BOOK REVIEW/ESSAY

IN UNION: A CRITICAL REVIEW OF *TOWARD A PERFECTED STATE**

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No man is an Iland, intire of it selfe; every man is a peece of the Continent, a part of the maine . . . any man's death diminishes me, because I am involved in Mankinde; and therefore never send to know for whom the bell tolls; It tolls for thee.

—John Donne**

I. INTRODUCTION

A. *The Problem of the Individual and Community*

One of the most interesting debates being waged in contemporary American jurisprudence is that between the "liberals"[1] and their "com-

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** DONNE, *Devotions Upon Emergent Occaisions Meditation no. xvii,* in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE 441 (C. Coffin ed. 1952).

[1] I deliberately put the word "liberal" in quotation marks. The debate between the liberals and the communitarians has become reified. The issues at stake are easily obscured. If by "liberal" one means the acceptance of a differentiated state in which the sphere of private right and private conscience is legally protected and ethically mandated, then Hegel is a liberal. Given this meaning, one of Hegel's great American followers, John Dewey, always believed he was providing us with a "liberal" vision. As the debate has intensified, however, what it means to be a liberal or a communitarian has been increasingly reduced to vague platitudes masked by easy distinctions: "liberals" stress the value of the legal recognition of a subject separate from social role, whereas "communitarians" do not; "liberals" emphasize the state's obligation to recog-

munitarian" challengers over the relationship of the individual and society. The hallmark of the liberal ideal is respect for the autonomous individual.[2] A just society refuses to promote any particular purposes and ends—visions of the good—and instead leaves individuals to choose for themselves. To save the individual from being sacrificed to a greater, collective good and thus preserve the status of individual freedom, liberals postulate a moral category of the right that is prior to the good.[3] The basis of the right, and thus all moral action, is the subject itself[4]—an individual possessing an autonomous will—and not the objects chosen through the exercise of the will. Yet despite its focus on individuality on the ontological plane, at least on the ethical plane, liberalism recognizes the need for community. In particular, the utilitarians invoke the collective good as the ultimate criterion of moral conduct.[5] Even with this caveat, however, the liberal vision cannot give us

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nize individual rights, whereas communitarians underscore the obligation to belong to the state or to one's community. Hegel's dialectical method is valuable in helping us to think beyond these distinctions. For Hegel, we must think of these liberal and communitarian "categories" as opposite poles in a dialectical relationship where the outcome of the tension is a higher unity. *See infra* notes 12, 15.

[2] *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY vii-xv (1977) (outlining a liberal theory of law based on the supremacy of individual human rights that rejects the "ruling theory," a combination of positivism and utilitarianism, because "it rejects the idea that individuals can have rights against the state that are prior to" state-created rights); J. RAWLS, A THEORY OF JUSTICE 3 (1971) ("Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."); *cf.* Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 990-1040 (1978) (outlining a theory of the free speech clause that "justifies protection [of speech] because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others").

[3] *See, e.g.*, J. RAWLS, *supra* note 2, at 31-32 ("This priority of the right over the good in justice as fairness turns out to be a central feature of the conception."). In contrast, teleological theories, such as utilitarianism, define the good as prior to and independent "from the right, and the right is defined as that which maximizes the good." *Id.* at 24 (footnote omitted).

[4] *See* I. KANT, *On the Common Saying: This May Be True in Theory, But It Does Not Apply in Practice*, in KANT'S POLITICAL WRITINGS 73 (H. Reiss ed. 1970) (The category of the right is "derived entirely from the concept of freedom in the external relationships of human beings, and has nothing to do with the end which all men have by nature or with the recognized means of attaining this end.").

[5] *See* J. RAWLS, *supra* note 2, at 22-27 (footnote omitted) ("The main idea [in utilitarianism] is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it."); *id.* at 27-33 (noting some contrasts between "justice as fairness" and utilitarianism); *see also* Sandel, *Morality and the Liberal Ideal*, THE NEW REPUBLIC, May 7, 1984, at 15 (Under utilitarianism, "[i]f enough cheering Romans pack the Coliseum to watch the lion devour the Christian, the collective pleasure of the Romans will surely outweigh the pain of the Christian, intense though it may be."). Even Rawlsian contractarians recognize a minimal theory of intersubjectivity, although the theory remains one of external rather than internal relatedness.

a rich enough account of our experience of community.

In contrast, communitarians argue that liberalism provides a "denuded"[6] vision of a self hopelessly distanced from its values, aims, characteristics, and experiences. Although the liberal ethic barely raises community above the level of mutual collaboration,[7] communitarians advocate a strong conception of community by which the individual is constituted.[8] Because "we are partly defined by the communities we inhabit, then we must also be implicated in the purposes and ends characteristic of those communities."[9] Thus, communitarians also call for an appeal to a historically situated collective notion of the good as the basis for ethical and political life. Unfortunately, the stark either/or presented in the current debate does not adequately describe the issues at stake.

The most sophisticated version of the communitarian challenge is Hegel's notion of internal interrelatedness—the view that personal identity is itself constituted in and through participation in a greater whole, the self as defined by others.[10] The individual is conceived not as an atomistic being, a selfbounded substance capable of self-definition independent of its relations to other, but rather as a social reality.[11]

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[6] I borrow this term from my colleague C. Edwin Baker. *See* Baker, *Sandel on Rawls,* 133 U. PA. L. REV. 895, 898 (1985).

[7] *See* Sandel, *The Procedural Republic and the Unencumbered Self,* 12 POL. THEORY 81, 87 (1984).

[8] *See, e.g.,* M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179-83 (1982).

[9] Sandel, *supra* note 5, at 17.

[10] *See* G.W.F. HEGEL, SCIENCE OF LOGIC 761-77 (A. Miller trans. 1969) [hereinafter SCIENCE OF LOGIC]; Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics,* 133 U. PA. L. REV. 291, 361 (1985).

[11] To the liberals, any such constitutive notion risks sacrificing the individual to her group—an appeal to a vision of a "collective good" denies the acceptability of individual deviation and difference. For example, Professor Baker finds Michael Sandel's communitarian project subject to this critique:

> Sandel can identify virtue with communal sentiments and favor this virtue over [Rawls'] justice only by making a particular ethical assumption: he must assume that it is proper for the group to subordinate the individual—that group rights may properly prevail over claims that are based on the ethical priority of the equal, autonomous individual.

Baker, *supra* note 6, at 919; *see also* Sandel, *supra* note 5, at 17 ("Communitarians would be more likely than liberals to allow a town to ban pornographic bookstores, on the grounds that pornography offends its way of life and the values that sustain it.").

Liberals also question the metaphysical plausibility of the notion of internal interrelatedness. *See, e.g.,* Fried, *Liberalism, Community, and the Objectivity of Values* (Book Review), 96 HARV. L. REV. 960, 966 (1983) ("The suggestion that a person's identity extends beyond his physical body to those with whom that person shares common goals . . . is sufficiently obscure that one can sympathize with Rawls' rejection of it.").

Yet, as I have attempted to demonstrate elsewhere,[12] nothing in the Hegelian vision of internal interrelatedness necessitates the end of the rights-bearing subject championed by the liberals. Acknowledgement of the "I" as a social reality need not result in the total submersion of the self-reflective subject in the community life.[13] Nor need it lead to state worship through the reduction of the individual to the pawn of a greater, collective good.[14] Hegel's dialectical approach recognizes the full significance of modern recognition of the subject separate from social role and the value of autonomy. At the same time, Hegel's approach presents us with a non-instrumentalist view of solidarity and the obligation to belong to a political community. In short, Hegel combines communitarian aspirations with a modernist conception of individual freedom.[15]

For all its promise and sophistication, in the end, Hegel's vision does not provide a rich enough account of individuality.[16] We need then

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[12] *See* Cornell, *supra* note 10, at 360-378 (tracing the reconstruction of an "ethic of citizenship" based on a dialogic regulative ideal that is supported by the notion of internal interrelatedness).

[13] *See id.* at 363; Cornell, *"Convention" and Critique,* 7 CARDOZO L. REV. 679, 689-90 (1986).

[14] *See* G.W.F. HEGEL, PHILOSOPHY OF RIGHT 37-40 (T. Knox trans. 1952) [hereinafter PHILOSOPHY OF RIGHT]; Cornell, *supra* note 10, at 361-63.

[15] As I have outlined in an earlier article:

> In the early Hegel one finds a view of the subject and a vision of reconciliation that affirms neither liberal individualism nor its mirror image, a sentimental conception of community life. The Hegelian conception of the ethical relationship as one of symmetric reciprocity is expressed in the regulative ideal of dialogism. Dialogism incorporates an account of what we are as speaking subjects that comes to terms with the role of language as constitutive of our experience and yet does not deny the ideal of a self separate from social role.

Cornell, *supra* note 10, at 379.

[16] Hegel's failure can be traced to the concept of *Geist,* his "solution" to the problem of the relationship of the one and the many. *Geist* is traditionally conceived as either: (1) the one that is many, or (2) the shared spirit of the many, unified through the otherness of the internal interrelatedness of the many. On the first reading, Hegel reintroduces the dualistic notion of substance he sets out to deconstruct—"substance" as an entity which exists in such a way that it needs no other entity to be. *Geist* is the ultimate substance, even if substance is understood as a self-constituted subjectivity that unifies all its properties. On the second reading, however, the dialectical reciprocity of purportedly oppositional and independent subjects is maintained without privileging either the one or the many. Still, even this second reading ultimately must reckon with Hegel's own emphasis on the "we," *Geist,* at the expense of an intensive encounter with the individual.

Recognizing the difficulties of fully accounting for the place of both the "I" and the "we," we may ask: Why bother with a metaphysical approach to the problem of the one and the many? Why not simply address the problem of the individual's relation to her community as a political problem? In particular, the leftists in the Conference on Critical Legal Studies press us to take action to change the reality of the individualist approach to communal life. *See, e.g.,* R. UNGER, THE CRITICAL LEGAL STUDIES

to develop non-instrumentalist views of community that emphasize the

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MOVEMENT 32-36 (1986) (envisioning an economy of the future based upon a "rotating capital fund [where] [c]apital would be made temporarily available to teams of workers or technicians" *Id.* at 35.). At the same time, these scholars often warn us against "final" philosophical solutions, earning them the title of "nihilists"; Abel, *Torts,* in THE POLITICS OF LAW 185, 196-200 (D. Kairys ed. 1982) (footnote omitted) (arguing that a just approach to injury and illness cannot be achieved without radical change in the labor market, for example, "a reduction in specialization and perhaps rotation between handwork and headwork . . . and [a change] in control over the means of production," *id.* at 197); Singer, *The Player and the Cards: Nihilism and Legal Theory,* 94 YALE L.J. 1, 4 (1984) ("As a theory of knowledge, nihilism claims that it is impossible to say anything true about the world. . . . As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life.").

Those more satisfied with contractualist or instrumentalist solutions to community teach us instead to be content with our current "conversation." For example, Richard Rorty defines "[n]ormal discourse [as] any discourse [—be it political, legal, or otherwise—] which embodies agreed-upon criteria for reaching agreement; abnormal discourse is any which lacks such criteria." R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 11 (1979). Philosophy, because it seeks to impress itself upon other disciplines as the master discourse—a supposed objective standard external to other "conversations"—is a classic example of abnormal discourse. *See id.* at 8-9, 131-164; *see also* Stick, *Can Nihilism Be Pragmatic?,* 100 HARV. L. REV. 332, 366 (1986)("The vice that Rorty and the pragmatists denounce in epistomological philosophy is precisely its attempts to impose external standards of rationality on practical discourses."). It is because a normal discourse proceeds by a set of internally shared norms and standards that objectivity and rationality are attainable. Rorty's "pragmatism" thus rejects any universal approach to human nature based on the exaltation of a particular metaphysical system. *See* Rorty, *Nineteenth Century Idealism and Twentieth Century Textualism,* in CONSEQUENCES OF PRAGMATISM 160 (1982). In practice, such an exaltation would lead to the "freezing-over of culture" and the "dehumanization of human beings" by eliminating alternative expressions of what it means to be human. R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 377 (1979).

What nihilists and pragmatists share is skepticism about the relevance of philosophical solutions, if indeed such solutions even exist. The irony is that even contractualist and instrumentalist views of community life, both of which assume that a group can only be understood as an aggregate of separate entities, also rest on metaphysical premises, even if the premises are justified solely by an appeal to tradition rather than a "solution" to the problem of the one and the many. As Charles Peirce wisely reminds us: "Find a scientific man who proposes to get along without metaphysics . . . and you have found one whose doctrines are thoroughly vitiated by the crude and uncriticized metaphysics with which they are packed." 1 CHARLES SANDERS PEIRCE, COLLECTED PAPERS ¶ 129 (C. Hartshorne & P. Weiss 2d ed. 1960).

Certainly since Roberto Unger's pathbreaking study in R. UNGER, KNOWLEDGE AND POLITICS (1975), the association of the Anglo-American liberal tradition with a given set of metaphysical views on the problem of the one and the many in the context of the relationship of the individual to her community is no longer a foreign concept:

> One of the insights to emerge from the present study is that the system of metaphysical ideas about the mind and society does indeed have consequences for the determination of the proper place of the individual in social life. The limits on the sorts of political and economic organization liberal doctrine will allow may be altogether broader than has been generally been supposed, but those limits exist.

Id. at 11. As Unger notes, the commitment to a "liberal" metaphysics and the rights-based ethic it supports still permits the possibility of widely divergent approaches to the political framework needed to foster such an association. For example, "[e]galitarian

social and personal significance of being in union with others above and beyond the instrumental desire to maximize one's own welfare or even the welfare of the group. At the same time, we need to supplement and indeed surpass Hegelian metaphysics through the recognition of the ontological status of the individual.

B. *Weiss in Focus*

Perhaps no one has given greater attention to the problem of individuality than Paul Weiss.[17] From the beginning of his philosophical investigations, Weiss has presented us with a pluralistic vision of the universe that recognizes the ontological status of the individual.[18] But in his latest work, *Toward a Perfected State,*[19] Weiss confronts and rejects the pluralism exalted by instrumentalist or contractualist views of group life. His goal is to provide us with a non-instrumentalist vision of communal, public, and political life, which neither sacrifices Hegel's insight into the "we" nor stops, as Weiss believes Hegel did, at the gateway of an actual encounter with the existing individual.[20]

In the classical tradition of political theory, *Toward a Perfected State* expresses an ethical vision to guide us in re-examining the relationship between the individual and the community, between society and the state, and indeed between states themselves. Politics is not reduced to the struggle for political power,[21] nor political theory simply

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liberals support the welfare state, and favor a scheme of civil liberties together with certain social and economic rights—rights to welfare, education, health care, and so on." Sandel, *supra* note 5, at 16. In contrast, "[l]ibertarian liberals defend the market economy, and claim that redistributive policies violate peoples' rights; they favor a scheme of civil liberties combined with a strict regime of private property rights." *Id.*

Yet, as Unger deftly reminds us, the flexibility available in liberalism will only take us so far. If we are to attempt a reconstruction of community that transcends both the "unending due process" of the welfare state and the dehumanizing efficiency of the law-and-economics vision, we must directly confront liberal metaphysics and its implications. *See* R. UNGER, *supra,* at 18-21; *cf.* 2 CHARLES SANDERS PEIRCE, *supra,* ¶ 121 ("It is when . . . [scientific men] promise themselves that they will not make any metaphysical assumptions that they are most in danger of slipping too deep into the metaphysical slough for deliverance, precisely because one cannot exercise control and criticism of what one does unconsciously.").

[17] *See* Bernstein, *Human Beings: Plurality and Togetherness* (Book Review), 35 REV. METAPHYSICS 349, 351 (1981)("Paul Weiss has thought deeply and subtly about the problems provoked by the one and the many. To say that he has confined himself to a 'single thought' is to say nothing less than that he has been thinking and probing the thought that is at the center of philosophy . . . .").

[18] *See* P. WEISS, MODES OF BEING 6-18 (1958); P. WEISS, REALITY 141-156 (1938).

[19] P. WEISS, TOWARD A PERFECTED STATE (1986).

[20] *See id.* at 119.

[21] *Cf.* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 3 (1980) ("So long as we live, there can be no escape from the struggle for power."); T. HOBBES,

to an analysis of our day-to-day political practices.[22] Instead, the goal of political theory is to elaborate theoretically a vision of the "good" public life. Weiss's understanding of political theory marks a definitive break with liberalism's insistence on neutrality toward competing definitions of the collective good.[23] In *Toward a Perfected State,* Weiss attempts to weave the web of social and institutional networks needed to embody the good life in a complex modern society.

C. *The Critical Discussion*

My own discussion will trace Weiss's attempt to develop a noninstrumentalist view of what it means to be in union. I will discuss his distinctions between the collaborative and the associative aspects of being in union and between communities and communes. These distinctions are relevant to the way in which we think about group life generally, and more specifically to how we think about labor unions. I will also briefly discuss Weiss's analysis of the divergent roles of, and the relations between, society and the state. Weiss's analysis allows us to avoid the simplistic identification of society with what Hegel called "civil society," the private sphere of the market governed by the laws of property and contract. His analysis also allows us to recognize the im-

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LEVIATHAN 150 (C. MacPherson ed. 1968) ("The Greatest of humane Powers, is that which is compounded of the Powers of most men, united by consent, in one person, Naturall, or Civill, that has the use of all their Powers depending on his will . . . . Therefore to have servants, is Power; To have friends, is Power: for they are strengths united.").

[22] *Cf.* MacNeil, *Bureaucracy, Liberalism, and Community—American Style,* 79 NW. U.L. REV. 900, 904 (1984-85) (footnote omitted) (commenting that "[b]ureaucracy . . . is a particular form of government of human affairs saturated with reasoned and detailed planning"). *But cf.* A. DOWNS, INSIDE BUREAUCRACY 1 (1967) (arguing that bureaucracies make critical political decisions).

[23] *See* B. ACKERMAN, *supra* note 21, at 327 (attempting a reconstruction of the liberal state based on a coherent dialogue of neutrality); Sandel, *supra* note 7, at 82 (noting that the foundation of the liberal vision is that "a just society seeks not to promote any particular ends . . . [and] therefore must govern by principles that do not presuppose any particular conception of the good"). An appeal to neutrality underlies the development of "process" theories, which focus on the rationality of the means used or the proper functioning of the political process in achieving a chosen outcome rather than the substantive value of any particular outcome. *See* Baker, *Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection,* 58 TEX. L. REV. 1029, 1038-1040 (1980) (discussing and criticizing neutrality theories in the context of equal protection analysis). For examples of "process" theories, see J.H. ELY, DEMOCRACY AND DISTRUST (1980) (outlining a theory of political process that generally focuses on neutrally summing individual choices in forming collective decisions); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 20 (1972) (proposing an approach to equal protection marked by rigorous judicial scrutiny of the means adopted to further legislative ends).

portant yet limited role of the state, and indeed of the sphere of right, in individual fulfillment.

I will then turn to Weiss's concept of potentiality in order to examine the promise of reconciliation between the individal and society, and the possibility of a telos toward perfection, without an appeal to the closure of experience in Hegel's *Absolute Knowledge.*[24] Here I will discuss how Weiss thinks beyond the "fundamental" contradiction—the public/private dichotomy—that Duncan Kennedy presents in his work.[25] For Kennedy, this dichotomy—an inescapable fact of our existence—keeps the dream of rational reconciliation from being realized.[26] Weiss, on the other hand, does not consider it our fate to be ripped apart by the oppositional longings of our public and private selves. The goal of political theory is to spell out a realistic vision of reconciliation in modern society.

I will conclude by examining Weiss's attempt to move beyond the monadic view of independent entities presented in his earlier works. Weiss seeks to overcome the fragmentary and external interrelatedness inherent in his radical notion of privacy through the introduction of the *dunamis,* his conception of our "common ground." On one level, Weiss clearly and carefully avoids the dualism Hegel deconstructs in his *Science of Logic.*[27] For Weiss, the "I" of the human individual is not a separable substance from the *dunamis.* The *dunamis* is the gathering force that unifies the "I," and at the same time brings together the dispersion of beings—the several "I's."

As I have already suggested, I agree with Weiss that even the most sophisticated interpretation of Hegel cannot provide us with a full account of the individual. I also find many aspects of Weiss's own intensive dialectic of individuality convincing. I will argue, however, that Weiss's idea of radical ontological privacy carries with it the temptation to dualism that Weiss's own conception of the *dunamis* would lead him to reject, and that ultimately an anti-dualist understanding of the "being" of the individual is important to Weiss's own post-Hegelian project.

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[24] Hegel's concept of *Absolute Knowledge* describes what would be known by an "infinite intellect, one not sharing our obvious perceptual, corporeal, and temporal limitations." A. WHITE, ABSOLUTE KNOWLEDGE: HEGEL AND THE PROBLEM OF METAPHYSICS 146-47 (1983).

[25] *See* Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 205, 213 (1979) (stating that the fundamental dichotomy is "that relations with others are both necessary to and incompatible with our freedom").

[26] *See id.* at 210-13.

[27] *See* SCIENCE OF LOGIC, *supra* note 10.

II. In Union: Weiss's Vision of Community

A. *Collaboration and Association*

Weiss begins his discussion by distinguishing the two aspects of being in union, the collaborative and the associative. By collaboration, Weiss means to indicate the self-conscious joining together of individuals to accomplish a task or a series of tasks. Collaborations are goal oriented and come about because individual human beings recognize that there are challenges they simply cannot meet as individuals:

> A manageable challenge, a common tradition, similar training and habits, and sometimes just the need to deal with what is beyond the ability of any to master, when combined with a steady purpose, often suffice to get a number of people to act collaboratively. An inherited, guiding common condition, governing their collaboration, helps determine what will be done. The inclinations, habits, training, and aims that had served them before lead them to engage in different interlocked tasks to bring about what none could alone.[28]

Weiss's emphasis on the role that habits and training play in the definition of what constitutes collaboration allows him to distinguish his own understanding of collaboration from that of the social contract theorists, who postulate a mythical state of nature. Such theorists—Hobbes being one of the most notable—argue that totally separate beings come together for the sake of overcoming absolute savagery.[29] Weiss, in turn, responds:

> There never was a time when human beings were just Hobbesean savages, each with a hand raised against the rest. Without help no human being ever gets past infancy. If humans eventually become Hobbesean savages they would do so after they had benefited from collaborations which made it possible for them to continue and prosper in the face of natural threats and disorders. The contract Hobbes thought they might have had to make would require them to take advantage of a common knowledge of what they needed, a common language, and a common understanding of the na-

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[28] P. Weiss, *supra* note 19, at 19.

[29] See T. Hobbes, *supra* note 21, at 223. According to Hobbes, men come together in a commonwealth to deliver themselves from the incessant warfare toward which they tend by nature and which renders the "life of man, solitary, poore, nasty, brutish, and short." *Id.* at 186.

ture of a contract, sovereign, obedience, and so on.[30]

In order to communicate with one another, let alone to contract with one another, we rely on the shared meaning of a common tradition. The very idea of a contract implies a pre-exisiting social system, in which what it means to contract is defined.

Weiss's view of collaboration includes the instrumental alliance with others that Hegel associated with the market relations of civil society as but one possible form collaboration might take. Collaboration for the accomplishment of a task can involve the relegation of the other to an instrument or means for one's own self-maximization, but it need not do so.[31] There is nothing in the idea of collaboration that prevents us from heeding the Kantian maxim that we should treat others as ends rather than as means.[32] Yet alone the collaborative aspects of being in union, even under Weiss's expansive definition, cannot yield an adequate account of our experience of belonging together: to define union solely as collaboration is to reduce our interaction with one another to conscious negotiation. For Weiss to stop with that definition would barely raise him above the instrumentalist theories he sets out to critique.

But Weiss recognizes that our embeddedness in a shared world constitutes who we are and might become. Institutions are not here for the individual to manipulate in pursuit of her desires. They also embrace the expressive acts of collectivity. For Weiss, the associative aspects of being in union de-emphasize the goal oriented nature of collaboration. Instead, association stresses the spiritual sharing of values—the sense of being one with others that comes from the sharing of the common ground of our humanity.[33] This common ground is what Weiss calls the *dunamis.* He describes it as follows:

> People are together with whatever there is, by being related in a common space and time, in other ways, and through a common ground. All originate from and continue to be connected with one another, and eventually disappear into that ground. That ground has been referred to over the centuries and in different cultures in many different ways—'Tao', 'The Receptacle', 'The Collective Unconscious', 'The Will',

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[30] P. WEISS, *supra* note 19, at 12.

[31] *See id.* at 12 ("Each person could be said to act selfishly, to be occupied primarily with benefiting from and overcoming challenges. But, equally, each could be said to be altruistic, occupied with achieving what might benefit others . . . .").

[32] *See* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 52-54 (R. Wolff ed. 1969); P. WEISS, *supra* note 19, at 12.

[33] *See* P. WEISS, *supra* note 19, at 24.

> 'The *élan vital,*' and 'Creativity'. All are somewhat overlapped by what I have called the *dunamis,* to accentuate the fact that what is the ground of all is at once potential, powerful, and dynamic. However it be designated, it is acknowledged by everyone to be internally indeterminate.[34]

Thus, for Weiss, an actual union of human beings involves both collaborative and associative aspects: "Since [individuals] are unities, they are able to unite their collaborative and associative roles. Insisting on themselves, they combine their participation in a collaboration with their participation in an association, and thereupon become interrelated members of a union."[35] We are involved inescapably with others because we inevitably share in a portion of the *dunamis.*

It may be added that, for Weiss, the *dunamis* is not only the "common ground" of all that is, but it is also the unifying principle of the individual subject. The *dunamis,* in other words, is what allows each one of us to be an "I," even if that "I" never can be fully reached or completely known. Each one of us is a unity, more than just the "me," with which the "I" faces the world and the "you" that others confront. The "I" is irreducible to the public expressions of the self. We are always more than we are known to be either by ourselves or by others. According to Weiss, it follows that the individual is a radically private being. Privacy, as Weiss uses the term, should be understood on the ontological plane rather than on the level of legal categories.[36]

What is the "cash value" of emphasizing both the collaborative and the associative aspects of being in union? The most obvious answer is that the distinction between them helps to give us a far richer account of our actual experience of being in union, whether in the family, the workplace, or the neighborhood, than the one offered by purely instrumental views of joining together. Take, for example, the experience of workers joining together in a labor union, which, though not specifically discussed by Weiss, nicely illustrates his point. Unions are often presented—indeed by unions themselves—as if they were solely collaborative enterprises in which the workers join together for the promotion of the individual welfare of each worker. The collective good is merely the outcome of each worker using the other workers or the ex-

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[34] *Id.* at 21-22. Weiss also makes clear that the *dunamis* is the ground that gives rise to our individuality. "Always available, it is a flux where distinctions are being constantly made and unmade, without ever achieving the status of separations. Some distinctions there, though, crop out in the form of separate, actual individuals, each with its own privacy." *Id.* at 22.

[35] *Id.* at 33.

[36] *See id.*

ternal union apparatus as a means for economic self-betterment.[37] The organization is nothing more than the outcome of the convergence of the worker's individual interests.

This collaboration-based view of the union is reflected in the justification for allowance of the "union security shop."[38] The security shop is defended as a method for solving the free rider problem by making sure that all workers who will individually benefit from the collective bargaining agreement will also have to contribute to the group that has been the means for their benefit. Otherwise, first one worker will realize that she can get a free ride and then another, and soon the group will dissolve[39]—unless, of course, this process ends with the realization on the part of the individuals involved that they are corroding the very

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[37] *See, e.g.*, R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 5 (1984) ("The average unionized worker will see that unions generally 'deliver the goods,' by providing higher wages and benefits as well as a voice at the bargaining table and on the shop floor, but that some of 'the goods' have a social cost."). As a matter of federal law under the National Labor Relations Act, a union representing a majority of employees may act as the exclusive bargaining representative of all employees in the bargaining unit. *See* 29 U.S.C. § 159(a) (1982). Thus, the collaborative efforts of the union inure to the benefit of both members and non-members, giving rise to the free rider problem discussed below. *See infra* notes 39-41 and accompanying text.

[38] The phrase "union security shop" may refer to a number of arrangements between employers and unions, all designed to curb the free rider problem. The traditional security shop agreement requires an employee to join the union after an initial grace period on the job and to remain a member during the term of the agreement. *See* 2 THE DEVELOPING LABOR LAW 1366 (C. Morris 2d ed. 1983); *see also* 29 U.S.C. § 158(a)(3) (1982) (providing that "nothing in this subchapter, or in any other statute of the United States . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . ."). The employee, however, need only become a dues paying member; full union membership is not required. *See id; see also* Hershey Foods Corp., 207 N.L.R.B. 897 (1973), *enforced,* 513 F.2d 1083 (9th Cir. 1975) (finding the union to have violated § 8(b)(2) of the NLRA by causing an employer to discharge an employee who resigned from the union but continued to pay required dues). An agency shop agreement generally requires that employees, "as a condition of continued employment, must either become members of the union or pay the union a service fee—usually equal in amount to union dues." 2 THE DEVELOPING LABOR LAW, *supra,* at 1387. Maintenance-of-membership agreements "require all employees who are union members at the time the contract is executed or at a specified time thereafter, and all employees who later become members, to retain membership as a condition of employment." *Id.* at 1390. Nonmembers, however, have no duty to join the union or pay dues or a "service fee." *See id.* Both the agency shop and maintenance-of-membership agreements represent lesser forms of union security than the traditional security shop agreement, the former because the service fee payer has no obligation to abide by union rules and the latter because nonmembers need not participate at all. *See id.* at 1389-90.

[39] As the court in *Buckley v. American Federation of Television and Radio Artists* stated: "A required tolerance of 'free riders,' i.e., those who enjoy the benefits of the union's negotiating efforts without assuming a corresponding portion of the union's financial burden, would result not only in flagrant inequity but might also eventually seriously undermine the union's ability to perform its bargaining function." 496 F.2d 305, 311 (2d Cir.) (citations omitted), *cert. denied,* 419 U.S. 1093 (1974).

means of their self-betterment, and that to continue to do so would not be self-maximizing behavior. Thus, absent a voluntary shifting of behavior, if we are to protect such groups—and the National Labor Relations Act does indeed protect such groups[40]—then we must allow the security shop as a means for solving the free rider problem.[41]

If, however, we emphasize both the collaborative and the associative aspects of being in union, we see a very different picture. The union is viewed as the embodiment of the shared spirit of the workers whose communal existence is an expression of who they really are. In the process of self-consciously appropriating their experience of being united, workers

> set themselves in contrast with all else [i.e., any other union] at the same time that they accept one another as belonging together. It is possible for them to act at cross-purposes, to hate, fight, and even kill, but they will do so as fellow humans joined through the agency of part of the *dunamis*.[42]

If one adds to the collaborative aspects of being in union the associative aspects, the building of a shared, communal life becomes an end in itself.[43] The affective aspects of solidarity are emphasized, and the workplace becomes the collective home of the workers. The good of group life is not reduced to its instrumental ability to facilitate individual betterment. The union is a shared, as opposed to a common, good,[44] whereas the "good" of solidarity is understood as intrinsic to the prac-

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[40] Section 1 of the National Labor Relations Act as amended by the Labor Management Relations Act provides:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Labor Management Relations Act, Pub. L. No. 80-101 (1947) (current version codified at 29 U.S.C. § 151 (1982)); *see also* American Seating Co., 98 N.L.R.B. 800, 802 (1952) ("Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be 'free riders.' ").

[41] The Supreme Court has noted the bankruptcy of this solely collaboration-based approach to the "security shop," commenting that the "dues only" requirement of the agency shop and the traditional security shop disembowel the concept of "membership." *See* NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963) (" 'Membership' as a condition of employment is whittled down to its financial core.").

[42] P. WEISS, *supra* note 19, at 23. Whether in agreement or discord, the individuals are "joined in and through a portion of the common ground, making them attuned to one another's presence and attitudes." *Id.*

[43] *Cf.* MacNeil, *supra* note 22, at 935 (arguing that the goal of "community has intrinsic value in its own right").

[44] Charles Taylor has succinctly described the difference between a shared and a

tice of unionism. Certainly in the Knights of Labor, the collaborative aspects of unionism were almost completely played down. The emphasis instead was on the creation of a "brotherhood"—and unfortunately it was a brotherhood—in which the individual member could feel part of a larger whole. For the state to refuse to protect the process of group self-definition is to deny human beings one of their most fundamental modes of expression—the process of joining together in a group.[45]

Under this enriched vision of labor unions, the "choice" to favor the union is understood as an expression of already assumed responsibilities and obligations, stemming from the experience of belonging together with the other workers.[46] The union, in other words, is the expression, not the creation, of the workers' solidarity.[47] Thus, although we may adopt a statute that legally protects unions only as voluntary

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common good:

> By shared good I mean something different and stronger than mere convergent good, where people may have a common interest in something. A good is shared when part of what makes it a good is precisely that it is shared, that is sought after and cherished in common. Thus the inhibitants of a river valley have a common interest in preventing floods. This is to say that each one has an interest in the same flood prevention, and this is so irrespective of whether they have some common understanding of it, or indeed whether they form a community at all. By contrast, shared goods are essentially of a community; their common appreciation is constitutive of them."

C. TAYLOR, *Philosophy and the Human Sciences,* in PHILOSOPHICAL PAPERS 2 (1985).

[45] *See* 1 P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 433-438 (1947) (noting that great emphasis was placed on "solidarity," with the aim being the unification of all workers in a general mass organization, though this ultimate goal was never actually achieved). Of course, the example of the Knights of Labor serves nicely as a reminder of why there is so much suspicion of analogous organizations. Women were usually excluded as part of the self-definition of the morality of the group. *See id.* at 437.

[46] *Cf.* 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner) ("Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [a worker] can attain freedom and dignity only by cooperation with others of his group.").

[47] Similarly, the members do not owe their union "dues" simply because they have "chosen" that obligation when they "chose" membership; obligation to the union, even on the part of those who were not the originators of the group, flows from the very belonging together that the union embodies. In like manner, internal union sanctions are not directed "against" incorrigible members; they are an expression of the group vision of how and why the workers belong together. To deny the group the process of internal self-definition would be to deny the members the freedom to actually become a union.

A similar argument in favor of allowing unions to develop their own sanctions, whether for the protection of union security or for the promotion of a unified strike, has been made repeatedly in the American labor movement, by the early AFL unions as well as by the more radical IWW and the Knights of Labor. *Cf.* 1 P. FONER, *supra* note 45, at 433-38 (discussing unions' insistence on secrecy, ritual, and qualifications for membership).

associations, the associative position would suggest to workers that their "choice" to form a union or to join an already established union actually has been made when they become workers in the factory. To deny one's membership in the group would be to engage in an unacceptable form of false consciousness. Under this vision of the union, however, the view of the traditional security shop, which allows the worker to pay dues without assuming the full obligations of membership, is an unsatisfactory compromise to the tension between group sustenance and individual rights. The union security shop would be understood to undermine the "shared" good of solidarity.

B. *The Individual, the Moral, and the Ethical*

Inherent in the creation and the development of a shared life are values, norms, and principles implicit in the self-definition of the group. If a union is to embody or achieve the "value" that characterizes its associative aspect, then the individual members of the group must act in consonance with that "value." As Weiss states:

> Because a union is constituted by both collaborations and associations, it is a pulsating, limited, bounded-off whole of multiply related people defining a common value in which its unit members participate. A person is moral to the degree that his or her actions conform to the demands that that value makes on a particular occasion.[48]

Simply put, an individual is immoral to the extent that her actions are counter to what the union requires or prescribes and amoral to the extent she is simply occupied by other things.[49] Weiss's definition of morality, however, comes curiously close to rendering the individual an instrument to group ends, albeit group ends that the individual may help to define. Has Weiss solved the problem of instrumental approaches to group life by privileging the group as opposed to the individual? Morality conceived as group morality engulfs the individual and offers her no opportunity to stand back and assess the union or oppose its dictates—the group provides the standard by which the group is assessed. Yet, Weiss repeatedly cautions that no union, and thus no morality, ever encompasses all that we are or fully accounts for the value we have as private beings.[50] Is the individual then left with

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[48] P. WEISS, *supra* note 19, at 35.

[49] *See id.* at 35.

[50] *See, e.g., id.* at 40 ("Since no union controls privacies, none can involve people to the degree they could conceivably be involved."); *id.* at 57 ("No matter how effective a community . . . is, and no matter how completely societies and states control what

the dilemma of choosing between "immorality" and an unfulfilling selflessness?[51]

Weiss's solution to this dilemma demands that we move beyond the acceptance of the dependency of moral ecology on existing unions, each of which is to be respected. "Since there are many unions, there are many moralities. To assess them in relation to one another, account must be taken of what is ethically required."[52] Although there is nothing necessarily bad about the various moralities in and of themselves, "[a] desirable morality is one whose presence and strengthening is ethically endorsed, and which promotes the realization of the good in individuals, unions, societies, and states."[53] To understand what Weiss is arguing here, we must grasp his distinction between morality and ethics. As he explains, "Morality has to do with the degree to which people are associatively and collaboratively together in an actual union. What is there required of them may deviate considerably from what an ideal union requires."[54] Ethics, in contrast, though once known as the Greek term for "morality," today

> refer[s] to assessments of actions in terms of an absolute good pertinent to people. Since these are both private and public beings, and since each has an appropriate good, it is sensible to extend the meaning of the "ethics" so that it embraces that final ideal good of which the goods of private and public persons are specializations. Since unions, societies, and states have their own limited goods, and since it is not improper to speak of them as "bad" if they fall short of what such complexes should be, . . . it is desirable to go still further and use "ethics" to refer to the good that assesses whatever there be in terms of the ideal, final good.[55]

And what is the final good? For Weiss, the final good is the highest degree of harmony between beings that is compatible with the intensification of the vividness of individual life experience.[56] It is the

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they encompass, none ever reaches men's privacies."); *id.* at 68 ("[No person] is ever so caught up in a union or so absorbed in a society that he cannot and does not express himself in ways which challenge the roles he has in a union . . . .").

[51] *See id.* at 36 ("Someone, therefore, who confined actions to meeting the demands of the union, though moral, would not necessarily be as good as was possible.").

[52] *Id.* at 36.

[53] *Id.* at 356.

[54] *Id.* at 354-55.

[55] *Id.* at 355-56.

[56] *See id.* at 35 ("At the very least, a union tells each to fit in with others; at most, it tells all to enrich and vitalize it by finding compatible places within it as so many sustaining, harmonized units.").

orchestration, not the denial, of the values of both community and autonomy.[57] Weiss's definition of the good echoes that of his teacher, Alfred North Whitehead. The highest good is amplified so that the good of each value both allows for, and promotes, the good of all. The good, to quote Whitehead, is "that union of harmony, intensity, and vividness which involves the perfection of importance for that occasion."[58] Evil occurs when "the characters of things are mutually obstructive."[59] Evil thus involves the constriction of growth, the belittlement of enhancement, and the inhibition of intense experience. We can, of course, criticize both Weiss and Whitehead for the vagueness of their ideal of the final good, as it tells us little about how we are to actually balance harmony and intensity against each other. Yet, the ideal of the final good so conceived can still provide us with guidance in evaluating competing moralities. For example, we can use their conception of the ideal to think through the problem with the Knights of Labor. The problem is that the exclusion of women by the Knights creates mutual obstruction of the sexes, inhibits the growth of both sexes, and infringes on the rights of women who sought to appropriate the values and norms of the group—other than exclusion of women—as their own.

Weiss's distinction between the moral and the ethical provides a mechanism by which the individual may assess competing unions. The distinction allows us to appreciate fully the need to protect individual rights and the need to promote the flourishing of group life at the same time. Whereas an actual union asks individuals to conform to an established morality, "[a]n ideal union demands that people conform to an ideal morality"[60]—one that is ethically prescribed.[61] "Since no actual union is in fact ideal, every person is again and again faced with the need to decide whether to act in consonance with the demands of an actual or an ideal union."[62] As Weiss states:

> Each person, while a member of a union, also stands apart from it, able to carry out an accepted role. As so standing apart, each is able to assess both the morality produced

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[57] *Cf. id.* at 381-82 ("Were [people] to assume accountability for what occurs in an excellent state framed within the humanized world, they would be well-governed, and both freely and effectively exercise their privacies in consonance with what that state does.").

[58] A. WHITEHEAD, MODES OF THOUGHT 19 (1957).

[59] A. WHITEHEAD, PROCESS AND REALITY 517 (1929).

[60] P. WEISS, *supra* note 19, at 354.

[61] *See id.* at 356 ("A morality is to be ethically assessed as good or bad, depending on how it accommodates, preserves, and enhances people, and promotes a perfected society and state.").

[62] *Id.* at 355.

> by the joining of a number, and the limitations to which their activities are thereby subject. Evidently, from the standpoint of their privacies, a union should at least preserve whatever values each possesses, and go on to enhance all of those values in harmony.[63]

Thus, the individual is not forced to serve blindly the union of which she is a member. Nor is she relegated to hopeless immorality, because immoral action can be justified by appeal to a higher, ethically mandated good. As a private being, standing apart from a union, the individual may assess the desirability of the union in terms of how closely it approximates the ideal. Similarly, the individual can assess the actions of herself and others within the union by considering whether they move the established morality closer to the ideal morality.

Weiss's distinction between morality and ethics also allows the individual to appreciate fully the particular viewpoints of the different unions and the possibility of real and prolonged conflict in any complex social union, while adhering to the universal or general vantage point of an ideal good. One function of the state is to attempt to harmonize the competing unions and their divergent moralities, not in accordance with the aspirations of any particular morality, but instead in accordance with the ideal of the ethical, which allows us to reflect on the limits of any particular moral system. At stake in the regulative ideal is not a particular moral system, but rather the spirit in which that system is accomplished.[64]

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[63] *Id.* at 37. There are interesting similarities between Weiss's view of association and associative obligation and the interpretation of community offered by Ronald Dworkin. Like Weiss, Dworkin recognizes that the collaborative view of community, with its emphasis on choice as the only basis for obligation, does not adequately express our understanding of communal obligation. Also like Weiss, Dworkin emphasizes that there are conditions that must inhere in communities in order for them to induce their participants to assume obligations. For Dworkin, these conditions consist of 1) reciprocity of commitment; 2) the personal and special nature of the group's protections and obligations; 3) mutual concern; and 4) equal concern. *See* R. DWORKIN, LAW'S EMPIRE 196-202 (1986).

[64] Of course, we can analyze Weiss's concept of "ethics" in another way. The ideal as an abstract certainly qualifies under Peirce's definition of a sign, and necessarily remains vague. Vagueness here is used to indicate a sign that tolerates competing interpretations. As already suggested, the specification of the ideal takes place in its historical elaborations, and its concretization in the actual enriches the meaining of the ideal itself. Such an ideal does provide us, however, with a perspective that helps us to narrow the field of competing interpretations and to evaluate conflicting assessments of different unions. *See generally* 3 WRITINGS OF CHARLES S. PEIRCE 82-89 (C. Kloesel ed. 1986) (discussing Peirce's theory of signs).

C. *The Distinction Between Community and Commune*

In *Toward a Perfected State,* Weiss does not leave us with a static description of the relation between the individual and her group. Rather, Weiss believes that the role of the individual changes depending on the kind of group of which she is a part. As part of his inquiry, Weiss uses the distinction between collaboration and association to differentiate between two forms of group life: communities and communes.

Communities grow out of our need for collaboration in attempting to satisfy our individual desires.[65] As Weiss states, individuals collaborate "in order to maintain themselves against what else there is in the world."[66] In contrast, communes grow out of the associative aspects of being in union—particularly the sharing of some set of values—and are characterized by the interrelationship of group members.[67] For Weiss, the classic examples of communes are religious and scientific groups. Both groups are devoted, in Weiss's opinion, to some higher value, be it God or scientific truth.[68] Weiss, however, does not intend that the distinction between communities and communes be treated as absolute, nor does he suggest that collaboration and association are expressed in them in a mutually exclusive manner.[69] In fact, his very idea of union implies the interaction of collaboration and association, and this idea extends to the context of communities and communes.[70] For example, in a commune, both the collaborative and associative aspects of being in union are present. But in a commune, the very definition of the collaboration is sustained by adherence to the shared value set that is the basis of the commune. As Weiss explains:

> Collaboration for a commune involves a distribution of efforts, all valued because sanctioned by a superior value.

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[65] *See* P. WEISS, *supra* note 19, at 52.

[66] *Id.*

[67] *Id.* at 42-43. Weiss notes that in a commune, "people focus on a supposed sustainer of a value greater than their own, and act together mainly to carry out common practices." *Id.* at 43.

[68] *See id.* at 43. Weiss's formulation recognizes that there could be an ethical commune devoted to the ideals of a conception of justice.

[69] Weiss admits that community and commune are readily confounded, yet distinguishable:

> Both have collaborations and associations joined together. Both define a morality to which people are supposed to conform. Both can be included in and include other communities and communes. Both can occur within societies and states. And the one may sometimes imperceptibly give way to the other. Still, they do differ, and deserve to be sharply distinguished.

Id. at 52.

[70] *See id.* at 59.

> The members of a community rarely make reference to such a value. And when they do, it is usually because some or all are also already functioning in a commune. The members of a commune are characterized by a common devotion; those in a community put emphasis on what is to be done to have it continue and prosper. A monastery is a commune; a well-run hospital a community.[71]

Thus, communities and communes are distinguished not on a mutually exclusive basis, but by their different emphasis. The distinction matters, however, for two reasons. First, the very sense of what it means to be a member of a group and to participate as an individual in a group differs in a community and a commune. Second, the distinction allows Weiss to overcome what he considers to be the central shortcoming of contractualist or instrumentalist theories of the state: the failure to come to terms with our intuition, based on experience, that there are forms of solidarity that are not strictly instrumental. Weiss believes that human beings are intrinsically social. Mutual co-determination is not just a goal, it is an inevitable reality. Thus, in Weiss's opinion, to be truly comprehensive, a study of human sociality must focus on all the numerous levels of what it means to be in union in a complex industrial society.

Weiss thus shares the Marxist view that a vital shortcoming of advanced capitalistic societies is their one-sided emphasis on the instrumental value of economic self-seeking, which turns collaboration into a relation of the one against the other and undermines other forms of association.[72] But Weiss disagrees with the Marxist critique when "[it] join[s] this view to the not altogether compatible suppositions that there is a necessary course to history, and that a dominant commune is to be overthrown through the intelligent use of force."[73] Weiss maintains that force can only produce an artificial commune, one in which "the collaboration is externally joined to an association."[74] Weiss, then, does not share the outcome of the Marxist vision: that a commune embracing all humanity can meet adequately people's particular non-economic needs and aspirations. For him, we can never dispense with the need for small, local groupings:

> To the usual complaint that the Marxist does not make ade-

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[71] *Id.* at 52.

[72] In Weiss's own words, "[t]he Marxists are surely right in remarking that people are associated, and that economic collaborations are limited to those who compete for common goods against other collaborations." *Id.* at 50.

[73] *Id.* at 50-51.

[74] *Id.* at 51.

> quate provision for the exercise of individual rights, it is therefore necessary to add another, pointing to the failure to allow for the existence of freely constituted limited communes whose members collaborate and associate to realize noble ends which might result in benefits for all.[75]

D. *Society, the State, and the Sphere of Private Right*

Weiss describes society as produced in and through the interplay of communities and communes kept more or less in balance. As Weiss defines it:

> A society is constituted by a union of people and a distinctive condition, itself the product of two factors, an ideology and a territory. The ideology provides an ordering for what occurs, in terms of its consonance with what is commonly cherished; the territory enriches a present place with an inherited past. The ideology and territory together constitute a homeland, a valued termporalized region.[76]

Society, then, is not to be identified with civil society, the sphere of the market.[77] It is a complex, yet informal network, of the various group-

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[75] *Id.* In this sense, Weiss echoes the calls of mainstream communitarian writers for a return to smaller, intermediate forms of association. *See, e.g.,* MacNeil, *supra* note 22, at 934-39 & n.141 (discussing the importance of intermediate forms of association in the communitarian vision and noting that the "[f]ailure to recognize the existence of community and to make the distinction between it and the entire society . . . are among the greatest weaknesses of liberalism, intellectually and practically" *Id.* at 936 n.141); Sandel, *supra* note 7, at 94-95 (lamenting that "[a]s the scale of social and political organization has become more comprehensive, the terms of our collective identity have become more fragmented, and the forms of political life have outrun the common purpose needed to sustain them"); Sandel, *supra* note 5, at 17 (noting that "communitarians worry about the concentration of power in both the corporate economy and the bureaucratic state, and the erosion of those intermediate forms of community that have at times sustained a more vital public life").

[76] P. WEISS, *supra* note 19, at 65-66.

[77] *See* PHILOSOPHY OF RIGHT, *supra* note 14, at 122-55. As Hegel summarizes it:

> Civil society contains three moments:
> (A) The mediation of need and one man's satisfaction through his work and the satisfaction of the needs of all others — the *System of Needs.*
> (B) The actuality of the universal principle of freedom therein contained — the protection of property through the *Administration of Justice.*
> (C) Provision against contingencies still lurking in systems (A) and (B), and care for particular interests as a common interest, by means of the *Police* and the *Corporation.*

Id. at 126. Civil society is an instrumental construct, based on the system of human needs. For Hegel, the vision of civil society approximates the vision of the state set forth by the social contract theorists. *See* S. AVINERI, HEGEL'S THEORY OF THE MODERN STATE 143 (1972). In contrast, Hegel envisions the state as something different from

ings it encompasses and through which it is expressed, and it includes the traditional values people take for granted and the accepted definitions of social roles. Indeed, whereas society offers people a degree of guidance, protection, and success, "it has no well-focused or well-controlled power or boundaries, and no stated, intelligible, stable rules and regulations."[78]

The state, on the other hand, is formally constituted. According to Weiss, the central purpose of the state is the articulation of legal entitlements. The state "imposes articulated, enforceable demands on people who are together in a society. It may forbid the actions that the society prescribes or allows . . . ."[79] The state therefore provides "a governance that could benefit people in a way and to a degree not otherwise possible."[80] Ultimately, the distinction between society and the state means that the status of the individual is different in her relation to the state than in her relation to society. Although as a member of society a person is something more than a simple unit, yet less than a totally private being,[81] within the state a person is a citizen with publicly established rights.

Weiss holds, however, that not all rights originate with the state; inalienable rights inhere in the individual. Weiss's strong anti-positivist theory of the ground of rights reflects his radical view of ontological privacy. As Weiss states the positivist thesis, "only the state has rights, [and] nothing from its position is to be deemed inviolable."[82] The assertion that all rights originate with the state legitimizes the withdrawal or limitation of such rights when the state so desires—the individual has no inalienable rights. In contrast, Weiss believes that rights have a private ground that is independent of and prior to their public embodi-

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civil society—an end in itself where man achieves universality:

> If the state is confused with civil society, and if its specific end is laid down as the security and protection of property and personal freedom, then the interest of the individuals as such becomes the ultimate end of their association, and it follows that membership of the state is something optional. But the state's relation to the individual is quite different from this. Since the state is mind objectified, it is only as one of its members that the individual himself has objectivity, genuine individuality, and ethical life. Unification pure and simple is the true content and aim of the individual, and the individual's destiny is the living of a universal life.

PHILOSOPHY OF RIGHT, *supra* note 14, at 156.

[78] P. WEISS, *supra* note 19, at 170.

[79] *Id.*

[80] *Id.*

[81] *See id.* at 68 ("[A]s publicly functioning together with reference to, but not necessarily in accord with what society requires, [persons] are distinguishable from themselves, both as private persons and as units.").

[82] *Id.* at 172.

ment. For example,

> [p]rivately, the right to speech or assembly is the inalienateable right to frame expressions for oneself or to decide to come together with others. Publicly, the right to speech or assembly is the inalienable right to say or do things in public which do not adversely affect the persons and activities of others. A state has the task of giving the right a protected expression."[83]

Weiss takes the division between the private ground and public expression very seriously. He maintains that the need to consider the rights of others and the requirements of the state mean that there can never be a fully adequate expression of the private ground of rights. The public expression of rights always involves balancing: the balancing of interests and rights of others against the private right per se.[84] The state is involved with the individual as a public person, a citizen, and not as a private being. A right not practiced in public is beyond the reach of the state.[85] "What [the state] does on behalf of any of a person's publicly expressed rights . . . will never be adequate to the claims made by that person as just a private being."[86] The state, then, does not even pretend to encompass all of what we are, but only one part—it protects what we are as public beings, as citizens.[87]

III. The Reality of Potential and the Possibility of Reconciliation

One of the most interesting aspects of Weiss's work is his emphasis on what he calls "prospects." "A prospect is a real possibility, a relatively indeterminate condition pertinent to what is present. Action is needed if the prospect is to be turned into a relatively more determinate

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[83] *Id.* at 173. An inalienateable right flows from the nature of a being and is privately possessed, "expressing what a being is as apart from all others, living and using a body in unduplicable ways." *Id.* at 135. Though an inalienateable right can never be taken away so long as the being lives, its "public exercise may be limited, qualified, and even precluded." *Id.* at 173. Inalienable rights are those rights possessed by a being as a public person—"inalienateable rights given a bodily role." *Id.*

[84] *Id.* at 173.

[85] *See id.* at 174 ("Although a state may be able to offer support for whatever is publicly expressed, it is never able to deal with private inalienateable rights.").

[86] *Id.*

[87] The limited role of the state can also be understood from a different vantage point. The state is by no means the only grouping for individuals. To argue that the state is created to ward off others "overlook[s] the fact that people have been and are still together in communities, communes, and societies, functioning well for long periods in the absence of a state, and in considerable independence of any state that might in fact exist." *Id.* at 151.

entity in a succeeding present."[88] Prospects, according to Weiss, inhere in the very idea of a cumulative view of time in which the future is not radically severed from the present but is instead understood as being in the locus of indeterminate possibilities.[89] To explain his concept of the future, Weiss refers to a "large rock [that] makes a large afternoon shadow possible."[90] The shadow is one of the rock's "many pertinent future possibilities."[91] Whether this, or any one of the rock's other possibilities, is ultimately determined "will depend on what occurs in the present."[92] Thus, although the outcome of a process of causation is necessitated by the link between the present and the future, the fact that the particular outcome is within the still indeterminate future imparts the possibility of novelty.[93]

With his notion of prospect and his emphasis on novelty, Weiss reaches what he takes to be his fundamental disagreement with Hegel. On Weiss's reading of Hegel, Hegel's retrospective account is possible only because the ideal has been fully actualized in the real. In Hegel's circle of immanence, the full determinations of "being" ultimately disclose themselves.[94] Because each stage of "being" within the circle is a congealed form of "Absolute Being," Weiss believes that there is no real categorical novelty or future.[95] As Weiss states:

> [t]he realization of a prospect is a new occurrence, grounding a new adventure productive of a new result. If, therefore, it be supposed that something like a cosmic purpose is at work at each stage, and that it there exhibits the self-same final

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[88] P. WEISS, PRIVACY 146 (1983).

[89] *See* P. WEISS, *supra* note 19, at 115.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] As Weiss explains: "What in fact occurs at the outcome of a process of causation is both necessitated and necessarily new. . . . Since the conversion is new but occurs within the scope of a necessary connection [between the present and the future], it yields what is predictable as general, and unpredictable as particular." *Id.* at 116.

[94] SCIENCE OF LOGIC, *supra* note 10, at 824-44.

[95] *See* P. WEISS, *supra* note 19, at 127. The question of whether or not there is categorical novelty in Hegel turns in part on how one defines novelty. In Hegel, the dialectic proceeds through determinate negation, in which the contradiction is *Aufhebung*, a word almost impossible to translate into English. *Aufhebung* implies both overcoming and preservation. *See, e.g.*, R. BERNSTEIN, PRAXIS AND ACTION 18 n.6 (1971) ("'*Aufheben*' is to negate, affirm and transcend, or go beyond. These are not necessarily three distinct moments, but can be involved in a single process."); C. TAYLOR, HEGEL AND MODERN SOCIETY 49 (1979) (*Aufhebung* "is Hegel's term for the dialectical transition in which a lower stage is both annulled and preserved in a higher one."). So, in one sense, the "new" is never radically severed from the "old." The privileging of determination in Hegel through determinate negation allows us to read his historical dialectic at the very least as a story of how the new arises out of the old.

> result in different partial guises, too small a role will be accorded to what is present. Inevitably, there will be a slighting of the novelty of what is produced.[96]

Weiss thus denies that there has been, or indeed can be, the full reconciliation of the ideal and the actual in history. But the denial of full reconciliation of the ideal and the real does not mean that we must deny the possibility of movement toward the ideal of perfection. Nor need we reject all attempted rational reconciliations of the actual with the ideal as illusory escapes from the "fundamental contradiction" presented in the work of Duncan Kennedy.[97] Kennedy believes we are helplessly entrapped in a struggle between strong competing impulses—one for community and another for individual privacy, one for freedom and another for the stabilization of order. Law pretends that it resolves this painful contradiction through an appeal to rational standards of adjudication, but in reality it simply re-expresses it. We can inevitably justify a result opposite to the one embraced by the judge if we look at the case from the other pole of the contradiction.

Weiss would remind Kennedy that his own view of the inescapable nature of our social reality downplays the significance of *praxis*.[98] Even if there is no "final solution," Weiss would claim that the development of a political theory and a theory of law has as its goal the evaluation of the divergent reconciliations of the "fundamental" contradictions in human life.[99] We engage in the evaluative process by asking how closely these reconciliations approximate the ideal. This ideal embodies a classical notion of perfection, in which the perfection of a physical or social organization depends on the quality of life supported by the organization.

Weiss shares this classical notion of perfection with Whitehead. Yet in Weiss's work there is an ambiguity in the appeal to perfection that does not appear in Whitehead's. For Whitehead, all forms of life are marked by their internal striving for perfection. He supports his teleological view by providing a version of the "final form," even if the final form is no more than a dynamic and creative process—the God-

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[96] P. WEISS, *supra* note 19, at 128.

[97] Kennedy, *supra* note 25, at 211-13.

[98] *See* R. BERNSTEIN, *supra* note 95, at x ("*Praxis*" . . . signifies the disciplines and activities predominant in man's ethical and political life. These disciplines, which require knowledge and practical wisdom, can be contrasted with "*theoria*" because their end is not knowing or wisdom for its own sake, but doing—living well."). *See generally id.* (tracing the themes of *praxis* and action through Marxism, existentialism, pragmatism, and analytic philosophy).

[99] *See* P. WEISS, *supra* note 19, at 159.

head itself.[100] Weiss's *dunamis,* on the other hand, does not embody the divine or indeed any other version of the final form. Yet, perfection as a metaphysical ideal demands something more than the introduction of the *dunamis* as a unifying life force. In order to present a complete vision of perfection, Weiss will have to clarify the status of the *dunamis.*

In spite of his failure to fully elaborate the metaphysics underlying his reliance on perfection, Weiss does illuminate the ideal of perfection in the context of modern society and the modern state. *Toward a Perfected State* itself can be understood as an attempt to set forth the properties that every modern state must possess, no matter what concrete values pervade it. Without such an ideal, there would be no goal to which we could direct our striving.

IV. THE CRITIQUE OF ONTOLOGICAL PRIVACY

I suggested in the introduction that Weiss has been concerned with overcoming the problem of fragmentary or external interrelatedness, both as this problem has arisen in the account of the unity of the "I" and in his discussion of the "common ground"—our shared humanity. In order to counter this problem, Weiss introduced the *dunamis.* The synthesizing power of the *dunamis* provides an account of the internal interrelatedness of individuals within a greater whole. Yet, one might ask why the problem of community should be approached by introducing a metaphysical explanation such as the *dunamis.*

Weiss would argue that it is difficult to see how we can have an account of community as the uncoerced internal interrelatedness of the subjects themselves without an appeal to an encompassing spirit—the Will, the Tao, Whitehead's creativity, Hegel's *Geist,* or Weiss's *dunamis*—even if the spirit is understood as arising in and through the group itself. For example, Hegel's own account of community as inter-

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[100] Whitehead's system of self-creating actualities requires a regulative ideal by which the actual entities in the process of becoming achieve their definitiveness or concreteness. Whitehead, however, believes that it is a fatal flaw of philosophers to ground their metaphysical systems ultimately in a separate and transcendant deity. *See* A. WHITEHEAD, *supra* note 59, at 521. For Whitehead, then, God is not an exception to the general metaphysical schema, but is conceived by the same principles. As Whitehead states: "In this sense God is the principle of concretion: namely, He is that [unique] *actual* entity from which each temporal concrescence receives that initial aim from which its self-causation starts." *Id.* at 374 (emphasis added). Just as "creativity" is Whitehead's version of the universal of which each actuality is but a moment, God too is an instance of creativity: "God is the aboriginal instance of this creativity, and is therefore the aboriginal condition which qualifies its action. It is the function of actuality to characterize the creativity, and God is the eternal primordial character." *Id.* at 344.

nal interrelatedness cannot be separated from his account of *Geist* as the self-differentiating *Absolute.* For Weiss, Hegel remains a central figure in political theory precisely because Weiss views Hegel's attempt to bridge the gap between individuality and community as the most serious challenge to the traditional liberal vision. Yet, while Weiss appreciates the power of Hegel's vision, he attempts to distinguish his *dunamis* from Hegel's *Geist.*

On at least one plane, Weiss does indeed distinguish the *dunamis* from *Geist*—the *dunamis* is indeterminate. Weiss denies that there is the closure of experience in *Absolute Knowledge.*[101] Nor for Weiss is the "we"—and this is how Weiss reads Hegel[102]—made "the true substance" of the individual. The individual exists as a separate unity, because of its contrastive relationship with the *dunamis* in which the "I" originates. As Weiss explains his disagreement with Hegel:

> Since a state, like everything else that is real for Hegel, is the outcome of the Absolute's internal arrival at some crucial point, Hegel should also have held that his Absolute has a congealed form in individual men, as surely as it has in a state, since people too are real.[103]

Hegel does, however, recognize the individual as the "congealed form of *Geist.*"[104] As I have argued elsewhere,[105] it is a strong misread-

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[101] As Richard Bernstein points out,

> Like Hegel, Weiss argues that there is no item that is necessarily and forever hidden, there is nothing that is knowable in principle that cannot be known. . . . But where Weiss sharply departs from Hegel is when Hegel claims that there is an *identity* of thought and being. For according to Weiss, while we can think and know everything that is thinkable and knowable, this does not mean that knowing—not even God's knowing—exhaustively captures all that is."

Bernstein, *supra* note 17, at 358.

[102] *See* P. WEISS, *supra* note 19, at 170 ("There is warrant in Hegel for an Hegelianism of the right which takes people to be truly human only in a state, and to be envisageable as distinguished from this only as inverted, condensed versions of it.").

[103] *Id.* at 206. Weiss correctly notes that the categories that according to Hegel conformed to reality were the outcome of the dialectical process between reciprocal opposites. The critical point is reached when understanding can go no farther because the opposites in tension can no longer suffice as an explanation of reality. As Hegel's *Absolute* encompassed each dialectic that preceded it, each resolution could be seen as a congealed form of the *Absolute.*

[104] *See* C. TAYLOR, *supra* note 95, at 11, 26-31. The individual, on Hegel's terms, is not to be understood as a discrete form of spirit, divorced from *Geist,* the spirit grounding the universe, but rather as the embodiment of the universal spirit. It is this very embodiment by finite beings that allows for the infinite freedom of *Geist* and its coming to self-knowledge.

> [W]hat is most fundamental about us is that we are vehicles of *Geist.* Hence in achieving full insight our science of the universe is transformed;

ing of Hegel to suggest that Hegel does not recognize the subject separate from social role—the universal "I" or rights bearing subject. In fact, Hegel's conception of modernity is characterized by the development of the vision of the individual as separate from social role. The power of Hegel's vision lies in his attempt to show that the universal "I" need not be based on an atomic view of the subject and is perfectly consistent with a vision of community as internal interrelatedness.

Weiss's purported disagreement with Hegel, then, is based at least in part on a misreading. If the *dunamis* is the origin of the "I," and if it is the *dunamis* that accounts for the common ground of all humanity, we cannot really say that the "I" is radically private rather than a separable but not fully distinct expression of our shared humanity. The very idea of the *dunamis* undermines Weiss's radical polarization of the inside and the outside. Weiss compares the *dunamis* to the Tao, the Will, and the collective unconscious, yet each of these notions of the whole has challenged explicitly the radical, ontological privacy of the individual. Weiss's own conception of the *dunamis* expresses an internal inconsistency.

Despite Weiss's misreading and the inconsistency in his own conception of the *dunamis,* we can still agree with Weiss that Hegel's vision of individuality is vulnerable to criticism for its one-sided emphasis on the self as a fully transparent, rational self-consciousness achieved in, and through, the totalizing reason of *Absolute Knowledge.* Hegel does not offer us a comprehensive account of our being in the world. In Weiss's terms, Hegel gives us the category of individuality and little else. I will now reconstruct what I take to be Weiss's central disagreement with Hegel. Weiss believes that Hegel, through the "reification" of *Geist,* undermines his own dialectic. Thus, Hegel's tendency to turn the community into the "true" substance of the individual can be rejected on the basis of his own dialectical insight that gave rise to the category of individuality. Weiss contends that we must show both how the self-conscious subject belongs to the community *and* how it determines itself as a self against it. Of course, the relationship *against* the community is still a relationship. Weiss's own conception of the individual can be re-interpreted within the relational framework I have suggested here.

Given such a framework, Weiss's conception of the *dunamis* does

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from being knowledge that we as finite spirits have about a world which is other than us it becomes the self-knowledge of universal spirit of which we are the vehicles.

Id. at 28.

[105] *See* Cornell, *supra* note 10, at 359-65.

not reinforce the view of the self as an independent substance, because the *dunamis* is itself the manifesting power in which all beings come to be. Ultimately, Weiss does not maintain that individuals exist in their separateness without participation in the "Being"—the *dunamis.* Rather, it is through their participation in the *dunamis* that individuals achieve self-definition, even if that participation simply takes the form of a contrastive relationship. As noted above, a contrastive relationship is still a relationship. If Weiss only sought to emphasize the contrastive moment of individuality, one could argue that he was still true to Hegel's dialectical project. However, Weiss attempts to go beyond Hegel by suggesting that individual human beings are not only internally interrelated but also externally related. Unfortunately, he never really shows us how we achieve complete severance from the *dunamis.* Nor does he convincingly answer why, if one could completely sever the self from the greater whole, the resulting radically private being would not represent the problem of the individual as a monadic being, which is the very problem the *dunamis* is supposed to solve.

Weiss must ultimately come down on one side or the other. If he starts from the standpoint of a radically private "I," he cannot avoid the reduction of social union to mere collaboration. Community in the strong sense of *Gemeinschaft* cannot be rationally explained. The solidarity that does not appeal to self-interest remains a gift, a mystery. But Weiss's project is to offer us an explanation for our sociality, our inherent condition of being with one another—*Mitandersein*—that goes beyond mere instrumentalist or contractualist theories of society. The view of being in union as collaboration *and* association demands an account of how the radically private "I" itself is constituted by its internal connections to the "we." If Weiss stops short of arguing that the "I" is constituted by the "we," then he must show on the level of phenomonological description why he does not slide into atomism and the problem of external interrelatedness he wants to avoid.

I believe that Weiss's continued emphasis of the notion of radical ontological privacy is a residue of his earlier view of the entity as an atomic substance, a view that stemmed from his critique of Whitehead's process philosophy.[106] But Weiss grasps how his own "overcoming" of the dilemmas of process philosophy left him unable to overcome the fragmentary and external relatedness of atomic entities. As I have suggested throughout this review, Weiss's project in *Toward a Perfected State* is to resolve the problem of external relatedness, and this project necessitates a discarding of his earlier views of substance. Weiss's inten-

[106] *See* P. WEISS, REALITY 132 n.1, 207-08 (1938).

sive dialectic of individuality need not, however, rest on his view of ontological privacy.[107] It is possible for Weiss to move beyond Hegel's abstract account of individuality without rejecting Hegel's central critique of all forms of ontological privacy. Weiss emphasizes the "difference" with the *dunamis* that allows individuality to be, but this "difference" can and should be understood as a simple contrastive relationship. Absent this understanding of his project, the reciprocity of oppositional categories is undermined, albeit from the opposite direction of Hegel. If Hegel tends to reinstate the philosophy of substance by identifying the individual with the community, Weiss reifies the contrastive relationship with the community in which the individual achieves self-definition so as to undercut his own account of the internal interrelàtedness of social union. The significance of the tension in Weiss's work can best be demonstated in relation to his account of right.

Weiss relies on his view of ontological privacy to justify a strong, anti-positivist theory of right. Yet, he acknowledges the inevitability of competing rights situations, in which the most that can be achieved is a compromise. Moreover, Weiss intimates that there are different kinds of rights—the rights of the individual, the rights of the communities and communes, and the rights of the state. The content of the compromise of a competing rights situation is to be judged in accordance with the ideal of perfection. In this sense, the actualization of rights, whether of the individual or of the group, only takes place within a vision of the good. On the level of categorical reflection, Weiss shows us how there can be an ideal that guides the state in achieving reconciliation. But on the level of phenomonological description, he fails to provide concrete guidance as to how we are to weigh the competing rights of the individual and the group.

In a complex society, a reconciliation between group life and individuality that does justice to both is needed. The question of how it is to be achieved, however, remains troublesome. In order to proceed, we not only need a vision of the good and a normative view of the state, both of which Weiss offers, but also an account of exactly why and in what circumstances the sphere of individual right can and should be limited by an appeal to the collective good.

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[107] Heidegger's attempt in *Being and Time* was to move beyond what he saw to be Hegel's overemphasis on the reflective capacity of the self. But Heidegger wanted to avoid endorsing any view of the subject that would reintroduce a radical vision of ontological privacy with its inevitable dualism between the external and the internal, the subject and the object. *See* M. HEIDEGGER, BEING AND TIME (J. Macquarrie & E. Robinson trans. 1962).

In spite of Hegel's failure to flesh out a full vision of concrete individuality, we can still learn from his account of right. For example, whereas Hegel recognizes the significance of the subject of right, he takes it to be an historical and collective achievement, not a condition essential to the very being of the self. Right is the principle of reason in the legally guaranteed freedom of all men. The ground of abstract right is the freedom that has been actualized in civil society. We are all recognized by the state in our equal and formal capacity to own property. Ironically, the recognition of individual right also implies the acceptance of the power of social context. In order to realize our rights, we are obligated to belong to the community. The state in Hegel can exact this obligation precisely because it protects individual autonomy. Yet, the legal expression of subjectivity also demands that the individual be separated from context. As a result, the legal recognition of individuality undermines the possibility of the substantive moral life, which is necessary for its justification. The state, according to Hegel, overcomes the abstractness of the sphere of right and mitigates the paradox inherent in the idea of individual right through the appropriation of *Sittlichkeit*, which recognizes the seemingly divergent spheres of life—abstract right, morality, and the family—as parts of a greater whole. The sphere of right, on an abstract plane, expresses the relations of reciprocal symmetry and mutual co-determination embodied in a morally just communal life. It is the embodiment of the ideals of reciprocity and co-determination in civic life that gives content to the abstract justice and the sphere of right itself and that can guide in limiting the sphere of right. Within the limits of his own historical period, Hegel tells us how his understanding of the sphere of right, as encompassed and defined within the context of a normative state, can justify the curtailment of right in particular circumstances. For example, the right of private property must yield to taxation as a means to correct the inequalities inherent in civil society that threaten the moral quality of the collective life of the community.

On the categorical plane, at least, Weiss's critique of contractualist theories of the state incorporates the understanding of right as a social institution based on the relations of reciprocal symmetry embodied in the idea of legal obligation. Yet Weiss also wants to defend a strong, anti-positivist theory of right. Once again, his continued emphasis on ontological privacy leads him away from a concrete, historical analysis of how the sphere of right has developed within the context of modernity. As a result, he pays little heed to the paradox—and how we are actually to overcome it—that Hegel argues is inherent in rights discourse. Weiss just assumes that through an appeal to the ideal of

perfection we can overcome the "possessive individualism" that C.B. MacPherson sharply described.[108]

There is perhaps a greater irony in Weiss's view of ontological privacy. Weiss insists that we need ontological privacy to do justice to the integrity of the individual. Individuality for Weiss is a given, not a precarious historical achievement as it is for Hegel. At times, Weiss seems to argue that the idea that privacy is socially constituted inevitably reduces the individual to a public being. But the reduction of the individual to the collective does not follow from the recognition that privacy is socially constituted. Nor need it result in the political or ethical depreciation of the value of individuality. Indeed, the acknowledgement of the power of historical context can serve as a reminder that it is only in certain circumstances that individuality can flower. The actual political protection of individuality and individual right may be served better by an approach that recognizes the constituting power of social context, rather than by one that insists that ontological privacy is the very being of the subject in all societies.

CONCLUSION

Toward a Perfected State makes a profound contribution to post-Hegelian philosophy. Because Weiss rejects Hegel's circle of immanence, his account need not be solely retrospective. Weiss's narration is informed by the possibilities that inhere in the indeterminacy of the present and in the presence of our democratic tradition. As a result, he does not just narrate the meaning of what has been; he traces the outline of a conceivable social and ethical order. *Toward a Perfected State* is also an extremely valuable addition to the classical tradition of political theory. Within the framework of the debates in American law, Weiss's book demonstrates that the commitment to individuality and to liberty need not lead one to advocate neutrality at the expense of a vision of the good life. Instead, Weiss explicitly argues that a modern view of the good must include a commitment to both individuality and liberty. No one has written more eloquently on privacy as an ontological category than has Weiss. At the same time, however, Weiss has never been satisfied with an instrumentalist or contractualist approach to group life. It is precisely the attempt to come up with a vision of reconciliation that does justice to our longing for both community and

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[108] *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 2 (1962) (The difficulty of modern liberal theory is its conception of "the individual as essentially the proprietor of his own capacities, owing nothing to society for them.").

autonomy that makes *Toward a Perfected State* such a timely contribution to the debates in recent American jurisprudence.