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FROM NEGATIVE RIGHTS TO POSITIVE LAW: NATURAL LAW IN HEGEL'S *OUTLINES OF THE PHILOSOPHY OF RIGHT*

by

MARCOS GONZALEZ

Under the Direction of Sebastian Rand

ABSTRACT

In this paper I attempt to address an interpretive difficulty that surrounds Hegel's position in the history of jurisprudence. After a brief overview of Hegel's project, I outline the first two sections of the *Outlines of the Philosophy of Right* in order to support my argument that Hegel advocates a natural law theory of legal validity. I then show that confusions regarding Hegel's place in the history of jurisprudence arise from his view that the ethical evaluation of laws is limited (with some exceptions) to procedural laws that govern the enactment and recognition of laws in the administration of justice. I end by providing Hegel's distinctive argument for legal publicity, which he takes to be essential for the enactment and recognition of valid law.

INDEX WORDS: natural law, Hegel, *Outlines of the Philosophy of Right*

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by

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DEDICATION

I would like to dedicate this thesis to my mother, father, and sister, and my colleagues in the Georgia State University philosophy department, without whom I would be ill-tempered and mean.

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"It may be infuriating to know that one has a right and then be denied it on the grounds that it cannot be proved. But the right which I have must also be a posited right: I must be able to describe it and prove it, and a right which has being in itself cannot be recognized by society until it has also been posited."[1]

1 INTRODUCTION

The *Outlines of the Philosophy of Right*[2] is Hegel's treatise on law, society, and the state. This paper is an attempt to fit Hegel's philosophy of the law into contemporary debates regarding the nature and sources of legal authority. To date there has been widespread disagreement concerning the place of Hegel's legal philosophy in the history of jurisprudence. For instance, at least two philosophers have claimed that Hegel's emphasis on the rule of law and conventional rights, as well as his criticism of conscientious objectors' reasons for non-compliance place him squarely among the legal positivists.[3] Alternately, Thom Brooks has recently argued that Hegel "satisfies all but one of the four general features of natural law," which he takes to describe the following features shared in common by most natural law theories:[4]

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[1] Hegel, Georg Wilhelm Friedrich. *Elements of the Philosophy of Right.* Ed. Allen W Wood & Hugh Barr Nisbet. Cambridge University Press: Cambridge, 1991. §222Z. Most sections of *Outlines* are followed by a remark by Hegel, which serve as clarification and further commentary on the main body paragraph. Additionally, many sections contain additional comments called *Zusätze* that were compiled by Bruno Ganz, a student of Hegel's who published an edition of *Outlines* in 1833. I will note the remarks with "R" and the *Zusätze* with a "Z."

[2] Referred to hereafter as *Outlines*

[3] Karl Popper is one of the most strident critics of Hegel on these grounds, claiming that Hegel advances an "ethical and juridical positivism, the doctrine that what is, is good, since there can be no standards but existing standards; it is the doctrine that might is right." Popper, Karl R. 1902-1994. *The Open Society and Its Enemies*. [5th ed., rev.]. Princeton, N. J.: Princeton University Press, 1966. p. 243.

[4] Brooks, Thom. "Natural Law Internalism." *Hegel's Philosophy of Right*. Ed. Thom Brooks. Malden: Wiley-Blackwell, 2012. pg. 171

(1) we can make a distinction between 'law' and 'true law'

(2) we distinguish 'law' from 'true law' from the standpoint of justice

(3) 'true law' often entails the law is universally and eternally true

(4) the standard of justice is external to the law.

Brooks claims that Hegel advocates a natural law theory of law. These theories express a particular view of legal validity, or the status of a norm as a legally binding norm.[5] The variety of natural law theory that his criteria express emphasizes the reliance of a legal rule's status as law (the legal validity of a norm) on its cohering with a set of norms discovered through an account of justice.[6] Hence, in order to be identified as a natural law theorist, Hegel must advance two theses. The first is reflected by criterion (1) and is a conceptual thesis about law: law, in order to qualify as law, must meet certain requirements. The second thesis, reflected by criterion (2), states that the necessary conditions of a norm's status as law are to be evaluated from a point of view that is concerned with the justness or morality of that norm. In effect, the legal validity of a norm entails its justness. With respect to criteria (1) and (2), Brooks argues that Hegel's philosophy of law clearly violates postivism's separability thesis, famously expressed by John Austin as follows: "The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different

[5] An example of natural law moral theory is Aquinas's derivation of the normative authority of human law from a natural law, where "natural" consists in being consistent with a universal human nature that places objective moral requirements on human action. Natural law theories of law assert a strong relationship between legal validity (a norm's having the status of law) and that supposed law's moral content. Radbruch arguing that there is a threshold of injustice beyond which a law loses its legal validity is an example of natural law legal theory, which expresses the principle *lex iniusta non est lex.* Brooks' principle claim is that Hegel advocates a natural law theory of law. However, I will also show that Hegel has a natural law theory of morality, since he claims to be discovering a set of objective moral norms grounded in the concept of the will.

[6] Not all legal theories that appeal to extra-legal norms to evaluate the law are natural law theories. For example, a utilitarian would argue that the justness of a law should be evaluated from the point of view of utilitarianism.

enquiry."[7] In essence, the separability thesis claims that the criteria that determine the validity of law within a legal system are discoverable independent of the criteria that may figure into an assessment of the law's justness. Brooks instead argues that for Hegel law "becomes more true (or actual) the better it coheres with a standard of justice," suggesting a tight connection for Hegel between legal status and justice.[8] Since, according to Brooks, Hegel acknowledges a gap between some conventional law and "true law," Hegel's is a candidate natural law legal theory. Because this gap for Hegel is explained by the law's deviation from the conceptual requirements of a legal system--requirements that are also moral--Hegel's theory reflects features (1) and (2).

Brooks claims that Hegel's unique contribution to natural law theory lies in his deviation from criterion (4) above. Hegel deviates from this criterion since he argues that justice is a "moral standard [derived from] from within the law itself."[9] Brooks calls this position *natural law internalism*, a position that differs from condition (4) in that the moral evaluative point of view is internal to the legal system.[10] I want to use Brooks' argument as a model as a foil for my own reading of Hegel's philosophy of law. While I accept that natural law theories generally contain the features that he cites, I argue that a distinction between 'true law' and 'law' for Hegel is not as Brooks describes. In sections 1.2 and 1.3 of this paper I will show that the standard of justice for Hegel is external to the legal system and derived from features of human action. Additionally, not all of the norms that Hegel presents through his systematic account of justice find straightforward expression in the state's laws, implying that at least some of the evaluative crite-

[7] Austin, John (1832). *The Province of Jurisprudence Determined*. Ed. W.E. Rumble, 1995. Cambridge: Cambridge University Press. pg 175.

[8] Brooks, pg 172. I use "legal validity" and "legal justification" to refer to the status of a law as law.

[9] Ibid. pg 176

[10] I will explain this position in detail in section 2.2.

ria that Hegel advocates are extra-legal and that not all of a state's laws are evaluable according to these criteria. To some degree, this makes Hegel appear to be a legal positivist.

A positivistic account of legal validity claims that all legally valid laws are enacted or decided in virtue of their being consistent with an authoritative legal source:[11] this is reflected by the postivist's Sources Thesis, which emphasizes the role that authoritative legal materials play in legal reasoning. Such a view is proposed by the positivist, Joseph Raz. As Raz notes, the concept of legal justification necessitates the view that legal rules are "nested in justificatory structures."[12] He expresses what is distinct about legal justification in the following formula:

> The statement 'It is law that P' legally justifies the statement 'It is the law that R' just in case 'It is law that P' is true and there is a set of true statements (legal or non-legal) <Q>, such that <Q> and it is the law that P state a complete reason to believe that R (and <Q> by itself does not state such a reason).[13]

Essential to Raz's view is the idea that non-moral premises are sufficient to yield a true statement of law, thus separating the validity of a legal norm from its justness.

Hegel would disagree with the positivist account of legal validity. On Hegel's view, individuals have moral claim-rights[14] that derive from the capacity for self-consciousness, moral reflection, and intentional agency, which are all fixed features of our human nature. He derives these rights by first locating the normative ground of specific claim-rights held by individuals. He then argues that these rights of self-consciousness create a set of corresponding duties, the

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[11] Hart (1961) explains the role of sources according to their functioning as a "rule of recognition." This rule is the set of governing laws that determines, for example, whether a legal rule was validly enacted.

[12] Raz, Joseph. “Legal Rights." *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, 238.

[13] Ibid. 7-8

[14] In contemporary rights theory, a legal claim-right is correlative to a legal duty.

subjects of which are those for whom deliberation occurs within a system of rules backed by coercive mechanisms; that is, officials acting in a public capacity that obliges them to recognize or apply laws. Hegel's theory of rights implies a pragmatic connection between the duties that correspond to these core rights and a set of authorized powers these duties require. His account of the latter locates the normative authority of a set of power-conferring laws, or the conditions under which legal relations are rightly alterable--this is "Right" and describes Hegel's theory of legitimacy. On this view, claim rights held by an individual authorize a set of laws, rights that must be respected by legal officials in a position to exercise discretion when making judgments that effect them. I will show that the methodology Hegel appeals to in support of claims like these place him in the camp of natural law moral theorist such as St. Thomas Aquinas. Such theorists claim that true moral statements are grounded in human nature or the nature of the world. As we will see, Hegel's systematic derivation of social institutions relies on claims about the nature of the concepts that underlie and justify these institutions, concepts that he believes have an objective nature.

1.1 How is Hegel's Theory a Natural Law Theory?

Many natural law theorists present a simple and implausible relationship between a law's justness and its validity. My reading of *Outlines* shows that confusions regarding Hegel's place in the history of jurisprudence arise from the complex, albeit much more plausible, relationship between his natural law moral theory and natural law legal theory. According to traditional natural law legal theories, human law and natural law can deviate by supplying contradictory directives. But the means by which natural law informs positive law can be thought of in at least two different senses. One simple understanding of this relationship is that law ought to express norms dis-

covered by a natural law moral theory, which can take any number of forms. Hence, a naive theistic natural law theory might argue that the Decalogue should be included in the constitution. In this sense, natural law theory would provide a set of norms to be directly expressed by positive law. I call this relation *rule overlap.* While Hegel's natural law theory includes some rule overlap, his theory also expresses a different relation between the directives of natural and positive law. On his account, the ways in which a legal system can diverge from the demands of justice include (1) failure of rule overlap, such that a society's legal system fails to accommodate norms required by a systematic philosophical account of "right" (Hegel's natural law ethical theory) and (2) failure of the social order to structure its deliberative processes that determine the law in accordance with the moral freedom of the individuals who require these norms.[15] With respect to rule overlap, it is clear that on his view there is some rule overlap between positive and natural law. In my discussion of Hegel's theory of contract, for example, (in section 1.2 of this paper) I will explain how the basic features of a contractual agreement, in addition to the prohibition on theft and assault (both norms that he deduces from his natural law ethical theory) are all straightforwardly expressed in contract law and criminal law.

In addition to failure of rule overlap, a legal system can diverge from natural law by failing to incorporate just procedures demanded by natural law theory. Additionally, such failure means the failure of these institutions to validly recognize and enact legal norms. This type of divergence of a legal system from natural law is different than failure of rule overlap, since Hegel's view of the norms that govern the recognition and enactment of law are not to be confused with positive laws. Hegel is quick to "rule out any possible idea, let alone expectation, that [Right's] systematic development should give rise to a positive code of laws such as is required

[15] I will discuss why individuals require institutional norms in section 1.3.

by an actual state."[16] The *Outlines* does not provide a blueprint for all of a state's laws. Rather, Hegel acknowledges that different states can have different laws and still require similar deliberative processes among the various legal institutions that compose the state. My thesis will focus primarily on this account of how positive law can deviate from justice. Hegel is to be read as advocating a general structuring of a state's deliberative practices. These practices are authorized by a set of positive obligations discovered through a systematic account of the requirements of successful human agency. In sum, successful human agency both requires and authorizes a set of social practices.

With respect to the social practices essential to human agency, Hegel claims that a genuine account of freedom requires a systematic derivation of the essential features of a political system. His methodology involves evaluating the rationality of actual institutions. By pursuing this methodology, Hegel avoids an overly rationalistic and utopian methodology, saying,

> Since philosophy is exploration of the rational, it is for that very reason the comprehension of the present and the actual, not the setting up of a world beyond which exists God knows where - or rather, of which we can very well say that we know where it exists, namely in the errors of a one-sided and empty ratiocination.[17]

Rather than advancing a novel, utopian theory of the state that claims to better accord with the natural rights of individuals, Hegel wishes to uncover the latent rationality of existing institutions and practices. He thinks that setting up an "empty ideal" is unnecessary because current institutions and practices--even if imperfect--already provide all the materials required to justify claims regarding the appropriate organization of the state. Hegel's theory of a just social order places

[16] GPR §3R

[17] GPR pg. 20

emphasis on the latent rationality of the actual social order, a social order replete with contingent practices and norms.

Rather than emphasizing the ideal features of a state, Hegel insists that freedom can only exist in a rational state, and a rational state is one in which Right exists concretely or that is *actual* (*wirklich*). A rational state is one in which the concept of the free will is actualized, or "Right is any existence in general which is the existence of the free will."[18] By Right Hegel does not mean a claim-right or a liberty, for unlike contemporary libertarians and classical liberals, Hegel does not believe that freedom is exhausted by the liberty of individuals to make choices. Free choice describes just one aspect of our subjectivity, "the will's self-conscious aspect, its individuality *as distinct from* its concept which has being *in itself*."[19] Although the subjective basis of one's choices accounts for important features of moral judgment, such as intention, purpose, and conscience, a full account of freedom requires the possibility of evaluating the objective content of the acts the agent chooses. Additionally, Hegel's theory of institutional rationality extends the scope of intentional action to institutions like property and the administration of justice, which he treats as products of the human will or as willed objects. Hence, rather than providing evaluative criteria solely for individual action, Hegel's theory of the will also includes an account of the systematic relationship between social institutions. The "activity of the will" therefore denotes a broader conception of agency than can be explained by the individualist or libertarian paradigm.[20]

Just as libertarians must explain how the individual will fails to achieve liberty, Hegel must explain how institutions fail to actualize freedom. His answer is that institutions fail to ac-

[18] GPR §29

[19] GPR §25

[20] GPR §28

tualize freedom by inadequately expressing the concepts upon which they rely to justify their activity. For example, take Hegel's claim that a system of punishment based on revenge is unlawful: "When the right against crime takes the form of revenge, it is [...] not in a form that is lawful, i.e. it is not just in its existence."[21] Such a system of punishment is unlawful because it fails to bring the concept of punishment into existence. So although such a system might produce some of the features of punishment, it would fail to *actualize* justified punishment. When the whole of a state's institutions are related systematically to individual action, we arrive at an account of what Hegel calls the "concept of the will." Understood alongside his emphasis on the actuality and existence of freedom, his theory proposes a close tie between moral and ontological necessity and the demands that rationality places on our conception of freedom. He claims that freedom is "a particular way of thinking - thinking translating itself into existence, thinking as the drive to give *itself* existence."[22] Thinking translates itself into existence in accordance with the concept of the will. With respect to individual actions, this idea is relatively straightforward and similar enough to any account of practical reason. Individuals are able to determine a necessary course of action in light of their beliefs and desires. However, broadened to the institutional normative framework Hegel seeks to develop, the duties that rational consistency impose only obliquely affect individual action. In sum, Hegel attempts to discover the conceptual foundation of an institution's existence. The necessity of a particular feature of an institution is determined by its explanatory function with respect to other institutions it requires and presupposes. For example, if property is essential for the recognition of each others' personhood, as Hegel claims it is, he must explain how the acquisition and transfer of property will allow such recognition to occur. In a sense, property wills the concept of a contract. The purpose of a private property regime

[21] GPR §220

[22] GPR §4Z

presupposes a valid means of acquisition and transfer, and these in turn require an account of how a subject who fails to acknowledge the personhood of a property owner is violating a right. Taken together, an account of property, contract, wrong, and punishment are implied or willed by the purpose of property and receive their determinate shape by purposes related to adjacent institutions.

A state whose legal institutions fails to express the necessary features of a just legal system will be unjust and will also fail to produce or recognize valid laws. This failure is due to the inability of individuals who are confronted by such institutions to rationally endorse these institutions. I will argue in chapter two that Hegel's derivation of one institution from another--a methodological technique that he employs throughout *Outlines*--is tied closely to his emphasis on the rational endorsement of a state's laws. This criterion is expressed most explicitly in Hegel's defense of a unique variety of legal publicity, the requirement that laws must be public..

1.2 Hegel's Derivation of the Rights of Persons to Hold and Transfer Property

As we will see, Hegel has a layered view of identity and views the self as engaged with the world at different levels of identity: as a person, a moral subject, and as a citizen. In the first section of *Outlines*, called Abstract Right, Hegel develops a foundational conception of legal personality based around the acquisition and use of property. In section two, Morality, the focus shifts from personhood to our moral subjectivity, or our capacity to take the position of a moral subject. Lastly, in Ethical Life, where he discusses his theory of private law, Hegel discusses the rights and duties involved in being a family member and a citizen of a state.[23] Each conception carries

[23] Hegel describes the different conceptions of the person operative at each moment of *Outlines*: "In right, the object is the *person*; at the level of morality, it is the *subject*, in the family, the *family-member*, and in civil society in gen-

with it different normative demands on other individuals and on the state. However, each level also supplements the others by providing normative resources that the others lack. For example, the concept of the moral subject provides the normative resources needed to explain important features of personhood such as punishment and the normative authority of contracts, while the conception of the citizen is required to develop a concrete conception of moral duty. For present purposes it is important to note that the various conceptions of the self operative in *Outlines* are mutually supporting and no normative framework is conceptually prior to the other.[24]

Like some liberal theorists, Hegel argues for universal rights based in our personhood. However, the rights derived from legal personhood are abstract and insufficient to account for the variety of rights relevant to concrete freedom, since one's status as a person does not depend on any concrete facts about that person. This is because personhood is only a "formal universality," and a person is a "completely abstract 'I' in which all concrete limitation and validity are negated and invalidated."[25] By "concrete limitations," Hegel is referring to our particularity, which describes "a content consisting of determinate ends," or "the external world immediately confronting [the abstract will]."[26] Determinate ends are the purposes of action pursued by an individual on account of his physiological makeup, the economic circumstances constraining his decisions, and all of the other contextual factors that guide the agent's action towards purposes that

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eral, the *citizen*" (GPR §190). In the same passage Hegel claims that "human being" denotes a person with needs and ends.

[24] In lieu of space for an extended discussion of the relevant portions of Hegel's logic regarding grounding relations, we can understand Hegel's claims about logical priority as a thesis about explanatory ground. The concept of legal personhood is not explanatorily prior to the concept of a contract, since an adequate explanation of legal personhood also requires an adequate explanation of a contract. Conversely, an adequate explanation of the concept of a contract requires an adequate explanation of personhood. In this sense, these concepts are mutually grounding and neither is logically prior, even if--dialectically--one is temporally prior to the other.

[25] GPR §35

[26] GPR §34

satisfy her own interests. Because the person is a "completely abstract 'I'," particularity "is not [...] contained in the abstract personality as such. Thus, although it is present - as desire, need, drives, contingent preference, etc. - it is still different from personality."[27] Elsewhere, he says, 'I' is totally empty; it is merely a point--simple, yet active in this simplicity."[28] These claims imply two facts about legal persons. The first is that the sufficient conditions of personhood are independent of the person's particularity. Concrete facts about a person are neither sufficient nor necessary to determine one's personhood. If we say, "Lexy is a person," her personhood is neither limited nor conditioned by any other true, affirmative statement with "Lexy" as the subject; Lexy's nationality, gender, or any salient life experiences are irrelevant to Lexy's personhood. Hegel treats the abstract self as implied by the persistence of the subject throughout choices and circumstantial events that affect her.

Secondly, Hegel suggests that a conception of freedom as "*pure indeterminacy*" is, by itself, incapable of being realized in determinate institutions and practices. Hegel alludes to the French Revolution to illustrate his point:

> If the will determines itself in this way, or if representational thought considers this aspect in itself as freedom and holds fast to it, this is *negative* freedom or the freedom of the understanding... [If] it turns to actuality, it becomes in the realm of both politics and religion the fanaticism of destruction, demolishing the whole existing social order, eliminating all individuals regarded as suspect by the given order, and annihilating any organization which attempts to rise up anew.[29]

Hegel interprets the significance of the Reign of Terror as a persistent dissatisfaction with attempts to institutionalize, or to make concrete, the abstract principles of the revolution on account of the role that particular interests played in pursuing those principles. These principles

[27] GPR §37

[28] GPR §4Z

[29] GPR §5R

were inevitably mediated by institutions that were staffed and operated by people with particular interests and ends that inevitably guided their action. Hegel thinks the French Revolution serves as a practical example of the problem of developing a theory of the state with only the normative resources of universal personhood. What is needed is an account of actual freedom, or freedom that exists, in order to overcome this problematic account of the relationship between freedom and institutions.

Nonetheless, the rights of abstract personhood place important normative constraints on the legal framework of civil society and the state. Although Hegel argues that an abstract conception of freedom is itself incomplete, he generates a set of principles from an abstract conception of legal personhood that are operative throughout the development of the concept of Right. He begins by evaluating the means by which a purely internal, abstract conception of selfhood achieves recognition in the external world. The most essential object of ownership is one's own body, the first natural object that we confront in the external world. He explains the external, corporeal dimension of personhood, saying, "As the immediate concept and hence also as essentially individual, a person has a natural existence partly within himself and partly as something to which he relates as to an external world."[30] For Hegel, the body stands as the immediate unity of the "self-reflecting *infinite 'I'"* and its individuated, corporeal existence.[31] Regarding ownership of one's body, Hegel suggests that although one has effective possession of one's body, the corporeal mediation of the self is not sufficient to establish ownership over one's body. The infinite ground of personhood—the persisting, self-reflective *I*—achieves legitimate ownership of one's body through an act of will. He explains that "I at the same time possess *my life and body*, like

[30] GPR §43

[31] GPR §14

other things, only *in so far as I will it*."[32] The distinction arises from the possibility of renouncing one's body through various forms of asceticism, self-mutilation, or suicide. Indeed, Hegel claims that animals also possess their bodies, but since the possibility of renouncing their own body is not available to them, they do not achieve possession through an act of the will. Lastly, as the most immediate means of expressing and individual's external actuality, the body stands as the possibility for possessing other objects as standing in a relation as one individual to another. This relation explains the necessity of an account of private property.[33]

Given the prohibition on assault and slavery entailed by Hegel's account of possessing one's own body, he can begin to work towards a general principle of abstract right. As he explains, the most basic normative requirement of the abstract right of personhood is the "commandment of right [...] *be a person and respect others as persons*."[34] But what does this duty entail? This principle entails duties to not harm oneself or others, but it also includes the right to acquire and alienate property[35] and as a result of the latter, the right to engage in contractual agreements.[36] The commandment of right generates a liberty to acquire and alienate property and a variety of attendant rights regarding just transfers that emphasize the duties of contractual exchanges. With respect to his argument for property acquisition, Hegel claims that because "what is immediately different from the spirit is... a *thing*, something unfree, impersonal, and

[32] GPR §47. Hegel goes on to explain that while self-ownership requires an act of the will, immediate possession of one's body is sufficient to establish ownership in relation to others. It seems that while the mere possibility of full self-ownership does no terminate in freedom for oneself, it does ground the prohibition against slavery and physical assault. (see GPR §48)

[33] GPR §46

[34] GPR §36

[35] GPR §§44-65

[36] GPR §§72-81

without rights," we have no duty not to acquire property.[37] Hence, we are at liberty to acquire property. Second, regarding just holdings, Hegel does not cast his justification of property in the material interests that it secures. Although he takes himself to be characterizing liberalism's concept of personhood in broad terms, his explanation of just property acquisition, just holdings, and just transfers does not center on the material benefits that these rights secure for the property holder. It is true that property provides for the satisfaction of "particular interests," which include "natural needs, drives, and arbitrary will."[38] However, he also claims that "the *rational* aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality."[39] His argument against the justification of property predicated on the material benefits the institution secures follows from his views of the nature of personhood. Since the determinate ends towards which our natural desires, needs, and drives impel us are a limitation on our abstract freedom, property cannot be considered a right simply because it is instrumental to satisfying these needs. According to Hegel, the acquisition of property is a right because it represents the abstract will's desire to literally *identify itself* with external objects and to find its freedom in the objective world.[40] If the abstract will is to be free, it must create a "sphere of freedom" within which its internal and abstract consciousness of itself is affirmed and

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[37] GPR §42. This is not to say that we do not have other important duties regarding others in the course of acquiring property. As Hegel will explain in Civil Society, commerce and exchange are always conditioned by the needs and desires of others around us (For example, see §240 and §240Z on the "rabble mentality"). What he does claim is that objects, unlike persons, do not possess themselves. They lack the inwardness that allows self-consciousness persons to choose how they relate to their own external existence. (see GPR §44 and §44R)

[38] GPR §45

[39] GPR §41Z, emphasis mine.

[40] For this reason, Hegel says, "Personality is that which acts to overcome this limitation [between the subject and the world of natural objects] and to give itself reality - or, what amounts to the same thing, to posit that existence [*Dasein*] as its own" (GPR §39).

respected by others.[41] Property rights and the rights of security of person are how individuals are affirmed by others and by themselves as free, and because of its purpose in security freedom by this means, property is essential to the realization of the free will.

By claiming that property allows us to "supersede subjectivity," Hegel means to emphasize that in order for proprietary obligations to be valid, there must be objective norms in light of which a subject's claims are recognizable as valid or invalid. Hegel claims that the source of these norms is "the concept of the will."[42] Again, the concept of the will is supposed to encompass individual intentions and the purpose or function of institutions within which individuals act. For this reason, the concept of the will is further analyzed into (1) the arbitrary will of individuals, which describes the ability of individuals to make choices and (2) the Idea of the will or the "actually free will." The Idea of the will represents a state of affairs in which a reasonable person (i.e., the speculative philosopher) can assent to the rationality of its operative institutions and practices. As one such practice, the acquisition, use, and alienation of property is a norm governed activity necessitated by the concept of the will. When we are identified through a piece of property, we make our will an object to ourselves and others. We become an object of contractual exchanges, property disputes, a lien-holder, a renter, etc, and we are recognized as such by others. We also give shape to our property through its continual use. Property itself is an objective existence in that the concept of holding a piece of property presupposes objective norms that account for the justness of holdings and transfers. As such, property is a necessary condition of bringing the will into existence, and on account of this fact Hegel considers property an "essential end in itself" rather than as a mere means for satisfying needs.[43]

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[41] GPR §41

[42] GPR §4

[43] GPR §45R

Hegel understands a contractual agreement to be a conceptual requirement of private property. An original acquisition was justified by the absence of an obligation on the part of persons to recognize things as right-holders. Just transfers, however, must explain how a piece of property can validly be transferred from one property holder to another. It is necessary, Hegel explains, "to dispose of [property] *as property* in order that *my* will, as *existent*, may become objective to me."[44] If a property owner wishes to transfer her property, she must do so according to rules that ensure the integrity of the object as a piece of property across the transfer, and the terms of a contract are these rules. The idea of just holding requires an account of just acquisition and just transfer. If a thief steals someone's slow-cooker, it would be factually inaccurate to describe it as the thief's property. Rather, a transfer did not occur. The justification for police force against a thief who has wrongfully acquired a slow-cooker would look past the fact that the thief was holding the object to the facts of its acquisition. For this reason, a thief does not validly hold an object she acquired because it is not her property.

In emphasizing what the concept of property requires of associated practices such as contractual agreements (and as we will see, punishment), Hegel grounds the legitimacy of a society's practices surrounding property in the concept of the will, or the set of implicit commitments that these practices express when correctly understood. A society with a legal system that allowed children to enter into contractual agreements, recognized the validity of agreements to exchange inalienable goods, or the validity of mistaken agreements, would be doing harm to the concept of property. To this extent, the conceptual requirements of property allow one to infer a set of basic principles that must give shape to institutions adjacent to, and laws emanating from, the concept of property, and institutions that violate these principles are unjust on account of doing "violence

[44] GPR §173

to the concept" of property.[45] Conceptual necessity grounds Hegel's theory of justice in part because of the necessity that institutions be reasonable to its citizens. Hence, the most basic requirement of a valid contractual agreement is that it is possible to assent to its terms, or as Hegel says, "Contract presupposes that the contracting parties *recognize* each other as persons and owners of property."[46] Because, for example, children cannot understand the terms of a contract, they cannot validly enter into contractual agreements.

In virtue of the agreement that contracts effect, a contractual exchange expresses a "common will;"[47] two wills are essentially combined into one. Hegel qualifies this point, however, when he states, "Yet it is also implicit (at this stage) in this identity of different wills that each of them is and remains a will distinctive for itself and not identical with the other."[48] A just transfer requires a union of wills because each party must recognize and assent to the norms that govern the transfer. Hegel sees reason to qualify the commonality of a will because the presence of two individual wills is needed to explain how in a contractual agreement there can arise a "collision of rights."[49] Because both parties can intentionally or unintentionally violate the terms of the contract, each is in a position to commit a wrong, which is to assert one's subjectivity in opposition to the "universality" that agreeing to objective norms expresses.[50] The unity and difference between the parties to a contract is for Hegel the most basic example of the formal fea-

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[45] Hegel uses this phrase in his discussion of slavery. Slavery does violence to the concept of personhood, just as recognizing the validity of a contractual agreement between children would do violence to the concept of property. (GPR §2)

[46] GPR §71R

[47] GPR §75

[48] GPR §73

[49] GPR §84

[50] Hegel distinguishes between a contract that represents a "general will" and a genuinely universal contract, which is simply one that is just. (see §81Z)

tures of ethical obligation. The norms must be consistent with the concept of property, and the possibility of failing to abide by them points Hegel to a general description of moral failure and ultimately to his justification of punishment.[51]

Hegel discusses "wrong" at length at the end of Abstract Right. However, intentional wrongdoing is of particular importance to understanding the subsequent section on Morality. Michael Quante notes the "logical implication-relationship" between the spheres of Abstract Right and Morality.[52] In short, after developing a conception of wrongdoing in Abstract Right, Hegel requires an account of how a wrong is made right through punishment.[53] Similar to liberal theories, Hegel then has to explain how the valid exercise of punishment requires an account of intentional action. An account of morality is required in order to show how punishment is distinguishable from coercion, since the former serves to correct a wrong rather than to disrupt a valid holding. An analysis of crime and punishment will reveal a justificatory nexus that structures the deliberative transactions that lead from a finding of guilt to an appropriate punishment.

In order to account for how intentional wrongs can validly be corrected, the ability to validly enforce the terms of a contract requires a further determination of the person into a moral subject. Abstract persons were not identified by their actions but by their property and the effects their deeds have on the property and bodies of others. In much the same way that property

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[51] Hegel traces wrong to the violation of a contract (GPR §§82-104).

[52] Quante, Michael. *Hegel's Concept of Action*. Cambridge, U.K. ; New York: Cambridge University Press, 2004. pg. 21

[53] While an account of wrongdoing requires an account of punishment, Hegel similarly claims that a particular criminal act, in virtue of being "null and void in itself," in fact wills the corrective punishment. The criminal's purpose is to commit an act that has negative value for others, even though it might satisfy his own interests. On this account, the criminal's act must be met with an a restorative act, or the "superseding [the] opposition [between the universal will which has being *in itself* and the individual will which has being *for itself*." Hegel calls this restoration "the negation of the negation" (GPR §104).

allows an individual to achieve a "sphere of freedom" by means of objective norms that account for recognized property holdings, intentional action describes the necessary conditions of an individual's ability to be held responsible for—or to own—actions resulting from evaluative deliberation.[54] Because Hegel's justification of punishment requires an answer to how agents can be responsible for actions, he will argue through the most basic criteria of intentional agency to modifications and deeper developments of these criteria. He expresses these criteria as rights of subjective freedom.

1.3 Hegel's Derivation of the Rights of Subjective Freedom

The rights grounded in personality facilitated the mutual recognition of personhood by providing the rational basis for positive laws: the duties not to interfere with others' property and personhood. The rights that Hegel enumerates in the section titled "Morality" are also grounded in a feature of all rational persons, namely our capacity for self-conscious reflection about the moral value of actions. This capacity gives rise to rights that (1) specify the criteria under which actions can be imputed to agents and (2) propose a few distinct evaluative criteria of the justness of a state's laws, including (2a) that the law directs citizens to acts or forbearances consistent with the conscience of a moral subject with an interest in pursuing objectively good ends and (2b) that the laws are promulgated in a way that allows citizens to recognize the value of the state's laws.

The rights derivable from our capacity for self-conscious moral evaluation function differently than the rights of personhood. One important difference between the derivations that

[54] As Quante notes, deeds and actions are distinguished by the responsibility we have for the latter and the imputability of the former. For example, if I mean to hit a baseball into right field and I accidentally strike and kill an endangered bird, this was my deed, since I was the proximate cause of the bird's death. However, because it was not part of my intention, the deed is not imputable to me. In other words, we would not consider it my action.

occur in Morality and Abstract Right is that many norms of the latter serve as a justification of the action-guiding laws of civil society with which all citizens must comply, while the former constrain the deliberative procedures of the state's institutions. For although it is possible for a state to violate the concept of property by, for example, allowing the legal system to recognize the validity of contractual agreements between minors, they cannot take away features of moral agency that belong to all persons. With respect to the rights of morality, Hegel's task is to describe how intentional action functions in any individual with the capacity for moral reflection. Hegel's theory of the state and civil society emphasizes the obligation on the part of those shaping our institutions to structure their deliberative practices in a way that protects the moral rights of individuals.

The theme of Morality is intentional action, or the "translation" of a subject's ends into objectivity.[55] A comprehensive account of action entails an account of responsibility[56], intention and welfare[57], and the good and conscience[58]. Although we reach an account of intentional action by way of justifying punishment, Morality is not solely concerned with responsibility. Due to the importance of self-reflective moral thinking in the actualization of right, Hegel also discusses the structure of morality in order to show the ways an individual subject's moral opinion can possibly cohere or diverge from genuine, or objective, right. Similar to a violation of contract, a morally bad action occurs when a subject asserts their subjective ends in opposition to what themselves and others recognize as valid, whereas genuinely moral action consists in an agent's inner end being objectified in a way that is congruent with the Idea of the Good. Hence,

[55] GPR §9

[56] GPR §§115-118

[57] GPR §§119-128

[58] GPR §§129-140

Hegel is primarily concerned to show how the claims of moral subjectivity presuppose a structural distinction between content generated by moral subjects through appeals to conscience and the content of the genuine good reached through moral deliberation. The overlapping of these two varieties of content is a presupposition of moral action and explains the phenomenon of moral duty. In addition to straightforward moral wrong, it is essential for Hegel to show that a subject can diverge from genuine moral obligation and retain a sense of certainty that he or she has really acted according to duty, namely, one legislated by one's own conscience.

1.3.2 Rights Grounded in Purposeful and Intentional Action

A divergence between the content of a subject's moral concepts and what is objectively moral is not just an idiosyncratic Hegelian presupposition. Rather, the subject's purpose and the objective content of a deed come apart through an analysis of purposeful action. Through her purposeful action, an agent intends to bring about some state of affairs or "posits an alteration to [a] given existence."[59] We seek to bring about some end in the world and hence "[have] an *idea of the circumstances which that existence involves*."[60] However, in endeavoring to bring about some state of affairs, we almost never carry it out to our exact specifications, for the deed "may contain something other than what was present in the will's idea."[61] From this Hegel draws an important conclusion regarding imputability, namely that we have "the right [...] to recognize as [our] action, and to accept responsibility for, only those aspects of [our deeds] which were present in [our] purpose."[62] This right holds that an agent cannot be held responsible for distant and un-

[59] GPR §115

[60] GPR §117

[61] GPR §117

[62] GPR §117

foreseeable consequences that have nothing to do with the initial action. Hegel calls this basic moral right the *right of knowledge*, stating that "my will is responsible for a deed only in so far as I have knowledge of it."[63]

In order to make the foreknowledge of a state of affairs a criterion of imputability, Hegel claims that we must identify an action by an act type rather than by the particular state of affairs brought about by a deed; this requires the use of universals that circumscribe the relevant consequences of an act type from the irrelevant. Regarding a deed only by the state of affairs brought about would place too much emphasis on consequences that are "contingent additions which have nothing to do with the nature of the action itself."[64] For example, if a baseball player hits a pop fly and strikes a bird, we would not hold him responsible for the state of affairs brought about despite the consequences. We would only hold him responsible for hitting a pop fly, which is the only thing he purposed to do. Due to the constraints that imputability place on how we understand action, we have to describe actions as act types with purposed consequences; this requires the use of universals and marks a transition to a new right: the right of intention.

To understand a deed according to a universal is to classify it according to the consequences it specifies. But Hegel foresees and responds to an objection, one that might potentially be offered by a defense attorney attempting to excuse an arsonist from her crime. Hegel presents a scenario in which an arsonist purposes only to light the corner of a townhouse on fire. However, the fire spreads and burns down the entire block. Given Hegel's imputability criterion for purposive action, it would be inappropriate to hold her responsible. Understanding the action according to its universal qualities, however, involves more than accessing what the agent foresaw in carrying out a deed. It also requires understanding the act's necessary consequences, or as

[63] GPR §117A

[64] GPR §118R

Hegel says, "necessary consequences attach themselves to every action--even if what I initiate is purely individual and immediate--and they are to that extent the universal element contained within it."[65] Hence, the use of universals emphasizes act types associated with consequences typical to them, since the criteria of match between a particular purpose and the sequence of events brought about after a deed is too fine-grained to account for successful action.

With the transition to intention, Hegel modifies his imputability criterion to place greater burden on the agent to know the consequences of his or her deeds. He calls his new imputability criterion the Right of Intention:

> The *right of intention* is that the *universal* quality of the action shall have being not only *in itself*, but shall be *known* by the agent and thus have been present all along in his subjective will; and conversely, what we may call the right of the *objectivity* of the action is the right of the action to assert itself as known and willed by the subject as a *thinking agent*.[66]

Whereas the right of knowledge might potentially excuse the arsonist above from the responsibility of burning down the entire townhouse, understanding action according to universals widens culpability to include consequences that the agent might not have foreseen but are nonetheless necessarily related to the action. Hence, although striking a bird would not likely be included in a description of a batter's action, burning down a townhouse would be included in the arsonist's. The *right of objectivity* of the action says that, in the case of the arsonist, we are justified in judging her action according to the necessary consequences that followed from it, even if she was not aware they would occur. Since universals that describe actions are identifiable by their necessary consequences, actions are determinable apart from the action the agent intended

[65] GPR §118A

[66] GPR §120

to bring about; this is one way to specify the divergence between the content of a subject's intention and the genuine nature of the action.

1.3.3 Rights Grounded in Individual Interests

The right of knowledge and intention both specify the criteria according to which someone can be held liable to punitive sanction. But in addition to rights regarding the epistemic status of the content of actions, Hegel acknowledges a right to act on ends that the agent believes are in the interest of their own welfare. Hegel claims this right "constitutes *subjective freedom* in its more concrete determination."[67] He argues from the following premises to the right of individuals to pursue their interests:

(1) Human beings' "natural subjective existence" inevitably influences their actions.

(2) The Good can only be actualized through particular human beings.[68]

Therefore,

(3) The Good will inevitably include ends dictated by natural necessity.

Premise one is a claim about the purposes that a natural being will inevitably incorporate into her action plans. Hegel's strong claim is that acting on moral ends does not require the individual to act contrary to ends dictated by nature. On the contrary, "human beings wish to act in support of whatever interests them, or should interest them, as their own."[69] Rather than setting up a moral netherworld, Hegel emphasizes and incorporates the natural dispositions of human beings into his overall conception of the Good, saying that "the fact that [a subject is] a living being is not contingent [...] but in accordance with reason, and to that extent he has a right to

[67] GPR §121

[68] GPR §130

[69] GPR §123

make his needs his end."[70] Because action is tied so closely to the interests of the agent, Hegel claims that the interests that result from our natural existence are "the soul and determinant of the action."[71] These interests include "needs, inclinations, passions, opinions, fancies, etc."[72] Because of the essential role played by naturally dictated ends on principles of action, there exists a "right to... find its satisfaction in the action."[73]

Because particular interests are inevitably pursued in the course of actualizing Right, the Good—or the criteria by which ends are evaluated —will involve "the unity of the *concept* of the will and the *particular* will."[74] Hegel's position on the role of individual interests should figure importantly in the laws of a state, just as the norms of abstract right. It is with the concept of "the Good" that Hegel unifies what have up until then been considered a set of disparate normative theses about the independent content of moral actions and the relative content of subjective morality into one theory of moral obligation. However, private project pursuit is not the only right arising from particularity. The "highest right of the subject," according to Hegel, is the individual's "right to recognize nothing that [she does] not perceive as rational."[75] Hegel calls this the *right of the subjective will*.[76]

This right expresses the criterion that a state's institutions must create norms that can be "particularized as infinite subjectivity" and Hegel calls this particularization *conscience*.[77] Although a state's normative requirements must be mediated through particular individuals, the di-

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[70] GPR §123Z
[71] GPR §121
[72] GPR §121
[73] GPR §121
[74] GPR §129
[75] GPR §132A
[76] GPR §132
[77] GPR §131A

vergence between subjective and objective content motivated by *the right of objectivity* pose problems for a value theory that places too much emphasis on the role of subjective conscience in determining the value of an action. Hegel explains that because conscience is a "subjective determination, it is at the same time formal" and "because of its formal determination, [conscience] is equally capable of being *true* and of being mere *opinion* and *error*."[78] Although acting on one's conscience can accompany feelings of moral success, this feeling is insufficient to successful moral action. Hegel says this is because "whatever [conscience] *considers* or declares *to be good* is also actually good, can be recognized only from the *content* of this supposed good."[79] Conscience poses a problem for moral duty because it can instill a false sense that one has succeeded morally where one has in fact failed. It is possible to fail morally while following one's conscience. This is because the moral value of an action is determined not by a judgment issuing from the interiority of a subjective feeling but from the action being based on good reasons that are assessable according to objective criteria.

The transition to ethical life from Morality is brought about by the inability of the individual moral subject to arrive at a determinate conception of the Good without appealing to social practices and norm-governed institutions. The rights grounded in purposeful and intentional action both specified the criteria according to which actions are imputable to agents. Because act types are associated with necessary consequences, the right of intention also entailed a right of objectivity, or the right to attribute an action to an agent regardless of his self reports about his intention. The epistemic criteria required to attribute an action to an agent center around features of the action that are external to the agent, namely, features that describe the content of the action. With respect to ethical actions, Hegel defines the concept of the Good in a way that permits

[78] GPR §132A

[79] GPR §137A

individual interests to play some evaluative role in the action's goodness. However, because of the fissure between a subject's disposition towards an action and its objective content--the coincidence of which characterized the phenomenon of moral duty--the moral point of view requires an account of how objective ethical norms are to be determined. The transition to ethical life occurs in part to show how the predicament of the moral subject concerning the content of objective norms is to be resolved.

Many current Hegel scholars have noted that the emphasis on Hegel's criticisms of Kantian morality have obscured other important issues. This is clear in the extent to which commentators have looked at Ethical Life as a corrective to the empty formalism of Kantian morality. Passages in *Outlines*, however, indicate that the relationship between Morality and Ethical Life should not be understood as that between an impoverished and an improved normative point of view. For one, Hegel notes that the moral worldview is "the pivotal and focal point in the difference between *antiquity* and the *modern* age."[80] The modernity of moral subjectivity lies primarily in how the rights generated from features of intentional agency relate to the legitimacy of a legal system. Modern states ought to respect their citizens. Hegel's emphasis on the recognitive, epistemic criteria of a legitimate system of property and moral blame results by the end of Morality in the view that prior to law, the variety of interests that individuals pursue are unable to generate contentful duties; again, this deficiency arises from the conception of the person operative in Abstract Right and Morality. Abstract personhood, or "the 'I"s pure reflection into itself,"[81] was only sufficient to generate norms surrounding private property, norms that are grounded in the most basic "commandment of right [...] *be a person and respect others as per-*

[80] GPR §124A

[81] GPR §5

sons."[82] Likewise, the moral subject was only sufficient to generate rights regarding legitimate culpability criteria, a right to act on agent-relative reasons, and a right to know and accept the laws of a state. Civil Society, rather than merely supplementing two deficient views of the person, is constrained by the rights generated by personhood and morality.

My thesis is borne out by passages in the section on the administration of justice and morality which suggest that the rights of morality impose duties on the administration of justice and the state to respect the individual's right to moral freedom. I claim that an understanding of the object of duty has been largely misunderstood by Hegel scholars. Key to my thesis is that an analysis of our status as moral subjects can provide a set of extra-legal principles that receive recognition by the judiciary and legislature. In doing so, Hegel draws a clear conceptual connection between a set of specific individual rights that he deduces from our capacity for moral deliberation and a set of ancillary criterion regarding the authority of laws. In this sense, Hegel's theory is a natural law legal theory, since the normative framework presented in Abstract Right and Morality deduces the normative foundation upon which the institutions of civil society will be built and according to which such institutions are authorized to recognize and apply the law. Additionally, the laws that the extra-legal norms derived from personhood and our moral subjectivity effect are not primarily the action-guiding ones. Rather, they are more appropriately likened to procedural laws. In the next section I will respond to Thom Brook's claim that Hegel is a natural law internalist. I argue that since the normative framework presented in Abstract Right and Morality creates a set of extra-legal principles, Hegel's natural law theory is not as Brooks describes.

[82] GPR §36

2 THE EFFECT OF MORAL RIGHTS ON THE ADMINISTRATION OF JUSTICE

In the previous chapter I outlined a set of rights grounded in moral subjectivity: (1) the right of knowledge (2) the right of intention (3) the right of objectivity and (4) the right of insight (or the right of the subjective will). Hegel noted the inability of the individual subject to determine ethical content either through appeals to conscience or through universalizing maxims. Instead, Hegel claims, "the right of individuals to their subjective determination to freedom is fulfilled in so far as they belong to ethical actuality."[83] But how does ethical actuality allow for the fulfillment of our moral nature? Throughout the section on Ethical Life, Hegel justifies many of his prescriptive claims about the organization and procedures of the administration of justice by citing rights (1) - (4) above. We can hence track which rights of morality terminate in specific duties incumbent on the administration of justice to complete these rights in a relatively straightforward way. I will introduce each right after a discussion of law's wider function with respect to our moral subjectivity. I call this the cognitive function of law and I will show how Thom Brooks's claim that Hegel is a natural law internalist is inadequate on account of his ignoring the relationship between the rights of moral subjectivity, which are extra-legal, and specific features of the administration of justice.

2.2 The Cognitive Function of Law

Positive right refers to a law that is *gesetzt*, meaning placed, put, or set down, which for Hegel describes the promulgation of a legal code.[84] For Hegel, positive law serves a few differ-

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[83] GPR §153

[84] http://dict.tuchemnitz.de/dings.cgi?lang=en&service=deen&opterrors=0&optpro=0&query=setzen&iservice=&comment=&email=

ent functions. The broadest and most essential function is what I call law's *cognitive function.* This function characterizes a set of sub-functions that are all related by the role that each plays informing agents of the evaluative concepts required for ethical action. The sub-functions of law with respect to cognition of ethical action are (1) to categorize actions according to universals (2) to make principles of justice determinate, and (3) to make principles of justice known. All three of these sub-functions express the cognitive function of law because they are all grounded in the rights of moral subjectivity that regard the requirements necessary to know the relevant evaluative criteria for ethical action.

Consider how Hegel expresses law's broadly cognitive function: "what is *legal* [gesetzmässig] is... the source of cognition of what is *right* [Recht], or more precisely what is lawful."[85] This difficult formulation of the relationship between right and law seems to imply that, for Hegel, the principles of right from abstract right and morality are not drawn on to evaluate the justness of a law. Since positive law is the "source of cognition of what is... lawful," one does not distinguish between law and true law by means of resources outside of the law. Instead, positive law provides all of the normative resources needed to gauge the validity of the law. Thom Brooks follows these suggestive remarks and places emphasis the role played by law in providing determinate shape to the law's underlying principles. Law's function of making legal principles determinate is not unique to Hegel's view. Although Aquinas proposes a different relation between right (natural law) and positive law (human law), he notes that human law is "derived from the natural law... by way of determination of certain generalities."[86] So the natural law to not steal from someone might achieve determinate form in laws that specify acts that constitute fraud. Aquinas continues that this process is "likened to that whereby, in the arts, general

[85] GPR §212A

[86] Aquinas, St. Thomas. *Treatise on Law: Summa Theologiae.* Washington D.C.: Regnery, 1996. (pp. 78-79)

forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape."[87] Hegel also argues that principles of right (what Aquinas would call natural law) receive determinate shape through positive law.

Brooks also sees the law's classificatory function as expressive of an internal natural law view. Expressing this function, Hegel says that "[positive right] also comes into existence in terms of *content* when it is *applied* to the *material* of civil society," a process accomplished by legally classifying particular actions.[88] Why does law have this cognitive function? In short, the classificatory function of law is to show how abstract moral principles apply to concrete cases that arise in civil society. Hegel acknowledges that a large variety of proprietary, familial, and civic relationships are constantly arising, requiring the legal system to apply laws to the material of civil society so that those engaged in these relationships know what is lawful and illegal. Brooks takes this statement to support his claim that Hegel develops a notion of legal justice internal to the law. So rather than claiming that the measure of validity lies in a normative standard external to standing law, legal facts provide all of the normative guidance needed to guide the law through "endless further determinations" that accompany the ever-changing material of civil society.[89]

Brooks claims that justice appears in Hegel's legal philosophy solely in how standing law gives shape to successive legal determinations, providing guidance in legal disputes where standing law is undeveloped. In such cases where two or more laws that seem to be applicable to a present case, Brooks claims "we appeal to the one that brings out what we believe to be a superior understanding of justice immanent to our law that brings better coherence to our legal system

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[87] Ibid.

[88] Ibid.

[89] GPR §216

as a whole."[90] Hence, legal codification serves the purpose of developing a conception of justice internal to the law by marking clear boundaries of how the principle applies to concrete cases, particularly those about which there are no current legal determinations. On this account of the law's cognitive function, the applicability of law to new and changing cases functions to inform citizens of how right is expressed in actuality. However, Brooks' understanding of law's cognitive function overlooks Hegel's argument for how and why the law ought to serve this function, namely to allow for the flourishing of our moral subjectivity. Consider how Hegel explains the reason why law ought to serve a cognitive function. "For the law to have binding force," Hegel writes, "it is necessary, *in view of the right of self-consciousness*, that the laws should be made *universally known*."[91] As I will argue in the next section, these rights are correlative to duties held by the administration of justice to meet its cognitive function appropriately. A legal system can be organized in such a way that it does not adequately meet this function. If this is the case, the normative resources of standing law are insufficient to generate valid law and Hegel's theory appears to be more like a traditional natural rights theory than Brooks imagines.

2.2.2 The Right of Intention and Law's Classificatory Function

Hegel describes the purpose of a legal judgment as the subsumption of an individual fact set under a "self-sufficient" universal.[92] By self-sufficient, Hegel means to distinguish a law's content from the subjective "volitions and opinions" that may truly motivate the action. As he explains, "The course of law is in itself an occurrence of universal validity, and although the particular content of the case may be of interest only to the parties themselves, its universal content

[90] Brooks, 89

[91] GPR §215 emphasis mine

[92] GPR §219

(i.e. the right within it and the decision on this right) is of interest to everyone."[93] Of the rights of morality outlined in Chapter Two, both the right of knowledge and the right of the subjective will ground the subsumption of a particular fact set under a universal law. Most important is the *right of knowledge*. Again, the right of intention stated that "the *universal* quality of the action shall have being not only *in itself*, but shall be *known* by the agent and thus have been present all along in his subjective will."[94] This right justified the imputability of an action to an agent based on the necessary consequences associated with the act type in question. With respect to the administration of justice, the right of knowledge justifies subsuming a fact set under a legal determination. However, a difficulty arises with respect to crimes that are distinguished by the intentions of the agent, which seemingly have no relation to the necessary consequences of an action. Robert Pippin takes the right of knowledge and the right of objectivity to suggest that intentions are retrospectively determined, which states that an action's "point, purpose, and implication [...] has none of the privileged authority we intuitively attribute to the agent."[95] In order for intentions to be retrospectively determined, an action or set of actions must evince some underlying intention that can possibly conflict with the self-reports of the agent. The intention would be fully captured by the action regardless of the agent's mental states. This is not Hegel's view. First, it would commit Hegel to denying the relevance of *mens rea* in criminal proceedings and would hold utterances by the defendant that give evidence of culpability or exculpation totally irrelevant to the verdict. Rather than advocating something like a strict liability theory of crime, Hegel seems to argue that circumstantial evidence can be sufficiently strong to allow the court to

[93] GPR §224

[94] See note 48.

[95] Pippin, RR

categorize the act as a murder. This is done relatively straightforward by establishing a criteria of admissibility for circumstantial evidence:

> The essential factor in categorizing an action is the subjective moment of the agent's in sight and intention; [...] proof is concerned not with objects of reason or abstract objects of the understanding, but only with details, circumstances, and objects of sensuous intuition and subjective certainty, so that it does not involve any absolutely objective determination.[96]

Consider an example. Assume a husband strikes his wife with a vehicle and is tried for premeditated murder. The husband maintains his innocence by claiming he did not intend to strike her. The prosecution highlights a few important facts: the husband took out a life insurance policy a few weeks prior to the killing, friends of the wife tell the court that the husband had recently become distant and cold to his wife, and the husband faced sudden financial trouble. Given that the husband is rational, the court would be justified claiming that the evidence surrounding the killing may warrant attributing the intention to murder to the husband. In this sense, the right of knowledge relating to the universal nature of actions would allow for the distinction between premeditated murder and accidental manslaughter by considering a wide set of facts, many of which would be jointly sufficient for the count to attribute the legally relevant action to the husband.

2.2.1 The Right of Intention and the Publicity Requirement

The most straightforward relation between the state's administrative procedures and the rights of morality regard Hegel's arguments for the promulgation of the law. In Morality, Hegel foreshadowed the cognitive function of law saying, "Through the public nature of the laws and the universality of customs, the state takes away from the right of insight its formal aspect and

[96] GPR §227

that contingency which this right still has for the subject within the prevailing viewpoint [of morality]" (§132R). In Morality, Hegel described the right of insight as the "right that my insight into an obligation should be based on good reasons and that I should be convinced by it, and in addition, that I should recognize it in terms of its concept and nature."[97] Now contrast these comments with ones in which Hegel explicitly relates the right of insight into the legality of a law: "In [the] objective field, the right of insight applies to insight into legality or illegality, i.e. into what is recognized as right, and is confined to its primary meaning, namely cognizance in the sense of familiarity with what is legal and to that extent obligatory."[98] Taken in conjunction, the two quotes above suggest that whatever is recognized as lawful and obligatory will adequately serve as a rational rule for action. However, these remarks must be read in light of Hegel's claims about the cognitive function served by the publicity requirement.

The publicity requirement shows that the formal structure of moral subjectivity that gave rise to the various rights in Part Two of the *Outlines* put pressure on the development of law in civil society. Brooks was correct to note the important function that legal codification plays with respect to meeting the demand that law ought to be known. However, he ignores the means adequate to make the law known by focusing only on law's function of making abstract principles determinate. For Hegel positive right is valid just in case it is "*universally recognized*, *known*, and *willed*" as such.[99] In an addition to section 211, Hegel claims that "legislation should not be represented merely by that one of its moments whereby something is declared to be a rule of behavior valid for everyone; more important than this is the inner and essential moment, namely

[97] GPR §132A

[98] GPR §132A

[99] GPR §209. Here Hegel uses the term "universality" to emphasize the role that laws play in ethical deliberation. He says, for example, "To posit something as *universal* is, as everyone knows, *to think*" (GPR §211A).

cognition of the content in its *determinate universality*." Hegel grounds the authority of norms on moral subjects' capacity to endorse them as rational agents. Hegel explains this in the *Encyclopedia* when he says, "ethical... determinations ought not to lay claim to the obedience of the human being merely as external laws or as the dictates of an authority. Instead, they ought to find assent, recognition, or even justification in his heart, disposition [*Gesinnung*], conscience, insight, etc."[100]

One question that arises from this requirement is what specific obligations do moral subjectivity place on the state, and furthermore, what does it mean for the state to be obligated? Freedom of conscience has traditionally been construed in a way that places limits on what the state can compel its citizens to do, and in America this freedom extends to private conceptions of the good that receive constitutional protection; however, as Neuhouser notes, Hegel's conception of the state accommodates moral subjectivity not by giving the individual moral license over the state but by requiring that the state make the reasonableness of its requests on its citizens transparent and public; this is the primary purpose of Hegel's theory of promulgation. Neuhouser does not recognize the extent to which legal and ethical transparency places a set of specific obligations on the state, a set of obligations that constitutes a necessary condition of the liberty of individuals whose self-conception is constituted by the society to which they belong. Hegel takes it that a just social order prescribes norms that the state's citizens ought to be able to endorse, not in the sense that the prescribed norm is a possibility for an agent, but that the agent can assess the moral value of the action and assent to its goodness.

[100] Hegel, G. W. F., & Inwood, M. J. *Hegel's Philosophy of Mind*. Oxford : New York: Clarendon Press, 2007. §503A

2.3 What is Unique about Hegel's views on Promulgation?

In the sections of *Outlines* Hegel devotes to law, he places repeated emphasis on the fact that laws and the administration of justice should both be transparent to the public. Views like John Locke's and Immanuel Kant's argue for legal publicity from the point of view of classical liberalism or what Hegel calls "abstract right." Their views emphasize publicity's role in protecting personal freedoms, or the ability to do as one pleases so long as one harms no one else. John Locke claims that since people desire protection of their liberty, they willfully "tie themselves up" under "*declared* and received laws."[101] On Locke's contractarian view, the law's being declared prevents a leader's arbitrary decrees from having any binding force and ensures that civil society sets expectations regarding crime and punishment. As for what the law asks of us as individuals, the only expectation is to not diminish the freedom of others. Kant agrees that this is law's purpose and explains that publicity is "only negative, i.e., it only serves for the recognition of what is not just to others."[102]

Hegel also grants that the publicity requirement is essential for the protection of personal freedoms granted in civil society. In civil society, laws and the administration of justice supplement our moral subjectivity and ensure that contracts are upheld, personal property is protected, and personal freedoms are guaranteed in all of their forms. On account of the practical function of law, to borrow a phrase from Rawls, Hegel grants *lexical priority*[103] to the satisfaction of personal freedom, saying, "Right comes into existence [*Existenz*] only because it is useful in relation

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[101] Locke, J., & Macpherson, C. B. (1980). *Second Treatise of Government*. Hackett Pub. Co: Indianapolis, §137.

[102] Kant, I., Kleingeld, P., Waldron, J., Doyle, M. W., & Wood, A. W. (2006). *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. New Haven: Yale University Press. (8:382)

[103] Rawls defines lexical order as "an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we consider the third, and so on." Rawls, J. (1999). *A theory of justice* Rev. ed. Cambridge, Mass.: Belknap Press of Harvard University Press. (pg. 43)

to needs."[104] Although law serves an important function of securing personal freedoms in civil society, we cannot justify the actions proscribed or prohibited by a law (its content) by explaining how these actions are mutually beneficial. To justify the content of the law, we must show that the actions it requires or prohibits are subject to widespread consensus among rational persons. Hegel explains how his account diverges from the liberal view that has emphasized personal freedom:

> Thus, the process of legislation should not be represented merely by that one of its moments whereby something is declared to be a rule of behavior valid for everyone; more important than this is the inner and essential moment, namely cognition of the content in its determinate universality.[105]

Hegel thinks that to guarantee moral freedom, the law must be known by individuals—the law must be agreeable to reason, not just to social utility. The publicity requirement secures the right of people to know that the law is valid because it is rational, not simply useful. Hence, while Hegel believes that publicity is as important for the protection of property rights as any of the classical liberals, for him, actually *knowing* the law means knowing it in its "determinate universality," the element of the law that only rational reflection can evaluate.[106] I'll discuss determinate universality in greater detail when I discuss Dudley Knowles' concern that Hegel is simply a legal positivist. For now it's important to distinguish this aspect of Hegel's view of publicity from the liberal view, since the reader can mistake his references to "the right of self-consciousness" for something like the liberal accounts of publicity that grounds it in personal

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[104] *GPR* §209A

[105] GPR §211A

[106] GPR §211

freedom.[107] To be sure, the personal freedoms granted in civil society are as important to Hegel as it is to the classical liberals. They are just not what ground his claims about publicity.

The publicity requirement and the publicity of the administration of justice are both conditions for moral freedom.[108] As a condition for moral freedom, publicity is required in order for people to be respected as self-conscious persons with a sense for right and wrong. As Frederick Neuhouser explains, our moral freedom places an obligation on those who create law to be mindful of the fact that those asked to comply with the law are moral subjects:

> Moral subjects are self-determining not only in the sense that they are able to choose which among their given desires they want to take as ends for action; they also have the capacity to determine their wills, not merely arbitrarily, but in accord with their own principles or, more precisely, in accord with their own understanding of what is (morally) good.[109]

To rephrase this, the principles to which moral subjects appeal in order to determine what drives to pursue or needs to satisfy are all conditioned by the subject's belief about what is really good.

As I explained, on the personal freedom account, belief about the goodness of the law is grounded in agreement about social expectations. But on this view, which actions are *really* good is impossible to determine, since we could just as easily agree to do wrong. Locke attempts to solve this problem with his natural law theory which claims that all rational individuals are capable of understanding the natural law that the state's law should reflect. For Hegel, however,

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[107] GPR §132

[108] In the first section of his discussion of civil law, Hegel claims, "For the law to have binding force, it is necessary, in view of the right of self-consciousness… that the laws should be made universally known" (*PR* §215). With respect to publicity of legal procedures (due process), he says, "The right of self-consciousness, the moment of subjective freedom, can be regarded as the substantial viewpoint when we consider the necessity for publicity in the administration of justice and for so-called trials by jury" (GPR §228).

[109] Neuhouser, 25

publicity accommodates our moral nature by giving us insight into what is good about a law. In conjunction with the requirement of moral freedom that laws must be rationally reconcilable to moral subjects, the publicity requirement places the additional burden on the state to ensure the rationality of the content of laws. Hence, the legitimacy of the law is based in its ability to be "*known as universally valid.*"[110] For Hegel, the content of the good exists as an objective content, meaning moral actions are assessable on grounds external to the subject and actualized in the world in the actions that we call right. Publicity ensures that moral individuals are at least capable of having the knowledge they need to determine what is actually good, which again they could not do as moral subjects abstracted from society's laws.[111]

Once we situate the subject into ethical actuality, we see how important law is for the possibility of realizing moral freedom. We have to see right as objective and actual through its implementation in the institutions of civil society. Hegel claims that employment and consumption in civil society create a sphere of compatible interests. His theory develops two theses that I discussed in prior sections: (1) natural needs and interests can be satisfied in an infinite variety of ways and (2) limiting the means of satisfying one's needs by placing them in reference to others makes the contents of an individual's ends "universal."[112] Hegel takes the first claim to indicate a shortcoming in an account of rights that places emphasis on individual interests, such as the right to find satisfaction in the action.

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[110] GPR §210

[111] "The right of the subjective will is that whatever it is to recognize as valid should be perceived by it as good, and that it should be held responsible for an action – as its aim translated into external objectivity – as right or wrong, good or evil, legal or illegal, according to its cognizance [*Kenntnis*] of the value which that action has in this objectivity." (GPR §132)

[112] GPR §121

The second claim, however, is more difficult. Hegel's claim is that the administration of justice educates us into our society's "system of needs," the complex network of material interests that provides the economic framework within which we develop a self conception and engage in economic transactions.[113] Within civil society, law operates on contingent needs and interests, providing citizens with contentful duties by at once limiting their sphere of freedom to be consistent with others and by proscribing positive duties towards others. The pedagogical role of law is to apply abstract principles to this material, making them socially relevant. Since the courts of law develop concretely applied principles of right, and since Hegel understands this is a cognitive function, the publicity of law is an essential duty of the administration of justice. For Hegel, publicity protects personal property, but he adds that the state must abide by the publicity requirement so that positive right—i.e., the workings of our legal institutions—can also meet an important demand of individual moral freedom. In short, the laws in civil society must be able to make sense to individuals, otherwise they are unable to act morally. As Neuhouser explains, "Individuals actualize moral freedom, then, when they subscribe to a rationally held vision of the good, determine their ends in accord with it, and successfully realize that vision in the world by bringing about the good through their own actions."[114] With respect to law, this demand states that in order for a law to be validly in force, individuals must be able to rationally identify with its sanctions; this is just one means by which the right of insight is protected. On account of this

[113] As do most classical liberals, Hegel emphasizes law's role in protecting property rights. The more important function of law is to demonstrate how the abstract principles developed in Abstract Right actually function in a concrete society. The system of needs, then, is the precondition for law, or as he says, "Only after human beings have invented numerous needs for themselves, and the acquisition of these needs has become entwined with their satisfaction, is it possible for laws to be made" (GPR §209Z).

[114] Neuhouser, F. (2000). *Foundations of Hegel's Social Theory: Actualizing Freedom*. Cambridge, Mass.: Harvard University Press

condition, it is not just essential that law be "out there" for everyone to see. It is more important that reasonable people know the law to be theoretically sound.

The publicity requirement also requires state's institutions to be organized in a manner consistent with the actualization of moral freedom. In Hegel's constitutional monarchy, the rule of law requires that the law be made public because right must be rationally and universally justifiable. For Hegel, it is not enough for the laws to be on record and publicly accessible. Their public knowledge is a necessary condition of the institutional framework he recommends in ethical life. Because of the shortcomings of morality that I recalled in chapter one, the process of punishment in ethical life also takes on concrete universality in publicly-aired procedures. Publicity in the administration of justice ensures that rights infringements are punished in a manner consistent with the right of moral subjectivity. This requires concrete means by which the universal element of right—the aspect of the content that is knowable and subject to agreement—is present to those subject to the administration of the law. Hence, when a suspect is on trial for theft, Hegel says that for the court of law to determine whether or not the defendant's action constituted theft, a jury must determine the matter so that "the verdict of guilt or innocence should emanate from the soul of the criminal."[115] This odd way of putting things is just Hegel's way of saying that a jury's judgment of guilt or innocence expresses the fact that law is public and that right is in the consciousness of society. The act on trial is "raised out of its apparent empirical character" and subsumed under the category of theft as it is delimited by the law and understood in the eyes of the public. This means the action, so far as the jury is concerned, is "a recognized fact of a universal kind."[116] This sort of intelligibility was impossible in both abstract right and

[115] GPR §227A

[116] GPR §226

to the moral subject. But in ethical life, the moral subject achieves the social conditions required for true moral freedom, a fact that Hegel explains as follows:

> Just as right *in itself* becomes law in civil society, so too does my individual [*einzelne*] right, whose existence [*Dasein*] was previously *immediate* and *abstract*, acquire a new significance when its existence is recognized as part of the existent [*existierenden*] universal will and knowledge.[117]

Law is therefore for Hegel an essential condition of moral success, although its administration must respect features of our moral constitution in order to be binding.

2.4 Why Hegel is not a Positivist as Ordinarily Understood

Since on Hegel's account we must have rational confidence in the laws we abide by, we can respond to the worry that Hegel is a legal positivist who believes that whatever we have made into law is thereby "posited as right." Dudley Knowles expresses such concern in comments of his book, although he is ultimately uncertain about whether Hegel is legal positivist. In essence, he wonders about the extent to which universal agreement about what we think is lawful converges with what is genuinely right. Merely pointing to public institutions and widespread recognition of standing law does little to prove that either of these phenomena can ensure the convergence. Thus, Knowles asks,

> Is Hegel signaling a conservative (and in this context, servile) acceptance of law as we find it, peremptorily commanding us however awful its demands, or is stating the obvi ous – that legal systems must recognize *some* limits on declared conscientious objection, in the name of rationality…? My judgment inclines to the first verdict, since Hegel nowhere maintains a robustly critical attitude to positive law – but the question is open.[118]

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[117] GPR §217

[118] Knowles, D. (2002). *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right*. London ; New York: Routledge., pp. 276

Knowles's question sounds troubling for Hegel, since it is unclear how a Hegelian society would treat individuals who publicly air arguments criticizing the rationality of laws.

It should be clear from my analysis that on Hegel's account, the legitimacy of positive right does not find its source in legal sources alone. Instead, like many other theories of law, by appealing to facts about human nature, Hegel explores the higher-order rules that serve as the legitimating source of positive law. Hence, Hegel's account of practical rationality does not imply that laws are right in virtue of their being law. Instead his account emphasizes the rightness of the law conceived in terms of everyone knowing it accords with the demands of moral freedom. To be sure, publicity does not guarantee that all publicized laws are genuinely lawful. It is a necessary condition of self-determination and the possibility of erecting a legitimate legal system, but there are many other conditions that must be in place too.

3 CONCLUSION

According to Hegel, the legal authority of laws is parasitic on the law's effectiveness at promoting or facilitating our moral subjectivity. This is, of course, a quite different procedure for establishing legal validity than has been traditionally advocated by natural law theorists. But through his analysis of moral subjectivity, Hegel claims to derive rights that create a general set of obligations on the part of moral agents and the state. The obligations imposed on the state regard the procedural norms in the administration of justice that allow a subject of criminal prosecution to have insight into the rationality of a law. Thom Brook's claim that Hegel is a natural law internalist is insufficient in that it ignores the extent to which extra-legal norms weigh on the administration and creation of law. While Hegel's theory shares features of traditional natural law theory, it has the important difference of tracing particular institutions to particular features of our moral constitution. In this sense, Hegel's theory provides a more robust and careful account of the intersection between rights derived from human nature and the state's obligation to create just laws.

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