught under the double pressure of over-integrated minority populations and under-integrated majority populations, the boundary-drawing and difference-preserving power of the constitution declines.[36] The first group is pulled out of the system from above and profits from the achievements of the constitution without being committed to anything more. The second group remains excluded from the enjoyment of its rights and drops out at the bottom. But as "liable parties, charged, accused, convicted, and so forth," they remain "strictly subject to the penal

structure of the state apparatus."[37] While the one has every opportunity to make claims, the other has practically none. While the one almost always goes unpunished, an autistic legalism that fetishizes law is enforced on the other, who "stands in the dark" (Brecht). This is legalism beyond the principle of legality.[38] But when the difference between legal and illegal (legal code), which is constitutive of autopoiesis, makes no difference to the few over-integrated and to the many under-integrated, and a broad, positively integrated middle class is missing, law fails *as* law (as we saw in chapter 4).[39]

The colonization of law by power and money annuls the logic of functional differentiation. The difference between inclusion and exclusion eclipses the difference between legal and illegal, government and opposition, having and not having property, success and failure in school, and in the end the boundaries of the systems can no longer be identified. A self-destruct mechanism, which represents a generalized form of the Marxist model of crisis, is set in motion and transforms autopoiesis into allopoiesis; the internal or self-production of law, power, and property is transformed into the externally directed production of law, power, and property.[40] What matters is not property title, legal power to occupy, or an undeniable legal claim, but who has the strongest battalion in each case. Constitutional texts become wastepaper and all law turns into soft law.

The exclusion of a large part of the global population from access to money, knowledge, power, opportunities for legal redress, and so forth is far more dramatic than Marx's impressive analysis of the existence within civil society of a class of excluded persons; this class was at least still *included*. That meant, namely, that capital was still dependent on the labor power of the "industrial reserve army," so that a minimum reciprocal dependence was always still available, and the lack of access by the majority to the achievements of the system could be compensated through promising struggles for recognition. That, however, is precisely not the case with the current exclusion problem. From the perspective of global society, the excluded are a "surplus population" (Arendt), in the sense of millions of functionally superfluous bodies that have simply been pushed aside into the "environment" of the highly organized systems of communication and have become invisible through ghettoization. "While human beings count as persons within the sphere of inclusion, it appears," according to Luhmann, "that within the sphere of exclusion their bodies are almost all that matter."[41] They participate in the public life of the people only as infectious organisms and as

threatening movements of bodies: objects for epidemic control and the police. Organic existence detaches itself from its communicative mediation through specific codes, media, and value spheres. Luhmann writes, "physical violence, sexuality, and elementary, instinctual fulfillment of one's needs, are released and become directly relevant, without being civilized by symbolic recursions."[42] The excluded today do not even have "chains" to lose: One only shackles that which one still needs.[43] They have literally "nothing to lose" but "control over their own bodies."[44]

A consequence of the "chain reaction of exclusion"[45] is an almost complete destruction of democratic sovereignty at all the levels for conceiving of a people in terms of constitutional law. If one distinguishes, with Friedrich Müller (as we did in chapter 3), the people as *addressee* (all persons dependent on or subject to the law) from the *active* people (all those entitled to vote) and from the *legitimating* people (institutions with authority to make decisions either *as* a people—like parliament—or in their name—like the courts), then the destruction of democratic solidarity appears at all levels.

First, through the excommunicating reduction of human beings to bodies, *economic* exclusion literally robs human rights of their object. Their guarantee, for a broad segment of the people as addressee (citizens), becomes a farce. Second, *sociocultural* exclusion from the educational system and the system of postal addresses, illiteracy, and ghettoization condemn the economically impoverished masses for the most part to "political ineffectiveness and apathy."[46] Even the active people, with voting rights, sinks back into the passive *status negativus* (Jellinek). Third and finally, *legal* exclusion, through "unlawful force, unconstitutional inequality, denial of legal protection, impunity for the staffs of oppression," destroys the democratic legitimation of authoritative institutions.[47] The legitimating people, which should be accountable in accordance with an unbroken "circle of legitimation," becomes a mere *icon* in the hands of the ruler of the day, because the circle of legitimation is broken everywhere by election fraud, denial of rights by the courts, normalized corruption, and emergency legislation unconstitutionally secured by the executive (the *Medidas Provosorias* in the case of the Brazilian presidential regime).[48]

As long as there are no global or regional equivalents for the democratic constitutional state, hardly anything is likely to change in the situation of the classes excluded from work. Only such equivalents, which combine full political inclusion with hard, reliably implementable law, could create an international situation out of which the nominalist-symbolic constitutions of the

peripheral countries could for the first time develop into normatively effective national constitutions. Given the disastrous eclipsing of the functionally differentiated global society by the dysfunctional difference between inclusion and exclusion, and between over- and under-integration, it stands to reason that nothing will change until those most strongly affected by the negative consequences of the ruling neo-liberal way of thinking are also represented with a seat and a voice in the international organizations that transform thoughts and words into decisions. Even where governments can act and decide as active and equal legal subjects on the international stage (according to the "one state, one vote" model of the UN General Assembly), the under-integrated are being represented by their governments (which are nearly always undemocratic, partially democratic, or sham democracies) without representing themselves (as Marx saw in his time with the small-holding peasants of France [see chapter 3]), and without "enforcing" their interests "in their own name" through *their own* representatives.[49]

Only a real democratic representation of the under-integrated, which does not just talk about their interests or act as if the global people or its subpeoples were a mute icon, but can be legitimately accountable to it, would be strong enough to overcome [*aufheben*] the internal contradiction of contemporary liberalism. That contradiction consists in propagating global laissez-faire and implementing it with every effort, but not laissez-passer, as François Quesnay, one of the liberal founding fathers, had called for as early as the eighteenth century.[50] Kant, Quesnay's contemporary, had even understood laissez-passer as "a cosmopolitan right" "of universal hospitality." For Kant it was a matter of "right," not "philanthropy." The "right to visit" of laissez-passer is an equal entitlement to unhindered and free movement everywhere, in order to be able to enter into a "possible commerce" with any human being at all.[51] A liberalism that denies laissez-passer by every means to migrants seeking work contradicts its own egalitarian premises and privileges the freedom of those who have fared better. Only by supplementing laissez-faire with laissez-passer, which gives "no one more right than another to be on a place on the earth," is the entire meaning of freedom within economic liberalism developed.[52] The unprivileged freedom of the market is realized today only in the privileged region of the European Community with its four basic freedoms of free circulation of goods, services, capital, and labor power. Everywhere else, the border-transgressing market freedom is divided, since the *entire* freedom of the global market is only interesting to those who are excluded from it.[53] It would

be in their interests to modify an old slogan: No liberalization without representation.

The self-destruction of democracy through mechanisms of social and communicative exclusion affects not only the countries within the peripheral regions of the globe, but also increasingly the democratic system of representation within the center. This can be observed in the peripheries of large cities in the West, and it can be read in the statistics on poverty and imprisonment (in the United States), but above all, it can be seen in the dramatically sinking proportion of individuals participating in elections.[54] Democracies are undeniably "participation-flexible," but in the case of "very low and further decreasing voter participation," as for instance in the United States, democracy could soon cross the threshold at which its procedures "run dry and lose their meaning."[55] For democracy, which normatively stands or falls with the performatively exercised self-obligation/self-legislation of the people—thus, with the identity of the ruling and the ruled—it makes no difference whether non-voters (political apathy) are motivated by under-integration (exclusion, powerlessness, political hopelessness, and resignation) or over-integration (blank acceptance of the political class by those whose interests are served) or both. Since in all three cases the political autonomy of the people is shifted back into permanent latency, it is no longer there performatively. The difference between over-integrated and under-integrated apathy merely consists in the fact that in the first case, because of the lack of alternatives, the democratic principle of difference (see chapter 3) is canceled by the homogenization of individuals, interests, values, and so forth, while in the other case the principle of identity (see chapter 3) is canceled by a form of heteronomous domination.

As a guideline, Friedrich Müller has proposed that the amount of exclusion that is no longer democratically acceptable be formulated according to a rate of exclusion equal to the respective majority needed to amend the constitution, that the cumulative effect of exclusion be calculated according to the determination of the rate of exclusion, and that the parameter of exclusion be added up accordingly.[56] If the addition of the excluded poor—measured by the people as addressee (all inhabitants) and the legitimating people (all citizens)—together with the rate of political exclusion (average electoral non-participation) reaches a constitution-*amending* majority, then a creeping constitutional *change* has been produced.[57] Using this standard, with 12 percent excluded by poverty and approximately one-third of citizens being regular non-voters, the European Union has a truly "alarming level" of exclusion,

but the "threshold of creeping *constitutional change*" has not been crossed. In the United States, however, with a 13.7 percent poverty rate plus an average proportion of non-voters from the last congressional and presidential elections lying around 59 percent—similar to Brazil and other Third World democracies—the two-thirds majority required to amend the constitution (Article 5, U.S. Constitution) has already been crossed and, therefore, started a change in the constitution, "from a legitimate democracy to a state apparatus that is no longer *democratically* justifiable."[58] Even if one does not share Müller's statistical picture of cumulative exclusion, the diagnosis of an advanced process of creeping constitutional change still remains highly plausible, and it is likewise reasonable to calculate the implicit constitutional *change* according to the explicit constitution-*amending* majority.

6.2 Hegemonic Global Law

The return of both the inclusion problems of "classic" European modernity to the dizzyingly enlarged structure of global society has put democracy on the defensive at the same moment that it appears to be triumphant worldwide and that, as a political idea and constitutional form, it stands virtually without alternative. This is true not only for the many new democracies that are often defective from the start, but also for the old and established ones.[59] The cause is globalization: "While global forces reduce the power of the people to influence policy democratically at the national level, at the global level, where the need now is greater, there are no democratic institutions at all that would enable people to control or even influence their destiny."[60] But that means neither that state-organized democracy—up to now the only one that has existed, in the Hegelian sense of "actual existence"—is already at an end, nor that there are no prospects for transnational democracy within global society and its large regions.

The account of the negative effects of a one-sided functional globalization has to be relativized, at least in historical comparison, but also materially. Compared with the imperialist process of globalization from 1880 to 1945—whose signature was world war, the globalization of war, and genocide—the improvements made in the second half of the twentieth century have been enormous. They are also the result of the beginning of a process of partly state-bound, partly supranational globalization of civic solidarity. In recent decades, there has been a "real explosion of global political activities," which

long ago ceased being restricted to foreign and economic policy and large international organizations.[61] This has a material ground. In the age of imperialism, money and capital, power and politics, tore themselves away, step by step, from their embeddedness in the nation-state. They freed themselves from the structural coupling to the legal order constituted by the state in order to become independent of the rapacious colonial empires that were dividing up the "barbaric" world among the powerful interests of the "civilized" world, and of the belligerent competition of the great powers for a "place in the sun" (William II). But that changed fundamentally after 1945. The one-sided globalization of power and capital was—despite the still significant dominance of the economy—overcome [*aufheben*] by the simultaneous globalization of all functional spheres. The globalization of the economy and politics toward a world economy and world politics certainly burst the boundaries of nation-state control and embedding, but it gained its new autonomy only *through* the increasingly strong dependence of the likewise de-nationalized systems of global law, electronic communications technology, transportation, science, medicine, education, and so forth. Denationalization of functional systems, in any case, no longer automatically means de-legalization and de-constitutionalization.[62]

Parallel to the globalization of heterarchical networks of capital and power, the legal system has evolved toward a world legal system, which extends from the *Lex Mercatoria* to the comparatively fixed domestic as well as supranational positive system of human rights. From the Law of the Sea to the Charter of the United Nations, "world law" (Luhmann) forms a thick network out of private and international contract law, human rights and international law, global customary law and legal precedents, and international and European case law. It is created, developed, and made concrete through the decisions of the UN General Assembly and Security Council, through GATT and WTO agreements, through statutes of the OSCE (Organization for Security and Cooperation in Europe), and through statutes of the European Council and other international and transnational organizations, which like the World Bank or the International Monetary Fund regulate criteria and allocation of foreign exchange credits to their member states and monitor exchange rates. Other sources of law—apart from the increasingly irresistible power of "custom" (Eugen Ehrlich)—are the International Olympic Committee, which prescribes binding regulations for doping, or environmental regimes such as the United Nations Environmental Program, which establishes the limits for

maritime pollution. The "summit meetings" of the eight largest industrial nations (G8) and the OECD, in which the rich lands of the West have joined together, have far-reaching authority for regulating the entire global economy, but occasionally also for decisions about war and peace, as with the ending of the Kosovo war. Add to this the rival companies of the oil-producing countries (OPEC).

European law, which for its part is closely integrated with state and global law, is the most effectively institutionalized. In cooperation with the EU Court of Justice, the Parliament, the Council of Ministers, and the Commission of the European Union lay down binding European primary law (constitutional and contract law) and manage the daily growing density of regulations of a new secondary law (simple European law). The *output* of regulations for the European Community has more than doubled from 3,209 legislative acts in 1970 to 8,471 in 1987. In the case of France, the amount of European regulations in 1987 had already increased to nearly half of all of the legal standards passed by legislation.[63] Together with the density of regulations of European law, the legislative power of the combined executive agencies—which is replacing parliamentary law by guidelines, decrees, decisions, and recommendations (Article 249, Treaty establishing the European Community, or TEC)—is growing. And it is increasing the role of the jurists, whose interpretive skills no longer just outwardly guarantee the reflexive conclusion of the legal system, but increasingly also act as self-instituted sources of law.[64]

The boom of international organizations was set in motion quite early by the first revolution in electronic media: the invention of the telegraph, which was much celebrated by Marx. The International Telegraph Union (ITU), founded in 1865, was the first higher-level legal entity within international law in which states themselves were members.[65] Its work was so immediately effective that in the first forty years of its existence the number of international telegrams per year rose from 5 million to 82 million, such that whoever stayed out of the ITU had to reckon with considerable disadvantages. Consequently, the daily newspapers in the large cities of Europe and America could come out three times per day and more frequently with the most recent news from all over the world. The International Postal Union followed in 1874, and one year later the International Bureau of Weights and Measures. Meanwhile, the rapid development of technology, resulting from the continuous innovation of technical standards, measurement processes, and so forth, led to the formation of "idiosyncratic regimes of production," which institutionally linked the

separate sectors of technology (forms of measurement, and accident research, but also research into human intelligence and education, sports, etc.), the economy (the automobile or aviation industries, computer industries, large publishers, etc.), and the law (special national and international courts, branch-specific arbitration tribunals, and global law firms) *across* the boundaries of states and international organizations.[66] The number of international organizations alone rose to 395 by 1984, thereby tripling the number since 1951. By 1989 the number again rose rapidly to over one thousand. These organizations, in which more and more international police functions are also bundled, cover "almost every conceivable sphere of human activity, from the regulation of air traffic . . . through the preservation of the animal world and the use of the sea floor all the way up to the definition of measurements and norms for the disposal of problematic materials."[67] Norms for environmental risks, technical standards, data security, and the protection of children are becoming—especially on the Internet—increasingly de-nationalized and "are growing according to need at the periphery and interfaces of society, produced by actors who have no other legitimation than their present interests."[68] One can see in the threat to the rights of authors and artists by the Internet (that the state can barely monitor) that it is not just private freedom of action that is being put into concrete form through the spontaneous creation of norms. The anonymous fellow citizen, in the form of the market-dominated providers of Internet access, service, and content, occupies the place of Big Brother that the state had to vacate. On the Internet the "private exercise of power by the global player" can, precisely *because of* "the absence of the state, lead to a total loss of freedom."[69]

As a whole, the "network of agreements" (Creveld) has led to new forms of international and supranational comprehensive jurisdiction [*Allzuständigkeit*], which is no longer the distinctive property of the sovereign state, but rather is claimed by a multitude of post-national organizations, partly in direct competition with the states that are linked with them. Non-state organizations such as the United Nations and its countless subunits (which aside from the normal realms of governance—from world peace to world hunger and world health—even includes its own university) claim *comprehensive jurisdiction,* which is indeed restricted in its implementation, but is by no means ineffective. The charter and the decisions of the UN General Assembly and Security Council have legally binding force. Unanimous Security Council decisions obligate the international community to implement these decisions and thereby grant it, in

those cases, a global monopoly on violence that is materially secured by the agreement of all the superpowers. The European Community, the most powerful pillar of the European Union, has its own legal subjectivity with limited jurisdiction—originally purely economic, but through the Maastricht Treaty, also extending to domestic and foreign policy—that is continuously extended with and without the wills of the member states. Even without its own coercive apparatus, the community has a power of implementation that long ago matched that of its member states. It is there in the "direct effect" of European law, whose guarantee of freedom must be protected by the courts of member states just like domestic law, and it is there in the interpretive priority of European law over national law in case of conflicts, including that of constitutional law (European Law Supremacy).[70] European law functions at least as reliably as that of individual states: "The (European) Court can declare illegal European Union (EU) laws and national laws that violate the Treaty of Rome in arenas traditionally considered to be purely the prerogative of national governments, including social policy, gender equality, industrial relations, and competition policy, and its decisions are respected."[71] These are the classic characteristics of sovereignty, albeit without a state. Because in the European Union jurisdictions are not programmed either to the European Community or to member states according to *topic* and *conditionally* (as in the German federal state where certain matters, such as education, are under the states, while others, such as the military, are federal), but are instead programmed according to *goals* and *finally* (who can in each case better fulfill certain tasks in the production of the common market, the European Community or its states or regions?), "all spheres of policy" fall "under a potential reservation by the Community."[72]

The formation of many overlapping international organizations, in which states reciprocally coordinate their policies (GATT, WTO) in a binding manner; transnational organizations, in which specialized administrative activities of various countries are folded into new units (e.g., the Schengen Agreement); and supranational organizations, which even implement law against the will of their member states (UN, EC), allows the complexity of the global political system to increase. Through the production of a series of paradoxes of sovereignty, the clear-cut boundaries between national and international, private and public law are confused and become blurred. With the founding of the first international organization (IO), the ITU, states ($S_1 . . . S_n$) had already united to form an order of international legal subjects and the union itself

emerged as an international legal subject, producing a paradoxical pattern that resembles Russell's set paradoxes (the set of all sets, which contains itself, is/is not a set): IO (IO, $S_1 \ldots S_n$). Such antinomies can have an effect that is just as productive as destructive.[73] If the number and type of international and supranational regimes are reproducing themselves, then with the antinomies, which call for ever more new solutions but through which even more new contradictions are produced, the complexity of the global political system increases and, with this complexity, so does the unauthorized power of international organizations.

Even individual organizations within the economic system, such as multinational enterprises and corporations, challenge the comprehensive jurisdiction of states. To be sure, there are only a few corporations, such as Shell or Unilever, that are genuinely multinational in the technical sense; but most of the enormous enterprises, which are increasingly decentralized and come about through expansion and worldwide mergers, only nominally have a particular national address. They have their center in one country and spread themselves out with affiliates—often huge metastases—and according to the mother-daughter principle, across the world. But they are utterly and completely what the old Social Democrats were accused of being (but never were): "workers without a fatherland." They understand themselves globally; they think and communicate in networks that span the entire world. Globalization *also* functions and *intensifies* according to the logic of the Thomas Theorem in sociology. If a situation (economic, political, legal, etc.) is defined by the actors *as* global, then in its consequences—and that is all that matters here—it *is* global. One way or another, the economic power that is accumulating in globally operating corporations is enormous. In 1992, the volume of trade of the one hundred largest multinational corporations was as big as the gross national product of the United States, and about 25 percent of global productive assets were in the hands of one hundred multinationals. But states are still far from being demoted to a mere superstructure phenomena, and although corporations threaten to relocate when any opportunity presents itself, they are still highly dependent upon locations that are embedded within nation-states that have extensive "social capital" (Robert Putnam). To put it crudely, the higher the wage level the greater the productivity. In the United States in 1994, the hourly wage for ordinary production work was around $16.40, in China around $.50. But the multinationals do have a considerable threat potential at their disposal, and they are now nationally and internationally

much better organized than the unions, which are becoming weaker and weaker. So it is hardly surprising when they successfully assert their interests not only against Third World countries, but often enough against such powerful political bodies as the U.S. Government or individual U.S. states.[74]

If one follows those legal theorists who are well-versed in systems theory, such as Gunther Teubner, then the multinational enterprises represent sui generis legal orders. The self-given authority of these enterprises has in fact long been a rival of state power, but now the multinationals are also challenging, with growing success, the state's attempt to tie the private contracts of the multinationals to state law and even the state's legal ascription of the monopoly over legitimate power to sanction. Increasingly, they escape the clutches of state sovereignty, but they are by no means operating in law-free spaces; rather, they are forming autonomously evolving legal orders that—though only loosely coupled—remain integrated in the plural context of national (and supranational) legal interpretation.[75] At the same time, not only does the self-constitutionalization of internal corporate laws concerning contracts and organization into target catalogues, basic norms for work organization, principles of business practice, and so forth make the particularistic self-given authority of the corporation stand out quite clearly, but with growing dependence on "poly-contextually" (Teubner) interconnected global law, an increasing tie to human-rights standards is also coming to light. There are investment bans due to severe human-rights violations, environmental regulations, and anti-Apartheid standards, that come about as UN sanctions by the world public, but also as the self-regulation of large corporations.[76] Sensitivity about human rights is changing the investment climate, and in that case even boardrooms react.

This sensitivity of multinational corporations to human rights and the environmental protection (consider the case of Shell Oil's Brent Spar oil platform), which is welcome in itself, does come at a price. While it was still the case, right up to the threshold of recent stages of globalization, that the private production of new law through contracts remained firmly integrated into the hierarchical "structure of law [*Stufenbau des Rechts*]" (Hans Kelsen)—the national legislature drew public boundaries (however wide) around the legality of private contracts and could (in principle) open or close the room for maneuvering at any time through new law—multinational corporations are now breaking apart this framework.[77] They solidly assert themselves as bearers of an autonomous jurisdiction or "quasi-jurisdiction" that, if necessary, must be

implemented against national law: "Transnational economic enterprises, represented by their attorneys, are acquiring a status like that of a citizen, which makes it possible for them to demand payment from governments for their political decisions just like an agent of the sovereign people."[78]

The multinationals operate on the legal foundation of the guaranteed equality and stability of the internal norms of the corporation, a kind of private rule of law that is compatible in many cases with the law of one of its host countries, but not with that of another.[79] This results in numerous conflicts that are relevant to criminal law. Thus, top managers are often under an extremely high threat of sanctions for violating norms internal to the corporation. If they act in state A in conformity with corporate norms in order to avoid the corresponding corporate sanctions, they often come into conflict with the laws of state A, which they would not have had any difficulties with in states B or C. If they are then punished with high fines by state A, then the corporation pays the penalty just like buying a plane ticket,[80] a type of reimbursement that was, until now, only common with the Mafia. But the dependable orientation to the legal norms internal to contracts—"on pain of going under" (Marx)—is a necessary condition for successful operations, not just for multinational organized crime, but also for multinational subjects of private law.

When a multinational corporation falls apart—like the Maxwell Corporation at the end of 1991—it can unleash a maelstrom from which only the creation of new supranational law can show the way out. In the Maxwell case, under extreme time pressure, a nonrepresentative, ad hoc commission made up of international law firms, representatives of the relevant courts in the affected countries (England and the United States), and a quickly assembled group of public officials, managers, economic and legal experts negotiated a bargaining protocol for the liquidation of the enormous assets. When the legal situations in the affected countries are very different, or tend to be nearly diametrically opposed as the English and American jurisdictions were in the Maxwell case, then the quickly compiled, complex network of legal rules cannot help but invent new supranational law that is opposed to both jurisdictions. While the protocol was legally effective only once and was approved by the respective national courts in accelerated proceedings (they had no other choice due to the threatening catastrophe), in succeeding litigation and with later incidents of a similar type, it was accepted, made concrete, and further developed as valid law by the courts. "The protocol," declared the

U.S. judge responsible for the Maxwell case, "is by US-standards, as well as UK, a unique document." And his British colleague supported him saying: "Maxwell is a very interesting example of cross-border cooperation by the courts in two jurisdictions and is breaking new ground."[81] In this way, the hierarchical structure of democratically legislated law is turned upside down and the pinnacle of private law takes the place of the public foundation.

Within the sphere of state sovereignty, the hierarchical order of "governance by government," which for its part is an organ of the people's will, is laid down by the constitution. And all forms of neo-corporatist arrangements between government and civic organizations, associations, individual states, or business enterprises—of "governance with government"—are just as subordinate to the rule of law (traceable to the will of the people) as the many "negotiation systems" (Willke) of "governance without government." However, the democratic structure of the law is being abolished [*aufheben*] within the global legal order.[82] There, the heterarchy of "governance without government," together with the systems of negotiation, the states, business enterprises, production regimes, and international organizations coupled together ("governance with government"), tend to marginalize "governance by government," which consists of individual states and the classic international law cases of the "sovereign equality" of the UN member states (Article 2, number 1, UN Charter) and is manifest in GATT Agreements as well as in the decisions of the UN General Assembly.[83] Globally, the coupling of law and politics is much weaker than that of politics and the economy, which is always becoming stronger.[84] Because of that, however, the public law of the *volunté générale* is everywhere pushed "onto the course of private law" and made dependent on the organizations of the economy.[85] The consequence is a marginalization of democratic self-legislation. Democracy is caught "on the defensive."[86]

Often enough multinational corporations pit their "home-country," situated within the center, against their "host-country" on the periphery. Under the dual pressure from overpowering countries and overpowering corporations, the poor "host-countries" sign almost any contract.[87] Like old-fashioned lobbyists, the multinationals are still the strongest. An anti-intervention law against interference by multinational corporations, introduced by the United Nations after the overthrow of Allende, was completely quashed by them.[88] On the open floor of lobbyism (refined "neo-corporatism" or "systems of negotiation"), personal relationships, as always, call the tune:

Philia, face-to-face communication, the ordinary social interaction between the federal chancellor and the Volkswagen board of directors in the midst of the complex society. In this classical form of "consensus democracy," the more narrow the room for political maneuvering becomes as a result of globalization, the more clearly the interests of capital triumph over the interests of the public. *Lex Mercatoria* is hegemonic law. "Hegemonic law" is all law that achieves standing without sufficient and direct representation of all affected interests.

As long as global decision makers such as the WTO accept only states and corporations as participants while excluding and ignoring NGOs from affected regions, they themselves lack the slightest trace of a backing by the global *volunté générale*—they lack the "stamp of legitimacy."[89] Deregulation and dismantling of trade barriers, the basic freedoms of the market, are not ends-in-themselves. The hard cases are those in which it is a matter of deciding whether protective tariffs should even fall when they protect a *promising* new industry in a periphery country; or when it is not fully certain whether the multinationals are misusing their superiority in the country for extra-legal purposes of political intervention. In order to be decided in a reasonably appropriate manner, these questions require the democratically balanced participation of each of the weakest interests: "These countervailing economic issues might not be properly taken into account unless direct access is provided for *all* the interests concerned. . . . Anything less would be a denial of the right to self-determination."[90] However, in order to be able to distinguish with any certainty the promising industries from those that are ailing, and the genuine grassroots NGOs formed by the affected from their (para-)criminal siblings, normatively effective constitutional structures are needed within each of the affected countries and regions.

But these structures come under the pressure of globalization even in the fortunate countries of the northwestern zone. The balance among "diverging interests" within a state, an essential element of the Western postwar order, is being set aside.[91] The capitalism of the Rhein is declining not only on the Rhein. At least in principle, national corporations were committed, through their integration into the hierarchical structure of law, to the general interest and were subject to the legislative power of the people in the sense of being part of an "unbroken democratic chain of legitimation" (Böckenförde) within the constitutional state. But for multinational corporations, globalization detaches the *economic* "general interest" of the multinational from the *political*

general interest of the people of any of particular state. Multinationals are often in the favorable position of being able to pit competing states against one another, and when two states are in conflict, it pleases capital. The corporation can then seize the opportunity to bend national and international legal norms and institutions in its own interests. The result is "corrupt law" (Luhmann). Why? As Robé puts it, "Because there is no political structure of representation of the common interest challenged at the global level."[92] Without political inclusion of each affected population through a public sphere that can make itself heard and that is directly represented in decision-making bodies, the interests of capital will barrel through, globally unchecked. It may still be better—to modify a well-known bon mot of Joan Robinson—if the interests of capital barrel through than if they fail to come at all, but it is not good. For there is (still) no political power within the world society that would be capable of separating the "public goods" from the "public bads" of modern capitalism. Such a (counter-)power can only be formed and permanently established—in the Kantian sense of the *peremptory* and not merely *provisional* state of law—by a strong public. That would, however, be a public that is much stronger than the weak public that already exists today, that is, the weak public of global civil society.

6.3 Weak Publics

Following Nancy Fraser, I distinguish between "weak publics" and "strong publics."[93] For Fraser, every public whose "deliberative practice consists exclusively in opinion formation and does not also encompass decision making" is weak.[94] An example of a weak public is the marginalized role, including censorship, that Hegel assigns to it in his philosophy of right.[95] Another example is the public sphere [*Öffentlichkeit*] of the enlightened public [*Publikum*] of intellectuals in the pre-Revolutionary Europe of the eighteenth century. All public spheres within nominalist-symbolic constitutional regimes (in Loewenstein's sense; see chapter 3) are weak, but not necessarily ineffective. The case is different where the Hegelian separation of state and society, of the power to decide and the freedom of action, is superceded [*aufheben*] by the existence of "sovereign parliaments." Sovereign parliaments are the paradigmatic strong public because they represent "a public sphere *within* the state," and their discourse "encompasses both opinion formation and decision making."[96] But the parliamentary public sphere functions only as the central

junction of a widely branching network because only a network of multiple publics like that, which takes the unending variation of multiple yes/no positions and bundles, intensifies, and then amplifies them through the media, is capable of producing the necessary selectivity for a productive parliamentary deliberation and legislation, and of "unleashing" the "communicative freedom" of the people and the "pluralism" of its "convictions and interests."[97]

Where there is a normatively effective constitution, *any* autonomous public sphere is a *strong* public, as long as it excludes no one from discourse *and* contributes to binding decisions in a legally secured way. All public debates that are guaranteed by basic rights, and that intersect with the political decisions of the people or its representative bodies through the procedural and organizational norms of the constitution, are strong. In this case, one can speak of a "structural coupling" between the communicative power of "public life" (Arendt), the administrative power of the political system, and the legally binding force of law.[98] It must, according to Neidhardt, "be structurally assured that political actors have an elementary interest in participating in the production of public opinions. This is presumed if *and only if* those political actors are dependent on the public, which they can continually reach primarily through the media. A connection like this is institutionalized in democracies by the fact that the filling of political offices is dependent on elections."[99] That requires, apart from a liberal political culture, legal regulations that facilitate (as much as is possible) equality of access to public forums for all affected interests and expressible ideas, and that effectively restrict the economic or even policelike colonization of the public sphere.[100] Those who *discuss,* or are at least adequately represented by discursive positions, must in the end also be able *to decide,* be it through electing representatives or by voting on issues.

But the strengths of the public sphere are proportionate not only to its practical realization through "elections and voting" (Article 20, Paragraph 2, Sentence 2, German Basic Law), but also to its real possibilities for influence, specified by "hard law," at *all* levels and steps of interpretation, concretization, application, and realization (implementation) of law. The public sphere of the courts is highly significant; it is where it is decided whether effective possibilities for making legal claims are fulfilled and whether basic rights are only on paper—are only normative *texts*—or whether they can become effective as action-guiding legal *norms* (in the sense of Friedrich Müller's distinction; see chapter 3). Paradigmatic of strong publics are the civil rights movement, the Watergate scandal, and the movement against the Vietnam War in the

United States, which through the structural coupling of opinions, provocative actions, civil disobedience, and demonstrations, were able to effectively carry through the concretization of civil rights and even international law with test cases and court judgments.[101] A counterexample is the weak public sphere of the nominalist-symbolic constitutional regime in Brazil, where since the late 1970s until far into the 1990s thousands of street children were murdered by death squads (with the complicity of the police) or were kidnapped and disappeared. There were very effective and spectacular international, then also national, protests by NGOs and civil rights movements (among others, there was an occupation of the parliament by street children in September 1989)—which at least led to the appointment of a parliamentary inquiry, the intervention of prominent senators like the later President Cardoso, and several legal changes. However, the sad fact that, *despite* the improved legal possibilities, even today there has not been a single completed criminal proceeding "consistently carried out" with a "constitutionally correct result" demonstrates the essential drawback of a public sphere that is strongly mobilized, but only weakly institutionalized in terms of the procedural norms of the constitution: the lack of a structural coupling of public deliberation and binding decisions.[102]

In contrast to strong public spheres, the current global public sphere, the (comparatively) stronger public sphere of the European Union, and quite certainly the public spheres of the symbolic-nominalist constitutional states of Russia, Latin America, or India are weak publics. Such publics are by no means insignificant, as the example of the street children of Brazil accurately demonstrates, and are much more than nothing. Their public forums represent (in the widest sense) problem-solving procedures that lead to convictions.[103] Identifying and solving problems—through experimental as well as provocative interventions—is an essential internal dimension of modern democracy in which, as we have seen (chapter 3), it is not a question of an adequate procedure of legitimation for majority *rule*, but of self-legislation—free from domination, according to principle—of *different* individuals, who must solve their social problems *through* democratic self-obligation. As a problem-solving procedure, democracy is oriented not toward a majority, but toward truth, or rather (fallabilistically) toward avoiding errors.[104] In contrast to the standard conservative-liberal version of majority rule restrained by basic rights (see chapter 3), I assume—with Habermas and Dewey—that input legitimation and output legitimation in democracy belong together.[105]

The people are sovereign only as a *learning sovereign* that exposes itself to a risky experimental practice of trial and error and that continually includes those voices that have been excluded, the dissent that has been ignored, and the minorities that have been silenced.[106]

Identitary self-legislation—meaning that the "rule of the ruled" (Möllers) negates all domination—is possible only if it emerges from an open spectrum of *conflicting* and *different* opinions, cultures, subject areas, and interests (input legitimation), and the results of democratic deliberation have "the presumption of rationality" only to the extent to which they exclude no one from the public procedure of discursive will formation (output legitimation).[107] A democratic public sphere must solve its problems through free and open communication, and communication that allows all relevant viewpoints and concerned perspectives to be heard is also—in social practice no different than in science—the best means for solving problems. Democracy is for John Dewey, therefore, an inclusive, expanding network of communicatively structured problem-solving communities.[108] Even the bodies of the executive and the judiciary are, in this sense, democratic problem-solving communities. That is, the government, the administration, and the courts must be able to rely, in their law-bound actions and judgments, on the argumentatively defensible reasons of legislative decisions and not just on the sheer facticity of the prevailing majority. Whether the reasons deliver what they promise must, therefore, be subjected to the test of an appropriately specialized process of application and judgment, and also publicly criticized from this perspective and fed into the "circular process of legitimation" (Müller).[109] As problem-solving procedures, courts and administrations have, therefore, an independent, democratic function, and, although they must, as decision-making procedures, remain subject to the legislative power of the people, they should not break the democratic chain of legitimation.

A democratically structured public sphere remains weak, however, as long as the debates that translate ideological and material conflicts of interest into more or less solvable problems are only loosely coupled with the decision-making procedures that lead to binding decisions. A weak public has, depending on its contingent position and situation, stronger or weaker influence on political, administrative, and judicial decisions. The clerical and literary public sphere of the former East Germany was just as much an example of this as the networks of the global public that spread out from CNN and Amnesty International, sessions of the UN General Assembly, development reports of

the World Bank, and Greenpeace spectacles. Weak publics often have great influence, but not administratively translatable power.[110] The previously mentioned increasing sensitivity to human rights by multinationals is a characteristic example of the moral effectiveness of the weak public sphere. Weak publics can cause a fossilized power, which has lost any backing by "the living power of the people" (Arendt), to collapse. This was no different in the French Revolution (chapter 3) than in the recent revolutions in South Africa and Eastern Europe. But they can also, *because* they are weak, be ignored, passed over, and crushed by a police and military power that can still rely on its own "staffs of enforcement" (Weber): Budapest 1956, Prague 1968, Beijing 1989. But weak publics can also, far below the threshold of revolutionary events and bloody repression, force authoritarian regimes to place certain topics on the agenda, ease restrictions, free dissidents, revise verdicts, and sign international human rights pacts. Conversely, and here there were many examples within the clerical opposition to the former East Germany (Stolpe), they can degenerate into tolerated playing fields, be infiltrated by informers, and be led to collaborate, willingly or unwillingly.

Just as soft law, which fills the "gray area between legally unbinding claim and political claim," between moral appeal and cogent law (*jus cogens*), was optimistically understood as "law in the making," so weak publics can also be viewed as strong publics in the making.[111] The public sphere of discussion (and in the strong case, also the decision-making public sphere) must, however, be distinguished from the public sphere of strong or weak law. After public discussion, a parliament decides public law. Only a strong public sphere, also equipped with sufficient possibilities for making legal claims, can transform unbinding weak law into juridically binding law, or soft law into hard law.[112] Thus, under the growing pressure over decades and centuries of a public sphere gradually becoming stronger and more inclusive, unbinding declarations of human and civil rights, which were as mere constitutional *texts* (Hobbes: "only words") hardly more than ethical demands, were turned into legislatively and judicially elaborated binding law.[113] But even a weak public can exert the pressure of the street by calling for, supporting, and demonstrating in favor of weak law become binding positive law. And it can demand the application, alteration, and concretization of already binding, codified law, as well as take legal action, denounce violations, and drag unknown cases into the light. While the strong public sphere is put in working order by the constitutional law concerning organizations and procedures (popular sovereignty,

separation of powers, hierarchy of authoritative bodies, system of responsibilities, chains of legitimation) so as to transform discussion into law and constitutional *texts* into valid norms of *action,* the weak public depends exclusively on institutionalized basic rights and human rights, for their part, strong or weak, as soft or hard law. The force of basic rights, whether it lies in symbolic appeals or is normatively binding, without (or with deficient) democratic organizational power makes possible many variants of a loose coupling of a weak public and undemocratic legislative power.[114] Only the procedural norms of the constitution transform loose coupling into structural coupling and weak publics into strong publics. If one applies these distinctions and classifications to the "constitution" of global society, then it can be described as a weak public with a core of obligatory valid basic rights (in human rights and international law).

6.4 Strong Human Rights

The fundamental human right to life, the bans on torture and slavery, the prohibition on the use of force, and the right of peoples to self-determination[115] are now valid as legally binding, international customary law (*jus cogens*). Every state is obliged to enforce these laws and rights (*erga omnes* obligation), thereby binding each state to every other state and—in the case of grave human rights violations—even to every human being.[116] Of course, there are still wars, and their focus is shifting dangerously from the fairly comprehensible and verifiable conflict fronts between states and large alliances to a multitude of unclear and difficult-to-monitor ethnic, racial, and religious civil wars and wars of secession. These wars regularly lead to massive violations of human rights by semi-state and non-state actors; one can add to this international terrorism and gang and drug wars, which are only intensified by civil war and often destabilize entire states in Latin America and Africa. But there are no longer any just wars, instead only legal or illegal wars.[117] Any state that disturbs international law and order, or commits massive human rights violations, becomes a criminal state, if not a state of criminals, and can be policed by the UN Security Council, which is authorized to protect international law and human rights.[118] Since the outlawing of war through the Briand-Kellog Pact, war is no longer permitted under international law. Shortly after the pact's ratification in 1929, Gustav Radbruch wrote, "Even the defense against attack, which is still permissible according to the Kellog Pact, is not a defensive *war,*

since in the case of self-defense, right opposes wrong, whereas war requires an equally justified opponent."[119] To be sure, the Briand-Kellog Pact did not prevent World War II, but for the postwar tribunal it provided legal legitimation for the conviction of leading war criminals. In addition, the first worldwide prohibition on war (which achieved standing in 1928 as a result of considerable pressure from a pacifist-leaning European and American public was expanded beyond just a ban on war after the Second World War, with the universal prohibition on the use of force in the UN Charter.[120]

With the replacement of the moral justification for war with the distinction between legal and illegal use of force, the globalization of the legal system reached a stage of completion. There are no longer any areas unregulated by law or any persons without rights. Law, like economy, science, education, and even religion, is everywhere structured individualistically. No one has to fear, as did twelfth- and thirteenth-century European merchants and students, being called to account in a foreign land for the debts of one's compatriots. Just as, despite vast cultural and social differences, various national education systems resemble each other in their structure, the same basic legal institutions exist around the world: "There is legislation, there is the difference between penal law and private law, there is property, there are contracts, there are legal proceedings, etc."[121] In all regions of the world, "legal questions" can be distinguished from "non-legal questions," and therefore these questions can be translated from one legal system into another with minor transfer costs.[122] In short, nowhere in the world should someone still expect, under normal circumstances, "to be treated like a stranger with no rights."[123] According to Luhmann, jurists who deny this commit a pragmatic self-contradiction in then having "the courage" to fly abroad without worrying about their legal protection.[124] There is corrupt and less corrupt law, there are normatively valid and merely symbolic ("nominal") constitutions, but there is no doubt that "global society, even without central legislation and jurisdiction, has a legal order."[125]

The decentralized, polycontextual legal order, however, lacks consistent normative implementation. Some may receive justice, but others remain excluded. When the Security Council condemns a violation of the ban on the use of force, enforcement of the sanction remains—as in ancient Roman civil law—uncertain. It only provides legal permission for an independent exercise of power by those who are strong enough to enforce their own rights or the rights of those they want to help. Others go away empty-handed. This is, in fact, a great improvement compared to the extra-legal self-redress of a unilaterally

declared just war. But just as in the ancient Roman law of the praetor, the Security Council can only determine the legality of and conditions for an intervention; carrying it out remains dependent upon the existence of an independent power and the varying willingness to call on it. As in ancient Rome, this promotes hegemonic powers and mafia-like networks of client relations—a global variant of class justice that corresponds only too well to the picture of a deeply divided global society of wealthy centers and impoverished peripheries. Hegemonic law lacks an indispensable precondition of democratic legitimacy: equality in the equal treatment of like cases.

Important changes within international law, such as the successive expansion of the grounds for intervention found in Articles 39 and 42 of the UN Charter, are not instituted by the quasi-parliamentary General Assembly, in which "one state, one vote" applies. Rather, they increasingly stem from the resolutions of the Security Council, which is dominated by a few large nuclear powers who, at least in the case of a unanimous decision, can guarantee an occasional monopoly of force. In recent decades, in addition to wars of aggression, the Security Council has interpreted severe human-rights violations, failed states, and, most recently, global terrorism as being a "threat to the peace, breach of the peace, or act of aggression" (Article 39, UN Charter) or a threat to "international peace and security" (Article 42, UN Charter). When the Security Council identifies such threats, it can, as an extreme sanction, authorize the international community to take all "necessary" military "measures" that serve the "restoration" of peace and security. But the resolutions concerning these and other measures, each of which creates new law, are passed by the Security Council acting not as a legally bound executive authority, but as an absolute potentate. Since the end of the Cold War, the authority to legislate and interpret international and human-rights law has shifted from the semi-democratic, at least egalitarian General Assembly to the hegemonic executive authority of the Security Council.[126] To a large extent, this condemns the General Assembly to insignificance. It has been marginalized by the Security Council, diminishing its role not only as a decision-making body, but also as an important forum for an emerging *strong* global public; simply recall that the General Assembly can pass binding law, or recall the spectacular scene of Khrushchev. It is no longer even a matter for discussion that, according to all criteria of equal liberties, it "is perverse to assume that the Great Powers had *eo ipso* a right to threaten acts of mass destruction."[127] The decision-making ability and, with it, the power of the United Nations to

impose *effective* measures against violators of international law have undoubtedly grown since 1989. But this comes at the expense of its democratic structure and its considerable effectiveness in terms of social and educational policy. Operating in secret, the "police" (the Security Council) have forced their way into the publicly accessible "temple" of the General Assembly and abrogated the (however weak) parliamentary control over the power to establish order through law. Instead of peace founded on law [*Rechtsfrieden*], there is only pacification and order. Instead of the "quiet calm of the temple," there is "deathly silence."[128] Security unbound by law is tyranny.

Under the influence of the recent terrorist attack against the United States, this may be changing again; as the only remaining hegemonic power, the United States is obviously dependent in the fight against terrorism on broad international support and especially on that of NATO. But the NATO treaty explicitly and closely ties every declaration of defensive war to the UN Charter and the respective decisions of the United Nations. Viewed optimistically, the worst form of mass terror to date could, of all things, have set in motion a new phase of juridification of international and transnational relations, entirely against the intention of its conspirators.

These are, for the moment, however, only speculations, and they concern only a partial, though important aspect of the process of bringing global society under human rights, which even under the best of circumstances will not overcome [*aufheben*] its negative dialectic. It is precisely the growing relevance of human rights, so welcome in itself, that threatens—and here we run into a general problem with global law—to undermine the distinction between law and morality. Why? Because while human rights are indeed taking on positive form globally as hard law, they are, unlike "basic rights in the national context," "restricted in their possible meanings" neither by "a unified background of interpretation" nor—and this is the decisive point for democratic theory—"by the effect of the legislator on the shape of basic rights."[129] The "ability to differentiate between law and morality, which is institutionally guaranteed by formalization" in the case of a normatively effective national constitution, is thus undermined.[130] Because there is no strong public sphere that is organized through the procedural norms of a constitution and therefore structurally coupled with procedures for the elaboration of human rights, this leads to a highly ambivalent re-moralization of global law. A re-moralization like this is ambivalent because it threatens the gain in complexity achieved by functional differentiation, which above all consists in the ability to comply with law out of

nonmoral motives and the normatively cold enforceability of the law. The unambiguous humanitarian gain of human-rights intervention threatens to disappear again in the weaknesses of the global public sphere. This is a highly dialectical danger, but the de-nationalization of law was still one of the most important levers for the globalization of a solidarity based on human rights.

The globalization of law de-nationalizes a considerable segment of basic rights, (re)doubles their validity transnationally, and creates (e.g., in the form of "third generation rights") new, regionally (European, African, etc.) or globally valid rights.[131] As a result, citizenship and legal personhood are separated from each other.[132] Today even stateless persons have effective rights as legal persons, and the Convention on the Reduction of Statelessness from August 30, 1961, obliges the signatories to automatically naturalize persons born stateless and to facilitate the naturalization of stateless people generally. Hannah Arendt's famous objection to human rights—they have no cash value for stateless persons—is becoming invalid. The human rights that take positive form transnationally and internationally

- in Articles 1, 13, 55, 62, and 73 of the UN Charter (1945);
- in the Universal Declaration of Human Rights (1948);
- in the United Nations Human Rights Covenants on Civil and Political Rights and on Economic, Social, and Cultural Rights (1966);
- in numerous Agreements, Conventions, and Protocols on individual questions (such as statelessness, Apartheid, race discrimination, the status of refugees, trade in human beings and exploitation of prostitutes, political rights of women, rights of the child, etc.); and
- in each comprehensive regional convention (Africa, Europe, American/Inter-American)

have an effect, in the form of the weak public sphere, upon individual states, whether or not they each actually ratify the agreements and translate them into domestic law. Even in countries like China, human rights, strengthened by new forms of dissemination like the Internet, have an effect that should not be underestimated.[133] According to an analysis by *The Human Rights Guide,* in 1986 human rights were respected, on average, in 55 percent of all the states in the world; in 1991, the percentage was at least 62 percent—"an improvement so far unknown in history."[134]

The effectiveness and reliability of human-rights protection still essentially depends, however, on the states and their constitutional reality. Even if they are, as *ius cogens,* transnationally obligatory law, and *erga omnes,* all states are mutually obliged to enforce them, reliable enjoyment of rights can only be guaranteed by states. After the Second World War, basic rights in every Western country were expanded in terms of human rights, such that today even most communicative freedoms may no longer be restricted to their own citizens.[135] While in the Weimar Constitution it was explicitly only "all Germans" who were equal before the law (Article 109, Section I, Weimar Constitution), the German Basic Law commits all legislation to the legal equality of *all human beings* (Article 3, Section 1, German Basic Law).[136] Of the sixteen EU member states only six (Belgium, Denmark, Greece, Italy, Luxemburg, and Portugal) explicitly restrict basic communicative rights to their own citizens, but even in these countries, the general freedom of action, together with ordinary statutes and international human rights agreements, protect the freedoms of opinion, expression, assembly, and association of all non-citizens.[137] In general, the protection of human rights is more strongly formalized in domestic law, legally and judicially concretized, and much more clearly formulated in its universal character, than it was during the first half of the twentieth century. Currently, constitutions such as the German Basic Law explicitly bind themselves to internationally valid human rights and international law, to international legal treaties, and even to international organizations such as the EC/EU (e.g., Articles 23, 24, German Basic Law), such that in the case of a violation, national law comes directly into play. Even the largest state power in the world, the United States, which only reluctantly submits to international law, cannot permanently afford to simply ignore unfavorable judgments or temporary injunctions by the International Court of Justice in The Hague, as they did, for example, in the case of Nicaragua or that of LaGrand. For in other cases, as in that of the former Yugoslav President Milosevic, they themselves still have an elementary interest in the enforcement of the decisions of the International Court. The integration of states into the international system, which has always existed in principle, is today extensive and inescapable, except at the cost of self-destruction.[138]

Violations of the rules, even the numerous, often massive human rights violations all over the world, negatively confirm the rule, since in the end there is no law without violations of the law. There is no legal without the illegal. Everywhere and in nearly all cases (naturally there are always a number of

unknown cases), the distinction between legal and illegal is juridically applicable, and the function of law is thereby fulfilled and the global system is closed. The social function of law does not, however—as Emile Durkheim had already keenly observed—consist in eliminating the illegal, but rather in generating certainty of expectations through the dependable distinction between legal and illegal, and in increasing the opportunities for fighting very many more conflicts with a simultaneously declining willingness to resort to violence.[139] Law makes it possible to live with conflicts instead of dying in them, and permits the expansion of freedom, which stands and falls with the freedom *to* conflict. And law, which makes such freedom possible, is in turn dependent on its exercise. Without conflict and contradiction in *and* toward the law, the law would become functionless and would, like an immune system lacking viruses and bacteria, die of inactivity and would no longer be present when needed. Because global society has an active immune system, its potential for self-organization is infinitely larger than it was at the time of European imperialism, which largely had to make do without juridification and therefore could productively use only a few conflicts and always maintained a higher willingness to resort to violence. Because law makes possible more freedom *through* more division [*Entzweiung*], global society requires an autonomous legal order.

From Machiavelli to Hegel, the song of freedom is for modern writers a song of division. And with that, they also distance themselves from the ancient idea of solidarity as harmonious civic friendship (see chapter 1). Ancient Rome, according to Machiavelli, had only the "agitations" to thank for all the "laws" and "institutions" that were "to the advantage of public liberty."[140] Rome was, Machiavelli argues, more complex and stronger than Sparta or Venice because it opened its gates to strangers and did not banish the struggle of classes and parties to outside its walls.[141] On the other hand, where "equilibrium" is strictly observed and the "middle way" is clearly followed, freedom dwindles. Only where the division is dialectically institutionalized, "without middle" (Adorno), through "laws and institutions," does freedom thrive.[142] But institutionalized it must be, for the medium of such freedom within conflict, which "anarchically unleashes" (Habermas) ever more disputes and subjects for dispute, is law, which for this reason Hegel called the "existence of free will."[143] Therefore, there is no reason to expect that bringing fundamentalist, social, and political conflicts under a constitution and concurrently juridifying them at levels of national and global domestic policy will result in

the disappearance of these conflicts in some "overlapping consensus" (Rawls); rather, we can expect more conflict, but less violence. In this sense, constitutions are "consensual bases for dissension."[144]

The sense of democratic freedom as consensus on constitutional procedures lies precisely in the unleashing of dissent without violence, which Habermas once called the "unleashing of the productive force of communication." The democratic sense of constitutional consensus permits no gag rules (Holmes), no self-restriction, and no privatization of conflicts through communal and familial bonds (overlapping consensus).[145] Constitutionalized dissension is the having and resuming of an argument that cannot be laid to rest by a decision. It is also, *after* the votes and resolutions, *after* the judgments and orders concerning the rightness of the resolutions, the truth of the judgments, the context-sensitivity and generalizability of forms of life, the legitimacy of the interests, the convincing power of the norms and values, and the fairness of the compromises—a matter of, in short, the universal validity, always contestable all over again from the perspective of each person, of human rights, principles of organization, legal principles, and statutes.[146] For this, however, *all* of the freedom of the constitution is necessary; indeed, the dependable application of civil rights and liberties requires their legal elaboration by the strong public sphere of democratic self-organization.

If one starts from this standard, oriented toward the French Revolution, then global society does not have a constitution. To be sure, positive basic rights are an indispensable element of codified or uncodified, written or unwritten constitutions. If one looks only at human rights and international law, then one can in fact, as Allan Rosas and Daniel Thürer do, speak of an already far advanced "global constitutional project," and even of an existing "global constitutional law."[147] But as remarkable and historically unexpected as the progress of human rights over the last fifty years has been, it has realized only *half* of the freedom of a democratic constitution and could thereby threaten the whole in the end. While human rights are becoming stronger, democracy is becoming weaker. Each and every person everywhere has rights and enjoys at least a minimal protection of these rights. But at the same time, the political right of citizens to the legislative, parliamentary elaboration of these rights, which are really their *own*, is declining. This damages—as we have seen—the constitutional formalization that is necessary in order to be able to distinguish the rule of law from the rule of the moral imperative. As a citizen, one would be more secure in knowing that international law is not about "infinite

justice," but instead about the legally secured restoration of a legal peace [*Rechtsfrieden*] that has been disrupted.

Human rights have by now been forced to give their legal blessing to massive military attacks (and, in view of horrible scenarios of civil wars and warlords of the twenty-first century, will no doubt also in the future). And the weaknesses in the democratic legitimation of human rights are causing a global postponement of the national and supranational separation of powers in favor of the independent and united apparatuses of state and government—in the carefully considered "self-interest of the state" (Offe) and in growing coalitions and organizations.[148] The weak public sphere, which can affect the evolution of human rights and the global legal system only through the medium of moral influence, has to leave the creation, modification, elaboration, and implementation of these rights to the springing up of many different sources of law that are not (sufficiently) democratically legitimate. Global law, provided it is more than the law of private contracts,[149] is not passed, changed, interpreted, or developed by a global people, and also not (at least not as it reads in the Preamble to the UN Charter) by the "peoples of the United Nations," but instead by governments, hegemonic powers, international organizations, courts, jurists, multinational concerns, international law firms, and so forth. With the growing mass of global regulations, this situation is weakening the strong public spheres of those nation-states in which they (still) exist. The more irrefutable and inescapable the need becomes for the political organization of a new world domestic policy that encroaches on and strongly intervenes within states, the greater becomes the need for a political legitimation of that policy: "If the de-nationalization of politics is not also to cause a de-democratization of power, then the necessity of a democratization of postnational organizations arises."[150] This necessity is also the sole legal norm by which democratic constitutions, at least the German Basic Law, are bound to the dissolution of the state. The democratic and human-rights substance of the constitution *must not* shrink with de-nationalization.[151]

Every weakening of the strong public sphere of national democracies is, first of all, to the advantage of the thicker and thicker interweaving of economy and law, and thereby shifts the balance of the "separation of powers" set up between "solidarity" and "money" (Habermas) in favor of the medium of money. The weakening of the public sphere and parliaments, second, strengthens the (united) executive powers at the expense of the national legislature and shifts the weight of the "separation of powers" between "solidarity"

and administrative "power" (Habermas) in favor of the medium of power. From that follow questions regarding the "constitution" of global society.

6.5 Constitutional Questions

The dialectical interaction between a global public sphere, which is weak with regard to decision making, and legally (relatively) strong basic and human rights can be described as endangering the existing strong public sphere of democratic civil societies. This danger is, as we have seen, only acute as long as there are no transnational equivalents of democratic self-organization. In fact there are no such equivalents, and there are certainly "political, economic, and social interests and proceedings that shun democratic justification," which means the danger remains acute and there is no reason to speak well of the negative dialectic of globalization.[152] Without democracy *within, between,* and *beyond* the world of sovereign states, there will be no global solidarity, and a solution to both of the inclusion problems that follow every modernizing path like a long shadow is hardly conceivable. It thus becomes questionable whether the prospects for bringing global society under a constitution can be identified, which go beyond the merely partial freedom of a global community with basic rights and a weak public sphere. A first, hopeful step toward addressing this problem would be to extend the description of the weak public sphere to include a view of it as a strong public in the making.

This is no empty hope; rather, it is grounded in the concept of the public sphere itself. The public sphere is never something static; rather, the most flexible element of politics is the communicative power that is not to be found in the formal decision making that juridifies and transforms communicative power into administrative power; its real locus is in the "spontaneous flow of communication unsubverted by power" of a "public sphere that is not geared toward decision making but toward discovery and problem-solving and that is in this sense *non-organized*."[153] Communicative power is basically—with Marx and Arendt—the power to change the world through political action.[154] Any public action can be like that: a provocative violation of a rule, a popular revolt, a leaflet, a declaration, a parliamentary speech, a happening, or a teach-in. The potential of communicative power is just as productive as it is destructive. Both Arendt and Habermas emphasize its danger. Public actions can always turn into repression and violence.[155] At the same time, however, the non-instrumental, disorganized anarchic element of the public sphere is a

particularly unique "medium of *unrestricted* communication" (Habermas), which can also be open to anything that can be said and expressed in words and deeds. It was the medium for every struggle for emancipation from the Exodus to the French Revolution. Why? Because the power of public communication is ultimately not available to the power holders, who would like to have as many "staffs of enforcement" (Weber) as possible at their disposal.

Public power "is really possessed by no one," writes Arendt, since it "springs up between men when they act together and vanishes the moment they disperse."[156] Communicative political action is—like all discursive activities, aesthetic provocations, scientific discoveries, or convincing arguments—"unexpected," "incalculable,"and "unpredictable": an "event" that—as Arendt intensifies it existentially—breaks into "the world" with "infinite improbability."[157] The words of Jesus, occasionally quoted by Arendt in this context—"for they know not what they do" (Luke 23:34)—do indeed reveal, as she says, "an extraordinary understanding of freedom, and particularly of the power inherent in human freedom."[158] The thrust of the critique of domination in this insight—referring there and then to the forgiving, to the opening of a closed past—arises from the "unpredictability of human action"; for it is also unpredictable for the ruler and the head of the secret police, or for the manager of administrative power. Not only do those who act "in concert" (Burke) not know what they do—for better and for worse—but the rulers and their secret police also do not know what is being done by those who, in acting, "actualize" a power that is nonviolent, and is precisely for that reason so dangerous to any despotism.[159] Words and deeds link themselves up to the power of "public life" (Arendt), therefore, only when they orient themselves not toward instrumental opportunities for enforcement (Weber), but toward communicative "validity claims" (Habermas): "where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities."[160]

Tyrants and the totalitarian machinery of power can of course always suppress and destroy the power of public speech and action, but they can never make their way into it and rule it from the inside. This is also true of the instrumental politics of established popular parties, European committees, and international organizations. In order to publicly assert instrumental interests, even the most experienced and politically savvy career politicians must

also "promote their interests in a language that can mobilize convincing reasons."[161] Because it is really only achieved through an orientation to validity claims, discursively "fluid" communicative power certainly *can* be rhetorically "manipulated," but it cannot be "publicly bought" or "publicly blackmailed." Even rhetorical manipulation cannot exceed certain limits. The limit consists in the possibility of saying no, the possibility of a convincing critique of its persuasiveness. Public opinion "cannot be 'manufactured' as one pleases."[162] The "manufacturing" (Arendt) would destroy it, since it cannot be steered like autopoetically closed functional systems through media and codes, which are foreign to the type of acting in concert that is oriented to understanding.[163] But wherever bureaucratically administered power destroys the communicative power of discursive acceptance, in the long run it destroys along with it the living substrate of its own political institutions: "All political institutions are manifestations and materializations of power; they petrify and decay as soon as the living power of the people ceases to uphold them."[164] That also applies unreservedly to the European Union and the political system of global society.

However, the global communication community is, first of all, not just an ideal community of discourse that is already *epistemically* constituted in the smallest academic institution through the orientation to universal truth claims and validity claims. Second, it is also not just a legal community that is already *legally* constituted through locally raised, global legal claims. Third, and not least of all, it is also a real community that is *technologically* constituted by communicative accessibility.[165] To put it plainly, without writing, there is no urban republic; without printing, no modern state constitution; and without electronic media, no transnational human and cosmopolitan rights—they would be more like appeals, claims, "songs" and "ceremonial declarations" (Luhmann), only words (Hobbes).[166] Only when the technical media of global communication are available does the ideal communication community begin to change into the real communication community of truly *all* human beings. Human rights, democracy, and global solidarity only come out from the "specter" to the "historical movement" when, as Marx wrote in the middle of the nineteenth century, the "steamship," the "electric telegraph," and the "railways" are used for communication.[167]

The global positivization of human rights and the growing resonance of a weak global public sphere have really only been made possible by the technological revolutions in electronic media and air transportation since the middle of the twentieth century. The number of passengers on transatlantic flights has

risen rapidly since the 1970s: from 200 million in 1975 to 500 million in 1993.[168] Even if the vastly enlarged "*radius* of attention" by the political public sphere still guarantees no enlargement of actual attention, it is still true that never before have human-rights violations been reported worldwide as quickly and comprehensively as in recent decades.[169] And never before were they so frequently, firmly, and effectively protested and intervened in as a result.

The indignation at human-rights violations in geographically distant and culturally foreign parts of the world would have had no consequences and would not have even materialized at all without the often cynical, selective, and cold gaze of the mass media. That is the reason why it has become so inconvenient for states and groups to be placed on the blacklist of Amnesty International, since that can lead to consumer boycott and investment embargos. The conservative cultural criticism of the mass media, which gets particularly worked up about television, is counteracted not only by the positive effects of human rights, but also by the egalitarianization of information without which those positive effects would not even be half as significant. In principle, every human being, "in any social class whatsoever" can, "at any spot in the OECD-world, have nearly all information at his or her disposal."[170] While education and information remain subject to the differentiation of center (OECD-World) and periphery (Third World), communicative accessibility through electronic media breaks through even those boundaries. Even the surplus populations, who are excluded from all function-specific communications, are—with relatively few exceptions (mostly in Africa)—connected to the global communication network by the TV antennae on the roofs of the *favelas*. The system of mass communication is the only functional system that really excludes no one. Without it, the unfortunate would not even represent a potential for disruption. The ideal communication community, which Charles Sanders Peirce outlined in the ninenteeth century according to the model of a counterfactual scientific community, has its actual correlate today in the accessibility of every single human being via communications technology.[171]

Of course, up to now the global communication community has been (almost) fully realized only in the *status negativus* of a passive television viewer. And not every new communication technology increases the degree of accessibility. The Internet even deepens the rift between those who have access to its hardware and software and the have-nots, those who are still isolated from a

vast portion of the information network. In Africa there are even large cities that must occasionally make do without radio, television, and electricity, and that at night are literally in the dark.[172] In addition, there are fundamentalist regimes in which television is forbidden. But those are regionally limited exceptions. At any rate, there would be hardly any sign of a global civil society, which expands in critical distance to the world of global players, if there were no electronic media of dissemination with their computer-supported possibilities of networking. So far, the "global dissemination of new technologies of information and communication" has not, as Michael Zürn unsentimentally emphasizes, strengthened "the state in opposition to the individual, as predicted in George Orwell's *1984*, but instead the individual in opposition to the state."[173] They are making it possible for a new border-transcending civil society of publicly acting experts, journalists, individual protesters, NGOs, and a spectrum of social movements in many shimmering colors to open closed discourses, to drag suppressed issues into the light, to make alternatives visible, and to effectively outrage the public about the situation of the have-nots and the excluded.[174]

The merely partial "global constitutional law" (Daniel Thürer), reduced to rights with a weak public sphere, and which is developing between hard law and soft law, between moral claim and legal obligation, can support itself on a growing "global professional class" (Margaritta Bertilson) of lawyers, doctors, managers, and scientists, who are no longer exclusively employed by large banks, international law firms, and military apparatuses and have begun to overcome their own "foolishly compartmentalized narrowing of vision" (Gunther Teubner), the "blind spot of auto-professionalism" (Paul Streeten).[175] The emergence of the "global professional class" is not a product of chance, nor is it a mere superstructural phenomena, but is grounded in the dualistic structure of a global society in which the globalization of the purposive-rational [*zweckrational*] functional media of administrative power and monetary capital are accompanied and impeded by the simultaneous globalization of the communicative media of understanding for the differentiated "value spheres" (Weber), "professions" (Parsons), and "cultures of experts" (Habermas) in law, science, education, medicine, art, and the mass media.[176] In the electronic sphere (Internet) there are, as Saskia Sassen emphasizes, now two main actors, the business sector and civil society, and they push against each other more and more frequently.[177] With every innovation in communication technology, the influence of the weak public sphere grows.

Civil society already operates today against the broad lifeworld background of a global "human rights culture" (Rorty).[178] But this culture may not be reduced—as Rorty does, following in Dewey's footsteps—to the pedagogical-rhetorical expansion of the liberal, American university culture. To be sure, the significance of the educational and scientific systems for the emergence of a transnational civil society can hardly be underestimated. In combination with the market economy, the educational system not only reinforces the exclusionary effects of selection (see chapter 4), but also is—in a dialectical countermove—the midwife for a postconventional and reflexive level of universalist value orientations and moral sensitivity. That regularly appears to be the case wherever a considerable percentage of an age cohort pass through the areas of the educational system that are close to the sciences and are exposed to the permissive and cosmopolitan social milieu of colleges and universities.[179] The student unrest of the 1960s was the first global protest movement that followed on the heels of the globalization of an expansive education policy and its universalist values.[180]

However, the new culture of human rights is not just about education, value generalization, and "philanthropy, but . . . *law* [*Recht*]."[181] To the new forms of "transnational resistance" correspond the "new forms of transnational legal formation" established since 1945, through which the cultural superstructure is linked with the social base.[182] In the process, the *human*-rights culture forms the "normative common ground" on which the "different legal cultures" of the global society reach an agreement *below* the threshold of legislative elaboration and legal concretization.[183] Without legislative elaboration and legal concretization, the "fabric that is gradually becoming more solid out of positive law" sinks, as we have seen, into a gray area between morality and law.[184] But for a civil society that, because of the constitutional weaknesses of its public sphere, considers itself limited to the *politics of the appeal*, this rather disastrous legal ambiguity of human rights (as far as equality, determinacy, legal doctrine, enforceability, unambiguity, and so forth, are concerned) as something between morality and law is a nearly ideal breeding ground. The language of NGOs, which opposes the official language of nation-states and their government representatives, is the *still* moral, but *already* juridical "language of human rights"; as such it remains intelligible for both the public clientele of NGOs *as* moral and for the administered ears of the career politician *as* legal.[185] In their function as a placeholder for democratic legitimation (see chapter 3), global human rights constitute a strong public-sphere-in-the-

making precisely on the basis of their—deeply ambivalent—moral-legal double character.[186]

This is "not nothing" (Hegel). In the past decade, "thousands of NGOs, citizens' organizations, rights initiatives as well as environmental initiatives" have been successfully "vitalizing concrete theme-related democracy at local, national, and transnational levels."[187] The numbers, knowledge, and influence of actors in civil society has increased enormously thanks to inexpensive communication over the Internet. Organizations of jurists and human-rights organizations, unbound from the state, played an essential part in the conventions for the International Criminal Court (ICC) and the outlawing of land mines. At the United Nations, particularly in the United Nations Development Program (UNDP), NGOs can now obtain an advisory role, and the statements of Human Rights Watch and Amnesty International, particularly effective with the public, have for some time been supplements, as "shadow reports," to the far less credible, official state reports of the Geneva Human Rights Commission.

The successful public outcry generated against the murder of many thousands of street children in Brazil (discussed earlier) was achieved through the cooperation of courageous Brazilian journalists, liberation theologians and the Catholic Church, Amnesty International, UNICEF activists, and the international print and television media. Amnesty International played a key role, and the foreign television and press reports, together with newly created local movements such as the National Movement of Street Boys and Girls, succeeded in mobilizing the Brazilian public sphere, getting tourists to stay away from Rio, initiating the formation of parliamentary committees of inquiry, and so forth.[188] The perpetrators certainly profited from the corrupt law of their country, but the positivized legal *text* of a merely nominal-symbolic constitution "can [also] be taken at its word."[189] The unpunished mass murder, for which the state shared responsibility, contradicts the text of the Brazilian constitution and Brazilian criminal law. The attempt by professional jurists to push through test cases in this and other cases, supported by a broad public sphere, is not hopeless, and wherever it succeeds, the weak public sphere, *at least at that point,* becomes, strong. A weak public sphere-with-rights, which links global, regional, and national public spheres, is gradually becoming stronger with the growing number of such focused campaigns. A "radical reformism" (Habermas) can cling to the letter of the law in order to breath life into it step by step: "Normative texts, particularly constitutions, can be

established with insincere intentions, but ultimately not with impunity. They can strike back."[190]

And they are striking back. In the run-up to the 1999 Seattle Conference of the World Trade Organization (WTO), a rainbow coalition of hundreds of extremely heterogeneous groups in the United States succeeded in forcing the Democratic Party and the Clinton administration to put labor standards and environmental issues on the agenda. The themes of the protestors—debt relief for developing countries, the fight against AIDS, global climate, and so forth—have even been taken up in the regular agendas of the WTO, G8/G7, and other meetings, not as the main topics, but nonetheless as supplementary topics. Before the Prague Conference of the World Bank and the International Monetary Fund in 2000, there was, for the first time, a full meeting of the World Bank President James Wolfensohn with NGOs, at which problems of corruption, the control of multinational corporations, and regional development projects were discussed. The protests and violent conflicts in Seattle and at subsequent international conferences have not only united the scattered street fighters of every country in global days of chaos, but also mobilized a multitude of individual activists with very serious democratic aims. The majority of the Seattle protestors were, according to Michael Byers, "merely educated, informed people concerned about some of the effects of economic globalization." Many of them were "retired professionals with time on their hands and access to the Internet." Because protest actions like those in Seattle or those against Shell at Brent Spar and in Nigeria at least forced multinational corporations and economically dominant international organizations "to take other interests into account," Byers sees in them a kind of "wake-up call, not just for governments, corporations and the WTO, but for individuals everywhere, to exercise constructively this fragile yet powerful new form of democracy that has so remarkably appeared."[191] Of course, not all NGOs have purely democratic aims. After all, the International Chamber of Commerce, the National Rifle Association, the Ku Klux Klan, the Mafia, and other globally operating gangster and terrorist groups are also NGOs. Moreover, their internal structure—as with Greenpeace—is often not very democratic. But NGOs are also neither constitutionally representative bodies nor organs of a state power, but are foremost the organizational core of a strong public-in-the-making.

It appears as if a worldwide people, made up of the addressees of law, is beginning to express itself for the first time as a globally "*active*" and "*legitimat-*

ing people" (represented by freely associated organizations): "the vanguard of a slowly developing transnational 'people.'"[192] Of course, this "vanguard" is itself democratically legitimated only in a weak sense. It is elected by no one and "represents" the global 'people' only in a *counterfactual* and *advocatory* sense: "through their engagement and through the openness of discussion."[193] Engagement and openness are the sole criteria for democratic legitimation that exist in a weak public sphere-with-rights:

1. Through their *engagement,* NGOs, self-help groups, action committees, grassroots organizations, churches, international unions, feminists, single-issue movements, citizens' protests, scholarly associations, professional networks, Doctors Without Borders, human rights organizations, Greenpeace, Amnesty, the Red Cross, and so forth fulfill the same constitutional function within a weak public sphere-with-rights that political parties already have in a strong public sphere-with-decision-making authority. They "participate in forming the will of the people" (Article 21, Paragraph 1, Clause 1, German Basic Law). The more that the parties "have entrenched themselves as oligarchies" in today's party system and that transnational capital and international governmental organizations establish decision-making oligarchies (nearly) without democratic legitimation within the global society, the stronger is the partial democratic legitimation of the noncapitalist NGOs; "partial legitimation" should be understood here as analogous to Article 21 of the German Basic Law.[194]

2. The second, quasi-constitutional criteria of legitimation of a social and political core of articulation and growing "protest avant-garde," which arises from the varied forms of communicative execution of power, is its *inclusive openness*. When they begin to exclude anybody, to suppress voices, to concoct organizations of specialists, then they have already excluded themselves and begun a degenerating, self-destructive "structural transformation of the public sphere" (Habermas), as one often observes, unfortunately, with social movements and in revolutions.[195] The legitimation of the new civil-society culture of global opposition is weak, but not without verifiable criteria: "*Voi G8, Noi 6,000,000,000*" (You are G8, we are six billion). As long as the strong public-in-the-making must confine itself to the politics of appeal, to "permanent unrest," to "*obstructing actual (and undemocratic) global power* [*Herrschaft*]," the openness of the discussion, together with the sincerity of the engagement, is a necessary and sufficient criteria for *speaking* (in an advocatory way) even in the name of those who cannot or do not (yet) want to express themselves.[196]

The strengths of the weak public sphere (with rights, but without decision-making authority) lie without a doubt precisely in the fact that they oppose the globalization of markets and the official political arenas—the "imperatives of political administration" and the "profit principle of the market"—with "a third, civil and democratic moment."[197] Gunther Teubner offers the interesting proposal that the Habermasian distinction between system and lifeworld be used to provide a solution for the constitutional problems of global society. Teubner distinguishes the systemic, purposive-rational "organizational sphere" (formal organization, steering by profits and administrative power) from the communicative lifeworld's "spontaneous sphere" (autonomous regimes of research, education, the Internet, the mass media, law, art, health systems, etc.).[198] The communicative "spontaneous sphere" is, on the one hand, threatened by constant "colonization" by local, state, and global bureaucratic and economic organizations and system imperatives; on the other hand—and this is a communicative gain from globalization—precisely as a result of globalization, it has been released not only from being "embedded" (Polanyi, Scharpf) within the political and economic spheres of nation-states, *but also* from the state's "paternalistic decision-making" (Teubner).[199]

How can this gain in freedom be put into constitutional form? Through *basic rights,* which are certainly conceived as rights against the state, but do not merely impose binding law on the administrative power of the state and the globalized (or regionalized: European, etc.) political powers or draw the limits of legislative interference; for they should protect the isolated individual as well—in the sense of the doctrine of third-party effect [*Drittwirkung*] of the German Federal Constitutional Court—against the "imperatives of the . . . profit-principle" and from (globally networked) capital and its organizational power.[200] In addition, the protection of basic rights must not be confined to the rights of the solitary (world) citizen, but must guarantee over and above that the communicative integrity of "spontaneous spheres." Basic rights, therefore, should be understood not only as individual rights, but also as "discourse rights."[201] The protection of basic rights, therefore, also applies to

1. the legal guarantee of the public self-understanding of a *public* within civil society, and it demands, in particular

2. the protection of the highly modern and highly specialized *sources* of its communicative power, which flow into it from the many internally rational-

ized "autonomous regimes" of understanding: scientific aesthetic, legal, therapeutic, etc.

This idea of a juridification of global society in terms of basic rights—put in place by negative rights against the state [*Abwehrrechte*], but still post-liberal (along with the German Federal Constitutional Court, Habermas, and Luhmann) in the sense of expanding to include private economic encroachments of freedom and the protection of communicative infrastructures—could be introduced at various levels (and connected to existing ones—locally, nationally, regionally, and globally segmented; functionally or sectorally differentiated) but does not for the time being extend beyond the constitutional structure of a weak public-sphere-with-rights.

In order to institutionally secure the protection of basic rights necessary for preserving and expanding globalization's gains in freedom (which Teubner can enumerate for all anti-globalization fundamentalists in positive terms), what is required, as we have seen, is their democratically legitimated legislative elaboration. The communicative power of civil society must be convertible into legally bound, administrative power, without excluding the addressees of law. It requires, therefore, as Teubner writes, a post-state, global, regional, or sectoral equivalent not only of the "basic-rights element" of democratic constitutions, but also of their "procedural and organizational norms." Only then can the "mutual supervision between a spontaneous sphere and an organizational sphere" be normatively safeguarded, without whose "increase" the "democratic potential" of a public self-understanding cannot be unleashed, "increased," or become effective.[202] But every increase and intensification of the mutual control of the organizational sphere and spontaneous sphere—from obligatory and enforceable law on the one hand, to democratic deliberation and decision making on the other, without which there is no "normative constitution" (Loewenstein)—presupposes the structural coupling of problem-solving procedures and decision-making procedures, of the public sphere and popular sovereignty: a democratic "structuring of law" (Kelsen) that can be legitimated only from the bottom up, by a strong public sphere.

As long as there is none, the only hope that remains is the gradual "obstruction" (Müller) of undemocratic global authority [*Herrschaft*] through a politics of appeal, whose social struggles are principally concerned with the global, regional, national, and sectoral realization of a strong public sphere. Appeal

and struggle are not hopeless since, in fighting to get the process of elaborating the global legal code to include the egalitarian participation and effective representation of *all* of the addressees of global law, they can support themselves by using the placeholder of democratic autonomy: the already legalized framework of human rights within global society. The results of this struggle cannot be predicted, but its goal is the completion of the constitutional project of 1789, which consists in the revolutionary correction of a blind constitutional evolution through the self-constitutionalization of democratic solidarity.

7

And Europe?

People no longer put up with the theater of politics, just as Protestants could no longer put up with the theater of religion. One yearns for true politics—as they once yearned for true religion.

Pierre Bourdieu, "Politik ist entpolitisiert"

Normative texts, particularly constitutions, can be established with insincere intentions, but ultimately not with impunity. They can strike back.

Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie* VI

It is Europe that transnational systems of economy (with a fully integrated labor market and single currency, central bank, etc.), law (with fully differentiated European law, its own jurisdiction, etc.), and politics (with its own authoritative agencies, differentiated bureaucracy, etc.) have developed the furthest. In many areas, Europe is already more strongly integrated than the United States, but unlike the United States, Europe is not a federal state. Therefore, the prospects and risks involved in de-nationalizing law and politics can be analyzed particularly well using the European example. In contrast to the global legal order, with its disorganized strong rights and weak public sphere, Europe has a complete "constitution" of its own that includes basic rights as well as organizational and procedural norms, in the form of the treaties that established the European Community. Nevertheless, the European public sphere is weak. It seems, paradoxically, to be even more weakly developed than the global public sphere. While Europe is constitutionally organized, it is not particularly democratic. The already quite advanced status of European constitution making is simultaneously increasing both the

chance for a transition from a weak to a very strong European public sphere, and the danger of constitutionally solidifying the de-democratization of Europe and its nations.

Today there is a separate European system of government,[1] and the aim of an "ever closer union among the peoples of Europe"[2] and not just a union of states,[3] invoked repeatedly in the treaties of Rome, Maastricht, and Amsterdam, has in fact led to a "more and more intensive *Europeanization of the nation-state*"[4] and also of its *peoples*.[5] National and European law have incorporated each other and "meshed" into a third type of "common-European constitutional law."[6] Europe's nation-states long ago fused into an "unprecedented entity" with its own sovereign authority, the exercise of which—in contrast to traditional international law—no longer requires mediation by a state.[7] The "ruling authority" that the European Community exercises inside the nation-states does not depend on "the constitutional law of those states."[8] European law establishes a "legal cycle" that feeds off "its own sources" and is subject to "its own conditions of validity."[9] It is "autonomous and supranational."[10] In cases of conflict, "national law must yield, not (EU) Community law."[11] In the hierarchical construction of the law, which, in defiance of all the sociological prophecies of doom, is still perfectly recognizable here, European primary law stands at the top of the hierarchy of norms, and the primary and secondary Community law has a priority of application over national law. It is not merely the "normative *text*" that is in the contracts (European primary law) and codified by the judgments of the European Court of Justice and realized within national law, but rather an actually effective "legal *norm*" that is observed day in and day out.[12] In that respect, there is no doubt that the European primary law established by the contracts (TEU, TEC, TECSC, among others) is a complete functional equivalent of a state constitution.[13] The agreements guarantee the certainty of law, the rule of law [*Rechtstaatlichkeit*], liberal, social, and participatory basic rights and—for the first time—legally commit the European Union in Article 6, Paragraph 1, of the Treaty on European Union (TEU) to the principle of democracy: "The Union rests on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."[14] And it is obligated (as Article 6, Paragraph 4, adds) to provide "the means necessary" to realize these principles and "to attain its objectives." It is organizationally capable of doing that as well, owing to the material arrangement of its authorities and agencies.[15] Finally, the European legal community is, not unlike the national legal communities of its members, autopoetically closed by a highest (constitutional) court.

The European Union's functional equivalent of a constitution certainly has considerable flaws compared to national constitutions (discrimination of residents, potential deportation of EU citizens out of individual countries, democratically insufficient rights to participation, privileging of the executive and the state apparatus, etc.), but the European Union's constitution is a highly dynamic, constantly changing institution. One of its unprecedented features is that it is not amended or changed reactively like a state constitution that adapts to a changing reality, but instead, the European constitutional reality is actively produced, shaped, and reflexively codified step by step through (deliberative) amending and (latent) change. Europe's constitution is a continual process of (planned and unplanned) constitution making, a permanent "constitution in the making" (Ipsen), and yet by no means soft law.[16] It reflects "the *current degree of integration* of the European community in *constitutional-structural terms*."[17] Of course, this also means that its power to condition the process through which society reacts to itself in the medium of law is significantly weaker than in the stronger, conditionally programmed constitutions of the member states. To put it plainly, it is less protected against non-egalitarian and manipulative interventions and encroachments than typical national constitutions. Because Europe, since the founding of the European Coal and Steel Community in 1951, has been in an increasingly significant process of constitution making, the constitutional character of the EC and EU treaties could also only be gradually identified as such *and* recognized by the member states and the rest of the world of states only since the end of the 1980s.[18] Only since a ruling in 1986 has the European Court of Justice called the treaties "the basic constitutional charter" of the European Community, and meanwhile the continuously growing industry of experts in European law speak only of the "European constitution" when referring to the primary law.[19] Even Germany's Federal Constitutional Court, which regards with suspicion any constitutional claims and challenges that appear to be on a par with or even above the German constitution, called the older Treaty of the European Economic Community "the constitution, so to speak, of this Community," as early as 1967.[20]

If international and commercial lawyers ascribe a constitution even to the global legal order or the partial legal orders like GATT/WTO (with at least partial law, as we saw in chapter 6) that have become detached from the state,[21] then such is surely the case for Europe as well. With that, the period "of the unambiguous relation of law and state," which in retrospect was

rather short, is drawing to a close; and not just in Europe, although it is particularly pronounced there.[22] It was only in the middle of the nineteenth century that the European state, whose aging form Hegel had already conceptualized in terms of a philosophy of right at the beginning of the nineteenth century, became a centralized source of law and a power that could ascribe to itself—quite believably—complete authority for law making and implementation. That was the substantive reality in the doctrine of the "impermeability" of the "person of the state" (see chapter 5), whose external obligations could only be translated internally *by it alone,* through a state order to apply the law [*Rechtsanwendungsbefehl*].[23] But today it is evident that a "growing multitude of productive and not always coordinated law-making authorities who produce international law, but also the growing need for self-regulation by private corporations," stands in the way of the "monistic derivation of all law from the one source of validity in the state."[24] The state no longer exists in that aging form in which Hegel had already described it in 1820—and therefore, still before its great age—which naturally does not mean that it would have disappeared (as we saw in chapter 5). Although the European Court of Justice developed the noted doctrines of direct effect and of the priority of European law over national law as early as 1963 and 1964, respectively, it was still only the lower national courts of each member state that applied European law in thousands of cases and could (with the help of the doctrines of priority and direct effect, as well as opinions from the High Court in Luxembourg) protect themselves against appeals by higher national courts. And the implementation of the lower court judgments was, unlike those of the Luxembourg High Court, guaranteed from the start by the state's monopoly of force.[25]

However, the (partial) separation of law from the state does not have to mean that democratic popular sovereignty, which in any case never had the monistic state as a "constitutional presupposition" (Herbert Krüger), *must* perish together with monistic state sovereignty.[26] Normatively, there is no "state that is distinct from the constitutional order."[27] The constitutional model of the democratic state always permits only as much state as "the constitution brings into existence."[28] The concepts of constitution and democracy are not legally bound to the state. Despite the separation of the constitution from the state, democracy and human rights must not perish. A state like the Federal Republic of Germany presupposes the principle of democracy, but democracy does not presuppose the state.[29] Therefore, the European Union's "constitu-

tion in the making" (Ipsen) should not be measured "according to the state-model" (Gert Nicolaysen)[30] but rather by the principle of democracy.

The evolution of the European treaties into the functional equivalent of a constitution can be credited with quite significant gains in civil rights. But it is precisely at this point that the gaps in a merely functional constitutional evolution *without* revolution appear (see chapter 4).[31] The EU citizenship of the Maastricht EU treaty, which was elaborated with basic rights in the Amsterdam EC treaty, constitutionalized a civic order with its own law. The direct effect of European law means that this law, because it binds every European citizen independent of his respective national citizenship, also gives him or her the right "to prevail upon" the authorities and courts of the member states "to observe the treaties of the European Community."[32] The European trend goes continuously from partial market citizen to unspecified EU citizen and from economically restricted jurisdiction to the increasingly comprehensive jurisdiction of the European Community ("comprehensive jurisdiction [*Allzuständigkeit*]", see chapter 6). With the introduction of EU citizenship in the treaties of Maastricht and Amsterdam, "the legal subjects of the Community include not only the member states, but also their citizens."[33] Union citizenship "complements national citizenship" (Article 17, Paragraph 1, TEC) and provides a "double legitimation" to the independent "legal personality" of the European Community (Article 281, TEC), which stands with the legitimation mediated by national citizenship and national parliaments as a second, direct legitimation of European law.[34] Union citizens have not only their own, negative liberties, but also European voting rights (TEC, Article 19), the right to diplomatic protection by the Union (TEC, Article 20), the right to petition the European Parliament (TEC, Article 21), and under certain conditions, equal claims to the social benefits of member countries.[35] The democratic principle in the Maastricht Treaty, formally the Treaty on European Union (Article 6, Paragraph 1, TEU), is co-original with the continual "development" (Article 22, TEC) of the unmediated status of EU citizenship and ultimately refers to this as the future popular sovereign. In this way, the withdrawal of individual states from the European Union, which the treaties of Rome, Maastricht, and Amsterdam do not provide for anyway (Article 51, TEU; Article 312), also becomes a problem from the perspective of civil rights.

Even if a single country were to vote to withdraw from the treaties, this decision would be inadmissible, because—regardless of their respective

national citizenship—the citizens of the European Union have rights within the entire territory of the European Union, and thus, in all of the member countries. For example, if Denmark left the European Community after a referendum, then not only do the Danes lose their European rights, but the rights of all other citizens of the European Union would be affected and restricted. That applies not only to the economically relevant basic rights, such as the right to live and work anywhere in Europe, but beyond those to certain social benefits, ecological rights, and rights to political participation, which (in the communal self-administration) depend only on the permanent residence of the EU citizen. This is especially true of the universal principle of equality. Based on it, the European Court of Justice has not only standardized product and consumer norms, consumer protection, and so forth,[36] and prohibited gender-specific discrimination in the workplace across Europe,[37] but has also established the right of any EU citizen to have an abortion within the EU countries in which it is permitted. So Irish citizens may not be prevented by court orders in Catholic Ireland (where having an abortion is still prosecuted) from traveling to England or Holland for such an operation.[38] The existence of subjective rights between the European Community and its citizens prohibits the dissolution of the Community "even against the will of all member states."[39] Only the united citizenry of the European Union as the people of the European Community could carry out such a dissolution.

At this point, we run into a fundamental problem with the European legal order, because a fully developed, "active" European people—which could carry out a sovereign act like that of the dissolution of the European Union, or (less fictitious and more relevant) make even a single one of the constant constitutional changes directly or through its legislative body (parliament), or autonomously make even one part of the secondary law—does not exist. To be sure, the legally binding "requirements" of the European treaties (Article 1, Paragraphs 2 and 3, TEU) imply, just as much as the "considerations" of its many preambles,

> that the peoples of the member states participate in the process of European integration not only within their politically constituted state and by means of their state organizations, *but also directly, without the interposing of state bodies* . . . Thus, the member states should not by themselves be considered as participants in the process of European integration. The peoples of the member states must be considered, not just in and through the member states but in another form in addition to that, as subjects of the process of European integration.[40]

But in the European Parliament, which is really a parliament of peoples (Article 189, Clause 1, TEC), the peoples are insufficiently integrated and, moreover, are represented unequally; and despite growing, considerable responsibilities, they do not have the parliamentary rights that would be sufficient to recognize them as subjects with equal rights on a par with states.

The European "constitution in the making" is changing (to a large extent) without the participation of a European people or (at least) its "ever more closely" integrated peoples (Preamble and Article 1, Paragraph 2, TEU; Preamble, TEC; TECSC). Determining the aims for the closer integration of peoples on the basis of the principle of democracy, as well as the legally prescribed development of the rights of EU-citizens, can only be done by a European people. Only such a people, which asserts the common will of the citizens of Europe (with respect to the "national identities" of the member states; Article 6, Paragraph 3, TEU), could make the de facto constitution of the treaties into a legitimate constitution of the citizens. In the European Union, however, the treaty-ratifying states and not the citizens of the European Union or their direct representative are still the sole constitutional legislators.[41] The states and their governments are the authorized "masters of the constitution," not the peoples or even less the citizens of the European Union. In this situation, however, the citizens already form a "rudimentary" European people that is at least *in the making* or "emerging."[42]

The concept of a people consisting of EU citizens is a legal-normative concept constructed by the European Community's treaties. In the heterogeneous European context, EU citizenship can *and* may—for democratic reasons—only correspond to a highly abstract, inclusive legal concept of a people. A more substantial people is ruled out from the start. At any rate, it is as little presupposed in the principle of democracy (as we saw in chapter 3) as the state is. Strictly speaking, a more substantial concept of a people and democratic self-determination are even ruled out, for the principle of democracy calls for (as Article 20, Paragraph 2, German Basic Law does) the principled inclusion and participation of all (existentially affected) addressees of the law.[43] A more exclusive, ethnic, religious, or in any way closed concept of a people would exclude, together with the legally underintegrated segments of the population, the possibility of a democratic "identity of the rulers and the ruled" (chapter 3).[44] All of the elements of the material concept of a people (within a state or the European Union) follow from the intersection of the principles of identity

and difference (chapter 3): from the self-binding of individuals with equal rights. In order to form a people, the citizens must

1. ascribe to themselves all the necessary *rights;*

2. form a *community of communication* (whether based on histories, destinies, languages, religions, or cultures)—otherwise there can be no public deliberation;

3. *want* to found and continue a legal community (as a constituent or constituted power);

4. transfer this into real *action* (through sufficient participation that includes voting and running for office[45]), whether such action be motivated ethnically, morally, wickedly, from constitutional patriotism, universalistically, particularistically, egoistically, or altruistically; and, finally,

5. not exclude anyone who is *affected* by the possible coercive measures of the legal community from the community of equal citizens.

Accordingly, Angela Augustin defines the legal concept of the *demos* as an inclusive community of the affected, connected by communication, will, and action, who reciprocally ascribe one another participatory rights in the form of positive law.[46] In particular, in framing the constitution, "the exclusion of possible constituent powers" must be avoided.[47] For the European Union, that would mean that even permanent residents, who do not belong to a member state, would have to acquire the status of EU citizen.[48] In terms of civil rights, the new thing about the European Union is not just that it is not a state, but that it is already a mega-national political community, which has the (not unutopian) task of realizing for a second time the old Enlightenment contractualism idea (Rousseau, Kant) of the French Revolution—of bringing together strangers "under laws of right [*Rechtsgesetzen*] and common political procedures and actions"—but this time beyond the borders of the nation-state.[49] A democratic solidarity among strangers can exist only if "the European people"—no different than those who declared themselves citizens in 1789—creates itself in the process of permanent constitution making (and a process of continual learning). "In framing a constitution," in making and applying laws, through elections and referendums, in public debates and demonstrations, and "in the daily plebiscite," the people of a democratic civil society—as a learning sovereign—generates itself "each time . . . anew" *as* a (legal) "subject of accountability."[50] Democratic procedures are not instruments that a naturally or historically fixed collective subject could have at its disposal, but are actually

no different than principles of self-generation, which "also create the subject through their application."[51]

This normative conception of a people, which is required by the principle of democracy, must be just as sharply distinguished from every de facto, empirical-ethnic concept of a people—which Kant qualified in his Doctrine of Right (quite disparagingly) as "tribes" [*Völkerschaften*][52]—as from every other de facto social prerequisite of a functioning democracy.[53] Even if these prerequisites (European/Europe-wide associations, unions, parties, newspapers, broadcasters, social movements, etc.) are still quite far from being fulfilled, there is even now a European people *in the making*, which the European Community's treaties have already constituted. It is only *in the making* because, although it has rights, they are not sufficient rights for democratic self-binding, and because even though it is a (practically deficient) communication community and certainly a community of the affected, it can be characterized only very rudimentarily as a (legally self-influencing) community of will and action. In Müller's terminology, there is a community of the affected: a European *people as addressee* that, although relatively well-equipped with rights, still is not a sufficiently self-determining *active* people and not a sufficiently representative *legitimating* people. Whether the "in the making" or "becoming" turns into a "being," or at least remains progressively in the making and does not just rapidly die out or fade away, is a question that only the citizens of Europe *and* its states can answer. Unless the clearly audible articulation of the will of the citizens is converted into constitutional law, it cannot be done.[54] In the last instance, EU citizenship and a European people cannot be administratively manufactured, decreed by international treaties, or created by the glorious, Luhmannian evolution of the constitution. The personal objects of this evolution must produce themselves as subjects of political autonomy in applying democratic procedures. They must politically desire the European legal community, and if they do not want it, it will be destroyed by chronic deficiencies in legitimation, and the whole thing will end in a new "iron cage" (Weber).

The gaps between the fundamental recognition of the full, active status of EU citizenship and thereby the formal existence of a European people, on the one hand, and the inadequate legal development and actual guarantee of voting rights, on the other, can only be closed through a political process that is initiated by the "non-organized public sphere" (Habermas), driven by rousing speeches and protests, pushed from below, supported by a wide public debate that penetrates deeply into the consciousness of the masses, includes the

periphery—as well as recently arriving states such as Poland, the only country in Eastern Europe, after all, that liberated itself through a genuine revolution—and moves beyond division, argument, and conflict(s).[55] Despite the (extraordinary) number of referendums by individual states in favor of the European treaties,[56] the citizens of the member states (the peoples of Europe) and their parliaments stand in a highly mediated relation to those who actually decide on the primary law of the treaties. For the real decision-making authority lies with the united executive powers and with the quiet work of a legal evolution that has long since shifted the weight of the structural coupling of law from politics to the economy.[57]

The parliaments of the member states are deprived of deliberative power in their ability to initiate, give advice on, and decide upon legislation. Their public role is becoming increasingly weaker and is reduced to acclamation or veto, while the freedom to create legislation lies completely with the governments, gathered in the (EU) Council of Ministers and the European Commission, which is barely democratically legitimated and has the exclusive right to initiate legislation.[58] The bond of solidarity, which in modern democracy is identical with the bond of democratic legitimation (see chapter 3), is becoming frayed and brittle. To be sure, the Union has a people in the form of European Union citizenship, but it is at least as far away from the formation of a general, legislative will as the people in the German Empire in the decades after its founding in 1871.[59] Although the citizens were long ago recognized as subjects of integration in *status activus,* the *status activus* of the people of the Union has been up to now only nominal-symbolic constitutional law: legal *text,* but no concretized legal *norm.*[60] The citizens of Europe have their rights, but they did not give them to themselves. So the solidarity of European legal subjects remains asymmetrical, secured from above, and hierarchically structured. Their legal subjectivity still essentially consists in the status of *addressee* of the law: "in the *effect* of the law."[61] That is certainly "not nothing" (Hegel), and it is very important for the realization of private and communicative freedoms, for making the most of opportunities to participate, and for enforcing one's rights through legal action and bringing cases to court. "But," as Weiler puts it, "you could create rights and afford judicial remedies to slaves. The ability to go to court to enjoy a right bestowed on you by the pleasure of others does not emancipate you, does not make you a citizen. Long before women and Jews were made citizens they enjoyed direct effect."[62] The rule of law without self-legislation is not well-ordered freedom, but well-

ordered servitude.[63] This also weakens the principle of democracy in the member states. It creates a democratic gap: "The principle of democracy is valid within the member states, but their decision-making powers are dwindling; the European Community gains in decision-making powers, but the principle of democracy is only weakly developed there."[64] The well-ordered servitude of the European Union, accounting for at least half of all legal regulations—many authors estimate around 70 percent[65]—weighs heavily on the political autonomy of the national citizenries.

What's to be done? Does Europe need a constitution? From a functional point of view, as we have seen, that must be denied, since Europe has a complete constitutional equivalent in the Treaties. But the European public sphere is weak, and that in turn weakens the strong public spheres of the member countries. The democratic deficit takes positive legal form within organizational and procedural norms and is made clear by the structure of the international treaties, which impose a different type of constitution on the European Community than that of a national constitution. The source of the functional constitution of Europe is the conclusion of a contract by member states, not the legislative power of the people.[66] The internal basis for the validity of primary and secondary European law is the treaty among governments. In principle, there is nothing undemocratic about that—assuming a *Pax-Westphalian* international legal order—but only *so long as* it is a matter of an international agreement and not of a transnational organization. As masters of international treaties, the governments are subordinate—as in so-called foreign policy—to the control of their parliaments: parliamentary control of the government means fully shared decision-making powers.[67] The substantial, legislative fashioning of *all* policies is a matter for the parliamentary representatives of the people, who are *responsible* "for everything that is done in the state," regardless of whether it is a question of "domestic policy" or "foreign policies" and their treaties.[68] Only when that is guaranteed do the policies of the government (for instance, in the central legislative body of the European Community, the Council of Ministers) satisfy the minimum requirements of democratic determination (set by the German Basic Law). In two basic respects, however, that has not been guaranteed within European politics for a long time. First, within important spheres of "domestic" decision making, "direct effect" (also in positive constitutional law in Article 249, Clause 2, TEC), together with the application priority of European administrative law, is superceding the jointly fashioned, parliamentary control over "external or

foreign" politics by governments. For parliaments are no longer required to participate in the "internal" implementation of "external" obligations; the latter can even be enforced against their legislative wills. In this respect, justice has been dispensed through a "de-parliamentarization of higher decisions."[69] And second, the legislatively authoritative bodies are the united governments of Europe, while the legislative authority of the peoples, who are growing "ever closer" together, are essentially restricted to the veto rights of their parliaments. And the people of the unmediated community of EU citizens is—in the *status activus*—strictly speaking, not involved at all.[70] Turning the classic ordering of authority on its head in this manner threatens to complete the trend of de-parliamentization.

Since the EU Treaty of Maastricht, however, this gap between the authoritative powers dominated by the executive (and the economy) and their democratic legitimation is no longer a gulf between an existing, functional economic constitution in the treaties and a nonexistent, normative constitution of political democracy. Rather, the contradiction between two principles of legitimation (between the *constitution-making power of the European people* and the *conclusion of a treaty by member countries*) has, as we have seen, migrated along with the principle of democracy (Article 6, Paragraph 1, TEU) and EU citizenship (Article 17, Paragraph 1, TEC) *into the treaties*. Correctly described, it concerns the internal contradiction between an already democratic, *nominal-symbolic* constitution and a still *normatively effective,* undemocratic (and de-democratizing in its effects) constitution. The missing *"revolutionary act"* of a *"re-founding of the European constitution"* is already codified as a legal *text,* as an empty shell of undeveloped legality.[71] What is missing, however, in order to fill the outer shell with life, is a "revolutionary force" that would, in a "revolutionary situation," demand, decide, proclaim, and declare that the text be presented to the people or its constitution-making body for a vote.[72]

If the quiet, bureaucratic evolution of the European constitution is *not* supplemented through public action and the passionate interests of an EU citizenry capable of articulation and intervention, and brought back within the horizon of its common will, such that a 'treaty' or 'constitution' can be viewed by the citizens—at least counterfactually—as something fought for and chosen in a struggle by *them,* and thus worth protecting, then the consequences of a democratically "summoned 'constitutionalization' could, in retrospect, prove to be an evolutionary step toward the autonomy of the European technocracy."[73] An administrative constitutionalization like that one, not really

chosen by the citizens, would (even if it provided the European Parliament with all the rights of sovereignty, replaced the silly "Eurobarometer" opinion polls with a serious European referendum, established a genuine bicameral system, etc.) in the end still only institutionalize the de-democratization of Europe and its nation-states. For without a truly inclusive public sphere, activated by *all* the groups and classes of society, the constitution would bring no more than the already existing structures of over-integration and under-integration, the trends toward exclusion of larger segments of the population, the dominance of the most solvent economic interests, as well as the Haiders and Berlusconis that would assert themselves more strongly through a further division of the decision-making power in favor of the European Union.[74]

Therefore, the debate over a constitution that has finally begun is quite important because it puts the following question, which has been persistently and deliberately suppressed—for structural reasons—by self-interested career politicians, back on the agenda: *Why* is a union of Europe needed at all? But the debate must not revolve abstractly around the constitutional question; it must instead concretely demonstrate, using the issues that affect our lives (structural unemployment; the new dangers to civil rights from Europeanization and globalization; the return of civil wars to Europe), that there are no alternatives to the democratization of the transnational legal order. If Europe's political classes, in the glow of the fire from global terrorism, conjure up an "ever closer" integration of "the police, the intelligence services, and the prosecutors" (Gerhard Schröder), then the "peoples of Europe" will be confronted with a sudden deficit in the classic rights against the state, which could compel them into a countermovement against the active integration of European Union citizenship.

The immense opportunity for a democratically bold constitutionalization rests precisely on the fact that it can do without the revolutionary act of a completely new refounding of Europe. For Europe's constitutional revolution, which really only declared, proclaimed, and positivized the nominal legal *text,* already took place *without* revolutionary action. The "basis for legitimation" of the European constitution no longer has to be "exchanged" and replaced by another.[75] The principle of democracy is already positively established as hard law in the treaties (Article 6, Paragraph 1, TEU); it is, moreover, explicitly recognized as a "universal legal principle in the member countries for the European Union,"[76] and is at least proclaimed as soft law in the new Charter of Fundamental Rights. It "only" needs to be implemented,

elaborated, and given concrete form. This does not require street battles or storming the administrative offices in Brussels, the Parliament in Strasbourg, or the High Court in Luxembourg, but a *radical* reformism that takes the legal *texts* "at their word" (Müller), in an attempt to mold the empty shell of undeveloped legality into a public mouthpiece for the coming democracy.

Notes

Translator's Introduction

1. This point, along with the comparison to equality and liberty and the discussion of Rawls, are developed in Véronique Munoz Dardé, "Fraternity and Justice," in *Solidarity*, ed. Kurt Bayertz (Dordrecht: Kluwer, 1999).

2. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 105.

3. Ibid. While Rawls has since modified his theory of justice to some extent, the basic idea of the difference principle is still captured by the original formulation: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect, are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored" (303).

4. Ibid., 106.

5. Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), 184. Taylor is summarizing a line of argument developed by Michael Sandel. See Michael J. Sandel, *Liberalism and the Limits of Justice,* 2d ed. (Cambridge: Cambridge University Press, 1998).

6. See Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge: Cambridge University Press, 2003), esp. 74–92, and Bernard Yack, "The Myth of the Civic Nation," in *Theorizing Nationalism,* ed. Ronald Beiner (Albany, N.Y.: SUNY Press, 1999).

7. Yael Tamir, *Liberal Nationalism* (Princeton, N.J.: Princeton University Press, 1993); Taylor, "Cross-Purposes: The Liberal-Communitarian Debate"; Charles Taylor, "Nationalism and Modernity," in *The Morality of Nationalism,* ed. Robert McKim and Jeff McMahan (New York: Oxford University Press, 1997); Jürgen Habermas, "Citizenship and National Identity," in *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996). See also David Miller, *On Nationality* (New York: Oxford University Press, 1995), and Robert McKim and Jeff McMahon, eds., *The Morality of Nationalism* (New York: Oxford University Press, 1997). A good, concise overview of nationalism is provided by Craig Calhoun, *Nationalism* (Minneapolis: University of Minnesota Press, 1997).

8. On this point, see also Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership*.

9. Taylor, "Cross-Purposes: The Liberal-Communitarian Debate," 188.

10. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, Mass.: Harvard University Press, 1996), 274; see also 25–28.

11. Philip Pettit, "Reworking Sandel's Republicanism," *Journal of Philosophy* (1998): 84.

12. Sandel, *Democracy's Discontent,* 25–26. See also the chapter on republicanism in David Held, *Models of Democracy,* 2d ed. (Palo Alto, Calif.: Stanford University Press, 1996), 36–69. He distinguishes between "developmental republicanism," which stresses the intrinsic values of political participation and is associated with ancient Greece and Rousseau, and "protective republicanism," which underscores the instrumental value of political participation and is associated with Rome and Machiavelli.

13. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy,* trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), and Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory,* ed. Pablo De Greiff (Cambridge, Mass.: MIT Press, 1998).

14. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 31, 32.

15. Jean-Jacques Rousseau, "Letters Written from the Mountain, Eighth Letter," *in Letter to Beaumont, Letters Written from the Mountain, and Related Writings. The Collected Writings of Rousseau,* Vol. 9, ed. C. Kelly and J. Bush (Hanover, N.H. University Press of New England, 2001), 261.

16. Ibid., 261–262.

17. Jean-Jacques Rousseau, "On the Social Contract," in *The Basic Political Writings* (Indianapolis, Ind.: Hackett, 1987), Bk. II, Ch. 11, p. 170.

18. Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), ix–x.

19. See Sandel, *Democracy's Discontent*, Ch. 6, "Free Labor versus Wage Labor," 168–200.

20. John Dewey, *The Public and Its Problems* (Athens, Ohio: Swallow Press, 1927), 207–208; the quoted phrase is attributed to Samuel J. Tilden. On deliberative democracy, see Habermas, *Between Facts and Norms*, esp. Chs. 7–8; James Bohman, *Public Deliberation* (Cambridge, Mass.: MIT Press, 1996); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass.: Harvard University Press, 1996); Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002). See also the articles collected in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass.: MIT Press, 1997), and in John Elster, ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998).

21. Jürgen Habermas attempts to combine these two perspectives in a dual conception of society as "lifeworld" and "system" in Jürgen Habermas, *The Theory of Communicative Action,* trans. Thomas McCarthy (Boston: Beacon Press, 1984), and more recently in his analysis of law and democracy (see Habermas, *Between Facts and Norms*). For a critical account of the former, see Thomas McCarthy, "Complexity and Democracy: The Seducements of Systems Theory," in *Ideals and Illusions* (Cambridge, Mass.: MIT Press, 1991).

22. Emile Durkheim, *The Division of Labor in Society*, trans. W. D. Halls (New York: Free Press, 1984); Karl Marx, *Capital: A Critique of Political Economy, Volume One,* trans. Ben Fowkes (Middlesex: Penguin, 1976); Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York: Routledge, 1992); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957, 2001); Talcott Parsons, *The System of Modern Societies* (Englewood Cliffs, N.J.: Prentice Hall, 1971); Niklas Luhmann, *The Differentiation of Society,* trans. Stephen Holmes and Charles Larmore (New York: Columbia University Press, 1982); Niklas Luhmann, *Social Systems,* trans. John Bednarz Jr. with Dirk Baecker (Palo Alto, Calif.: Stanford University Press, 1995). For another account of evolution and revolution, put in terms of "acultural" and "cultural" theories of modernity, see Charles Taylor, "Two Theories of Modernity," *Public Culture* 11, no. 1 (1999): 153–174.

23. Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (New York: Palgrave, 2003), 9. The first chapter of this book provides a good, concise overview of Luhmann's social theory.

24. See John Rawls, *Justice as Fairness: A Restatement,* ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), 148ff.

25. See, for instance, David Held and Anthony McGrew, *Global Transformations: Politics, Economics, and Culture* (Stanford, Calif.: Stanford University Press, 1999), and David Held and Anthony McGrew, *The Global Transformations Reader* (Cambridge: Polity Press, 2000).

26. Jürgen Habermas and Jacques Derrida, "February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe," *Constellations* 10, no. 3 (2003): 291.

27. Patrick E. Tyler, "Threats and Responses: A New Power in the Streets," *The New York Times,* February 17, 2003, 1.

28. For helpful comments on this introduction, I would like to thank Thomas McCarthy, Pablo Gilabert, Todd Hedrick, and Hauke Brunkhorst; and for a constructive discussion of some of the themes developed here, I thank Keith Topper. For their generous assistance with questions of translation, I am grateful to Thomas McCarthy; Jörg Schaub, who also helped track down a number of quotes in German texts; Christoph Möllers for assistance with legal terminology; and especially Hauke Brunkhorst, who answered numerous questions throughout the process of translation and read drafts of each chapter. I thank Cicely Ott for proofreading and indexing. Finally, I thank Ana Garcia for reading drafts of every chapter and help with the bibliography; without her editing, the translation would have been far less readable.

Introduction On the Concept of Solidarity

1. See Ferdinand Brunot, *Histoire de la langue française des origines à 1900* (Paris: Armand Colin, 1937), 669, 745; see also Rainer Zoll, *Was ist Solidarität heute?* (Frankfurt: Suhrkamp, 2000), 20–21; Andreas Wildt, "Solidarität," in *Historisches Wörterbuch der Philosophie, Bd. 9* (Darmstadt: Wiss. Buchges., 1995), 1005.

2. See Ulrich K. Preuß, "Solidarität unter Bedingungen von Vielfalt," in *Sicherheit, Vielfalt, Solidarität. Ein neues Paradigma des Verfassungsrechts? Symposium zum 65. Geburtstag Erhard Denningers,* ed. Johannes Bizer and Hans-Joachim Koch (Baden-Baden: Nomos, 1998), 129; Hasso Hofmann, "Vielfalt, Sicherheit und Solidarität statt Freiheit, Gleichheit, Brüderlichkeit?," in *Sicherheit, Vielfalt, Solidarität. Ein neues Paradigma des Verfassungsrechts? Symposium zum 65. Geburtstag Erhard*

Denningers, ed. Johannes Bizer and Hans-Joachim Koch (Baden-Baden: Nomos, 1998), 111ff. Hasso Hofmann, *Einführung in die Rechts-und Staatsphilosophie* (Darmstadt: Wiss. Buchges., 2000), 193ff.; Karl Otto Hondrich and Claudia Koch-Arzberger, *Solidarität in der modernen Gesellschaft* (Frankfurt: Fischer, 1992), 12ff., 114ff.

3. See Wolfgang Schieder, "Brüderlichkeit," in *Geschichtliche Grundbegriffe, Bd. 1*, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta), 552–581, here 565ff.; Durkheim, *The Division of Labor in Society;* Dieter Grimm, *Solidarität als Rechtsprinzip. Die Rechts-und Staatslehre Léon Duguits in ihrer Zeit* (Frankfurt: Athenäum, 1973), 38ff.; Erhard Denninger, *Menschenrechte und Grundgesetz* (Weinheim: Beltz, 1994), 23ff.

4. Wildt, "Solidarität," 1004–1005.

5. Hofmann, *Einführung in die Rechts-und Staatsphilosophie,* 193.

6. Article 35 confirms this in the sharpest possible form by prescribing "insurrection" as the "most sacred of rights and the most indispensable of duties"—*le plus sacré des droits et le plus indispensable des devoirs*—of the "people" against a "government" that "violates the rights of the people." See Frank Maloy Anderson, ed., *The Constitutions and Other Select Documents Illustrative of the History of France 1789–1901* (Minneapolis: H. W. Wilson, 1904), 174; see also Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1973), 116–117; Ulrich K. Preuß, "Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates," in *Sicherheit und Freiheit. Zur Ethik des Wohlfahrtsstaates,* ed. Christoph Sachße and H. Tristram Engelhardt (Frankfurt: Suhrkamp, 1990), 116–117.

7. Rousseau, "On the Social Contract," Bk. 3, Ch. 14, 197.

8. Schieder, "Brüderlichkeit," 573.

9. Preuß, "Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates," 131.

10. Preuß, "Solidarität unter Bedingungen von Vielfalt," 129.

11. On the latter, see also Hannah Arendt, "What Is Freedom?," *Between Past and Future* (New York: Viking Press, 1961), 143–171; Hannah Arendt, *On Revolution* (New York: Penguin, 1965), 141ff.; Hannah Arendt, *The Life of the Mind, Vol. 2: Willing* (New York: Harcourt Brace Jovanovich), 195ff.

12. As it is in Hegel, in the only place in his work in which he uses the word *solidarity*, found in the notes from the lectures on the philosophy of right in winter semester 1819–1820. To "join in solidaristic union" [*sich "solidarisch zu verbinden"*] is the "right" of the "individual," if his freedom in civil society is to "have not only possibility, but also reality." See G. W. F. Hegel, *Philosophie des Rechts, Transcription of the Lectures of 1819–1820*, ed. Dieter Henrich (Frankfurt: Suhrkamp, 1983), 203–204.

13. See Franz-Xaver Kaufmann, "Sozialpolitik zwischen Gemeinwohl und Solidarität," in *Gemeinwohl und Gemeinsinn: Rhetoriken und Perspektiven Sozialmoralischer Orientierung,* ed. Herfried Münkler and Karsten Fischer (Berlin: Akademie, 2002), 19–54.

14. Preuß, "Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates," 117. See also Ernst-Wolfgang Böckenförde, "Demokratie als Verfassungsprinzip," in *Staat, Verfassung, Demokratie,* ed. Ernst-Wolfgang Böckenförde (Frankfurt:

Suhrkamp, 1991), 327f; and Joshua Cohen and Charles Sables, "Directly-Deliberative Polyarchy," *European Law Journal* 3, no. 4 (1997): 318–319.

15. Preuß, "Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates," 115, 119–120, 131.

16. Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), xiii.

17. The only influential *idea* that appeared as a serious rival was Marxism, but that was, in its Western and social-democratic variations, only an *interpretation* of the ideas of 1789. Even in Marx, the "last hinge, on which man turns" (Hegel) is freedom. And the Russian Revolution was only a pathological variant, which in its political thinking, moreover, remained utterly and madly fixated on the precedent of the great French Revolution and avoiding its "mistakes." Is there anything else? The "ideas of 1914" are thankfully long since forgotten, the different ideas of Europe are as pale as the bones of Charlemagne. Even recently much discussed constitutional concepts of security, diversity, and solidarity hardly provide an alternative to freedom, equality, and fraternity. On the latter, see the carefully revisionist observations of Erhard Denninger, "Vielfalt, Sicherheit, und Solidarität: Ein neues Paradigma für Verfassungsgebung und Menschenrechtsentwicklung?," in *Menschenrechte und Grundgesetz* (Weinheim: Beltz, 1994), 13–72, which are based jurisprudentially primarily on the constitutional texts of the new federal states (of the former East Germany) and theoretically on Rorty and multiculturalism. More skeptical in comparison is Jürgen Habermas, "Remarks on Erhard Denninger's Triad of Diversity, Security, and Solidarity," *Constellations* 7, no. 4 (2000): 522–528; Hofmann, "Vielfalt, Sicherheit und Solidarität statt Freiheit, Gleichheit, Brüderlichkeit?", Preuß, "Solidarität unter Bedingungen von Vielfalt."

18. Hofmann, "Vielfalt, Sicherheit und Solidarität statt Freiheit, Gleichheit, Brüderlichkeit?," 193.

19. See Theodor W. Adorno, *Negative Dialectics*, trans. E. B. Ashton (New York: Seabury, 1973), 286; on Adorno's understanding of solidarity, see also Christoph Menke, *Spiegelungen der Gleichheit* (Berlin: Akademie, 2000), 49–50; Dewey, *The Public and Its Problems;* Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 119, 122, 125, 128f, 132; Richard Rorty, *Contingency, Irony, Solidarity* (Cambridge: Cambridge University Press, 1989), 192, 195–196.

20. Preuß, "Solidarität unter Bedingungen von Vielfalt," 130; see also Manfred Prisching, "Solidarität in der Moderne—zu den Varianten eines gesellschaftlichen Koordinationsmechanismus," *Journal für Sozialforschung* 3, no. 4 (1992): 267–281; Hauke Brunkhorst, *Solidarität unter Fremden* (Frankfurt: Fischer, 1997), 71ff.

21. Niklas Luhmann, "Durkheim on Morality and the Division of Labor," in *The Differentiation of Society* (New York: Columbia University Press, 1982), 8.

22. On this distinction, see Jürgen Habermas, *The Theory of Communicative Action,* 2 vols., trans. Thomas McCarthy (Boston: Beacon Press, 1984, 1987).

23. Preuß, "Solidarität unter Bedingungen von Vielfalt," 130.

24. On the problem-solving potential of solidarity, see also Cohen and Sables, "Directly-Deliberative Polyarchy," 320, 322ff. see also Kurt Bayertz, "Begriff und Problem der Solidarität," in *Solidarität*, ed. Kurt Bayertz (Frankfurt: Suhrkamp, 1998), 39.

25. See Polanyi, *The Great Transformation.*

26. Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader,* ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 42–43; Karl Marx and Friedrich Engels, "The German Ideology," in *The Marx-Engels Reader,* ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 172.

27. Karl Marx, "Preface to *A Contribution to the Critique of Political Economy*," in *The Marx-Engels Reader,* ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 4–5.

28. Niklas Luhmann, "Verfassung als evolutionäre Errungenschaft," *Rechtshistorisches Journal* 9 (1990): 176, 180, 184.

29. On "generalizable interests," see Jürgen Habermas, *Legitimation Crisis,* trans. Thomas McCarthy (Boston: Beacon Press, 1973), 111ff.

30. See Birgit Mahnkopf, "Probleme der Demokratie unter Bedingungen ökonomisher Globalisierung und ökologischer Restriktionen," in *Demokratie—eine Kultur des Westens? 20. Kongreß der deutschen Gesellschaft für Politikwissenschaften,* ed. Michael Th. Greven (Opladen: Leske+Buderich, 1998), quoted in *Hessen im Dialog. 25. Römerberggespräche. Reader zur Vorbereitung des Kongresses* (Wiesbaden: Hess. Staatskanzlei, 1998), 44; Helmut Willke, "Soziologische Aufklärung der Demokratietheorie," in *Demokratischer Experimentalismus*, ed. Hauke Brunkhorst (Frankfurt: Suhrkamp, 1998), 30.

31. See also Hondrich and Koch-Arzberger, *Solidarität in der modernen Gesellschaft,* 80ff.

32. Mahnkopf, "Probleme der Demokratie unter Bedingungen ökonomisher Globalisierung und ökologischer Restriktionen," 16f.

33. See Friedrich Müller, *Demokratie in der Defensive. Funktionelle Abnutzung—soziale Exklusion—Globalisierung. Elemente einer Verfassungstheorie VII* (Berlin: Duncker & Humblot, 2001).

34. See Fritz Scharpf, *Effektiv und demokratisch?* (Frankfurt: Campus, 1999).

35. As broadly in agreement, see Udo Di Fabio, *Das Recht offener Staaten. Grundlinien einer Staats-und Rechttheorie* (Tübingen: Mohr, 1998), 106–107f; Günther Teubner, "Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts," in *Globalisierung und Demokratie,* ed. Hauke Brunkhorst and Matthias Kettner (Frankfurt: Suhrkamp, 2000), 240–273.

36. See Habermas, *The Theory of Communicative Action,* 2 vols.

37. Niklas Luhmann, *Law as a Social System* (New York: Oxford University Press, 2004), 418.

38. Hannah Arendt, *On Violence* (New York: Harcourt Brace & Co., 1970), 41.

1 Civic Friendship

1. Michel de Montaigne, "Of Friendship," in *The Complete Essays of Montaigne* (Palo Alto, Calif.: Stanford University Press, 1958), 139.

2. Ibid., 139–141.

3. Ibid., 136. In his interpretation of Montaigne, Derrida is fascinated above all by the sovereignty and exceptional character of Montaigne's ideal of friendship: Jacques Derrida, "He Who Accompanies Me," in *Politics of Friendship* (New York: Verso, 1997), 172ff., 182ff.

4. In Luhmann's sense in Niklas Luhmann, *Love as Passion: The Codification of Intimacy*, trans. William Whobrey (Stanford, Calif.: Stanford University Press, 1998).

5. Montaigne, "Of Friendship," 140.

6. Ibid., 142.

7. *Romeo and Juliet*, Act 3, Scene 3. From Cicero to Romeo, political theory always whistled the same tune: "When a state is removed, destroyed, extinguished, it is somehow similar. . . to the death and collapse of the entire cosmos." See Cicero, "On the Commonwealth," in *On the Commonwealth and On the Laws,* ed. James G. Zetzel (Cambridge: Cambridge University Press, 1999), 74.

8. Jean-Pierre Vernant, "Introduction," in *The Greeks,* ed. Jean-Pierre Vernant (Chicago: University of Chicago Press, 1995), 21. Romantic love and friendship appear "worldless" only from the perspective of the citizen of the polis (Hannah Arendt brings this perspective up-to-date in *Men in Dark Times* [New York: Harcourt, Brace & World, 1968], 23ff). From the perspective of the modern citizen with rights, on the other hand, the reflexive, self-referential differentiation of intimacy turns out, for its part, to be a world-disclosive power.

9. Plato, *Gorgias*., 507e, quoted in John M. Cooper, ed., *Plato: Complete Works* (Indianapolis, Ind.: Hackett, 1997), 852.

10. Aristotle, *Politics,* trans. C. D. C Reeve (Indianapolis, Ind.: Hackett, 1998), 1253a, p. 4.

11. Aristotle, *Nicomachean Ethics,* 2d ed., trans. Terence Irwin. (Indianapolis: Hackett, 1999), 1155a, p. 119.

12. Aristotle, *Politics,* 1280b, p. 81.

13. Aristotle, *The Eudemian Ethics,* trans. H. Rackam (Cambridge, Mass.: Harvard University Press, 1952), 1235a, pp. 359–360.

14. Aristotle, *Politics,* 1280b, p. 81.

15. Ibid.

16. Aristotle, *Nicomachean Ethics,* 1158a, p. 125.

17. See the survey in A. Müller, "Freundschaft," in *Historisches Wörterbuch der Philosophie, Bd. 2* (Basel: Schwabe, 1972), 1106; Otfried Höffe, *Aristoteles* (Munich: Beck, 1996), 244.

18. Aristotle, *Nicomachean Ethics*, 1166b, p. 143.

19. Ibid., 1167b, p. 144.

20. See Christian Meier, *Die Entstehung des Politischen bei den Griechen* (Frankfurt: Suhrkamp, 1983), 144ff.; Martha Nussbaum, *The Fragility of Goodness. Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, Mass.: Harvard University Press, 1986).

21. See Nussbaum, *The Fragility of Goodness,* 158ff.

22. Aristotle, *Rhetoric,* 1380b–1382a; similarly, see Cicero, "On the Laws," in *On the Commonwealth and On the Laws,* ed. James G. Zetzel (Cambridge: Cambridge University Press, 1999), Bk. 1: §§34, 49, pp. 117–118, 123.

23. Meier, *Die Entstehung des Politischen bei den Griechen*, 144ff. Defiantly and regressively against that is Carl Schmitt, who bases his concept of political friendship on the archaic "tribal association" [*Sippengenossenschaft*], in order to use this prepolitical concept of friendship (in the Arisotelian sense) in the battle against the modern-romantic concept. See Carl Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1987), 104.

24. At an ironic distance to the holy chains of friendship, see G. W. F. Hegel, *Elements of the Philosophy of Right,* trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991), Preface; on the concept of civic association, which already supercedes the paradigm of friendship in the abstract legal community, see Immanuel Kant, "On the Common Saying: 'This may be true in theory, but it does not apply in practice,' " in *Kant: Political Writings,* ed. Hans Reise (Cambridge: Cambridge University Press, 1991), 61–92.

25. Derrida, "He Who Accompanies Me," 184.

26. Montaigne, "Of Friendship," 144.

27. John M. Cooper, "Aristotle on Friendship," in *Essays on Aristotle's Ethics*, ed. Amélie Oksenberg Rorty (Berkeley: University of California Press, 1980), 322–323, 333.

28. Aristotle, *Nicomachean Ethics,* 1166a, 1170b, pp. 142, 150.

29. Even here, Montainge's parallel formula (translated from Aristotle)—"one soul in two bodies"—is entirely different. Whereas for Aristotle the difference between the second and the first self makes the first self recognizable in an observable form through the second self, for Montaigne both selves fuse into one soul, toward the epistemic night in which nothing is recognizable anymore and the subject's powers of imagination pull all domination into itself. On the recent attempt to revive this Romantic perspective of the philosophy of the subject, see Manfred Frank, *'Unendliche Annäherung.' The Anfänge der philosophischen Frühromantik* (Frankfurt: Suhrkamp, 19978); Slavoj Žižek *The Ticklish Subject: The Absent Centre of Political Ontology* (London: Verso, 1999).

30. See Vernant, "Introduction," 11ff.

31. Ibid., 17.

32. On the legal status of the slaves, which ruled out recognition, see the brief account in Carl Grünberg, "Sklaverei," in *Handwörterbuch der Staatswissenschaft,* ed. J. Conrad, L. Elster, W. Lexis, and E. Loening (Jena: Fischer, 1911), 524ff.

33. Aristotle, *Politics*, 1252a, p. 1.

34. Cicero, *Essay on Friendship,* trans. Alexander J. Inglis (New York: Newton & Cartwright, 1908), VIII, p. 21.

35. Aristotle, *The Eudemian Ethics,* 1237a, 377. That is also the function of the law as undifferentiated from ethics: "The legislator makes the citizens good by habituating them" (*Nicomachean Ethics*, 1103b).

36. See Virginia J. Hunter, *Policing Athens* (Princeton, N.J.: Princeton University Press, 1994), 70ff, 89ff.

37. See Ibid., 96ff, 149f.

38. Plato, *Laws,* 730d, quoted in Cooper, ed., *Plato: Complete Works*, 1413.

39. Paul Veyne, "The Roman Empire," in *History of Private Life: From Pagan Rome to Byzantium*, ed. Paul Veyne (Cambridge, Mass.: Harvard University Press, 1992), 171–173.

40. Ibid., 173.

41. See Paul Veyne, "Kannten die Griechen die Demokratie?," in *Kannten die Griechen die Demokratie?*, ed. Christian Meier and Paul Veyne (Berlin: Wagenbach, 1988).

42. Aristotle, *Nicomachean Ethics*, 1155a, p. 119.

43. Ibid.

44. Ibid., 1155a, p. 120.

45. Ibid.

46. Plato, *Laws*, 757a, p. 1433.

47. Aristotle, *The Eudemian Ethics*, 1239a, p. 391ff (on the hierarchical distinction between friendship based on virtue, utility, and pleasure).

48. Aristotle, *Nicomachean Ethics*, 1157a, p. 124. See also Aristotle, *The Eudemian Ethics*, 1236a–b.

49. Aristotle, *Nicomachean Ethics*, 1157a.

50. Ibid., 1157b, p. 124. Necessary friendship or friendship for utility should not, however, be understood as a purely instrumental alliance in the sense of a utilitarian calculation. The latter would be more like a corrupt variant of useful friendship that is no longer really covered by the concept of friendship. The high form of friendship for utility is more like a "genuine" friendship and, in that respect, purely founded on reciprocal well-wishing, which is, however, restricted by the (often very wide) limit of common utility. Two merchants are friends irrespective of what comes out of it. But if a crisis makes them into bitter competitors, the friendship suffers. Friendship is good for business, but (often far) exceeds it in its socio-moral binding force. That corresponds with, for instance, the accumulation of "social capital" as it is characteristic up to today for the economically shaped civil society of northern Italy, according to the investigations of the American sociologist Robert Putnam. See Putnam, *Making Democracy Work. Civic Traditions in Modern Italy* (Princeton, N.J.: Princeton University Press, 1993), 163ff. The ideal Aristotelian form of friendship of virtue would be, on the other hand, so permanent that it proves itself precisely during a crisis and is, therefore, the ideal foundation for the common good. See Aristotle, *The Eudemian Ethics*, 1236a, 1238a; See also Cooper, "Aristotle on Friendship," 304f, 311.

51. See the finely hierarchical denunciation in Cicero, *On Duties* (*De Officiis*), trans. M. T. Griffin and E. M. Atkins (Cambridge: Cambridge University Press, 1991), Bk. I: 150. See also Grünberg, "Sklaverei," 527.

52. Aristotle, *The Eudemian Ethics*, 1234b, p. 359.

53. Plato, *Republic*, trans. G. M. A. Grube, rev. by C. D. C. Reeve (Indianapolis, Ind.: Hackett, 1992), 442a–d; see also Cicero, "On the Laws," Bk. I: §49.

54. See Aristotle, *Nicomachean Ethics*, 1134b; on the relational and dynamic character of these conceptions of virtue, see Nussbaum, *The Fragility of Goodness*, 342ff.

55. Plato, *Republic*, 441b–442a, p. 117.

56. Cicero, *On Duties* (*De Officiis*), Bk. I: 148, p. 57.

57. Egon Flaig, "Europa begann bei Salamis," *Rechtshistorisches Journal* 13 (1994): 422; see also Hunter, *Policing Athens*, 154ff.

58. Aristotle, *Nicomachean Ethics*, 1161b, p. 132.

59. Ibid.

60. Ibid.

61. Ibid., 1134b, 1162a.

62. See Hauke Brunkhorst, *Einführung in die Geschichte politischer Ideen* (Paderborn: UTB, 2000), 88ff, 110ff.

63. Grünberg, "Sklaverei," 533; on the gradual civilizing of elementary relations of power through the introduction of contractual forms in the relation of master and servant, father and son, man and woman, and so forth, see Henry Sumner Maine, *Ancient Law* (Bristol: Thoemmes, 1996), 169f, 304ff.

64. Hegel defined friendship entirely differently and, in conscious divergence from Aristotle, not with the concept of *praxis*, but rather—in terms of the Protestant work ethic—with the concept of *poiesis* as interest-mediated, cooperative production: "Friendship rests on likeness of character and especially of interest, engagement in a common work, rather than in liking for the person of another as such." See G. W. F. Hegel, "The Science of Laws, Morals and Religion [For the Lower Class]," in *The Philosophical Propaedeutic* (New York: Basil Blackwell, 1986), §67, p. 51.

65. See Nussbaum, *The Fragility of Goodness,* 354, 360. On "useful" friendship, see note 50, this chapter.

66. Max Weber, "Religious Rejections of the World and Their Directions," in *From Max Weber: Essays in Sociology,* ed. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 326.

67. On Arendt, see Hauke Brunkhorst, *Hannah Arendt* (Munich: Beck, 1999).

68. Rorty, *Contingency, Irony, Solidarity*.

69. On the mechanism of exclusion and inclusion in the classic polis, see Brunkhorst, *Einführung in die Geschichte politischer Ideen,* 55ff.

70. Flaig, "Europa begann bei Salamis," 422.

71. Nussbaum, *The Fragility of Goodness,* 355; see also Aristotle, *The Eudemian Ethics*, 1235a.

72. Flaig, "Europa begann bei Salamis," 422; see also Luciano Canfora, "The Citizen," in *The Greeks*, ed. Jean-Pierre Vernant (Chicago: University of Chicago Press, 1995), 124; Moses I. Finley, *Das politische Leben in der griechischen Antike* (Munich: Beck, 1991), 82ff., 145.

73. See Martha Nussbaum, "Kant and Cosmopolitanism," in *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal,* ed. J. Bohman and M. Lutz-Bachmann (Cambridge, Mass.: MIT Press, 1997).

74. See Cicero, "On the Laws," Bk. I: §§30, 32, 61–62; see also Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich: Beck, 1999), 229, 234–235.

75. Cicero, "On the Commonwealth," Bk. III: §36, p. 73.

76. See also Alexander Demandt, *Der ideale Staat* (Cologne: Böhlau, 1993), 263f.

77. Veyne, *The Roman Empire*, 42–43.

2 Europe Began in Jerusalem: Brotherliness

1. Tertullian, *Apologeticus,* trans. A. Souter (Cambridge: Cambridge University Press, 1917), Ch. 38, p. 111: "Nobis nulla magis res aliena quam publica"—"Nor is there anything more foreign to us [Christians] than affairs of state." In the *Apologeticus*, a politically very skillful, legalistic apologia from 197 CE against the persecution of Christians under Septimius Severus, this is by no means to be understood as a declaration of war against the Empire. Because they were apolitical, the Christians were against all "clashes of partisanship"—behind which, prior to the nineteenth century, one always suspected the danger of civil war. They were, in a thoroughly statesmanlike manner, for peace, order, strict morality, and—just like the Epicureans, who were not persecuted—valued the inner peace of the soul more than drama, circus, and theater (see Tertullian, *Apologeticus,* Chs. 35, 44, 45).

2. See Tertullian, *Apologeticus*, Ch. 35.

3. On the difference between *caritas* and *philia*, see also the brief remarks by Derrida: Derrida, "He Who Accompanies Me," 176.

4. See also Luke 14: 26: "If any one comes to me (Jesus) and does not hate his own father and mother and wife and children and brothers and sisters, yes, and even his own life, he cannot be my disciple."—Here and with other Biblical passages, I largely ignore the findings of textual criticism since what concerns me is the dimension of the historical effects of the sayings and texts attributed to Jesus, Paul, and other historical figures. [All Bible passages are quoted from *The New Oxford Annotated Bible with the Apocrypha* (Revised Standard Edition), ed. Herbert G. May and Bruce M. Metzger (New York: Oxford University Press, 1977)—Trans.]

5. See Oscar Cullman, *The State in the New Testament* (New York: Charles Scribner's Sons, 1956), 11ff., 31ff., 47–48, 50ff., 71ff.

6. See also Michael Salewski, *Geschichte Europas. Staaten und Nationen von der Antike bis zur Gegenwart* (Munich: Beck, 2000), 188–189, 215–216.

7. On the inscrutable dialectic of Enlightenment that accompanied this rationalizing achievement of Christianity, see Sigmund Freud, *Civilization and Its Discontents,* trans. James Strachey (New York: W. W. Norton, 1961), 65ff.; on the problem, see also Ernst Tugendhat, *Vorlesungen über Ethik* (Frankfurt: Suhrkamp, 1993), 273ff., and from the post-structuralist perspective, see Žižek. *The Ticklish Subject,* 115. The ambivalence in the progress from law to love was strikingly expressed in the helpless gesture of Erich Mielke when he was forced to face the baffled East German Parliament, suddenly no longer as the head of the secret police, but as an accountable minister, and declared, "But I loved you all." As if the surprising recourse to the Christian commandment to love would make all of his sins against the law be forgotten. [Erich Mielke led the former East German secret police, the Stasi, from 1957 until 1989.—Trans.]

8. Žižek, *The Ticklish Subject,* 115.

9. Tertullian, *Apologeticus,* Ch. 42, pp. 122–123.

10. Ibid., Ch. 42, p. 123, see also the previous quote from Romans 8.

11. Ibid., Ch. 32, p. 99.

12. Ibid., Ch. 36, p. 107.

13. Hermann Cohen, "Das soziale Ideal bei Platon und den Propheten," in *Jüdische Schriften, Bd. 1* (Breslau: 1923), 321.

14. Tertullian, *Apologeticus,* Ch. 36, p. 107.

15. On the distinction between mechanical and organic solidarity, see Durkheim, *The Division of Labor in Society;* see also Brunkhorst, *Einführung in die Geschichte politischer Ideen*, 88–157.

16. See Cohen, "Das soziale Ideal bei Platon und den Propheten."

17. Ibid.

18. Karl Marx, "Contribution to the Critique of Hegel's *Philosophy of Right*: Introduction," in *The Marx-Engels Reader,* ed. Robert C. Tucker (New York: Norton & Co., 1978), 60.

19. See Frank Crüsemann, *The Torah: Theology and Social History of Old Testament Law,* trans. Allan W. Mahnke (Minneapolis: Fortress Press, 1996), 238ff.; Peter Weber-Schäfer, "Heil und Herrschaft bei den Juden: Könige und Propheten," in *Bürgerreligion und Bürgertugend,* ed. Herfried Münkler (Baden-Baden: Nomos, 1996), 13–24.

20. On the incomparability of the covenant, see Jan Assman, *Politische Theologie zwischen Ägypten und Israel* (Munich: Siemens-Stiftung, 1992), 81; Peter Weber-Schäfer, "Die Gerechtigkeit des Herrn," in *Konzeptionen der Gerechtigkeit,* ed. Herfried Münkler and Marcus Llanque (Baden-Baden: Nomos, 1999), 23–30; Graham Maddox, *Religion and the Rise of Democracy* (London: Routledge, 1996), 22.

21. Assmann, *Politische Theologie zwischen Ägypten und Israel*, 81.

22. See Brunkhorst, *Einführung in die Geschichte politischer Ideen*, 69ff.

23. See also Martin Buber, *Kingship of God,* trans. Richard Scheimann (New Jersey: Humanities Press International, 1967), 75; Frank Crüsemann, *Der Widerstand gegen das Königtum. Die antiköniglichen Texte des Alten Testaments und der Kampf um den frühen israelitischen Staat* (Neukirchen: Neukirchner, 1978), 19ff.

24. The last sentence, which alludes to the "cedars of Lebanon" (cedars were a symbol of kingship), would of course have been put down only later. See Crüsemann, *Der Widerstand gegen des Königtum,* 19f.

25. Ibid., 21, 28.

26. Buber, *Kingship of God,* 75.

27. A similarly principled critique of kingship as an institution is found only in *I Samuel* 8: 14–18; 10: 18–19, with reference to the Exodus.

28. Buber, *Kingship of God,* 59.

29. Crüsemann, *Der Widerstand gegen des Königtum*, 13, 26ff., with the evidence that while the typical allegories of antiquity were often critical of kings, they never rejected kingship, only bad kings or bad king-makers.

30. On the Greeks, see Christian Meier, *Athens: A Portrait of the City in its Golden Age* (New York: Metropolitan Books, 1998); Egon Flaig is critical of Meier's Eurocentrism, which of course is of no consequence for the self-description of Europe, but only relativizes the external description of non-Europeans: Flaig, "Europa begann bei Salamis."

31. On the sociology of ancient Israelite society, see Christa Schäfer-Lichtenberger, *Stadt und Eidgenossenschaft im Alten Testament* (Berlin: de Gruyter, 1983).

32. Maddox, *Religion and the Rise of Democracy*, 11, 37.

33. Georg Büchner, "The Hessian Messenger," in *Complete Works of Georg Büchner* (New York: Continuum, 1986), 41.

34. Heinrich Heine, "King David," in *The Complete Poems of Heinrich Heine* (Boston: Suhrkamp/Insel, 1982), 586–587.

35. Maddox, *Religion and the Rise of Democracy*, 3; see also 30.

36. Klaus Koch, *The Prophets, Volume One: The Assyrian Period*, trans. Margaret Kohl (Philadelphia: Fortress Press, 1982), 10ff.

37. Ibid., 12ff.

38. Crüsemann, *The Torah*, 325ff.

39. Ibid., 322ff.

40. Ibid., 380.

41. Ibid., 324ff.

42. Weber-Schäfer, "Die Gerechttigkeit des Herrn," 28.

43. On the concept of "confederation" [Eidgenossenschaft], see Max Weber, *Economy and Society*, 848.

44. Uwe Wesel, *Geschichte des Rechts* (Munich: Beck, 1997), 110.

45. See Crüsemann, *The Torah*, 232ff.

46. Ibid., 229.

47. Koch, *The Prophets, Volume One: The Assyrian Period*, 120. Always tied to the threat against the rich: "Woe to those who join house to house, who add field to field, until there is no more room, and you are made to dwell alone in the midst of the land. . . . Surely many houses shall be desolate" (Isaiah 5:8–9).

48. See Crüsemann, *The Torah*, 220–221.

49. Tertullian, *Apologeticus*, Ch. 39, p. 113.

50. Maddox, *Religion and the Rise of Democracy,* 63, 11.

51. Ibid., 47, 58–59.

52. Joseph Cardinal Ratzinger, "Der angezweifelte Wahrheitsanspruch," FAZ-Beilage v. 8/1/2000 (2000): 1.

53. Tertullian, *Apologeticus,* Ch. 39, p. 113.

54. Ibid.

55. Ibid., Ch. 25, p. 89; on the materialistic critique of Roman religion, see also Chs. 24, 29, 46.

56. Ibid., Ch. 26, p. 91.

57. Ibid., Ch. 25, p. 91.

58. Ibid., Ch. 42, p. 123.

59. Augustine, *The City of God,* trans. Marcus Dods (Edinburgh: T&T Clark, 1884), Vol. 2, Book 14, Ch. 12, p. 25.

60. Ibid., Bk. 7, Ch. 21, p. 160.

61. Ibid., Bk. 8, Ch. 4, p. 169.

62. Augustine, *De Ordine II,* 5, 16, quoted in Kurt Flasch, *Augustinus. Einführung in sein Denken* (Stuttgart: Reclam, 1994), 79.

63. On the recent protest against that, see Herbert Schnädelbach, "Der Flucht des Christentums," *Die Zeit* May 11, 2000.

64. Aristotle, *The Eudemian Ethics,* 1137b, p. 381.

65. See Jacques Derrida, "Der mich begleitet," in *Über die Freundschaft* (Frankfurt: Suhrkamp, 2000), 55. [This passage does not appear in the English translation of Derrida, "He Who Accompanies Me"—Trans.]

66. Maddox, *Religion and the Rise of Democracy,* 10; see also Cullman, *The State in the New Testament,* 37.

67. Maddox, *Religion and the Rise of Democracy,* 61ff, 66, 69.

68. Ibid., 11.

69. Augustine, *The Confessions,* trans. J. G. Pilkington (New York: Boni & Liveright, 1927), Bk. 7, Ch. 12, p. 128.

70. Ibid., Bk. 7, Ch. 17, pp. 154–155.

71. Ibid., Bk 7, Ch. 14, p. 153.

72. Ibid., Bk. 8, Ch. 6, p. 172.

73. Ibid., Bk. 3: Ch. 1, p. 41, Ch.2, p. 43.

74. Tertullian, *Apologeticus,* Ch. 46, p. 131.

75. Augustine, *The Confessions,* Bk. 2, Ch. 1, p. 27.

76. Ibid.

77. Ibid., Bk. 2, Ch. 2, p. 28.

78. Ibid., Bk. 2, Ch. 3, p. 30.

79. Ibid., Bk. 4, Ch. 2, p. 62.

80. Ibid., Bk. 4, Ch. 4, pp. 64–65.

81. Ibid., Bk. 4, Ch. 9, p. 70; see also Derrida, "He Who Accompanies Me," 187–188. He does not, however, break down the classification of love "in God" and "because of God" into the good soul (friend) and the bad soul (enemy: *inimicus*). *For the sake of* God, one loves the enemy as a transient, bodily creature of God, but not as a good soul directed toward God since the soul of the enemy is turned away from God and can, therefore, not be love *in* God. That could have the consequence (politically highly affirmative), that the killing of the enemy would end the domination of the corrupt, diabolically infected soul over the body and in that respect would be true love of the enemy.

82. Augustine, *The Confessions*, Bk. 4, Ch. 8, pp. 69–70.

83. Ibid., Bk. 9, Chs. 11–12. Quoted from *Confessions,* trans. R. S. Pine-Coffin (Penguin: London, 1961).

84. See, for example, Augustine, *The City of God,* Bk. 15, Ch. 5; see also Flasch, *Augustinus. Einführung in sein Denken*, 148.

85. Augustine, *The City of God,* Bk. 19, Ch. 15, p. 324.

86. Ibid., Bk. 19, Ch. 15, p. 325.

87. Ibid.

88. Augustine, *The Confessions,* Bk. 9, Ch. 9, p. 204.

89. Ibid., Bk. 9, Ch. 9, pp. 204–205.

90. Marx, "Contribution to the Critique of Hegel's *Philosophy of Right*: Introduction," 60.

91. Weber, "Religious Rejections of the World and Their Directions," 329.

92. See also Maddox, *Religion and the Rise of Democracy*.

93. Weber, "Religious Rejections of the World and Their Directions," 330.

94. Ibid.

95. Ibid., 331ff.

96. Maddox, *Religion and the Rise of Democracy,* 63.

97. Arendt, *On Revolution,* 84.

98. Augustine, *The City of God,* Bk. 4, Ch. 4, p. 139.

99. Ibid., Bk. 19, Ch. 17, p. 328; see also Bk. 19, Ch. 21.

100. Ibid., Bk. 4, Ch. 4, p. 140.

101. Ibid., Bk. 1, Ch. 35, p. 46; see also Maddox, *Religion and the Rise of Democracy*, 87.

102. Richard Rorty, "Heidegger wider die Pragmatisten," *Neue Hefte für Philosophie* 23 (1984): 21. [This essay has appeared only in German. Passages from the essay, though not this quotation, are included in the essay "Heidegger, Contingency, and Pragmatism" in *Essays on Heidegger and Others: Volume 2, Philosophical Papers* (Cambridge: Cambridge University Press, 1991)—Trans.]

103. Augustine, *The City of God,* Bk. 12, Ch. 20, p. 513. Arendt's gloomy book on totalitarianism concluded with this hope. See Arendt, *The Origins of Totalitarianism,* 479.

104. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).

105. See R. I. Moore, *The First European Revolution, c. 970–1215* (Oxford: Blackwell, 2000), 8ff.

106. Ibid., 15–16.

107. Peter Landau, "Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien," in *Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien,* ed. Heinrich Scholler (Baden-Baden: Nomos, 1996), 31.

108. Moore, *The First European Revolution, c. 970–1215*, 11ff., 18–19.

109. See Berman, *Law and Revolution.*

110. Ibid., 291–292; see also Maddox, *Religion and the Rise of Democracy,* 97.

111. Berman, *Law and Revolution* 221; Maddox, *Religion and the Rise of Democracy*, 99; Landau, "Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien," 42.

112. See Luhmann, *Law as a Social System,* 66.

113. Berman, *Law and Revolution*, 528.

114. Ibid., 178.

115. Ibid., 179.

116. Landau, "Die Bedeutung des kanonischen Rechts für die Entwicklung einheitlicher Rechtsprinzipien"; see also Berman, *Law and Revolution.*

117. Hans-Peter Schneider, *Daz ein Recht mac vromen: Der Sachsenspiegel—ein Rechtsbuch von europäischem Rang, Wolfenbüttel Hefte* 15 (1994).

118. Ibid., 503ff., 521. See also Berman, *Law and Revolution*.

119. Thomas Aquinas, *Treatise on Law*, trans. Richard J. Regan (Indianapolis: Hackett, 2000), "Q. 96: On the Power of Human Laws." On the differentiation of law and morality in Aquinas, see Ernst-Wolfgang Böckenförde, "Staatliches Recht und sittliche Ordnung," in *Staat, Nation, Europa* (Frankfurt: Suhrkamp, 1999), 224ff.

120. Aquinas, Expos. Super II epist. Ad Cor., 3, 2, quoted in Ludger Honnefelder, "Die ethische Rationalität des mittelalterlichen Naturrechts," in *Max Webers Sicht des okzidentalen Christentums*, ed. Wolfgang Schluchter (Frankfurt: Suhrkamp, 1988), 262.

121. Honnefelder, "Die ethische Rationalität des mittelalter lichen Naturrechts," 262.

122. Ibid., 267.

123. Ibid., 267f, 271.

124. Berman, *Law and Revolution*, 26. That was also true initially of the pre-Stalinist Russian Revolution under Lenin and Trotsky.

125. Ibid., 158.

126. Tertullian, *Apologeticus*, Ch. 39, p. 111.

127. Berman, *Law and Revolution*, 401.

128. Ibid., 521.

129. See Guy Bois, *Umbruch im Jahr 1000* (Stuttgart: Klett-Cotta, 1993).

130. Maddox, *Religion and the Rise of Democracy*, 6.

3 The Ideas of 1789: Patriotism of Human Rights

1. Hasso Hofmann, *Repräsentation* (Berlin: Duncker & Humblot, 1974), 204–205.

2. See Schieder, "Brüderlichkeit," 559ff. (on the transformation of "brotherliness"); Brunkhorst, *Einführung in die Geschichte politischer Ideen*, 179ff (on the transformation of the status of the citizen). On the dissolution of the part/whole scheme in early modernity, see Niklas Luhmann, "Staat und Staatsräson im Übergang von traditionaler Herrschaft zu moderner Politik," in *Gesellschaftsstruktur und Semantik, Bd. 3* (Frankfurt: Suhrkamp, 1989), 101ff., 110ff.

3. This aspect of Rousseau is repeatedly misunderstood in the misguided interpretations by Carl Schmitt and J. L. Talmon. See Carl Schmitt, *Die Diktatur* (Berlin: Duncker & Humblot, 1989), 116ff; J. L. Talmon, *The Origins of Totalitarian Democracy* (London: Secker and Warburg, 1955).

4. See Alexis de Tocqueville, *Democracy in America*, trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000); Arendt, *On Revolution*.

5. Emmanuel Joseph Sieyès, "Views of the Executive Means Available to the Representatives of France in 1789," in *Political Writings*, ed. Michael Sonenscher (Indianapolis, Ind.: Hackett, 2003); Emmanuel Joseph Sieyès, "What Is the Third Estate?," in *Political Writings*, ed. Michael

Sonenscher (Indianapolis, Ind.: Hackett, 2003), 1–67; see also Karl Lowenstein, *Volk und Parlament* (Aalen: Scientia, 1964).

6. Karl Marx, *The 18th Brumaire of Louis Bonaparte* (New York: International Publishers, 1963), 124; italics added.

7. On the distinction of both types of representation, besides the standard work by Hofmann, *Repräsentation,* see Harvey C. Mansfield, "Modern and Medieval Representation," in *Representation,* ed. J. Roland Pennock and John W. Chapman (New York: Atherton Press, 1968); 55–82.

8. Francois Furet and Denis Richet, *French Revolution*, trans. Stephen Hardman (New York: Macmillan, 1970), 60–61, 110–111. The inflationary use of the concept of friendship in the Enlightenment circles in the Revolution is entirely abstract, rather pale, humanity-oriented, thematically centered, and no longer at all oriented, as with Aristotle and Cicero, toward personal relations. The political and public use of the concept of friendship parts definitively here with the romantic concepts of individual love and friendship, which are repelled by all references to humanity and community, and by all "other obligations" (Montaigne). See chapter 1, this volume.

9. See also Hauke Brunkhorst, "Die Sprache im Zeitalter ihrer technischen Reproduzierbarkeit," *Leviathon* 2 (1999): 250–263.

10. Jack Censer, "Die Presse des Ancien Regime im Übergang—eine Skizze," in *Die Französische Revolution als Bruch des gesellschaften Bewuatseins,* ed. Reinhart Koselleck and Rolf Reichardt (Munich: Oldenbourg, 1988), 127–152; see also Jürgen Habermas, *The Structural Transformation of the Public Sphere,* trans. Thomas Burger (Cambridge, Mass.: MIT Press, 1989).

11. The total number of periodical journals (daily, every three days, weekly, biweekly, monthly) grew from 4 to 184 between the end of 1788 and the end of 1789. See Jeremy Popkin, "Umbruch und Kontinuität der französischen Presse im Revolutionszeitalter," in *Die Französische Revolution als Bruch des gesellschaften Bewußtseins,* ed. Reinhart Koselleck and Rolf Reichardt (Munich: Oldenbourg, 1988), 167.

12. Rolf Reichardt, "Revolution und Presse, Öffentlichkeit und Struktur der politischen Kommunikation," in *Die Französische Revolution als Bruch des gesellschaften Bewußtseins*, ed. Reinhart Koselleck and Rolf Reichardt (Munich: Oldenbourg, 1988), 178; Pierre Rétat, "Die Zeitungen des Jahres 1789: einige zusammenfassende Perspektiven," in *Die Französische Revolution als Bruch des gesellschaften Bewußtseins*, ed. Reinhart Koselleck and Rolf Reichardt (Munich: Oldenbourg, 1988).

13. Sieyès, "What Is the Third Estate?," 94, 97.

14. Furet and Richet, *French Revolution,* 40–41, 58.

15. Ibid., 60, 112.

16. Zoll, *Was ist Solidarität heute?,* 44.

17. Patrice Higonnet, "Die Sansculotten," in *Kritisches Wörterbuch der Französischen Revolution, Bd. 1*, ed. F. Furet and Mona Ozouf (Frankfurt: Suhrkamp, 1996), 652, 656; see also Schieder, "Brüderlichkeit," 566.

18. Franz, ed., *Staatsverfassungen,* 379; R. Brubaker, "Einwanderung und Nationalstaat in Frankreich und Deutschland," *Der Staat* 1 (1989): 10.

19. Immanuel Kant, *The Conflict of the Faculties*, trans. Mary Gregor (Lincoln: University of Nebraska Press, 1979), 159.

20. Schieder, "Brüderlichkeit," 565–566. On the identification of republic with democracy, whereby *both* are at the same time sharply differentiated—in the sense of the new meaning of "fraternity"—for the first time in the history of political thought not only from monarchy, but also from aristocracy, see Maximilien Robespierre, "On the Principles of Political Morality, February 1794," *Internet Modern History Sourcebook*, available online at http://www.fordham.edu/halsall/mod/1794robespierre.html. In his speech of February 5, 1794, in front of the Convention, Robespierre said "these two words are synonyms . . . ; because an aristocracy is no closer than a monarchy to being a republic," and democracy for Robespierre—entirely in line with Rousseau and sharply distinguished from the ancient understanding—is not "a state in which the people, continually meeting, regulate for themselves all public affairs," since that would "lead the people back into despotism." Thus, as in all contemporary constitutions, a parliamentary democracy with elements of direct democracy.

21. Hasso Hofmann, "Zur Herkunft der Menschenrechtserklärungen," *Juristisches Studium* 11 (1988): 845.

22. See Wolfgang Schmale, *Entchristlichung, Revolution und Verfassung. Zur Mentalitätsgeschichte der Verfassung in Frankreich, 1715–1794* (Berlin: Duncker & Humblot, 1988), 33ff.

23. Quoted in Ibid., 13.

24. Just like the transfer of all earthly claims to rule to the account of the monotheistic God in the ancient covenant of Israel (see chapter 2), only this time in the reverse direction. On the covenant, see Assman, *Politische Theologie zwischen Ägypten und Israel.*

25. Quoted in Schmale, *Entchristlichung, Revolution und Verfassung.*

26. Ibid., 14.

27. Karl Marx and Friedrich Engels, "Manifesto of the Communist Party," in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 491; on "communist individualism" see the standard work: Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (Boston: Beacon, 1960), 283ff, 192ff.

28. G. W. F. Hegel, *Hegel's Lectures on the History of Philosophy*, trans. E. S. Haldane and F. H. Simon, vol. 3 (New York: Humanities Press, 1974), 459.

29. Marx, *18th Brumaire of Louis Bonaparte*, 19.

30. See Hofmann, *Einführung in die Rechts-und Staatsphilosophie*, 193–194.

31. Luhmann, "Durkheim on Morality and the Division of Labor," 15.

32. Marx and Engels, "Manifesto of the Communist Party," 477, 476, 481.

33. See Marx, *The 18th Brumaire of Louis Bonaparte*, 15.

34. See Michael Walzer, *Exodus and Revolution* (New York: Basic Books, 1985), 4f; Michel Vovelle, *Die Französische Revolution. Soziale Bewegung und Umbruch der Mentalitäten* (Frankfurt: Fischer, 1985), 106, 130–131.

35. Jean-Jacques Rousseau, *The Government of Poland*, trans. Willmoore Kendall (New York: Bobbs-Merrill, 1972), 6.

36. Robespierre is clearly conscious of the world-historical break with traditional European political thought in his speech from December 25, 1793, on the principles of the revolutionary government: "The theory of the revolutionary government is just as new as the revolution out of which it arose. One should seek it neither in the books of the political writers, who did not foresee this revolution, nor in the lawbooks of the tyrants." Quoted in Herfried Münkler, "Republik, Demokratie und Diktatur," Lecture text, November 3: 2000, 23. The unpredictability is a decisive feature of the new concept of revolution, since, according to the ancient understanding, in terms of a theory of decline, revolutions were just as easily predictable as their results: the reestablishment of the good old practices. One only had to correctly read the signs of the decline, corruption, and decadence to know what was imminent and what had to be done.

37. Jean-Jacques Rousseau, "Political Fragments," in *The Collected Writings of Rousseau, Vol. 4*, ed. R. D. Masters and C. Kelly (Hanover, N.H.: University Press of New England, 1994), 33–34.

38. Rousseau, *The Government of Poland*, 6. In Kant's terminology, the Mosaic legislation would be the first truly *peremptory* (permanent) legislation to definitively overcome the *provisional* law of the state of nature (even if this was hardly Kant's opinion). On this, see Micha Brumlick, *Deutscher Geist und Judenhaß* (Neuwied: Luchterhand, 2000), 27ff.

39. Vovelle, *Die Französische Revolution. Soziale Bewegung und Umbruch der Mentalitäten*, 130. Similarly, see the song of the *Internationale* or songs by Bertolt Brecht or Wolf Biermann with the refrain: "Jesus Christ with gun and guitar (*Knarre und Gitarre*)—Che Guevara."

40. See Ulrike Brunotte, *Puritanismus und Pioniergeist* (Berlin: de Gruyter, 2000), 76ff.

41. Walzer, *Exodus and Revolution*, 6.

42. Karl Marx, *The Class Struggles in France (1848–1850)* (New York: International Publishers, 1964), 114.

43. Marx, *The 18th Brumaire of Louis Bonaparte*, 18.

44. Karl Marx, "Address of the International Working Men's Association to Abraham Lincoln, President of the United States of America, (*Marx & Engels Internet Archive* [1864] 2000 available online at http://www.marxists.org/history/ international/iwma/documents/1864/lincoln-letter.htm.

45. Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft* (Frankfurt/Main: Europäische Verlagsanstalt, 1955), 151. [This passage from the German edition is not in the English edition of *The Origins of Totalitarianism*, both of which were written by Arendt.—Trans.]

46. Sieyès, "What Is the Third Estate?," 155.

47. Hofmann, "Zur Herkunft der Menschenrechtserklärungen," 840–848, esp. 846ff.

48. Thus, the *pouvoir constituent* in Sieyès has nothing to do with the cliché of Carl Schmitt, which distorts it into a mythically decisionistic original power—inconceivable for the eighteenth century. For Sieyès, the constituent power of the people, which is juridically attributed to it in the state of nature, is not at all the "formless forming" (Carl Schmitt, *Verfassungslehre* [Berlin: Duncker &

Humblot, 1989], 79f) of a prelegal and prerational, mystical original power, but rather always already formed and (as with Hobbes, Locke, and Rousseau) juridified by the rational nature of human beings.

49. Immanuel Kant, *The Metaphysics of Morals,* trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 30.

50. Franz, ed., *Staatsverfassungen,* 304–305. It should be noted that in the Constitution of 1791, the *law* as an expression of the democratically produced *general will*—with the "participation of all citizens," whether "personal" or "through representatives" (Art. 6)—guarantees human rights and the rights of citizens and not somehow a *state* existing prior to the constitutionalized will of the citizens or *its* so-called monopoly of violence. Within democracy, *the* state is no longer the bearer and subject of the monopoly of violence, but rather the people as constituting *and* as performatively executing, "exercising" "state authority" (Art. 20, Par. 2, German Basic Law). Its point lies exclusively in the *guarantee of popular sovereignty*. Unlike absolutism, it is not a (claimed) monopoly of the state, but rather serves "to carry out each democratically legitimated policy." Dietmar Willoweit, "Die Herausbildung des staatlichen Gewaltmonopols im Entstehungsprozeß des modernen Staates," in *Konsens und Konflikt. 35 Jahre Grundgesetz,* ed. Albrecht Randelzhofer and Werner Süß (Berlin: de Gruyter, 1986), 322; see also C. Möllers, *Staat als Argument* (Munich: Beck, 2000), 272ff.

51. On the typology, see K. Loewenstein, *Verfassungslehre* (Tübingen: Mohr, 1959), 148ff. Where the people adorn the public processions of a nomenclature, a dictator, and so forth, only as an icon, there are often purely instrumental constitutions, which simply legalize the existing power relations and embellish them with nice words. In such cases, the monocratic governing party is declared to be the sole interpreter and executor of the people's will. Constitutions that, *as a text*, exclude a constitutionalization of state power and an effective autopoiesis of the will of the people, are referred to by Loewenstein as purely "semantic" constitutions. "Instrumental" constitution, an expression also used by Loewenstein, would be better.

52. On the distinction between normative text (*Normtext*) and legal norm (*Rechtsnorm*), see Friedrich Müller, *'Richterrecht'. Elemente einer Verfassungstheorie IV* (Berlin: Duncker & Humblot, 1986), 13, 34, 38.

53. On this point, besides the previously quoted work by F. Müller, see also Jacques Derrida, "Declarations of Independence," *New Political Science* (1986), 7–15; Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,' " *Cardozo Law Review* 11 (1990): 919–1045; on the logic of the "gap," see Žižek, *The Ticklish Subject*, 57–58.

54. See Niklas Luhmann, "Metamorphosen des Staates," in *Gesellschaftsstruktur und Semantik, Bd. 4* (Frankfurt: Suhrkamp, 1995), 105ff.; Cornelia Vismann, "Menschenrechte: Instanz des Sprechens—Instrument der Politik," in *Demokratischer Experimentalismus*, ed. Hauke Brunkhorst (Frankfurt: Suhrkamp, 1998), 279–304.

55. See Marx, *The 18th Brumaire of Louis Bonaparte*.

56. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1992), xxix.

57. [I use "rule" and its cognates here and elsewhere to translate *Herrschaft* and its cognates when the author's main interest is analytical rather than critical. In other contexts, when his emphasis is on the asymmetry of power relations, I use the equally common "domination" and its cognates.—Trans.]

58. See Benjamin Constant, "The Liberties of the Ancients compared with that of the Moderns," in *Political Writings* (Cambridge: Cambridge University Press, 1988), 308–328; John Stuart Mill,

"On Liberty," in *On Liberty, and Other Writings,* ed. Stefan Collini (Cambridge: Cambridge University Press, 1989), 1–116; de Tocqueville, *Democracy in America.*

59. See, for example, Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland,* 20 ed. (Heidelberg: Müller, 1999), §5; or Wilhelm Henke, "Republik," in *Handbuch des Staatsrecht der Bundesrepublik Deutschland,* ed. Josef Isensee and Paul Kirchhof (Heidelberg: Müller, 1987), §21, 22–23, 30–31. (A republic as democracy's "hindering appendix" and antidote against all radical democratic attempts to, with the slogan of Willy Brandt, dare "more democracy" and to stride toward the "realization of unrealistic (!) ideas.") On the critique of the conservative-elitist liberalism of Mill and Tocqueville, see Habermas, *The Structural Transformation of the Public Sphere,* 129ff.

60. See Friedrich Müller, *Wer ist das Volk? Eine Grundfrage der Demokratie, Elemente einer Verfassungstheorie VI* (Berlin: Duncker & Humblot, 1997), 9ff. 23ff; Müller, *Demokratie in der Defensive,* 15ff., 73; also similar is Ingeborg Maus, *Zur Aufklärung der Demokratietheorie* (Frankfurt: Suhrkamp, 1992).

61. C. Möllers, "Der parlamentarische Bundesstaat—Das vergessene Spannungsverhältnis von Parlament, Demokratie, und Bundesstaat," in *Föderalismus—Auflösung oder Zukunft der Staatlichkeit?* (Munich: Boorberg, 1997), 97.

62. Even from the perspective of the single individual who rules himself, "rule by the ruled" is no longer ruling *over* . . . , for instance, according to the Platonic-Aristotelian model in which reason rules over the appetites just as the master rules over the servant. Rather, it is freedom without a distinction of a ruling part. See Hauke Brunkhorst, *Demokratie und Differenz* (Frankfurt: Fischer, 1994), 216–217. This is, moreover, just like Judith Butler's critique of Foucault's Aristotelian concept of the soul as an "instrument of power" that "forms and frames the body" (See Butler, *The Psychic Life of Power* (Palo Alto, Calif.: Stanford University Press, 1997), 91–92.

63. Mansfield, "Modern and Medieval Representation," 80.

64. Ibid.

65. Dewey, *The Public and Its Problems,* 93.

66. Marx, *The 18th Brumaire of Louis Bonaparte,* 124.

67. See Hasso Hofmann, "Das Postulat der Allgemeinheit des Gesetzes," in *Verfassungsrechliche Perspektiven* (Tübingen: Mohr, 1995), 270ff.

68. Di Fabio, *Das Recht offener Staaten,* 152; in agreement in this respect is Habermas, *Between Facts and Norms;* Maus, *Zur Aufklärung der Demokratietheorie.*

69. Di Fabio, *Das Recht offener Staaten.*

70. For a contrast, see Böckenförde, "Demokratie als Verfassungsprinzip," 374.

71. See also C. Möllers, "Globalisierte Jurisprudenz—Einflüsse relativierter Nationalstaatlichkeit auf das Konzept des Rechts und die Funktion seiner Theorie," in *Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts,* ed. Michael Anderheiden, Stefan Huster, and Stephen Kirste (Stuttgart: Steiner, 2001), 45.

72. See, for example, Maus, *Zur Aufklärung der Demokratietheorie,* 148ff., 176ff, 191ff; Böckenförde, "Demokratie als Verfassungsprinzip," 295 (with reference to the "actual people"), 295–296 (on popular sovereignty). For Article 1 of the Weimar Constitution ("The German Reich is a repub-

lic. State authority emanates from the people."), see Gerhard Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* (Berlin: Stilke, 1926), 37. The second sentence of Article 1 prescribes "popular sovereignty" and understands by that, first, the people as "the ultimate source of all state authority" (constitution—in the German Basic Law: state authority "emanates" from the people) and, second, that "all state authority" is "in the end, the will of the people" (performance—in the German Basic Law: the "exercise" of state authority by the people).

73. Rousseau, "On the Social Contract," Bk. 2, Ch. 2, pp. 154ff; Maus, *Zur Aufklärung der Demokratietheorie,* 142–143, 191ff., 203ff.; Brunkhorst, *Demokratie und Differenz,* 197–198.

74. When Rousseau writes that ancient democracy (and Rousseau and his contemporaries did not know a different concept of democracy) "is contrary to the natural order" because in it "the majority govern and the minority is governed (Rousseau, "On the Social Contract," Bk. 3, Ch. 4, p. 180), then that is an offense against the principle of popular sovereignty, which as a principle of government is amenable with the natural freedom of the individual ("natural order"). While popular sovereignty, according to Herfried Münkler as well, is the "exercise of power by all" (= *volunté générale*), ancient democracy is the "rule of the many, the dictatorship of the demos" (= *volunté des touts*). See Münkler, "Republik, Demokratie und Diktatur," 16.

75. Rousseau, "On the Social Contract," Bk. 2, Ch. 4, pp. 156ff.

76. Hasso Hofmann, *Bilder des Friedens oder Die vergessene Gerechtigkeit* (Munich: Siemens Stiftung, 1997), 35–36; see also Brunkhorst, *Einführung in die Geschichte politischer Ideen*, Ch. 5, 179ff.

77. On independence, see Rousseau, "On the Social Contract," Bk. 1, Ch. 7, pp. 149–150 (the *volonté générale*, expressed in general laws that regulate only external actions, "guarantees" the citizens against any "personal dependence"), Bk. 2, Ch. 3 (independence and freedom of opinion), as well as Bk. 4, Ch. 1, p. 204 ("the simple right to vote" and "to state an opinion," which "nothing can take away from the citizens").

78. The formulation of Article 1 of the Weimar Constitution is paradigmatically concise: "The German Reich is a republic. State authority emanates from the people."

79. Rousseau, "On the Social Contract," Bk. 4, Ch. 8, pp. 226, 226n18.

80. On the right to difference, see Mill, "On Liberty," 77.

81. On "individuation through socialization," see Jürgen Habermas, "Individuation through Socialization: On George Herbert Mead's Theory of Subjectivity," in *Postmetaphysical Thinking* (Cambridge, Mass.: MIT Press, 1992); on the connection between individuation and functional differentiation, see Niklas Luhmann, "Individuum, Individualität, Individualismus," in *Gesellschaftstruktur und Semantik, Bd. 3* (Frankfurt: Suhrkamp, 1989), 149ff.

82. This is also the concept of a people in the German Basic Law, see Müller, *Wer ist das Volk?,* 24f.; Stephen Oeter, "Allgemeines Wahlrecht und Ausschlua von Wahlberechtigung: Welche Vorgaben enthält das Grundgesetz?," in *Politische Integration der ausländischen Wohnbevölkerung,* ed. Ulrike Davy (Baden-Baden: Nomos, 1999), 50, 53; Angela Augustin, *Das Volk der Europäische Union* (Berlin: Duncker & Humblot, 2000), 310–311, 337–338, 345 (contra Böckenförde), 347–348, 390.

83. Rousseau, "Letters Written from the Mountain, Eighth Letter," 261; italics added.

84. Ibid. On the central role of the concept of law in the French Enlightenment, see also Schmale, *Entchristlichung, Revolution und Verfassung,* 37ff.

85. Rousseau, "On the Social Contract," Bk. 4, Ch. 8, p. 225; see also Simone Zurbuchen, *Naturrecht und natürliche Religion* (Würzburg: Königshausen & Neumann, 1991), 164ff.

86. Rousseau, "Letters Written from the Mountain, Eighth Letter," 261.

87. Sieyès, "What is the Third Estate?," 156. That would naturally be a perfect example for Foucault's Panopticon society. But with the reduction of the law to the architecture of the modern prison, Foucault gives the dialectic of Enlightenment a much too one-sided interpretation, as forgetful of freedom as it is fundamentalist. The distinction between the Panopticon of Foucault and Bentham and the law of Rousseau and Sieyès is that the citizens do not kneel before the law as the Benthamite prisoners do before the invisible eyes of the prison guard.

88. For a similar, and rightly polemical argument against "values" as a substitute for the lost sacred authority, see Henke, "Republik," 14, 33, 36.

89. On the selectivity of the law, see O. Lepsius, "Die erkenntnistheoretische Notwendigkeit des Parlamentarismus," in *Demokratie und Freiheit,* ed. Martin Bärtschi (Zurich: Boorberg, 1999), 160; Ingeborg Maus, "Zum Verhältnis von Recht und Moral aus demokratietheoretischer Sicht," in *Politik und Ethik*, ed. Kurt Bayertz (Stuttgart: Reclam, 1996), 194–227.

90. Kant, *The Metaphysics of Morals,* 30, 24; see also Rousseau, "On the Social Contract."

91. Aristotle, *Politics,* 1276b–1277b.

92. Brunkhorst, *Demokratie und Differenz,* 216–217. On the paradox of freedom and domination, or rather self-domination, in Greek ethics, see also Michel Foucault, *The History of Sexuality, Vol. 2: The Use of Pleasure* (New York: Random House, 1985); Hauke Brunkhorst, "Ästhetik der Existenz. Foucault, Arendt, die Griechen und wir," *Revue internationale de philosophie* 2 (1999): 223–240.

93. Rousseau, "Letters Written from the Mountain, Eighth Letter," 260–261. Not only Kant, which goes without saying, but also Hegel follows Rousseau against Aristotle on this point. Only when *all* are free, as Hegel's freedom-theoretic credo goes, is the individual *really* free. The freedom of the despot, but also that of the Tocquevillian aristocrats, remains fraught with negativity. It is irredeemably deficient.

94. Rousseau, "On the Social Contract," Bk. 1, Ch. 7, p. 150, Bk. 4, Ch. 2, p. 206.

95. "To make use at any time and unhampered" should mean the following: Popular sovereignty is "continually existent" (Böckenförde, "Demokratie als Verfassungsprinzip," 295)—even if one does not assume—like Böckenförde and Carl Schmitt, a *pouvoir constituent* substantially preordering the constitution or just—like Kelson—a formal "basic norm." That was only possible under presuppositions of either natural law—as with Sieyès—or a transcendental subject—as with Kant. When one no longer has either, there only remains the hermeneutic circle of a desubstantialized circle of communication in the sense of Habermas or Luhmann. Everything else would be either "imitation substantiality" (Habermas) or "emptied nomocracy" (Heller).

96. On the former, see Plato, *Gorgias,* 478a–479a; on the latter, see G. W. F. Hegel, *The Philosophy of History,* trans. J. Sibree (New York: Dover, 1956), 18.

97. Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Aalen: Scientia, 1979), 82.

98. Friedrich Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können" (Heidelberg: 2001), 6.

99. Kant, "The Right of a State," in *The Metaphysics of Morals*, §46, p. 91.

100. Ibid. On the doubly negative justice as the principle of justice behind freedom, see Brunkhorst, *Einführung in die Geschichte politischer Ideen*, 210ff.

101. See Article 20, Paragraph 3, of the German Basic Law in connection with the terms of the Preamble and the key Article 146 on the constituent power of the people. On that, see Hans-Peter Schneider, "Die verfassungsgebende Gewalt des Volkes," in *Handbuch des Staatsrechts, Bd. VII*, ed. Josef Isensee and Paul Kirchhof (Heidelberg: Müller, 1993), §158.

102. Müller, *Wer ist das Volk?*, 76; see also the allusion to the problem in Alexander Meiklejohn, *Political Freedom* (Westport: Greenwood, 1979), 94: "Self-government" requires an answer to the question: "Who are The People of the United States by whose consent and authority our government is maintained?" and then within the concept of the people itself, the gaps become visible between citizens with voting rights and "'outsiders' and 'aliens'" who are clearly "subject to the laws," but "with no part in the making of them."

103. Robert Dahl, *Democracy and Its Critics* (New Haven, Conn.: Yale University Press, 1989), 122.

104. Oeter, "Allgemeines Wahlrecht und Ausschluß von Wahlberechtigung," 50; see also Dahl, *Democracy and Its Critics*, 119ff., esp. 129. Exclusion from the democratic *demos* is only possible as long as it "is compatible with laws of freedom" (Augustin, *Das Volk der Europäische Unioni*, 310), and it is in the case of children, because they will grow up and, thus, are still granted the full reciprocity of all instersubjective relations *over the course of time*. The justification seems just as unproblematic in the case of foreigners passing through or only present for a short time, provided they violate reciprocity and self-imposed *obligation*, that they can evade the consequences of their own legislative acts—provided they are not prevented from doing that by international or supranational law—immediately after or even before coming into effect. See Augustin, *Das Volk der Europäische Union*, 310–311.

105. Oeter, "Allgemeines Wahlrecht und Ausschluß von Wahlberechtigung," 53—with respect to the German Federal Constitutional Court.

106. On the deliberative function of parliamentarianism, see also Lepsius, "Die erkenntnistheoretische Notwendigkeit des Parlamentarismus."

107. On the critique of Rawls's thesis, see Bruce Ackerman, "Political Liberalisms," *The Journal of Philosophy* 91, no. 7 (1994): 364–386.

108. Müller, *Demokratie in der Defensive*, 61–62.

109. Ibid., 68–69.

110. See Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne* (Berlin: Duncker & Humblot, 1992).

111. Müller, *Wer ist das Volk?*

112. Thus, one must also clearly understand Rousseau's distinction of a civil religion of tolerance from the intolerant culture of Christianity. See Zurbuchen, *Naturrecht und natürliche Religion*, 166.

113. Jürgen Habermas, "Justice and Solidarity," in *The Moral Domain*, ed. Thomas E. Wren (Cambridge, Mass.: MIT Press, 1990), 245.

4 The Dual Inclusion Problem of Modern Society

1. Marx, *The 18th Brumaire of Louis Bonaparte,* 19, 15.

2. Polanyi, *The Great Transformation*, 164. On the burden for the environment, see also Niklas Luhmann, *Ecological Communication*, trans. John Bednarz Jr. (Chicago: University of Chicago Press, 1989); on the "colonization" of the lifeworld, see Jürgen Habermas, *The Theory of Communicative Action, Vol. 2, Lifeworld and System: A Critique of Functionalist Reason,* trans. Thomas McCarthy (Boston: Beacon Press, 1987), 332ff.

3. On pauperization as a presupposition of functional differentiation, see, for example, Rudolf Stichweh, "Inklusion in Funktionssysteme der modernen Gesellschaft," in *Differenzierung und Verselbständigung. Zur Entwicklungsgeschichte gesellschaftlicher Teilsysteme*, ed. Renate Mayntz (Frankfurt: Campus, 1988), 266; Polanyi, *The Great Transformation,* 81ff.

4. See Heinz Schilling, *Die neue Zeit* (Berlin: Siedler, 1999).

5. See, for example, Polanyi, *The Great Transformation;* Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. Richard Howard (New York: Random House, 1965); Michel Foucault, *The Birth of the Clinic* (Routledge: London, 1973).

6. Ronald G. Asch, "Kriegsfinanzierung, Staatsbildung und ständische Ordnung in Westeuropa im 17. und 18. Jahrhundert," *Historische Zeitschrift* 268 (1999): 642ff., 647, 654; see also Willoweit, "Die Herausbildung des staatlichen Gewaltmonopols im Entstehungsprozea des modernen Staates," 319–320.

7. See Alf Lüdtke, "Genesis und Durchsetzung des *modernen Staates*," *Archiv für Sozialgeschichte* 20 (1980): 470–491.

8. Polanyi, *The Great Transformation,* 106.

9. Ibid., 185.

10. Marx, *Capital, Volume One,* 875.

11. Marx and Engels, "Manifesto of the Communist Party," 475.

12. On the derivation of the formula "from status to contract" from Roman law and its reception, see Maine, *Ancient Law,* 170; see also 215ff., 304ff.

13. Durkheim, *The Division of Labor in Society,* 152; see also Habermas, *The Theory of Communicative Action, Vol. 2*, 113ff.

14. Marx and Engels, "Manifesto of the Communist Party," 476.

15. Niklas Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp, 1997), 499.

16. Claus Offe, "The Utopia of the Zero-Option: Modernity and Modernization as Normative Political Criteria," *Praxis International* 7, no. 1 (1987): 1–24.

17. Ibid.

18. Marx and Engels, "Manifesto of the Communist Party," 476.

19. Arendt, *The Origins of Totalitarianism;* see also Hauke Brunkhorst, "Rights and Sovereignty of the People in the Crisis of the Nation State," *Ratio Juris* 13, no. 1 (2000): 56ff.

20. Arendt, *The Origins of Totalitarianism,* 418.

21. Luhmann, *Die Gesellschaft der Gesellschaft,* 721. That at least may have been the strongest tie apart from the remnants, dragged along until 1789, of the traditional good of natural law—after all, the absolutist rulers were one and all Christian kings. See also Michael Stolleis, *Staat und Staatsräson in der frühen Neuzeit* (Frankfurt: Suhrkamp, 1990).

22. Luhmann, "Staat und Staatsräson im Übergang von traditionaler Herrschaft zu moderner Politik," 147.

23. Michael Stolleis, "Untertan—Bürger—Staatsbürger," in *Staat und Staatsräson in der frühen Neuzeit,* 303.

24. Stolleis, *Staat und Staatsräson in der frühen Neuzeit,* 304.

25. See Niklas Luhmann, "Power," in *Trust and Power: Two Works by Niklas Luhmann* (Chichester: John Wiley & Sons, 1979), esp. 146ff. The outcome of the competition between the U.S. and USSR systems also offers compelling evidence for this. This had been predicted as early as the 1960s by Talcott Parsons, whom spirited theorist of individualization declared definitively passé after 1989 for having allegedly failed to anticipate the end of the Soviet system. In his book, *The System of Modern Societies*, he argued that the Soviet Union had a chance of maintaining and increasing its capacity for economic and political performance, *only* if it institutionalized basic functional differentiations among autonomous systems for science, the economy, law, politics, the public sphere, and so forth, by way of structurally reforming its constitutional order (effective protection of basic rights, political parties, legal opposition, and the like). But they were not able to do this, as Parsons hoped they would.

26. Marx, *Capital, Volume One,* 255.

27. Ibid., 250.

28. Ibid., 253.

29. Luhmann, *Die Gesellschaft der Gesellschaft,* 724.

30. Ibid., 739.

31. Ibid., 749.

32. Ibid., 764.

33. See Talcott Parsons, *Societies: Evolutionary and Comparative Perspectives* (Englewood Cliffs, N.J.: Prentice Hall, 1966), 28.

34. Luhmann, *Die Gesellschaft der Gesellschaft,* 753. Of course, it does not follow from this that planning would be impossible, for example, planning for expanding a university, research, or even state-intervention in the economy, infrastructure, and so forth. But one cannot, with the frequently used planning media of power and law, produce true sentences, purchase property, and so on. Luhmann's own radical skepticism toward planning, is not an inevitable implication of systems theory. This is shown in Helmut Willke, *Systemtheorie* (Stuttgart: Gustav Fischer, 1993), 214ff.;

Helmut Willke, *Systemtheorie II: Interventionstheorie* (Stuttgart: Lucius & Lucius, 1996); Helmut Willke, *Systemtheorie III: Steurungstheorie* (Stuttgart: Gustav Fischer, 1995).

35. Luhmann, *Die Gesellschaft der Gesellschaft,* 770.

36. This does not mean that the systems of science and economy would not spur the imagination, creating hypotheses and revealing market gaps. See Udo Di Fabio, *Offener Diskurs und geschlossene Systeme* (Berlin: Duncker & Humblot, 1991), 173–174, n27, for exactly the opposite. But the subjects must fall out—precisely if one understands them, like Luhmann, or recently like Dieter Henrich, as autopoetic systems (see *Versuch über Kunst und Leben* [Munich: Hanser, 2001], 58.) And therein lies the problem.

37. On the negative dialectic of overintegration and underintegration, see Marcelo Neves, "Zwischen Subintegration und Überintegration: Bürgerrechte nicht ernstgenommen," *Kritische Justiz* 4 (1999): 557–577.

38. See Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne.*

39. See Marcelo Neves, *Symbolische Konstitutionalisierung* (Berlin: Duncker & Humblot, 1998), 70; Niklas Luhmann, *Political Theory in the Welfare State,* trans. John Bednarz Jr. (New York: de Gruyter, 1990), 34ff.; Luhmann, *Das Recht der Gesellschaft,* 582ff; Parsons, *The System of Modern Societies,* 88ff.

40. Luhmann, *Law as a Social System,* 490.

41. Žižek, *The Ticklish Subject,* 130–131.

42. Neves, *Symbolische Konstitutionalisierung,* 70.

43. Luhmann, *Das Recht der Gesellschaft,* 582, 584; italics added. On this, for example, see Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne.*

44. Luhmann, *Das Recht der Gesellschaft,* 583.

45. Ibid., 152–153, 156ff., 193–194, 199; see also Niklas Luhmann, "Die Funktion des Rechts: Erwartungssicherung oder Verhaltungssteurung?," in *Ausdifferenzierung des Rechts* (Frankfurt: Suhrkamp, 1981), 73ff.

46. Gustav Radbruch, *Rechtsphilosophie* (Stuttgart: Kochler, 1950), 289–290.

47. Neves, *Symbolische Konstitutionalisierung,* 70.

48. Weber, *The Protestant Ethic and the Spirit of Capitalism,* 60–61.

49. Ibid., 106.

50. Ibid., 72.

51. Max Weber, "The Protestant Sects and the Spirit of Capitalism," in *From Max Weber: Essays in Sociology,* ed. H. Gerth and C. Wright Mills (New York: Oxford, 1946), 320.

52. Weber, *The Protestant Ethic and the Spirit of Capitalism,* 99; translation modified.

53. Weber, "The Protestant Sects and the Spirit of Capitalism," 302–322.

54. Luhmann, "Individuum, Individualität, Individualismus," 204.

55. Maine, *Ancient Law,* 258; see also 208–209.

56. Luhmann, "Individuum, Individualität, Individualismus," 170. As an agent of socialization and special institution for intimacy, the family is obviously essential, but only for society, not for the individual. While the individual is dependent for his or her entire life on the achievements of the economy, law, and politics and can only do without them with difficulty and huge sacrifice, he or she can leave if there are problems with the family and one becomes estranged, and that is often the best solution to the problem.

57. Ibid., 224.

58. Ibid., 211.

59. Ibid., 158.

60. See also Talcott Parsons and Gerald M. Platt, *The American University* (Cambridge, Mass.: Harvard University Press, 1973), 1ff. Luhmann spelled that out from early on in terms of a sociological analysis of the constitution: Niklas Luhmann, *Grundrechte als Institution* (Berlin: Duncker & Humblot, 1965).

61. Kant, *The Metaphysics of Morals,* §47, p. 93, italics added.

62. The "acceleration problem"—the simultaneous growth of the independence and the dependence of the individual—is, in fact, *the* problem of sociology since Durkheim. See Di Fabio, *Offener Diskurs und geschlossene Systeme.* But it is not just a problem for functionalist sociology. Rather, it came—and *this* is significant above all for constitutional theory—onto the agenda of legal philosophy just at the moment in which it switched from state sovereignty to popular sovereignty, thus, with Rousseau and Kant. Incidentally, Luhmann and Habermas, pace Di Fabio, do not differ on *this* point. On this, see also Marcelo Neves, *Zwischen Themis und Leviathan: Eine schwierige Beziehung. Eine Rekonstruktion des Rechtsstaats in Auseinandersetzung mit Luhmann und Habermas* (Baden-Baden: Nomos, 2000).

63. On the integration of freedom and order in Kant, see also Wolfgang Kersting, *Wohlgeordnete Freiheit* (Frankfurt: Suhrkamp, 1993); on the democratic implications of Kant's Doctrine of Right, see Maus, *Zur Aufklärung der Demokratietheorie.*

64. John Dewey's key phrase of the "Great Community" aimed at the functional aspect of modern democracy, which cannot be reduced to private autonomy. Democracy for Dewey is a large, communicative community of many such communities of scientists and experimenters, in which more individual possibilities are set free than in all predemocratic forms of association combined. See Dewey, *The Public and Its Problems,* 143ff; see also James T. Kloppenberg, "Demokratie und Entzauberung der Welt: Von Weber über Dewey zu Habermas und Rorty," in *Philosophie der Demokratie,* ed. Hans Joas (Frankfurt: Suhrkamp, 2000), 44–80.

65. On the concept and function of "symbolic capital," see Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste,* trans. R. Nice (London: Routledge, 1984); Pierre Bourdieu, *Homo Academicus,* trans. Peter Collier (Palo Alto, Calif.: Stanford University Press, 1988).

66. Karl Marx, "Wage Labour and Capital," in *The Marx-Engels Reader,* ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 203–217.

67. [The allusion to Marx refers to the phrase "a class in civil society which is not a class of civil society." See Marx, "Contribution to the Critique of Hegel's *Philosophy of Right*: Introduction," 64.—Trans.]

68. Niklas Luhmann, "Zum Begriff der sozialen Klasse," in *Soziale Differenzierung* (Opladen: Westdeutscher Verlag, 1985), 121–122.

69. Ibid., 122.

70. Max Weber, *Gesammelte Aufsätze zur Religionssoziologie I* (Tübingen: Mohr, 1922), 4ff.

71. See Luhmann, "Zum Begriff der sozialen Klasse," 145.

72. See Karl Marx, *Capital: A Critique of Political Economy, Volume Two,* trans. David Fernbach (Middlesex: Penguin, 1978).

73. On the concept of "underclass" (Gunnar Myrdall) and "outerclass" (Bill Clinton), see Rudolf Stichweh, "Inklusion/Exklusion, funktionale Differenzierung und die Theorie der Weltgesellschaft," *Soziale Systeme* 1 (1997): 125–126.

74. Luhmann, "Zum Begriff der sozialen Klasse," 131; see also Luhmann, *Die Gesellschaft der Gesellschaft*, 772ff.

75. Luhmann, *Die Gesellschaft der Gesellschaft*, 774.

76. See, for example, Marx, *18th Brumaire of Louis Bonaparte.*

77. Ulrich K. Preuß, "Perspectives of Democracy and the Rule of Law," *Journal of Law and Society* 18 (1991); quoted in Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne*, 107.

78. Preuß, "Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates," 115.

79. On Hobbes, see Brunkhorst, *Einführung in die Geschichte politischer Ideen,* Ch. 5, 179ff.

80. See Thomas H. Marshall, *Citizenship and Social Class,* 33ff.

81. See Dieter Grimm, *Die Zukunft der Verfassung* (Frankfurt: Suhrkamp, 1991).

82. Marx, *The 18th Brumaire of Louis Bonaparte*, 66.

83. Luhmann, "Verfassung als evolutionäre Errungenschaft," 176, 180, 184. On the reduction of human rights to possessive individualism, see the first section of Marx, "On the Jewish Question."

84. Luhmann, "Verfassung als evolutionäre Errungenschaft," 180.

85. Luhmann, *Die Gesellschaft der Gesellschaft,* 367; see also Luhmann, *Das Recht der Gesellschaft,* 407ff., 470–471; Niklas Luhmann, *Die Politik der Gesellschaft* (Frankfurt: Suhrkamp, 2001), 96ff.; Jürgen Habermas, "Law and Morality," in *The Tanner Lectures on Human Values, VIII*, ed. S. McMurrin (Salt Lake City: University of Utah, 1988), 219–279.

86. On the continuous conflict between crown and high courts, the old "parliaments," which arose out of it in prerevolutionary France, see Schmale, *Entchristlichung, Revolution und Verfassung,* 37ff.

87. Hasso Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung?," *Juristen Zeitung* 22 (1999): 1072.

III Solidarity in the Global Legal Community

1. Hannah Arendt, "Imperialism: Road to Suicide," *Commentary* 2 (1946): 34; on the revisionist turn in Hannah Arendt's work, see Brunkhorst, *Hannah Arendt*, 84ff.

2. Arendt, *The Origins of Totalitarianism*, 79.

3. That is the thesis of Arendt's *The Origins of Totalitarianism*.

4. See Paul Streeten, *Globalisation—Threat or Opportunity?* (Copenhagen: Business School Press, 2001), 27.

5. Möllers, *Staat als Argument*, 250.

6. On the active role of the state not just in the field of globalization, see generally Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985); see also Saskia Sassen, "Embedding the Global in the National: Implications for the Role of the State," in *States and Sovereignty in the Global Economy*, ed. D. A. Smith, D. J. Solinger, and S. C. Topik (London: Routledge, 1999), 158–171.

7. Luhmann, *Die Politik der Gesellschaft*, 224.

8. Sassen, "Embedding the Global in the National: Implications for the Role of the State," 159–160.

9. Möllers, "Globalisierte Jurisprudenz," 52.

10. See Michael Zürn, *Regieren jenseits des Nationalstaats* (Frankfurt: Suhrkamp, 1998), 301–302.

11. See also Jean-Marie Guéhenno, *Das Ende der Demokratie* (Munich: Artemis, 1994); Di Fabio, *Das Recht offener Staaten*, 82.

12. Anthony McGrew, "Demokratie ohne Grenzen? Globalisierung und die demokratische Theorie und Politik," in *Politik der Globalisierung*, ed. Ulrich Beck (Frankfurt: Suhrkamp, 1998), 385; see also Streeten, *Globalisation—Threat or Opportunity?*, 8.

13. Immanuel Kant, "Toward Perpetual Peace," in *Immanuel Kant: Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 317–351. For Kant, the republican constitution is "the condition whereby war... is deterred; and, at least negatively, progress toward the better is assured humanity in spite of all its infirmity, for it is at least left undisturbed in its advance" (*The Conflict of the Faculties*, 155). On the "Westphalia system of international law," see Bardo Fassbender, "Die verfassungs- und völkerrechtsgeschichtliche Bedeutung des Westfälischen Friedens," in *Frieden und Recht*, ed. Ingo Erberich (Münster: Boorberg, 1998), 9–52. Up to now, Kant's thesis that the only path to a lasting world peace is through democratization (or, in Kant's terminology, "republicanization") of all states has also been empirically confirmed. While aggressive democracies would like to implement their interests elsewhere (consider Vietnam), to this day they have not led a single war *against one another*. Whether the sample population is sufficient for statistical significance is, however, disputed. See the by now classic study by M. Doyle, "Kant, Liberal Legacies, and Foreign Affairs," *Philosophy & Public Affairs* 3 and 4 (1983): 209ff. Kant's

cautious thesis that the "republican constitution" is "created in such a way as to avoid, by its very nature, principles permitting offensive war" (*The Conflict of the Faculties,* 153) is certainly accurate. Should that apply precisely to the Vietnam War, since that was surely an outright breach of the U.S. Constitution?

5 Decentering Eurocentrism

1. On the critique of this jurisprudential figure, see Möllers, *Staat als Argument*, 154ff.

2. Hegel, *Elements of the Philosophy of Right,* §331, §§333–334. If war "as something which ought to come to an end" is thereby to preserve the "possibility of peace," the "*bond*" of reciprocal recognition may not be torn even in war (§338). That is also true in Kant, "Toward Perpetual Peace."

3. G. W. F. Hegel, *The Encyclopaedia Logic, Part I of the Encyclopaedia of Philosophical Sciences,* trans. T. F. Geraets, W. A. Suchting, and H. S. Harris (Indianapolis, Ind.: Hackett, 1991), §92, p. 148; Hegel, *Science of Logic,* trans. A. V. Miller (New York: Humanities Press, 1969), 170–178. On the internationalization of the other sides of limits, see Jacques Derrida, *The Other Heading: Reflections on Today's Europe,* trans. Pascale-Anne Brault and Michael B. Naas (Bloomington: Indiana University Press, 1992).

4. Hegel, *The Encyclopaedia Logic, Part I of the Encyclopaedia of Philosophical Sciences*, §92, 148. See also Hegel's polemic against the doctrine of natural boundaries: Hegel, *Elements of the Philosophy of Right,* §247.

5. See Ingeborg Maus, "Nationalstaatliche Grenzen und das Prinzip der Volkssouveränität," (Manuscript, Frankfurt, 2001). In this respect, the current discussion of the "recognition of dependencies and inclusion of the other in the formation of one's own preferences" in the course of the entire European discussion of "multilevel politics" or constitutionalism can directly follow the older discussion: F. Scharpf, "Demokratieprobleme in der europäishen Mehrebenenpolitik," in *Demokratie in Ost und West,* ed. Wolfgang Merkel and Andreas Busch (Frankfurt: Suhrkamp, 1999), 688.

6. Maus, "Nationalstaatliche Grenzen und das Prinzip der Volkssouveränität," 5; see also 7, 14. See also Ingeborg Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie" (Manuscript, Frankfurt, 2001), 15.

7. Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie," 4ff; Maus, "Nationalstaatliche Grenzen und das Prinzip der Volkssouveränität," 9.

8. Möllers, *Staat als Argument,* 396.

9. Stefan Langer, *Grundlagen einer internationalen Wirtschaftsverfassung* (Munich: Beck, 1994), 17ff.

10. Meiklejohn, *Political Freedom,* 53.

11. Campanella, *Der utopische Staat* (Frankfurt: Fischer, 1969), 162.

12. See Martin Seel, "Dialektik des Erhabenen," in *Vierzig Jahre Flaschenpost,* ed. Wilhelm van Reijen and Gunzelin Schmid Noerr (Frankfurt: Fischer, 1987), 11ff.

13. See Brunotte, *Puritanismus und Pioniergeist.*

14. See Ulrich Menzel, *Globalisierung versus Fragmentierung* (Frankfurt: Suhrkamp, 1998), 32.

15. Marx and Engels, "Manifesto of the Communist Party," 474, 476–477.

16. Ibid., 476–477.

17. Karl Marx, "The *Grundrisse*," in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton & Co., 1978), 246.

18. See Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment*, trans. John Cumming (New York: Continuum, 1944).

19. See Nathaniel Bermann, "Bosnien, Spanien und das Völkerrecht—Zwishen 'Allianz' und 'Lokalisierung,'" in *Einmischung erwünscht? Menschenrechte und bewaffnete Intervention*, ed. Hauke Brunkhorst (Frankfurt: Fischer, 1998), 117–140.

20. See Luhmann, "Verfassung als evolutionäre Errungenschaft;" On the functional necesity of democracy, see Luhmann, *Law as a Social System*, 304, 363–364, 380, 404–405; see also Luhmann, *Grundrechte als Institution*, 137, 175.

21. There is extensive research on that. A good overview is provided in Manfred G. Schmidt, *Demokratietheorien* (Opladen: Leske & Buderich, 2000), 438ff., 460ff. On social constraints, see also Hans-Jürgen Puhle, "Demokratisierunsprobleme in Europa und Amerika," in *Das Recht der Republik*, ed. H. Brunkhorst and P. Niesen (Frankfurt: Suhrkamp, 1999), 317–345; see also Wolfgang Merkel and Hans-Jürgen Puhle, *Von der Diktatur zur Demokratie. Transformationen, Erfolgsbedingungen, Entwicklungspfade* (Opladen: Westdeutscher Verlag, 1999).

6 Center and Periphery

1. See also Streeten, *Globalisation—Threat or Opportunity?*, 31; Hans-Dieter Evers, "Globale Integration und globale Ungleichheit," in *Lehrbuch der Soziologie*, ed. Hans Joas (Frankfurt: Campus, 2001), 464.

2. Francis Fukuyama, *The End of History and the Last Man* (New York: Avon, 1992), 108.

3. See also Gertrud Koch, "Die neue Drahtlosigkeit. Globalisierung der Massenmedien," *Deutsche Zeitschrit für Philosophie* 6 (1997). The quotation is from Marx, "The *Grundrisse*," 223.

4. See Brunkhorst, *Einführung in die Geschichte politischer Ideen*, Ch. 4, 158ff.

5. Max Singer and Aaron Wildavsky, *The Real World Order* (Chatham, N. J.: Chatham House Publishers, 1993).

6. See Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne;* Neves, *Symbolische Konstitutionalisierung;* Marcelo Neves, *Die Grenzen demokratischer Rechtstaatlichkeit und des Föderalismus in Brasilien* (Basel: Helbing & Lichtenhahn, 2000); Müller, *Demokratie in der Defensive*, 29ff., 48ff., 62ff.; Guillermo O'Donnell, "Deligative Democracy," *Journal of Democracy* 1 (1994): 64ff.

7. See Žižek, *The Ticklish Subject*, 198f, 215–216; on the following, see also Heinz Kohl, "Die andere Seite der Globalisierung," *Frankfurter Allgemeine Zeitung* 265 (2000): 11.

8. See also Stefan Breuer, *Anatomie der konservativen Revolution* (Darmstadt: Wiss. Buchges., 1993), 201.

9. See Friedrich Niewöhner, "Satan droht euch Armut an und befiehlt eucht Schändliches," *Frankfurter Allgemeine Zeitung* 224 (2001): n5.

10. See H. Münkler, "Schärende Wunden," *Frankfurter Allgemeine Zeitung* 201 (2001): 10.

11. Georg Elwert, "Ethnizität und Nation," in *Lehrbuch der Soziologie,* ed. Hans Joas (Frankfurt: Campus, 2001), 246; see also Marie-Janine Calic, *Der Krieg in Bosnien-Hercegovina* (Frankfurt: Suhrkamp, 1995), 60ff. Calic comes to the conclusion that "ethnic conflicts" are more likely the "*result,* not really the *cause* of violent confrontations" (91).

12. On the variations of fundamentalism, see Georg Stauth, "Religiöser Fundamentalismus zwischen Orient und Okzident: Religiöse Identitätspolitik und ihr Verhältnis zur Demokratie," in *Schattenseiten der Globalisierung*, ed. Dietmar Loch and Wilhelm Heitmeyer (Frankfurt: Suhrkamp, 2001), 140–166.

13. On the "vicious cycle" and on the postmodern constellation of fundamentalism, see Žižek, *The Ticklish Subject*, 205–206; the quotation is from p. 211.

14. On the simultaneity of globalization and fragmentation, see Benjamin J. Barber, *Jihad vs. McWorld: How Globalism and Tribalism Are Reshaping the World* (New York: Ballantine, 1996); Menzel, *Globalisierung versus Fragmentierung;* Martin van Creveld, *Aufsteig und Untergang des Staates* (Munich: Gerling, 1999), 422ff., 434ff.

15. See Stefan Breuer, *Der Staat* (Reinbek: Rowohlt, 1998), 292.

16. Fritz Scharpf, *Regieren in Europa* (Frankfurt: Campus, 1999), 112ff.

17. Ibid., 45.

18. On the distinction between negative and positive integration, see Ibid., 46ff.

19. See also Klaus Günther, "Rechtspluralismus und universaler Code der Legalität: Globalisierung als rechtstheoretisches Problem," in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit,* ed. Lutz Wingert and Klaus Günther (Frankfurt: Suhrkamp, 2001), 550–551.

20. Marx, *The 18th Brumaire of Louis Bonaparte,* 33; see also Ernst Fraenkel, "Die repräsentative und die plebisyitäre Komponente im demokratischen Verfassungsstaat," in *Deutschland und die westlichen Demokratien* (Frankfurt: Suhrkamp, 1991), 168–169.

21. Wolfgang Streek, "Internationale Wirtschaft, nationale Demokratie," in *Internationale Wirtschaft, nationale Demokratie: Herausforderungen für die Demokratietheorie,* ed. W. Streek (Frankfurt: Campus, 1998), 30–31; on the Brazilian example, see Neves, *Die Grenzen demokratischer Rechtstaatlichkeit und des Föderalismus in Brasilien,* 37ff., 49ff.

22. See also Streek, "Internationale Wirtschaft, nationale Demokratie," 37.

23. Jean-Marie Guéhenno, "Europas Demokratie erneuern," in *Demokratie am Wendpunkt,* ed. Werner Weidenfeld (Berlin: Siedler, 1996), 411.

24. Claus Offe, "Main Problems of Contemporary Theory of Democracy and the Uncertain Future of its Practice," *Theoria* 86 (1995); see also Zürn, *Regieren jenseits des Nationalstaats,* 256ff., 297–298, 306–307.

25. On the Latin American model, see O'Donnell, "Deligative Democracy," 66f; see also Müller, *Demokratie in der Defensive,* 38, 51–52.

26. Žižek, *The Ticklish Subject,* 216.

27. See Langer, *Grundlagen einer internationalen Wirtschaftsverfassung;* Scharpf, *Regieren in Europa,* 31, 46ff.

28. Scharpf, *Regieren in Europa*, 49; see also Christian Joerges, "Markt ohne Staat?—Die Wirtschaftsverfassung der Gemeinschaft und die regulative Politik," in *Staatswerdung Europas? Optionen für eine Europäische Union,* ed. Rolf Wildenmann (Baden-Baden: Nomos, 1991), 225–267; Zürn, *Regieren jenseits des Nationalstaats,* 178ff.

29. Scharpf, *Regieren in Europa*, 52; see also Streeten, *Globalisation—Threat or Opportunity?*, 115–116.

30. See Streeten, *Globalisation—Threat or Opportunity?*, 8–9, 28ff.; Anthony Giddens, *Runaway World* (New York: Routledge, 2003), 15–16; United Nations Development Program, *Human Development Report 1996* (Oxford: Oxford University Press, 1996).

31. Philippe Rekacewicz, "Der Süden trägt die Last der Flüchtlinge," *Le Monde diplomatique* (April 2001): 12–13.

32. In the sense of the distinction by Habermas between system integration and social integration in the theory of communicative action (see Habermas, *The Theory of Communicative Action,* 2 vols.) The drawback of a merely functional integration, which mimetically reproduces itself in the mediatized speech gestures of the "political classes" of the West, is often the sudden outbreak of "non-functional cruelty" by skinheads, hooligans, and so forth. In updating the dialectic of enlightenment, see Žižek, *The Ticklish Subject,* 201ff.

33. Luhmann, *Die Gesellschaft der Gesellschaft*, 630; see also Achim Schrader, "Brasilien: Soziale Fragen, soziale Strukturen," in *Verfassungsreform in Brasilien und Deutschland*, ed. Wolf Paul (Frankfurt: Lang, 1995), 30–31.

34. Luhmann, *Die Gesellschaft der Gesellschaft,* 631.

35. Müller, *Demokratie in der Defensive.,* 49ff., 34ff., 39; see also Neves, "Zwischen Subintegration und Überintegration," 576.

36. Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne*, 65ff., 72ff., 110ff.; Neves, "Zwischen Subintegration und Überintegration"; Neves, *Die Grenzen demokratischer Rechtstaatlichkeit und des Föderalismus in Brasilien,* 61ff.

37. Neves, *Die Grenzen demokratischer Rechtstaatlichkeit und des Föderalismus in Brasilien,* 62; on the issue of Mexican civil jurisdiction, see also Volkmar Gessner, *Recht und Konflikt. Eine Untersuchung privatrechtlicher Konflikte in Mexiko* (Tübingen: Mohr, 1976), 63–64, 69, 73–74, 81ff., 100.

38. Neves, *Die Grenzen demokratischer Rechtstaatlichkeit und des Föderalismus in Brasilien,* 67–68.

39. Luhmann, *Das Recht der Gesellschaft,* 583.

40. Neves, "Zwischen Subintegration und Überintegration," 573–574.

41. Luhmann, *Das Recht der Gesellschaft,* 632–633; see also Markus Göbel and Johannes F. K. Schmidt, "Inklusion/Exklusion," *Soziale Systeme* 1 (1998): 113–114.

42. Luhmann, *Das Recht der Gesellschaft,* 633.

43. Marx and Engels, "Manifesto of the Communist Party," 500: "The proletarians have nothing to lose but their chains."

44. Luhmann, *Das Recht der Gesellschaft,* 585.

45. Schrader, "Brasilien: Soziale Fragen, soziale Strukturen," 30.

46. Müller, *Demokratie in der Defensive,* 90.

47. Ibid.

48. Ibid., 51.

49. Marx, *18th Brumaire of Louis Bonaparte,* 124.

50. See Streeten, *Globalisation—Threat or Opportunity?,* 25.

51. Kant, "Toward Perpetual Peace," 328–329; see also Klaus A. Ziegert, "Globalisierung des Rechts aus der Sicht der Rechtssoziologie," in *Globalisierung des Rechts,* ed. Rüdiger Voigt (Baden-Baden: Nomos, 1999–2000), 89.

52. Kant, "Toward Perpetual Peace," 329. There are economic solutions to the problem of dealing with the right of *laissez-passer* without the checkpoint chaos of open borders and catastrophes of global dumping; see Gerd Grözinger, "Weltbürgerschaft und Nationalitätenlotterie. Zwei Überlegungen zur globalen Verteilung von Reichtum und Bevölkerung," in *Demokratischer Experimentalismus,* ed. H. Brunkhorst (Frankfurt: Suhrkamp, 1998), 175–200; on the global unity of the "market utopia" and the "labor market," see also Helmut Willke, *Atopia* (Frankfurt: Suhrkamp, 2001), 21ff.

53. Until now, even the restrictions of economic liberalism seem to follow the hegemonic logic of *privileged* competition, such that the exceptions from free trade, sectoral preventive measures, protection and preferential treatment of weak economies—which are allowed within the GATT/WTO framework—protect the rich against the poor and, above all, the stronger among the poor against the weakest, and thereby contribute "to concealed manipulation by industrial nations and to discrimination between developing countries." See Langer, *Grundlagen einer internationalen Wirtschaftsverfassung,* 299–300, 302ff., 311ff.

54. The United States now has (in contrast to the 1960s and 1970s) not only the highest incarceration rate of the Western world by far (1 million inmates), its proportion of prisoners (600 of every 100,000 residents) is surpassed only by that of Russia. Meanwhile, the United States also spends more money on prisons (with an increase from $4 billion in 1975 to $30 billion in 1995) than it does for education, which is considerable given that it spends more money on education than most other industrial states. The "prison society" (Foucault) is also growing in the European Union but is still far from the American growth rate. See Fritz Sack and Michael Lindenberg, "Abweichung und Kriminalität," in *Lehrbuch der Soziologie,* ed. Hans Joas (Frankfurt: Campus, 2001), 193–194.

55. Schmidt, *Demokratietheorien,* 452.

56. Müller, *Demokratie in der Defensive,* 91–92.

57. See Georg Jellinek, *Verfassungsänderung und Verfassungswandlung* (Berlin: Häring, 1906).

58. Müller, *Demokratie in der Defensive*, 92.

59. On the "defective" democracies, see Puhle, "Demokratisierunsprobleme in Europa und Amerika."

60. Streeten, *Globalisation—Threat or Opportunity?*, 115–116.

61. McGrew, "Demokratie ohne Grenzen? Globalisierung und die demokratische Theorie und Politik," 386.

62. The latter was obviously the case in the 1930s. On de-nationalization as a precondition and consequence of the politics of national socialism in Germany and other fascist/totalitarian regimes, see Franz Neumann, *Behemoth. Struktur und Praxis des Nationalsozialismus 1933–1944* (Frankfurt: Fischer, 1993); similarly, see Arendt, *The Origins of Totalitarianism*, 395ff.

63. Michael Zürn, "Zum Verhältnis von Globalisierung, politischer Integration und politischer Fragmentierung," in *Jahrbuch Arbeit und Technik* (Bonn: Dietz, 1996), 11. Joerges sees the exceptional quality of the European legal community in the specific density of the regulations, in comparison with all other transnational or supranational organizations. See Christian Joerges, "Das Recht im Prozeß der europäischen Integration," in *Europäische Integration*, ed. Markus Jachtenfuchs and Beate Kohler-Koch (Opladen: Leske + Budrich, 1996), 74. [An English version appeared as "Taking the Law Seriously," *European Law Journal* 2 (1996): 105–135.—Trans.]

64. See Möllers, "Globalisierte Jurisprudenz," 47, 49ff.

65. Van Creveld, *Aufsteig und Untergang des Staates*, 421.

66. See Günther Teubner, "Idiosyncratic Production Regimes," in *The Evolution of Cultural Entities, Proceedings of the British Academy 112* (Oxford: Oxford University Press, 2002); Günther Teubner, "Alienating Justice: On the Social Surplus Value of the Twelfth Camel," in *Law's New Boundaries: Consequences of Legal Autopoiesis*, ed. D. Nelken and Priban J. (Burlington, Vt.: Ashgate, 2001).

67. Van Creveld, *Aufsteig und Untergang des Staates*, 422.

68. Milos Vec, "Die Norm begräbt den Staat," Frankfurt Allgemeine Zeltung (*FAZ*), *supplement*, February 11, 1999, VII.

69. Ralf-Peter Calliess, "Globale Kommunikation—staatenloses Recht," *Archiv für Rechts-und Sozialphilosophie* Beiheft 79 (2001): 68. That may be sorted out with an expansion of the doctrine of third-party effect [*Drittwirkung*] of basic rights—for it is undoubtedly a matter of privately induced encroachments on basic rights—according to Günther Teubner and Peer Zumbansen, "Rechtsentfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels," *Zeitschrift für Rechtssoziologie* 1 (2000). But that would no doubt just strengthen the (insidiously de-democratizing) interpretive dominance of the courts and also presupposes "staffs of enforcement" (Weber) wielded by the constitutional *state*. [The doctrine of "third-party effect" of basic rights is an element of German constitutional law concerning the extent to which the basic rights that protect the individual vis-à-vis the state also extend to areas of private law and relations between individuals.—Trans.]

70. See Joerges, "Das Recht im Prozeß der europäischen Integration," 78ff; Christian Joerges, "Rechtswissenschaftliche Integrationstheorien," in *Die Europäische Union. Lexikon der Politik, Bd. 5*, ed. Beate Kohler-Koch and Wichard Woyke (Munich: Beck, 1996), 230; Marcel Kaufmann,

"Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäische Staatenverbund," *Der Staat* 4 (1997): 522, 526–527, 534; Karen J. Alter and Sophie Meunier-Aitsahalia, "Judicial Politics in the European Community. European Integration and the Pathbreaking *Cassis de Dijon* Decision," *Comparative Political Studies* 4 (1994): 535–561 (on the independence and integrating force of European jurisdiction); K. Alter, "The European Court's Political Power," *West European Politics* 19, no. 3 (1996): 458–487; K. Alter, "Who Are the 'Masters of the Treaty'?: European Governments and the European Court of Justice," *International Organization* 52 (1998): 121–147; Marcus Heintzen, "Die 'Herrschaft' über die europäischen Gemeinschaftsverträge," *Archiv des öffentlichen Rechts* 119 (1994): 574ff., 585ff.; Claus Dieter Classen, "Europäische Integration und demokratische Legitimation," *Archiv des öffentlichen Rechts* 119 (1994): 240–241; Claus Dieter Classen, "Einführung," in *Europa-Recht* (Munich: dtv, 2001), xiv–xv.

71. Alter, "Who are the 'Masters of the Treaty'?," 121.

72. Dieter Grimm, "Vertrag oder Verfassung?," in *Zur Neuordnung der Europäischen Union: Die Regierungskonferenz 1996/97,* ed. Dieter Grimm et al. (Baden-Baden: Nomos, 1997), 26; see also Joerges, "Markt ohne Staat?," 232, 237.

73. See Thomas Kesselring, *Die Produktivität der Antinomie. Hegels Dialektik im Lichte der genetischen Erkenntnistheorie und der formalen Logik* (Frankfurt: Suhrkamp, 1984).

74. See Peter T. Muchlinski, " 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community," in *Global Law Without a State,* ed. Günther Teubner (Brookfield, Vt.: Dartmouth, 1997), 87–88, 92.

75. See Möllers, "Globalisierte Jurisprudenz," 51ff.

76. Muchlinski, " 'Global Bukowina' Examined," 83–84.

77. On the hierarchical structure [*Stufenabau*], see Hans Kelsen, *Pure Theory of Law,* trans. Max Knight (Berkeley: University of California Press, 1967), 221ff.; Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Springer, 1925), 229ff. [A similar discussion can be found in Hans Kelsen, *General Theory of Law and State,* trans. Anders Wedberg (New York: Russell & Russell, 1945), 123ff.—Trans.]

78. Günther, "Rechtspluralismus und universaler Code der Legalität," 544.

79. See the example in Jean-Philipe Robé, "Multinational Enterprise: The Constitution of a Pluralistic Legal Order," in *Global Law without a State,* ed. Günther Teubner (Brookfield, Vt: Dartmouth, 1997), 64–65.

80. Ibid., 66–67.

81. John Flood and Eleni Skodarki, "Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies," in *Global Law without a State,* ed. Günther Teubner (Brookfield, Vt.: Dartmouth, 1997), 117.

82. On the distinction among the three forms of governance, see Zürn, *Regieren jenseits des Nationalstaats,* 169–170; on the new role of negotiating systems, see H. Willke, *Ironie des Staates* (Frankfurt: Suhrkamp, 1992), 46, 71–72, 78–79, 123–124, 317ff.

83. See Zürn, *Regieren jenseits des Nationalstaats,* 176; on sovereign equality, see Langer, *Grundlagen einer internationalen Wirtschaftsverfassung,* 26ff.

84. See Di Fabio, *Das Recht offener Staaten,* 106. Luhmann goes so far as to deny the global system any constitutional character: "At the global level, there is nothing that corresponds to the structural coupling of the political system and the legal system," (*Das Recht der Gesellschaft,* 582).

85. Di Fabio, *Das Recht offener Staaten,* 107.

86. Müller, *Demokratie in der Defensive.*

87. Muchlinski, "'Global Bukowina' Examined," 88–89.

88. Ibid., 90–91.

89. Ibid., 100.

90. Ibid., 99–100.

91. Robé, "Multinational Enterprise: The Constitution of a Pluralistic Legal Order," 70.

92. Ibid., 71.

93. Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere,* ed. Craig Calhoun (Cambridge, Mass.: MIT Press, 1992), 132ff.

94. Ibid., 134.

95. Hegel, *Elements of the Philosophy of Right,* §224, 315, 316.

96. Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," 134.

97. Habermas, *Between Facts and Norms,* 185–186; see also Hans Wimmer, *Evolution der Politik* (Vienna: WUV, 1996), 479ff. But the selective function of the public sphere is by no means restricted to the political parties, as Wimmer assumes (523, 539).

98. See Habermas, *Between Facts and Norms,* 146ff, 356ff. While Habermas employs the distinction between strong and weak publics (*Between Facts and Norms,* 307ff.) in order to distinguish the organized from the non-organized public spheres of Western constitutional states, I use "strong public" to refer to *any* ('organized' or 'non-organized') public sphere that is not only protected by basic rights, but is "exercised" (Art. 20, Par. 2, GBL) by making use of the procedural norms of the constitution *as a people* through "elections and voting" (Art. 20, Par. 2, Cl. 2, GBL) and via the *adequate resonance,* effectively supervised by constitutional law, of public opinion(s) in "its" (Böckenförde—see chapter 3) bodies of "permanent" (Böckenförde) state authority. In the present context, this has the advantage of detaching the distinction between strong and weak publics from the context of the nation-state and making it more applicable to the analysis of transnational public spheres.

99. Friedhelm Neidhardt, Ruud Koopmans, and Barbara Pfetsch, "Konstitutionsbedingungen politischer Öffentlichkeit: Der Fall Europas," in *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung, WZB-Jahrbuch,* ed. Hans-Dieter Klingermann and Friedhelm Neidhardt (Berlin: Sigma, 2000), 284; italics added.

100. See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993). On the role of liberal culture, see Albrecht Wellmer, "Bedingungen einer demokratischen Kultur," in *Gemeinschaft und Gerechtigkeit,* ed. H. Brunkhorst and M. Brumlick (Frankfurt: Fischer, 1993), 173–196.

101. Jochen Abr. Frowein, "Reform durch Meinungsfreiheit," *Archiv des öffentlichen Rechts* 2 (1980): 169–188; see also Anthony Lewis, *Make No Law. The Sullivan Case and the First Amendment* (New York: Vintage, 1992); Sunstein, *Democracy and the Problem of Free Speech.*

102. Müller, *Wer ist das Volk?,* 53; see also Sonia Serra, "Multinationals of Solidarity: International Civil Society and the Killing of Street Children in Brazil," in *Globalization, Communication and Transnational Civil Society,* ed. Sandra Bramann and Anabelle Sreberny-Mohammadi (Creskill: Hampton, 1996), 219–241.

103. On the distinction between a problem-solving procedure and a decision procedure, see Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics,* trans. Ciaran Cronin (Cambridge, Mass.: MIT Press, 1993), 158–159.

104. See also Görg Haverkate, *Verfassungslehre. Verfassung als Gegenseitigkeitsordnung* (Munich: Beck, 1992), 129–130.

105. On the distinction between input-legitimation and output-legitimation, see Scharpf, *Regieren in Europa,* 16–17.

106. Brunkhorst, *Demokratie und Differenz,* 199ff; see also Habermas, *The Inclusion of the Other: Studies in Political Theory,* 177–178; Ulrich R. Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Miatrauen* (Berlin: Dunker & Humblot, 1998), 393ff.

107. Habermas, *The Inclusion of the Other: Studies in Political Theory,* 251; see also Scharpf, "Demokratieprobleme in der europäishen Mehrebenenpolitik," 688–689.

108. Dewey, *The Public and Its Problems;* on the further development of this idea, see Rainer Schmalz-Bruns, *Reflexive Demokratie* (Baden-Baden: Nomos, 1995). The enabling of "that experimental space, which maintains the capacity for development in a democracy and makes possible the practical learning process by the demos, without which (democratic) ruling either progressively ossifies or derails into a tyranny of the majority" is therefore the sole, democratically legitimate function of a constitutional court. See Haltern, *Verfassungsgerichtsbarkeit, Demokratie und Miatrauen,* 39).

109. See Habermas, *Between Facts and Norms,* 173, 180, 187–188, 191–192, 438ff; on the many branches in the discussion of the problem between the extremes of a euphoria of self-organization and neo-étatism, see also the contribution by Matthias Schmidt-Preuß, the neo-étatist critique of Udo Di Fabio, and the discussion on the theme "Administration and Administrative Law between Social Self-Regulation and State Control" in *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer,* Vol. 56 (Berlin: de Gruyter, 1997), 160ff., 235ff., 283ff.; O. Lepsius, *Steuerungsdiskussion, Systemtheorie und Parlamentarismuskritik* (Tübingen: Mohr, 1999); Horst Dreier, *Hierarchische Verwaltung im demokratischen Staat* (Tübingen: Mohr, 1991), 120ff., 210ff., 296ff.

110. On the distinction between the media of "influence" and "power," see Talcott Parsons, "On the Concept of Value Commitments," in *Politics and Social Structure* (New York: Free Press, 1969), 439–472.

111. Eibe Riedel, "Menschenrechte der dritten Dimension," *Europäische Grundrechte Zeitschrift* (1989): 17.

112. That is the element of truth in the myth of the *pouvoir constituent.*

113. See Riedel, "Menschenrechte der dritten Dimension," 20.

114. A historically fitting example is the German *Reich* between 1871 and 1914. The protection and guarantee of most (non-codified) basic rights—through administrative law—was quite high, but there existed only the first signs of a democratic public sphere. Under these conditions, however, the initially weak public sphere became progressively stronger, and from it arose, during World War I, the intellectual and institutional foundations of the constitutional revolution of 1918. See Marcus Llanque, *Demokratisches Denken im Krieg. Die deutsche Debatte im Ersten Weltkrieg* (Berlin: Akademie, 2000).

115. The right to self-determination is unconditionally valid only in the colonial context—to which Article 1, Clause 2, of the UN Charter was originally applied. It cannot be claimed against a democratic government that represents all of the people within its territory without distinctions based on race, skin color, or religion. In this case, only the violent suppression of the *demand* for self-determination is absolutely forbidden. See Dieter Frey, "Selbstbestimmungsrecht, Sezession und Gewaltverbot," in *Vereinte Nationen, Menschenrechte und Sicherheitspolitik,* ed. Ignaz Seidl-Hohenveldern and Hans Jörg Schröter (Munich: Calr Hezmanns, 1994), 50, 67–68, 74; see also Daniel Thürer, "Das Selbstbestimmungsrecht der Völker," *Archiv für Völkerrecht* 22, no. 2 (1984: 113–137; Christoph Gusy, "Sebstbestimmung im Wandel," *Archiv für Völkerrecht* 30, no. 4 (1992): 385–410 Christian Tomaschut, ed., *Modern Law of Self-Determination* (Dordrecht: Nijhoff, 1993); for a clear and concise discussion, see also Augustin, *Das Volk der Europäische Union,* 373–374.

116. See Juliane Kokott, "Der Schutz der Menschenrechte im Völkerrecht," in *Recht auf Menschenrechte,* ed. H. Brunkhorst, Wolfgang R. Köhler, and M. Lutz-Bachmann (Frankfurt: Suhrkamp, 1999), 177ff., 182–183.

117. See Ulrich K. Preua, "Zwischen Legalität und Gerechtigkeit," *Blätter für deutsche und internationale Politik* 7 (1999): 816–828.

118. See Hauke Brunkhorst, "Paradigmenwechsel im Völkerrecht?—Lehren aus Bosnien," in *Frieden durch Recht,* ed. M. Lutz-Bachmann and J. Bohman (Frankfurt: Suhrkamp, 1996), 268ff.

119. See Radbruch, *Rechtsphilosophie,* 308.

120. See also Bernhard Roscher, ". . . verzichten auf den Krieg als Mittel nationaler Politik," *Frankfurter Allgemeine Zeitung* (July 12, 1999): 12.

121. Luhmann, *Law as a Social System,* 481. On the globalization-dependent universality of the legal code and the most important formal principles of law, see also Günther, "Rechtspluralismus und universaler Code der Legalität," 558.

122. Luhmann, *Das Recht der Gesellschaft,* 573.

123. Ibid.

124. Ibid., 573n39.

125. Ibid., 574.

126. Martti Koskenniemi, "Die Polizei im Tempel. Ordnung, Recht und die Vereinten Nationen: eine dialektische Betrachtung," in *Einmischung erwünscht?*, ed. H. Brunkhorst (Frankfurt: Fischer, 1998), 63–87.

127. Ibid., 86.

128. Ibid., 87.

129. Möllers, "Globalisierte Jurisprudenz," 50.

130. Ibid., 49.

131. See Riedel, "Menschenrechte der dritten Dimension."

132. Jean Cohen, "Rights and Citizenship in Hannah Arendt," *Constellations* 2 (1996), 164–189.

133. See Martin Woesler, "Das Internet und die Menschenrechte in China," in *Globalisierung und Demokratie*, ed. H. Brunkhorst and M. Kettner (Frankfurt: Suhrkamp, 2000), 310–329.

134. Quoted from Zürn, *Regieren jenseits des Nationalstaats*, 105.

135. During the era of McCarthyism, that was still not at all obvious, even without McCarthy, and was therefore explicitly put forward by Alexander Meikljohn. See Meiklejohn, *Political Freedom*, 53.

136. That does not mean that according to the Weimar Constitution equality before the law was not valid for foreigners. Apart from the rights of citizens, the basic rights of the Constitution were human rights. As a rule, they were valid within the national territory and not just for citizens, and they regulated the relation between "state and individual," not "state and "citizen": Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919*, 300–301; similarly, but with the qualification that rights that speak of Germans are primarily *guaranteed* only to Germans: Richard Thoma, "Die juristische Bedeutung der grundrechtlichen Sätze der deutschen Reichsverfassung in allgemeinen," in *Die Grundrechte und Grundpflichten der Reichsverfassung, Bd. 1*, ed. Hans Carl Nipperdey (Berlin: Hobbing, 1929), 25–26. It was not disputed that the principle of the rule of law, which was guaranteed by Article 109, Paragraph 1, of the Weimar Constitution, should not end with citizens of the state.

137. Augustin, *Das Volk der Europäische Union*, 343–344.

138. See Langer, *Grundlagen einer internationalen Wirtschaftsverfassung*, 111.

139. See Emile Durkheim, *The Rules of Sociological Method*, trans. W. D. Halls (New Zork: The Free Press, 1982), 99ff; see also Luhmann, *Social Systems*, 373ff (law as an "immune system" of society), 385ff ("systems need contradictions for their immune systems," 385), 394ff.

140. Niccolo Machiavelli, *The Prince and the Discourses* (New York: Modern Library, 1950), Discourses Bk. 1, Ch. 4, p. 120.

141. Ibid., Bk. 1, Ch. 6, p. 127.

142. Ibid., Bk. 1, Ch. 6, p. 129; Bk. 1, Ch. 4, p. 120.

143. Hegel, *Elements of the Philosophy of Right,* §29.

144. Haverkate, *Verfassungslehre. Verfassung als Gegenseitigkeitsordnung,* 143.

145. Rawls's idea of an overlapping consensus, which is a central theme of his later work, does not therefore represent a supplement or a deepening of the concept of a constitutional consensus (see Rawls, *Political Liberalism,* 158ff.), but it is incompatible with this.

146. See Habermas, *Between Facts and Norms,* 151ff.; see also Neves, *Zwischen Themis und Leviathan,* 118ff.; quite similar, but from the perspective of the "language-reflexive" "structuring doctrine of law" is Müller, *Demokratie in der Defensive,* 61–62, 68–69.

147. Allan Rosas, "State Soveriengty and Human Rights: Towards a Global Constitutional Project," *Political Studies, Special Issue: Politics and Human Rights* (1995): 61–78. Daniel Thürer, "'Citizenship' and Demokratieprinzip: Föderative Ausgestaltung im innerstaatlichen, europäischen und globalen Rechtskreis," in *Globalisierung und Demokratie,* ed. H. Brunkhorst and M. Kettner (Frankfurt: Suhrkamp, 2000), 177–207; Daniel Thürer, "Der Wegfall effektiver Staatsgewalt: The Failed State," *Berichte der deutschen Gesellschaft für Völkerrecht* 34 (1997): 10, 15ff.; see also Stephen Oeter, "Internationale Organisation oder Weltföderation? Die organisierte Staatengemeinschaft und das Verlangen nach einer 'Verfassung der Freiheit,'" in *Globalisierung und Demokratie,* ed. H. Brunkhorst and M. Kettner (Frankfurt: Suhrkamp, 2000), 208–239.

148. See Klaus Dieter Wolf, *Die neue Staatsräson—Zwischenstaatliche Kooperation als Demokratieproblem der Weltgesellschaft* (Baden-Baden: Nomos, 2000), 52.

149. As long as privately passed law does not annul and surpass public law, or is not imposed on the weak de facto through structural violence, it is unproblematic from the point of view of democratic theory. It is "at least ideally legitimated by those affected." See Möllers, "Globalisierte Jurisprudenz," 59.

150. Christoph Gusy, "Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigun der Europäischen Union," in *Globalisierung und Demokratie,* ed. H. Brunkhorst and M. Kettner (Frankfurt: Suhrkamp, 2000), 132.

151. See Möllers, *Staat als Argument,* 406ff., 415.

152. Gusy, "Demokratiedefizite postnationaler Gemeinschaften unter Berücksichtigun der Europäischen Union," 132.

153. Jürgen Habermas, "Further Reflections on the Public Sphere," in *Habermas and the Public Sphere,* ed. Craig Calhoun (Cambridge, Mass.: MIT Press, 1992), 451.

154. Arendt, *On Violence.*

155. See Hannah Arendt, *Between Past and Future* (New York: Viking Press, 1968), 62–63, 258–259; Habermas, *Between Facts and Norms,* 307–308.

156. Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 200.

157. Ibid., 177–178; on the "truth" of the "event," see also Žižek, *The Ticklish Subject,* 128ff. The truth-reference of communicative power must not, however, be limited to an "event" (Žižek) and to the world-disclosive "uncovering" of "new realities" (Arendt, *The Human Condition,* 200), otherwise, the cognitive dimension of communicative-experimental problem solving, emphasized by Dewey and Habermas, gets lost.

158. Arendt, *Between Past and Future,* 168.

159. Arendt, *The Human Condition,* 200.

160. Ibid., 200.

161. Habermas, *Between Facts and Norms,* 364–365.

162. Ibid., 364.

163. For Luhmann, discourses are themselves systems. See "Systemtheoretische Argumentationen," in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (Frankfurt: Suhrkamp, 1971), 316ff.

164. Arendt, *On Violence*, 41.

165. See Brunkhorst, *Einführung in die Geschichte politischer Ideen,* 18, 28–29, 158–159, 173.

166. Ibid., 22ff. (writing), 158ff. (printing).

167. Marx and Engels, "Manifesto of the Communist Party," 473, 477, 480.

168. Zürn, "Zum Verhältnis von Globalisierung, politischer Integration und politischer Fragmentierung," 16.

169. M. Kettner and Maria-Luise Schneider, "Öffentlichkeit und entgrenzter politischer Handlungsraum: Der Traum von der Weltöffentlichkeit und die Lehren des europäischen Publizitätsproblems," in *Globalisierung und Demokratie,* ed. H. Brunkhorst and M. Kettner (Frankfurt: Suhrkamp, 2000), 401, 408ff.

170. Zürn, "Zum Verhältnis von Globalisierung, politischer Integration und politischer Fragmentierung," 105.

171. See Karl-Otto Apel, *Diskurs und Verantwortung* (Frankfurt: Suhrkamp, 1988).

172. See Abby Peterson, "Globalization and Political Communication. Media, Transnational Social Movements and the Nation-State," paper presented at a Conference on Media and Globalization, Rimini, 1999.

173. Zürn, "Zum Verhältnis von Globalisierung, politischer Integration und politischer Fragmentierung," 105–106; see also Gertrud Koch, "Unterhaltung und Autorität. Konstellationen der Massenmedien," in *Demokratischer Experimentalismus*, ed. H. Brunkhorst (Frankfurt: Suhrkamp, 1998), 92–105. With that, the manipulative, agitative reflection should by no means deny the obstructing effects of the global public sphere. The market-trusting, neoliberal episteme would hardly have spread so ubiquitously—until it was deep in the head of the last social democratic state secretary—if market-intoxicated media had not repeated it hourly and denounced all criticism as locational disadvantage. See Kettner and Schneider, "Öffentlichkeit und entgrenzter politischer Handlungsraum," 384ff., 396ff.

174. Kettner and Schneider, "Öffentlichkeit und entgrenzter politischer Handlungsraum," 405.

175. See Margaritta Bertilson, "On the Role of Professions and Professional Knowledge in Global Development" (Manuscript, Copenhagen, 1999); Günther Teubner, "Das Recht der globalen Zivilgesellschaft," *Frankfurter Rundschau* 253 (2000): 20; Streeten, *Globalisation—Threat or*

Opportunity?, 124; on the theory of the new civil society, besides the now classic study by Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge, Mass.: MIT Press, 1992), see also Schmalz-Bruns, *Reflexive Demokratie,* 213ff.; Rainer Schmalz-Bruns, "Gemeinwohl und Gemeinsinn im Übergang? Demokratietheoretische Aspekte transnationaler Integrationsprozesse," paper presented at the Dewey Symposium, University of Flensburg, November 2000.

176. For an interesting application (and transformation) of the most important distinctions in Habermas's theory of communicative action (system vs. lifeworld, organizational sphere vs. spontaneous sphere, imperatives of profit and administration vs. autonomous regimes of understanding, etc.) and an analysis of global civil society, see Teubner, "Das Recht der globalen Zivilgesellschaft."

177. See Saskia Sassen, "Digital Networks and Power," in *Spaces of Culture: City, Nation, World,* ed. Mike Featherstone and Scott Lash (London: Sage, 1999), 332.

178. Rorty, "Human Rights, Rationality, and Sentimentality;" Cohen, "Rights and Citizenship in Hannah Arendt."

179. Parsons and Platt, *The American University*.

180. See Talcott Parsons and Gerald M. Platt, "Age, Social Structure, and Socialization in Higher Education," *Sociology of Education* 43 (1970): 1–37.

181. Kant, "Toward Perpetual Peace," 328. Translation modified slightly.

182. Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können," 8.

183. Möllers, "Globalisierte Jurisprudenz," 49.

184. Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können," 8.

185. P. Zumbansen, "Spiegelungen von Staat und Gesellschaft: Gouvernanceerfahrungen in der Globalisierungsdebatte," 25.

186. In this sense, Paul Streeten also talks about a "global civil society in the making," which is established in an intermediate zone that is "neither public nor private." It represents a growing "social capital" (R. Putnam) that forms the core "of any future world citizenship." See Streeten, *Globalisation—Threat or Opportunity?,* 123.

187. Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können," 8–9; see also Streeten, *Globalisation—Threat or Opportunity?,* 119, 121ff.

188. Serra, "Multinationals of Solidarity: International Civil Society and the Killing of Street Children in Brazil," 220, 225ff.

189. Müller, *Wer ist das Volk?,* 54.

190. Ibid., 56.

191. Michael Byers, "Woken Up in Seattle," *London Review of Books* 1 (2000): 16–17.

192. Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können," 9, 12.

193. See also Ibid., 12.

194. Ibid., 14.; on the developments of the party-state that are dangerous to the constitution, see also Dieter Grimm, *Die Verfassung der Politik* (Munich: Beck, 2001), 151ff.

195. See the now classic study on this topic: Arendt, *On Revolution*.

196. Müller, "Was die Globalisierung der Demokratie antut—und was die Demokratien gegen die Globalisierung tun können," 11–12.

197. Teubner, "Das Recht der globalen Zivilgesellschaft," 20.

198. Ibid.; see also Habermas, *The Theory of Communicative Action, 2 vols*.

199. Teubner, "Das Recht der globalen Zivilgesellschaft," 20.

200. On the proposal to globalize the doctrine of third-party effect in terms of discourse rights, see Teubner and Zumbansen, "Rechtsentfremdungen: Zum gesellschaftlichen Mehrwert des zwölften Kamels," 204–205.

201. Ibid, 205. Such discourse rights should not be confused with the rather awkward group rights or even rights to cultural protection within North American multiculturalism.

202. Teubner, "Das Recht der globalen Zivilgesellschaft."

7 And Europe?

1. Gunnar Folke Schuppert, "Anforderungen an eine Europäische Verfassung," in *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung,* ed. Hans-Dieter Klingermann and Friedhelm Neidhardt (Berlin: Sigma, 2000), 246; see also J. H. H. Weiler, "The Transformation of Europe," *The Yale Law Review* 100 (1991); Scharpf, *Regieren in Europa;* Markus Jachtenfuchs and Beate Kohler-Koch, *Europäische Integration* (Opladen: Leske & Budrich, 1996); Edgar Grande, *Vom Nationalstaat zur europäischen Politikverflechtung* (Universität Konstanz: Habilitationsschrift, 1994).

2. See the Maastricht Treaty, formally the Treaty on European Union (TEU) from Feb. 7, 1992, Preamble, Art. 1, Par. 2 and 3; the treaties of Rome (Mar. 25, 1957) and Amsterdam (May 1, 1999) establishing the European Community (TEC), Preamble; and the treaty that was altered by the Amsterdam Treaty: the treaty establishing the European Coal and Steel Community (tECSC) from Apr. 18, 1951, Preamble.

3. Art. 1, Par. 3, of the TEU explicitly distinguishes "member states" from "peoples" as subjects of "consistent and solidary" relations, and the Preamble of the Charter of Basic Rights proclaimed in the Treaty of Nice (Dec. 7, 2000) already starts with the will of the "peoples of Europe" as its subject and refers only secondarily to the "national identity of the member states" and the "organization of their state authority."

4. Schuppert, "Anforderungen an eine Europäische Verfassung," 246.

5. On the ever closer economic, political, legal, and also cultural integration of peoples, see Augustin, *Das Volk der Europäische Union.*

6. Jürgen Schwarze, "Die Entstehung einer europäischen Verfassungsordnung," in *Die Enstehung einer europäischen Verfassungsordnung*, ed. Jürgen Schwarze (Baden-Baden: Nomos, 2000), 464–465. Also in the same volume, see the country studies on France, Germany, Great Britain, Spain, Austria, and Sweden, which confirm the influence of European law on the respective legal orders of member states and the reciprocal convergence that is thereby produced among those legal orders.

7. Grimm, "Vertrag oder Verfassung?," 9; Augustin, *Das Volk der Europäische Union*, 249, speaks of "state-like sovereignty." The unprecedented nature of the treaties can be referred to, following Gert Nicolaysen, as their "ingenuity." See Stephen Oeter, "Die Genialität der Verträge," *Frankfurter Allgemeine Zeitung* 207 (2001): 8.

8. Dieter Grimm, "Braucht Europa eine Verfassung?," in *Die Verfassung der Politik. Einsprüche in Störfällen*, ed. Dieter Grimm (Munich: Beck, 2001), 229f.

9. Ibid., 230; see also Augustin, *Das Volk der Europäische Union*, 253 (against Kirchhof, who sees the validity of European law as tied to acts of assent [*Zustimmungsgesetzen*] by individual member states.)

10. Augustin, *Das Volk der Europäische Union*, 253.

11. Grimm, "Braucht Europa eine Verfassung?," 218. The application priority is explicictly valid for "every hierarchical level," even national constitutional law, provided there is no conflict with "fundamental constitutional principles" (Augustin, *Das Volk der Europäische Union*, 253, 260).

12. Müller, *'Richterrecht'. Elemente einer Verfassungstheorie IV*, 13, 34, 38; see also Alter, "Who are the 'Masters of the Treaty'?," 121.

13. See Schuppert, "Anforderungen an eine Europäische Verfassung," 241ff.; Augustin, *Das Volk der Europäische Union*, 269ff.; Grimm, "Braucht Europa eine Verfassung?," 232–233, 235.

14. See also Augustin, *Das Volk der Europäische Union*, 321ff., on the principle of democracy.

15. Of course, it is an entirely different question whether the *interests* in the agencies of the European Union, parties, associations, unions, social movements, and public debates can be combined so that the European constitutional task will actually be realized one day. That may be doubted.

16. Augustin, *Das Volk der Europäische Union*, 270, 274; see also Kaufmann, "Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäische Staatenverbund."

17. Schuppert, "Anforderungen an eine Europäische Verfassung," 249; see also Weiler, "The Transformation of Europe"; and J. H. H. Weiler, "The Reformation of European Constitutionalism," *Journal of Common Market Studies* 1 (1997): 97ff.

18. Weiler, "The Transformation of Europe," 2405–2406.

19. Ibid., 2407.

20. Quoted in Augustin, *Das Volk der Europäische Union*, 274 n248; Grimm, "Braucht Europa eine Verfassung?," 215–216.

21. On GATT and the WTO, see Langer, *Grundlagen einer internationalen Wirtschaftsverfassung,* 12, 43ff., 50, 65ff., 85ff.

22. Möllers, *Staat als Argument,* 421.

23. Generally presupposed by Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899), 7–8, 9, 19, 26: "International law and state law are not just different areas of law, but rather different legal orders. They are two spheres that border each other significantly, never intersecting" (111).

24. Möllers, *Staat als Argument,* 423.

25. Alter, "The European Court's Political Power," 458ff.

26. On the critique of the thesis of the state as a constitutional presupposition—still held by old and neo-etatist constitutional theorists like Böckenförde, Isensee, Kirchhof, or Di Fabio—see Möllers, *Staat als Argument,* 256ff., 378ff.; see also Haverkate, *Verfassungslehre. Verfassung als Gegenseitigkeitsordnung,* 40ff.

27. Möllers, *Staat als Argument,* 263.

28. Adolf Arndt, "Umwelt und Recht," *Neue Juristische Wochenschrift* (1963): 25; quoted in Möllers, *Staat als Argument,* 422.

29. See the jurisprudential thesis of Möllers, *Staat als Argument,* 404f ("The citizens decide which forms of sovereign protection they want to be confronted with."), 405f ("A requirement to protect sovereign statehood, derivable from the text of the Basic Law, is not justified."), 407ff., and 415 ("From the Basic Law, one can . . . only . . . derive the duty to work toward democratic structures at the level of [European] Community law that are comparable to the Basic Law. . . . Only an act of integration satisfying the requirement of democratic determination is constitutionally valid, but no longer by calling for a return to national sovereignty for the German state power.") In his book, Möllers shows that in a democracy—in terms of constitutional law—the state is in every respect a weak argument.

30. Quoted in Oeter, "Die Genialität der Verträge," 8.

31. On the role of revolution, see Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung?," 1071ff.

32. J. Schwarze, "Europapolitik unter deutschen Verfassungsrichtervorbehalt. Anmerkungen zum Maastricht-Urteil des BverfG vom 12.10.1993," *Neue Justiz* 1 (1993): 3.

33. Heintzen, "Die 'Herrschaft' über die europäischen Gemeinschaftsverträge," 570.

34. Classen, "Europäische Integration und demokratische Legitimation," 259–260.

35. On the rights of citizens of the Union, see Augustin, *Das Volk der Europäische Union,* 30ff., 43ff., 61 (on the existence of rights in the direct relation between European Union citizens and the European Community), 63ff., 67ff. (rights against the state), 82ff. (social rights), 87ff. (political rights).

36. Following the well-known Crème-de-Cassis decision. See Alter and Meunier-Aitsahalia, "Judicial Politics in the European Community"; and Norbert Reich, "The 'November Revolution' of the European Court of Justice," *Common Market Law Review* 31 (1994): 535–561.

37. Art. 141, Par. 4, TEC explicitly permits affirmative action measure in favor of the professionally "underrepresented sex," and hence quota regulations, and so forth.

38. See van Creveld, *Aufsteig und Untergang des Staates,* 425.

39. Möllers, *Staat als Argument,* 404 (in connection with Everling).

40. Augustin, *Das Volk der Europäische Union,* 225; italics added.

41. See also Kaufmann, "Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäische Staatenverbund," 530ff; Augustin, *Das Volk der Europäische Union,* 60–61.

42. Augustin, *Das Volk der Europäische Union,* 377; see also 108ff., 393.

43. So also Ibid., 370ff.

44. On the open concept of a people in the German Basic Law, see Oeter, "Allgemeines Wahlrecht und Ausschlua von Wahlberechtigung," 38.

45. On the criteria, see the section on social exclusion (chapter 6) in connection with Müller, *Demokratie in der Defensive.,* 90ff.

46. Augustin, *Das Volk der Europäische Union,* 336ff., 375f, 397.

47. Ibid., 387.

48. Ibid., 402–403.

49. Ibid., 397, 400 ("mega-national political community"); on the concept of a people in revolutionary contractualism, see also Ingeborg Maus, "Volk und Nation im Denken der Aufklärung," *Blätter für deutsche und internationale Politik* 5 (1994): 602ff; Hasso Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaats," *Der Staat* 1 (1995): 17. A similar definition of the concept of a people is in Jürgen Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'" *European Law Journal* 3 (1995): 305–306. Habermas has also spoken strikingly in this context of "Europe's second chance" (*Between Facts and Norms,* 507).

50. Augustin, *Das Volk der Europäische Union,* 388.

51. Ibid., 390–391.

52. Kant, *The Metaphysics of Morals,* The Doctrine of Right, §53.

53. Grimm, "Braucht Europa eine Verfassung?," 239ff., 249–250.

54. Habermas also speaks of a "voluntaristic empty place that would have to be filled by the political will of capable actors." See Jürgen Habermas, "Braucht Europa ein Verfassung?," in *Zeit der Übergänge* (Frankfurt: Suhrkamp, 2001), 125. In doing so, he clearly comes closer to the position of Dieter Grimm, if one assumes that, first of all, it would be agreeable that possible solutions to the European language problem do not presuppose a homogeneous Euro-nation; naturally, that does not mean that it is (easily) resolvable. On the controversy, see Dieter Grimm, "Does Europe Need a Constitution?," *European Law Journal* 3 (1995): 282–307; and Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'"

55. If Poland succeeds in getting rid of its reactionary country parties, it might even become a driving force of the European unification processes. Its distinct national identity, stabilized by the triumph of the revolution, could find its mark in a new European project of democracy. New nations with a successful revolution behind them are probably in a better position to move to a new stage of political integration than are old, rich, decadent nations like Germany, Denmark, or France. In that respect (and because it would, moreover, insult Poland, Hungary, etc.), the plans by Joschka Fischer and others to carve Europe into a strongly integrated core and a weakly integrated periphery are more than problematic. That does not speak against stronger integrations of *different* European regions and nations, but against what is in the end just a continual exclusion of the periphery, particularly of the East.

56. Heintzen, "Die 'Herrschaft' über die europäischen Gemeinschaftsverträge," 581.

57. See also Di Fabio, *Das Recht offener Staaten,* 106–107.

58. See Kaufmann, "Permanente Verfassungsgebung und verfassungsrechtliche Selbstbindung im europäische Staatenverbund," 530ff; Classen, "Europäische Integration und demokratische Legitimation," 258; Meinhard Hilf, "Die rechtliche Bedeutung des Verfassungsprinzips der parlamentarischen Demokratie für den europäischen Integrationsprozeß," *Europarecht* 1 (1984): 16; on the priority of the united executives, see Weiler, "The Reformation of European Constitutionalism," 113; see the standard work: Wolf, *Die neue Staatsräson.*

59. Augustin, *Das Volk der Europäische Union,* 108ff; see also Grimm, "Vertrag oder Verfassung?," 20ff.

60. Augustin, *Das Volk der Europäische Union,* 60–61, 77, 108ff.

61. J. H. H. Weiler, "To Be a European Citizen—Eros and Civilisation," *Journal of European Public Policy* 4, no. 4 (1997): 503.

62. Ibid., 503; see also Weiler, "The Reformation of European Constitutionalism," 114–115.

63. On the striking phrase, "well-ordered freedom," coined by Kant, see Kersting, *Wohlgeordnete Freiheit.*

64. Grimm, "Vertrag oder Verfassung?," 17–18.

65. See also Habermas, "Braucht Europa ein Verfassung?," 17–18.

66. Schuppert, "Anforderungen an eine Europäische Verfassung," 243; in connection with Grimm, "Vertrag oder Verfassung?," 16, see also 27–28.

67. C. Tomaschut, "Diskussionsbeitrag," in *Kontrolle Auswärtiger Gewalt, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 56* (Berlin: de Gruyter, 1997), 114.

68. See Hans Meyer, "Diskussionsbeitrag," in *Kontrolle Auswärtiger Gewalt, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 56* (Berlin: de Gruyter, 1997), 110.

69. Paul Kirchhof, "Diskussionsbeitrag," in *Kontrolle Auswärtiger Gewalt, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, Heft 56* (Berlin: de Gruyter, 1997), 112.

70. Grimm, "Braucht Europa eine Verfassung?," 218–219, 234ff.

71. Schuppert, "Anforderungen an eine Europäische Verfassung," 244.

72. Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung?," 1074.

73. This sharper formulation is found only in the second version of the text: Hasso Hofmann, "Von der Staatssoziologie zu einer Soziologie der Verfassung?," in *Rechstsoziologie am Ende des 20. Jahrhunderts,* ed. H. Dreier (Tübingen: 2000), 205.

74. That is the not-unrealistic fear of Dieter Grimm, "Vertrag oder Verfassung?," 23, 26.

75. Leading then to the people's legislative constitutionalization of the contract ad absurdum; Schuppert, "Anforderungen an eine Europäische Verfassung," 244.

76. Augustin, *Das Volk der Europäische Union,* 396.

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