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Published by

Dartmouth Publishing Company
Ashgate Publishing Limited
Gower House
Croft Road
Aldershot
Hants GU11 3HR
England

Ashgate Publishing Company

Suite 420

101 Cherry Street

Burlington, VT 05401-4405 USA

Ashgate website: <http://www.ashgate.com>

British Library Cataloguing in Publication Data

Hegel and law – (Philosophers and law)

1. Hegel, Georg Wilhelm Friedrich, 1770–1831 – Contributions in law 3. Law – Philosophy

I. Salter, Michael
340.1

Library of Congress Cataloging-in-Publication Data

Hegel and law / edited by Michael Salter.

p. cm. — (Philosophers and law)

Includes bibliographical references.

ISBN 0-7546-2092-1 (alk. paper)

1. Hegel, Georg Wilhelm Friedrich, 1770–1831—Contributions in philosophy of law. 2. Law—Philosophy 3. Jurisprudence. I. Salter, Michael. II. Series.

K230 H43 A2 2002

340.1—dc21

ISBN 0 7546 2092 1

2002074726

Printed in Great Britain by The Cromwell Press, Trowbridge, Wiltshire

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Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material:

American Political Science Association for the essay: Peter G. Stillman (1974), 'Hegel's Critique of Liberal Theories of Rights', *American Political Science Review*, 68, pp. 1086-92.

Blackwell Publishers for the essay: Michael Salter and Julia J.A. Shaw (1994), 'Toward a Critical Theory of Constitutional Law: Hegel's Contribution', *Journal of Law and Society*, 21, pp. 464-86.

Blackwell Publishers Ltd & Pennsylvania State University for the essay: Seyla Benhabib ('On Hegel, Women and Irony', in Mary Lyndon Shanley and Carole Pateman (eds), *Feminist Interpretations and Political Theory*, Cambridge: Polity Press & co-published with Pennsylvania State University Press, Pennsylvania, pp. 129-45. Reproduced by permission of the Pennsylvania State University Press & Blackwell Publishers Ltd.

Cambridge University Press for the essay: Seyla Benhabib (1984), 'Obligation, Contra Exchange: On the Significance of Hegel's Abstract Right', in Z.A. Pelczynski (ed.), *The Owl of Minerva: Studies in Hegel's Political Philosophy*, Cambridge: Cambridge University Press, pp. 159-77, 299-303.

Cardozo for the essay: Gary Minda (1989), 'Toward a More "Just" Economics of Justice Review Essay', *Cardozo Law Review*, 10, pp. 1855-77. This article appeared in *Cardozo Review*, 10, 1855 (1997).

Hegel Society of America for the essays: Patricia Jagentowicz Mills (1986), 'Hegel's Antigone', *Owl of Minerva*, 17, pp. 131-52. Copyright © 1986 Hegel Society of America; Richard Winfield (1991), 'Rethinking Politics: Carl Schmitt vs. Hegel', *Owl of Minerva*, 22, pp. 25. Copyright © 1991 Hegel Society of America.

Journal of the History of Philosophy for the essays: Andrew Buchwalter (1991), 'Hegel, and the Concept of Immanent Critique', *Journal of the History of Philosophy*, 29, pp. 25. Peter G. Stillman (1976), 'Hegel's Idea of Punishment', *Journal of the History of Philosophy*, 14, pp. 169-82.

Kluwer Academic Publishers for the essays: Valerie Kerruish (1996), 'Persons and Available Identities: Gender in Hegel's Philosophy of Law', *Law and Critique*, 7, pp. 153-72; M.G. (1998), 'Hegel and the Social Dynamics of Property Law', in J.W. Harris (ed.), *Problems: From Genes to Pension Funds*, Institute of Advanced Legal Studies/Kluwer International, pp. 257-73; Abel Garza Jr (1990-91), 'Hegel's Critique of Liberalism

Natural Law: Reconstructing Ethical Life', *Law and Philosophy*, 9, pp. 371-98. With kind permission from Kluwer Academic Publishers.

Michigan Law Review Association for the essay: Markus Dirk Dubber (1994), 'Rediscovering Hegel's Theory of Crime and Punishment', *Michigan Law Review*, 92, pp. 1577-621. Reprinted from *Michigan Law Review*, May 1994, Vol. 92, No. 6. Copyright © 1994 The Michigan Law Review Association.

Oxford University Press for the essay: William N.R. Lucy (1997), 'The Common Law According to Hegel', *Oxford Journal of Legal Studies*, 17, pp. 685-703.

Pluto Press for the essay: Robert Fine (1995), 'Hegel's *Philosophy of Right* and Marx's Critique: A Reassessment', in W. Bonefeld (ed.), *Open Marxism*, New York: Pluto Press, pp. 84-109.

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Texas Law Review for the essay: Chad McCracken (1999), 'Hegel and the Autonomy of Contract Law', *Texas Law Review*, 77, pp. 719-51.

The University of Notre Dame for the essay: Edgar Bodenheimer (1990), 'Hegel's Politico-Legal Philosophy: A Reevaluation', *American Journal of Jurisprudence*, 35, pp. 217-46.

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important English that deal with the application to law of the work of major philosophers for whom was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of the philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engager in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

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[1]

HEGEL'S POLITICO-LEGAL PHILOSOPHY A REEVALUATION

EDGAR BODENHEIMER

I. INTRODUCTION

About twenty-five years after Hegel's death in 1831, a German teacher of philosophy and cultural history by the name of Rudolf Haym wrote a book on Hegel, in which he portrayed the deceased thinker as an advocate of political restoration and a defender of the Prussian monarchy of his time.¹ Haym based his judgment on certain statements made by Hegel in his *Grundlinien der Philosophie des Rechts*, published in 1820,² concerning the institution of the state, which Hegel claimed to be descriptions of existing reality rather than normative postulates for the future.³ Hegel called the state "the reality of the ethical idea," "the reality of concrete freedom," and that which is "absolutely rational."⁴ He also proclaimed it to be the highest duty of an individual to be a member of a state, asserting that a person possesses objectivity, truth, and ethical value only insofar as he or she belongs to a state.⁵ Furthermore, Haym blamed Hegel for supporting the persecution by the Prussian authorities of so-called "demagogues" and for launching an ugly attack on Jacob Fries, a prominent liberal and leader of a rebellious student movement that was fighting for democracy and German national unity (*Burschenschaft*).⁶

1. R. Haym, *Hegel und seine Zeit* (1857, reprinted 1962), pp. 357-91.

2. The German text is found in G. W. F. Hegel, *7 Sämtliche Werke* (H. Glockner ed. 1928). The English translation by T. M. Knox bears the title *Hegel's Philosophy of Right* (1945) [hereafter cited *Philosophy of Right*]. This title is misleading and, since it carries over into the text, casts a cloud over the otherwise adequate translation. The German term "Recht" covers both "right" and "law." The latter term includes, of course, duties and prohibitions as well as rights. Hegel used "Recht" in both senses, whereas Knox, with a few exceptions, used "right" when Hegel spoke of "law." References in this article are to section numbers, which are the same in the German original and the English translation. For quotations from lengthy sections, the page number of the translation will be added. Sometimes I have substituted my own translation for that of Knox.

3. *Philosophy of Right*, p. 11.

4. *Ibid.*, Sec. 257, 258 (p. 155), 260. I have changed "actuality" to "reality."

5. *Ibid.*, Sec. 258 (p. 156). I have changed "actual" to "real."

6. *Hegel und seine Zeit*, pp. 362-64.

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In recent times, Haym's critique of Hegel's ideological position was endorsed by Karl Popper⁸ and Sidney Hook.⁹ Popper, who characterized Hegel as a "charlatan," claimed that Hegel's theory was "the fertilizer to which modern totalitarianism owes its rapid growth."¹⁰ Popper also argued that, although German National Socialism substituted "blood" and "race" for Hegel's "spirit" and "reason," this difference was unimportant, inasmuch as the main political tendencies of Hegelianism and Nazism were the same.¹¹ This view was not, however, shared by the high priest of National Socialist philosophy, Alfred Rosenberg, who rejected Hegel's political philosophy as "blutfeind," i.e., as ignoring the primacy of blood and race in appraising the worthiness of a group or nation.¹² His aversion to Hegel becomes clearly understandable against the background of Hegel's statement that "a human being has value because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc."¹³ Hegel was for the most part treated as a non-person in Hitler's Third Reich.¹⁴

According to Hook, "Hegel had glorified the State and sang the uses of war."¹⁵ It is true that, in Hegel's view, the ethical health of peoples tended to be preserved by the instability produced by war, "just as the blowing of winds preserves the sea from the foulness which would be the result of a prolonged calm."¹⁶ Hegel also believed that the virtues of courage and self-overcoming for the general interest grew to a full blossoming only in war.¹⁷ It has been observed in this connection that Hegel's remarks about war do not necessarily have

7. K. R. Popper, *2 The Open Society and Its Enemies* (2d ed. 1952), pp. 27-

80. 8. S. Hook, *From Hegel to Marx* (1950), pp. 20-22; Hook, "Hegel Rehabilitated?" and "Hegel and his Apologists," *Hegel's Political Philosophy* (W. Kaufmann ed. 1970), pp. 55-70, 87-105.

9. 2 *The Open Society and Its Enemies*, p. 59.

10. *Ibid.*, p. 62. See also *ibid.*, p. 30.

11. A. Rosenberg, *Der Mythos des 20. Jahrhunderts* (5th ed. 1935), p. 525.

12. *Philosophy of Right*, Sec. 209 (translation altered).

13. Carl Schmitt, the crown jurist of the Third Reich, made the striking statement that on the day of Hitler's ascent to power, "Hegel, so to speak, died." Schmitt, *Staat, Bewegung, Volk* (1933), p. 32.

14. "Hegel Rehabilitated?," *Hegel's Political Philosophy*, p. 56.

15. *Philosophy of Right*, Sec. 324 (p. 210). The statement was probably induced by the fact that Hegel welcomed the chief result of the Napoleonic wars, i.e., the sweeping away of outdated feudal privileges. He also felt that the conquest of the Middle East by Alexander the Great had brought in its train the creation of a superior civilization for the region. See Hegel, "Vorlesungen über die Philosophie der Geschichte," *II Sämtliche Werke*, p. 354.

16. *Philosophy of Right*, Sec. 324.

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to be construed as a glorification of it, but may be regarded as an attempt to justify an institution which, in a period of time believing in the absolute sovereignty of nations, was generally considered to be unavoidable.¹⁷ Hegel's assertion that "war is not to be regarded as an absolute evil"¹⁸ gives some credence to the view that he attempted to find some positive side to the institution, without wishing to ignore the cruelties and hardships inflicted by war. It is anybody's guess how he would have approached the problem in the atomic age.

A number of writers have rejected the characterization of Hegel as an illiberal, regressive thinker who thought that might makes right. It has been pointed out, among other things, that (1) Hegel approved of the general objectives of the French Revolution, although he deplored its excesses, (2) that even during the years when he served the royal crown of Prussia as an educator, he each year celebrated the storming of the Bastille (the event that had ignited the French conflagration) on its anniversary in the circle of his friends, (3) that he admired Napoleon as a destroyer of the feudal order and promoter of freedom in Europe, (4) that he opposed the reactionary measures enacted by the Congress of Vienna after the fall of Napoleon, (5) that he criticized expressions of a vehement German nationalism, (6) that several times, during his tenure at Berlin, he intervened on behalf of students who ran into difficulties with the police because of their political convictions, (7) that throughout his life he stood up for the rule of law and condemned arbitrary government and oppression.¹⁹

It has also been noted that the Prussia in which Hegel lived and taught from 1818-1831, after it had been conquered by Napoleon in 1806, had adopted a series of reforms that had curtailed the privileges of the nobility, increased the freedoms of the middle classes, and instituted self-government in the cities.²⁰ This point has been made

17. See T. M. Knox, "Hegel and Prussianism," *Hegel's Political Philosophy*, p. 27. The interpretation of Knox also finds support in *Philosophy of Right*, Sec. 324, and *Georg Friedrich Wilhelm Hegel: Vorlesungen über Rechtsphilosophie 1818-1831* (K. H. Illing ed. 1972-1973) [hereinafter called *Vorlesungen*], Vol. 4, p. 733: "War is not an external contingency but a necessary phenomenon." (My translation)

18. *Philosophy of Right*, Sec. 324.

19. See S. Avineri, *Hegel's Theory of the Modern State* (1972), esp. chap. 4, 6, 9. J. Ritter, *Hegel and the French Revolution* (R. Winfield trans. 1982), pp. 35-69; H. Marcuse, *Reason and Revolution* (1960), pp. 169-233; C. Taylor, *Hegel* (1975), pp. 423-24; W. Kaufmann, "The Hegel Myth and Its Method," *Hegel's Political Philosophy*, pp. 152-71.

20. See Hegel's *Theory of the Modern State*, pp. 69-70; *Reason and Revolution*, pp. 170-71.

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by the defenders of Hegel's philosophy in order to show that Hegel was not beholden to a political system that deserved to be called "reactionary." It should also be mentioned that in Hegel's lifetime Prussia enjoyed a very high cultural vitality, and that to him the quality of a society's culture was a touchstone of paramount importance.

In attempting to describe the contemporary significance of Hegel's legal philosophy, which is inextricably interwoven with his political philosophy, the interpreter is thus confronted with a host of conflicting and irreconcilable assertions and counterassertions. This difficulty has been considerably alleviated, however, by the publication in Germany, in 1972 and 1973, of a scholarly work which to this date has received insufficient attention in the English-speaking world. It is a four-volume work by Karl-Heinz Ilting dealing with Hegel's philosophy of law.²¹ The first volume contains the previously unpublished text of a lecture class on legal philosophy presented by Hegel in 1818-1819, as taken down by Carl Gustav Homeyer, one of Hegel's students. The text of this lecture series was the basis of the particular version of Hegel's *Philosophy of Law* which he published in 1820. The second volume brings the text of the published volume, in juxtaposition with notes prepared by Hegel for his lecture courses in subsequent years. The third and fourth volumes comprise sets of notes taken by three of Hegel's students, Hotho, Griesheim, and Strauss, of the lectures delivered in 1822-23, 1824-25, and 1831, as well as a summary of the 1822-23 class prepared by Hotho. These materials again, with some exceptions, had not previously been published.²² Ilting points out that a certain degree of caution in relying on these student products appears advisable, although a comparative study convinced him of their essential correctness.²³

Two further discoveries were made in the 1980's. Hegel taught a course on legal philosophy at the University of Heidelberg in 1817-

21. *Vorlesungen* (see note 17). I have not been able to discover a review of this important work in English. A brief reference to it is made in a book review dealing with other publications on Hegel. See S. Avineri, Book Review, 16 *Owl of Minerva* (1985), pp. 199-200.

22. Some of the lecture notes taken by Hotho and Griesheim had been published by Eduard Gans in his 1834 edition of Hegel's *Philosophy of Law*. These additions (*Zusätze*) are included in the translation by Knox. Some student notes, prior to their publication by Ilting, were available in manuscript form in various German public libraries.

References to the student notebooks published by Ilting will hereinafter be identified by the volume and page numbers of the *Vorlesungen*, and also by the name of the student.

23. *Vorlesungen*, Vol. 3, pp. 51-80 (Editor's introduction).

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18, the last year of his tenure there before he shifted his activities to the University of Berlin. Notes taken by one of his students, Peter Wannenmann, of these lectures were published by Ilting in 1983.²⁴ Ilting considers the Heidelberg lectures as particularly valuable evidence of Hegel's views, because they were delivered in an atmosphere free from the political tensions and pressures that confronted Hegel in Berlin. Secondly, another German scholar, Dieter Henrich, discovered a set of anonymous notes covering Hegel's lectures delivered at Berlin University in 1818-19, which he also published in 1983.²⁵

The findings made by Ilting, which are of decisive importance for a proper understanding of Hegel's political and legal philosophy are these: statements are found in the lectures preceding the publication in 1820 of Hegel's *Philosophy of Law* that reveal Hegel as a thinker who, although he could not be called a liberal,²⁶ was favorably inclined toward certain tenets of liberalism, as they had emerged from the convulsions of the French Revolution, and who was in many respects opposed to the spirit of restoration that came to dominate the German-speaking countries after the fall of Napoleon. These statements were omitted in the 1820 publication, but some of them were repeated in the oral lectures subsequently given by Hegel. Ilting also showed that the 1820 volume contained passages paying homage to the general policies of the authorities and seemingly supporting the contentions of Hayn, Popper, and Hook that Hegel was the philosophical patron saint of the Prussian monarchy. Many of these statements cannot, however, be found, in the oral lectures preceding and following the publication of the 1820 volume.

How can these apparent shifts and vacillations in Hegel's expressed opinions be explained? Ilting points out that in 1819, after Hegel had completed, on the basis of the lectures delivered in 1818-19, the version of his legal philosophy destined for publication, the decrees

24. G.W.F. Hegel, *Die Philosophie des Rechts: Die Mitschriften Wannenmann (Heidelberg 1817/18 und Hohmeyer (Berlin 1818/19)*, (K.H. Ilting ed. 1983) [hereinafter called *Heidelberg Lectures*]. The class notes prepared by Hohmeyer were also published by Ilting in *Vorlesungen*, Vol. 1, pp. 217-51. Citations will be to this edition of the notes.

25. G.F.W. Hegel, *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift* (D. Henrich ed. 1983). Ilting considers this version to be less reliable than the other class notes, because it was apparently copied from an original set of notes and contains obvious misreadings. Ilting, Book Review *Philosophische Rundschau* (1983), pp. 161, 169-70.

26. Hegel's views on marriage and divorce, on the need for private and public discipline, and on the incidents of national sovereignty should be characterized as conservative.

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of Carlsbad were handed down at the behest of the Austrian Chancellor Prince Metternich. These decrees, which applied to Prussia, contained very stringent provisions for censorship which extended to scholarly works written by university professors. Hegel, in order to save the publication of his work, eliminated passages that clearly would have provoked an interdiction by the censor and—since there still remained many statements revealing a certain degree of non-conformity with the official orthodoxy—added comments designed to allay any suspicion of subversive political thinking on his part.²⁷

Here are some examples of discrepancies between the oral, uncensored lectures and the text of the published volume approved by the censor:

(1) In Hegel's opinion, a constitutional monarchy (which did not exist in Prussia during his lifetime) was the most desirable form of a state, and many passages in the lecture course of 1818-1819 indicate that he favored the English variety of such a monarchy. For example, he stated that "the cabinet alone is responsible for governmental actions, the monarch is relieved of responsibility."²⁸ He also said that "in a constitutional state the personality of the monarch is not of great importance, since the objective side of governing is detached from the monarch."²⁹ In his lectures delivered in 1822-23, Hegel remarked that "the monarch is a person who says 'yes' and puts the dot on the 'i'."³⁰ All these statements were not included in the published version of 1820.³¹ Hegel asserted instead that without the monarch and the structure of government connected with the monarchy, there would be merely a formless configuration that could not be called a state; the monarch, he said, was "an absolutely decisive moment of the whole."³² At the

27. *Vorlesungen*, Vol. 1, pp. 57-70 (Editor's Preface). Hegel's willingness to seek accommodation with the ruling authorities lends itself to criticism. Hegel himself was unhappy about the situation; he wrote to a friend that he was fearful (*ängstlich*) by nature and cherished tranquility in life! *Ibid.*, Vol. 1, p. 68. As against this negative factor, it should be taken into account that the book contained many new and challenging ideas: Hegel was afraid that, in case of his refusal to meet the objections of the censorship office, these ideas would become lost to posterity.

28. *Ibid.*, Vol. 1, p. 332 (Hohmeyer). See also *Heidelberg Lectures*, p. 164.

29. *Ibid.*, Vol. 1, p. 333 (Hohmeyer). A similar statement is found in Vol. 3, p. 763 (Hohm).

30. *Ibid.*, Vol. 3, p. 764 (Hohm). See also Vol. 4, pp. 677-78 (Ortstein), where Hegel calls attention to the fact that in England refusal of the monarch to sign a law passed by Parliament would produce a constitutional crisis.

31. The statement regarding the dot on the "i" was included as an addition in the 1834 edition of the *Philosophy of Law* prepared by Eduard Gans. It is also found in *Hegel's Philosophy of Right* (Knox trans.), p. 289. On the additions (which had not been subject to censorship because they were oral utterances), see *supra*, note 22.

32. *Philosophy of Right*, Sec. 279 (pp. 181, 183).

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same time, he delivered a strong attack on despotism.³³

(2) In his lectures of 1818-19 Hegel declared that the positive law of a state can be contrary to reason and therefore illegal.³⁴ Thus he seemed to align himself more or less with the position taken by St. Thomas Aquinas to the effect that a statute violative of natural or divine law may be lacking in validity.³⁵ In the published version, on the other hand, the following statement appears: "A legal provision may be shown to be wholly justified and consistent in the light of the prevailing conditions and existing legal institutions and yet, absolutely speaking, be wrongful and irrational, like a number of provisions in Roman private law."³⁶ This assertion conveys a sense entirely different from the one implicit in the statement found in the oral lecture. What Hegel was saying in effect is that an institution like slavery or the Roman family father's power over life and death of the family members may perhaps be defensible and lawful in an early stage of legal evolution, in which the consciousness of freedom has not as yet sufficiently matured, but must be regarded unjustifiable and wrong under the standards of a highly developed legal and social system. While the red pencil of the censor would undoubtedly have struck out the earlier statement, the later one could by no stretch of the imagination be construed as counseling disobedience to any existing law.

(3) In an article on the "Proceedings of the Assembly of Estates in the Kingdom of Württemberg," published in 1817, Hegel stated that, according to the view propagated by the French Revolution, no constitution of a state should be regarded as valid that did not recognize the principles of the law of reason. He added that "one must regard the incidence of the French Revolution as the struggle of rational constitutional law against the mass of positive law and privileges by which it had been stifled."³⁷ He mentioned freedom from taxation and jurisdiction over vassals and serfs as examples of unjustified prerogatives of the nobility that the revolution had done away with.³⁸ No such favorable appraisal of the revolution is found in the volume of 1820.

33. *Ibid.*, Sec. 278.

34. *Vorlesungen*, Vol. 1, p. 238 (Hohmeyer). Hegel returned to this position in 1824. See *Ibid.*, Vol. 4, p. 82 (Ortstein).

35. St. Thomas Aquinas, *Summa Theologiae* (Fathers of the English Dominican Province trans. 1913-1925), Pt. II, qu. 96, art. 4.

36. *Philosophy of Right*, Introduction Sec. 3, p. 17 (translation altered).

37. Hegel, "Proceedings of the Estates Assembly in the Kingdom of Württemberg 1815-1816," *Political Writings* (T.M. Knox trans. 1964), pp. 281-82. See also *Heidelberg Lectures*, p. 53. Hegel considered the feudal system as contrary to the idea of government by law. See *Vorlesungen*, Vol. 1, pp. 233-34. It has been pointed out that one reason why Hegel supported the Prussian monarchy was that the King was opposed to feudal privileges. Avineri, *Hegel's Theory of the Modern State*, p. 73.

38. *Heidelberg Lectures*, p. 147.

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(4) In the Preface to the published volume, the following famous apothegm is found: "What is rational is real and what is real is rational."³⁹ Hegel's critics have assailed this statement as a demonstration of political opportunism, designed to portray the existing political and legal order as an embodiment of reason.⁴⁰ The statement is repeated in the oral lectures delivered in 1824-25, but in this instance Hegel made it clear that he was ascribing an entirely uncommon meaning to the term "real." He said: "That which is not rational is also present in this world, it exists, but it is not real."⁴¹

For Hegel, reality was the "union of essence and existence."⁴² The essence of a thing is its purpose or proper function. The function of a key is to lock and unlock doors. A well-made key exists in consonance with its essential purpose; it therefore possesses reality. A defective key, viewed in the light of its purpose, is a nullity and need not even be called a key. The function of a state is to create conditions conducive to the well-being of its citizens. In Hegel's terminology, a badly governed state has existence but no reality.⁴³

This unorthodox use of language was brought about by Hegel's conviction that mankind was moving from a condition of primitive irrationality to a state of accomplished rationality. The word "real" meant to Hegel not any empirical given, but a succession of realized ideas that formed essential stepping stones in the march of reason towards its full consummation.⁴⁴ That which tended to thwart or impede this process, such as failure, evil, or unreason, represented to Hegel a distortion rather than affirmation of reality. But Hegel went even further in his optimistic appraisal of social evolution by claiming that a benevolent spirit often lets evil work for the sake of an ultimate good; the occurrence of oppression and injustice, for

39. Knox in his translation, of *Philosophy of Right*, p. 10, uses "actual" instead of "real." It would seem that "real" is a better translation of the German word "wirklich."

40. See, for example, Haym, *Hegel und seine Zeit*, pp. 365-67.

41. *Vorlesungen*, Vol. 4, p. 654 (Griesheim).

42. Hegel, "System der Philosophie: Erster Teil," 8 *Sämmtliche Werke*, Vol. 8, p. 319. See H. Glockner, *Hegel-Lexikon* (2d ed. 1957), Vol. 2, p. 2710.

43. Hegel said: "A bad state is one that merely exists; a sick body also exists, but it has no true reality. A hand that has been cut off, still looks like a hand, it still exists, but without being real." *Vorlesungen*, Vol. 3, p. 727 (my translation). See also *ibid.*, Vol. 4, p. 923 (Evil is something broken and void).

44. See in this connection *Heidelberg Lectures*, p. 157, where Hegel asserts: "That which is reasonable is bound to happen." In his 1819-20 oral lectures, which were contemporaneous with his preparation of the published volume, Hegel said: "That which is reasonable is going to become real." See *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, p. 51. (My translation).

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example, might teach a nation to change its ways. Understood in this fashion, evil might become "real" in the Hegelian sense by contributing to the realization of ideas that promote the goal of political and social organization, namely, the achievement of a fair and reasonable order of life.⁴⁵

The Hegelian conception of social evolution, in which an impersonal force, the "world spirit," plays a major role, offers a clue to the solution of a question that has posed a puzzle to many interpreters of Hegel's philosophy. It was pointed out earlier that, in the opinion of Rudolf Haym, the objective of Hegel's *Philosophy of Law* was to defend and sanctify the then existing political and legal system of Prussia. A study of the published volume and especially the oral lectures shows, however, that Hegel made himself the advocate of many political and legal ideas and institutions that had not been accepted in the Prussia of his time. Hegel, for example, made a plea for separation of powers in consonance with the theory of Montesquieu, but not in accordance with contemporaneous political thinking.⁴⁶ He advocated jury trials in criminal cases, which were not recognized in the Prussian criminal justice system.⁴⁷ His views of the functions of estates and corporations were innovative rather than descriptive of contemporary reality.⁴⁸ The guarantees of personal freedom he wished to see established (with specific reference to French and English law) went beyond the conceptions in vogue in his home state.⁴⁹ Furthermore, Hegel had declared in his oral lectures delivered in 1818-19 that an analysis of the concept of freedom must proceed on a level higher than the traditional understanding of the time.⁵⁰ We must, therefore, conclude that Hegel's political and legal philosophy was, to a substantial degree, normative rather than descriptive.

This interpretation seems to be set at naught by the fact that Hegel denied to the philosopher the right to set up postulates and to become the advocate of "oughts." He said:

45. Hegel's reflections on the "cunning of reason" are discussed by Avineri, *Hegel's Theory of the Modern State*, pp. 230-34.

46. *Philosophy of Right*, Sec. 272; *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, pp. 213-14; *Heidelberg Lectures*, pp. 151-52; *Vorlesungen*, Vol. 3, p. 745 (Hobbes).

47. *Heidelberg Lectures*, pp. 133-34; *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, pp. 182-86; *Vorlesungen*, Vol. 4, pp. 567-69 (Griesheim).

48. See Avineri, *Hegel's Theory of the Modern State*, pp. 161-67; see also III.

49. *Vorlesungen*, Vol. 4, p. 593 (Griesheim).

50. *Ibid.*, Vol. I, p. 234 (Hörmeyer).

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To comprehend what is, this is the task of philosophy, because what is, is reason. Whatever happens, every individual is a child of his time; so philosophy too is its own time apprehended in thoughts. It is just as absurd to fancy that a philosophy can transcend its contemporary world as it is to fancy that an individual can overleap his own age, jump over Rhodod. If this theory really goes beyond the world as it is and builds an ideal one as it ought to be, that world exists indeed, but only in his opinions, an unsubstantial element where anything you please may, in fancy, be built.⁵¹

The apparent inconsistency between this statement and some of the future-oriented recommendations of Hegel may perhaps be attributed to his willingness to accommodate the authorities of the state who, because of the radical agitation of the students, had in 1820 become highly resentful against the publication of any blueprints for the future. But it is also possible to offer an explanation for the seeming inconsistency which does not predicate it on opportunistic motivation. Hegel, as we have seen, identified "reality" with the inevitable self-realization of reason in a historical process. That which loomed in the future was to him not a set of "oughts" corresponding to the desires of human beings, but a prospective "is," forming a necessary link in the effort of the "world spirit" to bring about the triumph of reason.⁵²

The workings of the world spirit in shaping history are not incompatible with Hegel's belief in the freedom of the human will.⁵³ Hegel felt that reasonable individuals playing an active role in society will discern the trends of the time that foreshadow future developments and make their choices accordingly. In his opinion, destiny and free human action will for the most part move in the same direction.

We discover here a methodological similarity between the approaches of Hegel and Karl Marx. Marx believed that his theory of socialism was the description of an ineluctable future rather than the advocacy of a social-economic ideal. Unlike Marx, Hegel expected a revolutionary improvement of existing society rather than a radical transformation of it. Both were sure, however, that they were acting more as scientists forecasting an essentially predetermined future than as champions of panaceas born of purely human hopes and aspirations.

The discussion of Hegel's thought on state and law presented in this article is based on the published volume of 1820 as well as on

51. *Philosophy of Right*, Preface (p. 11).

52. On the "world spirit," see *Ibid.*, Sec. 347.

53. Human free will is affirmed by Hegel in *Vorlesungen*, Vol. 3, pp. 162-63 and Vol. 4, p. 101.

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the lecture notes made available by Iltting and Henrich.⁵⁴ Since the published version can no longer be considered an authentic exposition of Hegel's ideas, statements made in it cannot be viewed as reliable indicators of his thoughts, unless confirmed by the content of the oral lectures preceding or following the published volume; these lectures were not covered by the censorship law.⁵⁵

II. HEGEL'S VIEW OF HUMAN NATURE AND NATURAL LAW

Hegel's conception of natural law is deficient in clarity and specificity if we restrict our research to the statements addressed by the philosopher to the subject as such. Hegel's thoughts on the existence and content of natural law are therefore rarely referred to in scholarly writings. If, however, we pay attention to the views that Hegel expressed with respect to the nature and general attributes of human beings, insofar as these have a bearing on the proper functions of law and government, an interesting and original understanding of natural law emerges before our eyes.

Many years before the publication of his *Philosophy of Law*, Hegel wrote an article in a philosophical journal on the various scientific ways of dealing with natural law and its role in practical philosophy. This essay was translated into English under the title *Natural Law*.⁵⁶

In his article, Hegel pointed out that natural law may be approached from an empirical angle as well as from an *a priori* point of view; he recommended a combination of both methods of treatment. The article does not contain a concrete theory of natural law setting out specific principles and postulates assumed to be within its ambit. Hegel made it clear, however, that he considered certain understandings of natural law to be erroneous.

First, Hegel rejected a view of natural law that equates the notion with legal conditions prevailing in a supposed "natural," pre-political state of human affairs. A totally unregulated natural state, he said, would be a state of violence and disorder, of fear and oppression, and as such intolerable to human beings.⁵⁷ Such a state never existed,

54. See *supra* notes 21, 24, and 25.

55. It is noteworthy in this respect that the anonymous lecture notes published by Henrich which recorded the lectures of the year in which Hegel prepared his book for publication (which was 1820, although the publisher predated it 1821), bore much more similarity to the earlier lectures than to the published volume. See Iltting, Book Review, 1983 *Philosophische Rundschau*, p. 174.

56. Hegel, *Natural Law* (T.M. Knox trans. 1975). This essay was published 1802-03.

57. *Heidelberg Lectures*, pp. 37-38; *Vorlesungen*, Vol. 1, pp. 239-40 (Hohmeyer).

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he maintained, quoting Aristotle to the effect that the state is prior to the individual.⁵⁸ In Hegel's view, as in Aristotle's, human beings have always lived in organizations, whether they were sibs, clans, tribes, federations of tribes, or modern states. He was opposed to the notion of a social contract, according to which free and equal individuals living in a state of nature are supposed to set up a government by voluntary action and confer a certain measure of authority on it.⁵⁹ In his view, organized societies originate from need, not from convention.

Hegel also asserted that if certain abstractions such as "coercion" or "limitation of freedom" were to express the specific character of natural law, "it would then be a natural *wrong*, since on the basis of such negations as realities, ethical nature is thrown into utter corruption and misery."⁶⁰ In order to understand the meaning of this somewhat puzzling statement, it is necessary to realize that for Hegel the purpose of law was the promotion of freedom rather than the limitation of freedom by coercive means.⁶¹ "The sphere of law is the sphere of liberty."⁶² Restrictions on liberty and the use of coercion, as such, were ethical negatives in Hegel's view. Their only value lay in their function to maintain and protect the liberty of all by building fences around each individual's arbitrary will, in order to forestall acts of trespassing upon the freedoms of others.

It is Hegel's opinion that any positive determination of the concept of natural law has to face a deep ambiguity surrounding the meaning of "nature." The term as applied to human beings may simply refer to their immediately given impulses and drives, which are geared towards the maintenance of their life and physical well-being, and which they share with the animals. To these belong the instinct of self-preservation, the need for food and shelter, and the sexual impulse. The satisfaction of these primal drives, including the securing of means necessary to attain this objective, has been held by some to be the function of natural law.⁶³

58. Aristotle, *Politics* (B. Barker ed. 1946), Bk. I, 1253a: "We thus see that the polis exists by nature and is prior to the individual."

59. *Philosophy of Right*, Sec. 258; *Heidelberg Lectures*, p. 156.

60. *Natural Law*, p. 113.

61. The opposite position was taken by Jeremy Bentham, who argued that most laws are made at the expense of liberty. Bentham, *Theory of Legislation* (C.K. Ogden ed. 1931), p. 98.

62. *Vorlesungen*, Vol. I, p. 239 (Hohmeyer). See also *ibid.*, Vol. 3, p. 177 (Hohmeyer) and Vol. 4, p. 109 (Griehheim).

63. *Ibid.*, Vol. 4, pp. 76-77 (Griehheim).

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The term "nature," as Hegel points out, may also be used in the sense of "the nature of a thing," i.e., those qualities or characteristics of a thing which make its adequate functioning possible.⁶⁴ Thus understood, the nature of a thing would be coterminous with its "essence." Reverting to earlier examples used to explain the meaning of "essence," it could be said that it was the nature of a key to lock and unlock doors, and that it was the nature of a state to provide order and justice to its citizens.

If we apply this broader understanding of "nature" to the human condition, we should conclude that the nature of human beings comprises not only their physical needs but also their spiritual, noetic qualities. These are not, like the physical needs, immediately given but are developed by the individual in a gradual process of acculturation. Natural law as applied to this sphere of being would be a set of laws that reason (understood by Hegel as the chief vehicle of the spirit) adjudges to be essential to an adequate ordering of human coexistence.⁶⁵ As pointed out earlier, among the spiritual needs requiring satisfaction by the law Hegel assigned a high priority to the search for freedom⁶⁶; however, his analysis of this concept differed in some respects from the commonly accepted denotation.⁶⁷

Because of the ambiguity of the term "nature," Hegel refrained from offering an elaborated theory of natural law. He limited himself to stating that natural law was a system of positive law which was reasonable because it was in accord with human ethical nature.⁶⁸ But when we turn to Hegel's observations on the essential attributes of human ethical nature, it becomes possible for us to determine, at least in broad outlines, what kind of a legal system he considered consonant with the demands of reason.

Many conceptions of human nature propounded in philosophy or psychology have emphasized either the self-assertive or the social side

64. *Ibid.*, Vol. 4, p. 76 (Griehheim).

65. Judged from a practical viewpoint, such a set of laws would have to take the form of positive law. For this reason Hegel—as pointed out in a letter by one of his students to his father—stated in class that natural law should not be viewed as a sphere of law wholly divorced from positive law. See *Vorlesungen*, Vol. 2, p. 8. Notwithstanding the fact that Hegel's first two sets of lectures on legal philosophy were delivered under the title "Natural Law and Political Science," Hegel suggested that it might be desirable to replace the term "natural law" by "philosophical theory of law." *Heidelberg Lectures*, p. 38.

66. *Philosophy of Right*, Introduction Sec. 1; *Vorlesungen*, Vol. 4, pp. 79-80 (Griehheim).

67. See *infra* under III.

68. *Natural Law*, p. 113.

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of human beings. Hobbes described individuals as being by nature selfish, uncooperative, and aggressive creatures; since he placed great weight on the human instinct of self-preservation, he had difficulty in justifying the conscription of men in times of war.⁶⁹ For Nietzsche, the will to obtain or enhance power was the dominant motivation in human conduct. He looked upon the institution of law with a certain suspicion, since law was designed to erect obstacles to the activation of the will to power.⁷⁰ Aristotle and Grotius, on the other hand, stressed the social and communitarian aspect of human nature.⁷¹ Grotius specifically rejected the assumption that individuals were prompted by nature to seek only their own advantage; he believed that there was an inborn sociability in them which enabled them to live peacefully together in society.

Hegel accepted the egotistical as well as the communitarian conception of human nature. He spoke of a "dual" nature of human beings, placing an equal weight on self-assertive and other-regarding traits.⁷² He included the natural impulses and passions among the self-regarding features and attributed the social components to the workings of reason, which teaches us the benefits of moral conduct toward others. People are unique individuals who wish to live their lives according to their own desires and preferences. They are also social beings who wish to become integrated in a community to which they can make contributions in accordance with their special capabilities.⁷³ A proper organization of the social and legal system should pay heed to both of these constituents of human nature.

Hegel's approach might be said to represent a middle position between the diametrically opposed views of Nietzsche and Marx. Nietzsche denied the social instinct in man; he assumed that individuals were bent upon expanding their sphere of power as far as possible, and he considered this ego-oriented striving to be natural, irremediable, and wholesome. Marx believed that human beings could be completely socialized and conditioned by education to perform their social tasks in fraternal cooperation without the threat of compulsion. Hegel rejected both of these radical positions.

69. Hobbes, *Elements of Law* (F. Tönnies ed. 1928), Part 1, ch. XIV.2-5; Hobbes, *Leviathan* (M. Oakeshot ed. 1946), ch. XXI.

70. See E. Bodenheimer, *Power, Law, and Society* (1973), Sec. 2.

71. *Politics*, Bk. I, 1253a; H. Grotius, *De Jure Belli ac Pacis* (F. W. Kelsey trans. 1925), Proleg. 6.

72. "I am not only an individual person but also a member of an organic whole," *Vorlesungen*, Vol. 3, p. 508 (Hohio. My translation). See also Hegel, *Reason in History* (R. S. Hartman trans. 1953), p. 53.

73. See the further discussion of this view *infra* under III.

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In the sections which follow, two problems will be discussed that are of fundamental importance in any political and legal philosophy: the relations between citizens and their government and the tensions that might arise between the pursuit of private interests and the protection of the public good. It will be seen that Hegel's conception of the dual nature of human beings suffuses his entire discussion of these two problems. Anticipating the results of the discussion for the purpose of providing some initial guiding light for the inquiry, we might state tentatively that for Hegel natural law (in the sense of reasonable, adequate law) meant the attainment, with the help of the social and legal system, of a proper balance between the individualistic and communitarian impulses of persons. Hegel assumes that this basic problem requires a solution in all societies but he is aware, of course, that the balance will be drawn.

III. RELATIONS BETWEEN INDIVIDUAL AND STATE

Hegel, in his theory of society and law, ascribed to the individual a much more prominent role than some of his detractors have conceded. First of all, he insisted that the idea which law is destined to promote is freedom.⁷⁴ To be sure, freedom meant to Hegel more than the ability to do what one wishes to do. It included the rational control of one's emotions, in the sense that a free person will avoid becoming a slave of the passions or irrational impulses.⁷⁵ Furthermore, freedom signified for Hegel the liberation of human powers and the opportunity of activating one's special capabilities for the good of society. This element of freedom an individual can enjoy only as a member of an organized society.⁷⁶

Secondly, Hegel devoted about one third of his *Philosophy of Law* to a discussion of individual rights. The first of these is freedom of the person. This freedom would be incomplete unless it is extended to everybody in society. A person cannot be free unless his fellow-citizens recognize and respect his legitimate sphere of freedom. Hegel therefore proclaimed, as a sort of categorical imperative, the command "Be a person and respect others as persons."⁷⁷ The psychological need of an individual for esteem or respect from others, which Hegel

74. *Philosophy of Right*, Introduction Sec. 1; *Vorlesungen*, Vol. 3, p. 100 (Hohio); Vol. 4, p. 101 (Griestheim).

75. *Philosophy of Right*, Sec. 15 and Additions to Sec. 11, 15, and 18; *Vorlesungen*, Vol. 3, p. 141 (Hohio); Vol. 4, p. 134 (Griestheim).

76. *Vorlesungen*, Vol. 4, pp. 634-35 (Griestheim).

77. *Philosophy of Right*, Sec. 36. See also *Vorlesungen*, Vol. 1, p. 254 (Hohio).

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acknowledged in this imperative, has been asserted by modern psychiatrists to be one of the basic needs of human beings.⁷⁸

Hegel also attributed great importance to private property, which he described as the right of the individual to create an external sphere of his freedom.⁷⁹ In his oral lectures, he took the position that every person was entitled to have property; this statement is not found in the published volume.⁸⁰ Because of the unequal capabilities of human beings, he rejected equality in the distribution of assets.⁸¹ He was emphatic, on the other hand, about the "absolute injustice" of permitting ownership rights over persons, condemning slavery as well as the *dominium* the Roman family father held over his wife and children.⁸² He also criticized the feudal system for not allowing freedom of property and freedom of persons to come to their full fruition.⁸³ Among the freedoms of the person he placed a high value upon the right of vocational choice.⁸⁴

The right to enter into contracts was regarded by Hegel as a special kind of a property right. While ownership of land or chattels results from the exercise of an individual act of will, he argued, relations creating contractual property rights stem from a union of two or more wills in a bond of mutual commitments.⁸⁵ It is worthy of noting that Hegel refused to classify the institution of matrimony as a form of contract. A contract, he said, is freely concluded and freely dissolved by the parties. He was opposed, on the other hand, to the dissolution of a marriage by mutual consent. Although he did not advocate indissolubility of marriage, he wished to make the right of divorce subject to stringent restrictions.⁸⁶

78. See, for example, A.H. Maslow, *Motivation and Personality* (2d ed. 1970), pp. 45-46.

79. *Philosophy of Right*, Sec. 41; *ibid.*, Addition to Sec. 46; *Vorlesungen*, Vol. 3, p. 203 (Hohho).

80. *Vorlesungen*, Vol. 3, p. 215 (Hohho). This statement was, however, included by E. Gans in his Additions to the published volume. *Philosophy of Right*, Addition to Sec. 49 (p. 237).

81. *Vorlesungen*, Vol. 4, p. 198 (Griestheim). See also *Philosophy of Right*, Addition to Sec. 49.

82. *Philosophy of Right*, Secs. 43, 57; *Vorlesungen*, Vol. 3, p. 226 (Hohho). See, however, the historical-evolutionary qualification made by Hegel in the text accompanying *Philosophy of Right*, Introduction Sec. 3, p. 17 (translation altered).

83. *Vorlesungen*, Vol. 1, pp. 233-34 (Hohmeyer); Vol. 3, p. 233 (Hohho).

84. *Ibid.*, Vol. 4, pp. 521-11 (Griestheim); *Heidelberg Lectures*, p. 123.

85. *Philosophy of Right*, Sec. 71; *Vorlesungen*, Vol. 4, pp. 248-49 (Griestheim). See also M. Rosenfeld, "Hegel and the Dialectics of Contract," 10 *Cardozo L. Rev.* (1989), pp. 1199-1269.

86. *Philosophy of Right*, Sec. 75 and Addition to Sec. 176; *Heidelberg Lectures*, pp. 99, 101; *Vorlesungen*, Vol. 4, pp. 333, 425, 461-62 (Griestheim).

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Hegel then discussed the economic and vocational activities of people in civil society, as he saw them in abstraction from the regulatory activity of the state. "In civil society," he said, "each member is his own end, everything else is nothing to him."⁸⁷ Differently stated, the members of civil society attend to the satisfaction of their own multifarious and variegated needs. Each person pursues his or her own advantage, but, as Hegel emphasized, this pursuit involves a great deal of social interaction. "Every satisfaction of my needs is a mediate one, involving acts of will on the part of innumerable other persons."⁸⁸

Hegel assumed with Adam Smith—whose writings were known to him—that, on the whole, society profits from the self-serving activities of its members. As he expressed it, subjective and objective goals will ordinarily coincide.⁸⁹ Each person, he maintained, in producing, acquiring, and using goods is thereby indirectly benefiting others.⁹⁰ Thus, selfishness becomes transformed into satisfaction of general needs.⁹¹ Hegel therefore advocated an extensive right to pursue private economic activities. However, since there will always be persons seeking their own advantage by unscrupulous means detrimental to others, or to society as a whole, and also because the acquisitive abilities of individuals are very unevenly distributed, substantial disparities in wealth are likely to develop in society. If this hiatus becomes extremely large, the peace and order in society will be placed in jeopardy.⁹² Furthermore, since every person engaged in economic groups, the display of an excessively selfish attitude will not only hurt those others but also work to the disadvantage of the actor.⁹³ Freedom of enterprise, Hegel said, "should not be such as to jeopardize the general good."⁹⁴

An institution becomes therefore necessary whose function it is to promote an equilibrium between the self-assertive and cooperative

87. *Philosophy of Right*, Addition to Sec. 182 (p. 267). See also *Vorlesungen*, Vol. 3, p. 580 (Hohho).

88. *Vorlesungen*, Vol. 1, p. 309 (Hohmeyer). See also Avineri, *Hegel's Theory of the Modern State*, pp. 141-42.

89. *Ibid.*, Vol. 3, p. 388 (Hohho).

90. *Ibid.*, Vol. 3, pp. 394, 614 (Hohho); Vol. 4, pp. 168, 334, 635 (Griestheim).

91. *Philosophy of Right*, Sec. 199; *Vorlesungen*, Vol. 3, p. 613 (Hohho).

92. *Vorlesungen*, Vol. 3, pp. 574-77 (Hohho); *Philosophy of Right*, Secs. 244-45. On Hegel's attitude toward poverty see Avineri, *Hegel's Theory of the Modern State*, pp. 146-51.

93. *Vorlesungen*, Vol. 4, p. 337 (Griestheim).

94. *Philosophy of Right*, Addition to Sec. 236. See also *Vorlesungen*, Vol. 4, p. 373 (Griestheim).

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sides of human beings. This institution is the state. No detailed enumeration of the functions of the state is found in Hegel's writings. He made it clear, however, that he was not in accord with the Lockean conception of the state, pursuant to which the function of government exhausts itself in the protection of the life, liberty, and property of the citizens.⁹⁵ This conception, in his opinion, submerges the public sphere entirely in the private sphere. An individual, he thought, leads a private as well as a public life, and it is the purpose of the state to bring about a healthy reconciliation of these two modes of life.

The personal well-being of individuals was of great concern to Hegel, and he wanted them to pursue their particular aims with vigor.

It has often been said that the end of the state is the happiness of the citizens. This is perfectly true. If all is not well with them, if their subjective aims are not satisfied, if they do not find that the state as such is the means to their satisfaction, then the footing of the state itself is insecure.⁹⁶

At the same time, he wished to impose on individuals a responsibility of a more transpersonal character. They should establish a bond with their community, in the sense that their self-regarding activities should remain compatible with general communitarian aims. "The principle of modern states has prodigious strength and depth because it allows the principle of subjectivity to progress to its culmination in the extreme of self-subsistent personal particularity, and yet at the same time causes it to merge with the substantive unity and thus to preserve this unity in the principle of subjectivity itself."⁹⁷ Less abstractly expressed, Hegel wished to encourage individuals to realize their selves in freedom but with the simultaneous aim of being useful to society. He was convinced that a coalescence of the private and public sectors of life could be achieved that left both of them intact as independent factors but which at the same time confirmed their interdependence.

The individual's bond with the community should not, according to Hegel, be created by the exercise of power or coercion, but by

95. *Philosophy of Right*, Sec. 258. See also *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, pp. 212-13; *Vorlesungen*, Vol. 4, pp. 416-17.

96. *Philosophy of Right*, Addition to Sec. 265. Hegel criticized the Platonic state on the ground that it accorded no recognition to private interests. *Ibid.*, Sec. 185. 97. *Ibid.*, Sec. 260. See also *Vorlesungen*, Vol. 1, p. 327 (The members of the state must have their special freedoms). See in this connection F. Dallmayr, "Re-thinking the Hegelian State," 10 *Cardozo L. Rev.* (1989), pp. 1337-61.

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the voluntary acceptance of laws designed to weld the community into a viable whole. "Commonplace thinking often gets the impression that force holds the state together, but in fact its foundation is the fundamental sense of order that everybody possesses."⁹⁸ The existence of such sense of order depends, of course, upon the operation of an effective system of law. To Hegel, the rule of law was an indispensable precondition for the harmonization of particular and general goals.⁹⁹

Another instrumentality for achieving a cohesive society was, in his opinion, the creation of a well-organized system of education. Education was defined by Hegel as "the art of making men ethical."¹⁰⁰ The practice of this art, among other objectives, aims at the transformation of the purely instinctual nature of individuals into a second, intellectual, nature, and to make the intellectual level habitual to them.¹⁰¹ To Hegel, the chief capacity implanted in the intellectual (noetic) part of the human constitution was the ability to reason. Reason teaches us to adjust our conduct to the conduct of others and to transcend our purely self-regarding impulses. Hegel did not believe, as we have seen, that the selfish human impulses should be eradicated. Cultivation of the ego for purposes of self-realization was to him of equal importance with self-transcendence in the service of the community.

Hegel knew, of course, that the communitarian values could be instilled in the citizens only by proper guidance and example. He quoted the answer given by a Greek Pythagorean to a father who asked him for the best method of educating his son to become an ethical individual: "Help him become a citizen of a state with good laws."¹⁰² The quotation shows that Hegel, contrary to charges made against him, was by no means an idolizer of the institution of the state as such. He knew that there were evil and oppressive states.¹⁰³ He did believe, however, that under normal circumstances inculcation of a communitarian interest in a young person was an indispensable prerequisite for a healthy and rounded growth of personality. Human

98. *Philosophy of Right*, Addition to Sec. 268 (Translation slightly changed). See also *Vorlesungen*, Vol. 4, p. 479 (Griffiths), where Hegel states that the social bond should be voluntary.

99. *Philosophy of Right*, Sec. 4, pp. 215-17; *Vorlesungen*, Vol. 4, pp. 641-58 (Griffiths).

100. *Philosophy of Right*, Addition to Sec. 151. See also *Vorlesungen*, Vol. 1, p. 286 (Hohmeier).

101. *Vorlesungen*, Vol. 4, p. 407 (Griffiths).

102. *Philosophy of Right*, Sec. 153.

103. *Ibid.*, Addition to Sec. 258 (p. 279).

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been mentioned. Hegel feared that an entirely unconstrained pursuit of individual preferences might bring about unduly wide disparities of wealth; he voiced the opinion that private charity alone would be insufficient to cope with this problem.¹¹¹ He also recommended the offering of official guidance to industry and commerce engaged in foreign transactions when access to information about foreign conditions and potential hazards resulting from them was not readily available to private organizations.¹¹²

The approach opposed to that of Bentham holds that you cannot determine the public interest by counting up or aggregating private interests. On the contrary, you have to look to the public interest, as determined by the authorities of the state, in order to ascertain the permissible scope and objectives of private interests. Nothing that is not in the public interest may be regarded as a private interest entitled to a hearing. If you believe that you can have a legitimate private interest that is in conflict with the public interest, this points to some deficiency in your mental condition. This was the position taken in the Soviet Union before the advent of Gorbachov.

Hegel was opposed to this position. It is true that he allowed intervention by the state when the activities of private individuals came into sharp collision with the common good. But his approach differed in two crucial respects from the former Soviet approach. First of all, Hegel did not equate the common good with the proclamations and decrees of government officials purporting to define it authoritatively. He said in his lectures of 1818-1819: "I accept nothing just because it has authority behind it, but only that which is in agreement with my thinking and conviction."¹¹³ For Hegel, as we have seen, the public interest was coextensive with actions and measures tending to promote the development of civilization in its economic, social, and cultural dimensions. In contrast to the Soviet position described above, Hegel was inclined to countenance dissent with respect to the concrete requirements of the public good, because he thought that an individual personality might

111. *Philosophy of Right*, Sec. 242. See also *Vorlesungen*, Vol. 1, p. 322 (Hohmeyer). Hegel seemed to feel that the problem of poverty should be solved by providing work for the poor. *Philosophie des Rechts: Die Vorlesung von 1819/20 in einer Nachschrift*, p. 192.

112. *Philosophy of Right*, Sec. 236.

113. See *Vorlesungen*, Vol. 1, p. 239 (Hohmeyer). The context of the statement shows that Hegel was not only speaking of himself but was giving advice to everybody. This is made even clearer by a statement Hegel made in his last course of lectures in 1831. See *ibid.*, Vol. 4, p. 923.

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have the better of the argument in a conflict concerning such requirements.¹¹⁴

Secondly, the former Soviet position took a very narrow view with respect to the legitimacy of private economic undertakings. Economic activity induced by the profit motive was considered suspect, and the opportunities for acquiring private property were greatly limited. Hegel, on the other hand, thought that the institution of private property was, for the most part, beneficial, and he was close to the view of Adam Smith that the selfish pursuit of private advantage was in general conducive to the achievement of economic prosperity.¹¹⁵ Thus, according to Hegel, self-serving actions not motivated by consideration for the public interest might be socially beneficial. According to the former orthodox Soviet position, on the other hand, only actions induced by regard for the public welfare were to be tolerated.

I shall now turn to a recent movement in jurisprudence and political philosophy that exhibits some similarities and points of contact with the Hegelian approach. The movement is called "republicanism," but it is not connected with the Republican party of the United States. Some partisans of the movement, in order to accentuate the difference, call themselves "civic republicans." It is generally conceded that the views propagated by the civic republicans are not entirely novel. They were held, at least to some extent, by leading personalities in the early period of American history, among them James Madison and Benjamin Rush.¹¹⁶ Among the chief protagonists of the movement today are Cass Sunstein, a professor at the University of Chicago Law School, and Frank Michelman, who teaches at the Harvard Law School.¹¹⁷

Civic republicanism is often placed in contrast to liberalism. But whenever we use the term "liberalism" we have to be on our guard,

114. Indications of Hegel's position towards dissent are his interventions on behalf of students who had run into difficulties with the police because of their political activities. See Avineri, *Hegel's Theory of the Modern State*, p. 130.

115. See the text accompanying notes 79-81, 89-91.

116. On the historical background of republicanism see M.J. Horwitz, "Republicanism and Liberalism in American Constitutional Thought," 29 *Wm. & Mary L. Rev.* (1987), pp. 57-74; see also C.R. Sunstein, "Interest Groups in American Public Law," 38 *Stan. L. Rev.* (1985), pp. 36-48.

117. See F.J. Michelman, "Foreword: Traces of Self-Government," [hereinafter called "Foreword"], 100 *Harv. L. Rev.* (1986), pp. 4-77; Michelman, "Law's Republic," 97 *Yale L. J.* (1988), pp. 1493-1608; C. R. Sunstein, "Beyond the Republican Revival," 97 *Yale L. J.* (1988), pp. 1539-1590; "Interest Groups in American Public Law," pp. 29-87.

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because the term is not free from ambiguity. The type of liberalism that was under attack by the Republican party during the Presidential campaign of 1988 was a liberalism that affirmed the values of the New Deal and called for substantial governmental activity in the interest of social welfare. It might properly be named "welfare liberalism." This type of liberalism is not incompatible with modern civic republicanism.¹¹⁸ This movement's thrust is directed against a form of liberalism that might be called "libertarianism" or "laissez-faire liberalism." Libertarianism holds that values are subjective, and that individual self-interest is the only effective animating force in society. It agrees with Bentham that the public interest is little more than the aggregate of private interests, although a special niche might be reserved for national security, defense, and foreign policy; it might be granted that an independent public interest prevails in these three areas.

The conclusion drawn from this approach with respect to the function of politics is that government should satisfy as many private interests as possible. If there are conflicting interests, it will become necessary to arrange for bargains, compromises, and trade-offs. The legislature, according to this position, is essentially a barometer registering the relative strength of competing interests pressing for legislative advantages. One influential version of libertarianism is the "law and economics school" headed by Richard Posner, a federal appellate judge.¹¹⁹

In contrast to these ideas, republicanism believes that there are ideals of the good life that can claim objective validity, and that there is an independent concept of the public interest designed to pursue these ideals through political action. Consequently, the function of politics is not simply to implement existing private preferences. Republicanism rejects the model of interest group politics and the view that legislation is nothing but a compromise between competing interest groups. Legislation must be justified by reference to a public

118. See "Beyond the Republican Revival," pp. 1541, 1567, 1589; "Law's Republic," pp. 1494-1507.

119. See R.A. Posner, *The Economics of Justice* (1981), pp. 1-115; Posner, *Economic Analysis of Law* (3rd ed. 1986); Posner, "Economics, Politics, and the Reading of Statutes and the Constitution," 49 U. Chic. L. R. (1982), pp. 274-75. A more extreme version of libertarianism is offered by R.A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985); Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," 8 J. Leg. Stud. (1979), pp. 49-102.

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purpose.¹²⁰ It is clear that Hegel would have agreed with these objectives.

The modern advocates of republicanism recommend that important legislation be preceded by a large amount of discourse among citizen groups and legislators in order to create as much consensus as possible on the substantive requirements of the public interest. It is assumed that objective reason can be established through public dialogue, and that some solutions are morally better than others.¹²¹ There is no insistence that the public interest must be a unitary concept; it may embody multiple and diverse purposes.¹²² The view, however, that government should be neutral towards conflicting values is regarded as unacceptable.¹²³

Republicanism maintains that we cannot conceive our personhood without reference to our role as citizens. Like Hegel, the republicans emphasize that we are not only unique individuals but at the same time members of a community and as such extensively shaped by its value system. It is our responsibility to participate in the affairs of public life, although our role may be that of a critic rather than that of a loyal conformist.¹²⁴ Participation should not be limited to voting on election day. Some authors close to republicanism have argued that democracy should be extended to the workplace, where an individual spends the largest part of his or her time.¹²⁵ Pleas have also been made in favor of town meetings. Hegel would have applauded these ideas.

120. "On the republican account, self-interest is an insufficient basis for political advantage; it must be translated into some broader conception of the public interest." C.R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990), p. 12.

121. See G.A. Stone, L.M. Seidman, and M.V. Tushnet, *Constitutional Law* (1986), p. 5; "Interest Groups in American Public Law," pp. 31-32; "Beyond the Republican Revival," pp. 1543, 1548, 1554. See also B.A. Ackerman, *Reconstructing American Law* (1984), pp. 97-100.

122. "Beyond the Republican Revival," pp. 1555, 1572; "Law's Republic," p. 1507.

123. The position that government should display neutrality vis-à-vis the problem of the good life is taken by R. Dworkin, *A Matter of Principle* (1985), pp. 191-92. Sunstein replies that "with respect to neutrality, republicanism denies the possibility of developing an elaborate social theory without making value choices." "Beyond the Republican Revival," p. 1568.

124. See *Constitutional Law*, p. 7; "Beyond the Republican Revival," pp. 1541-43, 1555, 1573; "Interest Groups in American Public Law," pp. 31-32.

125. See, for example, P. Brest, "Further Beyond the Republican Revival," 97 Yale L.J. (1988), p. 1626; J. Fudge, "Community or Class: Political Communitarians and Workers' Democracy," *Law and the Community: The End of Individualism?* (A.C. Hutchinson and L.J.M. Green eds. 1989), pp. 75-81.

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At the same time, contemporary republicanism recognizes the singular importance of private rights. It thereby incorporates a central feature of the liberal tradition. It does not take the position, however, that rights are prepolitical or absolute.¹²⁶ If they are exercised in an unscrupulous way detrimental to the community, governmental intervention is justified. Republicanism thus rejects the idea of a minimal state sponsoring a maximum of non-interference and deregulation.

Summarizing the basic tenets of republicanism we might say that, according to this approach, neither the individual nor the community should be able to claim priority. Undiluted individualism is repudiated as much as any stringent forms of collectivism. In cases of conflicts between private and public concerns, a careful balancing of individual and community values should take place. This approach to political and legal ordering bears, of course, a distinctive similarity to Hegel's philosophy, his synthesis of private and public values, and his advocacy of a union between the universal and the particular. It is no accident, therefore, that the numerous law review articles devoted to the subject of civic republicanism during the last couple of years have been complemented by essays on Hegel's legal theory.¹²⁷

HEGEL'S DIALECTICAL METHOD

The way Hegel dealt with the relation between private and public interest is quite in keeping with the particular form of thinking advocated by him, which he called dialectical thinking. According to the dialectical approach, the natural and human worlds are to a large extent dominated by the principle of polarity.¹²⁸ Polarity means the coexistence of opposites. In physical nature, gravity and centrifugal force, matter and energy, corpuscles and waves confront each other and interact in some fashion. In human society, freedom is opposed to authority, competition to cooperation, security to risk; but these

126. "Beyond the Republican Revival," p. 1551.

127. See the two-part special issue, comprising more than 1000 pages, published under the title "Hegel and Legal Theory," 10 *Cardozo L. Rev.* (1989), pp. 647-1931. See also "Hegel and Legal Theory and Response," 11 *Cardozo L. Rev.* (1990), pp. 503-606; D. Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretations," 136 *U. Pa. L. Rev.* (1988), pp. 1178-1194.

128. Hegel's own exposition of the dialectical method, which is scattered throughout his works, is formulated in a highly abstract manner and therefore difficult to understand. For a concise introductory account see C. J. Friedrich, "The Dialectic of Political Order and Freedom," *The Concept of Order* (P.G. Kunz ed. 1968), pp. 340-41.

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contrasting principles often become blended in some form of synthesis.¹²⁹

It has sometimes been alleged that the Hegelian dialectic method violates a law of formal logic known as the law of the excluded third.¹³⁰ According to this law, two statements that contradict each other cannot both be true. If someone asserts that there is a table in a certain room and someone else denies it, one of the two must be right and the other wrong; there is no third possibility. Dialectical thinking, it is charged, takes the position that two contradictory statements can both be true.

The charge is unjustified, but Hegel himself has contributed to the misunderstanding by his idiosyncratic nomenclature. Hegel used the term "contradiction" not only to denote true antinomies, i.e., mutually exclusive statements, but he also employed it with reference to opposite propositions that are not incompatible. In other words, he obscured the distinction between "contraries" and "contradictories." If one person asserts "there must be freedom in a well-organized state" and another person states "there must be authority in a well-organized state," these two assertions are not mutually exclusive contradictions; some blending of freedom and authority exists, in fact, in every state. What is to be kept in mind is that two seemingly contradictory statements may be entirely compatible if there is a difference in the context in which they were made. It can be safely assumed that Hegel would not have repudiated the applicability of the law of the excluded third to two genuinely inconsistent statements, as for example, conflicting assertions regarding the presence or non-presence of a table in a room.

Long before Hegel, Aristotle had recommended use of the dialectical approach in answering the question which one of two contradictory propositions should be accepted.¹³¹ The laws of syllogistic logic do not fit this situation, because the major premise from which a certain conclusion may be derived by deductive reasoning has not as yet been ascertained. In such instances the parties seeking an answer (who in case of litigation will be the adversaries or the judge) will rely on arguments that they deem to be plausible, reasonable, and convincing. A careful evaluation of points speaking for or against a

129. On the principle of polarity see M. Cohen, *Reason and Nature* (2d ed. 1933), pp. 165-68.

130. The problem is discussed in J. Cohn, *Theorie der Dialektik* (1965), pp. 134-38; R.C. Solomon, *In the Spirit of Hegel* (1983), pp. 194-95.

131. Aristotle, "Analytica Priora," *The Basic Works of Aristotle* (R. McKeon ed. 1941), p. 63.

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contemplated solution will frequently be an important part of the process. A balance sheet of opposing considerations will be drawn up and a comparison of their relative weight and utility in the light of the problem to be solved will be undertaken.¹³²

The Hegelian dialectical project is much more far-reaching and ambitious than that of Aristotle. In Hegel's view, dialectical phenomena permeate the developmental laws of human society, perhaps even the structure of the universe. Everywhere he sees the operation of opposing forces, their struggle and eventual (but not necessarily enduring) reconciliation. The consequences of this view of the world are clearly visible in Hegel's political and legal philosophy.

According to Hegel, freedom must be accommodated with authority, equality must be balanced against differentiation, individualism must be reconciled with communitarianism. In the sphere of the law, this entails the necessity of balancing conflicting interests and values. Individual rights must sometimes yield to the common good; equality before the law must be made compatible with differentiation of function and recognition of merit; the pursuit of private interests, although normally comporting with the interests of the community, must sometimes yield to paramount exigencies of statecraft.

There is a connection between Hegel's theory of dialectics and his view of human nature. As we have seen, Hegel believed in a dual nature of man.¹³³ The self-seeking part of this nature often comes into conflict with its other-regarding side, with the result that compromises and adjustments will have to be made in order to keep the opposing tendencies in some equilibrium. In Hegel's opinion, a proper organization of the social and legal system should pay heed to both of these constituents of human nature. Self-realization and individual uniqueness, he thought, did not exclude fostering a sense of social solidarity.

Hegel, as we have seen, believed that the world, in spite of some frightful twists and turns of fate that could not easily be explained, was gradually moving from a condition of irrationality, superstition, and injustice to a state of affairs in which reason will prevail. He thought that his own philosophy of dialectics was the most adequate philosophy of reason, and that its acceptance in theory and practice could be expected in the not too distant future.

132. On dialectic reasoning in court procedure see E. Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* (rev. ed. 1974), pp. 392-97.

133. See text accompanying notes 72-73.

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What would a general acceptance of Hegel's philosophy actually mean? It would mean that many issues over which thinkers have fought for centuries in "either-or" terms would fade into insignificance. Is everything that happens inexorably determined, or do human beings possess freedom of will? Who should have primacy in the regulation of human affairs, the individual or society? Should society be organized on an egalitarian basis, or is some degree of hierarchy inevitable or desirable?

Hegel would have argued that these controversies, if they are treated as polarized issues, are futile because some truth will be found on both sides of the fence. Hegel assumed that much freedom of choice existed in the sphere of the individual human mind, but that physical and bodily processes were for the most part subject to the force of necessity.¹³⁴ He rejected, we have seen, commitments to an undiluted ideology of individualism or communitarianism. He was opposed to any manifestation of ethnic, racial, or religious discrimination, but he believed in the need for social stratification and in inequality of reward for work, if not carried to an excessive degree.¹³⁵

If the Hegelian approach is adopted, polarized philosophical controversies would perhaps be replaced by guidelines for concrete and practical decisionmaking. In the area of education, for example, parents would be advised not to adopt a principle of general permissiveness or exercise rigid authority over the children. It would be suggested to them to make discriminating judgments as to when the first or the second approach is called for. In the area of criminal law, the question of responsibility for delinquent acts would not be judged in terms of one-sided philosophies of determinism or free will; it would be handled on the basis of careful studies of the circumstances under which external conditioning factors may affect an accused person's capacity to choose between right and wrong. With respect to the alternative of competition and cooperation as guiding policies in economic life, the Hegelian approach would disfavor any sweeping acceptance of one or the other system, it

134. Hegel, "The Philosophy of History," *Theories of History* (P. Gardiner ed. 1959), p. 61: "As the essence of Matter is Gravity, so, on the other hand, we may affirm that the substance, the essence of Spirit is Freedom." For Hegel, spiritual forces (cosmic and human), not material essences governed by inertia, were the chief agents of movement and change. See also *Vorlesungen*, Vol. 1, p. 239 (Hörmeyer); Vol. 3, pp. 89, 93-95 (Hörmeyer).

135. See Avineri, *Hegel's Theory of the Modern State*, pp. 155-61; *Vorlesungen*, Vol. 4, pp. 494-95, 508-14 (Grünstein).

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would rest the choice on concrete findings that competition or cooperation, or a mixture of both, would produce the most advantageous result in a particular area of economic life. Philosophy, in this understanding, becomes practical wisdom or sagacity.

It needs hardly to be stressed that the dialectical endeavor of balancing or synthesizing disparate values is not to be extended to the conflict between values and disvalues. Hegelianism does not seek some compromise or "middle ground" between good and evil, fair and unfair, truthful and dishonest. There may be some situations in which an exception from a basic ethical principle will be permitted. Thus, a society may condone some dubious practices of competition or sanction certain types of untruthful statements by governmental authorities or private citizens. Such exceptions do not, however, detract from the presumptive and predominant validity of the fundamental ethical principles.

It seems appropriate to argue that the recent discoveries made by Illing and others set to rest (or at least take the sting out of) certain interpretative controversies regarding Hegel's philosophy of law that have been waged—often with great vehemence—ever since Hegel's death. Hegel has been claimed as an ally by the political right as well as the political left. He has been called a protagonist of fascism, an ideological forerunner of proletarian revolution, an inveterate conservative and a dedicated liberal.¹³⁶ All these one-sided attempts to put a label on Hegel's political and legal ideas fall short of the truth. The preceding investigations have tended to show, in my opinion, that Hegel was a centrist, a mediator between extreme positions, a synthesizer of opposing viewpoints. In other words, he was an advocate of the middle way. For him, as for Aristotle, virtue was a golden mean between "too much" and "too little."

In conclusion of this essay, I wish to state my personal conviction that a widespread acceptance of Hegel's philosophy, if interpreted along the lines suggested by recent reappraisals of this philosophy, would contribute beneficially to the solution of many pressing problems of our time. But the caveat should be added that many of the opinions expressed by Hegel were a product of the particular conditions of his time and cannot, for this reason, claim an enduring validity.

136. An amazingly large variety of discrepant interpretations of Hegel's politico-legal philosophy, originating from continental-European and English-speaking countries, have been collected and analyzed by H. Ottmann, *Individual und Gemeinschaft bei Hegel* (1977).

[2]

Hegel's Philosophy of Right and Marx's Critique: A Reassessment

ROBERT FINE¹

Representation, the critique of representation and the critique of the critique of representation – all are present.

Introduction

Within Marxist scholarship, the *Philosophy of Right* is the least understood of Hegel's works. It is normally treated as an uncritical endeavour to justify the modern state, but it should be read as a critique of the modern state: one that is both closer to Marx's than Marx himself realised, and one which challenges the standpoint of 'true democracy' which Marx was inclined to hold as the foundation of political criticism. My contention is that *Philosophy of Right* should be considered a seminal text for 'open' Marxism.

Most contemporary Marxists accept the validity of the young Marx's *Critique of Hegel's Doctrine of the State*, but I want to put forward the troubling proposition that the young Marx misinterpreted Hegel's work and as a consequence drew flawed conclusions concerning the substantive character and limitations of the state. I suggest that what is required is an integration of Hegel and Marx that does not presume the superiority of the latter in all matters.

Within the wider contemporary literature, we find many interpretations of *Philosophy of Right*. It has been read not only as an authoritarian apology for the modern state, but also as a conservative nostalgia for the pre-modern state, a precursor of a future totalitarianism, a promotion of social democracy, a theory of civil society and more. All these readings, however, miss the heart of Hegel's enterprise, which was not to prescribe an ideal state at all, but rather to analyse the existing state. It is not that Hegel refused to be prescriptive –