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The Moderate Enlightenment, the Radical Enlightenment, and Law
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Introduction

One of the difficulties standing in the way of characterizing law in European civilization is the failure to appreciate the opposition between what have recently come to be known as the Radical and the Moderate Enlightenments. There is of course an appreciation of the major difference between the traditions of Roman Law, Civil Law and Common Law and of diverse schools of jurisprudence, but without appreciating the opposition between the Radical and the Moderate Enlightenments, one major tradition of thought on the law tends to be overlooked, and the significance of mainstream traditions of legal thought are not fully understood. In this paper I will briefly discuss the opposition between the Radical and the Moderate Enlightenments, and point out its relevance for understanding law. To do this requires some background to the Enlightenment, showing what it was reacting against. The problem with this, however, is that European history is commonly understood in a way that does not acknowledge the place of the Radical Enlightenment. To appreciate properly the Radical Enlightenment it is first necessary to look at how European history as it pertains to legal thought is commonly understood, and then point out what difference it makes to take into account the radical Enlightenment.

A Very Brief History of European Legal Thought

Very briefly, as far as the history of European legal thought is concerned, the standard view is that this history began with Roman Law. The Romans applied Greek philosophical methods to the subject of law, something the Greeks had not done. Roman Law was systematized in the Justinian Body of Civil Law (the Corpus Juris Civilis, the compilation of law drawn up during the reign of the Byzantine Emperor, Justinian I between 529 and 534 AD). After virtually collapsing in the West with the end of the Roman Empire, the Roman tradition of law was replaced by ‘Germanic’ law or customary law. Such customary law was virtually embedded in the social order of which it was part and did not support a specifically legal discourse. When in 1070 a manuscript of the Justinian law books was rediscovered in Italy, and then when in 1075 Pope Gregory VII declared the supremacy of the Church over temporal rulers, systematic legal systems were recreated, first for the Church, then for the secular political orders, leading to the development of canon law, urban law, royal law, mercantile law, feudal and manorial law. This is the origin of the Civil Law tradition. The study of law formed the core of universities, and the development of law was intimately linked to the rise of scholastic philosophy. While building on customary law, this new legal system soon superseded it, and in the following centuries came part of the structure of medieval feudal society.

Due to the scholastic tradition of philosophy, medieval law was developed more fully as an autonomous discourse in the Middle Ages than it ever had been in Rome. Law was developed through ‘glosses’ which attempted to reconcile apparent contradictions and show that for every legal question only one binding rule exists. The first comprehensive legal treatise was written in about 1140 by the Bolognese monk, Gratian. In 1198 Pope Innocent III reformed the ecclesiastical court system and introduced the inquisitorial system of committal and trial, which eventually replaced the adversarial system. A high point in the development of medieval philosophy and jurisprudence was the work of Thomas Aquinas (1224-1274) in the thirteenth century. Synthesizing Aristotle’s philosophy with Christian Neoplatonism and reworking medieval philosophy of law, Aquinas drew distinctions between Eternal Law, the ideal of divine wisdom, Natural Law, participation by rational creatures in the Eternal

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Law, and Positive or Human Law, the law actually enacted, and Divine Law, associated with religious obligation.

This scholastic tradition of legal thought did not completely dominate, however. For some time it operated in conjunction with local traditions of law based on custom. In Britain, Henry II became king in 1154 and developed a unified system of law common to the country. He resisted Civil Law, although eventually what emerged in Britain was a compromise. The outcome was the English Common Law tradition which retained the adversarial system of committal and trial. As opposed to Civil Law which works from abstract principles to particular cases and considers only legal enactments as binding, the Common Law tradition places great weight on court decisions, which are considered ‘law’ along with statutes. This tradition, which had been strongly defended by William Blackstone (1723-80) in the eighteenth century, was later exported to the British colonies and is the tradition of USA, Australia, New Zealand and Canada. It is a tradition which has spawned a massive legal profession and delivered very little justice.² There was some sympathy for this in Germany, but as elsewhere, the Civil Law tradition of law prevailed.

Modern law continued the traditions of Civil Law and Common Law, but broke with medieval scholasticism. Its further development is seen to be associated first with the Reformation, but more importantly, with the Enlightenment which took up the cudgels against prejudice, privilege and feudal bondage, and sought to impose a rational order on social life. Such commitment to rationalism engendered efforts to ‘codify’ law, organizing and stating it systematically. Abandoning medieval scholasticism did not mean that everyone abandoned the tradition of Natural Law, however. Natural Law was defended by conservative legal theorists aligned with the Catholic Church as part of the rearguard defence of the old order, but also by more radical thinkers (beginning with Grotius) who used it to attack unjust laws; that is, positive laws inconsistent with natural law.³

The newer traditions were associated with the development of nominalism or terminism, the notion that universals are merely names or terms that can be redefined when convenient. As Thomas Hobbes (1588-1679) developed this idea, the critical force of reason was undermined along with the hierarchical cosmology which legitimated the medieval social order. In place of justice, ‘right’ was made the central concept of legal thought, with ‘right’ being seen to be determined by the implicit contract for mutual benefit each member of society enters into as a participant within society. In Hobbes’ philosophy, the mutual benefit was preservation of life. He argued that when scrutinized carefully, people could only claim the right to life, and were bound to abide by Positive Law formulated to serve the interest of the ruler. The ruler, however, was advised purely on grounds of self-interest to formulate laws that would not lead to revolt. John Locke (1632-1704) took over Hobbes’ structure of thought, but reformulated it to argue that there is a social contract as well as a political contract, and that people have a right not only to their life, but what they have mixed their labour with, that is, their property. When this is threatened by the king, Locke argued, people are entitled to overthrow him. While Hobbes argued that humans were mechanisms moved by appetites and aversions, Locke argued that people are moved by pleasure and pain, and that good is what produces pleasure and evil, pain.

The French Enlightenment is generally seen to have been largely inspired by the work of Newton and Locke. It was from Locke that the social contractarian form of the natural rights tradition of legal thought developed. After having served to justify the Glorious Revolution in England of 1688, the notion of the social contract was used to justify revolutions in USA and France. Utilitarianism developed to some extent in opposition to the notion of Natural Rights, but utilitarianism began with the work of John Gay who saw himself as a disciple of Locke. Utilitarianism became a major force in Britain with the work of Jeremy Bentham (1748-1832) and J.L. Austin. Austin famously defined laws as commands, backed by threat of sanctions, from a

³ A.P. d’Entrèves, Natural Law, London: Hutchinson University Library, 1951, chap.3
sovereign, to whom people have a habit of obedience. This is also a form of Legal Positivism, manifesting the influence of Hobbes who had argued that there is no necessary connection between ethics and valid law. A third major tradition of political thought, which developed in reaction to the social atomism of Locke, originated with Jean-Jacques Rousseau (1712-1778). Rousseau embraced the notion of the social contract, but defended a much more social view of humanity, and defended a stronger notion of reason, making the rational will rather than force the defining feature of law. He argued that the sovereign of a State is not a person but the ‘general will’ committed to the common good, whether people recognize this or not. Rousseau’s arguments inspired Kant and various neo-Kantians. The Prussian Civil Code promulgated in 1794 and the Napoleonic Code which came into force in 1804 were the products of such Enlightenment thinking.

Thus in the English speaking world we have the four main schools of jurisprudence, traditional Natural Law Theory, Utilitarianism, Social Contract theory, and neo-Kantianism, which in the English speaking world in the second half of the twentieth century were represented respectively by John Finnis, Herbert Hart, John Rawls and Hans Kelsen (originally an Austrian, and also a legal positivist of sorts). In Continental Europe, particularly in Italy and Germany, the natural law tradition has been more strongly represented, along with various neo-Kantian positions. Among Marxists, Ernst Block has defended the Natural Law tradition, while Jürgen Habermas has recently defended what could be regarded as a neo-Kantian position.

Correcting this Brief History: The Renaissance

In presenting this very brief history I hope to have captured the commonly assumed structure through which European history in general as well as its legal history is viewed. For instance it concurs with the standard Marxist periodization of the history based on recognition of the ancient, the feudal and the bourgeois modes of production. Being so brief, it is very easy to criticize. However, the point of presenting this is not to criticize schematic histories, which must always simplify and can always be criticized for doing so, but to suggest that the standard schematic history of European legal thought is fundamentally defective. It is more defective and different than Harold Berman claims when he argues that the modern world is a straightforward development from the legal revolution that occurred in late eleventh and twelfth centuries. So, what does it leave out?

What is left out is the legal thinking that developed during the Renaissance and the significance of this. Its significance becomes manifest in its relationship between the thought of Hobbes and Locke, and the development of what has been called the Radical Enlightenment. The Radical Enlightenment continued to advance ideas from the Renaissance and formed a somewhat confused tradition which continues up until the present opposing the heritage of Hobbes and Locke. In presenting this as a more adequate history I am aware that I am still offering a very schematic history of thought. Schematic histories involve great simplifications, using terms to characterize social orders and intellectual movements of the past that have been coined retrospectively, hiding within them a great diversity of social forms and points of view. However, such schematic histories are essential to comprehend the tendencies at work in the present and to identify the possibilities for creating the future. To reiterate, my concern is not that the prevailing schematizing of history is too schematic, but that it is schematic in a way that is preventing people properly appreciating the major possibilities open to us.

4 For a Marxist characterization of these, see Valerie Kerruish, Jurisprudence as Ideology, London: Routledge, 1991.
5 See Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, trans. William Rehg, Cambridge: Massachusetts: MIT Press, 1998. This is not to say that Habermas would accept this designation, but he continues a tradition that attempts to uphold a notion of practical reason beyond instrumental reason without challenging Hobbesian cosmology.
6 Berman, op.cit.
So, to revise the prevailing schematic history, we need to revisit the question: What was the Renaissance? And what is its importance for the study of law? As with the terms ‘medieval’ and ‘feudal’, the notion of the Renaissance was developed after the period in question. As the name implies, it was associated with the rebirth of earlier forms of thinking, the thinking of the Ancient World. The work of Ancient Rome, notably Rome of the Republic, and Ancient Greece, was revisited and counter-posed to the prevailing scholastic thought. The ideas developed in the Renaissance, which originated in Northern Italy and spread to Northern Europe, both influenced the Reformation and contributed to the scientific revolution. To some extent they also contributed to the Enlightenment. This much is uncontroversial. However, it is now becoming clear that the Northern Italian Renaissance was much more than a rebirth of Ancient ideas; it was a rebirth of the struggle for autonomy that had begun in Ancient Greece and which had continued in Republican Rome, and which had been suppressed by the conquest of the Greek city states by Macedonia and the overthrow of the Roman Republic by Julius Caesar and his successors.

The culture of the Renaissance was a product of this struggle for autonomy, that is, the struggle of people for liberty to control their own destinies. As such, the Renaissance did not simply succeed the medieval social order. It developed along with it in opposition to it. The struggle for liberty began in the eleventh century when towns and cities in Northern Italy broke away from feudal dynasties and established democratic republics, successfully defending them against invasion for over two centuries. It was in the process of defending their republican liberty from external threats, from internal conflicts between factions, and from despotisms emerging from within, that Renaissance culture developed. As Quentin Skinner noted: ‘During this long struggle the cities of Lombardy and Tuscany not only succeeded in repulsing the Emperor on the field of battle, but also managed to build up an armory of ideological weapons with which they sought to legitimize this continued resistance to their nominal overlord.’ Because of threats to its democratic republican constitution, it was in Florence that Renaissance culture flowered most vigorously. This was associated with the revival and development of history, the revival and development of the concept of ‘liberty’ to connote both political independence and republican self-government, defined in opposition to slavery, and the development of the concept of the State, understood as a self-governing community. It involved simultaneously a recovery and new appreciation of ancient thought along with the creative elaboration of new ideas to oppose the scholastic thought of medieval society. The political outlook that developed from this has been retrospectively characterized as ‘civic humanism’.

While in the early Renaissance the great achievements were in history and political philosophy, as the struggle for liberty lost ground, the great achievements were in art, science and cosmology. The greatest achievement in cosmological thinking was the work of Giordano Bruno (1548-1600). Bruno’s cosmology collapsed the hierarchical structure of medieval thought and conceived nature and matter as dynamic, sentient and creative. He was a major figure in what came to be known as ‘Nature Enthusiasm’. Embracing Nicholas Cusanus’ suggestion that the universe is a sphere whose centre is everywhere and whose circumference is nowhere, Bruno argued that every individual in the universe is a unique centre of equal significance to every other. In this way he legitimated and radicalized the quest for liberty of the civic humanists, extending concern with liberty to the whole of humanity. Bruno supported republicanism, but he did far more than this; he aligned himself with the poor, urging:

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8 Ibid. p6.
That the impotent be sustained by the potent, the weak be not oppressed by the stronger; that tyrants be deposed, just rulers and realms be constituted and strengthened, republics be favoured ... that the poor be aided by the rich; that virtues and studies, useful and necessary to the commonwealth, be promoted, advanced, and maintained, and that those be exalted and remunerated who profited from them; and that the indolent, the avaricious, and the owners of property be scorned and held in contempt.¹¹

Bruno’s cosmology provided the basis for a tolerant religion which allowed for diversity in order to overcome the growing hostility between Catholics and Protestants. He was burnt at the stake in 1600 by the Inquisition under pressure from the Spanish Habsburgs.

The ideas of the Italian Renaissance spread North and inspired a quest for republican liberty throughout Europe, but particularly in France, Switzerland, the United Provinces of Holland and England. This was associated with opposition to the dynastic empires of the Habsburgs, which in the sixteenth century stretched from Hungary to Peru.

Mechanistic Materialism and Possessive Individualism as the Counter-Renaissance

How does this picture of the Renaissance alter our schematic history of European thought? The elaboration of the mechanistic world-view by Descartes, Hobbes, Boyle, Newton and Locke, and the conception of humans and society developed by Hobbes and Locke, were opposed to the scholastic world-view of medieval society, but these thinkers were more concerned to oppose the republican liberalism of the Renaissance. Stephen Toulmin characterized Descartes’ work and influence as the counter-Renaissance, a characterization which is entirely apt.¹² Those involved in developing the mechanistic world-view, although influenced by Bruno, were vehemently opposed to him¹³ and the nature enthusiasts, while Hobbes’ Leviathan, published in 1651, was not merely an attack on the ideas and influence of the civic humanists, but an effort to eliminate the influence of historical thought that had been revived by Renaissance thinkers, to neutralize the influence of Ancient thinkers such as Aristotle, Livy and Cicero, and to change language to make the idea of liberty as it had been developed by the civic humanists unintelligible.¹⁴ People were conceived of as mechanisms moved by appetites and aversions. Satisfying appetites and avoiding aversions were then the only ends that people could intelligently pursue. Hobbes redefined the State from being an autonomous community, as the civic humanists had conceived it, to the artificial person brought into existence by granting power to a sovereign to represent this artificial person. As Skinner pointed out:

Renaissance political writers had begun to describe self-governing communities as states, stati or états, and more specifically as stati liberi or free states. They tended as a result to equate the powers of the state with the powers of its citizens when viewed as a universitas or corporate body of people ... Hobbes dramatically reverses this understanding, arguing that it is only when we perform the act of instituting a sovereign to represent us that we transform ourselves from a multitude of individuals into a unified body of people.¹⁵

¹¹ Quoted from Spaccio della bestia trionfante without giving a page number by Margaret Jacob, The Radical Enlightenment, 2nd ed. The Temple Publishers, 2003, p.31f.
In society people are free, Hobbes argued, when through fear of the consequences of disobeying laws they acquire a will to obey the laws. 16 At the same time, Hobbes promoted commerce as the means by which nutrients are obtained, circulated and digested by the common-wealth.

This is the origin of what C.B. McPherson characterized as ‘possessive individualism’. 17 While Hobbes developed his ideas to defend the rule of an enlightened, if egoistic despot, Locke used these ideas to defend rule by an oligarchy of the wealthy, the people who had expropriated land from the English peasants and reduced them to landless labourers or ‘wage-slaves’, forced to sell their labour power as a commodity. But at the same time Locke also defended tolerance for ideas held in private, including religious ideas. This is the philosophy which legitimated what Marx called the bourgeois mode of production or capitalism. Along with the Newtonian model of science, these ideas were incorporated in the classical economics of Smith, Malthus and Ricardo which legitimated the increasingly brutal society of nineteenth century Britain. Used as a metaphor for nature, they formed the basis of Darwin’s theory of evolution, allowing the nineteenth century British ruling class to legitimate this society and its imperialism as ‘natural’.

From the Moderate to the Radical Enlightenment

The ideas of Newton and Locke came to prevail in Britain and then in France (although there Cartesianism was also a strong influence) and Scotland, where they were championed by major figures of the Enlightenment. These Enlightenment philosophers demanded of all beliefs that they submit to the bar of reason, and some went on to criticize the Church and its privileges. However, as with Descartes, Newton and Locke, such Enlightenment thought was as much a reaction to the radical influence of the Renaissance as it was to mediaeval thought and institutions. Most importantly, it was a reaction against the radical form of civic humanism and nature enthusiasm that was emerging as a real threat to all those with privilege. In place of liberty, these thinkers were interested in rational control of nature and people. The legal systems developed on this philosophy, including the Napoleonic Code, were infused with the quest for such rational control. 18

It was this more radical development of ideas, advancing Renaissance culture, which could legitimately be characterized as the original Enlightenment. This is how Margaret Jacob characterized it, designating it as the ‘Radical Enlightenment’. Jonathan Israel has argued that Spinoza (1632-1677) was the source of this Radical Enlightenment, 19 but Spinoza himself was strongly influenced by the civic humanists and Bruno, and he compromised this tradition by embracing Descartes’ mechanistic physics. Israel has shown, however, that proponents of republicanism and nature enthusiasm were identified, labeled and attacked as ‘Spinozists’, and how vehement was the opposition to them. In the early eighteenth century the leading figure of this Radical Enlightenment was John Toland (1670-1721). Toland coined the term ‘pantheism’ to characterize the identification of God and matter, and in the early eighteenth century disseminated democratic republican ideas clandestinely through the Masonic Lodges. Toland’s work predated the Enlightenment of Voltaire and Montesquieu.

The members of the later ‘Moderate Enlightenment’ (as Israel has labeled them) were centrally concerned to neutralize the influence of the Radical Enlightenment. If the Moderate Enlightenment had been successful, democracy would not have advanced in the ensuing centuries. In fact the Radical Enlightenment was not

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neutralized and has continued as a tradition up until the present. However, the effort to suppress the Radical Enlightenment has produced a confused history. The achievements of the Radical Enlightenment in advancing democracy are attributed to the Moderate Enlightenment, while some figures and intellectual movements associated with the Radical Enlightenment have been characterized as anti-Enlightenment. Furthermore, proponents of the Radical Enlightenment have often been inconsistent and vacillating. This has led to a great deal of confusion in our vision of the Enlightenment and its influence. What I am suggesting is that the Moderate Enlightenment associated with the defence of Locke and Newton, can be held responsible for the very coherent development of culture described above, associated with the contractarian model of society, utilitarianism, classical and neoclassical economics, Darwinism and Social Darwinism, and the triumph of instrumental reason, and then disillusion with the Enlightenment by radical thinkers. More importantly, it has led to a failure to properly appreciate the nature and significance of the Radical Enlightenment. It is the history of this movement that I will now attempt to trace.

While the Enlightenment is usually associated the work of French philosophers influenced by Descartes, Locke and Newton, not all French philosophers identified with the Enlightenment were moderates. Jean-Jacques Rousseau (1712-1778), and even more so Denis Diderot (1713-1784), were really part of the Radical Enlightenment. However, it was in Germany in the late eighteenth century that the Radical Enlightenment resurfaced and was more fully developed. Despite the enormous advances of the Germans, their work is notoriously difficult to interpret, reflecting the complexity of the time. Germany was a backward area of Europe, strongly influenced by the Reformation, and still suffering from the effects of the Thirty Years War of 1618-1648. It was fragmented, still largely feudal, while confronted by the massive developments in Britain and France. This was the basis of the originality of the Germans, but also of confusion of ideas. My contention is that the best way to interpret and evaluate the greatest achievements of the Germans is in terms of the efforts to counter both the relics of feudal despotism and the atomistic utilitarianism of the British and the French, at the same time rediscovering and developing German traditions of thought and rethinking and creatively advancing the Radical Enlightenment. As background to the present, there are three figures who stand out: Herder, Fichte and Hegel.

Having encountered Toland’s writings in the 1770s, and through them, the work of Bruno, it was Herder (1744-1803) who was the legitimate heir and the most important proponent of the radical Enlightenment in the late eighteenth century. Herder embraced ‘Spinozism’, but drew upon the work of Leibniz to free Spinoza’s thought from its Cartesian accretions, thereby largely recovering and further developing Bruno’s cosmology. Nature was seen to consist of organically functioning forces, continually active, progressing and perfecting themselves according to inner eternal laws. He argued that humans are essentially social beings participating in this creativity, and promulgated an ethics of self-expression or self-realization, calling on nations and individuals to express the potentialities unique to them. He acknowledged the diversity of ways of life and the value of each of these. He was vehemently opposed to the arrogance of Europeans and their destructive colonization and exploitation of the rest of the world. The concept of ‘culture’ was central to his thinking, and Herder was the first philosopher to refer to ‘cultures’ in the plural. It is through culture that we create ourselves, he argued. While Herder is generally known as the theorist and proponent of national culture, what is not usually appreciated is the

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20 A feature of those associated with the Radical Enlightenment, apart from their defence of freedom and opposition to the mechanistic view of nature, is their hostility to imperialism. For a study of those Enlightenment philosophers opposed to imperialism, see Sankar Muthu, *Enlightenment Against Empire*, Princeton: Princeton University Press, 2003.


22 Ibid. p.190.
relation between this and his political philosophy. Herder was grappling with the problem inherited from the civic humanists of identifying the prime force for spontaneous political association which could overcome people’s short-sighted self-interest and motivate them to strive for liberty, which he characterized as ‘self-determination’. His proposed answer, ‘culture’, was associated with his strong commitment to democracy and his view that reform must come from below. Although it was not fully elaborated, it was Herder who originated the idea that the State should be an expression and instrument of the nation; a nation-State, effectively reviving the civic humanists’ notion of the State against the Hobbesian notion. Herder and the framework of ideas he developed to counter the Moderate Enlightenment had an enormous influence on the subsequent history of Europe - and the world. His ideas formed the core of opposition to Social Darwinism and imperialism, and underpin the United Nations.

While Kant had counterposed freedom through rationality to utility in upholding the dignity of humans, it was Fichte who pointed out and upheld the social nature of such freedom. Fichte’s most important insight was that it is only through achieving mutual recognition that people develop as free, rational agents, and on this basis he reformulated Kant’s ethical, political and legal philosophy. For Fichte, the end of political life is the proper recognition of the dignity of people as free agents, and the political community is necessary to achieve this. To provide the basis for freedom, Fichte argued that freedom must include the right to gainful and secure employment from which people are able to make a living. One of the functions of the State is to embody the common will and be the objective viewpoint from which to recognize the freedom and needs of each individual and judge the actions of its citizens. Along with its legislative, executive and judicial functions, Fichte proposed an organ of the State to observe the various activities of the branches of the State and government to see whether they comply with the basic principles of ‘right’. That is, the State should recognize and guarantee people’s freedom, including their freedom from economic insecurity, and recognize the significance of their role in society.

It is as advancing the ideas of Herder and Fichte, and more broadly, the Radical Enlightenment, that the achievements of Hegel can be best understood. Hegel (1770-1831) characterized the whole of human history as a sequence of cultural formations (or forms of spirit) through which people have come to be recognized more and more adequately as free agents, culminating in the modern State where everyone is recognized as free. When Hegel spoke of the State, he was not thinking of the Hobbesian notion of the State as the seat of the sovereign, but as a self-governing community. Hegel characterized it as the unification of the family principle with that of civil society. The State ‘as the spirit of a nation [Volk] is both the law which permeates all relations within it and also the customs and consciousness of the individuals who belong to it. It is the embodiment of the universal aspect of the society concerned with the common good in which recognition of the significance of each individual and each institution is objectified. The State is equated with the organization of the whole, differentiated into particular agencies, concerned to produce the whole as a result.

In developing his account of the modern State, Hegel was centrally interested in exposing the illusions in the apparent success of Britain and working out an alternative social and political order. He argued that while the oligarchy of wealth

23 Barnard, Herder’s Social and Political Thought, p.82.
25 Ibid. §16, p.151.
26 Hegel’s Philosophy of Mind, §535, p.263.
28 That Hegel was not merely describing reality but was putting forward ideas to solve problems, disguising what he was doing to avoid censorship, has become increasingly evident. On this see Stephen Houlgate, Freedom, Truth and History, London, Routledge, 1991, esp.104-119.
based on self-interest had led to the flourishing of commerce, it had also led to excessive concentrations of wealth and reduced most people to day labourers or to an unemployed rabble, losing all sense of right, integrity and honour. The general population had become, as Marxists argued, wage-slaves, forced into dependence for their subsistence on the arbitrary will of another and incapable of enjoying the wider freedoms of civil society. Without guild corporations, employers were able to lower wages to such an extent that the economy suffered from under-consumption, driving civil society to seek markets elsewhere and to colonize other countries. But France had not provided an alternative. It was clear to Hegel that there was no possibility of achieving freedom through making people conform to the general will conceived as the result of a contract, as Rousseau had proposed and the French had attempted to achieve in the French revolution. It is necessary to begin with the assumption that freedom derives from being recognized as a citizen of a State.

Recognition begins in the family in which people achieved immediate recognition in a relationship of love. A different form of recognition is granted within civil society. In this domain Hegel acknowledge the importance of the market in which people pursue their own interests, but treated this not as a natural order of things but a particular institutional structure based on the recognition of rights to property. Such recognition implies a system of law standing above such self-interest and above the market serving the common good. Hegel acknowledged, as the economists had done, that civil society in which people were predominately moved by self-interest worked for the common good, but only up to a point. To overcome the weakness of workers relative to their employers, Hegel defended the Corporation as an institution able to provide the family with a stable basis in the sense that it could ensure its members a livelihood and gain recognition for its members’ needs, abilities and their contribution to society. This would provide their members with an identity as people of significance, as part of a whole which is itself an organ of the entire society, enabling them to promote with comparative disinterest the ends of this whole. Beyond the Corporation is the ‘inner’ State or government. The government is that part of the State ‘which intentionally aims at preserving those parts, but at the same time gets hold of and carries out those general aims of the whole which rise above the function of the family and civil society.’

While it is widely acknowledged that Hegel’s philosophy is deeply flawed, it is the point of departure for almost all social thought opposed to the atomic individualism, utilitarianism and Social Darwinism of mainstream economics and political thought. The root of the problems in Hegel’s philosophy, which enabled him to portray people as ciphers for Reason, derives from his assumption of the identity of subject and object associated with his Objective Idealism. Embracing Hegel’s achievements without his defects has involved recovering and developing the philosophy of nature and celebration of human creativity of Bruno and Herder. That is, it revived and developed Renaissance cosmology and civic humanism and the Radical Enlightenment in opposition to mechanistic materialism and atomic individualism of the Moderate Enlightenment. The best way to understand process philosophy, I believe, is as the further development of this project.

The Radical Enlightenment and Law

29 Hegel The Elements of the Philosophy of Right, §244
30 Ibid. §246, p.267f.
31 Ibid. §258, p.276.
32 Ibid. §243, p.266.
33 Ibid., §253, p.271. This is a contentious claim, since in the past interpreters of Hegel assumed that he was merely describing different kinds of people in society. This is almost certainly a misinterpretation. See Robert R. Williams, Hegel’s Ethics of Recognition, Berkeley, University of California Press, 1997, p.251 for a discussion of this issue.
34 Hegel’s Philosophy of Mind, §541, p.269.
What relevance does all this have for understanding law? While I have touched on attitudes towards the law of Renaissance thinkers and proponents of the Radical Enlightenment, I have not yet shown what are the implications for law. Yet, just as there is a continuity between the Renaissance and the Radical Enlightenment, there also appears to be continuity in their conception of law. Centrally, it is associated with the reconception of the law as an aspect of the struggle for liberty.

The problem with scholastic legal thought for the Northern Italians was that the Justinian law books, which had come to define relationships in medieval society, justified the claims of the Emperor to be their ruler. To justify their independence, the whole structure of medieval law and the methods of scholastic philosophy had to be brought into question and replaced. This began with the work of Marsiglio of Padua (1290-1342) and Bartolus of Saxoferrato (1314-57) who argued that in cities the best governors were the whole body of the people, and Bartolus argued that when the law comes into contradiction with fact, then the law must give way to fact. A much more thoroughgoing attack on the scholastic tradition was mounted by the civic humanists, most importantly Lorenzo Valla (c.1407-1457) and his students and followers who, developing new techniques for studying history, pointed out the incoherencies in the Justinian law books. These contained diverse texts from different times with only a crude effort to integrate them. In doing this the legal humanists also brought to life the atmosphere of liberty associated with the Roman Republic and revealed the degeneration of law associated with the later empire. At the same time, they showed the irrelevance of Roman law for the modern world. They showed through this history that people as a community are the creators of their law, that law is created in particular contexts by people and that it is impossible to rely on some absolute reference point to anchor law. Autonomous societies must take responsibility for their own laws. This is an essential aspect of their liberty.

It is this insight that was kept alive by the Radical Enlightenment and which was reformulated and expressed with great force by Herder through his development of the concept of national culture. It was conveyed to and underlay Hegel’s reflections on law. While it is not possible in a short space to go into all the details of Hegel’s philosophy of law, interpreting this as a development of the Radical Enlightenment it is possible to point out some central notions which form the core of the tradition he inspired. To begin with, while Hegel gave a place to rights, in accordance with the civic humanists, Hegel was more fundamentally concerned with what is a good society, that is, with what good form of life does society embody. He opposed political philosophies which failed to do this as both undesirable and, to some extent, impossible. The good life is a free life. Freedom is not valued merely because we are better judges of what will satisfy our appetites than authorities. It is because we are free that our lives have public significance. As Charles Taylor wrote of the civic humanist attitude that Hegel maintained: ‘public institutions and practices – the “laws” – were based on the understanding that they were the common repository of the citizens’ dignity. Citizens love the laws because they are the common repository of their freedom…’ Drawing on Herder and Fichte, Hegel defended such an attitude to institutions and laws by arguing that to become a legal person is not only to be recognized as a free agent responsible for one’s actions and works, but that through achieving such recognition we become free agents. Freedom here is not simply to be free from constraint. It is to be part of a community, freely constraining oneself in

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37 This historicism, dissociated from and turned against the quest for rationality and historical progress, engendered the historical school of law which sometimes tended to be reactionary. See the writings of Savigny and Gierke.
accordance with the law because it is the law which is necessary for the freedom of the community, and the freedom of each individual within it. It is an aspect of recognizing the freedom of others who mutually recognize one’s own freedom, with a shared appreciation of the value of this form of life. As Taylor wrote of this: ‘To have a viable society requires not just that I and others think it is a good thing, but that we come to a common recognized understanding that we have launched a particular common enterprise of this sort, and this creates a particular bond around this society, this tradition, this history.’39 Hegel’s concern was to uphold such a bond in the much more complex form of society existing in the modern world.

These are the ideas and the project that have inspired philosophers influenced by Hegel, including Hegelians, neo-Hegelians (from T.H. Green to Charles Taylor), humanistic Marxists, pragmatists from Peirce to Dewey, and process philosophers. For the most part, these philosophers have not paid much attention to law. However, there are some exceptions, and it is worthwhile looking at these briefly to highlight the different orientation to law of such thinkers from those associated with the Moderate Enlightenment. Writing in England in the 1870s, T.H. Green defined his own ideas on law in opposition to the utilitarianism and legal positivism of Austin. Green criticized Austin’s Hobbesian notion of the State and corresponding conception of law. As Paul Harris and John Morrow explained in their introduction to an anthology of Green’s political writings:

Green argues that the essential social dimension to individual self-realization means that the individual must regard social institutions and practices (political organization, customs, mores, laws) as collective efforts after a common good. They are the result of the need to secure and maintain the conditions within which individuals can pursue their self-realization in their own ways, and of the need to harmonize the ways in which they do so. As such, these institutions and practices need to be acknowledged by the individual as deserving his allegiance and consideration as essential to his own self-realization – provided they continue to act as means to the common good and not impediments to it. … The state could best be understood as the culmination of a process through which rights had been refined and extended to facilitate the fullest possible degree of self-development. Austin had regarded rights as created by the commands of the sovereign, and so thought any obligation to recognize rights was quite independent of the nature of the right … Green, by contrast, understood rights as historical phenomena that were embodied in an increasingly wide range of social institutions reflecting men’s growing recognition of the conditions under which moral action was possible.40

Green inspired the British Idealists who dominated philosophy in Britain at the end of the nineteenth century and the beginning of the twentieth century. These are the ideas which were the point of departure for the process philosophy of Samuel Alexander and Alfred North Whitehead, the philosophy necessary to defend such ideas on naturalistic foundations in order to meet the challenge of the Social Darwinists. Hegel’s view that a social order that does not uphold some shared notion of the good life is ultimately unviable is, I believe, beginning to be validated by developments in Anglophone countries. Such a failure will require a revival of the Radical Enlightenment’s way of understanding law.

39 Taylor, p.70.