CHAPTER XIII

FICHTE

The true self, thinks Fichte, is something infinite. It needs a whole endless world of life to express itself in. Its moral law couldn't be expressed in full on any one planet.

Josiah Royce

Fichte's theory of law is an attempted deduction from the nature of self-consciousness. He held that the task of philosophy is to explain experience, and since the whole matter of man's thinking is contained in experience, experience must be the starting point of philosophical analysis.¹ When we analyze experience we find that it consists of ideas of things; that is to say, there is an objective aspect and a subjective aspect. There are thus, according to Fichte, two possible systems of philosophy, idealism and dogmatism. Idealism endeavors to explain the thing in terms of the idea; dogmatism endeavors to explain the idea in terms of the thing. The explanatory ground of idealism is an intelligence in itself; that of dogmatism, a thing in itself. For Fichte, idealism was the only possible philosophy, since he held that it was beyond the capacities of dogmatism to overcome the gulf between things and ideas.²

Fichte's principal legal work is the Grundlage des Naturrechts nach den Principien der Wissenschaftslehre (1796) translated by A. E. Kroeger as The Science of Rights (1869). Unless otherwise specified the references are to the translation which is cited as "S. R." In 1812 Fichte put forward a new presentation of his legal doctrines in his Das System der Rechtslehre. This work is printed in vol. II of the Nachgelassene Werke, 3 vols., edited by I. H. Fichte (1834-35) and is cited here as "N. W." The most thorough account of Fichte's life and work is the great study by Xavier Léon, Fichte et son temps, 3 vols. (1922-27), cited here as "Léon." References cited as "S.W." are to Fichte's Sämtliche Werke, 8 vols. (1845-46). There is a convenient edition of the Naturrechts edited by Medicus (1908), and keyed to the pages of the "S. W."

¹ 1 S. W. 425.
² 1 S. W. 438.
This point of view was inspired by Kant's failure to suggest a satisfactory theory of the thing in itself. Fichte was Kant's ablest follower, and so thoroughly had he absorbed Kant's teaching that his first work, which through an error appeared anonymously, was widely attributed to Kant himself. His theory of law, which is a remarkable approximation of Kant's own system of law, is an astonishing production; it was worked out before the appearance of Kant's system, and even before the publication of Kant's *Essay on Perpetual Peace*. Fichte's excursion into jurisprudence was directly inspired, however, by a series of articles in German periodicals on natural law by several now forgotten jurists. Fichte's dissatisfaction with jurisprudence as it then existed stemmed principally from the fact that little or no attempt was made to separate law from ethics. In his subsequent work he claimed that he was the first to accomplish this task, and that its realization made all other volumes on jurisprudence antiquated, with the exception of Kant's *Philosophy of Law*.

For Fichte, the initial step of philosophy is the discovery of the first principle of knowledge. It is the nature of consciousness to know, and it is thus the business of philosophy to explain how that is possible and what it means. When I think about this problem I observe my self-consciousness, just as I observe any other object. Philosophy is therefore defined by Fichte as the artificial consciousness, as the consciousness of consciousness. As the starting point in an effort to reach the basic principle of knowledge Fichte analyzes a simple act of judgment. He states that any universally accepted affirmative judgment could be utilized for this purpose, and the one he chooses is $A = \ldots$
A. That is to say, whatever else A may be when viewed empirically, it is itself. By an intricate process of reasoning Fichte then arrives at the first principle of consciousness: The ego posits itself. Fichte's reasoning is open to many objections, of which the first is that the law of identity, \( A = A \), states, if anything, only a partial truth if it refers to objects. To affirm that a thing is itself is to ignore its connection with the remainder of the universe, both from the point of view of what it contains of the universe within itself by implication, and also from the point of view of the relationship of the universe to it.

If \( A = A \) is regarded as expressing a judgment with respect to the object A, then it is denied in logic that the judgment is thinkable at all, since it is impossible for us to think pure identity; all actual thought is held to imply difference of some kind. There is more in the consciousness than the ego, and Fichte is therefore forced to formulate a second principle which he connects with the logical assertion \( A \) is not not-\( A \). This principle states that the "ego posits a non-ego to which it is absolutely opposed." Through these two principles the affirmative and the negative aspects of judgment are accounted for. But precisely because the two principles express only aspects of judgment they cannot be in real contradiction, their opposition cannot be final. He therefore formulates a third principle which asserts that the "ego posits a divisible ego in opposition to a divisible non-ego." This third principle returns the opposition of the first two principles to consciousness, and means that within the consciousness, not as a result of something forced upon it by the outside world, the ego and the non-ego mutually limit each other.

From these three principles Fichte then proceeded to deduce

---

7 1 S. W. 92.
8 Keynes, Formal Logic (4th ed. 1906) 453; 1 Sigwart, Logic (1895) 84 et seq. Fichte recognized that \( A = A \) was to be viewed only from the point of view of form and not from that of content; but from \( A = A \) he at once deduced that Ego = the Ego (I = I) which he held was valid not only in form but also in content.
9 1 S. W. 104.
10 1 S. W. 125.
certain of the categories. It was an heroic undertaking, and the first of its kind in the history of philosophy. It extended even to the deduction of space and time, light and air.\textsuperscript{11} However, in its theoretical presentation Fichte's system was a purely formal one, and was dismissed by Kant as simply an abstract logic. It may well be, as Goethe remarked, that Fichte too often forgets that experience is not in the least what he has imagined it to be. At the same time no one was ever more completely aware than Fichte that it is a logical impossibility to deduce the material propositions of a legal order from the principles of a purely formal system of the type he constructed.\textsuperscript{12} A system of philosophy, he said, which pretends to resolve human life entirely into logical principles defeats its own purpose, and in attempting to explain the whole of life, misses it altogether. A philosophical system, even when perfected in its theoretical aspects, always remains inapplicable to human affairs until adjusted to the facts of experience, where the true inner principles of life are to be found.\textsuperscript{13} What, then, in his legal philosophy, purportedly deduced from the proposition I = I, was Fichte's aim? He was the declared enemy of what he termed mere formal thinking,\textsuperscript{14} and he held that it had been indescribably injurious in philosophy, mathematics,\textsuperscript{15} the natural sciences, and indeed in all the pure sciences. A formalism which overemphasizes the dialectical element and permits it

\textsuperscript{11} Fichte later remarked on the merriment in philosophical circles which greeted this effort: "Light and air deduced a priori by Fichte! Think of it! ha! ha! ha! — ha! ha! ha! — ha! ha! ha! Come! Enjoy it with us! ha! ha! ha! — ha! ha! ha! — ha! ha! ha! — ha! ha! ha! Air and light a priori! tarte à la crème ha! ha! ha! . . . . . and so on endlessly." 2 S. W. 472-473. And these men, Fichte added contemptuously, call themselves Kantians.

\textsuperscript{12} 6 S. W. 365.
\textsuperscript{13} 5 S. W. 343.
\textsuperscript{14} S. R. 15.
\textsuperscript{15} German philosophy from Kant to Schopenhauer entertained curious views of the nature of mathematics. Whitehead's reaction to those views, however, may be taken as a warning: "I have never been able to read Hegel," he writes. "I initiated my attempt by studying some remarks of his on mathematics which struck me as complete nonsense. It was foolish of me, but I am not writing to explain my good sense." Autobiographical Notes in The Philosophy of Alfred North Whitehead (ed. Schilpp, 1941) 7.
to contradict the existential aspects of nature can, of course, result only in absurdities. But to dismiss formal thinking as such, as Fichte appears to do, would result, since it is the root of scientific method, in greater absurdities. Fichte's condemnation of purely formal thinking was based on the belief that it yields a system of conceptions without objects, and is, hence, empty thinking. This argument, if heeded, would have prevented the construction of the tensor calculus, which appeared to possess only formal interest until it was disclosed as one of the tools which made possible the formulation of the theory of relativity.

Thus, according to Fichte, a genuine philosophy posits conception and object together, and never treats one without the other. The conception of rights, as will be seen later, is assumed to be an original conception of reason. This conception, as Fichte attempts to demonstrate, is the conception of the necessary relation of free beings to each other. The object of the conception is therefore the possibility of a community of free beings. But the idea of such a community is, as Fichte recognizes, altogether arbitrary. It is necessary, he says, that every free being should assume other free beings as existing; but it is not necessary that all these free beings, as free beings, should form a group. However, a community of free beings appears possible on the assumption that each member will limit his freedom in such a manner that others can also be free. There is no requirement in the conception of rights that such a community be erected; there is only the requirement that, if it be erected, it shall be established on the basis of the conception of rights.

Fichte's theory of rights is thus purely an *a priori* one. He has set himself the abstract problem of determining the necessary legal structure of a community of free beings, assuming such a community is desired. If philosophy, in accordance with Leibniz' definition, is understood as the science of the possible, Fichte's inquiry is then, to this extent, a strictly philosophical one. Empiricism insists that we must study only what is; but
scientific thought owes much of its fruitfulness to the study of
the non-existent, as the analysis of frictionless engines, free
bodies, and the ether makes clear. There is thus ample warrant
for Fichte's method of approach; but the value of his system
will depend in the last resort on the knowledge it brings us of
the external world in general, and of substantive legal systems
in particular. Nevertheless, Fichte's method raises a number
of problems not usually so sharply encountered in the philo-
sophies of law. Fichte's preliminary assumptions, from which
the rest of his system is deduced, seem to be at the ultimate
limit of abstractness; all other systems of law rest to some
extent at least upon empirical elements. Even Hobbes' system
took its departure from the idea of motion, an empirical
concept. But abstractness creates a special problem, e.g., how
is it possible for abstract rules to have an empirical application?
It is one of Fichte's merits that he attempts to meet issues of
this sort, and if his solutions are not always satisfactory it is
not because he was not aware of the issues or endeavored to
minimize them. His explicit object was to establish his proposi-
tions on the basis of reasoning of the utmost rigor, and from
that aim he never deviated.

**Legal Relations**

For Fichte the basis of law is the idea of the legal relation.
It is the one firm foundation of jurisprudence, and in it every-
thing is contained.\(^16\) The conception of law is the conception of
a relation between human beings.\(^17\) It can come into existence
only when such beings are thought of as in relation to each
other. Fichte defines this relationship as the compulsion upon
each individual to restrict his freedom in recognition of the
possibility of the freedom of others.\(^18\) He terms this formula

\(^16\) N. W. 495. Spencer and others have gone further, and have purported to see
in relations the universal form of thought. "We think in relations. This is truly
the form of all thought; and if there are any other forms they must be derived
from this." *First Principles* (1880) 135.

\(^17\) S. R. 81.

\(^18\) S. R. 78.
“the fundamental principle of the science of rights,” and he calls the relationship itself the “relation of legality.”

It would be difficult to overemphasize the importance for jurisprudence of the conception Fichte has here isolated. Nevertheless the idea was not subjected to anything approaching a thorough analysis until the latter part of the nineteenth century, and even today the leading American exposition of the concept attributes “the first theoretical discussion” of it to Savigny. Although much of jurisprudence is concerned with the idea, it has never received the attention it apparently deserves. This neglect is perhaps due in large part to the circumstance that jurisprudence has never been worked out in detail as a logical system. Many of its leading ideas have received extensive critical treatment, but their logical foundations and the connections between the ideas have escaped rigorous analysis. Thus Hohfeld, in one of the most influential studies in the field, set forth the eight basic ideas in terms of which he held all legal analysis could be stated. All these ideas were, as he held, “strictly fundamental legal relations”; but no critical scrutiny of the idea of “legal relation” itself is undertaken at all. This condition was paralleled until recently in the history of mathematics, where natural, real, complex and other numbers, were studied with great care, but before any satisfactory conception of “number” itself was developed. The idea of “legal relation” seems to be as fundamental in jurisprudence as the idea of “number” in mathematics. As Kocourek emphasizes, “no legal phenomenon can exist without dealing with one or more jural relations. The purpose of every legal rule is to create the formal conditions for the existence of jural relations. No technical analysis of a legal question can be made without the manipulation, whether consciously or not, of jural relations. No legal solution is scientifically understand-

19 Kocourek, Jural Relations (1927) vi. Savigny’s discussion seems clearly to have been inspired directly by Fichte. 2 System des heutigen römischen Rechts (1839) 52 et seq.
20 Fundamental Legal Conceptions (ed. Cook, 1923) 5.
21 Ibid. 36.
able without the interplay of jural facts and jural relations."  

All this Fichte saw with one of his flashes of deep insight which enabled him to crystallize the essence of the matter.  

Fichte’s philosophical scruples would not permit him to take the conception of the legal relation for granted, and he therefore attempted to justify it by elaborate proof. He began with his favorite proposition I = I. He asserts that a finite, rational being cannot posit itself without ascribing to itself a free causality. But since a rational being by definition has the power of free causality, the purported proof which follows is unnecessary. Fichte argues that the activity of the rational being in contemplating the world is determined in its content in the sense that the objects of that world must be represented as they are. An activity opposed to this activity would therefore, in order to be its opposite, have to be free in regard to its content. Since the activity of the rational being in reflecting upon itself is the opposite of the determined activity which contemplates the world, it must also be opposite in its nature, i.e., free. But Fichte has already argued, as we have seen above, that the principles of the affirmative and negative aspects of judgment are not in real contradiction; he is able to return both principles to consciousness. Further, a mere matter of direction of contemplation cannot in itself assure the free causality of the individual. If I glance to the left and am bound, and if I glance to the right and am free, it must be because of something I perceive in those two directions. In Fichte’s case, the rational being, turning his thoughts inward, found a being who by definition possessed the power of a self-determining activity.  

But something lies beyond the sphere of the absolutely self-active. It is the sensuous world, which the rational being must posit as not produced nor producible through the activity of free causality. In that sensuous world the rational being must assume that the other rational beings which inhabit it are also  

---  

22 Op. cit. note 18 at v. Kocourek draws a distinction, not important here, between "jural relations" and "legal relations."  
23 S. R. 126.  
free. But no free being can recognize the other as such unless both mutually thus recognize each other; and no one can treat the other as a free being, unless both mutually thus treat each other. Hence the relationship between rational beings is a determined one, and is the legal relation. In essence, this is Fichte's deduction of the idea of the legal relation.

Fichte's formula of the legal relation differs from Kant's principle of right in an important respect. Kant's formula is a standard against which the first principles of the system of jurisprudence are to be measured. Fichte's formula is itself the first principle of jurisprudence, and from it the rules of positive law are to be deduced. The difference is vital. Kant is under no compulsion, in framing his system of jurisprudence, to secure an absolute conformity between the first principles which he chooses to establish and his yardstick. He measures the principles by the yardstick, but empirical considerations may dictate adjustments. He is at liberty to make these adjustments inasmuch as the principles are not deduced from the formula. With Fichte the case is otherwise. The rules of the system he proposes are allegedly deductions from the formula, and may or may not exhibit a congruity with the empirical conditions of the sensuous world. Fichte's system of jurisprudence is therefore in essence a hypothetical one, its incorruptibleness being a direct function of the rigorousness of Fichte's logic. On the contrary, Kant's system is of a logico-empirical nature, directly related to the circumstances of the sensuous world.

Certain consequences follow at once from Fichte's argument in the construction of the legal relation formula. Since the idea of law is deduced from the conception of man as a rational being, it follows that the idea of law is not something we are taught, nor does it come from experience, nor does it arise from arbitrary arrangements among men. At the same time, Fichte insists that the conception is not an empty, a priori form waiting for the impress of experience. When the conception is

\[S. R. 79.\]
manifested in the empirical consciousness it is conditioned by
the fact that it is to be applicable to men. Man cannot be man
isolated; he only becomes man amongst men. The case of
application must therefore occur since, as Fichte has been at
pains to show, a rational being cannot posit itself without
posing a rational being outside of itself.

In no sense, Fichte insisted, was his formula to be connected
with morality. Jurisprudence, he remarked in his System der
Rechtslehre, had been mistaken for a branch of ethics until
he came along. He held that all attempts to deduce law from
morality had utterly failed. His argument, however, is valid
only for his own system and not for law generally. The starting
point of Fichte's argument is a logical form, which contains
no elements of the "ought"; his deductions therefore, if an
"ought" is not smuggled in, will be distinct from morality.
His assertion that his system has no connection with morality
is therefore a valid one to the extent that his declared intentions
have been rigorously carried out. Moreover, the distinction is
inherent in the arbitrary character of his system, as he is careful
to emphasize. Morality may demand that every rational being
is bound to desire the freedom of all other rational beings; but
Fichte's system of rights merely shows each rational being the
consequences of his acts if he chooses to accept or to reject the
principle of right. But Fichte argues further that there is a
generic difference, apart from his system, between law and
morality. Law merely permits, he insists, but morality com-
mands categorically. He is here opposing the idea of "duty,"
a moral conception, to the idea of "right," a legal conception,
and he observes that the law does not command an indi-
vidual to make use of his rights. It is true that individuals
are not under a legal compulsion to exercise their rights.
This is clearly revealed in the case of the establishment
of new rights which have been made compulsory duties by
political action. Thus the State may command its citizens to

\[26 N. W. 497. \quad 27 S. R. 81.\]
exercise their right to vote,\textsuperscript{28} to attend school in order to obtain their right to an education,\textsuperscript{29} and to be vaccinated in order to secure their right to be free from certain diseases;\textsuperscript{30} but in all such cases the courts hold that the individual is under a duty to perform the required act, not that he is under a legal compulsion to exercise a right. In the Hohfeldian system the confusion between “right” and “duty” is eliminated by making them strict correlative; but it can scarcely be denied that in a large area of legal activity the law commands the performance of duties, \textit{i.e.}, the duty to file an income tax return, to drive on the right hand side of the road, etc. Fichte was on sounder ground when he argued that morality often forbids the exercise of a legal right. Thus, if law were derived from morality, morality would contradict itself, since it would first grant a right and then prohibit its exercise.

Since law results only when there is a relationship between human beings, there are no rights between man and the objects of nature, such as land or animals. This view now is the accepted one,\textsuperscript{31} but the idea that legal relations extend to animals has also been advanced on the ground that when animals are willed property they become the proprietors of the goods and possess certain rights.\textsuperscript{32} When two persons are related to the same object the question of the “right to a thing” arises; or more properly, the right which one person has against another to exclude him from the use of such things. Rational beings are placed in a relationship of mutual causality with each other only through acts, through manifestations of their freedom, in the sensuous world. Hence, Fichte’s conception of rights applies only to what manifests itself in the external world. What occurs subjectively has no causality in the sensuous world, and therefore belongs to morality and not to law.\textsuperscript{33}

\textsuperscript{28} \textit{Judd v. McKen}, 38 C. L. R. 380 (1926); 32 A. L. R. 389.
\textsuperscript{29} \textit{State v. Bailey}, 157 Ind. 324, 61 N. E. 730 (1901).
\textsuperscript{31} Salmond, \textit{Jurisprudence} (8th ed. 1930) 239.
\textsuperscript{32} Korkunov, \textit{General Theory of Law} (2nd ed. 1922) 201.
\textsuperscript{33} This is also the view of Amos, \textit{The Science of Law} (1874) 32.
basis Fichte denies a right, in the legal sense, to freedom of thought and to freedom of conscience. The individual has the power to perform these internal acts, and he may have duties concerning them, but it is improper in the Fichtean system to refer to them as rights. Kant’s theory permitted an action to lie for the calumny of a dead person. This would not be possible under Fichte’s conception since the system is applicable, by definition, only to the living.\textsuperscript{34}

\textbf{The Applicability of Fichte’s System}

The arbitrary character of Fichte’s system was developed in the course of his attempt to answer the question: How is a community of free beings, as such, possible? His argument had led him to the assertion of two apparently contradictory propositions: Persons, as such, are to be absolutely free, and dependent only upon their will. But as persons they are to be reciprocally influenced by each other, and hence not to be dependent solely upon their will. His task was to reconcile these two statements.\textsuperscript{35}

Every person thinks of every other person as a free being, and not as a thing. If this conception were actually dominant, no person could ascribe to himself the power to influence another as a thing, and hence could not have that power. But this is not the case. Every person has posited the body of every other person as modifiable matter. Hence every person, since his will can be limited only through his thinking, can will to modify the bodies of other persons. But because the individual is free, he can also establish the rule that he will never treat the body of any other person as a mere thing. However, the validity of the rule will depend upon whether or not the individual is consistent. But consistency in this case depends upon freedom of the will; and there is no more reason why an individual should be consistent, unless he is compelled to be so, than there is why he should not be consistent. This is the boundary line between necessity and freedom in Fichte’s

\textsuperscript{34} S. R. 83.

\textsuperscript{35} S. R. 125.
system, the line which separates the science of rights from that of morality. Precisely stated the line is: The rational being is not absolutely bound by its character of rationality to desire the freedom of all other rational beings. Morality shows this desire; but the science of rights merely shows that the individual has the freedom to desire it or not to desire it, and then shows the consequences of either act.

The fundamental principle of the science of rights, "limit thy freedom in such a manner that others can also be free," rests therefore on no absolute ground. However, if an absolute community is to be established between persons as such, every member of the community must assume the law; for only by treating each other as free beings can they remain free beings. The law therefore has only hypothetical validity; namely, if a community of free beings is to be possible, then the law must be observed. Fichte's law is thus not a mechanical law of nature, but, as he terms it, a law for freedom. Individuals are free to accept or reject it; and it possesses relevancy only on the condition that a community of free beings is to be established.

It is apparent that Fichte is adhering more closely to the method of science than to that of philosophy in the construction of his system. Traditionally science abstracts from the circumstances of the world, and concerns itself only with those distilled realities which yield to its manipulation. Its view of the world is necessarily incomplete, but it nevertheless achieves an insight into the nature of things which for its purposes it accepts as satisfactory. Philosophy's business is to account for the whole of things, and this is particularly so when it attempts to understand the varieties of human conduct. In the legal sphere it must see the phenomena as examples of the principles of the system. This means that the principles must be framed with the totality of the legal world in view. A system as admittedly partial as Fichte's may be in accord with the usual practices of science, but that is no assurance it will yield the complete knowledge that a jurisprudence seeks.
THE DEDUCTION OF POSITIVE LAW

Positive law, according to Fichte, arises in the following manner. The end of law is a community of free beings. This end can only be achieved if all persons subject themselves to the principle of right; but the principle is not applicable to a person who has not subjected himself to it, since the end no longer exists for which I adopted the principle. I have adopted the principle for myself, but not for the person who has not adopted it. Thus I acquire a right of compulsion against that person, and may apply force whenever he violates any of my original rights. I also at the same time acquire a right of judgment with respect to that person. There is no limit to the right of compulsion unless the violator subjects himself to the principle of right. But it is impossible to determine with any certainty whether the violator’s submission is complete and permanent, since the reality of his submission is a matter of inner sincerity. If I possessed foreknowledge of the violator’s whole future life, I could then tell whether the acceptance of the principle was real. Both parties must be externally convinced that each will be free from attack by the other thereafter. This is possible only by means of a guarantee, and the guarantee is only possible if both parties unconditionally transfer their physical power and their power of judgment to a third party. In that transfer I must be guaranteed perfect security of all my rights, not only as against all other individuals, but as against the third party himself. I must be convinced that all possible decisions of a legal nature with respect to affairs of mine will always be precisely what I should be compelled to pronounce, under the principle of right. The rules which will determine those future decisions must, therefore, be submitted to my examination, and those rules must apply the principle of right to all possible future cases which may occur. Those rules are what Fichte calls positive law.36

All positive laws are, Fichte held, deduced more or less from

36 S. R. 151.
the principle of right. They cannot be arbitrary, and they must be such as every rational being would make them. Fichte here draws a distinction between the decision of the court and positive law. At one end is the principle of right; at the other, the decision of the court. Positive law floats in the middle between them. In positive law, the principle of right is applied to the specific objects which the rule comprises; in the decisions of the court, the positive law is applied to particular persons. Fichte’s view of the judicial process was a wholly unsophisticated one. He held that the judge has only to ascertain what has occurred, and then to state the law which applies to that event. If the law is clear and complete, Fichte asserts, the decision or sentence should already be contained in it.

But the bare transference of my rights to the law is plainly, as Fichte recognized, not a sufficient guarantee that my rights will be protected in the future. The law is a mere conception, and how can a mere conception be realized in the external world? Even if the law announces that my rights will not be violated who will guarantee that the will of the law will be realized? Fichte solves this problem by asserting that the law must be a power, and that it only becomes an obligatory power from the consent of individuals who unite themselves into a commonwealth. His argument is that superior power over a free being can only be realized by the union of many free beings, since the sensuous world holds nothing so powerful as a free being—for the reason that it is free and can direct its forces with matured consideration—and holds nothing more powerful than a single free being, except many. For present purposes then, power depends upon whether they will the will of the law. Thus the strictest and only sufficient guarantee which each individual can demand is that the existence of the commonwealth itself be made to depend upon the effectiveness of the law.
Original Rights

Original rights in Fichte’s system were concededly a fiction, but one necessary for the purposes of his jurisprudence. Since man only becomes man in association with men it is impossible to think of him as one individual. It is therefore, Fichte held, a fiction to ascribe original rights to him. The rights of free persons cannot coexist at all unless they reciprocally limit each other, that is, unless the original rights are changed into rights which exist in a commonwealth. There is a further limitation: the conditions of personality can be thought of as rights only in so far as they appear in the sensuous world, and can be obstructed by other free beings. There is thus a right of sensuous self-preservation, that is, a right of preserving my body as such; but there is no right freely to think or to will. I have a right of compulsion against the man who attacks my body, but not against the man who disturbs me in my peaceful convictions, or who annoys me by his immoral behavior. Thus in principle Fichte’s system would not allow the protection of interests which are now slowly coming under the guardianship of the legal order.

Fichte asserts two original rights: The right to the continuance of the absolute freedom and inviolability of the body, and the right to the continuance of the individual’s free influence upon the whole sensuous world. These rights are a deduction from the principle that the individual demands as his original rights a continued reciprocal causality between his body and the sensuous world, determined and determinable solely through his freely formed conception of that world. It is claimed by Fichteans that the rights to life, liberty and the pursuit of happiness asserted by the Declaration of Independence are expressions in other terms of the two rights deduced by Fichte. But without further definition the two principles can scarcely

37 For the difficulties inherent in according legal protection to the “peace and comfort of one’s thoughts and emotions” see Pound, Social Control Through Law (1942) 58.
38 S. R. 169.
39 S. R. 169 n.
serve as guides to conduct. The first principle would appear to outlaw war, and Fichte in fact held, at least in one stage of his thought, that all wars were unlawful; but it would appear also to outlaw capital punishment. Although Fichte permits the imposition of the death penalty, he seems to recognize this consequence for he will not allow the state to execute the criminal. The only public act of the state is the exclusion of the criminal from the state; he is then civilly dead and killed in the memory of the citizens. They do not care what is done with the physical man after the sentence of expulsion. If the criminal is then executed it is through the function not of the judicial power, but of the police power, and is carried out by sheer necessity, and not in the exercise of a positive right.\(^4^0\)

In its more popular form Fichte's second principle is the right to happiness, the right of the individual to be left alone in his conduct.\(^4^1\) But is the state to secure the happiness of its citizens by allowing them freedom to follow their own inclinations, or shall it force them to be vaccinated, to remain sober, to save their money, and to attend school? Fichte, as one of the founders of modern European socialism, was committed to the belief that men could be made happy by law, or at least materially helped to that condition by legal means. He was also, as he recognized, committed to a belief in the freedom of the will. I have the right to will the exercise of my rights because I have the right to will them, a proposition which Fichte regarded as closing the circle of his investigations. If freedom of the will is denied, then the reality of absolute rights is also denied. This, in fact, is what Spinoza\(^4^2\) held, who conceived of a natural right as what a man did in accordance with the dictates of his own nature, so far as his power extended.

**The Equilibrium of Rights**

Original rights in Fichte's system are infinite. How then is it possible for a free being in the exercise of those rights to

\(^4^0\) S. R. 367.
\(^4^1\) Ritchie, *Natural Rights* (1895) 272.
\(^4^2\) *Tractatus Politicus* II, § iii.
violate the rights of another? If A says to B: “Don’t do that, because it limits my freedom,” B can reply “But you are limiting my freedom by taking that position.” Fichte proposes to solve this problem by the idea of the equilibrium of rights.

It is possible that the idea of an equilibrium of rights was suggested to Fichte by the theory of the balance of power. In that doctrine equilibrium is conceived of as a mutual or inhibiting limitation of two or more forces, which is the sense in which Fichte employs the term. In any event, the conception, which possesses a legitimate scientific use, is too vague, notwithstanding its extensive employment today, to be applicable to the relations of the social order.\textsuperscript{43}

Fichte’s theory of equilibrium asserts that free beings must mutually recognize and determine the sphere of their rights, since those acts are evidence that they have subjected themselves to the principle of right.\textsuperscript{44} There is an actual self-limitation of a free being by his mere cognition of other free-beings; this mere cognition also determines the limit which the free being must put upon his own freedom. There must be a similar self-limitation on the part of the other free beings, otherwise a state of lawlessness prevails. All legal relations between persons are therefore conditioned by their mutual cognition of each other, and are, at the same time, completely determined thereby.\textsuperscript{45}

Fichte’s original right of freedom and inviolability of the body excludes my causality as a free being from operating in the space occupied by the body of another free being at any time. Since this self-limitation is dependant upon a similar self-limitation in the other free being, my self-limitation is therefore problematical. Free beings are posited as free causes in the sensuous world, and it must be assumed that they desire to have some effect in that world in order to correspond to the conception. The objects subjected by the free beings to their particular purposes must be mutually inviolable if they are known.

\textsuperscript{43} I have discussed the idea more in detail elsewhere. See Cairns, The Theory of Legal Science (1941) 124.

\textsuperscript{44} S. R. 189.

\textsuperscript{45} S. R. 174.
But this subjection remains within the consciousness of the free beings, and does not manifest itself in the sensuous world. Thus the objects of the right remain also problematical. I am bound to respect the objects which the other person has subordinated to his ends only in so far as that other person respects mine. But this is not possible unless the objects are known. But there is complete ignorance on this point, and no legal relation is possible. Everything is and remains problematical.

From this impasse the only possible solution is for every person by reciprocal declaration to state what each desires exclusively to possess. This is the condition, Fichte believed, of all lawful relations between persons. The declarations may agree, or they may conflict. If they agree there is no further problem; if they conflict the question can be settled by compromise, or a quarrel or war can ensue. But all wars are unlawful, and the parties are therefore bound to transfer the decision of the dispute to a third party, or in other words, they must join a commonwealth. Each has the right to compel the other to join a commonwealth with him, since only thus the maintenance of law and a legal relation between men is made possible.

The right of property, that is, the right of exclusive possession, is therefore completed and conditioned by mutual recognition, and does not exist without it. All property is based upon the union of many wills into one will. Through mutual recognition possession changes into property. Future appropriations must be governed by a generally valid rule to be agreed upon. In order to avoid endless disputes Fichte thought that there should be a possession of the object followed immediately by a declaration of ownership, otherwise some one else might declare his possession of the same object. If possession and declaration are not thus united, the occupied object must contain a sign that it has been occupied. Since the signs are signs only in so far as they have been agreed upon, they may be of any nature, e.g., fences or ditches around land.

In this application of the principle of right to property Fichte
believes that he had answered the most important question raised by his system of jurisprudence: How can a purely formal rule of law be applied to determined objects?  

**The Rationale of Compulsion**

Fichte's principle of an equilibrium of rights is, as he recognizes, only a partial solution of the problem of mutual security. That principle is based ultimately upon the fidelity with which the persons who agree to respect one another's spheres of freedom observe their promises. Fichte argues that mutual fidelity and confidence are not dependent upon the conception of right and cannot be compelled by law, nor is there a right to compel confidence and fidelity, since they cannot be externally manifested and, hence, do not appertain to the sphere of the conception of right. It is true that persons may have made the agreement without the intention of keeping it, or they may have made it sincerely and have changed their minds later. Fichte says that the moment one party can suppose this possible of the other he has no security any longer, and the agreement is annulled because mutual confidence is annulled. This argument, although it opens the way for the introduction of a novel justification of compulsion, seems to contradict the theory of Fichte's system. Time and again Fichte asserts that his system has no concern with subjective states. It should therefore make no difference if a subjective condition of distrust should arise, so long as the terms of the agreement are kept in practice. At this stage in his argument Fichte cannot rely upon the fact of an actual breaking of the agreement to make his point, since his task is to justify a law of compulsion prior to the externally manifested event which requires its application. He has therefore been driven to the espousal of a subjectivism which it is one of the objects of his system to avoid.

In order to meet the problem which arises through the loss

---

46 S. R. 189.
of fidelity and confidence, Fichte proposes an arrangement which will relate to the will itself, so as to induce and compel the will to determine itself never to will anything inconsistent with lawful freedom.\(^4\) He rejects compulsion through the mechanical power of nature, because man is free and could overcome such a power, and because he would be changed into a mere machine in his legal state and would not be supposed to have any freedom of will to secure which the whole legal relation is established. Therefore, if it could be arranged that the willing of an unlawful end would necessarily—in virtue of an always effective law—result in the very reverse of that end, then the unlawful will would always annihilate itself. A person could not will that end for the very reason because he did will it. His unlawful will would become the ground of its own annihilation.

As a free being I propose to myself an end, and the opposite of that end I must detest as the greatest evil possible to me. The end proposed is the end established by the agreement. Hence, if I can foresee that an act, which I undertake to realize the proposed end must necessarily result in the opposite of that end, I cannot then wish to realize the original end for the very reason that I do desire it and do not desire its opposite. I cannot will the end because I will it. The problem is therefore solved. The lawless will annihilates itself and confines itself within its own limits.

Fichte has here described, in a highly abstract form, a situation which is encountered only too frequently in the legislative process. Legislation intended to eliminate or control what are regarded as abuses sometime stimulates those abuses to greater activity, or encourages the growth of other and even larger evils. Thus, the so-called "Raines Law" of 1896 was devised to suppress so far as possible the drinking of alcoholic liquors on Sunday in the State of New York. Hotels, but not saloons, were permitted to sell drinks on Sunday; a hotel was defined in the legislation as a hostelry with at least ten properly

\(^4\) S. R. 193.
furnished bedrooms. At once the saloon keepers transformed their establishments into hotels with the required number of bedrooms. By 1905 Manhattan and the Bronx alone possessed 1407 certified hotels, of which it was estimated that 1150 were created by the Raines Law. But the saloon keepers could not afford to maintain in idleness ten thousand bedrooms for which there was no real demand; they were therefore converted into places of assignation and houses of prostitution. Legislation intended to discourage Sunday drinking not only did not achieve its end, but it had the worse effect, in the eyes of its draughtsmen, of encouraging prostitution.

Fichte believed that if a contrivance could be secured which would operate with mechanical necessity so as to cause each lawless act to result in the very opposite it was intended to produce, then such a contrivance would compel the will to desire only what is lawful; and would restore the security which must be restored after fidelity and confidence have been lost. The good will would be rendered superfluous for the external realization of right, since the bad will would be forced by its very badness to effect the same end. In the case of a trespass through carelessness the trespasser, in Fichte's view, may be said to have no will at all; hence the law of compulsion produces of itself the will which is lacking. It does this by making the violation of the rights of others a violation of my own rights; I will therefore certainly take as much care to protect the other person's rights as to protect my own.

Thus the law of compulsion is to work in such a manner that every violation of the rights of another is to result for the violator in the same violation of his own rights. But is this a solution of the problem in the terms in which Fichte stated it? I may have entered into the agreement without the intention of keeping it. I may desire an end different from the one proposed by the agreement; and the fact that my rights are to be violated to the extent I violate the rights of others under the agreement may be a matter of indifference to me.

Ellis, The Task of Social Hygiene (1916) 29.
An agreement to establish a law of compulsion must contain a provision that both parties agree to treat, with united strength, the one of them who shall violate the rights of the other, in accordance with the provisions of the law of compulsion. But this is an impossible condition, because it means that one person would lend his own strength to repel his own attack. A contradiction remains even if we assume that the violator voluntarily submits to punishment. If the aggrieved party inflicts the punishment who is to guarantee to the aggressor that the aggrieved party will not purposely step beyond the provisions of the law of compulsion, or that he has not made a mistake in applying it? Thus the aggressor must have an impossible confidence in the justice and wisdom of the other, a confidence which Fichte assumes that he cannot possess. A revengeful mind, Sir Thomas Browne remarked, "holds no rule in retaliations, requiring too often a head for a tooth." The agreement could be realized only if the aggrieved party had always superior power, extending only to the limit provided by the law of compulsion, and if he lost all that power as soon as he had reached that limit.

Hence the necessary condition of such an agreement is that each party possess precisely as much power as right. But this condition can be realized only in a commonwealth, and thus the law of compulsion is not possible except in a commonwealth. Outside a commonwealth compulsion is only problematically lawful, and for that reason is always unlawful if really applied. With this argument Fichte reaches the conclusion that natural law, or a legal relation between men, is not possible at all except in a commonwealth and under positive laws. This conclusion is also dictated, as Gierke observes, by Fichte's initial conception of the ego as omnipotent. Right, prior to the state, is the absolute freedom of the individual to be a free cause in the sensuous world. Natural law, therefore,

49 S. R. 200.
50 S. R. 201.
51 1 Natural Law and the Theory of Society (1934) 102 and notes.
52 S. R. 176.
has no other sanction, in the free state period, than fidelity and confidence, which are not sufficient, in Fichte's system at any rate, as we have seen above, to constitute a legal sanction. However, law which is supported by the state must be based upon reason. This argument enabled Fichte to assert two propositions: "All law is purely the law of reason," and "all law is the law of the state." The great merit of his analysis, Fichte asserted, was to have raised the latter proposition beyond all doubt.

In essence, Fichte's rationale of compulsion, as he recognized, amounted to a justification of the principle of the lex talionis. This principle asserts that there must be an equivalence between the wrong and the punishment which is imposed for the commission of the wrong. As a justification of punishment the principle is now almost universally held to be a product of savagery. However, it has not been without its enlightened defenders. Kant himself adopted it, but with limitations. Cohen, while recognizing its practical limitations, such as our inability to measure the severity of punishment, believes that the principle contains elements of value. There is a natural desire for vengeance which must be met and satisfied by the orderly procedure of the criminal law or we will revert to the more bloody vengeance of the feud and the vendetta. Further, the principle suggests that a just system of punishment must eliminate all traces of favoritism.

**Constitutional Law**

In Fichte's system the object of the state is the enforcement of the conception of rights, or that which all persons necessarily will, among persons who live together in a community. Those persons seek through their common will a common security. They are motivated by self-love and not by morality, and thus each subordinates the common end to his private end. Through the law of compulsion the two ends are supposed to

---

53 N. W. 599.  
54 Ibid.  
55 S. R. 346.  
be united in the sense that the welfare of each is combined with the security and welfare of all. Fichte's problem is therefore to discover a will in which the private and the common will are synthetically united.\textsuperscript{57}

He accomplishes this by means of the organization of the state, which rests upon three compacts. There is, first, a property compact by which each pledges all his property as security that he will not violate the property of all others. Fichte contemplates an agreement of all with all, inasmuch as every free being has the right to traverse the whole sphere of the commonwealth, and thus can come in conflict with all other persons. This means that the conception of rights can be realized only in a universal commonwealth of all mankind. The right of the individual to claim the world as a sphere of causality is defined in the separate commonwealths, but a universal determination of the right is not possible until a universal confederacy has been realized.

The rights guaranteed by the property compact have to be protected by compulsion, if necessary. A second compact would therefore provide that each individual will protect the specified property of other individuals to the extent of his physical powers, provided they will protect his property in the same manner. In the first compact the parties agreed not to do certain things; in the second, they agree to do certain things. But the protection compact is effective only on condition that if A protects B's rights B will protect A's rights. I therefore obtain the right to claim the protection of others only by actually protecting the rights of others. But if this is so, no one will ever obtain a strictly legal claim to the protection of the other. It will always remain problematical whether the obligation required by the protection compact has been met or not, and hence, whether the other party has obligations or not. However, this uncertainty can be removed if mere membership in the state organization carries with it the fulfillment of the obligation demanded by the protection compact; in other words,

\textsuperscript{57} S. R. 206.
if promise and fulfillment are united, if word and deed are one and the same.

This problem is solved by a third compact which provides for a protective power to which each member of the organization must furnish his contribution. This contribution would be the fulfillment of his promise to protect the rights of all other members. There could thus be no further uncertainty as to his affording that protection to the others upon which his own claim to protection is grounded. This protective power is established with a totality consisting of all the members of the community. The totality is the second party to the contract. Fichte insists that the totality is not an abstract conception, as a *compositum*, but is, in fact, a *totum*. Thus in the state nature unites what she has separated in the production of many individuals. Fichte compares this conception to an organized production of nature such as a tree. If each part of the tree has consciousness and a will, then each part, as it desires its own preservation must also desire the preservation of the whole tree, because its own preservation is possible only on that condition. The individual makes a contribution to the protecting body in the form of votes, services, money and other things. That which is to be protected embraces all that each one possesses. What the individual does not contribute to the totality is his own, and in respect to it he remains individual, a free independent person. This is the freedom which the state has secured to him, and to secure which he became a member of the state. Man separates himself from his citizenship in order to elevate himself with absolute freedom to morality; but in order to do so he becomes a citizen.

---

58 Fichte’s remarks at this point have been much admired. Thus Vaughan observes that “in the image of the natural organism is found the germ of all that has been most fruitful in subsequent political speculation. It forecasts the idea that dominates the work of Hegel and of Comte; and Fichte himself, in his later work, did much, more perhaps than is generally acknowledged to unfold its true significance. It is this that makes the *Grundlage* so memorable a landmark in the history of political thought.” 2 Studies in the History of Political Philosophy (1925) 118.

59 S. R. 229.
The three compacts establish a state organization in which the common will is manifested and has become the law of all. But the common will has been realized as mere will, not as a power to maintain itself, not as a government. Fichte's next task is to solve that problem. He excludes both the transgressor and the offended party from the execution of the common will, and concludes that a third party has to be the judge since it would not be to his private advantage to decide in favor of either side. Nevertheless, there is the possibility that the third party may combine with one side or the other and work an injustice. To avoid this every one must be convinced that the unlawful treatment of any member of the state will infallibly result in his own unlawful treatment. This conviction could be produced if the unjust violence against an individual were legalized by its having occurred once. Because something has been allowed to occur once, each citizen must thereafter have a perfect right to do the same. But this would mean that justice was annulled for all time and would contradict the conception of rights. The conception of rights means that no single case of a violation of law must ever be allowed to occur. The protective power can never, therefore, remain inactive in any single case. This problem is met through a provision that a law shall have no validity for future cases until all previous cases have been decided according to it. No one shall be punished under any law until all previous violations of this law have been discovered and punished.

How is this power of compulsion to be secured? It cannot be secured through the people as a whole, since they would be both judge and a party in the administration of the law. Fichte rules out both a democracy, in the sense of the direct rule of the people without a government, and a despotism, as unlawful forms of government. A representative government is therefore absolutely required by the conception of rights.\textsuperscript{50} It is impossible for the members of the state to be convinced that rights will never be violated so long as the administrators of the

\textsuperscript{50} S. R. 244.
supreme power are not held accountable. The people of a commonwealth must therefore relinquish the administration of the supreme power to one or more persons who remain responsible for the proper application of that power. Hence, it is a fundamental law of every rational and legal form of government that the executive power, which, in Fichte's system, embraces the executive and judicial, should be separated from the power which controls and checks the administration of that executive and judicial power. Fichte calls the checking power the Ephorate. It must remain with the entire people, while the executive power must not remain with them.

Fichte gives elaborate consideration to the Ephorate as a power to check the government. The Ephors must be completely independent, must have a certain and sufficient income, and must have as few friendships, personal connections, and attachments as possible. If a law is violated the Ephors utterly suspend the government, and a convention of the people is called. The issue is there decided, and either the government or the Ephors are declared guilty of high treason. The idea of the Ephorate had, of course, its root in the Spartan system of Ephors; in modern times the theory is held to be derived from Calvin's Institutes, and its principal proponents have been Althusius and Fichte. The Pennsylvania constitution of 1776 and the Vermont constitution of 1777 provided for a Council of Censors who were charged with the duty of inquiring whether the constitution had been preserved inviolate. Pennsylvania abolished the Censors in 1790, but the institution persisted in Vermont until 1870; they met thirteen times and ten times proposed constitutional changes.\(^6\)

However, in the Rechtslehre Fichte withdrew his idea of an Ephorate on the ground that there was no one to watch the Ephors. They might start a revolution, although the government had not violated the law. Further, the government with all its power might suppress the Ephorate at the very start, just as the Roman patricians killed the tribunes of the people.

\(^6\) Gettell, History of Political Thought (1994) 318 n.
Once the Ephors were killed the government would find arguments and false charges enough to justify its conduct. Notwithstanding his inability to find a satisfactory solution, Fichte has raised a vital problem of government: How shall the government be made to obey the law? Under the American Constitution, congressional committees of inquiry and the threat of impeachment are the principal devices to this end. They would fail, of course, at the very time when they should be effective, if a situation comparable to that which existed during the Augustan period ever arose.

**Civil Law**

Since the property compact is the basis of the legal relation in Fichte's theory, it is equally the basis of the civil law. Fichte therefore attempted an exhaustive analysis of that compact in order to complete his inquiry.

He held that the need of nourishment was the original incentive of man's activity, and its satisfaction was the final end of the state, and of all man's life and activity. The highest and universal end of all free activity is therefore that men may live. The spirit of the property compact is the guarantee of this end. It is the fundamental principle of every rational form of government that each person shall be able to live from the results of his labor. If a man cannot live from the results of his labors, the others must provide him with sufficient property to support him. They have also the right to compel others to work when they are able to do so. There must be no poor man in a rational state, and there must also be no idler.

Fichte then proceeded to deduce a set of rules with respect to the various classes of property. Those rules were to be further amplified in his work on the *Closed Commercial State* which he published in 1800. This latter work attracted little attention at the time of its publication, and for the most part it is ignored by the histories of socialism; but thirty years after its appearance its ideas came into the main stream of

---

*S. R. 291.*
European socialism through Lassalle's *Theory of the State*, which was constructed on Fichte's foundation. All shades of opinion at the present day, from extreme nationalism to revolutionary bolshevism, have been sustained by Fichte's thoughts in this field.

The right to land is limited in Fichte's system to the use of it, *e.g.*, the farmer cannot prevent some one else from using the land provided it does not conflict with his own use. After the harvest others may use the land for pasturage unless the farmer also possesses the right of cattle-raising. Thus only the products of the land are the property of the farmer. He owns them, substance and all, but of the land he owns only the accidence. This idea has reappeared in modern times in the distinction taken between "property for use" and "property for power." "Those things are rightly privately owned," A. D. Lindsay thus summarizes the principle of communism, "which are necessarily privately used, and in so far as they are so used." But the distinction taken by Fichte is an arbitrary one in his system. An economic arrangement which would permit all men to live is not necessarily incompatible with fee simple title. Mines and the products of mines (precious stones, marble, sand, etc.) are to be owned by the state which, however, may transfer them by franchise to individuals if it desires to do so. Fichte permitted private property in tame animals, but not in wild animals until they were caught or killed. The government should regulate the professions, which include workers' unions, and limit their membership to the number that can support themselves. The members of the profession are to have the exclusive right to produce the objects assigned to it; raw materials are obtained from merchants, who also comprise

---

63 Engelbrecht, *Johann Gottlieb Fichte* (1933) 82.
65 S. R. 299. Hegel thought that Fichte's distinction was an empty subtlety. *If I take possession of a field and plough it, the furrow and all the rest are my property. That is to say, I will to take the whole thing into my possession, and the form which I have imposed is precisely a sign that I claim the thing as mine. Hence there is nothing left to be taken into possession by someone else.* *Philosophy of Right* (Knox trans. 1942) 238.
66 *Property: Its Duties and Rights* (1922) 77.
a limited profession, in exchange for finished products. The producer must always dispose of his property; but if he does not want wares he is entitled to receive money. Artists are subject to the same requirement. The money thus received is absolutely pure property over which the state has no control; for the state to attempt to tax it, Fichte thought, would be the height of absurdity. Similarly a man’s house is his absolute property, and what is in the house is beyond the supervision of the state.

Penal Law

Fichte’s theory of penal law rested upon what he termed a compact of expiation. He who violates the law has not accepted the fundamental principle of the community as his constant rule of action. But his rights are conditioned upon his observance of that principle; and when he does not observe the principle he loses his rights and becomes an outlaw. But the object of the state is to secure to each the full enjoyment of his rights, and if this can be accomplished without the imposition of outlawry, the punishment need not necessarily be affixed. By compact all citizens promise to all citizens that they shall not be outlawed, provided that this is compatible with the public security. Fichte’s argument thus led him to announce the extremely advanced principle that every citizen has the right to expiate offences. However fundamental the idea of expiation may be in the penitential discipline of the Christian and other churches, its adoption in the regulation of criminal behavior is unlikely so long as punishment continues to be based in large part upon motives of revenge. “Blood it is said will have blood,” Bentham writes, “and the imagination is flattered with the notion of the similarity of the suffering, produced by the punishment, with that inflicted by the criminal.” However, Fichte would not permit the right of expiation to extend further than is compatible with public security; to do otherwise would be irrational.

67 S. R. 344.
68 Rationale of Punishment (1830) 191.
Punishment is not an end in itself, Fichte argued, and contrary to Kant, he insisted that the maxim "he who has killed must die" is positively meaningless. The end of the state is the maintenance of public security, and punishment is merely a means to that end. The only purpose in providing punishment is to prevent by threats transgressions of the law. The end of all penal laws is therefore, Fichte saw with great acuteness, that they may not be applied. But the continuance of the argument led Fichte to support the idea of the poena talionis. The original intention of punishment was solely to deter the criminal from crime. When he commits a crime his punishment has another end: to deter other citizens from committing the same offense. The punishment must therefore be equal to the crime.

Fichte outlined the rules which determine the sufficiency of the counterpoise, or equality of the punishment and the crime. Thus in the case of a wrong committed through carelessness a fine equal to the amount of damage done is equal to the injury committed; but in the case of a deliberate crime, the criminal must not only restore what is taken but must, moreover, pay an equal amount from his own property; only by that additional payment is the punishment made equal to the offense. Somewhat oddly Fichte held that murder did not allow of an attempt to reform the criminal, and the punishment, as we have seen above, must be absolute exclusion from the community. He would, however, permit the establishment of private institutions for the purpose of attempting the reform of such criminals; but such societies would have to guarantee to the state the safe keeping of the murderer.

It cannot be said that Fichte's theory of the criminal law represents more than a generous effort, under the impetus of the liberal movement initiated by Beccaria, to rationalize the archaic penology of the eighteenth century. Fichte was not able to free himself altogether from the crude ideas of his contemporaries, as in his infliction of the pillory for slander; ⁷⁰

but his theories on the whole, notwithstanding the absolute indeterminacy as a standard of the idea of the *lex talionis*, were in the current of the reforms which the nineteenth century was later to recognize as necessary.

**Police Law**

Fichte drew a distinction between the civil laws and what he termed the police laws (*Polizeigesetzen*). In his system the civil laws prohibit merely the actual violation of the fundamental compact, but the police laws are intended to prevent the possibility of such violation.\(^{71}\) Accordingly, the police laws may prohibit acts which appear to be indifferent, and which in themselves are harmless, but which are calculated to facilitate the promotion of wrong, and to render difficult the protection of citizens' rights. Thus the state may forbid a citizen to carry arms although on the surface it is a matter of indifference to other citizens what I choose to carry about my person. Unfortunately, Fichte proposes no standard by which a proper exercise of the police power is to be judged. His enthusiasm for the power led him to propose that all citizens shall carry passports, and, further, when they venture on the streets at night they must be equipped with lights so as to be instantly recognizable.

**International Law**

No task occupied more of Fichte's attention than the one of working out the system of law which should control the relations of states, and his legal philosophy nowhere else led to results of greater value. His first reflections upon the subject were initiated perhaps by Kant's *Essay on Perpetual Peace* (1795) which he enthusiastically reviewed in 1796.\(^{72}\) In the

---

\(^{71}\) *S. R.* 377. In his *Philosophy of Right*, Hegel was later to develop further the idea of "police law." Professor Knox, however, points out that *Polizei* has a wider sense in Hegel's system than that conveyed by "police" in English. In his own very careful translation Professor Knox therefore generally translates it "public authority." *Hegel's Philosophy of Right* (1942) 360.

\(^{72}\) *S. W.* 427.
Grundlage he returned to the subject again in the same year, and with a greater dialectical skill than Kant exhibited; he reconsidered the question again, apart from his less formal discussions, in 1800, in 1812, and finally in 1813. His thought during this period was by no means consistent; but at all times it was in advance of the dominant conceptions of his day. He wrote during a period of great political turmoil, and all his political treatises reflect the turning points of that struggle. The Beiträge corresponds, Vaughan writes, “to the Jacobin domination and the Reign of Terror; the Grundlage to the first decisive triumph of Napoleon, ’the child and champion of Jacobinism,’ in Italy; the Geschlossene Handelstaat, a strange forecast of the continental Blockade, to the First Consulate, the Constitution of the year VIII, and the battle of Marengo; the Reden to the Treaty of Tilsit and the uprising of the Spanish nation against the insolent usurpations of Napoleon; the Staatslehre to the humiliation of the universal tyrant at Moscow, and the birth of the German nation amid the throes of the war of liberation.” Fichte’s juristic thought is the bridge from Kant, which is to say from Rousseau and the Revolution, to Hegel; its beginning is a theory of the individual and his natural rights, its close a doctrine of state socialism and the national state, which would he thought culminate in the future in a Christian world community.

Fichte’s theory of international law is a strict logical extension of his general theory of law. The relations of states are based upon the legal relation of their citizens. In itself the state is nothing but an abstract conception; only the citizens, as such, are actual persons. Further, the relation is based

---

73 It should be remembered, as pointed out above, that Fichte claimed to have developed his jurisprudence before the appearance of Kant’s Essay on Perpetual Peace. However, in the Grundlage international law is treated not in the body of the work, but in the Appendix.

74 Der geschlossene Handelstaat, 3 S. W. 389.
75 Das System der Rechtslehre, 2 N. W. 495.
76 Die Staatslehre, 4 S. W. 369.
78 S. R. 475.
expressly upon the law, or necessity, that citizens who meet each other in the sensuous world must guarantee security to each other. Thus the relation of the states lies in their mutually securing to each other the security of their citizens. The formula of that agreement is: I agree to hold myself responsible for all the damage which my citizens may do to your citizens, provided you will make yourself responsible for all the damage which your citizens may do to mine. Such a compact necessarily implies a mutual recognition of the legal organization and interdependence of states, as well as their equality. The treaty fixes boundaries and defines the rights of fishing, hunting, navigation and so on; it also permits states to send ministers to each other to make certain that the provisions of the treaty are being observed. Violation of the treaty gives a right to declare war, for the state which is made war upon has shown that a legal relation with it is impossible, and hence that it has no rights at all.

Nothing is more characteristic of eighteenth century thought than Fichte's attitude toward the conduct of warfare. From Gibbon to Toynbee historians have commented upon the moderateness of the warfare of that period, which extended from the punctiliousness of the soldiers towards each other to the care which the armies observed in preserving the permanent capital equipment of social life in the war-zone. With the introduction of the levée en masse in Revolutionary France, war, which had been kept to a minimum of destructiveness through the conception of it as the "sport of kings," passed into its nineteenth and twentieth century phase as la guerre totale. Fichte observes that since only the armed powers of the states carry on war it is not made upon unarmed citizens.

79 2 History of the Decline and Fall of the Roman Empire (Bury ed. 1946) 1221, 1223. "In war the European forces are exercised by temperate and undecisive conflicts," Gibbon wrote. "The balance of power will continue to fluctuate, and the prosperity of our own or the neighboring kingdoms may be alternately exalted or depressed; but these partial events cannot essentially injure our general state of happiness, the system of arts, and laws, and manners, which so advantageously distinguish, above the rest of mankind, the Europeans and their colonies." Quoted Toynbee op. cit. infra note 79 at 148.

80 4 A Study of History (1939) 141.
The object of war is not to kill, but merely to drive away and disarm the armed force which protects the country and its citizens; reason therefore seems to require that we should always advise the enemy when we intend to open fire upon his posts, just as we demand the surrender of fortresses before opening fire upon them. Nevertheless Fichte thought that the usual manner of carrying on war was certainly irrational and barbarous. He thought the practice of sharpshooting was illegal. The sharpshooter from a hidden place, where he is safe himself, cold-bloodedly takes aim upon a man as upon a target; with him, Fichte thinks murder is the end. He observes that the first use of sharpshooters, by Austria against Prussia, created universal indignation throughout Europe. He writes that we are now accustomed to it, and imitate it; but it is not to our honor.

Fichte saw that the right of war, like all rights of compulsion, is unlimited. The opponent has no rights because he refuses to recognize the rights of the war-making power. He may of course sue for peace and promise to recognize those rights. But how shall the other party be convinced that he is in earnest and is not merely seeking a better opportunity to subjugate? Hence the natural end of war is always the annihilation of the opponent.

But since every state does not possess the same amount of strength as of right, war may as often promote the cause of injustice as the cause of justice. Hence Fichte once again sought for a contrivance which would arrange matters in such a way that the just cause will always be victorious in war. Strength arises from the mass; hence a number of states must form a confederacy for the maintenance of law and for the punishment of all unjust states. It is clear that the combination will result in a power that will be always victorious. But how can it be arranged that this combination of states always will decree justly?

The states would guarantee each to the other their independence and the inviolability of the compact. The formula of the
confederation would be: We all promise to exterminate with united force any state, whether it belong to this confederation or not, which shall refuse to recognize the independence of any one of us, or which shall violate a treaty concluded between it and us. The compact, Fichte insists, creates a confederacy (Völkerbund) and not a state (Völkerstaat); the distinction is that an individual can be compelled to become a member of a state, since otherwise it is impossible to establish a legal relation with him; but a state can not be compelled to enter the confederacy because a legal relation with it can be established otherwise. Whether one state has recognized the independence of another state, appears from the fact whether or not it has concluded a treaty with it. Hence the confederation has a sure means of deciding this question; and it is not to be presumed that the confederation will knowingly and intentionally pronounce a wrong judgment, since all the world would see immediately the injustice of such judgment. If a state does not appear before the confederation to justify itself it thereby virtually admits its guilt. Since all treaties are concluded under the guarantee of the confederation, it can tolerate no indefiniteness in their terms. The states of the confederation cannot well have a common interest to act unjustly, for the principles which they apply to others will be applied to them. The confederation must have the power to execute the decisions, and hence must be armed; Fichte is against the establishment of a standing army, because it will be idle most of the time, and in favor of an army called out only in times of war by contributions from the separate states.

Fichte readily admits that he has not established the impossibility of an unjust decision by the confederation. Until reason herself appears in person upon earth and assumes judicial power, he writes, we shall always have a supreme court, which, being finite, is liable to error or to evil motives. The practical problem therefore is simply to discover a tribunal from which there is the least likelihood to expect this. His final thought is an optimistic one. As the confederation extends to
embrace the whole earth, eternal peace will be established. It is the only lawful relation of states, since war is as likely to give victory to the just as to the unjust; at the very best, under the direction of a confederation of states, war is only a means for the ultimate end, the maintenance of peace.\textsuperscript{81} Grotius had based the relations of states on a natural law doctrine which applied to states the same moral standards applicable to individuals. With the rise of the corporate state and the passing of the sovereign as the embodiment of state activity, the international lawyers substituted the idea of the compact as the ground for the regulation of state behavior.\textsuperscript{82} Fichte’s theory is squarely in this tradition and is a remarkable anticipation of nineteenth and twentieth century thought. As our current wars indicate the idea of the compact has proved as inadequate to control international relations as Grotius’ natural law theory. But in the years which have elapsed since Fichte wrote the wit of man has not been able to improve upon Fichte’s thoughts, as the theory of the League of Nations and United Nations shows.

\textbf{Conclusion}

In its abstractness Fichte’s theory of law is almost without parallel and it thus raises, as precisely as may be, the question of the value of such systems. It may be said at once that as aids to the understanding of any known legal system, or of any that is likely to be known, their value is slight. The subject matter of jurisprudence exists in the same sense that the subject matter of the various natural sciences may be said to exist. The histories of those subjects show us that advances are seldom made unless the ideas which control the investigation are constantly brought into a relationship with the available

\textsuperscript{81} S. R. 489. In the later studies Fichte’s thought oscillated from a pessimism inspired by contemplating the selfish motives of men and states (Rechtslehre, 2 N.W. 645) to the idea of a league of Christian states which would eventually embrace even the non-Christian peoples (Staatslehre, 4 S.W. 600).

\textsuperscript{82} Cairns, Foreword, A Symposium in Juristic Bases for International Law (1946) 31 Iowa Law Rev. 498.
factual data. There must be a constant reciprocal checking of
data by ideas and of ideas by data. It is explicitly not the aim
of the Fichtean type of legal system to explain an existential
subject matter. Its aim is avowedly to establish the necessary
principles of a particular kind of legal system which, in Fichte's
case at any rate, is not, and in all probability will never be,
existential. Such a procedure is entirely legitimate and, at the
worst, is a harmless intellectual exercise which runs, however,
the risk of being dismissed as utopian.

However, since philosophical inquiry of the type exemplified
by Fichte has not attained the abstractness of pure mathematics, empirical elements are always present. It is therefore
always possible that the results of such an inquiry may be
applicable to some extent to existential legal systems. In
Fichte's case there are a number of such instances, two of
which at least possess interest. His conception of the legal
relation, although jurists have subjected it to nothing like the
analysis it deserves, is plainly an important one. Again his
conception of the necessary requirements of an international
order has not been improved upon in its general outlines since
he proposed it. It is in such directions that the Fichtean type
of analysis may possess great value. They may either uncover
fundamental legal conceptions which jurists take for granted
and thus pass over in their studies; or they may indicate new
lines of development in new areas, but based on presently
existing legal ideas, as in Fichte's generalization of the con-
ception of contract to control the relations of states. Fichte's
system is an advance over the one put forward by Kant in the
fact that it takes much less for granted, and analyzes with great
care propositions which Kant felt he could safely assume; but
the case is otherwise with respect to the empirical elements of
the two systems. However much we may deplore the absence
of anything approaching a satisfactory treatment of them by
Kant, in comparison with Fichte he could appropriately be
regarded as a gross empiricist.