Hegelian Natural Law:
Situating Hegel's early essay among the theologians and moderns
David Henreckson

For many modern readers, the idea of natural law evokes something timeless and self-evident – a repository of moral criteria used to justify specific human actions or beliefs. On these terms, the concept appears quite alien in the ethical world conceived by G.W.F. Hegel as *Sittlichkeit*, wherein human social practices and beliefs constitute shared forms of life and reflect certain (implicit or explicit) standards for action. Yet despite the apparent tension, the concept of natural law persists throughout Hegel's writing, shifting according to the context, but maintaining an uneasy semantic presence throughout his work. It emerges most explicitly in Hegel's early essay "The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law" (1802-3). The essay – whose rambling title serves double-duty as an outline of its contents – has provoked some consternation among the relatively few scholars who have addressed its place in Hegel's corpus. H.B. Acton, for instance, supposes that Hegel's use of the term *natural law* must be ironic or "paradoxical." After all, the philosopher from Württemberg appears to reject the most common elements of what Acton believes must comprise an actual natural law theory.[1] But if so, the question persists: Why, after apparently dismantling several versions of natural law in his essay, does Hegel choose to rehabilitate the term, rather than leaving it behind as a relic of pre-critical thought?

If we are to answer this question, some interpretative difficulties in the Natural Law essay will have to be overcome, and others will have to be bracketed. In what follows I do not intend to evaluate the degree of continuity between Hegel's Natural Law essay and his more mature works – although many passages in the essay anticipate arguments made in *The Phenomenology of Spirit* (1807) and *Elements of the Philosophy of Right* (1820). Nor do I wish to make an argument for the essay as a "complete" statement of his early thought (whatever that might mean), or even as an entirely self-consistent work. There is

[1] H.B. Acton, "Introduction" in G. W. F. Hegel*, Natural Law: The Scientific Ways of Treating Natural Law, Its Place in Moral Philosophy, and Its Relation to the Positive Sciences of Law,* trans. T. M. Knox (Philadelphia: University of Pennsylvania Press, 1975), 16. All subsequent references to the body of Hegel's work will use inline citations.

evidence Hegel himself did not believe the essay was either.[2] My aim is more modest. Precisely because of its early date, the essay allows us to trace Hegel's transformation of two central concepts, *nature* and *law*, as he reclaims the semantics of his theological and philosophical predecessors for his own emerging ethical system. As framed by this early essay, the two themes of nature and law introduce a tension into the "science" of ethics. Out of this tension, a Hegelian conception of natural law begins to take shape, first, by process of negation, and second, in more constructive terms. The former movement is advanced through his critique of *empirical* and *formal* natural law theories, which each provide erroneous descriptions of nature and law, and so alienate the human community from its absolute standard, that is, its self-sufficient norm for belief and action. The next movement is constructive: both in his attempt to unify (i.e. "reconcile") nature with law, and also in his reconciliation of natural law with its positive instantiations in civil law. These two reconciliations are achieved, on Hegel's terms, through the formation of communities of virtue that are constituted, not by a fictive state of nature or an indifferent system of coercive law, but by the mutual recognition of life-goods and sacred values shared in common. Here Hegel's re-imagined natural law begins to converge, perhaps surprisingly, with earlier theological articulations of the idea, even as he incorporates a modern conception of human agency and responsibility.

* * * * *

Any venture into murky Hegelian waters requires the right balance of interpretive caution and courage, and the Natural Law essay is no exception. As in his other writings, Hegel conveys complex philosophical concepts in a rather idiosyncratic vocabulary. This is not a textbook treatment of the subject matter and its early modern history. Hegel's interlocutors and textual allusions often remain unspecified. In fact, the objects of his analysis do not always correspond directly with flesh-and-blood

[2] Laurence Dickey notes that Hegel returned to some of the constructive questions which arose in the Natural Law essay within the same year in his "System of Ethical Life and First Philosophy of Spirit" (1802). Interestingly, this complementary text adopts a remarkably different vocabulary even as it discusses many of the same political matters addressed in the second half of the Natural Law essay. Still, the constructive moves that Hegel makes in the later text are made possible by his earlier immanent critiques of empirical and formal natural law, as well as his re-conceptualization of the terms "nature" and "law" themselves.

persons whose written work can be scrupulously cited in footnotes. Rather, Hegel commonly has in view normative *forms of ethical life* or *consciousness,* each with its own manner of identifying an "absolute Idea" – its standard – and externalizing that absolute standard in a "positive organization" (59).

Despite these interpretive challenges, the essay is framed neatly as an analysis of the position that natural law ought to occupy vis-a-vis moral philosophy and public law. Hegel begins by addressing the state of ethical science in his own time, which he believes had failed to identify and live up to a single, self-sufficient standard. We need to re-conceptualize the very idea of natural law if we wish to "perfect" ethical science. Hegel suggests that two conditions must be satisfied for this to take place. First, this science must be able to unite our determinate perceptions, experiences, and inclinations, i.e. real consciousness, with the free, rational, and "logical element" of ideal consciousness. Second, it must be able to articulate an absolute standard that self-consciously reflects the particular character and normative goods of the rational community (56). The first of these conditions provides the framework through which Hegel will analyze two rival accounts of natural law, which he classifies as empirical and formal. The former account takes as its originating standard some principle of determinate "inorganic" nature; the latter account, by contrast, abandons the realm of determinate nature for the "organic," that is, self-legislating and rational, totality of law.

Already it appears that the concept of natural law is in danger of becoming an oxymoron. The tension between what is perceived as "natural" and as "law" strikes at the core of Hegel's analysis of each position. To understand Hegel's description and immanent critique of both empiricism and formalism, we need to follow his lead and turn, first, to the way in which each theory identifies the absolute standard; and second, to the concrete political ramifications of each ethical form of life (59).

Nature: Empirical Natural Law

The Saxon natural law theorist Samuel Pufendorf once explained that his preoccupation with the science of morality stemmed from his desire to "prove that what is handed down on this matter does by no means all rest upon vacillating opinions, but flows clearly enough from fixed and first principles." To

live well and to live peaceably, human beings require the means to distinguish between actions that are upright and those that are base. For this end, we require "grounds so secure" that we can deduce "genuine demonstrations which are capable of producing a solid science." These demonstrations, in turn, rest on "distinct principles" which leave no room for doubt.[3] In these concise terms, Pufendorf displays many of the key elements of what Hegel describes as empirical natural law. As a form of ethical life, empiricism[4] has both a standard and a methodology. It also exhibits a particular consciousness about its role in organizing political life and the social goods that it wishes to attain and preserve.

Although Hegel does not explicitly identify specific thinkers or political movements in his analysis of empirical natural law, he appears to have in mind a fairly broad social and intellectual context that arose in seventeenth-century Europe. In the decades following the Protestant Reformation, Western Europe was riven by religious conflict, long-simmering territorial feuds, and the emergence of newly centralized sovereign powers. Internecine struggles toppled regimes in England, Scotland, the Netherlands, and various states in present-day Germany. By the mid-point of the century, one way out of this interminable conflict appeared to lie in the proper identification of an exact rudimentary science of morality and political association. What Hegel calls empirical natural law emerged in this context and aimed to provide evident principles for this new science. By eschewing complex (and divisive) metaphysical or theological systems of ethical life, empirical natural law would be able to reduce vast totalities to a well-ordered "original simple necessity" (61).

Hegel describes this form of ethical life as one which grounds its search for the absolute standard in inorganic nature. In other words, the way to deduce what Pufendorf called the fixed and first principles is to begin with observation of the world around us – the workings of nature itself, the social condition of humanity, as well as particular human desires and inclinations. From this empirical

---

[3] Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis* (1660), 2.29.

[4] In the Natural Law essay, Hegel uses the terms empiricism and empirical natural law interchangeably, which may imply that he has in mind certain synonymous movements in the philosophies of science, epistemology, and the like. However, for my own purposes, empiricism and empirical natural law will apply strictly to what Hegel describes as a specific normative *form of ethical life*, including its absolute standard and mode of political organization.

reflection, certain fundamental principles will become evident. Here, Hegel distinguishes between *scientific* and *pure* strains of empiricism, each with its own methodology for arriving at its core principles. Scientific empiricism begins with a single determinate quality, along the lines of Hobbesian self-preservation or Pufendorf's principle of *socialitas*. From this original "simplicity" an entire system is deductively constructed. Reflexively, entire systems of morality and legality can be justified through reversion to this original principle, or condemned as contrary to natural reason. Hobbes, for instance, appraised his own political context – an English nation reduced by years of civil war between royalists, Cromwellians, and fickle Presbyterians – and argued that such a self-destructive society of individuals, if they wanted to survive, must transfer their natural rights and liberties to a sovereign power. The instinct to self-preservation trumps confessional beliefs. The need to secure civil peace through the creation of sovereign power takes precedence over natural liberties.

According to Hegel, however, this construct of ethical life rests on a false certainty. It assumes that an original, simple principle is able to support an entire edifice of ethical and political life. This assumption is jeopardized when empirical natural law "finds itself surrounded by a multiplicity of such principles, laws, ends, duties, and rights, none of which is absolute" (61). The reliance on an original simplicity now appears merely simplistic, since there appears to be no self-justifying way to select one fundamental principle over another.

The solution of pure empiricism is to adopt a different methodology. While scientific empiricism applied some specific principle to construct a total system, pure empiricism puts a premium on the consistency of the whole, rather than the diversity of principles and experiences that constitute it. On this account, multiplicity is no longer viewed as a problem, per se*,* because all the particular members and qualities of society are viewed as having "equal rights" in nature. Each individual, each natural inclination, each social good is counted just as meaningful as the next. Particularities are negated, at least in effect, since they must be made to fit within the conceptual totality of the system. This formal totality, as Hegel calls it, is represented in the pre-political *state of nature*. Conceived in this way, the original state

of nature exists by contrast to legal states, i.e. actual, historical human communities with all their modes of contractual relations and structures of civil law. Because pure empiricism is premised on an ethical totality in which all constituent members are equal, the state of nature must abstract what is "ethical" and what is "human" from all particular histories, habits, and potentialities. Any accidental qualities are removed from what simply *must be* – the totality of the system. In this way, Hegel suggests, the formal unity maintains its place and its internal consistency only by remaining empty and formless. If any specific ethical or political content is to be found, it has to be "smuggled in" (62).

For Hegel, the political ramifications of this strain of empiricism are deeply problematic. By obscuring the particular character of its constituent parts, the totality of this form of ethical life cannot supply any determinate content or justification for its political organization. Its hypothesis of a state of nature, in which all individuals are of equal, and therefore indifferent, value, has no purchase in reality. All that exists, all that ever really existed, is the state of law. Consequently, those who occupy positions of power in the political regime are able to use the indeterminacy to their own advantage. Hegel implies that the irony of this situation lies in the fact that, in terms of actual historical existence, the state of law existed *before* the state of nature hypothesis was ever concocted by empirical theorists. All that the hypothesis "accomplished" was to explain the mythical origins of the legal state, implying that the multitude of individuals had tacitly consented to be subject to whatever sovereign power already exists. This is the story told to preserve the political unity and social peace. But in fact, Hegel points out, the logical outcome of this empirical form of consciousness arrives when a sovereign power becomes the representation of the ethical totality itself, alienated from the community of free individuals who allegedly contracted to establish it in the first place. In this final movement, the unified sovereign is "represented as divine," as an entity "hovering over the multiplicity, not penetrating" it (66).

As its ethical standard is played out in the political and legal realm, we discover that empiricism cannot deliver what it claimed it would. In scientific empiricism, the emphasis on specific isolated principles, such as self-preservation, could not account for the totality of human life and social goods. In

pure empiricism, the consistency of the absolute standard could only be sustained by associating it with an indeterminate and fictional state of nature, one which has no direct bearing on actual social experience or legal rights. In sum, neither strain of empiricism can claim that its absolute standard is fixed immutably in an inorganic natural principle. For either strain to survive, some organizing agency is required. Most often, this need is fulfilled by a representative sovereign, a quasi-divine figure whose express will transforms "natural principles" into law. It turns out that the normative value of "nature" has significant limits since the coercive will of a sovereign power is required to give it binding force in the state of law.

It is important to note the methodological point that Hegel makes in this critique. He does not fault empiricism for ascribing normative value to inorganic nature, per se. Rather, he faults empiricism for lacking consciousness of what it is doing. Even the most "empirical" political system, ostensibly constructed from natural principles, will bear the imprint of an inner rational consciousness (67). There is world-making going on. "Nature" is being worked upon, and thus given a purpose, even if the agent is unconscious of the "natural" effects and ends she is inducing (68). The flaw in empirical natural law is therefore most evident in its assumption that inorganic prescriptive standards *just are* – that they arise independent of rational agents who have conceptions of an organic good. Conditions for alienation are already present, since Hegel sees empiricism's absolute standard as abstracted from the actual social practices and rational commitments of human communities. In other words, the empirical system is undermined by its own conception of determinate nature, driven as it is to locate some fixed "inorganic" principle which somehow stands apart from the world-making activity of organic, rational human beings. By setting up these arbitrary principles, e.g. natural inclinations toward self-preservation or sociability, in abstraction from the organic unity, empirical natural law "dismembers" the "living whole" of the ethical community (70). Tragically, in the end, these natural principles turn out to be not so certain, not so self-directed. In fact, by very definition, they lack consciousness of their own character and ends. So, although empiricism "brushes up" against an absolute standard in its unconscious creation of divine

sovereign power, it does not recognize its creation for what it truly is.[5] It continues to search for a fixed inorganic principle even after that search has proved fruitless. Empirical natural law fails to comprehend its own absolute standard. In fact, this standard turns out in practice not to be truly *natural* in any meaningful sense, but rather the pseudo-divine power of the sovereign, which mediates the concepts of nature and law for an alienated community (70).

Law: Formal Natural Law

While empirical natural law hoped to locate fixed first principles in determinate nature, the approach of what Hegel calls formal natural law appears quite the reverse. This rival ethical science begins by assuming a series of oppositions – between the ideal and real, the infinite and finite, law and nature – which underscore the "negative" character of formalism's absolute standard. On this view, the standard cannot be confined by determinate nature because the standard negates any particularity that might be located in that realm of empirical reality (71-2). There is an essential "non-identity" between the self-legislating realm of ethical reason and the bounded particularities of human nature, desires, and inclinations – namely, all those singular elements that might have served as fixed ground for empirical natural law.

The negative absolute of formalism takes its primary shape from the ethics of Kant and Fichte, both of whom are silent interlocutors in the mid-section of the Natural Law essay. Hegel's main critique of the former lies in what he sees as Kant's inability to supply any positive content from his universalized moral law, the categorical imperative. For Kant, practical reason, by a process of external reflection, attempts to apply the general principles of the undetermined moral law to specific cases. Hegel argues, however, that this process cannot assume any essential relationship between the rational law and its

[5] Although Hegel believes that empirical natural law is capable of unconsciously building a legal "edifice" with its own inner rationality, this does not entail any endorsement of the result. Internal rational consistency is not sufficient. In fact, the inner rationality that Hegel sees at work in empiricism actually leads, as we have seen, to some form of absolute sovereignty that is alienated from the multitude which created it in the first place. According to Hegel, this state of affairs is untenable in the long run. It can only sustain the absolute standard through a *pseudo*-divine and coercive political regime. This is a parody of the later "god of the community" and the embodied self-sufficient standard that should be sought out.

practical application. The basic oppositional terms of formalism require that any positive content of the law be "renounced" as an almost alien entity. As a result, when we try to apply the ideal moral law to any concrete circumstance, there is inevitably a degree of arbitrariness involved. In the end, Kant's ethic necessarily ends up with empty tautologies and self-canceling moral imperatives.

Here, both Kantian and Hegelian partisans have noted that some of the essay's criticisms of the categorical imperative appear misdirected and somewhat superficial.[6] Yet even if we acknowledge some slippage in specific details, the central issue for the essay as a whole is not so much whether Kant's strongest defense of the categorical imperative can withstand Hegel's relatively brief critique, but whether formal natural law will be able to overcome the basic oppositions of the real and the ideal, of nature and law. In order to focus on this question, it is useful to move beyond Hegel's analysis of Kant to his more focused analysis of Fichte's *Foundation of Natural Right.*

For political and ethical life, the challenge for formal natural law is to address the gap between the absolute standard of the moral law with the "conditioned" world of real, historical communities, with all their various legal structures and customary ways of life. In the realm of ideal consciousness, the free and rational individual is a "sovereign," a self-legislating being who is "subject to the will of no other." Consequently, for this ideal consciousness there is an essential unity of all the rights and duties of moral law with the consenting volition of rational individuals. But this unity can no longer be assumed in terms of particular social and legal arrangements. Because the absolute standard is essentially negative in character, there can be no true unity between the inner moral law and external, i.e. positive, law. The former belongs to an unconditioned realm of rational law. The latter is conditioned by contingency, errant desires and inclinations. For this reason, positive law concerns itself with external moral prescriptions regarding the violation of personal rights. Once we are removed from the realm of ideal consciousness and transported into that of historical reality, we have to reckon with the fact that "empty moral law" is *opposed* to actual human subjects and to any ideal notion of freedom. Through its

---

[6] See Paul Franco's discussion in *Hegel's Philosophy of Freedom* (New Haven: Yale University Press, 2002), 60.

externalization in positive law, the absolute standard of formalism is necessarily coercive in character. Or as Fichte described it, any attempt to theorize about the nature of human association must begin with the presumption that all "faith and constancy are lost."

On these terms, the form of political life that begins to emerge, most clearly in Fichte, is one in which individual freedom and rights are bounded on all sides by the corresponding freedom and rights of others. If we are to coordinate the competing claims of each individual member of political society (e.g. rights to private property and public expression) all individual wills must be united to the "general will." For Hegel, it is important to note that what Fichte imagines is merely a semblance of true unity. The terms of opposition between the absolute standard and positive law remain constant, and the individual's actual conformance to the general will do not bring about the "inner absolute majesty" of true reconciliation. Rather, Hegel argues, we remain with the terms of subjection and conformity to a purely external positive law (85).

In Fichte's faithless and inconstant political realm, some "supreme will" must exist to compel obedience to the law. But the question arises: Who or what will ensure that this supreme power itself conforms to the general will? Fichte recognizes the need for an entity which can mediate the dictates of the general will for the supreme power and its subjects. He arrives at the notion of the Ephorate. Lacking both executive and legislative power, the ephors constitute a quasi-judicial body. Although not a distinct administrative branch of the government, they hold a purely negative power: the right to issue an interdict to dissolve the regime if it violates the dictates of the general will. If such an interdict is issued, the individual members of society assemble to determine whether the ephors acted rightly, and if so, to request that a new supreme power be constituted. With mechanical efficiency, the former structures and bonds of political association would expire with hardly a trace.

For Fichte, the establishment of the Ephorate is meant to ensure that individual citizens are subject only to the impersonal laws of the state, and not the arbitrary will of the political sovereign. According to Hegel, however, Fichte has merely done an end-run around the more central problem for

his theory – namely, how to reconcile the goods, interests, and freedoms of individual persons with the general will. The Ephorate may address the superficial problem of how to balance out competing private interests in a political administration,[7] but it doesn't solve the fundamental *alienation* of the community from its law. For Hegel, the flaw at the heart of Fichte's theory is not so much an affinity for either despotism or mob rule (although he regards these as symptoms, 88), but rather its essential opposition of law and freedom. The ephors do nothing to solve this problem, since Fichte fundamentally conceives of law as "indifferent," and thinks of freedom in terms of a zero-sum game played between the individual and the collective.

In the end, Fichte's portrayal of human society has a basic need for an impersonal, "indifferent" positive law which aims to constrain the rights of individuals and secure a provisional state of order. Remarkably, Fichte's conception of law appears to serve the same function that natural principles did for the empirical natural lawyers, insofar as it provides free-standing criteria for human action and political association. By positing the absolute standard on one side of the nature-law or the real-ideal divide, both the formalists and the empiricists end up alienating the community from its own standard. In some respects, Fichte's view of political association may seem more palatable than the absolutism that emerges from some empirical modes of ethical life. At the same time, for Fichte the scope of individuals' collective agency is limited on all sides by legal prescription. In the rare moment of constitutional crisis, the community might be given a "sufficiently narrow" set of criteria to deduce whether the representative Ephorate or the sovereign had acted in accord with the law. But this was the extent of the popular political mandate.[8] While the institution of the Ephorate appears to be an advance on Leviathan,

---

[7] Although for Hegel, even this achievement is suspect. Why would the existing regime submit to the judgment of the ephors? And by what constitutional process would the new governmental administration acquire legitimacy? Despite Fichte's intentions, Hegel perceives that whichever private interest possesses the most political or martial power would be able to enforce its will upon the community. And so long as a certain measure of coercive restraint is preserved through a legal order, what basis would the populace have to complain? After all, the state of law exists to ensure that individuals' freedom and rights are constrained to the degree that provisional order is maintained.

[8] See Isaac Nakhimovsky, *The Closed Commercial State: Perpetual Peace and Commercial Society from Rousseau to Fichte* (Princeton: Princeton University Press, 2011), 56.

it does not solve the underlying issue: the dichotomy of law and nature. Nor does it address the zero-sum theory of freedom that follows from this division.

Death and Freedom

On Hegel's reading, Fichte's unsatisfying doctrine of freedom is closely tied to the way in which he derives specific duties and rights from a formal indifference. That is, the particular qualities, loyalties, and loves of a specific community must be negated, insofar as they are formally "opposed" by the absolute moral law. Consequently, as we have seen, a structure of law must be imposed on the community in order to restrain the competing rights and freedoms that would destabilize society if human agents were left to themselves. This posits a problematic relationship between law and freedom, based on Fichte's assumption that freedom consists merely in the capacity for choosing between two opposite entities (which Hegel refers to as +A and -A). On these terms, law's function is to coerce (*gezwungen*) the choice of whichever indifferent possibility (+A or –A) best preserves the legal order. Take the example of property rights. According to the terms of Hegel's critique, it does not strictly matter to formal natural law whether a specific parcel of land belongs to one individual or another. What does matter is the formal structure of law. In order for one individual to exercise dominion over a piece of property, all other individuals' rights to the land must be negated. Legal structures facilitate the distribution of land, and the supreme power ensures that the distribution accords with the dictates of the general will. The threat of retributive violence lies just beneath the surface, deterring anyone from contesting whichever judicial determination is reached. For Hegel, this position only reinforces the community's alienation from its standard, first, by negating the historical character of the community (e.g. the conditions which allow the community to recognize one individual's custodianship over her family's land), and second, by viewing all social relations are necessarily coercive in nature. Rights negate other rights; laws can only restrain, punish, and deter. Neither individual rights nor positive laws participate in any ethical totality, nor can they truly reflect its absolute standard.

So far, we have been dealing mainly in abstractions. Both empirical and formal natural law presume that nature or law can serve as "indifferent" principles for ethical action and political organization. The terms remain fundamentally opposed, and freedom can only be conceived in the absence of determinate nature (for formalism) or prior to a state of law (for empiricism). In order to overcome this division Hegel will need to specify some instance in which law and nature are reconciled through a conscious act of "absolute freedom" (90). This instance is supplied through the individual and communal confrontation with death.

Death has played a hidden role throughout Hegel's essay so far. For empiricism, death serves as the implicit cause for political organization. The Hobbesian state of nature is a state of war in which individuals contend ruthlessly with one another to maintain their own liberties and freedom. In such a state, death looms as the inevitable outcome unless individuals realize that natural freedom must be sacrificed to preserve their own lives. Law saves pre-political society from self-destruction, at the cost of natural equality and rights. Similarly for formalism, death looms, not behind the force of nature, but behind the force of law, as it deters individuals, on pain of punishment or death, from attempting to impose their rights contrary to the dictates of the general will. In each case, death compels individuals to comply with the absolute standard of the ethical system. In each case, some pre-political freedom is negated consequent to the confrontation with death. Hegel, however, asks us to imagine a possibility in which death is not the instance for negating freedom, but for establishing it.

Superficially, of course, death appears as "the absolute subjugator," the moment in which forces of nature or the judicial force of law impinge, in an ultimate sense, on the freedom of the individual (91). But what if there were an individual who, contrary to the forces of nature and law, *chose* death for himself? Imagine an individual who refuses to comply with the dictates of positive law and so assumes the penalty of the law – death. It is precisely through "his ability to die [that] the subject proves himself free and entirely above all coercion." For Hegel, this implies two things, first, in terms of individual agency, and second, in terms of collective recognition.

Hegel writes that the one who chooses to break the law and assume the penalty of death has proven himself "absolutely" free from the mere external conditions of legal coercion. He takes responsibility for his action and demands that the legal order make an account of its own standard for judging him. The punishment, in "its specific character," must be taken as "truly infinite and absolute." The judgment itself is revealed as participating in the totality of ethical life, and therefore "revered and feared *on its own account*" (92, emphasis added), rather than viewed instrumentally as a deterrent. Likewise, the choice of death appears to go against nature, insofar as nature teaches us to avoid death at all costs. This is implicit in the empiricist's principle of self-preservation. Yet the rational agent's choice of death reveals a dimension of absolute organic freedom, and thus "makes manifest the possibility of choice as such."[9]

Even if this is true, it is still unclear what sort of "infinite and absolute" entity Hegel has in mind. It is one thing to say that the choice of death reveals the absolute freedom of the human agent, vis-à-vis formal "law" and empirical "nature." But what exactly does this absolute freedom participate in?

Hegel's reference to death and absolute freedom may appear elliptical, but his meaning becomes clearer as he relates it to the phenomenology of war in the human community. War, according to Hegel, is the explicit collective recognition that something (e.g. the good of the community) is worth dying for. This undercuts both empirical and formal natural law. Empiricism posited the natural instinct to self-preservation as an absolute action-guiding principle. As a phenomenon, war appears to contradict this principle by requiring individuals to set aside the natural instinct in order to protect some shared good which is under threat. Sacrifice is required to make the unity of ethical life complete (93). Likewise, war disrupts the pretensions of formal natural law to a "perpetual peace" since it "preserves the ethical health of peoples in their indifference to specific institutions," reminding them of their deeper loyalty to a good held in common.

---

[9] See Franco's discussion, *Hegel's Philosophy of Freedom,* 63-4.

Hegel adopts a jarringly martial tone in this passage, and it is unclear whether he intends to commend the state of war in general, or is merely making a phenomenological observation about war's effect on a community.[10] Yet, if we set this concern aside for the moment, the underlying point becomes clearer: If there are certain social complexes (whether they are relational, familial, or socio-political) that exist not only as instrumental goods but as good *in themselves*, then we would be craven or deluded to think that there are not moments when we are obligated to sacrifice ourselves for their preservation. On these terms, Hegel intends for readers to glimpse the emerging consciousness of a moral ontology, an order of "total justice" which reveals the insubstantiality of abstract individual rights or fixed natural principles. In place of these abstractions, there is a conscious perception of the Good, which is recognized by free individuals through sacrificial participation in the community itself.

Hegelian Natural Law: Between tradition and modernity

Hegel has now set the stage for the emergence of ethical life – the reconciliation of nature and law, properly conceived. But in tracing this new constructive movement in the essay, some attention must be paid to the sources that Hegel may be explicitly or implicitly drawing upon. As I noted at the outset, scholars have generally criticized the Natural Law essay for its supposed intellectual debts to "traditional" ethical and political thought. Something must be conceded to Hegel's modern critics: there are clear traces of a more traditional natural law theory in Hegel's essay. At the same time, the criticisms of Hegel often misidentify *which* are the traditional features, as well as the role they play in the essay. Acton, for instance, associates the centuries-old idea of *lex naturalis* with "fundamental rational principles of public behavior, the same everywhere and always, which ought and often do guide legislators in framing the laws of particular states."[11] If this description of the idea is correct, it might appear that Hegel collapses the traditional distinction between natural and positive laws, making the civil law of the

[10] Cf. Hegel's later comments in §324 of *Elements of the Philosophy of Right*.
[11] Acton, "Introduction," 15. In a slightly different manner, Shlomo Avineri describes "natural law" as represented in an extrinsic body or "repository of [governmental] legitimacy," and thus – rather remarkably – believes that Rousseau and Fichte are proponents of "traditional natural law." *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), 83.

state the sole embodiment of ethical life. Other scholars, like Manfred Riedel, have instead identified the traditional elements of Hegel's natural law with his Aristotelian notion of "ethical nature." According to this view, Hegel imagines the state as a metaphysical entity (or "ethical nature") whose positive laws *are* absolute ethical life. Consequently, the state requires the subjection of all individual morality and rights to its civil law.[12] On this reading, it is difficult to see how any law could be unjust so long as it is identified with the ethical nature of the state.[13] Hegel's emphasis on the totality of the Good, embodied in the state, appears to negate the possibility for true individual agency or rights in the modern sense. Thus, in the end, his conception of ethical totality, underwritten by an outdated metaphysics, lacks the resources to resist the encroachments of political totalitarianism.[14]

So long as the concept of natural law is simply identical to prescriptive civil laws, critics like Riedel appear to make a valid point. Yet, ironically, this account ascribes the doctrines of *modern* natural law to Hegel – specifically, the sort he deconstructed in the first part of his essay. As a result, the critics fail to notice that the terms of Hegel's own analysis suggest that he is drawing on, or at least converging with, a more traditional strain of neo-Aristotelian thought. The importance of this convergence needs to be unpacked.

Scholars have often noted Aristotle's direct influence on Hegel – sometimes with the intent of saddling Hegel with a top-heavy metaphysics.[15] Yet few have asked whether Hegel's political and ethical thought may have been informed by more recent strains of Aristotelianism that played an important role

---

[12] Manfred Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy,* trans. Walter Wright (Cambridge: Cambridge University Press, 1984), 86-7.
[13] See the discussion in Ana Marta González, *Contemporary Perspectives on Natural Law* (Burlington, VT: Ashgate, 2008), 144-5; cf. Noberto Bobbio, "Hegel e il giusnaturalismo," *Rivista di Filosofia* 57 (1966), 379-407.
[14] Cf. Katerina Deligiorgi, "Religion, Love, and Law: Hegel's early metaphysics of morals," in *A Companion to Hegel*, eds. Stephen Houlgate and Michael Baur (West Sussex: Blackwell Punlishing, 2011), 37-8; Franco, *Hegel's Philosophy of Freedom,* 67. Georg Lucaks argues forcefully that "Hegel defends the undemocratic position that the immediate expression of the will of the people cannot create a real, ordered state of law. The weakness of his position is thus clearly exposed," *The Young Hegel*, trans. Rodney Livingstone (London: Merlin Press, 1975).
[15] This latter motivation is evident in Riedel. For more sympathetic accounts of Hegel's Aristotelianism, see Joachim Ritter, "Morality and Ethical Life: Hegel's Controversy with Kantian Ethics" (1966) in *Hegel and the French Revolution*, trans. Richard Dien Winfield Cambridge, MA: MIT Press, 1982); Alfredo Ferrarin, "Hegel's Aristotle: Philosophy and Its Time" in *A Companion to Hegel*; and Terry Pinkard, *Hegel's Naturalism: Mind, Nature, and the Final Ends of Life* (Oxford: Oxford University Press, 2012).

in early modern Protestant intellectual life. This oversight may be due, in part, to the sheer dominance of *anti*-Aristotelian thinkers like Hobbes, Pufendorf, and Christian Thomasius in popular early modern intellectual histories. The result has been a general neglect of the political and ethical thought of broadly Aristotelian and Thomistic figures like Philipp Melanchthon, Jerome Zanchi, Peter Martyr Vermigli, Martin Bucer, Theodore Beza, Philippe de Mornay, Johannes Althusius, Bartolomeus Keckermann, as well as later Lutheran and Calvinist scholastics. This oversight is hardly trivial, considering the fact that these Aristotelian and scholastic sources continued to occupy a significant place in Protestant university curricula and congregational catechesis up through the eighteenth century.[16]

The relevance of this Aristotelian strain of thought is particularly interesting for its political application. J.G.A. Pocock has noted that Aristotle's early modern revival put a new gloss on his old doctrine that political association was "natural" to humanity. For seventeenth and eighteenth-century Protestants, the use of Aristotle had to be harmonized with traditional doctrines of grace and providence. The ideas of political association and "natural" human agency had to be made compatible with, and reflective of, the movement of God's Spirit. Pocock therefore describes the new Aristotelians as imagining "the reunion of political history with eschatology."[17] Or, put in more Hegelian language, the character of specific political communities, revealed in moments of historical consciousness, ought to be recognized as the manifestation of the divine spirit. Laurence Dickey comments that these early moderns

---

[16] Joachim Ritter, drawing on the work of Hans Maier, wrote: "Since the renewal of an Aristotelian practical philosophy encompassing both ethics and politics, a renewal deriving above all from Melanchthon, this philosophical politics was influential as an 'academic doctrine of politics taught at the primarily Protestant universities and gynamsiums from the sixteenth through the eighteenth century," "Morality and Ethical Life: Hegel's Controversy with Kantian Ethics," 165. Ritter's 1966 essay professes hope that the early modern Aristotelian strain of political thought would receive new attention in Hegel scholarship due to Maier's work, (180-1 n11), although the topic remains relatively unexplored. The most comprehensive analysis in recent scholarship is presented in Alfredo Ferrarin's *Hegel and Aristotle* (Cambridge: Cambridge University Press, 2001), 394-411, although Ferrarin is less interested in the ethical and political applications than in the early modern reception of Aristotle's metaphysics. Early modern Protestant Aristotelianism also plays a significant role in Dickey's sweeping account of Hegel's intellectual background, *Hegel,* 77-137.

[17] J.G.A. Pocock, *The Machiavellian Moment* (Princeton: Princeton University Press, 1975), 43.

attempted to combine Aristotle's view of human persons as *zoon politikon* with a "liberal" Christian sense of "political hope for the future."[18]

What Dickey describes as political hope played a prominent role in the expansive legal reforms in Protestant territories after the reformation. Having rejected the authority of medieval canon law, Protestant theologians and reformers witnessed a transferral of political power from ecclesial to civil jurisdictions. This development corresponded with shifting conceptions of various social practices, including marriage,[19] poverty relief,[20] childhood education,[21] and the magisterial *cura religionis*.[22] Legal codes were transformed at a remarkable pace as Protestant communities attempted to articulate their legal and political standards.[23] Throughout the late sixteenth and seventeenth century, Protestant theologians, scholars, and political theorists wrote expansively on themes related to social reorganization, commonly framed by an Aristotelian conception of political life and a Ramist pedagogy that prized the practical over the merely theoretical.[24]

In this context, as Dickey and Pocock suggest, the early modern Protestants talked about "law" and "nature" differently than we might expect. Nature, although providentially ordered, is not simply a *given*; it must be organized and directed toward the temporal or eschatological ends of a rational human

---

[18] Dickey, *Hegel,* 227-9.
[19] Brundage, *Law, Sex and Christian Society*, 571-4.
[20] Ole Peter Grell and Andrew Cunningham, "The Reformation and changes in welfare provision in early modern Northern Europe," in *Health Care and Poor Relief in Protestant Europe 1500-1700* (London: Routledge, 2002), 1-41.
[21] For example, note Melanchthon's remarkable interest in curricular reform, a theme to which he returned throughout his life. Cf. *On Improving the Studies of the Youth* (1518), *In Praise of the New School* (1526), The *Instructions* (1528), as well as the educational orations contained in *Orations on Philosophy and Education*, ed. Sachiko Kusukawa (Cambridge: Cambridge University Press, 1999).
[22] W.J.T. Kirby, "'Cura Religionis': The Prophetical Office and the Civil Magistrate," in *The Zurich Connection and Tudor Political Theology* (Leiden: Brill, 2007), 25-58.
[23] See John Witte on the evangelical conversion of the canon law and civil law in *Law and Protestantism* (Cambridge: Cambridge University Press, 2002), 70-85.
[24] This facet of early modern Protestantism has been neglected in English language scholarship for a long while, although this unfortunate trend has started to turn around. E.g. Robert von Friedeburg, "*Persona* and office: Althusius on the formation of magistrates and councilors," in *The Philosopher in Early Modern Europe* (Cambridge: Cambridge University Press, 2006); Martin van Gelderen, "Aristotelians, Monarchomachs and Republicans: Sovereignty and *respublica mixta* in Dutch and German Political Thought," in *Republicanism: A Shared European Heritage,* vol. 1 (Cambridge: Cambridge University Press, 2002); Howard Hotson, *Commonplace Learning: Ramism and its German Ramifications, 1543-1630* (Oxford: Oxford University Press, 2007); and R.W. Serjeantson, "Hobbes, the Universities, and the History of Philosophy," in *The Philosopher in Early Modern Europe.*

community. The Calvinist theorist Johannes Althusius, for instance, conceived of political life in terms of various *consociatio* which organize a broader society of individuals, allowing "those who have their life together" to "communicate" those things which contribute to the good that is the life of the community itself.[25] The various forms of social relation comprise a *jus symbiotium,* a "norm of life-sharing," that allows individuals to recognize and contribute to the communal good.[26] In order to preserve this common good, the internal standards of consociations are made explicit in prescriptive laws or covenants which bind the "symbiotic" members to obey the norms. Conceptually, Althusius, like so many of his contemporaries, proceeds from the social recognition of the good to delineate specific rights and duties.

On these terms, the relationship between law and political power is also perhaps different from what we might have expected. Writing under the pseudonym Junius Brutus, the French resistance theorist Phillippe de Mornay employs the following definition of law: it is a "mind, or rather a gathered multitude of minds. For the mind is a particle of the divine breath, and he who obeys the law is seen to obey God and, in a certain way, to make God his judge."[27] Positive civil law appears intentionally underdetermined, as Mornay stresses that the customs and prescriptions of specific communities participate to greater or lesser degrees in the "higher" law that issues from its divine source.[28] Divine justice exists prior to human custom. For Mornay, this point has a particular historical application, since it demonstrates that no human person, certainly no mortal sovereign, can claim to possess absolute legal right over the community since law is a matter of divine justice and at least minimally reflected in all

---

[25] Johannes Althusius, *Politica*, 1.2.
[26] See Annabel Brett, *Changes of State* (Princeton: Princeton University Press, 2011), 129.
[27] *Vindiciae Contra Tyrannos,* Third Question, trans. George Garnett (Cambridge: Cambridge University Press, 1994 [1581]), 98.
[28] Alexander d'Entreves makes a similar point in reference to the difference between premodern and modern definitions of law: "'Law' – St. Thomas maintained – 'is a rule or measure of action in virtue of which one is led to perform certain actions and restrained from the performance of others.' Even friendly [modern] critics had been reluctant to follow St. Thomas so far. 'Such a description,' wrote Suarez, 'seems to be too broad and general.'" *Natural Law: An Introduction to Legal Philosophy* (New Brunswick: Transaction, 2009 [1951]), 76.

manner of communal practice and thought. Relational order, represented in the archetype of divine life and moral equity, precedes prescriptive rights.

We are now in a better position to reflect on the ways in which Hegel's essay may or may not be a reversion to a more traditional form of natural law. Much like the Protestant neo-Aristotelians, Hegel's notion of ethical life begins with the recognition of a true total justice – that is, divine life. He endorses Aristotle's dictum that the *polis* precedes the individual in some formative sense (113). He rejects the idea of indifferent laws or rights which somehow exist apart from, or in opposition to, the good of individuals or the political community. His political critique of empirical natural law converges with the neo-Aristotelians like Althusius and monarchomachs like Mornay by contending that absolute sovereigns exercise an arbitrary power over their subjects, violating the absolute standard of true justice.[29] Likewise, his political critique of formal natural law converges with the traditional sources by ascribing normative value to the positive characteristics of communities, recognizing that their norms of life-sharing provide the means to organize political regimes.

All this represents something of a *reditus* to an earlier form of natural law, conceived in terms of common participation in "divine life" rather than as a set of indifferent, prescriptive ethical principles. At the same time, Hegel's Natural Law essay also narrates an *exitus,* a procession out of, the earlier tradition. What appears new – and modern – is the emerging self-consciousness that relational complexes (which were formerly viewed as relatively static natural or providential orders) rely on the recognition and participation of rational human agents. This is a crucial point to make in response to critics like Riedel, insofar as they believe that early Hegelian natural law leads to an ethical totality unconstrained by individual agency or principles of legal right. If I am right to associate Hegel with the line of Protestant

[29] Scholars have noted that some later "political Aristotelians," notably Henning Arnisaeus, reject Althusius' views on sovereignty and are considerably more amenable to a form of state absolutism. See Martin van Gelderen, "Aristotelians, Monarchomachs and Republicans" in *Republicanism*, Vol. 1, eds Quentin Skinner and Martin van Gelderen (Cambridge: Cambridge University Press, 2002) 195-218. At the same time, much depends on the taxonomy used to identify strains of neo-Aristotelianism. In two recent works, Annabel Brett and Christopher Brooke indicate that the positive evaluation of central state power may coincide with the incursion of neo-Stoicism, particularly in terms of the role of "nature" as an indifferent action-guiding principle. Brett, *Changes of State,* 119-20; Brooke, *Philosophic Pride* (Princeton: Princeton University Press, 2012), 45.

neo-Aristotelians, then we would expect him to refer to some antecedent notion of divine *communio* – which he does (99, 104, 116). The shift between Hegel and his predecessors occurs, however, in his articulation of the manner in which human agents come to terms with, and overcome, nature and the supposedly determinate natural forces which claim their ultimate "right" in death (104). The organic element of Hegel's natural law, the means by which the human agent participates in divine life, must confront and reconcile with inorganic nature and the seemingly indifferent statutes and customs of positive law. This reconciliation is accomplished through self-sacrifice.

Hegel applies this motif in several ways, although he relates the archetypal sacrificial act in terms of the Christian doctrine of the Incarnation: the outpouring of divine life which

> the Absolute eternally enacts with itself, by giving birth to itself into objectivity, submitting in this objective form to suffering and death, and rising from its ashes into glory. The Divine in its form and objectivity is immediately double-natured, and its life is the absolute unity of these natures (104).

Although the two "natures" appear contradictory, the overflowing of divine life into inorganic nature achieves something remarkable: the mastery of death through its own death. In doing so, it "casts its light into this nature and through this ideal unity in spirit makes it into its reconciled and living body" (104-5).

This description appears somewhat abstract, but within the theological imagery Hegel relates how he envisions the reconciliation of particular laws, customs, as well as individual rights and volition, with the organic whole of ethical life. Although absolute ethical life and nature initially look on each other as "something alien" (108), the sacrifice of the former (later identified as an act of the "spirit," 111) accomplishes the "recovery" of nature and the "scattered" particularities of human existence. Put differently, the act of sacrifice is the self-conscious recognition of free individuals that, although nature provides definite conditions for our beliefs, acts, and social relations, human beings are nevertheless true "spiritual" beings – both *made by* the world and by *world-making* agents. As such, individuals are able to recognize their own responsibility for the complex of social norms and practices which they have received and which they sustain by their purposive activity.

This relates to the perceived opposition between individuals and the community, and as well the relationship between natural law and positive law. Late in the essay, Hegel defines natural law as "real absolute ethical life," the means by which social practices and rational commitments participate in the absolute standard (112). Intentional ethical formation is pursued in accord with this "natural law" by orienting human dispositions and habitual actions to a broader conception of the good. In this way, "natural law is to construct how ethical nature attains its true right" (113). By making natural law antecedent to "morality," contrary to Pufendorf and the modern natural lawyers, Hegel frames the individual's ethical formation and freedom in the context of a shared recognition of ethical life. Note, however, that this entails *mutual* recognition between the community and the individual, which is the community's "own proper body" (115). As such, natural law, i.e. real absolute ethical life, is made explicit through a constitutional system that protects its members' legal rights (115-6). In turn, the positive laws of this constitutional state ought to reflect "what in the nation is right and realized." Failure to articulate the standards of the nation, or failure to take responsibility for them individually, can be a "sign of barbarism."

Still, the question remains whether this political conception of natural law is sufficient to prevent circumstances in which arbitrary political power is held by a fortunate few over the disenfranchised many. Does Hegel's natural law avoid a sort of circular justification, in which any internally-consistent expression of the absolute standard in positive law is judged right? Does it provide individuals with the resources to make competent judgments about whether specific laws are just or unjust?

Hegel considers the example of a feudal society which may appear to satisfy the criteria he has set, insofar as individuals in various castes know their place in the organic whole, and recognize that their labor – whether as noble, cleric, or peasant – contributes to the common good of the realm. On the surface, the positive structures of law and political power seem consistent with the social *ethos* of feudalism. Nature and law appear reconciled through the system's endorsement by noble and peasant alike. For Hegel, however, this is a superficial reconciliation. The ethical unity of nature and law can only

hold if the *ethos* of feudal society mistakes noble "personality" for law and expunges any trace of the "divine image" from its nature (128). If individuals are willing to accept these commitments, once made explicit in this fashion, then they might be warranted to conclude that feudalism is a shared good, worthy of endorsement. But Hegel indicates that he cannot endorse such a system. On the terms of his own modern (perhaps bourgeois) commitments, he is able to offer reasons concerning how such a feudal society fails to identify the relevant social goods and how it fails to acknowledge the arbitrariness of its distribution of political power.

In light of this, the form of social critique that Hegel provides in the Natural Law essay is clearly not the rights-based approach some of his detractors are looking for. Hegel's hope for a just ethical life lies not in the identification of extrinsic laws or natural principles, but in the formation of virtuous citizens who are competent to recognize the common good, and then act appropriately (113-5). Notably, of all the virtues, Hegel underscores courage (*Tapferkeit*) as perhaps most vital to the well-being of the community.[30] It is the sort courage exemplified in the archetype of divine sacrifice – the self-identification with the norms of social life, the acknowledgement of one's complicity in just or unjust human relations – that gives nature back its own life. So it is courage, on Hegel's terms, which inclines individuals to take responsibility for the standards and customary laws which reflect a nation's implicit standard and conception of itself. Here, perhaps more than anywhere else, Hegel displays both his indebtedness to his traditional sources and to modernity. Hegelian natural law follows its traditional predecessors in its emphasis on ethical formation and in holding out the possibility for social critique through recognition of an absolute Good. At the same time, it holds to the critical-modern sensibility that demands that human agents acknowledge their own stake in the standards of shared ethical life, as well as the collective commitments that come to fruition in just or unjust social practices.

[30] Dickey points out that Christian Garve, who translated Aristotle's *Nicomachean Ethics* into German just prior (1798-1801) to Hegel's Natural Law essay, defined *Tapferkeit* as "*Geist* that had been given a political focus, a focus that Garve and Hegel talked about in terms of *Sittlichkeit,*" *Hegel*, 225.