CHAPTER XIV

HEGEL

Even if Hegel's construction has failed, Hegel's criticism is on our hands. And whatever proceeds by ignoring this is likely, I will suggest, to be mere waste of time.

F. H. Bradley

We are told by Hegel that philosophy was accessible to the ordinary knowledge of the cultured public until Kant. Beginning with Kant's intricate idealism it passed beyond their understanding, and its subtleties are now open only to the grasp of the professional.1 If Hegel's remark is an accurate description of a difficulty of modern philosophical thought, his own system, notwithstanding his insistence that it is the duty of all individuals to occupy themselves with philosophy,2 did nothing to overcome it. The intricacy of his thought is the theme of the commentator and the experience of the student. But Hegel also brings a special burden to the student who wishes to understand him. We are assured that Hegel

References cited as PR are to Hegel's Philosophy of Right (1942) translated by T. M. Knox. There is an earlier translation by S. W. Dyde (Hegel's Philosophy of Right, 1896) which, however, has now been superseded by Professor Knox's excellent version. For the German text there is a convenient edition, with an elaborate introduction by the editor, in the Philosophische Bibliothek: Grundlinien der Philosophie des Rechts, edited by Georg Lasson (3rd edition, 1930). References cited as JE are to the Jubilee edition of Hegel's Werke, edited by Hermann Glockner, 20 vols. (1927). The best single volume account in English of Hegel's philosophy in its entirety is W. T. Stace's The Philosophy of Hegel. Hugh A. Reyburn's The Ethical Theory of Hegel (1921) is an admirable introduction to the Philosophy of Right itself. Other studies of the Philosophy of Right are: Hegel's Philosophy of Right, by T. C. Sandars, Oxford Essays (1855), the first exposition in English and still unsupplanted; Lectures on the Philosophy of Law, by J. H. Stirling (1873) the author of the Secret of Hegel (new ed. 1898), of which latter work the joke is still repeated, although unjustifiably, that if he had discovered the secret he had successfully kept it to himself; Bosanquet, The Philosophical Theory of the State (1920) c. X; The Political Philosophies of Plato and Hegel (1935) by M. B. Foster; Reason and Revolution, by Herbert Marcuse (1941) c. VI, an analysis of the social background.

1 3 Lectures on the History of Philosophy (1896) 505.

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during the course of the exposition of a particular point not only had his entire system present to his mind, but that he kept equally before him all the philosophy of the past.

An introduction to Hegel's thought is thus likely to begin with a preliminary sketch of philosophical ideas to the first years of the nineteenth century. An exposition of a particular aspect of Hegel's system is usually preceded by an account of the major ideas upon which it rests. In all this there is much merit. When we are concerned with a thinker of Hegel's stature we cannot know too much about the interconnections of his thought. What he has to say on other topics, and especially the process by which he arrives at the specific conclusion he is expounding, are valuable in our efforts to reach the essence of his thought. This would seem to be the case with Hegel's theory of jurisprudence. It was first put forward as an integral part of the volume which he regarded as the methodical summary of his system. It was later reconsidered and expanded as a separate volume. Further, the latter part of the jurisprudence was itself additionally developed in the form of the lectures, published after his death, on the philosophy of history. Finally, Hegel himself apparently presupposed on the part of the reader some knowledge of his general system, particularly the exposition of his philosophic method in the *Science of Logic*.

Nevertheless, it appears possible to comprehend Hegel's philosophy of law without a preliminary excursus on his general system or on the systems of his predecessors. Indeed the first English expositor of the system thought that "we may take down the volume of Hegel's works containing the *Philosophy of Right* with its skillful apparatus of explanatory and critical notes.

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3 *Encyklopädie der philosophischen Wissenschaften im Grundrisse* (1817). The work is divided into three parts, Logic, Nature, and Mind. The third section, which contains the philosophy of law, was translated by Wallace as *Hegel's Philosophy of Mind* (1894).

4 *Grundlinien der Philosophie des Rechts* (1821).

5 *Vorlesungen über die Philosophie der Geschichte* (1837).

6 *PR 2*.

7 This is now particularly so in view of the publication of Professor Knox's edition of the *Philosophy of Right* with its skillful apparatus of explanatory and critical notes.
of Right, and although we have never opened any of the other volumes, we shall not find what we read unintelligible. ... We need not travel beyond the limits of this particular sphere in order to apprehend its true character."

Hegel himself took pains in the Introduction to the Philosophy of Right to sketch the elements of his general theory; but it may be doubted that his full meaning will be understood in the absence of a knowledge of his more elaborate statements. Nevertheless his legal theory, and the ethical theory of which it forms a part, can be stated without difficulty. There is no likelihood that legal thought will adopt either the philosophical basis or the technical apparatus of Hegel's jurisprudence. We have a vital interest in understanding as fully as may be the meaning and the grounds of the conclusions he has reached in jurisprudence. But it is the conclusions themselves which are our primary concern, since it is possible to deduce them from premises other than those which Hegel employed. Many of those conclusions have passed over into jurisprudence, and are part of the stock of ideas of legal theory today. Our task is to ascertain the meaning of those conclusions as they were expounded by Hegel, and to understand, so far as necessary for the purposes of the inquiry, the presuppositions which led him to reach them. That is an undertaking which appears possible although accompanied by a minimum of explanatory exegesis.

Hegel's purpose in publishing a treatment of the philosophy of right in a separate volume is made abundantly clear from his preface. He felt that the audience which attended his lectures on the subject needed the guidance of a manual in order fully to understand the import of his remarks; he felt also that the lectures stood in need of clarification and amplification, and that writing them out in the form of a manual provided the opportunity to accomplish those ends. His manual was thus to be a compendium, with its subject-matter circumscribed by the limits of the science. But it was to be a compendium with a difference. Hegel believed that philosophy possessed a logic or

"Sandars 216."
method of its own, one that was peculiar to itself, and which constituted philosophy's own kind of scientific proof. This was the dialectical method, which proceeds through the development of the concept. It is the process by which from the first member of a triad, say Being, a second element, Nothing, is deduced. This is possible because Being in its completely abstract form, devoid of all qualities, is Nothing. But we are able at this point to perceive the presence of the member of the triad, Becoming. In fact, we are forced to take this step according to Hegel because, unless we do so, we are asserting the paradoxical proposition that Being and Nothing are the same—that a thing both is and is not. We must therefore search for what Hegel calls the unity of opposites. In the present case it is found in Becoming; a thing both is and is not when it becomes. It is on this basis, says Hegel, that "the system of concepts has broadly to be constructed, and go on to completion in a resistless course." Hegel explicitly rejects two other methods of procedure, that which he terms **raisonnement** and the mathematical method of Spinoza. **Raisonnement** in Hegel's view was the method of the Sophists. It consists of the finding of reasons which justify the conclusions the individual wishes to uphold. These reasons, or grounds, have therefore no objective or essential principles of their own, and it is as easy to discover grounds for what is wrong as for what is right. It is the method especially adapted by the Sophists to the consideration of questions of law; it is still
followed in the legal profession and its products are known as "lawyer's arguments." To the mathematical method he objects that it necessarily involves presuppositions and that it is the method of the understanding.\(^\text{12}\) By presuppositions he means that Spinoza's method of beginning with definitions and axioms, notwithstanding the fact that they are a great storehouse of speculative truth, is basically the method of dogmatic assertion. Hegel held that his own method made no assumptions of this character. By the method of the understanding Hegel means the type of reasoning which is based upon the law of identity \(A = A\). In jurisprudence, he pointed out, since we argue from a specific law or precedent to another, advances are primarily regulated by identity.\(^\text{13}\) But when we pass to the speculative method we are at the level of the concept and have passed beyond identity to the unity of opposites. In the Hegelian system methodology occupied a preeminent place, and it was from the point of view of the application of his own philosophical method to the problems of law that Hegel wished his jurisprudence primarily to be judged. He took the view that jurisprudence at bottom was a philosophical science \((\text{Wissenschaft})\) and in such a subject, he held, form and content are inseparable.

At this point we come to one of Hegel's most controversial ideas and, at the same time, one of the most important in his philosophy. This is his assertion that the rational is actual and the actual is rational. Perhaps the best course, in order to grasp the meaning of this proposition, is to follow the steps which led to its assertion.

We can assume that the task of the philosopher is to state the truth about the subjects with which he is concerned. Philosophers in their books keep serving up hashes which purport to set forth these truths, but they are merely rewarmed dishes which are supplanted by each new serving. Through the philosophical method we can really arrive at the truth. So far as jurisprudence is concerned the truth is nothing new. It was embodied long ago in the various systems of law which the

\(^\text{13}\) Op. cit. supra note 9 at 144.
world has known. Philosophy’s problem is to isolate those truths and to exhibit their logical necessity. This does not mean, as Hegel’s critics have asserted, that legal institutions or rules are immune from criticism, or, in other words, that whatever is, is right. Hegel makes this perfectly clear in the distinction he draws between the laws of nature and positive law. The laws of nature are given and their measure is outside man. No matter how well we know them we can add nothing to them nor can we assist in their operation. Our ideas about them, however, can be false. Positive law, on the contrary, is posited, it originates with man. For the posited, however, man insists that the measure is within him. When we are confronted with nature we do not go beyond the truth that there is a law; but we cannot accept positive law simply because it exists. There is thus the possibility of a conflict between the ought and the is. It is the assignment of the philosophy of law to establish the rationality of law or right, and in this respect it stands in contrast with the study of positive law which is mainly occupied with the revelation of contradictions. Thought is now seen to be the essential form of things, and philosophy must therefore attempt to grasp law or right as thought. Again, this does not mean that right must yield to a supposed supremacy of thought, or that random opinions are entitled to weight. Thought which is valid must take the form, not of a mere opinion, but of a concept about the thing. We arrive at this position only through the employment of the philosophic methodology. Above all we cannot know the truth through the method of either intuitionism or subjectivism.

14 PR 224-225.
15 Kelsen, who is a declared neo-Kantian, asserts that the State is a normative order and therefore is not a fact. If it were a fact it could not be in “conflict” with an individual, “since facts of nature never are in ‘conflict’ with each other.” General Theory of Law and State (1945) 189. To this Professor Cahn replies: “It does not seem to have occurred to Dr. Kelsen that individuals (graciously conceded to be facts of nature) can be in conflict with each other.” 1945 Annual Survey of American Law (1946) 1233.
16 PR 6-7.
Philosophy’s concern is with the rational. This means that it is an effort to apprehend the actual. For the world that the philosopher contemplates is a world of appearance and essence, the outward and the inward, the unity of which constitutes actuality. Now the mere existent is not the actual, since if it were it would include caprices of fancy and evil, which are not rational. Caprices of fancy and evil represent the fortuitous, something of no greater value than the possible, something which may as well be as not be. It is the actual alone which is rational, which can be grasped in thought. But when rationality is actualized it assumes a multitude of forms, and it is not the business of philosophy to concern itself with such an infinite variety of affairs. Thus Plato should not have urged that nurses with children in their arms should continually rock them; nor should Fichte have insisted that passports should be signed and have the portraits of their owners painted upon them. Attempts to pass judgment upon matters of this sort are a form of supererudition in which philosophy loses its way. At bottom Hegel’s book has as its aim the effort to understand the state as an inherently rational institution. It is not an endeavor to construct the state as it ought to be, but only to reveal how the state, which is the world of the ethical, is to be understood.

We can approach Hegel’s position from another point of view. His system, like Kant’s, is based upon a principle of knowledge, reason, which acts universally. But reason in Kant’s hands is a formal principle. The ethical rules which are to guide individuals must be given a universal form, otherwise the individual could, in his behavior, indulge in self-contradictions. Kant

18 Laws 789 E. Professor Knox observes that Hegel “seems to have forgotten that Plato is saying that to make such a regulation is unnecessary and would be ridiculous.” PR 303 n29. Plato thought the rule a necessary one but that the legislator would be subject to ridicule if he enacted it as law; further that nurses with their womanish and servile minds would refuse to obey it. The individual citizen, Plato thought, should therefore adopt the rule as law for himself. So far as Hegel’s point is concerned it is a matter of indifference whether the philosopher recommends the adoption of the rule or not. In either event the philosopher should not concern himself with such trivia.
puts the case of the person who adopts the maxim: “I may increase my fortune by every safe means.” That person has in his hands a deposit the owner of which is dead; but there is no proof of the deposit. Is it possible, in accordance with the maxim, to permit the law: Everyone may deny a deposit of which no one can produce a proof? Kant answers “No,” because such a law would annihilate itself since there would be no deposits. But as Hegel observes, suppose there are no deposits, where is the contradiction? Kant’s system can tell us whether the action is self-consistent or not, but we want to know whether the practice of making deposits is morally valid. An evil man can be perfectly consistent and can thus meet the test of universality. Hegel’s theory of the concrete universal, the concept, attempts to meet exactly this point. It gives a material content to the universal. Hegel shows also that the Kantian morality itself is self-contradictory. We can take as a universal maxim the rule: “Help the poor.” But the best way to help the poor is to abolish poverty. But this would mean the abolition of a moral duty, since our duty to help the poor would vanish with the poor themselves. We must therefore keep poverty so that we can perform our duty. But in that case we are not really doing our duty, which is to give the most effective assistance possible to the poor.

Hegel was careful to warn his readers not to expect too much from philosophy. It always comes too late to teach the world what it ought to be. Philosophy, as the thought of the world, appears only when the formative process of actuality has been completed. Only when actuality is mature can the ideal be contrasted with the real; it is only then that the ideal apprehends the substance of the real world and shapes it into an intellectual realm. “The owl of Minerva,” Hegel observes in his greatest Delphic utterance, “takes its flight only with the falling of the dusk.” If this is an impractical philosophy, as critics of Hegel allege, it is nevertheless not without its

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20 1 *JE* 466.
21 1 *JE* 470.
22 PR 13.
justification. The impulse to understand the world is justified by the fact that it gratifies legitimate curiosity. It needs no further support in the hope or desire that practical results will issue from it. In fact, that some philosophies may have no practical consequences is at present perceived to be a virtue, now that the wave of utilitarianism is receding. "This subject," Hardy wrote of pure mathematics, "has no practical use; that is to say, it cannot be used for promoting directly the destruction of human life or for accentuating the present inequalities, in the distribution of wealth." That Hegel himself was not always a consistent Hegelian in the non-utilitarian view he took of his philosophy need not concern us here.

The Foundations of the Philosophy of Law

Hegel's philosophy of law takes as its subject-matter the Idea of right, that is, the concept of right and the actualization of that concept. Law itself, we are thus told at the outset, is to be explored from the point of view from which Hegel customarily regarded the world. Hegel held that mathematics, formal logic, and related subjects operated at the level of the understanding; they are concerned with "thoughts" or "universals" (the form) and with "particulars" (the content). But at the level of reason we encounter the "concept," the principle of which is the identity of opposites. When opposites such as form and content, universal and particular, are synthesized at the level of reason, they become concrete thought, the concept. By concreteness Hegel means that the concept has a content which it has given to itself through the process of synthesis. But this process can also be applied to the concept itself and, in turn, it yields the Idea. When we see the concept in its development, that is, when the concept itself has become concrete through its own self-determination, it is the Idea. The concept and its existence are two sides of the same thing; they are distinct, yet, like body and soul, to use Hegel's own example, they are united. Body and soul are one life, yet both can be

24 PR 14. 25 PR 225.
regarded as lying outside one another. A soul without a body would not be a living thing, and vice versa. Thus the determinate existence of the concept is its body, while its body obeys the soul which produced it. Hence the unity of determinate existence and concept, is the Idea. It is not a mere harmony of the two, but their complete interpenetration. However, it is important to emphasize that the process which transforms the universal into the concept, the concept into the Idea, is not to be viewed as a series of stages possessed of a temporal or historical nature. They are philosophical stages; they represent an order of logic and not of time. Thus we cannot say that property existed prior to the family; but in the logical development of right it must be treated first.  

For the purposes of the exposition of his philosophy of law Hegel emphasized two ideas—will and personality. Philosophy he regarded as a circle; but it is necessary to make a beginning somewhere, and these two ideas are the most appropriate through which to breach the circle. For the most part the justification of his assertions with respect to these two ideas are presupposed; in fact, what comes after is also presupposed for his philosophy of law is not the climax of his general system; the final phase is reached in the apprehension of the Absolute through art, religion and philosophy. But will and personality take us directly to the heart of his philosophy of law; for present purposes we need only grasp the meaning he assigns to them.

Right in general has its foundation in mind, or, as precisely as may be, in the will. The will is free, and thus freedom is both the substance and goal of the will; the system of right is therefore the province of actualized freedom. Freedom is, in Hegel's view, as characteristic of the will as weight is of matter. Matter, in fact, is weight; the two cannot be separated. It is the same with freedom and the will, since the free entity is the will. Without freedom will is an empty word; freedom becomes actual only as will, as subject. But a will which resolves on nothing is not an actual will. The absolute

26 PR 233.  
27 PR 226.  
28 PR 229.
goal or impulse of free mind is to make freedom its object. When it resolves, the will posits itself as the will of a specific individual, as a will which is separated from the will of another individual. In its activity the will overcomes the contradiction between subjectivity and objectivity, and its aims assume an objective instead of a subjective character. Hence right is an existent of any kind which embodies the free will. Right therefore is by definition freedom as Idea.

But we must pass beyond the single will of a subject, the stage of the abstract absolutely free will. Personality arises when the subject is conscious of himself as a completely abstract ego in which all concrete limits and values are negated and without validity. Thus the abstract will consciously self-contained, is personality. But personality implies a capacity to possess rights, and constitutes the concept and abstract basis of abstract, and therefore formal, right. Hence the mandate of right is: “Be a person and respect others as persons.” At the stage of formal right the person possesses rights simply because he is a person. There is no question here of particular interests, advantages or welfare. Further, abstract right is only a possibility; such a right is therefore only a permission or a warrant. Hence its only command, unconditionally its own, is: “Do not infringe personality and what personality entails.”

In accordance with these views Hegel divides his subject into three stages to correspond with the development of the Idea of the absolutely free will: (a) the sphere of abstract or formal right, where the will is abstract, that is to say, personality, embodied in an external form; (b) the sphere of morality, where the will has turned inward; it is the subjective will in relation, from the point of view of the good, to the right of the world and the right of the Idea; (c) the sphere of ethical life, where the good is not only apprehended in thought but is realized in the subjective will and the external world. This latter

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29 PR 32.
30 This idea was probably suggested by Kant's doctrine of a lex permissiva. See Kant, Philosophy of Law (1887) 95.
category can be viewed as the realm of the family, civil society and the State.

From the ideas of will and personality Hegel develops the categories of the sphere of abstract right. There is first possession or property. This is freedom of the abstract will in general, or the freedom of a single person related only to himself. There is secondly contract. This category recognizes the existence of more than one person, and it is only as owners that two persons exist for one another. Their implicit identity is realized through a transference of property in conformity with a common will, and without detriment to the rights of either. Thirdly, there is wrongdoing and crime. This occurs when the individual will is at variance with and opposed to itself as an absolute will. With these categories Hegel believed that he had exhausted the classification of the field of abstract right.\footnote{PR 38.}

Hegel's analysis is the culminating product of several centuries of study by philosophers and mathematicians. For the modern age the analysis begins with the explicit formulation of the systems of Descartes, Hobbes, Spinoza, and Leibniz. To use once again the phrase coined by the mathematician Pieri, the systems are basically of a hypothetico-deductive nature. Since Hegel is the last of the classical philosophers to put forward a system of law it may be well to state from the point of view of a scientific theory, the characteristics of that system. He aimed at a consistent set of premises as the foundation of his system; in other words, any deductions that were made from the premises should not lead to contradictions. The premises should also be complete in the sense that they would permit the possible deduction of propositions adequate to embrace the entire existential subject-matter of the field. If Hegel had been successful in the accomplishment of those two aims his system of law would have taken the form of a set of related propositions. If his method, as applied to jurisprudence, had not been interrupted by the rise of the ethnographical and sociological methods of the nineteenth century, it would have
tended on its formal side towards the ideal of the most successful of modern forms of analysis, that of logistics. The program of logistics was formulated in a statement by Russell as the attempt to prove "that all pure mathematics deals exclusively with concepts definable in terms of a very small number of fundamental logical concepts, and that all its propositions are deducible from a very small number of fundamental logical principles" and to explain "the fundamental concepts which mathematics accepts as indefinable." In jurisprudence this would mean the deliberate adoption of the logistic method of analysis, already implicit in Leibniz. It would mean, in the initial construction of the system, the explicit formulation of both the primitive or undefined concept, and the primitive or undemonstrated proposition. Its great virtue would be that the student of jurisprudence would know what he was doing, his undisclosed assumptions would be revealed, and his results would possess the utmost generality. It is true that a method of analysis which in mathematics requires a whole volume of the Principia Mathematica to demonstrate that $m \times n = n \times m$ would probably break down of its own weight in a subject so complex as jurisprudence, although the amount of space devoted to the attempt to define the word "law" in jurisprudence far exceeds the space occupied by the whole of the Principia. Hegel's method in its elements was nevertheless approaching this type of analysis, and jurisprudence together with economics, which has since developed a mathematical phase, possessed a subject-matter which would lend itself to such an approach. Jurisprudence was diverted from this path by nineteenth and twentieth century methods of "fact grubbing" so that it stands today badly in need of theory of a kind that gives proper allowance to both the existential and the abstract.

Before we pass to the further aspects of Hegel's system it is important to notice what he has accepted and rejected in the traditional jurisprudence. He rejects the usual approach to

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"Principles of Mathematics" (1903) xv.
jurisprudence which begins with definitions. To possess validity definitions, he held, should be stated in universal terms; but this is impossible because of the contradictions inherent in material legal systems and also because of the wrongs they contain. Thus in Roman law there could be no definition of "man" since the definition could not cover "slave," i.e., if a "slave" were a "man" then slavery is a denial of rights. He believed that the only proper approach was through the concept, or what we would term today "hypothesis." He held that natural law, or law from the philosophical point of view, is distinct from positive law; but they are not in opposition or contradiction, their relation being something like that which exists between the Institutes (conceived as a statement of general principles) and the Pandects or body of case law in which the principles are worked out. He believed that the historical element in positive law was correctly understood by Montesquieu, namely that legislation, both in general and in its particular provisions, should be treated not in isolation and abstractly, but rather as a dependent element of one totality, interconnected with all the other elements which make up the character of a nation and an epoch. He believed that the historicism of Savigny had its place, but that its function was limited and that it did not fall within the province of a philosophy of law. A particular law may be wholly grounded in and consistent with the circumstances and with existing legally-established institutions, and yet it may be wrong and irrational in its essential character. He rejects Kant's universal principle of right on the ground that it opened the

33 PR 15, 305 n4. However, as Whitehead observes, once we abandon the strictly logical point of view, definitions are at once seen to be of vital importance, since they determine the concepts which will be employed in the system. The Axioms of Projective Geometry (1906) 3.

34 PR 16.

35 Ibid.

36 PR 17, 121, 135.

37 "Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the freedom of the will of each and all in action, according to a universal law." Op. cit. supra note 30 at 45.
way to caprice by exalting the private self-will of the single person over the absolute or rational will. As popularized by Rousseau the idea made the individual more important than the group. It has produced an attitude in the minds of men, and situations in the world such as the Reign of Terror, which are paralleled in frightfulness only by the shallowness of the thoughts upon which they are founded. He rejects as perverse and lacking in speculative thought both the Institute's classification of the system of right into jus ad personam, jus ad rem, and jus ad actiones, and Kant's classification of jus reale, jus personale, and jus realiter personale. Finally he repudiates altogether caprice and the sentiments of the heart when they are set in opposition to law and positive right. That force and tyranny, he remarks, may be an element in law is an accident and has nothing to do with its nature. Above all, there is no possibility that the outcome of the philosophy of law shall be a code of positive law for use by an actual state.

**Property**

Hegel's theory of property, which is based on the idea of personality, originated in a rudimentary form with Kant. Everyone, Kant said, is invested with the faculty of having as his own any external object upon which he has exerted his will. Anything is rightfully mine when I am so connected with it that anyone who uses it without my consent does me an injury. These principles demand that everything external and useable have an owner; for if any useable thing were to remain without an owner freedom to that extent would deprive itself of the use of its voluntary activity in thus putting useable objects out of all possibility of use. Fichte transformed this

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38 “The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each while uniting himself with all, may still obey himself alone, and remain as free as before.” *Contrat Social* (1762) Bk. I, c. vi.
39 PR 33.
40 PR 39.
42 *Op. cit.* supra note 20 at pp. 79, 61-2. “It is a juridical duty so to act towards
theory into the doctrine that beings are absolutely free in their self-determination to have causality; that since they are free causes in the sensuous world they necessarily desire to have an effect in the sensuous world to correspond to the conception; hence, they have subsumed certain objects of the sensuous world, which must be mutually inviolable, to their ends.43

With Hegel the philosophical theory of property reached its ultimate level of sophistication. In order to exist as Idea the freedom of a person must be actualized in an external sphere. We must therefore oppose to free mind the idea of "thing" which is the external pure and simple, something not free, impersonal, and without rights. Since things have no end in themselves, and obtain their destiny and soul from the will, persons have as their substantive end the right to put their will into things thereby making the objects their own.44 Possession is to have extrinsic power over a thing. When I make something my own because of my natural want, impulse, or caprice possession satisfies that particular interest. However, the true aspect of the matter is not the satisfaction of wants, but that property is the first embodiment of freedom and is therefore in itself a substantive end. Thus Hegel does not repudiate the social basis of the theory of interests, which is the ground upon which all jurists, from Jhering to Pound, have placed it. If we start with the wants of the individual human being, as the theory of interests does, then the possession of property, even in the Hegelian system, appears as a means to their satisfaction; but since I am an actual will for the first time in what I possess, the requirements of the Hegelian system demand that this latter ground be taken as the true one.

Perhaps the greatest weakness in Hegel's theory of property is the point to which he next turns—the justification of private property. Since my individual will becomes objective in property, he argues, property acquires the character of private

others that what is external and useable may come into the possession or become the property of some one." Ibid. 71.

43 Fichte, The Science of Rights (1869) 176.

44 PR 41.
property. Where property is owned in common by separate persons it has the character of an inherently dissoluble partnership in which the individual’s retention of his share is a matter of arbitrary choice. From these principles Hegel argues that such things as water and air are incapable of private ownership; that when there is a clash between public and private ownership of land, the former must give way to the latter; that the state has the right in exceptional cases to abolish private ownership, but it is only the state that can do this; that the state can re-establish private property as in the case of the dissolution of the monasteries, for the rights of a community to property are inferior to those of a person.

There are three immediate objections to this theory. In the first place, it violates the law of parsimony, or Ockham’s razor. In the realm of law we are concerned with an existential subject-matter. Unless compelled to do so—and this Hegel has not shown—we ought not to pass to the transcendental realm of metaphysical free will to account for what is existential; if property is to be justified in the context of an existential subject-matter, namely law, it should be done at that existential level. Second, in the terms of Hegel’s own system the theory is erroneous. As we pass to the higher realms of his ethical order a person ceases to be an exclusive unit, but partakes of the nature and ends of other persons. *Pari passu,* property keeps its private character, but a common character is also added to it. Thus, as society becomes more organized the nature of property changes so that what is true of it at one period is not necessarily true of it at another. Finally, we are unable to deduce from the principle the proper distribution of property in present-day societies. Green thought that the value of property lay in the fact that it allowed the individual to carry out a plan of life. Present-day distribution, however,

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45 *Ibid.* Green, Ahrens, Lorimer, Ely and many others who have insisted that property is the realization of freedom have attempted, although without success, to meet the difficulties inherent in the proposition. For a discussion of their views see my *Law and the Social Sciences* (1935) 69 et seq.

46 *PR* 44, 236.

47 Reyburn, 130.
is far from meeting this need, and Green's only solution was to propose that society bestow on every individual at least enough property to develop a sense of responsibility.\(^48\)

Hegel accepts the principle of *occupatio*, but with the reservation that the first person to occupy a thing is the rightful owner not because he is first but because he is a free will; he can only become first if another succeeds him. He also agrees with Kant and Fichte that the mere exercise of the will toward a thing is not enough to make it mine; the thing must be occupied. Occupancy makes the matter of the thing my property, since matter in itself does not belong to itself. In the relationship of the will to the thing there are three types of connection. We may take possession of the thing directly, or, in other words, occupy it; we may use it; or we may alienate it. Occupation itself has three modes: we take possession of a thing by seizing it physically, by forming it, and by marking it as ours.\(^49\)

These modes of taking possession exhibit a process in which we pass from the particular to the universal. When we directly grasp an object we take into possession no more than what we can touch with our body. Further, the mode is subjective and temporary. It is true that the intellect not only draws the inference that what I grasp is mine, but also what is connected with it. But at this juncture the concept is exhausted and nothing further can be deduced from it; positive law must handle the question through its statutes. When I give form to a thing the character it acquires as mine is independent of my presence. This mode applies also to the formation of the organic, such as tilling the soil, cultivating plants, and taming animals. If we consider this mode in relation to man himself we see that it is only through the formation of himself, through the cultivation of his body and mind that he takes possession of himself and becomes solely his own property. If we believe

\(^{48}\) Green, *Principles of Political Obligation* (1895) § 221. However, Hegel observes that a solution of this sort is only a moral wish, but like anything that is only well meant it lacks objectivity. *PR* 44.

\(^{49}\) *PR* 46.
that man is absolutely free, then slavery is condemned. However, the slave's own will is responsible for his slavery, just as the will of a people is responsible for its subjugation. Hence the wrong of slavery lies not with the masters and conquerors, but with the slaves and conquered. Slavery occurs in the passage from the state of nature to true moral and ethical conditions. It is found in a world where a wrong is right. In those circumstances the wrong has its value and finds a necessary place. Taking possession by marking is of all the modes the most indefinite, but at the same time it is also the most complete, since the prior modes have also more or less the effect of a mark. A mark may be arbitrary, and need not signify a connection between the mark and the thing. A cockade may mean citizenship in a state, though the color has no connection with the nation, and represents not itself but the nation. Man shows his lordship over things through his ability to acquire them by the use of marks.

After we have taken possession of property and it is ours, the next step in the relation of the will to it is the use that is made of it. At this point Hegel accepts the present-day theory which places interests on a social basis. He argues that things exist only for my need and are to serve it; my need is the particular aspect of a single will which finds satisfaction in the use of things. Use is the external realization of my want through the change, destruction and consumption of the thing. In this way the thing is revealed as selfless and so fulfills its destiny. Here we encounter a problem raised by Locke. Assuming that a right of private property has been established, how far does that right extend? May a person acquire as much as he will? Locke denied that the principle of private property gave any such right. "As much as any one can make use of to

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50 PR 239. Hegel's argument appears to be a philosophical expression of the theological position maintained in Carlovigian times, that slaves were slaves not by nature but because of sin. However, from this it was deduced that they should be set free. 5 d'Achery, Spicilegium (1661) 53. Dante also argued that the submissive victim of violence abets the violence and hence is morally accountable. Paradiso, IV, 76-80.

51 PR 49, 239.
any advantage of life before it spoils, so much he may by his labor fix a property in,” was the limit set by Locke.\(^5^2\) Hegel approached the question from the doctrine of the equality of men, from which it was sometimes deduced that property holdings should be equal. He admitted the equality of men, but only as persons. As men their capacities are different and an equality of the sort proposed would be wrong. Hence what and how much I possess is a matter of indifference from the standpoint of right.\(^5^3\)

But Locke’s argument has also been given the further development that things which are not used may cease to be the private property of the owner if social considerations so dictate. Hegel attempted to answer this contention by arguing that use is a secondary and subordinate modification of property; the owner’s will, by virtue of which a thing is his own, is the fundamental principle. This question is by no means a settled one as we can observe from the series of United States Supreme Court cases which involve the right to suppress patents. It has there been argued that a patentee is in the position of a quasi trustee for the public, and is under a moral obligation to permit the use of the invention. So far, however, the Court has followed Hegel rather than the implications of Locke’s argument. “If the patent is valid,” Mr. Justice Brandeis observed, “the owner can, of course, prohibit entirely the manufacture, sale or use” of a patented article.\(^5^4\)

If I have the full use of a thing I am the owner of it, is Hegel’s argument. When we pass beyond completeness of use there is nothing left over to be the property of another. The relation of use to property is that of accident to substance, outer to inner, force to its manifestation. Hegel insisted that

\(^{5^2}\) Second Treatise on Civil Government (1690) § 30.

\(^{5^3}\) PR 44, 257.

\(^{5^4}\) Carbide Corporation of America v. American Patents Development Corporation, 283 U. S. 27, 31 (1931). But see the dissenting opinion in Special Equipment Co. v. Coe, 324 U. S. 370 (1945) where three justices take the position that the rule should be abandoned. To suppress individually is not the same as to restrict in combination with others, and action of the latter type may violate the federal anti-trust laws. Hartford-Empire Co. v. U. S., 323 U. S. 386, 324 U. S. 570 (1945).
the total use of a thing cannot be mine, while the abstract property is vested in another person. To make such a distinction is, he held, the work of the empty Understanding. However, he recognized that use may be separated from proprietorship, but only for a temporary period. He thus allowed for usufruct and all the gradations recognized by legal systems between that interest and full ownership, the instances of which he regarded as mere titbits culled from the history of the right of property. But when I withdraw my will from a thing it ceases to be mine. Property may thus be lost by prescription. Hence prescription is not a mere arbitrary introduction into systems of positive law; it is a deduction from the principles of right. It is necessary for a thing to remain mine that my will continue in it. This principle can be extended to national monuments. So long as they enshrine the spirit of remembrance and honor they are national property. When they lose that quality they become res nullius and the private possession of the first comer, e.g., the ancient monuments of Greece and Egypt when in the possession of Turkey.

Since a thing is mine only in so far as I put my will into it, I may abandon as a res nullius anything that I have or may yield it to the will of another and thus into his possession. This is the final mode by which property is modified through the relation of the will to it. Alienation raises the subsidiary question whether a product of my mind, such as a book or an invention, which is given an external form, may be reproduced when it comes into the possession of other people. Hegel upholds copyright and patent laws on the ground that the author and inventor remain the owner of the right of reproducing their products. Reproduction rights are capital assets and a special type of property; they are a distinct source of wealth and may be separately possessed. Copyright and patent laws are therefore comparable to laws against theft.

55 *PR* 52.
Contract

Contract is thought of by Hegel in terms of property; a promise is conceived as a subjective volition which, because it is subjective, can be altered. Property as an external thing exists for other external things, *i.e.*, the will of another person. Property can thus be a relation between a thing and my subjective will; but to this relationship can be added the will of another person, so that the thing is held because of my participation in a common will. This latter is the sphere of contract. Hegel here again rejects the idea that contracts are formed because of needs or wants; reason, or the Idea of the real existence of free personality, is the driving force.\(^{56}\)

Contract is the process which expresses and mediates the contradiction that I am and remain an independent, exclusive owner of something only by identifying my will with that of another and ceasing to be an owner. There is a unity of different wills, a unity in which there is a surrender of differences and peculiarities; yet each will retains from its own point of view a special character of its own, so that independent property ownership can exist. In a real contract both parties surrender and both acquire property, *i.e.*, an exchange; a contract is formal where only one of the parties acquires property or surrenders it, *i.e.*, a gift. From these principles Hegel argues that to subsume marriage under contract, as Kant did, is shameful; but in fairness to Kant it is necessary to add that marriage can be subsumed under contract in the Hegelian system provided the Kantian view of its existential aspect is accepted. Hegel also rejects the idea that the state is a "social contract"; an individual does not have the option to enter or leave the state, since we are already citizens of the state by birth. False also is Fichte's theory, which he maintained at one time, that the obligation to keep a contract begins only when the other party begins fulfilling his side of it. Fichte said that up to that point I am uncertain whether the other party is really in earnest. But the real question is not whether

\(^{56}\) *PR* 57.
the other party can fail to carry out his undertaking, but whether he has the right not to do so. In other words, Fichte has raised a moral point and not one lying in the field of the philosophy of right. Hegel is careful to add that he is speaking of the “real contracts” of the civil law, which are looked upon as fully valid only when there has been an actual performance of the undertaking. This is a matter which does not concern the nature of the relation of the stipulation to performance, but only the manner of performance.

The classification of contracts should, in Hegel’s opinion, be derived from the distinctions inherent in the nature of contract, and not from external circumstances. The distinctions are those between formal and real contracts, between ownership, possession and use, and between value and specific thing. In the main, as Hegel recognizes, this classification is that proposed by Kant. The classification is as follows: A. Gift; comprising (1) gift of a thing—gift properly so called, (2) loan of a thing without interest, (3) the gift of a service, e.g., the mere storage of a property (excluding a gift to take effect on the death of the donor, since testamentary disposition presupposes civil society and positive law). B. Exchange; comprising (1) exchange as such either as (a) barter or (b) purchase or sale, (2) rent either (a) of a specific thing or (b) of a universal thing, e.g., money at interest, (3) wages for service. C. Completion of a contract through pledges. When the owner is not in actual possession of the thing itself, the pledge puts him in possession of its value.

Hegel’s statement of the will theory of contract, if looked at closely, disposes of the usual objections to that theory. It is denied that the law can concern itself with the question whether there is an actual agreement of wills. “The law has nothing to do with the actual state of the parties’ minds,” Holmes observed. “In contract, as elsewhere, it must go by externals, and judge parties by their conduct.” 57 In his disposition of Fichte’s theory of contract Hegel, as we have seen

57 The Common Law (1881) 309.
above, seems to adopt this same argument. Suppose two parties enter into a contract, but one of them the whole time is determined not to perform his share of the agreement. There is certainly here no agreement of the will, but courts will nevertheless enforce the contract. And so apparently would Hegel. "The question therefore is not whether the other party could have had different private intentions when the contract was made or afterwards," he writes "but whether he had any right to have them." Thus, Hegel as well as Kant looks to the physical acts of the parties to ascertain whether or not there has been an agreement of wills. In other words, they both are in accord with the so-called present-day objective theory of contracts. If this is the real meaning of the theory it disposes of the objection that the abstract will is too tenuous an entity to be grasped by an empirical legal system. It also allows for the doctrine that an offeror is bound by an offer which is erroneously transmitted by the telegraph company and accepted as transmitted in good faith. It allows finally for the doctrine that parties to a contract will be bound, within certain limits, by the consequences of the agreement although unforeseeable. It cannot be said that in these two latter cases there has been an agreement of wills; but neither can it be said of the case put by Hegel. What then becomes of the will theory? Perhaps the answer is that the law should give effect, so far as possible, to what the parties voluntarily intended; that in contract the wills should be at one; but that if there is a conflict between the inner will and the physical act, it is the latter that will prevail in the interpretation of the intent of the inner will and its consequences. In the three cases just put the will was an active element. In the first the will through physical acts expressed a particular intent, but was secretly resolved upon something else; in the second, there was a will to create a contract, but the actual intent of that will was wrongly transmitted; in the third, there was an agreement of wills at the beginning, but the parties were unable to foresee all the consequences of that agreement. If

*PR* 61 (Translator's italics).
we attempt to eliminate the will altogether we run at once into an excessive contractualism, which sees a contract in such cases as the dropping by a passenger of a coin in the conductor’s box, or which argues that marriage is a contract although the relations of the parties are entirely established by law. This type of contractualism is condemned even by the critics of the will theory.\textsuperscript{59} If we preserve the will as an element to which weight will be given, we avoid at least this defect. That is to say, there must be an intent to create a contract, possessed of a certain meaning and the nature of that intent will be determined by both subjective and objective factors; but in the case of an absolute conflict the objective factors will control. The courts distinguish between the weight to be given objective acts, and they also consider the force of subjective factors. Thus, when the meaning of the contract is plain, the acts of the parties will not be allowed to prove a construction contrary to the plain meaning; further, the declarations of the parties to the contract with respect to what they intended it to mean will be received by the court.\textsuperscript{60} It is difficult to perceive on the basis of the strict objective theory how the latter declarations could be received.

In contract two wills are related as a common will. But the private will and the common will may not agree; the particular will may act in opposition to the general abstract right. This leads Hegel to the third stage of abstract right, that which is occupied with wrong.

\textbf{Wrong}

In contract there is an appearance of right, a correspondence between right, or the universal will, and the particular will. In wrong this appearance of right becomes a mere show, a seeming reality; wrong arises when the particular will and the universal will are not in accord. Wrong occurs in three cases: nonmalicious or unpremeditated wrong, fraud, and crime. In

\textsuperscript{59} Cohen, \textit{Law and the Social Order} (1933) 85, 92.

\textsuperscript{60} Williston, \textit{Treatise on the Law of Contracts} (1936) § 623.
the first class both parties recognize rightness and desire to see it realized, but their private interests obscure their view of it. This is the realm of civil suits at law. When A asserts that a rose is not red he still admits that it has color. It is the same with this type of right. Both parties will the right and desire the action to reach that result. The wrong lies in each holding that what he wants is right. In the second category, fraud, the wrongdoer alleges that he respects the right, but deliberately attempts to see that it is not realized. The person who is defrauded is made to think that right has been recognized. In the final category, crime, the wrongdoer is aware that his actions are wrong and makes no effort to assert the contrary. In fraud the particular will is apparently respected, since the defrauded person believes that what has been done is in accord with right. In crime both the particular will and the universal will are openly negated. Now if right is negated, it must annul what infringes it; for it thereby proves itself to be a necessary reality. This leads us to recompense and punishment. In non-malicious wrong there is no need of punishment, for right as a universal has not been infringed. Hence the compensation which is given in a civil suit is sufficient to justify right. But fraud and crime can be vindicated only by punishment, since in these cases right has been set aside as such, and mere recompense or restitution are not adequate to restore what has been altered. The particular will of the criminal must be penalized in order to annul the crime.

Hegel's purpose is to justify punishment as an expression of the criminal's own inherent will, as a visible proof of his freedom and his right; by being punished, the criminal is honored as a rational being. Hence the concept and measure of his punishment are deduced from his own act. In substance Hegel's argument is that force is directly self-destructive because it is a manifestation of a will which cancels the expression

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61 PR 64 et seq.
62 PR 70-71. Children, imbeciles and lunatics were excepted from Hegel's general theory on the ground that the individual had the right to know his act as good or evil, legal or illegal. PR 88.
of a will; taken abstractly force is therefore wrong.\textsuperscript{63} Since in its very conception force destroys itself its principle is that it must be cancelled by force. Under certain conditions it is not only right but necessary that a second exercise of force should annul the first. A crime is something negative so that its punishment is a negation of the negation. The injury resulting from the crime exists only as the particular will of the criminal; hence to injure this particular will is to annul the crime and to restore the right. Crime is the will which is implicitly a nullity and it contains its negation within itself. This negation is manifested as punishment. This punishment is only the manifestation of crime, the second half which necessarily presupposes the first. The elimination of crime is retribution, which means only that crime has turned back upon itself; hence it is the very act of crime itself which vindicates itself. Punishment is thus not only implicitly just; it is an embodiment of the criminal's own freedom, a right established within the criminal himself.

This justification of punishment implied at least two limitations which Hegel was careful to insist upon. Crime is annulled through retribution which has the appearance of something immoral, such as revenge, which has a personal element in it. "Vengeance is mine, saith the Lord." Actually, however, the personal element must never be permitted to exist. The idea of retribution is used by Hegel only in a formal sense; he means only that the crime is turned round against itself. If the subjective will interferes in punishment retribution passes over into revenge and becomes a new transgression. This is a defect of the Jewish, Roman and English law, which permit some crimes to be punished not as \textit{crimina publica} but as \textit{crimina privata}. A wronged person is apt to go too far in redressing the injury done him. Among the Arabs, for example, revenge is deathless and continues from generation to generation.\textsuperscript{64} Hegel also recognized that requital, except in one case, simply cannot be made specifically equal to the crime. The Eumenides sleep, but crime

\textsuperscript{63} PR 67 et seq. \textsuperscript{64} PR 247.
awakens them, he remarks. It is true that their principle is "an eye for an eye, and a tooth for a tooth." But mere thinking cannot determine how any given crime is to be punished; positive laws are necessary. With the advance of education, opinions about crime become less harsh, and criminals are not so severely punished. If the punishment to be meted out to crime is determined without due regard to empirical circumstances we may be led to adopt the Stoic view that there is only one virtue and one vice, or the view embodied in the laws of Draco which prescribed death as a punishment for every offence. Murder, however, is of necessity liable to the death penalty; life is the full compass of a man's existence and punishment can consist only in taking away a second life.65

Hegel's theory of punishment involved a rejection of other theories prominent in his day. Klein66 had argued that crime and punishment are both evils, and that it is unreasonable to will an evil merely because another evil exists already. This argument follows from the view that crime is a wrong done to a particular person, and punishment is an equivalent wrong done to the wrongdoer. But if crime is viewed as a violation of right, rather than as an injury to a person, Klein's argument is without force. Feuerbach67 had argued that punishment is a threat, and if a crime is nevertheless committed, punishment is justified because the criminal was aware of the threat. But, Hegel asks, is the threat justified? A threat assumes that a man is not free, and its aim is to coerce him by the idea of an evil. It is equivalent to the act of a man who threatens a dog with a stick. Threats treat a man not in accordance with his honor and dignity, but as a dog; they may arouse him to demonstrate his freedom. Beccaria had denied to the state the right of inflicting capital punishment, since in entering into the social contract the individual could not be presumed to have consented to his own death. Hegel denied that the state was a

65 PR 68, 246.
66 Grundsätze des peinlichen Rechts (1796) § 9 et seq.
67 Lehrbuch des gemeinen peinlichen Rechts (1801).
contract at all. He agreed that Beccaria was right in his insistence that men should give their consent to being punished. But he held that the criminal gives his consent through his very act. He agreed also that Beccaria’s efforts to have capital punishment abolished had had beneficial effects. The theories of punishment which regard it as preventive, deterrent, or re-formative are, in Hegel’s opinion, equally superficial. Fundamentally such theories hold punishment itself to be an evil; equally superficially they regard the results of punishment as a good. But the question at issue is not a good that, or evil this; it is wrong and the righting of it. If you brush aside the objective attitude, you fall into the moral attitude, i.e., the subjective aspect of crime, intermingled with trivial psychological factors.

Since Hegel wrote the theory of punishment has undergone a radical transformation. Emphasis is no longer placed upon the crime or the victim, but upon the criminal. It is denied that the criminal act is one of pure intention; it is asserted on the contrary that it is a product of many causal relations. This theory does not justify punishment itself; on the contrary it suggests that punishment should not be applied at all. Under the influence of the doctrine of natural selection sociologists such as Stanley Hall and Giddings have attempted to justify punishment on the ground that it is a mechanism of social selection. It eliminates or adjusts those who are not adapted to social life. This is an empirical argument, and at that level it may be answered that the history of punishment does not reveal that punishment is effective as an instrument of social selection. Further, who is to judge whether a particular individual is adjusted satisfactorily to social life? The natural selection theory justifies the condemnation of Socrates, as well as that of the American Revolutionary leaders, had they fallen into the hands of the British and been convicted of treason.

Civil Society and the Theory of Positive Law

Civil society in the Hegelian system is the logical, not the historical, stage between the family and the state. It is the battlefield of private interests where each member is his own end; but a member cannot attain his end unless he enters into relations with other persons. Civil society is an association of members in a relationship of complete interdependence, where however their actions as individuals are still allowed maximum play. To reach this position Hegel had passed from a consideration of abstract right, in which the will is universal, to an analysis of morality, where the will is subjective. But abstract right and the subjective will need to be united in an objective whole. The true conscience of the individual is subject to fixed principles which it knows as objective determinants and duties. The conception is transformed into the Idea when we pass beyond the individualism of morality to the sociality of the ethical order. Three phases mark the realm of social ethics: the family, civil society, and the state. Civil society emerges when the family is disrupted. This occurs when the children grow to maturity and form new families of their own.

Civil society as Hegel develops it contains three moments: the system of needs; the administration of justice; and the police and the corporation. He is not here asserting that law and the courts, which he treats under the classification the administration of justice, are prior to the state. Civil society as a logical category can be isolated from the state and considered separately; but civil society itself requires the state in order to exist.

"My notion is," says Socrates, "that a state comes into existence because no individual is self-sufficing; we all have many needs." The idea that the satisfaction of human wants is the organizational principle of society was also the basis of Hegel's theory. He thought that the full explanation of the

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CIVIL SOCIETY AND THE THEORY OF POSITIVE LAW

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"My notion is," says Socrates, "that a state comes into existence because no individual is self-sufficing; we all have many needs." The idea that the satisfaction of human wants is the organizational principle of society was also the basis of Hegel's theory. He thought that the full explanation of the
system of needs was the task of economics, which he held as a science to be a credit to thought. Economics also begins with the idea of needs and thereby accounts for mass relationships and movements in their complexity and their qualitative and quantitative character. The astonishing thing in this mutual interlocking of economic particulars, in Hegel’s opinion, is the evidence of ordered phenomena, paralleled by the regularity which the astronomer has perceived in the apparent irregularity of the solar system. What the English call comfort is something inexhaustible and illimitable; for any comfort can be shown to be a discomfort, and so the need for discoveries is endless. Further, we desire to imitate our neighbors and at the same time to preserve our own individuality; these two feelings are powerful factors in the creation of wants. As social conditions tend to multiply and divide wants and their satisfactions indefinitely, we soon find ourselves in the presence of luxury. Wherever luxury is extreme, distress and depravity also prevail; and in such case the Cynicism of Diogenes is the outcome. Should man therefore not confine himself to the simple necessities of nature? In that case, it is argued, he would have the freedom of the so-called “state of nature.” Hegel replies that this is a false view. If the individual is confined to the satisfaction of physical needs the mental is submerged in the natural, which is the condition of savagery and unfreedom. Freedom is to be found only in mind’s differentiation from nature.

Since Hegel wrote the idea of the system of wants has been extensively analyzed by sociologists. Small and Vincent held that all social interpretation must begin with desires and the wants expressed by these desires. However, Ward later took the position that “in the beginning were interests.” They are prior to desires, and account for them. Interests are “something in men that make them have wants, and something outside of men that promise to gratify the wants.” This idea is

71 Introduction to the Study of Society (1894) 173.
72 General Sociology (1905) 196.
now an influential aspect of contemporary legal thought, since it is one of the tenets of sociological jurisprudence. However, as a philosophical doctrine the theory of wants, in spite of its plausibility, is not a self-evident one. It was opposed, for example, by Zeno who asserted that man should be self-sufficient. The Stoic Wise Man towards outside things has intentions but no desires.\textsuperscript{73}

At this point Hegel effects a transition from the sphere of abstract right to that of positive law. He accomplishes this task through the medium of the important idea of relationship. Relationships arise from the system of reciprocity which obtains among persons in civil society because of the interdependence of needs and labor for their satisfaction. At the level of abstract right this relatedness is turned into itself as infinite personality. But this very sphere of relatedness gives abstract right a determinate existence in the form of positive law. When abstract right is objectified into something universally recognized, known, and willed, and at the same time possesses a validity and an actuality, it becomes positive law. Thus the realm of positive law is the objective sphere of relationships which obtains in civil society.\textsuperscript{74}

Kant\textsuperscript{75} had worked out the category of relation as a logical concept and we have already seen the application of the idea to law in the hands of Fichte. In Hegel it is a strictly deduced idea, and a pivotal point in his philosophical analysis of law. Since Hegel the idea of relation as a fundamental element in the structure of society has been extensively developed by European sociologists, particularly Durkheim,\textsuperscript{76} Vierkan,\textsuperscript{77} and von Weise.\textsuperscript{78} As in Hegel’s theory relations are held by

\textsuperscript{73} Bevan, \textit{Stoics and Sceptics} (1913) 59.
\textsuperscript{74} PR 134. Elsewhere I have discussed the idea of the system of legal relations from the sociological point of view. \textit{The Theory of Legal Science} (1941) 106 et seq. Cf. Vaihinger, \textit{The Philosophy of “As If”} (1924) 147: “Law is not really a science of objective reality but a science of arbitrary human regulations.”
\textsuperscript{75} \textit{Critique of Pure Reason} (1938, Smith trans.) 113 et seq.
\textsuperscript{76} \textit{Les règles de la méthode sociologique} (8th ed. 1927).
\textsuperscript{77} \textit{Gesellschaftslehre} (1923).
\textsuperscript{78} \textit{Allgemeine Sociologie} (2nd ed. 1933). For an English version see the
sociologists to be objective realities which possess an independent existence.

We have already seen that Hegel held jurisprudence to be a philosophical science. As a science, therefore, its form and content are inseparable. Thus he holds that right is positive in general (a) when it has the form of being valid in a particular state, and (b) this criterion is accepted as the basis for the recognition of right in its positive form. In other words, it is from the State that law derives its legality. Hegel is not asserting here, it must again be insisted, that a law is right because it exists; he is asserting that a law exists if the State says it does. In his system a bad law would be one that had mere existence, but no genuine reality. As Aristotle pointed out a severed hand looked like a hand; it existed, but had no actuality. Thus Hegel thought that a number of provisions in Roman private law which followed logically from the Roman matrimonial institution and from the *patra potestas* were wrong and irrational in their essential character.

Right as positive acquires the positive element in its content in three ways. First, through the particular character of a nation, the stage of its historical development, and the interconnection of all the relations which are necessitated by nature. Hegel is here according explicit recognition to the doctrines of Montesquieu; he is also laying the foundation for the subsequent efforts to explain legal phenomena in terms of geographical, ethnological, and biological factors, which came to the forefront in later nineteenth century legal thought.

"augmented adaptation" entitled *Systematic Sociology* (1932) by von Weisse and Howard Becker.

79 *PR* 15.

80 *PR* 283.

81 *Politics* 1253a 20.

82 *PR* 17, 120-121, 266.

83 For an exposition and criticism of these views see Pound, *Interpretations of Legal History* (1923) 69 et seq. For an acute criticism of the idea of a "spirit" of legal institutions see Seagle, *The Quest for Law* (1941) 151 et seq. Cf. *PR* 217-218. For Hegel's views on the geographical basis of history see The *Philosophy of History* (1900) 79 et seq.
stance that the universal concept must be applied to particular objects and matters which are existential. Thus, the concept of theft eventually will come to be applied to a case of literary plagiarism, a matter not even originally envisaged when the law against theft was promulgated. Finally, right becomes positive through the operation of the judicial process.

These principles are further justified and explained by Hegel as follows. To possess an objective actuality right must be known in some way or other to consciousness; it must possess the power which the actual has through the characteristic of validity. Thus right in its objective actuality becomes universally known. From the point of view of the legal process how is this accomplished? Hegel answers, when it is posited. That is to say, when thinking makes it determinate for consciousness and reveals it as right and valid. In thus acquiring this determinate character, the right becomes positive law in general. Thus for Hegel the distinguishing mark of law is its universality; and it can only acquire this characteristic when it possesses a determinate existence. Hence there is much more to the establishment of law than the mere promulgation of a rule of behavior valid for everyone, though that is one moment in the legislative process. The true essence of the matter is knowledge of the content of the law in its determinate universality, i.e., comprehension of the objectification of right through the process of positing. Custom differs from law only in that it is known in a subjective and accidental way; customs are therefore less determinate than law and their universality is obscure. The valid laws of a nation do not cease to be its customs even when collected and given the form of a legal code. The collection is a legal code, but one that is formless, indeterminate and fragmentary. Such a collection differs from a code properly so-called in that in the latter the principles have been apprehended and expressed in their universality. In Hegel's opinion the monstrous confusion of the English common law was due to the fact that English judges were essentially legislators.
As a result, England possessed no code of laws which met the test of rationality, determinateness, universality and form. To argue, as Savigny did, that customary law was "living" and therefore had a special vitality, is only part of the matter. No greater insult, Hegel said, could be offered to a civilized people or to its lawyers than to deny them ability to codify their law. Law (or right, Recht) must be known by thought, it must be a system in itself, and only as such can it exist in a civilized nation.\textsuperscript{86}

Thus, in answering the question why law has a binding force Hegel's theory comes to this. There is an identity between the implicit and posited character of positive law which gives it a specific rightness and therefore an obligatory force. But when right is posited in positive law contingent elements, because of self-will and other factors, may creep in. Hence there may be a discrepancy between the law as formulated and rightness. It follows therefore that in positive law we must turn to that which is lawfully established as the source of our knowledge of our legal rights. To that extent the science of positive law is an historical science based upon authority. It is the task of positive law to study the given laws, their historical growth, their applications and subdivisions. For the philosophy of law is reserved such problems as their rationality and their ultimate nature.\textsuperscript{87}

If the science of positive law, in Hegel's opinion, has its limitations, he is equally frank in admitting those of philosophical jurisprudence. It cannot concern itself with questions of morality which are of a private and subjective nature; it must take as its subject matter only those relationships which in principle can be externalized. In practice the laws of the nations differ widely in their recognition of this rule. In China, for instance, a husband is required by law to love his first wife more than the others, otherwise he is flogged. However, apart from nations, in the case of the oath, where the conscience is involved, integrity and honor must be taken into account as matters of

\textsuperscript{86} PR 271. \textsuperscript{87} PR 136.
substance. Further, philosophical jurisprudence in the application of positive law to the particular case can lay down only a general limit. It can not decide whether forty lashes or thirty-nine shall be inflicted. It may therefore properly allow for the contingent and the arbitrary by permitting a judge to impose a sentence of not more than forty lashes nor less than some other number. The judge by the necessities of the case is still confronted with the making of a finite, positive, decision. All codes to this extent are therefore incomplete. But it is in precisely this aspect of the law that completeness in this definite sense cannot be achieved, and codes must therefore be taken as they stand.88

In agreement with some of his philosophical predecessors, Hegel insisted that law must be made universally known. This rule is not, however, put forward as a self-evident ethical maxim, but is a deduction from principles previously constructed. Right concerns freedom, the worthiest and holiest thing in man, the thing which he must know if it is to have binding force upon him.89 Caligula posted the laws so high that no citizen could read them. The modern practices of burying them in cumbersome legal tomes, and in collections of judicial decisions, of writing them in foreign languages, are equally wrongs. Law is not the monopoly of a special class, although jurists customarily take that position. But we do not need to be a shoemaker to find out if the shoe fits; law is a matter of universal interest and our knowledge of it does not depend upon our status as professionals.

Nevertheless Hegel recognized that we were here in the presence of an antinomy. Law should be a comprehensive whole, closed and complete; yet it is impossible to escape new determinations. The conflict between the need for stability and the need for change is, Pound90 has argued, the central problem of the science of law; in one way or another, Pound maintains, all the vexed questions of jurisprudence prove to be

88 PR 137-138, 272.
89 PR 273, 88.
90 Interpretations of Legal History (1923) 1.
phases of this same problem. Hegel is not here attempting to solve the problem from the point of view of the construction of a sound legal system; he is concerned only with showing that the antinomy is a genuine one, that is, that it does not involve a logical fallacy. Hegel envisages, on one side, a set of simple general principles, universal in themselves and inherently and actually rational; on the other side, is the finite material to which the principles are applied. The very nature of the finite material entails an infinite process in the application of the principles to it. The subject-matter of a field like private law can never be “complete.” Its “completeness” is merely a perennial approximation to completeness. No branch of knowledge can ever be complete in the sense that it can make an exhaustive collection of all that pertains to its field. To argue therefore that we ought not to have a code of laws because no code can be complete is to misunderstand the problem. Every code of course can be better. An old tree sends out new branches without becoming a new tree in the process; it would be folly not to plant a new tree because it might produce new branches. The best answer to empty abstractions of the sort Hegel is here combatting is, he thinks, the commonsense proverb, Le plus grand ennemi du Bien, c’est le Meilleur.

Jurists as well as the public frequently reveal an antipathy to the formalities which the law requires. Hegel takes a middle of the road course with respect to them. Form can not be repudiated by feeling which never rises above the subjective, or by reflection, which holds to its abstract essences; nor can the understanding insist upon clinging to formalities in opposition to the thing itself and infinitely increasing their number. Legal events must be recognized as having taken place. Formality gives objectivity to my will. It is essential because what is inherently right must also be posited as right. My will is a rational will; it has validity; and this validity should be recognized by others. It is through form that this end is accomplished. Similarly, boundary stones are placed as symbols for others to recognize. Vinogradoff, from the sociological point of
view, traces the formalism of early law to its intimate connection with religion, the reverence for traditional custom and the federal organization of society where the psychological desires of individuals are subordinated to those of the group; he recognizes however, that formality may have a practical importance. In Bavaria and Alamannia land transfers take place in the presence of a number of small boys, who are then boxed on the ears so they will keep a vivid remembrance of what happened.  

**THE THEORY OF COURTS**

Hegel’s philosophy of law does not take for granted any legal institution which he regards as essential for the operation of his system. He therefore takes pains to establish that the judicial process is rational in principle and therefore necessary. In the Hegelian theory the administration of justice must be looked upon as both the duty and the right of the public authority. Whatever may have been the historical origin of the judge and his court does not therefore concern Hegel. His theory also involves both the repudiation of the idea that the establishment of a system of judicial administration is a matter of optional grace or favor on the part of the ruler, and the idea that the judicial system is an improper exercise of force, a suppression of freedom, and a despotism.

When right takes the form of law it becomes existential. It then has its own career, it is self-subsistent and has to vindicate itself as something universal. This is achieved through the recognition and realization of right in the particular case without the subjective feeling of private interest. It is the business of the court of justice to carry out that task.

Hegel had argued previously that the individual may maintain right against crime, that is, may take revenge. But revenge is only right implicit, not right in the form of right; revenge therefore becomes a new transgression. In the court of law it is the injured universal that appears, not the injured party. It

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91 Outline of Historical Jurisprudence (1920) 364.
is the function of the court of justice to pursue and avenge crime. This pursuit is not a mere subjective revenge, but is a pursuit transformed into a true reconciliation of right with itself, that is, into punishment. Both the objective and subjective aspects of Hegel's theory are here brought into agreement. In the former, law is reconciled with itself; by the annulment of the crime the law is restored and its inherent validity is realized. In the latter, the criminal is reconciled with himself, that is, with the law which he must know as his own, as valid, for him and his protection; when the law is applied to him he recognizes it as the satisfaction of justice and his own completed act.

From these principles certain requirements, in Hegel's opinion, necessarily followed. Every member of the community has the right to bring his case before the court, and is also under the duty to acknowledge the court's jurisdiction and to accept its decision whether he is plaintiff or defendant; rights which are to be vindicated must be proved; judicial proceedings must be public, since the aim of the court is justice, which is a universal belonging to all, and it is through publicity that the citizens become convinced that a just result has been reached.

After the facts have been ascertained, judicial decision is today said to involve three steps, as was seen in the discussion of Bacon's theory: (1) choice of the legal material on which the decision will be based, or the process of finding the law; (2) interpreting by logical methods the legal material thus selected with the intent of ascertaining its meaning; (3) application of the results to the facts of the case. Hegel's analysis of the judicial process places the emphasis differently, but his results are the same. He divides the work of judgment into two separate parts. There is first the necessity of ascertaining the facts. The result of this inquiry is to fix the case as a unique, single, occurrence and to fix its general character. It tells the judge whether he is concerned with contract, tort, crime, some other matter, or combination of matters. Hegel advances the

**Pound, The Theory of Judicial Decision (1923) 36 Harv. Law Rev. 641, 945 et seq.**
naive view that the ascertainment of fact involves in itself no pronouncement on points of law. The determination of the facts, he holds, is knowledge ascertainable by any educated man. But facts are not naked events; they are events seen from a special point of view and the way they are seen determines their character, and hence the judgment. Herman Duker, during the course of a hold-up, committed murder. He and an accomplice pleaded guilty and threw themselves on the mercy of the court. The accomplice was sentenced to life imprisonment and, at the same time by the same judge, Duker was sentenced to be hanged. The judge held Duker to be legally sane but a psychopathic personality. The judge also thought that it was "a confession of social and legal failure" and a "tragedy" to hang Duker, but no other course was open to him inasmuch as Duker, who was legally sane, could not be committed to a mental institution, and to commit him to the penitentiary would endanger the lives of the guards. The Governor, in commuting Duker's sentence to life imprisonment, held the judge's findings with respect to mental institutions and Duker's future behavior to be irrelevant and observed that "the plain fact is that psychopaths when found guilty of crime are in this country sent to the penal institutions." As Garlan remarks, "to formulate the 'facts' in one way and not in the other is to get one kind of a decision and not another." However, Hegel admits that the determination of the facts is ultimately a subjective matter; it depends upon single details and circumstances which are objects of sensuous intuition and subjective certainty. The determination does not contain in itself any absolute, objective, probative factor. Hence, finding the facts turns in the last resort on subjective conviction and conscience (animi sententiae), while the proof, which rests on the statements and affi-

93 PR 143.
94 Ulman, A Judge Takes the Stand (1983) 211 et seq. 273 et seq.
In the second aspect of the judicial process Hegel holds that the task is that of subsuming the case under the law that right must be restored. Hegel argues that the judge is the organ of the law and the case must be prepared for him in such a way as to make possible its subsumption under some principle. That is to say, Hegel says, it must be stripped of its apparent, empirical, character and exalted into a recognized fact of a general type. Hegel recognizes the three elements into which later jurists have analyzed the process of judicial decision, though he does not do so with formal explicitness. In his argument that the case must be subsumed under some principle, he admits that the judge must ascertain the legal rule to be applied; he admits that the law must be interpreted, but he rejects spurious or legislative interpretation, which he holds to be arbitrary, and favors genuine interpretation, where the scope of the judge's activities is confined to the logical ascertainment of the meaning of the law; he recognizes expressly that the law as determined must be applied to the cause in hand. To analyze the judicial process in these explicit terms, however, either did not occur to him, or seemed of small moment. He stresses other elements, particularly the importance of making the final result a general one. On this latter point, he is not opposed, as is clear from his recognition of the function of equity, to what is known as the individualization of application of legal rules and precepts; he is insisting that judicial decisions should not turn upon factors which lead to the abuses of favoritism and arbitrariness.

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96 Hegel makes a distinction between the establishment by proof of a rational category, such as the concept of right itself, and the establishment of a fact. In the first, the process is that of apprehension of rational necessity and demands a different method from that required in the proof of a geometrical theorem; in the second, the process is that of putting two and two together from the testimony and affidavits. PR 144.
97 PR 143.
99 PR 142. 143.
99 PR 142.
But the rights of individuals cannot be protected by the courts alone. There must be an undisturbed safety of person and property so far as that can be attained; there must also be an attempt to secure the conditions which make for the well-being of the individual. To the police Hegel assigns the first task, and to trade guilds or corporations the second. Hegel's theory of the corporation, by which he means a community of citizens possessing a common interest, has its present day counterpart in the doctrine of political pluralism. His argument for the existence of such communities is placed on a high plane. In modern times, he points out, the citizens participate only slightly in the public business. Nevertheless it is essential to provide men—ethical entities—with work of a public character over and above their private concerns. This work can be found in the corporation or association. The individual, while maintaining himself in the civic community, acts also for others. But this unconscious necessity is not enough; it is in the corporation that a conscious and reflective ethical reality is first reached. Corporations of course must fall under the direction of the state, otherwise they would ossify and degenerate into castes. In itself, however, a corporation is not a closed caste. Its purpose is to bring isolated groups into the social order and elevate them to a sphere where they gain strength and respect.

Although it is the essence of his political theory we need not follow Hegel into his discussion of the State. What he has to say is almost entirely of a political nature and has little bearing upon his legal doctrines. In Hegel's scheme the State as a political entity has three divisions: the legislative, which has the power to determine and establish the universal; the Executive, which has the power to subsume single cases and the spheres of particularity under the universal; and the Crown, which has the power of ultimate decision. The legislature is concerned with the laws as such in so far as they require fresh and extended determination. Laws are not originated by the legislature, they are merely adapted and extended to new situations.
INTERNATIONAL LAW

At the heart of international law Hegel discerned an antinomy which he was unable to resolve. International law arises from the relations of autonomous states. Its realization therefore is dependent upon a number of different wills each of which is sovereign. For this reason Hegel holds that international law in its essence must always remain in the realm of "ought."\(^{101}\)

Machiavelli\(^{102}\) was the first of the modern theorists to put forward the principle, which Spinoza and others subsequently adopted, that the moral and legal rules which are held to bind citizens in their private actions are not binding upon States in their relations with one another. Hegel justified the principle by the following argument, which strengthened further his view of the "oughtness" of international law. A state, unlike a private person, is a completely autonomous totality; hence a relationship between States differs from relationships of morality and private right. Private persons are subject to the judicial process, which realizes what is intrinsically right. It is clear that State relationships ought also to be intrinsically right, but in mundane affairs a principle ought also to be coupled with power. As matters now stand there is no power to decide against the State what is intrinsically right and to actualize the decision. Hegel therefore concludes that in international relations we cannot get beyond the "ought." This leads to the circumstance that international relations are relations between autonomous entities which enter into mutual stipulations but which at the same time are superior to those stipulations.\(^{103}\)

This is a position which moralists have always found offensive since the time when it was first outlined by Plato. No one has surpassed Plato in regard for the virtue of good faith and truth,\(^{104}\) but he held that under special circumstances the virtue was not an absolute one. To make his point he used his

\(^{101}\) PR 212.  
\(^{102}\) The Prince, c. 18 and passim.  
\(^{103}\) PR 297.  
\(^{104}\) Laws 730 BC; Gorgias 224 et seq.
favorable analogy of the physician. He held that falsehoods are useful to mankind only as medicines; but medicines should be handled only by physicians. Hence the rulers of the State may lie for the public good; but for the citizens to have the privilege of lying would be subversive and destructive. Cicero explicitly decided that promises were not always to be kept, and attempted a classification of the circumstances which permitted their violation. St. Augustine would not allow a lie even to save a life, but the Church did not accept the doctrine and held that a promise, although under oath, was not binding if contrary to the good of the Church. This doctrine played an important political rôle when associated with the theory of the consequences of excommunication and the claim of the Church to absolve a man from the obligation of an oath to a king. In modern times it has been argued by followers of Kant that unless promises are kept rational society would be impossible. As an absolute proposition, however, as Cohen observes, this is untenable. In the actual world, which is certainly among the possible ones, not all promises are kept; moreover, as Cicero pointed out, the actual world is so full of surprises that we must always allow for contingency, and a system so rigid that promises could never be broken would promote evil as well as good, i.e., we should not keep a promise when it would do only harm to the person to whom it was made. Hegel’s view that the actions of States are superior to the promises of States, however morally opprobrious that view may be, is thus not without some historical and rational justification.

Hegel therefore, while accepting Fichte’s contractual basis of international law, holds, on the basis of the principle of sover-

105 *Republic* 389 BC.
106 *De officiis* iii. 24 et seq.
107 *De mendacio* 6; 40 Migne, *Patrologia Latina* (1861) 494.
eignty, that states are, to the extent the principle is given effect, in a state of nature in relation to one another. Their rights are realized, not in a general will duly constituted as a superior power, but only in their particular wills. He is forced to reject Kant’s idea of a perpetual peace through the device of a League of Nations. But the success of Kant’s plan turned ultimately on a particular sovereign will and the plan for that reason was infected with contingency. Hegel is unable or unwilling to attempt any modification of the principle of sovereignty, and on that basis his argument is a sound one. Inasmuch as he held that the relations of States ought to be inherently right, it is difficult to understand why he did not depart from the merely actual and outline the requirements of a system that would permit the realization of that rightness. Instead he held that disputes between States could be settled in the last resort only by war.

CONCLUSION

With Hegel legal philosophy leaves by the same door it entered with Plato. Law for Plato was the way to the discovery of reality, the rule of right reason,\(^{112}\) the ascertainment of the ordering of human affairs which is in accord with the immortal element within us.\(^{113}\) For Hegel law is a deduction from Being—the first of the categories—and its proper sphere is the Philosophy of Spirit or Mind. It is the realization of freedom as Idea, the grasping of right as thought, the apprehension of the essential form of things.\(^{114}\) Translated into the same terminology Plato and Hegel both hold that law may be found by reason, and that it is to be found through the analysis of an ultimate category. They both employ a logical process to arrive at their views of the nature of law, but Hegel’s is immeasurably more formalized. Plato associates law with the good society, a society in which every member performs the social services for which his nature is best adapted;\(^{115}\) Hegel makes the same association\(^{116}\) except that in his hands the good society is one

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\(^{112}\) Minos 314E; Laws 659CD.

\(^{113}\) Laws 714A.

\(^{114}\) PR 33, 225.

\(^{115}\) Republic 433A.

\(^{116}\) PR 79, 86 et seq.
in which the concept of freedom is actualized. Their views of the nature of law seem therefore to differ in no significant particular; their views of the end of law are radically apart. In its answer to the primary question of every jurisprudence—What is law?—legal philosophy has thus with Hegel come full circle.

In contrast with the views of Plato and Hegel are those of Hobbes. He held that man makes and constitutes the truth of the first principles on which our reasoning depends. Natural law is therefore nothing but the precepts which are deduced from whatever first principles man chooses to reason from; positive law is whatever the sovereign commands. In sum, law is an invention, a contraction of our mind, and not something revealed through an analysis of reality or Being. These opposed theories have important consequences. In the case of Plato and Hegel the theory leads to a search for the ultimate nature of law. It leads also, since law has a final essence, to a definition of law from a point of view which cannot be varied. What is not embraced by the definition is not law since it does not partake of the essential character which the definition discovers. It follows also that the effort of jurisprudence should be directed at an understanding of law in the condition in which it stands closest to reality. It should not be occupied with the particular laws of States which, in the scholastic sense, are

117 PR 105.
118 In an acute study it has been argued that Hegel's theory of law differs from Plato's in two main respects: (1) Hegel "regards law as the product of an activity of 'posing,'" which yet imports into its nature no element impenetrable by the speculative reason; (2) he so limits the consequence of speculative reason in the determination of law, as to make it stop short of the particular detail of its actualization." Foster, The Political Philosophies of Plato and Hegel (1935) 120. These differences do not appear to me to be real ones. (1) By positing Hegel means that process of thought by which the principle of rightness is made determinate for consciousness and made known as what is right and valid. PR 134. Plato had no term for this process but there is no question that this process is illustrated in the Dialogues. (2) Hegel and Plato differed in their formulations of the rules of law but both agreed that there were limits to the process. Republic 425B; Laws 842 CD. 788B.
119 1 Works (1839) 388.
120 3 Ibid. cc. 5, 14.
121 3 Ibid. 147.
merely accidents, and reveal only the inessential aspects of reality. It is genuine reality, law in its true essence, that jurisprudence should study, and not just appearance. In the Hobbes tradition, which includes Locke, Hume, Bentham, Austin and the present-day so-called "realists," all this in large part is denied by the implications of the theory, notwithstanding the fact that there may be a lack of courage to face all its consequences. If law is an invention, it has no final reality and we are free to define its rules as we choose; particular laws are important, and on them it is legitimate to base assertions with respect to the general nature of law.

In brief, jurisprudence in its philosophical aspect was realist at its inception, reacted during one phase to an extreme nominalism, and closed in the Hegelian speculation with a reassertion of realism. In the main, philosophical jurisprudence has been realistic, and it is difficult to perceive how it could be otherwise. Even Hobbes and the present-day so-called legal "realists" (whose ideas are nominalistic) assume that a jurisprudence of general principles is possible; but if particular laws are unique events distinct from all other particular laws, if universals have no objectivity, a system of general principles cannot be constructed. In the courts the realist tradition of classical philosophy is as plainly marked. Their constant appeals to some form of a natural law doctrine, to ideals, to the nature of justice, to the good of society, and to right, are possible only in a realist view of the legal order. But realism as well as nominalism has its excesses, and Hegel as well as Plato is chargeable with them.

Realist jurisprudence has a tendency to remain at such an abstract level that its conclusions are of little or no help in the solution of the controversies which the study of actual systems of law engenders. That is the substance of Bryce's famous criticism of metaphysical jurisprudence. In part at least,

122 "I believe," Hardy writes, "that mathematical reality lies outside us, that our function is to discover and observe it, and that the theorems which we prove, and which we describe grandiloquently as our 'creations' are simply our notes of our observations." A Mathematician's Apology (1940) 68.

123 Studies in History and Jurisprudence (1901) 609-612.
Hegel is open to this charge, but certainly not with respect to all his analyses and conclusions. It may be leveled at him when he forces the legal order into the Procrustean bed of the dialectic; but not when he insists upon the force of custom in the making of law, or points out the irreconcilability of the idea of sovereignty and the theory of perpetual peace. Bryce admits that in the books of the metaphysical school "one finds legal conceptions analysed with an acuteness which cannot but sharpen the reader's wits," and that there is "much ingenious and subtle thinking." With this concession the case for the metaphysical type of analysis could rest. Have any of the other schools—analytic, historical, sociological—done more? The difficulty with the metaphysical school is not, as Bryce maintained, that it was abstract, but that it is not abstract enough. It aimed at an analysis of law at a level sufficiently abstract to encompass the possible legal systems. It succeeded only in devising systems that are inescapably of their time and place. Therefore it has been insisted that a legal system such as Hegel's cannot be studied as if it were a world constitution presented for adoption or rejection. It must be taken as the thoughts of a wise and learned man who in his logical grasp of the subtleties of some problems of jurisprudence has been surpassed by no one. His "reflections may often be valuable because they are suggestive," Sandars wrote at the beginning of Hegelianism in England, "suggestive in many different ways, and of many kinds of truth; but yet may not bear to be sifted and analysed and ranged as true or false." Hegelianism was a product of the intellectual currents of its time; it has become itself one of the currents which has formed modern thought. Throughout the nineteenth and twentieth centuries in jurisprudence it was at the basis of many of the separate schools—historical, ethnographic, economic. Today's legal speculation is too predominantly nominalistic for Hegel's views to be taken with the seriousness with which they were once studied. His influence remains nevertheless inescapable.