

Ideas Under Fire

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## Chapter Seven

# "The Preface," Hegel's Legal Philosophy, and the Crises of His Time

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As far as the individual is concerned, each individual is in any case a *child of his time*; thus philosophy, too, is *its own time comprehended in thoughts*.<sup>1</sup>  
—Preface, Hegel's *Philosophy of Right*

Because of its conceptual density and complexity, the Preface to Hegel's *Philosophy of Right* is a fascinating microcosm of the crises of his times. Rightfully, this Preface (which merits honorific treatment as a proper noun) has been the focus of many diverse interpretations into Hegel's overall project. Not the least influential among these interpretations is the view that his theory of law was intended to be a political apology for the repression practiced by the Prussian state of his day. Others have held that the Preface prepared the theoretical ground for the authoritarian and imperialist National Socialist state in the twentieth century.<sup>2</sup> Still others have claimed that his *Philosophy of Right* justified war as a perfectly normal function of a sovereign state.<sup>3</sup> In various ways, each of these interpretations aligns Hegel's philosophy of law with the kind of oppressive regime that would suppress philosophy or put ideas under fire.

As I shall argue, Hegel endured a number of personal, political, and professional crises, all of which combined in a dense tissue of theory that places a special emphasis on rational self-reflection in the organic function and evolution of law. And the Preface is, in essence, an account of the role of a philosopher in such conditions as Hegel experienced. This chapter excavates the major influences to be discerned in the Preface of Hegel's *Philosophy of Right*, including many that are usually considered too "personal" to be

included in standard works of intellectual history. The present study elucidates how the Preface manifests the intellectual, political, and personal contexts of Hegel's own time.

My account is constructed in several discrete stages. First, I outline the central themes of the Preface. Second, I explicate the important notion of *Bildung* (often, but not always, translated as "education") in Hegel's legal theory—an Enlightenment notion that Hegel picked up in his own formal education. Third, I elaborate what Hegel considered to be the virtues and flaws in the theory of law formulated by Immanuel Kant (1724–1804)—in Hegel's opinion, the most important figure of the Enlightenment. Fourth, I explicate the notion of freedom, which was central to Hegel's theory of law—the significance of which was made clear to him in the events of the French Revolution (1789) and the Great Terror (1793–1794). Fifth, I review the local politics in Württemberg and Prussia before, during, and after Napoleon's humiliating defeat of the Austrians in 1807—another important factor in the composition of the Preface. Sixth, I review the personal and professional rivalries between Hegel and Jacob Friedrich Fries (1773–1843) and Friedrich Karl von Savigny (1779–1861), two representatives of what today we would call legal positivism; in particular, I explain how Hegel's personal animosity toward these two men shaped parts of the Preface. This complex mélange of influences and concerns explains why Hegel waited over twenty years to publicize his original theory of law. In elaborating an innovative, ambitious, and compelling theory of law, Hegel came to terms with several complex and interrelated cultural, political, and personal crises.

#### THE PREFACE: CENTRAL THEMES

Hegel was born in the state of Württemberg on August 27, 1770, and he died in November 1831. In 1818, Baron von Altenstein, in his capacity as minister of religious, educational and medical affairs, invited Hegel to the prestigious chair vacated by Fichte at Berlin University. When the initial invitation was declined, von Altenstein added further enticements, in particular, an appointment to the state examination board and travel grants, including one to a spa. Hegel then accepted the chair with all its attending benefits. With this development, Hegel had finally secured his first suitable academic position only a few years before turning fifty, and the conditions in which he lectured on legal philosophy and published the *Philosophy of Right* (which is based on these lectures) were the most favorable he enjoyed in his career.

In his "Inaugural Lecture" at Berlin in 1818, Hegel reflected on the prospects for a renaissance of philosophy.<sup>4</sup> Peace had returned to the former principalities. Under the influence of the cultural movement of romanticism, contemporary legal philosophers had claimed that legality (a parallel concept

to morality) rests in the strongest subjectivist beliefs of the populace or the historicist spirit of the people, that is, the *Völk*. Hegel regarded such theories of law with contempt. (In the Preface, he explains that "the urgency of the times" had conferred "such great importance on the *petty* interests of everyday life.") As a consequence of the subjectivism of his contemporaries, legal philosophy had come to exclude the "*political totality of national life and of the state*" which lie behind "the *high interests* of actuality."<sup>5</sup> The special targets of these remarks were historicism (as defended by Savigny) and subjectivism (as defended by Fries). But Hegel thought that the nonsubjectivist, formal theories of law of Kant and Fichte also excluded the "political totality of national life and of the state." As an alternative to these existing approaches to law, Hegel advocated and practiced what he called "philosophical jurisprudence." Presumably, Hegel thought philosophical jurisprudence points the way to a renaissance.

*Philosophy of Right* marks out the contours of "philosophical jurisprudence." The Preface, in particular, identifies the fundamental issues which Hegel believed his contemporaries and Kant had ignored. Foremost among these is the question, "How does a rule posited by an institutional source bind an individual human being who (as a legacy of the Enlightenment) is expected to have a critical regard for the substantive content of laws?" The focus is on the authorizing origin of legal rules, doctrines, and institutions, which is difficult to specify, when tradition no longer served that function. This concern still resonates in legal philosophy. Joseph Raz has recently declared that an investigation into the nature of law must answer the question "Why are human laws binding upon a human subject?"<sup>6</sup> This is to be differentiated from a question about the identity of law: "Who is a member of legality?" Hegel's Preface is concerned primarily with the first question about the nature of law. Its implications are worked out in the succeeding chapters of the *Philosophy of Right*. Over the course of the book he elucidates what he means by "ethical life" (*Sittlichkeit*), a wide-ranging concept that jurists today would consider to fall within the realm of extralegal "oughts."

While Hegel objected to subjectivists and formalists on other matters, he agreed with them that the source of binding law is its authority. Still, in his opinion, the most important concern of philosophical jurisprudence should be the truth of a rule, not the authority of its source. Instead of linking a particular rule to the appropriate source, such as the "customs of a community" or the "subjective beliefs of the populace," legal philosophy should examine the content of the rule. In particular, it must ask, what does the content of a law presuppose with respect to the relation between individual and the external objects that that individual projects as obstacles to freedom? This question makes salient a presupposition to which Hegel was most sensitive: namely, a concern to identify what drives the individual human being to

desire to be free of external constraints. The engine of this drive does not rest in posited legal rules or in the institutions of the state. Rather, it dwells in the consciousness of the individual, that is, in something that is ontologically prior to the existence of a legal order of rules and institutions. This drive within the individual consciousness is nothing less than the will of the human subject to be free. This Hegel calls "spirit" (*Geist*).

Today we tend to consider the main constraint on human freedom to be the state's laws and the state's acting officials. Legal philosophers usually conceive of the state as an objective entity that is "out there" poised to impose limits on individual free agents. Judges are accordingly characterized as impartial umpires who stand between the constraining state and the metaphysically free individual. Against this kind of account, Hegel insists that we consider the state and the state's posited laws to be our own creation. I am at home with the state's institutions, unwritten customs, and coded rules when I am conscious that they are *mine*. I bond experientially with those laws and institutions. When we collectively feel "at home" with our own laws and institutions, we come to realize that we alone are the main obstacles to our own freedom. It is the legal philosopher's task to pierce the veil of formal legal reasoning in the cause of advancing human freedom, that is, in articulating the implicit historically and culturally deeper structures of thought behind the veil, philosophical jurisprudence clears away the principal obstacle to human freedom—ignorance. In this way Hegelian legal philosophy discerns for us the ethos of our own particular society, thereby freeing us by transforming its external objectivity into subjective experience.

Even morality, as a system of rights and duties, is only one structure in the relation of the individual and the social whole of the ethos. To examine the ethos of social life one needs to identify the historically contingent assumptions and expectations of the populace, their relations with the rulers, the posited laws, social institutions (such as the family, corporations, and estates) and political institutions (such as the legislature, the courts, and juries). No jurist can rest content with surface doctrines, statutory provisions, and precedents. As Hegel puts it in the Preface,

The truth concerning *right, ethics, and the state* is at any rate as old as its exposition and promulgation in public law and in public morality and religion. What more does this truth require, inasmuch as the thinking mind [or spirit, *Geist*] is not content to possess it in this proximate manner?<sup>7</sup>

Any single rule is situated in an ethos which encompasses all of the religious, social, political, and legal assumptions and expectations of a community. This is what Hegel called "ethical life" (*Sittlichkeit*). One is free if one

participates in the ethical life such that the rules of a legislature or other institutions of the state do not seem to be external to one or to be objective constraints upon one's actions.

This concern for the aspiration of the individual to participate in the ethical life of the community differentiates "philosophical jurisprudence" from the dominant theories of law of Hegel's day. In his opinion, something profound had been missing in the traditional medieval theories that rested the legitimacy of law on its source in nature; in this account there is no role for the self-reflective and critical subject. Although the individual did bond with the community's customs, and although such customs were considered the authorizing origin of legality, the individual human subject had no authority to question such customs. Savigny, Hegel's contemporary, endorsed a version of the traditional view. According to Savigny, a customary law is valid simply by virtue of its historical origins, not because it is consistent with the ethos of current society. At the same time, although the individual might subjectively feel immediately at one with posited laws (perhaps out of deference to authority), such laws need not be coherent. The subjective bond between the individual and ethical life would thus be founded arbitrarily, not rationally. Hegel's dismissal of this subjectivist account is, more directly, a rejection of Fries. A third approach, the accounts of law from Kant and Fichte, do attempt to found laws rationally; however, in Hegel's opinion, Kant and Fichte portray laws as "shells" which have no relation to the self-conscious subject. Even though Kantian statutes emerge from the deliberation and reflection of rational subjects, a statute is for Hegel merely a surface appearance of legality. Genuine legality, Hegel maintains, is constituted by the consciousness of the subjects who deliberate and reflect about the law's content. Here we see Hegel trying to cut a path through a minefield of existing theories of law, carefully avoiding the mines his predecessors and contemporaries had stepped on. But it is not enough for him to simply identify where his rivals go wrong; he actually denounces them in violent and abusive terms.

Hegel had a deep-seated contempt for those Enlightenment figures who accepted statutes as constitutive of legality. And his own project, that is, to reconcile objective institutions and posited laws with the subjective consciousness of the finite human subject, led him to view the dominant legal forces of his day as enemies to himself and to freedom. In describing Hegel as feeling embattled and pugnacious, I am not simply dramatizing in order to add color to an otherwise dry, abstract debate. Hegel's own rhetoric encourages this interpretation. He was disposed to see the people and institutions arrayed against him as "enemies," and for this reason he makes liberal use of sarcasm and vivid metaphors to inveigh against his opponents, his adversaries, and the theoretical positions he rejects.

This does not mean that Hegel had no substantive objections to his rivals. His professional enemies, Fries and Savigny, posited a gap between theoretical knowledge and social-cultural practices. For Hegel, such a gap is untenable. The content of law is explicated by identifying the structure of consciousness by which the finite subject relates to statutes and customs. For this reason he took a profound interest in the collective experiences of a populace. These experiences involve religion as much as posited rules, and social institutions (such as the family) as much as official political institutions. Unlike the laws posited by subjectivism or historicism, "the spirit of reflection comes into play," and the diversity of posited laws "draws attention to the fact that they are not absolute."<sup>8</sup> *Recht* is derived from human beings as they are, rather than from nature or empty abstractions. But the jurist must not stop at what is institutionally posited by human agents.<sup>9</sup> Rather, laws, as *Recht*, are constituted from *thoughts* of the subject, and subjective structures are nested in objective institutions and codes.<sup>10</sup> As a consequence, Hegelian "philosophical jurisprudence" attempts to describe legality as it really functions rather than as a theoretical ideal (e.g., Kant) or as an expression of subjective experience (e.g., Fries). For Hegel a legal obligation is not grounded exclusively in the "is" of particular experience nor exclusively in the "ought" of moral principles, neither the subjective nor the objective. As he writes in the Preface, "What it needs is to be comprehended as well, so that the content which is already rational in itself may also gain a rational form and thereby appear justified to free thinking."<sup>11</sup> It is not sufficient that the rationality of the laws be manifest from the lofty perspective of a systematic theory; they must be manifest in the concrete practices of communal life.

Ultimately, Hegel's rivals are treated both as personal enemies and as enemies to the truth itself. In overlooking "the content" of legality they are disregarding the truth that makes a law binding. In making the content of law central to philosophical jurisprudence, Hegel concentrates on the relation of a posited rule or institution to the ethos of the community. More particularly, a rule is binding when one can understand how it relates to the implicit structure of consciousness in a particular epoch of a particular ethos of a community. The role of the philosopher is to study whether a rule or institution represents this ethos, contradicts it, or is disengaged from it. Hegel's classical studies led him to believe that the origin of legal authority of the Greek *polis* lay in bonding between the individual citizen and the *polis*. An Athenian, for example, felt an unmediated bond with the posited laws and institutions of the *polis*—so much so that the customs of the *polis* seemed entirely natural. The laws also seemed natural to this Athenian because—after the *polis* displaced the family as the pivotal social institution—the gods protected the laws of the *polis*.<sup>12</sup> In a sense, the golden age of Periclean Athens consti-

tuted, for Hegel, the *bon sauvage* of Enlightenment culture, for, despite the bond between the individual and the ethos of the *polis*, the ethos of Athens encouraged a critical regard for authority.

When customs or statutory rules are binding, the individual bonds with the institutions and posited laws, and these institutions and laws become, as it were, "second nature." Legal thinking, as a philosophical activity, "does not stop at what is *given*."<sup>13</sup> Even if the state posits a rule, this does not ensure that the rule is legal. Even if individuals contract to accept decisions by the state on their behalf, this is not sufficient for legal status. Nor does the positing of a rule by an institution of the state ensure that the rule is valid. A valid law must reflect the "inner feeling and the heart and by the testimony of the spirit itself."<sup>14</sup> Legality begins with the will. The will strives to overcome any external obstacle. When the will does this, it "exists." It is, in Hegel's terms, "actual." "Actuality" is understood as the content of legal rules and institutions. The individual is free when there is no longer an external object to constrain his/her agency. The content of the legal order of the state is, thus, manifest in the individual's self-consciousness and thereby constitutes an integral component of that person's self-determination.

Philosophical jurisprudence, it may be said, charts our consciousness of natural objects, posited rules, feelings, and conventions. The rationality of consciousness is not an abstract realm of "oughts" nor in a utopian vision of society. Rationality is nested in the "is," that is, the self-consciousness of a finite being. This view is encapsulated in the rightfully famous formula, "What is rational is actual."<sup>15</sup> Truth, according to Hegel, lies in the immanent, infinite structures of self-consciousness. My will comprehends external things—cars, houses, books, diamond rings, and other commodities (including university degrees and legal doctrines)—as part of my consciousness and to appropriate them as mine. Self-consciousness exemplifies and embodies what Hegel means by actuality. What is actual (as opposed to what is merely apparent) involves the deep structures of thought.

Hegel does not simply accept as "given" whatever seems rational in the sense of being rationally justifiable.<sup>16</sup> In his 1817–1818 lectures he states the point as follows: "The ethical life of the state is that freedom should *be*, that what is rational, the universal will, should happen as a necessity and have external existence" (PR 122 R171).<sup>17</sup> Again, in paragraph 134 of his 1817–1818 lectures he says,

what is rational must happen. . . . The fact that the constitution appears as something won by the struggles of one's forebears confers a higher authority on the external shape; however, genuine rationality is the inner authority, being in harmony with the national spirit. (PR 134R192)

And again, in the 1817–1818 lectures, “[w]hat is rational must *be*, but it has its existence [*Existenz*] only in the self-consciousness of a people” (PR 136R197). The “must” here is not an “ought” in the Kantian sense of being an abstractly derived rational duty. This “must” emerges in a dynamic social evolution that forever remains incomplete. Resisting such a historical process is irrational. Hence: “What is rational is actual; and what is actual is rational.”

#### HEGEL'S INTELLECTUAL HERITAGE (I): THE ENLIGHTENMENT

As a student at the seminary, Hegel was steeped in Enlightenment thought and literature. He read continental authors, such as Jean-Jacques Rousseau (1712–1778), Baron de Montesquieu (1689–1755), Johann Christoph Friedrich von Schiller (1759–1805), and Friedrich Heinrich Jacobi (1743–1819), as well as Plato. His teachers also introduced him to English Enlightenment authors. Schelling urged him to read Kant as a way to appreciate how the particular, social context manifests universals. As a consequence of this reading, Hegel came to privilege *Vernunft* (reason) over *Verstand* (understanding). *Verstand* involved apprehending the universality of concepts; it privileges intelligence, ingenuity, and the analysis of concepts. *Verstand* contrasts with *Vernunft*. The highest form of *Vernunft* is aesthetic. (Hegel takes his cue here from the central account of Beauty in Plato's *Symposium*—an account Socrates attributes to a priestess named Diotima.) *Vernunft* derives from bodily emotions, and it drives one to transcend fate, tradition, and legal status as posited in customary norms and statutes. *Vernunft* is value laden with subjective feelings and judgments. *Bildung*, or cultural education, is necessary for one to access *Vernunft*. Myths and the cultural beliefs of past societies (such as those from which Christianity originated) become the object of study. More generally—and this is his major contribution to the philosophy of law—Hegel explores *Vernunft* as the source of the implicit structures of consciousness that underlie how lawyers, judges, officials, and the public conceive the laws posited by the state's institutions.

In addition to the influence of Kant, Hölderlin, and Schelling (all of whom I shall discuss in a minute), Hegel was influenced by important proponents of romanticism. When he moved to Jena in 1800, Hegel immersed himself in the work of these authors while writing his *Phenomenology of Spirit*. One such author, for example, was J. G. Herder (1744–1803), who had been a student of Kant. At the same time, Hegel immersed himself in German romanticism, and the Schlegel brothers were in his social circle (until one of them began an affair with Schelling's outspoken wife). Influ-

enced by German romanticism, Hegel became critical of the formalism and preoccupation with *a priori* reasoning in the work of Kant, Fichte, and Schelling.

The Enlightenment values that were integral to Hegel's intellectual formation as an adolescent and young man get turned on their heads in the Preface to the *Philosophy of Right*. To name one prominent example of this, he draws from romantic subjectivism to criticize Kantian rationalism and objectivity. There were two stages in Kant's rationalist criticism of law: first, he undertook a critical examination of beliefs which had been traditionally accepted; second, he explained natural phenomena in terms of laws analogous to the law of gravity. The first phase of critical rationality sought to discover the empirical causes of social events; the second invoked transcendental causes to explain these events. For Hegel, the laws of nature cannot be changed for they operate outside the control of human beings; however, since human law is inextricably bound to human consciousness, it cannot originate in natural law, as Kant presupposes.<sup>18</sup> Accordingly, Hegel's philosophical jurisprudence begins from the position that law exists as an emanation from within human consciousness.<sup>19</sup> Legal status—whether we are talking about posited customary norms (Savigny), natural laws (Hobbes, Schelling), universal rules (Kant, Fichte), or posited subjectivist values (Fries)—is, thus, a function of culture.

#### HEGEL'S INTELLECTUAL HERITAGE (II): KANT

Of course, Kant was not simply one Enlightenment figure among many who influenced Hegel. Kant was the most important philosopher of the Enlightenment, and in Hegel's thought Kant had a special place all his own. Accordingly, the Preface identifies both where Hegel agrees with Kant and where he disagrees with him.

First, as the source of legal authority Kant displaced tradition with rational criticism. This displacement greatly reduced the external constraints on freedom posed by his predecessors' reverence for tradition. But it raised troublesome questions, too. How could one be free if rational criticism must coordinate with the natural, physical inclinations that motivate ordinary human action? In the Kantian scheme, a person is free only if his/her motives are abstracted from physical impulses and social-cultural circumstances. Impersonal duties (which are discovered by *a priori* reasoning) are the only appropriate motives in a free moral agent. As a consequence, the self-determining Kantian moral agent is not the empirically identifiable subject, loaded with myriad desires, feelings, inclinations, and a conscience. Kantian autonomy requires one to purge oneself of such impulses or to override them rationally. Morality consists in acting according to certain rules or maxims which

apply to any agent, regardless of the social and historical context. Morality demands that a person's inclinations be subordinated to such rules. Because human beings cannot act naturally, or nonrationally, without bodily inclinations corrupting motivation, Kantian moral rules are formulated as rational "oughts" or impersonal duties.

In contrast to morality, according to Kant, legality involves rules that are posited by a source of authority that is "out there"—that is, as something external to the "oughts" discovered by reason. As such, it originates in something external to the self-determining individual subject. Legality, because of its externality, must be enforced against the subjective values and opinions of the individual. A jurist applies such external rules; hence, these rules structure the empirical world. This application is the work of practical reason. But because of the unbridgeable gap between the *noumenal* realm on the one hand and the *phenomenal* on the other, practical reason (by which in the *Critique of Practical Reason* Kant understood the application of formal rules to facts) is, inevitably, imperfect. Quoting Kant, Hegel sums up the logical consequence of attributing the most secure knowledge to a source that is independent of experience: "[T]his involves abstracting from the whole content of knowledge (although truth is concerned with precisely this content), it is quite impossible and absurd to ask for a test of the truth of the content."<sup>20</sup>

The Preface hints at Hegel's criticism of Kant—hints so sketchy that he appears to oversimplify Kant at times. Hegel's silence with respect to Kant's *Critique of Judgment* and *Religion within the Limits of Reason Alone* is notable in this regard. Still, he takes Kant's philosophy of morality and of legality as representative of one structure of consciousness in the development of freedom. Nevertheless, Hegel saw a serious problem in the sharp division Kant draws between the *noumenal* and *phenomenal* realms of knowledge. Theoretically, this gap separates the abstract "person" from the prejudices and experiences of a finite being in socially and legally contingent circumstances. Kantian legality is concerned with the legal status of abstract persons. A wall separates the self-determining subject, with its myriad desires and needs and interests, from the abstract legal world of *a priori* legal reasoning and posited concepts. Kant's jurists were never to examine the truth of legal rules, for the truth of a rule lies in its content. The formal rules must be assessed by themselves without any regard for their content.

Let us concentrate on one example of how Hegel read Kant's separation of the self-determining subject from legality. In one very influential work, Kant advocated a league of nations as a means to ensure perpetual peace among states.<sup>21</sup> According to Kant, the international legal order is composed of states which act as monadic units, each one equal to the others. The states are expected to abide by universal rules posited by the league. The rules will regard each state as a person. States are said to possess dignity. And dignity, we know from Kant's *Introduction to the Metaphysics of Morals*, is not

reducible to a common standard against which one person may be compared with others (as, for example, commodities on the market are reducible to a monetary price). Because each political unit in the international community determines itself, international law will respect and protect the internal decisions of the rulers of each state.

According to Hegel, the problem with the Kantian account of international law is its formalism. For the league's "general will" presupposes that the universal rules are agreed upon contractually by these self-determining monadic units. If any party to the league wants to opt out of the league's universal rules, there is no stronger bond between the states to prevent them from doing so. Kant's view of a league of nations ignores the historical fact that rational institutions—in Hegel's sense of rationality as the development of a self-conscious subject—possess the capacity to regenerate themselves as if they were organs of an organism. The general will of the league is not simply a contractual agreement between its self-seeking member units—something from which they can secede voluntarily. The state will preserve itself only by recognizing those international rules to which it has consented, either expressly or implicitly. This it does through treaties.<sup>22</sup> The state is an organic unity when it relates, as an organism, to other states internationally. The state only exists externally if other subjects of the international legal order recognize it as a state. This recognition is only abstract and formulaic.

But as an organism whose preservation depends on cultivating freedom (that is, the self-conscious recognition of the human subject), states, like human subjects, pass through different structures of consciousness as they develop. The state, like Kant's abstract person whose rights are understood independently of any social or cultural context, must come to recognize its dependence upon other states: "Without relations with other states, the state can no more be an actual individual [*Individuum*] than an individual [*der Einzelne*] can be an actual person without a relationship [*Relation*] with other persons."<sup>23</sup> This kind of dependence is not simply a contractual relationship between two self-seeking persons. Rather, it emerges in the course of a progression through several structures of consciousness until the state bonds with the whole world as "world history." What Hegel calls "world history" consists of the progression of structures by which the finite human being attempts to reconcile his identity with his own state, on the one hand, and with the international legal order, on the other hand.<sup>24</sup> The self-contained, monadic state—even a great power such as the United States today—is thus understood as a mere passing moment in the development of self-consciousness.

For Kant, perpetual peace will be achieved when states contract into a league of nations. A treaty represents a complete legal form. But Hegel's focus on freedom as a *developed* condition characterizes the legal form of a league of nations a mere appearance. As Hegel writes in the Preface,

[S]ince the rational, which is synonymous with the Idea, becomes actual by entering into external existence [*Existenz*], it emerges in an infinite wealth of forms, appearances, and shapes and surrounds its core with a brightly coloured covering in which consciousness at first resides but which only the concept can penetrate in order to find the inner pulse, and detect its continued beat even within the external shapes.<sup>25</sup>

The important point to appreciate in this context is that, once again, Hegel expresses dissatisfaction with the jurist's traditional concern for the *authority* of a rule. The authority of a rule might rest on its institutional source, on a foundational contract between states or within a state, or on a foundational rule such as "majority will" or "legislative supremacy." The elements of an authoritative legal order are its rules and doctrines, both of which Hegel would call concepts. Consistency and logic naturally play an important role when such concepts are the object of analysis.<sup>26</sup> If the concepts are authoritative, the jurist's analysis justifies the exercise of a state's collective force. In this respect, international law is not different from domestic law.

For Hegel, it is not the authorizing source of the law that makes a rule binding on a human subject. Rather, it is truth. This concern for truth requires the individual to examine the content of a rule, whereas a Kantian concern for authority requires only that the form of the rule derive from a higher source in the hierarchy of institutional sources, such as a league of nations. The content of law incorporates implicit structures of consciousness of an actual, finite individual (not simply an abstract entity). The quest for truth demands that universal rules be consistent with a social ethos, and this ethos must accommodate human subjects as subjects of international law rather than as mere objects of state action. This approach to law encompasses religious practices, the social roles of men, women, and children, along with assumptions about torture, displaced persons, genocide, and much more. Such concerns are inextricably bound up with spatiotemporal experience, the very phenomenal realm that Kant excluded from legality.

Kant insisted that human knowledge could never gain access to concepts as *noumenal* things in themselves; indeed, the closest one could come to accessing concepts was in representations. But representations incorporate the values that are excluded from *a priori* reasoning. For this reason, Kant's theory of law leaves aside questions about the truth of a rule, seeking instead to identify its authoritative source. The exclusive concern for the authority of law precludes all consideration for the evolving structures of human consciousness that for Hegel constitute the content of law. The content of an international legal doctrine, for example, may presuppose that the state is a mere self-sufficient monad that can survive economically, socially, and politically without recognition from other states. Such a state may have an unlimited desire to acquire title to land and physical resources. The view of inter-

national law embodied in this structure of consciousness presupposes a conception of that state's freedom that disregards its dependence on other states and on individual human subjects.

Already one can discern how Hegel understands the sovereign state as much more than a mere shell to regulate and protect private economic or social interests. Rather, as with the Greek *polis*, the state embodies a reflective *Sittlichkeit* where individuals are bonded with the social practices, customs, and religious rituals—so much so that the populace feels that the laws and institutions manifest its self-determination. Hegel distinguishes between Kant's understanding of concepts (*Verstand*) and reason (*Vernunft* plus love). For Hegel, knowledge can be charted on a spectrum, with concepts on the left side and posited facts on the right. Kant, by contrast, allocates concepts and facts to two separate spheres. For Hegel, concepts intermingle with facts so that facts are no longer posited as *noumena*; rather, they are constituted conceptually. Facts are the product of *Vernunft* plus love. Intuitions infiltrate one's perception of nature and of culture, including posited laws and institutions. Reason, as Hegel elaborates in the *Phenomenology of Spirit*, shifts between subjectivity and objectivity. In this capacity, reason accommodates the felt experiences of the content of concepts; its function is not confined, as Kant suggests, to consider only empty forms *vis-à-vis* other empty forms. In light of this Kantian influence, Hegel's originality lies in his focus on the social-cultural bonding which gives the modern state its legitimacy.

### HEGEL'S INTELLECTUAL HERITAGE (III): THE FRENCH REVOLUTION AND THE TERROR OF SUBJECTIVITY

During Hegel's childhood, two revolutions took place, one in America (1776) and one in France (1789). As students at the theological seminary or *Stift* in Tübingen (1788–1793), Hegel, Hölderlin, and Schelling initially held hopes that the French Revolution would resurrect the *bon sauvage* of the primitive *Sittlichkeit* as exemplified by Periclean Athens.<sup>27</sup> The old social hierarchy and habitual deference to tradition had been broken. The disparate states in the territory of "France" were centralized. Socially, the new "Frenchman" was free in that he was equal to his fellow citizens and, as such, there was no other person to constrain his actions. Politically, the Frenchman was free because his will determined what laws the state would enact. Tradition no longer functioned to constrain social and political freedom. Freedom became Hegel's central preoccupation for the rest of his scholarly and professional career. Indeed, he now reread the whole history of European civilization as a quest for freedom. Slavery had tainted the freedom of the Greeks and the Romans: only some classes enjoyed freedom. Christianity had estab-



lished the individual as the subject of freedom. The French Revolution then widened the scope of freedom to include everyone. The freedom of the finite human subject was now the center of the legal order.

As we saw with regard to Kant's complex influence, Hegel extracted both positive and negative lessons from the revolution. First, for Hegel the revolution was a signal that European civilization had finally evolved to the point that the freedom of the ordinary person on the street really mattered. The Preface to the *Philosophy of Right* makes this theme central. Modernity now departed radically from antiquity precisely because of its emphasis on freedom. How could an individual be free, in the sense of being self-determined, when feudal doctrines determined the legal order of society? How could an individual be free when officials of the state arbitrarily imposed their subjective values onto the populace (using as a pretext, first, the inherited authority of the landed gentry, then, in the second decade of the nineteenth century, an appeal to the *Völk*)?

As we can see already, Hegel's account of freedom operates by retrieving structures of thought nested in distinct epochs of Western civilization. This retrieval is not a descriptive, anthropological study or an academic historical exercise, but an analytical investigation of the very conditions of freedom. What are the analytically distinct structures of consciousness that relate objective institutions to a self-determining consciousness?

The *Philosophy of Right* begins with a conception of the will which is purged of all natural and socially contingent causes. This is an analytical structure that is postulated as an opening move in Hegel's elaborate efforts of retrieval. According to this postulated structure, there are no external constraints on the will nor external causes that move it in one direction rather than another; thus unconstrained, the will is thought to be free. Legal obligations arise when the will binds itself. Even in this binding, the will determines itself. Accordingly, external institutions, such as the legislature, the court, the police, doctrines, and codes, are brought into the consciousness of the individual subject as products of its own thoughts, beliefs, and rational construction. In this way, the posited rules become one's own, and legality needs no foundation outside itself to authorize the posited rules. Legality does not need to appeal to Nature or the holy for its grounds any more. Nor, for that matter, does it require a superordinate rule of recognition or *Grundnorm*, nor a graduated hierarchy of institutions.

The finite individual's freedom manifests self-determination in several respects that are not excluded by this initial postulate. For one thing, the institutions (such as the family, civil society, and the state proper) provide the social conditions for the development of individual freedom. Because the individual has participated in these institutions and in the enactment of the laws, the individual, the institutions, and the laws are mutually constituted. It is as if the institutions and laws were the individual's own, and the individual

had voluntarily and consciously consented to them.<sup>28</sup> Whatever is actual is constituted from the individual's will to freedom.<sup>29</sup> The institutional whole, like an organism, reproduces itself through its authorizing origin in the will. In this context, philosophical jurisprudence functions independently of the individual's subjective feelings or the historical spirit of the *Völk*, on the one hand, and of the posited rules of objective institutional sources, on the other. The individual—not just the expert jurist—retrospectively identifies the structures of consciousness which emerged in the course of time as the social-historical content of customs and posited rules.

A second positive lesson Hegel derived from the French Revolution concerns the relationship between the legitimacy and the stability of a legal order. The sudden overthrow of the aristocracy and feudal legal order in France demonstrated that a constitutional structure would dissolve if it remained an empty shell and did not reflect or respond to the populace. It simply would not work for political leaders to cleanse a society of all its social institutions and posit new legal forms. Even a foundational text, a "Constitution" legitimized by a plebiscite, did not ensure stability and continuity. As he says in the Preface,

[N]o state or constitution had ever existed, but that we had *now* (and this "now" is of indefinite duration) to start right from the beginning, and that the ethical world had been waiting for such intellectual constructions, discoveries, and proofs as are *now* available.<sup>30</sup>

From this insight Hegel drew a further, very general lesson from the revolution, namely, that the content of a legal order must incorporate within itself the social assumptions and expectations set forth in the constitutional text. This gap between formal legality (the constitutional text) and actual social life (including the legal order) opens up a special role for the philosopher. The role of the philosopher (and the jurist) is to articulate how these spheres may be related to each other. The role of the jurist is to identify the concepts (i.e., rules and doctrines) which the populace and officials and institutions and laws share over time, to understand the inherited legal doctrines or rules as obstacles to freedom, and to recognize the immanent legal and constitutional structure of thought embedded in the social relations of human beings with each other. When a finite individual participates in this enterprise, the individual is no longer at odds with the authority of the legal order. The establishment of authority is secondary to the quest for truth. Legal legitimacy emerges from the bond between the individual with the state. In a note added to the Preface, Hegel explains how this relationship yields further insights: "the culture [*Bildung*] of the present age has taken a

new direction, and thought has adopted a leading role in the formation of values. . . . Correct thinking is knowing [*das Kennen*] and recognizing the thing, and our cognition should therefore be scientific."<sup>31</sup>

When events in France devolved into the Great Terror, the revolution turned into a cautionary lesson for Hegel. The revolution began while Hegel was a student at the theological seminary. Although Hegel and his friends initially welcomed it, he soon realized that something had gone dreadfully wrong, and memories of the Terror stayed with him for the remainder of his life. The historicism of Savigny reminded him of the rationale behind the Terror. Fries's *Logic* and Fries's speech at the Wartburg Festival (to be discussed below) were further reminders of the Terror. Indeed, subjectivist romanticism in the works of Fries and Savigny helped him appreciate how crucial the rule of law is for objective freedom. Finally, in Fichte's account of abstract rights, he noticed that it failed to account for established social and political institutions, such as the landed gentry prior to the revolution. No doubt, these "reminders" inspired some of the vitriolic rhetoric to be found in the Preface.

The French Revolution encouraged Hegel to believe that freedom involves self-determination. By contrast, the prophet of French Revolutionary freedom, Rousseau, had claimed that the individual's will in a prepolitical condition (the state of nature) was incorporated into the historically contingent civil society.<sup>32</sup> Rousseau maintained that the prepolitical standards were corrupted once civil society took formation. In a legal order, persons are equal because they are abstract entities in the prepolitical state of nature. The abstract, natural person Rousseau imagines is untainted by all social differences.<sup>33</sup> The crux of the problem, for Hegel, is that a person conceived of in such an abstract fashion lacks the social and historical context to ground a legal system. Why would any monadic abstract person desire to recognize any other monad in the civil society?

The only dependence that may hold between one abstract person and another abstract person is when they are parties to a contract. Such a contract can produce the mere appearance of the general will between the two. As Hegel read Rousseau, the social contract is merely a shell that formally binds the self-interests of separate individuals by hovering over them. Conflict is inevitable because the individual subjective feelings that ground the contract are bound to clash and eclipse the general will that is supposed to unify them. The absence of any concrete relations between these individuals is precisely what led to the "fury of destruction" that was the Terror.

## CORRUPTION, NEPOTISM, AND HIERARCHY IN LOCAL POLITICS

Against the political background of optimism and hope for freedom brought on by the French Revolution, Hegel personally experienced bitter alienation due to corruption, nepotism, and class divisions in the Württemberg and Prussian governments. The politics of "Germany" (which had not yet been unified) differed radically from the sovereign states that emerged in France, Spain, and England after the *Treaty of Westphalia* (1648). Before Napoleon began reorganizing the map of Europe, Germany was several hundred principalities, some only small villages. The "Holy Roman Empire" ruled German territory through the local nobles. Hegel describes his dissatisfaction with this political arrangement in his 1797 essay "The German Constitution," which he begins with the famous assertion that "Germany is no longer a state."

Napoleon brought Prussia to utter collapse at the Battle of Jena in 1806. Hegel privately supported the French in this endeavor, and he described Napoleon as "the great professor of constitutional law."<sup>34</sup> For him, Napoleon represented the codification of laws and, more generally, the rational control of citizens over their own destiny, which for Hegel was tantamount to freedom. Hegel hoped for Prussia to emulate the centralization of government instituted by Napoleon in France, along with the institution of a merit-based bureaucracy, the centrality of reason in public deliberation, and the Napoleonic Code of law. In a letter to Christian G. Zellman dated January 27, 1807, he expresses these hopes: with Napoleon's victory, "education (*Bildung*) is triumphing over rudeness (*Roheit*) and spirit over spiritless understanding and mere cleverness (*Klugerei*), Science (*Wissenschaft*) alone is the theodicy."<sup>35</sup> A revolution in cultural consciousness had elevated philosophy to a guiding position in political life. In an 1806 lecture he said,

Through consciousness spirit intervenes in the way the world is ruled. This is its infinite tool, then there are bayonets, cannon, bodies. But the banner [of philosophy] and the soul of its commander is spirit. Neither bayonets, nor money, neither this trick nor that, are the ruler. They are necessary like the cogs and wheels in a clock, but their soul is time and spirit that subordinates matter to its laws. An *Illiad* is not thrown together at random, neither is a great deed composed of bayonets and cannon: it is spirit that is the composer.<sup>36</sup>

Despite these hopes, Napoleon's victory led to an economic and social collapse so devastating that the University of Jena closed its doors.

The Prussian state itself collapsed after Napoleon defeated it in 1808. This did have a positive side effect in that Hegel could now imagine how German principalities might join together into a secular state. Baron Heinrich Karl vom Stein (1757–1831), chief minister of a reform government in Prus-

sia in 1807, attempted to institute a constitutional monarchy. Stein abolished serfdom, reorganized the government and army on the basis of merit, and initiated the beginnings of a free market. He also constitutionalized liberal legal freedoms. Stein was particularly concerned to ensure the civil equality of Jews and non-Jews. However, Stein's efforts soon met with resistance, and he was dismissed in 1810; he then exiled himself to Russia. Karl August von Hardenberg (1750–1822) succeeded Stein and continued these reforms.

The ideals of the constitutional reform movement of Stein and von Hardenberg made a lasting impression on Hegel as he continued work on elaborating his account of law. After the wave of nationalism and xenophobia in 1813–1815, the King of Württemberg, Friedrich II (1754–1816), attempted to institute a new set of constitutional reforms. Friedrich II wished to establish legal equality constitutionally, to repeal restrictions against Catholics, and to open opportunities for Jews to participate in government. Without consulting anyone he instituted a new liberal constitution in 1815, expecting the Diet to approve it. The Diet, dominated by the estates and the Protestant Church, rejected the constitution. Political preference for the "old" constitution was thus solidified. Friedrich II died on October 30, 1816. Famine spread in 1817. The new King, Wilhelm I, instituted a new constitution in 1817. He liberalized freedom of the press and (against the objections of the old landed estates) aimed to create a new sovereign state of Württemberg. However, political repression set in at that time, culminating in the second wave of romantic nationalism and xenophobia during 1815–1817 and reaching a nadir (for the time being) in the Wartburg Festival of 1819.

When the Congress of Vienna proposed a German confederation in 1815, nationalism and anti-Semitism erupted in the student fraternities (*Burschenschaften*). Jewish and foreign students had been excluded from membership in the fraternities, but the most serious eruption of xenophobia and anti-Semitism there came during the celebration of Luther's translation of the Bible into German at Wartburg Castle on October 18–19, 1817. There were patriotic speeches and books were burned, including the *Code Napoleon*, the *German Police Laws*, and "un-German" books such as those of the reactionary Karl Ludwig von Haller. By then, Fries was the leader of the new romanticist political movement.<sup>37</sup> In 1816 he had published an anti-Semitic pamphlet in which he had attacked "Jewishness" because, he alleged, it formed a state within the state. On March 23, 1819, at Wartburg Castle, Fries, a liberal and advocate for a republican constitution, delivered an inflammatory speech maintaining that the emotional and nationalistic life of the *Volk* is the authority behind posited laws.<sup>38</sup> In the wake of this speech there was violence. An ultrareactionary playwright, August von Kotzebue, was assassinated by a radical member of the *Burschenschaft*, Karl Ludwig Sand, on March 23, 1819.<sup>39</sup> Karl von Ibell, an official of the *Länder*, was also the target of an assassination attempt.

After Prince Metternich's Karlsbad Decrees imposed severe restrictions on universities in 1819, Hegel withdrew the *Philosophy of Right* from his publisher. The decrees imposed the detention of students and a general repression of legal and political rights, including freedom of the press and the detention of students. Fries was dismissed from Jena (though reinstated in 1824). From Prussia, Metternich manipulated public perception of the reform movement of the south, turning it into an object of fear. Several of Hegel's students were detained and, interestingly, Hegel supported all of them.<sup>40</sup>

It is crucial to appreciate that Hegel had completed a draft of the *Philosophy of Right* before the Karlsbad Decrees in August 1819. The decrees authorized the dismissal of all university professors who were considered to have "an influence on the minds of the young through the propagation of corrupt doctrines, hostile to public order and peace or subversive of the principles of the existing political institutions."<sup>41</sup> Only after Hegel initially withdrew the book did he write the Preface. He then composed this part of the book with the expectation that the censors were likely to read *only* the Preface. Thus, his attack on Fries in the Preface as "[a] leader of this superficial brigade of so-called philosophers" served two functions: first, it was a retaliation on Fries for his role in banishing Hegel for years in the academic wilderness (on which, see below); second, not only did it smooth the book's passage past the censors, it ingratiated Hegel with the authorities.

Hegel says in the Preface that by fomenting student unrest at the Wartburg Festival, academics, such as Fries, had broken the trust which the state had bestowed upon professors. The great endeavor of philosophy had been so successfully usurped by the sophistry of a brigand that "it has almost become dishonorable to speak philosophically about the state."<sup>42</sup> The situation was so bad that "right-minded men cannot be blamed if they grow impatient as soon as they hear talk of a philosophical science of the state."<sup>43</sup> Even more understandable, Hegel continues, there was the prospect that governments would direct their attention (as they had, presumably, with recent state repressions) to what was being taught as philosophy. University teaching was no longer practiced, as in Greece, as a private art, "but has a public existence [*Existenz*], impinging upon the public, especially—or solely—in the service of the state."<sup>44</sup> Indeed, Hegel maintained that, due to indifference toward philosophy, governments had retained teaching posts in philosophy "only for reasons of tradition"; by contrast, in France, "to the best of my knowledge chairs of metaphysics at least have been allowed to lapse."<sup>45</sup> Unfortunately, philosophers had not repaid the state for being entrusted with responsibility. If, however, the problem is that governments have been indifferent to the quality of education, they have been penalized for their indifference by "the resultant decay of thorough knowledge [*Erkenntnis*]."<sup>46</sup> Hegel placed blame for the government's authoritarian reaction against students on Fries himself. Fries represented mediocrity, in Hegel's

opinion. Although Hegel felt that Napoleon's reforms could not be undone, such mediocrity had tragically undermined Napoleon's effort to create a new world.

Hegel used the Preface as an opportunity to attack his lifelong enemy, Fries, who had blocked reviews of his *Logic* six years earlier and who had beaten out Hegel for the chair at Heidelberg in 1804 (fifteen years earlier). Motives for the attack on Fries appear to have been largely personal. Hegel was himself one of the official professorial sponsors of the *Burschenschaften*, and several of his own students were at Wartburg. Moreover, he might have ingratiated himself with officials just as well by attacking the reactionary Haller (whose books were burned) in the Preface rather than the liberal republican Fries. Also, Hegel continued his friendship with F. H. Jacobi (1743–1819), who had condemned the French Revolution and complained that the romantic movement had criticized the Enlightenment but offered nothing to replace it. In fact, Fries's philosophy of law agreed in several respects with Hegel's, especially the idea that the laws should come "from below."<sup>47</sup> But Hegel could not forget how Fries had undermined his career, and he used the opportunity of the Preface to embarrass Fries for his role at the Wartburg Festival. "Herr Fries" (not Dr. Fries, nor Professor Fries, nor Professor Dr. Fries) is described by Hegel as having exhibited "the temerity, at a solemn public occasion which has since become notorious" (namely, the Wartburg Festival in 1819) to proclaim that public affairs should "gain its *life from below, from the people itself*" in the form of "living societies steadfastly united by the sacred bond of friendship."<sup>48</sup> Hegel proceeds to associate Fries implicitly with the shallow, formalistic philosophy of law based on *Vert-stand*.

The big question that Hegel saw at this early date was the one we raised earlier, that is, "Why are the laws of such a sovereign state binding upon finite individuals who are subject to the state's laws and institutions?" The Holy Roman Empire was really a "collection of independent and essentially sovereign states" and not a sovereign state, yet it claimed title to foreign lands.<sup>49</sup> The key to legitimizing state laws rested on the subjective determination of the individual to the state's institutions and laws. In the international legal order a sovereign state is free *vis-à-vis* all other states (as was explained by Grotius, whom Hegel cites on several occasions). Given that the modern state is free *vis-à-vis* other states, how then is an individual citizen free within the state? And what renders the sovereign state's laws binding on such subjects?

In this light, it is interesting that Hegel rejects all the most popular approaches to law of his day. He rejects the formalism of Kant and Fichte, the subjectivism of Fries, and the historicism of Savigny. These predecessors and rivals had no interest in the content of posited laws. According to Hegel, however, state laws embody the subjective consciousness manifested as the

substantive content of the ethos of the community. So, too, Hegel rejects the abstract approach of natural law theorists, such as Hobbes, who base law on universal natural rights. According to Hegel, reason directs the jurist to examine the social-cultural practices of individuals as constitutive of the state's laws—an approach that is exemplified in Aristotle's *Constitution of Athens*. When such individual practices are the consequence of self-conscious deliberation and when they embody the whole, we achieve an absolute *Sittlichkeit* in contrast with a relative *Sittlichkeit* in which, as in civil society, the individual does not entirely bond with the whole. Against the background of his hostility to Fries's positivism and the natural rights of Hobbes, Hegel argues in "The German Constitution" that the political organization of the Holy Roman Empire was hopelessly backward. Hegel feared that Germans—like Jews, as Fries and Savigny would later claim—would remain forever stateless.<sup>50</sup>

#### HEGEL'S FRIENDS

From the start, Hegel, Hölderlin, and Schelling felt alienated from the institutional authorities that dominated life at the *Stilft*. The seminary seemed weighed down by tradition and hierarchy, which only inflamed their rebellious tendencies. The teachers seemed to represent years of corruption and the superficial appearances of traditional feudal society.<sup>51</sup> Both Hegel and Hölderlin were exasperated with the provincialism and corruption of government in Württemberg. According to Harris, Hegel felt that he had wasted his time at the *Stilft*.<sup>52</sup> Still, it was there that he formed several important relationships.

The poet Hölderlin's philosophical influence on Hegel was immense.<sup>53</sup> He persuaded Hegel that objects—that which is other than oneself—did not have to dominate the self. Indeed, for Hölderlin, there was an exit from the trap of a subjectivity/objectivity dichotomy: love. The two talked about this when both were young students at the *Stilft* and later when they were in Frankfurt. Through Hölderlin, Hegel came to appreciate that Kant had been dismissive about love and sympathy, which Kant had call "pathological motives" of human behavior. Hölderlin encouraged Hegel to understand love as establishing a prereflective unity of subject and object.<sup>54</sup> Thus, love reconciles the objective to subjectivity.<sup>55</sup> This view recalls what Socrates says in Plato's *Symposium* (views which Socrates attributes to Diotima). According to this account, love precedes the understanding of concepts (or *Verstand*). In the *Phenomenology of Spirit* this conception of the subjectivism of love makes an appearance as Hölderlin's appeal to the "Beautiful Soul." In love I fuse with the other, he says. Love experientially precedes reflection. Love is on a different plane of experience from *Vernunft*.<sup>56</sup> Presubjective, preobjec-

tive love precedes the existence of artificial objects such as castles or books or buggies, and natural objects such as a trees or flowers or birds. The division between the subjective and objective is logically and experientially posterior to preobjective and presubjective existence. Most importantly for our purposes, love preexists a legal order. Hölderlin's influence on Hegel in the early 1790s showed itself in Hegel's earliest writings. By the early 1800s, in "Natural Law and Its Place in Practical Philosophy" (1802–1803), Hegel adopted the idea of a presubjective and prereflective love as the originating source of legal knowledge.<sup>57</sup>

Due to recurrent bouts of depression, Hegel seldom remained in a position for long. But there was one sustained period when he was at the cultural center of Germany. I am referring to his stay at Jena from 1800 until 1807. Jena was indeed the center of German cultural life and, in particular, the creative center of German romanticism. Hegel would regularly meet and talk with Goethe, Schelling, Frederick Schlegel, Schleiermacher, Wieland, and Herder. The romantics, the Schlegel brothers, and Novalis provided special stimulus during the first two years at Jena. During this time Hegel was Schelling's *Privatdozent* (an unsalaried teaching and research assistant). Schelling's guiding idea was that the subject could be reconciled with the objective through nature. Together Hegel and Schelling edited the *Critical Journal of Philosophy* from 1801 until 1803. In order to gain a license to teach, Hegel had to write a "habilitation," and his was "On the Orbit of the Planets." Hegel was ultimately granted the habitation, albeit not without some political intrigue at the university. He thereupon became an unsalaried "extraordinary lecturer" (for which he received compensation based on the number of students who attended his lectures). He then wrote *The Difference between Fichte's and Schelling's Systems of Philosophy* (1801), and—not surprisingly—he sided with Schelling.

Still, as we saw above when looking at Hegel's intellectual relationship to Kant, in his personal relationship to Schelling, Hölderlin, the Schlegels, and others, Hegel never absorbed an influence without transforming it at the same time. In this case, he worked against the influence of the romantic figures named above and his friend Hölderlin by concentrating his attention on the ethos or ethical life of a community. He maintained that posited rules and morality were mere phases. Kant's emphasis upon moral duty and rights—something which is prevalent in jurisprudential writings to the present—was, for Hegel, only one structure of consciousness that had developed in Western civilization. Hegel had a term for this particular moment in the development of freedom: *moralität*. *Moralität* institutionalized abstract right into a framework which allows individuals to act according to universal rules and directs them to treat other abstract persons as equals, independently of the social, economic, or intellectual merit accruing to individuals as concrete subjects.

## PERSONAL LIFE EXPERIENCE

We are now in a position to draw together the individual strands of Hegel's thought and to consider their origins synoptically. This will help us explore an issue that any study of Hegel must deal with at some point: What drove such extraordinarily broad and ambitious speculations? What inspired his comparative analysis of the Roman, Persian, Chinese, Greek, Islamic, and Germanic traditions? Was it his personal desire to reform the world? Was it unbridled intellectual curiosity? Was it the need for professional recognition? Surprisingly, it seems that one major factor, if not the most important one, was recurrent bouts of depression.<sup>58</sup> We know now that depression haunted him during much of his time as a private tutor for three years in Berne (1793–1796). It also dominated his time as a private tutor in Frankfurt (1797–1800), as an unsalaried *Privatdozent* in Jena (1801–1807), as a newspaper editor in Bamberg (1807), and at the end of his appointment as a headmaster at Nüremberg (1808–1816). Generally, depression marked his unhappiness as a private tutor, his continued isolation from the center of cultural life, the early death of his close friend Hölderlin, his frustration at being ignored for his intellectual contributions, doubts about his own capacities, and the realization of his own finite being. Not the least cause of his unhappiness was the promotion of his less experienced archrival, Fries, from the position of *Privatdozent* to a full professoriate at Heidelberg in 1818.<sup>59</sup>

Hegel's problems with depression began early in his career, which began with a bad start soon after he left the *Stilft*. In Germany at this time, estate owners and nobles were grasping to retain their traditional power as the Holy Roman Empire was dissolving. Hegel, having accepted Enlightenment lessons about the importance of critical rationality and freedom, had the misfortune of becoming the live-in tutor to a family in Berne (1793–1796) who epitomized the shallow upper-class life that the French Revolution sought to overthrow. After he related his Berne experiences to Hölderlin, Hölderlin obtained a private tutorship for him in Frankfurt, where Hölderlin lived. For a brief period, in 1796, Hegel regained his enthusiasm for life with his friend.

Hegel became depressed again in Frankfurt (1797–1800). No doubt, this bout of depression was brought on by his father's death and Hölderlin's deepening mental crises. Additionally, in 1800, Hegel was thirty years old, and his financial and professional position was not secure: no longer a young man, he had not published a book, had not attained a university position, and had little money except a small bequeathal from his father. He was distressed about the lack of public recognition for his potential and his intellectual contributions. His own obscurity and professional difficulties contrasted with his younger friend from Tübingen, Schelling; Schelling was five years Hegel's junior but in the 1790s was already widely known.<sup>60</sup> Pinkard suggests that Hegel came to realize at this time that he had been living in a daydream

and that his prospects of professional success were fading.<sup>61</sup> Hegel implored Schelling to find him a job in Bamberg. Instead, Schelling told him to come to Jena to be his unsalaried research assistant (*Privatdozent*), a position which remains in Germany today for students who wish to become university professors. Without the small inheritance from his late father, he would not have been able to take the position.

Hegel was aware that he frequently experienced depression during his creative period in Jena. But instead of becoming withdrawn and passive, he turned the depression into one of the most creative works in Western culture since the Greeks, namely, the *Phenomenology of Spirit* (1806). Hegel later called the period at Jena his “turning point.”<sup>62</sup> Pinkard suggests that a less ambitious academic would have been satisfied to publish his existing self-contained manuscripts in an anthology with a flashy title. Not Hegel. Instead, emotionally depressed, estranged from both political and professorial power, financially insecure, and prone to jealousy and anger over the success of a “superficial,” self-styled philosopher like Fries (who possessed a chair in “philosophy” by this time), Hegel pressed on with work on the manuscript of the *Phenomenology*. He embarked on writing the book in part because the publisher promised advances for submitting parts of the manuscript. He even rushed writing the second half of this classic in order to receive an advance on the sales.<sup>63</sup> To add to his financial stress—at least, one can speculate that it was stressful—Hegel was carrying on a sexual liaison with his maid, Christina Charlotte Johnson Burckhardt, who, in turn, produced a son on February 5, 1807 (Ludwig Fischer, who died in 1831), two weeks after Hegel completed the *Phenomenology of Spirit* (for which he wrote the preface last). Christina had produced two children from two other men. Hegel initially felt obligated to “that Burckhardt woman” as he was later to call her just before his marriage to Marie von Tucher.<sup>64</sup> H. S. Harris reports that Hegel saw no problem with this illegitimate child.<sup>65</sup>

Dogged by depression (and financial distress), Hegel left Jena for Bamberg. There, with the aid of his patron Niethammer, he became the newspaper editor from March 1807 until December 1808. As editor, he emphasized that in order to be legitimate, laws needed to be anchored in the social practices of individuals; furthermore, unless individuals bonded with the laws and institutions, the legal order would be the outcome of interest-group politics. In the *Philosophy of Right* this view would be developed as his account of civil society.

In December 1808, Hegel moved to Nüremberg. Niethammer, Hegel’s loyal supporter and now the central commissioner for education and consistory in Munich, appointed him the rector (headmaster) of the leading gymnasium of Prussia. Here Hegel put his notion of *Bildung* into practice by instituting a well-rounded education in the classics and philosophy.<sup>66</sup> He incorpo-

rated philosophy into the curriculum systematically. It was during this period, while serving as headmaster (1812–1816), that he wrote and published his *Logic*.

One might have thought that Hegel’s bouts of depression would end when, in 1811, he married Marie von Tucher, the daughter of a local merchant and twenty years his junior. Pinkard and H. S. Harris note that he did finally enjoy some peace of mind. But, as he confides in correspondence with his future wife in the summer of 1811, happiness in life includes a bit of melancholy. He writes: “[I]n nonsuperficial natures every sensation of happiness is connected with a sensation of melancholy.”<sup>67</sup> An immersion in thought and the act of thinking, he goes on to say, displace God and religion as the avenue of salvation for a philosopher such as himself.

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## CONCLUSION

Looking back from the vantage point of Hegel’s biography, we can see that his classic, the *Philosophy of Right*, did not come out of the blue, nor is his Preface a mere summary of the philosophic issues which the book addresses.

Using the vocabulary and ideas that emerged from the subject’s never-ending quest for objectivity (as described by his friend Schelling), he synthesized an account of the primacy of love (as urged by another friend, Hölderlin). Love is central to Hegel’s account. According to Hölderlin, pre-reflective love is the indispensable nexus of the subject with the objective

and that his prospects of professional success were fading.<sup>61</sup> Hegel implored Schelling to find him a job in Bamberg. Instead, Schelling told him to come to Jena to be his unsalaried research assistant (*Privatdozent*), a position which remains in Germany today for students who wish to become university professors. Without the small inheritance from his late father, he would not have been able to take the position.

Hegel was aware that he frequently experienced depression during his creative period in Jena. But instead of becoming withdrawn and passive, he turned the depression into one of the most creative works in Western culture since the Greeks, namely, the *Phenomenology of Spirit* (1806). Hegel later called the period at Jena his "turning point."<sup>62</sup> Pinkard suggests that a less ambitious academic would have been satisfied to publish his existing self-contained manuscripts in an anthology with a flashy title. Not Hegel. Instead, emotionally depressed, estranged from both political and professorial power, financially insecure, and prone to jealousy and anger over the success of a "superficial," self-styled philosopher like Fries (who possessed a chair in "philosophy" by this time), Hegel pressed on with work on the manuscript of the *Phenomenology*. He embarked on writing the book in part because the publisher promised advances for submitting parts of the manuscript. He even rushed writing the second half of this classic in order to receive an advance on the sales.<sup>63</sup> To add to his financial stress—at least, one can speculate that it was stressful—Hegel was carrying on a sexual liaison with his maid, Christina Charlotte Johnson Burckhardt, who, in turn, produced a son on February 5, 1807 (Ludwig Fischer, who died in 1831), two weeks after Hegel completed the *Phenomenology of Spirit* (for which he wrote the preface last). Christina had produced two children from two other men. Hegel initially felt obligated to "that Burkhardt woman" as he was later to call her just before his marriage to Marie von Tucher.<sup>64</sup> H. S. Harris reports that Hegel saw no problem with this illegitimate child.<sup>65</sup>

Dogged by depression (and financial distress), Hegel left Jena for Bamberg. There, with the aid of his patron Niethammer, he became the newspaper editor from March 1807 until December 1808. As editor, he emphasized that in order to be legitimate, laws needed to be anchored in the social practices of individuals; furthermore, unless individuals bonded with the laws and institutions, the legal order would be the outcome of interest-group politics. In the *Philosophy of Right* this view would be developed as his account of civil society.

In December 1808, Hegel moved to Nuremberg. Niethammer, Hegel's loyal supporter and now the central commissioner for education and consistency in Munich, appointed him the rector (headmaster) of the leading gymnasium of Prussia. Here Hegel put his notion of *Bildung* into practice by instituting a well-rounded education in the classics and philosophy.<sup>66</sup> He incorpo-

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laws and institutions of a modern state. Love preexists the social-cultural construction of the dichotomy between subject and object, between is and ought. In concert with the influence of his two close university friends, Hegel grounded the subject-object relation in spirit (*Geist*). By "spirit," he means the unarticulated drive of the subject to become self-conscious. This combination of ideas helps define his philosophy of law against an array of historical and contemporary rivals. And the self-consciousness of spirit contrasts with the classical Greek belief in an uncontrolled and uncontrollable fate—or of the gods of the *polis*. It also contrasts with the emphasis on positive law in Roman times. This contrast between modernity and earlier epochs runs parallel with Hegel's personal and theoretical objections to Fries's subjectivism (which accepted the emotional beliefs of the subject as a "given"), to Savigny's historicism (which accepted the customary norms of the *Volk*), and to Kant's formalism (which separated legality from moral duties in a phenomenal world).

Hegel also speaks to the philosophy of law in our own time, especially to the dominant theories of Anglo-American jurisprudence which focus on the externality of the authorizing origin of binding norms: institutional sources (Raz), the rule of recognition (Hart), the *Grundnorm* (Kelsen), and the law beyond the law (Dworkin). In these contemporary cases, what Hegel characterizes as the drive to become self-conscious (or spirit) constitutes the ethos of the modern legal order. Moreover, Hegel traces the journey of spirit in the evolution of law from earliest times. Spirit is never content with any particular structure embedded in consciousness. The authority of a modern legal order grows from within human consciousness. Hegel expresses the point in the Preface to the *Philosophy of Right* as follows:

The *ethical world*, on the other hand, the state, or reason as it actualizes itself in the element of self-consciousness, is not supposed to be happy in the knowledge that it is reason itself which has in fact gained power and authority [*Gewalt*] within this element, and which asserts itself there and remains inherent within it.<sup>69</sup>

Laws lie immanent within the social life of a particular society. The philosopher's role is to recognize and articulate the implied structures of consciousness nested in the posited rules and institutions of any particular society

Hegel's originality and professional success came at great personal cost. Soon after publishing the *Phenomenology of Spirit* (1806), a friendship dating back to his youth dissolved when Schelling could not identify his own legal theory in Hegel's *Phenomenology of Spirit*. Soon after that Hegel lost his friend Hölderlin to madness. Moreover, he suffered from ongoing financial insecurity, repeated failures over many years to obtain a salaried professorship, the loneliness of living on the margins of German intellectual life,

and the sustained personal enmity of Fries and Savigny. And all this occurred at a time when his philosophy of law went against the grain of the prevailing subjectivism, which grounded the binding character of human laws in an antirational and ethnic nationalism (all accompanied by anti-Semitism and xenophobia). The constitutional reform movements in Württemberg (1807 until 1810) and in Prussia (1815 and 1819) offered models for Hegel's proposed reforms in part 3 of the *Philosophy of Right*. While France, Spain, and England succeeded in becoming sovereign states in the new international legal order, Hegel became convinced that he had to explain the legitimacy of a sovereign state's laws and why the finite individual was obligated to obey its laws.

Hegel's legal essays and his *Philosophy of Right* are as much about establishing his own personal identity as a philosopher of law as they are about defining his theory of law. He continually contrasts his own self-image of a philosopher with that of a "self-styled" philosopher who accepts a rule because tradition has accepted it or because the *Volk* subjectively desired it. According to Hegel, the public must approve, identify with, and indeed, bond with the laws and institutions. Most importantly, the individual, and most certainly the philosopher, should recognize the actuality embodied in the laws and institutions.<sup>70</sup> If all this is possible and manifested in social life, the individual will be free. Recommendations for reforming an institution address its mere appearance. Such recommendations are directed to abstract, remote (Kantian) "oughts." But the philosopher—and by this Hegel clearly means himself—is concerned with what "is." The philosopher's obligation in all this is not—as many academics think today—to become a specialist of applied ethics, market economics, public policy, or gender politics. The philosopher's role cannot be encompassed narrowly by these specialisms. Rather, the philosopher's goal is truth, and truth addresses the substantive content of posited laws and institutions.

Hegel offers a compelling account of the philosopher who works tirelessly to comprehend the historically manifested structures of thought which the populace, its institutions, and its laws presuppose. The philosopher comprehends the consciousness of a historically extended populace as well as the gaps and continuities in this evolving consciousness. Philosophy is "the thought of the world" and, as such, "it appears only at the time when actuality has gone through its formative process and attained its completed state." This picture of the philosophical enterprise assumes that the philosopher only becomes conscious of truth retrospectively, by making conscious what has hitherto been unconscious. As Hegel put it,

When philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk.<sup>71</sup>



Perhaps Hegel's own life best illustrates the formation of such wisdom, for he personally immersed himself in the crises of his times. Appropriately enough, his own contribution to the philosophy of law only began to be recognized at the dusk of his own life.

## NOTES

1. All references to *Philosophy of Right* in this paper use Nisbet's translation. See G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen W. Wood, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 1991).
2. See esp. Karl Popper, *The Open Society and Its Enemies*, vol. 2, *The High Tide of Prophecy: Hegel, Marx and the Aftermath*, 5th ed. (London: Routledge, [1945] 1991); John Dewey, *German Philosophy and Politics* (Freeport, NY: Books for Libraries Press, [1915] 1970).
3. See D. P. Verene, "Hegel's Account of War," in *Hegel's Political Philosophy: Problems and Perspectives*, ed. Z. A. Pelczynski (Cambridge: Cambridge University Press, 1971), 168–80; Errol E. Harris, "Hegel's Theory of Sovereignty, International Relations, and War," in *Hegel's Social and Political Thought: The Philosophy of Objective Spirit*, ed. Donald Phillip Verene (Atlantic Highlands, NJ: Humanities Press, 1980), 137–50.
4. "Inaugural Address," delivered at University of Berlin, October 22, 1818, reprinted in Hegel, *Political Writings*, eds. Laurence Dickey and H. B. Nisbett (Cambridge: Cambridge University Press, 1999), 181–85.
5. "Inaugural Address," 181.
6. Joseph Raz, "The Problem about the Nature of Law," in Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994), 195–99.
7. Hegel, *Philosophy of Right*, Preface, 11.
8. *Ibid.*, 13.
9. See esp. *ibid.*, 13, Addition (H).
10. *Ibid.*, 17.
11. *Ibid.*, 11.
12. H. S. Harris, *Hegel's Development: Night Thoughts (Jena 1801–1806)* (Oxford: Clarendon, 1983), 1:152. However, this view of the Athenian social and political life has been recently disputed. See Edward E. Cohen, *The Athenian Nation* (Princeton: Princeton University Press, 2000).
13. Hegel, *Philosophy of Right*, Preface, 11.
14. *Ibid.*
15. *Ibid.*, 20.
16. See Shlomo Avineri, "The Discovery of Hegel's Early Lectures on the Philosophy of Right," *Owl of Minerva* 16 (1985): 202–4.
17. The 1817–1818 lectures are translated in J. Michael Stewart and Peter C. Hodgson, trans., *Hegel's Lectures on Natural Right and Political Science: The First Philosophy of Right*, introduction by Otto Pöggeler (Berkeley: University of California Press, 1995).
18. Hegel, *Philosophy of Right*, Preface, 13, Addition (H).
19. See Manfred Riedel, "Nature and Freedom in Hegel's 'Philosophy of Right,'" in *Hegel's Political Philosophy: Problems and Perspectives*, ed. Z. A. Pelczynski, 136–150, esp. 136 for an elaboration of this distinction.
20. Hegel, "Natural Law," 123.
21. Kant, Immanuel. *Perpetual Peace*, trans. M. Campbell Smith (New York: Garland, 1972).
22. Hegel, *Philosophy of Right*, 270Z, 333.
23. *Ibid.*, para 331A, 322.
24. See Hegel's *Lectures on the Philosophy of World History*, trans. H. B. Nisbet, introduction by D. Forbes (Cambridge: Cambridge University Press, [1818–1831] 1975).

25. *Ibid.*, Preface, 21.
26. See, generally, Gillian Rose, *Hegel contra Sociology* (London: Athlone, 1981), 6.
27. See Joachim Ritter, *Hegel and the French Revolution: Essays on the Philosophy of Right* (Cambridge, MA: MIT Press, 1982 [1969]), 44.
28. See, generally, Neuhäuser, *Foundations of Hegel's Social Theory* (Cambridge, Mass.: Harvard University Press, 2000), 37, 142.
29. Hegel, *Philosophy of Right*, para 21, 22A, 27.
30. *Ibid.*, Preface, 12.
31. *Ibid.*, Preface, 14, A (H).
32. *Ibid.*, 5.
33. *Ibid.*, 258A.
34. As quoted in Paul Franco, *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 1999), 121.
35. As quoted in Shlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), 64.
36. As quoted in Avineri, *Hegel's Theory*, 64.
37. Even Hegel's patron, Niethammer, implicitly sided with Fries. Terry Pinkard, *Hegel: A Biography* (Cambridge: Cambridge University Press, 2000), 307.
38. When Hegel criticized this speech, Fries claimed he had some Jewish friends and his speech was not anti-Semitic because there was a distinction between attacking "Jewishness" and attacking "Jews."
39. Kotzebue detested the French Revolution, the Enlightenment, democracy, Napoleon, academic freedom, and freedom of the press. See Pinkard, *Hegel*, 444 and following.
40. Hegel offered three months' wages as bail for Asverus.
41. As quoted from Wood's note in *Philosophy of Right*, 389n18. Karlsbad is in present-day Czech Republic.
42. Hegel, *Philosophy of Right*, Preface, 17.
43. *Ibid.*
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. This is Fries's metaphor. Hegel used the term "concrete." *Philosophy of Right*, para 290. For other similarities between Fries and Hegel, see Wood's notes in *Philosophy of Right*, 384–87nn11–12.
48. Hegel's emphasis as quoted by Hegel in *Philosophy of Right*, Preface, 15.
49. "The German Constitution," in *Political Writings*, 14, 35–40.
50. The Treaty of Westphalia, he complains, prevented Germany from becoming a modern state with a political power [*Staatsmacht*]. "The Constitution of Germany," in *Political Writings*, 73. And then Hegel continues, "[i]n the Peace of Westphalia, Germany's statelessness became organized," 74.
51. H. S. Harris, *Hegel's Development*, 2:62.
52. H. S. Harris, *Hegel's Development*, 1:66.
53. Pinkard, *Hegel*, 80.
54. H. S. Harris, *Hegel's Development*, 1:125.
55. See Clark Butler and Christinane Seiler, trans., *Hegel: The Letters*, with commentary by Butler (Bloomington: Indiana University Press, 1984), 8; Pinkard, *Hegel*, 133–36. The subjective-objective paradox is examined and an exit sought in contemporary legal theory in William Conklin, "The Trap," *Law and Critique* 13 (2002): 1–28.
56. Harris, *Hegel's Development*, 1:324.
57. Hegel, "On the Scientific Ways of Treating Natural Law, on Its Place in Practical Philosophy, and Its Relation to the Positive Sciences of Right," in Hegel, *Political Writings*, 102–80.
58. Commentators and biographers describe Hegel as depressed throughout his career. I use the same term, although one should be aware of the niceties of the clinical sense of depression. It is doubtful that Hegel ever was clinically depressed in the sense of having a psychosis.

59. See H. S. Harris, *Hegel's Development*, 1:109, 155, 269–70; Pinkard, *Hegel: A Biography*, 55.

60. By this time Schelling had published the following: *The Unconditional in Human Knowledge: Four Early Essays (1794–1796)*, trans. Fritz Marti (Lewisburg: Bucknell University Press, 1980); *Einleitung an dem Entwurf eines Systems der Natrphilosophie oder über den Begriff der speculativen Physik und die innere Organisation eines Systems der Philosophie*, in Schelling, *Ausgewält Schriften*, ed. Manfred Frank (Frankfurt am Main: Suhrkamp, 1985; originally published 1799).

61. Pinkard, *Hegel*, 86.

62. Pinkard, *Hegel*, 225.

63. Harris, *Hegel's Development*, 1:lxix.

64. As quoted from correspondence by Hegel to Mrs. Frommann, in Pinkard, *Hegel*, 301.

65. Harris, *Hegel's Development*, 1:lxiii. Hegel's earlier sense of obligation to Ms. Burkhart had "drooped by the wayside" by the time he proposed to Marie von Tucker. See Pinkard, *Hegel*, 301.

66. However, one should not think that Fries was far from Hegel's mind. In 1811, Hegel wrote to Neithammer describing Fries as having "gone beyond the Kantian philosophy by interpreting it in the most superficial manner, by earnestly watering it down ever more, making it ever more superficial." He continued by describing Fries's *Logic* as "spiritless, completely superficial, threadbare, trivial, devoid of the least intimation of scientific coherence." Fries's explanations were "slovenly disconnected, explanatory lecture-hall twaddle, such as only a truly empty-headed individual in his hour of digestion could come up with." Wood, Hegel, *Philosophy of Right*, 382n6.

67. Butler, *Hegel: The Letters*, 243–244.

68. See Hegel, *Lectures on Natural Right and Political Science: The First Philosophy of Right: Heidelberg, 1817–1818 with Additions from the Lectures of 1818–1819*, trans. J. Michael Stewart and Peter C. Hodgson, ed. by staff of Hegel Archives, introduction by Otto Pöggeler (Berkeley: University of California Press, 1995).

69. Hegel, *Philosophy of Right*, Preface, 12–13.

70. *Ibid.*, 270, 316A.

71. *Ibid.*, Preface, 23.