HEGEL: A USER’S MANUAL

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for Michael Jäger

What Hegel offers is the Absolute—thought that is able to comprehend the world because the world is produced and structured by this thought. It is therefore easy to conclude that if Hegel is right, legal and social reform require only that things be adjusted to conform to his ideas. Throughout the turbulent history of Hegel interpretation, readers of Hegel who would agree about little else have shared this understanding of his theory.

My contention is that Hegel’s system does not generate correct suggestions for legal or political change. The vision of Hegel’s legal theory as a foundation for political action is only one—and not the most useful or interesting—of its possible interpretations. In fact, Hegel structured his theory in a way that makes it impossible to derive definitive answers to political or legal questions from it. Though we may take inspiration and guidance from theory—and, because of the scope of his undertaking and the profundity of his insight, more from Hegel, perhaps, than from any other modern philosopher—suggestions for political and legal change require far more than simple derivation from all-encompassing, transcendent political theories. The reason—or one good reason—is that there is no way to guarantee the truth of any political theory—or of any theory about anything for that matter. The appropriateness of any proposal for change must be demonstrated in discussion and practice. Suggestions for reform should be adopted only after agreement on their probable conse-

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Much of what follows, especially my interpretation of Marx and my discussion of the dangers of the truth discourse, has been strongly influenced by conversations I have been fortunate enough to have over the years with Michael Jäger. Jäger’s works include: Die Methode der wissenschaftlichen Revolution (1985); Versuch über das kleine Einmaleins der Macht, in Marxismus und Theorie der Parteien 38 (W. Elfferding ed. 1983); Nichtaussagenkonzeption oder subjektive Rationalität? Auseinandersetzung mit Stegmüller, Westmeyer und einigen Aspekten der Verhaltenstherapie-Diskussion, in Subjektivität als Methodenproblem 69 (M. Jäger ed. 1979); Von der Staatsableitung zur Theorie der Parteien—ein Terrainwechsel im Geiste Antonio Gramscis, in Eurokommunismus und marxistische Theorie der Politik 45 (Arbeitskreis Westeuropäische Arbeiterbewegung ed. 1979). Of course, the responsibility for the mistakes made here is no one’s but my own.

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quences and not on the basis of their theoretical pedigree. The law
provides the framework for the necessary discussion and experimenta-
tion. In these legal and political forms, and only there, we are free. It
was Hegel's hope that he had convinced us to accept the necessity of
social institutions and to abandon our incessant attempts to avoid
procedural complexity by enslaving ourselves to theories of the
Absolute.

Hegel's demonstration of this proposition is part of a long tradi-
tion. Indeed, it may be the great tradition of Western philosophy.
One of the fundamental ideas of German idealism is that no doc-
trine—political, theological, philosophical, scientific, or other—can
relieve us of the responsibility for developing our own conception of
the good. Kant elaborated the basic condition of human freedom—
that individuals are free only as universal legislators, only as the au-
thors of the rules that bind them. Hegel attempted to demonstrate
that, in a world governed by Newton's laws, it still makes sense to
speak of human freedom. Marx attempted the same demonstration
for a world governed by the law of value. Heidegger maintained that,
despite our fervent desire and eager attempts to escape our freedom,
we will never be able to do so.

This Article focuses on Hegel's book, the title of which has stead-
fastly been mistranslated as the Philosophy of Right.1 The Philosophy
of Right has never been successfully integrated into this tradition. I
have found no commentary that permits me to feel as free at the end

1 The title in the original is Grundlinien der Philosophie des Rechts. It would probably be
more accurate to translate it as Basic Principles of the Philosophy of Law. The principal ques-
tion is whether the German Recht should be translated into English as law or as right. In the
major Western European languages, there are two words to cover three meanings, and English
allocates the meanings to the words differently than do the Continental languages. The Eng-
lish word right is used generally to refer to individual rights—for example, Dworkin's Taking
Rights Seriously—while law refers both to the enactments of parliament and to the entire en-
terprise in which jurists are engaged. It is in this latter sense that we speak of law school and
law professors, and that Hart speaks of The Concept of Law. On the Continent, on the con-
trary, the Romance, Germanic, and Slavic languages have one word to refer exclusively to
parliamentary enactments—lex, loi, legge, Gesetz, zakon—and another to refer both to individ-
ual rights and to the legal enterprise—jus, droit, diritto, Recht, pravo. Thus, the French refer
both to le droit de propriété (the property right) and to la faculté de droit (the law school) and
the Germans to das Recht auf Arbeit (the right to a job) and to die Rechtswissenschaft (the
study of law).

In his title, Hegel used the word Recht in the expansive sense it shares with law. In fact,
he stretched its meaning to include the entire objective spirit. Law, then, is the correct
equivalent here of Recht. Marcuse came to the same conclusion. "[T]he concept of law is
central to the Philosophy of Right, so much so in fact that the title of the work might better be
'Philosophy of Law.'" H. Marcuse, Reason and Revolution: Hegel and the Rise of Social
Theory 206 (2d ed. 1960) (1st ed. 1941). Similarly, an Italian scholar has recently concluded
that, in Italian, the common law should be masculine, because law, in that sense, corresponds
to diritto, the Italian equivalent of Recht. See Criscuoli, The Proper Gender of the "Common
of the book as I felt at the beginning. The particular issue I address is

It is not certain when Recht was first translated as Hegel's right. One of the earliest instances appeared in an American translation, probably by W.T. Harris, of Hegel's Philosophische Propaedeutik. See G. Hegel, Outlines of the Science of Rights, Morals, and Religion, translated in 4 J. Speculative Phil. 155 (W.T. Harris ed. 1870). The translator noted that "'Das Recht,' translated 'Rights,' is to be taken not so much in a moral as in a legal sense, and hence more nearly signifies 'the Just.'" Id. at 155. The translator seems to have translated Recht as right rather than as law in order to reserve law for Gesetz: "Law [Gesetz] is the abstract expression of the Universal Will that exists in and for itself . . ." Id. at 169. In other words, the translator wished to carry over into English the European dichotomy between right/justice and law. See also G. Morris, Hegel's Philosophy of the State and of History: An Exposition 12 n.1 (1902) ("The word 'right,' as here, in accordance with German usage, employed by Hegel (German Recht, as distinguished from Gesetz; compare the French droit and loi)").

In the most recent translation, Knox simply followed the tradition, although he seems to have regretted the practical difficulties. See G. Hegel, Philosophy of Right vi (T. Knox trans. 1952) (1st ed. 1821) (translator's foreword) (hereinafter Philosophy of Right) ("'Right' has been selected almost everywhere as perhaps the least confusing rendering of Hegel's meaning, although this leads at times to phrases unnatural in English.").

In fact, the mistranslation may be symptomatic of the standard misinterpretations of the Philosophy of Right. As long as it is thought that there are only two terms in the discussion—the individual and individual right on the one hand, the state and state-enacted law on the other—it must be decided on which side to place Hegel. But there is a third term, namely, the law as the form of the process for making social decisions. This process is what Hegel meant by law, and it is also the sense of the term that is ignored both by the standard (mis)translation and by the standard (mis)interpretations of the book. Nonetheless, to eliminate possible confusion as well as to conform to the translation chosen by my colleagues in this symposium, I use Philosophy of Right throughout.

Finally, a word about the text of the Philosophy of Right. In most editions, it is accorded a talmudic treatment that requires some explanation. As Hegel published it, the Philosophy of Right contained a preface, 360 paragraphs, each numbered with a section sign, and a series of Anmerkungen or "Remarks" to many of the paragraphs. The paragraphs offer terse and often relatively inaccessible statements of Hegel's basic principles. During his lectures, Hegel recited the text of the paragraphs and commented on them. For those without the benefit of the lectures, Hegel included the Remarks immediately following many of the paragraphs. They offer a discussion, occasionally lengthy, of the historical and philosophical context of his thought. Many editions also contain the Zusätze or "Additions." These are based on lecture notes taken during different years by two of Hegel's students—Heinrich Hotho and Hauptmann von Griesheim. Eduard Gans, Hegel's student, colleague, and friend, edited and organized the student notes and included them in the 1833 edition of the Philosophy of Right. See G. Hegel, Grundlinien der Philosophie des Rechts, in 8 Werke (E. Gans ed. 1833) [hereinafter G. Hegel, Grundlinien]. Gans has been criticized for reworking the Additions in a way that corresponded to his own interpretation of Hegel's theory. Knox has therefore relegated them to an Appendix in his translation. Finally, the recent German editions contain Hegel's own manuscript notes to paragraphs 1 to 180, as found in his personal copy of the book. Hegel had had his copy interleaved with blank pages. As he prepared for his lectures, he corrected the text and organized his thoughts for his presentation. As might be expected, the notes are cryptic and often impossible to read, let alone interpret. Nevertheless, Hegel's notes do offer a check on the student notes and some evidence that Hegel was no more adept than we are today at getting thoughts unscathed from the lectern into student notebooks. In what follows, an "R" or an "A" after the paragraph number refers to the corresponding Remark or Addition.
the relationship between the individual and the state. Hegel is read universally as having taken a substantive position on this relationship. Views regarding his position, however, vary dramatically. In this regard, there are three readings of the *Philosophy of Right* that particularly trouble me.

The first reading troubles everyone else as well. It tips the balance between the individual and the collectivity entirely to the benefit of the latter. The individual is subordinated to the whole, possesses no independent basis for moral critique or judgment, and is concretely free only as an obedient servant of the state. This is the totalitarian or authoritarian reading of Hegel.² It is shared by some who endorse the authoritarian reading,³ as well as by some who are frightened by it.⁴

The second reading of the *Philosophy of Right* that troubles me evolved to avoid the totalitarian implications of the first. This reading maintains that individuals are truly free only when they understand that their interests and those of the collectivity completely coincide.⁵

² I use the terms totalitarian and authoritarian as synonyms, and essentially as Marcuse used them: to describe a system that “absorb[s] all opposition, and . . . define[s] the entire universe of discourse” so as to produce “[t]he total victimization of the individual . . . .” H. Marcuse, supra note 1, at x, 415.

³ The result is: positive law and the historically developed state are the reality of freedom, freedom in and for itself, and are therefore also ethical life. Thus, for Hegel, there is no other ethical life than the law and the state, since there can be no freedom outside of law and the state. And this knowledge, of course, must lead to the unconditional affirmation of law and the state, since only in such affirmation does subjective consciousness demonstrate that it has advanced to true freedom. J. Binder, Das System der Rechtspolitik Hegels, in Einführung in Hegels Rechtsphilosophie 56, 93 (1931) (emphasis in original) (my translation).

⁴ “And this success, the power and expansion of the state, must overrule all other considerations in the private life of the citizens; right is what serves the might of the state. This is the theory of Plato; . . . it is the theory of Hegel: it is the Platonic-Prussian morality.” 2 K. Popper, The Open Society and Its Enemies 66 (5th rev. ed. 1966). For criticism of Popper’s interpretation of the *Philosophy of Right*, see Kaufmann, The Hegel Myth and Its Method, 60 Phil. Rev. 459 (1951).

⁵ “This conscious identity of the subject and the state is a condition for the adequate functioning of the commonwealth. . . . ‘The state is actual only when its members have a
At the same time, however, the individual's interests are not simply presumed to be those of the state. The state must be structured such that it actually realizes the complete freedom and the private well-being of its individual citizens.\(^6\) The perfect coincidence of individual and collective interests, however, is not of this world. In his description, therefore, Hegel cannot be understood to be referring to any empirical state. His description is an ideal, a utopia with which actual states might be compared and against which they should be measured.\(^7\)

This utopian reading of Hegel is not without its problems. First, in the few passages in the *Philosophy of Right* in which Hegel expressed a substantive position about the relationship between the individual and the state, he was almost always wrong. For example, few would approve of Hegel's views about capital punishment\(^8\) or the status of women\(^9\) as substantive ideals. Second, the reading indicates nothing about the realm of possibility. A utopia establishes an ideal model worthy of aspiration but, at the same time, negates its own effectiveness by admitting that it can never be attained and that the actual relations between the individual and the state can never achieve perfect harmony. Hegel rejected any implication that his analysis of the state was moralistic or utopian. His project was to demonstrate how the actual, existing state is rational. To Hegel, the challenge was to understand what is and not what ought to be.\(^10\)
To avoid the utopian defects of the second reading, a third, contemporary reading ignores the state altogether and interprets Hegel as a theorist of intersubjectivity and community. The third reading focuses on the origin of individual rights in the opening section of the Philosophy of Right and emphasizes the role played by mutual respect and recognition in the development of the individual.\(^{11}\) This reading focuses solely on the first level of Hegel's theory and ignores the particular problems of large-scale social organization that Hegel addressed in the discussion of ethical life.\(^{12}\) The difficult question still remains: How should concerns that originate in abstract right and morality—claims, in the end, of the individual—be integrated with the competing demands of the collectivity? The relationship between individual right and social obligation is the most interesting and difficult of the questions presented by the Philosophy of Right and, in my view, is the question at the root of most legal disputes. Instead of confronting the problem, the proponents of this third reading insert the notion of community between the individual and the state. But the presence of the new concept does not resolve the issue. In fact, it either serves to avoid the problem or it suggests that complete harmony between the individual and the collectivity is ultimately achievable.

As different as these three readings are from each other, particularly in terms of the implications they yield for legal and political change, they share two fundamental misconceptions about the nature of Hegel’s theory. The first is the belief that in the Philosophy of Right, Hegel sistematically teaches the state what it ought to be; it can only show how the state, the ethical universe, is to be understood.

To comprehend what is, this is the task of philosophy, because what is, is reason.

Id. preface, at 11 (footnote omitted).

\(^{11}\) “The reification of Geist in the later Hegel diminishes the significance of the theme of intersubjectivity, even if it undoubtedly is still assumed as the background of the Philosophy of Right.” Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291, 373 (1985) [hereinafter Cornell, Reconstruction]. See also Cornell, The Poststructuralist Challenge to the Ideal of Community, 8 Cardozo L. Rev. 989, 994 (1987) (“[o]ne should read the Philosophy of Right against the Logic’s metaphysical portrayal of truth of all of reality as one of communicative freedom”).

\(^{12}\) In fact, the vocabulary of intersubjectivity seems to make it impossible even to conceive of the state.

Neo-marxist theory, . . . when it embraces the notion of a “communication community” where the intersubjectivity of individuals goes to account for the priority of their community status[,] . . . has to propose the equal relevance of each individual in decision processes; the structureless nature of a community of communicating individuals makes institutions impossible.

Right, Hegel attempted to resolve the difficult question of the relationship between the individual and the state. The second is the unspoken but confident assumption that a correct resolution of the issue would eradicate the tension between the two.

These views all assume that in the Philosophy of Right, Hegel was discussing the contents of the individual's duties with respect to the state. I contend that, on the contrary, Hegel rarely discussed contents in the Philosophy of Right. When he advanced what he believed to be the correct substantive relationship between the particular and the universal, the individual and the state, he did so only in passing, as an illustration. Hegel was interested principally in forms, in the various forms for the exercise of human freedom. He attempted to specify neither the precise content of any of the particular forms nor the relationship between them. Thus, the relationship between individual rights and the state-imposed limitations on these rights remained open. Of course, at any particular moment, each state has as a practical matter resolved its relationship to the individual. But the state is not found at the apex of the Hegelian theory of the law because of its content. Rather the state represents the only form for collective reflection, discussion, and resolution of matters of important societal concern. The Hegelian categories—individual rights, morality, the family, civil society, and the state—represent progressively more comprehensive forms for the discussion and resolution of substantive issues. In other words, Hegel described what he believed to be ever-recurring forms of self-reflection, at an individual and societal level. He did not dream of dictating to us either their substantive content or the resolution of conflicts between the individual and society. Hegel's theory leaves us free to resolve these issues for ourselves.

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13 "The content of the rational will is what this community requires of us. This then is our duty. It is not derived from formal reason but from the nature of the community which alone can embody reason." C. Taylor, Hegel 430 (1975).

14 I am particularly interested in one specific aspect of Hegel's concept of freedom: "being not a mere object, but the subject of one's existence; not succumbing to external conditions, but transforming factuality into realization." H. Marcuse, supra note 1, at viii. See also 2 E. Gans, Naturrecht und Universalrechtsgeschichte 55 (M. Reidel ed. 1981) (lectures from 1832-33) ("I alienate myself and know myself in this determination, to which I am not bound, but rather in which I am only because I posit myself in it. This is true freedom, the substantiality of will.") (my translation). In Hegel's thought, at least two other aspects are equally essential to the concept of freedom. The first is that freedom is not an attribute that attaches to human beings depending on their status (free or slave), but is rather a definitional element of human self-consciousness. See G. Hegel, The Philosophy of History 18 (J. Sibree trans. 1956) [hereinafter Philosophy of History] ("The German nations, under the influence of Christianity, were the first to attain the consciousness, that man, as man, is free: that it is the freedom of Spirit which constitutes [man's] essence."). The second is the understanding that human freedom is always exercised in society and in situation. The circumstances for its exercise are largely
The second problem with the traditional interpretations of Hegel's legal theory is that they seem to be based on an obsessive need to eradicate contradiction. All these theories assume that the only satisfactory way to resolve tension is to eliminate it. Thus, according to these theories, the only acceptable integration of the interests of the individual and the state or the collectivity must be perfect coincidence. This urge is certainly not Hegelian. I can think of little less appealing than a society in which all of the pieces fit together precisely, in which individual and collective interest perfectly coincide. The point of the social enterprise is the tension that exists between creativity and institution. I doubt that it could ever be eliminated. At least I hope that it will not be. Whatever resolution we come to, someone will always be able to suggest a way to do it differently or better. Then the debate should begin again. Not a single line of Hegel implies that, somehow, the tension between the individual and society could or should ever be abolished. In other words, in this fundamental respect Hegel did not share the compulsiveness of some of his readers. He did not propose a final and peaceful resolution of contradiction. Instead, he examined the forms in which the contradictions are fought out. The various temporary resolutions of these contradictions are the work of the world spirit. The guarantee of our freedom is that no system can dictate to us how to resolve these matters. They are simply left to us. We are the representatives of the world spirit.

Thus Hegel was not proposing a utopia. The principles elaborated in the Philosophy of Right are no less fundamental today than they were in the early nineteenth century, and they continue to govern the society in which we live. Hegel did not adulate the state, but neither did he turn his back on it. He neither fled to utopia nor buried his head in the sands of intersubjectivity. Instead, he recognized the state for what it is: the only form—in this society at least—for the collective resolution of social problems. Once he had demonstrated that each legal institution is a form for the exercise of human freedom, Hegel's work ended. Hence, my contention that no definitive substantive political or legal consequences can be derived from the Philosophy of Right. Those, for example, whether of the Left or the Right, who have sought in Hegel a granite foundation for millenarian projects that can be justified only by their absolute truth, have misread Hegel as egregiously as those who revile him as the spirit of the conservative reaction or of totalitarian closure.

This Article is divided into three parts. Part I examines the cir-
cumstances and consequences of some of the characteristic receptions of the *Philosophy of Right*. Part II demonstrates the open texture of Hegel's legal theory by comparing the theoretical structure of the *Philosophy of Right* with Marx's *Capital*. Part III argues that we should not attempt to derive political or legal consequences from transcendental theories.

In the almost two centuries since its first publication, the *Philosophy of Right* has generally been read in the service of partisan political goals. This has been one price for the inhumanly difficult sentences that regularly adorn Hegel's prose. These sentences usually can be overcome only by those who seek an absolute foundation for their own political views. These political receptions of Hegel's legal theory offer important lessons. The interpretations, of great diversity and of equally great historical influence, have established the direct connection between a particular reading of Hegel's book and a particular political program. Defects in those political programs reveal dangers immanent in the interpretation of Hegel that a contemporary reading may wish to avoid.

Because historically the invocation of Hegel's theory has proven extraordinarily influential, no reading of Hegel should be taken seriously unless it is elaborated after conscious reflection on the political difficulties to which Hegel interpretations have contributed. Unfortunately, few have turned their attention to the history of the reception of the *Philosophy of Right*. Moreover, the first part of this Article does not pretend to offer the needed comprehensive treatment. My purpose is limited to illustrating the consequences of a few characteristic interpretations of Hegel's theory. To present the material in the form of narrative, I have generally limited the discussion to works published in English and German before the end of World War II. I have included Habermas, though he is later, because of his importance to the contemporary debate. The most conspicuous omission is Karl Marx's extraordinary paragraph-by-paragraph commentary to Hegel's discussion of the state. With the exception of the introduction, Marx's commentary was not published until 1927 and thus had no direct historical influence. The better reason for omitting it here, however, is that it deserves a treatment of its own. Further, since I only discuss writers who have commented specifically on the *Philoso-

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phy of Right, the much larger body of writing revealing Hegelian influence has necessarily been neglected.

The second part of this Article compares the theoretical construction Hegel employed in the Philosophy of Right with the structure of Marx's Capital. The task, once again, is to demonstrate that Hegel, instead of attempting to resolve the important question of the relationship between the individual and the state, chose to leave the resolution to us. Although in the Philosophy of Right Hegel repeatedly claimed that his primary concern was human freedom, his claim seems to have convinced no one. It is therefore of no use to quote him at length on the subject. Instead, I suggest that Hegel has structured his legal theory in a way that renders the derivation of definitive legal or political consequences impossible. He left us free to choose our own path.

The structural argument, although straightforward, requires an introduction. One way to understand the structure, and particularly the open texture, of Hegel's theory is to compare it to a theory that is both chronologically and temperamentally closer to us, Karl Marx's labor theory of value. Marx divided the capitalist mode of production into numerous explanatory units, individual forms that help determine the whole—including the commodity, money, surplus-value, wages, reproduction, circulation, and profit. He then analyzed each by means of a separate but related theory and ordered the theories such that each one is based on the concepts developed in the previous theories. The difficult question is how the various theoretical levels relate to empirical reality. One of the manifestations of this problem is the relationship between value and price, what has come to be known as the "Transformation Problem." Marx resolved the matter by integrating the theoretical levels with one another in such a way that only the completed model effectively resembles empirical reality. I examine this element of Marx's theory in Part II.

The structure of Hegel's theory is similar to that of Marx. Hegel isolated numerous forms for the exercise of human freedom in modern society, separating them into three different levels and providing each with its own theory. The first level concerns individual rights, the second level addresses the individual's moral responsibility, and the third level explains certain institutions of social organization—chiefly the family, production and exchange in the marketplace, and the state. As in Marx's theory, each succeeding level is based on concepts developed at the previous level.

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16 See infra text accompanying notes 283.
What is ambiguous about Hegel's theoretical structure is the relationship between the three levels and empirical reality. The conflicting interests of the individual and the state must somehow be resolved. Several different potential resolutions of this issue find support in Hegel's text. But Hegel did not attempt to demonstrate the necessity of a particular resolution of the problem. Instead, he expressly left open the relationship between the first two levels and the third, between individual rights and moral responsibility, on the one hand, and the demands of the collectivity, on the other hand. My understanding of the concept of freedom in Hegel is that the proper integration of these competing concerns cannot be resolved with finality. And Hegel did not attempt to do so. By analyzing forms and not contents, and by leaving the relationship between the various levels of his theory unspecified, Hegel left the matter to us. Since every suggestion for legal or political change assumes a particular relationship between the individual and the community—even, for example, the question of a tax increase or whether to enforce a contract—nothing definitive can be derived from Hegel's theory. This open-textured aspect of Hegel's theory is discussed at the end of Part II.

Part III serves only as a brief reminder of other considerations that counsel against the derivation of legal or political consequences directly from Hegel's theory. The focus expands beyond Hegel to the relationship between transcendence and politics and to the usefulness of the distinction between truth and error. I argue that, even if it were possible, political consequences should not be derived from transcendent visions. It is a misunderstanding of politics to think that political solutions should somehow be derived from the Absolute. The Europeans have long held a conception of politics as the transformation of utopian theory into action. Never have they had much success with the idea, and it has occasionally led them to disaster. There is no reason for us suddenly to adopt it here.

I then suggest that the truth discourse, the kind of discourse that isolates and enshrines truth and chases error into hiding, is no way to resolve our political differences. The elevation of theory to truth—which is certainly not Hegel's method, though often an idea of the Hegelians—is part of the problem rather than the solution. I believe, instead, that we should use systems only for systematizing and structures only for structuring. We should not be so foolish to assume that just because we decide to label an idea as "error," it is useless in practice or that, merely because we believe certain thinkers to be mistaken, their ideas are necessarily less valuable or productive.

In sum, Hegel, as I read him, is the most postmodern of philoso-
He offers openness, flexibility, and freedom and rejects the derivation logic of the dogma peddlers. We may embrace Hegel if we wish, but what there really is to learn from him is that the important decisions are still up to us.

I.

Hegel's concept of freedom in the *Philosophy of Right* has not had an easy time. Human freedom was Hegel's primary concern, and the term appears continually in his work. Its interest for him came early. Hegel was eighteen when the Bastille fell. According to an undying tradition, Hegel, to celebrate the event, planted a freedom tree with his friend Schelling on a meadow not far from Tübingen. For Hegel, the Revolution was a "glorious mental dawn" greeted by jubilation and enthusiasm. At the end of his life, he confided to his students that he celebrated the anniversary of the fall of the Bastille every year with a toast to the ideas of 1789. In one of his early writings, Hegel protested the church's attempt to repress civil and political liberties, for "the repression of the enjoyment of freedom of the mind brings death to reason." He maintained this concern throughout his life. Law, for Hegel, was the actualization of the realm of freedom, the simple existence of the free human will—the development of the concept of freedom, in other words, "freedom as Idea." Moreover, freedom is not confined to the part of the law that is concerned with the recognition of human rights. Morality, ethical life, and the interest of the state are also forms and embodiments of freedom, and all of world history consists of the development of the concept of freedom.

Despite the consistency, elegance, and Rousseauian vision of these statements, the message did not get through. Hegel often seemed to glorify the state at the expense of the individual. He ar-

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17 See A. Gulyga, Georg Wilhelm Friedrich Hegel 21 (W. Seidel trans. 1974) (translation from Russian into German). The tradition's persistence is especially evocative in light of the fact that the story is probably apocryphal. See 1 F. Rosenzweig, Hegel und der Staat 18 (1920).

18 Philosophy of History, supra note 14, at 447. "All thinking beings shared in the jubilation of this epoch. Emotions of a lofty character stirred men's minds at that time; a spiritual enthusiasm thrilled through the world . . . ." Id.

19 1 F. Rosenzweig, supra note 17, at 18.

20 G. Hegel, Die Positivität der christlichen Religion (1795/1796), in 1 Werke 104, 182 (E. Moldenhauer & K. Michel eds. 1971) [hereinafter 1 Werke].

21 See Philosophy of Right, supra note 1, para. 4.

22 Id. para. 29.

23 Id.

24 Id. para. 30R.

gued, for example, that the idea of freedom is actual only as the state.26 The state is the place where the individual recognizes the universal as its own substantive mind, takes it as its end and aim, and is active in its pursuit.27 The state is mind on earth, a self-subsistent power in which single individuals are only moments.28 The state is the power that regulates the life of individuals and alone is permanent. It must be venerated as a secular deity.29 Whether the individual exists is of no moment to the objective ethical order that contains the state.30 The empty business of individuals is only a game.31 The laws of real freedom demand the subjugation of the mere contingent will.32 Only the will that obeys the law is free.33 In other words, freedom is the destruction of individuality.34

This apparent ambivalence has muted the power of the Hegelian understanding of freedom. Though Hegel's defense of human freedom, with Rousseau's, is the most passionate in Western philosophy, it seems to be a home-run ball that curves foul just before landing in the stands. The theoretical problem seems to be that freedom's subject changes midway through Hegel's demonstration. Whereas the individual was free at the beginning, the state is free at the end. Individual freedoms are constantly in tension with the demands of the collectivity, yet it seems that Hegel, inexplicably, came down fully on the side of the state. Largely because of this apparent inconsistency, Hegel's readers have had great difficulty elaborating his position. For almost two centuries, Hegel has been both vilified by those who have seen him as the representative of erroneous and threatening theories—rationalism, pantheism, and conservatism—and exalted by those who find in Hegel a solid foundation for their own brands of liberalism, collectivism, or totalitarianism.35

26 Philosophy of Right, supra note 1, para. 57R.
27 Id. para. 260.
28 Id. para. 258A.
29 Id. para. 272.
30 Id. para. 145A.
31 Id.
32 Philosophy of History, supra note 14, at 456.
33 Id. at 39.
35 For the history of the reception of the Philosophy of Right, see Crites, Hegelianism, in 3 Encyclopedia of Philosophy 451 (P. Edwards ed. 1967); Avineri, Hegel Revisited, 3 J. Contemp. Hist. 133 (1968); Riedel, Einleitung, in 1 Materialien zu Hegels Rechtsphilosophie 11 (M. Riedel ed. 1975) [hereinafter 1 Materialien zu Hegels Rechtsphilosophie]; H. Rosenberg, Zur Geschichte der Hegelauffassung, in Politische Denkströmungen im deutschen Vormärz 69 (1972). An extensive bibliography of the commentaries to Hegel's legal philosophy is found in
Already at publication, the Philosophy of Right was the object of
tive, polemic, and rejection. One problem was the virtually in-
superable barrier of language and style.36 Hegel, like Bach, found
himself at the end of an intense tradition—one that, in fact, dis­
appeared shortly after his death. As time passed, significantly fewer
readers could read Hegel's books from beginning to end.37 Little
more than half a century after Bach's death, things had changed
enough for Mendelssohn to be able to rediscover him. Hegel has been
less lucky in this regard. Almost two centuries later, he is still await­
ing his Mendelssohn.

A second problem that has plagued the book is a political one­
sidedness, due at least partially to the historical circumstances pre­
vailing at the time of its first publication.38 Shortly before the book
was to appear in 1819, the dramatist August von Kotzebue, an
avowed reactionary and apparently a spy in the pay of the Russian
court, was assassinated by a theology student in Mannheim. The
Prussian government immediately concluded that a conspiracy ex­
isted to overthrow the government. Several of Hegel's students were
among those arrested. Upon Metternich's request, ministers from the
German states convened at Karlsbad and promulgated the Karlsbader
Beschlüsse, a series of police-state measures designed to repress polit­
ical opposition, particularly in the universities. Professors were for­
bidden, under threat of discharge, from exercising any form of
political criticism. The accompanying censorship laws covered all
newspapers, magazines, and books, even scholarly books, of less than
320 pages.39 Though it is impossible to know, the laws may have pre­
vented Hegel from expressing political criticism of the Czarist regime
and praising American democracy—thereby lending a somewhat

36 Though so many philosophers (perhaps not even excepting the obscure Heraclitus)
have thus far communicated their views and opinions in speech and writing, and
have frequently lamented the misunderstandings, it is unlikely that there are any
who surpass the author in obscurity and, one almost wants to say, in
impenetrability.

Paulus, Book Review, Heidelberger Jahrbücher der Literatur 392 (Apr. 1821), reprinted in 1
Materialien zu Hegels Rechtsphilosophie, supra note 35, at 53 (the review originally appeared
anonymously) (my translation).

37 "The generation that was equal to the richness of [Hegel's Phenomenology of Mind] is
becoming extinct; already today the number of those who have been able to read it from begin­
ing to end is probably small enough to count." 2 W. Windelband, Die Geschichte der
neueren Philosophie 334 (5th ed. 1911) (my translation).

38 See Riedel, supra note 35, at 15-17.

39 See M. Botzenhart, Reform, Restauration, Krise: Deutschland 1789-1847, at 89-90
more liberal tone to his book.\textsuperscript{40} As a result, the bourgeois public of the early nineteenth century, more interested in the daily political events than in Hegel's text, was easily convinced that Hegel's was the philosophy of the reaction.

In the overheated political climate of the day, the book's structural analysis could not get a fair hearing. Instead, it was interpreted—trivially, from our point of view—as an intervention in the raging disputes about legal politics, such as the debate between Savigny and Thibaut about the ripeness of German law for codification, the relationship between church and state, the question of whether justice should be administered in public, and the role of juries, local government, corporations, popular representation, the parliamentary two-chamber system, nobility of birth, and primogeniture.\textsuperscript{41} In this context, the \textit{Philosophy of Right} attracted hostile reviews from representatives of virtually all of the major contending schools of the time, including the Historical School, the followers of Kant, Fichte, and Schelling, and the adherents of the Enlightenment.\textsuperscript{42} To be fair, Hegel had gone out of his way in the \textit{Philosophy of Right} to offend most of these schools and others\textsuperscript{43} and had already alienated his former friend Schelling by remarks he made in the preface to the \textit{Phenomenology}.\textsuperscript{44} Yet despite—or, more likely, because of—the emotion,

\textsuperscript{40} "I was just about to let the printing begin as the parliamentary resolutions arrived. Now that we [know] where we are as far as censorship is concerned, I will soon have [it] printed." Letter from G. Hegel to F. Creuzer (Oct. 30, 1819), reprinted in 2 Briefe von und an Hegel 217, 220 (J. Hoffmeister ed. 3d ed. 1969) (my translation).

\textsuperscript{41} See Riedel, supra note 35, at 18.

\textsuperscript{42} Id. at 19.

\textsuperscript{43} "You have begun a new campaign, more formidable than ever, and, without quarter, have insulted and wounded friend and foe alike, such that even I, one of your faithful, can step onto the battlefield only after convalescence." Letter from N. von Thaden to G. Hegel (Aug. 8, 1821), reprinted in 1 Materialien zu Hegels Rechtsphilosophie, supra note 35, at 76 (my translation).

\[The\] accusations of superficiality, which Mr. H. heaps on everyone who is not of his view as though all of German philosophy were a marshy swamp, in which his \textit{philosophy of the concept alone} gushes forth like a deep, crystal-clear spring, are repeated with the same word (one might believe that the author knows only the one German word \textit{superficial}) until nausea.

Paulus, supra note 36, at 55 (emphasis in original) (my translation).

For Hegel's comments about others, see, e.g., Philosophy of Right, supra note 1, para. 211R (footnote omitted) (Savigny and the Historical School) ("[n]o greater insult could be offered to a civilized people or to its lawyers than to deny them ability to codify their law"); id. preface, at 11 (Fichte) ("[a]long such tracks all trace of philosophy is lost"); id. para. 75R (Kant) ("shameful is the only word for it"); id. preface, at 6 (Jakob Fries and the liberal German Student Societies (\textit{Burschenschaften}) ("[t]his is the quintessence of shallow thinking"); id. para. 258R n.* (K. von Haller and German political romanticism) ("fanaticism, flabby-mindedness, and the hypocrisy of good intentions").

\textsuperscript{44} To pit this single assertion, that "in the Absolute all is one," against the organized whole of determinate and complete knowledge, or of knowledge which at least
the initial critics did not delve deeply into the text. Most of them fastened on the preface, with its equation of the real with the rational, and on some of the more polemical Remarks that Hegel had added to make the work more accessible.

One hope for a clear exposition of Hegel's thought might have been his direct students and close associates. Several of them were named as associate editors of the first complete edition of Hegel's Works. Of them, the most likely candidate to succeed Hegel as the exponent of legal philosophy was Eduard Gans. Gans was a student, friend, and colleague of Hegel's and became Dean of the Berlin law faculty shortly after Hegel's death. Yet, as Gans admitted, although Hegel left behind a number of imaginative students, he left no successor. Gans's service to his master consisted chiefly in teaching Hegel about the law and in editing the Philosophy of Right for Hegel's Works. When called on to defend the Hegelian position, Gans was unable to jump over the shadow of his age. His responses did not rise above the level of daily politics on which the attacks occurred. Until the early 1830s, Gans defended Hegel against the claim that Hegel's thought represented the servile official philosophy of the Prussian government. Thereafter, Gans attempted to defend Hegel against official reproaches of his liberalism. Gans, of course, fully understood that Hegel's book was a paean to human freedom. Unfortunately, he was unable to foresee the difficulties we would have
with the book. Moreover, in his own lectures on legal theory, Gans implicitly criticized and revised the Hegelian system.\footnote{53 See Riedel, Einleitung, in E. Gans, supra note 14, at 11-30; Riedel, Hegel und Gans, in Natur und Geschichte 257 (H. Braun & M. Riedel eds. 1967). Gans read Hegel from a liberal, republican standpoint. He substituted the new American Republic for the constitutional monarchy as the prime example of a modern state. He also deduced democratic institutions from Hegel’s own premises, including the two-chamber system of representation, popular elections and governmental opposition. Gans, who probably taught legal philosophy to Karl Marx in Berlin, also began the theoretical transition to the Young Hegelians. He recognized the necessity of examining all forms of government as historical forms, forms that had come into existence and that would develop or perish, and therefore forms that could be criticized and changed.}

Although other students of Hegel also defended his work, they too limited the defense to the scope of the critique.\footnote{54 See, e.g., Förster, Noch ein Denunziant der Hegelschen Philosophie, 1839 Hallische Jahrbücher für deutsche Wissenschaft und Kunst (No. 49), reprinted in 1 Materialien zu Hegels Rechtphilosophie, supra note 35, at 285. Förster was appointed professor of engineering and artillery in Berlin but subsequently lost the position because of his democratic writings. He later became court counselor with duties in the royal museum. He wrote widely as a historian, poet, and dramatist. See Friedrich Christoph Förster, in 10 Encyclopaedia Britannica 674 (11th ed. 1910).} Karl Ludwig Michelet, another of Hegel’s students, became professor of philosophy in Berlin and developed a philosophical theology later described as “Neo-Christian Spiritualism.”\footnote{55 See Karl Ludwig Michelet, in 18 Encyclopaedia Britannica 370 (11th ed. 1911).} He defended the Hegelian tradition until his death in 1893, but his defense of the Philosophy of Right came too late to influence the historical reception of the book.\footnote{56 See C.L. Michelet, Hegel: Der unwiderlegte Weltphilosoph (1870 & photo. reprint 1970) [hereinafter Weltphilosoph]; C.L. Michelet, Naturrecht oder Rechts-philosophie als die praktische Philosophie (1866 & photo. reprint 1968).}

Philip Marheineke also joined the philosophy faculty in Berlin and came to be regarded as the leader of the Hegelian Right. His theoretical work, however, dealt not with law but consisted chiefly in defending orthodox church doctrine in terms of Hegelian philosophy.\footnote{57 See Philip Konrad Marheineke, in 17 Encyclopaedia Britannica 707 (11th ed. 1911); P. Marheineke, Die Reform der Kirche durch den Staat (1844).} Heinrich Hotho, whose student notes in Hegel’s lectures on legal philosophy were one of the two sources for the Additions to the Philosophy of Right, became a professor of aesthetics and art history in Berlin and director of the print room of the Prussian museum. Hotho developed Hegel’s theory of aesthetics but seems not to have written further about the law.\footnote{58 See Heinrich Gustav Hotho, in 13 Encyclopaedia Britannica 804 (11th ed. 1910).} Hegel’s legal theory continued to exercise influence on law faculties for a couple of decades, especially because of its discussion of punishment,\footnote{59 See E. Sulz, Hegels philosophische Begründung des Strafrechts und deren Ausbau in der deutschen Strafrechtswissenschaft (1910).} but none of the original generation...
of Hegel's followers produced a convincing explanation of the apparent contradictions in the *Philosophy of Right*.

The modern discussion about the *Philosophy of Right* began not with Hegel's own students but rather with Friedrich Julius Stahl, a follower of Schelling. Stahl held the chair of ecclesiastical law and polity in Berlin, eventually becoming a conservative politician in the Lutheran church. While he was still a lecturer in Munich in 1830, Stahl produced one of the few lasting commentaries on the *Philosophy of Right*. Despite Stahl's extreme conservatism, his critique in many ways anticipated one of the other lasting nineteenth-century commentaries about Hegel's book, namely, that of Karl Marx.

Stahl, like Marx, criticized Hegel's explanatory method, particularly his attempt to demonstrate that the various legal institutions can be ordered in a way that would correspond to the categories of his *Logic*. Stahl also believed that Hegel was unable to reconcile all legal institutions with the idea of freedom. For example, he considered Hegel's attempt to justify punishment to be nothing more than a dialectical-conceptual game. Moreover, again like Marx, Stahl also

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61 See F. Stahl, Hegels Naturrecht und Philosophie des Geistes, in 1 Die Philosophie des Rechts nach geschichtlicher Ansicht 288 (1830), reprinted in 1 Materialien zu Hegels Rechtsphilosophie, supra note 35, at 220.

62 See supra note 15.

63 [Hegel's] natural law can be truly understood only when one remembers that, in each sentence and in each result, everything is designed to obtain from human relationships a system in which each concept transcends itself, leads to its opposite, and by reunion creates a third . . . . Whenever a rule of thought serves as the actual producer, as does the dialectic here, rigidity is unavoidable, and things only count in the sense in which the logical demonstration requires. The wealth of relationships that every living thing has in all directions and with which it is penetrated is then lost to science.


64 If something determinate is to be deduced where nothing determinate follows, then, of course, any deduction is purely a matter of whim. This arbitrariness prevails in Hegel's as much as, or perhaps more than, in previous versions of natural law. Hegel reproached Kant that, from Kant's purely formal laws, collective ownership of property may be as easily deduced as private ownership; but the same is the case to an even higher degree in Hegel's formal movement. Why, for example, does the dialectical progression from right run through wrongs (*Unrecht*) and crimes and not through the right of the other while the dialectical progression from family to the state does not run through the dissolution of family (*Unfamilie*) or the dissolution of the state (*Unstaat*) but rather through more families and other states?

Id. at 226 (my translation).

This has been a constant criticism of Hegel's theory of punishment: Since the essence of Hegel's philosophy consists in converting irrationality and compulsion (*Unfreiheit*), by means of speculative-dialectical deduction, into reason
protested against what he imagined to be the inversion of subject and predicate in Hegel's theory. The result of the inversion is that, despite Hegel's assurances, human beings are not really free to think and act as they wish. On the contrary, freedom belongs only to abstract thought that exercises its own freedom and realizes itself by positing human beings and historical circumstance.

Stahl also seems to have been the first to recognize that Hegel's discussion concerns only the modern forms in which human beings exercise their freedom. Curiously, he understood the formal aspect of Hegel's theory only as a problem, as though Hegel thought that human freedom had only external aspects and that nothing at all of substance mattered to him. Stahl did not recognize that, precisely

and freedom without really calling either into question, Hegel permitted crime and punishment to continue to exist as they are in the positive law and contented himself with "regarding" them differently—he believed, more rationally—than the common jurist. But in social reality, wrong cannot thus be turned into right or compulsion into freedom.


In fact, an acceptable Hegelian theory of punishment probably requires more effort than Hegel himself was prepared to invest. For an interesting recent attempt, see Köhler, Strafbegründung im konkreten Rechtsverhältnis: Die Aufgebung der abstrakten Straftheorie am Leitfaden der Hegelschen Rechtsphilosophie, in Festschrift für Karl Lackner 11 (W. Küper ed. 1987).

If thought determinations are declared to be all that exists, then personality has a derivative, subordinate existence: it is there only as a means to realize the relationships of mind. . . . Freedom then is not the situation in which individuals may freely choose. Rather it consists of those circumstances in which they cannot [choose at all], in other words, there, where a rule is realized without their will. It is not the human being but the rules of mind that must be free (that is, their existence must not depend on humankind). It is not human beings who act in history, as our historians have imagined, but rather the logical law of the three moments.

F. Stahl, supra note 61, at 231 (my translation).

The many individuals in the state have a right to representation, and, for this reason, representative constitutions are rationally necessary; but not so that A and B and C, who actually live in the state, may be represented, but rather so that the category of multiplicity can have an external organ.

Id. at 232 (my translation).

It is true that personality apparently plays a large role in [Hegel's] system . . . but a personality that is only a logical process, and, in the end, only for that reason is there, does not truly exist as personality . . . . [According to Hegel,] the fact that we often do not get our due in the state does not mean that the state is imperfect. Our rights are nonetheless guaranteed to us in abstracto: the recognition of individual rights is expressed in permanent legislation and demonstrated by their constant exercise and profession; the rationality of our states therefore leaves nothing at all to be desired. The relationship between A and B in the matter X is only coincidence, and nothing of importance can depend on the just or unjust resolution of the question. On the contrary, it is even rationally necessary that reason also include its own opposite, coincidence. Consequently, not every matter may be decided justly.
because Hegel discussed only forms and not contents, Hegel should have been exonerated of the charge that he had inverted subject and predicate. For, while it is true, according to Hegel, that the forms for the exercise of human freedom constantly recur in modern society and are therefore largely independent of direct human volition, the substance of the rights—how they are applied in individual cases—is very much a matter that is left to us.

In other words, it was Stahl, and not Hegel's direct students, who came closest to elaborating some of the central features and difficulties of Hegelian legal theory. Unfortunately, as a follower of one of Hegel's philosophical opponents, Stahl was not motivated to use his discoveries to elaborate Hegel's system. Moreover, Stahl was of such conservative political views that his insights later became suspect. Had dramatic political events not intervened, Stahl's contribution might have occasioned a debate about the structure of Hegel's legal theory, and the reception of the Philosophy of Right might have proceeded differently.

However, just at the moment when the discussion might have begun in earnest, revolution again broke out in Paris, and political concerns again took precedence over everything else—even among philosophers. In July 1830, three "Glorious Days" of Parisian barricades and rebellion toppled, once and for all, the 240-year-old Bourbon dynasty and replaced it with the constitutional monarchy of the "bourgeois king" Louis-Philippe. This was the first major breach in the system of restoration established by the Congress of Vienna.68 After reading of the event, Heinrich Heine remarked that it was "sunshine wrapped in newspaper" and that it divided the age into a before and an after.69 Its political impact abroad was extraordinary. After learning of the news, Flemish and Walloon Catholics rioted throughout the southern provinces and, after insurgent fighting, seceded from the Netherlands to form the kingdom of Belgium. A rebellion of nationalist Polish troops resulted in a (short-lived) proclamation of Polish independence the next year. Freedom fighting and internal unrest also arose in Italy, Spain, Portugal, Switzerland, and England.

In central Europe, too, there was mass movement and revolutionary turmoil. The military was called in to suppress worker and popular uprisings in Aachen, Jülich, Cologne, Elberfeld, Frankfurt, Munich, Reichenberg, Chemnitz, Leipzig, Hanover, and even in Berlin, Vienna, and Prague. There was radical student unrest in over half

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68 See M. Botzenhart, supra note 39, at 105-25; R. Rürup, supra note 39, at 147-56.
69 See R. Rürup, supra note 39, at 147.
of the German-language universities. The ducal palace in Brunswick was set aflame, and the duke was forced to flee and then abdicate. The city hall was stormed in Dresden and the police headquarters burned to the ground. The customs houses in the provinces of Har- nau and Fulda were destroyed—with the result that no customs duties could be collected for over a year. Several thousand peasants protesting tax and rent collection destroyed documents and collection offices.

Suddenly, everything was politics. There was a general politicization of public life, an increase in daily journalism, a differentiation of newspapers according to political persuasion, and the beginning of planned, organized election campaigns. The liberal German bourgeoisie did not always side with the people. One newspaper widely read at the time, the Augsburger Allgemeine Zeitung, reported that September 1830 was “full of threats, insurrection, pillage, burning and destruction,” and lamented that the bourgeoisie found itself squeezed between despotism and the rabble.

The resurgence of popular movements inspired the Left and radicalized it while it stiffened the opposition of the ruling parties. Once again, the Left and the Right both criticized—and rejected—Hegel. The Left, the Young Hegelians, reproached Hegel for the “speculative” quality of his philosophy—for stubbornly maintaining the rationality of empirical reality—and for refusing to recognize the theory’s radical implications for practice.

The Young Hegelians have often been criticized for sacrificing theoretical rigor to political expediency. There is no doubt that, as readers of Hegel, they neglected much of the system to emphasize the

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70 “[T]he time is political, even when very much is still lacking before it is political enough.” Ruge, Die Hegelsche Rechtsphilosophie und die Politik unserer Zeit, 1842 Deutsche Jahrbücher für Wissenschaft und Kunst (Nos. 189-192) 755, reprinted in 1 Materialien zu Hegels Rechtsphilosophie, supra note 35, at 323, 336 (emphasis in original) (my translation).

71 See R. Rürup, supra note 39, at 148-49.

72 “‘Speculation’ is satisfied with itself and examines spiritual reality not in terms of its differences with, but rather in terms of its identity to, external reality.” Ruge, supra note 70, at 336.


74 Their writings are manifestos, programs, and theses, but never anything whole, important in itself. In their hands, their scientific demonstrations became sensational proclamations with which they turn to the masses or the individual. Whoever studies their writings will discover that, in spite of their inflammatory tone, they leave an impression of insipidity. They make immoderate demands with insufficient means, and dilate Hegel’s abstract dialectics to a piece rhetoric...
principles of dialectical negativity and contradiction.75 But at least one of them, Arnold Ruge, clearly understood—even more clearly perhaps than Stahl—that the *Philosophy of Right* is about the forms in which human freedom is exercised.76 Ruge had been imprisoned for five years as a young man for his democratic political activity. After his release, he founded various radical political journals, one with Karl Marx. Ruge agreed with Hegel that the state is the form for social self-determination, a process that can take place only with the free and self-conscious citizen.77 Ruge, however, believed that all of the institutions necessary for a functioning state were still lacking in Germany.78

In this context, Ruge criticized Hegel's concept of form. In his view, Hegel had praised the forms of German constitutional government despite the fact that they were weak, rotten, and dysfunctional. The problem, according to Ruge, was Hegel's purely theoretical standpoint. He detached the existing state from history and viewed it as absolute and eternal.79 In Ruge's view, the state exists only as a particular historical product. The true form of the state, once it has achieved historical existence, is its particular historical form. It is impossible to come to a conceptual grasp of the existing state without criticizing the state's inadequacies. Hegel, he argued, confused logical with historical categories and confounded the eternal determinations—person, family, society, state, will, love, law, and freedom (definitions that *can* be grasped in the form of generality)—with the particular historical forms in which these institutions exist. Hegel therefore considered as eternal what is a historical product and believed to be a logical necessity what in fact is subject to criticism and

Their critical activism knows no bounds; what they seek to bring about is in every case and at any price "change."

K. Löwith, supra note 73, at 67.

75 Id.

76 See Ruge, supra note 70.

77 The state is public spirit and the process of public thought and action. The state is the essence while the self-conscious subject is existence. This essence, the state, is not only the purpose but also the *product* of the self-conscious subject's activity, and freedom, therefore, is this self-producing and self-governing thought and will

Id. at 328 (emphasis in original) (my translation).

78 Therefore, what is necessary in order to have a state that actually exists in the form of a state, is all of the great institutions (national representation, juries, freedom of the press) that raise human beings, in their complete dignity and in the full light of public consciousness, to the creators of their own freedom, and all of these are still lacking among the Germans.

Id. (my translation).

79 Id. at 336.
change. In the end, according to Ruge, Hegel abandoned the critical-historical power of his theory and took refuge in eternal essences.

There is power, vision, and beauty in Ruge's critique of Hegel. Ruge accepted Hegel's understanding of the state as the form for the process of self-governance, the process of the formation—and reformation—of social life. He criticized Hegel only for labeling as rational a particular historical form of that process, one that permitted only a restricted exercise of freedom and popular participation. The problem, however, was not with Hegel but with the world. As Marx later made clear, a certain form of state can be rational and organic to a particular social organization despite the state's limitations. Hegel described the necessary forms for the exercise of freedom in a social system based on private property and the corresponding division of labor. (I point out the assumption underlying Hegel's analysis not in criticism but rather to emphasize his own chosen and stated premise.) Hegel was interested not, as Ruge claimed, in abstract, ahistorical essences but rather in historical structures. Hegel's insight was precisely that political structures persist over time and that, whether run honestly or corruptly and whether skimpily or generously with respect to citizen participation, they are all forms for the exercise of human freedom. If the question were to arise whether there should be more or less human freedom, Hegel would certainly say more. But what exactly constitutes greater human freedom was simply not a question Hegel was willing to decide once and for all.

Of course, not all of the Young Hegelians read Hegel in the way that Ruge read him. As Friedrich Engels remembered the critique a half-century later, for example, the Young Hegelians criticized Hegel for having attempted, inexplicably, to find a definitive content for ethical life. On the one hand, Hegel recognized that philosophy could

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80 "Hegel thus attempts to present hereditary kingship, primogeniture, the two-chamber parliament etc. as logical necessities, when in fact the real point could only be to demonstrate that they are all products of history and to explain and criticize them as historical existences." Id. at 339-40 (emphasis in original) (my translation). Marx made the same point. "Hegel is not to be reproached for having depicted the essence of the modern state as it is but rather because he offers what exists as the essence of the state." K. Marx, Zur Kritik der Hegelschen Rechtsphilosophie, in 1 Marx-Engels Werke, supra note 15, at 266 (emphasis in original) (my translation).

81 Ruge, supra note 70, at 340.

82 Marx followed Hegel in this regard. "Nonetheless, the different states in the various civilized countries, despite the great difference in form, all have in common that they rest on the foundation of modern civil society, whether at a higher or lower level of capitalist development. They therefore have certain essential characteristics in common." K. Marx, Kritik des Gothaer Programms (1891), in 19 Marx-Engels Werke 11, 28 (1974) (my translation).
not consist simply in a collection of final truths. Yet, Hegel somehow felt obligated to crown his system with some form of absolute truth. Even more oddly, he seems to have believed that the absolute Idea had been realized in the reign of Frederick William III. Engels and his comrades simply extracted what they believed to be the revolutionary method from Hegel's work and rejected Hegel's personal political convictions.

The discovery of an apparent contradiction between Hegel's method and his own political views was not limited to the Young Hegelians. The July Revolution also politicized the Right and caused it, too, to criticize Hegel. K.E. Schubarth, for example, having originally read Hegel as Engels did—as an attempt to identify the ultimate contents of ethical life—correctly saw that, if that was what Hegel stood for, his theory was incompatible with human freedom. After 1830, however, Schubarth was much more interested in the incompatibility of Hegel's theory with the Prussian monarchy. Schubarth recognized that Hegel's dialectics served as the theoretical basis for

83 "For Hegel, the truth sought by philosophy was not a collection of ready dogmatic principles which, once discovered, need only be learned by memory...," F. Engels, Ludwig Feuerbach und der Ausgang der klassischen deutschen Philosophie (1886/1888), in 21 Marx-Engels Werke 261, 267 (1962) (my translation).

84 "Thereby the entire dogmatic contents of the Hegelian system is declared to be the absolute Truth, in contradiction to his dialectical method that instead dissolves all dogma; thus the revolutionary side of the theory was suffocated beneath its expansive conservatism." Id. at 268 (my translation).

85 Everything that is real in the field of human history becomes in time unreal, is already, by its determination, irrational, is, from the outset, plagued by irrationality; and everything that is rational in the human mind is determined to become real, no matter how much it contradicts existing apparent reality. The principle concerning the rationality of the real is transformed by all of the rules of the Hegelian method into another: Everything that exists deserves to disappear.

86 Perhaps it might be good for the state if it represented objective ethical life, but much worse for humanity, since ethical life, if rigidly incorporated into external institutions, would cease being anything spiritual or alive or a constant product of the inner power of the soul and the heart. The state, which so often, and often in vain, has had to rely on the ethical life of its citizens, would no longer be required to do so, and individuals would permit themselves to rely on the ethical life of the state when they lack it. I wonder whether, under such an apparently very ethical concept, the state and humanity must not in the end perish.

87 See K. Schubarth, Uber die Unvereinbarkeit der Hegelschen Staatslehre mit dem obersten Lebens- und Entwicklungsprinzip des Preussischen Staats (1839), reprinted in 1 Materialien zu Hegels Rechtsphilosophie, supra note 35, at 249.
It seemed to Schubarth, as it did to Engels, that this aspect of Hegel's theory contradicted Hegel's own political views. To Schubarth, it seemed perfectly appropriate to agree with Hegel's political opinions while rejecting the revolutionary implications of Hegel's theory.

In general, the Right found in Hegel's philosophy an extreme presentation of bourgeois rationalism, a philosophy incompatible with the principles of monarchy. Thus, when the conservative Frederick William IV ascended to the Prussian throne in 1840, not quite a decade after Hegel's death, one of his first goals was to rid the empire of "the dragon seed of Hegelian pantheism." For this purpose, he decided to appoint Schelling, the most prestigious living representative of German idealism, as Prussian privy councilor and member of the Berlin Academy, and requested that he deliver lectures at the University of Berlin.

Schelling accepted the appointment and agreed to give his inaugural lecture at 5:00 p.m. on November 15, 1841. The lecture was to be held in Auditorium No. 6, the largest room then available at the University. The room provided seats for 290 students and standing room for another 140 auditors. Admission was to be by ticket only. On the day of the lecture, hundreds of students seeking tickets crammed into the apartment of the University's beadle. Even though the beadle locked his door, those outside broke down the doors and windows to get in. Half the University courtyard was filled with others seeking the same privilege. As the ticket holders filed into the
auditorium, the eager masses of students without tickets crowded around the doors. As 5:00 p.m. approached, impatient students suddenly stormed past the four attendants who were providing security. Other students broke down a locked door on the other side of the auditorium.

The auditorium was packed. On the stage, there was barely enough room for Schelling to sit down. Students were crammed together so closely behind Schelling's table that they were able to read his notes as he spoke. In the audience, the dignitary seats were occupied by university professors, including Savigny, Trendelenburg, Ranke, and C.L. Michelet, as well as by representatives of the Prussian government. Behind them, German, French, English, Hungarian, Polish, Russian, modern Greek, and Turkish were heard in the auditorium. Michael Bakunin, Søren Kierkegaard, and Friedrich Engels were among the public. During the preceding summer, Bakunin had read as much of Schelling as he could find. He believed that he had found in Schelling "an immeasurable profundity of life and creative thought." Kierkegaard reported that he could barely hear Schelling because of the noise, uproar, and whistling of those who had been unable to squeeze into the room. Nonetheless, he took seriously Schelling's promise to raise the philosophical level both of modern thought and of his listeners. Kierkegaard therefore decided to trust Schelling and to risk his life again by returning for the next lecture. Engels scribbled madly as Schelling spoke, managing to transcribe much of the lecture literally. As Schelling finished speaking, the auditorium erupted into applause and a thunderous Bravo! Engels left the room thinking that anyone who had even a vague idea of the power of mind over the world would agree that the current battlefield for control over German public opinion was the auditorium where Schelling was lecturing.

Despite this astonishing reception, Schelling's subsequent lectures were not well received. In 1844, he had only fifty paying students. By 1846, the number had dropped to twenty-nine, and he

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93 Letter from Søren Kierkegaard to Peter Johan Spang (Nov. 18, 1841), in Schelling im Spiegel seiner Zeitgenossen, supra note 91, at 449.
94 Id. Schelling's second lecture brought Kierkegaard to ecstasy. "I am so happy that I heard Schelling's second lecture—indescribable. I have sighed long enough, and thought has sighed long enough within me; since Schelling mentioned the word 'reality' regarding the relationship of philosophy to reality, the fruit of thought leaped for joy within me like once in Elisabeth. I remember almost every word he said from that moment on. Here perhaps clarity can come . . . ." Pölcher, supra note 91, at 202 n.22 (quoting Kierkegaard) (my translation).
95 See Engels, supra note 91, at 163.
decided to withdraw from teaching entirely. The interesting question is why, within the course of five years, the most famous living philosopher was abandoned by his students. The answer illuminates the dramatic decline of German idealism. The problem was not that Schelling had nothing to say. Generations of philosophers with far less to say have had no difficulty filling their auditoriums. Moreover, Schelling's late philosophy, a precursor of modern existentialism, had a profound effect on twentieth-century thought. Nor was the problem that Schelling criticized Hegel. Rather, the difficulty seems to have been that he did not criticize Hegel enough, or at least not in the right way. Instead, he maintained the fundamental insight of the speculative Absolute to which Hegel, in his own way, had also been true, namely, the identity between mind and nature, between thought and the world. During the previous half-century, the French had initiated the age of permanent revolution. During the same period, the Germans, despite the impressive succession of philosophical systems, were stymied. German intellectuals were tired of being informed of the rationality of a conservative and increasingly repressive political reality. This is especially so given the government's inability to remedy the economic crisis—as unemployment grew and the masses became increasingly impoverished, there was a corresponding increase in political censorship. In the 1840s, Germany was ready to move to political action.

For a report of the mood in Germany at the time, we have the testimony of Heinrich Heine. In January 1844, Heine wrote a narrative poem about a trip he had taken a few months earlier from Paris to Hamburg and back. During a moonlit walk in Cologne, the poem's narrator noticed that he was being followed by someone wearing a mask and holding an executioner's axe under his coat. The narrator soon found the company unbearable. He turned, confronted the

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97 See K. Löwith, supra note 73, at 115-21; W. Schulz, Die Vollendung des deutschen Idealismus in der Spätphilosophie Schellings (2d ed. 1975); Margoshes, Friedrich Wilhelm Joseph von Schelling, in 7 Encyclopedia of Philosophy 305, 308-09 (P. Edwards ed. 1967). For a critical view of Schelling's later philosophy, see G. Lukács, The Destruction of Reason 155-192 (P. Palmer trans. 1980). Hegel had begun his Logic with the concept of being (Sein). In his late work, Schelling examined the mystery of being: Why does anything at all exist? Why is there not nothing?
98 See M. Botzenhart, supra note 39, at 126-55; R. Rürupt, supra note 39, at 151-70.
99 The censorship affected not only radical journals, including Marx's Rheinische Zeitung, but also the liberal press. See D. McLellan, supra note 15, at 60-61.
stranger, and inquired of his identity. "I am no friend of rhetoric nor am I very philosophical," the stranger replied. "I am of a practical nature." The stranger then pressed his single thought relentlessly. "What you contrive in the mind, that is what I execute, that is what I do. And even as the years pass, I do not rest until I transform into reality what you have thought; you think, and I, I act . . . . I execute the judgment you have made, even when it is unjust . . . . I am the deed that is produced by your thoughts."\textsuperscript{101} The Revolution of 1848 was almost upon the country. Neither the Left nor the Right had any interest in a philosophy that sought pure understanding and eschewed action.

Once again the crowing of the Gallic rooster—the overthrow of Louis-Philippe and the proclamation of the Second French Republic in February 1848—opened the space needed for political change in Germany.\textsuperscript{102} The first phase of the March Revolution in Germany and Austria was fought in mass demonstrations, public meetings, and on the barricades. The struggle almost immediately achieved the restoration of political rights, the establishment of popular militias, and, in some places, the swearing of the military to obey the constitution. The second phase was not as successful. The Prussian and Austrian governments had time to regroup. Frederick William IV rejected the constitution presented by the Frankfurt National Assembly. As the old order reconquered the city, hundreds died in street fighting in Vienna.

Although the revolution failed both in France and in Germany, the consequences in Germany were more severe. The revolutionary-democratic tradition was destroyed by emigration, persecution, and repression. The failure of the National Assembly profoundly and enduringly shook the confidence of the liberal bourgeoisie, which subsequently tended to compromise with conservatism rather than to risk a popular revolution. The defeat in 1848, together with Bismarck's triumphs during the following two decades, represented the shipwreck of German liberalism and the end of classical German idealism.\textsuperscript{103} In 1831, Friedrich Förster had stood by Hegel's open grave and proclaimed that "this German thought, as conceived and created by

\begin{footnotesize}
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\item Id. at 104-05 (my translation).
\item See M. Botzenhart, supra note 39, at 156-58; R. Rürup, supra note 39, at 170-97.
\item Of course, other factors were also at work, including the rise of empirical social science and the enormous progress in technology and the natural sciences. "Spiritualism and idealism seem to have to hold their peace because the forces of nature, rendered useful to human life, find themselves in new ferment . . . ." R. Haym, Hegel und seine Zeit 6 (1857). For insight into the decline of German idealism, see Wunt, Der sog. Zusammenbruch der Hegelschen Philosophie, geschichtlich betrachtet, 1 Hegel-Studien 247 (1961).
\end{enumerate}
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Hegel through many a wakeful night by silent lamp, will conquer the world."104 Yet not three decades later, Hegel was virtually forgotten. Already in the 1860s, as Marx noted, Hegel was treated in Germany as Spinoza had been a century earlier—like a dead dog.105

Curiously, at about the same time Hegelian influence began to disappear in Germany, it took root briefly on the American frontier.106 Some Americans had been exposed to Hegel even earlier. The historian George Bancroft had attended Hegel's lectures in Berlin—and found them to be unintelligible.107 The New England Unitarians, Emerson among them, read Kant and Hegel. In 1842, James Murdock published a survey of contemporary German thought.108 Though he considered Hegel to be the "most famous and the most recent of the German pantheists who have attempted to improve upon Schelling,"109 he spent most of his discussion of Hegel's thought protesting about the unintelligibility of Hegel's prose.110

Hegel also came to America, particularly to Ohio, in the intellectual baggage of German immigrants in the 1830s.111 Among them was Johann Stallo, who, apparently for the first time on American soil, came to grips with Hegel's legal theory.112 It was an extraordinary effort. Stallo understood that the fundamental problem was to reconcile the individual and the state. He also clearly understood the possible pitfalls involved in resolving this issue on the basis of Hegel's theory. Stallo wished neither to justify the existing order nor to an-

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104 Förster, Grabrede, in K. Rosenkranz, Georg Wilhelm Friedrich Hegels Leben 564, 565 (Berlin 1844).
108 J. Murdock, Sketches of Modern Philosophy, Especially Among the Germans (Hartford 1842).
109 Id. at 118.
110 Hegel is the most unintelligible writer I ever read. Even the most acute German philosophers complain of his style, as being not only very harsh and dry, but so extremely obscure that they cannot fully understand him. . . . [A]fter a fortnight's hard study, I was nearly as ignorant of the whole process, and of every part of it, as when I first sat down to examine it. . . . I found myself in the midst of water so deep and so turbid, that I could neither reach nor see the bottom.
Id. at 120-21.
111 See L. Easton, supra note 107.
nounce a utopian model. His solution to the problem had two elements, one formal, the other substantive.

As a matter of form, Stallo recognized that the organization of society—of all society—is, in the end, democratic. No governmental structure is ever really imposed on a people. A people that is willing to defend itself cannot be oppressed. Thus, every people has, in some way or another, willed the government that rules them.113 Stallo claimed that individuals are therefore destined to identify their private will and reason with the universal. Their rights then coincide perfectly with their duties, their wishes with their obligations, and their subjectivity with their objectivity—they are, in other words, free.114 Thus, law is the positive assertion of the voice of society, but it is one that originates in and from the consciousness of the individual. This first element of Stallo's theory suggests that the state is the form for the collective resolution of problems that arise within society. If the will of the individual and that of society diverge, both the collective and the individual have the right to assert that the other is mistaken.

The second element of Stallo's reading of Hegel involves substantive rights and duties. Stallo assumed that in Hegel's theory, the abstract levels—those concerning individual rights and morality—are fully preserved at the level of ethical life.115 On that basis, Stallo felt obliged to hold that the individual's substantive interests always coincide with those of the collectivity. To do so, and at the same time to avoid both rationalization and utopianism, Stallo construed the notion of interests to include only the general purposes of the relationship. Society is an organism through which the individual members attain fulfillment. The purpose of the individual is to contribute to the welfare of society, while the purpose of society is to contribute to the welfare of the individual.116 In the end, this solution begs the question. It neither establishes substantive criteria for the evaluation

113 All governments, however despotic in appearance, are in reality democratic. Even the despot is the creature of the people's will. If the slaves of a despot collectively will to be free, has the despot any superhuman power to restrain them in their fetters? The only difference between democratic and other forms of government is, that in the former the will of the people is a conscious and rational will, in the latter unconscious and unreasonable . . . . It is a truism to say that the universal tendency of society is towards democracy.

Id. at 161 (emphasis in original).

114 Id. at 159, 162.

115 "In every organism all the inferior states are preserved in their full validity, though with absolute reference to higher stages." Id. at 165 (emphasis in original).

116 The whole, society, is not something antagonistic to the individual, by which the latter is to be crushed; the individual attains to his full pride and happiness through society. Just as much, then, as the end of the individual is the welfare of organized society, of the state, the end of the latter is the welfare of the individual.
of political programs nor does it necessarily lead to Stallo's own well-intentioned suggestions for social egalitarianism.  

Societies for the study of Hegel's thought arose all over the Midwest, but the principal conduit for Hegelian and other post-Kantian philosophical thought in America was the St. Louis movement. The St. Louis Philosophical Society was founded in January 1866 when a dozen people gathered in a law office in downtown St. Louis and listened to short inaugural speeches by the Society's President, Henry Brockmeyer, a practicing lawyer, and its Secretary, William Torrey Harris, a local educator. Auxiliary members of the Society later included Emerson, Stallo, Henry James, Sr., and Joseph Pulitzer, as well as in Germany, Karl Rosenkranz and J.H. Fichte (the great Fichte's son). The Society's *Journal of Speculative Philosophy* became the most important philosophical review in America during the second half of the nineteenth century. Its contributors included George Morris, Charles Peirce, William James, and John Dewey.

The Society was founded with political aspirations. Harris and Denton Snider, the Society's principal political theorist, sought a theory with which to overcome the sectional divisions that continued after the Civil War. Philosophically, they wished to counter the influence of New England Transcendentalism and of Herbert Spencer's brand of materialism and utilitarianism. They were particularly concerned about the Transcendentalist bias against large-scale social institutions and the often eccentric individualism that it produced. Because of these political concerns, the St. Louis Hegelians wrote extensively about political issues. Yet they did not produce a comprehensive explication of the *Philosophy of Right*. They were not as much interested in the systematic quality of Hegel's legal and political thought as in the "series of wonderful insights" they found there, the "wealth of suggestive ideas, potent arguments, and

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The state is consequently bound to provide for the intellectual and physical subsistence of the individuals.

Id. at 163.  

117 "The practical means—the legal foreclosure of encroaching wealth in the hands of individuals, the measures to be taken for preventing the separation of labor from its products, the establishment of institutions for the relief of physical and mental destitution . . . do not belong here." Id. at 164.  

118 D. Snider, supra note 106, at 7.  

119 For a summary of the development of the St. Louis movement, see W. Goetzmann, supra note 106, at 8-9.  

120 See F. Harmon, The Social Philosophy of the St. Louis Hegelians 6, 99 (1943).  

121 See id. at 1.  

122 See id. at 101.  

123 Harris, Book Review, 6 Phil. Rev. 288, 288 (1897).
sound, common sense." They were not allergic to all systematic thinking. Both Brockmeyer and Harris, the Society's leaders, devoted much of their lives to the study of Hegel's *Logic.* In the field of politics, however, they had very immediate concerns, specifically the preservation of American federalism and the institutions in which it was embodied. The St. Louis Hegelians sought to justify American institutions from the perspective of Hegelian idealism. They were so imaginative in their translation of Hegel into American idiom that they were able to rationalize American life just as they found it. One of the reasons for the Society's decline was that those rationalizations could not survive the open social conflict at the end of the American nineteenth century.

Another factor that contributed to the decline of the St. Louis movement was the triumph of American pragmatism. Some of the American pragmatists had in fact begun their careers with an interest in Hegel. John Dewey, for example, fell under Hegel's spell as a graduate student of George Morris's at Johns Hopkins University. In the world of divisions and separations between the self and the world, the body and the soul, and nature and God that was the heritage of nineteenth-century New England culture, Hegel supplied Dewey with the unification and synthesis he craved. Dewey thus interpreted Hegel as the theorist of the organic relation between sub-

124 Ritchie, Book Review, 3 Phil. Rev. 120, 121 (1894).
125 "It soon became manifest that there was one book of Hegel which uprose the lofty center round which all the other works of the philosopher, all our studies, in fact all the thought of the All itself gathered—that was Hegel's so-called Larger Logic." D. Snider, supra note 106, at 11. Brockmeyer devoted much of his life to translating the book, but the translation, although it was circulated in manuscript, was never published. Harris, who, after the decline of the movement, took up residence in Washington, D.C., as U.S. Commissioner of Education, published a treatise on the *Logic.* See W. Harris, Hegel's Logic. A Book on the Genesis of the Categories of the Mind. A Critical Exposition (1890). For Harris's biography, see K. Leidecker, Yankee Teacher: The Life of William Torrey Harris (1946).
126 See D. Snider, The State, Specially the American State, Psychologically Treated (1902); D. Snider, Social Institutions (1901); Harris, the Idea of the State and Its Necessity, 3 The Western (N.S.) 206 (1877).
127 I do not mean to imply that Harris and Snider found nothing to criticize. They recognized the rise of monopoly capital and the concentration of economic and political power in the hands of the "monocrats." But, despite the impoverishment of the masses, they believed that the monocrats represented a socially productive force and were thus to be preferred to the threat of civil strife presented by "industrial socialism." See F. Harmon, supra note 120, at 28-49.
129 See id. at 142; R. Bernstein, John Dewey 9-21 (1966). For Morris's interpretation of the Philosophy of Right, see G. Morris, supra note 1.
ject and object. As Dewey's interest turned to experimental science, he left Hegel in an attempt to cut his own path between the empiricists' atomistic concept of experience and the idealists' notion of the all-encompassing whole. William James ridiculed what he believed to be the excesses of the Hegelian infatuation with the Absolute and an unacceptable attachment to eternal truth. Oliver Wendell Holmes compared legal theories derived from the works of Kant and Hegel with those originating in the common law and rejected the foreign theories. The pragmatists' rejection of Hegel, and particularly James's critique, sounded the knell to Hegelianism in America. The result was that, already a century ago, most of the material about the American Hegelians disappeared into book depository libraries, unused and unavailable.

About the same time that Hegel's work was gaining a foothold in America, it was also introduced into England. In the 1830s, John Stuart Mill had complained that philosophy was falling into disrepute in England and that great events had ceased to inspire great ideas. Thomas Carlyle and Sir William Hamilton had expressed the same belief a few years earlier. The problem seems to have been that empiricism and intuitionism—the traditional philosophies of Great Britain—were inadequate to resolve the principal philosophical problem of the Victorian era, namely, the difficulty of reconciling the incredible progress of the natural sciences with the traditional dogmas of Christianity. In the second half of the nineteenth century, English philosophers turned to Hegel's philosophy in an effort to resolve this problem.

The poet Samuel Taylor Coleridge seems to have preceded the English philosophers in grappling with the difficulties of the Hegelian dialectic. Coleridge had enough patience to penetrate only the first ninety-one pages of the Science of Logic, and his judgment was largely

131 For Dewey's Hegel interpretation, see Dewey, Kant and Philosphic Method, 18 J. Speculative Phil. 162, 169-74 (1884).
132 For Dewey's views of Hegel's legal theory, see J. Dewey, German Philosophy and Politics 107-20 (1915).
133 "My conclusion, so far, then, is this, that altho the hypothesis of the absolute, in yielding a certain kind of religious peace, performs a most important rationalizing function, it nevertheless, from the intellectual point of view, remains decidedly irrational." W. James, A Pluralistic Universe 60 (1977); see R. Bernstein, supra note 128, at 143-44.
135 See R. Bernstein, supra note 128, at 144.
136 See W. Goetzmann, supra note 106, at x.
137 See 1 J.S. Mill, Dissertations and Discussions 96, 97 (1835).
139 See H. Haidar, Neo-Hegelianism 1-3 (1927).
140 See J. Muirhead, Coleridge as Philosopher 87-88 (1930).
negative. James Stirling wrote the first English work directly resulting from Hegel’s influence. On its heels, Hegelian thought was imported into England and a neo-Hegelian school formed at Oxford. The success of the school, however, was short-lived: it rose and fell before either the Phenomenology or the Science of Logic could be translated into English. The problem was that English thought was entirely unprepared for the import. Despite the seventeenth-century Cambridge Platonists and the holistic vision of the Romantic poets, the ground had not been sufficiently worked for Hegel to take root successfully. Unlike Germany, England had not known the likes of Johannes (“Meister”) Eckhart, Jakob Böhme, Spinoza, Herder, and Goethe. As a result, many of the English neo-Hegelians had great difficulty understanding Hegel. In epistemological matters, F.H. Bradley, the leader of the neo-Hegelian school, emphasized the unrevealed mystery of the world—and thereby got Hegel precisely backwards. McTaggart, Bradley’s colleague at Cambridge, was unable to do any better.

James Stirling, one of the few to penetrate Hegel’s thought, also seems to have been one of the first English neo-Hegelians to attempt a reading of the Philosophy of Right. Unfortunately, Stirling misapplied the Logic to Hegel’s legal theory and arrived at a disastrously totalitarian reading of Hegel’s book. Stirling believed that the key to

142 The Phenomenology was not translated until 1910 and the greater Logic until 1929. See Phenomenology of Mind, supra note 44; G. Hegel, Science of Logic (W. Johnston & L. Struthers trans. 1929).
144 “I am getting the impression that I have been tending more and more to take refuge in the unknown and unknowable . . . .” Letter from F.H. Bradley to Bertrand Russell (Jan. 31, 1914), in 1 The Autobiography of Bertrand Russell 225, 226 (1967). Cf. G. Hegel, Konzept der Rede beim Antritt des philosophischen Lehramtes an der Universität Berlin (1818), in 10 Werke 399, 404 (E. Moldenhauer & K. Michel eds. 1970) (“the sealed essence of the universe has in itself no power that might resist the courage of knowing; it opens itself up before cognition and reveals its wealth and depth for cognition’s sight and enjoyment”) (my translation).
145 “[McTaggart’s] acquaintance with Hegel’s writings was like the chapter-and-verse knowledge of the Bible that out-of-the-way Protestant sectarians often have; the unanimous judgement of Hegelian experts appears to be that McTaggart’s interpretations of Hegel were as perverse as these sectarians’ interpretations of the Bible.” P. Geach, Truth, Love and Immortality 17 (1979).
146 See Stirling, Lectures on the Philosophy of Law (pt. 1), 6 J. Speculative Phil. 313 (1872) [hereinafter Stirling, Pt. 1]; Stirling, Lectures on the Philosophy of Law (pt. 2), 7 J. Speculative Phil. 20 (Apr. 1873) [hereinafter Stirling, Pt. 2]; Stirling, Lectures on the Philosophy of Law (pt. 3), 7 J. Speculative Phil. 24 (July 1873) [hereinafter Stirling, Pt. 3]; Stirling, Lectures on the Philosophy of Law (pt. 4), 8 J. Speculative Phil. 123 (Nov. 1874) [hereinafter Stirling, Pt. 4].
Hegel's thought was his analysis of the act of self-consciousness. Self-consciousness consists of the realization of a universal (a knowing) through a particular (a something) into a singular (a knower). The process of knowledge is similar whether the particular object of knowledge is nature, the law, or the mind itself. Every organization, for example, is the realization of a universal or plan by means of the reduction of many particulars to the unity of a singular. The law represents the realization of abstract right (the universal) by means of individual morality (the particular) in the citizen of the state (the singular).

The difficulty arises from Stirling's rigorous application of the schema of the Logic to the law. Above all, the parallel he established with epistemology suggested to him that the process produced a knowledge of the world, and that Hegel's analysis of the state was therefore concerned with contents. Since the epistemological process can be said to produce knowledge only when all three moments of the process coincide, Stirling was led to believe that the law and each of its constituent moments must also coincide perfectly. Stirling began with the distinction between subjectivity and objectivity, between what is mine only and what is mine in the sense that all properly thinking individuals may rightly call it mine. In the process of knowledge, as Stirling remarked, it is our duty to raise subjectivity to objectivity, to bring the inaccurate perception of the contingent individual in line with the necessary universal.

Disaster arose, however, when Stirling attempted to transfer the obligation to raise subjectivity to objectivity to the realm of practical philosophy. Stirling recognized the potential for divergence between an individual's assertion of rights and the objectivity of the law. However, instead of conceding the possibility of real conflict between equally dignified levels of the theory, Stirling followed his epistemological model and accorded no firmness to a claimed right that does not coincide with the law—just as individual perception can raise no

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149 [T]here is no perfect family where there is not the fulfilled IDEA, where each of the three moments, universal, particular, and singular, has not full justice accorded it. So the state: a state must be idea—perfect harmony of universal, particular, and singular, else it is imperfect and not a state.
Id. (emphasis in original).
151 See id. at 31.
152 "An exalted sense for formal right may prove in the end but mere wilfulness, indeed—a formal will that in its own intensely pure formality can only remain blind to every concrete consideration beside it." Id. at 36 (emphasis in original).
claim against objectively verifiable reality.  

The true contents of the law are not simply what we believe them to be, but rather are the actual societal usages that coincide with societal sentiment. Stirling's example was filial obedience, an observance that is both a sacred usage and a civil custom, and that is accepted both internally by individuals and externally by society. Socially observed usages are the substance of each individual's free will. Individuals can therefore implicitly trust in the whole and willingly sacrifice themselves to it. The preservation of the state is infinitely more important than the preservation of the individual, and it is the individual's duty to perceive and acknowledge that fact. The state is paramount, it has a Machtspruch, a complete right of negation over all of the lower sphere. We have arrived full circle from freedom to the rationalization of unmitigated totalitarianism.

Stirling's is the prototype of the dangerous misunderstanding of Hegel's legal theory that arises by reading the Philosophy of Right solely through the prism of the Logic. Once Hegel's legal theory is read—for whatever supposedly good reason—as referring to the substantive content of rights and their limits, freedom is always defined as the individual's acceptance of collective morality, whether incorporated in social convention or in a utopian communitarian ideology. But there is nothing free about a will that is told that it must trust implicitly in social custom, whether filial obedience or any other.

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153 And it is very subtle on the part of Hegel to point out, accordingly, that formal right is only a possibility; for a possibility, as he expressly defines it here, "is a Seyn, a being, an existent something, that has the import also not to be" . . . . My abstract right is, but how often is it also not? as I think it not worth while to assert it. That is, abstract right, beside concreter interests, has only the significance of a possibility . . . .

Id. at 37 (emphasis in original).

154 Stirling, Pt. 3, supra note 146, at 28.

155 In such usage we see society to be in enjoyment of what we may call the second or higher nature; such usage, or the system of such usages, we can see also to be capable of being named the substance of free-will, a substance which each individual free-will, each member of the society knows to be that individual member's own proper substance. He then possesses virtue, ethical personality, whose whole nature is permeated and pervaded by this substantial life; who regards, accordingly, his particular place in the system as not negative to him, but peacefully accepts it, trusting implicitly in the whole, and ready to sacrifice himself to it; and this is so, not as regards the State only, but as regards every one of its subordinate particular institutions.

Id. at 28-29 (emphasis in original).

156 Stirling, Pt. 4, supra note 146, at 128.

157 Id. at 140.

158 To conform to custom, merely as custom, does not educate or develop in [an individual] any of the qualities which are the distinctive endowment of a human being. The human faculties of perception, judgment, discriminative feeling, mental...
Even if the trust is not to be implicit and the individual is held to have an obligation to investigate and understand the rationality of the observance, the individual is still not free. Being forced to believe a system of thought merely because one understands it is not freedom. To be useful in the modern world, freedom has to mean, at the very least, that the individual’s right of critique is firmly established, and that the individual’s right to argue for change is as well respected as is the collectivity’s right to argue for conformity.

The definitive criticism of English neo-Hegelian political theory came at the hands of L.T. Hobhouse. As Hobhouse watched the bombing of London from his garden, he believed that he had witnessed the “tangible outcome of a false and wicked doctrine.” He was referring to the neo-Hegelian theory of the state, particularly as it had been expounded by Bernard Bosanquet, who at one time had been a colleague of Bradley and T.H. Green at Oxford. Hobhouse believed that the “metaphysical theory of the state” could be summed up in three propositions. These concern the relation between freedom and will, the notion of the real will, and the role of the state.

According to the first proposition, freedom or true individuality can be obtained only when individuals think and act in conformity with their real wills. The premise is that freedom consists not in the absence of constraint but rather in positive self-determination. Since the will is determined by its purposes or objects, it is only free if it is determined by itself. Its self-determination, however, depends not on following its actual arbitrary whim at any particular moment—there is always the danger that one element of the will might tyrannize the others—but rather in following the real will, the will as rational and harmonious order. The metaphysical theory’s second proposition asserts that the individual’s real will is identical to the general will, as it is expressed in the social fabric and in the custom and tradition accepted by the normal member of society. Moral freedom thus consists in conformity to the individual’s real will as expressed in the social fabric. The final proposition is that the general activity, and even moral preference, are exercised only in making a choice.

The despotism of custom is everywhere the standing hindrance to human advancement, being in increasing antagonism to that disposition to aim at something better than customary, which is called, according to circumstances, the spirit of liberty, or that of progress or improvement.


159 See L. Hobhouse, The Metaphysical Theory of the State (1918).
160 Id. at 6 (author’s dedication).
162 See L. Hobhouse, supra note 159, at 33-34.
will is embodied in the state. The state is the organizing principle that gives vitality, meaning, and coherence to social tradition, just as social tradition lends harmony and coherence to the multiplicity of arbitrary, individual wills. Thus, we are morally free, according to neo-Hegelian political theory, when our actions conform to law and custom as interpreted by and embodied in the system of institutions that constitute the state.\textsuperscript{163}

Hobhouse was able to challenge the metaphysical theory on every point. He began by objecting to the equation of freedom with the real will.\textsuperscript{164} According to Hobhouse, the will is what it is, even when arbitrary or mistaken, and is not in need of a rational and harmonious reconstruction. No part of the individual's will is more real than any other. The first proposition thus produces an unhelpful confusion between human nature, which is rich and various, and the ideal, which expresses the possibilities of harmony.\textsuperscript{165} The second proposition must also be rejected, for it assumes the answer to the question it is designed to resolve—that the rationally reconstructed will, the real will, is identical with society's general will.\textsuperscript{166} In fact, society progresses because of disharmony and difference.\textsuperscript{167} The acceptance of difference contributes to a richer life and a better society than does conformity. Moreover, if political freedom means anything, it means active citizenship—not that individuals adopt the social will as their own, but rather that each has as much opportunity for active participation as any other. Finally, the conception of the identity between the general will and the state rests on a false understanding of the state as representing the whole of the social fabric.\textsuperscript{168} To say, as did Bosanquet, that state action is general—that it consists of laws and institutions of general application—and that its activity consists of an exercise of will, is not the same thing as to say that it is the exercise of the general will. Civilized society has generally consisted of the imposition on the many of an order of life designed to benefit the few, and it is a mere mockery to claim that such an order represents the general and collective will of its members.\textsuperscript{169}

The fascination of the English neo-Hegelians with the mystical Absolute and their inability to avoid its totalitarian implications in practical philosophy are both so wide of the Hegelian mark and so

\textsuperscript{163} See id. at 31, 43.
\textsuperscript{164} See id. at 45.
\textsuperscript{165} Id. at 71.
\textsuperscript{166} Id. at 46.
\textsuperscript{167} Id. at 60-61.
\textsuperscript{168} Id. at 75.
\textsuperscript{169} Id. at 82-83.
intolerable that their thought was not destined to gain a large following. It was not preordained, however, that neo-Hegelianism would create in England a profound and lasting distrust of Hegel, of the dialectic, and of speculative philosophy in general. This distrust of Hegel resulted partially from a peculiar historical circumstance: the neo-Hegelians made the fatal mistake of recruiting to their ranks two Cambridge undergraduates, Bertrand Russell and G.E. Moore.170 Towards the end of 1898, after not more than a year or two as Hegelians, Moore and Russell rebelled against German idealism.171 The unknowable neo-Hegelian Absolute provided the perfect foil for their new realism.172 In the hands of Moore and Russell, the refutation of neo-Hegelianism proved to be one of the principal sources of modern analytic philosophy. In his later years, Russell continued to take dialectics in jest.173

With some of the leading philosophers writing in English in this century as the committed opponents of Hegelianism, Hegelian thought in England was doomed. In the 1930s, one of Bradley's students believed that “[t]he reaction in contemporary thought against Idealism seems . . . to have passed beyond all reasonable bounds.”174 A decade later, things had gotten even worse. As another student of Bradley's remarked, “As a consequence of this single-minded devotion to non-Hegelian modes of philosophy, otherwise sensible men, who have avowedly steered clear of Hegel, take his name in vain with some abandon.”175

Just as Hegel was buried in England, he again rose from the dead, this time in Germany. Of course, Hegel had never truly been forgotten there. After Hegel's death, a society for the study of Hegel's thought continued to meet and to publish a journal in Berlin. More-

170 I remember the exact moment during my fourth year when I became [an Hegelian]. I had gone out to buy a tin of tobacco, and was going back with it along Trinity Lane, when suddenly I threw it up in the air and exclaimed: 'Great God in boots—the ontological argument is sound!'

171 See B. Russell, supra note 144, at 63.

172 I felt it, in fact, as a great liberation, as if I had escaped from a hot-house on to a wind-swept headland . . . . In the first exuberance of liberation, I became a naive realist and rejoiced in the thought that grass is really green, in spite of the adverse opinion of all philosophers from Locke onwards. I have not been able to retain this pleasing faith in its pristine vigor, but I have never again shut myself up in a subjective prison.

Id. at 61-62.


174 C. Campbell, Scepticism and Construction ix (1931).

175 R. Church, Bradley's Dialectic 10 (1942).
over, certain tendencies, elements, and fragments of Hegel's thought continued to influence German social science.\textsuperscript{176} A degenerate version of Hegelianism became the official ideology of the Prussian state, accepted above all among the bureaucracy and certain sectors of the bourgeoisie.\textsuperscript{177} But the most powerful voices, such as Rudolf Haym's, spoke of Hegel only to condemn him, and found little in his work worthy of reconsideration.\textsuperscript{178} Even Hegel's direct students refused to defend Hegelian orthodoxy. For example, in Michelet's loyal defense, he conceded that Hegel had made accommodations to "the reactionary government politics of the Restoration years," that he abandoned the natural law critique of government he had developed in his youth, and that, in the end, he permitted his universal to overpower the individual.\textsuperscript{179} The Hegel of the Prussian years had become irredeemable.\textsuperscript{180}

The rejection of Hegel was part of a general rejection of metaphysics in the second half of the German nineteenth century. The problem was that the philosophical tradition that was able to derive empirical facts from the Idea seemed incompatible with the dramatic changes in German life, including an unparalleled pace of industrialization and the enormous progress of natural sciences and technology. Yet some sense of value was still needed. To make room for the individual in the midst of an objectivist confidence in the sciences, German philosophy returned to Kant.\textsuperscript{181} The neo-Kantians rejected what they believed to be Kant's metaphysical insistence on the thing-in-itself and, instead, developed his epistemology—the necessary categories and forms for human perception and thought—and sought to ex-

\textsuperscript{176} See G. Lukács, supra note 97, at 548, 555.


\textsuperscript{178} Haym was especially troubled by Hegel's identification of the real with the rational in the preface to the \textit{Philosophy of Right}. He found Hegel's statement particularly outrageous at a time of increasing political repression. "The \textit{Preface} to this book is infamous for good reason. For it is nothing other than a scholarly justification of the Karlsbad police state and its political persecution." See R. Haym, supra note 103, at 364 (my translation). Haym made the same criticism of Hegel's theoretical system: Haym failed to understand how a defective political system might be called "rational." See id. at 357-91. Thus, Haym was no more able than were the Young Hegelians to see through the defects in a political system to its structural necessity.

\textsuperscript{179} C.L. Michelet, Weltphilosoph, supra note 56, at 43, 45, 47 (my translation).

\textsuperscript{180} "In examining what was written about Hegel during the second half of the 19th century, I have found only one text—not even a text, a few fragments of letters—that defend him against the classic reproach that he was the philosopher of the reaction." E. Weil, supra note 14, at 14 (my translation).

\textsuperscript{181} See E. Kaufmann, Kritik der neukantischen Rechtsphilosophie 5-6 (1921), reprinted in 3 Gesammelte Schriften: Rechtsidee und Recht 176, 183 (A. von Scherpenberg ed. 1960) [hereinafter E. Kaufmann, Kritik].
tend it even to moral and legal theory. But the purely formal neo-Kantian conception of rationality proved incapable of offering a substantial orientation in a rapidly changing world.

By the turn of the century, German philosophy was afflicted with serious malaise. Attempts to cure the disorder produced a return to Hegel. In 1910, Wilhelm Windelband, a leading neo-Kantian, officially announced the revival of Hegelianism. Neo-Kantianism had set for itself the goal of exploring the a priori conceptual basis of knowledge, ethics, law, history, art, and religion, but instead tended increasingly to psychologism. Hegel, in Windelband’s view, offered the opportunity to return to the original neo-Kantian project of establishing transcendental values. After all, Hegel was the leading theorist of the transcendent Absolute, and his historical perspective permitted a potential exit from anthropological relativism. Moreover, as Windelband noted, Hegel also offered the possibility of transcending the purely formal quality of neo-Kantianism by offering some content to sate the “hunger for an all-encompassing world view.” As was noted by Emil Lask, perhaps the most perceptive of the neo-Kantian/neo-Hegelian legal theorists, the challenge was to establish the relation between the individual, who must be considered an absolute end in itself, and society. Particularly, the challenge was to establish the nature and place of transpersonal, social values. Despite the opening to Hegel, however, both Windelband and Lask held fast to the neo-Kantian distinction between values and empirical reality. From this perspective it was possible to pose the question, but, unfortunately, not to answer it.

By the end of the First World War, the spiritual malaise had grown to a radical crisis in all areas of German intellectual life. Industrialization had drawn masses of peasants to the cities and transformed them into an industrial working class with strong trade unions and a political party contending for power. At the same time, the landed elite continued to exercise substantial influence in political af-

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184 Id. at 277-78 (my translation).
185 See E. Lask, Rechtsphilosophie (1905), in 1 Gesammelte Schriften 275, 292-93 (E. Herigel ed. 1923).
186 See id. at 287.
187 “The formal apriorism thus left us to float rudderless on the sea of reality.” E. Kaufmann, Kritik, supra note 181, at 186 (my translation).
188 “The German spirit finds itself in a crisis such as it has probably never experienced in its tragic history.” Id. at 244.
fairs, while the bourgeoisie had gained control of the economy. The Germans had been forced entirely unprepared into the modern age. Moreover, they found themselves owing massive reparation payments for a war that they had lost even though foreign troops occupied no German soil. The German mind did not find it easy to tolerate chaos. The result was a radical search for orientation, for solid foundations, for substantive values, for guidance in action, and for distinctions between right and wrong.

For Erich Kaufmann, the problem was that neo-Kantianism had created an unbridgeable gap between morality and legality, between the individual's sense of obligation and legal duty.\textsuperscript{189} The individual's moral responsibility was determined by the categorical imperative, while legal obligation was judged exclusively by the formal criteria for lawmaking. The solution lay in an open return to metaphysics, particularly to Hegel's legal theory.\textsuperscript{190} Kaufmann believed that Hegel had identified certain eternal, objective laws of the necessary institutions of ethical life—the family, civil society, and the state.\textsuperscript{191} He understood these laws to establish that law and morality differ in perspective rather than substance. From the point of view of society—the living organism—the laws express the principles that govern the institutions. The job of lawmakers is to discover and to promulgate these objective institutional laws.\textsuperscript{192} Only from the standpoint of individual will do the institutional laws take the form of normative pronouncements.

Kaufmann read Hegel as the bridge over the gap neo-Kantianism had created between the individual and the state, but did not read him as a guarantee of harmony between the two poles. The unity was one of principle: the individual exists in society and the state exists only to further individual subjectivity. Since theory and practice will never coincide, legislation can never fully achieve an optimal universality. Thus, there will always be tension between the individual and the collectivity.\textsuperscript{193} Unfortunately, Kaufmann's contemporaries did not wish

\textsuperscript{189} Id. at 215.
\textsuperscript{190} See E. Kaufmann, Hegel's Rechtsphilosophie (1931), in 3 Gesammelte Schriften: Rechtsidee und Recht, supra note 181, at 285.
\textsuperscript{191} Id. at 291.
\textsuperscript{192} Id. at 292-93.
\textsuperscript{193} Unless individual interests somehow find their satisfaction in a super-individual whole, and the interests of the whole in those of the individuals who constitute it, a super-individual whole is not even "possible." Of course, there will always remain a certain "tension" between the collectivity and the members of the collectivity or a part of these members: as there is between force and law, reality and value. In fact, the problem of every social group lies precisely in this tension that never can be completely eliminated. Every examination of social phenomena that is not
to hear of the necessary tension between the individual and the collectivity. The crisis of the German soul was far too severe. What gained prominence in Germany of the 1930s and 1940s was a reading of Hegel that completely subordinated the individual to the whim of the state.

Hegelian thought was never accepted into the official pantheon of National Socialism. Alfred Rosenberg, a leading party ideologist and one of those executed at Nuremberg for crimes against humanity, believed that Hegel’s doctrine was alien to the blood ties of the German people. To Rosenberg, Hegel was but another step in the corruption of European philosophy, a process that extended from Socrates, Plato, and Aristotle to Hegel and Marx. Others, however, particularly those neo-Hegelian legal philosophers who supported or at least acquiesced in Hitler’s assumption of power, were aware that neither Mein Kampf nor Rosenberg’s effort was capable of providing a satisfactory theoretical grounding for National Socialism. What they sought and found in Hegel’s legal theory was the apotheosis of the ethnic community (Gemeinschaft). Their interpretation of Hegel provided the standpoint from which all of German law could be reconceived.

The National Socialist theorists’ interpretation of Hegel is rooted in what is perhaps the most influential discussion of Hegel in this century, Wilhelm Dilthey’s commentary to Hegel’s early writings. Many of the Hegelian writings Dilthey considered were in manuscript and still largely unknown. In those works, Hegel had been concerned principally with reconstructing Christianity as a rational yet popular religion. Dilthey read Hegel’s early writings through the lens of his

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195 Id. at 175, 328.
196 I am thinking primarily of Julius Binder, Martin Busse, Karl Larenz, and Gerhard Dulckeit. Because there can be little doubt that theirs was one of the organic philosophical traditions of the time, I refer to them, in what follows, as “National Socialist theorists.” They may not all have been members of Hitler’s National Socialist German Workers’ Party and some, both during the War and subsequently, attempted to make amends. I am aware that this is a very sensitive question, and I certainly do not use the term here to impute guilt.
198 See W. Dilthey, Die Jugendgeschichte Hegels (1905).
own philosophy of life (Lebensphilosophie) and discovered an unexpected opening to the irrational.199 In his own thought, Dilthey was an empiricist but was able to avoid the conclusion that life is simply a mass of disconnected facts. Life as it is everywhere encountered is already organized, interpreted, and filled with meaning. The organizing categories are social and operate primarily below the level of conscious deliberation. When these categories are consciously and explicitly elaborated, they become institutions such as religion, art, and the law.

Dilthey believed that Hegel, in his early writings, had come to a similar conclusion. Hegel defined spirit as a living, organized unity or totality, in contrast to a multiplicity that is merely subsumed under categories or laws. Individuality arises only by separation from the original living whole. According to Dilthey, Hegel believed that this infinity or wholeness of life was inaccessible to knowledge because thought is unable to conceive simultaneously of identity and difference. Since reason is incapable of grasping the richness of life, the finite individual may come to understanding only through a religious, irrational identification with the whole.200 Dilthey’s became the dominant perspective on Hegel in the Weimar Republic.201

Julius Löwenstein, adopting the perspective of Dilthey’s discovery, noticed the irrational roots of Hegel’s philosophy of law.202 Löwenstein interpreted the dialectic as a method for direct access to the secretive Absolute.203 One of the insights that Hegel achieved by means of the dialectic concerned the necessary relationship between the state and an ethnic group (Volk).204 Culture, ethnos, and state constitute a unity. The summary of world history that Hegel re-

200 Much later, Lukács attempted to demonstrate that Hegel’s evolution from his early writings to the Phenomenology is best understood as political rather than theological. See G. Lukács, supra note 44. But, of course, Lukács’s critique came too late to influence the pre-War interpretation of Hegel.
201 Hegel is without doubt the greatest irrationalist known in the history of philosophy . . . . Hegel is an irrationalist because he emphasizes the irrational in thought, because he irrationalizes thought itself . . . . He is an irrationalist because he is a dialectician, because the dialectic is the method of rationalized irrationalism—because dialectical thought is rational irrational thought.
202 “Hegel’s system was long decried as ‘panlogism’ until Dilthey discovered his political roots. There is no important concept in HEGEL’s philosophy that did not develop from the ground of irrationality.” J. Löwenstein, Hegels Staatsidee: Ihr Doppelgesicht und Ihr Einfluss im 19. Jahrhundert 4 (1927) (my translation).
203 Id. at 26.
204 Id. at 26-29, 54.
corded at the end of the *Philosophy of Right* was the evolution of spirit from one such unity to the next. Therefore, the concept of the state necessarily includes the reality of the ethnic spirit and the development of ethnic history.\(^{205}\) When compared to the substantiality, general objectivity, and ethical power of the state, the individual is purely accidental, and the individual's fate irrelevant.\(^{206}\) Both their welfare and their freedom require individuals to participate in the state and to lead their lives according to ethnic custom.

Löwenstein noted that it was in his early writings that Hegel most powerfully elaborated his vision of the unity of *ethnos*, culture, and state and of the subordinate role of the individual.\(^{207}\) Löwenstein recognized that Hegel, after writing the *Phenomenology*, accorded an increasingly greater role to Kantian morality, especially to the importance of the free self-determination of the individual. However, Löwenstein believed that Hegel's primary contribution to political theory was to have provided a double foundation for the state, incorporating both its historical-substantial relationship to the ethnic spirit and the individual's subjective free will.\(^{208}\) The reformulation of ethical life to include the individual as an essential element means that the individual is no longer sacrificed for the sake of the whole, but, at the same time, that the individual may not simply retreat into a private morality. The individual gains concrete freedom only by participating in the state.

By the 1930s, Dilthey, Löwenstein, and others—unwittingly—had produced the groundwork for the National Socialist theorists' interpretation of Hegel. The National Socialist theorists themselves developed the consequences: the bond between the state and the ethnic community, the *Führer* principle, and the subordination of the individual to the requirements of the collectivity.

The National Socialist theorists conceived of the law and the state as the ethical elaboration of the community's ethnicity.\(^{209}\) Their view was that the law and the state are deeply rooted in—and in many

\(^{205}\) "The state is rather the unity of cultural-spiritual life, of social organization, of the constitution and political power: the totality of all secular cultural manifestations. Thus, for [Hegel], state, nation, *Volk*, ethnic spirit, commonwealth and *Reich* are interrelated if not synonymous concepts." Id. at 29 (my translation).

\(^{206}\) Id. at 31 ("Whether the individual exists or not is all one to the objective ethical order.") (citing Philosophy of Right, supra note 1, para. 145A).

\(^{207}\) Löwenstein cited specifically the *System der Sittlichkeit*. Id. at 32; see G. Hegel, *System der Sittlichkeit* (1802), in Hegels Schriften zur Politik und Rechtspolitik 415-99 (G. Lasson ed. 1913) [hereinafter G. Hegel, System].

\(^{208}\) J. Löwenstein, supra note 202, at 33.

\(^{209}\) See Rottleuthner, supra note 197, at 233. I follow Rottleuthner in much of this discussion of the National Socialist theorists' neo-Hegelianism.
ways identical to—the ethical and religious life of the ethnic community.210 They read Hegel in this perspective. They found in his work confirmation for their vision of the law as the objective form and expression for a community’s ethical life and of the state as the legal form for the expression of the organicity of the ethnic community.211 The National Socialist theorists read extensively in Hegel’s early writings,212 though they also cited to passages of the Philosophy of Right to support their views.213

Once law was identified with the customs of the ethnic community, it was clear that legislation could be considered to be “law” only if it corresponded to substantive views of the ethnic community. Judges, therefore, were encouraged to resort to their ethnic consciences rather than to conform to rigid rules. Nonetheless, some agency was needed to recognize true expressions of the ethnic soul. This was the role of the Führer or leader.214 The Führer was the person who, immediately and unerringly, recognized and formulated the true basis of the ethnic community. True and objective law was therefore identical to the Führer’s will. Since total consciousness of what the age requires gains ground only slowly, it was believed that a small group—“the avant-garde of the world spirit”—would always possess the exclusive right to action.215 Once the Führer discovers the correct norm, the ethnic community recognizes it by acclamation.216 In the hands of the National Socialist theorists, Hegel’s legal philosophy became another buttress for dictatorship.217

From the standpoint of the ethnic community, the National Socialist thinkers also reconstructed the relationship between the three levels of Hegel’s legal theory—particularly the relationship between abstract right and ethical life—in a way that subordinated the individual to the requirements of the ethnic community.218 These thinkers

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210 “[T]he law is not only a system of social norms that are assured by means of force, but also the true and binding living order of a comprehensive ethnic community based not on arbitrariness but on a unity of blood and a union in fate: the people as race.” Larenz, Sitte und Recht, 5 Zeitschrift für deutsche Kulturphilosophie 232, 232 (1939) (my translation).
211 K. Larenz, Deutsche Rechtserneuerung und Rechtspolitik 5 (1934).
212 See Rottleuthner, supra note 197, at 233.
213 See, e.g., Philosophy of Right, supra note 1, paras. 156, 211R.
214 “The will of the Führer that emerges as law can be nothing other than the conscious formulation of ethnic justice. . . . For the Führer, as the guardian and executor of the ethnic order, is above all else called to recognize ethnic law and to cast it into the form of law.” E. Huber, Verfassung 127 (1937), quoted in Larenz, supra note 210, at 245 n. 2 (my translation).
216 Id. at 22.
217 Id. at 71.
218 See Rottleuthner, supra note 197, at 239-50.
saw correctly that neither abstract right nor morality represented finished and empirically observable areas of the law.\textsuperscript{219} Instead, these are theoretical levels representing the law's elementary principles. However, these theorists proceeded to identify the law with ethical life and to degrade the realm of the individual—abstract right and morality—to "abstract, unreal moments."\textsuperscript{220} In other words, abstract right, morality, and ethical life were not equally dignified moments of a more universal conception of the law. Rather, ethical life (the state) was primary and completely subsumed the individual's rights and moral claims. Thus, the institutions of property, contract, and tort could be reinterpreted not as protections accorded the individual against overreaching by the collectivity, but rather as instruments for the perfection of ethical life.

Julius Binder's interpretation of Hegel's theory of contract provides an example of the extent to which these theorists subordinated abstract right to ethical life.\textsuperscript{221} Binder claimed that Hegel was concerned in his discussion of contract not with the creation of obligation by means of the executory promise, but rather with the simple transfer of title. The reason is that the creation of legal—as opposed to moral—obligation means that an individual may be subjected to suit, judgment, and execution. These are concepts that cannot arise at the level of abstract right but require the fully developed concept of ethical life. Since contract is thus a social institution, it must be infused by the concerns of the collectivity rather than by those of individual free will. The National Socialist thinkers thus tended to read abstract right exclusively from the perspective of ethical life and the demands of the collectivity.\textsuperscript{222}

The lesson of Hegel's reception by the National Socialist theo-


\textsuperscript{220} The truth and sole reality of the law is thus the ethical life of the ethnic community, which, when considered from the perspective of the logical absolute, creates the individual person and is, in relation to it, primary . . . . But . . . for the same reason, abstract right and morality can only be abstract, unreal moments of the law: "They have to have ethical life as their support and foundation"—the ethnic community of the people in the state. In his early works, Hegel noted "that the absolute totality of ethical life is nothing other than the ethnic community," and he never abandoned this deep and creative insight but rather attempted to expand and substantiate it in all of his later works.

Id. at 20-21 (my translation).

\textsuperscript{221} See Binder, Der obligatorische Vertrag im System der Hegelschen Rechtspolitisches, in Verhandlungen des dritten Hegelkongresses vom 19. bis 23. Apr. 1933 in Rom, at 37 (B. Wigersma ed. 1934); Rottleuthner, supra note 197, at 242-43. For a contemporary critique of Binder's reading of Hegel's theory of contract, see G. Dulckeit, supra note 219, at 97-104.

\textsuperscript{222} See Rottleuthner, supra note 197, at 244.
rists is twofold. First, it demonstrates that, regardless of the socially constituted nature of individuality, it is vital to honor the individual as a legal subject. Though the National Socialist theorists understood the relationship between the individual and the collectivity in an irrational and largely distorted manner, they recognized that individuals and society largely create themselves in their interaction, that they are bound together by language, custom, education, and religion, and especially by the space accorded to individuality. Nonetheless, that fact of social interaction solves none of the normative problems to be resolved in the law. The question is not the actual mutual dependence of the individual and the community but rather the appropriate role to be accorded both to the individual and to the collectivity in the legal order.223

The second lesson to be learned from the National Socialist theorists concerns the difficulties involved in reading Hegel as a source of substantive norms. Whenever Hegel is interpreted as proposing the proper normative content—whether that content consists of the community’s ethnic substance, the sovereignty of the Prussian state, participatory democracy, the will of the people, or the interests of the working class—the difficulty immediately arises: Who is to elaborate Hegel’s proposal? Whenever there is a substantive standard, the implication is that proper answers are to be determined in some manner other than by majority rule—otherwise the standard would simply be procedural. Whenever a substantive standard is derived from a transcendental theory, there is always a danger of despotism, whether of a Führer, an avant-garde political party, technocrats, or philosopher-kings.

In 1941, Herbert Marcuse attempted to warn of the dangers and inaccuracies of the National Socialist theorists’ reading of Hegel, but by then it was much too late.224 Marcuse pointed out that the National Socialist glorification of the ethnic community—its equation of the community’s customs with the law—was actually a method to maintain the people in a prerational state and to subject them to the will of the few. Marcuse insisted that Hegel’s was a legal philosophy

223 Similarly, one typical—and tiresome—critique of Kant errs by assuming that, because Kant insisted on the moral autonomy of the individual, he necessarily conceived of individuals as entirely independent of social bonds. The question Kant was addressing, however, and the one we continue to confront, is to what extent individuals should be accorded the right to create the rules that bind them. My view is that much can be gained—in fact, it may be the only acceptable solution—by recognizing in the individual a level of moral responsibility far beyond that which any of us could successfully fulfill.

224 See H. Marcuse, supra note 1, at 409-19.
Marcuse then sketched his own interpretation of the Philosophy of Right.\(^{225}\) Marcuse's analysis demonstrates his ability to find in Hegel many of the elements of the Frankfurt School's social and political theory. According to Marcuse, Hegel believed that civil society, on its own, is incapable of generating a program that incorporates the free, rational, and general interest. Hegel believed this because the constituents of civil society are individual property owners whose particular interests are in continual conflict because of economic competition. This conflict of interest is irreconcilable and prevents the formulation of the general will. Only a sovereign state can guarantee the rational organization of society. Its purpose is to dominate the conflicting interests and channel the destructive competition. Civil society thus necessarily creates an authoritarian state and elevates the state to a position superior to civil society itself. To remove the government as far as possible from economic competition and particular interest, the affairs of the state are entrusted to a stable, professional bureaucratic elite.

According to Marcuse, Hegel was confronted with a society in which individuals are constituted by the private ownership of property and therefore recognize only claims of "mine" and "thine." Marcuse believed that Hegel denied any natural harmony between individuals in civil society and that, therefore, the only ordering principle could come from the state. In such a society, the only conceivable reconciliation between the particular and the universal, the individual and the state, is the use of force.\(^{226}\) But this view was not Hegel's. It was also not Marx's. Hegel was confident that, even in such a society, reason could reconcile the differences. For Hegel, civil society is not a random collection of dumb mules, each pulling arbitrarily in its own direction. Instead, Hegel saw civil society as rigorously structured by rational principles. Hegel—and Marx, for that matter—placed his confidence in the mechanism Adam Smith denominated the *invisible hand*. An individual producer can survive, literally, only by producing commodities that are needed by others. This is what Hegel termed the *system of needs*, and Marx the *law of value*. As each productive unit seeks to increase its profit by judging social needs more accurately and by producing more efficiently, society as a whole benefits. Economic competition, as Hegel conceived it, is not, as Marcuse argued, warfare. It is rather the very reconciliation of the individual

\(^{225}\) Id. at 169-223.

\(^{226}\) Id. at 187.
and the universal that Marcuse sought. The only shortcoming with reason at the level of civil society is that it has not yet arrived at the level of conscious reflection. The role of the state is not, as Marcuse believed, to impose order by sheer muscle power on chaos. Rather, the state organizes the conscious fine tuning of an ordered system.

Marcuse did not miss Hegel's point by accident. He read Hegel through the lens of a society in which the law of value had been permanently suspended. The most powerful industrial groups—the trusts and cartels—seemed to have assumed direct political power. They used the power to mold the economy to the needs of monopoly production, to destroy working class opposition, and to wage expansionary war. Where Hegel had conceived of the state as a neutral means to reflect on the necessities of social production, Marcuse saw it as an instrument used by one element in civil society to terrorize the others.

On one level, Marcuse was right. The National Socialist terror resulted largely from finance and monopoly capital's subjugation of the state. Moreover, the law of value had literally been suspended in Germany in 1936 by laws mandating all-encompassing price controls. But the fact that economic competition might at times be-

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227 The fact that I must direct my conduct by reference to others introduces here the form of universality. It is from others that I acquire the means of satisfaction and I must accordingly accept their views. At the same time, however, I am compelled to produce means for the satisfaction of others. We play into each other's hands and so hang together. To this extent everything private becomes something social. Philosophy of Right, supra note 1, para. 192A.

228 This medley of arbitrariness generates universal characteristics by its own working; and this apparently scattered and thoughtless sphere is upheld by a necessity which automatically enters it. To discover this necessary element here is the object of political economy, a science which is a credit to thought because it finds laws for a mass of accidents. . . . The most remarkable thing here is this mutual interlocking of particulars, which is what one would least expect because at first sight everything seems to be given over to the arbitrariness of the individual, and it has a parallel in the solar system which displays to the eye only irregular movements, though its laws may none the less be ascertained.

Id. para. 189A.

229 "[F]or it is the supreme and universal fact that the status quo perpetuates itself through the constant threat of atomic destruction, through the unprecedented waste of resources, through mental impoverishment, and—last but not least—through brute force." H. Marcuse, supra note 1, at xiv.

230 Id. at 410.

231 Id. at 216, 410.

232 See 1 C. Bettelheim, L'économie allemande sous le nazisme 107 (1979) (the banks and monopoly capital gained direct control over government and the economy); F. Neumann, Behemoth: The Structure and Practice of National Socialism 1933-1944, at 354 (2d ed. 1944).

233 See Verordnung über das Verbot von Preiserhöhungen (Nov. 26, 1936), discussed in F. Neumann, supra note 232, at 305-11.
come so fierce that one faction takes the state as hostage, does not mean that civil society is fundamentally a war of each against all or that, in such a society, the only possible reconciliation of the particular and the universal is by means of force.

By the end of the Second World War, despite the efforts of Mar­cuse and others, Hegel's *Philosophy of Right* had become so compro­mised by totalitarianism that Hegel's detractors could dismiss him as an enemy of the open society.\(^{234}\) Moreover, the book had become even more inaccessible.\(^{235}\) Despite the increasing number of comment­aries about Hegel since the war, little has been done to improve the situation. Even Theodor Adorno, one of Hegel's most inspired and creative students, has conceded that some of Hegel remains incompre­hensible.\(^{236}\) Especially if one considers the questions that are thematic here—the structure of Hegel's theory and, in particular, the relationship between the individual and the state—even Hegel's fol­lowers seem to stumble around in total darkness.\(^{237}\) In other words, we still do not comprehend Hegel's thought—"Those who seek to un­derstand Hegel are still very much alone with themselves"\(^{238}\)—and chances are that we will never be able to master it.\(^{239}\)

\(^{234}\) See 2 K. Popper, supra note 4, at 27-80; see also E. Cassirer, The Myth of the State 273 (1946) ("[n]o other philosophical system has done so much for the preparation of fascism and imperialism as Hegel's doctrine of the state—this 'divine Idea as it exists on earth' "); B. Rus­sell, A History of Western Philosophy 768-69 (1946) ("[s]uch is Hegel's doctrine of the State—a doctrine which, if accepted, justifies every internal tyranny and every external aggression that can possibly be imagined").

\(^{235}\) "Hegel's philosophy is very difficult—he is, I should say, the hardest to understand of all the great philosophers." B. Russell, supra note 234, at 757.

\(^{236}\) In the field of great philosophy, Hegel is probably the only philosopher about whom—literally—one occasionally does not know at all, and cannot conclusively decide, what he is talking about, and with respect to whom even the possibility of making such a decision is in no way provided by his work. T. Adorno, Skoteinos Oder Wie zu lesen sei, in Drei Studien zu Hegel 84, 84 (1974) (my translation).

\(^{237}\) "If one interprets the structure of the *Philosophy of Right* according to the most usual understanding of the Hegelian dialectic, then earlier stages are 'aufgehoben' by the later. They are at once destroyed, transcended, and incorporated into a new synthesis. . . . If this is cor­rect, then . . . ." Radin, Property and Personhood, 34 Stan. L. Rev. 957, 975 n.62 (1982).

\(^{238}\) D. Henrich, Hegel im Kontext 7 (1967) (my translation).

\(^{239}\) We will not be able to recreate the existential basis of dialectical idealism, regardless of how profoundly we penetrate the method of Hegel's thought and regardless of how well we might learn to understand and reconstruct the movement of his concepts. The resistance of the universe against conquest by the thoughtful spirit, however courageous it might be, appears to us today to be insuperable. That transient moment in time in which KANT, FICHTE and SCELLENG ventured out on the high seas of metaphysical contradiction and made their brilliant discoveries has passed. . . . [T]he wings of the idea and the spirit are tired and heavy today, when we compare them to the energy of the epoch in which the Phenomenology, the Logic, and even the Encyclopedia were written. All of the results of scientific
Because it attempts to tune Hegel to the current striving for participatory democracy, one contemporary interpretation of Hegel is particularly worthy of examination. This is the interpretation of Hegel’s social theory in the early writings of Jürgen Habermas. Habermas does not so much interpret the *Philosophy of Right* as criticize it, or rather propose to interpret it from the point of view of Hegel’s early writings. Habermas makes two related criticisms of Hegel’s mature legal theory. The first concerns Hegel’s conception of the individual; the second, Hegel’s attitude towards the French Revolution.

In his early writings, Hegel criticized the Kantian conception of the individual spirit, especially Kant’s view of the individual as constituted exclusively in unity with its self-consciousness, completely abstracted from its community and the objects it seeks to know in the world. In contrast, the early Hegel conceived of the individual as grounded in interactive struggle with other members of the community, particularly through language, labor, and the family. Spirit is the communication between individuals through the medium of the universal, such as language and normative values. The individual is thus fundamentally the unity of the universal and the particular. The ethical order is the dialectical development of this unity.

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241 Habermas relies particularly on the *System der Sittlichkeit* and the two versions of the *Philosophie des Geistes* that are incorporated into the *Jenenser Realphilosophie*. See G. Hegel, System, supra note 207; 1 G. Hegel, Jenenser Realphilosophie 193-241 (J. Hoffmeister ed. 1932); 2 G. Hegel, Jenenser Realphilosophie 177-273 (J. Hoffmeister ed. 1931). Habermas concedes that the *System der Sittlichkeit* is “fragmentarily elaborated.” J. Habermas, Arbeit, supra note 240, at 9. The difficulties with the text, however, are much worse than Habermas indicates. In fact, it verges on irresponsibility to conclude anything at all from it. The situation is so bad that the editors of the latest edition of Hegel’s *Works* decided not to include the writings until they had been critically revised.

242 J. Habermas, Arbeit, supra note 240, at 9-10.

243 Id. at 14-15.
reflection of the individual subject represents a derivative and limited perspective in this original intersubjectivity. Although individuals know themselves as both identical to and different from other individuals, the individual is not opposed to the universal, the collectivity, but rather, from the very beginning, constituted by it. Kant's neglect of the constitutive function of intersubjectivity caused him to conceive of morality solely as the characteristic of the individual will that makes its own law. By abstracting from the interactional constitution of the subject, Kant severed morality from all ethical—that is, community-related—considerations. For the early Hegel, on the contrary, there is an intimate connection between legal norms, in which social interaction is formally conceived in terms of mutual recognition and reciprocity, and the processes of labor, language, and recognition. Contract, for example, is an institution that builds on the notion of reciprocal behavior already present in the social individual from experience in dialogue, care, and cooperation.

Habermas criticizes Hegel for returning in his later systematic works to an essentially Kantian notion of the individual. In the Philosophy of Right, for example, the early Hegel is present only in the discussion of abstract right. There, the individual seeks and receives recognition in the exchange of property. But even abstract right is no longer related to the labor process. Instead, the labor process is incorporated into the discussion of civil society and is shaped from the outside by the categories of abstract right. Most dramatically, intersubjectivity has completely vanished from the conception of ethical order and the state. In Habermas's view, the late Hegel considered social institutions to be wholly unrelated to intersubjectivity. They represent rather the process by which absolute thought comes to self-consciousness.

Habermas's second critique of Hegel's mature legal theory is implied in his disagreement with Hegel's attitude towards the French Revolution. Habermas argues that Hegel, both in the Phenomenology and in the Philosophy of History, celebrated the Revolution because he was afraid of it. Hegel accepted the Revolution's substantive achievements, but dreaded the revolutionary process itself. To legitimate liberty, equality, and fraternity, and yet reject the revolutionary interaction that achieved it, Hegel was obliged to conceive the realiza-

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244 Id. at 13.
245 Id. at 20-22.
246 Id. at 33.
247 Id. at 34.
248 Id. at 42-44.
249 See J. Habermas, Kritik, supra note 240.
tion of abstract right not as a subjective but rather as an objective process of world history. This process produced the dissolution of the ethical order of the Greek polis, which knew the substantial identity of individual and collective interest. The creation of abstract right was the triumph of abstract individual autonomy, but at the same time it severed the individual from ethical substance, which remained in the state. In place of the original substantial unity, there remained only the diremption of the isolated abstract individual on the one hand and the rigid, impersonal formality of the law on the other hand.

There are three comments to be made about Habermas's reading of Hegel. First, he misunderstands the manner in which the Philosophy of Right is constructed. Second, he camouflages the very problem he set out to resolve. Third, he avoids the normative difficulties.

From the point of view of theory construction, Habermas's point might be rephrased as follows: since the self-conscious individual spirit is really a product of human interaction in areas such as labor, language, and love, it can be analyzed only after the dynamic of these processes has been elaborated. Social theory should begin, then, with an examination of labor and other interactional processes, and demonstrate on that basis how individual self-consciousness arises. Habermas correctly sees one of the points of dialectical theory construction, discussed at greater length below. He recognizes that social theories are constructed on different levels, beginning with the most elemental and progressing to the more complex. What Habermas misses, however, is the difficulty of beginning with a supposed universal human essence. Of course, the individual is constituted and de-

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250 Id. at 132.
251 Id. at 137-38.
252 Some argue instead that the individual and the community share a flat surface, the only question being the precise location of the boundary: "The boundary between the individual and her community would be relaxed, 'but not so completely relaxed [as] to give way to a radically situated subject.'" Cornell, Reconstruction, supra note 11, at 360 (quoting M. Sandel, Liberalism and the Limits of Justice 153 (1982)).
253 The National Socialist theorists made the similar mistake of believing that Hegel should have begun—or, in fact, did begin—with community interaction rather than with the abstract person.

It seems at first—especially in regard to the ethnic community that now has become a conscious reality—to be unbelievably clear that a philosophical legal theory must begin not with the abstract person but with the concrete ethnic community itself . . . and it may be remembered, in order to vindicate Hegel's honor, that his apparently different starting point may be explained entirely as a product of historical factors. By contrast, I believe that I can show that this represents only an apparent contradiction to the central role of the concept of community in Hegel's system: For this ethnic community in the state constitutes, even for Hegel, the fundamental starting point.
veloped in the social labor process. But labor does not take place outside of particular social formations. That is why Karl Marx chose to begin Capital not with an examination of a transhistorical labor process, but rather with the specific features of the capitalist mode of production. The idea of universal labor represents a return to natural law theory and to a conception of human nature rooted in theology and ultimately in the notion of the soul. Instead, since Marx radically rejected the notion of universal human nature, he analyzed society only in its historical forms. Thus, Marx began Capital with an analysis of the commodity and examined the labor process only in the form of individual commodity production.

Similarly, one of Hegel's achievements was to conceive the subject in its historical specificity and to reject the Kantian conception—still present in Hegel's earlier works—of the transhistorical character of the subject. The historical specificity of the period consolidated by the French Revolution rests on the moral autonomy of the individual. Hegel's purpose was not to argue with this result but rather to chart the course of freedom through a society that is organized on that principle.

Second, Habermas's suggested theory construction would conceal precisely the problem we need to resolve before society may be reorganized to permit greater participatory democracy. His theory points in a utopian direction and no longer focuses on the fundamental contradictions in this society. The conflict we experience today is not between some supposed universal form of the labor process and the individual, but rather between the individual or groups of individuals and the current forms of the organization of ethical life, particularly the state. For theories that conceive only of the emergence of the self-conscious individual on the basis of human interaction, large-scale forms of social organization will appear to be mysterious reifications, imposed from without for no good reason. Habermas's discussion of the French Revolution is further evidence of this failure to come to terms with the modern state. What Hegel lamented about

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G. Dulckeit, supra note 219, at 16-17 (my translation).


255 "[T]he truly important ethical task we face today [is] the development of a praxis oriented to the creation of dialogic communities and new forms of democratic solidarity." Cornell, Reconstruction, supra note 11, at 378.

256 "On the level of political theory, the reification of Geist leaves us with the Prussian state, and with little guidance in our attempt to rethink an ethic of citizenship that insists on participation." Id. at 374.
the French Revolution was not the bloodshed; rather, he saw that its Rousseauian bias prevented it from creating appropriate institutions and required the persistence of the Terror. Thus, any proposals for increased participation are destined to fail unless they somehow take account of the rationality of the state.

Finally, the mere recognition that individuals are constituted in intersubjective interaction does nothing to resolve the normative question of the proper role for individual autonomy in modern society. From the fact that individuality is a social construction, many normative conclusions are possible. For example, it is possible to conclude, as did the National Socialists, that society may, at its pleasure, abrogate individual rights and completely subordinate the individual to social demands. On the other hand, one might equally conclude that moral autonomy is a normative value entirely superior to the intersubjective basis of individuality. Similarly, even though psychoanalysis makes clear that individuals do not have much conscious control over their words and deeds, we continue to hold individuals responsible for breach of contract and to punish them for their crimes. These thoughts are not inconsistent. They simply take place on different levels. Hegel understood that, in modern society, moral autonomy cannot be abrogated by social science research. We live in a form of social organization that would be unthinkable if it failed to accord a fundamental role to the individual. What Hegel attempted to demonstrate was that, in such a society, certain forms typically arise for the exercise of human freedom.

257 See Wildt, Hegels Kritik des Jakobinismus, in Aktualität und Folgen der Philosophie Hegels, supra note 197, at 269, 272-79. As others have pointed out long since, the political implications of Hegel's late works, particularly the Philosophy of Right, are just as critical and revolutionary as any of the early works on which Habermas relies. See H. Fulda, Das Recht der Philosophie in Hegels Philosophie des Rechts (1968).

258 If conscience is not the voice of God, why should we attach so much importance to what one or two individuals happen to think? Does not the wisdom of our ancestors, enshrined in institutions, supply a better test of truth? What social value attaches to individuality? The answer is that the individual, fallible and weak as he may be in his isolation, is still the centre of a rich diversity of relations, of which his relation to a society claiming his allegiance is only a part. The organized system of life only covers a portion of the ground. What is recognized and formulated is but a fragment of living experience. Every individual draws from deeper wells of being than those revealed in current speech and custom. If we do not any longer think of him as directly in converse with God, we can think of him as a part of nature, the product physically and spiritually of a long ancestral line of development, susceptible to emotional and ideal suggestions from all manner of experience. If it is through all these that error comes, it is always through one individual that each new truth first comes, and it is better for society in the end to be exposed to many errors than to run the risk of losing one truth.

L. Hobhouse, supra note 159, at 94-95.
What all of this demonstrates—the controversy about the structure of Hegel's legal theory, his relation to the French Revolution, the relative roles of substance and form in his analysis—is the importance of elaborating a reading of Hegel that can both avoid the pitfalls of the past and respond to the concerns of contemporary society.

II.

The difficulty and challenge of Hegel's legal thought is to construct the relationship between the individual and the state, between individual rights and claims of the collectivity, in a way that avoids both libertarianism and totalitarianism. This is not simply a difficulty experienced by the uninitiated who pick up the *Philosophy of Right* for the first time. Even those who best understood Hegel in the last century pointed to the problem.259

This relationship is the very topic which Hegel set out to examine in his book. The second title page in the original edition of the *Philosophy of Right* clearly stated the issue Hegel confronted when writing the book: *Natural Law and the Study of the State in Outline.*260 The problem was to reconcile two different traditions in legal philosophy—the reflections of the natural rights theorists since Grotius, on the one hand, and the theories of the students of the proper organization of the state, such as Montesquieu, on the other hand. Of course, Hegel did not intend to leave the material as he found it. His goal was to reconcile the preexisting theories by means of concepts derived from his *Logic.* In the course of both his early drafts of the book and his lectures on the book in Berlin, Hegel continually revised and reorganized the material to clarify its structure and the systematic relationship between the various elements of the theory.261 Partially because of the continual reworking of the text, the *Philosophy of Right* never clearly takes a position on the relationship between the individual and the state.

The question, once again, is how Hegel's chapters on individual

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259 Friedrich Stahl raised the problem before the book was a decade old. "Because of this awkwardness, the immediate relationship between what is produced later, on the basis of intermediate steps, and the earlier steps, remains unclear, as does whether there is even a relationship at all." F. Stahl, supra note 61, at 227 (my translation).

260 *Naturrecht und Staatswissenschaft im Grundriss.* The two title pages are reproduced in G. Hegel, Grundlinien der Philosophie des Rechts, in 7 Werke 9-10 (E. Moldenhauer & K. Michel eds. 1970). Heidegger has demonstrated the importance of a careful study of the titles of Hegel's works. With respect to the Phenomenology, see M. Heidegger, Hegels Phänomenologie des Geistes (1930/31), in 32 Gesamtausgabe (1980).

rights and moral responsibility are to be integrated into the final level of the theory concerning collective goals and the state. My thesis is that Hegel merely posed the question but did not answer it. I have found no text in the Philosophy of Right—or in any other Hegelian work, for that matter—that clearly states Hegel's view about the proper substantive relationship between individual rights and collective goals. Of course, numerous passages in various of his works confront the question in the context of particular historical periods and specific areas of the law. It is tempting to generalize from these statements, but generalization proves to be impossible. Hegel's remarks on the subject imply several different and mutually contradictory theories.

Moreover, had Hegel desired to take a position, he would not have done so by simply expressing his opinion. As Hegel clearly understood, one opinion, even if it is Hegel's own, is worth no more than any other. For Hegel to have resolved the matter, the solution would have to emerge by necessary implication from his premises and the structure of his theory. Hegel offered no such solution. Instead, Hegel elaborated three theoretical levels—abstract right, morality, and ethical life—without indicating that any particular resolution of the potential contradictions was necessary. Further, every important suggestion for legal or political change implies a particular resolution of the relationship between the individual and the collectivity. Since Hegel did not definitively resolve that issue, his work cannot serve as a basis for resolving contemporary issues of law and politics.

One way to demonstrate the open structure of Hegel's legal theory is to turn briefly to Marx. Marx openly acknowledged his theoretical debt to Hegel.\(^262\) Lenin too, as he read through Hegel's Logic, noticed the structural similarities between the two theories and came to the conclusion that "[i]t is impossible completely to understand Marx's Capital, and especially its first chapter, without having thoroughly studied and understood the whole of Hegel's Logic."\(^263\) In fact, a dogmatic historicist misreading of Hegel subsequently became so integral a part of Stalinist ideology that revolutionary Communists in the 1960s were compelled to confront the Hegelian legacy in Marx-

\(^{262}\) "[A]s I worked on the first volume of 'Capital' . . . I acknowledged openly that I was a student of the great thinker." K. Marx, Nachwort zur zweiten Auflage, supra note 105, at 27; see also Letter from K. Marx to J. Dietzgen (May 9, 1868), in 32 Marx-Engels Werke 547 (1965) ("When I have shaken off the economic burden, I am going to write a "Dialectics." The correct laws of the dialectic are already contained in Hegel; though in a mystical form. The form must be discarded. . . .") (my translation).

\(^{263}\) See V. Lenin, Conspectus of Hegel's Book the Science of Logic (1914), in 38 Collected Works 85, 180 (1963) (emphasis in original).
ism and attempt to eradicate it. 264

The point here is not to read Hegel as the Leninist tradition does—as the theoretician of the Marxian dialectic—but instead, to read Marx and Hegel together as presenting two of the many possible varieties of dialectical theory construction. One aspect of theory construction they shared was the understanding of social reality as process and formation. Social activity is a process that occurs within certain forms and, within those forms, continually reforms itself. One of the ways Marx and Hegel differed was in the resolution of the relationship between the various levels of form analysis. Since Marx, in Capital, attempted to specify the appropriate relationship, an understanding of Marx’s theory makes it easier to see how Hegel left his theory open. Thus, for our purposes at least, Lenin may have gotten it backwards. Lenin claimed that only those who had read and understood Hegel could understand Marx. But it is at least equally arguable that an understanding of Capital may provide the insight needed to read the Philosophy of Right. 265

We therefore begin our study of the relationship between theoretical levels in Hegel with an examination of the same question in Marx.

The Literarisches Centralblatt für Deutschland, a weekly review of learned books, reviewed the first edition of the first volume of Capital shortly after its publication. 266 The reviewer noted that Marx’s argument rested on a single axiom—that the value of a commodity is determined by the labor time socially necessary to produce it. The reviewer admitted that, once one accepts the labor theory of value, “one also has to concede almost all of the consequences that Marx draws from it with the most rigorous logic.” 267 The reviewer’s principal objection was not with the reasoning but with the premise. Though Marx discussed the labor theory of value at length in the

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265 There are even some who believe that such was Lenin’s own experience.

[B]asically, Lenin did not need to read Hegel in order to understand him, because he had already understood Hegel, having closely read and understood Marx. Bearing this in mind, I shall hazard a peremptory aphorism of my own: “A century and a half later no one has understood Hegel because it is impossible to understand Hegel without having thoroughly studied and understood ‘Capital’!”


266 See Book Review, 19 Literarisches Centralblatt für Deutschland 754 (July 4, 1868) (reviewing K. Marx, Das Kapital. Kritik der politischen Oekonomie. Erster Bd. (1867)). The author of the review is identified only as “h.”

267 Id. at 755 (my translation).
opening chapters of *Capital*, “nowhere is the least attempt made to prove that the supposed natural law actually governs the world.”

Ludwig Kugelmann, a gynecologist living in Hanover who had participated in the Revolution of 1848 and who had become a friend and confidant of Marx and Engels, read the review, snipped it out, and sent it to Marx who was then living in London. Marx commented on the review in his next letter to Kugelmann.\(^{268}\) The letter is one of Marx's most well-known—and successful—attempts to set the record straight about his method. Marx discussed three points: the relationship between the individual and the totality, mediation between the various theoretical levels, and the notion of *Aufhebung* (negation, transcendence, and preservation). Since Marx borrowed the three ideas directly from Hegel, it is useful to examine each in turn.

“That any country that ceased working—not only for a year, but even for a few weeks—would perish, that,” according to Marx, “every child knows.”\(^{269}\) Further, Marx argued that every child also knows that different commodities require different amounts of society's total labor. The total available labor must be distributed to produce the commodities society needs. Workers, machines, and raw materials must be gathered together in appropriate quantities at the beginning of the working day, and by the end of the day they must have produced a product that fulfills a social need. In a society such as ours, in which the producers are formally independent, the mechanism for the distribution of social labor among the various branches of production is the variation in a commodity's exchange value. As commodities are exchanged, labor is distributed as required by social needs. When a need is sated, the exchange value decreases, and capital and labor flow out of that branch of production.\(^{270}\) In other words, value is not merely the measure of commodity exchange: it is above all an expression of the social relationship between formally independent producers. In sum, the first point that Marx made in his letter to Kugelmann was that society is a functioning organism, a totality, in which the individual elements are invested with meaning by their place in the whole. As a result of this insight, Marx adopted the theoretical strategy never to conceive of the individual or particular solely

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\(^{268}\) See Letter from K. Marx to L. Kugelmann (July 11, 1868), in 32 Marx-Engels Werke 552 (1965).

\(^{269}\) Id. at 552 (my translation).

\(^{270}\) To be “socially necessary,” labor must not only be expended under the normal conditions of production and with average skill and intensity, but also for products that themselves fulfill a social need. Thus, labor time, social demand, and competition between producers all play a role in the value determination. See P. Sweezy, The Theory of Capitalist Development: Principles of Marxian Political Economy 41-54 (1970).
on its own terms, but rather always to conceive of it at the same time as an element of the whole.271

Marx's second point to Kugelmann was that the theoretical strategy he had chosen required a certain theoretical structure. If we wander through society, we encounter individuals engaged in a large number of diverse activities, and we are able to arrange these activities into a certain number of categories—the production and sale of goods, personal consumption, governmental activity, literary creativity, and the like. Given Marx's strategy, the challenge is to conceive of each of these activities both in their particularity—as specific enterprises with limited goals, developed procedures, and particular rules—and yet at the same time, to conceive of them in their interrelationship, as parts of the whole. If we examine merely the traits that all of the activities share, we would learn nothing of the particularity of each one. On the other hand, if we describe only the particularity of each of the elements, the relationship between them can never really be constitutive.272 In other words, the problem is to construct a theory that contains within itself both identity and difference.273 Marx understood from reading Hegel that there was only one way to construct a scientific theory that successfully responds to this challenge. Two characteristics of the solution are of interest here: first, a certain way of dividing the totality into explanatory units, and, second, a particular order to the explanations.

The first characteristic of this method of theory construction involves a rejection of empiricism, that is, of the belief that distinctions that are not made in empirical reality are not worth making. Marx did not choose empirically existing activities or institutions as the elements or explanatory units of his theory. Instead, he understood that if he was to maintain his theoretical strategy of always conceiving of the individual as part of the totality, only the developed theory of the whole could provide an accurate model of empirical reality. The indi-
individual elements, the individual objects of explanation, therefore, could not be objects one might encounter in the real world, but must rather be the forms that, together, constitute the whole. For example, Marx began *Capital* with an analysis of the "value form" or the "commodity form," the form that products of human labor acquire when produced in a society that is based on commodity exchange. The second form Marx analyzed in *Capital* is "money." However, Marx was not concerned with the money we carry in our pockets. Depending on our jobs and sources of income, the money we hand over the counter in the grocery store may be either money capital or redistributed surplus value of one variety or another. For the early stages of his theory, Marx was not interested in empirically existing money, which has a large number of additional characteristics, but rather in the *form* that commodities acquire when used as the universal medium of exchange.

The second relevant characteristic of Marx's theory construction concerns the method of ordering the various form analyses. Marx chose the only obvious solution, to begin with the forms that would permit him to develop the concepts he would need to explain other forms. For example, Marx could not explain the money form until he had explained the commodity form, for money is a particular kind of commodity, namely, the commodity that has become the medium of exchange. Marx himself variously described this method as progressing from the elemental (*einfach*) to the complex, from the individual to the universal, or from the abstract to the concrete.274

As Marx began his work on political economy, he reflected on how to adapt this theory structure to his particular investigation.275 It occurred to him that he might begin with the real and the concrete—the actual population—because of its role as the active subject of the social process of production. But he decided that it would be false to begin with a complex notion with multiple determinations. Technically, the population cannot be understood without an understanding of social class. Moreover, the idea of class is largely unthinkable without concepts such as wage labor and capital. These two notions presuppose an examination of exchange and the division of

274 For Marx, the concrete means the empirically existing reality, the totality with all of its multiple layers of determination. "The concrete is concrete because it is the condensation of many determinations, in other words, the unity of multiplicity." K. Marx, Einleitung [zur Kritik der politischen Okonomie] (1857), in 13 Marx-Engels Werke 615, 632 (1961) (my translation). Abstract, on the other hand, refers to the earliest and most undetermined levels of the theory, and not merely, as the word is frequently employed today, to any theoretical term or any generalization from empirical facts.

275 See id. at 631-33.
labor, which, in turn, rest on the concept of value. The initial chaotic idea of the whole must therefore be analyzed into the elemental underlying categories, into "ever thinner abstracta."276 By beginning with the more abstract—the elemental—concepts and progressing to more complex notions, Marx believed that he could recreate theoretically a complex and "rich totality consisting of multiple determinations and relationships."277 At this point in the discussion, Marx referred specifically to Hegel's *Philosophy of Right*, which begins "correctly," according to Marx, with possession, "the subject's most elemental legal relation."278

To produce a theory of the capitalist mode of production, Marx chose to begin with the commodity, more particularly, the commodity form.279 On the basis of his study of the commodity form, Marx elaborated his labor theory of value. Marx then turned to the money form and produced the theory of commodity circulation. In the course of his examination of capital, Marx developed the theory of surplus value. His examination of the wage produced a theory of wage labor. Finally, at the end of volume I of *Capital*, Marx examined capitalist accumulation and generated a theory of the reproduction of the conditions of capitalist production. Each theory was formulated in terms of concepts elaborated at the previous level. In other words, Marx ordered the forms according to their increasing complexity. Since the concepts at the initial theoretical level proved to be a sufficient basis for an elaboration of the complex structure, Marx believed that he had discovered something about the functioning totality.

Marx was not interested in a theory of the capitalist mode of production for its own sake. Rather, the totality he was interested in explaining was the capitalist social-economic formation.280 The theory of the capitalist mode of production, as contained in the three volumes of *Capital*, was to be the first level of an ambitious and far-reaching theory of the entire process of societal life in the modern age. The second level was to be the state, which Marx conceived of not as

276 Id. at 631 (my translation).
277 Id. (my translation).
278 Id. at 633 (my translation).
279 "I begin with the most elemental social form in which the labor product presents itself in contemporary society, and that is the 'commodity'." K. Marx, Randglossen zu Adolph Wagners "Lehrbuch der politischen Okonomie," supra note 254, at 369 (my translation).
the group of rulers or as a collection of bureaucrats, judges, and police, but rather as a form, as the process of forming the production process and subsuming individuals into it. In his theory of the state, Marx would have developed a theory of the political reproduction of the class system. The theory of the national state was to be the link to an examination of the world market and the theory of global economic crisis.\footnote{\textit{I examine the system of bourgeois economics in this order: capital, landed property, wage labor; the state, foreign trade, the world market.}}\textsuperscript{281} Just as capital could be explained only on the basis of the theory of value, Marx believed that the modern state could be understood only on the basis of concepts elaborated in a study of the capitalist production process. In this sense, and in this sense only, the capitalist mode of production is the base on which the superstructure of the state might be analyzed. The base does not represent a morally privileged place in society. The base and superstructure are not even empirically separate—the factories on one side, the courts, churches, and schools on the other. They are simply different theoretical levels in the examination of the totality.

The final issue of theory construction that Marx mentioned in his letter to Kugelmann concerns the notion of \textit{Aufhebung} (negation, transcendence, and preservation). The \textit{Aufhebung} Marx discussed concerns the relationship between the various levels of his theory to each other and to empirical reality. Of course, only the fully developed theory successfully describes observable reality. But the question is the extent to which the elemental, abstract theories survive in the concrete totality.

Galileo's law of falling bodies may serve as an introduction to the problem. Simply formulated, the law states that small bodies close to the earth's surface tend to fall with constant acceleration. The question is how this law is related to certain observable phenomena, such as the eccentric trajectory described by a maple leaf fluttering back and forth as it falls from a tree in autumn. One might ask whether the law even describes the phenomena at all. It might be claimed that a theory has been falsified when it is demonstrated that it does not describe empirically observable reality. The scope of Galileo's law would then have to be limited to what occurs in a vacuum. As an alternative, one might argue that Galileo's law is not designed to explain empirically observable phenomena.\footnote{Sagredo is quite right to emphasize the necessity for setting aside all "external resistance", because the laws of Galilean physics are "abstract" laws which do not hold as they stand for real bodies. There is, no doubt, some reality to which they refer, but this is not the reality of everyday experience.}\textsuperscript{282} Rather, Galileo's law—
like the labor theory of value—is the first step in a theory chain that includes more concrete theories. For Galileo’s law, the more concrete theories encompass wind resistance and aerodynamics. Galileo’s law is a starting point from which the more concrete laws must begin. Moreover, in most cases, even Galileo’s law describes some empirically observable effect. On an autumn afternoon, leaves fall, however erratically, towards the earth.

In Marx’s theory, the empirical effect of the law of value is also mediated through several more layers of theory. The labor theory of value predicts that a commodity will be exchanged at value, that is, in proportion to the socially necessary labor incorporated into it. In developed capitalist economies, however, commodities are not traded at value but rather at market price. Value is related to market price by means of the theory of production price. The transformation of value into production price resolves what is known as the Transformation Problem.\textsuperscript{283} The theory of production price explains that capitalist production requires an approximately similar return on investment in each of the various branches of production. (Otherwise, of course, capital would flee to the more profitable branches.) Since the different branches of production require differing quantities of fixed capital, surplus value must be redistributed so that branches with a greater amount of fixed costs obtain a greater mass of profit. Production prices are the prices at which commodities must be sold for the profit ratios in the individual branches to be equivalent. Even production prices, however, do not directly explain the empirically observable market price, because the reallocation of surplus value among the various branches occurs through the mechanism of supply and demand in the marketplace. When commodities are sold precisely at production price, it is only by coincidence. They are typically traded at a market price that oscillates around the production price.

Marx both elaborated the theory chain from value to market price and specified the extent to which, and the mechanism by which, the various theoretical levels are integrated into the whole. Value, as a determinant of market price, must yield in direct proportion to the difference between the organic composition of capital in one branch and that in the others. Value fails to the extent necessary for the profit mass generated by each branch to be equally proportionate to its fixed costs. The mechanism for the allocation is competition and the marketplace. Capital flows into and out of the various branches until the profit on investment attains equilibrium.

\begin{itemize}
\item \textsuperscript{283} See P. Sweezy, supra note 270, at 109-30.
\end{itemize}
Not all of the levels of explanation in Marx's theory are empirically verifiable. Because the various levels of the theory may point in different directions, empirical reality is best understood as a tense and momentary compromise, a provisional equilibrium of contradictory forces. The effects predicted by the abstract levels of the theory may be negated and transcended by those described at the more concrete levels, but they are also preserved. In other words, the abstract levels are aufgehoben in the concrete totality, preserved in an integral tension, and incorporated with other elements into a dynamic whole.

Both great progress and grave risks are associated with the mode of theory construction Marx adopted. The benefit was that it permitted Marx to see much further than did the classical economists. Ricardo, for example, already had accepted the labor theory of value. However, when confronted with the great diversity of categories in political economy—profit, rent, price, interest, and wages—Ricardo attempted to subsume them all directly under the law of value. In other words, Ricardo assumed that theory must be immediately related to empirically observable reality. Since he was unwilling to accept abstract forms as his theoretical objects, he was unable to see reality as overlapping complexity. He was also unable to mediate between the law of value and much of empirical reality and was forced to leave many phenomena unexplained.

The danger created by this type of theory construction is that it might lead the unwary into a metaphysical vision of the world. Once theorists are emancipated from empirical reality and consider themselves free to construct abstract objects for their theories, they might be tempted to believe that the forms they have created actually constitute invisible elements of reality. Because of this danger, it is worth emphasizing that the forms constructed for the various theories in the theory chain are nothing more than useful constructions. The various theoretical levels are only levels of explanation, and do not represent spheres of existence. Thus, the initial theory in the theory chain is placed first not because it is more essential or fundamental on some metaphysical level, but rather because it elaborates categories that are needed at the remaining levels. There are no privileged or absolute starting points, no theoretical levels that are intrinsically more fundamental than the others.

284 "Ricardo's presentation [was] defective because he completely failed to examine the value form—the particular form that labor as the substance of value assumes ..." K. Marx, Theorien über den Mehrwert, in 26.2 Marx-Engels Werke 169 (1974) (my translation).

285 "[Ricardo's method] led to erroneous results because it omitted the necessary middle terms and, in an unmediated way, attempted to prove the congruence of economic categories with each other." Id. at 161-62 (my translation).
A theory's starting point depends on the kind of totality the theorist wishes to explain and on the kind of explanation that is offered. Marx chose as his totality the social-economic formation and chose to begin with social production. As the Centralblatt's reviewer correctly noted, Marx never attempted to prove the absolute validity of his starting point. Marx also did not attempt to do so in his letter to Kugelmann, even though the review had challenged him directly on the point. Marx responded, instead, with an argument from plausibility—these are things that every child knows. For Marx's purposes, considering what it was he wished to demonstrate, his starting point was a plausible and useful one. But he claimed neither that his starting point was the only permissible one nor that interesting results could not be obtained from the other alternatives.

The Philosophy of Right and Capital share the three structural features Marx explained in his letter to Kugelmann. Of course, that is not to say that the Hegelian and Marxian methods are identical. In fact, it may seem only to add to the confusion to speak of similarities between the two theories, because, on one level at least, they seem to be looking in exactly opposite directions. Marx focused on the conditions of historical social change, while Hegel examined the necessity associated with a particular conceptual structure.

But, in fact, Marx and Hegel had quite related understandings of the relationship between structure and history. Unlike the Young Hegelians, the later Marx was no longer convinced that criticism could immediately produce social change. Instead, Capital analyzes a system—the capitalist social-economic formation—that achieves great structural integrity and resistance. It cannot be changed by simple critique. Change requires the harnessing of its laws—much as a bridge can be built despite the law of gravity, but only by respecting it—laws which are necessary features of a system based on the private ownership of the means of production. When he announced that certain features of the capitalist mode of production are necessary, Marx was not simply generalizing from the results of his empirical investigation of the English factory system. Rather, Marx was arguing from the conceptual structure of the notion of capital.

Hegel, on the other hand, started from the Kantian notion of a priori knowledge, knowledge that results necessarily from the analysis

286 Of course, the explanatory power of a theory has nothing to do with the theorist's purpose. See M. Jäger, Die Methode der wissenschaftlichen Revolution, supra note *. I use the notion of the theorist's purpose here as Hempel uses the "theoretician's dilemma": as a standpoint from which to examine the difficulties of theory construction. See C. Hempel, The Theoretician's Dilemma: A Study in the Logic of Theory Construction, in Aspects of Scientific Explanation 173 (1965).
of a concept and not from empirical investigation. Hegel then histori-
cized the notion of conceptual development. Hegel's concept, though
eternal, reveals itself in history. For Hegel, the structure of the Greek
polis, particularly the relationship between the individual and the
community, differed markedly—tragically, he would have added—
from that of modern bourgeois society. In Hegel's view, the world
spirit leaps ever westward, from one coherent conceptual structure to
the next.\textsuperscript{287} In the \textit{Philosophy of Right}, Hegel examined the concep-
tual necessities of freedom, the immanent reason of a system based on
particular historical premises—the private ownership of property.\textsuperscript{288}

Further, both Marx and Hegel began with elemental units that,
when taken alone, are totally absurd. Marx began with individual
commodity exchange, as though the law of value could somehow gov-
ern an isolated exchange and as though an exchange governed by the
law of value would not already be mediated by money and take place
at market price. Similarly, Hegel began with the individual's exercise
of freedom in the appropriation of nature as private property. Of
course, private property cannot exist apart from society. Even the
case of the individual is extremely problematic. We cannot point
to the limits between the individual on the one hand and the collectiv-
ity on the other hand. Hegel's understanding, however, was that in a
society based on private property there is no alternative to beginning a
discussion of the legal system with the notion of the legal person. In
this society, the legal person is the fundamental subject of rights, the
object of the commands of the legal system, and at the level of self-
reflection, the subject of moral duty. The principal issue in modern
society is the relation between this individual subject of rights and
duties and legally regulated social organizations—the family, civil so-
ciety, and the state. The purpose of Hegel's theoretical construction
was to make this conflict apparent.

\textsuperscript{287} See G. Lebrun, \textit{La patience du Concept: Essai sur le Discours hégélien} (1972).

\textsuperscript{288} Of course, the theoretical structures of Marx and Hegel, however closely related, are not
identical. The most notable difference, in my view, regards time. Hegel's was a vision of an
"eternal present" that is "always there."'' 2 H. Glockner, Hegel 559 (1940). The Concept is
as it has always been. It does not live in history. Time lies outside of it. "Time was never
really a phase of the inner nature of spirit, but in some sense an accident, since as Hegel says,
al of the phases of spirit were present in spirit from the outset." Dyde, Hegel's Conception of
Freedom, 3 Phil. Rev. 667 (1894). For Hegel, history is the process by which the concept of
freedom conquers material reality. Societies do not develop from one stage to another.
Rather, the concept leaps from one society to the next.

For Marx, there is no concept outside of time. Marx mercilessly extirpated from social
science all remnants from theology, including the notion of a transhistorical human nature.
Marx's conceptual structures are inherent to a particular social formation. It is possible to
analyze the dynamic and decay of those structures, but there is no teleological necessity for
movement from one structure to the next.
Of the three characteristics of theoretical construction Marx described in his letter to Kugelmann, the first two elements are relatively unproblematic in the *Philosophy of Right*—the conception of the individual as an element of the totality and the development from abstract to concrete. The theoretically and politically difficult question is the third one, the role of *Aufhebung*—the problem of the relationship between the abstract theories of individual right and individual morality to the concrete totality.

"The truth is the whole."\(^{289}\) This is one of Hegel's most fervently held convictions. Injunctions to consider the individual and particular not only on their own terms but also as part of the totality are found throughout Hegel's work.\(^{290}\) Moreover, the totality Hegel chose to investigate in the *Philosophy of Right* coincided with the elements of Marx's social-economic formation—production and distribution, morality, law, and the state.

The fundamental difference between the theories of Marx and Hegel is the purpose the explanations were designed to achieve. Marx wanted to demonstrate that most social activity is related to the process of social production. At the same time, he hoped to demonstrate that the capitalist mode of production is only one particular form in which society might produce—production in the restrictive form of private appropriation. This particular form, in Marx's view, is destined to produce ever more drastic crises in all aspects of social life. Marx traced the contradiction back to its elemental form—the value form—and began his presentation with it. Because of the purpose of Marx's demonstration, law and politics—conscious social efforts to regulate and channel production—were not to be examined until after the completed presentation of the laws of production, distribution, and consumption.

Hegel's purpose was different. He wished to demonstrate that most social activities represent forms for the exercise of the free human will, active forms through which social life is continually reformed. In that pursuit, Hegel found it useful to begin with the exercise of freedom by the individual and then, at a later stage, to demonstrate how human freedom is exercised at the social level. Hegel distinguished three explanatory units in the developed totality of human freedom—abstract individual right, moral responsibility,

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\(^{289}\) Phenomenology of Mind, supra note 44, at 81.

\(^{290}\) "We have, then, here a connected system, where one extreme is the universal life, *qua* universal or genus, the other being that same life *qua* a single whole, or universal individual . . . ." Id. at 324.
and ethical life (Sittlichkeit). Ethical life includes the progressively more expansive and conscious exercise of freedom in the family, civil society, and the state. The units in Hegel's analysis display a progressive expansion of the scope of freedom. These units were to be analyzed as a series of forms that shape the whole.

Hegel's conception of how to present the series of form analyses coincided precisely with Marx's conception. In his lectures, Hegel described his theoretical construction almost exactly in the words Marx later used. Hegel's goal was also similar to Marx's goal, to create in the mind an equivalent of the concrete, a "unity of distinct determinations." Hegel began with what he believed to be the most elemental form for the exercise of human freedom, the individual's exercise of rights that are analytically prior to and not yet incorporated in the positive law. The elemental form of these rights is the

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291 Ethical life is the term Knox and others have chosen as a translation of Hegel's concept of Sittlichkeit, the title Hegel accorded to the third part of his legal theory. That part encompasses the family, civil society, and the state. Hegel may have coined the term to express both a continuity with and a critique of Kant's legal theory, which is contained in a book entitled Metaphysik der Sitten. The fact of the matter is that Sittlichkeit is simply untranslatable. See Stirling, Pt. 3, supra note 146, at 27-29 (the difficulties of finding a translation into English). As Hegel used the term, it means exactly what he constructed it to mean.

In my view, the principal danger is a translation that erroneously conveys the impression that Sittlichkeit was intended to refer to the contents of a collective or community morality. See, e.g., Radin, supra note 237, at 976 n. 68 ("community morality").

One alternative is to use the term Sittlichkeit, untranslated, in the English text. That would alert readers that there is no English equivalent to the term and point them back to Hegel's text to establish the meaning for themselves. Knox's ethical life does essentially the same job. Though he attempted to justify the translation as a kind of equivalent, see Philosophy of Right, supra note 1, para. 33TN, the equivalence seems to be based on the fact that the two terms, standing alone, are equally meaningless in English. Because ethical life is a cipher, I have adopted Knox's translation here.

292 "What we have to do with here is philosophical science, and in such science content is essentially bound up with form." Philosophy of Right, supra note 1, at 2 (emphasis in original) (Knox did not emphasize form in his translation).

293 Consequently you might raise here the question why we do not begin at the highest point, i.e. with the concretely true. The answer is that it is precisely the truth in the form of a result that we are looking for, and for this purpose it is essential to start by grasping the abstract concept itself. What is actual, the shape in which the concept is embodied, is for us therefore the secondary thing and the sequel, even if it were itself first in the actual world. The development we are studying is that whereby the abstract forms reveal themselves not as self-subsistent but as false.

Id. para. 32A. Lest the last word of the passage mislead, Hegel often used false and abstract as synonyms, as he did true and concrete. See, e.g., G. Hegel, Vorlesungen über die Geschichte der Philosophie, in 19 Werke 250 (E. Moldenhauer & K. Michel eds. 1971) (hereinafter 19 Werke) ("The truth is concrete, not abstract.") (my translation).


295 "[The French Republic] recognizes rights and duties anterior and superior to the positive law." Const. Preamble III (Fr. 1848, abrogated 1852), in Les Constitutions de la France
property right, by virtue of which individuals exercise their freedom by choosing and appropriating objects as their own. The next step is the creation of a community of will with another—the appropriation of property by mutual consent. This is contract. This step, however, is particular only to the two parties and is not yet universal. The final step in abstract right involves the expansion of freedom beyond the limits of right to include the commission of torts and crimes. Hegel lays the groundwork for the law of property, contract, torts, and crimes, but the discussion is still abstract—individual rights are not yet displayed in their concrete social form.296

Morality, the next level of Hegel’s theory, expands the exercise of freedom inward, to self-reflection. Individuals are responsible for their acts, but the idea of freedom limits that responsibility. Individuals must accept responsibility for their acts only so long as they are under a moral duty. The most basic restriction is that moral subjects are responsible only for acts they have consciously carried out. At the next level, even for acts consciously performed, individuals are responsible only when they have neither excuse nor justification. Finally, individuals are morally responsible only to the extent they agree to accept a moral duty.

The sphere of ethical life expands the exercise of human freedom beyond the individual to entities and institutions that are collectives of numerous moral subjects. In the family, individuals contribute to the exercise of a free will that represents more than their own personal interest. The next level, civil society, involves an extension in scope well beyond the family to the entire social unit of production and distribution. Yet, civil society represents only an indirect expression of collective will. Each producer depends on the others for raw materials and sales, but the collective will is formed and expressed only indirectly, behind the backs of the participants, by means of the pressure of market forces. Civil society contains no organ capable of consciously forming and expressing the will of the collectivity. In our society, the only instance that considers the collective will directly and that organizes and exercises freedom on a social level is the state. However limited or mistaken the state’s expression of freedom may be, it nonetheless is the sole organ through which the collectivity asserts conscious control over its own affairs. In any society in which civil and political society are separated—any society based on the private ownership of the means of production—the state is the necessary...

296 See Hartmann, supra note 12, at 119.
form for the expression of the collective will. Because the state represents the summit of the development of the free human will, it is the culmination of Hegel's presentation.

In his theory of the state, Hegel sought to learn the lesson taught by the French Revolution.\(^{297}\) He wished above all to preserve the Revolution's great achievement—the political recognition of the inalienability of human freedom—without surrendering to the excesses of dictatorship and the Terror. The Revolution freed individuals from the families, castes, guilds, and other limited and particular groups to which they were bound, leaving behind only the naked opposition between the individual and the universal will. All distinctions, even those between representative and represented, seemed antagonistic to the revolutionary commitment to equality.\(^{298}\) The newly emancipated individual, as citizen, wished to participate in the process of government. The problem was that the desire for universal, direct participation led either to anarchy or to dictatorship. It produced anarchy when no group was capable of gaining sufficient power to take control, and dictatorship as soon as any group dominated. In direct democracy, no group can claim to represent anything more than a particular faction. That faction is toppled as soon as the next faction solidifies. As a result, the Revolution's absolute freedom, its attempt at the direct realization of the general will, produced only the Terror, pure negativity, "meaningless death, [the] sheer horror of the negative," and "the rage and fury of destruction."\(^{299}\) Hegel reproached the theorists of the social contract, particularly Rousseau, for having produced an abstract conception of equality that led inexorably to this destruction. In Hegel's view, society's greatest challenge was to bridle the continual oscillation between anarchy and despotism.\(^{300}\)

Hegel's diagnosis was that freedom cannot be realized in a direct and unmediated fashion. In the end, the Revolution failed because it was unable to establish the structure and institutions, the solid political organization that freedom requires. Hegel took it as his task to resolve the difficulty, to prove that it is possible to organize a state as a


\(^{298}\) See Philosophy of Right, supra note 1, para. 5A.

\(^{299}\) Phenomenology of Mind, supra note 44, at 608, 604. Death under the Terror "is thus the most cold-blooded and meaningless death of all, with no more significance than cleaving a head of cabbage or swallowing a draught of water." Id. at 605.

\(^{300}\) "This collision, this nodus, this problem is that with which history is now occupied, and whose solution it has to work out in the future." Philosophy of History, supra note 14, at 452.
form for the exercise of freedom, as an institution that permits the collective exercise of will, for the continual reformation of society, yet is not subject to repeated cycles of conquest by particular interests—rebellion, reestablishment of order, and relapse into terror. Hegel thus paid great attention to the state’s internal division of labor. The legislature provides to the various interests in civil society direct representation in the state. However, in a society based on private property, the legislature is of only limited rationality: it is essentially a marketplace for particular interests and ideas. In such a society, the state requires a sovereign—a constitutional monarch or president—not dependent on any interest or faction. The role of the sovereign is to evaluate legislation from the point of view of the collectivity and, if it is satisfactory, to promulgate it. The sovereign thereby affirms that the legislation is the exercise of the will of the collectivity and not merely of a consortium of interests. In sum, Hegel examined a society based on private property and elaborated the forms, both individual and collective, that exist in such societies for the expression of free will. Hegel believed that, given the basic configuration of such societies, these forms would continually reassert themselves.301

Two challenges may be made to Hegel’s demonstration: first, that Hegel’s demonstration has long since been surpassed by the evolution of modern society; and second, that its idealist premise is unacceptable. Neither objection has merit. At first glance, it might seem that several elements of Hegel’s system, such as the constitutional monarchy, no longer describe the forms in which freedom is exercised in the modern state. Of course, nothing guarantees Hegel’s theory against obsolescence. But since Hegel was interested in basic structural forms, most of the instances he examined continue to find equivalents today. What is important about the monarch is neither the crown nor the acquisition of the position by inheritance. Hegel’s analysis was largely a functional one. In the modern state, it is essential for there to be an instance capable of rising above the parties, factions, and local interests of civil society and representing instead all of society and the social conception of the good. In the United States, the President performs this function. The electoral college may have been designed partially to avoid the direct confrontation of competing interests in the election of the President.302 Moreover, the place of the

301 On some principle or other, any state may be shown to be bad, this or that defect may be found in it; and yet, at any rate if one of the mature states of our epoch is in question, it has in it the moments essential to the existence of the state.

Philosophy of Right, supra note 1, para. 258A.

302 “Another and no less important desideratum was, that the Executive should be independent for his continuance in office on all but the people themselves. He might otherwise
American President resembles that of a monarch in that typically both are removed from daily governmental haggling. The similarity between the two institutions has been noted by journalists and by Hegel himself. Even in countries such as France, where the president is directly elected by the populace, presidents seem to assume a nonpartisan quasi-monarchical role, whether they begin on the Left or the Right. Mitterand differs little from de Gaulle in this regard. In general, Hegel's insights have aged well. They were valid when he wrote and seem to be equally valid today. For me, at least, they do not pose much difficulty. They display patterns that are organic to the society in which we live, one which does not differ as much as we would like to think from that of Hegel's time.

The second criticism of Hegel's presentation is its idealism. Marx, for example, was convinced that Hegel had turned the predicate (freedom) into the subject and then attempted to demonstrate its progressive realization in the real world. Lenin, following Engels, posed the issue as the choice between materialism and idealism and labeled it "the fundamental question of philosophy." Marx, Eng...
gels, and Lenin were honest enough to admit that the materialist world view could not be proven, or the idealist vision refuted. Instead, they phrased the issue in terms of a decision. Lenin raised the stakes by declaring that one's choice in the matter operated as a political affiliation. The working class and its allies choose materialism. The enemies of the working class choose idealism.

A century and a half after Marx and others initiated the discussion, it is clear that the question was badly posed. One problem with viewing materialism and idealism as simple alternatives is a decisionism that is common both to the Leninist formulation and to Stalinism. The simple either/or abolishes the possibility of rational discussion, elevates philosophy to the unquestioned arbiter of political disputes, and raises the party to the role of philosopher-king. The purges, the Lysenko affair, and the rest of the Soviet system are simply further steps down the same path. Yet, despite the catastrophic consequences of the idea, even modern, anti-Stalinist Marxism has tended to defend Lenin and to argue that the role of philosophy in the revolution is simply to defend materialism against all foes.

A second problem with posing materialism and idealism as simple alternatives is that there are more than two alternative goals for a scientific theory. It is a thesis of the philosophy of science that an infinite number of theories can be formulated to explain any set of data. A theory's starting point and development depend on what the theorist is attempting to demonstrate. Hegel, for example, chose to demonstrate that social activity is essentially the exercise of human freedom. He began with the simplest form in which freedom is exercised—property—and, by virtue of his sublime ingenuity, was able to

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308 Trofim Denisovitch Lysenko was a Soviet biologist who developed a theory of genetics based partially on the inheritance of acquired characteristics. He criticized Mendelian genetics for its “idealism” and argued that his theory was more compatible with dialectical materialism than was that of his opponents. Stalin adopted Lysenkoism and reorganized Soviet science to favor “proletarian science” over “bourgeois science.” The result was a setback in the fields of genetics and cybernetics from which Soviet science has yet to recover. See D. Lecourt, Lysenko: Histoire réelle d’une “science prolétarienne” (1976).

309 See, Althusser, Lenin and Philosophy, in Lenin and Philosophy, supra note 265, at 23.


Consider, for example, the following question and the potential answers.

Question: What keeps the moon from crashing into the earth?

Possible answers:
1. Centrifugal force;
2. Shyness;
3. The glass sphere on which it is affixed;
4. A fire brigade of little green creatures;
Etc.
generate most social institutions, including civil society and the monarch. Marx, on the other hand, chose to demonstrate how social activity is related to the production process. He began with commodity exchange and would also have been able to generate most social institutions, including, of course, civil society and the monarch.

Today, the question is no longer how to choose between idealism or materialism, no longer whether social institutions are structured by the ideal of freedom or whether they are integrated into the process of social production. Social institutions are determined by both of these processes, as well as by a host of others. Today, the agenda includes a number of important and very different dialectical developments. A feminist theory might begin with the relation between man and woman in the family and generate much of the remainder of civil society and the state.311 A theory of minorities might focus on individual relations of discrimination and show how many large-scale social institutions are designed to protect prejudice. An ecological theory might begin with consumption and the production of waste. Psychoanalytic theory has already attempted to explain social institutions on the basis of the early relations of sexuality.312 An anthropological theory might begin with fundamental manifestations of mythmaking and belief. A linguistic theory might attempt to show how social institutions reflect basic structural features of language. Though not all possible theories are equally useful, each has some insight to provide. Imagination is the only limit. Since the possibilities are endless, it makes no sense to criticize Hegel for having chosen one of the available options and having demonstrated how much can be learned from a dialectical theory.

The comparison between Hegel and Marx has revealed two aspects of Hegel's theory construction. First, Hegel viewed the law not as a collection of rules and institutions, but rather as the totality of the exercise of freedom in modern society. Second, Hegel examined the law as the structure—the interrelated forms—in which freedom is exercised in contemporary society. The theories that govern these forms, however, do not correspond directly to what we know of the forms in the world. The theory approximates empirical reality only in the theory's fully developed state, only after an analysis of the workings and effects of each form has produced a complex model of the functioning whole. In other words, the individual rights of contract

and property and the individual’s moral responsibility are, in empirical reality, not necessarily as predicted by the abstract theories that have these forms as their objects. An individual’s rights, as they may be exercised in a complex contemporary society, are overlayed by numerous determinations and limitations that are the result of state action in the furtherance of collective goals.

The question, then, is the relationship between individual right and individual morality on the one hand, and the state on the other hand. Of course, it is the state and not the individual that promulgates the law. The state, however, may not be required to respect prepositive individual rights to their full extent. It also may be able to impose the command of the law on individuals even when they would not, as universal legislators, promulgate such a rule. To put the question in terms of Marx’s letter to Kugelmann, the issue is to what extent the earlier levels of Hegel’s theory of the law are preserved (aufgehoben) in the complex totality. In other words, how much of individual right and the limitations on moral responsibility are preserved in the positive law?

This question does not assume that individuals preexist society. The embarrassment in the post-Hegelian discussion about the relationship between the individual and the state is due partially to the fear that the question presupposes the existence of a presocial natural law. Since, in Hegel’s theory, individuality and individual rights are conceptual elements of a particular historical constellation, there can be no argument that individuals somehow possess rights before they enter society, and no discussion about the extent that presocial individuals must surrender their rights when they enter society. But the question may still be asked about the individual in society—of the amount of autonomy that should be conceded to the individual, of the relationship between the individual rights that arise as a result of the structure of modern society, and the collective goals represented by the state. The question is not a historical one—about the transition from the state of nature to civilization—but rather an analytical one—about the relationship between different levels of the same theory. As Hegel repeatedly emphasized, the appropriate order for the presentation of a structural analysis does not always, or even generally, correspond with historical development.313 Thus, Hegel’s con-

313 [W]e only wish to look on at the way in which the concept determines itself and to restrain ourselves from adding thereto anything of our thoughts and opinions. What we acquire in this way, however, is a series of thoughts and another series of existent shapes of experience; to which I may add that the time order in which the latter actually appear is other than the logical order. Thus, for example, we cannot
ception of the structural relation between society and the individual has foreclosed this question when understood diachronically, but poses the question even more dramatically when understood synchronically. Modern societies differ dramatically in the extent to which individual rights and the moral limitations on an individual's responsibility are respected by the state. Even more important, every suggestion for legal or political change implicitly proposes to resolve the issue.

To my knowledge, Hegel never specified the precise relationship between individual rights and social obligation. He did discuss the issue regarding particular institutions and specific historical periods. Unfortunately, because the passages tend to conflict with each other, they offer no answer that can be generalized. There is language in Hegel's text to support three different views about the relationship between the various levels of Hegel's theory of the law. First, abstract right and the moral limitations on individual responsibility may be considered categories with full empirical content. These categories would then be preserved in their full breadth and meaning in the developed concrete totality. Second, abstract right and morality might be regarded as mere transitory theoretical moments that are completely negated and transcended at the final theoretical level. Consequently, they would leave no residue and have no empirically observable referent. Finally, it might be argued that the question itself is misleading because the various levels of the theory never come into conflict, and the empirical contents of the levels always coincide.

Each of the three readings finds support in some passage of Hegel's text. Unfortunately, none of them yields acceptable consequences, and therefore none of them represents a successful resolution of the problem. The only acceptable solution is to recognize that Hegel simply did not take a position on the question. Instead, he left the relationship between the various levels of the theory to us to decide.

Hegel devoted much of his effort to overcoming the limitations established by the Kantian notion of the unknowable thing-in-itself.314 The thrust of his *Logic*, for example, especially the doctrine of essence, was to demonstrate that reality is fully accessible to knowl-

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say that property *existed* before the family, yet, in spite of that, property must be dealt with first.

Philosophy of Right, supra note 1, para. 32A (emphasis in original); see G. Hegel, Enzyklopädie der philosophischen Wissenschaften para. 408A, in 10 Werke, supra note 144, at 170-71.

314 See, e.g., Philosophy of Right, supra note 1, para. 44R.
There is no unknowable essence behind the appearances. There are indications throughout Hegel's work that this theoretical position may have tempted him to identify explanatory units—the forms, the objects of the various theoretical levels—so that they would have a maximum of empirical content. The initial levels of his theory might then be considered abstract because they are as yet unencumbered by more complex determination, but not because they lack empirical content. There is some evidence in Hegel's writings that he intended the notions of abstract individual right and moral responsibility to suffer little or no limitation by the state or the positive law. The individual's rights would then be fully protected against claims of social goals, and the categorical imperative would survive intact. If this theory were taken to its extreme, the consequence would be a radical individualism.

The problem with the view of abstract right as absolute—the "absolute right of appropriation"—is that it does not describe what we know of the positive law. Of course, property and contract rights are often proclaimed to be absolute. But the positive law subjects both kinds of rights to considerable limitations on the basis of social concerns. For example, owners of property may not exercise their rights entirely as they please, even when they do not violate the

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316 "[W]e have to take [history] as it is. We must proceed historically—empirically." Philosophy of History, supra note 14, at 10.
317 "[T]he moment of the individual's self-conscious freedom must maintain its right against objective truth and objective spirit." G. Hegel, Vorlesungen über die Geschichte der Philosophie, in 19 Werke, supra note 293, at 509 (my translation).
318 "At this point... [the right of property] is no longer merely implicit but has attained its recognized actuality as the protection of property through the administration of justice." Philosophy of Right, supra note 1, para. 208.
319 "[T]he principle of the modern state requires that the whole of an individual's activity shall be mediated through his will." Id. para. 299A. "Conscience... is a sanctuary which it would be sacrilege to violate." Id. para. 137R.
320 Though it may seem possible to identify Ronald Dworkin with this position, in fact Dworkin speaks to a slightly different issue. He too distinguishes between abstract and concrete rights. See R. Dworkin, Law's Empire 293 (1986). His point is that, once the conflict between competing abstract rights has been resolved and a concrete right recognized, it makes no sense to say that the concrete right may be trumped by social goals. See R. Dworkin, Taking Rights Seriously xi (1978) [hereinafter R. Dworkin, Rights]. This does not result in radical individualism because relevant social concerns have already been largely accounted for in the process of synthesizing concrete right from competing abstract rights.
321 Philosophy of Right, supra note 1, para. 44.
322 See The French Civil Code art. 544 (J. Crabb trans. 1977) ("Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that use is not made of them which is prohibited by laws or regulations."); id. art. 1134 ("Agreements legally made take the place of law for those who make them.")
The civil law restricts the exercise of property rights by the doctrine of abuse of right; the common law recognizes related limitations. Further, both systems impose construction and zoning restrictions on the use of real property. Contract rights in the positive law are also molded by their role in the social process. Many contract doctrines, including unconscionability, consideration, and the statute of frauds, alter the rights that would arise from a simple reading of mutual consent. Consumer-protection legislation alters contract rights even more dramatically. Both property and contract rights are constantly channeled and limited on the basis of social concerns. Any reading of the *Philosophy of Right* that ignores these limitations and insists on absolute respect for prepositive individual rights falls considerably short of explaining the very society that is its object of study.

Similar limitations are imposed on the doctrine of moral responsibility that Hegel elaborated at the second level of his legal theory. In his discussion, Hegel recognized that the moral limitations on an individual's accountability are a further form for the exercise of freedom. Individuals may be held accountable only for actions which they consciously intend, for which they have neither excuse nor justification, and which they would prohibit as universal legislators. Once again, however, morality is not fully respected in the positive law. In certain circumstances, individuals are held legally responsible not only when they have not acted consciously, but also when they have exercised all possible care to prevent others from suffering harm. Such, for example, are the various rules for strict products liability.

Moreover, the categorical imperative also undergoes alteration when integrated into the positive law. The modern principle of majority

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323 So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person.


325 This Court has long recognized that parties should be free to contract for any lawful purpose upon such terms and conditions as they believe to be in their mutual interest. Such freedom is not absolute however, and the interests of the people of Oklahoma are not best served by a marketplace of cut-throat business dealings where the law of the jungle is thinly clad in contractual lace.


326 See *Restatement (Second) of Torts* § 402A (1977).
rule often requires individuals to obey rules that they would not have promulgated as universal legislators. In other words, the principles Hegel developed in his examination of the limits to an individual's moral responsibility do not survive fully intact when integrated into the positive law.

The second alternative interpretation of the Philosophy of Right is to consider abstract right and morality as purely transitory moments in the theoretical elaboration of the whole. The notions of right and morality would then be important not for themselves but rather for the characteristics of the individual they help to produce. Rights and morality may vanish as independent sources of an individual's claims, once they are integrated into the theory of the state. The person would be conceived as a mere vessel for rights, just as the moral subject would be a recipient for moral duty. This interpretation of the relationship between the various levels of Hegel's theory emphasizes the needs of the concrete social totality. The conclusion follows that whenever there is conflict between a claim of right and a social goal, society's interest should prevail.

Certain passages in the Philosophy of Right seem to support this second interpretation. One example is Hegel's discussion of the relationship between the individual and the family. In the family, the individual's personal claims are abandoned. Similarly, abstract right disappears into the claims of morality. Moreover, there is evi-

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328 "Thus for Hegel the various moments of the objective spirit are each confined to their own levels. Subjective right and morality cease as such as soon as one arrives at the level of the family and the state ..." F. Stahl, supra note 61, at 227. "[T]he earlier phases of an evolution, which we may call logical, formal, or abstract, are something like the preliminary arrangements of a juggler's trick. They are there merely for the sake of something else, and do not contain anything ultimately interesting, since everything of that kind has been carefully removed. Hence the first stages of Hegel's thought are valuable as revealing vividly by way of contrast what the true person is not, or, at most, what a mere side or fraction of a true personality is." Dyde, supra note 288, at 655, 657.
329 "Thus duty to the ethnic collectivity in our view always precedes the duty to family so that a true conflict between family duty and duty to the collectivity can no more exist than can a conflict between custom and law." Larenz, supra note 210, at 253.
330 "Hence in a family, one's frame of mind is to have self-consciousness of one's individuality within this unity as the absolute essence of oneself, with the result that one is in it not as an independent person but as a member." Philosophy of Right, supra note 1, para. 158. See also id. para. 159 ("The right which the individual enjoys on the strength of the family unity and which is in the first place simply the individual's life within this unity, takes on the form of right (as the abstract moment of determinate individuality) only when the family begins to dissolve.") (emphasis in original).
331 Welfare without right is not a good. Similarly, right without welfare is not the good; fiat justitia should not be followed by pereat mundus. Consequently, since the good must of necessity be actualized through the particular will and is at the same time its substance, it has absolute right in contrast with the abstract right of
dence that, after the Karlsbader Beschliisse and before publication of the Philosophy of Right, Hegel seriously revised his legal theory—reducing reference to prepositive rights and placing greater emphasis on the law as posited by the state.332

One of Hegel’s goals was to combat an empiricist individualism of the Hobbesian variety that conceives of individuals as fully constituted subjects of rights even before they enter society. Hegel was interested in giving force to the idea of the social totality, and may have wished to emphasize that rights exist only as part of a social process that includes the state and the positive law. Of course, many besides Hegel have criticized the view that individual rights preexist the positive law. According to the critics, the positive law does not protect preexisting individual rights but rather itself creates the rights as it structures legal relations and legal situations.333

This reading of Hegel fails to explain many of the most interesting features of the modern legal system. Both individual rights and moral responsibility continue to play a fundamental role in the modern legal system, especially in the struggle against oppression. Two centuries ago, during Hegel’s youth, the idea of universal human rights arose in the context of revolution.334 The importance of rights,

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332 You ask me some things about Hegelian natural law. . . . In general, law first finds its true realization in the ethical, in which, first as family and then, on a higher level, as state, it achieves objectivity and in which the individual regards the objective law and the objective good in unmediated fashion. . . . [Hegel] considers the state to that extent as an institution for the liberation of humankind from its natural, unmediated, particular will. . . . Thus Hegel considers it to be a fundamental duty of every individual to be a citizen of a state . . . .”

Letter from Richard Rothe to his father (Dec. 21, 1819), quoted in Ilting, supra note 261, at 8 (my translation). See also Letter from Richard Rothe to his father (Jan. 1, 1820), id. at 9 (my translation):

You ask me what Hegel thinks of individuals outside of the state. He accords them no rights other than unmediated, natural desire and no other duty than the duty to become members of a state; even more, he does not even think of them as human. There is, according to him, no true, concrete law at all outside of the state.

. . . .

Rothe attended Hegel’s lectures on the Philosophy of Right in Berlin during the Winter semester 1819-1820. These lectures were given immediately following the Karlsbader Beschliisse and probably represent the chief source for the final elaboration of the published version of Hegel’s book. See Ilting, supra note 261, at 7.

333 See J. Ghestin & G. Goubeaux, supra note 324, at 110-23 (discussing the critique of the notion of subjective rights by Villey, Duguit, and Kelsen).

334 “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty and the pursuit of happiness.” The Declaration of Independence para. 2 (U.S. 1776). “The goal of
if anything, has increased in the period since Hegel wrote. Most successful struggles for the benefit and welfare of neglected groups depend on and culminate in the creation of new rights. Individual rights now extend far beyond elemental notions of property and contract to include: the rights of artists, authors, and inventors in their creations, rights to social security and other welfare payments, and the right to a sphere of privacy. There is a virtually universal political consensus that, whatever their source, modern society requires both a guarantee of individual autonomy against encroachment by the state and a recognition of the individual's right to participate in the social and political process. In the tradition of classic liberalism, for example, Ronald Dworkin has argued that a right by definition is a claim that always trumps social goals. Many modern socialists also seem to agree that individual rights would be necessary in the society they envision. Even Marx—who was no friend of the abstract rights of property and contract—recognized both the necessity of political participation and the danger that collective goals present to the free development of the individual, and structured his utopian vi-

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335 See Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. Rev. 589, 590 (1986) ("the assertion or 'experience' of rights can express political vision, affirm a group's humanity, contribute to an individual's development as a whole person, and assist in the collective political development of a social or political movement, particularly at its early stages").

336 See J. Ghestin & G. Goubeaux, supra note 324, at 115-16.

337 See R. Dworkin, Rights, supra note 320, at 204-05.

338 "Why should not socialism, in its turn, have its own rights theory? I believe a future society without any theory of rights would be a society without law, in which conflicts would be decided on the basis of the distribution of power." Lynd, Communal Rights, 62 Tex. L. Rev. 1417, 1420 (1984).

That individual freedom was the historical result of the class struggle of the bourgeoisie for its own emancipation does not mean in any way that individual freedom is a bourgeois value, destined to perish with the bourgeoisie and to be disdained by the superhumans of the future. Individual freedom is a universal value: I challenge anyone to find a human being, bourgeois or proletarian, who feels more human by renouncing his rights.


sion to avoid the problem. On the level of morality, the modern view seems to be that individuals are not always obligated to obey the law. Indeed, one of the characteristics of totalitarianism is the complete subordination of individual right and responsibility to the demands of the collectivity. Hegel’s reputation as an “enemy of the open society” rests on the fact that his theory seems to permit individual right to disappear beneath the demands of social goals.

A third possible resolution of the relationship between individual right and collective goals also finds support in the Philosophy of Right. This view argues that there is no necessary conflict between the various levels of the theory, and that therefore individual rights, when correctly understood, always coincide with collective goals. Hegel seems to have held such a vision of the golden age of Athenian democracy. Unfortunately, this view too has its problems. To begin

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340 I had long believed that I knew [the Communist Manifesto] completely when—I was about fifteen years old—I made an eerie discovery. Among the sentences, that, long since, had become a matter of course, was one that read as follows: “In the place of outmoded bourgeois society with its classes and class conflict, comes an association in which the free development of all is the condition for the free development of each.” I do not know when I had begun to read the sentence as it reads here. I read it in this way, it read for me like that, because it corresponded to my view of the world at the time. How great was my astonishment, my horror really, when, many years later, I discovered that the sentence actually read exactly the opposite: “... in which the free development of each is the condition for the free development of all.”

It was clear that I had to some extent read one text into another, read in my own ideas, my own immaturity; and that what could be permitted, even encouraged, there, because the word pointed to other words, to the unspeakable, was absurd here, because, in my mind, knowledge, a prophecy, stood on its head. Nonetheless, my horror was mixed with relief. Suddenly a text had appeared before my eyes for which I long had waited, for which I long had hoped.


341 See M. Walzer, supra note 327.

342 The civil codes of many Eastern bloc countries phrase the notion of abuse of right in terms that subordinate the individual entirely to social goals.

A right may not be exercised in a way contrary to its socio-economic purpose or the principles of socialist community life in the Polish People's Republic. Such action or omission by an entitled person shall not be deemed to be the exercise of his right and shall not enjoy protection.


343 “[Hegel] continually implied that no genuine conflict of interest ever can arise between individuals and the society they belong to ... .” G. Sabine, A History of Political Theory 639 (1937).

344 As far as the Greeks are concerned, the outstanding peoples in the period of their complete world historical development differed from each other in the following way. Among the Spartans, the pure indiscriminate life in ethical substance dominated; thus property and the family relationship were not accorded their due. Among the Thebans, on the contrary, the contrary principle emerged; among them subjectivity and leisure, as much as such characteristics can be ascribed to the
with, Hegel’s theory does not require that the empirical consequences of each theory level must always coincide.\textsuperscript{345} His demonstration that the world is accessible to human reason does not imply that it is free of tension. Moreover, this third view also fails to describe what we know of modern society. Private property implies differing interests and virtually guarantees a conflict between the radical demands of individual right and the equally radical initiative of those who seek to limit those demands for the benefit of the collectivity. This conflict has raged in the United States Supreme Court throughout this century.\textsuperscript{346} Furthermore, any conflict between individual right and the state necessarily creates a further conflict between moral obligations and the commands of the positive law.\textsuperscript{347}

Another difficulty with this third reading of Hegel—that there is no conflict between the individual and the state—is that Hegel himself acknowledged the possibility of discord.\textsuperscript{348} In fact, he conceived of justice precisely as the resolution of conflict between different levels of legal theory. He analyzed \textit{Antigone}, “the perfect example of tragedy,” as the collision between the two mightiest ethical forces—family love and...
and the law of the state. Justice strikes the appropriate balance betw een the competing forces.

Each of these three proposed readings of Hegel pursues the same goal, and each makes the same mistake. In each case, the goal is to derive practical consequences directly from Hegel's demonstrations. The necessary assumption in each case is that Hegel attempted a substantive resolution of the relationship between the individual and the state. In my view, the only acceptable reading of Hegel abandons the assumption that anything definitive can be derived from his results and recognizes that he was not generally concerned with resolving questions of substance but rather analyzed the forms available for resolving these difficulties. Moreover, he also did not resolve the potential conflicts between the various levels of his theory. Instead, he left the resolution—at any one time in any particular society—to the election campaign, the legislature, and the courts.

Hegel himself is largely at fault for the misconception that the Philosophy of Right is concerned with a definitive resolution of substantive issues. There is one point at which the structure of the theory should have compelled him to express a view about the relationship between the various levels of his theory—namely, in the course of the transition between morality and ethical life. However, instead of squarely confronting the issue, he produced what may well be the single most misleading passage in his entire work. In this passage, Hegel criticized Kant's categorical imperative for its formalism and for its failure to provide a mechanism for specifying particular duties. Hegel implied that the problem with the categorical imperative...
tive was its lack of content. He suggested that his own theory would be able to resolve the problem at its next theoretical level, ethical life. The passage created the impression that ethical life provides the content lacking in the categorical imperative. Thus, just as we are poised for our initial encounter with ethical life, Hegel seems to say that the challenge is to provide content where Kant had provided none.

The categorical imperative, however, occupies a role in Hegel's system structurally different from the role it plays in Kant's system. For Kant, the individual is free only as universal legislator. On that basis, Kant attempted—with uncertain success according to some commentators—to generate positive duties from the principle of non-contradiction contained in the categorical imperative. Hegel, on the other hand, viewing everything from the totality, believed that the categorical imperative and the individual's private conscience were incapable of generating legal obligations. Legal obligations could be generated only in the political and legal process. For Hegel, the categorical imperative thus played a purely negative role. The categorical imperative emancipates individuals from the moral duty to obey any laws that they would not themselves have promulgated as universal legislators.

Hegel's position becomes clearer when seen from the standpoint of both Kant and Marx. According to Kant, the individual is the universal legislator. The social aspects of Kant's theory are generally derivative of the individual conscience. Hegel's criticism of Kant was not motivated merely by the absence of content—although Kant had some difficulty demonstrating how individuals give content to their obligations. Instead, duties are created not by the individual but in a social process. Kant failed to offer a social mechanism by which duties might be created. Hegel resolved this difficulty by demonstrating

from outside and particular duties may be arrived at accordingly, but if the definition of duty is taken to be the absence of contradiction, formal correspondence with itself—which is nothing but abstract indeterminacy stabilized—then no transition is possible to the specification of particular duties nor, if some such particular content for acting comes under consideration, is there any criterion in that principle for deciding whether it is or is not a duty.

Id. para. 135R.

354 "But the objective system of these principles and duties, and the union of subjective knowing with this system, is not present until we come to the standpoint of ethical life. Here at the abstract standpoint of morality, conscience lacks this objective content . . . ." Id. para. 137.

355 See Harrison, Kant's Examples of the First Formulation of the Categorical Imperative, in Kant: A Collection of Critical Essays 228 (R. Wolff ed. 1967) [hereinafter Kant: A Collection]; Kemp, Kant's Examples of the Categorical Imperative, in Kant: A Collection, supra, at 246.
that social institutions are no less an exercise of freedom than is the individual conscience.

Both Hegel and Marx were interested in social totalities, and both resolved the totalities into a series of forms. Hegel, however, neither attempted to specify the appropriate content for the forms he analyzed nor indicated the appropriate relationship between the different levels of his theory. He offered only a mechanism—the political and legal process—by which the forms are filled with content. The difference with Marx's theory becomes patent. Because Marx had a different project, he was able to specify the relationship between the various levels of his theory. He resolved the Transformation Problem by specifying both the mechanism by which, and the precise extent to which, value is preserved in market price.\(^{356}\)

The contrast between the three theory constructions demonstrates that Hegel applied the open texture of Kant's theory to the social totality he shared with Marx. The result is a theory that, for two reasons, is incapable of producing prescriptions for legal or political change. First, Hegel was concerned generally with forms and not with substance. Therefore, it is impossible to locate Hegel definitively on one side or the other of any substantive issue. For example, although Hegel elucidated the form of the individual's property right, he provided no guidance about whether the right to welfare benefits should be construed as a property right.\(^{357}\) Second, the open texture of Hegel's theory prevents a definitive conclusion about the extent to which characteristics of abstract right survive in the positive law.\(^{358}\) For example, even if we were to conclude that the right to welfare benefits is a property right, we still must decide to what extent the state may impose conditions on the exercise of that right.\(^{359}\)

The same difficulties repeat themselves at each level of Hegel's theory. As far as morality is concerned, Hegel made no effort to provide a content for the individual's conception of the good. He also failed to specify the circumstances in which an individual's moral objections might justify a failure to obey the law. Finally, at the level of science, culture, and art, Hegel provided a series of forms, but it is not clear how a content is to be attached to these forms, nor is it clear whether Hegel's forms are filled by the actual events, historical trends, and social arrangements that are present in society.\(^{360}\)

\(^{356}\) See supra text accompanying notes 283.

\(^{357}\) "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); cf. Reich, The New Property, 73 Yale L.J. 733 (1964) (examining the extent to which welfare benefits have become property rights).

\(^{358}\) "[N]o limit may be placed on the right of property at the level of abstract right [since that right is] abstract precisely because of the absence of limitation by a superior positive law." E. Weil, supra note 14, at 37 (my translation).

\(^{359}\) Cf. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245 (1965) (questioning the procedures by which social welfare benefits are granted).
ethical life, Hegel did not attempt to specify the appropriate content of family obligations, of good faith in the marketplace, or of state legislation. Nor did he attempt to designate the extent to which the state can intervene in the family or civil society, by preventing divorce or abortion, or by enforcing or refusing to enforce contracts.

This structural demonstration of the open texture of Hegel’s theory confirms the results of Joachim Ritter’s pioneering discussion of Hegel’s vision of the law and modern society. Central to Hegel’s vision of modernity is his conception of the fundamental difference between Greek society and our own. The perfection of classical form reflected the unity and harmony between the individual and the collectivity in Greek society. The Greeks lived in harmony between subjective freedom and ethical substance, avoiding both oriental despotism—the overwhelming of the individual—and an exaggerated individualism that cuts the individual off from the collectivity. In Greece, the (non-slave) individual was independent and free, yet still connected to the general interests of the polity. This unity produced a harmony between the moral and the political, between the demands of the individual’s conscience and political obligation. There is no doubt about Hegel’s nostalgia for the classical period, yet Hegel also recognized the period’s shortcomings. The Greeks were free, but their freedom was limited in two ways. First, because the Greeks kept slaves, their freedom did not extend to all individuals. Second, the Greeks were not fully aware of the nature of individual freedom. In the modern world, what was unified in the classical period becomes separated and divided—the religious and the secular, subjectivity and objectivity, the individual and society. The dichotomy persists in modern intellectual history in the coexistence of Descartes’s Method on the one hand and Pascal’s logic of the heart on the other—rational scholarship versus aesthetic subjectivity. The French Revolution completed the process in the realm of politics and produced a radical discontinuity with the past. The Revolution emancipated the individ-

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360 See J. Ritter, supra note 297. For purposes of complete disclosure, it should be mentioned that Ritter’s Hegel interpretation has been labeled “bourgeois ideology par excellence.” Wildt, supra note 257, at 269 n.2 (my translation).


362 “If it were permitted to feel longing, then it would be for such a land, for such circumstances.” G. Hegel, Vorlesungen über die Geschichte der Philosophie, in 18 Werke, supra note 294, at 173 (my translation).

363 “With the Greeks, the individual human being, that is the free spirit, received its due, but its infinity had not yet been understood.” G. Hegel, Fragment zur Philosophie des Geistes (c. 1822), in 11 Werke 517, 527 (E. Moldenhauer & K. Michel eds. 1970).
ual and made the economically independent producers politically free citizens.

Ritter suggests that Hegel did not interpret away the dichotomy. For Hegel, the separation represents the fundamental condition of the modern age, from which there is no possibility of escape. Hegel's accomplishment was to recognize this dichotomy as one form of the unity of the two aspects, as "the form in which their original unity historically maintains itself under the conditions of the modern world." The problems consolidated by the Revolution—the dichotomy of existence and the discontinuity of history—cannot be overcome by speculative attempts to deduce the new world as it should be.

Once it is clear how much Hegel did not resolve, the question arises where we might turn for help. The answer is easy. Hegel left these questions for the world spirit. But where on earth do we make contact with the world spirit? This is the ecstatic and terrifying nature of our freedom. We are the representatives of the world spirit. All that the Philosophy of Right can do for us is to help us acquire consciousness of the process by which we control our own destiny. We tear back the curtain of the political process and, behind it, as in a mirror, we see nothing but ourselves.

Thus, the unity of the particular and the universal in the law is simple, even obvious—it is simply the participation by the citizenry in political affairs. Individuals do not exercise the full extent of their freedom either by capitulating without question to the will of the state, or by taking refuge in private affairs, or by merely creating alternative forms of community. We are free only to the extent we partici-

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364 J. Ritter, supra note 297, at 65 (emphasis in original).
365 Id. at 67.
366 Human beings as individuals, in fact everyone as such, is a manifestation of spirit. For its part, spirit as such is dependent on individuals, on the empirical individual subject. Spirit is that which propels itself, knows itself and realizes itself.... No absolute without parousia [the actual presence of spirit in the world]. No parousia without the assistance of human beings: Nothing happens around us or with us without us.

367 "It is manifest that behind the so-called curtain, which is to hide the inner world, there is nothing to be seen unless we ourselves go behind there, as much in order that we may thereby see, as that there may be something behind there which can be seen." Phenomenology of Mind, supra note 44, at 212-13. What we see, of course, is the political system we have created. The disenfranchised—women, minorities, the underclass—see only their absence in the mirror.

368 "[Hegel] made no compromises about the autonomy of the ethical order. He demanded that a people make their own laws and considered it ridiculous—a disgrace—when a people is not considered ripe enough for the task." K. Rosenkranz, supra note 104, at 332 (my translation).
pate in social institutions in order to (trans)form social life.\(^{369}\) This is the only interpretation that can make sense of Hegel’s text, while at the same time avoiding insuperable political difficulty.\(^{370}\) When we ask, for example, about the appropriate limitation of individual right, Hegel tells us that it is we who, through our institutions, confront and resolve the matter. Although at any one moment it may seem possible to justify a decision as though it were inevitable,\(^{371}\) there is nothing in the law but what we put there. We are responsible for electing the President who chooses the Supreme Court that decides these issues. In this sense, which is also the most profound level of the Absolute, the law is precisely what the Supreme Court says it is.

None of this analysis should be the least surprising. The fundamental and lasting message of German idealism is that no theory can definitively teach us how to decide cases. Instead, we are left to develop our own criteria for delimiting appropriate spheres for individual right and social goals. Schelling made this point at his inaugural lecture in Berlin.\(^{372}\) Of course, Schelling’s public eventually aban-

\(^{369}\) [I]n the State, as the actualization of concrete freedom, neither is the universal established in authority and carried into realization in abstraction from the particular interests, opinions, and volitions of individuals, nor do the latter live, as private persons, exclusive devotion to their special interests; rather, the universal enters concretely into their wills, and consciously determines the direction of their activity. “The tremendous strength and depth of the principle of modern states,” are derived from the circumstance that the principle of subjectivity, or private personality, is allowed to be carried to its fullest and extreme development, and is yet at the same time reduced into substantial harmony with, and made a vehicle of realization for, the universal Will of man.

G. Morris, supra note 1, at 82-83.

\(^{370}\) “Thus the universal must be furthered, but subjectivity on the other hand must attain its full and living development.” Philosophy of Right, supra note 1, para. 260A. The ability to explain satisfactorily this passage, together with the text of paragraph 260, is, in my view, one of the prerequisites for a successful interpretation of Hegel’s legal theory.

\(^{371}\) Dworkin is the master of this process. I am thinking not of his theoretical work but rather of what might be called his “Supreme Court opinions.” In a series of essays about some of the most difficult contemporary conflicts between individual right and social goals, he managed to reconcile the two perfectly on the basis of premises accepted by the Court, as though there were no conflict. See, e.g., R. Dworkin, Bakke’s Case: Are Quotas Unfair?, in A Matter of Principle 293 (1985). In this sense, Dworkin is the legal philosopher of our time. His is the voice with which the world spirit speaks. As Hegel once remarked about Napoleon at Jena, he is the world soul on horseback. Cf. Letter from G.W.F. Hegel to F.I. Niethammer (Oct. 13, 1806), in G. Hegel, The Letters 114 (C. Butler & C. Seller trans. 1984) (“I saw the Emperor—this world-soul—riding out of the city on reconnaissances. It is indeed a wonderful sensation to see such an individual, who, concentrated here at a single point, astride a horse, reaches out over the world and masters it.”).

\(^{372}\) Only profound inexperience, however, could imagine that the world is ready to accept every consequence that is guaranteed or presented to be the product of basic and rigorous study, every consequence without distinction. Otherwise, for example, the world, at times, would have to submit to an essentially unethical doctrine, or even to one that negates the basic principles of ethical life. But no one expects
doned him because of it. But that in no way impairs the validity of the insight.

This does not mean that there is nothing to be learned from Hegel or that we are no cleverer now than we were before we opened the *Philosophy of Right*. Our own ideas would be much richer if we ever fully absorbed everything Hegel had to teach us: his understanding that essence is fully displayed in appearance, his insight into theory construction, and perhaps, above all, his conception of freedom.373 Nothing, however, of any practical consequence can be derived directly from the *Philosophy of Right*. Every attempt to transform Hegel’s theoretical results into legal or political practice encounters the impassible obstacle of the unresolved integration of the various levels of the theory. Every attempt to use Hegel’s theory represents an implicit thesis about the relationship between individual rights, moral responsibility, and social goals. Every thesis about this relationship is the proponent’s own—and not Hegel’s—and therefore must stand or fall on its own merits, arguments, and reasoning. In other words, no suggestion for legal or political change can irrefutably be tied to the Absolute by means of Hegel’s theory. Transcendence, if it is to be found at all, must be found elsewhere.

Did Hegel not warn us of all of this as we first opened the *Philosophy of Right*? Did he not mention in so many words that what we would gain from reading his book was chiefly the understanding that the decisions are all up to us? What else could he possibly have meant when he wrote that the owl of Minerva spreads its wings only at the approach of dusk?374

III.

Suppose I am dead wrong. Suppose that Hegel’s theory allows the deduction of important practical consequences. Further, suppose that the consequences seem to be progressive elements of a much needed program for political and legal change, such that most right-
thinking human beings would agree with and applaud them. Finally, suppose that we wish to argue our agenda for change by demonstrating that our proposals may be derived directly from Hegel’s theory.

The question I wish to address in the remainder of this Article is whether this kind of derivation helps or hurts our cause. My contention is that, even if it were possible to do so, theory should not be used in this way. Turning our political program into a deduction from an all-encompassing, transcendent political theory moves us not one whit closer to our goals. There are two reasons for this. First, politics done under the sign of the Absolute often lead to disaster. Second, the transformation of a theory into a truth discourse from which practical consequences necessarily follow seems to me, at least, to be part of the problem rather than part of the solution. In this bicentenary of the storming of the Bastille—an event of great importance to Hegel—one way to examine these issues is to consider how two recent French writers, Jean Baudrillard and Michel Foucault, have reassessed the usefulness of the ideas of transcendance and truth. Unfortunately, there is no room here to develop these ideas in a convincing or even in a thoughtful manner. Nonetheless, it may be useful to recall that much remains to be discussed before proposals for social change may be derived from Hegel’s legal theory.

To make it clear at the outset, the problem is not with theory itself. There can be no escape from theory. All observation is theory laden. The problem is rather with universalizing theories that claim a privileged relationship to reality. Of course, the Absolute is necessary at times. Speculation in the fields of philosophy, art, and religion is usually meaningless unless done in the pursuit of unity, transcendece, and vision. But that does not mean that the Absolute is a necessary feature of all aspects of human endeavor. In other areas of thought, transcendance merely lends beauty to practical systematization. The French revolutionary imagination, for example, often resolved practical problems by means of gorgeously eccentric utopias. The republican calendar and the metric system are typical.375 Finally,

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375 The republican calendar was composed of 12 months, each with 30 days. Every month was divided into three ten-day periods called décades. Five days, the Sans-culottides, were set aside for national holidays at the end of each year. The calendar became law in 1793, but, despite the sublime names given to the months, the Gregorian calendar was restored in 1805. See French Revolution, in 11 Encyclopaedia Britannica 154, 170-71 (11th ed. 1910).

The metric system was enacted into law in France in 1801. It was designed to produce a harmonious system of weights and measures. The meter represents one ten-millionth part of the quadrant of the earth through Paris. The unit of volume is a cube one meter, or one-tenth of a meter, on each side. The unit of weight, the gram, is the weight of a cubic centimeter of water at four degrees centigrade. See Metric System, in 18 Encyclopaedia Britannica 299 (11th ed. 1911). The system has proved advantageous for systematization but has failed its...
transcendance is generally irrelevant in other areas and may even prove destructive if not employed with care. One such area is politics; another is the law. The problem with transcendence arises whenever the utopian vision produced by an all-encompassing theory becomes the standard by which political activity or a legal decision is judged. Utopian visions are easy to recognize: they erupt with a surfeit of knowledge. Visionaries are convinced that there is no more to the world than there is in their philosophy. They confidently trace all matter of practical difficulties back to a particular flaw or fundamental social cleavage. The cure generally involves the elimination of contradiction and the replacement of the social system in which we live with one based on superior principles.

The problem with these utopian visions is not merely that they are illusory. For many of us, our illusions are our fondest possessions, and we would not surrender them for the world. The problem is rather that these visions have nothing to do with either law or politics. What is wrong with these visions is the notion that politics is possible only after the world has been understood. Instead of admitting that we never can have enough knowledge to act without reproach and that we should correct our course on the basis of experience, utopian theorists believe that we have enough knowledge, that we can be certain, and that we really do not need to listen to one another. What is wrong with these visions is their idea that there is some other better society to strive for. The visionaries refuse to confront the problems of the present with the means presently available. They use the vision of a better society—of a substantive or procedural utopia—as an excuse for not fixing this one. What is wrong is their conception of politics as philosophy, the idea that politics is something other than a pragmatic attempt to reorganize this world in our time in a way that works. What is wrong is the belief that it is not enough to be rational: that politics is legitimate only if hooked to the star of the Absolute.

At least in recent times, as Jean Baudrillard suggests, the utopian dream. The current version of the system—the *système international*—does not include several frequently used metric measures among its seven base units. Beer and gasoline should be ordered in terms of cubic meters rather than liters. The metric ton should be expressed as a megagram. The metric system has also failed to conquer time—the day is still divided into minutes and hours and not kiloseconds. The National Bureau of Standards has taken the position that liters, minutes, hours and days "are used so widely that it is impractical to abandon them." See *Science and the Citizen: Meter by Meter*, Sci. Am., Mar. 1976, at 60A. Other units will be accepted under the metric system for a limited time for the same reason, including the nautical mile, the knot, the barn, and the gallon. Id. Moreover, many find it significantly easier to cook with cups and tablespoons than with grams.

376 "The absolute is nothing but the knowledge of those objects; the objects are nothing but what the absolute knows." W. James, supra note 133, at 21.
vision seems to have been chiefly a European disease. The utopias imagined by the Europeans are so structured that they could never possibly be attained. Even Marx’s vision is riddled with unreconciled and inherently irreconcilable contradiction. The Europeans do not live in modernity; they strive after it. All of the misfortune is in that striving. The Europeans have constructed a Left that sees the ideal society just ahead, and a Right that sees it just behind. As a result, they are tossed back and forth between war and revolution.

France promulgated fifteen constitutions in not much more than a century and a half. Germany started five utopian wars between the midpoint of the last century and the midpoint of this one. The Bolshevik Revolution is especially exemplary of the transcendent conception of politics. The system it created continues to chase its elusive vision down the corridors of one of the most inane and depraved social organizations ever conceived by the human mind. Moreover, these difficulties are not simply historical. The Green Party, the only recent German political movement with a pragmatic program, is in danger of destroying itself precisely because it cannot transcend its European heritage.

Thus transcendence, like everything else, must be used at the
right time and in the right place. America may be the cultural desert that Baudrillard describes, but it has the advantage of being relatively immune to visionary temptations. Disastrous forays, such as the war in Vietnam, are limited and generally self-correcting phenomena. America is a land of unredeemed pragmatics. There is no tradition of anything else. The groundwork for utopian theories is simply lacking in America. Thus, the current wave of American Hegelianism will wash through the sand, just as it did a century ago. As American intellectuals, we may continue to yearn for political utopia, but we should already begin to suspect that we are better off not taking these dreams too seriously.

There is a second reason why the effort to use Hegel's theory as a source for correct political inspiration is misguided. Attempts to derive prescriptions for change from Hegel's Philosophy of Right seem to imply that his theory may be used as a tool for distinguishing truth and true political practice on the one hand, from falsehood and moonshine on the other. The problem is not merely that nothing could have been farther from Hegel's mind than to have issued such prescriptions. The problem is that theories—though extremely useful when they systematize, structure, and reveal otherwise unnoticed connections and relationships—have a potential for tyranny when enshrined as truth. Of course, there is nothing absolutely true about any theory, even a prevailing theory in the natural sciences. Every theory is an organic combination of truths and errors, things that work and things that do not. It is not necessary for a theory to be true—

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383 See J. Baudrillard, supra note 377.
384 The fact that there is no labor party with a mass base in the United States seems to confirm this thesis. The question is posed in W. Sombart, Why Is There No Socialism in the United States? (P. Hocking & C. Husbands trans. 1976) (1st ed. 1906).
385 Many American intellectuals envy us and would like to recreate for themselves our ideal values, a history, and to relive the philosophical and Marxist pleasures of old Europe. . . .
386 [N]ot to imagine that the world turns towards us a readable face that we have only to decipher; it is not an accomplice to our knowledge; there is no prediscursive providence that weighs in our favor. Discourse should be conceived as a violence that we do to things, in any case as a practice that we impose on them . . . .
387 "[L]ike every other discipline, botany and medicine are composed of errors as well as truths, errors that are not residues or foreign bodies but which have a positive function, an historical efficacy, a role often inseparable from that of the truths." Id. at 33 (my translation).
by any definition—for us to be able to learn from it. Often much more can be learned from ideas that are apparently false than from those that are allegedly true. The difficulty is with the notion of truth itself, for it can be used not merely to separate perception that is apparently accurate from ideas that seemingly are not, but also can be used to distinguish between those who have the truth and those who are in error. When used in this way, truth serves principally the interests of those in possession of one particular truth. Foucault has demonstrated that many of the social institutions that were created by or survived the French Revolution were at least partially designed to divide the world into us and them, the well and the sick, the sane and the crazy, the law-abiding and the criminal.

Isn’t the real challenge to abandon these easy systems and to try to understand, instead, why we continue to need these truths and what we can do to free ourselves from them? Does anyone really still believe that these systems can promulgate the way to a better life? How long will it take us to learn that there is nowhere to hide?

388 After Austin, we understand better what there is in law that connects it with coercion and what there is in law that does not. This is his principal legacy. He provides one more instance in philosophy of our gaining something from a false statement that we might not have gained from a true one.

