Hegelian Vanity, Common Law Humility: On Legal Theory, Its Expression and Its Criticism

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The intellectual is constantly betrayed by his own vanity. God-like, he blandly assumes that he can express everything in words; whereas the things one loves, lives, and dies for are not, in the last analysis, completely expressible in words. To write or to speak is almost inevitably to lie a little. It is an attempt to clothe an intangible in a tangible form; to compress an immeasurable into a mold. And in the act of compression, how Truth is mangled and torn! The writer is the eternal Procrustes who must fit his unhappy guests, his ideas, to his set bed of words. And in the process, it is inevitable that the ideas have their legs chopped off, or pulled out of joint, in order to fit the rigid frame. All of which does not mean one should cease from trying to express the impossible. One should labor at that distant ideal unremittingly, but one should offer the results with some humility.

—Anne Morrow Lindbergh

I have been asked to comment on Arthur Jacobson's essay on Hegel's Philosophy of Right, and I shall do so, but I want to make clear at the start the motivation of my remarks. On reading the first draft of Professor Jacobson's paper, then hearing Professor Jacobson read at the Hegel and Legal Theory Symposium a selection of materials from that first draft, and now reading his revised manuscript, I have found myself unable either to accept or to reject his claims. And my inability does not stem either from a studied attitude of politeness or from a wish to remain above the argument. Instead, my inability to concur or deny derives from an inability to know how to take what he says, how to understand what he is claiming (on his own behalf or on Hegel's):

On one side, in Jacobson's paper there are insights about Hegel's philosophy and about our common law of such force that I wish to
praise them. Yet, on the other side of the ledger, there are many claims and assertions and remarks that simply baffle me as to their meaning, or their import; therefore, I am at a loss to understand them. And, without understanding, what comment, what criticism, is possible? This leaves me in the position of feeling not only quite cautious about commenting, but also quite chastened. Is it simply I who fails to understand, who cannot parse this prose? I should like to think not, but one can never be sure, a priori, about the correct answer to such a question.

My task becomes one of finding a way to say something useful about writing that, on the one hand, is so obviously relevant to one of my main interests, jurisprudence, but that, on the other hand, is so desperately out of reach. I have decided, after much thought and hesitation, to proceed in the only way that seems available to me: I mean to record as clearly, accurately, and fairly as I can the obstacles to understanding that I find in Jacobson’s (and, via him, in Hegel’s) text.

I. OVERVIEW

This symposium on Hegel and Legal Theory invites us to discover the relevance of Hegel, if any, to our various theories of law (or theories of particular areas of law, such as property, contracts, and the like). Jacobson has used this occasion for putting together a number of themes dealing with both Hegel and legal theory. The number of themes is daunting: there is, first of all, Jacobson’s interpretation of Hegel’s *Philosophy of Right*; then, too, he sketches two different typologies of jurisprudential theories; third, as a consequence of this sketch, Jacobson criticizes Hohfeld’s theory of correlative legal rights and duties; fourth, he offers some characterizations of the common law both as a legal system and as a legal theory; and fifth, he provides a conception of legal positivism and natural law theory which places them within the same type of jurisprudential theory.

This is a very full agenda, and some of its items are handled better than others. After a brief survey of Jacobson’s paper, I am going to offer some selective criticisms of these matters, criticisms that I hope illuminate not only their particular topics but also my basic point, which concerns the vanity of Hegelian theorizing and the contrasting humility of the common law.

Jacobson claims that Hegel’s philosophy of right is a “jurisprudence of right”; it expresses a theory of law in which legal rights are crucial or essential but legal duties are eliminated or de-emphasized.

The jurisprudence of right alters the correlation of rights with duties by suppressing, if not eliminating, duty. Duty is sometimes
present in this jurisprudence as auxiliary to right, sometimes only
as a way of talking about rights. Theorists of right give [duty] the
least possible role in the jurisprudence [of right].

Such a jurisprudence “breaks” the Hohfeldian correlation of legal
rights and duties. Thus, Hegel’s philosophy of right is an example
of what Jacobson calls a “correlation-altering” or “correlation-break-
ing” jurisprudence. Since this type of jurisprudence depends on the
possibility of altering or breaking the relations between legal rights
and legal duties, according to Jacobson, there can be no necessary or
logical correlation between legal rights and duties. But this denial of
correlation flies in the face of Hohfeld’s familiar claim that legal
rights and legal duties are necessarily or logically correlated legal rela-
tions.

Hohfeld’s legal analyses presuppose what Jacobson calls a
“correlation-maintaining” jurisprudence. One of Jacobson’s purposes
is to show that, contrary to our traditional jurisprudential assump-
tions, not every jurisprudence must contain a Hohfeldian conception
of the necessary relations between legal rights and duties.

Jacobson claims that our two traditional theories of law, legal
positivism and natural law theory, are both examples of Hohfeldian
jurisprudence in that both are held captive by this supposed correla-
tion of legal rights and duties. Problems that arise from this concep-
tual captivity are, for example, that neither legal positivism nor
natural law theory can account well for the dynamics of a legal sys-

3 Id. at 877.
4 Id. at 877, 879-83.
5 W. Hohfeld, Fundamental Legal Conceptions 36-38 (1923). My facile description does
little justice to the wealth of detail and argument by which Hohfeld works out his tables of
“Jural Opposites” and “Jural Correlatives.”
6 Jacobson, supra note 2, at 883-86
7 Id. at 883, 884-85.
8 Id. at 886-91, 902-04, 906.
But Hegel does provide us with additional materials which suggest the possibility of correlation-breaking or correlation-altering between legal rights and duties, which possibility Jacobson claims to be an essential characteristic of the common law. Thus, these materials help us understand better some of the dynamics and values of the common law. This is a perspective on law not available to us through traditional jurisprudence; hence, "[c]ommon lawyers can learn from [Hegel]."10

II. HEGEL'S PHILOSOPHY OF RIGHT

A. Is It a Jurisprudence?

I begin with the thought that Jacobson may be hasty in assuming that in this text Hegel is presenting a jurisprudence of right. Hegel's title promises only a "philosophy" of right,11 which for Hegel apparently subsumes many different areas of philosophy discussed separately in contemporary Anglo-American philosophy. (I am not arguing in favor of the current trend toward philosophical specialization; I am trying to caution us in thinking about how we should approach and take Hegel's remarks in this particular text.)

Hegel says that in this text he is offering a "speculative" or "philosophical science of the state,"12 and he seems to equate "the state" with the "ethical world" or the "ethical universe."13 This sounds as though Hegel is attempting to state a global ethical-political theory, one which may include law and legal activity, but which is not limited to the law. In particular, I understand Hegel to be speaking about law (where he does) as only one stage in the life of the state and its members.

My evidence for this suggestion is twofold. First, Hegel all but says as much when he sets out the structure that his text takes. At the end of his "Introduction," for example, he says that "the stages in the development of the Idea of the absolutely free will" take us through "the sphere of Abstract or Formal Right"; then through its external

9 Id. at 907.
10 Id.
11 The full title, translated, is said to read, The Philosophy of Right and Law, or Natural Law and Political Science Outlined. See C. Friedrich, The Philosophy of Law in Historical Perspective 131 (2d ed. 1963); G. Hegel, Philosophy of Right translator's foreword, at v (T. Knox trans. 1952) (1821) [hereinafter Philosophy of Right]. Since Hegel is speaking about law and political science, and since he does not consider "right" and "law" to be synonymous, at least on some occasions for some purposes, this suggests that his text may not be setting forth simply a jurisprudence of right.
12 Philosophy of Right, supra note 11, preface, at 2, 7.
13 Id. at 4, 6, 11.
embodiment into itself, which constitutes "the sphere of Morality"; and then through the unity of these two preceding "abstract moments," which unity is the sphere of "Ethical Life," which sphere incorporates "the Family, . . . Civil Society, . . . [and] the State." This seems to mean, in non-Hegelian language, that he aims to follow the evolution of "right" through its several logical stages, only one of which is "right" considered as law. And Hegel's translator, T.M. Knox, reinforces the notion that Hegel addresses many social phenomena in this text, only one of which is the law.

My second reason for wondering whether this is fully a jurisprudence that we are being offered is the fact that the key term in Hegel's title, "Recht," is broader in meaning or extension than is the English word "law." "Recht" surely encompasses law, as we understand it in English, but also goes on to survey issues of politics and morality or ethics that we might not think "law" encompasses. (According to Knox, "[B]y Recht [Hegel] means not only civil law, but also morality, ethical life, and world history." So it may be that certain of Hegel's remarks relate to his vision of political philosophy or moral philosophy, but not to jurisprudence. In fact, much of Hegel's text is concerned with setting out ethical or political claims that need not directly implicate law at all. Of particular relevance here is the possibility that, even if we were to grant Jacobson's claim that Hegel's philosophy of right breaks or alters the correlation between rights and duties in general or in theory, this may have little or no bearing on the correlative relations between legal rights and duties.

For example, I might imagine a situation in which a moral or political right leads to no corresponding moral or political duty. If I have a moral right to punish another person, does this mean that the other person has a moral duty to suffer such punishment? Not necessarily. Or, if I have a political right to elect someone to an office, does

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14 Id. para. 33.
15 See id. paras. 142TN-46TN (Knox's notes to the opening sections of Part III of Hegel's text).
16 This is a commonplace, but perhaps worth remembering here. And, in this context, it interests me to note that Hohfeld remarks in passing on the ambiguity of "Recht." See W. Hohfeld, supra note 5, at 40, 70.
17 Philosophy of Right, supra note 11, translator's foreword, at vi.
18 It is the goal, for example, of Ronald Dworkin's writing to show that law derives from political morality, and hence that political and ethical matters are directly relevant to legal rights and duties. R. Dworkin, A Matter of Principle (1985); R. Dworkin, Law's Empire (1986); R. Dworkin, Taking Rights Seriously (1978). Jacobson cites Dworkin's work as an example of a jurisprudence of right. Jacobson, supra note 2, at 877-78. But Dworkin's position is embattled, even if potentially defensible; its truth cannot be simply assumed (or its mootness ignored). At a minimum, legal positivists would insist that the relevance of politics and morals to law has not been established.
this mean that the other person has a political duty to be elected (or to fill the office)? I doubt it. I do not say that this proves that moral or political rights and duties are not correlative, but only that it raises the possibility that they need not be correlative. And such conceptual possibilities (if they truly are such) have no logical weight in assessing the different question of whether legal rights and duties are necessarily or logically correlative.

This last is Hohfeld’s question, as I understand him, and if we are seriously and fairly to consider his question, then we must consider the very real possibility that the claimed correlativity of legal rights and duties has something to do with the nature of law, or a legal system. It seems plausible to think that legal systems and laws serve certain values that either are not found or are weighed differently in other axiological fields (such as politics, morals, the arts, or aesthetics). Legal systems have values—for example, the publicity and enforceability of rules and judgments, the efficacy and availability of fora for litigation, the finality and bindingness of decrees—that may not be shared by other axiological systems. In a legal context, then, the need for correlativity of rights and duties may be greater than (or at least different from) the need in these other systems. Or perhaps something about the need for authority or legitimacy in a legal system, or its monopoly on societal sanctions, or some other such characteristic of law necessitates that legal rights and duties be correlative, even if moral or political rights and duties need not be correlative (or, not correlative in the same way). Hence, Hegel’s remarks, if applicable to nonlegal activities or systems, may not be directly relevant to any jurisprudential theory or topic, which seems to be the sole object of Hohfeld’s scrutiny.

B. Is It a Jurisprudence of Right?

I have a second and more substantial difficulty with Jacobson’s reading of Hegel. Even if we were to grant that Jacobson has identified something that we wish to call Hegel’s “jurisprudence,” it remains unclear whether Hegel espouses a jurisprudence of right. This is Jacobson’s foremost point, and for me it fails.

A “jurisprudence of right,” according to Jacobson, “alters the correlation of rights with duties by suppressing, if not eliminating, duty.”\(^\text{19}\) He goes on to say that a jurisprudence of right can assign “one of three roles to duty.”\(^\text{20}\) It can “treat duty as a necessary evil”; or it can “treat duty as a prudent public way of talking about the love

\(^{19}\) Jacobson, supra note 2, at 877.

\(^{20}\) Id. at 900.
persons bear one another”; or it can “assign duty a role in the success of the jurisprudence—one, however, which is subordinate to right and whose purpose is to cultivate right as the jurisprudence defines it.”

For Jacobson, it is clear that in the Philosophy of Right, Hegel chooses the third course of action.\(^2\)

Try as I might to credit Jacobson’s reading here, I simply cannot agree that Hegel’s text subordinates or suppresses duty in the service of right. I realize that Jacobson acknowledges a “positive role [for] duty in the Philosophy of Right,” which positive role he says is “to propel the individual along the path of mutual recognition.”\(^2\) But, to my understanding, this makes too slight a concession, as it also belies what I take to be the clear implication of Hegel’s words. If we can speak about the relation between rights and duties in the way suggested by Jacobson, then I want to say that duty in Hegel’s text is the equal of right—not its subordinate.

In this book, Hegel sketches his vision of the logical development of what he sometimes calls “the Idea of right,”\(^2\) an Idea which is tied to “the will” and its “freedom.”\(^2\) As Hegel’s Idea of right becomes more elaborate and complex, one sees that the progression in the development of a person’s rights entails a similar progression in that person’s duties, and a development in one’s duties entails a development of one’s rights. Ultimately, for Hegel, one’s rights become a measure of one’s duties, and vice versa. But at no point in the analysis do I find that rights and duties stop being correlated by Hegel. Instead, what I observe is that the progress of these two notions is from one kind of correlation to another kind of correlation.

At the first stage, “Abstract Right,” I hold rights that correspond to duties in others. In the second stage, “Morality,” my rights ought to have coalesced with my duties, but (logically speaking) they need not have coalesced and (empirically speaking) they will not have done so. In the third and final stage, “Ethical Life,” my rights and duties coalesce. This progression in the Idea of right is summarized in paragraph 155, where Hegel says:

\[\text{[I]}\text{n th[е] identity of the universal will with the particular will, right and duty coalesce, and by being in the ethical order a man has rights in so far as he has duties, and duties in so far as he has rights. In the sphere of abstract right, I have the right and another has the corresponding duty. In the moral sphere, the right of my\]
private judgement and will, as well as of my happiness, has not, but only ought to have, coalesced with duties and become objective.\textsuperscript{26}

Jacobson quotes this paragraph,\textsuperscript{27} but draws from it the conclusion that “[o]nly [in the two pre-ethical stages] do duties and rights need correlation,” whereas “[i]n the full ethical life of free individuals, rights and duties ‘collapse’ together.”\textsuperscript{28} I do not believe that this reading of Hegel is correct. To say that one’s rights and duties “coalesce” is not to say that they disappear (and, in this sense, fail to correlate). Rather, it is to say that their correlation is transformed. The fact that one’s rights and duties are correlated remains; the nature of their correlation changes.

Hegel’s sketch of the progressive development in one’s rights and duties includes the following elements. A person’s rights are correlated with the duties of others in the most primitive and private stage of the development of the Idea of right (or freedom of the will). This is the case in part because of the nature of the primitiveness of the people involved at that stage (for example, their primitive personalities) and because of the primitiveness of the social (private) context in which these personal relations take place. As one moves out of this first stage, through the second stage (“Morality”) and into the third stage (“Ethical Life”), one moves toward greater realization both of the people involved and of the society which creates or constitutes the social context in which (and with which) these people interact. Each factor—the people involved, the society encompassing them—has an influence on the other, and it is their synergism that Hegel calls the logical unfolding or development of the Idea of right (or freedom).\textsuperscript{29}

That is, it is through this kind of interaction that a person’s rights and duties develop or evolve, eventually becoming transformed into public rights and duties with respect to each person and his or her relations with the state.

Hegel’s point is made somewhat more clear in paragraph 261:

\begin{footnotes}
\item[26] Id. para. 155.
\item[27] Jacobson, supra note 2, at 901.
\item[28] Id.
\item[29] Hegel appreciated the need for considering life (and law) synergistically, or holistically. For example, he praises Montesquieu for treating legislation not as something isolated and abstract but rather as a subordinate moment in a whole, interconnected with all the other features which make up the character of a nation and an epoch. It is in being so connected that the various laws acquire their true meaning and therewith their justification.
\end{footnotes}
In contrast with the spheres of private rights and private welfare (the family and civil society), the state is from one point of view an external necessity and their higher authority; its nature is such that their laws and interests are subordinate to it and dependent on it. On the other hand, however, it is the end immanent within them, and its strength lies in the unity of its own universal end and aim with the particular interest of individuals, in the fact that individuals have duties to the state in proportion as they have rights against it (see Paragraph 155). 30

Hegel glosses this paragraph in a “Remark” which contains the following:

Duty is primarily a relation to something which from my point of view is substantive, absolutely universal. A right, on the other hand, is simply the embodiment of this substance and thus is the particular aspect of it and enshrines my particular freedom. Hence at abstract levels, right and duty appear parcelled out on different sides or in different persons. In the state, as something ethical, as the inter-penetration of the substantive and the particular, my obligation to what is substantive is at the same time the embodiment of my particular freedom. This means that in the state duty and right are united in one and the same relation. 31

30. Id. para. 261. I find Hegel’s cross-reference to paragraph 155 significant, and clarifying, and hence take paragraph 261 to be an elaboration of paragraph 155. I also find it significant that in his Remark to paragraph 261, Hegel uses slaves as an example. “Slaves, therefore, have no duties because they have no rights, and vice versa.” Id. para. 261R. This same example was added by an earlier editor to Hegel’s text at paragraph 155: “A slave can have no duties; only a free man has them.” Id. para. 155A.

31. Id. para. 261R. If I understand Hegel, the unity of a person’s rights and duties occurs in the context of the ethical community’s becoming a state: “This concept of the union of duty and right is a point of vital importance and in it the inner strength of states is contained.” Id. In the Addition to paragraph 155, we have: “If all rights were put on one side and all duties on the other, the whole would be dissolved, since their identity alone is the fundamental thing, and it is to this that we have here to hold fast.” Id. para. 155A. So the unity of rights and duties is their final stage, their final correlation, but it is not their only stage or correlation. Until such a point, they have different correlations, depending on the stage in the development of the people involved and their societal context:

[N]one the less the distinct moments acquire in the state the shape and reality peculiar to each, and since therefore the distinction between right and duty enters here once again, it follows that while implicitly, i.e. in form, identical, they at the same time differ in content. In the spheres of personal rights and morality, the necessary bearing of right and duty on one another falls short of actualization; and hence there is at that point only an abstract similarity of content between them, i.e. in those abstract spheres, and what is one man’s right ought also to be another’s, and what is one man’s duty ought also to be another’s. The absolute identity of right and duty in the state is present in these spheres not as a genuine identity but only as a similarity of content, because in them this content is determined as quite general and is simply the fundamental principle of both right and duty, i.e. the principle that men, as persons, are free.

Id. para. 261R.
The nature of the correlation changes, as I said above, but the fact of correlation (of right and duty) remains. The correlative relation between right and duty goes from being a relation between different people (in the private sphere) to a relation between each person and the state (in the public sphere), which is that person’s “ethical community.”

Jacobson argues that “the collapse of rights and duties in [the ethical sphere does not] destroy the fundamental character of Hegel’s work as a philosophy of right.” While to my knowledge he does not deal with the relevance of paragraph 261, he does read paragraph 148 as confirming his position. “Hegel’s doctrine, as he makes clear in paragraph 148, is not a ‘doctrine of duties.’” But Hegel’s Remark to paragraph 148, which is what Jacobson quotes in supporting this claim, does not bear the weight that Jacobson wishes to place on it. Hegel’s Remark is this:

The ‘doctrine of duties’ in moral philosophy (I mean the objective doctrine, not that which is supposed to be contained in the empty principle of moral subjectivity, because that principle determines nothing—see Paragraph 134) is therefore comprised in the systematic development of the circle of ethical necessity which follows in this Third Part. The difference between the exposition in this book and the form of a ‘doctrine of duties’ lies solely in the fact that, in what follows, the specific types of ethical life turn up as necessary relationships; there the exposition ends, without being supplemented in each case by the addition that ‘therefore men have a duty to conform to this institution’.

A ‘doctrine of duties’ which is other than a philosophical science takes its material from existing relationships and shows its connexion with the moralist’s personal notions or with principles and thoughts, purposes, impulses, feelings, &c., that are forthcoming everywhere; and as reasons for accepting each duty in turn, it may tack on its further consequences in their bearing on the other ethical relationships or on welfare and opinion. But an immanent and logical ‘doctrine of duties’ can be nothing except the serial exposition of the relationships which are necessitated by the Idea of freedom and are therefore actual in their entirety, to wit in the state.

Hegel is not saying here that his philosophy does not contain a doctrine of duties. Quite to the contrary, he explicitly calls attention to the fact that his “‘doctrine of duties’” is “comprised in the system-

32 Jacobson, supra note 2, at 901.
33 Id.
34 Philosophy of Right, supra note 11, para. 148R (footnotes omitted).
atic development of the circle of ethical necessity which follows in th[e] Third Part'\textsuperscript{35} of his Philosophy of Right. Hegel claims only that his doctrine of duties is not akin either to a Kantian doctrine of duties or to an empirical doctrine of duties.

Kant's doctrine is empty because it is based on an "empty principle of moral subjectivity . . . that . . . determines nothing—see Paragraph 134."\textsuperscript{36} This means that Kant's is a failed philosophy, because it is based on the wrong principles. An empirical doctrine of duties is also hopeless, because it takes its material from existing relationships and shows its connexion with the moralist's personal notions or with principles and thoughts, purposes, impulses, feelings, &c., that are forthcoming everywhere; and as reasons for accepting each duty in turn, it may tack on its further consequences in their bearing on the other ethical relationships or on welfare and opinion.\textsuperscript{37}

This attempt at creating a philosophical doctrine of duties fails because it is based on the wrong method.

Hegel believes that his doctrine of duties is the only true philosophical theory of duty because it is based on the right principles and the right method. It is a "philosophical science" because "the specific types of ethical life turn up as necessary [logical or conceptual] relationships."\textsuperscript{38} In addition, according to Hegel, "an immanent and logical 'doctrine of duties' can be nothing except the serial exposition of the relationships which are necessitated by the Idea of freedom and are therefore actual in their entirety, to wit in the state."\textsuperscript{39} This exactly describes Hegel's program in this text. It would add nothing to his program or philosophy, because it would be redundant, to supplement each of his analyses with "the addition that 'therefore men have a duty to conform to this institution.'"\textsuperscript{40} But duty remains an integral part of Hegel's theory of right; he simply does not bother to make the internal correlation of rights and duties explicit each time that he expounds another twist or turn in the "necessary relationships" of "ethical life." The necessity of such a correlation remains.

III. Vanity in the Expression of Legal Theory

I have explored the most significant area of my disagreement with Professor Jacobson; it is time to explore the reasons for my in-
ability to proceed further in assessing the claims made by either Hegel or Jacobson.

At the beginning of this Commentary, I quote Anne Morrow Lindbergh to the following effect: “The intellectual is constantly betrayed by his own vanity. God-like, he blandly assumes that he can express everything in words; whereas the things one loves, lives, and dies for are not, in the last analysis, completely expressible in words.” Lindbergh is bringing to light one kind of intellectual vanity, namely, the supposition that we can express everything that we know or care about in words. But we are not capable of doing this, intellectual pride to the contrary. There are matters beyond our ken, and beyond our capacity and ability to express. We may sense or perceive these things, but we cannot know or express them. They are mysteries the human mind seeks to overcome but cannot. Kant recognized our fatedness to this kind of perplexity, and our tragically misguided attempts to overcome it he called “transcendental illusion.”

This kind of intellectual vanity imagines the intellect capable of expressing truths about life without conditioning its expressions in the limits of the language it uses. We forget or ignore that our expressions take place and have meaning only within specific media and specific contexts, and that a part of the meaning that any expression has is a function of the particular medium and context in which it proceeds. So, in addition to the vanity of intellectual pride, we also are susceptible to what I think of as the vanity of intellectual emptiness. Hegel indulges in both.

A. Intellectual Pride

An example of Hegel’s trying to say too much, of his trying to

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41 A. Lindbergh, supra note 1, at 6. I understand Lindbergh’s remark to use “betray” in two senses. Intellectuals are “betrayed” in the sense that their vanity allows them to misuse their usual allies—their words—and this misuse feels like betrayal; and in the sense that this kind of miscue betrays or reveals a common blindness in intellectuals, a failure to appreciate one of the conditions of their work.

42 See I. Kant, Critique of Pure Reason 297 (N. Smith trans. 1929) (1781). Kant recognizes this human fate in the opening sentence of his preface to the first edition: “Human reason has this peculiar fate that in one species of its knowledge it is burdened by questions which, as prescribed by the very nature of reason itself, it is not able to ignore, but which, as transcending all its powers, it is also not able to answer.” Id. at 7.

43 In speaking about the vanity that I find in Hegel’s writing, I am attempting to fit certain features of Hegel’s writing with the root senses of “vanity” (which I have extracted from the dictionary). This is to say that I find some stretches of Hegel’s writing to be: (1) futile or worthless, without value or profit, because pointless; (2) prideful, self-important, narcissistic; and (3) vacuous, inane, idle, unfounded, and hence empty. See 2 The Compact Edition of the Oxford English Dictionary 3589 (1971).
say more than he conceivably can know, or more than he has a right to say, is his fundamental assertion early in the *Philosophy of Right*:

The basis of right is, in general, mind; its precise place and point of origin is the will. The will is free, so that freedom is both the substance of right and its goal, while the system of right is the realm of freedom made actual, the world of mind brought forth out of itself like a second nature.44

Hegel’s claim to know the “basis of right” is based on his encyclopedic theory of the development of the “Absolute” or the “Spirit,” a theory he sketches in his famous *Phenomenology of Spirit*45 and other writings. This sketch claims to portray the logical or necessary stages in the development of Spirit, and its manifestation in the Idea of right is simply one step in Hegel’s portrait of the logical sequence of stages or phases of the Spirit. This theory contains views of the world, of the human mind or spirit, and of human knowledge (among many other things), and Hegel accepts these views because they are generated by his dialectical method, a method that he claims to be the one, true “philosophical science” capable of revealing such realities to us.46 As such, Hegel’s assertions about the “basis of right” derive from his commitment to Idealism and Dialectical Logic. These Hegelian commitments are profoundly antihistorical, profusely theoretical, and, I believe, wrong.

It is common in philosophy for some philosopher to claim that he or she has special knowledge of some ultimate fact, unvouched to the rest of us. We can test this claim by asking: How did this philosopher achieve this knowledge, and in what does it consist? Hegel’s theory and method achieve their results or conclusions by eschewing empirical, historical, practical, and linguistic data, and proceed instead by analyzing the dialectical logic of the purported stages through which the human mind or spirit necessarily evolves. I seriously doubt whether such knowledge as Hegel’s theory and method

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44 Philosophy of Right, supra note 11, para. 4 (footnote omitted).
45 G. Hegel, *Phenomenology of Spirit* (A. Miller trans. 1977) (1807). Hegel indicates his reliance on his earlier writings in his Remark to paragraph 4 of the *Philosophy of Right*:

The proof that the will is free and the proof of the nature of the will and freedom can be established (as has already been pointed out in Paragraph 2) only as a link in the whole chain of philosophy. The fundamental premisses of this proof are that mind to start with is intelligence, that the phases through which it passes in its development from feeling, through representative thinking, to thinking proper, are the road along which it produces itself as will, and that will, as practical mind in general, is the truth of intelligence, the stage next above it. These premisses I have expounded in my *Encyclopaedia of the Philosophical Sciences* and I hope by and by to be able to elaborate them still further.

Philosophy of Right, supra note 11, para. 4R (footnote omitted).
46 See supra text accompanying notes 34-39.
purport to make available to us is possible. In other words, in response to Hegel's claims, I find myself asking whether it is possible for anyone to have such a synoptic view of human nature, human history, and the like. Or, more particularly, I wonder if it is possible for any human being to have divined the ultimate foundation of all that we call “right” in this world. I cannot believe that it is. Instead, I think that Hegel here is engaged in the kind of intellectual activity that produces pointless, prideful, and empty assertions: his words are being uttered in vain.

Stanley Cavell has noticed, in a different but analogous context, that “[t]he head-on effort to defeat skepticism allows us to think we have explanations where in fact we lack them.”47 Hegel is offering us explanations which he thinks he possesses, but which in fact he lacks. His theory of Idealism and his method of Dialectical Logic mislead him into thinking that, for the phenomena he studies, he has explanations of the kind proffered (for example, “[t]he basis of right is, in general, mind”48). But in this sense I claim that Hegel cannot know the basis of right, because no human can know such a thing in this way. (What would it be like to know such a thing as Hegel claims to know it? Try to imagine what such knowledge would consist in. In this same way, do we know the basis of life? Could we? Or the basis of justice? Of knowledge? I do not think so.) In other words, I am not criticizing Hegel for some personal lack of knowledge on his part, as though he could improve his lot with a little more effort. I am saying, instead, that his entire project is misguided, in that it attempts to gain (and to claim) a kind of knowledge of things of which humans are not capable. As against Hegel here, I am convinced that Kant was right, that there are limits to human knowledge. (This does not mean that we can explain these limits, or comprehend them, and it certainly does not mean that I accept all of Kant’s attempted explanations of this phenomenon.)

It would be far better for us, I believe, if instead we were to recognize our lack and learn to live within our limits. Here I think of a sage remark by an obscure Dutch novelist and philosopher, Aart Van Der Leeuw: “The mystery of life is not a problem to be solved, but a reality to be experienced.”49 As I understand it, this is not a plea on

47 S. Cavell, Knowing and Acknowledging, in Must We Mean What We Say? 258 (1969). A sustained instance of Cavell’s diagnosis is given in one of his later books, where he patiently shows the vacuity in philosophical attempts to “explain” and justify the “generality of language” by appeal to so-called “universals.” See S. Cavell, The Claim of Reason 175, 178-79, 184, 187-89 (1979).
48 Philosophy of Right, supra note 11, para. 4.
HEGELIAN VANITY

behalf of human ignorance; it is a request that we recognize our limits and the ineffable nature of our lives on this earth. (Anne Morrow Lindbergh makes the same request in asking us to see that some of the most fundamental aspects of our lives “are not, in the last analysis, completely expressible in words.”) To call something a “mystery” is not to offer a competing explanation of it, but rather is to claim that the thing is inexplicable.

A second example of what I am calling Hegel’s “intellectual pride” is his claim that the “precise place and point of origin [of right] is the will.” When I see such an utterance, I want to ask not only how Hegel claims to know this, but also why he thinks it important. Is it useful or important to establish that “right” has its “origin” in the “will”? Why? What does this enable us to do that we cannot do without it? In particular, do we have some understanding or theory of the will that makes this claim usable? I do not think that we do. Instead, this is merely a hoary, old psychologism that sees the human mind as possessing certain faculties and that attributes certain characteristics to these various faculties.

To speak of the “will” as being the basis of “right” apparently allows Hegel to inject the concept of freedom into the equation (because supposedly we all know that the fundamental attribute of the will is that it is free). It makes no sense to me to proceed in this way. Freedom is no more (but no less) a fundamental value or attribute of human beings than is a concern for comfort, security, protection, conservation, consumption, finding and providing a means of living, having and raising a family, caring for others and oneself, having fun, doing work, and any number of other human concerns, interests, activities, and values. And, in my view, none of these human attributes resides in any particular mental faculty. It is simply beside the point to attempt to reduce all of our complex notions of “right” to an origin in the “will” (if such a thing even exists as Hegel conceives it), which itself is said to be “free.” But this is what Hegel does.

Hegel cannot know what he claims to know about the Idea of right (or any such global, abstract topic). No human being can know what Hegel claims to know about such matters. This is not to say, however, that we cannot know (or say) much about these matters. I am not espousing skepticism. There is much that we can know and say about the law, and about right, but I believe that such knowledge

50 A. Lindbergh, supra note 1, at 6.
51 Philosophy of Right, supra note 11, para. 4.
52 I should note, however, that in lecture notes appended to this book by an earlier editor, Hegel denies that he espouses this kind of “psychologism.” Id. para. 4A.
comes to us through detailed, specific investigations of the phenomena presented to us in particular legal systems, and through their subsequent comparison and contrast. In other words, to adopt a phrase from Clifford Geertz, I believe that our knowledge of law is based on "local knowledge," rather than the global or abstract knowledge that Hegel offers us. (Thus, I deny in particular that Hegel's dialectical method can afford us the kind of knowledge it claims for matters such as law and right, especially in view of its eschewal of empirical, historical, practical, and linguistic data.4)

Geertz's conception is that, "[I]ke sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge." For him, this means that law is local not just as to place, time, class, and variety of issue, but [also] as to accent—vernacular characterizations of what happens connected to vernacular imaginings of what can. It is this complex of characterizations and imaginings, stories about events cast in imagery about principles, that [Geertz] ha[s] been calling a legal sensibility.5

If Geertz is correct that legal knowledge and legal sensibility are based on such "local" constituents of sense and meaning, then I believe that it is through a study of such minutiae that we shall come to understand the law, if at all. We must know what law consists of in any particular context or legal system before we can say "what law is" (then and there). Any more general statement about law, without some more comprehensive gathering of evidence from a variety of legal systems (as Geertz recommends from his "comparative" or "ethnographical" perspective) will be mere empty utterance.

Taken together, these two propositions, that law is local knowledge not placeless principle and that it is constructive of social life not reflective, or anyway not just reflective, of it, lead on to a rather unorthodox view of what the comparative study of it should consist in: cultural translation. Rather than an exercise in

54 Hegel claims that his dialectical method (on which his entire "philosophical science" is based) is completely distinct from other ways of "knowing," and that this distinctive method rescues his philosophy from the decadence of earlier philosophical theories. This is Hegel's philosophical faith in method.
[In this book I am presupposing that philosophy's mode of progression from one topic to another and its mode of scientific proof—this whole speculative way of knowing—is essentially distinct from any other way of knowing. It is only insight into the necessity of such a difference that can rescue philosophy from the shameful decay in which it is immersed at the present time.
Philosophy of Right, supra note 11, preface, at 1-2.
55 C. Geertz, supra note 53, at 167.
56 Id. at 215.
in institutional taxonomy, a celebration of tribal instruments of social control, or a search for *quod semper aequum et bonum est* . . . , a comparative approach to law becomes an attempt, as it has become here, to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another.\(^7\)

Hegel removes the possibility of our gaining any such comparative knowledge of law (or right) because he eliminates just this sort of detailed and particular inquiry into the workings of specific legal systems. Instead, he calls for a purified "philosophical science" shorn of any consideration of ephemeral phenomena.

But if we ask what is or has been the historical origin of the state in general, still more if we ask about the origin of any particular state, of its rights and institutions, or again if we inquire whether the state originally arose out of patriarchal conditions or out of fear or trust, or out of Corporations, &c., or finally if we ask in what light the basis of the state's rights has been conceived and consciously established, whether this basis has been supposed to be positive divine right, or contract, custom, &c.—all these questions are no concern of the Idea of the state. We are here dealing exclusively with the philosophic science of the state, and from that point of view all these things are mere appearance and therefore matters for history . . .

The philosophical treatment of these topics is concerned only with their inward side, with the thought of their concept . . .

The opposite to thinking of the state as something to be known and apprehended as explicitly rational is taking external appearances—i.e. contingencies such as distress, need for protection, force, riches, &c.—not as moments in the state's historical development, but as its substance. Here again what constitutes the guiding thread of discovery is the individual in isolation—not, however, even so much as the *thought* of this individuality, but instead only empirical individuals, with attention focused on their accidental characteristics, their strength and weakness, riches and poverty, &c.\(^8\)

Here Hegel dismisses out of hand exactly the kind of material that might give his words some purchase or grip. Thus, having eliminated any appeal to empirical, historical, practical, or linguistic materials for the sake of philosophical enlightenment, Hegel has eliminated that which would give his words some concrete application.

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\(^7\) Id. at 218.

\(^8\) Philosophy of Right, supra note 11, para. 258R (emphasis in original); see supra text accompanying notes 34 & 37.
B. Intellectual Emptiness

I said earlier that it would be best if we recognized our limits and learned to live within them. But apparently this is difficult for human beings to do (something acknowledged by Kant when he says that human reason entertains questions which it can neither ignore nor answer\(^{59}\)). Wittgenstein too sees this fatedness to overreach ourselves as a fundamental mark of a philosophical problem, or of the mood we call "philosophy." (While Kant's allegory of the philosophical fix is cast in terms of human reason, Wittgenstein speaks in terms of philosophy as "a battle against the bewitchment of our intelligence by means of language."\(^{60}\) For Wittgenstein, with this fate comes the need for his kind of philosophical activity, the therapeutic goal of which is to bring philosophy "peace, so that it is no longer tormented by questions which bring itself in question."\(^{61}\)

The later philosophy of Wittgenstein and the work of J.L. Austin are sometimes spoken of generically as "ordinary language philosophy."\(^{62}\) It is to my mind one of the permanent insights contributed by

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\(^{59}\) I. Kant, supra note 42, at 7.


\(^{61}\) Id. § 133 (emphasis in original).

\(^{62}\) Practitioners of ordinary language philosophy are frequently accused of engaging in their own vain practice (something akin to the vanity I ascribe to Hegel). They are said to be arrogant in their dependence or reliance on the vagaries and callowness of ordinary speech. Here it is well to remember Austin's explicit strictures on the kind of appeal to ordinary language to which he was committed:

> [O]ur common stock of words embodies all the distinctions [humans] have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon—the most favoured alternative method.

> . . . Certainly ordinary language has no claim to be the last word, if there is such a thing. It embodies, indeed, something better than the metaphysics of the Stone Age, namely, as was said, the inherited experience and acumen of many generations of [humans]. But then, that acumen has been concentrated primarily upon the practical business of life. If a distinction works well for practical purposes in ordinary life (no mean feat, for even ordinary life is full of hard cases), then there is sure to be something in it, it will not mark nothing: yet this is likely enough to be not the best way of arranging things if our interests are more extensive or intellectual than the ordinary. And again, that experience has been derived only from the sources available to ordinary men throughout most of civilized history: it has not been fed from the resources of the microscope and its successors. And it must be added too, that superstition and error and fantasy of all kinds do become incorporated in ordinary language and even sometimes stand up to the survival test (only, when they do, why should we not detect it?). Certainly, then,
ordinary language philosophy that it recognizes as a phenomenon deserving philosophical attention the persistent attempt of traditional philosophers (among whom I number Hegel) to speak as though there were no limits to, or conditions of, their remarks. Wittgenstein and Austin respond to this persistent attempt in different ways—Wittgenstein tries to deflate its attraction by understanding the urge behind it, while Austin tries to deflect its attraction by dismissing its attractiveness. But both philosophers recognize this urge as definitive of traditional philosophy, and each wars against it in his own inimitable way. In Stanley Cavell’s work, which I find makes the most and the best out of both Wittgenstein’s and Austin’s legacies, this persistent attempt of traditional philosophers to speak outside the limits of language is called “the will to emptiness.” It names the second fundamental criticism that I make of Hegel, under my rubric, “the vanity of intellectual emptiness.”

Many of Hegel’s remarks are vain in the sense that they are pointless or empty. By this I mean that his words are uttered in vain, or his expressions are offered in vain, because they are unconnected to any actual human activity or any natural “language-game” (to use one of Wittgenstein’s terms of art). According to Wittgenstein, phi-

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64 See Cavell, The Division of Talent, 11 Critical Inquiry 519, 523 (1985):
I take those philosophers [Wittgenstein and Austin], especially Wittgenstein, along with Heidegger, as major representatives of the impulse to philosophy in this century, and the thing they most notably share as philosophers is the understanding of philosophy as the continuous struggle to end philosophy—as Wittgenstein puts it, to bring philosophy peace; you may call it a struggle to turn aside philosophical theory, as if philosophy has become the most intimate enemy of genuine thinking. It follows that the last gesture to expect help from in these struggles against philosophy is one that simply recommends the abandoning of theory, particularly on the apparently sensible ground that it is empty, as if the will to philosophy were less fundamental an aspiration in human life than the will to science or to art. Indeed, Wittgenstein and Heidegger seem to have discovered in philosophy something I have called a “will to emptiness” (it is one of the characterizations I have given of skepticism), which they have dedicated their teaching to turning us from.

65 What Wittgenstein means by “language-game” is difficult to say, but Stanley Cavell has used this term to suggest one way of understanding Wittgenstein’s diagnosis of philosophical illness:

[Y]ou always tell more and tell less than you know. Wittgenstein’s Investigations draws this most human predicament into philosophy, forever returning to philosophy’s ambivalence, let me call it, as between wanting to tell more than words can
When philosophers use a word—"knowledge", "being", "object", "I", "proposition", "name"—and try to grasp the essence of the thing, one must always ask oneself: is the word ever actually used in this way in the language-game which is its original home?

What we [Wittgensteinians] do is to bring words back from their metaphysical to their everyday use.  

To "bring words back," one must realize both that we are somehow "away" in our words, in the words that we are using at the moment,  

and that words already have a home, already have established uses or meanings. The meaning of the words we use already exists there, in the language; it is not something that we have a choice over (other than in our choosing one word rather than another, because of their respective meanings). And the meaning of our words also is not something that we individually can change; it is a shared public matter (as Wittgenstein suggests in his so-called "private language argument"), not something that we privately effect. Language is a medium that we may use (or misuse), but its proper use requires that we recognize and work within its limits, its conditions. Everyone knows that putting just any words together just anywhere, and saying them, does not ensure sense. But then why are we so dead to the

say and wanting to evade telling altogether—an ambivalence epitomized in the idea of wishing to speak "outside language games," a wish for (language to do, the mind to be) everything and nothing.

S. Cavell, Disowning Knowledge 201 (1987). See S. Cavell, The Claim of Reason, supra note 47, at 189. Cavell recognizes, however, that this Wittgensteinian notion of philosophers speaking "outside language games" is itself "hardly more than an allegory, or myth." S. Cavell, In Quest of the Ordinary 48 (1988). While I recognize this potential limitation in the utility of a term of art such as "language-game," I continue to believe in the value of the use of such a term, in part because (unlike Hegel) Wittgenstein's terms of art are directly connected with and integrated into the language of ordinary life.

66 L. Wittgenstein, supra note 60, § 116 (emphasis in original).
67 See S. Cavell, supra note 63, at 34.
68 Cavell expresses this point well when he says:

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\text{[W]e have a choice over our words, but not over their meaning. Their meaning is in their language; and our possession of the language is the way we live in it, what we ask of it...}
\]

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\text{Words come to us from a distance; they were there before we were; we are born into them. Meaning them is accepting that fact of their condition. To discover what is being said to us, as to discover what we are saying, is to discover the precise location from which it is said; to understand why it is said from just there, and at that time.}
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possibility that inserting a special ("key") word into a sentence might not work, might not make sense?

For instance, Hegel uses "mind" and "right" and "will" and "freedom" in ways that confuse me, since they are ways that tally with no known use with which I am familiar. I take it that there are at least two possibilities here: either Hegel is using these terms in a special or technical sense, as "terms of art" in some special philosophical language-game; or Hegel is using these terms as they are ordinarily and customarily used and understood. Unfortunately, neither possibility seems to match Hegel's practice and intention.

First, if Hegel is using these terms as special or technical terms, then they cannot achieve what Hegel claims to want to achieve in his philosophizing: revealing what is true in our ordinary notions of "mind" and "right" and "law" and "state" (and so on). In his Preface to the Philosophy of Right, for example, Hegel explicitly claims to be rationalizing the old, ordinary truths about right, ethics, and the state. He says that his philosophy states these old truths in a new form so that their true content finally can be understood and accepted.

In this press of truths, there is something neither new nor old but perennial; yet how else is this to be lifted out of these reflections which oscillate from this to that without method, how else is it to be separated from them and proved, if not by philosophic science?

After all, the truth about Right, Ethics, and the state is as old as its public recognition and formulation in the law of the land, in the morality of everyday life, and in religion. What more does this truth require—since the thinking mind is not content to possess it in this ready fashion? It requires to be grasped in thought as well; the content which is already rational in principle must win the form of rationality and so appear well-founded to untrammelled thinking.\(^69\)

Hegel is attempting to reveal the truth implicit in our ordinary notions and conceptions, but he does so through a method which eschews exactly the kind of empirical, historical, practical, and linguistic data out of which Hegel's explication must make sense.

Look again at Hegel's specialized use of his several terms (such as "mind," "right," "will," "state"). Through such specialized or technical use, Hegel avoids (rather than confronts) the realities and complexities of these ordinary terms or concepts. Yet I believe that it is only through an investigation of these complex realities that we can reveal whatever truth they may contain—explicit or implicit. In

\(^{69}\) Philosophy of Right, supra note 11, preface, at 3 (emphasis in original).
other words, to be revelatory of ordinary truths, I believe that Hegel’s philosophy must explore those ordinary truths, and not engage in special or technical language-games which use ordinary terms in unknown ways.

Someone who imagines that he is defending the tradition by maintaining its right and need to introduce technical terms (or . . . to invent special philosophical language games . . .) probably has in mind the philosopher’s use of such terms as “sense data,” “analytic,” “transcendental unity of apperception,” “idea,” “universal,” “existential quantifier”—terms which no ordinary language philosopher would criticize on the ground that they are not ordinary. But is the word “seeing” in the statement “We never directly see material objects” meant to be technical? Is “private” in “My sensations are private”? Are any of the words in such a statement as “We can never know what another person is experiencing”? Are such statements used in some special language game? The assumption, shared by our ordinary language critic and our defender of the tradition, that such words are not meant in their ordinary senses, destroys the point (not to say the meaning) of such statements. For on that assumption we cannot account for the way they seem to conflict with something we all (seem to, would say that we) believe; it therefore fails to account for what makes them seem to be discoveries or, we might say, fails to suggest what the hitherto unnoticed fact is which philosophy has discovered.  

The second possibility, as I said, is that Hegel does mean for his terms to be understood in their ordinary senses. But if this were the case, then he would have to use them ordinarily, and he does not seem to do this. Instead, his use of “mind” and “right” and “will” and “state” seems to derive not from language or life, but solely from his philosophical theory and method. But matters of mind and right and will and state are deeply embedded and implicated in our language and our lives, and I do not see how they can be removed from such media without irreparable loss of meaning and intelligibility. Of course, just such a loss of meaning and intelligibility is one of the traditional philosophical harms against which Wittgenstein set his therapeutic philosophy.

Wittgenstein’s therapy is specifically aimed at examining (and changing) the way we relate to our words when we are in a philosophical mood, or when we are speaking philosophically. He finds that philosophers have a penchant for speaking as though they could say anything anywhere anytime, without regard to the resources available

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70 S. Cavell, The Availability of Wittgenstein’s Later Philosophy, in Must We Mean What We Say?, supra note 47, at 59.
to them, their circumstances or context, and the institutions and customs embedded in the medium of language. Yet if we yield to the temptation to speak in this way, then, as Stanley Cavell suggests, our words may lead the way, but our minds will fail to follow.

The profoundest as well as the most superficial questions can be understood only when they have been placed in their natural environments. (What makes a statement or a question profound is not its placing but its timing.) The philosopher is no more magically equipped to remove a question from its natural environment than he is to remove himself from any of the conditions of intelligible discourse. Or rather, he may remove himself, but his mind will not follow.\footnote{S. Cavell, Must We Mean What We Say?, in Must We Mean What We Say?, supra note 47, at 41.}

Cavell's diagnosis is that philosophers who speak in this way—without due regard for their circumstances and their conditions—end up not knowing what they are saying, or not knowing what they (really) mean by what they say.

What they had not realized was what they were saying, or, what they were \textit{really} saying, and so had not known \textit{what they meant}. To this extent, they had not known themselves, and not known the world. I mean, of course, the ordinary world. That may not be all there is, but it is important enough...\footnote{Id. at 40 (emphasis in original).}

Hegel puts his faith in a theory, one that promises a “philosophical science” of the Ideas of mind and right. Hegel believes that through this theory he has gained a comprehensive, encyclopedic view of the human spirit and its logical or necessary manifestations. In this, he is claiming God’s knowledge, for only God could know all that needs to be known to claim such a view. (This I take to be the kind of vanity Lindbergh criticizes when she says that the intellectual acts “God-like,” imagining himself or herself capable of expressing “everything in words.”\footnote{See supra text accompanying notes 1 & 41.}) Hegel’s theoretical use of “mind” (or “right,” “will,” “freedom”) betrays misplaced faith not only in his ability to create a theory or system adequate to the task, but also in his powers of self-expression. It is impossible.

Hegel’s words far too often have a home, a use, only within his artificial theory and method. And it is my contention that Hegel’s philosophical theory and method are not adequate to secure the informativeness of his words. (Again, this is not a criticism uniquely applicable to Hegel or his theory. I am willing to say, rather, that \textit{no} philosophical theory or schema or framework is capable, in itself or...
on its own, of giving sense to a philosopher’s assertions.) Hegel tries to establish a new way of thinking and speaking, a new way of viewing human life and action. This is fully open to him, or to anyone, given that he uses ways normative (or normal) for doing this. But the way he attempts this project is by creating new uses of words that, to my mind, do not connect sufficiently with the established uses in our language of those same words to permit his new view to be intelligible. It is not that we cannot create new uses of words or new views, but it always must be done with what we have, with the materials at hand. The time and opportunity of Genesis are past; they were gone forever. Only God can create something out of nothing. We must create out of what we have, and that is an established custom or usage, which is a kind of “institution,” as Wittgenstein calls it.74 I might say: Tradition, not theory, is what permits us to create anew. And it is always we—not you, not I, not Hegel, not Eisele—who create and recreate the new out of the old.

Hegel’s words, alone in his theory, tell me nothing of what I want or need to know. As well, they fail to connect with what I know, and with what I expect, about such matters as “law” and “right” and “mind.” For Hegel to make sense to me, he must begin with the ways (norms) of making sense (using language) with which both of us are familiar and which we normally and naturally use in communicating with one another.75 But he does not. Hence, Hegel’s claim that the “basis of right is, in general, mind,”76 is as useful (and as useless) for me as if he (or anyone) should say, “The basis of right is, in general, value.” Or: “The basis of right is, in general, nature.” Or: “The basis of right is, in general, reason.” These assertions are interchangeable; they come to the same thing: Nothing.

74 See L. Wittgenstein, supra note 60, §§ 199, 540.
75 This is a constant theme in James Boyd White’s writing, and it is one of his best. For example:

In [legal] argument . . . the speakers are forced to perform an allegiance to their common language, to the ways of talking that make the dispute intelligible and the community possible. One of the functions of a culture of argument, the law among others, is to provide a rhetorical coherence to public life by compelling those who disagree about one thing to express their actual or pretended agreement about everything else. Argument functions by agreement, and by agreement under stress, and is thus constitutive of the changing culture that even the opponents share. In compelling this kind of agreement, the law makes disagreement at once intelligible, limited, and amenable to resolution.

J. White, When Words Lose Their Meaning 268 (1984). See, e.g., White, The Fourth Amendment as a Way of Talking about People, 1974 Sup. Ct. Rev. 165, 167 n.3 (“one of the functions of the law is to . . . compel those who disagree about one thing to speak a language which expresses their actual or pretended agreement about everything else”).

76 Philosophy of Right, supra note 11, para. 4.
C. Jacobson's Paper

I find a similar emptiness in certain assertions in Professor Jacobson's paper, especially in his typology of jurisprudential theories. Here I am not speaking about his distinctions among a jurisprudence of rights, a jurisprudence of duties, and a jurisprudence of rights and duties (although I sometimes question his grounds for classifying a particular theory of law within one of these types). Rather, I am most puzzled by a number of his claims regarding the purported differences between a "correlation-breaking" ("CB") theory of law (which "alters" or "breaks" the correlation between rights and duties postulated by Hohfeld) and a "correlation-maintaining" ("CM") theory of law (which maintains this postulated correlation of rights and duties).

Jacobson distinguishes these two types of legal theory on the basis of four criteria: (1) whether the source of law is within or without the legal system; (2) whether the enforcement of law is separate from its legislation; (3) whether the system constitutes a "plenum"; and (4) whether the system is dynamic.77 Jacobson makes the following statements to explain some of these criteria:

The source of law in the correlation-altering jurisprudences is inside the legal system. Typically it is the legal subject, or person. The source of law in the correlation-maintaining jurisprudences is outside the legal system. Though the exact source of law in such jurisprudences is often open to question, it is certainly never the person.78

The correlation-altering jurisprudences do not distinguish enforcement of law from legislation. When jurisprudence does distinguish them, then persons cannot be the source of either. Pure legislation devoid of enforcement always comes from outside the legal system, from heros or assemblies of heros. Legislation is possible only in a jurisprudence where the source of law is outside the system, in a correlating jurisprudence. By the same token, pure enforcement is also possible only in a correlating jurisprudence. Enforcement is the sole authentic legal action in systems whose source of law is outside the system.79

Jurisprudences that break or alter the correlation are dynamic, in the sense that persons occupying the legal system must alter the universe of legal norms to follow a single one of them. The law-abiding occupants of systems whose source of law is within the

77 Jacobson, supra note 2, at 879-83.
78 Id. at 879-80 (footnote omitted).
79 Id. at 880.
system find that they can obey a legal norm only in the process of creating it. Obedience to law in such systems is personal legislation. (In Common Law the equation of obedience with personal legislation is quite explicitly captured in the doctrine of precedent.) Jurisprudences maintaining the correlation, by contrast, are nondynamic, since change never comes from within the system in its ordinary operation.80

These assertions leave me wondering what they mean. Take, for example, the first criterion Jacobson states: the "source of law" in a CM jurisprudence is outside the legal system, whereas in a CB jurisprudence it is inside the system.81 What does this mean? Jacobson never tells us what might be a "source" of law in a CM jurisprudence, so it is difficult to imagine what he means to be telling us. Perhaps an example might help.

Jacobson does say that legal positivism is one type of CM theory.82 Accordingly, I shall examine positivism in the light of Jacobson's first criterion and see what I can make of it. Is the "sovereign" in Austin's theory, or the "Rule of Recognition" in Hart's theory, or the "Basic Norm" in Kelsen's theory,83 outside the legal system which each purports to create and govern? Jacobson says that the sovereign in positivism is "a superpersonal agency,"84 but this does not imply that such an agency is "outside" the legal system it creates and governs.

Perhaps what Jacobson means is that, insofar as the sovereign is legally unlimited or illimitable (as in Austin's theory), or insofar as the Rule of Recognition is a brute social fact based on acceptance or rejection (as in Hart's theory), or insofar as the Basic Norm is hypothesized (as in Kelsen's theory), then to this extent the source of law in positivism is outside the legal system. Again, I do not see why this must be the case. Does the sovereign's being legally illimitable place it outside the legal system? Is the Rule of Recognition, as the foundation of a legal system, outside of that system? Is the Basic Norm outside? And, to the extent that a "sovereign" governs the legal system it creates, is the sovereign outside of that system? I do not see that these questions must be answered, necessarily, in the affirmative,

80 Id. at 883 (footnote omitted).
81 See supra text accompanying note 78.
82 Jacobson, supra note 82, at 877, 883.
84 Jacobson, supra note 2, at 884.
and yet I take Jacobson to be making a conceptual claim here, something about the logical or necessary nature of CM theories of law.

The root of the problem, I believe, is that Jacobson is using the word "outside," as though it were simply obvious, just clear, what it means for a "source of law" to be "outside" of a "legal system." But the meaning of such a claim is not obvious at all. It requires working out, and illustration, and qualification if it is to be made comprehensible at all. And Jacobson does not do any of this. Without it, however, I find his assertion empty; it tells me nothing.

The same can be said, mutatis mutandis, about the other quotations from Jacobson's paper.

As to the second criterion: In what sense does "[p]ure legislation devoid of enforcement always [come] from outside the legal system?" Although the use of "pure" as a modifier is meant to convey something useful or informative, it does not, because Jacobson never tells us with what term he is contrasting this modifier. "Pure" as opposed to what? Impure legislation? Hybrid legislation? When Kant speaks in terms of "pure reason," he frequently is contrasting it with "practical reason," but Jacobson does not seem to have the "pure/practical" contrast in mind. When Kelsen speaks about his "Pure Theory of Law," he is contrasting it with various impure or mingled theories of law, but again this does not seem to be the contrast that Jacobson has in mind here. Is there such a thing as "pure legislation?" Jacobson seems to think so, but I cannot tell what it is.

"Legislation" as I understand it always comes from within a legal system. How can a legislative act take place without the confines of a system of which it is a part? And how can it be said that "[l]egislation is possible only in a jurisprudence where the source of law is outside

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85 I should mention, however, that Jacobson uses one technique to address this problem: he intersperses his text with single-spaced elaborations and examples of some of his claims (a practice Jacobson has taken over from Hegel, who uses the same device in the Philosophy of Right, to the same effect). This ameliorates the problem I find, but does not solve it.

In my own regard, I should say explicitly that I have tried to avoid committing the same mistake I attribute to others; I have done what I could to provide sufficient examples and evidence to support my claims here. But a critic of Hegel whose theme is vanity must of necessity recognize the possibility that his own vanity has blinded him to mistakes and omissions of his own. In particular, I remain uncertain whether I have treated Hegel fairly in view of his extensive writings, of which I have canvassed so little. This is a risk I have decided, nonetheless, to run.

86 See supra text accompanying notes 79-80. In this subsection, I have deleted some material as a consequence of revisions in Jacobson's paper made subsequent to my submission of this Commentary; I have not otherwise tried to take account of late changes in his paper.

87 Jacobson, supra note 2, at 880.

88 See I. Kant, supra note 42.

89 See H. Kelsen, Pure Theory of Law (M. Knight trans. 1967).
Jacobson must be trying to mean something other than what is ordinarily or normally meant by "legislation." And yet, his paradoxical equations rely exactly on his meaning what is ordinarily meant by that word (otherwise, his conclusions would not have the revelatory effect that he surely hopes, and expects, them to have). But, as it stands, I find his equations simply empty, without force or informativeness.

As to the fourth criterion: How does Jacobson mean to be relating the notions of obedience, personal legislation, and the doctrine of precedent? His equation is unintelligible to me. And how does he mean that "law-abiding occupants of systems whose source of law is within the system find that they can obey a legal norm only in the process of creating it?"91 This poses a false paradox, one predicated on some impossible conception that a legal norm is "always" being changed whenever it is being followed or obeyed (because the obedience to it at a different time alone, even in the same context or case, is supposed to make the rule different, to recreate it). This paradox plays on our notions of sameness and difference, and refuses to see that some differences are relevant, some irrelevant, to our attribution of change (or stability) to a legal norm.

IV. HUMILITY IN THE COMMON LAW: "A FRANK AND JOYOUS ACKNOWLEDGMENT OF IGNORANCE"

The vanity that I find in many of Hegel's expressions of legal theory (and in some of Jacobson's) can be contrasted with the humility of the common law along the three lines that I suggested earlier.92 But before I make this comparison, I want to clarify what I mean by the "common law."

For my purposes here, I am content to accept and employ Professor Harry Jones's characterization of the common law as "not merely, or even essentially, a body of rules of more or less ancient judicial origin."93 Rather, in Jones's view, the common law is:

[A] mode of reasoning, a way of using legal sources to analyze problems and to reach and justify decisions in disputed cases. The common law, we might say, is both product and process, the rules courts have laid down in past decisions and the ways in which courts draw on this past recorded experience as a source of guidance for future action. The precedents, the rules and concepts

90 Jacobson, supra note 2, at 880.
91 Id. at 883.
92 See supra note 43.
embodied in them, the traditional techniques governing the use of precedents in the analysis and disposition of new problems, these, in sum, constitute the common law.  

It is Jones's emphasis on the common law as a "decisional style," as "habits of thought" or a "mode of reasoning" that I want to employ here; what I wish to show is that, as a style of argument, judgment, and general expression, the common law proceeds humbly, not vainly. This means, according to the three elements extracted earlier from the dictionary, that legal argument, reasoning, and expression in the common law (especially but not solely as manifested in judicial opinions) tend to have the following characteristics:

1. Having Point

In a judicial opinion or a brief written for a court within a common law system, the claims and arguments are pitched to the felt need to decide the particular case (and, within it, the specific points of law that are) in front of the court for decision. This does not mean that every word and argument will be a logical stepping-stone leading to a decision or judgment. To be sure, there will be detours, pauses, reflections, and asides. But in each instance, the words used, if they are working properly, will have their places in and take their functions from the point of the entire exercise, which is to decide this particular case. And this fact will tend to make them function not in vain. Some words will be performatives, constituting actions taken; some will serve as explanations; some as justifications or excuses; some as

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95 See, e.g., Jones, supra note 93, at 444-45, 448-49, 455.
elaborations or descriptions; and so on. All, however, will be there as elements in the pursuit of a favorable or fair judgment; or else they will be used in vain.

Karl Llewellyn, one of the best readers of judicial opinions and best observers of the common law tradition, taught us this lesson long ago in his classic work, *The Bramble Bush*:

*Everything, everything, everything, big or small, a judge may say in an opinion, is to be read with primary reference to the particular dispute, the particular question before him. You are not to think that the words mean what they might if they stood alone. You are to have your eye on the case in hand, and to learn how to interpret all that has been said merely as a reason for deciding that case that way. At need.*

This “fitness for a particular purpose” so conditions our words within the common law process that it humbles them, in the sense that it gives them point and purpose.

2. Being Humble

Writing within the common law also tends toward humility by compelling consideration for the past customs and decisions that have been inherited by the people presently practicing within the common law. Where Hegel’s philosophy is antihistorical and theoretical, the common law process is antitheoretical, and receptive to history. The common law process uses history as one of its elements or materials. (It uses theory too, of course, but only on occasion and “at need,” not speculatively or idly.) In this regard, the common law reveals itself as capable of learning from others, including those who came before us.

An example of the historical attitude of the common law is its establishment and use of the institution of precedent and the doctrine of *stare decisis*, which are central values in the common law.97 Loosely translated, they mean, “If it ain’t broke, don’t fix it!” Anyone proposing to meddle with the common law, to change or “improve” it, has the burden of showing that the proposed change is necessary, or at least useful. The presumption is not against change—because life entails change, and I understand the common law to be a living system (and a system for living). But the presumption is against meddling or fiddling with a system without a demonstrated (“felt”) need for doing so. Like any living thing, the common law evolves. But it is not a system or process known for revolutionary or radical change—

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97 See Jones, supra note 93, at 444, 449, 452, 454-58, 460, 462.
because life also entails stability, security, and conservation of energy and resources.

One function of the institution of precedent is, then, to train people who live within a common law system in the humility of following and learning from others. This attribute of the common law mimics the fact that we all begin our lives as children, who learn by seeing others do something and then following them (or refusing to follow them); and the fact that some of us grow up to be parents or teachers, who learn to teach others our ways.98

3. No Empty Words

Humility in expression within the common law also is fostered by the fact that expressions there take place within various established legal genres (judicial opinions, briefs, memoranda) and fora, which are the natural homes or contexts for these expressions. These connections give us a fabric or network of significance invented by no one person and acquired by us. This fabric or network becomes our medium for expressing ourselves in relation with others.99 Humility in expressing oneself here is partially a function of the pressure of other people working within the same medium, sometimes helping you, sometimes opposing you; partially a function of mastering a medium about which you always can learn more and which you never can exhaust; and partially a function of submitting oneself to the conditions of the medium to make sense (with others) of oneself and others and the world.100

Legal genres, fora, and media are not the creation of one person. Rather, they are products of social and collective processes and activities; they exemplify the problem with Hegel's reliance on his own invented theory. His remarks fail to have force, or are empty, in part because they are generated out of an artificial, abstract philosophical theory unconnected with the language and institutions of an utterly

98 I have said more on this theme in Eisele, Must Virtue Be Taught?, 37 J. Legal Educ. 495 (1987).
99 This theme is central to James Boyd White's work. See, e.g., J. White, The Legal Imagination (1973); see also Eisele, supra note 94, at 355-65 (discussing White's work).
100 See supra note 75. Learning from others means having to deal with others, both from the past and in the present and, I suppose, also with a view to the future. J.L. Austin emphasizes this fact of learning from others in his remarks on the value of ordinary language and its riches. See supra note 62. But there are many ways in which our dealings with other people within the common law system promote a sense of humility or modesty. Professor Jacobson has shown me that he too recognizes the humility of the common law, for example, when he depicts the consequences of uncertainty with respect to the applicability of a legal rule in the common law. See Jacobson, supra note 2, at 888-89. I am grateful to him for this correction of a failure in my own writing.
social phenomenon, law. On the other hand, Geertz recognizes the significance of law as a *social* phenomenon.

It is this imaginative, or constructive, or interpretive power, a power rooted in the collective resources of culture rather than in the separate capacities of individuals . . . , upon which the comparative study of law, or justice, or forensics, or adjudication should, in my view, train its attention.\(^{101}\)

Given a general social system of significance and signification such as the common law, which I have called a "medium" or a language, both Geertz and Jones recognize that the expressions to be found within such a process tend toward the particular, tailoring themselves to fit the specific case at hand. This impetus toward the particular or concrete forces each speaker or writer within the common law process to conform his or her words to the specific task at hand, and this tends to produce expressions not used in vain. Thus, for Jones, judicial opinions in the common law "are explanations and justifications of decisions reached in concrete cases."\(^{102}\) And, for Geertz, the law is "a mode of giving particular sense to particular things in particular places."\(^{103}\)

This pressure toward the particular trains one toward humility in one's expressions, since the common law claim of "local knowledge" sufficient to decide a particular dispute takes place within an acknowledgment of global ignorance, or at least global silence. (The concepts of "holding" and "dictum" trace this avowed limit to our knowledge. In the common law, we decide what we must decide today in the holding of a case; what we need not decide today we may talk about in dicta, but we leave to be definitively decided some other time, when it is ripe and properly presented for decision.)

In gaining the power of particular expression, then, we forgo the apparent attraction of abstract, theoretical talk. In my opinion, this is an acceptable exchange: we forgo an impossible dream for a living reality. But this kind of exchange, with its accompanying self-denial, can disillusion or disappoint, even when we realize that philosophers from Plato onward have advised us that "[d]isillusion is what fits us for reality."\(^{104}\) If my remarks and criticisms in this Commentary

\(^{101}\) C. Geertz, supra note 53, at 215; see id. at 173, 182, 219. Jones makes similar observations about the common law as a cultural form or resource, as a medium of significance and value. See Jones, supra note 93, at 444, 447, 450, 454.

\(^{102}\) Jones, supra note 93, at 456.

\(^{103}\) C. Geertz, supra note 53, at 232.

\(^{104}\) S. Cavell, supra note 63, at 54. Cavell's full remark is as follows: "Disillusion is what fits us for reality, whether in Plato’s terms or D.W. Winnicott’s. But then we must be assured that this promise is based on a true knowledge of what our illusions are." Id. I recognize that this
seem disappointing, even constraining, then I am prepared to try to show (on some other occasion) why and how I find hope, not despair, in my words.

Still, I would be the first to admit that these comments place limits on our claims to know the law, and on what we can claim to know about the law. To some this may seem to stupefy us, to leave us sadly ignorant of a major piece of human experience. To these readers, I can only say that a “frank and joyous acknowledgment of ignorance” is a necessary (pre)condition to entering or entertaining any claim to know. But many before me, including my betters, have said this much already.

By taking the history of law and institutions for his province, Maitland planted himself in the position where his genius for thinking other men’s thoughts could operate with most effect. Law, as he understood it, is fundamentally a system of common thought about common things: the things and the thoughts, the actual doings, for example, of a villein or a trade unionist, and the reflections thereon of Bracton or the judges in the Taff Vale Case, reacting on each other, and modifying each other into a pattern of such shifting intricacy that the most comprehensive vision will not take in the whole pattern, and the keenest eye will misread some of the incidents. They say now that his theory of the defensive origin of the boroughs is “wrong”, or, what is worse, “imaginative”; and I am reminded of the warning in my school edition of *Julius Caesar*: “Do not talk about Shakespeare’s mistakes: they are probably your own.” But very likely his critics are right. As he says himself, “the new truth generally turns out to be but a quarter truth, and yet one which must modify the whole tale”: and in a world so perplexingly contrived as this is, a frank and joyous acknowledgment of ignorance is the only way of wisdom. “We must go into the twilight, not haphazard, but of set purpose, and knowing well what we are doing”; and, when all the other classes have been abolished, there will remain the distinction between those who know that all hypotheses, interpretations, creeds, programmes, and what not, are questions, and those who suppose them to be answers.105

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