

# Chapter 2

## Metaphysics of Freedom



The history of the philosophy of freedom within the Continental European tradition is often treated as a historical and systematic development from Kant to Hegel (via Fichte and Schelling). In such presentations, Kant provides the intellectual point of departure for the construction of the idea of freedom. Fichte draws this point out into a line, with a theory of consciousness highlighting the *subjective* presupposition of the idea of freedom. In his philosophy of nature, Schelling adds to that picture a corresponding line, sketching its *objective* foundations. And Hegel transforms these two lines into a triangle by adding an *absolute* baseline that unites the subjective and objective angles.<sup>1</sup> In drastically simplifying matters, this schema is both *helpful* and a *hindrance*.

What is *helpful* is the abstract demarcation of archetypal positions arising from an idea of freedom that critically examines itself. Actually, there is hardly any way of avoiding the questions which subjective and objective presuppositions freedom requires, as well as deliberation how they could be permanently reconciled. Accordingly, this triangular schema helps prevent us from either overlooking, or overemphasizing, certain perspectives. As the image correctly suggests, freedom as a whole is only in view when we look at the subjectively-inner and objectively-outer conditions together with the help of a theory that encompasses both aspects and relates them appropriately to one another.

Yet, this triangular illustration becomes a *hindrance* whenever it is held to be an accurate account of the philosophies it assimilates. In that regard, it caricatures those positions more than it characterizes them. The consistency of the schema suggests, for example, that the philosophical systems represented by its constitutive lines are one-sided and complete, whereas the attractiveness of the philosophies of Fichte, Schelling and Hegel up until today precisely consists in their many-sidedness and openness to alternative interpretations. For that reason alone, I am not following this conventional narrative sketch here.

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<sup>1</sup> See Richard Kroner's classic *Von Kant zu Hegel* (Tübingen, 1921ff.).

With my alternative selection of authors, I aim rather to open up that epoch of philosophy to questions demanded by contemporary thinking. Instead of expecting to find *final answers* in *German Idealism*, with the philosophies here collected, I wish to seek out the *original questions* to the problem of freedom. Therefore, I have not granted Georg Wilhelm Friedrich Hegel (1770–1832) the last word on metaphysical freedom, but rather given this to the less well-known philosopher, Karl Christian Friedrich Krause (1781–1832). In terms of both its methods and its content, Krause’s philosophy offers more participatory and procedural openness than that of Hegel and his followers (as we shall see in Sect. 2.3.1). Its proximity to today’s thought is thus greater.<sup>2</sup>

The investigation begins with Kant’s philosophy, as it presents the central problem of a critically self-reflective theory of freedom. If freedom exempts itself from every external directive and questions all traditional values and commitments and is therefore ultimately only supported by itself, how can it be protected against its dissolution into arbitrariness and from a corresponding destruction of its own – e.g. cultural – presuppositions?

Fichte addressed this problem by first bringing before our eyes the abyss of freedom – its possibility of negating the whole world – and then trying to deduce all individual liberties from nothing but the idea freedom itself. Fichte will have us believe that freedom can only be protected from itself, by satisfying, in all of its manifestations, certain demands of rationality which are to regulate our lives down to the last detail. Hence the philosopher has to instruct the citizens how to use their freedoms correctly. The result is a *directive liberalism*.

A clear opposition against this position is formulated by the – even in Germany, unjustifiably forgotten – philosophy of Fichte’s student, Karl Christian Friedrich Krause (1781–1832). Krause, whose philosophy is to this day widely honored in the Spanish and Portuguese speaking world for setting the standard of a cosmopolitan liberalism, relies on *freedom as method*: Liberty should be promoted by liberal means. Consequently, the forms of freedom’s use ought to be defined less by the state, but rather determined by the citizens – through participatory and representative procedures. Instead of being freedom’s recipients the individuals should become its producers. Krause advocates a *participative liberalism*. All manifestations of freedom – for example, democratic procedures – must always critically be evaluated and reformed in the light of the idea of freedom. Krause thereby lifts the discussion to a level from which today’s philosophy of freedom must not slip.

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<sup>2</sup>For a more detailed discussion see Claus Dierksmeier, *Der Absolute Grund des Rechts: Karl Christian Friedrich Krause in Auseinandersetzung mit Fichte und Schelling* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2003).

## 2.1 Reflexive Freedom (Immanuel Kant)

Kant's philosophy of freedom had an impact second to none. He provided the basis for a thoroughly modern philosophy reflecting critically upon its own boundaries. His philosophy throws the subject of modernity back upon itself and makes it aware of the foundational power of its own thinking. Kant refers to reason questions previously decided by tradition and authority. Not only in the sphere of the *theoretical* philosophy and in questions of *knowledge*, Kant invokes the self-enlightenment of human existence as "*human being's emergence from his self-incurred minority [Unmündigkeit]*" (AA VIII 35)<sup>3</sup>; he likewise makes freedom the basis of his *practical* philosophy. In questions of *action*, too, Kant demands autonomous self-determination, by instigating a *metaphysics of freedom* in which the idea of freedom, applied to itself, *grounds* but also *bounds* the freedoms to be founded upon it.

Kant thereby lays the foundation for liberalism's two opposing tendencies. *Freedom as its own foundation* – this notion is directed against the genuine opponents of liberal thinking, that is, against proponents of ethics who do not view freedom as the (highest) value. They learn from Kant's philosophy that those values to which freedom is supposedly subordinated only become valued by means of self-determined recognition, i.e. through freedom – and thus cannot reasonably be opposed to the idea of freedom. *Freedom as its own boundary* – that is directed against false friends of freedom who speak of a liberality that desires to respect no (other) values. They have to be taught that responsibility presents the flip side of freedom, and that therefore the observance of certain rules of moral, social, and ecological sustainability is a necessary consequence of each and every consistent liberalism.

### 2.1.1 How Much Metaphysics Does Freedom Require?

Kant's doctrine of freedom covers a broad thematic spectrum: For him freedom is a moment of *theoretical* philosophy (pondering the possibility of freedom in a world governed by laws of nature) as well as of *aesthetic* theory (reflecting how in the experience of beauty our mental faculties enter into a non-coercive convergence). It plays a role in observations concerning the *philosophy of history* and the *philosophy of nature* (for example in musings about how the unintended effects of natural as well as sociological forces contribute to the flourishing of individual as well as collective freedom), and the idea of freedom ultimately provides the foundations for Kant's *ethics* through a theory of moral autonomy. How are these diverse perspectives on human freedom united? Which aspects of these notions are most relevant for contemporary political and economic philosophy?

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<sup>3</sup>Kant's works are cited according to the Akademik Ausgabe (AA) (i.e. Kant' *Gesammelte Schriften*) pagination. In all cases the Kant *Cambridge Edition* translations have been followed.

A particularly appropriate perspective for this question arises from viewing his program of transcendental philosophy as that of a reason critically assuring itself about the conditions of its validity. To philosophize transcendently means, according to Kant, to pay attention to the necessary conditions constituting self-consciousness. We cannot understand anything about our environment and ourselves without recourse to certain fundamental assumptions. His project is to find out what these assumptions are and how they could be justified. Kant believes that the key to that lies in identifying structures that are “synthetic *a priori*.”<sup>4</sup> By that, Kant means, above all, that no one lives self-sufficiently. Every person is dependent upon a natural as well as social environment. The subject thus co-determines the world of objects to which it is related, and which it – in Kant’s words – “synthesizes.” In this process, through the connection (synthesis) of appearances (i.e. of that which is “conditioned” by sensory perception) with spontaneous mental contributions (of the “unconditioned”) a subject becomes self-aware.

When a subject orients itself in the world by laws inferred from experience Kant speaks of syntheses *a posteriori*, in other cases of syntheses *a priori*. Only a synthesis *a priori*, i.e. the process relating to the world based on nothing but mental structures, can generate timeless, certain knowledge. Those – and only those – fields of human practice (like morals and law), for which syntheses *a priori* can be constructed, allow norms that can be certified without recourse to personal experience; they alone generate universal directives for freedom.<sup>5</sup>

Subjectivity relies on contexts, as does personality on relations. Persons exist and experience themselves only within and by mean of relations with their fellow beings and environment. The theory of freedom must do justice to this fundamentally *relational* essence of human beings; when followed through consistently to its ultimate conclusions it will thus lead to a context-orientated ethics.<sup>6</sup> – All-important is, of course, *how* a subject relates itself to its world. To that question, Kant’s *Critique of Practical Reason* provides decisive directives. Kant wishes to establish commandments (*synthetically practical* propositions) *a priori* without recourse to specific experiences (AA V 31); more precisely, he wishes to establish their conditions of possibility, and even more precisely: that very structure of reason that facilitates a reasonable human being’s *ethical* relation to self and other. He is searching for *subjective universality* as a form of *interpersonally-universal validity*.

The fundamentally decisive idea is as follows: Just as the theoretical cognizing of the true is no purely private matter, nor is the practical realizing of the good only a question of personal taste. We act freely, not arbitrarily; without outer compulsion, but not without inner directives. The true and the good are neither orientations that human beings simply *fabricate* nor orientations they simply *find*. Beyond subjective

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<sup>4</sup> See Otfried Höffe, *Immanuel Kant* (München, 1983); translated as Otfried Höffe, *Immanuel Kant* (Albany: SUNY Press, 1983).

<sup>5</sup> See Claus Dierksmeier, *Das Noumenon Religion: Eine Untersuchung zur Stellung der Religion im System der Praktischen Philosophie Kants* (Berlin: de Gruyter, 1997).

<sup>6</sup> See Onora O’Neil, “Autonomy, Coherence, and Independence” in Milligan & Miller, eds., *Liberalism, Citizenship, and Autonomy* (Aldershot: Avebury, 1992), 212–220.

relativism and objective dogmatism, Kant locates a possible third way: a *rule-governed generation* of the true as well as the good on the part of reason; leading to interpersonally valid subjective certainties.

By identifying a *third* class of possible statements about the world, Kant already moves beyond the dichotomy idiosyncratic of later analytic philosophy of either empirical (synthetic *a posteriori*) or analytic (tautological) propositions. This advance occurs by means of the *categories of the understanding* which structure our experience. A consensus with intersubjective validity about certain necessary and, at the same time, non-trivial (*synthetic a priori theoretical*) propositions becomes possible according to Kant through the convergence of (conditioned) intuition and (unconditioned) concept through categories (mediating both). A given situation is brought under general “categories” by determinate “schemata” and thus conceived as possessing a structurally warranted validity surpassing the particular situation.<sup>7</sup>

For example, our understanding automatically supplies regular successions of events with predicates of causality. Unaware of our own contribution, when observing regular *sequences*, we transform them into connections of *cause* and *effect*. Our mind thus constructs from a “previously-subsequently” a “because-therefore,” and thereby claims something beyond what we observe with our eyes. We thus form a cognition which (synthetically) goes beyond the logical analysis of the elements causally connected here – with a claim to validity not only for us but for everyone.<sup>8</sup> Such truth-claims are, therefore, not merely a private affair.

Just as in our theoretical apperception of the world we are afflicted by *avoidable error*, so in our practical relations to the world we encounter *inappropriate actions*. What can be done in order to avoid or correct either? One must examine whether that which in the process of the categorization of experiences (e.g. *in* succession) raises a *claim to necessary and universal validity* (e.g. *as* causality) rests on *universally acceptable foundations*. A claim to universal validity can legitimately only be made when the conditions of possibility of *our* experience can be demonstrated as necessary conditions of *experience as such*, when therefore that which individuals cognize here and now can be grasped correctly by everyone at every time and place.

A structural analogue occurs in Kant’s practical philosophy. There, our references to the lifeworld (*Lebenswelt*) are informed by the *categories of freedom*, which provide the decisive formal directives. They mediate the (unconditioned) moral law with the (conditioned) sensible reality, by structuring it according to (mediating) laws of freedom. The idea of the good, just like the notion of truth, is not merely a private conception. Likewise, Kant proceeds in analogy to the insights of his theoretical philosophy when pondering how to correct fallibility in human practice. Everybody must examine whether the condition of possibility of *their* free action conforms to the conditions of *free action as such*, i.e. whether their individual

<sup>7</sup>See Hans Bussmann, “Eine Systemanalytische Betrachtung des Schematismuskapitels in der Kritik der reinen Vernunft,” *Kant-Studien* 85:4 (1994), 396.

<sup>8</sup>See John R. Silber, “Der Schematismus der Praktischen Vernunft,” *Kant-Studien* 56:3–4 (1965), 253–73, 257 and Rüdiger Bubner “Was heißt Synthesis?” in Gerold Prauss, ed., *Handlungstheorie und Transzendentalphilosophie* (Frankfurt am Main: Klostermann, 1986), 27–40.

actions have a structure that is strictly universalizable (AA V 87). Thus Kant's *categorical imperative* proclaims: "act only in accordance with that maxim through which you can at the same time will that it become a universal law" (AA V 160). Kant identifies in this commandment the foundation of moral goodness as such, which is why, according to him, "all imperatives of duty can be derived from this single imperative as from their principle" (AA IV 421).

*Categories of freedom* determine an activity *formally* so that, regardless of what aim is pursued, we can say that it stands (or does not stand) in contradiction to the demand of universal validity.<sup>9</sup> Thus reason makes possible the *imputation* of human actions on the one hand (*imputatio facti*) and their *ethical direction* on the other. Interestingly, with Kant the imputation is based upon the direction – and not *vice versa*. And precisely this is the essential point of the Kantian doctrine of freedom:

Since persons can ethically determine themselves, only thus do they have the option *not* to execute a particular action. It is only because human beings can act *ethically*, that they are in a position to rise above natural impulses and instincts, and only then *imputably* act (ethically or unethically). Practical reason does hence not only judge our free actions, in the first place it makes them possible. If we never could act in conformity with the categorical imperative, then it would be completely impossible to act with genuine freedom, according to Kant.

Certainly, most people always presuppose their own freedom and make nearly all of their decisions premised on that assumption.<sup>10</sup> This self-image is, however confronted with the argument that, nevertheless, at times one may be compelled by inclinations or certain circumstances towards unethical actions. Such a lack of freedom is even loudly proclaimed every now and then; for example in order to excuse oneself from moral responsibility or to justify ethically repugnant behavior. Against this, Kant nevertheless maintains:

Suppose someone asserts of his lustful inclination that, when the desired object and the opportunity are present, it is quite irresistible to him; ask him whether, if gallows were erected in front of the house where he finds this opportunity and he would be hanged on it immediately after gratifying his lust, he would not then control his inclination". (AA V 30)

Whoever beforehand maintained that he was thoroughly controlled by his inclinations would thus realize that he was nevertheless able to control them on at least this one occasion, thinks Kant. In such cases, persons ascribe to themselves a "negative freedom," i.e. a "freedom-from." Since, on this view, subjects can resist actions, they may legitimately be held accountable for them and *juridical* connections of freedom and responsibility between action and actor may be construed. Kant's legal and political philosophy operates on this foundation of an uncontentious

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<sup>9</sup> See Gerhard Schönrich, "Die Kategorien der Freiheit als handlungstheoretische Elementarbegriffe" in Gerold Prauss, ed., *Handlungstheorie und Transzendentalphilosophie* (Frankfurt am Main: Klostermann, 1986), 246–270 and Susanne Bobzien, "Die Kategorien der Freiheit bei Kant" in H. Oberer & Seel, eds., *Kant: Analyse, Probleme, Kritik* (Würzburg: Königshausen & Neumann, 1988).

<sup>10</sup> See Larry Krasnoff, "How Kantian is Constructivism?," *Kant-Studien* 90:4 (2009), 385–409.

self-understanding – i.e., without intolerable metaphysical baggage; as we shall see, this is a significant intermediate result for modern liberalism.<sup>11</sup>

But does negatively-outer *freedom of action* suffice for moral-political concerns? To thematize questions of disposition and intention, does one not also need to talk about the *freedom of the will* to determine oneself ethically or unethically, i.e. about positively-inner freedom? Actually, one can object to Kant's argument so far that the form of freedom referred to in the example of the gallows could itself possibly rest upon an unfree will. One could for instance allege that mere inclination – and not ethical freedom – is directing things. Has merely one preference (for a satisfaction of certain wants) been replaced by another and stronger preference (to stay alive)? Perhaps, then, the human being only possesses the 'freedom' to follow what in any particular case is his strongest inclination and is however necessitated by his or her own nature.

Hence, Kant adds another example: If now however it should be demanded of the same man on pain of execution to destroy an honorable man through false testimony, then one would venture to assert that – whether he would do it or not – it would be possible for him to overcome his love of life for the sake of another's honor, although he certainly may not feel the slightest *sensory (sinnliche)* inclination or necessitation to do so. Who, Kant asks, does, however, not know about that *ethical (sittliche)* freedom that is morally proclaiming one should not slander the honorable man? And who would venture to predict with certainty in what way the person concerned would decide? Considering that for centuries human beings have again and again chosen martyrdom for moral reasons, one may here conclude: Reality proves possibility. We must theoretically realize that which those individuals realized practically so as not to underdetermine the idea of freedom.

In and for itself therefore negative freedom, that "freedom from," which we daily ascribe to ourselves, remains dubious. Only positive "freedom for," i.e. for the good – in the previously discussed example of the true testimony despite the threat of execution – proves unquestionably that we are free. The radical nature of everyday freedom becomes evident in heroic freedom. Thus it is only the reality and power of positive freedom that establishes the possibility and the radius of negative freedom.<sup>12</sup> First appearances are hence deceptive: Negative freedom does not lead the way and then, as a kind of friendly encore, enable its positive orientation towards ethical values and other values. Rather, it is the other way around: The consciousness of being called to act in accord with the demands of positive freedom leads to an awareness of negative freedom. Freedom may hence in no way be equated with the realization of existing preferences. It includes also the possibility of critically

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<sup>11</sup> That is above all to be noted in regard to the philosophy of John Rawls. He believed that he had to extricate himself from Kant because he set out from the mistaken assumption that Kant's concept of freedom as rational autonomy rested upon manifold presuppositions of his moral and metaphysical theories, which is why, according to Rawls, another foundation for the idea of freedom had to be sought for the concerns of contemporary liberalism – and this would have to be found in a rationalistic calculus of interests. More on this in Sect. 2.3.2.

<sup>12</sup> See Onora O'Neil, "Autonomy, Coherence and Independence" in Milligan & Miller, *Liberalism*, eds., *Citizenship and Autonomy* (Aldershot: Avebury, 1992), 212–221, 213.

relating oneself to one's own preferences, to reject some, to emphasize others, or, third, to develop yet others, etc.

With the example of the false testimony Kant shows that the concept of inner freedom required for moral philosophy is something familiar to everyone and not only the preserve of philosophically educated minds. One does not need complicated dialectical exercises in order to avail oneself of the concept of freedom employed in Kant's legal or moral philosophy. In both cases, Kant merely reconstructs foundational assumptions that our *everyday* consciousness inevitably already makes when it thinks of itself as free. On but these assumptions he establishes his ethics. Therefore, it does not at all depend upon, as is sometimes claimed, (possibly illegitimate) metaphysical foundations. Kant's ethics consequently also continues to be relevant for societies that conceive of themselves as post-metaphysical.

Let us pause here for a moment and consider the results of these reflections for liberal thinking. Kant shows how values can be liberating. The only faculty that we do not hold to be trounced by sensory stimuli is that power of ethical commitment – in the latter example: to the duty to be truthful. Here, the ethical value (truthfulness) does not lead to a reduction, but rather to an awareness and increase of our freedom. At the same time, however, the value of truthfulness can only wield such a power since the former is an act of ethical self-commitment. As an imposed value, not shared by those concerned, the same commandment, not to lie, would be ineffective. According to Kant, just as the moral law lets us realize our freedom theoretically, our freedom in turn lets us realize the moral law practically. Therefore, to oppose freedom to ethical values (like some libertarians) is just as mistaken as it is to subordinate freedom to them (like many communitarians).

But how can we philosophically explain the very freedom presupposed by our everyday consciousness? It is only in order to answer this question that Kant has recourse to metaphysics. Since this groundwork is of subordinate importance for practical questions, it will here be discussed only briefly: Kant thinks of freedom of choice as merely a faculty of the empirical subject and *not* the transcendental subject. Freedom of choice comes about because the transcendental subject precisely does not have this capacity, but rather is merely free to follow and express the moral law. With this theorem, Kant *explains* his counter-intuitive claim that the human being is not at first simply free – and then, on top of that, takes on some normative orientation, but rather that we become free to choose as a result of ethical duty. This *prima facie* unwieldy thought is clarified by Kant's oft-cited distinction between "will and choice."<sup>13</sup>

The will, Kant says, is *pure* practical reason; reason, that is, which self-legislates and realizes its own concepts: radical ethical freedom.<sup>14</sup> In contrast, choice (*Willkür*) denotes that psychophysical freedom of human beings, seemingly indeterminate, to opt for or to do this or that: the freedom to select (*Wahlfreiheit*). Freedom of choice

<sup>13</sup>See Hud Hudson, "Wille, Willkür, and the Imputability of Immoral Actions," *Kant-Studien* (1991), 179–196.

<sup>14</sup>"We can therefore also explain reason by means of the faculty of *judging* and (in a practical regard) *acting* according to principles" (AA VII 199).



however is only *possible* insofar as ethical freedom is *actual*, “for then it would itself be subject to the natural law of appearances, to the extent that this law determines causal series in time” (AA III, 373f.). The possibility of deciding for this or that expires precisely when a subject is without normative regulation and instead simply follows hedonistic or other preferential calculi. As a mechanism purely reacting to stimuli, his behavior would then resemble that of a robot; it would be both describable and predictable in terms of algorithms. Voluntary choice between alternatives would not take place (AA V 97). Rather, the conjunction of inner and outer circumstances would determine the subject’s decisions. This resembles the ‘freedom’ of an hour-glass blessed with consciousness, foreseeing its running out, but at the same time itself ‘deciding’ in favor of precisely this and no other course of events for each and every grain of sand.<sup>15</sup> Kant also derisively compares this form of liberty with the “freedom of a turnspit,” which, “when once it is wound up, also accomplishes its movements of itself” (AA V 97).

This then is the core of the Kantian metaphysics of freedom: Because of its ethical faculty, the human being is able to act against the urges of interests and environmental influences.<sup>16</sup> Morality makes free. Autonomy is experienced – but as obligation. As the example of the false testimony impressively demonstrates, even the threat of execution cannot extinguish our awareness of the possibility of deciding in accordance with the moral law.<sup>17</sup> Unlike the outer, political-juridical freedom of action, the inner moral freedom of conscience is thus not always perceived to be a gift, but often rather as a burden.<sup>18</sup> The consciousness of freedom does not resemble a passively-relished choice of the respectively most delightful option taken from a simply quantitatively assessed sphere of possibilities, but instead it is accompanied by uncertainty and angst. Since its qualitative aims are not already precisely given, they must above all be decided in responsibility before the particular conscience. The dignity (*Würde*) and the burden (*Bürde*) of freedom are one and the same. Consequently, freedom is less an objective *fact* (*Tatsache*) and more a continuous subjective *project*. Fichte will thus speak of an *Act* (*Tathandlung*), since freedom does not exist *in itself*, but rather *for and through us*.

Critics have reproached Kant for thus orientating human freedom – and thus ultimately also the human dignity resting upon it – to too great an extent around the very variable capacity for moral rationality. There are two things to say about that:

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<sup>15</sup> Many contemporary philosophers are satisfied with a freedom of this kind (semi-compatibilism). Derek Parfit can in this respect be taken as representative here for a large part of the Anglo-American discourse (Parfit, *All That Matters* [Oxford, 2009], 267). His critique of Kant is that we do not at all need to think of any superior form of freedom; to him, it is enough if we experience our decisions *as* our decisions in order to – whilst starting out from deterministic premises – not end up in fatalism. In other words: If the illusion of the freedom of the will is unavoidable and irrevocable then it is also harmless – for the experiencing and organizing of everyday liberties.

<sup>16</sup> See AA V 29. See also Lewis White Beck, *Kants Kritik der Praktischen Vernunft: Ein Kommentar* (München: Fink, 1995), 46.

<sup>17</sup> See AA V 31.

<sup>18</sup> See H. L. A Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963), 8ff.

First, Kant actually often gives the impression that human freedom does not belong – but is rather opposed – to our animal nature. Accordingly, in Kantian thought, small children, senile and mentally handicapped persons – as a result of their reduced rational capacities – cannot enjoy a full compliment of rights, while animals would possess none at all; and there are some passages which in fact imply this.<sup>19</sup> Here comes to light an essential problem with every theory of human rights based upon freedom; one which, as far as I am concerned, only K. C. F. Krause could adequately resolve (See Sect. 2.3.2).

Second, the particular appeal of Kant's theory lies precisely within the way in which it establishes human dignity in and through autonomy.<sup>20</sup> By rejecting all material mobilization, it helps to prevent the estimation of human life only in terms of the utility it produces. According to Kant, human dignity can neither be given nor taken away. One of Kant's justifiably most cited passages proclaims: "What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity" (AA IV, 434). That dignity and price are thus mutually exclusive for Kant precisely leads to the view that the value of human life may never be offset or discounted, but rather demands an absolute priority above all calculi concerning utility; a commandment that should be constantly revisited in business ethics.<sup>21</sup>

Nevertheless, even someone who might not accept Kant's *transcendental* explanation of freedom (i.e. his metaphysical interpretations of the implicit assumption of our everyday consciousness) can easily follow Kant's social philosophy. All of the determinations of the Kantian doctrine of freedom that now follow, which refer to *outer* actions (rights, politics, economics, etc.) do not depend upon Kant's explanation of *morally-inner* freedom. The previously discussed distinction between 'will' and 'choice' merely deals with the moral inner life. In contrast, the legal and political philosophy is based upon interpersonally manifest facts; it is, as we shall now see, concerned with freedom in the forum of society.

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<sup>19</sup>Concerning the problem of Kant's conception of the dignity of the person with respect to disabled people and animals see Martha Nussbaum, *Frontiers of Justice*. She notes for instance that "for Kant, human dignity and our moral capacity, dignity's source, are radically separate from the natural world" (ibid. 131). That established an irrevocable separation (a "split") in the human being which hinders the creation of harmonious living conditions (in the human understanding as well as in our relation to the animal kingdom): "The split wrongly denies that animality can itself have a dignity. Thus it leads us to slight aspects of our own lives that have worth, and to distort our relation to other animals" (ibid. 132). See also Nussbaum, *Creating Capabilities: The Human Development Approach*, 85 & 160.

<sup>20</sup>See Oliver Sensen, "Kant on Human Dignity," *Kant-Studien (Ergänzungsheft)* (2011), 166.

<sup>21</sup>For that see the unanimous contributions to Dennis Arnold & Jared Harris, eds., *Kantian Business Ethics* (Northampton, MA, 2012).

### 2.1.2 *Outer Freedom: The Good and the Law*

According to Kant there is a *necessary object of pure practical reason*, which describes an aim that we (without self-contradiction) cannot but strive after (AA V 119). He calls it the “highest good” and describes it as the ideal of ethics for an embodied self: as a life in which those experience happiness (*Glückseligkeit*) who are morally worthy of it (*Glückswürdigkeit*).<sup>22</sup> Kant understands this as the ultimate objective every ethically relevant sphere of life must advance in its own way. Hence it is through this aim that Kant’s diverse categorical imperatives arrive at a conceptual unity. For there is not only, as is often claimed, *one* categorical imperative in different *formulations* (an impression admittedly fueled by Kant’s *Groundwork of the Metaphysics of Morals*), but rather (as a glance at his subsequent writings on moral philosophy reveals) there are many differing *forms* of that imperative. Within all of the subdivisions of Kant’s practical philosophy (morals, rights, politics etc.) the categorical imperative assumes a form appropriate for each of these disciplines. And that respective form corresponds to the *synthesis* of this *particular* field of action with the *universal* concept of a rationally autonomous subject and its highest good. The synthesis of freedom and lifeworld (*Lebenswelt*) can thus principally be carried out in four ways. It will be self-related either to the actor (inner acting) or to others (outer acting) and at the same time can either be directed against or in favor of something. Ethical agency can thus refer to inner and outer actions: either ethically-negative ones (forbidding, excluding) or ethically-positive ones (commanding, electing). As a consequence, four central ethical arenas result: negatively-inner action (ethics of conscience) complemented by positively-inner acting (ethics of ends), as well as negatively outer-action (rights) complemented by positively-outer action (politics). They all follow specific – yet complimentary – categorical imperatives.<sup>23</sup> What connects them is that idea of practical reason (the ‘highest good’).

Kant’s ethics culminates in the vision of a world in which individuals who do good (*glückswürdig*) also become happy in life (*glücklich*); a vision through which he morally and philosophically ennobles the human interest in well-being: After all, a commandment to neglect the happiness of moral individuals stands in opposition to the idea of a harmonization of the worthiness and the attainment of happiness

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<sup>22</sup>For this, Kant constantly uses symbolic, and at times, religious language. In the so-called ‘Typic of Pure Practical Judgement’ (AA V 67ff.) in the *Critique of Practical Reason*, Kant already textually anticipates the symbolic concept that would be unfolded later in his *Critique of the Power of Judgement* and makes it fruitful for his theory of moral practice. See Annemarie Pieper, “Kant und die Methode der Analogie” in Gerhard Schönrich & Yasushi Kato, eds., *Kant in der Diskussion der Moderne* (Frankfurt am Main: Suhrkamp, 1996), 108–109. The decisive explanations about how it could be achieved that he who does good also participates in the good is something that Kant provides only in his late work, in the *Critique of the Power of Judgement* (1790), and in the theories it prepared concerning symbolic and figurative thinking which Kant unfolds thereafter in his *Metaphysics of Morals* (1797/98), and in a series of essays published around that time.

<sup>23</sup>See Claus Dierksmeier, *Das Noumenon Religion: Eine Untersuchung zur Stellung der Religion im System der Praktischen Philosophie Kants* (Berlin: de Gruyter, 1998).

formulated by the “highest good.” A world in which the good suffer and the evil rejoice would not only be *unpleasant*, it would moreover be judged as *unjust*. No one could consistently want such a world – i.e. from the standpoint of possible universalization; hence the categorical imperative demands its transformation. So, contrary to what one sometimes reads, Kant does not reject the “pursuit of happiness”. He merely instructs humanity to pursue this goal via actions that make it ‘worthy’ of its happiness. This affirmation of an ethical pursuit of happiness is therefore not, as some have thought, Kant’s belated attempt to soften his otherwise overly rigorous ethics. Instead from the outset the moral law is directed to abolishing anything hindering a harmony of the worthiness and the attainment of happiness.

In addition to this moral command, law and politics are tasked to resolve any *outer* ossification of ethical asymmetries, i.e. as far as is possible they are to make sure that society protects against systematic incentives for unethical action.<sup>24</sup> The law does this by preventing illegal from going unpunished and appears profitable. Still, the law is only a very limited means for the dissolution of unjust states of affairs. For pragmatic motives (efficiency, feasibility, etc.) as well as for normative reasons (the protection of freedom) only a very small part of the ethical asymmetries pervading our lives can be resolved by lawful coercion. Could it therefore be the task of politics to promote the good beyond rules of compliance? May the state find modes of recognition (of a material as well as ideal kind) so as to encourage the ethical engagement of the citizens? Could politics be directed to this goal – and at the same time satisfy liberal standards of legal justice?<sup>25</sup> Should politics serve as the public landscape architect of the common good or should we, for the sake of freedom, leave the planting of moral seeds to the backyards of private self-sufficiency?<sup>26</sup>

What is at issue here is the view (of Hayek and others; see Chap. 3) that the freedom of open society either stands or falls according to whether politics *abstains* from visions and utopias of the good. This question touches upon a central point in the self-image of modern liberalism. Conservative liberal thinkers (like Hayek) as well as also more progressively liberal authors (like Rawls), set such great store by Kant’s doctrine of law precisely because of its reputation for legitimating coercion only within strict liberal boundaries.<sup>27</sup> So it is most instructive to observe how Kant seeks to find the path from his legal philosophy towards a theory of liberal politics. On closer examination, though, it becomes clear that in quite the same way that law

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<sup>24</sup> Kant’s moral philosophy and philosophy of religion rather deal extensively with the problem concerning how it is possible that a human being acts morally even if he believes that the conditions are and remain such that often precisely the moral deed will deprive him of the happiness he is entitled to. See Dierksmeier, *Das Noumenon Religion*, 58–61.

<sup>25</sup> See Katrin Flikschuh, *Freedom: Contemporary Liberal Theory* (Cambridge: Polity Press, 2007).

<sup>26</sup> See Claus Dierksmeier, “Zur systematischen Liberalität in Kants Politik- und Staatsbegriff” in Ottmann, ed., *Kants Lehre von Staat und Frieden* (Baden-Baden: Nomos, 2009), 42–63.

<sup>27</sup> See Michael Köhler, “Zur Begründung des Rechtszwangs im Anschluss an Kant und Fichte” in Kahlo & Zaczyk, eds., *Fichtes Lehre vom Rechtsverhältnis* (Frankfurt am Main, 1992), 93–125.

confirms and complements morals, law in turn is paired and completed by a politics orientated by the idea of responsible freedom.

This move is a milestone in the development of liberalism and it takes its cue from Kant's parting with transcendent and naturalistic theories of moral value. Instead of deriving the principles of law and politics from external authorities (transcendence) or objective directives (naturalism), Kant appeals to reason.<sup>28</sup> Autonomy instead of heteronomy, self-legislation instead of external-legislation, is his slogan.<sup>29</sup> The idea of a freedom giving itself its own law in a rational manner functions as the highest principle. Kant thus wishes to develop legal philosophy in such a way that it identifies the principle of law as a rationally necessary upshot of the principle of freedom.<sup>30</sup> Hence, before (metaphysically) unfolding the idea of law, Kant (transcendentally) construes it. That is to say, he first (transcendentally) demonstrates that something like *law* must be thought so that our *consciousness of freedom* can be completely clear and transparent to itself. Only subsequently does he (metaphysically) consider the extent to which the historically given *laws* correspond to the thus developed *idea of law* – or can approximate towards it through philosophical critique.<sup>31</sup>

Of that *idea* of law, Kant says:

*There is only one innate right. Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (AA VI, 237-238).

Unlike what Fichte will later have us believe (see Sect. 2.2), according to Kant, one cannot derive the specificity of legal rules from mere practical reason, i.e. deduce them by logical inference from said right to freedom. Kant rather sees that *various* concepts of law, according to historical and cultural contexts, can legitimately honor the *one* idea of law. Instead of promulgating from the lectern a particular set of laws as the philosophically only true ones, i.e. announcing only one possible interpretation of that innate right to freedom, Kant's thinking is open to diverse historical alternatives. While he himself interprets the statutes of one particular legal tradition (namely, the *Prussian General Law of the Land* of 1794) in the light of that idea of law, he does not exclude, but rather emphasizes the possibility, that at other places and at other times, other kinds of juridical institutions can also legitimately claim to realize the liberal idea of law.

<sup>28</sup> See Hariolf Seel & Gerhard Oberer, *Kant: Analysen, Probleme, Kritik* (Würzburg: Königshausen & Neumann, 1988), 218–224.

<sup>29</sup> See Friedrich Kaulbach, *Das Prinzip Handlung in der Philosophie Kants* (Berlin, 1978), 263–278.

<sup>30</sup> See Howard Williams, ed., *Essays on Kant's Political Philosophy* (University of Chicago Press, 1992), 24.

<sup>31</sup> See Friedrich Kaulbach, "Das transzendental-juridische Grundverhältnis im Vernunftbegriff Kants und der Bezug zwischen Recht und Gesellschaft" in Kaulbach & Krawietz, eds., *Recht und Gesellschaft: Festschrift für Helmut Schelsky zum 65 Geburtstag* (Berlin, 1978), 263ff.

Kant thus separates the *abstract deduction* of the idea of law (for Kant: “*transcendental deduction*”) from its *concrete unfolding* (“*metaphysical deduction*”) in respect to particular legal orders. He thus separates the structural *idea* from substantial *concepts* of law. That distinction between *concept* and *idea* is something we will deal with below in more detail: First, in regard solely to Kant’s political philosophy. It leads him to an approach of central significance for current liberalism; for there, in the political field, Kant separates a structural idea of liberal politics from concrete liberal conceptions of politics and shows how the idea of liberal politics differentiates itself into various political projects. Second, though, we will see that this very distinction between *idea* and *concept* plays a key role for the entire philosophy of liberalism. So much by way of anticipation.

But now let us return to Kant by asking: Must law exist at all? For what reason should there be a normative ethical concept for outward-directed behavior separate from moral criteria? Cannot morality simply serve as the principle of state action and enforcement? Could we not say that law is simply there to avenge especially egregious moral violations? Law – the *ultima ratio* of morality? To these questions the Kantian philosophy answers with a clear *No* – which resounds until today in the constitutions of liberal societies. Since not every good will entails also outer morality and, conversely, an evil will at times can lead to outer moral actions (AA VI 313ff.), Kant argues that it is indispensable to have laws distinguished from morals *qualitatively* (according to content) and not only *quantitatively* (according to grades of intensity). Intentions and deeds are twofold: they require independent ethical principles (AA VI 249).<sup>32</sup>

The right to property can serve as an example. Conflicts, e.g. concerning possession and usufruct of property, do not only occur among malicious people. Certain goods only allow for one use at a time. Whenever thus the moral usage of one person is incompatible with the ethical plans of the other, even well-meaning people may fall into conflict.<sup>33</sup> Such a conflict about property marks, however, on the Kantian reading, a conflict between *objects of freedom*, i.e. a contradiction of reified freedom with itself.<sup>34</sup> In the name of freedom, this should be resolved. Hence, according to Kant, all subjects who “cannot avoid living side by side with one another” (AA VI 307) have to get rid of every legal uncertainty and ambiguity about the use of their common lifeworld with the help of institutions that posit and protect rights. Laws of *universal* freedom should therefore limit all *particular* freedoms in such a way that they do not oppose and cancel one another out.

The idea of the freedom of all thus immanently regulates the freedoms of individuals. That is, Kant does not presuppose a concept of a *first* unlimited outer freedom, which *afterwards* would have to be cut back to make it socially compatible.

<sup>32</sup> See Wolfgang Bartuschat, “Apriorität und Empirie in Kants Rechtsphilosophie,” *Philosophische Rundschau* 34:1/2 (1987), 31–49.

<sup>33</sup> See Otfried Höffe, *Der Staat braucht selbst ein Volk von Teufeln: Philosophische Versuche zur Rechts- und Staatsethik* (Stuttgart: Reclam, 1988), 56ff.

<sup>34</sup> See Rolf Gröschner et al., *Rechts- und Staatsphilosophie: Ein Dogmenphilosophischer Dialog* (Berlin: Springer, 2000), 223.

Rather, he sees the right of individual freedom to manifest and reify itself in the world *from the very beginning* under the strict condition that it take place under forms accepted by everyone; within forms, that is, which concede equal rights to all.<sup>35</sup> In contrast to the contractualist theory inspired by Thomas Hobbes (1588–1679), according to Kant’s philosophy our outer freedom *does not become* restricted (by the state) to universalizable forms, but rather (by its idea) *it is already so limited*. The *material limitation* of freedom under the rule of law merely expresses its *ideal limitation* according to reason. In his eyes, conditions, which the state imposes in order to assure the compatibility of the liberties of all, do not not reduce but realize individual freedom. Interventions in our acts that conform to this principle of law, do not harm the citizens’ freedom; they manifest it. A state under this rule of law is hence always a friend, and never a foe, to freedom. Anarchists may not appeal to Kant.

In short, where many thinkers observe the law as an outer limitation of freedom, Kant recognizes it as its inner boundary. Hence his definition of right as: “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” (AA VI 230). Law appears accordingly as a limitation of one’s *own* actions to be decided rationally *by everyone for themselves*. The idea of freedom would consequently be incomplete were it not directed by the idea of law. In liberal law (*freiheitlichen Recht*) humanity finds the right freedom (*rechten Freiheit*).<sup>36</sup> Hence the *legal imperative*: “so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law” (AA VI 231).

In contrast to most libertarians and various neoliberal theorists of today (see Sect. 5.2) Kant declares: Law is not defined as the authority to coerce, but rather itself legitimates coercive authorities in the first place.<sup>37</sup> Each and every act of coercion must result from the application of the principle of law to a finite subject and, importantly, it must be justified to the *coerced* subject in particular as conforming to and necessary for the principle of freedom, i.e. as “a *hindering of a hindrance to freedom*” (AA VI 231). If, for example, someone finds himself in court because of an accident resulting from drunk driving, he may not welcome the punishment he receives, but he cannot rationally characterize it as *unjust*. Persons are not negated by legal coercion, but rather confirmed in their status as mature subjects of freedom, insofar as from the point of view of the coerced subject, the legal coercion can be understood as an act of *liberty-affirming self-constraint through others*.<sup>38</sup>

<sup>35</sup> See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, M.A.: Harvard University Press, 2009), 223ff. See also Gregory Kavka, “Why Even Perfect People Would Need Government,” *Social Philosophy and Policy* 12:1 (1995) 1–18.

<sup>36</sup> For example Kant writes that “when I draw up a penal law against myself as a criminal, it is pure reason in me (*homo noumenon*), legislating with regard to rights, which subjects me, as someone capable of crime and so as another person (*homo phaenomenon*), to the penal law, together with all others in a civil union” (AA VI 335).

<sup>37</sup> See Köhler, “Zur Begründung des Rechtszwangs im Anschluss an Kant und Fichte,” 105.

<sup>38</sup> See Peter Unruh, *Die Herrschaft der Vernunft: Zur Staatsphilosophie Immanuel Kants* (Baden-Baden: Nomos, 1993), 44.

If a state, though, uses coercion for purposes other than the protection of rights, it acts unjustly. In that regard, it is one and the same. No matter how noble the motives and how welcome the results might be, they cannot by any means justify that transgression. In questions concerning the inner determination of the will, that is, in the domains of morality and religion, the state should not interfere, according to Kant (see AA VI 219). Therein lies a decisive defense of personal liberty in the Kantian concept of legality, which protects the citizen from every usurpation on the part of the state, however well-meaning. In this regard, Kant's model is not only superior to utilitarian and other consequentialist doctrines, all of which legitimate the right to coerce for the sake of its effects and can therefore never be justified to those who doubt that in a given case these effects either occur or are desirable. It is superior as well to all theories of negative freedom, which aim to prove the compatibility of law and freedom by characterizing law as the sum of legitimate coercive acts and then founder, though, upon the question as to what actually legitimates coercion in the first place (See Sect. 5.2).

Translated into the terminology I brought into play, this notion could be expressed thus: While quantitatively directed liberalism generally seeks to protect the freedom of the individual through less, rather than more, state intervention, Kant subordinates the quantitative perspective to the question concerning the appropriate quality of state action, orientated by the need to promote the freedom of all. In short, one requires just as much state-intervention as is necessary to fulfil the aforementioned need: no more, but also no less. For Kant, the quality of the idea of freedom provides the measure of the quantity of the citizen's liberties. Kant therefore stands firmly not only against excessive state action, but also – all libertarians should take note – against insufficient state action.

### 2.1.3 *Social Rights?*

If freedom realizes itself in law and this presupposes a relation to objects, does there not also follow from the universal right of all persons to freedom a right to participate in the world at large and to have access to nature? Must the state of law also be a social state in order to enable everyone to be able to make use of the freedoms they are legally entitled to? Does the idea of freedom have a social side? Today, much seems to speak in favor of that idea.

The legal philosophies of the sixteenth to eighteenth centuries construed a fictional state of nature where all could take care of themselves through their own effort and wits, bringing food on the table, as it were, by the work of their hands. Between that imaginary world and our current lives, there is a stark – also philosophical – difference. Today, the access to freedom is societally mediated; no longer can individuals through an original appropriation of nature relate to ownerless goods and employ them to master their lives in isolation.<sup>39</sup> Instead, the freedom of

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<sup>39</sup>See G. W. F. Hegel, TWA 7, 388.



the individual finds its relation to the objects of the world everywhere bounded by ownership rights, so that we require the legal consent of others for nearly every appropriation and use of the environment. Wherever this approval is lacking, then often – the best of will and brave diligence notwithstanding – individuals cannot sustain themselves. From the prohibition of appropriating other’s property – as materially manifested freedom – unlawfully, might we not need to postulate to put every person in such a position that they do not need to act contrary to the law in order to survive? Must not hence everyone who wants to protect private property also ensure that the fundamental rights of human life can be realized without infringing upon the property rights of others? Should not the minimum presuppositions of maintaining one’s existence and using one’s freedom be construed and claimed as indispensable foundations of any individual’s right to freedom?<sup>40</sup> A right to social participation as a result of a consistently thought liberalism – what is Kant’s view on that?

At first glance it catches one’s eye that in his ‘Doctrine of Right’ Kant converts the slogan of the French Revolution, i.e. *liberté, égalité, fraternité*, into the formula, *freedom, equality, independence* (see AA VI, 314). It may therefore seem as though he replaces the earlier apparently social-moral concept of fraternity with a category of law, and wants to demand the individual’s participation in the economic and political sphere as a civil right.

A closer look, however, reveals that Kant’s texts do not allow for this reading. In §46 of his ‘Doctrine of Right’ Kant defines the concept of the “*citizens of the state*” as containing three moments:

Lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognizing among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he would not in turn bind the other; and third, the attribute of civil *independence*, or owing his existence and preservation to his rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned. (AA VI 314)

Kant thus makes *economic* independence a presupposition of *political* independence. Distinguishing between “citizens of a state” and “associates in the state,” he declares that human beings who do not reach economic independence also do not have a claim to political autonomy. In the paragraph in question, he expressly claims that:

not all persons qualify with equal right to vote within this constitution, that is, to be citizens and not mere associates in the state. For them their being able to demand that all others treat them in accordance with the laws of natural freedom and equality as *passive* parts of the state it does not follow that they also have the right to manage the state itself as *active* members of it, the right to organize it or to cooperate for introducing certain laws. (AA VI 315)

In other places Kant adds that those who do not enjoy independent employment also must lack the right to active citizenship. For instance, a barber with his own

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<sup>40</sup>Michael Köhler, “Justitia distributive: Zum Begriff und zu den Formen der Gerechtigkeit,” *Archiv für Rechts- und Sozialphilosophie* 79 (1993), 457–482.

shop – this is Kant’s own example – is to be looked upon as economically independent, whereas another barber who works based on home-visits is not. Women and children are from the outset degraded as merely passive “associates in the state”.

How can we explain these – from our current perspective – abstruse restrictions on the right to political participation? Kant drew on a reality surpassed by his philosophical idea for its conceptual determination and thus mistakenly inferred norms from facts. Instead of celebrating this dip in his thinking as a libertarian curvature,<sup>41</sup> we should rather recognize it as the embarrassing dent that it is. Something else would have been far more in accordance with his system, i.e. if the right of everyone to political representation would have given rise to a counterfactual claim to economic participation. Poverty does undermine active, intellectual as well as practical participation in political decision-making – that is correct! Consequently, however, it is not the political participation of the poor, which should be abolished, but their poverty.<sup>42</sup>

Such a reading would also correspond with the Kantian formula of *freedom, equality, independence*. Then, for this interpretation, one need only demand for “independence” what Kant’s legal philosophy grants to the principles of freedom and equality as a matter of course, namely that they must also be counterfactually realized. Kant in no way maintains that all human beings *are* by nature legally free and equal, but declares that all human beings *should be* free within legal boundaries and equal before the law. The same thing ought to be true of independence too. Kant even seems to tend in this direction when he recommends that an “associate in the state” should at all times have the capacity to “work his way up from a passive condition to an active one” (ibid.). If, however, such a self-emancipation out of economic dependency is not possible for contingent reasons, then, one has to object: Why not then at least intervene by law? This, at any rate, was how Fichte and Krause saw the issue (for Fichte and Krause’s development of this idea see, respectively, Sects. 2.2.2 and 2.3.3).

Moreover, insofar as the citizens themselves obviously have an interest in their economic emancipation, this very problem arises once again within the sphere of politics in a distinct way. Politics has the mandate to remove unjust living-conditions in accordance with the law. Perhaps then the overcoming of poverty and disadvantage could become the objective of politics. As we have already seen, Kant conceived of politics as a positively *outer* determination of action. Although this frees the political arena from an inquisition into inner motivations, it does not make questions concerning the ethical aims of political agendas in any way superfluous: Motivations and objectives are two different things; even the blackest soul can sometimes – for whatever reason – set something noble in motion. Not the secret intentions of politicians, but rather the recognizable aims of their politics ought to

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<sup>41</sup> See Wolfgang Kersting, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staatsphilosophie* (Frankfurt am Main, 1993).

<sup>42</sup> Thus also Ripstein, *Force*, 282–285. Inspired by Kant he develops an obligation of the state to the needs of the poor through taxation of the rich and extracts from Kantian lines of thought the creation of a modern welfare state.

be in the focus of philosophical attention: Is there a separate *categorical imperative* for politics? Can political philosophy achieve an independent *a priori synthesis*? The answer is provided by the *liberal proceduralism* of the Kantian ethic.

Kant's ethic typically proceeds formally at first and materially only thereafter. Initially, it turns away from the directives of traditional *material values* (happiness, enjoyment, utility, justice, well-being, charity, piety, etc.) towards *formal procedures* (avoidance of contradiction, universalizability) that are to uncover the morally obligatory aims and values. For this insistence on formality, up until today, Kant has been unjustly interpreted as culpable of a rigorous formalism allegedly repudiating all human striving for happiness and wellbeing. But such interpretations are erroneous. For as we have already seen, all the disciplines of Kantian ethics culminate in the concept of the "highest good" (AA V 108ff.).<sup>43</sup> Politics, too, is directed towards this "highest good", in a yet to be characterized manner. Politics not only curates the law, it transforms it as well. Yet how are we able to determine, which political use of the legislative agrees with the liberal principle of law, and which contradicts it?<sup>44</sup>

Since Kant's idea of law is not constructed by pre-given ethical aims (common good, welfare, etc.), the criteria of politics must first be *formally* determined. Thus, still "the *form of publicity*, the possibility of which is involved in every claim to a right" (AA VIII 381) remains. Abstracting from all representations of the good, politics can realize the claim to conduct itself under the principle of freedom by examining as to their universalizability the way in which the political objectives are being established. The public, so to speak, is to run this universalizability-test.<sup>45</sup> For, according to Kant, it is possible, through a republican "organization of the state," to arrange illicit political forces "in opposition to one another in such a way that one checks the destructive effect of the other or cancels it, so that the result for reason turns out as if neither of them existed at all and the human being is constrained to become a good citizen, even if not a morally good human being" (AA VIII 366).

By making political directives public, as soon as my directives are likely to impair the rights of others, there arises an "*a priori* foreseeable resistance of everyone to me" (AA VIII 381).<sup>46</sup> The notion of publicity thus yields "a criterion to be found *a priori* in reason" with which "we can cognize at once, as if by an experiment of pure reason, the falsity (illegitimacy) of the claim in question (*praetensio iuris*)" (AA VIII 381). Therefore Kant issues the "*transcendental formula* of public right" (AA VIII, 381) that we should only engage in politics whose procedures can at all times be made public. Public action is thus structured by the principle of freedom (*synthesis a priori*) and the sphere of permissible politics bounded on principle, without recourse to material ends of politics.

<sup>43</sup> See Claus Dierksmeier, "Kant on Virtue," *Journal of Business Ethics*, 113:4 (2013), 597–629 and Robert B. Loudon, "Kant's Virtue Ethics," *Philosophy*, 61:238 (1986) 473–489.

<sup>44</sup> See Ulrich Sassenbach, *Der Begriff der Politischen bei Immanuel Kant* (Würzburg, 1992) and Claudia Langer, *Reform nach Prinzipien: Untersuchungen zur politischen Theorie Immanuel Kants* (Stuttgart, 1986).

<sup>45</sup> See Howard Williams, *Essays on Kant's Political Philosophy* (1992), 34f.

<sup>46</sup> See also Reflexion 7687 in AA XIX, 491.

Yet, up to this point, political reason is “only *negative*” (AA VIII, 382) in its operation. Still, the sphere of permissible directives so demarcated lacks an additional *positive criterion* for legislation.<sup>47</sup> Not all measures passing the publicity-test are equally well-suited for organizing the political will of a society. Political reason must choose from the abstract quantity of permissible enterprises those whose concrete quality best promotes the citizens’ cohabitation. To provide a genuine categorical imperative of politics, reason must therefore still substantially lead the community’s will beyond the formal demand for legal structures. This necessary positive criterion is the *pursuit of happiness* (See AA VIII, 386ff.).

The rehabilitation of happiness (*Glückseligkeit*) within Kant’s political theory has confused many a commentator,<sup>48</sup> and, since Kant expressly excluded considerations about welfare from the justification of law and the state, this is quite understandable. With the oft-cited words – “welfare possesses no *principle*” (AA VII, 87n) – Kant had declared war on all state-paternalism. Kant did indeed dispute the central assumption of all utilitarian attempts at making commensurable and measuring individuals’ *happiness, pleasure, or utility* so that technocratic governments could simply enhance everyone’s wellbeing. The individuality and difference of human beings, intensified by their every free act, simply does not allow for a universally valid concept of *material* happiness. Accordingly, Kant determines “political freedom” in the following way: “This consists in each being able to pursue his welfare as he conceives it and also that he can never be used by another as a means for the end of his own happiness in conformity with the other’s concept of happiness but only in conformity with his own” (AA XXIII, 129). No single project could serve the happiness of absolutely everyone; making people feel comfy is not the job of the government.<sup>49</sup>

Still, Kant does champion a *formal* theory of happiness under the aegis of freedom. Projects that are in harmony with citizens’ free choice of goals may be promoted as the object of politics. State action should create the necessary *conditions* – for example through the creation of economic prosperity – for enabling citizens to find happiness in the way they see fit.<sup>50</sup> So Kant approves of pursuing the welfare of the community as a “means to secure their right and to place them in a condition to make themselves happy in every way” (AA XIX 560). He also contemplates measures where “to encourage silkworms, the sovereign offers a reward for planting mulberry bushes, or some other action” (AA XXVII 548). Today one would more likely think of the construction of structural and informational networks,

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<sup>47</sup> See Joseph Knippenberg, “The Politics of Kant’s Philosophy” in Beiner, ed., *Kant and Political Philosophy: The Contemporary Legacy* (New Haven, 1993), 155–172.

<sup>48</sup> Heinz-Gerhard Schmitz even sees here a – for him welcome – turn from Kant’s entire concept of morality and its replacement with a concept of prudence. See Heinz-Gerhard Schmitz, “Moral oder Klugheit? Überlegungen zur Gestalt der Autonomie des Politischen in Denken Kants,” *Kant-Studien* 81:1 (1990), 413–422.

<sup>49</sup> See Wolfgang Kersting, *Kant über Recht* (Paderborn, 2004).

<sup>50</sup> See Paul Guyer, *Kant on Freedom, Law, and Happiness* (2000), 285.

administrative directives for the coordination of individual and collective pursuits, or state support for charity work and participation in NGOs.

The ends change; what remains is the method of protecting voluntariness through respect for citizen's individual interests. In politics it is permissible, often even commanded, to motivate citizens materially,<sup>51</sup> as long as the advantages and incentives are being obtained in accordance with laws of liberty. Forms of recognition – ideal as well as financial – for helping political projects along are therefore not only pragmatically sensible, but – in the light of the idea of the “highest good” – also demanded: as a just support for those who further the political order and the public goods it promotes.

Kant opens up interesting possibilities through this dual determination that, on one hand, renounces every *substantial* concept of happiness, while it, on the other hand, marshals the *structural* conditions that enable the individual and collective search for happiness. This move facilitates a political philosophy that allows for a procedural instead of a substantial answer to the question which civil concerns should direct civic policy. Because individuals' ends and goals in life are infinitely variable, they cannot be *directly* promoted by state action without some being discriminated against for the benefit of others. Yet, individual welfare can certainly be supported *indirectly*; for instance, by the government enabling and capacitating citizens to pursue their own happiness individually as well as through voluntary cooperation. The state can and should adopt the goal of offering appropriate procedures, institutions, and infrastructure for this. Then one can reconcile the otherwise countervailing demands for freedom and wellbeing. Thus, orientated by the lodestar of a participatory self-determination on the part of the citizens, Kant steers his political concept of freedom between the Scylla of the libertarian refusal of all organized political activism and the Charybdis of illiberal paternalism. The aptness of Kant's theory for our times results precisely in his positioning himself both against the formalism of a merely “negative freedom” excluding all content, and in favor of a *procedural*, rather than *substantial* determination of “positive freedom”.

### 2.1.4 Societal Self-Regulation

According to Kant, politics should refrain from coercion, but may introduce – monetary, material, informational, logistical as well as immaterial, for instance, reputational – incentives in order to promote its projects. Consequently, politics is not a mere amalgamation of the generality of lawful rules and aggregated special interests. Kant's concept of politics may not be reduced to state-prudence,<sup>52</sup> the “doctrine of right put into practice” (AA VIII, 370), the promotion of progress toward justice

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<sup>51</sup>The differentiation within the class of *praemia auctorantia* already worked out within Kant's earlier lectures on morality provides the foundation for this idea. See Hans Vaihinger, *Kant-Studien* (Berlin & New York, 1942), 64ff.

<sup>52</sup>Although the contrary view is supported by Schmitz, “Moral oder Klugheit?” See 413ff.

and/or the protection of peace. It certainly encompasses those dimensions,<sup>53</sup> but still aims at something higher: an ethically creative interpretation of the lifeworld (*Lebenswelt*). The political agent must ascertain which societal defects citizens conceive as unjust and which ideals provide suitable alternatives.<sup>54</sup> Which accomplishments and norms are seen as particularly apt to help or hinder the promotion of the common good – and how is that fed back into our societal structures of incentivization and recognition?

Yet how do political actors ascertain the people's sense for socio-ethical problems to which they must cater? One answer popular in the secondary literature focuses upon certain reflections in Kant's *Critique of the Power of Judgment* that explain how individuals learn to assume the perspective of others in order to bring about a convergence of social judgements.<sup>55</sup> Kant suggests one should judge as if directed by an "idea of a *communal sense*" i.e. oriented by a counterfactual ideal which can only be approximated towards (AA V, 293). He who judges must assume a perspective in which, as best one can, the view of all others is taken into account, by referring his particular judgment "*as it were ... to human reason as a whole*" (ibid.).<sup>56</sup> Certainly, man does not possess a God's-eye view of the world. Nevertheless the practice of thinking "in the position of everyone else" (AA V 294) can be cultivated and optimized. The shadows our private perspectives cast on the world and the obscurity they produce can be lightened up by augmenting our range of vision with the perspectives of others.

Political theory here merges into the philosophy of culture. Can an "aesthetic education of man," like the one proposed by Friedrich Schiller (1759–1805) in allegiance to Kant, support a politics that is both liberal and at the same time orientated towards the common good? According to Schiller, by making us sensitive to the perspective of our fellow man, culture instigates in man, "a disposition which comprises in itself the wholeness of humanity."<sup>57</sup> Cultural forms make us receptive to the feelings, points-of-view, and world-interpretations of others.<sup>58</sup> Without such

<sup>53</sup> See Thomas Kater, *Politik, Recht, Geschichte: Zur Einheit der politischen Philosophie Immanuel Kants* (Würzburg, 1999).

<sup>54</sup> Jürgen Habermas, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft* (Frankfurt am Main, 1990), 190.

<sup>55</sup> See Ernst Vollrath, *Grundlegung einer philosophische Theorie des Politischen* (Würzburg, 1987) and Hannah Arendt, *Lectures on Kant's Political Philosophy* (Brighton, 1982). In their emphasis upon the political meaning of reflective judgement, the works of Hannah Arendt and Ernst Vollrath provide an important contribution to Kant-interpretation; but they err in according judgement too much independence over and above the sphere of practically normative theory as a whole. This aestheticizing of Kantian normativity is rejected within Patrick Riley, "Kant's Two Conceptions of the Will in their Political Context" in Williams, ed., *Kant's Political Philosophy* (Chicago, 1992), 309.

<sup>56</sup> See O'Neil in Williams, ed., *Essays on Kant's Political Philosophy*, 77.

<sup>57</sup> Friedrich Schiller, *Sämtliche Werke* V (München, 2004), 637; translated in Friedrich Schiller, *On the Aesthetic Education of Man* (Dover, 2004), 103.

<sup>58</sup> For contemporary reflection upon the contribution of aesthetic education to the project of a reflexively global politics see Martha Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (Princeton, 2010), 7 & 103f.

foundations promoting mankind's mutual respect and sensitivity towards one another, failure would threaten the project of a political reason autonomously deliberating about its goals. It would fall victim to the cold calculus of uncultivated thinking, like a man who – to quote Schiller once more – “self-seeking without being himself, unfettered without being free” – shrinks and sinks into gross egoism.<sup>59</sup>

Yet, no state can flourish that is comprised of individuals who absolutize their private ends and, wherever they can, assert themselves at the expense of all others. Society must control utility-maximizers who exploit every legal loophole. However, the tighter the straitjacket of incentives and rewards, and the more firmly tied the knot of surveillance, all the more difficult is it for freedom to breathe. Wherever it chokes, the putrid stench of opportunism engulfs us all the more. Without humanist culture, political liberalism cannot exist for long. Therefore the liberal state has a cultural mission. For this reason alone, culture is not merely a private matter; for without it the *res publica* cannot survive.<sup>60</sup>

Politics requires the symbolic worlds of culture in order to bring about a unifying interpretation of the social life and generate a plausible vision of its optimization.<sup>61</sup> Politics cannot operate in a vacuum of abstract concepts.<sup>62</sup> Without the concreteness of integrated symbols and convincing scenarios, politics cannot thrive.<sup>63</sup> The intellectual lodestar for such a symbolic endeavor marks the command – formulated in Kant's concept of the highest good – to abolish step-by-step society's ethical asymmetries; a lodestar by which the respective political actors then are to navigate on the very path that, based on their own judgment, best fits the given situation. The regulative idea of the “highest good” provides the vision of a societal life where “freedom, partly moved and partly restricted by moral laws, would itself be the cause of the general happiness, and rational beings, under the guidance of such principles, would themselves be the authors of their own enduring welfare and at the same time that of others” (AA III, 525).

Although this may very much contradict the customary image of Kant: The *pursuit of happiness* becomes bound up with Kant's political liberalism and not at all in contradiction to its underlying principle of freedom – e.g. by Kant caving in to an otherwise overly restive human nature – but rather as its consistent expression.<sup>64</sup> By including conceptions of the ‘highest good’ in the sphere of politics the synthesis of practical reason with its lifeworld is completed. As reason is certainly autonomous, but not autarch, Kant coherently and consequently declares it the actual “task of

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<sup>59</sup>Friedrich Schiller, *Sämtliche Werke* V, 646; translated in Friedrich Schiller, *On the Aesthetic Education of Man*, 113.

<sup>60</sup>See Wilhelm Humboldt, *Ideen zu einem Versuch, die Grenzen der Wirksamkeit des Staats zu bestimmen* (Stuttgart, 1967).

<sup>61</sup>See Dieter Henrich, ed. *Über Theorie und Praxis* (Frankfurt am Main, 1967), 35.

<sup>62</sup>See Heiner Bielefeldt, *Symbolic Representation in Kant's Practical Philosophy* (Cambridge, 2003).

<sup>63</sup>See Dierksmeier, *Das Noumenon Religion*, 148f.

<sup>64</sup>See Schmitz, “Moral oder Klugheit,” 413ff.

politics” to make “the public satisfied with its condition” (AA VIII, 386). Accordingly, we cannot simply *negatively* protect the freedom of all, one must also – in the sphere demarcated and delimited by the principle of freedom – *positively* promote those projects from which citizens expect a better life. Hence results “another transcendental and affirmative principle of public right,” which provides the systematic conclusion of the political theory of Kant’s philosophy of freedom:

“All maxims which *need* publicity (in order not to fail in their end) harmonize with right and politics combined.”

For if they can attain their end only through publicity, they must conform with the universal end of the public (happiness), and to be in accord with this (to make the public satisfied with its condition) is the proper task of politics. But if this end is to be attainable *only* through publicity, that is, by the removal of all distrust towards the maxims of politics, such maxims must also be in accord with the right of the public, since only in this is the union of the ends of all possible” (AA VIII, 386)

That which *legally* becomes the goal of politics in the sphere of publicity of a state governed under the rule of law, is consequently also *legitimated* in the name of liberty.<sup>65</sup> While philosophy does thus provide a *procedural* political goal, it leaves its *substantial* contents to the discretion of liberal republican processes. Kant thus connects the idea of a liberal order with that of a pluralistic public sphere. He furnishes politics with a normative idea, but does not lay down how specifically politics should be carried out in the light of this idea. On the contrary, he justifies the view that – and how – various societies could, according to their respective needs, come up with their own differing *concepts* of how the *idea* of liberal politics could be concretized and realized.

Kant thus identifies *normatively* correct politics as the path towards its *empirically* successful implementation.<sup>66</sup> The *political imperative*, to only follow directives which *require* public agreement for their realization, refers politics to the *participation* of the population. Obviously, this procures the acceptance of the policies at hand. Instead of fantasizing about shattering private interest by a universal ethic imposed ‘from above,’ for Kant, it is all a question of the integration of the individual into the social – for the end of everyone’s “*moral happiness*” (AA VII 277). Having the citizens’ concrete concerns inform legislation is an outcome of the directive to bring politics into alignment with the free participation of citizens in order to pursue – within the boundaries of the rule of law – the conceptions of freedom they champion.<sup>67</sup> Kant therefore does not subordinate the citizens’ understanding

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<sup>65</sup> An idea again appears here which is analogous to one that Kant already invoked in the ethically-inner determination of ends. “What, in the relation of a human being to himself and others, *can* be an end *is* an end for pure practical reason; for, pure practical reason is a faculty of ends generally, and for it to be indifferent to ends, that is, to take no interest in them, would therefore be a contradiction, since then it would not determine maxims for actions either (because every maxim of action contains an end) and so would not be practical reason” (AA VI, 395).

<sup>66</sup> See Volker Gerhardt, *Immanuel Kants Entwurf “Zum ewigen Frieden”: Eine Theorie der Politik* (Darmstadt, 1995).

<sup>67</sup> See Christopher Gohl, *Prozedurale Politik am Beispiel organisierter Dialog: Wie politische Beteiligung professionell gestaltet werden kann – eine Grundlegung* (2011)



of freedom and politics – like Fichte and Marx (see Sect. 2.2.4.) – to the philosopher’s supposedly better knowledge and to the political goals they formulate; he rather constitutively incorporates citizens’ conceptions of themselves and the world into his political model.

Although Kant, as a citizen of his time, obviously took part in socio-political discourse and was savvy enough to ensure that the public attended to his opinions, in accordance with his own political philosophy he never claimed to speak with philosophical authority on daily politics. On the contrary, having established a *universal idea* of political freedom, he left its concretization through *specific concepts of freedom* to the citizens. As *one* such citizen Kant also allowed himself to express his views about current political affairs. Like everyone else, philosophers also have the right to add their voice to controversies concerning the optimization of laws – and they may be outvoted, like everybody else, too.<sup>68</sup>

For this reason, Kant’s political liberalism proves attractive beyond the circle of people convinced by Kantian philosophy as a whole. Kant did not proclaim for the political sphere the metaphysically-moral conception of a *freedom obligated towards a determinate good*, but rather merely proclaimed the outer-legal variant of a *freedom generally orientated towards the good*; consequently, his concept of the political can also integrate views privileging concepts of political freedoms other than the ones he favored.<sup>69</sup> Kant regionalizes and temporalizes politics; it may, or rather, it should be different from place to place and from time to time, as he spurns the depiction of a philosophical perfect state, a perfectly rational legal and economic system or political model. In order to protect everyone’s right to freedom and, at the same time, to arrive at adequately specific policy recommendations, two things are imperative: first, an informed public taking part in the development of political objectives and, second, an emphasis upon citizens’ objections as *prima facie* indicators of possible violations of rights. Kant therefore expected the realization of his political theory from political freedom itself. Since philosophy does not only theoretically demand a plural public, but also practically promotes the public use of reason, it advances the factual recognition of its own liberal ideas.

Through constitutional arrangements regarding the appropriate organization of the state the public discourse about political directives must ensure that each law deliberated upon has to pass the publicity test. For this purpose, Kant stresses the importance of distinguishing between “the form of state” and “the kind of government” (AA VIII, 353). Although he looks upon democracy as the adequate contemporary expression of political freedom, he does not conceive of democracy as an end in itself. He speculates that in bygone times other forms of government may have

<sup>68</sup> See Volker Gerhardt, *Partizipation: Das Princip der Politik* (München, 2007).

<sup>69</sup> Kant thus begins a project of political philosophy which John Rawls similarly made the central program of his late philosophy. When Rawls ranks Kant among the proponents of that “comprehensive liberalism,” against which he believes he has to demarcate his project of a “political not metaphysical” liberalism, then, in my opinion this is either owing to the will to brand only himself as the founder of that program and/or an imprecise interpretation of Kant. For more detailed information about this see Sect. 3.2.1.

been more suitable for actualizing the liberal principle of law; and, furthermore, he points out that a democracy (*demos/kratein*) which turns into as a dictatorship of a ‘tumultuously’ gathered volition of the crowds is but “mob rule” (AA XXIII, 160ff.). Specific *procedures* must rather first transform the sheer will of the people into the legitimate will of the state. Liberty-protecting processes have to prevent the whims of the masses passing themselves off as acts of law and state – so that minorities can be protected and state action becomes uncoupled from private willfulness.<sup>70</sup> Liberal processes are to ensure that politics does not lose its structural liberty during the determination and specification of civic freedoms.

Consequently, Kant does not champion merely procedural justice. Although, under the condition of modernity, he considers the democratic form of governance to be the most appropriate way of legislating public law (AA VIII, 353), he does not conflate the representative institutionalizing of political processes with the republican way of governing in the interest of freedom that, according to him, is the philosophical mission of politics. The right to freedom remains as ever the corrective ideal and the criterion for the critical evaluation and legitimation of all forms of legislation, including democratic ones.<sup>71</sup> The democratic legislator may hence only work within the boundaries of a legal framework devoted to liberty and removed from popular discretion; that is, for instance, within the sphere of a constitution directed – procedurally and substantially – towards protecting the freedom of all (see AA XXIII, 160ff.). It is not the will of the *majority* in itself that should rule, but rather it is only the representation of a *lawful* will (expressing itself in majorities, but protecting the rights of minorities) that can legitimately organize citizens’ freedom (see AA VI 313f.). Freedom acts thus not only as the basis of democratic legitimacy, but also as its boundary. If a democracy annuls its founding liberal principle – like, for example, through the Weimar ‘*Ermächtigungsgesetz*’ of March 24, 1933 – it nullifies its own normative foundation.

With this turn to the liberal constitutional-state it becomes clear that, for Kant, the state’s mission results from the specific measures of legal and political philosophy – and not vice versa. That makes his liberalism philosophically more attractive than that of many current Anglo-American thinkers who notably take their cues from a certain understanding of society and state (mostly multi-party democracy plus market-economy) when philosophizing about the contours of rights and politics. Kant’s political philosophy thus transcends the cultural boundaries of the occidental context in which it arose and remains especially relevant for dialogue concerning human rights and constitutional law within the age of globality.

Moreover, the Kantian philosophy of law is neither primarily nor exclusively orientated towards the concept of the *nation* state. Kant does not legitimate the state in terms of ethnic particularity, but rather in terms of humanistic universality. Statehood results because everyone’s innate right to an access to a world ruled by

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<sup>70</sup> See also Reflexion 7687 (AA XIX 490) which is aimed at the idea of monarchy: “But this type of government or state constitution is certainly bad simply because the soundness of the government depends upon whether or not the will of an individual is good.”

<sup>71</sup> See Langer, *Reform nach Prinzipien*, 87–95.

laws of freedom cannot be realized without institutionalization. As Kant had showed, even most benevolent human beings cannot prevent themselves from coming into conflict with one another concerning that to which they respectively are legally entitled. So as not to be judge in their own affairs, they require institutions of arbitration. While this function is today mostly undertaken by nation states, from a philosophical perspective, this is insignificant; sub-state and super-state institutions could, with just the same claim to legitimacy, be entrusted with the protection of rights. What is indispensable is solely the provision of a monopoly of power within the respective sphere of regulation so as to guarantee the execution of the law.<sup>72</sup> Kant, in short, is no nationalist, but rather a federalist and a cosmopolitan.

Yet, since the historical directive of Kant's time was the sovereign management of law by nation states, he concerned himself with accurately determining their lawful relations *among one another*. In the face of international conflicts, where states behave towards one another like individual subjects in a legally unregulated state of nature, one has to consider whether states also have a duty to submit to coercive lawful rules (AA VI, 354).<sup>73</sup> Kant saw this to be the case. The absence of a generally binding world-order in the long run enables individuals and collectives to dodge the law, which, in his eyes, ultimately means that the lawful framework "of all the others is unavoidably undermined and must finally collapse" (AA VI 311). Kant thus strove for a lawful world order whose operations would result from universally recognized lawful principles and not merely from regional power relations. On one hand, this order should be so liberal and subsidiary that the individual states within it can protect their cultural idiosyncrasies and exist undisturbed – as long as they do not infringe upon the rights of other states or commit human rights violations. On the other hand, that global order should be able to address and regulate everything that communally concerns all world citizens.

The eventual name for this lawful representation of humanity is of only marginal significance. Kant juggles with the expressions "federal state [*Bundesstaat*]" versus "federation of states [*Staatesbund*]," in pretty much the same ways as today we debate concepts like *Global Government* versus *Global Governance*.<sup>74</sup> More important are the criteria orienting such conceptions. These, however, were already clearly prescribed by Kant with the formulation of the legal and the political imperative. For that reason, Kant deserves to be honored as one of the first liberals both to identify the problems resulting from the global constellation of modern life and to contribute to their intercultural pacification.

All in all, Kant succeeded in navigating his philosophical liberalism safely between the equally unappealing extremes of a formalism of negative freedom and a dogmatism of positive freedom. For the quest for a consciously responsible liberalism that drives many thinkers today, Kant thus provided a solid intellectual point

<sup>72</sup> See Anna Stilz, *Liberal Loyalty: Freedom, Objection and the State* (Princeton, 2009).

<sup>73</sup> See Georg F. Cavallar, *Kant and the Theory and Practice of International Right* (Cardiff, 1999).

<sup>74</sup> See Antonio Franceschet, *Kant and Liberal Internationalism: Sovereignty, Justice and Global Reform* (2007) and Mark F. N. Franke, *Global Limits: Immanuel Kant, International Relations, and Critique of World Politics* (Albany, New York, 2001).

of departure. Kant championed a reflexive, self-critical conception of a self-determining freedom, which allows, also on the global and intercultural level, the synthesis of diversity (concrete *concepts* of freedom) and unity (structural *idea* of freedom). Looking far beyond the affairs of his time, he developed conceptual foundations for a cosmopolitan liberalism that his successors, especially Karl Christian Friedrich Krause (see Sect. 2.3.4), made use of when developing plans for a European federation of states (*Staatesbund*) as well as for a worldwide league of nations.<sup>75</sup>

With Kant also begins the impulse to conceive of the relationship between individual autonomy and societal responsibility not as an unavoidable conflict, but rather as a necessary synthesis. Instead of engaging in a tug-of-war between the two respective parties – where a quantitative increase in freedom continually leads to a decrease in justice or responsibility and vice versa – Kant inspired people to examine how a reciprocal inclusion and qualitative reinforcement of either notion could take place. Kant thus became the catalyst for the social philosophy of *German Idealism*, which exerted a strong influence on the intellectual forefathers of socialism and social democracy. This very transition of the principle of freedom into its socio-political concretizations shall now be exemplified by two particularly distinctive representatives, Fichte and Krause. Both set out on the quest for a viable balance between individual freedom and social responsibility; a balance that is as precarious as it is necessary.

## 2.2 Directive Freedom (Johann Gottlieb Fichte)

In texts about the history of the idea of liberalism, Fichte is often overlooked. For many his work seems hardly accessible and its content mostly sublated and surpassed by Hegel's philosophy. Furthermore, the fact that Fichte promulgated socialism with a planned economy seems to suggest that his work should be classified as illiberal and passed over. But such a reading oversimplifies things. Fichte wished to grant freedom even greater importance than did Kant. He regretted that, with the exception of the *practical* philosophy, the idea of freedom does not always occupy the premier role in Kant's thinking. In Kant's *theoretical* philosophy it has merely a marginal function and in the *Critique of the Power of Judgement* its function, while certainly important, nonetheless remains in the background. In contrast, Fichte decided to make freedom the explicit basis of his *entire* philosophical system. He even addresses theoretical and aesthetic questions with reference to freedom. In aspiration and approach, philosophical liberalism cannot actually be any more radical.

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<sup>75</sup> Karl Christian Friedrich Krause (1781–1832) filled the lacuna left over by Kant in his congenial engagement with him by producing a systematic theory of the rights of world citizens in which the peaceful and liberal establishment of supranational structures of order is the central theme (see Sect. 2.3).

Nevertheless, Fichte's philosophy does not appear to be consistently liberal: In large parts of it, especially within his practical philosophy, directive coercion as opposed to freedom is the leitmotif. In the firm belief to be doing freedom a service, Fichte considers it right, for instance, to pass over or suspend liberal procedures of political decision-making in order to reach a final state of perfect freedom. Illiberal measures are sanctified as means towards freedom's end. Prominent examples are his outlines for a planned economy, his instrumentalist treatment of the environment, and his harsh contractualism – rejecting the rights of the disabled as well as gravely curtailing the freedoms of women and children: all proclaimed in the name of freedom. This paradox makes Fichte's philosophy an informative lesson, as it exemplifies the central problem concerning how, when, and where freedom may be advanced by coercion – by means of the decisive question: *Whose* idea of freedom actually tips the scales; that of the philosophers or that of the citizens?

In the work of all of the proponents of *German Idealism*, freedom is the philosophical principle *par excellence*, and Fichte's work should be seen in this context.<sup>76</sup> In the eyes of the German Idealists, Kant had certainly uncovered the true, unconditioned character of freedom, but he did not provide a sufficient basis for it. According to Fichte, Schelling, Hegel and other thinkers of this epoch, one had to reconceive of reality itself as derivative of the principle of freedom, in order to demonstrate that, in truth, there is no valid alternative to freedom-based philosophy. Kant was therefore to be supplemented or surpassed by a philosophy which would be not hesitantly but emphatically, not partially but totally, dedicated and devoted to freedom.

In this context, lawful *coercion* is of particular interest, since it obviously limits individual freedom.<sup>77</sup> To justify this, one can of course not, like English utilitarians, simply refer back to the *benefits* which legal coercion (in protecting and securing the individual) may provide. Reasons for compulsion, which are not essentially related to freedom, can be rejected in the name of freedom. *Moral* or *religious* considerations are therefore likewise problematic. The validity of subjecting to lawful coercion even *those* who do not share those very reasons cannot thus be derived.<sup>78</sup> Although morality, religion, and a utility-conscious prudence provide numerous *secondary* reasons to behave lawfully, they do not capture what needs to be *primarily* identified here, a rationale for coercion that belongs to the principle of freedom itself.<sup>79</sup>

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<sup>76</sup> See Henry S. Richardson, *Developments and Main Outlines in Rawls's Theory of Justice* (New York: Garland, 1999).

<sup>77</sup> See Michael Köhler, "Zur Begründung des Rechtszwangs im Anschluss am Kant und Fichte" in Michael Kahlo, Ernst Amdeus-Wolff & Rainer Zaczyk, *Fichtes Lehre vom Rechtsverhältnis: Die Deduktion der [Paragraphen] 1–4 der Grundlage des Naturrechts und ihre Stellung in der Rechtsphilosophie* (Frankfurt am Main, 1992), 93 & 106.

<sup>78</sup> See *ibid.*, 119.

<sup>79</sup> See Hans-Martin Pawlowski, Stefan Smid & Rainer Specht, "Vorwort" in *Die Praktische Philosophie Schellings und die gegenwärtige Rechtsphilosophie* (Stuttgart: Bad Cannstatt, 1989), 9.

The attempt merely to define coercion as the *double negation* of freedom, that is, as the nullification of a nullification of freedom, is just as unsatisfying. Kant had already considered the idea, taken up later anew by Friedrich August von Hayek and others (see Sect. 3.2.1) of a justification for coercion as “a *hindering of a hindrance of freedom*” (AA VI: 231). But Kant also immediately made it clear that the right to freedom could precisely not be explained by the authorization to coerce, but that rather the authorization to coerce always depends upon the rights it is to protect. The question concerning legitimate coercion therefore again leads immediately back to the question concerning a lawfully legitimated freedom. Whoever does not want to confound facts with norms and who does not want to equate the freedom that ought to exist with the freedom that does, has to indicate *which* freedom is supposed to be defended by the means of lawful coercion.

A philosophical clarification about to which freedom everyone has an inviolable right, must precede the definition and justification of coercion. Legal positivism therefore also fails in the attempt to define ‘right’ only in terms of that which the state declares to be right. The idea of law cannot of course be derived from the factual power of coercion in the cynical sense of the expression that “*might makes right*.” The required self-sufficiency of the justification of lawful coercion however clearly means something completely different than a self-legitimation of legal facticity through value-relative decisionism.

Hence, Fichte concludes, freedom must limit itself. Whoever is coerced by me will hardly agree with my coercion if, as a result, only *my* freedom is excellently secured, while theirs is annihilated. I must rather make it clear that also *their* freedom is thereby defended. Consequently, not merely my purely private possession of freedom, but rather an *interpersonally valid* content of freedom, has to serve as a criterion. The principle that can acceptably limit anyone’s freedom must therefore at the same time affirm everyone’s freedom. *Private* freedom thus forever refers beyond itself to the horizon of *societal* freedom, without which it is theoretically null and practically void. To legitimate coercion one requires more than a contingent convergence of (conditioned) interests and concerns. Only (unconditioned) freedom itself can justify coercion.

Fichte now localizes that unconditioned, absolute freedom in the metaphysical freedom of the “Absolute,” or, in other words, within the ultimate principle of being itself.<sup>80</sup> Fichte believes that it is only insofar as freedom essentially holds the entire world together that it can constitute a uniting bond between individuals which transcends contextual contingencies. In his time, Fichte’s speculative Idealist metaphysics of a cosmically unfolding freedom in no way stood alone; it was rather typical of early nineteenth century philosophy. Fichte’s philosophy did, however, stand out from the thinking of his contemporaries because of its methodological rigor. He derives highly atypical consequences from the principle of freedom, which make us receptive to the systematic problems of the kind of liberalism he supports. At issue here is the aforementioned paradox, that Fichte’s philosophy takes up freedom as its

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<sup>80</sup> See Georg Römpf, *Ethik des Selbstbewusstseins: Der Andere in der idealistischen Grundlegung der Philosophie: Kant, Fichte, Schelling, Hegel* (Berlin, 1999), 274f.

goal and – as a means for its attainment – advocates a “system of coercion.”<sup>81</sup> That – and why – this paradox results from a *methodological* mistake with wide ramifications, should be more precisely discussed in the following; not least so that, in this context, the more perspicacious alternative found in Krause’s *procedural liberalism* (Sect. 2.3) can be better appreciated.

### 2.2.1 Epistemology and Metaphysics of Law

From time immemorial, most philosophers have treated rights and law as a branch of *practical* philosophy distinct from morals. Kant did this (see Sect. 2.1.2) by distinguishing within the practical realm legal from moral norms (i.e. the ethics of good intentions and dispositions) according to their respective mode of sanctioning. In terms of *substance*, Kant sees law as concerned with *outer* freedom affecting others; in terms of *sanctioning*, legal norms allow *coercion*, while morality must be content with appeals to inner freedom. Consequently, law and morals both function as forms of *ethical* norms; they both formulate an *ought*, and not always also an *is*. Precisely this changes with Fichte. He believes one has to treat the theory of freedom-giving law in *theoretical* as opposed to practical philosophy, i.e. as part of the structure of what *is* as opposed to what ought to be. Fichte seeks a theory that not only makes an *appeal* for the establishment and maintenance of a system of rights serving freedom, but rather one which *guarantees* its own implementation. Fichte wishes not only to legitimate coercion *within* the legal system, but also to establish a coercion *to* it.

In a letter to Karl Leonhard Reinhold (1757–1823) in 1795, Fichte complained about how Kant would explain *that* an individual positing unethical maxims falls into self-contradiction once they are universalized. Yet Kant would not explain *why* individuals have to conceive of themselves in terms of precisely that universal perspective instead of, say, contenting themselves with a merely private – or self-contradictory – positing of maxims.<sup>82</sup> As a result, Fichte realizes that the actual task of the philosopher is to show, in contrast to Kant, that freedom can *only* be conceived as integrated within a kingdom of rational beings standing under universal

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<sup>81</sup> See especially Manfred O. Hinz, *Fichte’s “System der Freiheit”: Analyse eines widersprüchlichen Begriffs* (Stuttgart, 1981).

<sup>82</sup> Letter from August 29, 1795 (GA III/2, 384, EPW 407). Fichte’s works are, whenever possible, cited from Johann Gottlieb Fichte, *Gesamtausgabe der Bayerischen Akademie der Wissenschaften*, Reinhard Lauth & Hans Gliwitsky, eds. (Stuttgart-Bad Canstatt, 1964): GA (with Roman numerals for the series, dash, Arabic numerals for the volume, comma and page numbers) for the Fichte *Gesamtausgabe* (e.g. GA I/3, 123). Otherwise, Immanuel Hermann Fichte’s edition is followed (e.g.: FW II, 233). The following English translations of Fichte’s works are followed and cited: Yolanda Estes & Curtis Bowman, eds. *J. G. Fichte and the Atheism Dispute (1798–1800)* (Routledge, 2016): AD; Daniel Breazeale, ed. & trans., *Fichte: Early Philosophical Writings* (Ithaca & London, 1988): EPW; and *J. G. Fichte, Foundations of Natural Right* (Cambridge, 2000): FNR.

laws. The solution to the problem is proclaimed one day later, concisely expressed in a letter to Friedrich Heinrich Jacobi (1743–1819):

*the individual must be deduced from the absolute I ... A finite being (supposing that one can be deduced) can think of itself only as a physical being who is part of a realm of physical beings, of which a part (viz., that part which consists of those beings which are unable to initiate anything) is under its causal control, while it interacts reciprocally with the other part (viz., that part which consists of those beings to whom it attributes the concept of subject). (The conditions which make individuality possible are called "rights.") A finite being posits such a realm just as surely as it posits itself as an individual, for these are reciprocal concepts. (GA III/2, 391–392, EPW 411)*

For the question of freedom, this means: Right would be derived, together with coercion, as a necessary expression of freedom, if no one could think of themselves as anything other than already connected within a lawful order universally protecting and structuring freedom. To make this point, Fichte wishes to engage in the deduction of the concept of right/law from the highest principle of philosophy so that "we can rely on this concept to answer all the questions common sense can raise concerning right" (GA I/3, 359; FNR 50).<sup>83</sup>

This claim clearly goes significantly further than the Kantian attempt merely to provide "metaphysical foundations" for the doctrine of law. In contrast to Kant, Fichte aims not only at a critical application of the idea of freedom to juridical themes. Rather, Fichte's doctrine of law assumes a foundational role in the *theoretical-metaphysical* derivation of the lifeworld. In it occurs the development of an, at first, still abstract subject into a concrete person by means of a deduction of the external world, of individuality, and of interpersonality.<sup>84</sup> Fichte justifies the subjective assumption of an external world existing independently of individual consciousness not within the sphere of his theory of knowledge, but rather in his doctrine of law.<sup>85</sup>

The comparison with Kant (see Sect. 2.1.4) clarifies what is at stake: Kant had always carefully distinguished between *critique* and *doctrine*, i.e. between *transcendental* foundational work and *metaphysical* instantiation, that is, between the legitimation of an *idea* and of the *concepts* concretizing it. Fichte finds fault with how this does not lead to a unified philosophy. The idea of freedom would thus not be the sole principle of philosophy, but rather appears co-determined by worldly objects and themes. Fichte therefore nullifies that Kantian distinction (GA I/2, 159). With his *Science of Knowledge (Wissenschaftslehre)* he wishes to carry out transcendental philosophy *and* metaphysics – critique *and* doctrine – at one and the

<sup>83</sup> See Christian Maria Stadler, J. G. Fichtes *Grundlegung des ethischen Idealismus, oder, Transcendentale Deduktion zwischen Wissen und Wollen* (Cuxhaven, 1996), 129 and Hartmut Tietjen, *Fichte und Husserl: Letztbegründung, Subjektivität und praktische Vernunft im transzendentalen Idealismus* (Frankfurt am Main, 1980), 193–197.

<sup>84</sup> See Jacinto Rivera de Rosales, "Die Begrenzung. Von Anstoß zur Aufforderung," *Fichte-Studien* 16 (1999), 167–190 and Edith Düsing, "Das Problem der Individualität in Fichtes früher Ethik und Rechtslehre," *Fichte-Studien* 3 (1991), 29–50.

<sup>85</sup> See Wolfgang Schrader, *Empirisches und absolutes Ich: Zur Geschichte des Begriffs Leben in der Philosophie J. G. Fichte* (Stuttgart: Bad Cannstatt, 1972), 26ff.



same time.<sup>86</sup> The aim is a unified metaphysics of freedom, which brings the *derivation* and the *proof of validity* of the principle of freedom together in one conclusively proven theorem (*Letzbegründungstheorem*) (GA I/2160f.).<sup>87</sup> The idea of freedom and the actuality of freedom should melt into one.

The philosopher, Fichte holds, has to reconstruct all our knowledge from the ground up (GA I/3, 316n; FNR 7n) – as a *necessary concept* of the mind whose conceptual necessity extends to the specificity of its substantial *determination* and *application* in life (GA I/3, 319; FNR 8–9). The difference Kant established between *transcendental* and *metaphysical deduction* is collapsed – with grave consequences: As we saw (Sect. 2.1.2), Kant could simply fall back upon historical givens (like the *Prussian General Law of the Land* and the legal institutions outlined within it, like private property) as the object of his *metaphysical deductions*, without – unlike with objects of *transcendental* deduction – having to speculatively derive them. Fichte’s method, on the other hand, forces him to deduce also these givens.<sup>88</sup> The law is thus properly deduced only when it can exactly be identified in its whole concreteness as a *necessary* moment of human self-consciousness.

But since Fichte’s legal philosophy would like to operate, not with representations of what *ought* to be, but rather as a doctrine of what *is*, it does not, as with Kant, aim to explain the *normative* necessity of the idea of law, but rather the *factual* necessity of law: as a strict “condition of self-consciousness [which] constitutes the deduction of that concept” (GA I/3, 319; FNR 9).<sup>89</sup> Yet, wherever metaphysical and transcendental deductions – that is, proofs of content and the proofs of validity – coincide, philosophy has to master *all* phenomena; it cannot leave anything unexplained, it must (be able to) trace all things to their ultimate foundation, and in this way first establish their respective significance (GA I/2, 146). That also includes the *derivation* of every object of consciousness with the result that “the necessity of all the particular objects in nature and their necessary classification” must be derived from that foundation (GA I/3, 348; FNR 38).<sup>90</sup> All practical – for instance, economic – conditions, transforming, protecting, or hindering life under the rule of law should be derived in this way.

The effects of this methodological shift upon the theory of freedom are extreme. For example: It is one thing to explain the specific form of human freedom in terms

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<sup>86</sup> See Christian Maria Stadler, J. G. Fichtes *Grundlegung des ethischen Idealismus, oder, Transcendentale Deduktion zwischen Wissen und Wollen*, 19.

<sup>87</sup> See Wolfgang Schrader, “Konstruktion versus Unmittelbarkeit: Zum Verhältnis von Philosophie und Leben bei J. G. Fichte,” *Fichte-Studien* 11 (1997), 367–377.

<sup>88</sup> See Ludwig Siep, *Praktische Philosophie in Deutschen Idealismus* (Frankfurt am Main, 1992) 65–80, especially 68f.

<sup>89</sup> According to J. Brachtendorf, Fichte claims “too much when he pretends that the concept of law is a condition of self-consciousness and that he has deduced it from the I,” since it is in no way the case “that rational beings must always stand in such a relation.” Existing law is certainly a condition of possibility for society, yet “that society exists is not a condition of self-consciousness” (Johannes Brachtendorf, *Fichte’s Lehre von Sein: Eine kritische Darstellung der Wissenschaftslehre von 1794, 1798/99 und 1812* [Paderborn, 1995], 190f).

<sup>90</sup> See Schrader, *Empirisches und absolutes Ich*, 70 & 77ff.

of the concept of a choice from manifold options; but it is quite another to “deduce” that “the manifold” exists in the world because it belongs to the structure of freedom to be able to choose from various options.<sup>91</sup> Fichte thus makes the *world as a whole* dependent upon *transcendental consciousness*: The external world thus exists because freedom needs an object to toil with in order to become conscious of itself. Fichte maintains that certain materials exist *because* one requires them for ethical action – dense matter for bodily movement and self-articulation, subtle matter (i.e. air and light) for the ends of communication (GA I/3, 368; FNR 60–61). In the *Wissenschaftslehre nova methodo*, for example, space in its entirety is deduced as a “sphere of freedom”<sup>92</sup> because only within it could the relative position of objects be changed and, consequently, only within it could freedom become practical.

Fichte’s contemporaries already reproached him for treating nature as a whole merely as a substrate of ethical self-determination.<sup>93</sup> Thus he appears guilty of a *theoretical reductionism*, which *views* the world merely as raw material for freedom, as well as of a *moral rigorism*, which only *respects* free agency.<sup>94</sup> For a long time many Fichte scholars have taken pains to counter these objections by citing passages which, in contrast, evidence a less derivative valuation of nature.<sup>95</sup> But such attempts are pointless. The claim that he would turn the world into a mere “material of our duty” (GA I/5 353; AD 25) is something that Fichte himself would not have understood as a reproach, but rather as a compliment (GA I/5, 349; AD 22–23). Fichte considered the instrumentalization of the entire world for the ends of freedom, not as an awkward blemish upon the face of his philosophy but rather as its badge of honor.<sup>96</sup>

The repeated comparison with the Kantian architectonic elucidates the explosiveness of Fichte’s procedure: Kant had started out with a *threefold* philosophical structure (theoretical, practical, and aesthetic) and had established for his philosophical system a merely *regulative* unifying principle. He did not attempt to resolve the three independent basic mental faculties (understanding, reason, imagination) into one single principle.<sup>97</sup> Rather, Kant purposefully distinguished three classes of phenomena: rational, irrational, and a-rational. A-rational phenomena – for instance objects and life forms of the natural environment – are in many cases not – or not fully – determined by ethical reason. Still, this does not justify deprecating them or

<sup>91</sup> See Fichte, *Wissenschaftslehre nova methodo: Kollegnachschrift von K. Chr. Fr. Krause (1798–99)*, Erich Fuchs, ed. (Hamburg, 1982), 61.

<sup>92</sup> See *ibid.*, 114.

<sup>93</sup> See Marco Ivaldo, “Die systematische Position der Ethik nach der Wissenschaftslehre nova method und der Sittenlehre 1798,” *Fichte-Studien* 16 (1999), 237–254.

<sup>94</sup> See Hans Freyer, “Das Material der Pflichten: Eine Studie über Fichte’s spätere Sittenlehre,” *Kant-Studien* 25, 113–155.

<sup>95</sup> See Virginia López-Dominguez, “Die Idee des Leibes im Jenaer System,” *Fichte-Studien* 16 (1999), 273–293.

<sup>96</sup> This original view is followed in: Christian Maria Stadler, *Freiheit in Gemeinschaft: Zum transzendentalphilosophischen Rechtsbegriff Johann Gottlieb Fichtes* (2000), 25ff. For the genealogy of these ideas, see Claus Dierksmeier, “Kant-Forberg-Fichte” (1999).

<sup>97</sup> See Klaus Düsing, *Die Teleologie in Kants Weltbegriff* (Bonn, 1968).

treating them as opposed to reason. According to Kant, nature does not only exist for the ends of humanity. Our end-seeking (reflective) as well as end-giving (teleological) interpretation cannot determine nature *in itself*, but can at most determine it *for us* regulatively, and not constitutively, never totally, but forever only partially: “Teleology *considers* nature as a kingdom of ends, morals *considers* a possible kingdom of ends as a kingdom of nature” writes Kant (AA IV 436; italics, C.D.). Nature is therefore *interpreted* as, among other things, a medium of morality, but is not forcefully reduced to that role alone. For, in Kant, teleological thinking belongs “to no doctrine at all, but only the critique” of reason (AA V 417), a metaphysics placing the whole world in the service of freedom remains impossible.<sup>98</sup>

Fichte strives for the exact opposite. He first reduces our theoretical knowledge of the world to a fleeting dance of pictures whose true significance only ethics can pin down (GA I/5, 440; AD 114–115). He thus declares practical philosophy the “root” of all philosophy, one which penetrates into sovereign sphere of theoretical philosophy, thus making the latter subordinate to the former. Nature is, consequently, not to be studied in and for itself, but rather explained as – and thus transfigured into – a field of agency conforming to freedom; it is characterized as a world whose actual truth is only to be reached by the knowledge of its ethical purpose (GA I/5 158 & 169f).<sup>99</sup> Contrary to his stated intentions, Fichte thus champions a conception of the world that it is not less, but rather more, intensively dualistic than the Kantian conception. Fichte knows only *two* classes of phenomena: valuably-rational versus worthlessly-irrational phenomena – *tertium non datur*. “Whatever is grounded in reason is absolutely necessary; and whatever is not necessary is precisely on that account contrary to reason” (GA I/5 348 AD 22). In this lies the crux of his metaphysics of freedom.<sup>100</sup>

Fichte radicalizes philosophy into a struggle between world-views, between *nature* (deterministic world-view) and *freedom* (perspective of autonomy). Instead of the *mediation* of both worlds (by a third dimension, that of the reflecting and symbolizing power of imagination) favored by Kant, Fichte’s conception forces one to side with either one or the other point of view. And Fichte of course favors the moral conception of the world. What results is the dominance of a first-order (practico-ethical) world-view over a second order (theoretico-scientific) world-view

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<sup>98</sup>For more details about this see Wolfgang Bartuschat, *Zum systematischen Ort von Kants Kritik der Urteilskraft* (Frankfurt am Main, 1972).

<sup>99</sup>“The practical I and the theoretical I relate to one another like end and means. The theoretical I is the means with whose help the I can be practical” (Stadler, *J. G. Fichtes Grundlegung des ethischen Idealismus*, 356).

<sup>100</sup>See Günter Schulte, “Vernunft und Natur – Transzendentalphilosophie als Symptom” in Hammacher & Muses, eds., *Erneuerung der Transzendentalphilosophie im Anschluß an Kant und Fichte: Festschrift für Reinhard Lauth zum 60. Geburtstag* (Stuttgart, Bad Cannstatt, 1979), 345–359. C. M. Stadler attempts to absolve Fichte from this reproach with the peculiar argument that Fichte lacked “any sense of a disposition for the teleology of nature” because he, unlike Schelling, did not (falsely) claim that nature was “still unconscious spirit,” but rather (correctly) that it existed “only as material of duty” and as a “value-free material for the realization” of morality (Stadler, *Freiheit in Gemeinschaft*, 73).

(GA I/5, 349 AD 22–23). Quite consistently, therefore, Fichte writes that the kind of philosophy one has depends upon what kind of person one is and wishes to be (FW I 434f.). For an ethically committed consciousness there can only be Fichte's freedom-orientated world-view.

While Kant had declared the gradual harmonization of nature and freedom to be an ongoing, open project, Fichte champions a radical and total subordination of nature to freedom, and gives it top priority in his philosophy. All phenomena contrary to the moral law are labeled as insubstantial *appearance* or declared to be mere *illusion* (FW II, 298f.). For Fichte there exists no necessity to have a non-instrumental theoretical or practical approach to nature; to claim otherwise simply betrays the fact that one is beholden to a lower-order world-view. Only technical purposes warrant an interest in nature. A philosophical reconciliation of freedom with its natural contexts or even a recognition of the environment as intrinsically valuable are both absent – for systematic reasons. Since Fichte subordinates nature as a whole (*ontologically*) to the ethical sphere of human ends, i.e. freedom, everything within nature counts (*ontically*) as but a means at the arbitrary disposal of humans (GA I/3, 406–407; FNR 104–105).<sup>101</sup>

Corresponding to that *principal* subordination of the sensible world to the consciousness of freedom (on the part of transcendental philosophy) we find in the *everyday* lifeworld (on the part of moral philosophy) the – no less problematic – complete subordination of everything sensible to the rational (GA I/5 440; AD 114–115) as well as the subordination of the body to the mind.<sup>102</sup> Not unfairly, therefore, Fichte has been accused of metaphysical reductionism as well as of ethical rigorism. Hegel, for instance, characterized Fichte's concept of freedom – precisely for this reason – as purely 'negative.'<sup>103</sup> Hegel holds that the I's freedom from and against all limitations – so strongly promoted by Fichte – would, carried to conceptual extremes, be an attribute of death.<sup>104</sup> Life, on the contrary, presupposes bonds of positive reference, which is why Hegel strove to promote a "concrete," "organic," "affirmative," and "substantive" freedom through which individuals become autonomous within their environment rather than against it.<sup>105</sup>

Like *nature*, Fichte also slips his interpretation of *society* into a freedom-theoretical straightjacket. Every I meets in the external world restricting resistance; as a result, the subject is in part impeded in its freedom, in part the resistance is such that the subject perceives itself to be free or as being called upon to be free because

<sup>101</sup> Concerning this, see Manfred Brocker, *Arbeit und Eigentum: Der Paradigmenwechsel in der neuzeitlichen Eigentumstheorie* (1992), 311f.

<sup>102</sup> See Peter Rohs, *Johann Gottlieb Fichte* (2007), 106.

<sup>103</sup> Georg Wilhelm Hegel, TWA 2, 69–82. Translated in Hegel, *The Difference Between The Fichtean and Schellingian Systems of Philosophy* (Ridgeview Publishing Company, 1978).

<sup>104</sup> "I can kill everything and abstract from everything. Thus the obstinacy is invincible and can in itself overcome everything. But the highest thing would be to overcome this freedom, this death itself" (Hegel, TWA 2, 547).

<sup>105</sup> See TWA 7, 298 & 7, 406. Translated in Hegel's *Philosophy of Right* (London, Oxford & New York, 1967), 107 & 160. See also TWA 9, 66; 10, 333; 12, 58–66; 12, 417.

of it – for instance through appeals to ethical action (GA I/3 343f.; FNR 33f.). Calls to a responsible use of freedom indicate a rational sender (GA I/3 344; FNR 34–35). Everyone, however, who *cognizes* the rationality of others must, logically speaking, also *recognize* them. For insofar as he understands autonomous reason to be the condition for the validity of *his* rights to freedom, for the sake of consistency he also has to see in the other’s reason a foundation of equal validity.<sup>106</sup> As the demand to recognize others thus proceeds from one’s own reason it presents no external limitation of freedom (GA I/3 353; FNR 44).

Yet, its logical cogency notwithstanding, there still remains the possibility that this recognition will not ensue *de facto* (GA I/3 356; FNR 46). This, however, Fichte cannot tolerate; for otherwise, he fears it would not be “possible to point to an absolute reason why someone should make the formula of right – limit your freedom so that the other alongside you can also be free – into a law of his own will and action” (GA I/3 387; FNR 82). Why should one limit one’s freedom if one cannot oneself be certain that others are doing the same? Consequently, Fichte devises means and ways to guarantee *absolutely* said reciprocal recognition – through state coercion<sup>107</sup> and a complicated mechanism for the protection of rights.<sup>108</sup>

Herein again, Fichte proceeds contrary to Kant. Instead of leaving reciprocal recognition within the medium of the *sphere of ought*, Fichte is committed to the law’s *sphere of being* and must thus transform the merely *hypothetically-conditioned* character of factual recognition into one *categorically-unconditioned* recognition which is assured by “certainly not the moral law” but rather “the law of thought” (GA I/3 356; FNR 47). Not recognizing the other as a subject entitled to rights, declares Fichte, presents a contradiction in transcendental consciousness which hinders the generation of free consciousness as such. In his *Foundations of Natural Right* (1796/1797) Fichte declares a direct reciprocal interaction (*Wechselwirkung*) between physical modification and volitional determination to be indispensable. He completely identifies (normative) liberty and (factual) physicality with one another (GA I/3 363; FNR 56). Physical action thus directly assumes a constitutive function for law.<sup>109</sup>

It is true that Fichte had already modified this position within his *Vocation of Man* of 1800.<sup>110</sup> Yet, that change of course did not have a significant influence upon

<sup>106</sup> Rosales, “Die Begrenzung. Von Anstoß zur Aufforderung.”

<sup>107</sup> See Michael Köhler, “Zur Begründung des Rechtszwangs im Anschluss am Kant und Fichte,” 113ff.

<sup>108</sup> For an exemplary discussion see Wolfgang Janke, “Anerkennung: Fichtes Grundlegungen des Rechtsgrundes,” *Kant-Studien* 82:1 (1991), 197–218.

<sup>109</sup> For the variations upon the theory of recognition which follow on from the *Foundations*, see Düsing, *Das Problem der Individualität*; also Ivaldo, *Die systematische Position der Ethik nach der Wissenschaftslehre nova methodo und der Sittenlehre 1798*. For a critique of the *Foundations of Natural Right*’s theorem of interpersonality see Eberhard Heller, *Die Theorie der Interpersonalität im Spätwerk J. G. Fichtes: Dargest. in den “Thatsache des Bewusstseyns” von 1810/1811; eine kritische Analyse* (1974), 59ff.

<sup>110</sup> In later years, Fichte promulgated the view that we reach the apperception of the other only by means of a supra-individual ground that we share with all others. The founding of recognition is

the unfolding of his doctrine of law, politics, and economics. In most of his writings on social philosophy, Fichte outlines those ideas of a factually requisite, mechanically reciprocal recognition in such a way that in the case of failed or refused (factual) recognition it should be possible – or even ethically necessary – that the non-recognizer thus becomes (normatively) devoid of rights (GA I/3 355f.; FNR 45f.).<sup>111</sup> In breaking the law, Fichte writes, the other provides the “sure proof” (GA I/3 387; FNR 83) that he did not bring his body completely under the control of his reason. Because of this infringement, one may now justly withdraw the recognition owed to his reason and withhold the concomitant respect for his dignity. Through unlawful action the wrongdoer loses his human dignity and, from then on, Fichte expressly says, one may consider him “as a merely sensible being” and treat him as a mere thing, i.e. as fundamentally devoid of rights (GA I/3 356; FNR 46).<sup>112</sup>

For the same reason Fichte refuses to acknowledge rights of all those persons who lack “a real reciprocal interaction” with us, as, for instance, in regard to “the rights of the dead.” *Real* thus means *physical*: Rights concerning intellectual relations, for example concerning “freedom of thought, freedom of conscience” are flatly refused (GA I/3 360; FNR 51–52). We owe a relation of law only to such rational beings who can exact our recognition through physical influence. Fichte thereby touches upon a central problem of liberal philosophy as such: How do we deal with those who do not stand in reciprocal relations to us? Do we have obligations to future generations whose weal and woe we influence through our actions, but who, on their part, can yet neither benefit nor harm us? Does our freedom still deserve respect after death (the natural boundary of all chances for reciprocation)? May we, for instance, foil the testament of the deceased for the benefit of the living? And how does it stand with the freedom and dignity of mentally handicapped persons, whose behavior perhaps does not always clearly indicate a desire faultlessly – in exact observance of the social contract – to toe the line of the law? Are they thus only to be considered as mere things devoid of rights?

Fichte answers these questions in a manner that crassly contradicts our moral intuitions.<sup>113</sup> That results from that principal feature of his social philosophy to

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able to be reconstructed in a way that does more justice to the phenomenon; the *understanding* of the call-to-recognition – now clearly empirico-factually conceived – requires a *disposition* towards supra-individual reason, whose possibility is derived from precisely that *supra-individual* ground (of being) which the *Wissenschaftslehre nova methodo* already engaged. See Makoto Takada, “Zum intersubjektiven Verständnis des Ich in der *Wissenschaftslehre nova methodo*,” *Fichte-Studien* 35 (2010), 345–356. In passing it should be remarked that through engaging with this more mature position, Fichte’s follower, Karl Christian Friedrich Krause, constructed his own theory of interpersonal (and also intercultural) recognition. More on that in the following chapter.

<sup>111</sup> For a critique of this see Ludwig Siep, “Naturrecht und Wissenschaftslehre” in Siep, ed., *Praktische Philosophie in deutschen Idealismus* (Frankfurt am Main, 1992), 38.

<sup>112</sup> For a critique of this idea see Rainer Zacyk, *Das Strafrecht in der Rechtslehre J. G. Fichtes* (Berlin, 1981).

<sup>113</sup> For a twentieth-century critique see Ernst Bloch, *Naturrecht und menschliche Würde* (Frankfurt am Main, 1991) and Helmut Girndt “Über den Umgang mit der empfindungsfähige Natur nach J. G. Fichte” in *Transzendentalphilosophie als System: Die Auseinandersetzung zwischen 1794 und 1806* (1989), 139ff. For K. C. F. Krause’s contemporary critique of Fichte see Claus

reproduce the entire system of rights in analogy with geometrically construing surfaces from lines and lines from points. Fichte gradually construes from reciprocal agreements (lines) between purely *private* subjects (points) the public relations of law (as a surface).<sup>114</sup> Thus he anticipates many of the later conceptions of game theory and social contract theory. As a consequence, we can learn from his example a lot about their features: Fichte begins with two subjects who only wish to realize their private wills and recognize one another (for example, in their respective properties) through a reciprocal arrangement (GA I/4 5f.; FNR 165f.). Rational self-interest produces the interest in the other. What arises next is a relation of reciprocal protection of rights and property of a still very fragile nature: “The smallest violation of another’s property nullifies the entire contract and entitles the injured party to take *everything* from the transgressor, if he can” (GA I/4 9; FNR 169–170).

Upon the “surface of the earth,” as a “sphere where everyone can exercise his efficacy,” everyone’s property can, in principle, always be endangered by everyone else. Consequently, no-one’s property is *absolutely* secured through the mere agreement of two or more persons (GA I/4 9; FNR 170). Yet, according to Fichte, this in turn threatens to nullify the decisive condition under which one could at all consent to refrain *categorically* from appropriating the other’s property. Something else must be added: The will (passively) to refrain from appropriating the other’s property has to be reciprocally augmented by the decision (actively) to protect property: A reciprocal “protection contract” has to be established (GA I/4 10; FNR 171). Fichte reasons further that, just like the property contract, this “protection contract, like every other contract, is conditioned” (GA I/4 10; FNR 171): only under the condition of *factually* provided protection is one bound to protect the other against a third party. In order now to make that (theoretically) only *hypothetical* condition (practically) *categorical*, it must be assured that entry into that contract *inevitably* produces the fulfillment of the citizen’s obligation through the requisite “contribution in the form of abilities, services ... or ... money” (GA I/4 16; FNR 178). Thus (in a manner similar to the later accounts of Robert Nozick and others) Fichte lets the state arise from the spirit of possessive individualism (*Besitzindividualismus*): The state first articulates itself as a protective association from an abstract pact of mutual assistance on the part of particular individuals after “the whole has come to exist as a result of contracts among individuals” (GA I/4 15; FNR 177). Its unifying end is but the individuals’ interest in the protection of their safety and possessions. Where these interests, or the possibility of its timely fulfillment, are lacking, then so too the rationale for maintaining the community.<sup>115</sup>

Now, since, in the chosen mechanical picture of a static equilibrium of service and counter-service, even the smallest disruption to the balance would nullify the whole, the universal security of rights appears as strictly conditioned by the

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Dierksmeier, “Fichtes kritischer Schüler: Zur Fichtekritik K. C. F. Krauses (1781–1832),” *Fichte-Studien* 21 (2003), 151–162.

<sup>114</sup> See Hans Jürgen Verweyen, *Recht und Sittlichkeit in J. G. Fichtes Gesellschaftslehre* (Freiburg, 1975), 124.

<sup>115</sup> See *ibid.*, 132.

service-contribution of each individual: “Thus the contract is cancelled as soon as the citizen does not contribute” (GA I/4 17; FNR 179). Then, the guilty party is liable with his *entire* existence; the state forcibly subjects this person to its law and treats him now like lifeless matter. For this reason, just as Fichte postulates, the contract actually guarantees its own fulfillment: “If someone exists apart from the contact, then he stands outside every rightful relation whatsoever”; whereas if he enters into the contract “then it binds him completely” (GA I/4 18; FNR 180). But since no government can afford to coerce its citizens incessantly, the order of law must be so constituted that violations of the social contract will not occur in the first place, and Fichte thus stipulates that “*if an arrangement could be found that would operate with mechanical necessity to guarantee that any action contrary to right would result in the opposite of its intended end, such an arrangement would necessitate the will to will only what is rightful*” (GA I/3 427; FNR 127).

As a result, for the execution of the law one would no longer depend upon a good will, ethical self-commitment, voluntarily assumed responsibility, etc. Once this kind of mechanical state apparatus exists, then a strict judiciary, with automaton-judges subsuming deeds under norms (GA I/3 398; FNR 95), will forever protect its order. And Fichte seriously believes that the idea of freedom commands the establishing of such a – totalitarian – state, as, in his reading, the liberal idea of law encompasses *all* the means for its *complete* realization (GA I/3 426f.; FNR 126f.). Fichte recognizes that it is just as impossible as it would be unethical to completely prevent human beings born free from *carrying out* actions contrary to law by means of *physical* precautions (GA I/3 425f.; FNR 125f.). Yet he sees no problem at all in thoroughly *necessitating* their *wills* to legality: For “this law of coercion does not infringe upon the freedom of the *good* will or its full dignity” (GA I/3 427; FNR 127; italics, C.D.). If it were clear to everyone that each volition contrary to the law necessarily resulted in “the opposite to what was intended” then, Fichte speculates, solely volitions in conformity with law would remain extant (GA I/3 426; FNR 126). Any volition contradicting law should thus become the reason for its own – not *improvement*, but – *negation*, and this “proposition in its full synthetic rigor” would provide the unifying principle for all laws of coercion and punishment and a corresponding machinery of surveillance (GA I/3 426; FNR 126).

These ideas lead to a peculiar result: In order to secure the preservation of the mechanical equilibrium of law, every conflict of rights, even every unintentional conflict of rights, must be conceived as an intolerable disruption of the overall balance, which therefore must not only in retrospect be declared null and void as well as corrected (as is common in most constitutional states), but rather must ideally be prevented from the outset.<sup>116</sup> In Fichte’s time the technical possibilities for a complete surveillance and regulation of behavior were still lacking. Nowadays, since such tech-

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<sup>116</sup>“Coercion is the typical foundation of the Fichtean state: it enables the existence of the equilibrium of law because without the threat of punishments this equilibrium is unstable. Detering activities contrary to law is the central element of the deduction of communal being in §§14ff of the *Foundations*” (Lucca Fonnescu, “Die Aufhebung des Staates bei Fichte,” *Fichte-Studien* 11 (1997), 85–98). For criticism of that see Köhler, *Begründung*, 111.



nologies are increasingly at our disposal, the illiberal menace encapsulated in these ideas is all the more salient. As far as possible, with the means available then, Fichte wanted to place the entire mechanism of the state – particularly socio-economic laws and regulations – in the service of the *unavoidable fulfillment* of the social contract. Allegedly for the sake of freedom, Fichte made *coercion* the principle of politics and economics, calling for directive paternalism on the part of the freedom-granting state. Starting from an almost libertarian position (with the state as merely an institution for protecting possessions) Fichte surprisingly ends up at a theory of law that is not libertarian at all (with a conception of a comprehensive nanny-state).

Fichte's philosophy of freedom is nevertheless not to be seen as but a eulogy for legal coercion. Fichte's works also contain an abundance of ideas that directly go against that *mechanical* concept and show another, more liberal Fichte. His social-philosophical writings frequently contain biological metaphors giving expression to the notion of an *organic* self-organization of society.<sup>117</sup> That, too, is typical of his time. In numerous philosophies of the early nineteenth century, the epithet *organic* gathers together many initially partly unarticulated and partly still unclear ideas with the common aim of escaping the rigid spirit of (Hobbes-inspired) social-contract theory.<sup>118</sup> Many thinkers felt that Kant's *Critique of the Power of Judgment* legitimated new and different ways of thinking through the relation of individual freedom and collective order oriented by the lodestar of a harmonization of nature and freedom achievable through culture. Fichte was no exception, and he enriched his social-philosophy with organic metaphors, too.

Occasionally Fichte declares that the human being is an "organization," a "consummate plant" (GA I/3 379; FNR 74). For, unlike machines, in the organism "the whole also exists for the sake of the parts, it has no purpose other than to produce these parts in a specific way" since "the product of nature ... continually produces itself, and maintains itself precisely insofar as it produces itself" (GA I/3 378; FNR 73). Fichte maintains that the human being represented in the image of the organism could only be conceived in terms of "the concept of freedom given to him by his own self-consciousness" (GA I/3 379; FNR 74). As beings whose concept is alone to be attained and interpreted by themselves, humans can truly realize their potential only when guided by their *own* aims. And all such passages obviously stand in recognizable tension with everything outlined earlier.

If, as it now seems, the "character of humanity" consists in "formability" towards freedom (ibid) then the vocation of the human being can hardly lie in a lawful order destructive of that freedom. As a consequence, it could be concluded that the citizens themselves ought to produce the law organizing their modes of socialization: in reflexive freedom and inspired by their *own* ideals. Instead of a *philosophically deduced* order, a *socially construed* order ought to arise, emerging from free civic agreement. And, in the light of that, would one then not also have to reconsider and redraft the objective of the law?

<sup>117</sup>See Manfred Riedel, "Fichtes zweideutige Umkehr der naturrechtlichen Begriffsbildung," *Zeitschrift für philosophische Forschung* 31:1 (1977), 5–18.

<sup>118</sup>About the mechanical versus organic distinction see Carla Amadio, "Aesthetik und Politik von der Grundlage der gesamten Wissenschaftslehre aus," *Fichte-Studien* 11 (1997), 99–112.

Some passages of Fichte's works, for instance in *The System of Ethics*, actually seem to warrant this reading: Freedom cannot be conceptualized as intrinsically vague, i.e. as non-conceptual. Freedom rather must know of itself and has to be committed to a concept of itself. Nevertheless, this concept cannot be gleaned from a purpose outside of freedom itself to which liberty would have to surrender: Human freedom must itself designate the ends that provide its orientation. But truly autonomous freedom can only remain in this process, however, if the goals it thus takes on in turn affirm freedom. Freedom *is* therefore that which posits itself as a universal end; freedom aims at freedom – otherwise it is not freedom. This is why individual freedom intrinsically refers to universal freedom. Personal freedom must be sought in the mode of universality. Otherwise the essence of individual freedom would become negated by its application, i.e. its idea would be negated by its realization.

Fichte hence confirms Kant's *categorical imperative* that individual subjective axioms of action (the maxims) should continually be able to be posited as an objective law. This, Fichte agrees, is the appropriate formula of the idea of freedom and its normative self-commitment. And since that categorical imperative demands that human beings be treated as ends in themselves and not instrumentalized, Fichte must also orientate the lawful order towards the aims autonomously formulated by the citizens and develop the law as the reflexive organization of *their* freedom. Throughout Fichte's writings we find numerous hints at such a more organic – rather than mechanical – conception of law. He thus recognizes for instance – refraining from all the negative restrictions which law imposes upon the pursuits of individuals – “the *positive element* in the concept of right” (GA I/3 356; FNR 47) as precisely lying within the fact that everyone may be treated and judged only according to that lawful concept which he himself “must possess” (*ibid.*).

But beware: Fichte is *not* referring to an idea of law empirically gleaned from historical reality. Rather, Fichte divines that this very concept of law is “contained within the essence of reason,” since “no finite rational being is possible if this concept is not present within it ... in consequence of the being's rational nature” (GA I/3 358; FNR 49). He treats the factual conceptions of law entertained by real people with lofty disregard. He is similarly ambivalent when he describes the conception of conditions of the possibility for being “a person” as a “*right*” of said person, and calls all of these rights contained “in the mere concept of the person ... *original rights*” (GA I/3 390; FNR 87). In such contexts, he may well write that such *rights* belong to the essence of persons as such, thus *unconditionally* and not as a result of conditioned relations of recognition.<sup>119</sup> Yet as soon as such declarations appear, they

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<sup>119</sup> It is hence problematic that this revaluation of all individuals (including oneself) is with Fichte nevertheless ultimately only to be understood instrumentally on behalf of reason since all human beings are or should be means to the end of the universal reason; a position, which entails the immediate devaluation of all of those being or making them fit for this project. See Klaus Kodalle, “Der Stellenwert der Historiographie im Kontext des Fichteschen Gesichtsdenkens” in *Fichte-Studien* 11 (1997), 259–285. This is shown within, among other places, Fichte's formulation that the justification for the existence of human beings is contained in the work they do for the end of the species: “for that alone is he there, and if this should not occur, thus he does not at all need to be” (GA I/5 230).

are retracted: “There is no condition in which original rights exists; and no original rights of human beings.” Basic rights, i.e. human rights, are “a mere *fiction* ... for the sake of science” (GA I/3 403–404; FNR 102).

Doubts are appropriate. If the idea of law really follows as a necessary conception from the articulation of the free essence of human beings, then Fichte’s claim that there is a natural law only within, and not before, the state, can hardly be maintained (GA I/3 395ff.; FNR 92). Certainly, the *realization* of the norms of natural law requires the state. But if the idea of law together with a limitation of everyone’s freedom to the boundaries of the law belongs to the free essence of human beings, can – or indeed must – one not then speak of a minimum supply of pre-positive, rational normativity, i.e. natural law?<sup>120</sup> Fichte seems now and then to concur when he declares that his concept of law is what legitimates positive laws in the first place. For instance, he argues: If one has an original right to personal liberties then one also has a claim to the adjudication of the rights which make this de facto possible: “Original right (*Urrecht*) returns back into itself and becomes a self-justifying, self-constituting right, i.e. an *absolute right*” (GA I/3 409; FNR 108).

For its legitimation, an absolute right depends only on itself, not on empirically given laws. But if a right is valid for us *as* a person, then it is valid for *every* person (GA I/3 374; FNR 68–69). To demand rights to personal liberty means to claim a concept that interlinks the positing (of the rights) of one person with that (of the rights) of others. We can only expect freedom for ourselves in the name of reasons that at the same time obligate us to stand up for the freedom of all persons, of all world citizens. A foundation for intercultural human rights appears therefore to be the upshot of Fichte’s concept of reason. If freedom is universally valid, should it not also be globally realized? Fichte, however, leaves that promising cosmopolitan path to become overgrown by the notional plants of the nationalism for which he was *as famous* at the beginning of the twentieth century as he has become *infamous* now after that century has come to an end.<sup>121</sup> These potentials for a generously universal conception of freedom are, however, squandered. Fichte makes an astonishingly narrow-minded use of these intellectual foundations in order to secure a conception of perfect freedom through philosophical directives. Because the actual value of freedom consists for him in its rational use alone, Fichte subjugates all civil and civic freedoms to the philosophers’ blueprint of freedom; and being without hope of enforcing this blueprint on a global scale, he limits his theory to national parameters.

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<sup>120</sup> See Riedel, *Fichtes zweideutige Umkehr der naturrechtlichen Begriffsbildung*. The same applies to Fichte’s central reflections concerning the “right of world citizens”; see Verweyen, *Recht und Sittlichkeit*, 98.

<sup>121</sup> For information concerning Fichte’s reception in the philosophy of National Socialism, see Konrad Cramer, “Um einen nationalsozialistischen Fichte von Innen bittend: August Faust über Fichte im Jahr 1938” in Jürgen Stolzenberg, Oliver-Pierre Rudolph, eds., *Wissen, Freiheit, Geschichte: Die Philosophie Fichtes im 19 und 20 Jahrhundert* (Amsterdam, 2010). See also Christian Jansen, “The Formation of German Nationalism, 1740–1850” in *The Oxford Handbook of Modern German History* (2011), 234.

Without hesitation, Fichte tells those who protest against his nationalist paternalism that they misunderstand themselves. That icy reproach of a *false consciousness* will later become a staple of Marx. Fichte, however, employs it even more rigorously. Marx at least allows the *false consciousness* (for him, at most times: capitalist ideology) to possess a *partial* historical truth, which, helped along by the philosopher, eventually can be transformed into *complete* truth (accordingly: communist theory). Fichte, instead, radicalizes the separation between true and false consciousness and situates it between the levels of the transcendental and everyday consciousness. The ordinary consciousness, insofar as it is philosophically reconstructed and guilty of mistaken assumptions, has *no claim to validity* at all. One must neither theoretically consider it, nor practically respect its proponents.

### 2.2.2 Social Philosophy

Fichte's social philosophy starts out from plausible, even congenial, concerns: All persons, according to Fichte, require a certain sphere to realize and symbolize their respective freedom: property (GA I/3 361; FNR 53). In property, freedom becomes materially graspable. The right to property functions, so to speak, as the grammar that regulates the communication of civic freedoms among one another. Whoever wishes to secure the semantics of freedom in inter-individual relations must know the syntax for the relation of individual and community. For example, in order to demarcate justly what does and does not belong to whom, the private must first be linguistically distinguished from the public. Fichte thus dedicates voluminous studies to the style of the legal prose of possession and property, interpreting the specific proclamations of civil rights, as it were, as public speech-acts of freedom itself. The poetic attraction of those considerations lies in how they describe the rights of others as manifestations, not negations, of the individual's freedom.

Fichte argues: Whenever I exclude others from my relationship to objects and wish to do so in a lawfully valid manner, I must acknowledge as legitimate the same behavior on part of every other rational being. In principle, therefore, my relation to any object entails the object-relations of all others (GA I/3 414–417; FNR 113–116). Hence, the legal order's refusal to allow my appropriation of certain goods that belong to others is not merely the expression of an *alien* will (to possess) but also the manifestation of my *own* will (to possess) (GA I/3 416; FNR 115–116). Therefore, my right to property finds no alien limit in the property rights of others, but rather its very own boundary. That connection of everyone with everyone else is what constitutes the right to property: The social limits of property thus function, not as *supplementary* restrictions of an *antecedently* abstractly-universal right, but rather define all property radically (i.e. from the Latin *radix*, its root) as a common property prior to its subsequent private division.<sup>122</sup> Everyone is entitled to freedom-

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<sup>122</sup>For more information about the following, see Johann Braun, *Freiheit, Gleichheit, Eigentum: Grundfragen des Rechts im Licht der Philosophie J. G. Fichtes* (1991).

enabling property. As a consequence, freedom should not only be *protected* by the rule of law (i.e. doubly negatively: as negation of negations of freedoms already established as a legal entitlements), but it has rather to be also (immediately positively and affirmatively) *created* (GA I/5 314). No-one may be animated (e.g. by destitution) to violate the law (e.g. towards theft) (GA I/3 459; FNR 163).<sup>123</sup> The state under the rule of law must also be a social state.

Fichte is convincing when he demands us to see in the rights of others, not negative limitations, but positive bounds, which in the first place individuals into valid relations of mutual recognition. Consequently, the individual's lawful position is confirmed – or, where necessary, corrected – by society.<sup>124</sup> It seems hardly surprising, therefore, that Fichte, unlike other philosophers of freedom, does not feel inspired towards a passionate hymn in favor of exclusive private possessions. Nevertheless, it remains surprising that he lets himself be carried away by an elegy on collective property. Although one finds his occasional approval for an intermediary, social-democratic position, he ultimately clearly joins the socialistic chorus about common property, in which the private at most chimes in as a softer counterpoint to the collective leitmotif. In an all too rapid series of chords, Fichte moves from his philosophically directive idea of freedom – via the interlude of a quasi-organic social utopia – to a brisk socialist oeuvre; orchestrated and announced, though, as an ode to freedom.

This is occasioned by his philosophical method, since it, directed by Fichte's speculative deduction alone, believes itself entitled to pay no attention at all to popular opinions. Fichte does not aspire to a politics by the people. His aim is the purest possible translation of the *rational* will of human beings into legislation and executive decisions (GA I/3 438f; FNR 139f). Only rational interests concerning the common good, and not the arbitrary opinions of the majority, should be politically decisive. Imitating Rousseau's distinction between the '*volonté de tous*' and the '*volonté générale*,' Fichte demands that the (factual) "communal will" (*gemeinschaftlicher Wille*) of the people must, in order to maintain political legitimacy, first be transformed into a (normatively acceptable) "unified will" (*gemeinsamer Wille*) (GA I/3 436; FNR 137). That requires an integrative representation of the common interests orientated towards a universally valid – and hence generally accepted – law (GA I/3 436; FNR 137). How can this succeed?

The most appropriate image for illustrating this concept is that of an organic product of nature. This image has frequently been used in recent times to describe the unity of the different branches of public power, but – so far as I know – it has not yet been used to explain the civil condition of the whole. [...] In the organic body, each part continually preserves the whole, and by doing so, is itself preserved; the citizen relates to the state in the very same way. And in fact, in the one case as well as in the other, this preservation of the whole does not require any special arrangement; each part, or each citizen, preserves only itself in

<sup>123</sup> For this "new motif in Fichte's thinking" which allows us to now grasp the rule of law "as something dynamic, as a system of interconnected rightful relations," see Nico Wallner, *Fichte als politischer Denker: Werden und Wesen seiner Gedanken über den Staat* (Halle/Saale, 1926), 107–110.

<sup>124</sup> See Verwey, *Recht und Sittlichkeit*, 107f.

the place that has been determined for it by the whole, and in the very act of doing so, it preserves the whole in this particular part: and precisely because the whole preserves each part in its place, the whole returns into itself and preserves itself. (GA I/4 19; FNR 180–182)

Politics has accordingly to follow a concept of the common good, which harmoniously unites the particular interests and the needs of the political whole. For the specification of this abstract aim, Fichte makes use of the parallelism of natural product and social union: in numerous appeals to the “ordinary” and “sound judgment,” which felicitously ascertains the “nature of the issue” (GA I/3 454f.; FNR 157). It is simply a question of “treating everything according to its final purpose”, states Fichte. In this way, the required program could easily be “scientifically established” (GA I/5 150).

What is the origin of this remarkable optimism about divining with certainty and ease the respective necessities? Is such a teleological doctrine of the “final purposes” given by nature at all possible and admissible within the framework of a transcendently directed philosophy?<sup>125</sup> Certainly, it strays notably from the straight philosophical path pursued by Kant. For unlike Kant, Fichte presupposes not only a principal *compatibility* of nature with human ends, but rather – as for him the *ought* is the ultimate purpose of being – begins from a metaphysically founded (more precisely expressed: feigned) *harmony* of nature and freedom. Fichte ascribes a servitude to freedom even to such forms of life that in and of themselves do not display any such liberal tendencies.<sup>126</sup> A procedure, whose general premises are just as questionable as its specific conclusions. Whoever takes Fichte at his word, has to ask at once: Why then does such an exquisitely arranged world still require means of coercion, when, as we are told now, some internal teleological necessity drives the cosmos toward the realization of the liberal utopia? What does one need *compulsion* for?

While in Fichte’s *Foundations of Natural Right* it still looks as though (legal) coercion alone is needed to establish society, things sound quite different a little later in the *System of Ethics* (GA I/5, 253). And in *Some Lectures concerning the Scholar’s Vocation* that followed shortly afterwards, one even reads that “upon the *a priori* prescribed course of the human species there lies a point where all state-based relations become superfluous” (FW VI 300). Fichte suddenly emphasizes that the state does not first socialize individuals by law, but already *finds* them embedded in ethical forms of community (FW VII 382). Numerous places, where Fichte even occasionally flirts with the complete *dissolution* of the state,<sup>127</sup> suggest a theory of sociality established neither completely nor essentially by enforced laws, but rather by voluntariness.

At times one even seems to be hearing anarchic sounds when Fichte proclaims that clever politics could and should lead to a future state of affairs where individu-

<sup>125</sup> See the critique of Fichte already put forward by Albert Th. Van Krieken, *Ueber die sogenannte organische Staatstheorie: Ein Beitrag zur Geschichte des Staatsbegriffs* (Leipzig, 1873), 60–65.

<sup>126</sup> See Georges Gurvitch, *Fichtes System der konkreten Ethik* (Tübingen, 1924), 251.

<sup>127</sup> This is carefully documented and interpreted in Fonescu, *Die Aufhebung des Staates bei Fichte*.

als will conform to society's plans from ethical motivation such that gradually the lower forms of human behavior brought about through the sheer force of the law develop into a higher – more ethically than juridically established – compact for societal life. For, as is clearly repeated in later writings, the “life in the state does not belong among the absolute purposes of humanity.” The state may then merely function as precursor of higher forms of fellowship; it serves as a useful means to an “art” – which will ultimately replace it – of “furnishing the entire relations of humanity according to the previously scientifically interpreted reason [...] until the species stands there as a complete expression of its eternal original image in reason” (FW VII 10f.).

Fichte surely never wishes to give up the state's role in economic planning and distribution,<sup>128</sup> but, in later years, he wished to do away with precisely that apparatus of coercion which he had wanted to prove to be a logically absolutely required precondition for the possibility of a consistent idea of freedom.<sup>129</sup> It remains unclear how the reason-directed social relations he strives after would have to be put into place (FW VII 161). On one hand, Fichte at times recommends the “absolute state” as “institution for coercion” (FW VII 143f.), as the most appropriate means for this purpose. Then again, on the other hand, he announces that, aside from their duties of citizenship, human beings should remain completely free of all political bounds<sup>130</sup>: The state should only create the “outer conditions” with which human beings “could, with their own freedom, make themselves the apparent manifestation of reason” (FW VII 162) – for instance through indirect promotion of “religion, science, and virtue” (FW VII 166–168); a strikingly more restrained interpretation of the tasks of the state.<sup>131</sup>

Does Fichte's social-philosophy then ultimately follow a liberal or a totalitarian model? For Fichte, when it comes to freedom, is the path the goal? Or can the eminence of the ultimate end justify whichever choice of means? Fichte provides various and ambiguous answers to these questions. His thinking oscillates between (structural) ideas and (material) concepts of freedom and thereby exemplifies central questions for philosophical liberalism as a whole: How far is philosophy permitted to venture into the concrete? When and how do philosophically meaningful pointers deteriorate into pedantic dirigisme and illiberal dogmatism? The final answer to these queries lies in Fichte's economic philosophy.<sup>132</sup> Long before Marx attempted to rescue human freedom from alienation and exploitation, Fichte had

<sup>128</sup>See Heinrich Rickert, “Die philosophische Grundlagen von Fichtes Sozialismus,” *Logos Internationale Zeitschrift der Philosophie der Kultur* 9 (1923), 149–180.

<sup>129</sup>See Georg Geismann, “Fichtes ‘Aufhebung’ des Rechtssaates,” *Fichte-Studien* 3 (1991), 86–117.

<sup>130</sup>See Walker, *Fichte als politischer Denker*, 111.

<sup>131</sup>For more information about this conflicting interpretation see the contributions from Günter Zöller and Christoph Asmuth in Günter Zöller (ed.), *Der Staat als Mittel zum Zweck: Fichte über Freiheit, Recht und Gesetz* (Baden-Baden, 2011).

<sup>132</sup>See David James, *Fichte's Social and Political Philosophy: Property and Virtue* (Cambridge: New York, 2011), 22f.

already seen the close connection between a liberally founded doctrine of law and a socially engaged philosophy of economics and thus worked upon their dovetailing. Fichte quite clearly recognizes and suggests that economic conditions in particular manifest human freedom in everyday life. Since for Fichte the universal right to freedom involves the particular presuppositions of a free life, economic questions (for example the allocation of goods as well as the distribution of costs and burdens in society) become the object of his doctrine of freedom.

### 2.2.3 *Economic Philosophy*

Fichte unequivocally demands: “everyone ought to be able live from his labor” (GA I/4 22; FNR 185). Whoever does his bit for the economic freedom of the whole, should receive his or her personal due – the material presuppositions of his or her individual freedom – on the part of the community. Every person should receive a private sphere of efficacy and property (GA I/3 361; FNR 53–54). Yet the market by and of itself will never guarantee that all obtain the goods they require for a free life. Fichte sees this as an unacceptable contravention of his idea of freedom that must be resolved by means of a national economy directed towards the freedom of all by regularly and reliably assigning everyone their fair share.

For this purpose, Fichte devises the model of *The Closed Commercial State* (1800) within which a cyclical exchange of goods and services takes place planned and overseen by the state. First of all, the state assigns to the proprietors their respective possessions and then establishes rules for their mutual exchange of commodities and services. According to these legally unchallengeable rules, thoroughly symmetrical relations of exchange should put an ordered cycle of allocation in place. This cycle is devised so that no one ever ends up positioned worse than they were upon the state’s initial distribution. Fichte does not see the economy as able to process asymmetries productively.<sup>133</sup> That is why he signs his readers up for a static model of mechanical order.<sup>134</sup> For him stability cannot result from a dynamic balancing of economic inequalities. Consequently, Fichte fears foreigners. They are certainly not instituted into their property by the state. Their exchange behavior is thus much less malleable. So, they could disrupt the precious balance of the pre-established relationship between property and exchange.

Only a world-state could ultimately resolve this problem. Only when there are no more foreigners can property be guaranteed in a truly permanent and absolutely stable form recognized “by the present constitution of humankind” (GA I/3 418; FNR 118). In the absence of a world-state, the national economic system and nation-state must be “closed” so that, at least within their boundaries, the desired balance

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<sup>133</sup> See Hinz, *Fichtes “System der Freiheit.”*

<sup>134</sup> See Bernard Willms, “Zur Dialektik der Planung: Fichte als Theoretiker einer geplanten Gesellschaft” in Böckenförde (ed.) *Säkularisation und Utopie* (Stuttgart, 1967).



of goods is not endangered from outside.<sup>135</sup> Fichte accordingly severs the national society from the world-market in order to conduct undisturbed, within the so enclosed space, his politics of redistribution. The specific provisions for the execution of this plan within *The Closed Commercial State* are no longer of interest today. They do not penetrate into the essence of economics and attempt to bring Fichte's ethical ideals into play, not *in* the economic exchange process, but rather *against* it.

More interesting than that early outline for a planned economy (as a means) with a liberal agenda (as the end) is, however, the position Fichte presented 12 years later when reflecting upon his own subsequent studies of economic literature.<sup>136</sup> Fichte took the topic of economics up again in lectures held in Berlin in 1812, but this time he wishes not only to cover and constrain the region of economics with juridical structures from the outside, but rather aims to transform it from within. He believes himself to be successful in this endeavor, and thus in a position to profess the very principles required for all future economic policy. This is shown by the following passage in which Fichte summarizes his mature philosophy of economics as follows:

*In Summa:* Everything rests upon (1) that the state has a concept of human wellbeing and of the means to advance this and of the important consequences of this means. (2) That it in every moment knows precisely the actual and true condition of its nation and its standpoint in every respect. The first, as something *a priori*, is expected of it without doubt. The second arises from the constitution, since it always oversees the state of agriculture and business, and the results of that which its own action produces, and from time to time it is necessary to put aside precise accounts about it since it must establish the price of the commodities. It in no way lacks the power to give direction to the National-Industry since without its will no hand in the state stirs towards this end, and it continually has freely at its disposal a sum of forces which it can also arbitrarily increase or diminish. One should not fear the army of officials and their work and paperwork which would bring this about. (FW X 587)

The economic theory summarized in these words is bewilderingly heterodox. In its considerations about the state as a *venture-capital*-agent are united with socialist doctrines, and guild-thinking is united with physiocratic speculations and mercantile subtlety. Economically one can hardly find a common denominator for these ideas, but one might philosophically. Fichte ultimately presents his theory as the self-unfolding of metaphysical reason in economic matters. We must hence seek the conceptual key for deciphering the code of the true essence and value of commodities underlying all economic activity within precisely this philosophical enterprise.

Fichte desires to find reliable bases of value assessment for questions of social participation and redistribution. Real freedom manifests itself often as access to goods. Whoever wishes to promote a just allocation and fair distribution must make goods administrable and their value commensurable. Fichte hence strives to attribute to all commodities a fixed *inner value*, remaining stable in the face of every fluctuation of their so-called *outer value*, i.e. of their exchange value on markets.

<sup>135</sup> About this see the far-sighted critique given in Krieken, *Ueber die sogenannte organische Staatstheorie*, 641.

<sup>136</sup> See for instance Fichte's commentary to Theodor Schmalz's "Handbuch der Staatswissenschaft" of 1808 in GA II, 13, 9ff.

His policy of redistribution requires as much. He seeks this “basic criterion of the value of all things” far away from the price of commodities, so as to not fall into that “bias towards money which disturbs all healthy insights into this matter” (FW X 558).

Fichte first posits the subsistence-costs of laborers as a necessary component of every commodity’s value (FW X 559), below which nothing could be continuously produced. He then adds on the laborer’s claim to “leisure,” more precisely a claim to participation in the goods achieved macro-economically above the level of everyone’s subsistence (FW X 544). Leisure is thereby defined as a span of the “ability to live without labor” (FW X 560), whereby it is not a question of free time alone, but also a question of a “release from all material purposes,” secured by adequate material provision, during this time (FW X 539). In leisure time, one ought to be able to dedicate oneself to higher ends, for example, moral self-improvement.

Thus Fichte abruptly changes from a theoretical to an ethical perspective on economics. It is true, usually, laborers procure exchange-value, which exceeds simply covering the costs required for their continuing ability to work, and thus allows them some leisure. Nevertheless, this is not always the case. Therefore the state shall intervene. According to Fichte, every citizen who contributes towards society’s wealth is entitled to claim adequate remuneration from society’s total assets. If a laborer invests time, that is, if he puts in individual effort and leisure in order to establish subsistence and leisure for society, one must compensate this justly – according to the proportion of the time employed by him to the time applied within the *entire* society and its *total* profit produced (FW X 561). The individual can thus multiply his applied hours with that economic performance ratio and may thus calculate what he is entitled to from the state (*ibid*).

All individuals are charged with being as economically successful as possible so that the community can secure the material freedom of each and everyone. Fichte, for instance, comments in the margins of his copy of Theodor Schmalz’s *Handbook of Political Science* [*Handbuch des Staatswissenschaft*] of 1808 that prosperity “is not merely the means for another end, but rather the end of the whole is to be as great, cultivated, and wealthy as it can be. – The individual is not allowed to say: I wish to put up with being poor. You should and must be as rich as you can” (GA II/13, 9). Fichte’s social-utopia needs economic growth.

But that alone does not yet solve the problem of (re)distributing value: While within the mental model of a *static* economy it is relatively comprehensible how the respective proportion of goods can be measured out for all, a *dynamic* order aiming towards growth brings along its very own econometric difficulties. In a constantly changing economy, how can one establish stable and lasting relations of property? How can one prevent the exchange-system producing ever-greater inequalities in private-property? Fichte deals with this problem with his usual tendency towards drastic solutions. He absolutely does not recognize any property prior to governmental assignment. Every position of property must, in the last instance, result from public distribution. As, however, public allocations have to proceed from equal rights for everyone, the government must assign everything to everyone in accordance with the same principles.

Not only the abstract institution of private property, but also that of concrete private possessions, is thus turned by Fichte into a canvas for governmental designs.<sup>137</sup> Accordingly, Fichte does not leave things to rest with a *one-time* allocation. He wishes also to ensure that every citizen “maintains the value of this property” through every further exchange of commodities and services that takes place even *after* that hypothetical original allocation (FW X 524). Fichte, that is, strives for nothing less than a lasting fixation of all *relative* assets. Unlike usual relations of exchange, where the cleverer individuals have an advantage over duller ones, the knowing over the unknowing, the independent over the dependent and – because of *economies of scale* and the conventional *terms of trade* – the rich have, in most cases, an advantage over the poor, from now on it ought to be so that “trading into infinity, no one will as a result become either richer or poorer” (ibid.).

What is heralded here is by no means merely the utopia of freely chosen communitarian socialism. Rather, according to Fichte, it is the “task of the state” to secure – and, if necessary, also by force – this “progress of humanity” through a firm control of all relations between commodities and prices (GA II/13, 10). The logical presupposition of that regulation of prices by the state constitutes a theory of the true value of commodities, formulated irrespective of any exchange relations. Its purpose is to enable the state to allocate to all precisely that to which they are entitled, and so Fichte strives for a metaphysically secured commensurability of the value of all commodities and services. His theory of money, doctrine of trade, and his idea of political economy all thoroughly depend upon this absolute dimension of value.

But what is that ultimate and highest criterion through which economic goods can be ascribed a completely market-independent value? For that role, mere working time does not seem to qualify since obviously equal working time does not always produce equal value – neither the same use value nor the same exchange value. In every competitive economy some lines of production certainly fair better than others and, even within one and the same profession, some producers attract more customers than others. Hence a market could hardly come to exist spontaneously in which everyone trades goods with everyone else simply for the amount of labor contained within them.<sup>138</sup> Since the individual estimation of the utility of exchanged goods continually oscillates, the desired egalitarianization of trade requires that one must politically fix value relations of the commodities’ values.

That designation now may not be a forever fixed singular attribution. Otherwise it cannot adequately reflect the continual increase in production that Fichte demands from society (FN X 544). With a *static* principle of value the increase in individual

<sup>137</sup> “The being of the freedom of the individual [...] is again completely lost by Fichte, since the empirical individual is, concerning the guarantee to property, exposed to the total grip of the administering community.” Willms, *Zur Dialektik der Planung*, 121f.

<sup>138</sup> The trade on time in especially created trade-exchanges is something different. That is an exception, however, which confirms the rule, because in such exchanges one can *only* deal in units of time. The fact that one especially needs to create such artificial environments in order to facilitate 1:1 exchange in temporal units indicates that the exchange ratios that are protected by them could, in their absence, only rarely adjust themselves. Otherwise we would not require such exchanges.

powers of production, for instance, would lead to an unequal distribution of the burdens between individual lines of production, as technology-driven growth in the economy hardly ever takes place in all sectors at the same time and in the same way. The upshot would be allocations running counter to the equal right of all citizens to their “due property” (FW X 530). Fichte thus looks for a *dynamic* medium that automatically reflects the societal progression in productive powers adequately:

It is to assign some kind of product of labor as continual criterion of all value, and to attribute the value to all remaining products of labor. That that product of labor must be a food-stuff, and certainly the most universal and most used foodstuff, e.g. a quantity of corn (a bushel) is obvious; for the possibility of life is precisely the ideal criterion of all value and labor. (FW X 563)

The quantification of all future economic production in terms of corn-bushels is *not* a self-evident proposition, however. Fichte’s quantification of economic goods in terms of corn (albeit modeled most likely after the British economics of his time) proceeds – unlike that of, for instance, Fichte’s contemporary David Ricardo (1772–1823) – in a physiocratic manner (FW X 565). Ricardo had established a corn-calculation in order to show that, by leaving aside econometrically notoriously elusive fluctuations in the value of *money*, one is able to validate certain assessments of *marginal* and *comparative* value; especially about the *relative* relation of soil-fertility to its annuity.<sup>139</sup> Ricardo, that is to say, makes an exemplary *regulative* use of the calculation in terms of corn, but in no way assumes that corn is the actual *constitutive* criterion of all value. Fichte, on the other hand, seeks in corn an *absolute* measure of value: Every advance of productive powers ought to show in the corn-price, which – inasmuch as it is not calculated in money – always remains stable and consequently serves him as a reliable constant. Fichte believes that corn continually increases in price proportional to the cheapening of the production of other goods conditioned by growth (FW X 566). Therefore, the price of corn appears to be the sought-for dynamic third medium that can express the firm value-relation of all other goods standing in exchange-relations. With this criterion of value, the entire political economy is subsequently newly directed by Fichte:

The price of everything upon its surface is produced by the state, and it seeks out the products of labor which enter into commerce and declares them; and for this price everyone will be able to have every access at any time to the desired commodities against the equivalent which is to be found in his hands. Now how should the state secure this? There remains no other means than that it itself takes over commerce, to become the [...] third class, the trad-

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<sup>139</sup> See David Ricardo, Miscellaneous Pamphlet Collection (Library of Congress) and Commercial Pamphlet Collection (Library of Congress), *An Essay on the Influence of a Low Price of Corn on the Profits of Stock: Shewing the Inexpediency of Restrictions on Importation: With Remarks on Mr. Malthus’ Two Last Publications: “An inquiry into the Nature and Progress of Rent” and “The Grounds of an Opinion on the Policy of Restricting the Importation of Foreign Coin”* (1815) (taken from the printing in *Works* [London, 1821]). For Ricardo the meaning and purpose of the calculation in corn is to show how the rate of profit of a branch of the economy is oriented by the weakest marginal profit within it: In the case of agriculture: how the rate of yield of the soil poorest in profit also determines the measure for the yield of more fertile soils insofar as the surplus of productivity of these soils are absorbed by proportionally increasing rental costs (soil-annuity).

ing class [...], that means merchants must be civil servants who buy on the state's account everything without exception that is offered to them at the fixed price, and thus sell on the state's account. (FW X 568f)

In terms of econometrics, Fichte's theory of the foundational corn-criterion falters. One reason is that the production of corn is not *intertemporally* stable; another is that even *simultaneous* corn-production requires different production-expenses in different places. There is consequently no fixed relation of applied labor and produced corn, not even when one neglects the time factor.<sup>140</sup> As a result, Fichte's desire to reach social equality through a unitary taxation of all land-ownership is already thwarted at the outset. A land-tax of this kind would – because of the differing fertility of different soils – lead to an unfairly uniform burden and thus achieve the exact opposite of Fichte's egalitarian intentions; a difficulty later ever again faced by various "One-Tax" systems.

Another problem with the calculation in terms of corn is that the bringing about of exchange relations between corn and other commodities is only imaginable, if at all, in a strictly subsistence-orientated minimal economy. In no cases does this criterion allow the construction of meaningful relations of value for the innumerable non-material goods in complex service and communication-orientated societies. Goods can enter into a corn-calculation at best according to their relevance for the objectively general interest in survival (like basic nutrition). The more differentiated a society, however, the more it produces goods directed towards subjective individual preferences. Since the latter then can only be grasped by a generalizing economic calculation, economic planning based upon a central calculation must fail – not only accidentally, but also generally – to establish a stable relation of equivalence between corn and those differentiated economic goods.

Why these economic details? Because with Fichte's assumption of an a priori determinable value of commodities there topples a central-pillar of a distributive politics supposed to secure for citizens equal access to all life-goods relevant for freedom. Fichte overestimates the hermeneutic competence of the state and underestimates the heuristic potentials of the market. He does not even consider the contribution of fair, justly accessible and ordered markets for the establishment of value relations between goods and services. Compared with his ideal of an optimal ethical distribution, Fichte deems every market-constituted evaluation of goods and allocation of commodities to be pitifully deficient. He views market prices only as distortions of just exchange-ratios, but never as procedures achieving the latter approximately.

Fichte thus explains changes in price only in terms of the profit-motive of merchants to pass overpriced commodities on to consumers. Accordingly, he values the profits of trade as an illegitimate robbery from society's treasures and concludes that the state should rather place trade in its own hands (FW X 569f). Yet that is not all. As soon as domestic trade is value-metrically brought into line, the established

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<sup>140</sup> See David Ricardo, Miscellaneous Pamphlet Collection (Library of Congress) and Commercial Pamphlet Collection (Library of Congress), *On the Principles of Political Economy and Taxation* (1817) (taken from the printing in *Works* [London, 1821], 121).

price-relations must be protected from foreign trade. Fichte's more detailed considerations about this (FW X 587ff) are variations upon the selfsame theme of *The Closed Commercial State*. They follow the schema: The national economy presents an endangered order, which all too easily would be brought into disequilibrium by uncontrolled inner and outer commercial movements. The state thus requires unlimited powers of control and coercion.<sup>141</sup> In essence, economic freedom cannot exist within or through the market, but only outside of it.

It would certainly not be fair to gauge Fichte in terms of knowledge reached only after the failure of 'Real-Existing Socialism' (*real-existierender Sozialismus*). But one should certainly compare Fichte's theory with the level of knowledge within the economics of his day. After all, that is what he wants to surpass. It is thus quite significant when Fichte ignores its insights. When he views commerce as nothing other than an exploitation of customers, he overlooks, for instance, the balances and allocations resulting from the merchant's counter-cyclical sale of commodities which commerce produces within society. Since commerce reacts to price-differentials and so gradually reduces these, it leads in the long term to a more efficient allocation of goods – and thereby to an increase in society's overall wealth. Profits obtained by merchants *in this way* are garnering otherwise unrealized returns and thus do not amount to a theft from society's assets. In that regard German national economics of the early nineteenth century thoroughly agreed with classical English economics. The same is true *mutatis mutandis* of commerce across borders. Trade imbalances in the *roundabout commerce* of an international exchange economy can lead to an increase in the prosperity of all parties. That had been previously recognized within classical economics since Hume and Smith, and Ricardo had begun to model such effect already, although still with fictional numerical values.<sup>142</sup>

Fichte, though, considers the appeals of English economics to spontaneous commercial balances as the evasions of a lazy reason refusing to engage with the construction of plans (FW X 554). He believes that before him one just did not yet seriously penetrate the concepts of property, trade, and exchange – and thus one had simply been unaware of the possibility of governing economic life by pure reason. Here, too, Fichte misjudges the state of the discussion back then. English economists had developed their theory of dynamic orders coping with inequalities productively as a reaction precisely to the failed hopes of mercantilists and physiocrats

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<sup>141</sup>About this see Fichte's outline "Concerning Bonds [*Pfandbriefe*]," which probably came into being around 1809/10, especially his remarks there concerning the 'Durability of Value' (GA II/13, 11): "Only the state can secure the durability of this (we again insist upon a closed Commercial-State)."

<sup>142</sup>For the contemporary status of the discussion about the national economy, see the article "Political Economy" in the fourth edition of the *Encyclopedia Britannica, Or, A Dictionary of Arts, Sciences, and Miscellaneous Literature* (Edinburgh, 1810), vol. 17, 106–123, as well as the equally very instructive article of the same name in *The Cyclopaedia or: An Universal Dictionary of Arts, Sciences, and Literature* (Philadelphia, New York, 1810). For the integration of Fichte's theory within the contemporary context of German philosophical theories of economics see also Tetsushi Harada, *Politische Ökonomie des Idealismus und der Romantik: Korporatismus von Fichte, Müller und Hegel* (Berlin, 1989).

to devise an economy completely planned by the government; attempts in many ways resembling Fichte's. The British-Scottish economists had not simply overlooked, but rather rejected, the option of outlining rationalist models of closed cycles of goods and static commercial balances.

### 2.2.4 *Socialism Versus Social-Democracy*

A philosophical evaluation of Fichte's theory must obviously begin with the idea of freedom, around which revolves his outline for a socio-economic order directed by the state. In this regard, it is first of all to be recognized that Fichte very early on saw – and appropriately evaluated as challenges to freedom – some essential problems posed by the globalizing market and exchange economy. Fichte justifiably rails against conditions forcing human beings – out of economic necessity – to agree to contracts they would otherwise never enter. That is particularly pertinent wherever – as a result of historical injustice (colonialism, imperialism) – people end up in situations that render it impossible for them to reject the very conditions, defined by outer powers, for their own economic participation in the global market. Unjust commerce is illiberal.

Translated into the language of sport: Whoever has no other choice but to earn his living through boxing at fairs (*Preisboxen*), certainly recognizes – with every entrance in the ring – the fundamental rules of boxing as de facto binding, but not, for that mere reason, as fair. Something similar is true today of many developing countries. They cannot renounce participating within the global economy, but in no way find their legitimate interests appropriately addressed by the regulations of the *World Trade Organization*: Fichte clairvoyantly recognized this problem. Wherever there is no global government to govern the global economy, sheer power often defines the *terms of trade*: Trade agreements concluded by asymmetrically positioned partners, however, often perpetuate precisely the very economic unfreedom and indigence that bring the weaker party to the table. In this regard, Fichte's critique of an economic freedom naively seeking liberalism through *laissez-faire* economics certainly remains cogent. Free trade is only to be demanded in lockstep with the gradual development of a global economic order that secures fair access to the global market for all world citizens.

Yet Fichte's recommendations for therapy appear to be just as erroneous as his diagnosis was sound. Whoever recognizes that decentralized transactions – under certain unfavorable presuppositions – create, or worsen, injustice, had better direct the wind of change to those unfavorable frameworks than attempt to nullify the free exchange of goods and services. His optimistic faith in a planned economy notwithstanding, Fichte anticipates that citizens might attempt to break out of his fixed exchange-schema. Hence he tries to foil such attempts by contriving multiple measures of police-control and supervision. But he thus throws into question why citizens would want to escape a system that grants them “property absolutely guaranteed by the state” (FW X 561) without any market risk? Why would they not

simply want to wait obediently until the hand of the state doles out to them what they require for economic autonomy?

Fichte casually asks this question himself when investigating why human beings trade in and with variable currencies (FW X 575). No one can know what quantities of gold and silver are yet to be found upon earth, or which quantities of goods are to be acquired by them (FW X 575). Compare this to the quantity of corn-money controlled by his ‘state of reason’ (*Vernunftstaat*), which exactly represents one-to-one the available quantity of corn and thereby offers a stable foundation of value (FW X 571f.). For Fichte it thus appears to be completely unreasonable that citizens everywhere accept commerce in non-fixable – i.e. themselves traded – currencies (FW X 575). The aim of a generally balanced commercial transaction would thus always be endangered, and through disadvantageous trades one would constantly be in danger of reducing the level of property previously maintained. Fichte can thus understand the commerce in unstable currencies extant upon the world-market in no other way than as brought about “by the need” of the trade-partners (FW X 576). If they did not have to sell under conditions of uncertainty, they certainly would not; hence, if they do so, they are certainly coerced; and he concludes: “Here reigns *force*, certainly not right” (ibid.). “Who profits thereby ... ? Whoever understands well to calculate the needs of others. All commercial speculations, what else are they but presuppositions of such need” (ibid.).

The unintentional irony within Fichte’s reasoning lies in his attempt to help out here with price-dirigism. Certainly, most human beings in no way wish to be diverted from the ‘predicament’ of a commercial or financial transaction resting upon their estimation of its personal benefit to them. One must rather force the ‘blessings’ of a planned economy upon them.<sup>143</sup> Fichte fails to realize that, not only the criminal and crazy, but also everyday citizens tend to prefer their own judgment of the situation to benevolent state planning.<sup>144</sup> Yet, in the firm possession of objective assessments of economic value, Fichte feels comfortable to disregard these subjective evaluations.

Which leads us to the question: If Fichte had not erroneously believed himself to possess an infallible criterion of value, would his economic theory then perhaps have turned out differently? Which form of economy would he have ended up with if he had renounced the assumption of a metaphysical omniscience in economic evaluations? How would his postulate of providing – for liberty’s sake – an appropriate sphere of efficacy for all individuals be realized under conditions of informational uncertainty? Under this premise, might not the answer be found in forms of *recursive* freedom instead of in forms of *directive* freedom, therefore in forms which – instead of *coercing* – make the *freedom* of individuals the means for socio-economic reform? With the impossibility of an absolute measure of value one

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<sup>143</sup> In Fichte’s state, money remains the only private property openly available, but also only within narrow boundaries, for it is significantly limited by political state-interventions as well as by the exclusion of all foreign money in its individually liberating effect. See Willms, *Zur Dialektik der Planung*, 123 n.560.

<sup>144</sup> See Karl Hahn, *Staat, Erziehung und Wissenschaft bei J. G. Fichte* (München, 1969), 109.



should expect a renewed appreciation of subjective estimations of utility and a reevaluation of market dynamics.

Once one no longer sees market transactions, like Fichte, merely as an economic state-of-nature to be corrected by the state (FW X 578), then market-based price formations appear in a new light. They now appear as interpersonal discussions about how much – in terms of money – citizens appreciate certain goods. That this conversation is comprised of verdicts about prices that differ and vary from one person to another as well as from one situation to another is, then, not only innocuous, but rather welcome. While such a free and fluctuating formation of prices certainly eludes all rational planning, it is, however, not necessarily contrary to all reason. Subsidiary allocations by the market are rather a-rational; they require a philosophical interpretation which does not force everything into that dual schema of rational versus irrational favored by Fichte. The exchange value of commodities and services established on the market is not inevitably a *deceptive illusion* (*trügerischer Schein*). Rather one might come to see it as a *necessary appearance* (*notwendige Erscheinung*) of the use value of goods and services which otherwise, i.e. in and of itself, remains ineffable: as a value, that is to say, which although not formed rationally might still – under determinate further presuppositions – be approved by reason.

Such a point of view also corresponds more closely with the liberal foundations of economic philosophy worked out by Kant, upon which Fichte believed himself to be building. Kant had, after all, defined the price of commodities: “the price (*pretium*) of a thing is the judgment of the public about its *value* (*valor*) in proportion to that which serves as the universal means to represent reciprocal exchange of *industry* (its circulation)” (AA 6:289). For Kant, inter-subjective judgments of value determine the price of commodities, and not – as with Fichte – objective costs of self-preservation. Consequently, and insofar as the prices the market establishes are not subject to the conditions of an illegitimate distortion (an – at that time as today – unfortunately all too often counterfactual presupposition), they may provide information about what society actually values. Thus the economic freedom of citizens could be brought about through market-transactions, not merely against them.

For the functioning of such a price-based discourse on values the procedures of the market-economy must, however, be optimized in the interests of the freedom of all human beings. Still today, the path up to that destination remains long and toilsome. Only when access to the market is equitable and negotiations on all sides are carried out without coercion or manipulation, can there be a valid supposition of justice regarding commercial agreements. Only then may it be assumed that by means of formal fairness results of substantial justice are brought about. This aspect, therefore, i.e. the appropriate *formal* and *procedural* presuppositions of a free interpersonal discourse concerning economic value, would consequently be key to advance the Fichtean ideal of a universal participation in the goods of the earth. Fichte’s socio-philosophical aims would more likely be served by a regulatory and fiscal law affirming and transforming market-freedoms, rather than with price-controls that abolish commercial freedom once and for all. Economic freedom, when universalized, demands social-democracy rather than socialism.

Georg Wilhelm Friedrich Hegel (1770–1831) argued in a similar vein. He likewise saw in social grievances tangible hindrances to freedom that must be removed. He therefore came out in favor of provisions for the poor and a governmental surveillance of the economic order. He proceeded, though, from a general recognition of the historically formed views and pursuits of both individuals and institutions. Hegel, accordingly, sought freedom in tried and tested forms of sociality and in their further advancement, instead of attempting to design the essence of freedom completely anew from the philosophical drawing board. Not abstract philosophical planning is key, but rather the concrete appropriateness of a way of life for autonomous action. One has to ascertain where, and to what extent, institutions of concrete freedom (families, businesses, associations) are to be protected and strengthened – and to what extent the state has the duty to criticize and correct these. Students of Hegel, not coincidentally, later expanded these ideas into a philosophical foundation for subsidiary social-state action.<sup>145</sup>

A short path leads from Hegel to Karl Marx (1818–1883). The bourgeois freedom Hegel aimed to protect was, Marx felt, ground down by capitalist conditions so that ultimately freedom was still only to be had in the forms of *alienation* (for capitalists) and *exploitation* (for the proletariat). Marx thus devalued as “negative,” not only the Fichtean freedom which turns against its environment, but bourgeois freedom as a whole, including all of its traditional ties – as involuntary contributions towards the consolidation of an economic system which undermines all ethical commitments and is thereby deeply contrary to freedom. As a positive ideal, Marx introduced a freedom through which all human beings could realize – also economically – their true essence, i.e. their humanity. The essence of mankind to be realized thereby, according to Marx, does not rest on the back of history (golden age, paradise, primeval communities, etc.) or upon the deepest ground of human existence (nature of humankind, image of God), but rather in the future: it consists in reaching for still outstanding forms of economic and political freedom. In the name of such *positive* freedom, Marx ultimately calls for the violent destruction of certain forms of *negative* freedom: As with Fichte, with Marx, coercion is chosen as a means for realizing freedom, but no longer with paternalistic, but now rather with revolutionary force.

Some contemporaries attempted more moderate alternatives; such as Ferdinand Lasalle (1825–1864), who, for example, wished to transform capitalism from inside by supporting institutional balances like an organized workforce, or also Franz Hermann Schulze-Delitzsch (1808–1883), who aimed to tame it through cooperatives and consumer-cooperation. For them it was a question of strengthening individuals, who are weakened by isolation, through association, and thus of forming forces able to counterbalance the power of capital. These, and other cooperatively orientated groupings of the nineteenth century sought a ‘Third Way’ between the planning-dictate of totalizing collectives, on the one hand, and the opposed extreme

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<sup>145</sup> See Stefan Koslowski, *Die Geburt des Sozialstaats aus dem Geist des deutschen Idealismus: Person und Gemeinschaft bei Lorenz von Stein* (Weinheim, 1989).

of the unregulated contingent decisions of atomistic individuals on the other; a path of mediation between individual freedom and social responsibility.

In my opinion, probably the purest philosophical formulation of that basic idea of a liberalism of responsible freedom is, however, found not with those well-known social-liberal and social-democratic figures, but rather in the work of philosopher, Karl Christian Friedrich Krause (1781–1832), who up until recently has rarely been discussed. According to him, the philosophical idea of freedom must be theoretically connected (*verbinden*) and practically allied (*verbünden*) with the citizens' consciousness of freedom in order to prove effective in society. Instead of writing in the style of Fichte and Marx against the *false consciousness* of the nation, Krause wishes to philosophize in a manner that begins with the worldview of his public. Economic justice is not to be forced through against the liberal market economy. Krause rather intends to support social justice *by means of* economic freedom and responsibility. For Krause, the means for freedom is not coercion, but rather freedom itself. He leads the idea of freedom through a critical reflection upon its presuppositions and aims toward a conception of a liberal order, which continuously reforms itself – and thus raises philosophical liberalism to a new methodological level.

### 2.3 Participative Freedom (Karl Christian Friedrich Krause)

Karl Christian Friedrich Krause (1781–1832), while hardly known within the Anglophone world,<sup>146</sup> is remembered by many Spanish and Latin-American philosophers as the authentic progenitor of a sustainable and context-sensitive philosophy of freedom.<sup>147</sup> Although Krause's philosophy was also neglected in Germany for a long time, since the 1980s, however, it has been receiving increasing attention among scholars. It has a key place in the history of ideas, insofar as Krause pioneered ideas which were later of formative importance for *German Idealism* as a whole.<sup>148</sup> Moreover, slowly but surely the outdated caricature of Krause as a

<sup>146</sup> Apart from references to Krause in the work of Thomas Hill Green and James Lorimer, as far as I am aware, in the Anglophone world, one only finds real enthusiasm for Krause within the work of Clay MacCauley. MacCauley never fails to praise Krause, and describes him as “one of the best, wisest, most prescient and, in true manliness, one of the greatest of human kind” and considers it the greatest misfortune that Krause did not become Fichte's successor in Berlin, instead of “the compliant and complacent Hegel” (Clay MacCauley, “Krause's 1818 League of Peace,” *The Advocate of Peace* 81:2 (1919), 43–44 & 48; see also Clay MacCauley, *Krause's League for Human Right and Thereby World Peace* [Tokyo, 1917]).

<sup>147</sup> See Dierksmeier, “Krausism” in Nuccetelli, Schutte & Bueno (eds.), *A Companion to Latin American Philosophy* (2010).

<sup>148</sup> See the studies by Enrique M. Ureña, *K. C. F. Krause: Philosoph, Freimaurer, Weltbürger: Eine Biographie* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1991) and Enrique M. Ureña, *Philosophie und Gesellschaftliche Praxis: Wirkungen der Philosophie K. C. F. Krauses in Deutschland, 1833–1881* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2001) as well as Claus Dierksmeier, *Der absolute Grund des Rechts: Karl Christian Friedrich Krause in*

second-rate philosopher yields to the portrait of a first-class thinker whose work was not only of relevance yesteryear, but also provides great inspiration for today.

Krause is particularly innovative as a result of his methodologically consistent implementation of the Kantian project of a philosophy focused upon freedom: dialogically, phenomenologically, and discursively. Krause thus arrives at a liberalism open to difference, which is highly suggestive for the current discussion. Directed to humanity in its entirety, his philosophy considers – at the outset of the nineteenth century – issues such as the legal representation of unborn children, minors, the disabled, distantly living peoples, and future generations. While promoting global governance structures for the peaceful resolution of international conflicts, he stresses the importance of sustainable conservation and pleads for the complete elimination of any kind of religious, sexual, and racial discrimination. And all of this was at a time when, as is well known, the prevailing tone favored the sounds of nationalistic and sexist chauvinism.

Such – in 1800 extremely unusual – postulates are not merely prophecies of a consciousness mystically communing with the future. They can rather consistently be derived from the fundamental convictions of Krause’s methodology. As we have seen, Kant had already drawn attention to the self-reflexivity of the idea of freedom (see Sect. 2.1.1). Kant had specified the idea of freedom by referring to itself as regards its *content*. Krause goes one step further and appropriates that reflexive way of thinking in regard to the *method* of philosophy as well. Krause wishes to involve all persons in the generation of the rules under which they live; wherever possible in a direct and participatory manner, and wherever this is (still) impossible, at least in an indirect and representative way. From this approach, Krause develops a global ethics of freedom, the potential of which has up to now in no way been exhausted.

The proximity of Krause’s doctrine to arguments currently championed by the proponents of ‘capability theory’ is particularly striking. Krause likewise bemoans how social contract theories fail in the face of asymmetrical living conditions: Whenever certain stakeholders (children, women, the disabled, or even animals) are so placed that the consideration of their interests is not in the self-interest of a rational utility-maximizer, the contractualist construction threatens to collapse. Krause thus suggests a revision of its fundamental assumptions (legitimizing societal solidarity by the means of a contract for the sake of a reciprocally beneficial utility-exchange), and thereby he anticipates the critique of contractualism championed today by Martha Nussbaum and Amartya Sen.

These points of contact cannot be investigated in detail here. Yet, in especially striking cases I will highlight these parallels by referring in the footnotes to corresponding claims within Martha Nussbaum’s work. In addition to Krause’s pronounced *systematic* proximity to the “capabilities approach,” there may also have been *historical* lines of connection, on one hand, by means of Thomas Hill Green

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*Auseinandersetzung mit Fichte und Schelling* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2003).

and Ernest Baker<sup>149</sup> and, on the other, by means of Friedrich Fröbel and John Dewey.<sup>150</sup>

In what follows, I first situate Krause's thinking within the philosophical context of 1800. I then discuss how his relational concept of personality and qualitative

<sup>149</sup>Amartya Sen studied in Cambridge (UK) in an environment influenced by Ernest Baker; Baker was a student of Thomas Hill Green. The latter – a leading authority in German Idealism – was not only essentially closely connected to Krause's ideas (for instance, in regard to his capability-orientated concept of freedom, his panentheistic metaphysics, and his conception of cosmopolitanism), but rather, incidentally, also explicitly referred to Krause (for instance to his definition of rights, as entitlements enabling freedom and the presuppositions of reasonable self-determination); see Peter P. Nicolson & Richard Lewis Nettleship, *Works of Thomas Hill Green* (Bristol: Thoemmes) II, 341.

<sup>150</sup>In questions of pedagogy, Martha Nussbaum aligns herself with John Dewey (e.g. in Martha Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* [Princeton, NJ: Princeton University Press, 2010], 18 & 60), who, for his part, (in John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* [New York: Macmillan, 1929], 207) explicitly and emphatically refers to the work of Friedrich Fröbel. Fröbel, however, was in direct contact with Krause. For the relationship between Fröbel and Krause see P. Hohlfed, "Über Krause und Fröbel" in *Die Neue Zeit* 3 (1874), 161–182; L. Kurze, *Die pädagogischen Gedanken Karl Christian Friedrich Krauses in ihrem Zusammenhang mit seiner Philosophie dargestellt* (Langensalza, 1911), 138–145, K. Giel, "Unvorgreifliche Gedanken über die Beziehung zwischen Krause und Fröbel," in: Kodalle & Hofgeismar (eds.) *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg, 1985), 112–123, and especially E. M. Ureña, *Philosophie und gesellschaftliche Praxis: Wirkungen der Philosophie K.C.F. Krauses in Deutschland (1833–1881)* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 2001), 215ff.: Krause and Fröbel became acquainted because Krause responded to one of Fröbel's essays in the magazine *Isis* with good-natured criticism – good-natured in respect of its pedagogical content, and critically because Fröbel presented his educational ideals as 'German,' whereas Krause advocated 'human' Ideals. Subsequently, a correspondence took place which intensified when Fröbel began to read Krause's works. Fröbel then attempted to acquaint himself personally with Krause. A meeting occurred between both teachers and some of their students that was both personally and professionally positive: The schools began to cooperate closely. Krause's son-in-law, Leonhardi, who sought to increasingly involve himself in the field of Fröbel's projects (especially in the Fröbel-school in Keilhau), became an essential link (see *ibid.* 298ff.). A close collaboration arose (from 1872 onwards) in, e.g., the General Education Association (*Allgemeinen Erziehungsverein*). Another connection could be the principle of *cyclical education* promoted on the part of the Krausist *Institución Libre de Enseñanza*. Cyclical education, as understood by the Krausists, rejects the separation of content by age groups and the compartmentalization of the disciplines. Instead, its standard model of education seeks progress through penetrating topics in accordance with the students' respective advances, deepening their grasp of them with each cyclical reoccurrence of the subject, and through clustering topics so that they meet the vital needs of the students and their societal contexts, see L. Esteban Mateo, *El Krausismo, la Institución Libre de Enseñanza y Valencia* (Valencia, 1990), 56ff. A cursory glance reveals that those pedagogical considerations are very similar to the program of a life-affirming cultivation enabling democratic self-determination that was followed by John Dewey (and supported by Martha Nussbaum). Francisco Querol Fernández also stresses (in *La filosofía del derecho de K. Ch. F. Krause: con un apéndice sobre su Proyecto europeísta* [Madrid, 2000], 395) the demand for a *life-long* cultivation closely associated with Krausism. For information about the dissemination of these and other widely exported educational principles from Krause's philosophy by the *Institución Libre de Enseñanza*, see Francisco Garrido Domínguez, *Francisco Giner de los Ríos: Creador de la Institución Libre de Enseñanza* (Granada: Editorial Comares, 2001), 59–64. In what follows we shall provide more information about the political aspects of Krausist pedagogy.

understanding of freedom motivated his adoption of a methodology fundamentally different from those of his philosophical contemporaries and associates. I go on to discuss the central positions of Krause's socio-political and economic philosophy and finally return to considerations concerning its relevance for current problems of globalization. Throughout this reconstruction examples will illustrate how his philosophy of freedom was influential in Spain and Latin-America.

### 2.3.1 *Reception, Context, and Method*

In many Spanish speaking countries, Krause's philosophy found its practical expression in the political movement of Krausism or *krausismo*, a liberalism aiming at social harmony.<sup>151</sup> Over half a century, from the middle of the 1860s until its suppression by Franco in the middle of the 1930s, *krausismo* shaped the constitutional life and political culture of Spain.<sup>152</sup> The same is true of Argentina and Uruguay, where, since the 1870s, whole generations of presidents were committed to the Krausist thinking – until, in the second half of the twentieth century, dictators took over power and suppressed any kind of liberalism. Immediately after the end of those dictatorships, the first democratically elected presidents of those countries and the parties supporting them again avowed Krause's intellectual heritage. This applies both to the Argentinian President, Raúl Alfonsín, and Argentina's liberal party, *Unión Cívica Radical* (UCR), which was very popular during his time in office, as well as to the Battle family in Uruguay, which since produced several heads of state.<sup>153</sup>

Up until the 1990s it was believed that the programmatic publications of Krausism were original creations of Iberian culture. Enrique Menendes Ureña's textual analyses have shown, however, that the writings that Julian Sanz del Río (the father of Spanish Krausism) distributed to his people were – contrary to what he made them believe – nothing but cleverly arranged translations of Krause's original

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<sup>151</sup> For more information about the Krausist concept of “harmonious liberalism” see Juan José Gil-Cremades, “Die politische Dimension des Krausismo in Spanien” in Klaus Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg: Meiner, 1985), 221–223.

<sup>152</sup> Nicolás Salmerón, president of the first Spanish republic is known to most people as “exponent de la penetración krausista en la vida pública,” see, for example, Juan Terradillos Basoco, “El Institucionalismo y el Nuevo Enfoque de la Doctrina Penal” in López Álvarez (ed.), *La Institución Libre de Enseñanza: su influencia en la cultura española* (Cádiz: Ronda, 1996), 80. Carlos Otto Stoetzer indicates (in *Karl Christian Friedrich Krause and his Influence in the Hispanic World* [1998] 98) that not only Salmerón, but also the third president of the Spanish republic, Castelar, were Krausists, which had an effect on the Spanish constitution of 1869 (see Stoetzer, 104). For the Krausist influence upon the genesis of the first Spanish republic see C. A. M. Hennessy, *The Federal Republic in Spain: Pi y Margall and the Federal Republican Movement, 1868–1874* (Oxford, 1962) & John Brande Trend, *The Origins of Modern Spain* (Cambridge, 1934), 30–49.

<sup>153</sup> See Enrique Ureña, “Krause hoy” in Jorge O. Casella (ed.), *Las ideas filosóficas que influyeron en la formación del Uruguay contemporáneo* (Montevideo, 1988), 19–27.

texts.<sup>154</sup> A few years ago, Ureña also presented extensive and meticulously researched studies which set the record straight in regard to Krause's impact on his homeland (where he was widely regarded as a "vergessener Privatdozent"). Ureña could show that there was, in a manner of speaking, something like a *German Krausism* at the end of the nineteenth century. The view that, within Germany, Krause's work never found any resonance, should thus be corrected.<sup>155</sup>

Krause deserves particular attention in the context of the philosophy of freedom of the early nineteenth century. At that time numerous thinkers strove to apply Kant's theory of freedom to social questions. In the competition to be Kant's official successor, Fichte first took the lead, by surpassing many of his competitors by virtue of the systematic rigor of his approach. Krause, although he was deemed to be Fichte's best student,<sup>156</sup> nevertheless chose to endorse this view. At the tender age of 22, he published a legal philosophy, which, in its structure and content, as well as its title, competed with Fichte's *Foundations of Natural Right*. In his "Foundations of Natural Right" of 1803, Krause explicitly accused Fichte's philosophy of grave structural and theoretical deficiencies.<sup>157</sup> This critique allows us to reconstruct how Krause broke away from Fichte's *directive* liberalism to bring his own *participative* liberalism into being.

Fichte's deductions, Krause complains, attempt "by illusory teleological proofs" (NR 236) to feign a concreteness which can only be attained by a philosophy which – unlike Fichte's – does not merely pretend to engage with people's lives and ideas.<sup>158</sup> Krause wanted to rehabilitate the everyday world-view – and its typical

<sup>154</sup> See Ureña, K. C. F. *Krause: Philosoph, Freimaurer, Weltbürger*.

<sup>155</sup> See all of Ureña, *Philosophie und gesellschaftliche Praxis*.

<sup>156</sup> See Rafael V. Orden Jiménez, *El Sistema de la filosofía de Krause: Génesis y desarrollo del panenteísmo* (Madrid: UPCo, 1998), 41–56.

<sup>157</sup> For the textual history and intellectual background of this work, see Wolfgang Forster, *Karl Christian Friedrich Krauses frühe Rechtsphilosophie und ihr geistesgeschichtlicher Hintergrund* (Ebelsbach, 2000).

<sup>158</sup> Krause's writings are referenced by means of the following abbreviations: (AR): *Abriss des Systemes der Philosophie des Rechtes oder des Naturrechts* (Göttingen, 1828); (ERB): *Der Erdrechtsbund an sich selbst und in seinem Verhältnisse zum Ganzen und zu allen Einzeltheilen des Menschheitens*, Georg Mollat, ed. (Weimar, 1893); (EU): *Entwurf eine europäischen Staatenbundes als Basis des allgemeinen Friedens und als rechtliches Mittel gegen jeden Angriff wider die innere und äußere Freiheit Europas (1814)* H. Reichel, ed. (Leipzig, 1920) (original edition 1814); (G): *Grundlage des Naturrechts, oder philosophischer Grundriss des Ideales des Rechts. Erste Abtheilung* (Jena, 1803); (G II) *Grundlage des Naturrechts oder philosophischer Grundriss des Ideales des Rechts. Zweite Abtheilung*, G. Mollat, ed. (Weimar, 1890); (GW): *Vorlesungen über Grundwahrheiten der Wissenschaft, zugleich in ihrer Beziehung zu dem Leben. Nebst einer kurzen Darstellung und Würdigung der bisherigen Systeme der Philosophie, vornehmlich der neuesten von Kant, Fichte, Schelling und Hegel, und der Lehre Jacobi's. Für Gebildete aus allen Ständen* (Göttingen, 1828); (K): *Erklärende Bemerkungen und Erläuterungen [Kommentar] zu J. G. Fichte's Grundlage des Naturrechts*, Georg Mollat, ed. (Leipzig, 1893); (LL): *Lebenlehre oder Philosophie der Geschichte zur Begründung der Lebenskunstwissenschaft* (Leipzig, 1904); (Nph): *Anleitung zur Naturphilosophie. I. Deduction der Natur, II. Anleitung zur Construction der Natur* (Jena & Leipzig, 1804); (NR): *Vorlesungen über Naturrecht oder Philosophie des Rechts und des Staates*, R. Mucke, ed. (Leipzig, 1892); (SL): *System der Sittenlehre. I. Versuch einer wis-*

assumption of an *independent* external world (K 5). Unlike Fichte, Krause does not identify a world to which one – among other things – relates oneself morally with a world that actually exists only insofar as we can relate to it thusly; a world that, abstracted from the purposes of human freedom, possesses neither meaning nor intrinsic value. To follow Fichte’s views invites thus an irrevocable dualism between the reasonable (freedom) and the unreasonable (necessity).

According to Krause, what is missing here is a medium indifferent to reason; a medium of neither reasonable nor unreasonable, but rather of reasonably determinable sensibility. As a consequence, Fichte’s conception cannot productively synthesize the ‘*I*’ with nature. Free life inevitably comes into opposition with nature, and one ends up with “precisely that erroneous view of nature as inhibition and obstruction, but not real life” (K 5). In such a theory, free activity *in* nature must degenerate into the demand for radical actualization of freedom *against* everything that is not yet reasonable – and thus also against nature. According to Krause, this is the origin of Fichte’s philosophical transformation of nature into nothing but a dead “material of duty” (GA 1/5, 353; AD 25) as well as of Fichte’s advocacy of the devaluation of animals and plants as *in themselves* worthless things, which is strongly criticized by Krause (GW 455).

Krause’s objections to Fichte’s theory of intersubjectivity have a similar focus.<sup>159</sup> As we have seen (Sect. 2.2.1), Fichte at times advocated that, so as to not forfeit its claim to recognition, freedom *qua* reasonable freedom has to be demonstrated through thoroughly ethical conduct. According to Krause, however, the recognition of human dignity is something that is neither won nor lost (K 11). Hence the forever *conditioned* reciprocity of factual recognition cannot justify the basic right of all human beings to be recognized as moral and reasonable. Rather, the *unconditioned* right to be respected as a reasonable being justifies an absolute legal obligation (*Rechtspflicht*) towards general recognition. In direct opposition to Fichte, Krause thus demands: “Treat as a reasonable being also *one* who treats you as an unreasonable being, who does not respect your reasonableness.” Even “if no one respected me, this would not mean that I am no longer duty bound towards respect in general, not even legally” (K 13f italics in the original).

Fichte’s doctrine that the foundation of law is the symmetry and reciprocity of legal acts (*Rechtsleistungen*) is rejected in favor of a rehabilitation of “original

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*senschaftliche Begründung der Sittenlehre. Zweite, vermehrte und verbesserte Auflage, II. Abhandlungen und Einzelgedanken zur Sittenlehre*, P. Hohlfeld & A. Wünsche, eds. (Weimar, 1888); (Sysl/II): *Vorlesungen zum System der Philosophie*, Siegfried Plegerl, ed. (Breitenfurt, 1981) (original edition, Göttingen, 1828); (U): *Das Urbild der Menschheit* (Göttingen, 1851) (original edition, 1811); (VR): *Das System der Rechtsphilosophie – Vorlesungen für Gebildete aus allen Ständen*, K. A. D. Röder, ed. (1874). *Das Urbild der Menschheit* is available in English translation as: K. C. F. Krause, *The Ideal of Humanity and Universal Federation*, W. Hastie (Edinburgh, 1900).

<sup>159</sup>These objections do not affect Fichte’s later theory of intersubjectivity. Since Krause had intimate knowledge of the *Wissenschaftslehre nova methodo* (today’s text is based upon his lecture notes) – and employed a similar approach within his own theory of intersubjectivity – it should also not be assumed that they were Krause’s target.



rights” (*Urrechte*) of personality (K 29). Consequently, the freedoms owed to every human being do not result from reciprocal exchange or contract. One is not only (hypothetically) obligated to enable the freedom of all persons if and insofar as one can expect symmetrical acts in return (*Gegenleistungen*).<sup>160</sup> There is rather a (categorical) duty to enable everyone’s freedom, and this duty also extends to thoroughly asymmetrical relations (such as, for example, the rights of future generations or of people with disabilities). The social contract does not result from the quantitatively-maximizing calculation of otherwise disconnected individuals haggling for rights and advantages. Rather a qualitatively-optimizing logic of human fellowship grants to all persons the right to a self-determined life, and this also entails, according to Krause, the entitlement to commit themselves autonomously to social contracts.<sup>161</sup>

Fichte’s doctrine, according to which only strict reciprocity can justify claims to rights is, incidentally, rejected by Krause, even in cases where exchange and contract theories (*Tausch- und Vertragstheorien*) are by their very nature particularly strong, namely, in the sphere of civil-law contracts. In no instance, according to Krause, does right arise *from* contract alone. It is rather the case that everyone’s right to personality produces a right *to* enter contracts with others: And this is why it is not the arbitrary will of the parties which is the basis of rights, but, in the first place, human rights that provide the necessary basis for private legal autonomy:

The validity of law can therefore not originally be based upon some kind of contract since every contract presupposes an arbitrary determination of the will. Choice (*Willkür*), however, is any determination of inner freedom which derives its determining grounds merely from the willing person as individual person. Law rather first gives to the free will the sphere of its choice and justifies it to move arbitrarily within its limits. For any contract to have legal force one has to presuppose the existence of rights in and through the state in order to enter into such a contract. In short, in the already established state it is possible to enter into rightfully binding contracts [...]. It is therefore a deep and dangerous misunderstanding to ground all rights, even the state, and all legally binding powers, upon contracts, upon so-called fundamental contracts, which have no legal force beyond said choice”. (ERB 39f.)

Even contracts within the realm of civil law and the obligations accompanying them do not always come to an end, as Fichte believed, as soon as just one party does not comply with the contract in some way (K 37). That is, reciprocity creates concrete rights only insofar as it itself is already abstractly justified and legally authorized for it – an insight, by the way, which accords with today’s juridical practices and productively contradicts the reconstructions of law and society prof-

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<sup>160</sup>To see what the “capability approach” has to offer for the same topic see Martha Nussbaum, *Frontiers of Justice*, 393f., e.g. the following quote: “We do not have to win the respect of others by being productive. [...] Productivity is necessary, and even good; but it is not the main end of social life” (ibid., 160). The search for reciprocal advantage would simply be a “wrong account of the primary basis for social cooperation” (ibid., 129).

<sup>161</sup>Compare with Martha Nussbaum’s claim that “we acknowledge, as well, that the kind of sociability that is fully human includes symmetrical relations, ... but also relations of more or less extreme asymmetry; we insist that the nonsymmetrical relations can still contain reciprocity and truly human functioning” (*Frontiers of Justice*, 160).

ferred by game theory and utility theory that dominated the end of the twentieth century (about which there is more in Chap. 3).<sup>162</sup>

In the same context of a rejection of the mechanistically-reciprocal justification of rights, Krause also attacks Fichte's theory of excessive self-defense. If people harm us but slightly, one may not maltreat them *ad libitum*, since their actions cannot extinguish the constitutive legal relationship between us and them (K38). On the whole, Krause rejects what he sees as Fichte's "unlawfully determined" criminal law, which recognizes a barbarous penal power that, upon illicit conduct, would rob human beings of their right to dignity and henceforth treat them like beasts (VR 116).<sup>163</sup> Succinctly and powerfully, Krause notes:

The *thesis* is false, for its condition [i.e. that the other acts illicitly] is in no way the foundation of legal status (*Rechtswürdigkeit*), but this is rather the reasonable nature [i.e. of the other]. It is impossible that the latter be stripped off by a single illicit action [...]. Therefore, Fichte's positing of rigid consequences [*Fichtes Konsequenzmacheri*] is unjust. (K 46)

For Krause, freedom is an upshot of humanity's "reasonable nature". On this foundation rests the unconditioned dignity of human life, which is – even for the respective persons themselves – inviolable.<sup>164</sup> Consequently, universal "rights for world citizen" (*Weltbürgerrechte*) are to be proclaimed, which guarantee certain freedoms to all human beings, not based on their specific citizenship, but in virtue of their general personhood. Concerning those cosmopolitan rights, Krause writes:

They belong to me not insofar as I am a citizen of this particular region and state, but insofar as I am a citizen of the world. I can thus call them, together with the rights to my body, as the proximate condition of their attainment, my rights as a world-citizen [*Weltbürger*], and call my possession of them my cosmopolitan property [*weltbürgerliches Eigentum*]; they rank higher than any positive form of coercion and are indelibly etched into the legal constitution of the world [*Gesetzbuch der Welt*]. (G 28)

Since the idea of freedom is not only the highest content of his philosophy, but serves also as its ultimate methodological principle, Krause has no desire to present his philosophy of freedom as ready-made before the public. He rather aims for the active contribution of the public. If a philosophy of freedom is to be liberating, freedom's ends and means must harmonize. Philosophy's path has to foreshadow its goal. Krause does not want to *persuade* his readers rhetorically, but rather aims to *convince* them truly. This is why he constantly refers back to pre-philosophical attitudes and everyday sensibilities and integrates them into his train of thought. He searches for a theory that does not dismiss as unscientific humanity's everyday con-

<sup>162</sup>See also Martha Nussbaum's intensive critique of "contractualism" as such: "our dominant theories of social contract give us the wrong message. For centuries they have been giving us a defective story about why people get together to form a society" (*Frontiers of Justice*, 222f.); see also *Creating Capabilities*, 87.

<sup>163</sup>See Michael Köhler, "Zur Begründung des Rechtszwangs im Anschluss an Kant und Fichte," 118.

<sup>164</sup>Compare with Martha Nussbaum's claim that "the approach espouses a principle of each person as an end. [...] The approach, however, considers each person worthy of equal respect and regard, even if people don't always take that view about themselves" (*Creating Capabilities*, 35).

cerns and world-views. The goal must rather be to understand, reconstruct, and address these more clearly and coherently than they themselves can; where that succeeds, people will heed philosophy gladly and voluntarily. For that reason, Krause's focuses upon dialogical argumentation, comprehensible thought-experiments, and a theory formation – open to falsification – open to empirically testing its explanatory power. In short, he focuses upon methods which only later became widely adopted in academic philosophy.<sup>165</sup>

From 1803 onwards, there are therefore two strands to his philosophy. He develops his theory by means of a continually self-critical engagement between analytic and synthetic observations, which mediates between scholarly ideas and everyday worldviews. The indispensable conceptual *constructions* serving all theory-formation should combine intellectual speculation and experience in a process of thinking in which “the deduction and the intuition of the object, as though holding hands, proceed together side-by-side into the depths” (SysIP 336).<sup>166</sup> Two things are thereby avoided: The lack of contact with reality of those solely *deductive* methods which retreat into merely formal and conceptual worlds on the one hand, and the unimaginative blindness of purely *inductive* approaches and the analytical opaqueness of merely *intuitive* approaches on the other (SysIP 334f). In marked contrast to the speculative philosophies of the time, Krause makes clear that it is in no way as though “the constructing philosopher wishes to masquerade as the Creator; [...] or [that] the philosophizing spirit [*Geist*] ventures to scientifically deduce, demonstrate, and construct, as such, the infinitely determined temporal individuality of things” (SysIP 337). A philosophical *construction* should rather only be the link uniting the given intuitions, inductions, and deductions, which are required for this reciprocal critique and integration into a universal theory. Such construction, consequently, does not rest upon a mystical power of intuition or representation inaccessible to ordinary people.

Krause's philosophy thus contains presuppositions which enable it itself to be critically surpassed. The conceptual constructions of his philosophy result from free, creative mental activity (*Geistestätigkeit*): without blueprints and guarantees of success. Krause expressly underlines the capacity for error and revision of all philosophical speculation. Only thus can one avoid a philosophy like that of his teacher Fichte, which in extracting results from erroneous premises immunizes itself against any critique, only to fail all the more dramatically the more consistently it proceeds (SysIP 335f).

For this reason, too, Krause turns to his readers. In the light of their experience and insights, he examines, time and again, his constructions. While the *German Idealists* sometimes took to the lofty heights of a “transcendental” or “absolute consciousness” and, from this perspective, rebuffed the protestations of the “mundane” and “blind” consciousness of ordinary people as *per se* intellectually unsatisfactory, Krause takes them seriously. Although, Krause does not automati-

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<sup>165</sup> For more detailed information about this see Dierksmeier, *Der absolute Grund des Rechts*, Chapter IV.

<sup>166</sup> See *ibid.*, 322ff.

cally regard every critique as justified, he nevertheless takes up each objection and always tries to do justice to the concerns it conveys. No reasonable critique, he believes, can be completely off the mark; this is why their respectively applicable aspects must be recognized and acknowledged first. Only subsequently may one then proceed to a theory that integrates and surpasses these objections.<sup>167</sup>

Krause's theoretical philosophy takes a didactic path designed as a discourse that gradually leads his readers from their respective knowledge and level of insight to the requisite *synthetically* speculative topics of metaphysics. In his practical philosophy, that analytical approach develops out of the prevalent moral convictions of his contemporary citizens. Krause accepts their reservations as an indication that his philosophical constructions are yet imperfectly explained or still in need of revision (Nph 84). In this way, in Krause, the public is transferred from a passive object of philosophy into an actively participating subject. And just as with the establishment of truth in theoretical philosophy, Krause also involves the public within practical philosophy: By integrating their actual conceptions of freedom into the procedures of ethical argumentation.

### 2.3.2 *The Freedom of Nature and of Humanity*

In the philosophy of the nineteenth century, nature is often reduced to a mere object of human activity. Krause however looks for human freedom not so much in *independence* from, but rather in *interdependency* with, its environment. Human beings ultimately develop themselves and their freedom, not only in abstraction from their biological and social contexts, but rather mostly in and through them.<sup>168</sup> Human beings live in and out of relations to their shared environment and posterity (*Um-, Mit- und Nachwelt*). From this relational understanding of the person there results a sustainability-orientated concept of freedom. Clearly, human beings must maintain the natural preconditions of their life if – in using their freedom – they do not want to negate its preconditions (VR 58). Since human freedom always depends on a context, every enlightened thinker will demand the “protection, maintenance and support of nature” (NR 135). Furthermore, Krause reasons that nature ought to be grasped according to its own laws and “in its inner freedom and absoluteness” (Nph 82).

Krause incorporates into his philosophy ontologically, as well as ethically, the degrees of freedom realized within all living beings, i.e. their self-organizing

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<sup>167</sup> For more information about the development of Krause's philosophical system in reaction to Fichte's metaphysics see also Stefan Groß, *Die Philosophie Karl Christian Friedrich Krauses im Kontext des Deutschen Idealismus: Vom Bild des Absoluten Krauses Lehre vom Göttlichen und Fichtes Wissenschaftslehre von 1804* (Berlin: Peter Lang, 2010).

<sup>168</sup> Compare with Martha Nussbaum's claim that “we insist that need and capacity, rationality and animality, are thoroughly interwoven, and that the dignity of the human being is the dignity of a needy enmattered being” (*Frontiers of Justice*, 278).

capacities,<sup>169</sup> and thereby departs from the trend of his time towards an *anthropo-centric* devaluation of nature (ERB 36).<sup>170</sup> Yet he does not lapse into the other extreme of *biocentric* thinking, but rather argues *anthroporelationally*: It is necessary to convey to the human consciousness, according to its categories, all natural boundaries it ought to recognize.<sup>171</sup> Precisely this mediated conveyance is *imperative*, because nature does not immediately reveal its internal structures of intrinsic values at first glance.

In order to situate ourselves within nature as adequately as possible, we should strive to understand nature according to its *own* laws and strivings. Nevertheless, man, being situated within nature, cannot attain a God's-eye view. Nature must therefore be reflected upon in a twofold way: From the human perspective, and also with a critical glance upon this perspective. We are to recognize each living being as something not designed for mankind but living according to its own freedom (ERB 45), while also keeping in mind that, as far as we know, the human being is the only creature on earth aiming to evaluate accurately this intrinsic value of nature (ERB 36).<sup>172</sup> That nature's intrinsic value (i.e. independent of our consciousness) cannot be assessed by anything other than our consciousness hinders the *immediate* derivation of normative commandments from facts. Biological facts can at times constrain, but never obligate us.<sup>173</sup> For this reason, biocentric theories – be their motives as noble as those within the *deep ecology* movement or as ignoble as those of social Darwinism (*survival of the fittest*) – cannot claim *immediate* moral validity. Diagnoses are insufficient; we require valuations.<sup>174</sup> Krause thereby questions that position which later on, since the time of George Edward Moore (1873–1958), has been called the *naturalistic fallacy*.<sup>175</sup>

Conversely, we must also not commit the obverse *normative fallacy* of teleologically ascribing moral purposes to nature (VR 104). Krause likewise strongly opposes the tendency, found within Antiquity and throughout the Middle Ages up until eighteenth century scholasticism, which metaphysically inscribed the respectively favored good as a supposedly inherent striving within the essence of human life. In

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<sup>169</sup> Compare this with Martha Nussbaum's claim that "what is relevant to the harm of diminishing freedom is a capacity for freedom or autonomy. It would make no sense to complain that a worm is being deprived of autonomy, or a rabbit of the right to vote" (*Frontiers of Justice*, 360).

<sup>170</sup> Ernst Bloch even speaks of an "*abolition of nature* in German Idealist Natural Law" in "Naturrecht und menschliche Würde," 91 (see also *ibid.* 86).

<sup>171</sup> For Martha Nussbaum's position on this see *Creating Capabilities*, 161.

<sup>172</sup> See the similarly anthroporelational ethic of Martha Nussbaum in *Frontiers of Justice*, 355.

<sup>173</sup> A similar argument can be found in Otfried Höffe, "Naturrecht ohne naturalistischen Fehlschluss" in Höffe (ed.), *Den Staat braucht auch ein Volk von Teufeln: Philosophische Versuche zur Rechts- und Staatsethik* (Stuttgart, 1988), 35.

<sup>174</sup> Compare with Martha Nussbaum's claim that "the Capability Approach is not a theory of what human nature is, and it does not read norms off from innate human nature. Instead it is evaluative and ethical from the start" (*Creating Capabilities*, 28).

<sup>175</sup> See §12 in George Edward Visser Burkhard Moore, *Principia Ethica* (New York: Barnes & Noble, 2005) and, for more detail, see William K Frankena, "The Naturalistic Fallacy," *Mind* 48 (1939), 464–477.

searching for ethical norms, one cannot avoid the self-critical spirit of humanity and its freedom.<sup>176</sup>

The values and aims of freedom are not arbitrary, however. Whoever emphasizes freedom within ethics does not necessarily reduce morality to the contingent collusion between contractual parties negotiating their liberties, just as if human decision alone confers value upon the world. From the indispensability of human freedom for moral values it neither follows that freedom *alone* presents a good to be respected, nor, conversely, that our freedom is diminished *only* in respect to the values it facilitates. If, that is to say, freedom fulfills itself in the effort to relate properly to its world and contexts, then the construction of the inherent value of the natural environment may be neither arbitrary, partisan, nor unfree. A daunting task for philosophical construction.

Krause takes up this challenge by presenting and discussing different levels of freedom and consciousness of freedom in nature as a criterion for the relevance of non-human interests. Specifically, he distinguishes “three essentially different levels of finite reasonable personality” and the grades of freedom belonging to each (VR 245). The lowest form of freedom describes individuals whose self-direction is merely physical. The next level incorporates persons, whose behavior is orientated mentally but is only (pragmatically) rational (*verständlich*) and not also (morally) reasonable (*vernünftig*), i.e. whose acts are only conditionally motivated and not based upon unconditional reasons. The third level of freedom describes those who, in addition, become self-conscious in a reflexively philosophical manner and from this standpoint critically evaluate their preferences. “As to these three levels of reasonableness, we find all three of them presented in certain ways by the human beings upon this earth” (VR 245).

In this way, Krause anticipated Ernst Haeckel’s (1834–1919) globally influential thesis of the recapitulation of the development of species (*phylogeny*) in the development of the individual (*ontogeny*): Every human being initially repeats in his personal development “certain periods” of vegetative and animalistic life (LL 18), within which he nevertheless would only remain as a result of a lack of education or disability. For most of their lives, most human beings act according to the second level of consciousness of freedom, i.e. in the mode of self-assertive finality. To a human being in the full sense there potentially belongs, however, also that highest level of consciousness – self-critical freedom – as well as, actually, a more or less conscious striving towards it.

The essential difference between animal and human being lies in the human I’s ability to recognize itself as integrated by self-transcending rules and norms to which it is knowingly and willingly bound. Animals are not capable of that, since “they determine themselves only according to sensory finite impulses and not according to eternally infinite concepts [...]” (VR 172). Within “the sphere of our experience” we thus rightfully see the human being as the only form of life (LL 115) to whom belongs freedom in the all-embracing sense and, consequently, also a par-

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<sup>176</sup> For the present state of the discussion see Hilary Putnam, *Ethics without Ontology* (Cambridge, MA: Harvard, 2004), 75.

ticular responsibility as well as a certain ethical primacy (ASys 183).<sup>177</sup> Krause hence neither endorses a biocentric view, seeing animals and human beings on one and the same level, nor an anthropocentric devaluation of all non-human life as mere stuff for arbitrary human use.

The special position of the human being in contrast to plants and animals is not grounded upon *actual* mental accomplishments. In contrast, Krause thinks, that often on the phenomenal level there is not such a huge difference between intelligent animals and human beings who (want to or must) live reduced to the realm of sensuality. What counts for the differentiation in species is rather the *potential* form of reflexive self-determination: An ethical freedom, to which only human beings (can) develop towards within the course of their lives. Humans and animals are not only *gradually* differentiated from one another, they differ also *categorically*. They are divided by precisely that difference which runs between purely technical ratiocination (which is environmentally conditioned and only free within limits) and moral reasoning (which is unconditionally free) (NR 136). And this constitutes a difference “in their entire essence” (LL 338). Unlike animals, mentally and/or physically limited human beings are *reflectively-autonomous* beings; their disability certainly inhibits the *articulation* of their human nature, but this does not signify a *privation* of it (LL 172).<sup>178</sup>

Hence, for Krause, disability in no way entails a loss of human dignity (VR 247). In this way, too, Krause represents a turning point within modern thinking. While numerous philosophers of the early nineteenth century demoted people with disabilities to a mere article of *Sozialhygiene*, for Krause, the disabled are never merely passive objects of law, but rather always active subjects with inextricable dignity.<sup>179</sup> To enjoy humane freedom is the right of all human beings “however deformed and deficient, however stunted, however mentally or physically ill, however immersed in misery” they may be (LL 180). For the sake of their human dignity, society is

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<sup>177</sup> Compare with Martha Nussbaum’s claim that “The species norm is evaluative, as I have insisted; it does not simply read off norms from the way nature actually is. But once we have judged that a capability is essential for a life with human dignity, we have a very strong moral reason for promoting its flourishing and removing obstacles to it. The same attitude to natural powers that guides the approach in the case of human beings guides it in the case of other animals” (*Frontiers of Justice*, 347).

<sup>178</sup> “A child with severe mental impairments is actually very different from a chimpanzee, though in certain respects some of her capacities may be comparable. Her life is lived as a member of the human community and not some other community; it is there that she will either flourish or not flourish. The possibilities of flourishing in that community are defined around species norms. [...] the fact, that their disabilities create impediments to species-typical ways of flourishing creates a moral imperative for society: such impediments should be treated and cured, where possible, even if the treatment is expensive” (*Frontiers of Justice*, 363f.).

<sup>179</sup> Compare this with Martha Nussbaum’s claim that “a focus on dignity is quite different, for example, from a focus on satisfaction. Think about debates concerning education for people with severe cognitive disabilities. It certainly seems possible that satisfaction, for many such people, could be produced without education. [...] A focus on dignity will dictate policies that protect and support agency, rather than choices that infantilize people and treat them as passive recipients of benefit” (*Creating Capabilities*, 30).

obligated to respect and care for disabled persons (G II, 189).<sup>180</sup> The disabled have an entitlement to expect that others, i.e. the state, will help them make the best possible use of their freedom (G II 189).<sup>181</sup>

This entitlement to social support is not *conditioned* by returns. It belongs to the dignity of all human beings that their rights be *unconditionally* granted to them.

Insofar as the individual citizen is affected by one or more unavoidable limitations in body and soul, he can be incapable of naturally fulfilling some legitimate requirements or become incapable of this within the course of his life. To these belong those who are born without genius, those born blind, those born deaf and dumb, those who are naturally weak etc., as well as those who are weakened by sickness or mechanical damage to body or spirit or both. Now because, as is proven, the possession of the rights that are supposed to be awarded to him are in no way originally legally founded upon what he does in return, they are rather established by the constantly available demands of reason, so can the same unfortunate [person] [...] in no respect be or become legally incapacitated as a result of his misfortune. (G II 149)

By way of legal *representation*, society advocates that rights should also be enjoyed by individuals who do not (or are unable to) demand them.<sup>182</sup> For this purpose, Krause promulgates a universal legal guardianship of humanity for *all* individuals. Instead of disenfranchising certain individuals or groups, this concept conversely serves as protection against creeping disenfranchisement (such as, of the child by the parents, the wife by the husband, the disabled by the healthy, of the uneducated by the educated, etc.). In contrast to many thinkers before him, Krause does not draw on factual dependency in order to legitimate legal dependency, but conversely forges – from the legal equality of all persons – an argument for the quickest possible improvement of degrading forms of life.

This legal guardianship, however, should – as much and as soon as possible – render itself superfluous (VR 459). Representation is to be exercised in this emancipatory sense alone. Inasmuch as, for instance, a child can adequately handle its own freedom, it should no longer be kept in tutelage (*bevormundet*); the same is true, *mutatis mutandis*, of people with disabilities who always only partially, and never totally, fall under the management, care, and legal representation of others (VR 458f). Liberation towards autonomy is both the legitimation and limitation of all representation (NR 155).

Autonomy is also the guiding theme of Krause's treatment of the difference between the sexes, which, Krause declares, is anyway much exaggerated. But inso-

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<sup>180</sup> Francisco Garrido shows that these Krausist ideas entered Spanish legal theory by means of F. Giner de los Ríos' philosophy of law – the fundamental equality of the right to dignity of all human beings was explicitly extended to the "loco" and the "feto." See F. Garrido, *Francisco Giner de los Ríos. Creador de la Institución Libre de Enseñanza* (Granada, 2001) 88.

<sup>181</sup> Compare with Martha Nussbaum's claim that "we should bear in mind that any child born into a species has the dignity relevant to that species whether or not it seems to have the "basic capabilities" relevant to that species. For that reason, it should also have all the capabilities relevant to the species, either individually or through guardianship" (*Frontiers of Justice*, 347).

<sup>182</sup> See also James Lorimer (ed.), *The Institutes of Law: A Treatise on the Principles of Jurisprudence as Determined by Nature* (Edinburgh, 1872), 308.



far as it actually exists, it in no way annuls “the universal human equality, rather it is only a further determination of it” (VR 471). Sexual differences can specify the universal human rights of women and men in respect of their implementation, but not reduce or violate them. Completely against the spirit of his time and society, Krause thus defends the rights of women in fiery words:

In contradiction to all spiritual, physical, and human empirical knowledge and history they wanted to claim that, spiritually and physically, the woman occupies a lower level of development, that women are only incomplete men [...]. Similarly averse to the nature and vocation of the human being is the claim that the whole vocation of woman is exhausted by her role as a mother and that the female half of mankind are not destined to participate in public life. The sexual function and its ethical and legal consequences (looking after the children and the household) annul neither for the man nor for the woman the demand for and the possibility of universally humane education and a satisfying career (in all aspects of the human vocation). And that which especially concerns the procreation, care, and upbringing of children is something that both sexes essentially and necessarily equally possess and, as the similarity of the bond with the children already shows, they possess the same intimate role and thus, as reasonable beings, an equally justified obligation, although the mother possesses the special duty towards the first nutrition and closest physical care in the womb and after birth. The whole life of the woman in itself must therefore, also in view of rights, be so determined that she can fulfill this duty which is only hers to fulfill [...]. (NR 272f)

Concerning the entire societal life and the participation in intellectual and material goods, Krause demands equal rights for both sexes.<sup>183</sup> At the same time he advocates specific rules for the protection of mothers.<sup>184</sup> Krause thus creates legal *inequalities* in order to enforce the fundamental *equality* of rights to autonomy in view of *diverging* conditions of its realization.<sup>185</sup>

The extent of Krause’s originality at that time is also shown by his advocacy of an autonomous sexuality which may not be reduced to the reproductive function (ERB 138), in direct opposition to his contemporaries, Johann Gottlieb Fichte and Georg Wilhelm Hegel, who were completely impervious to ideas of sexual independence or any kind of legal emancipation of woman (see § 16 of Fichte’s *Foundations of Natural Right* and § 166 of Hegel’s *Philosophy of Right*). Krause’s

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<sup>183</sup> For information about the influence of the women’s rights advocate, Angelina Carnicer, and the Krausist “feminismo” see L. Esteban Mateo, *El Krausismo, la Institución Libre de Enseñanza y Valencia* (Valencia, 1990), 103ff. See *ibid.*, 126ff for information about the *Krausist Institución para la enseñanza de la mujer* in Valencia, which prepared the adjustment of the educational differences between men and women in order to bring about concrete equal opportunities. See E. M. Ureña, “Algunas consecuencias del panenteísmo krausista: ecología y mujer” in *El Basilisco*, Segunda Epoca, 3:4 (1990), 51–58.

<sup>184</sup> See Christine Susanne Rabe, *Gleichwertigkeit von Mann und Frau: Die Krause-Schule und die bürgerliche Frauenbewegung im 19. Jahrhundert* (Böhlau Verlag: Köln Weimar, 2006).

<sup>185</sup> See also F. Querol Fernández: *La filosofía del derecho de K. Ch. F. Krause*, a.a.O., S. 317. Similar contemporary arguments can be found in Susan Moller Okin & Jane J. Mansbridge, *Feminism* (Aldershot & Brookfield, 1994). Martha Nussbaum also argues that treating everyone schematically equally “proves an ally of the status quo. In order to put women and men in a similar position with respect to educational opportunity in a society that strongly devalues female education, we will have to spend more on female education than on male education” (*Creating Capabilities*, 57).

remarks about the protection of the rights of underage children,<sup>186</sup> whose freedom and dignity, if in doubt, must be defended against even their parents (G II 189), also far surpasses the horizon of his contemporaries. The family is subjected to the laws of society and is also controlled by it – especially with regard to the education of children. For a comparison one need only glance at the starkly illiberal views of Fichte (§§44f. of his *Foundations of Natural Right*) and Hegel (§175 of his *Philosophy of Right*). While the philosophy of his time callously declared children the property of their parents and wives the property of their husbands and – completely or partially – deprived them of their own rights to freedom, Krause campaigned for their autonomy.

Krause's theory of human sociality correlates the societal norms with grades of freedom. The various levels of maturity, which human freedom moves through, involve various forms of responsibility (LL 127ff.).<sup>187</sup> Individual life begins with "sensory freedom," which takes its cues from context, follows habits, and customs (VR 441). On a next level of "rational freedom [*verständiger Freiheit*]" individuals set about making themselves more independent of their contexts – specifically through rational abstraction, and, for instance, emphasize their subjective characteristics in contradistinction to society (ibid.). That intellectual freedom leads to the productive liberation of individual capacities and energies, but – exclusively exerted – also to one-sidedness and isolation. It is rectified by a "reasonable freedom [*vernünftige Freiheit*]" (ibid.). This highest level of freedom enables forms of coexistence surpassing connections concerning mere needs and interests by uniting human beings in the name of ethical aims (ibid.).

In the right to freedom lies the philosophical foundation of human rights. These are treated by Krause as subcategories of a more universal theory of personal rights, and thus not limited to, though exemplified by, *homo sapiens*. Life's essential grades of freedom are the main criterion. Plants, for instance, represent a form of unconscious life, which, internally as well as externally, certainly exhibits functional self-organization in space and time, but not conscious self-reflection. Yet the idea of freedom requires conscious life, and thus only comes into existence when an entity knows about itself and its environment. Plants are therefore not subjects of a freedom-oriented ethics, but only its objects.<sup>188</sup> Hence biocentric theories propounding the ethical equality of human life with plant life cannot find support in Krause.

Yet, at the same time, Krause does not argue anthropocentrically, as his animal ethics show. All animals represent forms of *conscious* life. Some animals, moreover, possess more highly developed forms of *self-conscious life* and *personality*.<sup>189</sup>

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<sup>186</sup> See Querol Fernández, *La filosofía del derecho de K. Ch. F. Krause*, 178–183.

<sup>187</sup> Krause's remarks in this connection anticipate the discoveries of Piaget and Kohlberg in their empirical investigations into the development of the moral consciousness of adolescents (see Lawrence Kohlberg, *Child Psychology and Childhood Education: A Cognitive-Developmental View* (New York: Longman, 1987).

<sup>188</sup> See Martha Nussbaum, *Creating Capabilities*, 158f.

<sup>189</sup> In the same way Capability Theories define "animals as agents, not receptacles of pleasure or pain" (*Creating Capabilities*, 160).

Krause declares that such animals hold a rank of particular relevance for an ontology of freedom, “because we assume that they know themselves in certain ways, sense themselves, and strive to maintain and perfect their selfhood according to sensory ends” (VR 172). A glance at our own pets, teaches us for example:

that these beings show all those idiosyncrasies which express the lowest level of the spiritual personality; they feel themselves, feel pleasure and pain, they have representations and fantasy, as is well known they determine themselves according to social concepts, since within various individuals of the same species they nevertheless recognize the same species, e.g. just as every man distinguishes himself as man, so every animal accordingly discerns its own species. They are therefore intellectual beings [*geistige Wesen*] [...]. (VR 246)

While the majority of the thinkers of his era thought anthropocentrically, viewing animals merely as instinctively driven automata and thus as mere *things* conveniently at hand for human purposes, Krause expressly recognizes animals as free beings.<sup>190</sup> Because of their capacity for self-determination, Krause categorizes them as *persons*<sup>191</sup> – and makes a plea for their protection; a position, which, in the history of animal ethics, still waits for its proper recognition.<sup>192</sup>

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<sup>190</sup>In this way, also, Krause’s position foreshadows Martha Nussbaum’s, which likewise recognizes not only human beings, but rather “a wider range of types of beings who can be free” (*Frontiers of Justice*, 88).

<sup>191</sup>“Right exists without regard to the person. No person has a privilege (no one anticipates the right of another), but every person has his or her right. This is just as true ... of the simplest (*qui capere valet, capiat!*) animals” (NR 114).

<sup>192</sup>In Krause’s time there were certainly isolated ethical reflections on animals (for an overview see: Aaron Garrett, et al., *Animal Rights and Soul in the 18th Century* [Bristol & Sterling, 2000]): The following authors, for instance, argue in favor of animal rights, or more precisely, the rightful duties of man to animals: Humphry Primatt, in *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals* (London, 1776) argues with the golden rule, starting out from the animal’s capacity for suffering; Wilhelm Dietlar (in: *Gerechtigkeit gegen Tiere* [Mainz: Schiller, 1787]) on the basis of an ontology of happiness for all life forms; Johann Georg Heinrich Feder (in “Über die Rechte der Menschen in Ansehung der unvernünftigen Tiere” in *Neues hannovrisches Magazin* 2 [1792], 945–960) based on a theory of perfection; and Lauritz Smith, *Über die Natur und Bestimmung der Tiere wie auch von den Pflichten der Menschen gegen die Tiere* (Copenhagen, 1790), with creationist theology. They also surpassed the characteristic style typical of their era, which merely limits, to some extent, human action towards animals out of an aversion towards cruelty. Nevertheless, it is only Krause who manages to integrate questions of animal ethics systematically into the modern philosophy of freedom (which was already noted at the end of the nineteenth-century by Ignaz Bregenzer in *Thier-Ethik: Darstellung der sittlichen und rechtlichen Beziehungen zwischen Mensch und Thier* [Bamberg 1894], 208). Krause’s approach is phenomenologically more convincing than those theories interested merely in animals’ capacity for suffering. His position portrays animals not only as passively capable of suffering, but also as actively capable of freedom, and in this way it also very much resembles the Capability Theories of today; compare the following observation of Martha Nussbaum that, “mere sentience is too simple a focus: it neglects the variety of animal capacities and activities, and thus certain areas of damage to flourishing that do not register as pain.” For this reason, “uncritical nature-worship” is out of place and, and rather a “valuational exercise” is demanded (*Frontiers of Justice*, 94). Whoever today reaches back to Jeremy Bentham (cue: “capacity for suffering”) and Arthur Schopenhauer (“animals are not things”) for progenitors of current reflections on animal rights (see, for instance, Tom Regan, *Animal Rights and Human Objections* [Englewood Cliffs: New Jersey, 1989]) should therefore definitely enlist Krause in the trajectory of precursors.

Yet, as we have seen, Krause does not view animals as on the same level with human life. Fully developed human beings are capable of reflexively orientating their basic faculties, i.e. they are capable of feeling their feelings, willing their willing, thinking their thinking, but also, feeling their thinking, willing their feeling, and reasoning their willing. By means of these reflexive faculties human beings are able autonomously to criticize and direct themselves (LL 115ff.). Unlike human beings, animals are, as far as we know, incapable of such self-reflective freedom and the genuinely ethical finality this enables (NR 149f.); therefore, they are deprived of such rights that specifically shape this third level of freedom.

As soon as one considers the animal as a self-inward being possessing self-consciousness and self-feeling, one demands that man should also be just towards animals. But no one will talk about an animal justice which animals themselves practice. That is because one does not consider the animal capable of grasping the idea of justice in order to make justice its end. Thus one says: Man should be the guardian of all animals and man considers the entire animal kingdom as in need of legal representation [*unmündig*] and rightly so. (VR 205)

It is thus not because animals cannot themselves demand their rights – also children, minors, and the mentally ill are often unable to do so (NR 149f) – but because they *ontologically* exist upon a lower level of freedom that they have a different *axiological* ranking. Animals and humans possess different rights. Yet their rights are not any *weaker*. They belong directly to animals with the same binding force as human rights belong to human beings. Just as much as human rights, animal rights are *unconditional*. Just as little as human beings, do animals have to work for their specific rights; no reciprocity of rightful commissions and omissions is called for.<sup>193</sup> Just as with human beings whose autonomy is limited (such as children, disabled and senile persons) a legal guardianship is thus to be applied to animals, so that “the temporally-free conditions of the completion of their purely animalistic life are guaranteed” (VR 246). Animals possess the right to a self-determined life insofar as they (unlike predators at times) do not violate the higher level, i.e. human rights (NR 136f).<sup>194</sup>

That which humans as the representatives of the highest degree of freedom and autonomy on earth may enforce upon others of the same standing, e.g. the elimination of unlawful violence, may also be enforced upon every being belonging to a lower level of freedom. If we are allowed to limit our shared environs – by enforceable laws – for the protection of everyone’s freedom, then we are also allowed to limit that of animals insofar as their rightful interests are respected. If humans may industrially utilize their own organic waste products (hair, nails, etc.), then they may

<sup>193</sup> Today Martha Nussbaum makes similar arguments, see FJ 354–365.

<sup>194</sup> The right of animals to constitute themselves was also recognized in 1892 by Henry S. Salt in *Animals’ Rights Considered in Relation to Social Progress* (1892) [New edition: London, 1980]. Like Krause, Salt also recognizes in the moral law the legitimate limit of animal behavior (to be enforced by humanity); so that a guardianship of humans over animals has to be realized (*ibid.*, 46). However, Salt’s position is based upon an implicit “anima” metaphysics which moves every natural kind (also flowers and crystals) into a position equal to the one of humanity in a quasi-contractualist position; see Andreas Flury, *Der moralische Status der Tiere: Henry Salt, Peter Singer und Tom Regan* (Freiburg im Breisgau, 1999), 96ff.

do the same with animal resources.<sup>195</sup> Krause also thinks that it may be possible to use animal labor “for reasonable purposes” and thereby curtail the animals’ natural freedom of movement (NR 137). Such a use does not automatically impinge upon the respective animal’s right to freedom if it serves acceptable ends and does not distress the animal (VR 246), as we are wont to make similar use of human labor.<sup>196</sup>

More far-reaching rights are, however, problematic. May humans, who do not kill one another for the purpose of nourishment, eat animals? Only insofar, states Krause, as “without such killing humanity on earth could not exist, unless some other kind of nourishment were found” (LL 300n.). This theory does not provide a justification for the industrial exploitation of animals for gourmet purposes. For Krause believes that the justifying condition, i.e. that otherwise human life could not be guaranteed, only rarely occurs. Most people, after all, would have access to vegetarian food of adequate quantity and quality. And to destroy animal life without need cannot, according to Krause’s theory, be justified at all, since one thus negates the natural freedom of animals without good reason.

Although Krause claims that animals “have a right to bodily well-being, to absence of pain, and to the requisite nutrition” (VR 246) he does not advocate that it is incumbent on humanity to assure a comfortable existence for all living beings of this earth. As a general rule, animals are quite capable themselves to take care of their own welfare, to obtain their own food, and avoid pain, etc. – They thus realize their natural rights as a result of their own capabilities and freedom. But human interference with the animal biospheres requires due diligence (LL 117).<sup>197</sup> If one takes animals out of their original habitat, or limits it, and so impairs their capacity for self-care, then a duty to species-appropriate behavior and nutrition follows hot on the heels (NR 136n.).<sup>198</sup> This conclusion, Krause optimistically believes, would concur with a pervasive “feeling favoring justice for animals,” which “cannot be eradicated” from the human mind (NR 137).

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<sup>195</sup> Martha Nussbaum brings up similar ideas in connection with education and cultivation: “A good education is sensitive to the individuality of the child, and is not rigid and above all not cruel or humiliating, but it does have goals and standards, and exacting through respectful discipline is often appropriate in leading children toward those goals. Why should we think differently about non-human animals?” (*Frontiers of Justice*, 377)

<sup>196</sup> Also see here Martha Nussbaum: “The analogue to work rights is the right of laboring animals to dignified and respectful labor conditions” (*Frontiers of Justice*, 400).

<sup>197</sup> Compare with Martha Nussbaum’s claim that “large numbers of animals live under human’s direct control: domestic animals, farm animals, and those members of wild species that are in zoos or other forms of captivity. Humans have direct responsibility for the nutrition and health care of these animals [...]. Animals in the “wild” appear to go their way unaffected by human beings. But of course that can hardly be so in many cases in today’s world. Human beings pervasively affect the habitats of animals, [and] our pervasive involvement with the conditions of animal flourishing gives us such responsibilities now” (*Frontiers of Justice*, 373f.)

<sup>198</sup> Compare with Martha Nussbaum’s claim that “As for the idea that we should leave animals alone when they live in “the wild,” this naively romantic naturalism ought to be rejected for today’s world. There is no habitat that is not pervasively affected by human action” (*Creating Capabilities*, 162).

In dealing with animal persons as well as human persons, the aim is the same: To guarantee an optimum of freedom through lawful representation and protection. For both humans and animals, this implies a facilitation of the requisite space and opportunities for free individuation. With regard to human social relations, Krause, therefore, highly appreciates how the differentiation of modern society allows individuals to realize personal talents and preferences so as to play a part in society in their own unique way. But whoever supports the functional differentiation of society must also promote the sectorial specialization of ethics. A diversified society can no longer be directed by an ethic wholly alike for everyone and remaining the same for all times; it rather has to open itself up to regionally, professionally, culturally, and personally diverging representations of the good. The ethic of freedom is then to be so structured that it becomes receptive and adjusted to the peculiar logics of different societal subsystems.

A liberal society therefore cannot derive laws from a far-reaching metaphysics of the good, but rather justifies legal norms in and for themselves so that these enable human beings – all human beings – to strive for the good in their own way. Accordingly, Krause distinguishes, for example, an *ethical* concept of freedom from a *legal* concept of freedom. Krause declares that “the essential form of human life itself is ethical freedom, that is one’s *innermost* [*selbsteigne*] choice of the individual good [...]” (NR 254). Legal freedom, in contrast, means freedom in which “everyone would have to possess a determinate outer sphere for the confirmation of his ethically free efficacy, in which sphere he can externally realize that which he internally cognizes with ethical freedom as good and thus decides to realize” (VR 452f.) Legal freedom protects the potential of reasonable freedom; ethical freedom realizes it. The freedom to be legally protected should *enable*, but not *enforce*, the ethical orientation of individuals.

The law is to grant opportunities, but not to lead mankind in shackles towards the good life (G II 166f.). The good should enter into the world through voluntary choices, not through coercion (VR 304). The law has consequently “to externally restrict the ethical freedom as little as possible” (NR 256), so that that *ethical* freedom can develop itself as much as possible. The first and foremost content of freedom’s law is thus a “legal authorization [*Erlaubnisgesetz*]” of the *ethical* use of freedom, negatively as well as positively: “He who possesses jurisdiction may or may not avail himself of this right of his” (NR 256). The law does not only defend the reality and actuality of ethical freedom but also its possibility and conditions (LL 191); and, with that, also lots of immoral uses of freedom. Freedom cannot be had without this ambit. “This sphere of power (of outer freedom) must namely be greater than the sphere of its already constituted, reasonably-appropriate will, otherwise the free self-development cannot take place” (VR 304). Krause knows that morals only thrive by being tried and tested in and by freedom. “Every man and every society of men thus has the right to a determinate external sphere of freedom” (VR 453).

Consequently, Krause draws sharp boundaries of legal protection around the personal liberties of citizens. Whoever is morally troubled by the other’s unethical use of freedom, he proclaims, should rather help to reduce the given motivations towards

immorality and replace them with incentives towards the good, instead of limiting the freedom of choice of his or her fellow citizens (VR 317). For since freedom not only presents one good among many (i.e. a first-level good) but also – being frequently the only path towards these other goods – a good superior to them (i.e. a second-level good or meta-good), it may not be limited for the sake of these other goods *alone*, but rather its possible limitation must *at the same time* continually be carried out in accordance with its proper idea – i.e. in the sense of a reasonably, self-limiting freedom (VR 455).

Krause thus does not advocate a (“negative”) concept of freedom without any relation at all to the good. He unambiguously claims rather that “freedom is not aimless choice [*Willkür*], not egotistic self-interest, not arbitrary lawlessness” (ERB 9). Yet Krause also does not champion a (“positive”) concept of freedom, which makes a single, quite determinate morality the foundation of ‘freedom’s rights’ (*Freiheitsrechte*). Krause can maintain this distance from either side since his idea of freedom is not committed to one materially-concrete concept of the good but directed to a structurally-abstract idea of the good. There thus arises neither a formal (“negative”) under-determination nor a substantial (“positive”) over-determination of the idea of freedom.

Certain (ethical) ends should direct but not dominate the freedom of the subject. In Krause’s eyes, ends to which human freedom is autonomously committed do not corrupt but realize the idea of law. Thus, for him, law is something more and something different from a mere legitimation and limitation of coercion, namely a system of the outer conditions for responsible freedom (G 19f.). Therein consists the pronounced proximity of Krause’s position to today’s capability theories. The idea of law has not only a negative-protective side, but also positive-productive aspects: It aims not only to protect against the ‘injury’ (*laesio*) of factually given liberties, but also at contributions to the creation of capabilities and opportunities by forms of cooperation and life which promote the individual as well as the collective pursuit of goals.<sup>199</sup>

The shelters of private freedom that the law is to provide thus do not result from indifference towards the concrete differences of the ethical aims of individuals, but rather from respect for them. Thus, for Krause, the negative – restrictive – moment of freedom does not *define*, but rather *articulates* the idea of right. It is secondary to its primarily positive focus on affording chances for an autonomous existence. If individuals reasonably limit (in the sense of negative freedom) their freedom with and for one another, they can pursue their goals with less conflict and harmonize better (in the sense of positive freedom) with the interests of the general public. The bounds of the liberal law thus do not signify a quantitative minus, but rather a qualitative plus in freedom. Krause, that is, understands negative and positive dimensions of freedom as mutually reinforcing aspects of one and the same freedom. Freedom, since it develops successively from initial *dependence*, through levels of private

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<sup>199</sup> See also Martha Nussbaum’s characterization of her own theory: Capabilities “are not just abilities residing inside a person, but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment” (*Creating Capabilities*, 20).

*independence*, to forms of targeted *interdependence*, needs on all levels of its development (in always different degrees), both the negative liberation, without which it withers, and the positive orientation, without which it wilts.

The freedom for the good ('freedom-to') nevertheless possesses logical priority. No society should ever prevent its subjects from leading an ethical life, and to this belongs the voluntary dedication to the ethical. For the same reason society must not pervert the citizens' own ethical striving and compel them to good actions (G II 166f.). People must be allowed to pursue their own respective conception of the good and must therefore be safeguarded against well-meaning heteronomy. Hence individuals require negative freedom ('freedom-from'). Both freedoms, the positive freedom to commit and the negative freedom to refuse, thus present only two sides of one and the same qualitative freedom for moral autonomy. Not in isolation but only in unison do they articulate the essence of freedom.

Among the preconditions of personal freedom, which are to be legally protected, Krause includes, besides basic individual properties and capabilities, also an individual's capacity to enter into relationships with and towards other (natural as well as collective, i.e. juridical) persons. From this concept of relational personhood follows (as a first-level right) a set of basic personality rights. To these are related (as a second-level right) a 'right to right' and (as a third-level right) a claim on society for its promotion. The personality rights are therefore self-reflexively related to their realization. Krause calls this a "right to legal empowerment" (*Rechtsbefähigungsrecht*), which should guarantee that everyone "is capable of exercising his specific rights" (VR 260f.).<sup>200</sup> Thereby Krause already anticipates much of the discussion about human rights at the end of the twentieth century: His concept of basic rights encompasses human rights of the first, second, and third generation, i.e. civic rights, rights to political participation, and to social as well as cultural inclusion.<sup>201</sup>

Since freedom degenerates without objectives, Krause also dedicates himself to the general conditions for the realization of personal ends – on the part of institutional infrastructure, as well as individual capabilities (VR 452f.). Much of what is today widely discussed in the spheres of *capability theory* was already anticipated by him<sup>202</sup>: For Krause, the radius of any basic 'freedom right' (*Freiheitsrecht*) always also encompasses the right to *cultivate* oneself accordingly so as to be able to *exert* this respective freedom autonomously. The free cultivation and exertion of one's own body, for instance, requires certain presuppositions such as an intact liv-

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<sup>200</sup> Today's Capability Theories see things quite similarly: "In other words, to secure a right to citizens in these areas is to put them in a position of capacity to function in that area." And for that it is not sufficient that one grants certain rights to citizens only on paper; one must enable them to seize these rights: "They really have been given right only if there are effective measures to make truly capable of political exercise." Thus, for instance, Martha Nussbaum formulates it and she further explains that "to do this involves affirmative material and institutional support" (*Frontiers of Justice*, 287).

<sup>201</sup> See Bard-Anders Andreassen & Stephen P. Marks (eds.), *Development as a Human Right: Legal, Political and Economic Dimensions* (Antwerp & Portland: Intersentia, 2010).

<sup>202</sup> See all of Martha Nussbaum's Capabilities lists in *Creating Capabilities*, 34f.



ing environment (VR 483). One must dwell in hygienic and unchallenging conditions (VR 498) or have access to care and treatment in the event of illness. Hence “the health of citizens” is, for Krause, a “public concern,” because without it the corresponding individual freedom easily turns out to be a chimera (G II 169).

Similarly, *rights to intellectual freedom* protect people’s *intellectual cultivation* and *exertion*. For what is the point of the freedom of thought “if one cannot concentrate and is unable to educate one’s mind and learn scientific truth”? (LL 195) A right to free agency is also needed – e.g. a right to the intellectual activity of science and the physical activities of the arts (G II 125): “To deprive someone” of the realization of these rights “means to deny his human dignity” (G II 117). Without a minimal level of education, after all, intellectual freedom hardly ever arises, which is why Krause derives a secondary right to education from the primary right to intellectual freedom. Krause has in mind a pedagogy (U 230f) which gradually empowers the human being for mature self-control (U 231–235). In a third step, he considers whether, in order to secure the impartiality of educational contents, “public educational institutions” are required (G II 169), financed by the state (G II 136). On the other hand, private initiatives in education are also to be allowed, in order to guarantee a plurality of epistemic approaches, so as to help individuals form their own, mature judgment. Consequently, for the purpose of a real freedom of expression there also needs to be an uncensored media and free access to information (*ibid.*).

The example of the educational policy of the *Institución Libre de Enseñanza* (ILE), which exists until today, clearly illustrates Krause’s basic concerns. The ILE was established in Madrid in 1876 by the Krausist Francisco Giner de los Rios in order to avoid the influence of church and state upon academic teaching and to develop Spanish citizens’ political maturity.<sup>203</sup> As Spain’s first private institute of higher education this cultural and educational institution shaped Spain’s educational elite over many decades (e.g. the famous “*generación de 98*”).<sup>204</sup> Up until its closure during the Franco era, the ILE significantly influenced Spain’s intellectual life – and also that of Latin America – by offering intellectual alternatives to the worldviews propagated by church and state. This initiative set precedents, for example, in Valencia in 1903. Based upon the free lectures of dedicated teachers, the Krausists founded there a *Universidad Popular*. Since the population was often insufficiently educated for taking up university courses, the Krausists created alternative offerings. They provided additional educational formats that made academic topics with relevance for daily life more broadly accessible. They especially attempted, by means of political education, to enable citizens to make use of their

<sup>203</sup> See J. F. Alemparte, “Aufnahme der deutschen Kultur in Spanien: Der Krausismo als Höhepunkt und sein Weiterwirken durch die Institución Libre de Enseñanza” in Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg, 1985), 141 und J. J. Gil-Cremades, “Die politische Dimension des Krausismo in Spanien,” in *ibid.*, 235. For more information about the pedagogical conception followed by the Krausists see note 285 in this chapter.

<sup>204</sup> See Juan López-Morillas, *El Krausismo Español: Perfil de una aventura intelectual* (Madrid: Ediciones Fondo de Cultura Económica, 1980).

freedom and motivate them towards the active participation in the fledgling Spanish democracy of that time.<sup>205</sup>

The transition from the realm of intellectual *education* to the field of intellectual (often: political) *activities*, as shown in these practical examples, is indicative for Krause's theory. From the right to education there follow rights, which protect the freedom of conscience and the freedom of thought (VR 481), which safeguard the "acceptance or tolerance" of a critical public (VR 483) and which guarantee that all citizens can participate in the spiritual and cultural life of their society (VR 483). In this way, Krause gradually develops a catalog of human rights from the principle of freedom, which includes the rights of social life (VR 488; 491), a protection of the intimacy and exclusivity of private life (VR 484), forms of free economic activity, and of private autonomy (VR 491).

This is not the place for a more detailed presentation of the corresponding corollaries. But the decisive idea of these considerations should once again be pointed out: Krause qualifies the idea of freedom by a theory of relational personhood which stresses the interdependence of individuals with their social and natural environments more than it stresses independence. Accordingly, Krause also relates the fundamental right to a free cultivation of personality to the specific social and environmental preconditions of individual autonomy. Because of the central role of social spaces of interaction for the development of personal freedom, his theory of freedom thus ultimately leads to a sketch of a public order in the service of freedom. That order is to be structured by emancipatory forms of interaction so that the freedom of everyone is promoted by the freedom of all; this idea is the aim of Krause's legal and economic philosophy.

### 2.3.3 *Private and Public Interest*

In countless theories of freedom there is a conflict between private and public interest. The representatives of *negative* freedom usually fight on the side of *private* interest and employ the idea of freedom in the service of protecting that interest from public interference. They are, so to speak, concerned about the maximization of private goods. Conversely the representatives of *positive* theories of freedom are advocates of the common good and recognize in public freedom a liberty of higher value to which private freedom should subordinate itself. What about Krause's theory? What follows from Krause's conception of relational personhood and his concept of freedom focusing on interdependence for the ordering of the civic sphere and the rights belonging to it (property, possession, transfer, etc.)?

Concerning the animal environment, Krause had pleaded, as we have seen, for an ethics that recommends consideration in proportion to different levels of freedom. But what kind of ethics should we apply when the object of free activity is no longer a self-conscious animal (with his own liberties and rights), but rather an uncon-

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<sup>205</sup> See L. Esteban Mateo, *El Krausismo*, 134ff.

scious plant, or even a nonliving thing without inherent freedom? Are boundaries then also still to be drawn or can human freedom now enjoy unhindered choice and exploit the world as it pleases? What liberties may human freedom take with unfree entities?

Nothing, according to Krause, can be absolutely worthless (ASys 182), because of the never to be excluded possibility of it serving somehow, someone, at some time, as a means towards freedom (NR 139). Sustainability protects future freedom. As a consequence, anyone disturbing or destroying the environment must justify their actions; it must plausibly be the case that they thus create more freedom than they annihilate.<sup>206</sup> Unlike most liberal thinkers, Krause does not first abstractly allow the use of nature, only to then, subsequently, limit it as required. Rather, Krause prohibits from the outset every useless and purposeless destruction of nature as well as every excessive exploitation of nature: “Things are to be consumed, that is destroyed through their use, (a) only under the condition that they can promote higher living-being (a higher amount of the good or a higher good); and (b) only if the damage which they inflict on living beings could otherwise not be prevented” (NR 144n.).<sup>207</sup> Against traditional philosophies of freedom, Krause thus shifts the burden of proof from the defendants of nature upon those who wish to instrumentalize it.

From these qualitative directives results the quantitative radius of the legitimate use of objects. Use *without consumption or wear and tear* can be granted without limit (NR 176). In regard to objects with *multiple* uses, an examination is due, which, e.g., with the use of wood, may reveal that one should give priority to “timber instead of firewood” (NR 176). It becomes more complicated if we move from natural products to manufactured objects. There is of course an important difference between “material goods dignified in themselves,” i.e. such in which inheres the freedom they represent (artworks, etc.), and mere “utility goods” (NR 143). One may not only “use” pure “utility goods,” but also “use them up” (NR 144), insofar as the rights of others and of society are not opposed to this (VR 292). Yet matters differ in respect of said “material goods dignified in themselves”; i.e. objects incorporating the ‘freedom rights’ of their creators that need to be respected, which is especially the case with intellectual property (as we shall see below).

Thus, although mere things can *in principle* be appropriated and used freely, this obviously surrenders neither their appropriation nor use to arbitrary and unlimited *choice*. Both are rather first to be regulated on the path of public, i.e. political, self-

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<sup>206</sup> For more information about whether plants have rights, see the detailed discussion by Francisco Querol Fernández, *La filosofía del derecho de K. Ch. F. Krause: Con un apéndice sobre su proyecto Europeísta* (Madrid: Universidad Pontificia Comillas, 2000), 227–234. See Martha Nussbaum’s position (*Frontiers of Justice*, 94) as well as, in regard to the differentiation between plants and animals, *Creating Capabilities*, 158f.

<sup>207</sup> One can here catch sight of an answer to the later arising question about how man should adequately handle the “Promethean gap” lying between humanity’s technical and prospective capabilities; already found in Günther Anders, *Die Antiquiertheit des Menschen: Über die Seele im Zeitalter der Zweiten industriellen Revolution*, (München: Beck, 1956), 267ff.

determination. The notion of the originally communal human possession of the earth functions as a fundamental corrective to *all* appropriation and use of things.

Prior to public distribution, no individual possesses a legitimate right to some kind of useful thing except his own body, and only the public allocation according to just division is the form in order to obtain the rightful possession of something useful. Whoever wishes to take possession of something must first be entitled by everyone for this appropriation, just as is the case with whoever intends to work on something; [...] No individual can be placed by another individual in the rightful possession of some kind of useful thing or be driven out of such possession. (G II 191)

With these words, Krause rejects the acquisition of goods in the ‘Wild West’ manner as propounded by, for example, John Locke (1632–1704), according to which working on No-Mans-Land thus makes it one’s own. The earth is neither infinite nor ever a no-man’s-land; it belongs in principle to all of humanity. One must thus continually ensure that in all acts of appropriation the rights of others – not to be excluded from global participation and to have a proper realm for their respective freedom – remain preserved. That, however, cannot at all be guaranteed by the individual, but only by a community representing everyone. All possessions up to date attained throughout history can thus only lay claim to provisional, and not eternal, validity. They are subject to the right to revision possessed by a future legally constituted humanity (ERB 108).

If one wants to grant everyone access to freedom, one must not necessarily call for an *equality of goods* (*Gütergleichheit*) (NR 142) like Fichte, but certainly for a *uniformity* (*Gleichförmigkeit*) of the right to acquisition (VR 253). The right to property has to balance the individual claim to the privatization of things with the public concern for open access to objects that are means to freedom (VR 511f.). For that is, following Krause, precisely the deeper, philosophical sense of private property, where “the outer becomes an inner, equivalent to the inner – being lawfully made dependent on the freedom of the entitled person” (NR 171). Just as all have a right to freedom, everyone also has a right to differentiate him- or herself from others (through merit and industry), i.e. to make his or her existence unequal from theirs.<sup>208</sup> Nevertheless, not every inequality is now to be celebrated as an expression of freedom or praised for expressing the individual will to differentiation. Wherever an inequality exists because equal opportunities are lacking, there is a lack of freedom, and this must always be annulled. Thus commands freedom.

Krause gives the social dimension of property neither a prior nor posterior place in relation to its private dimension; he rather recognizes the former as being immanent within the latter, as an internal counterbalance of all private possession, without which it loses its principal legitimacy. In Krause’s view, private property is not hindered but rather promoted by the demand of social responsibility. This demand does not burden the proprietors with excessive duties, but instead releases them

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<sup>208</sup> The idea of communal ownership is for Krause in no way to be understood socialistically or as stressing collectivism, see Wolfgang Vester, *Sozialphilosophie und Sozialpolitik der deutschen Rechtsphilosophie des XIX Jahrhunderts (Krause, Ahrens, Röder)* (Cottbus: Grosse, 1935) 36. More on this below.

from having to explain on a case-by-case basis their right to the exclusion of others which is bound up with the idea of private property. The concrete, socially adequate regulation of private proprietors supports the abstract institution of private property. The freedom of the owner is therefore not negated by social constraints in the name of everyone's freedom, but it is rather affirmed; laws and taxes that enable that freedom of everyone accordingly realize – and do not ruin – the freedom to property ownership.

Krause keeps his distance from both the extremes of individualism and collectivism. He neither narrows down freedom to private property, as was common in nineteenth century liberalism, nor does he strive for freedom by abolishing any and all property structures. He achieves this twofold distance by means of an innovative concept of property: Property, Krause notes, can always only bear upon functional characteristics. One can, to be precise, (legally) have ownership *over* something, but never (ontologically) be in possession *of* something. Thus “it cannot actually be said that this thing is property, one should rather say that this condition adhering to the thing is property” (NR 173). Not only does Krause thus distinguish possession and property as do the Roman and German traditions of jurisprudence, but also, what is more, an extremely consequential practical difference is thus also inscribed in the concept of property itself.

The point of this distinction between ontological and legal property is, according to Krause, to avoid the possible misunderstanding of “unconditional possession,” including the heresy that the proprietor could do with a possession “whatever he likes and whatever he pleases” (VR 287).<sup>209</sup> The everyday understanding of legal property as the holding of rights without regard for others, confuses the often granted, but also sometimes refused, exclusive *legal* relationship of a proprietor towards non-proprietors with the *metaphysical* relation of a subject towards things. An object can certainly belong to proprietors in certain legal respects, but it can never absolutely, ontologically be theirs. In short, rights to property are always valid functionally, never totally. And their function is freedom.

Although there is an *unconditional* right to possess *some* property *in general* for one's own free use, Krause recognizes only a *conditioned* right to *specific* properties and uses (NR 173). Properties and their employment are subjected to the discretion of their owners only within certain boundaries. Human beings should certainly also obtain some personal possessions to the “exclusion of all other persons” in order to win, for instance, a radius of free, undisturbed productivity. Nevertheless, the exclusion of others may never become a defining feature of the right to property. The

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<sup>209</sup> With his critique of the conventional theories of property (see their presentation in Julius Weiske & Franz Bopp, *Rechtslexikon für Juristen aller teutschen Staaten enthaltend die gesammte Rechtswissenschaft* [Leipzig: Wigand, 1839] 146f.), Krause is very much aware of the fact “that in the majority of states, as they are currently, in respect of the majority of assets an unconditional right to property is lawful. Here, however, we are not after teaching the legal status quo, but rather after seeing what reason considers as eternally right. It happens that, with the increasing education of peoples, this raw determination (*Bestimmniss*) of the absolute right to property becomes increasingly less feasible, that one limitation after the other must be added, and that one is thus gradually lead back to the reasonable principle of property, just as it was developed here” (VR 287f)

validity of this or that exclusion rather stands and falls with its function of embodying freedom. Thus, also for Krause, the handling of everyday objects is mostly up to the liberty of the owners; but not because they may possess in and for themselves a (quantitatively) unlimited right to do to their things whatever pleases them, but because (qualitatively) to all individuals a determinate “sphere of freedom [*Freiheitskreis*]” must be granted, in which they freely define themselves (VR 452f.).

In terms of positive law, this means: The exclusion of others can only become effective as a secondary *juridical consequence* of a prior relation of the owner to a specific property, a relation that needs primarily to be approved by society (NR 173).<sup>210</sup> The right to exclude others (in Latin *privare* = to exclude, to deprive) does not constitute private property, rather, conversely, the right to property has as a consequence at times – but not always – certain rights to exclusions. This theoretical differentiation has tangible practical consequences. As we saw, things ought to be used according to their basic determination in the light of the *reasonable* freedom of *all*. From this there follows not only a specific *proscription* (*Verbot*) against senseless destruction, but also an unspecific *prescription* (*Gebot*) to use things sensibly and optimize their utility. Only a *fundamentally socially obligated concept of property*, which reciprocally qualifies the rights to freedom of the individual member and the social whole, can harmonize the “opposing demands of communal property on the one hand and the strict (absolute) private property” on the other hand (NR 173).<sup>211</sup>

Therefore, Krause believes that the material individualism of classical British liberalism sins against its own principle: freedom. When liberals, like Locke, attempted a justification of property in general, they typically enlisted the *doctrine* of the concrete types of acquisition in the service of a *theory* on the abstract right to ownership, and thus they confused the *genesis* and the *validity* of property: historical formation with systematic legitimacy.<sup>212</sup> Whether unilateral actions (occupation, specification, and work) or multilateral actions (contract and law) lead to the acquisition of *particular* property, is, from a philosophical perspective, irrelevant to the question concerning whether anything like private, i.e. exclusive, property may exist *at all* (AF 174). This never follows from those actions themselves, but rather depends on a preceding justification of the *institution* of property. That *universal* right to property, however, can only be legitimated by the *fundamental right to personal freedom* (VR 512) and not, like particular properties, by *specific forms of acquisition*. Anything else would found the institution of property upon an insecure basis. Neither occupation and specification nor contract and law can legitimate

<sup>210</sup> See Francisco Querol Fernández, *La filosofía del derecho de K. Ch. F. Krause*, 378.

<sup>211</sup> For more information about the concept of “organic property” in Krause see: Julius Kautz, *Theorie und Geschichte der National-Oekonomie* (Wien, 1858). Kautz classifies Krause himself (62ff., 79) and his followers, Ahrens (83), as well as Leonhardi and Tiberghien as the earliest campaigners for a socially directed market economy (ibid. 170 f.). A similar judgment appears in Eugen von Philippovich, *Die Entwicklung der wirtschaftlichen Ideen im 19. Jahrhundert* (Tübingen: Mohr, 1910) and similarly Vester, *Sozialphilosophie und Sozialpolitik*, 46ff.

<sup>212</sup> See Rolf Gröschne et al. *Rechts- und Staatsphilosophie*, 131ff.

property empirically in any and all cases, but, as merely hypothetical principles of validity, these legal forms do not suffice to derive the initial right to property.

Krause's follower, *Ahrens*, supplemented these considerations, with the remark that – *contra* the social-contract theory – the disadvantaged people in impoverished countries could not rationally accept conditions which prevent them from assuring their own subsistence, and that – against the theory of work and occupation – today property can no longer be attained only through industriousness, since hardly anywhere do 'ownerless things' present themselves to the potential appropriator for their occupation and work. Nowadays when non-propertied individuals seek untapped opportunities for their industry, they are typically dependent on being granted access to goods, which they then work upon or refine. Some such basic access to the world and its goods, however, is owed to everyone as a consequence of each person's entitlement to freedom, according to Krause.<sup>213</sup> When, given appropriate procedural rules, the private property of some is employed to help others realize their basic personal right to acquire property, e.g. if the state taxes one's possessions to help others to some property, then we should not complain that this is an intervention into the freedom of private property, but rather welcome it as its appropriate regulation, according to its very own immanent principle. From the perspective of the principle of freedom, social securities and private property condition rather than combat one another.

The potency of conceptualizing property as, in principle, socially obligated comes especially to the fore with the problem of intellectual property. The question concerning the ownership in "intellectual things" or "objectified intellectual works" (VR 252) was already eagerly discussed in Krause's time with the example of the reprinting of books (AR 175n.). Krause's follower, Heinrich Ahrens, quite in the sense of his teacher's doctrine, offers the following solution to the dilemma about how society's interest in literature as a public good and the financial interests of the author can be reconciled. Since a book *per se* presents a common good, the author can possess no absolutely private, i.e. exclusive, right to it. In the rare event of an author without any countervailing interests, a text thus passes over immediately into the possession and use of the general public. But if, as in ordinary cases, such interests are to be recognized, these must be evaluated in light of the notion of freedom-functional property. Unless and until society offers no other form of subsistence for the author other than book-sales, the financial interests of this 'intellectual worker' (*Geistesarbeiter*) are to be adequately respected. Without the prospect of profiting from sales the author might have, instead of the writing of the book, tried to procure his livelihood differently. As a consequence, for the duration of the author's life (and possibly also longer based on inheritance law) there must not be any reproduction without remuneration. Yet since the author never has an absolute right to the text, but rather a claim to income generated by it, compensatory interventions are always possible, for example, in the case of texts with particular societal relevance (research literature, etc.) (AR 175).

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<sup>213</sup> See Heinrich Ahrens, *Die Rechtsphilosophie, oder, das Naturrecht; auf philosophisch-anthropologischer Grundlage* (Wien: C. Gerold, 1852), 462.

Without going into further details, we can see clearly from the above example that Krause supports a *relative* and not *absolute* concept of property, which treats the right to possession, not from the singular perspective of the proprietor, but from the perspective of universal freedom. While other thinkers treat the social commitments of property rights as merely exceptions to a right conceived as without inherent limits, Krause can elegantly derive these legal qualifications from his principle of freedom-functional property (VR 287f). Thus the conflict between private and public interest (often driven to extremes by theories of negative freedom) loses much of its drama. Krause shows that what is at hand here is not a question of an ultimately irresolvable quantitative polarity between private and public concerns, but rather a question of their reconciliation by means of a qualitative criterion. To wit, in order to be protected, the exercise and employment of possessions must be socially acceptable. Property must never turn into an end in itself but has always to remain a means only – a legal attribution on behalf of freedom.

Generally, the state operates under the assumption that private possessions are put to appropriate use. This is, however, otherwise (preventatively) in the case of goods of extreme societal relevance. Krause is thinking of forestry and agriculture, whose undertakings should remain under public supervision because of their vital importance for the sustainability of life. Krause's disciple, Heinrich Ahrens, further ponders – based on the same principle of freedom-functional, socially-obligated property – how (reactively), in the cases of obvious adverse misuse detrimental to the common good, expropriations can be justified and compensated.<sup>214</sup> What is more, Krause grants a right to permanent usufruct to non-proprietors, wherever this can increase the number of compatible utilizations of given goods for the benefit of the freedom of all. Certain claims on the property of another, like, for example, usufruct, occupancy, right of way, and easements, should open access to otherwise underused goods, their private possession notwithstanding. Last but not least: Forms of communal and societal property should be promoted (VR 291). The basic idea is always the same: Freedom not only legitimates private property, but also limits it.

What is true of the relationship between persons and things also characterizes the relationship between person and person, inspired, as it is, by an idea of freedom fulfilling itself in and through its societal embedding (LL 173). In Krause's thought, associations between persons do not have to be artificially added to individual existence, they are rather a natural form of how human freedom manifests itself. Families, associations, and society should not be secondarily derived (as today's game-theorists and contractualists care to do) from the interests of individuals primarily presumed to exist in isolation. Social contract theories thus falsely treat as emergent what is actually essential. In human beings, sociality is not contingent, however, but constitutive. For there is, Krause writes, "no ... possible sociality, unless they, as human beings as such, are already sociable" (U 79).<sup>215</sup>

<sup>214</sup> Ahrens, *Die Rechtsphilosophie*, 467ff.

<sup>215</sup> Martha Nussbaum also champions a relational concept of the person which is constitutively characterized by sociality; just like Krause she differentiates it from the apolitical models of contractualism and determines the "idea of the human being as 'by nature' political" (*Frontiers of*



Unlike animals, humans can voluntarily enter and annul contracts. Human beings do not need one another merely for utility-enhancing exchanges and the reciprocal overcoming of deficiencies. They also come together for more noble ends.<sup>216</sup> Beyond the mutual compensation of deficits, they strive to perfect themselves as well as to improve and ennoble their ecosystem into an ever-more freedom-enhancing environment (LL 149).<sup>217</sup> Sociality arises not only through the inevitable coexistence of “characterless rational persons,” but much rather – and contrary to the social contract theories of the time and the game theories of today – through freely chosen cooperation and collaboration of “persons full of character” (ERB 41). The theory of freedom should thus not reconstruct interpersonal relationships merely as institutions satisfying lower and urgent needs. It must also grasp them as interconnections for voluntary value creation. All aspects of societal life that display a desire for *free* sociality beyond assuring material survival are of particular dignity: The penchant for cultural self-advancement, symbolic communication, and spiritual contemplation, as well as the wish for joint ethical engagement in service to the freedom and dignity of others.<sup>218</sup>

Krause’s social philosophy ascribes great importance to associations of persons. In their goals and through the forms of life they promote, certain institutions – like for example those dedicated to the cultivation of *art*, *science*, and *religion* (LL 198) – express the very idea of freedom. They provide society with patterns of non-oppressive community and responsible self-commitment. Even when some organizations, due to their mission, constrain and co-determine the use of their members’ freedoms, this, too, can be grasped as a (qualitative) actualization of freedom and not as a (quantitative) constriction of it (U 318ff.) as long as, in their procedures and aims, these institutions are based upon personal freedom, offer inner and outer openness, and are democratically constituted, etc. – Krause’s idea of freedom thus functions both recursively and procedurally at once. That which legitimates the interpersonal institutionalization of freedom limits it as well. Community-building is never an end in itself but should help individuals to realize and reinforce their freedom. Illiberal collectives are not Krause’s cup of tea.

Beginning with the family, moving on to further and wider social relations (community and city), and concluding with sub-state and state, national and suprana-

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*Justice*, 86) and explains that the concept of the person includes “the ideas of a fundamental sociability and of people’s ends including shared ends” (ibid. 86) with the consequence that “the good of others is an important part of one’s own scheme of goals and ends” (ibid. 91).

<sup>216</sup>In just the same way, Martha Nussbaum argues against the “very idea of classical liberalism, namely that the goal and *raison d’être* of social cooperation is mutual advantage” (*Creating Capabilities*, 150).

<sup>217</sup>Once again the comparison with Martha Nussbaum: She strives for “the gradual formation of an interdependent world in which all species will enjoy cooperation and mutually supportive relations. Nature is not that way and never has been. So it calls, in a very general way, for the gradual supplanting of the natural by the just” (*Frontiers of Justice*, 399f).

<sup>218</sup>Thus, Martha Nussbaum also states that that the end of “social cooperation is not to gain an advantage; it is to foster the dignity and well-being of each and every citizen” (*Frontiers of Justice*, 202).

tional structures, even the entire world, Krause develops – with great attention to the sociological details – the theme of how individual freedom is complemented and completed by collective freedom. Said “inner sociability” ultimately leads, according to Krause, to the idea of but “one mankind,” which – conforming to this very idea – comprises all persons, human beings far and near, and future generations just as much as present generations (U 72). The more that human beings are orientated by this idea in their thoughts and deeds, the more harmonious will they coexist and cooperate with others, Krause holds (U 72). In principle, human freedom has a cosmopolitan and intergenerational direction.

The government has to ensure the harmonious co-existence of the diverse social associations. To fulfill this task, the state has to relate to all sub-state associations “but only on the part of the law and for the sake of the law” (NR 226). It should not orchestrate communitarian life, but rather promote the subsidiarity and autonomy of associations (VR 84f).<sup>219</sup> In this field, too, Krause’s theory of freedom redirects customary lines of argumentation. Communitarian freedom has, like every other freedom as well, a pre-positive claim to legal recognition. While in the legal theories at that time, the state deigns to acknowledge social associations if these can adduce good reasons for it to do so, Krause demands the opposite. The state has to recognize as legitimate any and all associations aiming for the collective exercise of freedom, as long as no good reasons stand against this – like lack of liberality or failure to comply with the law (G II 134).

Already at the beginning of the nineteenth century Krause thus wrote a theory of civic engagement and intermediary organizations,<sup>220</sup> which anticipates conceptually the later juridical doctrine of *legal persons*.<sup>221</sup> In his time, taking subsidiarity as the bedrock for (legal) theories about sociality was a novelty (AR 171). Krause, after all, explained that processes of organized community building are always already

<sup>219</sup>E. Diaz praises (in Elias Diaz, “Krausismo e institución libre de enseñanza: pensamiento social y político,” *jornadas homenaje a Giner de los Rios*, 234) the Krausist “concepción organicista de la sociedad,” because in it individual freedom as well as the social whole find their appropriate place. According to him, the Krausist insistence on “subsidiariedad” is not merely an expression of the desire for efficiency. Rather it expresses in a positive way the fellowship (*Miteinander*) of individually-personal and socially-personal freedom in an open “pluralism.” Krause’s societal doctrine thus prevents “la absorción y consecuente disolución del individuo en el todo social o en las plurales asociaciones” (ibid.).

<sup>220</sup>Concerning the importance of the intermediary organizations in Krause see G. Mollat, *Lesebuch zur Geschichte der deutschen Staatswissenschaft von Kant bis Bluntschi* (Osterwick: Harz, 1891) 97–104. Johannes-Michael Scholz’s essay “Legitimationspraktiken krausistischer Dezentralisierungspolitik” in *Ius Commune* 12 (1984), 117–163 shows – orientated by Krause’s leitmotif of “Lebenskreise” in vivid detail the influence of the Krausist body of thought concerning subsidiarity theory on the Spanish legal policy of the previous century. Equally instructive is Querol Fernández, *La filosofía del derecho de K. Chr. F. Krause*, 415ff.

<sup>221</sup>Krause’s students were the first to employ the term “legal person [*juristischen Person*]” which is still common today. Krause speaks, on the other hand still within the Roman-law tradition of “societal persons [*gesellschaftlichen Personen*],” or with his own neologism of “associative-self-beings [*Vereinselwesen*]” (VR 241). Concerning Krause’s treatment of the tension between natural persons and legal, general persons, see the writings of the Spanish Krausist: Francisco Giner de los Rios, *La persona social: Estudios y Fragmentos* (Madrid: V. Suárez, 1899).

different from ephemeral legal relations (e.g. purchasing), purely functional partnerships for certain ends (e.g. trading companies), or rather conventional legal entities (e.g. the family). When social organizations are consciously and deliberately brought about, they also deserve a legal status *sui generis*. They are to be considered as manifestations of consciously collectivized freedom – and must not only be considered instrumentally, for instance, in respect of the goods and functions they realize. This theoretical insight must lead to their practical recognition. Where citizens' associations are understood in just this sense as forms of the development and organization of freedom, there immediately follows the anti-etatistic insight that wide fields within public order could and should emerge bottom-up, i.e. from private and voluntary cooperation, instead of having to be decreed in a top-down fashion.<sup>222</sup>

It did not remain unnoticed at the time that this approach allows rethinking the relationship between society and state entirely – based upon the notion of collective freedom.<sup>223</sup> From the contemporary perspective, two things particularly stand out: First, how Krause distances himself from atomistic liberalism by stressing that voluntary integration into collectives is an important expression of individual freedom. And second, how in regarding freedom as the *raison d'être* of those commitments, he also differentiates himself from positions labeled “Romantic” then and “communitarian” today.<sup>224</sup> This is already shown by his terminology: Krause anticipated the differentiation, later popularized in German sociology, between “community” and “society” (U 62).<sup>225</sup> He, however, values *societies* as desirable, since they

<sup>222</sup> See José Luis Malo Guillén, *El Pensamiento Económico del Krausismo Español* (1999).

<sup>223</sup> Heinrich Ahrens developed Krause's thinking – with the help of the distinction between “corporation” and “association” – into a theory of civil societies and trading companies; see Peter Landau, “Gesellschaftliches Recht und das Prinzip freier Körperschaftsbildung in der Rechtsphilosophie von Heinrich Ahrens” in Dilcher & Distelkamp (eds.), *Recht, Gericht, Genossenschaft und Policey Studien zu Grundbegriffen der germanistischen Rechtshistorie* (Berlin, 1986). Also noteworthy is Krause's influence upon Lorenz von Stein and Robert von Mohl. Robert von Mohl himself positively acknowledged Krause's influence upon his thinking, see Robert von Mohl, *Die Geschichte und Literatur der Staatswissenschaft in Monographien dargestellt* (Graz: Akad. Dr.- & Verl.-Anst, 1855), 245. Klaus Fischer sees “Lorenz von Stein as the intellectual successor of K. C. F. Krause” in Klaus H. Fischer, *Die Wissenschaft der Gesellschaft: Gesellschaftsanalyse und Gesichtsphilosophie der Lorenz von Stein unter besonderer Berücksichtigung seines gesellschaftswissenschaftlichen Entwurfs* (Frankfurt am Main: Haag & Herchen, 1990), 109.

<sup>224</sup> The influence of Krausist sociology upon the social philosophy of Spencer is regarded as certain in Spanish Krause research: “Spencer será deudor, ciertamente, de Krause, al retomar la idea de que la sociedad es un organismo y que la evolución es por esencia orgánica” (León Esteban Mateo, *El Krausismo, la Institución Libre de Enseñanza y Valencia* (Valencia, 1990) 35). In the same way there is a likely influence of Krausist doctrine upon Spanish sociology – above all in the work of Perez Pujol (1830–1894) – (see M. Núñez Encabo & Manuel Sales y Ferré, *Los orígenes de la sociología en España* [Madrid: Editorial Cuadernos para el Diálogo, 1976]).

<sup>225</sup> One can trace a conceptual line of thought to Ferdinand Tönnies. The philosophical teacher of Tönnies – Rudolf Eucken – admired Krause's philosophy and dedicated intensive studies especially to his social philosophy, as one can learn from the research currently being conducted at the Eucken archive in Jena (I am grateful to Uwe Dathe for informing me about this). For many substantial agreements exist. It can be concluded that Tönnies' organic principle of sociology (see §2 in Ferdinand Tönnies, *Gemeinschaft und Gesellschaft: Der reinen Soziologie* [Berlin: Kurt

are liberal, namely, consciously and deliberately established forms of association. *Community* arises from coexistence, sometimes without free will. “Community but not society can be forced on us by fate.” The latter, that is to say, presupposes deliberate association and thereby the conscious will towards self-integration in a higher unity.

Despite due respect to natural communities like the family, Krause clearly does not share the later prevalent pejorative outlook of Ferdinand Tönnies (1855–1936) and, afterwards above all, Werner Sombart (1863–1941), that societies are merely ethically thinned-out communities (U 62). “For society is a union of individual activity for communal achievement.” Therefore, it is the “freely recognized and individually reciprocally enlivened community” that foremost deserves the title “society” (ERB 49). Krause thus does not champion a statist or popularist philosophy, but a civic, social philosophy; one that is founded neither on blood and soil nor on cold utility, but rather upon freedom and reason.

In this context, it must once again be emphasized just how explicitly Krause objects to the view that society and state could be grounded by *reciprocity* – by interest-oriented exchanges and thought-experiments aiming at utility. Remember: Even legal relationships based on reciprocal obligations do not, in his view, obtain their respective legal form and status from that reciprocity (NR 165). Mutual claims – constitutive as they are for commercial life – draw their legal force not only from the interests communicated within them.<sup>226</sup> The private will of the subjects only establishes binding contracts if it *lawfully* determines itself (necessary condition) and can adduce *legitimate* reasons (sufficient condition).<sup>227</sup>

Krause therefore never simply reconstructs contracts from their *negatory-restrictive* aspects. Contracts are not merely instruments to avoid or compensate damages or losses in exchange relations, for instance by contractual penalties, indemnification rules, etc., but rather fulfill *integratively-positive* functions. For the protection of these functions rather, and conditioned just as well as bounded by them, the negatory-compensatory aspects of contract law come into view. Contracts enable “individuals [...] to divide work” (VR 451). Contracts are thereby of a significant meaning, far beyond the utility they grant the parties concerned. They create stability, security, and trust within social transactions, they enable long-term economic planning, and thus constitute a central moment of civic self-sufficiency and collective freedom. Beyond emotional and family commitments, they allow for a reliable and constant allocation of goods and services through lawful, sanctioned agreements (U 218).

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Curtius, 1912]) is clearly Krausist. And also Tönnies’ reflections about the concepts “power of choice/choice of power [*Willkür/Kürwille*]” are also already anticipated by Krause (VR 317). Nevertheless – and this is decisive – Krause’s valuation of community and society is thoroughly opposed to that of Tönnies.

<sup>226</sup> Again, Martha Nussbaum is of a similar view: “We acknowledge, as well, that the kind of sociability that is fully human including symmetrical relations ... , but also relations of more or less extreme asymmetry and truly human functioning” (*Frontiers of Justice*, 160).

<sup>227</sup> See Querol Fernández, *La filosofía del derecho de K. Ch. F. Krause*, 93.

Private autonomy enjoys constitutional protection with Krause for the same reasons. Every single private contract, however, remains forever bound by and to the legal basis of all contracts, and can never replace this basis.

The contract is merely concerned with the allocation and individualization of right and of the legal claim, and not with the justification (nor the foundation) of law itself, that is why after the fulfillment of the contract the claim can still remain. Contract [sic!] is therefore only legitimately valid so far as the societally associated will could be seen as included (given) within the legal bases it relies on. (NR 198)

As the idea of law functions as the ultimate principle of legal legitimation, society is entitled to protect individuals who, from need or ignorance, might otherwise enter into contracts inimical to their autonomy. In contract law, the state regulates the individuals' sphere of action, not at all to eliminate their autonomy, but rather to safeguard it (NR 164). Thus Krause reconstructs, as inherent to the principle of freedom, those limitations of contractual autonomy that constitute the traditional canon of general contractual duties ("good faith" [*Treu und Glauben*]), of mutual contractual obligations (offer, acceptance), debtor's duties (notification, offer, specification, transfer), and the creditor's duties (demand, acceptance), including possible omissions (G II 170; NR 164ff.; VR 280ff).

Here too the strengths of Krause's conception directly catch one's eye, namely in view of the philosophical interpretation of the presuppositions of validity for establishing contracts: Capacity (no lack of understanding or maturity), absence of mental or physical coercion, presence of a 'permitted' subject matter of the contract (VR 342ff.). The agreement of the parties may be brought about neither by fraud or deception, nor can it include an error about the substance or essential characteristics of the object; and they must be explained reciprocally, correspondingly, and on time, etc. How are all of these restrictions justified? A clever maximizer of his or her own interests (which game theories or contractualist theories normally postulate) would accept these qualifications only as a necessary evil if and when they increase the average rate of returns: limitations of freedom in exchange for increased utility. Clearly, such reconstructions of contractual law fail to capture what Krause aims at, i.e. showcasing those qualifications as but conditions for enabling everyone's freedom. Krause advocates that these rules of fairness do not reduce the freedom of concluding contracts but rather secure this freedom in the first place.

For a contract to be valid, it need not only represent the interests of directly involved parties. It also has to conform to everyone's 'freedom rights' (VR 343). What holds true of contracts between individuals is all the more required of the *social contract*. The state can by no means simply be thought of (as libertarians would like) as a private contract extended to all citizens for the sake of the reciprocal protection of their interests.<sup>228</sup> The various goals uniting people with each other are

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<sup>228</sup> Similarly, Martha Nussbaum says "the capabilities approach denies that principles of justice have to secure mutual advantage [...]. Justice is about justice [...]. It is always very nice if one can show that that justice is compatible with mutual advantage, but the argument of principles of justice should not rest on this hope" (*Frontiers of Justice*, 89).

by no means sufficient – in a generalized form – to ground a state of *law*.<sup>229</sup> For every private contract is only ever valid provisionally and hypothetically, i.e. based upon the consenting volition and the persistent interest of the participants, and therefore can in no way provide preemptory and categorical validity (NR 133). On such shaky grounds, Krause feels, no stable state of law can be erected.

No. A communal entity is neither an agreement of private individuals nor a side-effect of a reciprocally conditioned waiving and exchanging of rights. The community of rights exists *unconditionally* – for the right to freedom and through it. Social contract theories built solely upon the logic of bartering cannot, after all, include within the shelter of law human beings who can neither profit nor damage us (for instance members of future generations or the distantly located poor), since the nature of a utility-oriented exchange is to watch out for *symmetry* of commission and omission. Krause, however, does not have this problem. From the outset, his theory of society insists upon the unconditional protection of human rights, also and especially in cases of strictly *asymmetric* relations.<sup>230</sup> A social contract (*Staatsvertrag*) laid down in the form of a constitution can therefore only be viewed as a *historical manifestation* of human rights, but not as their *systematic ground of validity* (AR 182).<sup>231</sup> Likewise, the reverse applies: The universal human right to law justifies the right to formulate a national social contract or a constitution.

### 2.3.4 Procedural Policy in Global Responsibility

All human beings should, according to Krause, have the “same opportunity for the development of their spiritual and physical capacities” (NR 277f.); to create fair opportunities is the task of policy. The state helps those who cannot adequately support themselves by their own means (G II 149). The access to basic needs like nourishment, housing, and clothing must not only depend upon the market economy (G II 149), since “the legal ground of useful possession does not lie in work, but rather in the need and, above all, in the reasonable nature itself” (G II 188). Everyone should be capacitated for a life in freedom and dignity.

Recall that Fichte still believed that whoever did not work and did not find anyone to provide him nourishment gratuitously, should “die of hunger, and rightfully so” (FW III/1, 119). Krause begs to differ. He rejects a reciprocally conditioned relationship between work and sustenance. The individuals are *unconditionally*

<sup>229</sup> “The non-economic spheres of society cannot however develop their *Logos* from the logic of economic relations of exchange [...] The economy [...] cannot be the source code of society” (Udo di Fabio, *Die Kultur der Freiheit* (München: Beck, 2005), 122.

<sup>230</sup> Martha Nussbaum also sees things this way (*Frontiers of Justice*, 22). Like Krause, contrary to the basic logic of game theory and contractualist theories, she thinks that “A large asymmetry of power ... might make questions of justice more urgent than, as in contractarianism, taking them off the agenda” (ibid. 87).

<sup>231</sup> See Vester, *Sozialphilosophie und Sozialpolitik*, 15.

obligated to work for their and the collective livelihood according to their abilities. Conversely, society owes to all the presuppositions for an existence in freedom – also *unconditionally*. Both these commitments do not condition one another; they exist in and for themselves.

The physical and spiritual needs have to be provided for him [the worker], not because he works but because he is in need of them as a human being. If, although he is able to, he should not be working enough or properly, then he should thus be punished, but no right can be based upon taking away from him something other which he otherwise justly requires. (G II 198)

Since Krause does not conceive the legal order as a barter society, but rather a community for enabling all-round freedom (VR 531), he wants a dignified free human life for all, independently of social and biological contingencies (G II 152). Today, we may find analogous positions less within John Rawls' plea for a quantitatively-equal provision of "basic goods," and rather within Martha Nussbaum and Amartya Sen's qualitatively-differentiated "capability" approach (see Sect. 4.2.3).<sup>232</sup> Similarly, i.e. with solidarity, one would have to deal also with natural catastrophes (and other disasters). "Natural damages on the common field of life" must not "be borne only by the person contingently affected, since, in contrast, this is a legal concern of the entire society" (VR 440).

On the whole, Krause wants to balance out through providential social policy the postulates of personal *freedom*, legal *equality*, and the citizens' economic *independence*. The historical experiments of *krausismo* illustrate this endeavour: Due to the "unidad intrínseca entre política, filosofía y economía"<sup>233</sup> in Krause's thinking, at the end of the nineteenth century leading Spanish *Krausistas* felt compelled to develop a social-liberal concept of economic policy that was said to balance out the diverging demands for social justice and individual freedom. The "libro más conocido de la corriente krausista," the "*Estudios económicos y sociales*" (Madrid 1876) of Gumersindo de Azcárate<sup>234</sup> as well as the "*Tratado de Hacienda pública y examen de la española*" of J. M. Piernas Hurtado (which in the late nineteenth century was for several decades the standard textbook for economics at Spanish universities) were firmly dedicated to these intentions.<sup>235</sup>

<sup>232</sup>Peter Landau thus believes that a basic-income, differentiated according to divergent needs, as well as a basic supply of education and health care, would thus have been supported by Krause. See his "Karl Christian Friedrich Krauses Rechtsphilosophie" in Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studie zu seiner Philosophie und zum Krausismo* (Hamburg, 1985), 92.

<sup>233</sup>See José Luis Malo Guillén, "La Institución Libre de Enseñanza y la ciencia económica," *Sistema – Revista de Ciencias Sociales* 157 (2000), 93–114, 99.

<sup>234</sup>For the realpolitik of Azcárate see *ibid.*, 105ff.

<sup>235</sup>This Krausist economic theory first appearing in Madrid in 1884/85, went through several editions, and was widely used in academic economic instruction until the 1930s. According to its intellectual structure and train of thought, this treatise may be regarded as a true representation of the Krausist thinking of the time. See José Luis Malo Guillén, *krausismo económico español* (2005).

In foreign policy, the Krausists mostly fought for a policy of free trade, but regarding domestic policy they clearly distanced themselves from the economic thought of classical liberalism. Those economic and political differences result from philosophical divergences. A closer look at the latter leads us to some illuminating conceptual ideas – also for current debates. From the second half of the nineteenth century, economics both in its classical as well as its neoclassical (i.e. wedded with marginalism) form increasingly sought to feature mathematical methods.<sup>236</sup> One wished to read the (optimal) economic activity by means of *deductions* from general economic laws – largely omitting social factors.<sup>237</sup> Within that paradigm pursuing an equilibrium of market forces, every external intervention into the market is *per definitionem* viewed negatively as a disturbance of otherwise balancing forces. One was, consequently, against state intervention in economic life. Instead, such economists sought refuge alone with the “invisible hand” of the market – in a sometimes extremely selective reading of a crudely misunderstood Adam Smith.<sup>238</sup> They, in short, defended an economic philosophy of negative freedom.

The social-liberals in Germany proceeded conversely. They backed the empirical investigation of historical conditions instead of abstractly-universal laws. *Induction* was their method of choice. The representatives of diverse “historical schools” wanted statistically to calculate which respective measures lead to desirable distributions of property, in order to derive recommendations for future economic policy and social welfare.<sup>239</sup> They opposed the market’s lottery with an unbridled trust in the planning capacity of society, which, when steered by correct insights, through the state’s *visible hand*, would easily accomplish what the market’s *invisible hand* grappled with so unsatisfactorily: a just distribution of welfare. They championed an economic philosophy of positive freedom.

The Krausist liberals criticized both approaches for being one-sided and – following Krause’s philosophical methodology – sought the connection of *induction*

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<sup>236</sup> See Claus Dierksmeier, “The Freedom-Responsibility Nexus in Management Philosophy and Business Ethics,” *Journal of Business Ethics*, 101:2, 262–283.

<sup>237</sup> Here one should remember especially the works of William Stanley Jevons (1835–1882) and Carl Menger (1840–1921), in which it was announced that they wished to practice economics in the sense and in the form of mathematical mechanics. See Carl Menger, *Untersuchungen über die Methode der Sozialwissenschaften und der politischen Ökonomie insbesondere* (Leipzig, 1883) and William Stanley Jevons, *The Theory of Political Economy* (London & New York: Macmillan, 1871) and his *The Principles of Science: A Treatise on Logic and Scientific Method* (London: Macmillan, 1874). For the contemporary debate see Samuel Bostaph, “The Methodological Debate between Carl Menger and the German Historicist,” *Atlantic Economic Journal* 6:3 (1978), 3–16.

<sup>238</sup> For the argument against equating Smith’s theory with *laissez-faire* economics, see Matthias Hühn & Claus Dierksmeier, “Will the Real A. Smith Please Stand Up!,” *Journal of Business Ethics* (2014), 1–14.

<sup>239</sup> See Gustav von Schmoller, *Über Einige Grundfragen der Sozialpolitik und der Volkswirtschaften* (Leipzig: Duncker & Humblot, 1904) and Werner Sombart, *Die drei Nationalökonomien: Geschichte und System; der Lehre von der Wirtschaft* (München: Duncker & Humblot, 1929). For the overall state of the discussion in his time, see Peter Koslowski, *Methodology of the Social Sciences, Ethics and Economics in the Newer Historical School: From Max Weber and Rickert to Sombart and Rothacker* (Berlin & New York: Springer, 1997).



and *deduction* in conceptual *construction*.<sup>240</sup> That means, in the first instance, that neither reality should be dismissed as negligible for the benefit of pure theory, nor that the proper momentum of the economic sphere may be neglected in pursuit of noble ideals. Theory and practice should relate to one another through a common goal. Mediating concepts ought to be expressly *construed*, in order to integrate both spheres productively, instead of playing them off against one another.<sup>241</sup>

On the basis of frequent *factual divergences* between morals and the economy and, at the same time, because of their conviction regarding the (principal, freedom and responsibility based) *commensurability* of economic and ethical laws, the Krausists assigned to economists the task of scientifically investigating how market failures and social evils can be theoretically explained and practically corrected. They, so to speak, author the economic philosophy of a substantive idea of freedom, encompassing as well as socially reshaping both negative and positive aspects.

For the Krausists, the adequacy of society's influence upon economic life results not from a *quantitative* plea for either *more* state action (as on the part of the socialistic liberalism and the representatives of positive freedom) or *less* (as on the part of the Manchester liberalism and the supporters of negative freedom), but rather from the *qualitative* prescription to enable the freedom of all.<sup>242</sup> From this then follows the stipulation to intervene by means of economic policy in free economic activity as much as is necessary and, at the same time, as little as is possible. The state's balancing activity must be subsidiary and thus secondary to the primary endeavors of individual self-reliance and charitable care for others.<sup>243</sup> The state is the *last guarantor* of opportunities to a life in freedom, not their *first producer*. A free state requires a free economy; and where the latter fails, the former repairs it, but does not replace it.<sup>244</sup>

In an *ideal* market (i.e. in a market not distorted by asymmetries from information, power, opportunities, transaction costs etc.) individual economic activity directs itself to where the greatest profits are expected. Thus production takes place wherever the greatest possible value can be attained by the least possible means; a

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<sup>240</sup>For Krause's concept of construction see Claus Dierksmeier, *Der absolute Grund des Rechts*, Chapter 3.

<sup>241</sup>See José Manuel Piernas y Hurtado, *Tratado de Hacienda Pública y Examen de la Española* (Madrid: Tip. De M. Ginés Hernández, 1891), 25ff.

<sup>242</sup>E. Diaz situates Krausist social-politics upon the golden mean between "abstencionismo" and "estatalismo" in his *Krausismo e Institución Libre de Enseñanza: Pensamiento social y político*, 230f.

<sup>243</sup>In the first instance people should help one another upon a voluntary basis. Wherever this help is not enough to guarantee that each and all can live freely and self-determine themselves, the state should, according to Hurtado, compensate the "deficiencias de la caridad privada" by "beneficiencia publica" (Hurtado, *Tratado de Hacienda Pública y Examen de la Española*, 116).

<sup>244</sup>Hurtado thus writes that the state should not run and take into its own hands "la industria por via de especulación," but may exercise an influence only upon the economic processes necessary for freedom, law and security, "cuando la actividad privada no se sienta capaz o no se halle dispuesta a llevarlas a cabo por si misma" (Hurtado, *Tratado de Hacienda Pública y Examen de la Española*, 117f).

process that optimizes the societal allocation of resources. As a consequence, private economic activity promotes the common good without having to directly intend this effect. Given these presuppositions (which, however, in such a pure form only exist on economists' blackboards), the government's direct and *material* intervention into the entrepreneurial calculations may damage the efficiency-enhancing allocations of the market. Then, "*laissez faire*" would make more sense, but not in order to bring about such ideal market conditions.

For real markets other considerations apply. From a Krausist point of view, one must insist upon a *formal* configuration of the market and certain *guidelines* for entrepreneurial action. A protection of public goods by regulations as well as performance-friendly taxation should continually broaden the opportunities for economic self-reliance and thus improve the presuppositions for *fair* transactions. Where this succeeds, a wage policy orientated by the market price, including a correspondingly unequal distribution of wealth can be accepted – not only in the name of economic efficiency, but also as an expression of the different extent of people's ambitions. This, however, only holds true if and where all have the chance to better themselves through their own accomplishments. Where this is not the case, the community must help out.

In elaborating the factual presuppositions required for a fairer market, the Spanish Krausists follow a three-level model of the *individual* (micro-level), *intermediary associations* (meso-level) and the *state* (macro-level). Piernas Hurtado, for instance, thus prescribes as a qualitative *end* that all economic life should provide everyone with appropriate conditions for life and freedom, by which the quantitative pursuit of profit is positioned at the level of a – legitimate and necessary – *means*, but can no longer appear as an *end in itself*. Means and ends – technical and normative rationality – cannot be played off against one another within this model, but rather are constructively related to one another: Parameters and systems of recognition have to be found by which a state may attain *welfare*, companies can attain *cooperative revenue*, and individuals are able to make *profit*, each in a manner that helps rather than hurts the social, ecological, and moral contexts of the economy.<sup>245</sup> The *Krausist* economic doctrine thereby already anticipated in the late nineteenth century attempts again undertaken in the late twentieth century to coordinate freedom, equality, and independence structurally with the internal logic of the economic sphere, so that the individuals' opportunities and the freedom of all are enhanced at one and the same time. The Spanish Krausists were thus well ahead of the *Methodenstreit* ("methodology controversy") and *Werturteilstreit* ("value-judgment controversy") in economics around the turn of the twentieth century – and formulated a philosophical standpoint which still contains much potential for our current debate (for the current state of economics see Sects. 4.1.3, 4.2.1, and 5.2).<sup>246</sup>

<sup>245</sup> See Stoetzer, *Karl Christian Friedrich Krause*, 311ff.

<sup>246</sup> For the contemporary debate at the time see Jürgen Backhaus & Reginald Hansen, "Methodenstreit der Nationalökonomie," *Journal for General Philosophy of Science* 31:2, 307–336. For Amartya Sen's role in current economics see Steven Pressman and Gale Summerfield, "The Economic Contributions of Amartya Sen" in S. Pressman (ed.), *Leading Contemporary*

Economic policy is promoted or impeded by the constitutional order. In the interests of everyone's freedom, Krause votes for a federal-subsidary state constitution in which sovereignty is not handed to a single higher-level authority, but is rather collectively exerted by the legislative, executive, and judicative powers (VR 528).<sup>247</sup> With freedom as his method, Krause strives for a political order that does not treat citizens as merely passive objects, but as active subjects, and so includes them in the state's decision-making. Freedom should be granted to the population in a procedural manner; the population is meant to participate in legislation.<sup>248</sup>

The Spanish Krausists put this mandate directly into practice, as may be illustrated by the 1883 referendum about the 'cuestión social' by Gumersindo de Azcárate (1840–1917).<sup>249</sup> At that time, Spanish society threatened to fall apart because of the antagonism between labor and capital. To address blatant social inequality, monarchist forces recommended to Spanish society that it take a step into the past towards the violent *restoration* of the pre-modern social order. Conversely, socialist groups backed violent *revolution* leading to an egalitarian future. Against these two dirigistic alternatives, the Krausists put their entire trust in a participatory solution: Peaceful *reform* of the current state of affairs through the involvement of the population. Trusting the capacity for the enlightened self-organization of society, Azcárate initiated a countrywide 'Encuesta' about the social question, which documented sociopolitical demands. That brought about the resolution to the controversy and enabled the Krausists to defuse tensions by actualizing several sociopolitical demands, which previously were not implementable: A "proof of concept" for the Krausists's favored model of deliberative political governance and the harmonistic model of society underlying it.

The integration of the people's will into legislation may, though, never take place at the cost of the principle of law, according to Krause: "The fact that one or millions are deciding for an action in complete agreement makes it neither just nor

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*Economists: Economics at the Cutting Edge* (London & New York: Taylor and Francis, Routledge), 66–98.

<sup>247</sup> In respect of the regional structure of the state, Krause distinguishes between villages and provinces, i.e. tribal and national communities, and applies them to a separate, federal, and subsidiary ordered structure of administrative systems (VR 349). His follower Heinrich Ahrens develops Krause's thinking and wants to establish a federalism of the golden mean – between the extreme positions of the state being only the sum of the communities or the communities being the mere agents of the state – with the help of Krause's "life-philosophy" (*Lebenlehre*) according to which every higher form of life is characterized by a moderate transformation of its nevertheless autonomous members (Heinrich Ahrens, *Die organische Staatslehre auf philosophisch-anthropologischer Grundlage* [Wien, 1850], 221ff.). For the socio-political appropriation of these ideas in Krausismo see Johannes Michael Scholz, "Krausistische Staatskritik in der spanischen 'Restauración'" in Bergfeld (ed.), *Aspekte europäischer Rechtsgeschichte: Festgabe für Helmut Coing zum 70. Geburtstag* (Frankfurt, 1982), 335 and Scholz, *Legitimationspraktiken krausistischer Dezentralisierungspolitik*, 117–163.

<sup>248</sup> For the status of all democratic "cooperation of legal persons" in the legislation see also Landau, *Karl Christian Friedrich Krauses Rechtsphilosophie*, 90f.

<sup>249</sup> See Johannes Michael Scholz, "La función sociopolítica del krausismo" in Ebert (ed.), *Reinvindicación de Krause* (Madrid, 1982), 87–99.

unjust” (NR 228) Democracy must never degenerate into the tyranny of the majority (AR 192). Only the systematic mediation of the empirical will of the people with the normative idea of law can legitimately determine the state’s activity.<sup>250</sup> Freedom may never be surrendered to the sheer will of the state apparatus or the majority of the population. Citizens owe obedience only to a lawful regime.

A state can certainly not demand the blind obedience of its citizens, but can demand free obedience, that is, an obedience grounded upon their own recognition of the reasonableness of the laws; otherwise the state would make machines out of its citizens, would itself hinder reason and profane its own vocation. (G II 173)

The common good is for Krause not simply the smallest common denominator of all factual interests. The universal will is not the same as the will of the majority, but must be ascertained from instances of a legislation orientated around the principle of law (VR 523). The legitimate will of the people thus does not just exist before and beyond the constitutional procedures, but rather first emerges from them (VR 522).<sup>251</sup> One cannot divide democratic substance from its constitutional form or play them off against one another. Procedures and principles require and condition each other.

Only insofar as they govern themselves in *conformity with law* “are the people themselves the sole administrator of law, sovereign, and autocrat” (LL 207); only then is there “a community, *res publica*, in the complete, genuine sense of the term” (LL 207). Under this strict and often unfulfilled precondition alone one could say “that what the community establishes as right is right in itself as well” (LL 211). Where this *legal* representation of the people’s will succeeds, Krause prioritizes the idea of the parliamentary democracy over the then prevailing form of government, namely, constitutional monarchy (VR 541n.) Also and especially democracy remains subordinated to law and this, in turn, is subordinated to freedom, which is why Krause demands a transparent policy of “absolute publicity” [*Publicität*] (ERB 109). Legislative “decrees must have this disclosure, that is, they must be publicly decided, publicly announced, and accessible to everyone at all hours” (G II 167). Similar to Kant, Krause concludes that “the basis of the absolute disclosure of state authorities is positive, whereas mistrust and fear of suppression are not” (ERB 109). Publicity promotes participation. It lets individual and collective freedom find within each other a regulative body which enables them together to construct and thereby reciprocally optimize the democratic will.

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<sup>250</sup> For a complete contrast, see the concept of right in the contemporaneous *Rechtslexikon* (Weiske und Bopp): “The national spirit [*Volksgeist*] collectively living and operating in every individual creates positive right” and “the foundation is the collective consciousness of the people; one recognizes this because it reveals itself in outer actions by emerging in practice, convention and custom; in the uniformity of a continuous, thus lasting conduct one recognizes the people’s belief, which is a common root opposed to mere coincidence” (ibid., 152f.).

<sup>251</sup> This distinction between immediate *people’s sovereignty* and lawfully, i.e. institutionally mediated *national sovereignty* is further developed by, above all, Krause’s follower, Heinrich Ahrens. For an exemplary case, see *Die organische Staatslehre auf philosophisch-anthropologischer Grundlage*, 197n.

This turn towards a transparent, dialogue-orientated, and self-critical political model, too, was further developed by the Spanish Krausists.<sup>252</sup> They did not want static and etatistic policy making, but rather one that was societal and dynamic, i.e. a policy constantly further developed by a discourse in the light of its own liberal leitmotif. Instead of, like many Continental European liberals, primarily defending acquired liberties, they continuously aimed at the conquest of new freedoms.<sup>253</sup>

Freedom enhancing policy requires state institutions. That is why Krause was skeptical about the theories concerning the imminent death of the state that were emerging at the time. Injustice (and thus criminal state activity) could certainly diminish with a progressive improvement of living conditions (NR 230). But even if crime could one day be reduced to zero, “policing and punishment would be abolished, but law would not be” (VR 360). Anything else would mean mixing up (negating) administrative and criminal law with the whole of law and thus misunderstanding the (positively-affirmative) character of the constitutional state (NR 239); for “the state is not originally established to avoid and to destroy injustice, but rather it is the institution of society which is supposed to realize the idea of law” (LL 192f).

This vote in favor of the constitutional state is in no way the same as a sanctification of the national state.<sup>254</sup> The “people’s state [*Volksstaat*] which one customarily incorrectly only called the state” (AR 179), certainly takes a prominent position in the circles of institutions protecting rights but may never be made absolute (LL 203). For, contrary to the tendencies typical of the age, Krause ascribes no excessive significance to the people’s *ethnicity*. For one thing he explains in detail how legal structures evolve underneath and outside of the sphere of the nation state.<sup>255</sup> For another thing, his thought is strictly cosmopolitan and rejects every form of patrio-

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<sup>252</sup>In an oft-cited study by López-Morillas it says that the Krausist “es liberal porque el liberalismo político es un postulado necesario de la doctrina de Krause, ya que, al mantener que no hay más autoridad que la razón, el krausismo subraya que el libre ejercicio de ésta es imposible bajo un régimen político fundado en el cesarismo o la arbitrariedad. Decir liberalismo es [...] decir proyección política del racionalismo armónico y luchar en pro de aquél es coayudar a la implantación de éste. [...] El krausista no abrazaba el liberalismo por simple preferencia o capricho, sino que necesariamente tenía que ser liberal si quería mantenerse fiel al espíritu de la doctrina que profesaba” (Juan López-Morillas, *El krausismo español. Perfil de una aventura intelectual* [Madrid, 1980] 176).

<sup>253</sup>See Julián Sanz del Río, “El derecho y el Estado según Krause” in *Boletín de la Institución Libre de Enseñanza* 6 (1882), 269.

<sup>254</sup>It seems particularly important that Krause reached the idea of the dissolution of the national state as the theoretical model of social unification over a hundred years before it arose within subsequent social sciences. Teresa Rodríguez de Lecea in “Der spanische Krausismo als praktische Philosophie” in Kodalle (ed.), *Karl Christian Friedrich Krause (1781–1832): Studien zu seiner Philosophie und zum Krausismo* (Hamburg, 1985), 202. For a modern critique of “methodological nationalism” see Ulrich Beck & Edgar Grande, *Das kosmopolitische Europa: Gesellschaft und Politik in der zweiten Moderne* (Frankfurt am Main: Suhrkamp, 2004).

<sup>255</sup>See Vester, *Sozialphilosophie und Sozialpolitik*, 11ff.; According to E. Diaz the fact that the Krausist doctrine does not contribute to the “exaltación hegelinana del Estado” and favors strictly separating state and society considerably contributed to its favorable reception in Spain, Diaz, *Krausismo e Institución Libre de Enseñanza: Pensamiento social y político*, 64n.

tism devaluing foreign countries.<sup>256</sup> National law, for Krause, clearly does not legitimate itself by itself (as in legal positivism), but does so by its functional contribution to the freedom of all, i.e. concretely, in order to “provide” everyone with “his human rights” (VR 350) through the institutionalization of political autonomy. Krause explicitly says that national laws are supposed to be always constituted with regard to the possible “attunement of the whole of living humanity” (ibid). In his footsteps, Latin-American Krausists enshrined the *cosmopolitan* and *intergenerational* obligation of all national politics into constitutional law.<sup>257</sup>

A people is, for Krause, simply the cultural correlate of a legal community (LL 206). Only as representatives of humanity are nations authorized to enact and sanction legal norms. Therefore, the idea of a nationalistic liberalism is a non-starter (NR 230, VR 352). Krause rejects Fichte and Hegel’s assumption that the Universal Spirit (*Weltgeist*) is biased towards certain nations and would realize itself supremely within the German people. Krause counters that “all currently living human beings taken together [must] be considered as representatives of reason itself” (G II 156f). With him there is therefore no Universal Spirit predetermining history (by making a grubby backroom deal with this or that nation). Krause is interested in humankind as a whole and its shared cosmopolitan reason.<sup>258</sup>

History is the open-ended process of human freedom (LL 160). To the individual and collective freedom there corresponds the openness of human history.<sup>259</sup> The freedom underlying human commerce and social life, although not randomly chaotic, is nevertheless unpredictable on both the individual as well as the general level (VR 200). Insofar as humanity wishes to survive, it must necessarily progress in its ethical development (LL 129), but precisely this survival is not guaranteed “for it could even be mankind’s own misfortune to be extinguished in its prime” (LL 175). Whether that will happen can only be shown by experience (LL 213n.). Human beings, not chained to specific forms of being and behaving, can fail in their collective projects just as much as in their individual projects (LL 160). There is thus no speculatively predetermined world history for Krause.

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<sup>256</sup> Thus, for instance, in November 1815 he explains to his father: “In order to respect and to love the German people, I do not need to hate another people in an unjust way” (*Briefe* 435).

<sup>257</sup> The Argentinian constitution of 1853 can in certain essential respects be identified as Krausist (see Julián Barraquerro, *Espirito y Práctica de la ley Constitucional Argentina* [la Tribuna, 1878]); in that, for instance, it is directed *towards all mankind* and not only the Argentinian people, that the basic rights are derived from *personal right*, that sovereignty is conferred only upon the whole of society and that it intends to provide a thoroughly subsidiary and decentralized redistribution of power. See Otto Carlos Stöetzer, “Raíces intelectuales de la Constitución Argentina de 1853,” *Jahrbuch für Geschichte von Staat, Wirtschaft und Gesellschaft Lateinamerikas* (1985) 22, 295–339. As well as Claus Dierksmeier, “Harmonischer Liberalismus am Rio de la Plata,” *Liberal, Vierteljahreshefte für Politik und Kultur* (2008) 50, 46–49.

<sup>258</sup> See León Esteban Mateo, “El Krausismo en España: Teoría y Circunstancia (1),” *Historia de la Educación* 4 (1985), 97–118.

<sup>259</sup> See Alfred Theodor Schneider, *Karl Christian Friedrich Krause als Geschichtsphilosoph* (Leipzig: Druck von Bär & Hermann, 1907), 37.

Historical agency is influenced by one's respective understanding of history (LL 22f.). Whether human beings master their tasks depends upon their respective use of freedom – and this is in no small part a consequence of their understanding of freedom (NR 262). The intellectual and the practical realization of the idea of freedom thus influence one another (VR 200). A fatalistic view of the world can paralyze efforts towards social emancipation, a liberal theory, on the other hand, can have emancipatory effects (G II 119). The contemplation of cultural history is thus partially determined by the *history of freedom* both on the universal (species) level and on the particular (individual) level (LL 401ff.). We are accordingly able to, on the one hand, speak of a historical progress towards and within the consciousness of freedom, without nevertheless suggesting, on the other hand, that one can be certain about the future course of history, e.g. about the expansion of liberal systems (LL 160).<sup>260</sup>

To think historically, then, means to rely on interpretations and embrace ambiguity. Krause too undertakes such historical interpretations. For instance, he conceives of the Europe of his day as being in a gradual transition from a period of intensive national and cultural differentiation to a more integrative phase of regional cooperation (LL 376–396). He hopes one could soon progress from the still prevailing quasi-mechanical “system of mere political balancing” to a more organic international legal order (EU 9).<sup>261</sup> Most European states do already recognize fundamental human rights, freedom of religion widely prevails, and technology helps to disseminate ideas to overcome national borders (LL 425). Moreover, one would find everywhere the seeds of a historically founded common European consciousness (LL 422).<sup>262</sup> The epochal step towards a supranational legal order could thus first of all be demanded and expected from Europe.<sup>263</sup> Krause even draws up a sample constitution for such a union of European peoples, in the hope that a successful European Union might serve as a model for the world and find emulation in various regions.<sup>264</sup>

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<sup>260</sup> Tiberghien's history of philosophy explicates Krause's ideas by interpreting history as the normative history of freedom and judges it from the point of view of a strict prohibition of retrogression and from a soft precept towards development; see S. Monreal, *Krausismo en el Uruguay: Alguno's fundamentos del Estado tutor* (Montevideo: Universidad Católica del Uruguay Dámaso A. Larrañaga, 1993), 68.

<sup>261</sup> See Clay MacCauley, “Krause's Proposition for a European League of States,” *The Advocate of Peace (1894–1920)*, 79 (11), 337–39.

<sup>262</sup> Krause's pro-European thinking distinguishes him from his philosophical contemporaries. See Rolf Helmut Foerster, *Europa: Geschichte einer politischen Idee* (München: Nymphenburger Verlagshandlung, 1967), 240–243.

<sup>263</sup> See Lorimer, *The Institutes of Law*, 310.

<sup>264</sup> It was not by accident that Krause published his *Entwurf eines europäischen Staatenbundes* in 1814. It contained ideas which Krause wanted to explain within his text on *Erdrechtsbund*, but which remained fragmentary (see von Mollat, ed. *Der Erdrechtsbund an sich selbst und in seinen Verhältnissen zu allen Einzelheiten des Menschheitens* [Leipzig, 1893]).

The world's citizens can only attain perpetual peace through a law-abiding league of nations – for which Krause draws up constitutional considerations, too.<sup>265</sup> For as long as there exists no legal institution spanning the planet, in cases of conflict every country can insist upon its right to self-defense. But where every state acts as a judge in its own affairs arms races and spiraling violence are the consequence (VR 500). It is therefore to be hoped that the world's citizens will see this sooner or later and then one day “legally determine the relations of peoples as the whole of mankind and establish a higher organism of law, to which the peoples will relate themselves in the same way that every individual human being relates to his own people” (U 60). The required delegation of state sovereignty rights to higher regional, as well as global, unities is legitimate since, from the outset, Krause sees the nation state as just *one* – but in no way the *only* – form for institutionalizing the rights of freedom (LL 203f.).<sup>266</sup>

But since and so long as this condition of global law is still a long way off, the rights of individuals and peoples must be promoted in other ways.<sup>267</sup> Provisional legal systems are to be established. A few states, acting from joint principles, may suffice for a start (U 142). And Europe ought to take the lead (EU 11). For example, a European Union could abolish all military conflicts within the European continent (SL 318) and ensure that, at least within its sphere, the “law of peoples [becomes] increasingly independent of fortune or misfortune, the size of the population, and any arbitrary decision-making” (EU 13). Krause thinks that it would be optimal if the earth were gradually to be transformed by such regional associations of peoples working together towards the task of establishing a fair world order (LL 201, U 149).

These cosmopolitan ideas are the result of the methodological principle of Krause's participative liberalism. Since the idea of ‘right’ imposes a duty of everyone to contribute to the acquisition and preservation of the rights of everyone else, one is to strive to put the world eventually in precisely such a state wherein “every citizen of the planet, wherever he may be heading, is granted his germane personal rights” (VR 467). In just the same way as one avails oneself of human rights, one must also help others to realize theirs, regardless of how far away (spatially or temporally) they live.<sup>268</sup> The legal world order to which Krause aspires for the future would bring with it transformations of existing rights (VR 449f.) and modifications of the earlier (local, national, and regional) legal systems (LL 204). Should a “state of mankind [*Menschheitsstaat*] on this earth” (VR 348) ever arise then one has to reckon with a certain redistribution of legal positions, which in the light of that new

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<sup>265</sup> For the cosmopolitan and pacifist character of Krause's philosophy see Veit Valentin, *Geschichte des Völkerbundgedankens in Deutschland: Ein geistesgeschichtlicher Versuch* (Berlin, 1920), 48f.; Hermann Hetzel, *Die Humanisierung des Krieges in ihrer culturgeschichtlicher Entwicklung* (Frankfurt an der Oder, 1889), 58 & 157; MacCauley, *Krause's League for Human Right*, 458.

<sup>266</sup> See Karl Viktor Fricker, “Das Problem des Völkerrechts,” *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), 91–144.

<sup>267</sup> For more about Krause's “splendid cosmopolitanism” see also Carl Fortlage, *Genetische Geschichte der Philosophie seit Kant* (Leipzig, 1852), 228.

<sup>268</sup> Compare with Martha Nussbaum's claim that “humanity is under a collective obligation to find ways of living and cooperating together so that all human beings have decent lives” (*Frontiers of Justice*, 280).



alliance appear in need of reform (U 147).<sup>269</sup> But since the earth is anyhow “the original external property of the entire whole of mankind” (VR 463) and certainly fundamentally belongs to “all and everyone who are at the same time counted as rational ends,”<sup>270</sup> this is philosophically unproblematic, howsoever controversial the concrete legal implementation could prove (VR 466).

Krause hereby provides an interesting, indeed provocative contribution to globalization ethics. He seeks to mediate between theoreticians who claim that no possession of rights is ever of permanent validity until the highest possible system of law is established and those who claim that every historically acquired right must be binding for all times. “In between these, decisively emerges the unpartisan truth that subordinate rights of subordinate legal persons have the authority to prevail” wherever they need not be “demoted by the novel higher ground of law into an inferior position, and [adjusted] accordingly to the now arising and emerging higher organism of rights” (VR 328). This transformation must not always entail the loss of acquired legal positions in favor of a modified return. For there will always exist particular areas of life in which individual “independence must be maintained” (NR 264n.). The accession of a state to a community of peoples will not change many of its local structures. But in respect to certain geographical sources of livelihood (*Lebenschancen*) a compensation in favor of disadvantaged peoples is to be expected. For the actual occupation of nature and its treasures has taken place as a result of power-relations. Thus it often ran counter to the “authority to take possession of the earth” (NR 262) which equally belongs to all human beings – on account of their common ownership of the earth. Therefore the first possession of land cannot also be the last (NR 262).<sup>271</sup>

Since every newly created legal entity is not only encouraged to quantitatively further the total extent of its freedoms through expansion or internal complexity, but rather also qualitatively to enhance them and thus to free itself from ethical contingency and asymmetry (NR 264), some of its internal legal positions are continually to be modified (ERB 108). Such a fairness-oriented transformation of global ownership presupposes the “insight” and “good, rightful will” (NR 264) of the global citizens, which is obviously not always a given. Instead often, wherever tensions are encountered, there prevails violence, destruction, and war, between individuals as well as peoples (NR 265). Krause nevertheless believes that the hope for a growing legal penetration of the areas of social conflict is justified. Culture and the sense of

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<sup>269</sup> In the same way, Martha Nussbaum claims that “one might then doubt that domestic arrangements can be insulated from scrutiny, if they are such as to make it impossible for people in other nations to live decent lives” (*Frontiers of Justice*, 229).

<sup>270</sup> See Martha Nussbaum: “The capabilities approach is fully universal: the capabilities in question are held to be important for each and every citizen, in each and every nation, and each person is to be treated as an end” (*Frontiers of Justice*, 78).

<sup>271</sup> Martha Nussbaum similarly says that “even the concept of redistribution [...] needs to be called into question, since it rests on the prior determination that people own the unequal amounts they have.” She thus argues against positions which claim “that the part of a person’s holdings that is needed to support other members of a society (or world, [...]), are actually owned by the people who need them, not by the people who are holding on to them” (*Frontiers of Justice*, 373).

justice, on the one hand, and people's prudent self-interest on the other, are significant driving forces for the global advance of law (NR 268). Long-term economic calculations of utility hand in hand with an appeal to "the conscience of mankind" (U 305) can definitely result in humanity increasingly directing itself towards the integrative regulation and protection of rights by means of global institutions. And once an order maintaining the interests and rights of all of earth's citizens arises, it would also – because of the economic advantages attained through membership – be very likely to endure.<sup>272</sup>

Krause in no way wishes to level the diversity of civilizations and peoples in that envisioned global federation of law, but rather especially aims to protect diversity through the progress of cosmopolitan law.<sup>273</sup> While, in a legally unregulated world, economic and military power raze traditional cultures *ad libitum*, their chances for a critically-affirmative preservation are far better in well-ordered relationships of cosmopolitan law. Precisely because, for Krause, the earth belongs to *all* people and peoples for the realization of *individual* freedom, the lifestyles of cultures may also manifest themselves in *dissimilar* ways of life. The basic right of all humans to a self-determined life may well lead to a multiplicity of divergent local and regional legal systems. These can continue to exist as, in essence, internal specifications of a globally networked system of rights and freedoms (VR 539f.).

That implies that neither is justified the one claim which in recent times was fanatically claimed and striven for: that all men could have absolutely only identical equal rights. Nor is justified the other claim, which was just as fanatically taken up and enforced: that every man could have only his own quite individual right, and consequently one is unable to think about a universal (human) right possessed by all men. Both of these erroneous claims rather rest upon two basic truths, which were however at the same time misunderstood and comprehended in a one-sidedly exaggerated fashion. The universal, ever equal right of man is the eternal, unchangeable, and forever remaining foundation, but, on this foundation, rights must then be further determined. (LL 197)

Krause's cosmopolitan vision is astonishing. Two hundred years ago, he already showed the sociological as well as normative boundaries of the nation-state and took up the theme of globalization. While at the beginning of the nineteenth century most German philosophers inferred from the *de facto* marginalized role of colonialized peoples an inferior status for them in terms of rights and freedom, Krause boldly marches in the opposite direction. He campaigns for "the One indivisible human nature" (VR 469) which all individuals share in, and demands that it be respected vis-à-vis all persons regardless of where and how they live.

Krause strongly rejects all racial differentiations within the right to freedom. He disapproves of the reference to a supposed cultural gap between European and non-European peoples, common at the time for the justification of colonialism. Back

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<sup>272</sup> See Vester, *Sozialphilosophie und Sozialpolitik*, 11 as well as Siegfried Wollgast, "Karl Christian Friedrich Krause (1781–1832): Bemerkungen zu seinem Menschheitbund und Friedensplan" in Erhard Lange (ed.), *Philosophie und Frieden: Beiträge zum Friedensgedanken in der deutschen Klassik* (Weimar, 1985), 260–276.

<sup>273</sup> See Clay MacCauley, *Karl Christian Friedrich Krause: Heroic Pioneer for Thought and Life* (Gazette Press, 1925).

then, Krause was already using arguments very similar to those used today by, for instance, Thomas Pogge.<sup>274</sup> Those differences of cultivation and civilization, Krause holds, largely do not at all exist in the form and intensity claimed. But where they do exist, they have in many cases first been brought about by practices of colonialism in violation of international law. Therefore cultural and socio-economic differences may never be employed for the justification of relations of subordination, as legal grounds for (further) discrimination or even as proof of racial inferiority. Those asymmetries rather obligate us to support with solidarity those affected by them as well as to provide remediation for colonized peoples (VR 464).<sup>275</sup>

Certainly, Krause did not believe that ideas alone could change the world, but he also never gave in to the opposing view that the world could manage without them. Human beings are, not in the least, what they become; and the latter results in part from what they strive for. Only a theory which also knows of the ideas and ideals of humanity is thus of practical value. And it was precisely the establishment of such a realistic idealism to which Karl Christian Friedrich Krause devoted his entire life.

Particularly interesting in Krause is the status of philosophical arguments and, especially, the status of metaphysics. Citizens instead of professors should ultimately decide whether and which metaphysical body of thought should influence humanity's public self-image. Therefore, instead of providing the world with a single overarching metaphysics, Krause advocates a world where the consensus regarding values and norms requisite for cosmopolitan coordination arises from the many minor metaphysics of the citizens. His philosophy of freedom is thus, so to speak, self-reflexive: Krause had initially (*descriptively*) characterized the idea of freedom as an unavoidable foundation of human self-determination. Its analysis showed that individually freedom can be consistently employed only if one attributes it to all human beings. That universal (*ascriptive*) dimension of the idea of freedom then (*prescriptively*) corresponds to a normative consequence; namely, the responsible exercise of one's own freedom in the interests of all human beings. Krause's idea of a globally responsible freedom results from a cosmopolitan ethics whose specifications derive from the influence of precisely those for whom it wishes to be valid. Therefore, Krause's philosophy of freedom is a participative liberalism *par excellence*.

Nevertheless, some readers will no doubt ask why – if all of this is true and if this Krause really philosophized with such balance and foresight – they have never heard of him before. Why do we not find – as with other far less interesting philosophers – statues of him, streets named after him, and busts portraying him? Why does his name not appear in most histories of philosophy? Indeed, within the German and English-speaking academic world, he is hardly known. And anyone

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<sup>274</sup> See Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge & Malden, MA: Polity, 2002).

<sup>275</sup> Once again Martha Nussbaum's position is compatible: "Many of the problems of poorer nations were caused by colonial exploitation, which prevented them from industrializing and robbed them of natural resources, among other things. Redistribution in the present seems an appropriate form of remediation for the past" (*Creating Capabilities*, 115).

who searches for him on the internet or within appropriate lexica often finds his work less favorably presented as here. Krause is condemned for abstruse language, fantastical ideas, and metaphysical preferences, and thus the impression may arise that he is justifiably forgotten.

Elsewhere I have endeavored to rebut these objections in detail.<sup>276</sup> Hence I shall confine myself to but a few cursory observations here. That Krause was an enthusiastic utopian with obsolete metaphysics, would, in the light of the argumentation reconstructed here, appear doubtful. It is true however that Krause worked out his own technical terminology, which does indeed make the appropriation of some of his works more difficult. Although this was not always the case – some of his writings and also some of his posthumously published lectures are very clearly and, indeed, most elegantly written –, Krause's at times excessive recourse to his own terminology has certainly hindered the reception of his thought.

The external occasion for this move was the religiously and politically tense situation at the University of Jena. First, his teacher Fichte was forced to leave the university because of the so-called *atheism controversy* and, subsequently, also his colleague, Schelling, left in the wake of the so-called *pantheism controversy*.<sup>277</sup> Krause, who had developed his own philosophy through critical engagement with theirs, did not wish to get into 'the cross-hairs' of questions about the philosophy of religion. Also, Krause wished to escape the ambiguities of quotidian concepts through a regularly constructed derivation of the required technical terms so as to bequeath to philosophy a logically unambiguous terminology. Other thinkers with similar aspirations, like, for instance, Leibniz (with his '*mathesis universalis*') attained more recognition for such efforts than did Krause.

It seems to me that the actual reason for Krause's poor reception in his homeland was much rather his unfortunate academic career. In his time, only a few philosophers outside the university system were able to raise their work into public consciousness. Krause, though, never managed to get hold of a regular professorship. This had to do, for one thing, with envious chicaneries from political and academic opponents<sup>278</sup> and, for another, certainly also with Krause himself. He neglected to promote either himself or his work. Tactical maneuvering was far removed from his nature. Trusting that his philosophy spoke for itself, he (all too?) peacefully acquiesced to inferior employment contracts and chose to apply his energies to the development and perfection of his system at the expense of its marketing. He had absolutely no desire to be a 'public intellectual.' Therefore, the true responsibility for the lack of prominence of his philosophy lies more within his personality than in his works, whose rediscovery is very much to be hoped for. Facing enormous cosmopolitan challenges and searching for a healthy mean between an irresponsible

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<sup>276</sup> See Dierksmeier, *Der absolute Grund des Rechts*.

<sup>277</sup> For more information about this see Klaus Kodalle & Michael Ohst Martin, *Fichtes Entlassung: Die Atheismusstreit vor 200 Jahren* (Würzburg: Königshausen & Neumann, 1999).

<sup>278</sup> For a more detailed discussion see Enrique M. Vierhaus Rudolf Ureña, *K. C. F. Krause: Philosoph, Freimaurer, Weltbürger: Eine Biographie* (Stuttgart-Bad Cannstatt: Frommann-Holzboog, 1991).

libertinism on the one hand, and the equally unappealing alternatives of socialist or religious command economies as well as virtue- or eco-dictatorships (*Tugend- oder Ökodiktaturen*) on the other, the global community today can discover in Karl Christian Friedrich Krause an instructive precursor of the project of a liberal world ethos (*Weltethos*).

## 2.4 Results and Implications

In this section, as in later sections under the same heading (Sects. 3.3 and 4.3), we pause in order to see what systematic results our trawl through history has yielded, and what consequences can be derived from them for contemporary work on a theory of freedom.

Immanuel Kant showed: Only through the freedom to act morally can we make our own (also immoral) decisions. Without this ethical freedom enabling us to opt against our inclinations, we would be mere automatons weighing up quanta of pleasure, impelled by advantage-maximizing algorithms programing our very existence. Our freedom would be neither unconditioned nor spontaneous; it could not make us the authors of our actions.

Our real employment of that radical freedom is obviously also conditioned by the circumstances of life, by education and cultivation, by access to resources, both material and informational, and political as well as cultural. Not only a lack of rights diminishes freedom. Not only the legal, but also the social and cultural buttresses of freedom should therefore be strengthened by liberal politics. But since Kant also maintains, in harmony with classical liberalism, that *coercing* state interventions should be limited to the narrow sphere of the administration of rights, other *non-coercive* forms of politics must be found. To further the radius of an empowering and capacitating politics enabling an autonomous life for everyone, it must be open to the interests and opinions of the population.

Yet Kant does not only *legitimate* – he also *limits* – the democratic self-regulation of the open society according to the principle of a freedom self-consciously shaping itself. He thereby prepares a bridge towards conceptions of the ‘common good’ considered off limits by many other liberal theories. Freedom, he declares, can only be consistently conceived as directed toward a notion of a “highest good,” albeit one open to different interpretations. Freedom’s highest good does not lie ready-made waiting to be found. It only arises as a result of a communal searching and striving: as the result of free political deliberation. Against the false alternative – fostered by many of liberalism’s friends and enemies – of *either* a theory of freedom averse to values *or* one consumed by ethical commitments, he opens a third way. Kant shows that freedom always already has a *resolve* towards values, without *dissolving* itself in them.

Culture is required for values to be realized in a liberal manner; so that the state is not lead into attempting to violently counter moral anomie, ethical pathologies, and social atomization; and so that ethical impulses (*ethischer Drang*) instead of

governmental impositions (*staatlicher Zwang*) create the required commitments and institutions which enable individuals and institutions to tolerate freedom. A liberal society needs the state to promote culture (*Kulturstaat*); not to establish a dominant culture, but certainly to place into the citizens' hands the necessary means of communication for peacefully and liberally developing a shared political will. The more the representation of minds and the collaboration of spirits succeed, the easier becomes the coordination of body and things. Culture improves governance. Wherever it facilitates identification with others and empathy for their situation, people find it easier to act from consideration and self-restraint, for instance by improving the livelihood of strangers. Especially in the era of globality and ever-more pluralistic societies, a cosmopolitan culture that promotes sympathy for the fate of foreign human beings is of increasing significance.

Fichte reassesses the Kantian attempt at making freedom the foundation of all modern, self-reflexive, and self-critical philosophy. He points out: One cannot philosophize about freedom without considering its, above all, social presuppositions. But how are these to be integrated into philosophical liberalism? Fichte wishes to achieve this through a theory of *reasonable* freedom. Only a thoroughly rational concept of freedom could identify what precisely state and society have to provide for individuals' autonomous lives. Since only (his) philosophy can legitimately indicate the freedoms truly worthy of promotion, only the philosophically directed state – but not the freely constituted citizens' will – is granted the right to define and concretize the right to freedom.

Fichte thus commits an instructive error: Whoever, like Fichte, views the world as *either* material conforming to reason *or* as mere resistance contrary to reason, will treat it in just the same way. The same is true of our fellow human beings. Alterity is valuable to Fichte only when in service of his philosophical model; in all other cases it is seen as a hindrance to be abolished. In the realm of such thoughts there is no room for shades of grey. Everything within nature and society is clearly separated into black and white according to how serviceable it is to freedom. With Fichte, the normative force of freedom thus has theoretically and practically excessive effects. This leads to an *exaggerated concept* – as well as to an *over-bearing reality* – of legal coercion. Fichte's insistence that freedom is essentially *ethically orientated* is just as convincing as his wish to protect only *ethically realized* freedom appears bizarre. His correct view that coercion may only be legitimated through the logic of freedom, however, in no way justifies Fichte's erroneous belief that coercion also presents the correct means for every advance towards freedom.

For Fichte, coercion is advanced from a *means to enable* a state of law to a *means to realize* reason's ideal state. And therein lies the decisive problem. A notable example is Fichte's social-contract doctrine. In order to motivate the individual towards law-abiding behavior by means of a machinery of incentives and punishments, Fichte contrives a mechanism of legal and economic relations resting upon strict reciprocity. Wherever that symmetrical reciprocity is absent, no legal relationship – and, as a result, also, no protection of freedom – is achieved. This model cannot process asymmetries. It supports a closed social space that continually safeguards a static equilibrium through strict (legal and economic) surveillance.

Human beings are entirely prevented from politically or economically exercising their freedom in ways Fichte views as unreasonable.

The result is, in many respects, a dictatorship of reason in the name of freedom. Since Fichte believes himself able to derive most precisely what and how much every human being needs to live freely, he embarks upon, for instance, planning an optimal economic system. Therein the state features as *that which is reasonable* and the market as that which is *contrary to reason*. Since the market only disturbs the well-planned distribution of goods it is eliminated. Fichte *overestimates* the possibility of the state to establish freedom-conducive relations between goods and services. At the same time, he *underestimates* the contribution market-structures can provide to this endeavor. It would have been more appropriate to conceive of the market as an *a-reasonable* process; one that – dependent on its political and cultural framing and direction – can be more or less *reasonably* shaped.

In Fichte's philosophy of freedom, liberal and totalitarian motives are thus fighting for predominance. At the same time, cosmopolitan and national motives battle one another. On the one hand, Fichte behaves universally and ascribes to every person an original right (*Urrecht*) to freedom. Still, he does not advance towards a globally-oriented liberalism. Because Fichte supposes that the reasonable order he strives for can only be secured in small, controllable spaces, he restricts his political perspective to the German people. And since global markets can disturb national equilibriums, the unstable world had better remain outside. Instead of devising procedures with which the challenges of globalization could be surmounted in a liberal manner, Fichte advocates national unilateralism. It is no wonder, therefore, that later populist thinkers chose him as their philosophical hero.

Karl Christian Friedrich Krause undertook to even out the socialistic-totalitarian and ethnic-nationalistic imbalances in Fichte's thinking. His critique of Fichte goes to the root of the matter, being directed against the false dichotomy between nature and reason. In truth, according to Krause, the relations between natural necessity and moral freedom are far more complex. Krause presents them in a multi-level order of forms of freedom interlaced with one another instead of in a model of opposed polarities. This order then provides a differentiated foundation for the conferral of rights and obligations. Krause can thus espouse ecological sustainability and the protection of animals for example – not as limitations, but as consequences of the liberal principle.

Krause seeks the foundations of ethics beyond the logic of reciprocity. Against the Fichtean social-contract theory (and contemporary game-theory) he establishes a foundation for the principle of freedom that encompasses not merely symmetrical exchanges but also asymmetrical situations in life. This allows him to guarantee human dignity unconditionally: Unborn lives, the severely disabled, members of future generations, and the senile must be protected by the legal and societal order even though their contribution to it might not be economically equivalent to what they receive. For Krause wishes to formulate the rights of all persons so that people become *effective* about what *affects* them; wherever possible through participation, and otherwise through representation. With Krause, humanity as a whole is promoted to the overall corrective of all legal claims. Consideration for other human

beings' rights to freedom appear, from this perspective, not as *subsequent* curtailments of an *originally* infinite freedom, but rather as the *outer* expression of the *inner* structure of freedom. For Krause, freedom goes in hand with responsibility for the freedom of others.

Especially in regard to the right to property it becomes clear how this different groundwork leads to an innovative liberalism. Property and possession are to be cherished for promoting freedom, according to Krause. Certain – *absolute* – forms of property, however, often prove less conducive to the freedom of all than other – *relative* – forms. The liberal support for private property must correspondingly prevent property from being never communally and always exclusively possessed. In contrast: The enabling of an autonomous life for all functions as regulator of the order of possession; and therefore the human claim to just participation is globalized by Krause. Our commitment to help others attain freedom does not end at the front door, customs-barriers, or national boundaries.

Krause's *cosmopolitanism* outshines the work of his predecessors. He holds a subsidiary federal order to be the best protection of freedom inside the nation as well as outside of it, in the international and intercultural space. Just as on the domestic front Krause pleads for the civil-societal development of institutional orders, he makes similar pleas in foreign (and global) affairs. He opposes a globalization 'from above' with his model of a cosmopolitanism 'from within.' Krause wants freedom's commitments to be established by the global citizens themselves. As a result his preferred procedure is a subsidiary political self-determination arising from civil-society organizations and movements, and not the plebiscite; one finds contemporary equivalents of these ideas in, for instance, the concept of *Network Governance* and *Stakeholder Democracy*. By differentiating the *idea* of freedom in the *medium* of freedom in various *concepts* of freedom, Krause's philosophy returns to its methodological principle, already sketched by Kant. It frees human beings for the formation and implementation of their own representations of freedom.

We here witness a historically as well as systematically fascinating trajectory of thought in three steps: Kant had turned the idea of freedom back upon itself, by showing that the basis for the legitimation of individual freedom is the freedom of all. Correctly understood, the freedom of others and its promotion must hence be recast as an objective for individual freedom. Fichte further develops this consequence, albeit in a manner often running contrary to its liberal core concern. From the task established by Kant and the overblown Fichtean solutions, Krause extracts the appropriate consequence: To elevate the realization of the idea of freedom not merely as the aim of individual liberties, but rather to make liberty also the means for its pursuit.

Correspondingly, these three thinkers present the relationship between metaphysics and freedom very differently. In Kant, metaphysics serves to enable the self-questioning of everyday conceptions of freedom. Fichte employs it in order to give a definitive answer to those questions. And Krause in turn uses metaphysical thinking as a horizon of orientation before which human beings can individually as well as institutionally answer the conundrums being produced by the radical nature



of their freedom. In short, with Kant, metaphysics leads us to the big questions how freedom should relate itself to its lifeworld. Fichte's metaphysics provides but one big answer, whereas Krause uses his metaphysics in order to combine Kant's big question with the global citizens' many small answers.

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