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UNNATURAL RIGHTS: HEGEL AND INTELLECTUAL PROPERTY

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by
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I. Introduction: Property and Rights.

Many proponents of intellectual property law seek refuge in a personality theory of property associated with G.W.F. Hegel.[1] This theory seems to protect intellectual property from potential attacks by a utilitarian analysis. Famously, utilitarianism does not believe in natural rights[2] and recognizes property only contingently insofar as it furthers society's goals of utility or wealth maximization. Personality theory, in contrast, supposedly offers a principled argument that property, in general, and intellectual property, specifically, *must* be recognized by a just state, regardless of efficiency considerations. Personality theory also seems to protect intellectual property from assault by critics who maintain that it is not a form of "true" property at all.[3] Finally, personality theory has also been used to support an argument for *heightened* protection of intellectual property beyond that given to other forms of property – the Continental "moral" right of artists in their creations is an example.

Hegel is often cited by personality theorists, but almost always incorrectly. In this Article I seek to save Hegel's analysis of property from the misperceptions of its well-meaning proponents. I believe that the version of the personality theory of property that dominates in American intellectual property scholarship is imbued by a romanticism that is completely antithetic to Hegel's project.

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[1] *See e.g.* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. REV. 287 (1988); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L. J. 1 (1992);

[2] *See infra* text at note –.

[3] In the words or Judge Richard Posner and his co-authors, "A trade secret is not property in the usual sense - the sense it bears in the law of real and personal property or even in such areas of intellectual property law as copyright. . . . David D. Friedman William M. Landes, and Richard A. Posner, *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 61-62 (1991). For other articles debating the property-status of trade secrets *see e.g.* Steven Wilf, *Trade Secrets, Property, and Social Relations*, 24 CONN. L. REV. 787 (2002); Geraldine Szott Mooht, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U ILL. L. REV. 683; Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 1 (1999); David D. Friedman, William M. Landes, Richard A. Posner, *Some Economics of Trade Secret Law,5 J. ECON. PERSP. 61 (1991);* Roger G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998); Pamela Samuelson, *Information as Property: Do Rucklehaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 35 CATH. U. L. REV. 365 (1989); John C. Coffee, Jr. *Hush!: The Criminal status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminilization*, 26 AM. CRIM. L. REV. 121 (1988).

It is true that Hegel thinks that a modern constitutional state should establish a minimal private property regime because property plays a role in the constitution of personality. It is not true, however, that Hegel thought that society is required to respect any specific type of property or any specific claim of ownership. It is also true that Hegel thought that intellectual property could be analyzed as a form of "true" property and not as a sui generis right that is merely analogous to property. However, it is *not* true that Hegel ascribes any special role to intellectual property. As such, Hegel's theory can not be used to support the proposition that the state *must* recognize intellectual property claims. Rather, Hegel would argue that should the state in its discretion decide to establish an intellectual property regime, it would be coherent to conceptualize it in terms of property principles. Moreover, the Continental moral right of artists is inconsistent with an Hegelian analysis of property.

Surprisingly, although Hegel thinks that property is necessary for a certain conception of personhood, he leaves to practical reason the decision as to what specific property rights a state should adopt. In contrast to a widespread misconception, Hegel completely rejects any concept of natural law generally, and any natural right of property, specifically. Jeremy Bentham, the founder of modern utilitarianism, thought that the very concept of natural rights was "nonsense on stilts".[4] Hegel goes a step further and considers the expression "natural rights" to be an oxymoron.[5] To Hegel, nature is unfree and legal rights are artificial constructs created as a means of actualizing freedom by escaping the causal chains of nature. Consequently, rights are not merely *not* natural, they are *unnatural*.

Having no recourse to nature, Hegel justifies the concept of property on purely functional grounds – the role it plays in the modern state. In his *Philosophy of Right*[6], Hegel seeks to discover the internal logic that would retroactively explain why constitutional, representative governments were supplanting feudal governments and why free markets were supplanting feudal economies in the Western world at the time he was writing. Hegel agrees with the classical liberal philosophers of the eighteenth century that the modern state derives from a founding concept of personal freedom but thinks that classical liberalism is too self-contradictory to explain the relationship between the state and freedom. The modern state is not liberalism's hypothetical state of nature, and its citizens are not naturally autonomous individuals exercising negative freedoms. Rather, the state and its members engage in complex interrelationships in civil, familial, commercial and other contexts. Hegel asks, what are the logical steps by which the abstract individual of liberal theory becomes the concrete citizen of the liberal state, and how do we structure a state so that it actualizes, rather than represses, the essential freedom of mankind?

This means, first and foremost, that Hegel's property analysis does not relate to all aspects of personality – or generally what Margaret Jane Radin calls "human flourishing."[7] -- only to this political aspect or citizenship. Secondly, Hegelian property does not even relate directly to full citizenship, but only

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[4] Jeremy Bentham, *A Critical Examination of the Declaration of Rights* in POLITICAL THOUGHT 257, 269 (B. Parekh ed. 1973).

[5] I discuss Hegel's argument *infra* in text at notes –.

[6] G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed. & H.B. Nisbet trans. 1991).

[7] Margaret Jane Radin, *Market Inalienability*, 100 HARVARD L. REV. 1849, 1851 (1982).

to the first intermediary step above autonomous individuality which step that I call in this article "legal subjectivity"[8].

Legal subjectivity is the mere capacity to follow the rule of law – nothing more. This is a precondition to the liberal state which is supposed to be governed by the rule of law, not the rule of men, as the feudal state was. The autonomous liberal individual enjoys negative freedom from restraints because she hypothetically lives a solitary life. By engaging in commercial relationships of property and contract, the individual subjects herself to legal duties and learns to recognize other people as bearers of legal rights (*i.e.* as legal subjects). When other legal subjects reciprocate and recognize that they have the duty to respect the first individual's rights of contract and property, that individual also attains the status of subject.

Hegel calls this regime of property and contract "abstract" right precisely because it is a necessary but insufficient part of modern society. Although the legal subject is more developed than the autonomous individual, the subject is empty and contentless. That is, the subjectivity created by abstract right provides only the *form* of personality. Content is added to personality through more complex interrelationships among people at the higher levels of morality – the stage in which the person internalizes right – and ethical life – the stage at which the internal subjectivity of morality is reconciled with the external objectivity of obligations to others. Consequently, Hegel will insist that abstract right (including property) is external to the subject. That is, the subject is *subjected to* the law. The legal subject obeys the law of property and contract is not because she subjectively believes that it is right, but because she recognizes it as a means to accomplish her ends.

This means that the legal subject is an "uncultured"[9] creature who represents an impoverished conception of personhood. The legal subject is fit only for the tawdry business of buying and selling.[10] She is not yet capable of morality or ethics and cannot yet become a lover, mother, friend, participant in civil society, voter, or legislator – let alone an artist. In other words, the subject is only a lawyer. Higher

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[8] Hegel's terminology in the *Philosophy of Right* is somewhat different from mine in that he sometimes uses the word "subject" to refer to an even more primitive form of personhood – the abstract individual in the state of nature posited by classical liberalism – and sometimes uses the word "person" to refer to what I call the legal subject. In my scholarship I have intentionally modified Hegel's terminology for two reasons. I discuss my primary reasons *infra* in text at notes –. Another reason I have done so in an attempt to make it more consistent with that used in contemporary critical theory. Specifically, in a series of articles and books I have argued extensively for the parallelism between Hegel's concept of the person bearing abstract rights and the aspect of personhood that French psychoanalyst Jacques Lacan called the subject. *See e.g.* JEANNE LORRAINE SCHROEDER, THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET (2004) [hereinafter, SCHROEDER, VENUS].

[9] HEGEL, *supra* note –, at 73.

[10] I am reminded of Justice Benjamin N. Cardozo's famous dichotomy contrasting the "morals of the marketplace" with "the punctilio of an honor the most sensitive". *Meinhard v. Salmon* 164 NE 545. 546 (NY 1928). Hegel is more radical than Cardozo and, as usual, creates a trichotomy, rather than a dichotomy. To Hegel abstract right – the rule of the market – is more primitive than mere morality understood as an intermediate level of personality that is below ethics, yet above abstract right. In abstract right the rule of behavior (law) is external to the subject and imposed by force. In morality, the rule is internal – that is, the moral person engages in certain behavior because she *feels* it is the right thing to do. Unfortunately, morality is purely subjective and, therefore, unreliable. In ethics, the external objectivity of law and the internal subjectivity of morals are harmonized.

aspects of personality will be created not through the crude legalities of property, but through more complex human interaction.

It follows from the fact that the subjectivity created by abstract right is purely *formal*, that it is only the form of property, and not its content that is relevant to Hegel's analysis. All that matters to Hegel is that buying and selling occur – the identity of what is bought and sold is irrelevant for the purpose of establishing the rule of law. One implication of this is that although in order to function successfully, a modern state must recognize *some* property rights because the rule of law is one of its most basic building blocks, but it is not necessary that it protect any *specific* property rights. Specific property rights are purely contingent. In Hegel's words, "everything which depends on particularity is [in the regime of abstract right] a *matter of indifference*. . ."[11]

This means that if intellectual property can serve property's function in the production of legal subjectivity, it is not because of any affirmative, concrete content that the creator pours into the object she creates. Hegel argues that intellectual property can serve as property because of its *formal* characteristics, *despite its unique content*. Indeed, to Hegel, intellectual property is an ideal candidate for property treatment because its abstraction and intangibility epitomize the radically negative abstraction that is the lowest common denominator of all types of property. Hegel emphasizes that property is a legal right enforceable against legal subjects with respect to objects, not a natural relationship between a subject and object. Nevertheless, we frequently conflate our intuitive, natural, empirical relationships with physical objects with our intellectual, artificial and formal legal property rights.[12] In contrast, intellectual property is obviously artificial and famously anti-intuitive thereby making this crucial distinction crystal clear.

Further, a Hegelian property analysis can not legitimately be used to justify enhanced rights with respect to intellectual property such as the Continental *droit morale*. First, a moral right assumes a unique relationship between an artist and her creation so that destruction of the creation is somehow harmful to the artist. This is an empirical claim based on the content of the art work irrelevant to the formal role of property. Second, insofar as moral rights are a limitation on the artist's right and power of alienation over her creations they are inconsistent with a Hegelian analysis of property. Hegel believes that property rights are only fully consummated in the alienation of property through contract. This is because it is only through performance of reciprocal contractual obligations that two legal subjects effectively recognize their mutual rights and duties. In other words, in contract, the subject – who *claims* to be law abiding – proves it by quite literally putting his money where his mouth is. Consequently, moral rights in artistic works may or may not be a good ideas as a practical matter but they have nothing to do with the creation of abstract right and

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[11] HEGEL, *supra* note –, at 69. In this passage Hegel is specifically arguing that his theory has nothing to say about the proper allocation of property. In other words, his theory of abstract right's function only supports the proposition that every person should have some property rights, but its logic does not dictate an egalitarian distribution of property. This does not mean, of course, Hegel's theory is anti-egalitarian. Rather his property theory is indifferent with respect to distribution. The state is, therefore, free to employ *other* considerations to determine optimum distribution of wealth, so long as it respects *some* minimal rights of private property.

I believe that the logic that only minimal property rights are necessary, and the distribution of actual property rights are contingent, also suggests that the type of property rights are also contingent.

[12] I discuss familiar distinction *infra* text at notes –.

legal subjectivity.

This Article proceeds as follows. I first give a brief account of Hegel's theory of property as set forth in the *Philosophy of Right*. I then explain why Hegelianism must be viewed as a rejection of natural rights generally and natural rights to property specifically. In this context, I specifically address the misconception that Hegel, like John Locke, adopted a first-occupation theory of property. In fact, Hegel expressly considers first-occupation in a later chapter in the *Philosophy of Right* and shows not merely that it is not rightful, but makes it his exemplar of civil "wrong".

My second point is that Hegelian property rights, like the legal subjectivity it creates, are purely formal. As objects are mere mediators of intersubjective relations, objective content is irrelevant to, if not distracting from, property's purpose. Indeed, to concentrate on the content of the objects of property is to shift one's gaze away from the interrelationships among subjects with respect to the object and towards the empirical relationship of each subject to her object. By doing so, one no longer subjectifies the owner by identifying her with other subjects. Rather, one objectifies her by identifying her with her owned object. This is the opposite of the function Hegel assigns to property. Indeed, this is the psychoanalytical definition of fetishism – the objectification of subjects and subjectification of objects.[13] Consequently, Hegel's project is completely antithetical to Radin's theory of property and personhood that, from a Hegelian perspective, wrongly raises objects to the dignity of subjects.

A Hegelian property analysis has two important implications for intellectual property law. First, if society decides to adopt an intellectual property law regime, then it is logically coherent to analyze the regime as a form of "true" property. Indeed, I will show that a Hegelian understanding of property solves many of the "problems" of intellectual property doctrine that seem baffling from a traditional property analysis. Consequently, a Hegelian property analysis can aid legislators and judges in formulating a more internally consistent and predictable positive law.

But, unfortunately for most personality theory proponents, Hegel's logic has absolutely nothing to say on the issue as to whether society *should* adopt a positive law of intellectual property. All his logic argues is that in order to a free society to function everyone must have *some* minimal property rights and that there should be a positive law of private property and free contract with respect to some category of objects. From a logical perspective, perhaps it is enough for each citizen to have at least one peppercorn and that there be a free trade in peppercorns. The question as to what positive laws society should adopt is purely a matter of practical reasoning.

II. Hegelian Property.

A. The Logical Function of Property

Hegel devotes a large portion of the first part of the *Philosophy of Right* to an analysis of the role property rights play in the creation of personality. Yet, Hegel's philosophical system is so radically different from the classical liberal tradition that his theory of property had been consistently misinterpreted by

[13] *See infra* text at notes –.

American legal scholars. I contend that this is because these analysts try to read Hegel's section on property in isolation without continuing through to his analysis of "wrong" (at the end of Part I), and without knowledge of Hegel's idiosyncratic, but precise, vocabulary or an understanding of how his political philosophy and jurisprudence fits into his magisterial and totalizing philosophical system. Because every one of Hegel's ideas purportedly depends on every other of his ideas as part of a single grand system, it seems that one cannot fully understand any part of Hegel without first understanding the whole.[14] This is exacerbated by the fact that Hegel is one of the most dense and difficult writers in world history. Consequently, American readers tend to read their own pre-existing legal assumptions into Hegel and pull sentences out of context to come to wrongheaded conclusions.

I argue that, although Hegel is difficult to understand, he is by no means impossible. This is because a corollary of the proposition that each one of his ideas is necessarily located and understandable only within his system is the proposition that his system as a whole can be generated from any one of his ideas. That is, if Hegel's individual ideas are found within his system, the seeds of his entire system are equally found within every individual idea. Consequently, so long as one understands Hegel's unique ground rules – which are admittedly counter-intuitive to an American lawyer - and frees oneself from one's liberal assumptions, one should be able to follow his argument. I believe that the power of Hegel's analysis is well worth the effort.

As I have argued extensively elsewhere,[15] although Hegel was writing in early the nineteenth century Germany and had little understanding of Anglo-American legal concepts, his analysis of property offers a profoundly powerful insight into our legal institutions. What I believe should be interesting to Americans is that the very essence of his project which is the problem of freedom: what is it, is it possible, and if so, how can it be actualized in the world.[16]

However, because Hegel was writing in a specific historical context, he must be read in context as commenting on, and reacting against, the classical liberal philosophy of the previous century. Indeed, most of his works can be read as long commentaries on Immanuel Kant. Consequently, on one hand, Hegel can only be understood in the context of the liberalism that he was critiquing but on the other hand, Hegel must be read against, not within, the liberal tradition that is so familiar to us. Hegel is best understood not as *anti-liberal* in the sense that he does not reject liberalism's basic insights concerning the equality and freedom of all men. Rather, he is a super-liberal in the sense that he forces liberalism to the logical extremes of its pre-suppositions.

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[14] Hegel's goal was to create a philosophy without presuppositions. This runs up against the practical problem that one must begin one's analysis somewhere. His proposed solution is to tentatively start with a founding principle (usually derived from Kant) and then testing it by seeing whether it can generate a coherent whole (*see e.g.* "The deduction *that* the will is free and of *what* the will and freedom are . . . is possible only within the context of the whole [of philosophy]." HEGEL, *supra* note –, at 36-37). Consequently, even Hegel's simplest ideas can only be completely understood in terms of the complex totality that it generates.

[15] *See generally*, SCHROEDER, VENUS *supra* note –, and JEANNE LORRAINE SCHROEDER: THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE (1998) [hereinafter, SCHROEDER, VESTAL].

[16] Hegel writs at an extreme level of generality and his political philosophy can be read ad consistent with both classical conservatism and classical liberalism. Obviously, I am in the second school.

In this Article, I make reference not only to Kant's liberalism expressly discussed by Hegel, but also to Lockean libertarianism which is probably the version of liberal property theory most familiar to American lawyers, followed closed by Benthamite utilitarianism. This is because, on first reading, an American might assume a misleading similarity between Hegel and Locke. At further reading, however, Hegel's account of property is completely diverse from Locke's so that any attempt to read Hegel from a Lockean perspective is doomed to failure.

There are neo-Lockean defenders of intellectual property – most notably Wendy Gordon - who argue that copyright can be explained within a Lockean theory of first-occupation. That is, a creator justly "owns" her creation precisely because she has created it out of her own labor intermixed with the commons.[17] Though a coherent argument, it is not one with which Hegel agrees for reasons I will explain. In contrast, the proponents of the personality theory of intellectual property uneasily graft a romantic vision of creativity on top of an unexamined, but implicit, natural rights assumptions about property. In contrast, Hegel has no truck with the notion of heroic authorship, at least at the level of abstract right, because he believes that property relates only to the creation of legal subjectivity – that is, subjection to the rule of law -- not creativity.

B. Freedom

The *Philosophy of Right* is Hegel's *Bildungsroman*[18] of citizenship. It is the retroactive retelling of how the modern person, and the constitutional state in which he is necessarily located, came to be. This is a logical, not an empirical account. Hegel does not purport to explain how actual people are born, educated, mature and learn to function in society. He is, instead, interested in exploring such highly abstract questions as "What is a person?" "What is freedom" "What is the state and how does it relate to personality and freedom?" To understand Hegel one must always keep in mind that he believes that philosophy can explore these questions at only the highest, most abstract level.[19] Concrete questions are the bailiwick of practical reason, not logic. That is, although in modern American parlance, "pragmatism" is considered a school of philosophy, Hegel thought that it was a completely separate intellectual discipline. However, unlike pragamatists who scorn speculative philosophers, speculative philosophers do not disdain pragmatism. Hegel believes that philosophy must be modest in its goals and that pragmatism is philosophy's necessary, albeit distinct, corollary.[20] Philosophy can guide us in drawing in pencil the broad outlines of

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[17] *See e.g.* Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L. J.1533 (1993, Wendy Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

[18] Arthur Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877 (1989).

[19] David Gray Carlson, *How to Do Things With Hegel*, 78 TEX. L. REV. 1372 (2000) [hereinafter, Carlson, *How to Do Things*].

[20] Hegel argues that the logic of philosophy cannot standing alone solve practical questions in the preface to the *Philosophy of Right*. He states:

" . . . this infinite material and its organization, are not the subject-matter of philosophy. To deal with

our lives, but only pragmatism can ink in the color.

The primary distinction between Hegel and liberalism is that, to the liberal, freedom exists in the "state of nature"[21] and that constitutional republic government is justified as the only form that is consistent with freedom. Although Hegel believes that there is truth in liberalism's intuition, he is troubled by the fact that all societies radically differ from this hypothetical state of nature and that actual citizens must necessarily be radically different from the liberalism's vision of the autonomous individual. Consequently, the state can never be made to complement the state of nature in any simplistic way. Rather, Hegel will argue that a properly structured state *supplements* the state of nature in that it allows its members to actualize their freedom that can only be potential in the state of nature. The questions are then, not merely how do we keep the state from repressing the freedom of its members, but also, can the state affirmatively help its members to express their freedom.

The primary distinction between Hegelianism and Lockean libertarianism, specifically, is that Locke thought that property was a right in the state of nature and that, therefore, recognition of property rights was a precondition of freedom in the state.[22] Hegel makes the familiar point that property is intersubjective and, as such, cannot precede society. The creation of the state can not be explained in terms of the protection of property because the question of the creation of the state and the question of the definition of property turn out to be one and the same question.

Let me be more specific. Hegel begins with liberalism's starting point: human freedom in a hypothetical "state of nature". Such "natural" freedom is negative, abstract and, therefore, merely potential.[23] To be actual, freedom must become positive and concrete and this can only occur through

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> them would be, to interfere in things with which philosophy has not concern and it can save itself the trouble of giving good advice on the subject. Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms; and Fichte likewise need not have perfected his *passport regulations* to the point of 'constructing', as the expression ran, the requirement that the passports of suspect persons should carry not only their personal description but also their painted likenesses. In deliberations of this kind, no trace of philosophy remains . . .

HEGEL, *supra* note –, at 21.

[21] I put the term "state of nature' in scare quotes because, as I shall explain, there is nothing natural (empirical) about this liberal construct. Rather, it is a purely hypothetical concept retroactively posited. Nevertheless, it has a "truth" that is beyond mere empirical existence. *See infra* text at notes –.

[22] As Merold Westphal explains:

> Now, because property is the first embodiment of freedom (in the Hegelian sense of logical priority), his theory is also a critique of liberalism's (formalist) tendency to define freedom without paying sufficient attention to questions of morality, the family, the political community, and severe poverty. When Locke makes property rights first, it is because they are the end to which everything else is means. When Hegel puts them first it is because in their immediate form as the minimal mode of human freedom they are in radical need of correction and completion through contextualizing." MEROLD WESTPHAL, HEGEL, FREEDOM, AND MODERNITY 31 (1982).

[23] "The content, or the distinct determination of the will, is primarily *immediate*. Thus, the will is *free* only *in itself* or *for us*, or its in general the will in *its concept*. Only when the will has itself as its object is it *for itself* what it is

intersubjective relations – *i.e.* within society. To restate this in a slightly different way, rights can not exist in the state of nature because they are intersubjective in nature. As Wesley Newcomb Hohfeld so famously articulated, rights,[24] duties, powers and immunities can only be understood as existing insofar as they can be asserted and enforced against other persons. Similarly, Hegel will define rights as the first step individuals take in their attempt to escape the lonely autonomy of the state-of-nature in order to actualize their freedom through intersubjective relations.

Hegel thinks liberalism's starting point contained at least two internal contradictions. The first is that, to be truly free, as Kant posits, the autonomous individual must have no distinguishing empirical or natural characteristics whatsoever. Any concrete characteristic is necessarily a limitation. Consequently, Kant's free individual is what Kant calls a "noumenon" or "thing-in-itself" that we cannot know directly in our phenomenal, natural world.

The autonomous individual can, therefore, have no content or individuating characteristics whatsoever.[25] Even to have a body – or a life – is to limit what we can do – as all of us who contemplated the fact that we cannot jump from a cliff and fly away has realized. Moreover, the autonomous individual is paralyzed – he (or, more accurately it, since sexuality is itself a limitation) is not forced to do anything, *but it can also not do anything* because any act would create affirmative content that would constrain it in the future. Consequently, the freedom in the liberal "state of nature" can only be potential because it is purely arbitrary.[26] This notion of personality seems wholly inconsistent with the very notion of society which requires its members to take on social roles and duties. As I shall discuss, Kant expressly recognized this as a logical paradox that he called the "third antinomy" and which forms the basis of his, and Hegel's, analysis of freedom.[27]

In Lockean libertarianism, this paradox manifests in a conundrum that is very familiar to American property and constitutional jurisprudes. As already mentioned Locke thought that not merely freedom but the right to property existed in the state of nature.[28] Consequently, government exists in order to protect natural rights including society so that, in order to be considered just, society must recognize property rights. Indeed, property rights are considered one of the bastions that is supposed to protect the individual from

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in itself". HEGEL, *supra* note –, at 44. That is, abstract right is the first step in the actualization of freedom. "Right is primarily that immediate existence which freedom gives itself in an immediate way." Id., at 70.

[24] *See e.g.* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING 23, 27 (W. Cook ed. 1919).

[25] " Only *one aspect* of the will is defined here - namely this *absolute possibility* of *abstracting* from every determination in which I find myself or which I have posited in myself, the flight from every content is a limitation." HEGEL, *supra* note – at 38.

[26] "The freedom of the will, according to this determination, is *arbitrariness*." HEGEL, *supra* note –, at 48. "The content, or the distinct determination of the will, is primarily *immediate*. Thus, the will is *free* only *in itself* or *for us*, or its in general the will in *its concept*. Only when the will has itself as its object is it *for itself* what it is *in itself*." *Id.* at 44.

[27] *See infra* text at notes –. I discuss the third antinomy more fully in Schroeder, *Lacanomics*, *supra* note –.

[28] JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Lachelt ed., 2d. ed. 1967) (3d. ed. 1698).

the overreaching power of the state. This is of course enshrined in the Fifth and Fourteenth Amendments which prohibit the state from taking property without paying just compensation.

A standard critique of Locke is that if one accepts the Hohfeldian proposition that rights, by definition, are intersubjective, then Locke's theory is hopelessly circular. How can one justify society on the grounds that it protects property rights when it is impossible to imagine property rights before the creation of society?[29] If it only exists in society then, by liberalism's very terms, then property is a creature of positive, not natural, law.[30]

Hegel's entire philosophy can be read as revolving around these central puzzles of liberal freedom – is freedom merely a theoretical construct or *can it be made to operate in the empirical world in which we live?* As Kant poses this question, can freedom be made practical or is it merely transcendental?[31]

For reasons beyond the scope of the immediate discussion, Hegel argues that the abstract, autonomous individual whose freedom is completely negative in the hypothesized state of nature is passionately driven to actualize her freedom in the world.[32] Suffice it to say at this time, that this relates directly to a central theme of Hegel's metaphysics – his complete rejection of Kant's distinction between the noumenon and the phenomenon; the transcendental and the practical.[33] To Hegel, the former only exists in the latter. This means that although on the one hand Hegel presents his account of personality as being logical, not empirical, on the other hand, Hegel believes that in order for a logically generated theory to be true, it must have an empirical manifestation in the material world. Consequently, to say that freedom is *potential* in the state of nature (in Kant's terminology, is transcendental, a theoretically possible noumenon) is a meaningless statement unless it can also be shown to be *actual* in our daily lives.

1. Individuation and Differentiation.

In order to actualize its freedom, the autonomous individual must leave the lonely state of nature and take on concrete particularity by engaging in intersubjective relations – it must seek recognition by

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[29] Jennifer Nedelsky gives an excellent account of this debate in JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990). *See also* SCHROEDER, VESTAL, *supra* note –, at 17-18, 299-300.

[30] "Property *has a*lso carried with it the paradox of self-limiting government: it is the limit to the state; it is also the creature of the state. In property, the state sets its own limit. NEDELSKY, *supra* note –, at 8.

[31] Jeanne L. Schroeder, *The Lacanomics of Apples and Oranges: A Speculative Account of the Economic Concept of Commensurability*, – YALE J. LAW & HUMAN. – (2003) [hereinafter, Schroeder, *Lacanomics*].

[32] For example, he states, with respect to the concept of the autonomous individual in the state of nature " When I say 'I', I leave out of account every particularity such as my character, temperament, knowledge, and age. 'I' is totally empty; it merely a point - simple, yet active in this simplicity. The colorful canvas of the world is before me; I stand opposed to it and in this [theoretical] attitude I overcome is opposition and make its content my own." HEGEL, *supra* note –, at 35-36.

[33] Jeanne L. Schroeder & David Gray Carlson, *The Essence of Right and the Appearance of Wrong: Metaphor and Metonymy in Law, 24 CARDOZO L. REV.* 2481 (2003) [hereinafter, Schroeder & Carlson, *Essence of Right*].

others. As mentioned, the logically most primitive form of particularity identified by Hegel is what I call "legal subjectivity" – the capacity to bear legal rights and duties and obey the rule of law. Legal subjectivity is created in the most primitive realm of intersubjective relations that Hegel calls "abstract right" – property and contract. The reason why the liberal individual is a noumenon is because the absolute pure autonomy of the state of nature is understood as the negative freedom from any and all constraints.[34]

To Hegel property is the starting point for the creation of subjectivity because it is the most primitive way that abstract individuals can take on the particularity necessary for recognition by other persons. The radically free individual can have no distinguishing characteristics that might impose limitations on its radical freedom. Consequently, no individual can be recognized in the state of nature since every individual is identical to every other individual. Indeed, it is as though there is only one person in the state of nature.[35]

The individual seeking to be recognized must therefore take on individuating characteristics to distinguish himself from others. He does this by entering into object relationships not for the sake of the objects, but as a means of mediating and achieving intersubjective relationships[36]. To understand this we must first examine what Hegel and Kant mean by "objects" because this will be crucial to our consideration of intellectual property as property.

For an individual to be a free will means, to Kant and Hegel, that she is an end in herself, and not the means to the ends of another. Indeed, Kant's categorical imperative (which Hegel rewrites as "be a person and respect others as persons")[37] can be read as a statement that the minimal definition of ethics [38]consist precisely in never treating another person as a means. Consequently, Kant calls a just society "a

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[34] "The will contains (alpha) the element of *pure indeterminacy* or of the 'I's pure reflection into itself, in which every limitation, every content, whether present immediately through nature, through needs, desires, and drives, or given and determined in some other way, is dissolved; this is the limitless infinity of *absolute abstraction* or *universality*, the pure thinking of oneself." HEGEL, *supra* note –, at 37.

[35] "If we speak here of *more than one* person where no such distinction has yet been made, we may say that, in terms of personality, these persons are equally. But this is an empty and tautological proposition; for the person, as an abstraction, is precisely that which has not yet been particularized and posited in a determinate fashion." *Id*. at 80.

[36] Hegel describes the relationship of contract, which completes the logic of property and creates the subject through recognition as follows:

> This relationship is therefore the mediation of an identical will within the absolute distinction between owners of property who have being for themselves. . . . This is the mediation of the will to give up a property (an individual property) and the will to accept such a property (hand hence the property of someone else). The context of this mediation is one of identity, in that the one volition comes to a decision only in so far as the other volition is present.

Id at 105.

[37] "Personality contains in general the capacity for right and constitutes the concept and the (itself abstract) basis of abstract and hence *formal* right. The commandment of right is therefore: *be a person and respect others as persons.*" *Id*. at 69.

[38] In the *Philosophy of Right* Hegel differs from Kant who defines a single category of ethics in defining a broader regime of *right* that consists of the most primitive regime of abstract right (legalism), and the two more highly developed morality and *Sittlichheit* (usually translated as ethical life, but more literally, the state of being in a situation).

kingdom of ends" in which each individual self-legislates her own code of behavior.[39]

Following this, an "object" is defined as anything that is not capable of becoming a subject – that which has no will and cannot achieve self-consciousness.[40] Objects are those things that may property be treated as ends. Essentially this means that anything but another individual is potentially an object.[41]

One implication of this is that there are no "natural" objects. An object obtains its status by its identification as such by an act of will by an individual seeking to become a subject.[42] Since objects gain their status by identification and because the purpose of identifying objects is intersubjective recognition, not the satisfaction of natural or physical needs,[43] objects are not limited to physical things. Indeed, because it is so easy to confuse our "natural" physical relations with tangible things with our legal rights of property enforceable against others with respect to things, tangibles are arguably the less adequate forms of objects. It is the very abstraction of intangibles that enables the individual more adequately serve as "object" than tangibles. Hegel states:

> Intellectual accomplishments, sciences, arts, even religious observances (such as sermons, masses, prayers, and blessings at consecrations), inventions, and the like, become objects of contract; in the way in which they are bought and sold, etc., they are treated as equivalent to acknowledged *things*. It might be asked whether the artist, scholar, etc. in its legal possession of his art, science, ability to preach a sermon, hold a mass, etc. - that is, whether such objects are *things*. We hesitate to call such accomplishments, knowledge, abilities, etc., *things;* for on the one hand, such possessions are the object of commercial negotiations and agreements, yet on the other, they are of an inward and spiritual nature. Consequently the understanding may find it difficult to define their legal status, for it thinks only terms of the alternate that something is *either* a thing *or* not a thing (just as it must be *either* infinite *or* finite). Knowledge, sciences, talents, etc. are of course attributes of the free spirit, and are internal rather than external to it; but the spirit is equally

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As I keep emphasizing, property only directly relates to the first of these.

[39] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 41 (Mary Gregor ed. 1997).

[40] *See e.g.* "[T]hing' [is to be] understood in its general sense as everything external to my freedom, including even my body and my life. The right of things is the right of *personality* as *such.."* HEGEL, *supra* note –, at 71. "What is immediately different from the free spirit is, for the latter and in itself, the external in general - a *thing*, something unfree and without rights." *Id.* at 73.

[41] Consequently, as discussed below (*infra* text at notes –) the only "thing" that cannot be treated as objects of property is personality itself, understood the capacity to be a self-consciousness capable of exercising freedom. *Id.* at 96.

[42] "When I think of an object, I make it into a thought and deprive it of its sensuous quality; I make it into something which is essentially and immediately mine." *Id.* at 35.

[43] "The rational aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality." *Id.* at 73.

> capable, through expressing them, or giving them and external existence and *disposing* of them (see below) so that they come under the definition of *things*. Thus they are not primarily immediate in character, but become so only through the mediation of the spirit, which reduces its inner attributes to immediacy an externality. . . . Abstract right is concerned only with the person as such, and hence also with the particular, which belongs to the existence and sphere of the person's freedom. But it is concerned with the particular only in so far as it is separable and immediately different from the person – whether it receives it only by means of the subjective will. Thus intellectual accomplishments, sciences, etc. are relevant here only in their character as legal possession; that possession of body and spirit which is acquired through education, study, habituation, etc. and which constitutes an *inner property* of the spirit will not be dealt with later. But the *transition* of such intellectual property into externality, in which it falls within the definition of legal and rightful property, will be discussed only when we come to the *disposal* of property.[44]

Indeed, I would argue that although trade secrets are the category of intellectual property that has traditionally been considered most problematic to property scholars may be, from a Hegelian perspective, trade secrets can serve as the quintessential form of object precisely because they have virtually no substance but the negative quality of their secrecy.

Although Hegel insists that property is intersubjective in nature, he also insists that it always involves objects.[45] Many jurisprudes, most notably Hohfeld and Thomas Gray, in their attempt to distinguish the legal right of property from the empirical fact of object relations, have mistakenly concluded that legal property, properly understood, does not require objects at all.[46] For example, Hohfeld tries to redefine property as a multital right – or a right good enforceable against the world, understood as an undefined multiplicity of others – as opposed to a paucital right such as contract, – a right enforceable against an identified other or restricted class of others.[47] Unfortunately, not only is this counterintuitive, it fails to explain the distinction between property and torts – both multital rights. This explains why despite Hohfeld's substantial influence on commercial jurisprudence generally, his idiosyncratic terminology has been rightfully consigned to the dustbin of history.

Hegel, in contrast, insists on the objective aspect of property, even though property is not primarily an object relation (let alone a natural or physical relation to a tangible thing). Rather, as I have already introduced,[48] property is an intersubjective relationship *mediated* by objects. That is, each individual

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[44] *Id*. at 74-75.

[45] I discuss the necessary role of objects in Hegelian property analysis in SCHROEDER, VENUS, *supra* note – and SCHROEDER, VESTAL, *supra* note –.

[46] HOHFELD, *supra* note –, at 85. I explain why this analysis fails in SCHROEDER, VESTAL, *supra* note –, at 107-14, 156-81; and Schroeder, *Chix Nix Bundle-O-Stix*, *supra* note –.

[47] HOHFELD, *supra* note –, at 72.

[48] *See supra* text at notes –.

desires to engage in intersubjective relations in order to achieve subjectivity as a step in the actualization of freedom. But, how can an individual do this without treating every other person with whom one interrelates as a means to this end in violation of the categorical imperative? Hegel's answer is that objects serve as mediators or means by which both parties achieve their ends through mutual exploitation. That is, the subjects recognize each other, and achieve the end of subjectivity, by entering into contracts for the exchange of objects.

2. Negativity and Identifiability. The fact that individuals take on object relations in order to differentiate themselves might, at first blush, suggest that the *content* of property (*i.e.* the specific identity of specific objects) is what matters. But this is not so. Abstract right (property) does not yet establish the content of personality, it merely establishes the empty form – subjectivity – into which content will be added later in the regimes of morality and ethics. This raises the question that troubles non-Hegelians: the "function" of property is supposed to make the individual into a recognizable subject, but how can a subject be recognizable if she has no content?

Jacques Lacan, the French psychoanalyst, uses the metaphor of the creation of a vase by a potter to explain the concept of an identifiable, yet empty and formal, notion of subjectivity.[49] A vase is a vase only because it is empty – like the subject, its essence is negativity. Nevertheless, the value and the beauty of the vase consists in the fact that its walls separate and distinguishes an unique internal void within the vase from the external void of the rest of the world. This allow us to fill and create content for the internal void. Metaphorically, if abstract right forms the individual into a vase-like subject, then it is only the *form* of the vase that is important at this stage. Property, is a potter not a florist. Morality and ethics – not law – will add the flowers of personality later on.

Another way to think of this is to consider the fact that Hegel himself usually refers to the creature formed in abstract right as *die Person*. In my writing I have chosen instead to use the term "subject" (which is a term Hegel sometimes uses to describe what I call the autonomous individual) in large part to avoid the connotations of humanity conveyed by the colloquial English word "person".[50] *Die Person* in German has a more abstract and formalistic connotation, implying the important point that content, including abstract right itself, is external to the subject – the sense that the subject is the subject of, and is subjected to, the law.

The German word for what we would call a person (in the sense of human being) is, not *die Person* but *der Mensch*. To understand the concept of *Person* as subject one should refer back to its Latin origins. *Persona* is a mask (specifically a death mask).[51] Lacan also frequently uses the image of the mask to explain subjectivity. For reasons that are beyond the scope of this Article, Lacan maintains, in contrast

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[49] LACAN, SEMINAR VII, *supra* note –, at 120-23, Paul Verhaughe & Frederic Declercq, *Lacan's Analytic Goal or the Feminine Way*, 54, 62, in REINVENTING THE SYMPTOM (Luke Thurston ed. 2002).

[50] *See also supra* note –, for other reasons for my choice of terminology.

[51] Indeed, Robert Bernasconi argues that Hegel uses the word *Person* precisely to invoke the Latin concept of "mask" to describe the subject of abstract right. Robert Bernasconi, *Persons and Masks: The Phenomenology of Spirit and Its Laws*, 10 CARDOZO L. REV. 1685 (1989).

to the dominant stereotype, the true subject is "feminine" – a technical psychoanalytic category that must be distinguished from anatomical femaleness.[52] Lacan explores, and reinterprets, a traditional notion of femininity as masquerade . This should not merely be thought of in terms of such traditional feminine behavior as coquettery and display (make-up, fashion, etc.), although this behavior may be one way masquerade manifests itself. Masquerade is more generally the presenting of a mask – a *persona* – to the world. It is vulgarly presumed that the mask the feminine subject wears masks a true underlying reality. Lacan explains that this presumption is, in fact, the masquerade. The truth underlying the mask is *that there is no truth underlying the mask.* Underneath the form of the mask of subjectivity is pure negativity. In the words of Slavoj Zizek "this nothingness behind the mask is the very absolute negativity . . . which . . . is the subject *par excellence*, not a limited object opposed to the force of subjectivity!"[53] In speculative terms, Hegel argues that there is no noumenon underlying phenomenon. There is no true essence underlying appearance because everything is appearance . Or, more accurately, as I shall explain below,[54] true essence *is* appearance. The legal subject as *persona* is a recognizable mask with nothing behind it.

C. The Traditional Property Trinity.

1. The Elements of Property. It has been fashionable in American jurisprudence to argue that, because property appears in a seemingly endless series of variations, it has no unitary essence. The classic metaphor is that property is an arbitrary "bundle of sticks".[55] Hegel, in contrast, defends traditional notions of property, although he will reinterpret them.. Not only does the regime of legal

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[52] Lacan's theory of sexuality is complex and anti-intuitive. Although we tend to associate feminine personality traits with female persons and masculine personality traits with male ones (which explains Lacan's intentionally confusing choice of terminology) they, in fact, only loosely correspond to their biological counterparts and all persons paradoxically reflect some aspects of both genders. Traditionally, men have claimed to have subjectivity – understood as taking on the active, speaking rule of society. Lacan argues that masculinity is, in fact, a self-deception. Men do not *have* subjectivity because only women *are* true subjects. I discuss Lacan's theory extensively in SCHROEDER, VENUS, *supra* note –, and SCHROEDER, VESTAL, *supra* note –.

[53] SLAVOJ ZIZEK, THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY 143 (1994). *See also* SLAVOJ ðIðEK, THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS 161-62 (1996). Lacan recites the story from classical Greece of a contest to determine which of two artists created the most realistic paintings. The first artist produced a still life that was so impressive that birds actually pecked at the painted grapes. The second artist produced a draped canvas. When the judge tried to remove the veil he realized that the veil *was* the painting! Lacan' point was that although, to an animal, reality is the underlying thing. One captivates the animal by depicting the thing. To the human, however, our reality is only virtual reality interpreted through the symbolic realm of language and the imaginary one of pictures. To captivate the human, therefore, one displays the veil as a veil, tempting the human into thinking that she can capture the animal reality beneath the human virtual reality. JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 111-12 (J. Miller, ed. A. Sheridan trans. 1981).

[54] *See infra* text at notes –. I discuss Hegel's understanding of essence and appearance and how it relates to his jurisprudential theory in more detail in Schroeder & Carlson, *Essence of Right*, *supra* note –.

[55] SCHROEDER, VESTAL, *supra* note –, at 156-157.

relations that Hegel calls "property" logically require objects, it also requires the three traditional elements of possession, enjoyment and alienation – but re-defined at the level of highest abstraction. I have discussed Hegel's interpretation of these three elements extensively elsewhere.[56] In this Article I will only give a brief general description of his argument, although I will develop some of these ideas later.

The three elements of property are necessary not in any natural sense of the term, but in a purely functional sense. Property is a regime created to achieve a goal – the creation of subjectivity through intersubjective recognition.[57] The three elements are required to achieve this goal.

a. Possession. Possession is the identification of a specific object to a specific individual.[58] Because the point of possession is the differentiation of the possessor from the non-possessor, possession can also be thought of as the *exclusion* of others from the object identified to the owner.[59] By associating a specific object to a specific individual, that individual is differentiated from other individuals not identified with that object.

It follows from the fact that objects need not be tangible, that the assumption that underlies much of American property that the archetypical form of possession consists of physical custody is incorrect. According to Hegel, although physical custody of tangible things might, at first blush, seem to be the most "determinative" form of possession, in the sense that it is readily apparent, it is the least adequate precisely because it is the most contingent.[60] Possession is a *claim* to an object, but custody is a brute fact that can be defeated by a brute. The inadequacy of custody as possession is obvious when one considers that a thief does not destroy my rightful claim of possession merely by depriving me of custody of my goods.

If possession is defined as the identification of an object to an individual through exclusion of others, then any intersubjective manifestation of that identification is a form of possession.[61] Hegel specifically noted that designating or marking is a more adequate form of possession than custody, even though it might

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[56] Most of my work in this area has been consolidated and rewritten as SCHROEDER, VESTAL, *supra* note –, and SCHROEDER, VENUS, *supra* note –.

[57] "[T]he possession of property appears as a means; but the true position is that, from the point of view of freedom, property as the first *existence* of freedom, is an essential end for itself." HEGEL, *supra* note –, at 77.

[58] "Thus to appropriate something means basically only to manifest the supremacy of my will in relation to the thing and to demonstrate that the latter does not have being in and for itself and is not an end in itself." *Id.* at 76.

[59] Hegel argues that designation should not be thought of as a substitute for the norm of possession through sensuous grasp. Rather, sensuous grasp should be seen as a imperfect type of designation. "If I seize a thing or give form to it, the ultimate significance is likewise a sign, a sign given to other in order to exclude them, and to show that I have placed my will in the thing." *Id.* at 88.

[60] "From the point of view of the senses, *physical seizure* is the most complete mode of taking possession, because I am immediately present in this possession and my will is thus also discernible. But this mode in general is subjective, temporary, and extremely limited in scope, as well as by the qualitative nature of the objects." *Id.* at 84.

[61] "The *existence* which my willing thereby attains includes its ability to be recognized by others. . . . My inner act of will which says that something is mine must also become recognizable by others." *Id.* at 81.

be somewhat less determinative (i.e. it may be ambiguous).[62] Elsewhere I have argued that the filing system applicable to the perfection of security interests in personal property under Article 9 of the Uniform Commercial Code should not, as is often thought, be considered a substitute for "possession" of the collateral by the secured party.[63] Rather, from a Hegelian perspective, filing is itself a form of possession through marking.

One of the advantages of possession through designation is that it helps to distinguish the legal right of property from the mere fact of physical relations with tangible objects. By doing so, it clarifies that the function of property is formal and is not dependent on the content of any specific object of the property claim. In Hegel's words, "For the concept of the sign is that the thing does not count as what it is, but as what it is meant to signify.. . . It is precisely through the ability to make a sign and by so doing to acquire things that human beings display their mastery over the latter."[64] That is, it is ultimately the act of mastery that is represented by the sign.

b. Possession of Intellectual Property. A Hegelian analysis helps to "solve" the supposed "problem" of possession of intellectual property frequently identified by critics who argue that intellectual property is not "true" property.[65] Obviously, intellectual property, being intellectual, cannot be physically grasped. Moreover, being intellectual, it can exist in the minds of more than person at the same time. Does this mean that no one person "possesses" it? Compared to the certainty of the physical custody of tangible things, any claim to "possession" of intellectual property would seem to be ambiguous and indeterminate. Perhaps intellectual "property" claimants do not "really" possess at all, but merely have some other sui generis legal right only roughly analogous to possession?

To present the issue in this way implicitly is to assume that sensuous grasp as the ideal of possession. It conflates the two different meanings of the English word "possession" as both the *fact* of custody and the claim to legal rights with respect to an object. Many have claimed that there is no concept of true possession in intellectual law in the sense that it is possible for an infinite number of people to have possession of the same information without depriving the original owner of her possession.[66]

Adam Mosouff, a thoughtful recent defender of both property analysis and trade secret law has

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[62] "Taking possession by designation is the most complete mode [of possession] of all, for the effect of the *sign* is more or less implicit in the other ways of taking possession. . . . For the concept of the sign is that the thing does not count as what it is, but as what it is meant to signify." *Id.* at 88. "This mode of taking possession is highly indeterminate in its objective scope and significance. *Id.*

[63] SCHROEDER, VESTAL, *supra* note –, at 147-56.

[64] HEGEL, *supra* note –, at 88.

[65] For example, Robert Bone explains that one problem facing those who wanted to protect trade secrets as property, "The difficult question was how someone could 'possess' an intangible thing, like information, which was not subject to physical control." Bone, *supra* note –, at 255.

[66] For example, Posner and his co-authors thinks that trade secrets are not property in the ordinary sense of the term "because it is not something that the possessor has the exclusive right to use or enjoy." Posner *et al.*, *supra* note –, at 62. *See also* Moohr, *supra* note –, at 693.

taken this to heart by agreeing that there is a possessory aspect of intangible property, but by suggesting that possession is not a necessary element of property at all – replacing the traditional trinity of rights of *possession*, enjoyment and alienation, with an "exclusion" theory of property reflecting rights of *acquisition*, enjoyment and alienation.[67] As we have seen, [68] Hegel anticipated all of these claims in the *Philosophy of Right*. He defines possession as any intersubjectively recognizable way an owner designates an object as his own by excluding others from it. Mosouff's concept of acquisition, in fact, falls within Hegel's definition of possession. This is not merely a matter of semantics. Mosouff's categorization causes him to reject the necessity of possession entirely, thereby throwing the baby out with the bath water. Hegel's analysis tries to explain the traditional assumptions about possession, reconcile them with a more philosophically sophisticated understanding of the function of property and show what seemingly disparate forms of property have in common.

Intellectual property can be analyzed as property if (in addition to other conditions) we can find some aspect that serves the function of possession – *i.e.* an intersubjectively recognizable means by which the owner expresses her claim to exclude others. The laws governing the traditional categories of copyright, patent, and trade/ service mark all require that the enforceability of ownership claims be conditioned on a publicity requirement – registration in the appropriate office and, in some cases, the affixation of a statutory notice (such as the familiar c in a circle) to many tangible embodiments of the intellectual property. These constitute examples of what Hegel called possession through marking. Far from being a poor substitute for physical custody, marking is perhaps the most adequate form of possession.

Trade secrets are probably the most puzzling form of intellectual property from a traditional perspective. Particularly troubling is the fact that trade secret law does not merely lack a publicity requirement, a trade secret has the status of a trade secret *only so long as it is kept secret.* Yet, from a Hegelian perspective, it is this secrecy requirement that can be analyzed as another form of possession through marking.[69]

Under trade secret law, the mere fact that a "secret" is secret is not enough to make it an enforceable trade secret. The owner must also take reasonable steps *to protect its secrecy*[70] It is these

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[67] Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZONA L. REV. 371, 390 (2003).

[68] *See supra* text at notes –.

[69] Although not a Hegelian, Bone anticipates this argument. He states "At common law, property rights depended on possession. . . . .Moreover, possession required clear acts manifesting an intent to bring the thing under exclusive control and to appropriate it to individual use." Bone, *supra* note –, at 255. He continues: It follows . .. That the only way someone could possess information to the exclusion of others was to keep it secret." *Id.* "Accordingly, secrecy was the *sine qua non* of possession and thus of common law property right in information." Id. Bone argues that later trade secret law was not consistent with this analysis.

[70] In order to qualify for trade secret protection the Uniform Trade Secrets Act requires, among other things, that the information be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy. UNIFORM TRADE SECRETS ACT 14 U.L.A., 437-38 (1990) Sec. 1(4)(ii). The Restatement is not so strict, waiving a "showing of specific precautions" "if the value and secrecy of the information is clear". RESTATEMENT (THIRD) OF UNFAIR COMPETITION, MISAPPROPRIATION OF TRADE VALUES, Chapter 4, Sec. 39, cmt. g.

reasonable steps – obtaining confidentiality agreements, keeping the information "under lock and key", etc. – that mark the secret as being identified the claimed owner. It is simple to see how a confidentiality agreement marks secret information – the confident knows what the property is (the secret) and expressly agrees that it belongs to the owner. It is initially harder to understand how other modes of protecting secrecy serve the identifying purpose of possession. By definition, those persons who are excluded from the secret do not know the *content* of the secret. How then, is the secret as object so identified with the subject as to help make the subject identifiable?

This apparent enigma falls away when one remembers that the confusion reflects the romantic Misperceptions of Hegel's personality theory of property. The romantic identifies the *substance* of the object as being important to property's function of creating personality, while Hegel insists the *form* is of the essence. It is sufficient that others know that the "owner is claiming property even if they do not necessarily know the identity of what is claimed. Under the law of trade secrets, by imposing protections preventing the revelation of a secret the claimant is declaring himself the owner of a unique object. It is this claim that is recognizable by other subjects. Vis a vis the public, trade secret law is, therefore, like the old game show *Lets Make a Deal* where contestants vied for unknown prizes "behind curtain number 1" or "in box number 2" or whatever.

This explains the two recognized modes of trade secret violation – breach of a confidentiality agreement and "stealing" trade secrets through an independently wrongful act such as corporate espionage.[71] The former is less problematic because the signer of a confidentiality agreement is given access to the secret (so she has the opportunity to know what it is) and, by signing the agreement acknowledges the claimant's claim. As I will discuss below,[72] this establishes a "common will" that will legitimize this unilateral claim.

In the case of violation by independent wrong, the very violation paradoxically establishes the right of possession that is violated. This relates to Hegel's idea, discussed below, [73] that certain wrongs play a back-handed compliment to right, and that right can only be understood as the righting of wrong. That is, by engaging in nefarious behavior, such as hacking into computer records, the violator reveals that she *knows of* the claimant's *claim* (*i.e.* the claim to exclude is intersubjectively recognizable at least by the person against whom the claim is to be enforced).

The Hegelian analysis of possession also explains why trade secrets are not enforceable when they become public (*i.e.* when other people gain access to the content of the former secret). A person who merely "happens" on the content of a trade secret – either by discovering it herself or by receiving it from a confidant without knowledge that she is violating a confidence – is not on notice of the "owner's" claim. Consequently, the trade-secret claimant has not established its possession with respect to this person

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[71] Wilf calls these two categories "breach of duties and bad acts". Wilf, *supra* note –, at 73.

[72] *Intra* text at notes –.

[73] *See infra* text at notes –.

because it is not recognizable by that person.[74]

c. Enjoyment. The second element of property is use, or what I prefer to call "enjoyment"[75] of the object by the owner. If the function of possession is to distinguish one individual from another, the point of enjoyment is to distinguish the owning subject from the owned object.[76] In possession, an owner identifies an object to herself, but this is equivalent to identifying herself *with* the object. The "logic" of property is recognition of the owner *as a subject* by another subject. By enjoying the object, the owner submits it to his will thereby making it clear that it is the owner that has the free will that makes him a potential subject.[77] Remember, a subject is defined as an end in and to her self, and an object is defined as the means to an end. In enjoyment, the owner exploits her thing thereby establishing that she is the subject who has the end of enjoyment, and the enjoyed thing is a mere means to this end.[78]

The form of enjoyment obviously varies depending on the object. I would note here in passing that, although the three elements of possession, enjoyment and alienation are logically distinct in that they form different functions, as an empirical matter, the same activity can meet the requirements of more than one element. For example, some acts of enjoyment (such as eating food) also mark it and, therefore, also serves as acts of possession. Similarly, other acts of enjoyment (such as exploiting the object in commerce) are also acts of alienation. As I shall discuss,[79] some of the substantive requirements of trade secret law that

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[74] From this perspective, there is one apparent anomoly in the law of "innocent" recipients of trade secrets. A good faith recipient of a trade secret from a dishonest confidant of the owner is not liable to the owner for its use, whereby a good faith recipient from a thief is even though both of these persons are equally lacking in notice of the existence of the owner's possessory claims. At further thought, one realizes that this is not a puzzle unique to trade secret law. Rather, it reflects the American rule with respect to tangible goods. Pursuant to UCC Sec. 2-403(1) and (2), good faith purchasers for value and buyers in the ordinary course of business can sometimes defeat the possessory claims of the original owners of a good. A thief, however, can never pass good title so that if a person buys a good from a their, the original owner has the right to get her property back regardless of the purity of the buyer's heart. Arguably the American rule is inconsistent with the "logic" of property and probably exists because of a pragmatic concern to remove incentives to theft. Many other jurisdictions do recognize a good faith purchaser rule even the case of theft.

[75] In numerous works, I have tried to develop parallels between Hegel's theory of the creation of legal subjectivity through property and Lacan's theory of the creation of psychoanalytic subjectivity through sexuality. I have suggested that possession and alienation are "masculine" in the Lacanian sense, whereas use is "feminine". To clarify this parallel I use the word "enjoyment" when I speak of property to reflect Lacan's term "*jouissance*" which is the French term for enjoyment

[76] "*Use* is the realization of my need through the alteration, destruction, or consumption of the thing, whose selfless nature is thereby revealed and which thus fulfils its destiny." HEGEL, *supra* note –, at 89.

[77] "When I and the thing come together, one of the two must lose its [distinct] quality in order that we may become identical." *Id*. at 89.

[78] "[T]he thing, as negative in itself, exists only *for my need* and serves it." *Id.* at 89. He continues "The thing is reduced to a means of satisfying my needs." *Id.* "Since the substance of the thing for itself, which is my property, is its externality, i.e its non-substantiality – for in relation to me, it is not an end in itself . . . *Id*. at 90.

[79] *See infra* text at notes –.

seem problematic to many commentators can be explained if one accepts the Hegelian conception of enjoyment as exploitation and recognizes that the same act serves the double duty of establishing both the possessory and enjoyment elements of property.

Although both possession and enjoyment are necessary for the goal of intersubjective recognition, intersubjectivity is merely latent in possession and enjoyment and, therefore, is still insufficient to the creation of subjectivity. Possession is the negative intersubjectivity of one person excluding others. Enjoyment is also frequently exclusive – only one person can eat the same piece of food. For example, under the law of trade secrets, for a secret to be protected as property the rights of others to enjoy the secret must be limited — indeed, inappropriate enjoyment will define one form of trade secret violation.

Because in enjoyment the subject uses things to satisfy her needs, one might at first blush assume that it is the content of the thing, not the form of enjoyment, that is of the essence. Further thought, however, reveals once again that Hegel's analysis of property, as an abstract right, is purely formal. If the logical function of enjoyment is the distinction between owner and owned thing through the owner's display of mastery, then enjoyment can be thought of as the *negation of the thing's existence*,[80] not the positivation of its particularity. The most complete form of enjoyment is consumption – which actually destroys the object entirely. Indeed, perhaps a more accurate term for this element might be *exploitation.* Consequently, Hegel emphasizes that at the level of enjoyment all things are paradoxically specific yet equivalent and comparable to all other things. He states

> "But [the individual thing's] specific utility, as *quantitatively* determined, is at the same time *comparable* with other things of the same utility, just as he specific need which it serves at the same time *need in general* and thus likewise comparable in its particularity with other needs. Consequently, the thing is also comparable with things which serve other things. This *universality*, whose so simple determinacy arises out of the thing's particularity in such a way that it is at the same time abstracted from this specific quality, is the thing's *value*, in which its true substantiality *determined* an becomes an object of consciousness. As the full owner of the thing, I am the owner both of its *value* and of its use.[81]

In other words, Hegel is looking forward to the economic analysis that recognizes that, although to be valuable property must have use value, use value can be translated into exchange value so that all property is ultimately commensurable.[82] That is, in order to serve the logical function of enjoyment, all things are identical in the regime of abstract right. Indeed, Hegel goes so far as to say that if one cannot reduce one's

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[80] *See supra* note –.

[81] HEGEL, *supra* note –, at 92.

[82] As I discuss in *Lacanomics*, *supra* note –, Hegel differs from most modern supporters and critics of the American law and economics movement that hold that either everything is commensurable or incommensurable. Hegel, in contrast, thought that commensurability (quantitative distinction) and incommensurability (qualitative distinction) existed in a dialectical relationship. Each is a true, but incomplete, aspect of property.

thing to its use value because of restraints on alienation, then one is not the complete owner of the thing.[83]

Although necessary, enjoyment is more problematical than possession because unchecked enjoyment can defeat the goals of property. The individual seeks recognition through property as a means of actualizing her freedom. But, in enjoyment, the individual becomes dependent on the object that is her support. Radin believes that such a dependency on the class of objects she calls "personal property" leads to human flourishing.[84] Hegel, in contrast, believes that dependency is the opposite of the freedom that is the essence of personality – it is the slavery of addiction. However, if the individual seeks to end her dependency by ridding herself of the object of her addiction, she once again becomes undifferentiated and unrecognizable.

d. Enjoyment of Trade Secrets. The Hegelian analysis sheds light on another supposed puzzle of intellectual property identified by critics. It has been asserted that one major difference between intellectual property and other forms of property is that usually the use of the latter is necessarily exclusive so that use of an object of property by one person necessarily excludes the use by another. A simple example is that it is impossible for two different people to eat the same item of food. Consequently, the use of an owned object by a person who is not the owner without the permission of the owner necessarily violates the property rights of the owner by destroying the owner's ability to use her object and frequently destroying the fact of possession or ability of the owner to alienate the object.[85]

In contrast, at first blush, the use of intellectual property by one person does not seem necessarily to interfere with the use by another. For example, it is empirically possible for many people simultaneously to enjoy the content of a copyrighted book or employ patented technology. The fact that another person learns the content of a secret does not deprive the original owner of her knowledge of the content. Why then is non-permitted use by a non-owner an infringement of intellectual property?

This supposed puzzle rests on misperceptions as to the nature of the right to use based, once again, on an implicit assumption that the archetypical objects of property are physical and the archetypical form of use is consumption – as in my food example. In contrast, if enjoyment is thought of as the subject's exercise of her dominion over the object through exploitation then what should concern us from a property analysis is not the *fact* that many persons *could* use the same information, but whether the claimant has the *right and power to exclude others* from using the information.

In trade secrets, the way that an owner exploits her knowledge is through the exclusive exploitation of the information for her own financial purposes to the exclusion of others. In the oft-vilified case of *United*

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[83] He suggests that this is why traditional feudal restraints on alienation were disappearing at the time he was writing in the early nineteenth century. HEGEL, *supra* note –, at 93.

[84] *See supra* note –.

[85] Bone describes the traditional quandary as follows. "Because information is capable of infinite replication, everyone can enjoy it without anyone having less of it. Anc once someone learns information, there is no way to erase that knowledge an therefor no means of excluding the person in fact." Bone, *supra* note –, at 255. Posner et al. state "A trade secret is not property in the usual sense – the sense it bears in the law of real and personal property or even in such areas of intellectual property law as copyright – because it is not something that the possessor has the exclusive right to use or enjoy." Posner *et al.*, *supra* note –, at 61-62.

States v. Carpenter[86] the Supreme Court intuited part of the answer, but only imperfectly. This case held that confidential information constitutes property for the purposes of the federal mail and wire fraud statute. Whatever the problems of the specific holding of these cases,.[87] the Court was nevertheless correct in noting that *the value* of confidential property lies in the claimants exclusive right to control its use.[88] To translate this into Hegelese, if what is conventionally called "use" is better understood as the exercise of mastery over the object, then *control of its use* is itself a form of use. In other words, in the case of intellectual property exclusion does double-duty – it is not only a form of possession, it is also a necessary aspect of its use (exploitation). Critics of trade secret law are, therefore, mistaken when they maintain that many people can use the content of trade secret law without diminishing the object of property. In the case of a trade secret, the value to the owner consists of the fact that the owner obtains a business advantage by virtue of the object's secrecy.

e. Alienation. The question then becomes, how does the individual both remain identifiable without also becoming dependent on any object. The answer lies in alienation.

Hegel's argument is famously confusing to non-Hegelians. As my colleague Justin Hughes questions, if the logic of property is differentiation and individuation of the abstract person through the acquisition of objects, doesn't alienation of objects defeat this purpose? This would be true of the simplest form of alienation – abandonment.[89]

Contract solves this problem. To reiterate, Hegel believes that subjectivity is created not by possession *per se*, but by intersubjective recognition by other subjects and that property is only a medium for this purpose. This regime of recognition is abstract right – the rule of law. The recognition sought in subjectivity is the capacity to bear legal rights and duties enforceable against and by other subjects. To overly concentrate on the specific object of property is actually to confuse the owner with the object - the opposite of recognizing the person's unique subjectivity. This is in sharp contradistinction to Radin's

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[86] 484 U.S. 19 (1987).

[87] I would point out in passing that personality theory has nothing to say on this case. The mere fact that confidential information can serve as Hegelian property in no way implies that the state must or should protect it as property for all purposes. I intuitively agree with John Coffee's assessment that *Carpenter* is unwise as a practical matter in that it potentially criminalizes ordinary contract disputes between employers and employees.

[88] *See infra* text at note –.

[89] Surprisingly, gift is also inadequate to the purpose of property because it the purpose of property is mutual recognition between and among subjects through objects. First, as in alienation, the donor by merely giving up his object, loses the object as a means for identification. Second, gift is not mutually inter*subjective*, but unilateral in the sense that the donee is merely the passive recipient of the donor's will rather than an acting will herself. From the standpoint of the dialectic of recognition, therefore, in gift the donor treats the donee as an object, rather than recognizing her as an equal subject. I explain the inadequacy of gift in Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. REV. 815, 870-82 (1999) [hereinafter, Schroeder, *Pandora*], *supra* note –, and SCHROEDER, VENUS, *supra* note –, 48-64.

proposition that the merging of owner with her personal property furthers human flourishing.[90] Hegel, looking forward to psychoanalysis, considers such a relationship to be destructive – addiction or, more technically, fetishism.

In contract each party remains identifiable as a rights-bearing subject through object relations because the object he gives up in contract is simultaneously replaced by a new object. That is, the contracting parties recognize each others as rights-bearing subjects – persons having the capacity not only to own property, but to respect the property rights of others, and to live up to his contractual obligations. In Hegel's words:

> [Contract] contains the implication that each party , in accordance with his own and the other party's will, *ceases* to be, an owner of property, *remains* one, and *becomes* one. This is the mediation of the will to give up a property (an individual property) and the will to accept such a property (and hence the property of someone else. The context of this mediation is one of identity, in that the one volition comes to a decision only in so far as the other volition is present.[91]

Hegel goes so far as to assert that "The whole issue can also be viewed in such a way that alienation is regarded as a true mode of taking possession."[92] By this I read him to mean that possession is the recognition by others that a specific object belongs to a specific subject. Paradoxically, this recognition only *expressly* happens retroactively when the owner contracts to sell that object to another person. In other words, the identification of subject to object in possession is only *effectively* recognized at the moment when another subject pays the first subject to release the object from her possession.

Once again, one must keep in mind the radicality of Hegel's definition of things that can serve as objects – anything that is not the free will of the individual herself. Not only can intangibles be objects, an individual's own labor is an object separate from her personhood. Consequently, service contracts, whereby the individual alienates part of the object of her productive capacity in exchange for that intangible object known as money, is, to Hegel, a contract for the exchange of property. In fact, the service contract is an excellent example of the logic of Hegel's dialectic of recognition. In our modern capitalistic society, a primary way we recognize each other is through our occupations. Moreover, as commercial law recognizes, an executory contract to perform services or deliver goods or other property in the future is also a form of objects.[93]

The mutual *intersubjectivity* of contract is necessary because, according to Hegel's argument, one becomes a subject when one is recognized as a subject *by another subject*, not merely by another *individual* (the earlier stage of personality). Since subjectivity is the capacity to bear legal rights and duties,

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[90] *See supra* text at notes –.

[91] HEGEL, *supra* note –, at 105.

[92] *Id*. at 95.

[93] See note –.

it only exists insofar as the rights are enforceable against a person capable of bearing duties, and the duties are owed to a person capable of bearing rights – i.e. another subject. Since all persons logically begin as abstract individuals, in order to achieve subjectivity, each individual must first make other individuals into subjects by granting them recognition as subjects. This means that it is impossible to create rights by unilaterally claiming them for oneself. Since rights are intersubjective they can only be created intersubjectively. This is one reason why the Lockean attempt to justify claims of property through first-appropriation fails.[94]

The implicit logical conundrum is obvious. How does anyone become a subject recognized by other subjects when there are no subjects in the state of nature: where does the *first* subject come from? Hegel's answer is that multiple subjects must come into existence simultaneously. As I have written extensively elsewhere, this is the alchemy that Lacan calls "love" – the relationship in which each lover sees in his beloved more than she has, that empowers the beloved to live up to the lover's expectations and become more than she once was.

Contract is the most primitive form of love – albeit a pathetic one. Each *individual* by admitting that another individual has legal rights (*i.e.* the right to possess and contract to exchange the object to be acquired) makes that individual into more than she once was – she is no longer an individual, but a subject.

2. Formality and Recognition. The Hegelian logic of alienation confuses many commentators because they do not completely internalize the purely formal nature of subjectivity and property in the regime of *abstract* right. Here, object relations are purely instrumental and subordinate to this goal of recognition.

We have defined a free individual an end in and for her self, and not the means to the end of another. In contrast, an object is something that is the means to the ends of something else. In abstract right, each individual paradoxically wants both i) that other individuals help him reach his end of become a subject and ii) that the other individual remain an end in and to herself and not merely a means to the first person's ends. This is because subjectivity is only created through recognition as such by *a person that one recognizes as another subject*. To treat another person as one's means, rather than as his own ends, is to fail to recognize him as an individual (let alone a subject). The question then becomes, how can one accomplish one's own ends (which requires action by another person) without impinging on the ends of that other person or treating her like a means (an object).

Hegel's answer is that external objects can mediate the relationships between the subjects. Both subjects mutually exploit the object of exchange as a means of recognizing each other – each fulfills her own ends (becoming a subject) while respecting the ends of the other (also to become a subject). The two subjects are united in a common will, in the sense that each wills his own ends, but these potentially competing ends temporarily coincide in the meeting of minds known as contract.

This means that, as a *logical* matter, one does not enter into object relations for the sake of the object itself or for the "natural" or other concrete functions they might serve. Because of this, the specific characteristics of any object of a property claim is irrelevant to Hegel and should be a matter of indifference

[94] *See infra* text at notes –.

to the subjects.

> Right is something *utterly sacred* for the simple reason that it is the existence of the absolute concept of self-conscious freedom. - But the *formalism* of right - and also of duty - arises out of the different stages in the development of the concept of freedom. In opposition to the more formal, i.e. *more abstract* and hence more limited kind of right, the sphere and stage of the spirit in which the spirit has determined and actualized within itself the further moments contained in its Idea possesses a higher right, for it is the concrete *sphere, richer within itself and more truly universal*.
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> Each stage in the development of the Idea of freedom has its distinctive right, because it is the existence of freedom in one of its own determinations. When we speak in opposition between morality or ethics and *right*, the right in question is merely the initial and formal right of abstract personality. Morality, ethics, and the interest of the state - each of these is a distinct variety of right, because each of them gives determinate shape and existence to *freedom*.[95]

In other words, a full concrete personality requires the entire regime that Hegel calls *Recht* that includes not only abstract right (property and contract), but morality and ethics. Abstract right is the most primitive form of right that only creates the *form* necessary for freedom – the empty vessel of legal subjectivity understood as the mere ability to accept legal rights and duties imposed by others. The *content* of personality will be added by morality and ethics.

Consequently, Hegel states with respect to the legal subject:

> Since particularity, in the person, is not yet present as freedom, everything which depends on particularity is here a *matter of indifference*. If someone is interested only in his formal right, this may be pure stubbornness, such as is often encountered in emotionally limited people; for uncultured people insist most strongly on their rights, whereas those of nobler mind seek to discover what other aspects there are to the matter in question. Thus abstract right is initially a mere possibility, and in that respect is formal in character as compared with the whole extent of the relationship. Consequently, a determination of right gives me a warrant, but it is not absolutely necessary that I should pursue my rights, because this is only one aspect of the whole relationship. For possibility is being, which also has the significance of not-being.[96]

Indeed, it is *precisely* the function of the element of alienation to make this irrelevance and indifference manifest. Nevertheless, even as subtle an analyst as Hughes, who expressly recognizes that the fact that object relations can also serve natural functions (food and shelter) is irrelevant to a Hegelian

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[95] HEGEL, *supra* note –, at 59.

[96] *Id*. at 73.

analysis,[97] misses this point. Hughes finds alienation to be "incoherent"[98] because the subject loses the object that supposedly makes the subject recognizable.[99] He finds this particularly problematic in Hegel's discussion of copyright because the objects of copyright, being the author's creations, would seem to be intrinsically linked to the author's personality.[100] Consequently, he infers from this that the objects of copyright would uniquely serve the goal of differentiating and identifying the author and concludes that complete alienation of artistic works would defeat the goal of the creation of personality. Consequently, he sees the Hegelian analysis of property as supporting certain restraints on alienation of copyrightable material, such as in the Continental regime of "moral" right under which an artist retains some control over her creations even after the sale.[101]

But this critique is based on the misimpression that, to Hegel, the *legal* right of property relates to the creation of the full complex personhood of empirical human beings situated in relations of family, civil society and state.[102] But, legal relationships relate only to the creation of *legal subjects* – persons capable of bearing rights and duties. The legal subjectivity that is mutually constituted with abstract right is, therefore, equally abstract and formal. Moreover, it is precisely their abstractness and formality that enable abstract right and legal subjectivity to serve as the substratum for the concrete freedom of citizenship.

I have briefly mentioned above my analysis that I have developed extensively elsewhere that Hegel's property jurisprudence is essentially erotic and Hegelian contract must be seen as a primitive type of Lacanian" love".[103] My goal in doing so was to break down the dichotomy between rationality and passion that implicitly underlies both utilitarianism and its romantic opposition. To Hegel, rationality and passion are two sides of the same coin.[104] Reason tells the autonomous individual that he must actualize his freedom and

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[97] Hughes, *supra* note –, at 333.

[98] *Id*. at 339.

[99] *Id*. at 345.

[100] *Id.* at 246-47.

[101] *Id*. at 345-48.

[102] This can be seen in the fact that Hughes thinks that some objects are more important in the creation of personality than others. *See e.g.* "different categories of intellectual property seem to lend themselves to different amounts of 'personality.' Poetry seems to lend itself to personality better than trade secrets, symphonies better than microchip masks." *Id.*at 339. *See also* "The more a creative process is subject to external constraints, the less apparent personality is in the creation. At some point, these constraints on a particular form of intellectual property may be too great to permit meaningful expressions of personality. We may determine that the personalty justification should apply only to some genres of intellectual property or that the personality generally present in a particular genre warrants only limited protection. *Id*. at 344.

[103] *See e.g*. SCHROEDER, VENUS, *supra* note –, at 47-50, 54-56, 225-26.

[104] *Id*. at 2-3, 75-76. In my analysis I rely heavily on Lacan's concept that "repression and the return of the repressed are just two sides of the same coin." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK III: THE PSYCHOSES 1955-56 12 (Jacques-Alain Miller ed. & Russell Grigg Trans. 1993).

to do so requires recognition by other subjects. Consequently, the free individual rationality decides that he must give way to the desire for others. Because abstract right is created in order to enable the interrelationship of mutual recognition to occur, it is erotic.

But the "love" and desire that exist at the level of abstract right is only a pale shadow of the passions we feel towards our family, lovers and friends. Consequently, I have argued vociferously that although utilitarians like Posner are right in seeing a parallel between economic activity and sexuality, he is completely wrong in trying to reduce the latter to a form of the former.[105] Rather from the position of Hegel, it is the former (economics) that is a step that makes the latter (passion) possible. That is, contract establishes the *form* of love, not its content.

Conversely, Hughes as well as Radin are equally mistaken in trying to argue that property can perform a direct function in the creation of the full, loving artistic personality. Although Hegel is a great defender of legalism and capitalistic markets, he is also clear to insist that must be limited to their appropriate sphere. To analyze more complex interrelationships in terms of abstract right (property), as they do, is not merely erroneous. Hegel, never one to mince words, calls it "crude" and "shameful"[106] Consequently, only the most base persons insist on rights.[107] This is why he condemns the classical liberal concept of government as social contract – citizenship is Hegel's most highly developed level of personality and, therefore, unlike the subject, cannot be thought of in terms of legal categories.

But a corollary of this is that is equally incorrect, indeed shameful, to adopt the romantic position towards copyright that confuses the purely legal relationship of property with the flowering of personality in artistic expression. From a Lacanian point of view to do so is *literally* perverse. Specifically it is fetishistic – the conflation of objects with subjects .[108] The specificity of objects of copyright has nothing to do with its status as a *legal* concept. As I shall discuss below, to Hegel, saying copyright is "property" is not to say that society must or should establish a copyright regime. This decision can only be made by pragmatic reasoning. In this sense, Hegel's theory has a surprising utilitarian twist. Society's desire to further creativity *may*, however, be a good pragmatic argument in favor of such a regime.

3. Recognition and Continuity. Hughes finds Hegel's insistence on the importance of alienation paradoxical because it seems to conflict with the idea that property serves to make individuals recognizable.[109] That is, if an individual becomes recognizable by being identified with an object, doesn't alienation of the object render him once again unrecognizable? Moreover, if the objects owned by an individual keeps changing over time (because of alienation through exchange), how do we recognize that the subject we met today is the same as the one we met yesterday?

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[105] *Id*.

[106] HEGEL, *supra* note –, at 201 (specifically, discussing the contractual analysis of marriage)..

[107] *Id*. at 72.

[108] SCHROEDER, VENUS, *supra* note –, at 72-73.

[109] Hughes, *supra* note –, at 345.

Hegel fully recognizes the need that there be continuity of personhood over time and that this seems to require that a person continue to hold and not alienate certain objects. Hegel tries to reconcile the requirement of continuity with his insistence that the free person not be bound to specific object by sharply deliminating a small, minimal class of "inalienable" objects to "those goods, or rather substantial determinations, which constitute my own distinct personality and the universal essence of my self-consciousness are therefore *inalienable*, and my right to them is *imprescribable*. They include my personality in general, my universal freedom of will, ethical life, and religion."[110]

The only inalienable "objects", then, are the bare minimal "things" necessary to any conception a concrete personality such that their alienation would constitute the alienation of concrete personality. Hegel further explains:

> Examples of the alienation of personality include slavery, serfdom, disqualification from owning property, restrictions on freedom of ownership, etc.. The alienation of intelligent rationality, of morality, ethical life, and religion is encountered in superstition, when power and authority are granted to others to determine and prescribe what actions I should perform . . . or how I should interpret the dictates of conscience, religious truth, etc.[111]

Although these categories fall within Hegel's extremely abstract definition of objects, it is obvious that none of them are "objects" within either the colloquial understanding or conventional legal definition of the word. Note what these examples of alienable objects have in common. They form lowest common denominator of personality necessary for a person to actualize her freedom so that continued ownership of these objects is consistent with freedom. First there is the body and life. The individual, as spirit, is distinguished from her body as such so that the body can be recognized as an object and, therefore, property. However, recognition by another individual requires that some form of communication and this requires some form of physical existence. This also relates to Hegel's rejection of transcendence. Although he is usually characterized as an idealist, he is also a radical materialist in that he believes that for an ideal to exist it must be concretely manifested in the actual world. In other words, an individual soul requires an individualized body. Consequently, the goal of the actualization of freedom suggests that we should not alienate our bodies and life in suicide (although, there might be circumstances in which it is appropriate nobly to sacrifice it for the sake of a higher goal, such as love of country).

The other items in Hegel's list of inalienable objects consist of the capacity to form ends. This is definitional – if the minimum definition of the person is the free will, one must not alienate one's capacity for freedom.[112] In the words of my colleague Stewart Sterk, "By definition, a person who surrenders the right to hold beliefs or to make any future decisions has ceased functioning as a recognizable person has become

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[110] HEGEL, *supra* note –, at 95.

[111] *Id*. at 96.

[112] SCHROEDER, VESTAL, *supra* note –, at 278.

instead an object – the property of another person."[113]

Consequently, one might be able to argue from Hegel that one should not be able to sell one's *capacity* to create artistic works or scientific discoveries. But it does not follow from this that there should be limit on the ability to alienate that which one creates. Indeed the forming of opinions and the creation of art works is nothing but the production of objects that can be externalized as property.[114] In Sterk's words "Hegel's concern was with the person who would sell himself into slavery and cease functioning as a person, not with the artist or author who sells a completed work of art only to see it transformed or destroyed."[115]

Consequently, the romantic misinterpretation of the personality theory is incorrect because it assumes that artistic creations have a special status and should have enhanced protection against alienability. The exact opposite is true. If art were unique in this way then it could not serve the function of Hegelian property – to serve the mediating object exchanged between subjects As we have seen, it is only at the point of alienation through exchange that property truly becomes property. Inalienable property is, to Hegel, an oxymoron. Society may very well decide to make art inalienable for good, pragmatic reasons. But if society does so, it is not treating art as property and Hegelian personality theory has nothing to say about it.

III. Should We Recognize Intellectual Property?

The surprising thing about Hegelian political philosophy is that, although he argues that property is a necessary moment in the actualization of human freedom, and even though he argues that intellectual property is appropriately analyzed as a form of property, it does not follow from this alone that logic demands that society recognize intellectual property rights at all! Hegel only purports to explain why a modern constitutional republic should adopt a positive law granting *some* private property rights to each of its citizens. As I explained in the introduction to this Article, Hegel believes that logic can give us absolutely no guide lines as what specific property laws should be established, and what claims to property should be recognized. Positive law is the bailiwick of practical reasoning, not logic.

In this section I will address in detail three common mis-readings of Hegel's personality theory that might lead to the incorrect conclusion that logic dictates that society recognize intellectual property. First, I will show that Hegel believes that there are no natural rights of any sort, let alone natural property rights. Second, I will address the closely related point that Hegel expressly rejected a first-occupation theory of property rights. Third, I will show that intellectual property has no privileged place in his analysis and any type of property rights can equally serve the function of the creation of personality.

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[113] Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 1996 MICH. L. REV. 1197, 1243.

[114] "The distinctive quality of intellectual production may, by virtue of the way in which it is expressed, be immediately transformed into the external quality of a thing., which may then in turn be produced by others." HEGEL, *supra* note –, at 98.

[115] Sterk, *supra* note –, at 1243.

A. There Are No Natural Hegelian Rights.

1. The Potential and the Actual. I have, for simplicity, stated that Hegel started his analysis by contingently adopting the notion of the free individual in the state of nature. I will now be more careful in my terminology as we consider Hegel's theory of the relationship between freedom and nature.

As I have already discussed, Hegel thinks that the freedom of the autonomous individual in the "state of nature" is only potential. Hegel argues not merely that the individual must leave the state of nature and go out into the real world if he is to make his freedom actual as a matter of fact. He believes that the individual is *driven* by a passionate desire to do so.

A complete discussion as to why the individual would desire to leave this uterine state if ignorant bliss is beyond the scope of this Article.[116] Suffice it to say, it relates to one of the fundamental points of Hegel's idealism and theism. Hegel's idealism should not be confused with a vulgar neo-Platonistic concept of an ideal world "out there" beyond the imperfect physical world. Such a notion is more reminiscent to the Kantian notion of an unknowable, intellectual, necessary, eternal and transcendent world of essences called the noumenon or "thing-in-itself" beyond the contingent, empirical, temporary and imminent world of appearance that can be known by experience (the phenomena).

Hegel's metaphysics may be seen as one long critique of this aspect of Kant. Hegel rejected all concepts of transcendence.[117] To Hegel, there is no essence beyond appearance.[118] Essence only exists insofar as it appears.[119] Or more radically, essence is nothing but appearance properly understood. I will return to this when I refute the misconception that Hegel held a first-occupation theory of the justification of property. Hegel's is a radically materialistic philosophy,[120] but not a atheistic one. God, or Spirit, exists but He/It is not transcendent but imminent in the material world.

Why this is significant for our purposes is that it follows from Hegel's rejection of transcendence that there can be no potentiality without actuality – what claims to be potential must become actual or reveal itself a liar. Actually, the theory is more radical than this. As I have argued elsewhere, Hegel's logic is

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[116] This is, to me, one of the most problematic aspect of Hegel's analysis. *See* Carlson, *How to Do Things, supra* note –, for one explanation of this dynamic.

[117] "Hegelian philosophy rejects all transcendence. It is the attempt at a rigorous philosophy that could claim to remain within the immanent, and not to leave it. There is no other world, no thing in itself, no transcendence, . . ." JEAN HYPPPOLITE, LOGIC AND EXISTENCE 90 (Leonard Lawlor & Amit Sen trans. 1997). *See also*, David Gray Carlson *Hegel on Reflection and Essence* (unpublished manuscript 2004) [hereinafter, Carlson, *Reflection*.]

[118] "There are no 'essences' beyond or behind the appearances, at least none that can do any cognitive work. There are just the appearances . . . " Robert B. Pippin, Hegel's Idealism: The Satisfactions of Self-Consciousness 211 (1989), Carlson, *Reflection*, *supra* note –.

[119] Schroeder & Carlson, *Essence of Right*, *supra* note –, at 2482.

[120] For an excellent explanation of how Hegel's idealism is, in fact, radically materialistic, see LUCIO COLLETTI, MARXISM AND HEGEL (Lawrence Garner trans., 1973).

retroactive, not prospective.[121] Potentiality is only retroactively revealed after something becomes actual. Consequently, if the autonomous individual in the state of nature claims to be free, and if this radically negative freedom is only potential, then the individual's claims to freedom can only be retroactively tested after he leaves the state of nature and makes his freedom affirmative and actual.[122]

Another way of saying this is that Hegel's logic shows that the liberal "state of nature" is not natural at all. Rather, it is a logically "necessary" hypothesis that it is retroactively posited by the fact that we occasionally observe actualized freedom in modern constitutional republics. As such the "state of nature" is actually created by human thought. To Hegel, like Kant, real "nature" is the empirical, mechanical world governed by the causal laws of necessity where there is no freedom. Any freedoms and rights derived from the liberal conception of the hypothetical "state of nature" by definition can not literally be natural.

2. Nature and Rights. Hegel sharply distinguishes between natural and positive law, and locates rights within the latter. He states "there are two kinds of laws, laws of nature and laws of right: the laws of nature are simply there and are valid as they stand: . . . .The laws of right are something *laid down*, something *derived from* human beings."[123] The liberal "state of nature" is, in fact, the hypothesis that radically autonomous individuality is a necessary, albeit inadequate, moment of human personality. If so, then what is the status of "nature" and its relationship to rights and freedom? Once again, I do not pretend to give a comprehensive account of Hegel's philosophy of nature, but will point out one aspect that is relevant to this Article.

The first thing to note is to reiterate the simple point that there can be no "rights" in the liberal hypothetical state of nature because the "state of nature" is defined as autonomy and rights are necessarily interrelational – I have rights only insofar as you recognize them in contract or the state imposes them as duties on you by positive law.

But I believe that Hegel's point is more subtle and powerful than this. There is no freedom in the natural world. This can probably best be explained by going back to Kant's famous analysis of antinomies presented in his *Critique of Pure Reason.*[124]

An antimony is a logical paradox – two statements, a thesis and antithesis, seem to be equally logically required yet in contradiction. In this context, to say they are in contradiction means not merely that they are mutually inconsistent, but that they are the only logically possible alternatives. This suggests not merely that if the thesis is true then the antithesis must be false (and vice versa) but also that if the thesis is proven to be false, the antithesis must necessarily be true (and vice versa).[125] For reasons that do not concern us here, Kant identifies four antinomies that he divides into two dyads: two "mathematical"

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[121] SCHROEDER, VESTAL, *supra* note –, at 12-14, 31-32.

[122] Another way of saying this is that Hegel's logic is atemporal. From the perspective of eternity, potentiality and actuality – what may happen and what has happened – are one and the same.

[123] HEGEL , *supra* note –, at 13.

[124] IMMANUEL KANT, THE CRITIQUE OF PURE REASON (J.M.D. Meiklejohn trans. 1990).

[125] JOAN COPJEC, READ MY DESIRE: LACAN AGAINST THE HISTORICISTS 218 (1994).

antinomies and two "dynamical" antinomies. He claims to solve the two mathematical antinomies by showing that neither the thesis or antithesis is true because there is a heretofore unrealized third alternative that may be true.[126] He claims to solve the two dynamic antinomies by arguing that both the thesis and antithesis are true, but that their contradiction is merely apparent so that, in fact, the two statements can be reconciled.[127]

It is Kant's third antinomy of freedom and nature that concerns us. The thesis of Kant's first antinomy is freedom can exist in the world.[128] For this purpose Kant is referring to negative freedom as the uncaused cause – the potential for pure spontaneity, action beyond necessity. Like all of Kant's theses, this is supposed to be a dogmatic proposition posited by reason alone.[129] The antithesis, however, is that everything is subjected to the causal laws of nature – there are no uncaused causes and, therefore, no freedom.[130] Like all of Kant's antitheses, this is an empirical proposition reached by applying logic to our experience of the world.[131]

As this is a dynamic antinomy, Kant must solve this paradox by arguing that the contradiction between the two propositions is only apparent. If they are properly understood, then they can be reconciled. Indeed, Kant argues, both propositions are true, *but about different aspects of the world*. To show this, Kant must rely on his famous distinction between the phenomenal – the empirical, contingent, changing world of appearance that we can know from experience – and the Noumenal – the transcendental, necessary, eternal world of essences, or the "thing-it-itself" which we do not know directly, but can infer through logic.[132] It is true, Kant states, that the entire phenomenal world is natural and therefore subject to the laws of nature – i.e. everything empirical thing is caused.[133] It is also true, however, that freedom should exist in the transcendental, non-empirical world of the noumena.[134] Indeed, these conclusions seem

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[126] In other words, the two poles of the mathematical antinomies are not contradictories, but merely contraries in dialectic relationship. In a dialectic opposition, one contrary merely denies the truth of the other solution, but this negation "does not exhaust all the possibilities but leaves behind something on which it does not pronounce. COPJEC, *supra* note –, at 219. Consequently "rather than despairing over the fact that we cannot chose between the two alternatives, we must come to the realization that we need not choose, since both alternatives are false". *Id*. at 218.

[127] He argues that "no real contradiction exists between them, and that, consequently, *both may be true*." KANT, PURE REASON, *supra* note –, at 316.

[128] *Id*. at 252.

[129] *Id*. at 236-37.

[130] *Id*. at 286.

[131] *Id*. at 266.

[132] Robert Merrihew Adams, *Introduction to* IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON vi, ix (Allen Wood Ed. & George Di Giovanni trans., 1998), Schroeder, *The Stumbling Block*, *supra* note –, at 285.

[133] KANT, PURE REASON, *supra* note –, at 302, Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality and Legal Scholarship*, 44 WM & MARY L. REV. 263, 286 (2002) [hereinafter, Schroeder, *The Stumbling Block*].

[134] KANT, PURE REASON, *supra* note –, at 302, Schroeder, *The Stumbling Block*, *supra* note –, at 286

necessarily to follow from his definitions of phenomena and noumena.[135] If a "noumenon" were caused by something else, then it would be contingent on that other thing and, therefore, not a noumenon. Conversely, if a "phenomenon" were free of an external cause, then it would not be a mere phenomenon, but a noumenon.

The question that this analysis proposes is, if freedom is noumenal, can it manifest itself in the phenomenal world or is merely a theoretical construct?[136] To put this in Kant's idiosyncratic terminology, is freedom "practical?"[137] More specifically, since each individual human being is embodied and, therefore, phenomenal,[138] can man achieve freedom?

In the *Critique of Pure Reason* Kant claims to show that freedom is at least theoretically possible in the phenomenal world. He argues that although all phenomena are caused by something else, the cause need not itself be phenomenal. A phenomenon can be caused by a noumenon.[139] Because noumena are free (uncaused), their free acts can appear in the world through the phenomena they cause. Although each individual human being is phenomenal, man's essence (his spirit or soul, his status as the liberal autonomous individual) is noumenal and therefore free.[140] This implies that it is at least theoretically possible that the noumenal aspect of man can actualize his freedom by causing his phenomenal self to act. In the *Critique of Practical Reason* Kant tries to prove not merely that practical reason is theoretically possible but that it exists (or, at least that we have good reason to think it exists).

There are as many problems raised in this analysis as are solved. Even ardent Kantians are somewhat embarrassed by it.[141] Hegel called Kant's argument "a whole *nest* . . . of faulty procedure."[142] It is not my goal to offer a comprehensive critique of Kant here. My limited point is that, as I have argued

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[135] KANT, PURE REASON, *supra* note –, at 302-303, Schroeder, *The Stumbling Block*, *supra* note –, at 287.

[136] KANT, PURE REASON, *supra* note –, at 302, Schroeder, *The Stumbling Block*, *supra* note –, at 286

[137] IMMANUEL KANT, THE CRITIQUE OF PRACTICAL REASON 138 (T.K. Abbott trans. 1996).

[138] KANT, PURE REASON, *supra* note –, at 307.

[139]

> Is it not . . . possible that, although every effect in the phenomenal world must be connected with an empirical cause, according to the universal law of nature, this empirical causality may be itself the effect of a non-empirical and intelligible causality -- its connection with natural causes remaining nevertheless intact?

Id., at 306. *See also* Schroeder, *The Stumbling Block*, *supra* note –, at 287-88.

[140] KANT, PURE REASON, *supra* note 28, at 307.

[141] For example, Henry Allison prefaces his half-hearted defense of Kant's analysis of the antinomies by stating that his "goal is to show that, although hardly free from difficulty, they are not as hopelessly confused as Kant's critics generally assume." HENRY ALLISON, KANT'S TRANSCENDENTAL IDEALISM: AN INTERPRETATION AND DEFENSE 36 (1983).

[142] G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 195 (A.V. Miller trans. 1969) [hereinafter, HEGEL, LOGIC]. Hegel accuses Kant of committing the logical error of *quaternio terminorum* – a sort of failed syllogism. *See* David Gray Carlson, *Hegel's Theory of Quantity*, 23 CARDOZO L. REV. 2027, 2048-51 (2002) [hereinafter, Carlson, *Quantity*]..

elsewhere,[143] much of Hegel's famous speculative logical method can be seen as being inspired by Kant's idea of antinomy.

I would characterize Hegel's complaint against Kant as an accusation that Kant does not have the courage of his own convictions and is afraid to follow his insights to their logical extremes. Hegel, in effect, criticizes Kant for thinking that there were only four antinomies. Rather, Hegel's entire universe is constituted by a fundamental, essential contradiction.[144] Further, Hegel criticizes Kant for thinking that contradiction is a problem that must be "solved." Contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement . . . "[145] In other words, contradiction is a fact. It is correct that contradictions are unstable and must be resolved, but each resolution is temporary and leads to a new contradiction ad infinitum. But, far from being frightening or disturbing, this merely means that the universe is dynamic, not static. Contradiction is the engine of change. Of course, this means that Hegel's rejects the Kantian noumenal-phenomenal distinction. To Hegel, there can be no necessary, permanent, unchanging essence (noumenon) behind the contingent, temporary, empirical world of appearances that is in a constant state of flux. As we shall see, to Hegel, it is appearance all the way down.

Finally Hegel's sublative logic can be seen as a rejection of Kant's specific claims to have solved his four antinomies by assuming that he had to show either that both thesis and antithesis were true, but not in contradiction, or that both the thesis and antithesis were false because there is a third alternative. In contrast, through sublation (the standard but poor English translation of Hegel's term for the logical method of resolving contradiction) one realizes that both sides are simultaneously equally true and false, thereby generating a third alternative that simultaneously negates and preserves the two earlier propositions.[146]

That is, Hegel's sublative logic consists first in positing an understanding – a simple one sided

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[143] *See* Schroeder, *Lacanomics*, *supra* note –.

[144] David Gray Carlson, *Hegel's Theory of Quantity*, 23 CARDOZO L. REV. 2027, 2046 (2002) [hereinafter, Carlson, *Quantity*].

[145] HEGEL, LOGIC, *supra* note –, at 438. Hegel is particularly hard on those philosophers who try to deny or do away with contradiction. He says about Kant (specifically with respect to Kant's attempt to resolve his second antinomy):

> that the world is *in its own self* not self-contradictory, not self-sublating, but that it is only *consciousness* in its intuition and in the relation of institution to understanding and reason that is a self-contradictory being. It shows an excessive tenderness for the world to remove contradiction from it and then to transfer the contradiction to spirit, to reason, where it is allowed to remain unresolved. In point of fact it is spirit which is so strong that it can endure contradiction, but it is spirit, too, that knows how to resolve it. But, the so-called world . . . is never and nowhere without contradiction, but it is unable to endure it and is, therefore, subject to coming-to-be and ceasing-to-be.

Id. at 237-39.

[146] Schroeder, *Lacanomics*, *supra* note – , at * (citations omitted).

proposition with respect to a concept.[147] Dialectical reasoning realizes that the understanding is inadequate and contradicts it.[148] It points out that the understanding always leaves something out, and therefore, implies its negation Consequently, "[a]s its name suggests, dialectical reasoning always reads double."[149] Speculative reasoning realizes that there is truth to both propositions – the understanding does have something true to say, but the dialectic is equally correct that the understanding is inadequate – as well as something false – neither side completely captures the totality of the concept being considered.[150] This form of reasoning is "speculative" in the sense of investment - it is the excess return on -- the beyond of -- the understanding and the dialectic.[151] "[Speculative reasoning] affirms their difference . . . as such (which paradoxically, is the *same identical* lack in each of the subordinate terms)."[152]

"Speculative reasoning does not so much "solve" as to temporarily and contingently "resolve" the contradiction in a process which Hegel called *Aufhebung*[153] (sublation). The speculative proposition, however, immediately becomes a one-sided proposition of understanding. That is, through speculation the thinker speculates that "if z were the case, this would resolve the contradiction of x and y." The conclusion "the speculation is correct, and z is the case" is itself a one-sided understanding that forgets that, although z tries to resolve x and y, there was a true moment of contradiction between x and y that survives. Dialectic reasoning remembers this and contradicts the understanding by proposing a contradictory reading of the speculation. The thinker then forms a new speculation, that becomes an understanding, that generates a dialectic, etc.

Regardless of these differences between Hegel and Kant, I believe that the *Philosophy of Right* can be seen as Hegel's struggle to come to grips with the specific contradiction that Kant identifies in the third antinomy: freedom v. causality. In his analysis, Hegel, on the one hand, accepts Kant's proposition drawn from experience that all nature is subject to natural laws of causation. But this means that nature is fundamentally unfree and implies that actual (practical) freedom must be unnatural by definition. And yet, on the other hand, Hegel also begins his analysis by contingently accepting Kant's presupposition that the

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[147] Understanding is "the intuition that 'immediately' perceives a concept as an uncomplicated entity." David Gray Carlson, *Hegel's Theory of Quality*, 22 CARDOZO L. REV. 423, 443 (2001) [hereinafter, Carlson, *Quality*]. As I have said elsewhere "Understanding is 'common sense. It abstracts an immediate affirmative moment of a concept and assumes that it is its entire truth." Schroeder, *Lacanomics*, *supra* note –, at *.

[148] "Dialectic reasoning sees that all concepts are, in fact, mediated "and the understanding has merely isolated the affirmative existent part of the concept." Carlson, *Quality*, *supra* note –, at 443.

[149] *Id*. at 445.

[150] Speculative reasoning "brings forth the truth that between the two extremes . . . there is difference." *Id*. at 447. "Difference is, paradoxically, what the two extremes have in common. Speculative reasoning recognizes this differences as a surplus implied by the thesis and antithesis." Schroeder, *Lacanomics*, *supra* note –, at *.

[151] Carlson, *Quality*, *supra* note –, at 445.

[152] *Id.* at 448.

[153] Schroeder, *Laconomics*, *supra* note –, at *.

most basic notion of human personality is self-consciousness as free will. Hegel seeks to prove this presupposition (that freedom is possible) by finding that freedom actually does exists in the phenomenal world.

Because Hegel rejects transcendence, he can not adopt Kant's proposed answer to this problem: freedom is noumenal, but noumena can cause phenomena. Indeed, to Hegel, Kant's proposal answers nothing. According to Kant's own theory, we can know nothing about the noumenon. Consequently, Kant's proposition is equivalent to saying that we can know nothing about freedom. Hegel is, in effect responding to Kant "You are being inconsistent. Your philosophical writings show that you know a lot about freedom. By your definitions, therefore, freedom must be actual."

Hegel's counterproposal is that actual freedom is not natural but artificial: a human creation, a hard won achievement, created out of natural materials through the development of abstract right, morality and ethical life. Legal subjectivity (as well as higher stages of personhood) is, therefore, not a natural state. Rather the story of the development of human consciousness, to Hegel, is the struggle of man to free himself from and overcome his natural limitations. "Hence the personality of the will stands in opposition to nature as subjective. . . . Personality is that which acts to overcome this limitation and to give itself reality."[154] Abstract rights are, therefore, the first most primitive step in man's attempt to actualize his freedom understood as the overcoming of nature. "The basis of right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free*, so that freedom constitutes its substance and destiny and the system of right is the actualized freedom, the world of spirit produced from within itself as a second nature."[155] Rights are, therefore, not merely unnatural in the sense of artificial (man made), they are a means by which man distinguishes himself from nature.[156]

B. First Occupancy is a Wrong. There is a widespread misperceptions among American legal scholars that Hegel adopts a first occupancy theory of property justification similar to the more familiar Lockean theory.[157] This is based on the following passage from the *Philosophy of Right*:

> That a thing belongs to the person who *happens to be the first* to take possession of it is an immediate self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else.
>
> The above determination have chiefly concerned the proposition that the personality must have existence in property. That is the first person who takes possession is also its owner, then, is a consequence of what has been said. The first is not the rightful owner

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[154] HEGEL, *supra* note –, at 70.

[155] *Id*. at 35.

[156] Because there is no transcendence in Hegel's system, spirit only exists through matter, rights are created out of natural materials, so to speak. Accordingly, "Natural law or philosophical right is different from positive right, but it would be a grave misunderstanding to distort this difference into an opposition or antagonism; . . ." *Id*. at 29.

[157] *See e.g*. STEVEN R. MUNZER, A THEORY OF PROPERTY 69-70 (1990).

> because he is the first, but because he is a free will, for it is only the fact that another comes after he which makes him the first.[158]

To interpret this as an endorsement of first-occupancy as a *justification* for property rights, generally, or any specific individual's claims of property, specifically, is to take it out context. It also suggests that the reader has limited his study of the *Philosophy of Right* to the section most specifically addressed to property and did not continue on to Hegel's theory of justification. This passage appears in an early section of the chapter on abstract right devoted exclusively to an analysis of the logical function property serves in a modern liberal society.

As described above, Hegel's analysis of property purports to explain the function of the three traditional elements of possession, enjoyment and alienation. In this context it is clear that the quoted language is not intended to be a justification of either property generally, or specific claims to property, but is merely a description of what a claim to possession is.[159] That is, possession is the claim of a person in possession to exclude subsequent claimants. Consequently, it is a truism that *if* the first claimant has a valid right of possession, *then* a second party cannot claim it.

It would follow from Hegel's analysis of possession that first-occupation could not serve as *its justification*. First and foremost, Hegel's analysis of property is "logical" not empirical, but first-occupation is empirical in nature. To argue that the fact of first-occupation justifies the claim to possession is to conflate fact and law.

A more important objection is that first-possession is by definition one-sided and unilateral. The goal of property is the reciprocal recognition that only occurs at the forging of the common will at the consummation of property at the moment of alienation in exchange (*i.e.* contract). To understand why this means that first-occupation can not justify a claim of property, we must examine more closely Hegel's definition of what right is.

One can not understand Hegel's analysis of property if one limits one's reading of Hegel to that portion of the *Philosophy of Right* that on its face relates most directly to property, namely the Section 1 (entitled *Property*) of the first chapter (entitled *Abstract Right*). One must at the bare minimum start with his *Preface* and *Introduction* and read through to Section 3 (*Wrong*). Even then, ones comprehension will be partial if one is not already familiar with his idiosyncratic vocabulary and does not understand how these sections fit within Hegel's entire schema of right. Like every other aspect of Hegel's political philosophy, his concept of "right" is radically different from both the colloquial intuition or that reflected in classical liberalism.

Surprisingly, Hegel does not define or justify "rights" at the beginning of his chapter on "Abstract Right", which probably leads most readers to assume that he is adopting a standard definition. The meaning

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[158] HEGEL, *supra* note –, at 81.

[159] As Hughes correctly notes, although "much of Hegel's language *seems* to support either a 'first possession" theory or a labor theory (emphasis added)" of property, in fact his theory is quite different. Hughes, *supra* note –, at 334.

of "right" only becomes clear in his subsequent section on "wrong".[160] This is because, to Hegel, right can only be understood through wrong. Right does not exist without wrong because right can only be understood as the righting of a wrong. Paradoxically, wrong is the condition precedent of right and right can only be understood after one understands wrong (which is why he postpones the definition of right until the chapter on wrong). This necessarily springs from Hegel's metaphysics understood as a radical rejection of Kant's division of the world into the noumenal thing-in itself and the phenomenal empirical world in which we live.

Hegel's analysis of "wrong" is somewhat better known to American criminal law theoreticians because the bulk of it centers around "crime" and a theory of retribution. However, although crime, to Hegel, is the most extreme form of wrong, he identifies two lesser forms: civil wrong and deception. Surprisingly, Hegel's exemplar of civil wrong is *claims of first occupation*. It is only by understanding why first occupation is wrong can we understand what a right is in general and what a justified property right would be, specifically.

Hegel's discussion in the *Philosophy of Right* is difficult because it is short and allusive, and is couched in his idiosyncratic terminology. Moreover, as mentioned, it incorporates Hegel's metaphysics and ontology. That is, it is difficult if not impossible to follow his discussion without at least passing familiarity with his conceptions of "existence", "appearance", "semblance", and "judgment" developed in his *Science of Logic*

Hegel describes the relationship between right and wrong as follows:

> The principle of rightness, the universal will, receives its essential determinate character through the particular will, and so stands in relation to something inessential. This is the relation of essence to its appearance . . . In wrong however, appearance proceeds to become mere semblance or show. A semblance is a determinate existence inappropriate to the essence, namely an empty detachment and positing of the essence, as the power and authority over the semblance. The essence has negated that which negated it, and is thereby confirmed. Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid.[161]

That is, right is essence, and wrong is mere appearance. At first reading this seems consistent with fairly common notions of right – particularly a neo-Platonic idealist idea that what is is good and that evil is a negative quality (a lack of being). Right is what as left when wrong is eliminated. As such, wrong is destined

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[160] The discussion of wrong serves as the transition from the realm of abstract wrong to the next higher regime of interrelationship – morality. In the chapter on "wrong" Hegel argues that abstract right is only externally imposed upon the subject. One reason for this are briefly covered in this Article. First, as right is intersubjective by nature, rights come to the subject externally – through the consent of the other. Of course, in contract, the subject herself consents to the right, note that this is at this stage contingent or accidental. *See infra* text at notes –.

[161] HEGEL, *supra* note –, at 118..

to pass away and whatever is left is definitionally good.[162]

Such an interpretation is antithetical to Hegel's insistence that there is no such thing as a noumenon and that everything is phenomenal (appearance) – indeed to Hegel essence is itself nothing but an appearance. But what, then, could Hegel mean in identifying right with essence in contrast to wrong as appearance?

The difference to which Hegel refers is not to a distinction between essence and appearance *per se* but to a distinction between a correct and deluded understanding of the relationship between essence and appearance. Wrong is a delusion – or in Hegel's terminology, a semblance, and right is nothing but the dispelling of this delusion. Specifically, wrong is the delusion that a specific appearance is essential – that it is necessary and will not pass away. Essence appears when this delusion, like all appearances, passes away.

Essence must be distinguished from *being*.[163] Essence is not something that is, it is something that *does*.[164] Essence, properly understood, is the enduring principle that appearance must disappear. Hegel agrees with the usual intuition that by definition that which is mere appearance is temporary and contingent and is doomed to pass away. Indeed, this is the definition of the word. However, he disagrees with Kant's assumption that this implies that there must be a eternal and necessary reality – a noumenon or thing-in-itself – that lies underneath appearance. Rather, each appearance gives way to another appearance which gives way to another appearance *ad infinitum*. Remember Hegel believes that there is no such thing as potential or existence that does not have actual manifestation in the material world. But everything in the physical world is destined to pass away. Insofar as it appears in the world, therefore, essence is doomed to pass away like all other appearances. Consequently, essence exists only insofar as it disappears.[165]

In other words, Hegel's understanding of essence looks forward to Lacan's notion of the feminine masquerade. Wrong is the error that the mask is hiding something and right is the understanding that life is nothing but a masquerade.

This does not mean Hegelianism is relativistic or that it denies objective truth. Rather, it means that Hegel is radically materialistic. His recognizes that the entire objective world is in a constant state of flux and change. Everything that lives is destined to die. The universe is dynamic, not static. This is the essence of the universe.

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[162] As I and my co-author have noted elsewhere (Schroeder & Carlson, *Essence of Right, supra* note –, at 2482) even respected Hegel scholars have so misinterpreted this passage. *See e.g.* ROBERT R. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION 156 (1997).

[163] Hegel begins his *Science of Logic* with a consideration of pure being. He finds that being, as a concept, is self-contradictory and must go under through the logic of sublation. He does not discuss essence until over three hundred pages later. In Carlson's words "For Hegel, Essence is simply the negation and recollection of what was – Being. Essence is *not* Being and has no further content than that." Carlson, *Reflection, supra* note –.

[164] Schroeder & Carlson, *Essence of Right, supra* note –, at 2485.

[165] Hegel describes essence as "what it is through a negativity, which is not alien to it but is its very own, the infinite movement of being." HEGEL, LOGIC, *supra* note –, at 390. In Carlson's words . . . when Essence manifests what it *is*, it shows that it is *not*. *In other words,* essence erases itself. . . . When Essence posits its own non-being, it cancels itself. Carlson, *Reflection, supra* note –.

Wrong consists of *semblance* – the claim that which is mere contingent and temporary appearance is, in fact, necessary and eternal essence. "Wrong is thus the semblance of essence which posits itself as self-sufficient."[166] It is the denial of the contradiction, flux and dynamism of the universe. The three types of wrong identified by Hegel relates to three ways different forms of semblance.

To start where Hegel ends, crime is the worst type of semblance in that it is a complete denial of right – in Hegel's terminology an infinite negative judgment.[167] By denying right, the criminal is making a claim of his own over and against the world. Consequently, it is a radically self-contradictory position. This is why crime logically requires its reversal and negation through retribution. In Hegel's analysis, each criminal by committing a crime necessarily, albeit unconsciously, calls for his own punishment.[168]

Deception is somewhat less culpable than crime as it pays a back-handed compliment to right. In deception, the fraudster does not deny the existence of right, but she makes a knowingly false claim to right in the hopes of deluding her victim into accepting the false claim[169] That is, for a fraud to work, the fraudster must know either that right exist, or that at least society and her victim believe that it does.

Civil wrong is the least culpable form of wrong in that it is mere mistake or *self*-deception.[170] Civil wrong is the

> negative judgment pure and simple where merely the particular law is violated, while law in general is so far acknowledged. Such a dispute is precisely paralleled by a negative judgment, like, This flower is not red": by which we merely deny the particular colour of the flower, but not its colour in general. . . .[171]

In other words, when you commit a civil wrong you acknowledge and respect the existence of right, but are mistaken in thinking that you are entitled to the right. Wrong is nothing but the unilateral claim to have a right. Indeed, to Hegel *all* claims to abstract rights start as civil wrongs.

Why is a claim to right a wrong? Precisely because it is a claim that something *is*. "Wrong is . . .

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[166] HEGEL, *supra* note –, at 116.

[167] "[In crime] I will the wrong and do not employ even the semblance of right. . . . The difference between crime and deception is that in the latter, a recognition of right is still present in the form of the action, and this is correspondingly absent in the case of crime." *Id*. at 116.

[168] In Hegel's metaphor "The Eumenides sleep, but crime awakens them; thus the deed brings its own retribution." *Id*. at 129.

[169] "In this case, the wrong is not a semblance from the point of view of right in itself; instead, what happens is that I create a semblance in order to deceive another person. When I deceive someone, right is for me a semblance." *Id.* at 116. *See also*, *supra* note –,

[170] "If the semblance is present only in itself and not also for itself – that is, if the wrong is in my opinion right – the wrong is unintentional. Here, the semblance exists from the point of view of right, but not from my point of views." *Id*. at 116.

[171] G.W.F. HEGEL, HEGEL'S LOGIC 238 (William Wallace trans. 1975).

the semblance of essence which posits itself as self-sufficient."[172] As I and my co-author say elsewhere:

> Civil wrong, Hegel says, is to be considered right in itself. What is right in itself has a determinate ground, and the wrong which I hold to be right I also defend on some ground or other." In other words, a civil wrongdoer bases his claim of right on legal research—on some ground in the positive law of statutes or judicial precedents. Such a legal claim, however, is fixed and rigid—or, as Hegel says, finite. As such, it is not "true" or "right." The true and the right are precisely the *disappearance* of such fixities. "It is in the nature of the finite and particular that it leaves room for contingencies; collisions must therefore occur. . . ."[173]

Hegel's exemplar of civil wrong is first occupation. In the liberal "state of nature" all objects (other than our bodies) are unoccupied and may be occupied by any individual. But this means that each individual's claim to possess something is in conflict with the potential claims of any other. The function of property is the creation of legal subjectivity though mutual recognition in the creation of a common will. But a unilateral claim to ownership (first-occupation) is a failure to recognize the fact that it the common will that justifies property is itself radically contingent and temporary – it is mere appearance. To make a claim is an act of *individual* will that can only become a right when another agrees to it, changing its status from individual to common.

Prior to contract, there can only be a "collision" of competing claims to right.[174]

> Different persons may claim "possession" of the same thing, but they have no logical justification for imposing their particular will against each other. Insofar as any claimant successfully excludes others from a contested object, this is merely a result of brute force. All such claims to possession are, therefore, merely appearance, semblance. It is only when persons mutually agree to recognize each other's respective claims that possession can for the first time can seen as rightful, and legal (*i.e.* property).[175]

In Hegel's words:

> For the parties involved, the recognition of right is bound up with their particular opposing interests and points of view. In opposition to this *semblance,* yet at the same time *within the semblance itself* . . . right *in itself* emerges as something represented and required. But it appears at first only as an *obligation*, because the will is not yet present as a will which

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[172] HEGEL, *supra* note –, at 116.

[173] Schroeder & Carlson, *Essence of Right, supra* note –, at 2502-03 (quoting HEGEL, *supra* note –, at 117-18).

[174] HEGEL, *supra* note –, at 117.

[175] Schroeder & Carlson, *Essence of Right, supra* note –, at 2504.

> has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view.[176]

In other words "each person wills what is right, and each is supposed to receive only what is right; their wrong consists solely in considering that what they will is right."[177] This relates to the external and objective (*i.e.* intersubjective) nature of abstract right, as opposed to morality – understood as the internalization and subjectification of right – and ethical life – understood as the reconciliation of one's subjective morality with the objective standards of society. When an individual seeks to enter into a contract to buy a widget, she does not as an empirical matter have the conscious thought "I wish to achieve legal subjectivity by creating a common will with another person in which we recognize each other." Indeed, to have such a thought would presuppose the rich inner life that does not concern the legalistic aspect of personality that I am calling subjectivity.

Rather, in the realm of contract, the individual probably thinks something like, "I have money and want a widget and that person can sell the widget to me." The widget owner's reciprocal thought is probably something like "I have a widget and want money and that person can buy my widget from me." Note that both of these individual thoughts are in and of itself wrongful in that they claim a non-existent state of affairs. Moreover, both conflict with the categorical imperative to be a person and treat others as person. Rather than treating the other person as an end in her self, each person approaches the other as a means to her own end (to acquire a widget or cash, respectively).

When the two parties come to a meeting of the minds in contract, however, these two wrong wills, contingently and temporarily come together to form the common will that retroactively resolves the problem posed by the categorical imperative. Each party by recognizing that the other party had a claim to the object to be exchanged, retroactively rights the wrong through consensus. Abstract right is not a pre-existing something that exists, it is temporarily created only in the righting of the wrong of unilateral claims. That is, it is *abstract*, not necessary and pre-existing.

Note, that in this example, this specific abstract "right" is only rightful between the two parties joined in the common will with respect to this specific contract. Insofar as the parties claim "rights" beyond this their claims are wrong with respect to the rest of the world. It is only through the common will of society expressed in positive law that can right this wrong. And even positive law is "wrong" insofar as it pretends to be anything other than common law – that is, artificial, contingent and temporary.

To put this more simply, rights are essential, but essentiality is appearance *understood as mere appearance*. Any affirmative statement that a right *is*, or that someone *has* a pre-existing claim is wrongful. Abstract right only appears retroactively through the righting of this wrong. In other words, abstract right is not a fact, *it is an act*.

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[176] HEGEL, *supra* note –, at 117.

[177] *Id*. at 118.

C. Does Intellectual Property Rights Have a Special Status as Positive Law.

To recap, in Hegelian jurisprudence there are no natural law rights of any kind, let alone a natural right of property. First occupation cannot serve as a justification for any specific property claim because claims of first occupation are civil wrongs. Nevertheless, Hegel argues that a good society must adopt some form of abstract right because abstract right serves a function in the actualization of freedom in the world by helping to create that aspect of personality that I am calling legal subjectivity. Specific property rights can only be established and justified through a positive law that establishes a regime of abstract right. We have seen that Hegel argues that it is appropriate to analyze intellectual property as a form of "true" property within the regime of abstract right. The question then becomes, does Hegelian logic suggest that society *should* adopt an intellectual property regime?

Some legal commentators have assumed that, because the property plays a role in the creation of personality then a Hegelian analysis should have an especial solicitude towards the protection of intellectual property because artistic creations are so uniquely personal.[178] This position, at first blush, seems to be buttressed by the fact that although Hegel offers an extensive exegesis of property generally in the *Philosophy of Right*, copyright is one of the only *specific* category of property that he discusses. As we have seen, some analysts go further and think that the logical implication of Hegel's personality theory – albeit one that Hegel himself may not have recognized – is that society should adopt specific rules protective of intellectual property, such as the Continental moral right. Once again this is a misinterpretation of Hegel and represents a romantic notion of personality and artistic creation that he completely rejects.

To put this more strongly, this interpretation inverts Hegel's point. Hegel discusses copyright not because it is unique, but precisely to rebut arguments as to its uniqueness. From the perspective of abstract right, intellectual property is completely banal. As Natanel notes,[179] earlier Continental philosophers such as Kant and Fichte argue that copyright could not correctly be analyzed as property because of its unique content. In this context, it seems clear that the primary reason why Hegel discusses copyright in the *Philosophy of Right* was precisely in order to challenge this conclusion.

To Hegel, from the formal viewpoint of abstract right, a work of art and the right to copy it, are distinguishable from the *ability* to create art. That is, the creation and the right to copy the creation, are external to personality, in the same sense as more conventional objects of property such as goods. They are properly objects, understood as means to the creator's ends, and are, therefore, properly exploited in possession, enjoyment, and alienation. The alienation of creations and copyrights, therefore, are permitted because they are not essential to personality itself.

Once again, I believe that Hegel is even more radical than he appears at first blush. I think his point is not just the simplistic one of showing how copyrights are similar to other objects in form, despite their content. I think that his implicit point is to argue that *copyrights are the exemplars of property because of their radical externalized banality!* Intellectual property is the most abstract and externalized of objects. That is, the very thing about intellectual property that most troubles so many property scholars –

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[178] *See e.g.* Hughes, *supra* note –.

[179] Netanel, *supra* note –, at 19-20.

its intangibility – is to Hegel what makes it most property-like. Like a modern Hohfeldian lawyer, Hegel emphasizes that property is a purely legal relationship between and among legal subjects with respect to objects that is distinct from the empirical physical relations that natural people have with physical things. Right is not natural but artificial.

We can now explain why Hegel insists that creations, and the right to copy creations, are external to the subject. The objects of intellectual property have no separate natural, empirical existence They "exist" contingently and only insofar as, not only the creator, but other subjects, recognize them "as such." In another context, Lacan coined the term "extimacy"[180] which beautifully captures Hegel's idea of externality. Although at one level, we might have such a close emotional tie to our creations that they seem internal or intimate to ourselves, in fact, they only exist as creations at the moment that we communicate them to another. I might have an idea for a painting or, more prosaically, a law review article, but it does not come into existence "as such" until I express it in a way that is intersubjectively recognizable by others. That is, the idea of the painting is not a painting until it is painted, and the idea of an article is not an article until it is written. Even contemporary "conceptual art" which is not intended ever to be manifested in a physical form does not exist as art until the artist communicates (whether orally, in writing or otherwise) the concept to at least one other subject. Consequently, that which seems intimate, in fact, only comes into being the moment when it is externalized – in Lacan's terms, when it becomes extimate.

As an extimate externalized object, art can properly serve as the means to the owner's ends. This means that the romantic misinterpretation of copyright as unique and in need of especial protection in fact, would lead to very un-Hegelian view that copyright is not a full form of property. That is, the romantic assumes that, because artistic creations are so closely related to the creators personality (*i.e.* they are intimate), society should protect rights of possession at the expense of powers of alienation such as the moral right that gives an artist some control over the integrity of his creation even after it is sold. But this treats the creation not purely as a means, but partially as an end – an extension of the artist herself. By definition, if the art is an end it cannot serve as an object and cannot rightfully be subjected to the regime of property. The logic of property is only consummated in the creation of the common will through mutual alienation in a contract that momentarily and retroactively rights the wrong of first appropriation. Consequently, for an object to be fully an object of property it must be at least theoretically fully alienable, and any object that is not fully alienable can only be an object of a partial property regime.

Accordingly, any continued sentimental attachment of the creator to her externalized creations, at the level of *abstract right*, is a mere fetishism that threatens to stand in the way of the creation of legal subjectivity! Society very well may decide that it wants to grant a moral right to artists, but it cannot look to Hegel for a justification. However, Hegel would acquiesce to society's decision to do so, *if* society adopted a positive law of property with respect to *other* objects in the economy.

D. Pragmatism and Trade Secret.

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[180] Jacques-Alain Miller, *Extimite* (Elisabeth Doisneau eds. & Francoise Massardier-Kenney trans.), *in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE AND SOCIETY 74,81 (March Bracher, et al., trans., 1994). Lacan argues that subjectivity is itself extimate in the sense that he agreed with Hegel that one can only become a subject by being recognized as such by another subject. Consequently, that which we feels is most internal to ourselves – our very sense of being a self – in fact, only exists external to ourselves.

Should society adopt an intellectual property regime? And if it does so, what should be the contours of such a law? Hegelian logic has absolutely nothing to say on this subject. The content of any specific property regime can only be determined by positive law[181] and positive law is a creature of pragmatic reasoning. Consequently, Hegel can only tell us four things: i) logic suggests that in order for society to enable its members to actualize their freedom in the world, it should adopt a private property regime with respect to some objects; iii) property consists of the intersubjectively recognizable rights of possession, enjoyment and alienation of an object, understood in the most broad and abstract sense; iii) every citizen in society should have a minimal amount of property in order to actualize her freedom (although there is no logical necessity for an equal distribution of wealth); and iv) intellectual property can properly be treated as objects of property. However, so long as society establishes property rights with respect to some classes of objects. Hegelian *logic* does not dictate that: a) society must adopt an intellectual property regime; or that b) if society decides to offer some protection to intellectual property, that then it must recognize it as property for any or all purposes.

For example, in *United States v. Carpenter*[182] and *United States v. O'Hagan*[183] the U.S. Supreme Court held that, because state law treated confidential information as property or quasi property,[184] then it also constituted "property" within the meaning of the Federal Wire Fraud statute and the rules proscribing insider trading under the federal securities trading law, respectively. Commentators have generally roundly criticized these cases as an unwarranted extension of state law that threatens to criminalize ordinary contract disputes and contend that trade secrets are better analyzed in terms or contract and tort.[185] Surprisingly, a Hegelian analysis has little to add to this debate. I say "surprisingly" because I have just argued that state trade secret law squarely falls within Hegel's understanding of property. Nevertheless, it does not follow from the fact that the states have decided to treat trade secrets as property for some purposes, that the state or the federal government must, or even should, treat trade secrets as property for all purposes. Indeed, despite the fact that I frequently represented trade secret claimants while I was still in practice, and regularly maintained on my clients' behalf that trade secrets were property, I instinctively share the concerns of critics that the *Carpenter* and *O'Hagan* are as unwise as they are unwarranted.

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[181] "Right is in general *positive* (a) through its *form* of having validity within a [particular state] state; and this legal authority is the principle which underlies knowledge . . . or right, i.e. the positive science of right. (B) In terms of *content*, this right acquires a positive element(alpha) through the particular *national character* of a people. . . " HEGEL, *supra* note –, at 28.

[182] 484 U.S. 19 (1987).

[183] 521 U.S. 641 (1997).

[184] As others have correctly noted before me, although I argue state trade secret law can be analyzed within Hegelian property principles, it is far from clear that state legislatures and courts have interpreted them as property for any let alone all purposes. *See supra* note –. Consequently, the Supreme Court's description of state law is suspect on its face. Indeed, it is telling that the Supreme Court does not cite a single state statute or case in support of its proposition.

[185] *See e.g.* Bone, *supra* note –, Chiappetta, *supra* note –, Posner, *et al.*, *supra* note –, Coffee, *supra* note –.

What types of arguments should Hegel have us consider when deciding on a specific property law regime? He can't say anything other than that we must use pragmatic reasoning.[186] Hegel insists that his logical method is incapable of mandating pragmatic policy decisions. If it did, it would violate the very goal of political philosophy – to explain how man can manifest his freedom within society. If our specific decisions were mandated, we would not be free. Consequently, pragmatism turns out to be the corollary to Hegelian logic.

In his discussion of copyright Hegel throws out in passing one of its traditional pragmatic justifications – giving the author the right to control the copying of his words allows the author to capture the market value of his product thereby incentivizing people to create copyrightable works.[187] This should, however, not be interpreted as a logical mandate but only an example of the type of practical arguments that society might deem to consider in its discretion. Indeed, as an author, Hegel is hardly disinterested in the subject of copyright so his instincts are not necessarily to be trusted. I would mention in passing, that, although I have no idea what the early nineteenth century German copyright law might have been, I find it hard to believe that the presence or absence of copyright protection had any affect on Hegel's scholarly production.

These types of pragmatic arguments are familiar to anyone who has read the contemporary intellectual property literature. They are most closely associated with the law-and-economics movement which explicitly tries to quantify their analysis as cost-benefit analysis. But they can also be found in Lockean rights based and romantic personality analyses insofar as they discuss the supposed value and detriments of specific policy proposals. Elsewhere, I have strongly criticized the utilitarianism of the law-and-economics movement.[188] I have argued that the institution of private property can only be justified in terms of rights and freedom not by a cost-benefit analysis. Nevertheless, in this Article I concur with legal economists that it is appropriate for society to base its specific decision as to whether to recognize intellectual property (or any other specific claim to property) on precisely this type of practical considerations.

IV. Conclusion.

On the one hand, Hegel's property theory is powerful not merely because it is satisfying on a metaphysical level, but because its has surprisingly practical applications. Traditional property analysis finds many aspects of intellectual property doctrine to be mysterious and conclude that intellectual property may not be "true" property at all. If one applies an Hegelian analysis, however, these problems evaporate. These supposedly troublesome rules are shown not merely consistent with property categorization, they are explained by property analysis. As such, Hegelian analysis can be a tool in the development of a coherent, internally consistent positive law of intellectual property.

On the other hand, although Hegel's property theory implicates the most elevated goals – the

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[186] *See supra* note –.

[187] HEGEL, *supra* note 99-100. Hegel mentions that this pragmatic argument can be made to support a law against theft of any form of property.

[188] *See, e.g.* SCHROEDER, VENUS, *supra* note –.

creation of personality and the actualization of freedom, it proves to be a complete disappointment to the romantic who cherishes artistic creativity. Hegel's cannot be legitimately be used to bolster any argument that society must, or even should, adopt any form of intellectual property regime.

In the end, Hegel turns out to be an ironist like O'Henry. His story of property is a *Gift of the Magi* to romantics, springing a trick ending on his unsuspecting reader, Hegel beings with radical idealism of an exalted vision of freedom, but concludes with the banal pragmatism of the marketplace. Pragmatism turns out to be the necessary corollary to idealism. Consequently, although the *Philosophy of Right* masquerades as a poison pen letter to utlitarianiasm, it turns out to be a love letter in disguise.