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# Reply to Critics

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**Abstract**
In responding to the comments, I will begin with the problem of Eurocentrism, the notion of progress and the Dialectic of Enlightenment. Then I will try to address the methodological queries concerning theory construction. Thereafter, I will make some remarks on the role of religion for social evolution and the formation of the Kantian mindset. Finally, I will discuss the problem of cosmopolitan state formation, co-evolution and societal differentiation.

**Keywords**
Legal revolution, social evolution, co-evolution, evolutionary universals, adaptation, normative constraints, negation, differentiation, state formation, law and religion, progress, class struggle

The fact that my book has motivated so many significant voices from different scientific backgrounds to comment and criticize my provisional studies on the evolution of modern constitutional law has surprised me. Yet it delights me even more, as it gives me the opportunity to clarify some of my ideas a bit further. What also surprised me was the variety of topics addressed in the commentaries. These concern the world state debate, the co-evolution thesis, the relation of revolution and evolution, the role of law in revolutionary change, the function of religion for social evolution, the concept of progress and the Dialectic of Enlightenment and the methodological problems of constructing Critical Theory.

There are intriguing complementarities and surprising coalitions in the commentaries. Although Habermas and Lafont argue that I am on the right track, overly functionalist, Albert and Thornhill argue that I am on the right track but not functionalist enough. However, Thornhill criticizes the normative overburdening of my theory construction;

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Albert does not. On the other hand, Albert and Habermas both argue that I rely too strongly on Luhmann's idea of a functionally differentiated world society, an idea that for them is not differentiated enough.

In responding to these comments, I will begin (1) with the problem of Eurocentrism, the notion of progress and the Dialectic of Enlightenment. Then (2) I will try to address the methodological queries concerning theory construction, for which I hardly have any resolution. Thereafter, (3) I will make some remarks on the, arguably, emancipatory role of religion for social evolution and the formation of the Kantian mindset. Finally, I will discuss (4) the problem of cosmopolitan state formation, co-evolution and societal differentiation.

## Eurocentrism and the Dialectic of Enlightenment

The problem of Eurocentrism is posed by Cristina Lafont right from the outset, and rightly so. It is true that my conceptual resources are all derived from the so-called Western tradition (as are hers). This is simply because I have not studied any other. However, it would be misleading on that ground alone to argue that the processes I am talking about are entirely endogenous to the West, which only contains the Judaeo-Christian and Graeco-Roman tradition of occidental rationalism (Lafont, 2014: 8).[1] Evidently, these processes are not exclusive to the West. This fact, by now, is beyond reasonable doubt, thanks to postcolonial studies and global history (which I did take into account, at least selectively). Neither instrumental and moral universalism nor enlightenment and 'innerwordly asceticism' [*innerweltliche Askese*], are mere Western inventions. Even if we, as I think, should not renounce Max Weber's theory of rationalization, we should abandon his polemical basic distinction between Eastern passivism (man as a vessel of God, who waits for redemptive rain) and Western activism (man as an instrument of God, who works day and night for salvation). I also do not want to suggest (and I should have said it already in the book) that there were no significant legal developments in India, China, Japan, Africa and so on, which in the course of thousands of years of more or less dense interaction became part and parcel of the 'Western' legal tradition (which, for this reason in particular, is not simply 'western').

However, I have used the concept of *evolutionary universals* throughout the book for several reasons, and they are all closely related to the problem of Eurocentrism and, as Robert Fine rightly observes, to the idea of progress. To explain this, I must go back to elucidate how I reread some basic concepts of Kant and Hegel, concerning the relation of *universal concepts* and *normative progress* within the theory of social evolution. This rereading already contains certain elements of decentration of Eurocentrism.

*First*, as I use basic categories of social evolution, and some results of historical research only within this categorical framework, from the outset I use categories that are more abstract and decontextualized than historical categories.[2] Therefore, these categories are in a way placed in equal distance to any kind of contextual centrism. Evolutionary categories relate only contingently to specific places in historical time and space. They are *abstracted from history*, and, therefore, they *rely* on historical research, but *they are not history*. In contrast to history, evolutionary theory uses categories such as 'communication', 'differentiation', 'evolutionary advance', 'negation', 'segmentation',

'social class', 'life world', 'system', 'productive forces', 'division of labour', 'functional differentiation', 'communicative variation', 'social selection', 'social integration', 'systemic stabilization', 'relations of production', 'relations of understanding' and so on *without any concrete time and space index*, and it applies them to divergent historical data. This has decentring implications for Eurocentrism; we can see this already if we compare Hegel's basic schema of philosophy of history with the outline of a theory of social evolution set out by Marx (or by Durkheim or Parsons). Even if both Hegel and Marx understood themselves in a straightforward Eurocentric way, only Hegel's schema is *internally* eurocentric.[3] Whereas Hegel's developmental schema relates *specific epochs* of history *with a time and space index* in the Oriental, Graeco-Roman and Germanic world to an *abstract* logically quantified schema of the development of freedom (one, some, all), Marx makes just one further step of abstraction. He uses *only* abstract concepts *without any time and space index*. In particular, these concepts are the *gradual improvement of productive forces* and *the conflicting constellations of social classes*, which he combines to construct *equally abstract* evolutionary *stages* of *relations of production* and *formations of society*. These concepts apply everywhere and independently for any specific historical context (as do the basic categories used by Spencer, Durkheim, Mead and other evolutionists).

*Second*, I am very thankful to Robert Fine for placing my present book in the broader context of my other writings, in particular in relation to the 2002 book on *Solidarity*. Already then, I used Kant's argument from *Streit der Fakultäten* that the French Revolution was a sign of history that can never be forgotten because it indicates moral progress of humanity for the better. In Kant's essay, this claim appears rather mysterious, and it leaves the question open *why* this is so, and *what* it precisely means. The usual neo-Kantian answers to it (i.e., that the notion of moral progress has no empirical meaning is only counterfactual; it forms an as-if teleology to make sense of pure practical reason; it is a regulative idea, etc.) are not very satisfying. Even if we relinquish the Kantian formulation that an event such as the French Revolution can *never* be forgotten because it is too strong (and just rhetorically emphasize that it is *harder* than most other events to forget it because it entails a cognitively new moral insight about egalitarian freedom),[4] the question remains unanswered. However, as Fine rightly points out, one should understand Kant's historical signs [*Geschichtszeichen*] as a kind of missing link between Kant and Hegel (Fine, 2014: 5), which already anticipates Hegel's idea of an *existing concept* [*existierender Begriff*]. The existing concept (for example of 'egalitarian freedom') is a concept not only for the scientific observer of history but also for the social actors themselves. As an expression of their self-understanding, and especially if it is embodied in legal institutions, the concept itself is an *essential moment within social reality*. Even if its original meaning has been distorted, abused, perverted and misrepresented, in the course of a history of ever new forms of domination (that still is the history of Hegel's *Schlachtbank* [*slaughter bench*]), it operates in history as an *existing contradiction* [*daseiender Widerspruch*] that contradicts the 'whole that is the wrong' (Adorno) *from within the whole* (see Hegel, 1975 [1934]: 59, 424). It is only in the negative sense of 'existing contradiction' that I make use of Kant's *Geschichtszeichen* and Hegel's related notion of 'existing concept'.

To reconstruct (or reread) this idea in a way that is not at the outset Eurocentric, I use the much more abstract concept of *evolutionary universals*, which covers natural and social evolution. I combine this with the concept of *constraints* used in evolutionary biology to show that not everything can be explained by natural selection. This may or may not be the case in biology, but once we switch focus to social evolution, there is clear evidence for a concept of constrains, limiting and directing, but not determining, the path of evolutionary adaptation, and these are *normative* constraints (such as, e.g., Durkheim's modern 'cult' of the individual) (Brunkhorst, 2014a: 51, 2014b: 46; Durkheim, 1984: 73ff., 153ff.). On the basis of the distinction between normative constraints and selective adaptation, we can try to observe and reconstruct the evolution of normative constraints.

What is now important for the query regarding Eurocentrism is that this shift of focus to evolutionary theory no longer carries the entire burden carried by Kant or Hegel's philosophy of history, or by early evolutionary theory in sociology, exemplified by Marx, Spencer, Dewey or Durkheim. There is no longer any use for an affirmative concept of progress that is internally related to a substantial form of life (be it European, Asian, national, democratic, socialist or whatever). The concept of progress, oriented to the evolution of normative constraints, is (a) only *negative* (Brunkhorst, 2014a: 6–7, 10–20). Like natural evolution, social evolution is (b) *directed* but no longer teleologically (see Brunkhorst, 2014a: 2, 41, 102; Kubon-Gikle and Schlicht, 1998). There is no end of history. Like the beginnings of evolution, billions of years away, the ends of evolution, also billions of years away, are beyond any human interest. Finally, my concept of progress covers (c) only *some of the many paths* of evolution and not the whole thing. There is an endless plurality of co-evolutions (Brunkhorst, 2014a: 4, 56, 60, 195–196, 395).

This, *third*, also means that the concepts of 'evolutionary universal' and 'normative constraint' help to avoid the misunderstanding that instrumental and moral universalism, enlightenment and innerworldly asceticsm are mere Western inventions. For example, the idea of a politically centred community or city might have been invented for the first time by the Greeks or the Egyptians, by 'Black' or 'White' people, by Buddhists or Zoroastrians, by the people of Jericho, by the people of Delhi or by the people of Xian thousands of years ago. For each of their respective histories, it matters a lot if they have invented politics or not, and it matters for them and the (changeable and changing) narrative *construction* of their identity if they were something special or not, if they were the first or the last, if they were the vanguard of historical progress or not. However, in evolutionary terms this does not matter much (Brunkhorst, 2014a: 4–5). From the point of view of evolutionary theory, the 'Black Greeks' (Bernal, 2002–2006), or whoever it was – more or less accidentally but due to their famous experimental mindset[5] – invented a thing that proved as useful for evolution as farm animals, religion and bureaucracy for centralized and stratified societies and technology and written constitutions for functionally differentiated societies. Therefore, these things (like brains, spines and eyes in natural history) were reinvented and copied again and again. Once invented, these things belong to the universally available structures used for constructing animal bodies, legal bodies, renaissance paintings and complex societies. They are everybody's common property and nobody's private property: Evolutionary socialism. This applies in particular, as Fine argues (and I guess Lafont would agree), to *normative* advances and constraints that are

universal, such as 'anti-slavery', which since the end of the 18th century is 'no longer just a movement of those who have an interest in it, but one that belongs to everyone' (Fine, 2014: 4). Such advances may still be the pride of specific revolutionaries and abolitionists and their heirs. But, once invented, they are available and in equal moral distance to everyone's moral consciousness. Hence, the moment that an evolutionary universal is invented, the invention immediately begins to decentre Eurocentrism, Asia-centrism and so on.

Despite this, however, there is still something *specifically Western* in the Western legal tradition. What is specific is the *eclectic combination* of three elements: (1) profane Aristotelian *dialectic*, mediated through the Islamic reception and Islamic natural science, (2) the (probably unique) *technical corpus of Roman law*. Here again, one has to add that Roman law was unique in its high technical standard, but it was only one of many legal inventions, or pre-adaptive advances of the Eurasian Axe Age (briefly listed in Brunkhorst, 2014a: 63–64). These logical and legal instruments then were internalized in (3) the *Christian religion of salvation*, which had already integrated (and *not*, to avoid a further Euro- and Romano-centrism, sublated) both Jewish thought and Platonic philosophy and moreover – to be sure – elements of some other Eurasian religious worldviews.

It was this unique and eclectic combination, which, at a cognitive level, made possible the emergence of the first modern legal system in the 12th and 13th centuries (see Habermas, 2014, forthcoming: 9–11). If I see this correctly, in the 12th and 13th centuries, there did not exist anywhere else an academically *professionalized* class of lawyers (again on the historical basis of a long tradition of pan-Eurasian academism). Nowhere else did positive law, justified by religion and reason (natural law) and engendered in the political domain, have such a *legitimizing power*, and nowhere else did it, at the same time, also entail such a comprehensive, unifying and dangerous *power of control* over the practices, bodies, souls, and minds of nearly an entire continent (Brunkhorst, 2014a: 91–93, 131–133, 141–146). However, the invention of a modern legal system established an *evolutionary universal* in the course of 1000 years, and it was copied and (more or less independently) reinvented, assimilated under imperial pressure and accommodated voluntarily (as, for instance, in Japan) by every stratified society. These societies have used and shaped modern law differently, depending on local cultural, religious, economic, political and social conditions. However, with the turn from the *age of globalization* to the *global age*,[6] law has become one single global system with many (and a still growing number of) regionally and culturally segmentary differentiations of *the same* legal system. Therefore, it is no longer European in any sense, except with respect to the small European province.[7]

*Fourth*, in his comment Robert Fine goes further than Lafont as regards the critique of enlightenment and progress. He rightly sees that I make a strong case for dead White male Europeans such as Rousseau, Kant and Marx, and against other dead White male Europeans such as Burke, Constant, Tocqueville and Mill. Then, he argues that Hegel and Arendt in a way stand between both camps, but they can be interpreted as making the case for Rousseau, Kant and Marx stronger, even more radical, instead of mitigating it. I agree with his intention, and I agree that one must situate 'normative progress within the sphere of ''objective spirit'' rather than treat it as a mere idea' (Fine, 2014: 13).

However, Fine objects that I use evolutionary universals to endorse an *unequivocal* 'universalistic and egalitarian notion of [Rousseauian] democracy as self-legislation *in spite of* all the disfigurements it underwent in practice', whereas his heroes Hegel and Arendt 'embarked on a critique of the Rousseauian conception of democracy *because of* its disfigurements in practice'. Therefore, the concept of universalistic and egalitarian democracy already entails a 'normative *equivocation* of universals' (p. 6, 11). I am not sure what the meaning of *equivocation of universals* is here. The fact (which I emphasized and illustrated repeatedly with many examples) that it is the *same* equality of the *Declaration of Independence* that the abolitionists invoked against slavery, and the slaveholders used to justify slavery does not make the concept of universal law equivocal. It only renders equivocal its legal concretization (or implementation), which belongs to the concept as far as it operates as a normative constraint. However, what caused dissent among slaveholders and abolitionists was not the concept but the constitutional legal reference of its applicability. There were legal, political and moral arguments pro and contra, and both sides claimed the *better* argument for itself. The arguments pro and contra were not equivocal, even if the then valid concretization of the positive constitutional law was. However, there clearly was one side that was *right* with its demand to change the law or to keep it as it was, and the other was *wrong* (even if there was, due to normative learning, once, in classical times or even in the time of the Atlantic Revolution a point of time when this was an open question). Otherwise, the moral and legal protest against the unindemnified confiscation of the private property of the slaveholders after the Civil War could still be an issue, in the way that the question of redress and restitution for the injustice of slavery still is. Fine, I guess, argues the same way, when he argues that a normative universal such as anti-slavery *unequivocally* 'belongs to everyone' (p. 4).

I do not think that this means, as Fine presumes, that I want 'to save the concept from experience', whereas 'Hegel and Arendt wanted to prise open the concept under the shadow of experience' (p. 6). On the contrary, to prise open the concept under the shadow of experience is a crucial aspect of normative learning. Normative learning processes, on the one hand, clearly include learning from the perverted, reductive and incomplete applications of normative concepts, they include learning from deliberations on *absolute freedom and terror* as well as from the normatively fundamental *experience* that despite terror and revolutionary injustice the basic normative insights which revolution made tangible for the first time between 1776 and 1814 *are not forgotten*. These processes also include, on the other hand, learning that, for instance, the constitutional concept of equality cannot be reduced to the equality of White males or to the equality of possessive individualism. However, this is only possible because it is unequivocally the '*same* equality', 'which Lincoln invoked to condemn slavery' that still is 'invoked to condemn the inequality and oppression of women' (Rawls, 1993: 29) and to condemn the inequality of private property in unfettered market economies – *in spite of* all the disfigurements the concept of equality underwent in practice.

If I see it rightly, it is this point that Fine makes when he reads Hegel and Arendt as a radicalization and not as a mitigation of Rousseau. He insists that prising open the concept under the shadow of experience has only the purpose of saving and maintaining the full meaning of the original Rousseauian idea

> that every individual has the right to participate *in person* in the making of laws, [ . . . ] that mere *representation* robs individuals of the right of participation in public life, [ . . . ] that no right is valid that is not validated by the nation, [ . . . ] that no political order is legitimate that does not correspond with this idea of right. (Fine, 2014: 6)

I could not agree more with this (left-Hegelian) reading of Hegel and Arendt. For the same reason, I agree with the famous quote from Benjamin on the equivocal character of all documents of culture as documents of barbarism and so of law. However, I would not, as Fine precisely suggests, 'highlight the equivocation of progress,' but rather try 'to recover the legally enacted idea of progress in a dry climate of normative scepticism' (p. 11).

## Theory Construction

The methodological problems of theory construction are complex and intricate. I have not tried to resolve them in my book on a conceptual (and philosophical) level; this is just because I have not so much to say about it. I must admit that I only have tried to 'balance' the 'antinomies' between the two theoretical traditions of functionalism and Critical Theory that I have combined, but I have never tried to 'resolve' them 'conclusively' (Thornhill, 2014, forthcoming: 12). At least for my critics in both the camps of functionalism and Critical Theory, the balancing worked nicely, as the complementary objections that my work is marked by excessive functionalism (Habermas) and that it is marked by excessive idealism (Thornhill) show.

Leaving the basic methodological and conceptual problems open, or at best balanced, I have followed the (admittedly metaphorical) methodological maxim to implement the normative claims of Critical Theory as deeply as possible within systems theory, trusting that Critical Theory might force open systems theory's self-referential closure from within.[8] Combining Adorno and Marcuse with Habermas and Theunissen, I have tried to show, at least indirectly, that *normative concepts* of justice and equal freedom *exist as contradictions* within a society that is exposed to the one-sided pressures of functional imperatives and different formations of class rule. Both these pressures come together in the exceptional 'capacity for blackmailing', which, as Habermas (2014) rightly says, distinguishes the modern capitalist economy from any other functional system and from any premodern economic system.

I am very thankful for the three different reconstructions of my whole argument given by Lafont, Thornhill and Habermas. In a way, they all say what I wanted to say but much better and more clearly. Lafont condenses this in two or three short sentences. The normatively 'central claim' in my work is the idea that 'egalitarian freedom expresses itself in form of normative constraints'; the rational presupposition is that 'reason cannot be reduced to power, nor power to reason' because it is logically true that 'good reasons do not make bad arguments. You can misuse them, but you do so at your own peril. They can strike back' (Lafont, 2014: 1–2). Good reasons are, according to Lafont, David's weapon – even if in real history Goliath is usually the winner, or in a two-word statement from a realistic historian: 'Coercion works' (Tilly, 1990: 70).

Nevertheless, most questions of theory construction remain open, and I will try to discuss some of them briefly. The following questions are unresolved: (a) the role of revolutions for the evolution of modern societies; (b) the relation of functional imperatives to class struggle; (c) the evolutionary meaning of normative constraints; (d) the concept of legal revolution; (e) the schism between the provincial cities of Bielefeld and Frankfurt; (f) the problematic return of critical idealism and (g) the appropriate framework for a theory of social evolution.

## *Revolution and Evolution*

Lafont rightly argues that my proposed dichotomy between the Kantian and the managerial mindset is far too simple to represent the difference of revolution and evolution appropriately, and the focus on legal revolutions therefore might lead to the impression of 'over-generalizing exemplary cases' (Habermas, 2014: 2). Indeed, the Kantian mindset is not exclusively revolutionary. On contrary, as well as acting as a driving force of revolutions, the Kantian mindset is also *internal to a lot of managerial reformism*. Kant himself is the best example for both options. He took the French Revolution as a *Geschichtszeichen* of moral progress never to be forgotten, and he did this even in spite of the great terror and the execution of the king, which both can and should not be *justified* or *exculpated*, as Kant repeatedly noted. However, the impeachment and conviction of the citizen Capet made the republican revolution in Europe *factually* irreversible,[9] and Kant's writings after 1793 became increasingly radical, republican, cosmopolitan, egalitarian and (ethnically, 'racially' and culturally) inclusive (Kleingeld, 2013: 5, 7–8, 92–123). Moral theory has to pay a price once it becomes an existing concept, and *this*, not lastly, is a strong argument not to take Hegel's existing concept *affirmatively* (justifying history's slaughter bench as God's progress through history) but to observe it from the *negative* side of its existence as contradiction to the 'existing' (Adorno).[10] However, Kant's debate about moral progress does not only refer to 'revolutionary events' (Habermas, 2014: 2) because at the same time moral progress maintains a matter of *Reform nach Prinzipien* [*reform according to principles*], for example, in Prussia where Kant had close contact with the reformist wing of the Prussian bureaucracy (Langer, 1986). The alternative proposed by Habermas in 1968 – that is, radical reformism instead of post-Marxist revolutionary decisionism – is another example of the Kantian mindset operating from within the managerial mindset.[11] This is true also the other way round. There is *no successful revolution without* a strong element of *instrumental reason* and *managerially perfected organization*. I have mentioned this Leninist element a couple of times, beginning with the Papal Revolution, and ending with the nearby reduction of the revolutionary mindset to instrumentalism by Leninists and Maoists that continued after the revolution, *stabilizing* party rule and the establishment of new ruling classes (see Brunkhorst, 2014a: 84, 110, 371, 388, 401).

However, as I was absorbed by the reconstruction of the four revolutions (and also the attempt to rehabilitate the concept of revolution), I did not think about it explicitly on a conceptual level. Only when Lafont made it explicit during the conference in Flensburg (see Thornhill, 2014: 1, note 1) did I suddenly realize the conceptual gap. I then immediately integrated her remarks in my critical assessment of Koskenniemi's far too

**Table 1.** The correlation between different mindsets and different processes of historical transformation.

| | | |
|---|---|---|
| Revolutionary/abrupt change | (I) French Revolution as *Geschichtszeichen* | (III) Leninism |
| Gradual change | (II) *Reform nach Prinzipien*/ radical reformism | (IV) Technocratic incrementalism |
| Evolutionary change mindset | Kantian | Managerial |

dualistic opposition of the managerial and the Kantian constitutional mindset, which I have criticized from the beginning (Brunkhorst, 2014a: 48–49).[12] However, I will now use this opportunity to take a further step towards overcoming this dualism, and I will attempt to increase the internal complexity of my conceptual frame through Table 1, which makes the whole process at the outset less linear than it appears in the book (Habermas, 2014: 3–7).[13]

## *Functional Imperatives and Class Struggle*

The passage in my book (Brunkhorst, 2014a: 38) on immoral, brutal and gruesome evolutionary experiments quoted by Lafont (p. 9) is indeed open to misinterpretation. As far as actions and actors are concerned, there is no question that actors perform intentional actions. Whatever they think they are, their actions are *actions* insofar as there are *effectively realized intentions* motivating their actions, and, therefore, they are responsible for all results of effectively intended actions. All actions which are 'not unintended, blind or random' (p. 10) are due to the full accountability of the respective actor and groups of actors. Only in cases where the actor's behaviour was actually blinded (e.g. drug-driven) and its effects unintended (e.g. trying to help someone, not knowing that a cure makes a complaint worse, or because of force majeure, etc.) are people (usually) 'exculpated', 'mitigated' or 'immunized from normative evaluation' (pp. 10, 11, 13). Nevertheless, all kinds of actions have at least some unintended causal (perlocutionary) effects, which can make effectively intended actions less disastrous than those that are effectively intended (if I steal my neighbour's purse but the purse is empty), or they can be worse than effectively intended actions (if I steal my neighbour's purse, and she/he gets a stroke when she/he discovers the larceny).

An extreme case is that of the crimes of the Nazis. Hans Mommsen has tried to explain this phenomenon as a *functionally effective* self-radicalization of the Nazi regime, resulting from the highly advanced de-formalization of law and the increasing fragmentation and erosion of organized state power that occurred throughout the 12 years that the National Socialist German Workers' Party was in power. This was already analysed in the 1930s and early 1940s in Ernst Fränkel's *Doppelstaat* and Franz Neumann's *Behemouth*, and their analysis still stands up to most criticism, as far as I can see (see Stolleis, 1999). The fragmentation, decrease and erosion of state power was to a large degree an *unintended effect* of the way the Nazi regime tried to centralize, increase and stabilize its power with consistently criminal intent. The perverse evolutionary result of

this was that the fragmentation of state power *enabled* and *reinforced* a previously unthinkable augmentation of atrocities. However, actors with criminal intent, who react in response to chaotic situations (e.g. unclear verbal instructions) with more criminal activities than originally planned, are not exculpated from any single crime which they have committed alone or cooperatively within a criminal organization. On contrary, persons who as leaders with criminal intent tried to increase their own state power clearly also have particular responsibility for the unintended effects of the evolutionary process of fragmentation of state power, and for its disastrous and gruesome consequences, solely on the ground that they approved them.[14] Therefore, moral and legal accountability seems completely compatible with the thesis that there is no single action or behaviour that is beyond evolution, simply because everything is evolution. As Richard Rorty once said, it is not the theories of Australian neo-physicalists (or Luhmanian functionalists, or the heirs of both, neuroscientists) that threaten our freedom – it is the secret police. It is not law and economics that threatens our freedom – it is the cultural hegemony of law and economics. This evidently does not mean that physicalist, functionalist or neuroscientific concepts of freedom do not deserve criticism, even for political reasons, in particular as far as they determine cultural hegemony.

At least, and here I agree with Lafont, every effectively intended actions, and especially effectively intended negations, are *normatively important contributions to the variation pool of evolution*. Nevertheless, even if they may have an indirect steering influence (which is what I presume), they cannot finally determine evolutionary outcomes, simply because there are always unintended effects when five billion people act simultaneously in world society. There are, as every family member knows, unintended effects and quickly increasing complexity and over-complexity even when five people act simultaneously in a family, at least as long as not all of their actions are agreed upon and coordinated, and as long as not all of their plans are successful. To this degree, I follow Luhmann. But I agree with Lafont's view that *moral intentions are important as contributions to the variation pool of evolution*. To speak in evolutionary terms, tabolition of slavery was only possible because the moral protest against it engendered enough variation that made intentional (ideal and material interests) and unintended legal selection (functional imperatives) unavoidable, and it finally led to the re-stabilization of the prohibition of slavery and the establishment of anti-slavery as an evolutionary universal (see above remarks on Fine, 2014: 4). Therefore, and I am thankful that Lafont has emphasized this point. It is not only the case that *unintended* functional imperatives are mechanisms of selection (in periods of gradual as well as revolutionary change), but also *effectively intended* material and ideal class interests function as selective mechanisms. In fact, I distinguish these categories (Lafont, 2014: 10–11; Brunkhorst, 2014a: 295). Good examples are two columns written by Paul Krugman recently in the *New York Times* (21 March 2014, p. A23 and 24 March 2014, p. A19). In the first column, he describes a *functional mechanism*, now well established in America and Europe, which he calls the 'timidity trap'. The timidity trap more or less *unintentionally* urges left-wing parties (sometimes even against their intentions) to be more and more reluctant when it comes to addressing classical left-wing topics (e.g. unemployment, social security, higher wages, government spending, disaggregation of banks, state regulation, taxes on assessments etc.). As a more or less unintended effect, the parties on the left are

*drifting* further and further to the right, stabilizing functionally the global cultural hegemony of neo-liberal political economics. This is a clear case of unintended functional selection. However, Krugman ends his first column with the remark that, in the next column, we have to talk about *effectively intended* 'class interests'. In questions of class interests, the blackmailing power of normatively neutralized functional economic imperatives is *transformed into the power used by ruling and ruled social classes intentionally* against one another and their respective political representatives, and this power acquires importance in normative terms in relation to general and universal interests (which are the topic of Krugman's second column). The blackmailing power of *functional* imperatives then becomes a weapon for the *intentional* enforcement of class interests – either top-down through (for instance) investment strikes or bottom-up through (for instance) general strikes, both of which operate within a discursive context of normative justification (Brunkhorst, 2014a: 360, 364, 367–368, 379, 450). The two columns nicely show the intertwinement of *intended* actions based on class interests (the clashes of ideologies mentioned by Lafont) and *unintended* functional imperatives in the evolutionary process of *social selection* that finally led to the *stabilization* of neo-liberal political hegemony by the overwhelming power of the timidity trap *and* the class interest of global capital. However, even writing against it (as Krugman did) means to presuppose that the outcome of ordinary, non-revolutionary but reformist class struggle *must not* lead to a stabilization of the neo-liberal status quo but also can change it. It is, by the way, this kind of class struggle to which I refer with the keyword *democratic class struggle* (Brunkhorst, 2014a: 376–377, 390, 421, 459–461).

## *Normative Constraints*

So far, I agree with Lafont, and I just needed to clarify a bit further what I wanted to say. However, I disagree with Lafont when it comes to the *normative constraints* that are established, not solely, but in a very significant manner, by the great legal revolutions (Kant's *Geschichtszeichen*). I have stated repeatedly that normative constraints are different from the organic constraints of the natural evolution but have a similar function. Social evolution has replaced the functions of *organic* constraints by those of *normative* constraints, which 'shape, give direction to, and act as conditions of possibility for the wider underlying form of society as a whole' (Thornhill, 2014: 4). Specifically because they are normative, they are often violated, offended, infringed, contravened and impinged. There is no norm without violation. Nevertheless, at the same time normative constraints are not the outcome of clashes of ideology in the same way as ordinary constitutional, legal or moral norms are. This is the case because normative constraints have a 'quasi-transcendental' (Habermas) status, which *limits* evolutionary possibilities, *opens* and *discloses* new paths of evolution from within evolution and gives evolution a certain *direction* at a given moment. Usually, *both sides* involved in a *clash of ideologies* must operate (at least by lip service, cheap talk and hypocrisy) *within existing normative constraints*. A hundred years ago, at the beginning of the Egalitarian Revolution of the 20th century (see Brunkhorst, 2014a: 319–464), political leaders were proud to present themselves in public as leaders of empires, which had a formally acknowledged status in international law. A hundred years later, even those who are in fact leaders of

(only) informal empires, present themselves in public as anti-imperialist freedom fighters (e.g. Bush, Putin). The fact that one of them could declare the Crimea or Iraq a formal Russian or US-American colony (or mandate) seems no longer possible. As Matthias Albert rightly has argued in his comment (Albert, 2014: 3–4), there is neither a valid 'cultural script' nor a valid legal category available for that to be possible. The same was the case in the argument between Metternich and Gentz over the constitutional status of France after the final defeat of Napoleon (see Brunkhorst, 2014a: 240–242). Metternich clearly saw that it was not possible to restore the old European status quo *ante*, as Gentz had suggested.

Normative constraints established by revolution always represent a kind of *ratchet effect* (I discuss this in each part one of the four sections of Chapter 3 on Legal Revolutions, but for a brief and excellent representation see Thornhill, 2014: 4–6). The ratchet effect of revolution (which results from a normative learning process that, as Habermas (2014: 2) rightly observes, is 'not always presented as revolutionary event') makes Gentz look as outdated after the Atlantic Revolution, as did the Norman Anonymus after The Papal Revolution, Alanus after the Protestant Revolution and, arguably, Carl Schmitt after the Egalitarian Revolution (see Brunkhorst, 2014a: 96–98, 151–152, 327, 347, 352, 355). Therefore, the great legal revolutions matter for 'moral progress' (Kant). Each revolution has 'instituted universal legal norms behind which the subsequent evolutionary form of society could not easily and enduringly regress' (Thornhill, 2014: 7).

To conclude, it was *not impossible*, once and for all time, that Gentz could have prevailed against Metternich in a way that then would have led to a new, and in this case *regressive* (and actually restorative), set of normative constraints, leading to an alteration in the direction of evolution, *through gradual change*. This can happen in evolution, and it happens. Normative unlearning is possible.[15] Even moral occurrences, which 'are not forgotten' (Kant), are sometimes forgotten in history. Even Hitler might have won the war, and democracy might have vanished from earth. However, because of the path-disclosing power of normative constraints, it is never possible to rule out such occurrences, but they remain *very unlikely*, and even more unlikely than the existence and maintenance of egalitarian democracy. Unfortunately, the atrocities caused by authoritarian regimes and failed states are not so unlikely, even if democracy finally prevails. Moreover, it is not unlikely that the democratic institutions after 30 years of effectively intended neo-liberal 'reform' will remain unchanged but that democracy (as far as it corresponds to its idea as defined above by Fine) will wither away. This is quite likely because of the 'grotesque economic inequalities that prevail' today, and not only in the United States (Scheffer, 2014). Here we see the Dialectic of Enlightenment.

## The Concept of Legal Revolution

Echoing Marx's *Eighteenth Brumaire*, Luhmann has argued that the great constitutional revolutions were nothing more than soapbox oratories, heart-warming songs and illusions of manageability (*feierliche Erklärungen*, *Gesänge*, *Machbarkeitsillusionen*), which accompanied the sober functional business of the structural coupling of law and politics. My book is nothing more than an attempt to falsify this thesis, and to establish the counter-thesis that normative constraints and normatively progressive ratchet effects

are due, *not* solely, but *in particular*, to the great legal revolutions. They have ratchet effects that cannot be explained in exclusively functional terms. Therefore, I follow Berman's thesis that the great legal revolutions were both *legal revolutions in law* and at the same time *legal revolutions of society*, changing its 'collective conscience' in the direction of the 'modern tendency of moral conscience' (Durkheim).

Thornhill remains sceptical. There are, he argues in agreement with me, legal revolutions *in law* that might have some ratchet effects for all society. But these revolutions are not at the same time legal revolutions *of society*. There might have been 'rather diffuse bundles of related revolution' (p. 13) *in* law and *in* other functional spheres of society, and 'law had obvious utility in each of these' (p. 14) – but there is no such thing as *one* revolution *of* society expressed in slogans such as *Liberté, Egalité, Fraternité*. The emancipatory unity of revolution only exists in books. It makes heart-warming songs and conventionalized normative stories of hard-won revolutionary constitutional advances. But these stories are just telling a myth. They are 'a projection of normative analysis' (Thornhill, 2011: 10). Therefore, it remains unclear why in Critical Theory 'law is a privileged bearer of human freedoms, and as such, it is uniquely able to transcribe diverse human freedoms into an emancipatory grammar, which can be applied across, and made constitutive for, all parts of society' (p. 13). My claim, applied here to the Papal Revolution, that functional differentiation has been triggered by unintended side effects of that revolution (growth of legal complexity) seems to contradict my other thesis that 'law implicitly conducts learning processes, and resolves antinomies within these processes, for *all* society' (p. 13). Constitutional law, Thornhill argues, simply becomes overburdened once it is taken as expression of a unifying idea of freedom for all society. To explain my overburdening of law, Thornhill presumes (close to the Marxist critique of ideology) that I 'quietly' 'rest' my theory on the 'quasi-anthropological', old European 'notion that law has primacy in the normative apparatus of society because it is the societal medium that is best equipped to generalize human essence and human species-life' (Thornhill, 2014: 13).

However, as Thornhill himself acknowledges that the concepts of legitimization crisis and normative learning present 'problems of the normative self-construction of society' that 'are categorically not expressions of mono-original or essential-anthropological demands for ideal self-realization' (p. 11), I do not rest my argument on a philosophical anthropology of law as generalized human essence. On the contrary, I explain the highly unlikely combination of technically advanced law (that in the classical Roman Empire was just a law for coordinating the economic interests of the ruling classes) with a religious world view that contains a comprehensive and utopian idea of egalitarian emancipation *as* normative self-construction of a *specific society* that is modern. Only after the societal self-construction of law *as* emancipatory law, could the *abstract idea* of emancipation as human essence (that originates *historically* from the metaphysical and religious world views of Axial Age and was more or less the same in all world views that emerged between Old Athena and Xian) become an *existing contradiction* that is internal to modern society and no longer in need of any reference to human essence and human species life.

The really crucial difference between myself and Thornhill is rather different. Thornhill agrees that each of the four legal revolutions has 'instituted universal legal norms

behind which the subsequent evolutionary form of society could not easily and enduringly regress' (Thornhill, 2014, forthcoming: p. 7). However, he restricts this agreement on normative constraints and ratchet effects exclusively to '*functional norms* that underpin modern power, and that permit societies recursively to apply and reproduce their power' (Thornhill, 2011: 374). I agree that the *stabilization* of normative constraints can and must be explained functionally in this way. But *only* stabilization can be explained functionally. For example, the pious monks and church leaders who reconstructed the Corpus Juris Romani, established the Corpus Juris Canonici, initiated a legal discourse, erected a system of courts, founded law schools and universities *wanted to establish just law in the service of salvation and reform*, but *nobody wanted* (or even could expect and foresee) the *functional differentiation of a self-referentially closed legal system* that was simply an unintended side effect of intended legal organization, discourse and professionalization.

However, this does not mean that the *legitimating and socially integrative meaning* of the intended and discursively grounded establishment of emancipatory law is exhausted by its unintended functional effects. On contrary, the legitimating and socially integrative meaning of law in service of salvation and reform must be realized in a way that is *independent* of the functions that law fulfils for the stabilization of society. Therefore, the existence of mere *functional* norms alone cannot explain *how the first formation of law that is emancipatory could emerge* in Europe between the 10th and the 13th centuries. For example, the finding of a copy of Justinian's *Corpus Juris Romani* in a library in Pisa in 1050 was not an accident as systems theory is pleased to presume because it fits in so nicely with blind and contingent evolutionary processes. If anything it was the result of intentional, intense and systematic search, embedded in growing legal scholarship, ideas for radical reform, unresolvable social conflicts and powerful class struggles. Moreover, functionalism cannot explain why the *emancipatory potential of law* was not swallowed by a functionally differentiated legal system that was designed (by the imperatives of evolutionary adaptation) to minimize 'unpredictable resistance' (Thornhill, 2011: 374).[16] Hence, functionalism cannot explain why emancipatory constitutional law *strikes back*, repeatedly and sometimes revolutionarily.

Maintenance of the emancipatory potential of law and its ability to strike back cannot be explained alone 'as produced through society's specific responses to its own inner functional exigencies' (Thornhill, 2014: 15). First, law that is modern – and Thornhill does not dispute this – cannot be reduced to negative freedom, purposive rationality and the instrumental use of law (see Larmore, 2014: 150–151). Second, in spite of the heterarchical decentration of *the political–legal–sacral* complex of hierarchically stratified societies through the *functional differentiation* of *law*, *politics* and *religion*, at least the *political and the legal system* cannot cut their links with the *general public sphere* (Brunkhorst, 2014a: 49–51, 79–81, 433–434). It is this – and here I disagree with Thornhill and concur with Habermas – that distinguishes law and politics from 'subsystems such as economy, family, education, health' and 'religion,' which are no longer indispensable (if not superfluous) for political legitimization and social integration, but not for fulfilling special societal functions (Habermas, 2014: 4–5, 16).

Therefore, the Kantian mindset 'cannot be eliminated' from *public politics* and *public law* (that covers its internal differentiation in private and public law reflexively) – except (and this is just an empirical hypothesis) at the price of a legitimization crisis (Somek,

2013: 8). In the same way that the political system needs the 'living power of the people' (Arendt), the legal system needs the regenerative feedback from the general and diffuse public sphere. At the least, constitutional law is not just a 'lawyer's contract' but a 'layman's document' (Roosevelt). Legal norms that are a self-construction of modern society, I want to repeat here, cannot relinquish their internal connection with the colloquial language and the moral self-understanding of their addressees; the normative closure of the legal system is not only in need of cognitive and systemic adaptation to preserve itself (as in Luhmann's theory), but also the continuation of *normative learning*. All law that is public is opened not only *cognitively* to its *environment* but also *normatively* to the general and diffuse *public sphere* (Brunkhorst, 2014a: 50).

Politics and law are functional systems, *but* as public endeavours they remain internally linked to the general and diffuse public sphere, and to one another. Therefore, 'the legal system cannot differentiate itself from politics *in the same way*' as the economy, the family and religion 'were able to do' (Habermas, 2014: 5, my emphasis). It is only because of its still indispensable public character that the *decentred political system* can use positive law to 'influence, even shape and steer' *all* social subsystems 'in an indirect fashion, without adversely affecting the internal logic of those self-regulating systems', which themselves all must be 'legally constituted' (Habermas, 2014: 5). However, specifically because law and politics are at the same time, in a '*dialectical mode*' (Habermas, 2014: 5), functional systems in the sense of Albert, Luhmann and Thornhill, they can have *normatively disastrous and colonizing effects on the social life world of the people*, and they can cause *crises of motivation and legitimization*. They can even trigger revolutions as in the case of the Protestant Revolution, which strongly articulated its total alienation from canon law and opposed violently the oppressive concretization of divine and natural law in the existing system of private and public law (Brunkhorst, 2014a: 178–188). The same was true with the negative experiences of the people and European intellectuals on the eve of the Atlantic Revolution. At this time, the customs and conscription officers of the emergent modern state treated 'free human beings like mechanical works'. And, as it is stated in the *Oldest Systematic Programme of German Idealism*, 'it should not do that; therefore it should *cease*.'

However, I take this statement from the end of the 18th century (in a similar way to the Twelve Articles of 1525) not as an expression of human essence *vis-à-vis* the absolutist monster but as an expression of the *existing contradiction* that is internal to modern constitutional law. Therefore, I take the *concurrency* of systems formation and structural coupling of law and politics with the growing dependency of law and politics on an untameable and anarchic public sphere as a 'further justification' that up to the present modern law 'promoted freedoms that were [ . . . ] generally meaningful in all spheres of social practice' (Thornhill, 2014: 14). If viewed solely with regard to their *functional outcomes*, the Papal Revolution, the Protestant Revolution, the Atlantic Revolution and the Egalitarian Revolutions might easily each be split into five, six or seven revolutions – in law, education, science, religion, media and so on. However, from the actor's perspective of egalitarian freedom, the functionally differentiated *results* of the great revolutions are embodiments of the *same idea of egalitarian freedom*, which is modern – at least once they use it in a *practice* that strikes back. This is so not only in political practice but also *retrospectively*. Both future-oriented practice and retrospective memory are

as important and indispensable for the *normative self-construction of society* as the *mere cognitive* 'learning processes that occur *within the law and the law alone*' (Thornhill, 2014: 14). If we as social actors refer, for example, to the abolition of slavery in the 19th century, to the right for women in the 12th century to say no in case of marriage, to the legalization of divorce since the 16th century, to the legalization of homosexual relations and the implementation of gender-invariant rights to marriage at the end of the 20th century and in the early 21st century, to the enforcement of equal voting rights for all adult men and women in the course of the 19th and 20th centuries and to educational affirmative action in the second half of the 20th century, do we not refer, and *must* we not refer to *different sides of the same idea* of 'socially universal freedom' (p. 14), at least as long as we are involved in public discourse? (Larmore, 2014: 151). I think that this is not – in 'critical idealist fashion' – a comprehension of freedoms 'as *species-freedoms*' (p. 14) but still a 'self-construction of society' (p. 4), and it is a critical idealism not in the idealistic manner of Plato but in the pragmatic manner of John Dewey.

## *Overcoming the Schism*

Thornhill and Albert reconstruct the sociological argument of my book in a very illuminating way. On the one hand, they show that most of my argument is aligned to functionalist sociology, or systems theory. On the other hand, Thornhill in particular makes the points very clear where I try to implement the explosive charges of Critical Theory.

It is, as Thornhill rightly says, my interest to 'to rectify the damage and loss of explanatory capital caused by' the 'deep conceptual schism' between Frankfurt and Bielefeld in particular since the 1990s (Thornhill, 2014: 1). For this purpose, I take (I) from Adorno the *dialectical method* of determinate negation; (II) from Neumann, Mauss and Habermas the *basic idea* of an emancipatory potential that is, 'however inchoately', embodied in 'sociologically formative legal realities' (pp. 1–2). Therefore, I conceive, in Thornhill's fitting formulation 'constitutional norms as *socially generated* but *normatively essential* principles' (p. 7). This clearly goes beyond Kant and Adorno, and so does (III) the follow-up *empirical thesis*, adopting some arguments of Habermas from the 1970s, that law is the bearer of 'communicative norm-rationality' that is internal to social evolution alone. Methodologically, Critical Theory must 'give authority to its normative claims by examining the legal norms of freedom in historical elaborated contexts' and 'offer a sociological account of the processes through which' constitutional norms as 'discursively mediated agreements' 'come into existence' (pp. 3–4). Therefore, (IV) my general *explanatory* goal is 'to offer a strictly inner-sociological and causally differentiated – that is [ . . . ] *sociological* – explanation for the production of law' (p. 11).

For Thornhill, the very idea behind my work is that law 'in the sense of Kant, Rawls, Habermas, or Dworkin' has a 'philosophical' (or 'legal-philosophical') side that conceives it as 'a privileged bearer of overarching norms' that are relevant for the 'legitimization' of 'society as a whole' (Thornhill, 2014: 2). However, the philosophical dimension that makes law a 'medium of innerworldly transcendence', is so completely internal to the 'factual sociological production of law' that – in 'legal-sociological reflection' – 'the normative origins of the law can never be strictly separated from the conditions of its emergence and application' (pp. 3–4).

Here I would say: yes and no.

*Yes*, because *factually* – from the sociological point of view (p. 3) – laws legitimizing and transcending, and, hence, emancipatory normativity, can never be separated from the specific historical conditions of its emergence.

*No*, because the evolutionary emergence of laws legitimizing and transcending normativity is, at an *evolutionary* level, co-original with the emergence of discourses that are – from a philosophical point of view – concerned with the *validity and justification* of this normativity. These discourses are also part of social reality, but they are a part that *distinguishes itself* from the emergence and application of law, and the subject of *this* distinction is not the system but the people who participate in the discourse as a social group, which *in addition* is in need of functional stabilization (and only in this respect can we say that 'discourses are systems', as Luhmann argued in his first debate with Habermas in the early 1970s). As factual discourses, and there are no others, the discourses on the validity and justification of law are – as everybody knows from every scientific or philosophical debate – always already intertwined with power games and many other overlapping language games that are not just motivated by the forceless force of the better argument alone. They are often deeply entrenched in ideological formations, hegemonic and counter-hegemonic cultures, microphysics of power and so on. Nevertheless, sometimes they can become the very medium of ideological critique, of the unmasking of hegemony, and of emancipation from oppressive power, and there is no other medium to do that. Moreover, the *unity* of the dialogically contradicting extremes of discursive exercises (ideology production vs. critique of ideology) is that *both parties* (from within social evolution) must presuppose in the performance of their discourse that 'reason cannot be reduced to power, nor power to reason', and that 'good reasons do not make bad arguments' (Lafont, 2014: 2). They all know that they have to give reasons and not to reach for their guns. There is (nearly) nobody who cannot distinguish the gun shooting game from the give and take reasons game. Moreover, the rationality of the forceless force of the better argument, pooled in discourses, can be transformed into a 'rational motivation' (Habermas) to strike back, usually with words, but sometimes also with paving stones. This is the way that the common man of 1525 used the then hegemonic legal discourse for emancipatory purposes (Brunkhorst, 2014a: 180–186).

## *Critical Idealism*

Thornhill accepts the functional side of my normative universalism (I) that normative constraints (as *functional* norms) are 'expressions of universal patterns of evolution', which 'impact on all aspects of society, across the dividing lines between national states' (p. 10). This directly leads to the co-evolution thesis to which Albert, Thornhill and I all subscribe (see the section on 'the co-evolution thesis on national and cosmopolitan statehood'). However, from a purely functionalist point of view, Thornhill, to be consistent, is obliged to reject the basic idea of my book that (II) normative constraints are 'constructed as articulations of an encompassing evolutionary orientation towards general freedom' (p. 10) as 'critical idealism' and 'implicit essentialism' (p. 12). Therefore, the project of overcoming the schism between Bielefeld and Frankfurt must finally end with the unresolved antinomy between a 'theoretical construction of society as shaped – lastly –

by evolution' and a 'theoretical construction of society as shaped – lastly – by normative teleology' (p. 12).

However, I would not say *teleology*, and I would not say that the orientation towards general freedom is *encompassing*. In contrast, I try to avoid any Hegelian teleology of freedom. Therefore, I would prefer to use Dieter Groh's formulation of a *trace of reason* in a history of many traces. Thornhill himself offers this as an alternative (p. 9). A trace of reason first appears accidentally, like a trace in the sand of evolution, it proceeds in a certain direction, it is forced back by a bundle of functional imperatives, by environmental problems, by powerful and urgent class interests, it finds its way back to its original trace, discovers a new one and finally disappears in the sand of history – or not. Hegel already came close to that insight in talking about the modern state of reason as a vanishing point in the ocean of history.[17] Such a trace, if it exists, exists sociologically, and if it exists, then adaptive *cognitive learning processes* of learning machines can never give sufficient explanations of its turns and sequences. For sufficient explanation of the small traces of reason in the constitutional evolution, a recourse to *normative learning processes* of social groups seems unavoidable. These groups are nearly absent in Thornhill's great book on *Sociology of Constitutions*. But they exist in history, and their class struggles are not only about material but also about ideal interests, 'clashes of ideologies' (Lafont), and principles of justice which often are established against functional imperatives and selective mechanisms.

Normative learning is learning that social actors themselves interpret as a kind of moral progress. Their own *interpretation of evolution is part and parcel of social evolution*. They matter for understanding social reality just because ordinary people in their everyday life are not only *layman constitutional lawyers* (Roosevelt) but also *layman sociologists* (Alvin Gouldner) (see Beck, 1972). Therefore, the actors' understanding of themselves and their society resides on the *same epistemic level* as the theories of the professional sociological observer. Normative learning does not presuppose, as Thornhill assumes, 'a unified source of reflexive norm-rational agency, which, under certain circumstances, demands freedom', and 'stable norm-generative resources as the most essential substructure of society', and its 'innermost residual substance' (pp. 11–12). This is the wrong, old European model. There is not, on the first level of human nature (state of nature), a competent subject in a state of latency whose competencies then, on the second level of societal conditions of manifestation, are performed if they meet these conditions (state of society). On contrary, conversely, old Europe must be turned upside down. Then, we will see that it is societal communication, mediated through negative speech acts, that engenders a socialization process of the internalization of authority that at once *stabilizes authority* and *enables autonomy and the social formation of a sense of injustice*. Depending on the contingent social conditions of socialisation, individual human beings learn to strike back, from within the frame of normative self-construction of the respective societal formation [*Gesellschaftsformation*] (see Habermas, 1981: 52ff.; 1988: 187ff.).

## Framing Social Evolution

Habermas's main objection resembles strongly that of Thornhill, but with the opposite evaluation. Both argue that I finally do not resolve the antinomy between *systems theory*

*of evolution* and *history of revolutions*. Whereas Thornhill rejects my theoretical construction because it is shaped – lastly – by 'normative teleology' (p. 12), Habermas argues that my theoretical construction is shaped – lastly – by the 'abstractions' of systemic evolution (pp. 18–19).

I agree with Habermas that societies are 'systemically stabilized networks of action and communication among members of socially integrated groups', which are conflict and cooperate (p. 18), and I use a similar idea from the *Theory of Communicative Action* throughout my book. Even if I do not make much use of it, I also agree with the (Durkheimian) three-component model of the social life world (culture, person and society) as a starting point of the evolutionary differentiation between the societal component (which then differentiates in functional *systems* and their environment) and the life world (which then differentiates *internally*, following the differentiation of *discourses* and *validity claims*) (Habermas, 2014: 19–20; 1981: vol. 2).

If I see it correctly, there are two main differences between systems theory (Luhmann) and Critical Theory (Habermas), which both make sense within the complex process of evolutionary differentiation. The problem of theory construction is how to coordinate them appropriately.

*First*, we can construct an ideal point of departure on a journey that leads both Luhmann and Habermas, albeit in different directions, out of old Europe and its metaphysical thinking. An ideal point of departure is Husserl's *Fifth Cartesian Meditation* (1928). Owing to Husserl's supposed failure in this work, Luhmann decided to abandon truth and intersubjectivity, but to retain the *abstract structure of the self-reflexive subject*, and apply it to any kind of self-organized Turing machine, be it organisms, computers or social systems. To avoid any association with humanism, Luhmann replaced the self-reflexive *subject* with the self-referentially closed *system*. Habermas drew the opposite conclusion. He abandoned the subject and retains *intersubjectivity and truth* and applies them to the internal differentiation of the social life world.[18] He replaced the subject (in a formulation from *Faktizität und Geltung* [translated as *Between Facts and Norms*] that seems to come close to Luhmann but does not) with *subjectless circulations of communication*. From this starting point, both Habermas and Luhmann argue that society reproduces itself through communication. In this thesis, both deny the one-dimensional information model of communication, and they follow instead the three-dimensional model proposed by Karl Bühler (and others, such as Austin and Searle). However, whereas Luhmann conceives communicating actors (in a Hobbesian manner) as reflexive systems of conscience (psychic/personal systems) which are only significant for one another as bearers of high and risk-filled environmental complexity, Habermas conceives communicative actors as human individuals who are motivated by truth- and validity claims (that are internal to their speech acts) to reach an understanding.[19]

From these conceptual premises follows the *second* step. From the point of view of the systemic observer, society appears as an *endless flow of communication* (Habermas, 2014: 19). As Albert rightly emphasizes, this communication is *not in need of any form of* social or systemic *integration*; this is simply because, for Luhmann, such integration is *not possible* (Habermas, 2014: 8–9, 20). Therefore, from the systemic perspective, we can only observe *if* and *how* society solves the quasi-biological problem of keeping communication running, and we can only explain this through reference to *causal* and

*functional mechanisms*. Habermas admits that systemic self-organization through causal and functional mechanisms alone is possible. But it is only possible for *functional systems*, which, in evolutionary terms, are relatively young. Functional self-organization is possible in particular (and in accordance with Marx) for the capitalist (or any other) system of modern *economy*. However, Habermas argues – from the internal point of view of the social actor – that the life world of social groups and classes, and the public sphere of politics and law, are results of *social integration* via *intersubjective understanding* that is bound to *truth claims*. Therefore, he concludes, quite rightly, that a post-truth democracy would no longer be democratic.

*Third*, there is sufficient empirical evidence to support both perspectives, and both are still constitutive for 'progressive research programmes' (Lakatos). Writing on my *personal computer* (that clearly belongs to the social world), there is no doubt that 'systems exist' (Luhmann) without any subject or intersubjectivity, and not because they are socially integrated but simply because they are effectively adapted, and serve to keep communication running. *Writing and replying to other voices* on my personal computer, there is no doubt that social groups exist that must be integrated through understanding and truth claims. Whereas the 'capitalist system' (Marx) is a social system that is paradigmatic for the 'object domain' (Habermas, 2014: 18) of the functional perspective, the modern public sphere is paradigmatic for the object domain of the participant's perspective.

Taking this for granted, I do not deny the crucial and indispensable role of *cultural* knowledge and *personally* mediated 'learning'; that is, the 'acquisition of insights through the negation of errors' that '*only occurs through the participant's perspective*' (p. 19). However, I focus on the two sides of *society*, not in the 'more narrow sense' of *system* (p. 20), but in the broader sense that covers *social integration* and *functional stabilization*. When we turn our attention to the *take-off of social evolution*, we do indeed find a striking argument in Luhmann, which could easily, but ought not to, be misunderstood as a concession to Critical Theory (although it might be influenced by Luhmann's long debate with Habermas). This argument is as follows:

> Variation is triggered [ . . . ] by communication that refutes or rejects communicative propositions. [ . . . ] The refutation contradicts the expectation of acceptance. It contradicts the tacit consent that everything continues 'as always'. All variation therefore is contradiction as disagreement, that is, not in the logical sense of contradiction, but in the original dialogical sense. (Luhmann, 1997: 461)

However, for Luhmann this *original dialogue* is nothing other than reciprocally observed double contingency that immediately leads to the differentiation of functionally stabilized social systems, which, decoupled from personal systems, are not able to integrate. In consequence, only *expectations of acceptance* are denied and not *truth claims* (a differentiation that makes no sense for systems theory), and there is only *tacit consent* and no idea of *reaching an understanding* that is (completely) 'embodied in social facts' (Habermas, 2014: 19, note 13). Once a process of systems formation is triggered, systems begin to *learn cognitively* in the same way as computers and other Turing machines learn through adaptation to their environment and to *augment*

*adaptive capacity*. Despite this, at the same time, the same the *original dialogue* must be 'conducted in determinate cultural and social contexts' (Habermas, 2014: 19, note 15), and so it triggers *another* (a) 'cognitive' and (b) a 'socio-cognitive and moral learning process' (p. 19), which are as *unavoidable* as adaptive learning but *intersubjectively directed by problems and truth claims*.[20] In this way, social groups and classes begin to

- form, change and accumulate *normative insight*;
- acquire the potential to *negate functional imperatives*, which are not compatible with normative insight;
- acquire the potential for *critique of blind adaptation*; and
- acquire the potential for *rationally motivated* technical and social change.

In my book, I have tried to combine Critical Theory and systems theory from this starting point, with the intention of letting critique do its subversive job in this way from within systems theory (Brunkhorst, 2014a: 11–20). From there I went straight to the revolutionary emergence of modern law, abstracting broadly from most of the evolutionary steps in between.[21]

## Religion and Progress

These abstractions concern in particular the evolution of religion and the independent development of a profane sphere of cognitive, technical and scientific learning, which is socially (groups) and culturally (truth) embedded, and cannot be reduced to systemic learning and functional adaptation.

As Lafont (2014: 15) and Habermas (2014: 12–18) rightly argue, in this regard, I have not sufficiently accounted for the differentiation between *epistemic revolutions* and *legal developments* (Habermas, 2014: 13). It is true that the differentiation and individual evolution [*Eigenevolution*] of profane knowledge and science began much earlier (already in the Axial Age) than the individual evolution of law as a legal system (Papal Revolution), whose decoupling from religion was only completed in the Course of the Atlantic Revolution. We could even say that the legal revolutions *in law* followed a developmental schema that began with the *legal freedom of the Church* (Papal Revolution), was followed by the *legal freedom from the Church* (Protestant Revolution), was finalized (with respect to religion) with the *legal freedom from religion* (Atlantic Revolution) and, arguably, was followed by the 'emancipation of theology from ontology' (Theunissen) and the realization of the (non-identical) egalitarian and utopian surplus of religion that the young Marx called *human emancipation* (Egalitarian Revolution). At any rate, it was only in the course of the 20th century that religion became 'increasingly superfluous for the social integration of the every-day lifeworld' (Habermas, 2014: 16).

Moreover, Lafont and Habermas are completely right to point out that the long-standing existence of 'non-religious' – and non-metaphysical – 'resources' of profane knowledge and science 'opened up normative pathways for legal revolutions that would not have otherwise been possible' (Lafont, 2014: 15). In particular, the sheer increase in complexity, which finally overtaxed the socially integrative capacities of concepts of

political legitimization attached to divine monarchy (reflected for example in the king as *Vicarius Christi* in the political theology of the Norman Anonymous) and enabled innovations in law, was to a significant degree the result of epistemic revolutions and the increase of profane knowledge, relying on the rationalization of world views (Habermas, 2014: 11, 13–14). However, even though the conceptual differentiation is not explicit, these connections are not absent from my book. I represent the Agrarian Revolution that preceded the Papal Revolution in the 9th and 10th centuries, the rapid urbanization, technical innovations, scientific self-confidence and profane modernism in a coherent (maybe sometimes idealized and over-coherent) continuum with legal innovations such as canon 7 of the Dictatus Papae, which that prescribes '*novas leges condere*' (Brunkhorst, 2014a: 103–107):

> Contradictory customs had to yield to natural law, and this method was quickly generalized for all other cases of conflicts between contradictory authorities that now could and should be decided by the *better argument*. What had begun already in the eleventh century with *desiring knowledge for the sake of faith* ended a short time later with *desiring knowledge for the sake of knowledge*. (Brunkhorst, 2014a: 106)

The dialectic of intersubjective cognitive rationalization is, not a one-way street, but a circular process that (a) presupposes some advances in the growth of 'profane knowledge' (Habermas, 2014: 16), triggering (b) legal innovations and religious expectations of justice and salvation (knowledge for the sake of faith), closing the circle in the (c) rationalizing turn to the (by this point) methodologically generalized production of profane knowledge (knowledge for the sake of knowledge). I have focused on the cognitive and epistemic side of the great revolutions in discussing the *Ratchet Effect* and *Modernism* in sections I–IV of my book. In consequence, I do not dispute (and at least partly show) that non-religious conceptual resources opened up normative pathways for legal revolutions. But I should make this conceptually clearer and more explicit. However, we can turn this the other way round. It is not only non-religious conceptual resources that opened up normative pathways, but religiously motivated legal innovations also opened up new cognitive pathways, as already Weber and Merton have shown.[22]

In spite of this, I must admit that – due to the focus on legal revolutions (and two of them Christian legal revolutions) – I sometimes overestimate the role of *legal knowledge* for scientific innovations in other disciplines, and (with Weber and Merton) I also overstate the rationalizing power of religion for the emergence of natural science. Cassirer and many others rightly have emphasized the independent role of the so-called Renaissance for the evolution of the natural sciences. I neglect the Renaissance (which was still a Christian and metaphysical epoch) completely when it comes to examining legal revolutions in law *and* of society. I still assume with Berman and Weber that there is not much to say about the Renaissance in *this* respect. Here the revolutionary amalgam of *law and salvation* seems to be much more important; in particular, because it contained a feverish, sometimes fundamentalist egalitarian ideology that was not just for the educated classes but reached the uneducated and exploited urban and agrarian multitudes.[23]

## The Co-evolution Thesis on National and Cosmopolitan Statehood

Matthias Albert comment touches another sore spot. Albert has used my way of combining evolutionary and differentiation theory to display the theoretical deficit of contemporary theories of world politics. Moreover, he and Thornhill strongly support my co-evolution thesis and – thankfully – deliver in their comments and other writings much more empirical evidence for my thesis that 'national states emerged as parts of a cosmopolitan political system, and they were both structurally and normatively inseparable from inter- and transnational institutions' (Thornhill, 2014, forthcoming: 19; see also Thornhill, 2011, 2012; Brunkhorst, 2012; Albert, 2014). The still prevailing 'common suggestion that there exists an antinomy between national and transnational statehood' (p. 16) that renders any coexistence of national and cosmopolitan (or European) statehood a priori impossible is determined by the ideological hegemony of the (Hobbesian) *concept* of indivisible state sovereignty that allows no (mortal) God besides himself. It reflects an especially German ideology of 'an exclusive form' of 'centralized authority' (Albert, 2014: 5–6), sticking particularly on the *Bundesverfassungsgericht*. By the way, it is much more realistic to stick with a concept of state that implies that 'some power is centralized somewhere' (p. 6) and that the national state is 'a borderline case of statehood historically' (p. 9; see also Brunkhorst, 2014a: 75).

However, both Albert and Thornhill reject my (practical) optimism – albeit for opposing reasons. Thornhill accepts the broadly functionalist argument but considers my 'attempt to explain the formative interaction between national and cosmopolitan legal order through reference to underlying ideas of human freedom [. . .] as obscuring the factual dynamics shaping the correlated evolution of the national and the cosmopolitan political system' (Thornhill, 2014, forthcoming: 16, 20). By contrast, Albert neither rejects my thesis that there are normative constraints that cannot be explained as 'functional norms' (Thornhill) nor my attempt to square the circle between functional differentiation and social integration through law and solidarity (Albert, 2014: 8).[24] For Albert, the attempt to square the circle depends on a *too narrow* reading of systems theory, whereas a *broader reading* would allow for a dialectical synthesis that is *left-Luhmannian* (p. 12, note 7). However, he assumes that – even from a *functional* point of view – my 'account of functional differentiation in world society' is 'under-complex' because it 'buys too deeply into Luhmann's rather under-complex account of functional differentiation in world society' (p. 1).

Accepting basically (as Thornhill does) both my account of contemporary cosmopolitan statehood and its long-term co-evolution in an emerging world society, Albert does not argue that my 'optimism' 'regarding the integrative potential of both the global legal community [*globale Rechtsgenossenschaft*] and the cosmopolitan state' results from *humanist normative universalism* (that is Thornhill's explanation). However, and this resembles Habermas' objection that I narrow concepts to negation, normativity and justice (Habermas, 2014: 14), he sees it as the result of the fact that I focus *too narrowly* on the 'disintegrative effects of functional differentiation' (Albert, 2014: 9), which links in with a related narrowing of focus 'on the integrative potential of both particularistic and cosmopolitan forms of statehood' (p. 9).

I guess that Albert is completely right. If one 'buys into [Luhmann's] diagnosis of the primacy of functional differentiation in world society', this 'in turn leads … [us] to over-estimate the integrative potential of the cosmopolitan state' (p. 9). However, Albert knows very well and mentions several times that I do not buy completely into Luhmann's actually far too simple representation of world society. I emphasize in fact the priority of functional differentiation, but I should make the other, more implicit forms of differentiation more explicit.

First, there are many more forms of differentiation than two forms of

1. *Organizational segmentation* (national states and statist or state-like cosmopolitan organizations), and
2. *Functional differentiation of a huge variety of social systems.*

Albert rightly mentions that the introduction of cosmopolitan statehood already makes the functional model of world society more complicated than the Luhmannian model. But there are also 'a number of alternative [ . . . ] forms of statehood', and 'there *is* evolutionary variation as an expression of crisscrossing of ordering principles which go along with different forms of differentiation *within* the system of world politics' (pp. 9–10).[25]

However, I not simply neglect alternative forms of statehood and ordering principles. These include:

3. The 'combination of *stratification* (through elements of supranationality) and *functional differentiation*' (p. 10), which leads to
   - 3a. Constellations of 'balance-of-power' (p. 10), which I use with recourse to the still interesting reconstruction of the post–World War II world system which Parson accounted for as the emergence of a *global constitutional* order (Brunkhorst, 2014a: 87, 376, 410, 428); and it leads, of course, to
   - 3b. the formation of 'informal Empires', 'hegemonic' *and* counter-hegemonic 'configurations' (Albert, 2014: 10–11), which I observe in particular as *existing contradictions* of world society (Brunkhorst, 2014a: 408–412, 428, 432–462).

These also include:

4. Many different 'non-state forms of organizing political authority which potentially support rather than undermine disintegrative effects of functional differentiation' (Albert, 2014: 9) such as scientific, medical, technical and other world organizations and multinationals). My interest focuses on these organizations *as far* as they contribute to the *blackmailing power of the globalized capitalist system*.
5. 'Specific recombinations of functional differentiation and segmentation (regional integration, regional regimes)' (Albert, 2014: 11), which I especially analyze with respect to the European Union (and its *regional stratification*) at the end of my book.

Moreover, I explicitly deny Luhmann's suggestion that the *primacy* of functional differentiation leads to an unavoidable externalization of the once-and-for-all (that means as long as modern society exists) unresolvable old European problems of stratification (class society). One of my main objections against Luhmann's model of functional differentiation is that it neglects and excludes *conceptually* the *social differentiation* in national and transnational classes and groups. Whereas Lumann understands the *primacy of functional differentiation* in the *reductive* way that the only problems of modern society, which are left for resolutions, are *environmental problems* caused by the differentiation of system and environment, I understand *primacy of functional differentiation* in the *restricted* sense that, as a further form of differentiation.

6. *social class formation* is due no longer to traditionally established stratification but necessarily engendered in *different constellations of structural class conflicts* by functional differentiation of the *economy* (Marx and Weber's *erwerbsabhängige Klassen* [*income-dependent classes*]), the *political system*, the *legal system and religion*, and – arguable – the *educational system* (Brunkhorst, 2014a: 75–81).

My very point is (and I am thankful that Albert's queries give me the opportunity to make that clear) that functionally engendered (*system* vs. *environment*) social class formation must be experienced and is constituted *as* class conflict (in Habermas' terminology) at the border between *system* and *life world*. Therefore, the *primacy of functional differentiation* must be qualified by functionally engendered *social class formation that is internal to modern society*.

However, integrating Albert's theory of complex differentiation into my version of evolutionary theory, it becomes clear that these differentiations are still (by emphasizing the *existing contradiction* of hegemony and empire, the *constitutional* aspect of great power balance and the *transformative potential of transnational class struggle*) arranged in a way that (in contrast to Albert) is designed to keep open the path of 'hope' that the 'long tradition of cosmopolitan thought' (Albert, 2014: 12) – after the abolition of its old European metaphysics – still has a chance. 'If I had to lay bets, my bet would be that everything is going to go to hell, but, you know, what else have we got except hope?' (Richard Rorty). However, it should be *docta spes* (Bloch).

## Notes

1. Quotations given with the year 2014 refer to comments and critiques published in this volume.
2. On the following see Albert (2014: Chapter 5).
3. For a brief critique of Eurocentrism, see Brunkhorst (2005: 107–112). On Hegel's Eurocentrism and Marx's European 'provincialism' see Brunkhorst (2005; 164, 110).
4. This applies in the same way that it is hard, although not impossible, to forget the cognitive insights of the theories of natural selection, Kantian epistemic criticism, and microphysics. Unlike Bellah, I do not think that evolution has a memory that cannot be deleted.
5. The latter is what Meier calls *Könnensbewußtsein*. When Cleistenes and his comrades introduced the phylia reform, they wanted to pursue the reform for some express reasons – in particular, in order to get rid of dangerous social tensions. But as we can see from nearly every

new historical hypothesis on the meaning of that reform for the invention of the political and especially democracy, these consequences were unintended and accidental outcomes. See in particular, Meier (1983). For a more critical account, addressing further literature in recent research, see Lane (2014, forthcoming).

6. On the difference between the present *global age* and the earlier *age of globalization* which I have used throughout the book, see Bright and Geyer (2011).
7. World society is not only culturally mixed *and* diversified but now also *modern everywhere and all the time*. Even if – as is arguable – modernity was European once, it *is not European or Western any longer*. Moreover, it *originates* in a great variety of sources, which at latest began to develop in the Axial Age, in *ever different and changing formations of entangled cultures that cover the whole Eurasian continent* (see Brunkhorst, 2014a: 164, note 336). I am not sure if I wrote this sentence before or after Lafont's critique. Yet, for the thesis that '*if* modernity and modern law were European once, they are not any longer', and an extended justification of that thesis, see for instance Brunkhorst (2009b, 2012); Albert (2014). This thesis is already in my book on *Solidarity* from 2002. For an alternative, yet still comparable account of provincializing Europe, see Chakrabarty (2000). On the decentration of Europe, see Chakrabarty (2000).
8. This is a variant on Hegel-Marxian determinate negation, which is further developed by Habermas (see Brunkhorst, 2009a).
9. This is why Weber in a way was right to argue that the tragedy of Germany is that the Germans never beheaded a Hohenzollern prince.
10. I guess this is the very point of Fine's differentiation between *unequivocal* and *equivocal* universalism (see above, note 6).
11. Although I focus on legal revolutions, I also take both *Reform nach Prinzipien* and *radical reformism* into account (Brunkhorst, 2014a: 228, note 614, 252, 264, note 776, 338–9).
12. For further criticism of Koskenniemi, see my follow-up study (Brunkhorst, 2014b: 30–56).
13. This is at least *implicit* in my outlines of ongoing constitutional evolution after the Atlantic Revolution (Brunkhorst, 2014a: 294–316) and especially the constitutional evolution of the European Union (Brunkhorst, 2014a: 440–462).
14. This by the way is one of reasons why I follow Hans Kelsen, who after World War I already argued for a complete *individualization of state actions* and the abolishment of statist legal personality (or subjectivity) that was misused time and again to exculpate and immunize criminal actions of officials and leaders of states (see Brunkhorst, 2014a: 396–397).
15. See Brunkhorst (2014a: 50, 464). See also my account of devolution and regression (2014a: 32, 79, 90, 199, 310, 338, 401, 431, 461, 463, 466).
16. For a critique of Thornhill see Brunkhorst (2014c).
17. I have to thank Frank Ruda for the hint on this Hegelian metaphor.
18. Whereas Luhmann's turn *from subject to system* still is exposed to all the objections of the 20th-century mainstream philosophy of language against the optical metaphor (Rorty), Habermas's turn *from subject to intersubjectivity* is not.
19. Habermas assumes that I accept too much of Luhmann's (also from the point of view of linguistic and pragmatic philosophy highly problematic) differentiation between *social systems of communication* and *personal systems of conscience* (which are structurally coupled through language). However, I use this differentiation only for a very limited purpose, and in a sense that (unlike Luhmann) situates it *historically* in the context of the Protestant Revolution, which had latterly been reinvented and reinforced by the neoliberal-counterrevolution.

Therefore, the differentiation itself can become an object of the *critique of the ideology* of possessive individualism (see Brunkhorst, 2014a: 196–198). See my earlier view in Brunkhorst (2000: 190–203). By contrast, for Luhmann the differentiation of personal and social systems is *co-original* and therefore *constitutive* for social evolution as a whole (insofar, it is a kind of naturalization of historical and societal relations). Even if, with Berman and Habermas, 'the impetus towards the subjectivization [. . . ] of religious experience [. . . ] in Protestantism is just one step in a series of stages of individualization' (Habermas, 2014: 20, note 15), this is a very significant step for the formation of bourgeois society and bourgeois ideology. The disciplinary subject of the Protestant Revolution (no matter of which confession) is desocialized by himself or herself (Michael Kohlhaas), by endless procedures of disciplinary practices (Gorski, Weber, Scarlet Letter), by the theories of the individualized state of nature (Hobbes, Robinson) and so on. However, this does not mean that the constitution of the personal system is no longer internal to the process of *individualization by socialization* [*Individualisierung durch Vergesellschaftung*] (Habermas) and *sociocultural socialization* (that is not reducible to disciplinary subjectivity and Wittgensteinian *Abrichtung*). Similar to the way that law and politics are functionally differentiated but not decoupled from their internal ties to the general public sphere, persons undergoing a desocializing radicalization of individualization were functionally differentiated in the course of the Protestant Revolution. They were functionally differentiated (in particular from the economic system) but not decoupled from their internal ties to the social life world.

20. It is *an alternative* learning process (at least in the cognitive dimension) and not the *only* one as Habermas seems to presume. I would suggest that we distinguish cognitive learning of systems (Luhmann) from intersubjective cognitive learning (Piaget).
21. Habermas is right that I proceed 'somewhat too hastily' from the gestural and linguistic acts of *negation* to 'the rejection of upcoming *normative* claims to validity: that is, to questions about justice' (2014: 14). This is due to my basic interest in the role of legal revolutions for the emergence of modern society, and here normative claims to validity and questions of justice are at the centre of the legal development. Whereas Habermas' present studies on religious evolution focus on the relation of *faith and knowledge* (this began with his *Friedenspreis*-talk 2001), I am interested in legal revolutions. Therefore, I focus more on *norm and faith*. However, it was too easy to abstract from the role of 'ritual practices' for the origin of normativity and the rationalizing role of (normatively more or less unremarkable) mythical narratives for the 'linguistification of sacred meanings' (pp. 14–15).
22. See Brunkhorst (2014a: 168–174). The same is true of the early invention of a something like 'sociological functionalism' by John of Salisbury (p. 98).
23. By the way, Lafont's presumption that religion in the 20th century no longer motivated revolutionary and reformist social movements is disputable, even for women's or lesbian, gay, bisexual and transgender liberation movements. This is especially the case if we consider the beginnings of these movements in the late 19th and early 20th centuries. Communist atheism is also a kind of post-Christian religion, akin to the deism of the Age of Enlightenment. Moreover, I cannot see that I underestimated the role of 'non-emancipatory religious ideas' (2014: 15) and the unquestionable fact that (in spite of its emancipatory and rationalizing potential) religion also 'enabled and perpetuated oppression throughout' the social evolution (p. 14). I discuss this in particular – though not exclusively – in the first two parts (p. 10) in the sections

on the *Dialectic of Enlightenment* and on the Papal and Protestant Revolutions. The Chapter on the Papal Revolution ends with the sentences:

> At the end of the day, it became evident that the freedom of the church was not only restricted to non-heretic Christians, it also was not the freedom of the *pauperes*, whether Christian or not, who in their vast majority were peasants. [ . . . ] The clerics strived for the rights of the poor and the disenfranchised, but at the same time they discovered that the exploitation of liberated labour was much more effective than the exploitation of slave labour. Modern capitalism has a long pre-history. (Brunkhorst, 2014a: 146)

Moreover, the disciplinary aspect of the Protestant Revolution is as extensively discussed in the book as religiously motivated possessive individualism.

24. If I see it correctly, Albert uses 'world cultural scripts', 'global ideological framework' and 'reflexive form of global public' more in the sense of my 'normative constraints' and 'ratchet effects' than in the sense of Luhmann's functional 'semantic' and 'self-description'.
25. Interestingly enough, proceeding from a narrow and more radically functionalist evolutionary perspective than in his *Sociology of Constitutions* and the wonderful conclusion he sets out in his comment (2014: 16–20), Thornhill comes to the opposite conclusion, namely, that it is the function of rights-based international law and cosmopolitan state formation to enable states to *select all forms of statehood which are deviant from the national constitutional state* (except cosmopolitan statehood that is needed for the successful re-stabilization of national constitutional states). However, it seems just this social selection and adaptive improvement of the global system of national states that is limited by the normative constraints of human rights and democracy which are at the core of international law and cosmopolitan statehood. This is of course an empirical question.

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