

University of Miami Law Review

Volume 60
Number 4 *Volume 60 Number 4 (July 2006)*

Article 3

7-1-2006

Unnatural Rights: Hegel and Intellectual Property

Jeanne L. Schroeder

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Law Commons](#)

Recommended Citation

Jeanne L. Schroeder, *Unnatural Rights: Hegel and Intellectual Property*, 60 U. Miami L. Rev. 453 (2006)
Available at: <https://repository.law.miami.edu/umlr/vol60/iss4/3>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Unnatural Rights: Hegel and Intellectual Property

JEANNE L. SCHROEDER*

I. INTRODUCTION: PROPERTY AND RIGHTS

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

Hegel is often cited by personality theorists, but almost always incorrectly. In this Article I seek to save Hegel's analysis of property from the misperceptions of his well-meaning proponents. The personal-

* Visiting Professor of Law, University of Miami School of Law, Coral Gables, FL; Professor of Law, The Benjamin N. Cardozo School of Law, Yeshiva University, New York, NY.

1. See, e.g., Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287 (1988); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L. J. 1 (1994).

2. In the words of Judge Richard Posner and his co-authors, "[a] trade secret is not property in the usual sense—the sense it bears in the law of real and personal property or even in such areas of intellectual property law as copyright . . ." David D. Friedman, William M. Landes & Richard A. Posner, *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 61-62 (1991). For other articles debating the property status of trade secrets, see, for example, Steven Wilf, *Trade Secrets, Property, and Social Relations*, 34 CONN. L. REV. 787 (2002); Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683 (2000); Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 1 (1999); Roger G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998); Pamela Samuelson, *Information as Property: Do Rucklehaus and Carpenter Signal a Changing Direction in Intellectual Property Law?* 35 CATH. U. L. REV. 365 (1989); John C. Coffee, Jr., *Hush! The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988).

ity theory of property that dominates American intellectual property scholarship is imbued by a romanticism that is completely antithetic to Hegel's project. Hegel's theory is not romantic; it is erotic.

It is true that Hegelian theory supports the proposition that a modern constitutional state should establish a minimal private property regime because property plays a role in the constitution of personality; it is not true, however, that Hegelian theory requires that society respect any specific type of property or any specific claim of ownership. It is true that Hegel thought that intellectual property could be analyzed as "true" property and not as a *sui generis* right merely analogous to property; however, it is *not* true that Hegel ascribed any special role to intellectual property. As such, Hegel's theory cannot be used to support the proposition that the state *must* recognize intellectual property claims. Rather, Hegel would argue that if the state, in its discretion, were to establish an intellectual property regime, it would be consistent to conceptualize it in terms of property. However, a model that advances a moral right of artists would be inconsistent with Hegelian property analysis (although, society could decide to grant such a right for other practical reasons).

To clarify, although Hegel argued that property is necessary for personhood, he left to practical reason the decision as to which specific property rights a state ought to adopt. Hegel did not romanticize the creative process that gives rise to intellectual property. Despite a widespread misconception among American legal scholars, Hegelian theory does not accept a first-occupier theory of property rights. More generally, Hegelian theory completely rejects any concept of natural law, let alone any natural right of property. Jeremy Bentham, the founder of modern utilitarianism, believed the very concept of natural rights to be "nonsense on stilts."³ Hegel goes a step further and considers the expression "natural rights" to be an oxymoron. To Hegel, nature is unfree. Legal rights are artificial constructs we create as means of escaping the causal chains of nature in order to actualize freedom. Consequently, rights are not merely *not natural*, they are *unnatural*.

Having no recourse to nature, Hegel explained property on purely functional grounds—the role it plays in the modern state. In his *Philosophy of Right*,⁴ Hegel revealed the internal logic that retroactively explains why constitutional, representative governments were supplanting feudal governments and why free markets were supplanting feudal economies in the Western world at the time he was writing.

3. Jeremy Bentham, *A Critical Examination of the Declaration of Rights*, in BENTHAM'S POLITICAL THOUGHT 257, 269 (Bhikhu Parekh ed., 1973).

4. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H.B. Nisbet trans., 1991).

Hegel's question is precisely that of contemporary nation-building: Is the rule of private law a condition precedent to the establishment of a constitutional, representative government?

Hegel agrees with classical liberal philosophers of the eighteenth century that the modern state derives from a founding concept of personal freedom, but believes that classical liberalism is too self-contradictory to explain the relationship between the state and freedom. The modern state is not liberalism's hypothetical state of nature, and its citizens are not naturally autonomous individuals exercising negative freedom. Rather, the state and its members engage in complex interrelationships in civil, familial, commercial, and other contexts. Hegel asks, what are the logical steps by which the abstract individual of liberal theory becomes the concrete citizen of the liberal state? How do we structure a state so that it actualizes, rather than represses, the essential freedom of mankind? The answer is through mutual recognition. In this sense, personality is erotic; it is nothing but the desire to be desired by others.

This means, first and foremost, that Hegel's property analysis does not relate to all aspects of personality, or generally, to what Margaret Jane Radin calls "human flourishing,"⁵ but only to this political aspect of citizenship as respect for the rule of law. Secondly, Hegelian property does not even relate directly to full citizenship, but only to the first intermediary step above autonomous individuality, which I refer to as "legal subjectivity."⁶

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

Hegel called this regime of property and contract "abstract" right, precisely because it is a necessary but insufficient part of modern society. Although the legal subject is more developed than the autonomous individual, the subject is empty; devoid of content. The subjectivity cre-

5. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1851 (1982).

6. Hegel's terminology in the *Philosophy of Right* is somewhat distinguishable from my own; I discuss the primary reasons for my choice of vocabulary *infra* in text accompanying notes 42-45.

ated by abstract right provides only the *form* of personality. Content is added to personality through more complex interrelationships among people at the higher levels of morality, the stage in which the person internalizes right, and ethical life, the stage in which the internal subjectivity of morality is reconciled with the external objectivity of obligations to others. Consequently, Hegel would insist that abstract right (including property) is external to the subject. The subject is *subjected to* law. The legal subject obeys private law not because she subjectively believes that it is right, but because she recognizes it as the means to accomplish her ends.

This suggests that the legal subject is an uncultured creature who represents an impoverished conception of personhood.⁷ The legal subject is fit only for the tawdry business of buying and selling. She is not yet capable of morality or ethics and cannot yet become a lover, mother, friend, participant in civil society, voter, or legislator, let alone an artist. In other words, the subject is only a lawyer. Higher aspects of personality will be created not through the crude legalities of property, but through more complex human interaction.

It follows from the fact that the subjectivity created by abstract right is purely *formal*, that it is only the *form* of property, and *not its content*, that is relevant to Hegel's analysis. All that matters is that some minimal private property rights exist; the identity of what is owned, bought, and sold is irrelevant for the purpose of establishing the rule of law. One implication of this concept is that although in order to function successfully a modern state must recognize *some* property rights, it is not necessary that it protect any *specific* property rights. Specific property rights are purely contingent. In Hegel's words, "everything which depends on particularity is [in the regime of abstract right] a *matter of indifference*. . . ."⁸

This means that if intellectual property can serve property's function—the production of legal subjectivity—it is not because of any affirmative, concrete content that the creator pours into the object she creates. Hegel argued that intellectual property can serve as property because of its *formal* characteristics, *despite its unique content*. Indeed, for Hegel, intellectual property is an ideal candidate for property treatment because its abstraction and intangibility epitomize the radically negative abstraction that is the lowest common denominator of property.

7. HEGEL, *supra* note 4, at 73.

8. *Id.* at 69. In this passage, Hegel is specifically arguing that his theory has nothing to say about the proper allocation of property. In other words, his theory of abstract right's function only supports the proposition that every person should have some *minimal* property rights. I believe that the logic that only minimal property rights are necessary, and the distribution of actual property rights are contingent, also suggests that the type of property rights are also contingent.

Hegelian theory emphasizes that property is a legal right enforceable against legal subjects with respect to objects, not a natural relationship between subject and object. Nevertheless, we frequently conflate our intuitive, natural, empirical relationships with physical objects and our intellectual, artificial, formal, legal property relationships among subjects. Intellectual property is obviously artificial and famously anti-intuitive, thereby making this crucial distinction crystal clear.

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

In this Article, I first give a brief account of Hegel's property theory in the *Philosophy of Right*. I then explain why Hegelianism is a rejection of natural rights. In this context, I specifically address the misconception that Hegel, like John Locke, adopted a first-occupation theory of property. In fact, Hegel describes first-occupation in a later chapter in the *Philosophy of Right* as the exemplar of civil "wrong."

My second point is that Hegelian property rights, like legal subjectivity, are purely formal. The objective content of particular property rights is irrelevant to, if not distracting from, property's purpose. Objects are used by subjects merely as mediators of intersubjective relations. To concentrate on the content of the objects of property is to shift one's gaze away from the interrelationships among subjects with respect to the object and towards the empirical relationship of each subject to her object. By doing so, one no longer subjectifies the owner by identifying her with other subjects. Rather, one objectifies her by identifying her with her owned object. This is the opposite of the function of property in Hegel's philosophy. Indeed, this is the psychoanalytical definition of fetishism—the objectification of subjects and subjectification of objects. Consequently, Hegel's project is completely antithetical to

Radin's theory of property and personhood that, from a Hegelian perspective, wrongly raises objects to the dignity of subjects and debases subjects to the indignity of objects.

Despite this, a Hegelian property analysis sets forth two important implications for intellectual property law. First, if society adopts an intellectual property law regime, then it is logically coherent to analyze the regime as a form of "true" property. Indeed, I will demonstrate that Hegelian property analysis solves many of the "problems" of intellectual property doctrine that seem baffling from a traditional analysis. Consequently, Hegel aids in the formulation of a more internally consistent and predictable positive law.

However, unfortunately for the romantic personality theoretician, Hegel's logic has absolutely nothing to say on the issue of whether society *should* adopt a positive law of intellectual property.

II. HEGELIAN PROPERTY

A. *The Logical Function of Property*

Hegel devoted the first part of the *Philosophy of Right* to an analysis of the role property rights play in the creation of personality. Hegel's philosophical system is so radically different from the classical liberal tradition that his theory of property has been consistently misinterpreted by American legal scholars. I contend that this is because these analysts try to read Hegel's section on property in isolation without continuing through to his analysis of "wrong," and without knowledge of Hegel's idiosyncratic, but precise, vocabulary, or an understanding of how his political philosophy fits into his totalizing philosophical system. Because every one of Hegel's ideas purportedly depends on every other one of his ideas, as part of a single grand system, one cannot fully understand any part of Hegelian philosophy without first understanding the whole.⁹ This is exacerbated by the fact that Hegel is one of the most difficult writers in world history. Consequently, American readers tend to read their own pre-existing legal assumptions into Hegel and pull sentences out of context to arrive at wrongheaded conclusions.

Although Hegel is difficult to understand, he is by no means impossible. A corollary of the proposition that each one of his ideas is necessarily located within his system is the proposition that his system as a whole can be generated from any one of his ideas. Consequently, so

9. Hegel's goal was to create a philosophy without presuppositions. The practical problem is that one must begin one's analysis somewhere. His solution was to tentatively start with a founding principle and test it by seeing whether it could generate a coherent whole. See, e.g., HEGEL, *supra* note 4, at 36-37 ("The deduction *that* the will is free and of *what* the will and freedom are . . . is possible only within the context of the whole [of philosophy].").

long as one understands Hegel's unique ground rules, which are admittedly counter-intuitive to an American lawyer, and frees oneself from assumptions based on the classical liberal political philosophy that dominates American thought, one can follow his argument. The power of Hegel's analysis is well worth the effort.

As I argue elsewhere,¹⁰ although Hegel was writing in early nineteenth century Germany with little understanding of Anglo-American legal concepts, his analysis of property offers powerful insight into our legal institutions. What should be interesting to Americans is that the very essence of his project is the problem of freedom: what it is, if it is possible, and if so, how it can be actualized in the world.

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

In this Article, I make reference not only to Kant's liberalism, which is expressly discussed by Hegel, but also to Lockean libertarianism, the version of liberalism most familiar to American lawyers, followed closely by Benthamite utilitarianism. On first reading, an American might assume a misleading similarity between Hegel and Locke. Upon further reading, however, Hegel's account of property is completely diverse from Locke's. Any attempt to read Hegel from a Lockean perspective is doomed to failure.

Neo-Lockean defenders of intellectual property—most notably Wendy Gordon—argue that copyright can be explained within a Lockean theory of first-occupation.¹¹ That is, a creator justly “owns” her creation precisely because she creates it out of her own labor intermixed with the commons.¹² Though a coherent argument, it is not one with

10. See generally JEANNE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (2004) [hereinafter *THE TRIUMPH OF VENUS*]; JEANNE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* (1998) [hereinafter *THE VESTAL AND THE FASCES*].

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

12. See *An Inquiry into the Merits of Copyright*, *supra* note 11, at 1368.

which Hegel would agree. In contrast to neo-Lockeans, the proponents of the personality theory of intellectual property uneasily graft a romantic vision of creativity on top of unexamined, but implicit, natural rights assumptions about property. In contrast to romantics, Hegel has no truck with the notion of heroic authorship, at least at the level of abstract right, because he believes that property relates only to the creation of legal subjectivity, or subjection to the rule of law, and not to creativity.

B. *Freedom*

The *Philosophy of Right* is Hegel's *Bildungsroman*¹³ of citizenship. It is the retroactive retelling of how the modern person, and the constitutional state in which he is located, came to be. This is a logical, not empirical, account. Hegel does not purport to explain how actual people are born, educated, mature, and learn to function in society. He is, instead, interested in such highly abstract questions as: What is a person? What is freedom? What is the state and how does it relate to personality and freedom? To understand Hegel one must always keep in mind that he believes that philosophy can explore these questions at only the most abstract level.¹⁴ Concrete questions are the bailiwick of practical reason, not logic. Although in modern American parlance, "pragmatism" is considered a philosophy, Hegel thought that it was a completely separate intellectual discipline. However, unlike pragmatists who scorn speculative philosophers, speculative philosophers do not disdain pragmatism. Hegel believed that philosophy must be modest in its goals. Pragmatism is philosophy's necessary, albeit distinct, corollary.¹⁵ Philosophy can guide us in drawing the broad outlines of our lives, but only pragmatism can ink in the color.

The primary distinction between Hegel and liberalism is that, to the liberal, freedom exists in the "state of nature." Although Hegel believed that there was truth in liberalism's intuition, he was troubled by the fact that all societies radically differ from this hypothetical state of nature, and that empirical people are not autonomous individuals. Consequently, the state can never complement the state of nature in any sim-

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

14. David Gray Carlson, *How to Do Things With Hegel*, 78 TEX. L. REV. 1377 (2000).

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

[T]his infinite material and its organization, are not the subject-matter of philosophy. To deal with them would be to interfere in things with which philosophy has no concern, and it can save itself the trouble of giving good advice on the subject. Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms. . . . In deliberations of this kind, no trace of philosophy remains. . . .

HEGEL, *supra* note 4, at 21.

plistic way. Rather, Hegel argued that a properly structured state *supplements* the state of nature. It allows its members to actualize a freedom that can only be potential in the state of nature. The question is not merely how do we keep the state from repressing the freedom of its members, but also, how can the state affirmatively help its members express their freedom.

The primary distinction between Hegelianism and Lockean libertarianism, specifically, is that Locke believed that property is a right in the state of nature. The state is justified only if it can be made consistent with natural rights.¹⁶ Hegel made the familiar point that rights are intersubjective and cannot precede society. The state cannot be explained in terms of the protection of rights because the questions of the legitimacy of the state and the definition of rights turn out to be one and the same.

Thus, Hegel began with liberalism's starting point: the autonomous free individual located within a hypothetical "state of nature." Such "natural" freedom is negative, abstract and, therefore, merely potential.¹⁷ To be actual, freedom must become positive and concrete. This can only occur through intersubjective relations (i.e., within society). To restate this in a slightly different way, rights cannot exist in the state of nature because they are intersubjective. As Wesley Newcomb Hohfeld so famously articulated,¹⁸ rights, duties, powers, and immunities can only be understood insofar as they can be asserted and enforced against other persons. Similarly, Hegel defined the creation of rights as the first step individuals take in their attempt to escape the lonely autonomy of the state-of-nature in order to actualize their freedom through intersubjective relations.

Hegel believed liberalism's starting point contained at least two internal contradictions. The first is that to be truly free, the autonomous

16. As Merold Westphal explains:

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

MEROLD WESTPHAL, *HEGEL, FREEDOM, AND MODERNITY* 31 (1992).

17. "This content, or the distinct determination of the will, is primarily *immediate*. Thus, the will is *free only in itself or for us*, or it is in general the will in *its concept*. Only when the will has itself as its object [] is it *for itself* what it is *in itself*." HEGEL, *supra* note 4, at 44. That is, abstract right is the first step in the actualization of freedom. "Right is primarily that immediate existence which freedom gives itself in an immediate way. . . ." *Id.* at 70.

18. See, e.g., WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 23-28 (1919).

individual must have no distinguishing empirical or natural characteristics whatsoever, as Kant posits. Any concrete characteristic is necessarily a limitation. Consequently, Kant's free individual is what Kant calls a "noumenon" or "thing-in-itself" that we cannot know directly in our phenomenal, natural world.

The Kantian individual can, therefore, have no content or individuating characteristics whatsoever.¹⁹ Even to have a body—or a life—is a limit, as all of us who contemplated the fact that we cannot jump from a cliff and fly away has realized. The Kantian individual is paralyzed—he, or, more accurately, it, since sexuality is itself a limitation, is not forced to do anything, *but it can also not do anything*. Any act would create affirmative content that would constrain it in the future. Consequently, the freedom in the liberal "state of nature" can only be potential because it is purely arbitrary.²⁰ This notion of personality seems wholly inconsistent with the very notion of society which requires its members to take on social roles and duties. Kant expressly recognized this as a logical paradox that he called the "third antinomy."

In Lockean libertarianism, this paradox manifests a conundrum familiar to American property and constitutional theorists. As already mentioned, Locke thought that not merely freedom, but the right to property, existed in the state of nature.²¹ Consequently, government exists in order to protect natural rights; to be just, the state must recognize property rights. Indeed, property rights are one of the bastions that are supposed to protect the individual from the overreaching power of the state. This is, of course, enshrined in the Fifth and Fourteenth Amendments, which prohibit the state from taking property without paying just compensation.

A standard critique of Locke is that if one accepts the Hohfeldian proposition that rights are intersubjective, then Locke's theory is hopelessly circular. How can one justify society on the grounds that it protects property rights when it is impossible to imagine property rights without society?²² If property rights only exist in society, by liberalism's very terms, then property is a creature of positive, not natural, law.²³

19. "Only *one aspect* of the will is defined here—namely this *absolute possibility* of abstracting from every determination in which I find myself or which I have posited in myself, the flight from every content as a limitation." HEGEL, *supra* note 4, at 38.

20. "The freedom of the will, according to this determination, is *arbitrariness*." *Id.* at 48.

21. See JOHN LOCKE, TWO TREATISES ON GOVERNMENT (Peter Lachelt ed., 1967) (1698).

22. See JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); see also THE VESTAL AND THE FASCES, *supra* note 10, at 17-18, 299-300.

23. "Property *has* also carried with it the paradox of self-limiting government: it is the limit to

Hegel's political philosophy revolves around these central puzzles of liberal freedom—is freedom merely a theoretical construct or *can it be made to operate in the empirical world?* In Kantian terms, can freedom be made practical, or is it merely transcendental?²⁴

Hegel argued that the freedom of the abstract, autonomous individual in the hypothesized state of nature is only potential. For reasons beyond the scope of this Article, the individual is passionately driven to actualize her freedom.²⁵ Suffice it to say, that this relates directly to a central theme of Hegel's metaphysics—his complete rejection of Kant's distinction between the noumenon and the phenomenon; the transcendental and the practical.²⁶ To Hegel, the former only exists in the latter. On the one hand, Hegel presented his account of personality as being logical, not empirical. On the other hand, Hegel believed that in order for a logically generated theory to be true, it must have an empirical manifestation in the material world. Consequently, to say that freedom is *potential* in the state of nature is a meaningless statement, unless it can also be shown to be *actual* in our daily lives.

1. INDIVIDUATION AND DIFFERENTIATION

The Kantian individual is a noumenon because the absolute autonomy of the state of nature is the negative freedom from any and all constraints.²⁷ To actualize her freedom, the autonomous individual must leave the lonely state of nature and take on concrete particularity by engaging in intersubjective relations: she must seek recognition by others; her desire is to be desired by others. The logically most primitive form of particularity identified by Hegel is what I call “legal subjectivity”—the capacity to bear legal rights and duties and obey the rule of

the state; it is also the creature of the state. In property, the state sets its own limit.” NEDELSKY, *supra* note 22, at 8.

24. See Jeanne Schroeder, *The Lacanomics of Apples and Oranges: A Speculative Account of the Economic Concept of Commensurability*, 15 YALE J.L. & HUMAN. 347 (2003) [hereinafter *Lacanomics*].

25. See, for example, Hegel's discussion of the liberal concept of the autonomous individual in the state of nature: “When I say ‘I’, I leave out of account every particularity such as my character, temperament, knowledge [], and age. ‘I’ is totally empty; it is merely a point—simple, yet active in this simplicity. The colorful canvas of the world is before me; I stand opposed to it and in this [theoretical] attitude I overcome [] its opposition and make its content my own.” HEGEL, *supra* note 4, at 35-36.

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

27. “The will contains (alpha) the element of *pure indeterminacy* or of the ‘I’s pure reflection into itself, in which every limitation, every content, whether present immediately through nature, through needs, desires, and drives, or given and determined in some other way, is dissolved; this is the limitless infinity of *absolute abstraction* or *universality*, the pure thinking of oneself.” HEGEL, *supra* note 4, at 37.

law. Legal subjectivity is created in the most primitive realm of inter-subjective relations that Hegel called "abstract right"—property and contract.

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

The individual seeking recognition must therefore take on individuating characteristics to distinguish himself from others. He does this by entering into object relationships not for the sake of the objects, but as a means of mediating and achieving intersubjective relationships.²⁸ To understand this we must first examine what Hegel and Kant mean by "objects." This will be crucial to our consideration of intellectual property as property.

For an individual to be free means, to Kant and Hegel, that she is an end in herself; not the means to another's ends. Kant's categorical imperative, which Hegel rewrites as "be a person and respect others as persons,"²⁹ can be read as the assertion that the minimal concept of ethics³⁰ consists in never treating another person as a means. Consequently, Kant calls a just society "a kingdom of ends" in which each self-legislates her own law.³¹

Following this reasoning, an "object" is anything that is incapable of becoming a subject (anything which has no will and cannot achieve self-consciousness).³² Objects are those things that may properly be treated as ends. Essentially, anything but another individual is potentially an object.³³

28. See, e.g., *id.* at 105.

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

30. Hegel differs from Kant by defining a broader regime of *right* that consists of the primitive regime of abstract right and the more highly developed morality and *Sittlichkeit*.

31. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor ed., 1998) (1785).

32. "[T]hing' [is to be] understood in its general sense as everything external to my freedom, including even my body and my life. This right of things is the right of *personality* as *such*." HEGEL, *supra* note 4, at 71. "What is immediately different from the free spirit is, for the latter and in itself, the external in general—a *thing* . . . something unfree, impersonal, and without rights." *Id.* at 73.

33. Consequently, as discussed below, the only "thing" that cannot be treated as an object of property is personality itself, understood as the capacity for self-consciousness capable of exercising freedom. *Id.* at 96.

One implication of this interpretation is that there are no “natural” objects. An object obtains its status by identification as such by the will of an individual.³⁴ Since the purpose of identifying objects is intersubjective recognition, not the satisfaction of natural or physical needs, objects are not limited to physical things.³⁵ Indeed, as it is easy to confuse the “natural” physical relations that people have with tangible things and the symbolic, intersubjective legal property rights subjects have with respect to objects, tangibles are arguably the less adequate forms of objects.³⁶ The very abstraction of intangibles enables them to more adequately serve as “objects” than tangibles. Hegel states:

Abstract right is concerned only with the person as such, and hence also with the particular, which belongs to the existence [] and sphere of the person’s freedom. But it is concerned with the particular only in so far as it is separable and immediately different from the person—whether this separation constitutes its essential determination, or whether it receives it only by means of the subjective will. Thus, intellectual accomplishments, sciences, etc. are relevant here only in their character as legal possessions; that possession of body and spirit which is acquired through education, study, habituation, etc. and which constitutes an *inner property* of the spirit will not be dealt with here. But the *transition* of such intellectual property into externality, in which it falls within the definition [] of legal and rightful property, will be discussed only when we come to the *disposal* of property.³⁷

34. “When I think of an object I make it into a thought and deprive it of its sensuous quality; I make it into something which is essentially and immediately mine.” *Id.* at 35.

35. “The rational aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality.” *Id.* at 73.

36. Hegel includes in his class of objects:

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

Id. at 74–75 (footnote omitted).

37. *Id.* at 75.

Trade secrets are the category of intellectual property that traditionally has been considered most problematic to property scholars. From a Hegelian perspective, however, trade secrets can serve as the quintessential form of an object precisely because they have virtually no substance except the negative quality of their secrecy.

Although Hegel insists that property is intersubjective in nature, he also insists that it always involves objects. Many legal scholars, most notably Hohfeld and Thomas Gray, in their attempt to distinguish the legal right of property from the empirical fact of object relations, have mistakenly concluded that legal property does not require objects at all.³⁸ For example, Hohfeld tries to redefine property as "multital" rights—rights enforceable against an undefined multiplicity of others—as opposed to a "paucital" rights such as contract—rights enforceable against an identified restricted class of others.³⁹ Unfortunately, not only is this counterintuitive, it fails to explain the distinction between property and torts—both multital rights. This is why Hohfeld's idiosyncratic terminology has been rightfully consigned to the dustbin of history, notwithstanding his generally substantial influence on commercial jurisprudence.

Hegel, in contrast, insists on the objective aspect of property. Even though property is not primarily an object relation (let alone a natural or physical relation to a tangible thing), it is an *intersubjective* relationship mediated by objects. Each individual desires to engage in intersubjective relations in order to achieve subjectivity as a step in the actualization of freedom. But how can an individual do this without treating every other person with whom one interrelates as a means to this end in violation of the categorical imperative? Hegel's answer is that objects serve as mediators; both parties achieve their ends through mutual exploitation of objects. That is, the subjects recognize each other and achieve the end of subjectivity by entering into contracts for the exchange of objects.

2. NEGATIVITY AND IDENTIFIABILITY

The fact that individuals take on object relations in order to differentiate themselves might at first blush suggest that the *content* of property (i.e., the specific identity of specific objects) matters. This is not so. Abstract right (property) does not yet establish the content of personal-

38. See, e.g., HOHFELD, *supra* note 18, at 85. I explain why this analysis fails in *THE VESTAL AND THE FASCES*, *supra* note 10, at 107-14, 156-81, and in Jeanne Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994) [hereinafter *Chix Nix Bundle-O-Stix*].

39. HOHFELD, *supra* note 18, at 72.

ity. It merely establishes the empty form (subjectivity) into which content will be added later in the regimes of morality and ethics. This raises the question that troubles non-Hegelians: The “function” of property is supposed to make the individual into a recognizable subject, but how can a subject be recognizable if she has no content?

Jacques Lacan, the French psychoanalyst, uses the metaphor of a potter’s creation of a vase to explain the concept of an identifiable, yet empty and formal, notion of subjectivity.⁴⁰ A vase is a vase only because it is empty—like the subject, its essence is negativity. Nevertheless, the value and beauty of the vase are attributable to the fact that its walls separate and distinguish a unique internal void within the vase from the external void of the world. This allows us to create content to fill the internal void. Metaphorically, if abstract right forms the individual into a vase-like subject, then it is only the *form* of the vase that is important at this stage. Property is a potter, not a florist. Morality and ethics—not law—will add the flowers of personality later.

Another way to conceptualize this is to consider that Hegel usually refers to the creature formed in abstract right as “die Person”—typically, but misleadingly, translated into English as “person.” In my writing I have chosen instead to use the term “subject” (a term Hegel sometimes uses to refer to what I call the autonomous individual) to avoid the connotations of humanity conveyed by the colloquial English word “person.” “Die Person” in German has a more abstract and formalistic connotation, implying the important point that content is external to the subject.

The German word for what we would call a person (in the sense of human being) is not “die Person,” but “der Mensch.” To understand the concept of the person as a subject, one should refer back to its Latin origins. *Persona* means “mask.” As Robert Bernasconi explains, Hegel uses the word *Person* precisely to invoke the Latin concept of “mask” to describe the subject of abstract right.⁴¹ It implies that personhood is a *role* that an individual assumes.

Lacan also uses the image of the mask to explain subjectivity. For reasons that are beyond the scope of this Article, Lacan maintains, in contrast to the dominant stereotype, that the true subject is “feminine”—a technical psychoanalytic category that must be distinguished from ana-

40. THE SEMINAR OF JACQUES LACAN: BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959-60 120-23 (Jacques-Alain Miller ed., Dennis Porter trans., W.W. Norton & Co. 1992) (1986); Paul Verhaeghe, Frederic Verhaeghe & Frédéric Declercq, *Lacan’s Analytic Goal or the Feminine Way*, in REINVENTING THE SYMPTOM: ESSAYS ON THE FINAL LACAN 62 (Luke Thurston ed., 2002).

41. See Robert Bernasconi, *Persons and Masks: The Phenomenology of Spirit and its Laws*, 10 CARDOZO L. REV. 1695 (1989).

tomical femaleness.⁴² Lacan explores, and reinterprets, a traditional notion of femininity as a masquerade. This refers not merely to traditional "feminine" traits as coquetry and display (fashion, etc.), although this behavior may be one way masquerade manifests itself. Masquerade is more generally the presentment of a mask—a *persona*—to the world. It is vulgarly presumed that the mask the subject wears conceals a true, underlying reality. Lacan explains that this presumption is, in fact, the masquerade. The truth underlying the mask is *that there is no truth underlying the mask*. In the words of Slavoj Žižek, "this nothingness behind the mask is the very absolute negativity . . . which . . . is the subject *par excellence*, not a limited object opposed to the force of subjectivity!"⁴³

In speculative terms, there is no noumenon underlying phenomenon. There is no true essence underlying appearance because everything is appearance. Or, more accurately, as I shall explain below, true essence *is* appearance, properly understood. The legal subject as *persona* is a recognizable mask—a formal legal status—with nothing behind it.

C. The Traditional Property Trinity

1. THE ELEMENTS OF PROPERTY

It has been fashionable in American jurisprudence to argue that, because property appears in a seemingly endless series of variations, it has no unitary essence; property is an arbitrary "bundle of sticks."⁴⁴ Hegel, in contrast, defends traditional notions of property (although he reinterprets them). The regime of legal relations that Hegel calls "property" logically requires objects. This regime also necessitates the three traditional elements of property: possession, enjoyment, and alienation, understood at their highest levels of abstraction. I have discussed Hegel's interpretation of these three elements extensively elsewhere.⁴⁵

42. Lacan's theory of sexuality is complex and anti-intuitive. Although we tend to associate feminine personality traits with female persons and masculine personality traits with male ones, they, in fact, only loosely correspond to their biological counterparts and all persons paradoxically reflect some aspects of both genders. I discuss Lacan's theory extensively in *THE TRIUMPH OF VENUS*, *supra* note 10, and *THE VESTAL AND THE FASCES*, *supra* note 10.

43. SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 143 (1994) (footnotes omitted); *see also* SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 161-62 (1996); *THE SEMINAR OF JACQUES LACAN: BOOK XI: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 111-12 (Jacques-Alain Miller ed., Alan Sheridan trans., W.W. Norton & Co. 1981) (1973).

44. *THE VESTAL AND THE FASCES*, *supra* note 10, at 156-57.

45. Most of my work in this area has been consolidated and rewritten as *THE VESTAL AND THE FASCES*, *supra* note 10, and *THE TRIUMPH OF VENUS*, *supra* note 10.

Consequently, I give only a brief general description now, although I will develop some of these ideas later in this article.

These three elements of property are necessary not in any natural sense, but in a purely functional sense. Property is a regime created to achieve a goal—the creation of subjectivity through intersubjective recognition.⁴⁶ The three elements are required to achieve this goal.

a. Possession

Possession is the identification of a specific object to a specific individual.⁴⁷ The goal is the differentiation of the possessor from the non-possessor. Consequently, possession is more accurately the *exclusion* of others from the object identified to the owner.⁴⁸ By associating a specific object to a specific individual, that individual is differentiated from other individuals not identified with that object.

The assumption underlying much of American property—that the archetypical form of possession consists of physical custody of tangibles—is incorrect. According to Hegel, although physical custody of tangible things might at first blush seem to be the most “determinative” form of possession in the sense that it is readily apparent, it is the least adequate because it is the most contingent.⁴⁹ Possession is a *claim* to an object, but custody is a brute *fact* that can be defeated by a brute. The inadequacy of custody as possession is obvious when one considers that a thief does not destroy my rightful *claim* of possession merely by depriving me of the *fact* of custody of my goods.

If possession is the identification of an object to an individual through exclusion of others, then any intersubjective manifestation of that identification is a form of possession.⁵⁰ Hegel specifically noted that designating or marking is a more adequate form of possession than custody, even though it might be somewhat less determinative, or in

46. “[T]he possession of property appears as a means but the true position is that, from the point of view of freedom, property as the first *existence* [] of freedom, is an essential end for itself.” HEGEL, *supra* note 4, at 77.

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

48. Hegel, in effect, argues that designation should not be thought of as a substitute for the norm of possession through sensuous grasp. Rather, sensuous grasp should be seen as an imperfect type of designation. *Id.* at 88.

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

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

other words, ambiguous.⁵¹ For example, elsewhere I argue that the filing system for perfection of security interests in personal property under Article 9 of the Uniform Commercial Code should not, as is often thought, be considered a substitute for "possession" of the collateral by the secured party.⁵² Rather, from a Hegelian perspective, filing is a possession through marking.

One advantage of possession through designation is that it helps to distinguish the legal right of property from the mere fact of physical relations with tangible objects. It effectively clarifies that the function of property is formal and is not dependent on the content of any specific object of the property claim. In Hegel's words, "the concept of the sign is that the thing does not count as what it is, but as what it is meant to signify. . . . It is precisely through the ability to make a sign and by so doing to acquire things that human beings display their mastery over the latter."⁵³ In other words, possession is ultimately the display of mastery that is represented by the sign.

b. Possession of Intellectual Property

A Hegelian analysis helps to solve the supposed "problem" of possession of intellectual property frequently identified by critics who argue that intellectual property is not "true" property.⁵⁴ Intellectual property, being intellectual, cannot be physically grasped. Moreover, it can "exist" in the minds of more than one person simultaneously. Does this mean that no one person "possesses" it? Compared to the certainty of the physical custody of tangible things, any claim to "possession" of intellectual property seems ambiguous and indeterminate. Perhaps intellectual "property" claimants do not "really" possess at all, but merely have some other *sui generis* legal right analogous to possession?

Some have claimed that there is no concept of true possession in intellectual property law in the sense that it is possible for an infinite number of people to have possession of the same information without depriving the original owner of her possession.⁵⁵ To present the issue thusly is to presume that sensuous grasp is the ideal of possession. It

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

52. THE VESTAL AND THE FASCES, *supra* note 10, at 147-56.

53. HEGEL, *supra* note 4, at 88.

54. *See, e.g.*, Bone, *supra* note 2, at 254 (stating that "[t]he difficult question was how someone could 'possess' an intangible thing, like information, which was not subject to physical control").

55. For example, Posner and his co-authors think that trade secrets are not property in the

conflates the two different meanings of the English word “possession”: both the *fact* of custody and the claim to legal rights with respect to an object.⁵⁶

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

Trade secrets are probably the most puzzling form of intellectual property from a traditional perspective. Particularly troubling is the fact that trade secret law does not merely lack a publicity requirement. A trade secret has the status of a trade secret *only so long as it is kept secret*. Paradoxically, from a Hegelian perspective, this secrecy requirement is another form of possession through marking.⁵⁷

Under trade secret law, the mere fact that a “secret” is secret is not enough to make it an enforceable trade secret. The owner must also take reasonable steps *to protect its secrecy*.⁵⁸ It is these reasonable steps—obtaining confidentiality agreements, keeping the information “under

ordinary sense of the term “because [they are] not something that the possessor has the exclusive right to use or enjoy.” Posner et al., *supra* note 2, at 62; *see also* Moohr, *supra* note 2, at 693.

56. Adam Mossoff, a thoughtful, recent defender of both property analysis and trade secret law, has taken this to heart not by agreeing that there is a possessory aspect of intangible property, but by suggesting that possession is not a necessary element of property at all—replacing the traditional trinity of rights of *possession*, enjoyment, and alienation, with an “exclusion” theory of property reflecting rights of *acquisition*, enjoyment, and alienation. Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 390-91 (2003). As we have seen, Hegel anticipated these concerns in the *Philosophy of Right*.

57. Bone anticipates this argument. He states: “At common law, property rights depended on possession. . . . Moreover, possession required clear acts manifesting an intent to bring the thing under exclusive control and to appropriate it to individual use. . . . It follow[s] . . . that the only way someone could possess information to the exclusion of others was to keep it secret. . . . Accordingly, secrecy was the *sine qua non* of possession and thus of common law property right in information.” Bone, *supra* note 2, at 254-55 (footnotes omitted). Bone argues that trade secret law is inconsistent with this analysis.

58. The Uniform Trade Secrets Act requires, among other things, that a trade secret be the subject of efforts that are “reasonable under the circumstances” to maintain its secrecy. UNIF. TRADE SECRETS ACT §1(4)(ii) (1985). The Restatement is not so strict, waiving an “evidence of specific precautions [requirement where] the value and secrecy of the information are clear.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION: APPROPRIATION OF TRADE VALUES §39 cmt. g (1995).

lock and key," etc.—that mark and designate the object to the claiming owner. By definition, however, those persons who are excluded from the secret do not know the *content* of the secret. How, then, is the secret as object so identified with the subject as to help make the subject identifiable?

This apparent enigma disappears when one remembers that the confusion reflects the romantic misperceptions of Hegel's theory. The romantic identifies the *substance* of the object as important to property's function of creating personality, while Hegel insists that *form* is of the essence. It is sufficient that others know that the "owner" is claiming property even if they do not necessarily know the identity of what is claimed. Under the law of trade secrets, by imposing protections preventing the revelation of a secret, the claimant is declaring himself the owner of a unique object. It is this claim that is recognizable by other subjects.

This explains the two recognized modes of trade secret violation—breach of a confidentiality agreement and "stealing" trade secrets through an independently wrongful act like corporate espionage.⁵⁹ The former is less problematic because the signer of a confidentiality agreement gains access to the secret (so she has the opportunity to know what it is). By signing the agreement, she acknowledges the claimant's claim. This establishes a "common will" that retroactively legitimizes this unilateral claim.

In the case of violation by independent wrong, the very violation paradoxically establishes the right of possession that is violated. Certain wrongs play a back-handed compliment to right. That is, by engaging in nefarious behavior, such as hacking into computer records, the violator reveals that she *knows of* the claimant's *claim* (i.e., the claim to exclude is intersubjectively recognizable at least by the person against whom the claim is to be enforced).

The Hegelian analysis of possession also explains why trade secrets are not enforceable when they become public (i.e., when other people gain access to the content of the former secret). A person who merely "happens" on the content of a trade secret—either by discovering it herself or by receiving it from a confidant without knowledge that she is violating a confidence—is not on notice of the "owner's" claim. Consequently, the trade-secret claimant has not established its possession with respect to this person because it is not recognizable by that person.⁶⁰

59. Chiappetta calls these two categories "breach of duties and bad acts." Chiappetta, *supra* note 2, at 73.

60. From this perspective, there is one apparent anomaly in the law of "innocent" recipients of trade secrets. A good-faith recipient of a trade secret from a dishonest confidant of the owner is

c. Enjoyment

The second element of property is use, or what I prefer to call “enjoyment,”⁶¹ of the object by the owner. The function of possession is to distinguish one individual from another. The function of enjoyment is to distinguish the owning subject from the owned object.⁶² In possession, an owner identifies an object to herself, but this is equivalent to identifying herself *with* the object.⁶³ The “logic” of property is recognition of the owner *as a subject* by another subject. A subject is defined as an end in and to herself, and an object is defined as the means to an end. In enjoyment, the owner exploits the thing, thereby establishing that she is the subject who has the end of enjoyment, and the enjoyed thing is a mere means to this end.⁶⁴

The form of enjoyment varies depending on the object. Although the three elements of possession, enjoyment, and alienation are logically distinct in that they perform different functions, as an empirical matter, the same activity can meet the requirements of more than one element. For example, some acts of enjoyment (such as eating food) also mark it and, therefore, also serve as acts of possession. Similarly, other acts of enjoyment (such as exploiting the object in commerce) are also acts of alienation. Some of the substantive requirements of trade secret law that seem problematic to many commentators can be explained if one accepts the Hegelian conception of enjoyment as exploitation, and recognizes that the same act serves the double duty of establishing both the possessory and enjoyment elements of property.

Although both are necessary for intersubjective recognition, posses-

not liable to the owner for its use, whereas a good-faith recipient from a thief is liable, even though both of these persons are equally lacking in notice of the existence of the owner's possessory claims. At further thought, one realizes that this is not a puzzle unique to trade secret law. Rather, it reflects an anomaly that also underlies the American rule with respect to tangible goods: a thief can not pass good title to a good-faith purchaser.

61. In numerous works, I have tried to develop parallels between Hegel's theory of the creation of legal subjectivity through property and Lacan's theory of the creation of psychoanalytic subjectivity through sexuality. My most sustained account appears in *THE TRIUMPH OF VENUS*, *supra* note 10, and *THE VESTAL AND THE FASCES*, *supra* note 10. To clarify this parallel, herein I use the word “enjoyment” when I speak of property to reflect Lacan's term *jouissance*.

62. HEGEL, *supra* note 4, at 89 (“Use is the realization of my need through the alteration, destruction, or consumption of the thing, whose selfless nature is thereby revealed and which thus fulfils its destiny [].”).

63. *Id.* (“When I and the thing come together, one of the two must lose its [distinct] quality in order that we may become identical.”).

64. *Id.* at 89-90 (“[T]he thing, as negative in itself, exists only *for my need* and serves it. . . . The thing is reduced to a means of satisfying my need. . . . Since the substance of the thing [] for itself, which is my property, is its externality, i.e. its non-substantiality—for in relation to me, it is not an end in itself—and since this realized externality is the use or employment to which I subject it, it follows that *the whole use* or employment of it is *the thing in its entirety*.”).

sion and enjoyment are only latently intersubjective and, as such, are still insufficient to the creation of subjectivity. Possession is the negative intersubjectivity of one person excluding others. Enjoyment is also frequently exclusive—only one person can eat the same piece of food. Under the law of trade secrets, for a secret to be protected as property, the rights of others to enjoy the secret must be limited—indeed, inappropriate enjoyment by others is a trade secret violation.

In enjoyment, the subject uses things for her own ends. One might initially assume that it is the content of the thing, not the form of enjoyment, that is of the essence. Upon further thought, however, one realizes that enjoyment is also purely formal. If the logical function of enjoyment is the distinction between owner and owned thing through the owner's display of mastery, then enjoyment can be thought of as the *negation of the object's existence*, not the positivation of its particularity. The most complete form of enjoyment is consumption—which actually destroys the object entirely. Indeed, perhaps a more accurate term for this element might be *exploitation*. Consequently, Hegel emphasizes that at the level of enjoyment, all things are paradoxically specific yet equivalent and comparable to all other things. He states:

But [the individual thing's] specific utility, as *quantitatively* determined, is at the same time *comparable* with other things of the same utility, just as the specific need which it serves is at the same time *need in general* and thus likewise comparable in its particularity with other needs. Consequently, the thing is also comparable with things which serve other needs. This *universality*, whose simple determinacy arises out of the thing's particularity [] in such a way that it is at the same time abstracted from this specific quality, is the thing's *value*, in which its true substantiality is *determined* and becomes an object [] of consciousness. As the full owner of the thing, I am the owner both of its *value* and of its use.⁶⁵

In other words, Hegel is looking forward to the economic analysis that recognizes that, although to be valuable property must have use value, use value can be translated into exchange value; all property is ultimately commensurable.⁶⁶ In order to serve the logical function of enjoyment, all things are identical in the regime of abstract right. Indeed, Hegel goes so far as to say that if one cannot reduce one's thing to its use value because of restraints on alienation, then one is not the

65. *Id.* at 92.

66. Or, more accurately, Hegel thought that all concepts contain a moment of commensurability (quantitative distinction) and incommensurability (qualitative distinction) existing in a dialectical relationship. *Lacanomics*, *supra* note 24, at 349-51, 380-86.

complete owner of the thing.⁶⁷

Although necessary, enjoyment is more problematic than possession because unchecked enjoyment can defeat the goals of property. The individual seeks recognition through property as a means of actualizing her freedom. But, in enjoyment, the individual becomes dependent on the object that is her support. Radin believes that such a dependency on the class of objects she calls “personal property” leads to human flourishing. Hegel, in contrast, believed that dependency is the opposite of the freedom that is the essence of personality—it is the slavery of addiction.⁶⁸ However, if the individual seeks to end her dependency by ridding herself of the object of her addiction, she once again becomes undifferentiated and unrecognizable.

d. Enjoyment of Trade Secrets

Hegelian analysis sheds light on another puzzle of intellectual property identified by critics. Supposedly, one major difference between intellectual property and other forms of property is that use of the latter is usually exclusive by necessity. A simple example is that it is impossible for two different people to eat the same bite of food. Consequently, the use of an owned object by a person who is not the owner, without the permission of the owner, necessarily violates the property rights of the owner because it destroys the owner’s ability to use her object and, frequently, also destroys the object itself (making further possession and alienation impossible).

In contrast, the use of intellectual property by one person does not seem to interfere with the use by another. For example, it is empirically possible for many people simultaneously to enjoy the content of a copyrighted book or employ patented technology. The fact that another person learns the content of a secret does not deprive the original owner of her *knowledge* of the content.⁶⁹ Why, then, is non-permitted use by a non-owner an infringement of intellectual property?

This supposed puzzle rests on misperceptions as to the nature of the right to use. These misperceptions are based, once again, on an implicit assumption that the archetypical objects of property are physical and the archetypical form of use is consumption, as in the food example. In contrast, if enjoyment is the subject’s exercise of her dominion over the

67. Hegel thought that this is why feudal restraints on alienation were disappearing when he was writing in the early nineteenth century. HEGEL, *supra* note 4, at 93.

68. THE VESTAL AND THE FASCES, *supra* note 10, at 44.

69. Bone describes the traditional quandary as follows: “Because information is capable of infinite replication, everyone can enjoy it without anyone having less of it. And once someone learns information, there is no way to erase that knowledge and therefore no means of excluding the person in fact.” Bone, *supra* note 2, at 255; see also Posner et al., *supra* note 2, at 61-62.

object through exploitation, then what concerns us is not the *fact* that many persons *could* use the same information, but the claimant's *right and power to prevent others* from exploiting the information.

With regard to trade secrets, an owner exploits her knowledge for her own financial purposes to the exclusion of others. In the oft-vilified case of *United States v. Carpenter*,⁷⁰ the Supreme Court intuited this answer, but only imperfectly. This case held that confidential information constitutes property for the purposes of the federal mail and wire fraud statute.⁷¹ Whatever the problems of the specific holding of this case, the Court was nevertheless correct that *the value* of confidential property lies in the claimant's exclusive *right* to control its use. To translate into Hegelian parlance, if what is conventionally called "use" is better understood as the act of mastery over, or exploitation of, an object, then *control of its use* is itself a form of use. In other words, in the case of intellectual property, exclusion does double-duty—it is a form of possession, and also a necessary aspect of its use (exploitation). Critics of trade secret law are, therefore, mistaken when they maintain that many people can use the content of trade secret law without diminishing the object of property. In the case of a trade secret, the value to the owner consists of the fact that the owner obtains a business advantage by virtue of the object's secrecy and the owner's exclusive right to use the object.

e. Alienation

The "problem" with enjoyment, to the Hegelian analysis, is that the subject risks becoming dependent on her object. Dependency is the opposite of the freedom that the subject seeks to actualize through property relationships. How, then, does the individual both remain identifiable (through identification with objects) without also becoming dependent on any object? The answer lies in alienation.

Hegel's argument is famously confusing to non-Hegelian scholars. As my colleague Justin Hughes asks, if the logic of property is differentiation and individuation through the acquisition of objects, doesn't alienation of objects defeat this purpose?⁷² This would be true of the simplest form of alienation—abandonment.⁷³

70. 484 U.S. 19 (1987).

71. *Id.* at 26.

72. Hughes, *supra* note 1, at 345.

73. Surprisingly, gift is also inadequate to the purpose of property because the purpose of property is mutual recognition between and among subjects through objects, while gift is a unilateral act of the donor. I explain the inadequacy of gift in Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. REV. 815, 870-82 (1999), and THE TRIUMPH OF VENUS, *supra* note 10, at 48-64.

Contract solves this problem. To reiterate, Hegel believes that subjectivity is created not by possession per se, but by intersubjective recognition by other subjects. Property is only a medium for this purpose. This regime of recognition is abstract right—the rule of law. Subjectivity is the capacity to bear legal rights and duties recognized by, and enforceable against, other subjects. To concentrate on the specific object of property is to conflate subject with object—the opposite of recognizing the person's unique subjectivity. This is in sharp contradistinction to Radin's proposition that the merging of owner with her personal property furthers human flourishing. Hegel, looking forward to psychoanalysis, considers such a relationship to be destructive—an addiction, or more technically, fetishism.

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

[Contract] contains the implication that each party, in accordance with his own and the other party's will, *ceases* to be an owner of property, *remains* one, and *becomes* one. This is the mediation of the will to give up a property (an individual property) and the will to accept such a property (and hence the property of someone else). The context of this mediation is one of identity, in that the one volition comes to a decision only in so far as the other volition is present.⁷⁴

Hegel went so far as to assert that "[t]he whole issue can also be viewed in such a way that alienation is regarded as a true mode of taking possession."⁷⁵ That is, possession is the recognition by others that a specific object belongs to a specific subject. Paradoxically, this recognition only *expressly* occurs *retroactively* when the owner contracts to sell that object to another person. In other words, the identification of subject to object in possession is only *effectively* recognized at the moment when another subject pays the first subject to release the object from her possession.

Once again, one must remember Hegel's radical definition of objects as anything that is not the individual herself. This includes not only intangibles, but also an individual's own labor is an object separate from her personhood. Consequently, service contracts, whereby the individual alienates part of her productive capacity in exchange for

74. HEGEL, *supra* note 4, at 105.

75. *Id.* at 95.

wages is, to the Hegelian analysis, a contract for the exchange of property. In fact, the service contract is an excellent example of the logic of Hegel's dialectic of recognition. In our modern capitalistic society, a primary way we recognize each other is through our occupations.

The mutual intersubjectivity of contract is necessary because, according to Hegel, one becomes a subject (*eine Person*) only when one is recognized as such by another *subject*. Subjectivity (the capacity to bear legal rights and duties) exists only insofar as rights are enforceable. Since all persons logically begin as abstract individuals (not subjects), in order to achieve subjectivity, each individual must first make other individuals into subjects by recognizing them as such. This means that it is impossible to create rights by unilaterally claiming them for oneself. Since rights are intersubjective they can only be created intersubjectively. This is one reason why the Lockean attempt to justify claims of property through first-appropriation fails.

The conundrum should be obvious. How does anyone become a subject recognized by other subjects when there are no subjects in the state of nature? Where does the *first* subject come from? The Hegelian answer is that multiple subjects must come into existence simultaneously. This is the alchemy that Lacan calls "love"—the relationship in which each lover sees in his beloved more than she has, that empowers the beloved to live up to the lover's expectations and become more than she once was.⁷⁶

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

3. FORMALITY AND RECOGNITION

The Hegelian logic of alienation confuses many commentators because they do not recognize the purely formal nature of subjectivity and *abstract* right. Here, object relations are purely instrumental and subordinate to the goal of recognition.

Hegel, like Kant, defines a free individual as an end in and for her self, and not the means to the end of another. In contrast, an object is something that is the means to the ends of something else. In abstract right, each individual paradoxically wants both—that other individuals help him reach his end of becoming a subject, and that other individuals remain an end in and to themselves rather than merely a means to the

76. See THE TRIUMPH OF VENUS, *supra* note 10, at 47-50.

first person's ends. Subjectivity is only created through recognition as such by *a person that one recognizes as another subject*. To treat another person as one's means, rather than as his own ends, is to fail to recognize him as an individual or a subject. The question then becomes, how can one accomplish one's own ends (which requires action by another person) without impinging on the ends of that other person or treating her like a means (an object)?

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

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

Right is something *utterly sacred* for the simple reason that it is the existence [] of the absolute concept, of self-conscious freedom. But the *formalism* of right—and also of duty—arises out of the different stages in the development of the concept of freedom. In opposition to the more formal, i.e. *more abstract* and hence more limited kind of right, that the sphere and stage of the spirit in which the spirit has determined and actualized within itself the further moments contained in its Idea possesses a higher right, for it is the *more concrete sphere*, richer within itself and more truly universal.

Each stage in the development of the Idea of freedom has its distinctive right, because it is the existence of freedom in one of its own determinations. When we speak of the opposition between morality or ethics and *right*, the right in question is merely the initial and formal right of abstract personality. Morality, ethics, and the interest of the state—each of these is a distinct variety of right, because each of them gives determinate shape and existence to *freedom*.⁷⁷

In other words, a full concrete personality requires the entire regime that Hegel calls *Recht*, which includes not only abstract right (property and contract), but morality and ethics. Abstract right is the most primitive form of right that only creates the *form* necessary for freedom—the empty vessel of legal subjectivity understood as the mere ability to

77. HEGEL, *supra* note 4, at 59 (footnote omitted).

accept legal rights and duties imposed by others. The *content* of personality will be added by morality and ethics.

Consequently, Hegel states with respect to the legal subject:

Since particularity, in the person [i.e. what I am calling the subject], is not yet present as freedom, everything which depends on particularity is here a *matter of indifference*. If someone is interested only in his formal right, this may be pure stubbornness, such as is often encountered in emotionally limited people; for uncultured people insist most strongly on their rights, whereas those of nobler mind seek to discover what other aspects there are to the matter in question. Thus abstract right is initially a mere possibility, and in that respect is formal in character as compared with the whole extent of the relationship. Consequently, a determination of right gives me a warrant, but it is not absolutely necessary that I should pursue my rights, because this is only one aspect of the whole relationship. For possibility is being, which also has the significance of not being.⁷⁸

Indeed, it is *precisely* the function of the element of alienation to make this irrelevance and indifference manifest. Nevertheless, even as subtle an analyst as Hughes, who expressly recognizes that the fact that object relations can also serve natural functions (food and shelter) is irrelevant to a Hegelian analysis,⁷⁹ misses this point.

Hughes finds alienation "incoherent"⁸⁰ because the subject loses the object that supposedly makes the subject recognizable.⁸¹ He finds this particularly problematic in Hegel's discussion of copyright, because the objects of copyright, being the author's creations, seem intrinsically linked to the author's personality.⁸² Consequently, he infers that the objects of copyright uniquely serve the goal of differentiating and identifying the author and concludes that complete alienation of artistic works might defeat the goal of the creation of personality. Consequently, he sees the Hegelian analysis of property as supporting certain restraints on alienation of copyrightable material, such as in the *droit morale* under which an artist retains some control over her creations after sale.⁸³

But this critique is based on the misimpression that, to Hegel, the *legal* right of property relates to the creation of the full complex personhood of empirical human beings situated in relations of family, civil society, and state.⁸⁴ But legal relationships relate only to the creation of

78. *Id.* at 69.

79. Hughes, *supra* note 1, at 333.

80. *Id.* at 339.

81. *Id.* at 345.

82. *Id.* at 246-47.

83. *Id.* at 345-48.

84. This can be seen in the fact that Hughes thinks that some objects are more important in the creation of personality than others. See, e.g., *id.* at 339 ("[D]ifferent categories of intellectual

legal subjects—persons capable of bearing rights and duties. The legal subjectivity mutually constituted with abstract right is, therefore, equally abstract and formal. Moreover, it is precisely abstractness and formality that enable abstract right and legal subjectivity to serve as the substratum for the concrete freedom of citizenship.

Above, I mentioned in passing an analysis that I have developed extensively elsewhere: Hegel's property jurisprudence is essentially erotic because contract is a primitive type of "love."⁸⁵ My goal in doing so was to break down the dichotomy between rationality and passion that implicitly underlies both utilitarianism and romanticism. To Hegel's jurisprudence, rationality and passion are two sides of the same coin.⁸⁶ Reason tells the autonomous individual that he must actualize his freedom and to do so requires recognition by other subjects. Consequently, the free individual rationally decides that he must give way to the desire for others. Because abstract right is created in order to enable the interrelationship of mutual recognition to occur, it is erotic.

The "love" and desire that exist at the level of abstract right are only a pale shadow of the passions we feel towards our family, lovers, and friends. Consequently, I have argued vociferously that although utilitarians like Posner are right in seeing a parallel between economic activity and sexuality, they are wrong in trying to reduce the latter to a form of the former.⁸⁷ Rather, from the Hegelian position, the former (economics) is merely a step that makes the latter (eroticism) possible. That is, contract establishes the *form* of love, not its content.

Conversely, Hughes and Radin are equally mistaken in trying to argue that property can perform a direct function in the creation of the full, loving artistic personality. Although Hegel was a great defender of legalism and capitalistic markets, he also insisted that they be limited to their appropriate sphere. To analyze more complex interrelationships in terms of abstract right (property) is not merely erroneous. Never one to mince words, Hegel called it "crude" and shameful.⁸⁸ Consequently,

property seem to lend themselves to different amounts of 'personality.' Poetry seems to lend itself to personality better than trade secrets, symphonies better than microchip masks."); *id.* at 344 ("The more a creative process is subject to external constraints, the less apparent personality is in the creation. . . . We may determine that the personality justification should apply only to some genres of intellectual property or that the personality generally present in a particular genre warrants only limited protection.").

85. See, e.g., *THE TRIUMPH OF VENUS*, *supra* note 10, at 47-50, 54-56, 225-26.

86. *Id.* at 2-3, 75-76. In my analysis I rely heavily on Lacan's concept that "repression and the return of the repressed are just two sides of the same coin." *THE SEMINAR OF JACQUES LACAN: BOOK III: THE PSYCHOSES 1955-56* 12 (Jacques-Alain Miller ed., Russell Grigg trans., W.W. Norton & Co. 1993) (1981).

87. *THE TRIUMPH OF VENUS*, *supra* note 10, at 2-4.

88. *HEGEL*, *supra* note 4, at 201 (discussing the contractual analysis of marriage).

only the most base persons stand on their rights.⁸⁹ The noble person accords rights *to others*. This is why Hegel condemns the classical liberal concept of government as social contract—citizenship is Hegel's most highly developed level of personality, and therefore, unlike the subject, cannot be comprised solely by legal categories.

A corollary of this is that it is equally incorrect, indeed shameful, to adopt the romantic position towards copyright that conflates the legal relationship of property with the flowering of personality in artistic expression. From a Lacanian point of view, to do so is *literally* perverse. Specifically it is fetishistic—the identification of objects with subjects.⁹⁰ The specific content of objects of copyright has nothing to do with their status as a *legal* concept. To Hegel, saying copyright is “property” is not to say that society must or should establish a copyright regime. This decision can only be made by pragmatic reasoning. In this sense, Hegel's theory has a surprising utilitarian twist. Society's desire to further creativity *may*, however, be a good pragmatic argument in favor of such a regime.

3. RECOGNITION AND CONTINUITY

Hughes finds Hegel's insistence on the importance of alienation paradoxical because it seems to conflict with the idea that property makes individuals recognizable.⁹¹ That is, if an individual becomes recognizable by being identified with an object, doesn't alienation of the object render him once again unrecognizable? Moreover, if the objects owned by an individual keeps changing over time (because of alienation through exchange), how do we recognize the subject we meet today as the same subject we met yesterday?

Hegel fully recognized the need for a continuity of personhood. He reconciled the requirement of continuity with his insistence that the free person not be bound to specific objects by sharply delimitating a minimal class of “inalienable” objects: “Those goods, or rather substantial determinations, which constitute my own distinct personality and the universal essence of my self-consciousness are therefore *inalienable*, and my right to them is *imprescriptible*. They include my personality in general, my universal freedom of will, ethical life, and religion.”⁹²

The only inalienable “objects,” then, are the bare minimal constituents of a concrete personality such that their alienation would constitute the alienation of concrete personality. Hegel further explains:

89. *Id.* at 72.

90. THE TRIUMPH OF VENUS, *supra* note 10, at 72-73.

91. Hughes, *supra* note 1, at 345.

92. HEGEL, *supra* note 4, at 95.

Examples of the alienation of personality include slavery, serfdom, disqualification from owning property, restrictions on freedom of ownership, etc. The alienation of intelligent rationality, of morality, ethical life, and religion is encountered in superstition, when power and authority are granted to others to determine and prescribe what actions I should perform . . . or how I should interpret the dictates of conscience, religious truth, etc.⁹³

Although these categories fall within Hegel's extremely abstract definition of objects, it is obvious that none of them are "objects" within the colloquial or conventional legal understandings of the word. What these examples of alienable objects have in common is that they form the lowest common denominator of personality necessary for a person to actualize her freedom. This is why continued ownership of these objects is consistent with freedom. First there is the body and life. The individual, as spirit, is distinguishable from her body. The body could, therefore, be identified as an object of property. Recognition, however, requires communication between subjects and this requires physical existence. This relates to Hegel's rejection of transcendence. Although he is usually characterized as an idealist, Hegel was also a radical materialist who believed that an ideal exists only insofar as it is manifested in the actual world. An individual soul requires an individualized body. Consequently, the goal of the actualization of freedom suggests that we should not alienate our bodies and life in suicide.

The other items in Hegel's list of inalienable objects consist of the capacity to form ends. If the minimum conception of the person is free will, one must not alienate one's capacity for freedom.⁹⁴ In the words of my colleague Stewart Sterk, "[b]y definition, a person who surrenders the right to hold beliefs or to make any future decisions has ceased functioning as a recognizable person and has become instead an object—the property of another person."⁹⁵

One might argue that this means one should not be able to sell one's *capacity* to create artistic works or scientific discoveries. However, it does not follow from Hegel's reasoning that one should not alienate one's creations. Indeed, the act of creation is nothing but the production of objects that can be externalized as property.⁹⁶ In Sterk's words, "Hegel's concern was with the person who would sell himself

93. *Id.* at 96.

94. THE VESTAL AND THE FASCES, *supra* note 10, at 278.

95. Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1243 (1996).

96. "The distinctive quality of intellectual [] production may, by virtue of the way in which it is expressed, be immediately transformed into the external quality of a thing [], which may then in turn be produced by others." HEGEL, *supra* note 4, at 98.

into slavery and cease functioning as a person, not with the artist or author who sells a completed work of art only to see it transformed or destroyed."⁹⁷

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

III. SHOULD WE RECOGNIZE INTELLECTUAL PROPERTY?

The surprising thing about Hegelian political philosophy is that, although Hegel argued that property is a necessary moment in the actualization of human freedom, and even though he argued that intellectual property is appropriately analyzed as a form of property, he did not believe that it followed from this that society must recognize intellectual property rights in any way. Hegelian philosophy only purports to explain why a modern constitutional republic should adopt a positive law granting *some* private property rights to each of its citizens. Hegel believed that logic can give us absolutely no guidelines as what specific property laws should be established, and what claims to property should be recognized. Positive law is the bailiwick of practical reasoning, not logic.

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

A. *There Are No Natural Hegelian Rights*

1. THE POTENTIAL AND THE ACTUAL

For simplicity, I stated that Hegel started his analysis by contingently adopting the notion of the free individual in the state of nature. I

97. Sterk, *supra* note 95, at 1243.

now more carefully explain my terminology as we consider Hegel's theory of the relationship between freedom and nature.

Hegel thought that the freedom of the autonomous individual in the "state of nature" was only potential. Hegel argued not merely that the individual must leave the state of nature and go out into the real world if he is to make his freedom actual as a matter of fact. He also believed that the individual is *driven* by a passionate desire to do so.

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

Hegel's metaphysics is an extended critique of Kant's. Hegel rejects all concepts of transcendence.⁹⁸ There is no essence beyond appearance.⁹⁹ Essence only exists insofar as it appears.¹⁰⁰ Or more radically, essence is nothing but appearance properly understood. Hegel's is a radically materialistic philosophy,¹⁰¹ but not an atheistic one. Nonetheless, Hegel's God, or Spirit, is not transcendent, but immanent in the material world.

Why this is significant for our purposes is that it follows from Hegel's rejection of transcendence that there can be no potentiality without actuality—what claims to be potential must become actual or reveal itself a liar. Actually, the theory is even more radical than this. As I have argued elsewhere,¹⁰² Hegel's logic is retroactive, not prospective. Potentiality is only retroactively revealed after something becomes

98. JEAN HYPPOLITE, *LOGIC AND EXISTENCE* 90 (Leonard Lawlor & Amit Sen trans., State Univ. of N.Y. Press 1997) (1991) ("Hegelian philosophy rejects all transcendence. It is the attempt at a rigorous philosophy that could claim to remain within the immanent, and not to leave it. There is no other world, no thing in itself, no transcendence . . ."); *see also*, David Gray Carlson, *Hegel on Reflection and Essence* (2004) (unpublished manuscript, on file with University of Miami Law Review) [hereinafter *Hegel on Reflection and Essence*].

99. ROBERT B. PIPPIN, *HEGEL'S IDEALISM: THE SATISFACTIONS OF SELF-CONSCIOUSNESS* 211 (1989) ("[T]here are no 'essences' beyond or behind the appearances, at least none that can do any cognitive work. There are just the appearances . . ."); *see also* Hegel on Reflection and Essence, *supra* note 98.

100. *Essence of Right*, *supra* note 26, at 2482.

101. For an excellent explanation of Hegel's materialism, *see* LUCIO COLLETTI, *MARXISM AND HEGEL* (Lawrence Garner trans., 1973) (1969).

102. *THE VESTAL AND THE FASCES*, *supra* note 10, at 12-14, 31-32.

actual. Consequently, if the autonomous individual in the state of nature claims to be free, and if this radically negative freedom is only potential, then the individual's claims to freedom can only be retroactively tested after he leaves the state of nature and makes his freedom affirmative and actual.¹⁰³

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

2. NATURE AND RIGHTS

Hegel sharply distinguishes between natural and positive law, and locates rights within the latter. He states, "[t]here are two kinds of laws, laws of nature and laws of right: the laws of nature are simply there and are valid as they stand The laws of right are something *laid down*, something *derived from* human beings."¹⁰⁴ The liberal "state of nature" is, in fact, the hypothesis that autonomous individuality is a necessary, albeit inadequate, moment of human personality that we retroactively posit to understand political freedom. If so, what is the status of "nature" and its relationship to rights and freedom? Once again, I do not pretend to give a comprehensive account of Hegel's philosophy of nature, but will point out one aspect relevant to this Article.

The first thing to note is to reiterate the simple point that there can be no "rights" in the hypothetical state of nature because the "state of nature" is defined as autonomy. Rights are necessarily interrelational. Hegel's point is more subtle and powerful than this, however. More specifically, there is no freedom in the empirical natural world. This can probably best be explained by going back to Kant's famous analysis of antinomies presented in his *Critique of Pure Reason*.¹⁰⁵

An antimony is a logical paradox, or two statements that seem to be equally logically required yet are in contradiction. To say they are in contradiction means not merely that they are mutually inconsistent, but

103. In other words, Hegel's logic is atemporal. From the perspective of eternity, potentiality and actuality—what may happen and what has happened—are one and the same.

104. HEGEL, *supra* note 4, at 13 (footnote omitted).

105. IMMANUEL KANT, *CRITIQUE OF PURE REASON* (J.M.D. Meiklejohn trans., Prometheus Books 1990) (1787) [hereinafter *CRITIQUE OF PURE REASON*].

that they are the only logically possible alternatives. This suggests not merely that if one statement is true then the other must be false, but also that if one statement is proven to be false, the other is proven to be true.¹⁰⁶ For reasons that do not concern us here, Kant identifies four antinomies that he divides into two dyads: two “mathematical” antinomies and two “dynamical” antinomies. He claims to solve the two mathematical antinomies by showing that neither statement is true because there is a heretofore unrealized third alternative that may be true.¹⁰⁷ He claims to solve the two dynamic antinomies by arguing that both statements are true, but that their contradiction is merely apparent so that, in fact, they can be reconciled.¹⁰⁸

It is Kant’s third antinomy of freedom and nature that concerns us. The thesis of Kant’s first antinomy is that freedom can exist in the world.¹⁰⁹ Kant is referring to negative freedom as the uncaused cause—the potential for pure spontaneity, action beyond necessity. Like all of Kant’s theses, this is a dogmatic proposition posited by reason alone.¹¹⁰ Its antithesis is that everything is subjected to the causal laws of nature—there are no uncaused causes and, therefore, no freedom.¹¹¹ Like all of Kant’s antitheses, this is an empirical proposition reached by applying logic to our experience of the world.¹¹²

As this is a dynamic antinomy, Kant must solve this paradox by arguing that the contradiction between the two propositions is only apparent. If they are properly understood, then they can be reconciled. Kant argues that both propositions are true, *but about different aspects of the world*. Kant relies on his distinction between the phenomenal, or empirical, contingent, changing world of appearance that we can know from experience, and the noumenal, or transcendental, necessary, eternal world of essences, or the “thing-in-itself” which we do not know directly, but can infer through logic.¹¹³ It is true, Kant states, that the

106. JOAN COPJEC, *READ MY DESIRE: LACAN AGAINST THE HISTORICISTS* 218 (1994).

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

108. He argues that, “no real contradiction exists between them, and that, consequently, *both may be true*.” *CRITIQUE OF PURE REASON*, *supra* note 105, at 316 (emphasis added).

109. *Id.* at 252.

110. *Id.* at 236-37.

111. *Id.* at 286.

112. *Id.* at 266.

113. Robert Merrihew Adams, *Introduction to IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS* vi, ix (Allen Wood & George Di Giovanni eds. & trans., Cambridge University Press 1998); Jeanne Schroeder, *The Stumbling Block*:

entire phenomenal world is natural and therefore subject to the laws of nature—i.e., everything empirical is caused.¹¹⁴ It is also true, however, that freedom exists in the transcendental, non-empirical world of the noumena.¹¹⁵ Indeed, these conclusions follow from his definitions of phenomena and noumena.¹¹⁶ If a “noumenon” were caused by something else, then it would be contingent on that other thing and, therefore, not a noumenon. Conversely, if a “phenomenon” were free of an external cause, then it would not be a mere phenomenon, but a noumenon.

The question that this analysis proposes is, if freedom is noumenal, can it manifest itself in the phenomenal world, or is merely a theoretical construct?¹¹⁷ To put this in Kant’s idiosyncratic terminology, is freedom “practical?”¹¹⁸ By extension, one might ask, since each individual human being is embodied and, therefore, phenomenal,¹¹⁹ can man achieve freedom?

In the *Critique of Pure Reason*, Kant claims to show that freedom is at least theoretically possible in the phenomenal world. He argues that although all phenomena are caused by something else, the cause need not itself be phenomenal. A phenomenon can be caused by a noumenon.¹²⁰ Because noumena are free (uncaused), their free acts can appear in the world through the phenomena they cause. Although each individual human being is phenomenal, man’s essence (his spirit or soul, his status as the liberal, autonomous individual) is noumenal and therefore free.¹²¹ This implies that it is at least theoretically possible that the noumenal aspect of man can actualize his freedom by causing his phenomenal self to act. In the *Critique of Practical Reason*, Kant tries to prove not merely that practical reason is theoretically possible but that we have good reason to think it exists.

Freedom, Rationality and Legal Scholarship, 44 WM. & MARY L. REV. 263, 285 (2002) [hereinafter *The Stumbling Block*].

114. CRITIQUE OF PURE REASON, *supra* note 105, at 302; *The Stumbling Block*, *supra* note 113, at 285.

115. CRITIQUE OF PURE REASON, *supra* note 105, at 302; *The Stumbling Block*, *supra* note 113, at 286.

116. CRITIQUE OF PURE REASON, *supra* note 105, at 302-03; *The Stumbling Block*, *supra* note 113, at 287.

117. CRITIQUE OF PURE REASON, *supra* note 105, at 302; *The Stumbling Block*, *supra* note 113, at 286.

118. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 138 (T.K. Abbott trans., Prometheus Books 1996) (1788).

119. CRITIQUE OF PURE REASON, *supra* note 105, at 307.

120. *Id.* at 306 (“Is it not . . . possible that, although every effect in the phenomenal world must be connected with an empirical cause, according to the universal law of nature, this empirical causality may be itself the effect of a non-empirical and intelligible causality—its connection with natural causes remaining nevertheless intact?”); see also *The Stumbling Block*, *supra* note 113, at 287-88.

121. CRITIQUE OF PURE REASON, *supra* note 105, at 307.

There are as many problems raised in this analysis as are solved. Even ardent Kantians are somewhat embarrassed by it.¹²² Hegel called Kant's argument "a whole *nest . . .* of faulty procedure."¹²³ My simplified account is not an attempt to develop a comprehensive critique of Kant. My limited point is that, as I have argued elsewhere,¹²⁴ much of Hegel's speculative logical method can be seen as being inspired by Kant's idea of antinomy.

I characterize Hegel's complaint against Kant as an accusation that Kant does not have the courage of his own convictions and is afraid to follow his insights to their logical extremes. Hegel, in effect, criticizes Kant for thinking that there were only four antinomies. Rather, Hegel's entire universe is constituted by a fundamental, essential contradiction.¹²⁵ Further, Hegel criticizes Kant for thinking that contradiction is a problem that must be "solved." Contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement"¹²⁶ In other words, contradiction is a universal fact about the world. It is correct that contradictions are unstable and must be resolved, but each resolution is temporary and leads to a new contradiction *ad infinitum*. Far from being frightening or disturbing, this merely means that the universe is dynamic, not static. Contradiction is the engine of change. This means that Hegel rejects the Kantian noumenal-phenomenal distinction. To Hegel, there can be no necessary, permanent, unchanging essence (noumenon) behind the contingent, temporary,

122. For example, in his Preface, Henry Allison half-heartedly defends Kant's analysis by stating that his "goal is to show that, although hardly free from difficulty, they are not as hopelessly confused as Kant's critics generally assume." HENRY ALLISON, *KANT'S TRANSCENDENTAL IDEALISM: AN INTERPRETATION AND DEFENSE* 36 (1983).

123. G.W.F. HEGEL, *SCIENCE OF LOGIC* 195 (A.V. Miller trans., 1989) [hereinafter *SCIENCE OF LOGIC*]. Hegel accuses Kant of the logical error of *quaternio terminorum*—a sort of failed syllogism. See David Gray Carlson, *Hegel's Theory of Quantity*, 23 *CARDOZO L. REV.* 2027, 2048-51 (2002) [hereinafter *Hegel's Theory of Quantity*].

124. See *Lacanomics*, *supra* note 24.

125. *Hegel's Theory of Quantity*, *supra* note 123, at 2046.

126. *SCIENCE OF LOGIC*, *supra* note 123, at 440. Hegel is particularly hard on those philosophers who try to deny or do away with contradiction. He says about Kant:

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

Id. at 237-38.

empirical world of appearances that is in a constant state of flux. To Hegel, it is appearance all the way down.

Finally Hegel's sublative logic can be seen as a rejection of Kant's specific claims to have solved his four antinomies by assuming that he had to show either that both sides were true, but not in contradiction, or that both the thesis and antithesis were false because there is a third alternative. In contrast, through sublation (the standard but poor English translation of Hegel's term for the logical method of resolving contradiction) one realizes that both sides are simultaneously equally true and false, thereby generating a third alternative that simultaneously negates and preserves the two earlier propositions.¹²⁷

Regardless of these differences between Hegel and Kant, I believe that the *Philosophy of Right* can be seen as Hegel's struggle to come to grips with the specific contradiction that Kant identifies in the third antinomy: freedom v. causality. In his analysis, Hegel accepts Kant's proposition drawn from experience that all nature is subject to natural laws of causation. This means that nature is fundamentally unfree and implies that actual (practical) freedom must be unnatural by definition. Yet on the other hand, Hegel also begins his analysis by contingently accepting Kant's presupposition that the most basic notion of human personality is self-consciousness as free will. Hegel seeks to prove this presupposition (that freedom is possible) by finding that freedom actually exists in the phenomenal world.

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

Hegel's counterproposal was that actual freedom is not natural but artificial: a human creation, created out of natural materials. Legal subjectivity (as well as higher stages of personhood) is, therefore, not a natural state but a hard-won achievement. The story of the development of human consciousness, to Hegel, was the struggle of man to free himself from and overcome his natural limitations. "Hence the personality of the will stands in opposition to nature as *subjective*. . . . Personality is that which acts to overcome [] this limitation and to give itself reality

127. *Lacanomics*, *supra* note 24, at 363-64.

...¹²⁸ Abstract rights are, therefore, the first most primitive step in man's attempt to actualize his freedom, understood as the overcoming of nature.

The basis [] of right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free*, so that freedom constitutes its substance and destiny [] and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.¹²⁹

Rights are, therefore, not merely unnatural in the sense of artificial (man made), they are a means by which man distinguishes himself from nature.¹³⁰

B. *First Occupancy Is a Wrong*

There is a widespread misperception among American legal scholars that Hegel adopts a first occupancy theory of property justification similar to the more familiar Lockean theory.¹³¹ This misperception is based on the following passage from the *Philosophy of Right*:

That a thing [] belongs to the person who *happens to be the first* to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else.

... The above determinations have chiefly concerned the proposition that the personality must have existence [] in property. That the first person who takes possession of something is also its owner is, then, a consequence of what has been said. The first is not the rightful owner because he is the first, but because he is a free will, for it is only the fact that another comes after he which makes him the first.¹³²

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

128. HEGEL, *supra* note 4, at 70.

129. *Id.* at 35.

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

131. See, e.g., STEVEN R. MUNZER, A THEORY OF PROPERTY 69-70 (1990).

132. HEGEL, *supra* note 4, at 81.

Hegel's analysis of property explains the function of the three traditional elements of possession, enjoyment, and alienation. In this context it is clear that the quoted language is merely a description of what constitutes a claim to possession.¹³³ That is, possession is the claim of a person in possession to exclude subsequent claimants. Consequently, it is a truism that *if* the first claimant has a *valid* right of possession enforceable against a second party, *then* that second party cannot claim it.

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

A more important objection is that first occupation is by definition unilateral. The goal of property is the reciprocal recognition that only occurs through the forging of the common will at the moment of alienation of property in exchange (i.e., contract). To understand why first occupation cannot make a claim of property rightful, we must examine Hegel's definition of "right."

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

Surprisingly, Hegel did not define or justify "rights" at the beginning of his chapter on abstract right. This might lead the reader to assume incorrectly that Hegel adopts a standard definition. Hegel's understanding of "right" only becomes clear in his subsequent section on "wrong."¹³⁴ This is because, to Hegel, right can only be understood through wrong. Right does not exist without wrong because right is

133. As Hughes correctly notes, although "much of Hegel's language *seems* to support either a 'first possession'" theory or a labor theory of property, in fact his theory is quite different. Hughes, *supra* note 1, at 334 (emphasis added).

134. The discussion of wrong serves as the transition from the realm of abstract wrong to the next higher regime of interrelationship—morality. In the chapter on "wrong," Hegel argues that abstract right is only externally imposed upon the subject. In contract, the subject herself consents to the right, but at this stage, this consent is contingent or accidental.

nothing but the righting of a wrong. Paradoxically, wrong is the condition precedent of right (which is why he postpones the definition of right until the chapter on wrong). This conclusion necessarily springs from Hegel's metaphysics if understood as a radical rejection of Kant's division of the world into the noumenal thing-in-itself and the phenomenal empirical world in which we live.

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

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

Hegel describes the relationship between right and wrong as follows:

The principle of rightness, the universal will, receives its essential determinate character through the particular will, and so stands in relation to something inessential. This is the relation of essence to its appearance. . . . In wrong however, appearance proceeds to become mere semblance or show. A semblance is a determinate existence inappropriate to the essence, namely an empty detachment and positing of the essence, as the power and authority over the semblance. The essence has negated that which negated it, and is thereby confirmed. Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid.¹³⁵

That is, right is essence, and wrong is mere appearance. At first reading this seems consistent with fairly common notions of right—particularly a neo-Platonic idealist conception that evil is a negative quality (a lack of being), and right is what is left when wrong is eliminated. As such, wrong is destined to pass away and whatever is left is, by definition, good.

This interpretation is antithetical to Hegel's insistence that there is

135. HEGEL, *supra* note 4, at 115-16. As my co-author and I have noted elsewhere, *Essence of Right*, *supra* note 26, at 2482, even respected Hegelians have misinterpreted this passage. See, e.g., ROBERT R. WILLIAMS, *HEGEL'S ETHICS OF RECOGNITION* 156 (1997).

no such thing as a noumenon and that everything is phenomenal—that essence is itself nothing but an appearance. But what, then, could Hegel mean in identifying right with essence in contrast to wrong as appearance?

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

Essence must be distinguished from *being*.¹³⁶ Essence is not something that is, it is something that *does*.¹³⁷ Essence is the enduring principle that nothing endures and that appearances disappear. Hegel agreed with the usual intuition that that which is mere appearance is temporary and contingent and is doomed to pass away. Indeed, this is the definition of the word "appearance." However, Hegel disagrees with Kant's assumption that this implies that there must be an eternal and necessary reality—a noumenon or thing-in-itself—that lies underneath appearance. Rather, each appearance gives way to another appearance which gives way to another appearance *ad infinitum*.

It is important to remember that Hegel believed that no idea is potential unless it has an actual manifestation in the material world. Everything in the material world is destined to pass away. Insofar as it appears in the world, therefore, essence is doomed to pass away like all other appearances. Consequently, essence exists only insofar as it disappears.¹³⁸

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

This does not mean that Hegelianism is relativistic or that it denies

136. Hegel begins his *Science of Logic* with a consideration of pure being. He does not discuss essence until over three hundred pages later. In Carlson's words "[f]or Hegel, Essence is simply the negation and recollection of what was—Being. Essence is *not* Being and has no further content than that." Hegel on Reflection and Essence, *supra* note 98.

137. *Essence of Right*, *supra* note 26, at 2485.

138. Essence is "what it is through a negativity, which is not alien to it but is its very own, the infinite movement of being." *SCIENCE OF LOGIC*, *supra* note 123, at 390. In Carlson's words, "when Essence manifests what it is, it shows that it is *not*. In other words, essence erases itself. . . . When Essence posits its own non-being, it cancels itself." Hegel on Reflection and Essence, *supra* note 98.

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

Wrong is *semblance*—the deluded claim that that which is merely contingent and temporary appearance is, in fact, necessary and eternal essence. “Wrong is thus the semblance of essence which posits itself as self-sufficient.”¹³⁹ It is the denial of the contradiction, flux, and dynamism of the universe. The three types of wrong identified by Hegel relate to three different forms of semblance.

To start where Hegel ends, *crime* is the worst type of semblance in that it is a complete denial of right—in Hegel’s terminology, an “infinite negative judgment.”¹⁴⁰ By denying right, the criminal is making a claim of his own over and against the world. Consequently, crime is a radically self-contradictory position. This is why crime logically requires its own reversal and negation through retribution. In Hegel’s analysis, each criminal, by committing a crime, necessarily, albeit unconsciously, calls for his own punishment.¹⁴¹

Deception is somewhat less culpable than crime as it pays a backhanded compliment to right. In deception, the fraudster does not deny the existence of right, but makes a knowingly false claim to right in the hopes of deluding her victim.¹⁴² That is, for a fraud to work, the fraudster must know either that right exists or that society and her victim believe that it does.

Civil wrong is the least culpable form of wrong in that it is mere mistake or *self-deception*.¹⁴³ Civil wrong is:

negative judgment pure and simple where merely the particular law is violated, while law in general is so far acknowledged. Such a dispute is precisely paralleled by a negative judgment, like, “This flower is not red”: by which we merely deny the particular colour of the flower, but not its colour in general¹⁴⁴

139. HEGEL, *supra* note 4, at 121.

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

141. In Hegel’s metaphor, “[t]he Eumenides sleep, but crime awakens them; thus the deed brings its own retribution with it.” *Id.* at 129.

142. “In this case, the wrong is not a semblance from the point of view of right in itself; instead, what happens is that I create a semblance in order to deceive another person. When I deceive someone, right is for me a semblance.” *Id.* at 116.

143. “If the semblance is present only in itself and not also for itself—that is, if the wrong is in my opinion right—the wrong is unintentional. Here, the semblance exists from the point of view of right, but not from my point of view.” *Id.*

144. G.W.F. HEGEL, HEGEL’S LOGIC 238 (William Wallace trans., Oxford University Press 3d ed. 1975) (1873).

When one commits a civil wrong one acknowledges and respects the existence of right, but is mistaken in thinking that one is in the right. Civil wrong is nothing but the unilateral claim to have a right. Indeed, to Hegel, *all* claims to abstract rights start as civil wrongs.

Why is a claim to a right a wrong? Precisely because it is a claim that something *is*. "Wrong is . . . the semblance of essence which posits itself as self-sufficient."¹⁴⁵ As my co-author and I say elsewhere:

Civil wrong, Hegel says, is to be considered right in itself. "What is right in itself has a determinate ground, and the wrong which I hold to be right I also defend on some ground or other." In other words, a civil wrongdoer bases his claim of right on legal research—on some ground in the positive law of statutes or judicial precedents. Such a legal claim, however, is fixed and rigid—or, as Hegel says, finite. As such, it is not "true" or "right." The true and the right are precisely the *disappearance* of such fixities. "It is in the nature of the finite and particular that it leaves room for contingencies; collisions must therefore occur. . . ."¹⁴⁶

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

We continue:

Prior to contract, there can only be a "collision" of competing claims to right. Different persons may claim "possession" of the same thing, but they have no logical justification for imposing their particular will against each other. Insofar as any claimant successfully excludes others from a contested object, this is merely a result of brute force. All such claims to possession are, therefore, merely appearance, semblance. It is only when persons mutually agree to recognize each other's respective claims that possession can for the first time be seen as rightful, and legal (i.e. property).¹⁴⁷

In Hegel's words:

For the parties involved, the recognition of right is bound up with

145. HEGEL, *supra* note 4, at 116.

146. *Essence of Right*, *supra* note 26, at 2502-03 (quoting HEGEL, *supra* note 4, at 117-18).

147. *Id.* at 2504 (footnote omitted).

their particular opposing interests and points of view. In opposition to this *semblance*, yet at the same time *within the semblance itself*, right *in itself* emerges as something represented [] and required. But it appears at first only as an *obligation*, because the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view and interests.¹⁴⁸

In other words, “[e]ach person wills what is right, and each is supposed to receive only what is right; their wrong consists [] solely in considering that what they will is right.”¹⁴⁹ This relates to the external and objective (i.e., intersubjective) nature of abstract right. When an individual seeks to enter into a contract to buy a widget, she does not, as an empirical matter, have the conscious thought, “I wish to achieve legal subjectivity by creating a common will with another person in which we recognize each other.” Indeed, to have such a thought would presuppose the rich inner life that does not concern the legalistic aspect of personality that I am calling subjectivity.

In the realm of contract, the empirical person probably thinks something like, “I have money and want a widget and that person can sell the widget to me.” The widget owner’s reciprocal thought is probably something like “I have a widget and want money and that person can buy my widget from me.” Note that both of these individual thoughts are in and of themselves wrongful. They both conflict with the categorical imperative to be a person and treat others as persons. Rather than treating the other person as an end in herself, each person approaches the other as a means to her own end (to acquire a widget or cash, respectively).

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

Note that in this example, this specific abstract “right” is only right-ful between the two parties joined in the common will with respect to this specific contract. Insofar as the parties claim “rights” beyond this,

148. HEGEL, *supra* note 4, at 117.

149. *Id.* at 118.

their claims are wrong with respect to the rest of the world. It is only through the common will of society expressed in positive law that this wrong can be righted. And even positive law is "wrong" insofar as it pretends to be anything other than private law, and as such, artificial, contingent, and temporary.

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

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

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

Some legal commentators have assumed that because property plays a role in the creation of personality, we should have a special solicitude towards the protection of intellectual property on the ground that artistic creations are uniquely personal.¹⁵⁰ This position, at first blush, seems to be buttressed by the fact that copyright is one of the only *specific* categories of property that Hegel discusses in the *Philosophy of Right*. Some analysts go further and suggest that the logical implication of Hegel's personality theory—albeit one that Hegel himself may not have recognized—is that society should adopt specific rules protective of intellectual property, similar to the Continental notion of moral right. This is a misinterpretation of Hegel and represents a romantic notion of personality and artistic creation that he completely rejects.

150. See, e.g., Hughes, *supra* note 1.

To put this more strongly, this interpretation inverts Hegel's point. Hegel discussed copyright not because it is unique, but precisely to rebut arguments as to its uniqueness. From the perspective of abstract right, intellectual property is completely banal. As Natanel notes,¹⁵¹ earlier Continental philosophers such as Kant and Fichte argued that copyright could not correctly be analyzed as property because of its unique content. In this context, it seems clear that the primary reason Hegel discusses copyright in the *Philosophy of Right* is to challenge this position.

To Hegel, from the formal viewpoint of abstract right, an artistic creation is an object that must be distinguished from the *capacity* to create art. Creations are external to personality, in the same sense as conventional objects of property, such as goods. Creations should be considered means to the creator's ends, and are, therefore, properly exploited through possession, enjoyment, and alienation. The alienation of intellectual property is permissible because it is not essential to personality itself.

Once again, Hegel is even more radical than he appears at first. His point is not just the simplistic one of showing how copyrights are similar to other objects in form, despite their content. His implicit point is rather to argue that *copyrights are a perfect exemplar of property because of their radical externalized banality*. Intellectual property is the most abstract and externalized of objects. The very aspect of intellectual property that most troubles conventional property scholars—intangibility—is what made it most property-like to Hegel. Like a modern Hohfeldian lawyer, Hegel emphasized that property is a purely legal relationship between and among legal subjects with respect to objects, and that this relationship is distinct from the empirical relations that natural people have with physical things.

We can now explain why Hegel insists that creations, and the right to copy creations, are external to the subject. The objects of intellectual property have no separate, natural, empirical existence. They "exist" contingently and only insofar as not only their creator, but also other subjects, recognize them as such. In another context, Lacan coined the term "extimacy"¹⁵² which beautifully captures Hegel's idea of externality. Although at one level, we have such a close emotional tie to our creations that they seem internal or intimate to ourselves, in fact, they only exist as creations at the moment that we communicate them to

151. Netanel, *supra* note 1, at 19-20.

152. Jacques-Alain Miller, *Extimate* (Elisabeth Doisneau ed. & Francoise Massardier-Kenney trans.), in *LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE AND SOCIETY* 74, 81 (March Bracher et al. trans. 1994). Lacan argued that subjectivity is itself extimate because, as Hegel proposed, one only becomes a subject through recognition by another subject. Consequently, that which we feel is most internal to ourselves—our sense of being a self—comes from the outside.

another. I might have an idea for a painting or, more prosaically, a law review article, but it does not come into existence as such until I express it in a way that is intersubjectively recognizable by others. That is, the idea of the painting is not a painting until it is painted, and the idea of an article is not an article until it is written. Even contemporary "conceptual art" that is not intended ever to be manifested in a physical form does not exist as art until the artist communicates (whether orally, in writing, or otherwise) the concept to at least one other subject. Consequently, that which seems intimate, in fact, only comes into being the moment when it is externalized—in Lacan's terms, when it becomes extimate.

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

Accordingly, any continued sentimental attachment of the creator to her externalized creations, at the level of *abstract right*, is mere fetishism that threatens to stand in the way of the eroticism of mutual recognition that creates legal subjectivity. Society may very well decide that it wants to grant a moral right to artists, but it cannot look to Hegel for a justification.

D. *Pragmatism and Trade Secret*

Should society adopt an intellectual property regime? Hegel cannot tell us. The content of any specific property regime can only be determined by positive law,¹⁵³ and positive law is a creature of pragmatic

153. "Right is in general *positive* (a) through its *form* of having validity within a [particular] state; and this legal authority is the principle which underlies knowledge [] of right, i.e. the

reasoning, not speculative logic. Logic suggests only the following four things: 1) in order for us to actualize our freedom in the world, we should adopt a private property regime with respect to some objects; 2) property consists of the intersubjectively recognizable rights of possession, enjoyment, and alienation of an object, understood in the most broad and abstract sense; 3) every member of society must have a minimal amount of property in order to actualize her freedom; and 4) intellectual property can properly and coherently be treated as property. So long as society establishes property rights with respect to some classes of objects, speculative logic does *not* dictate either that society must adopt an intellectual property regime, or, if society does decide to offer some protection to intellectual property, that it must then recognize it as property for any or all purposes.

For example, in *Carpenter v. United States*¹⁵⁴ and *United States v. O'Hagan*¹⁵⁵ the U.S. Supreme Court held that, because state law treated confidential information as property or quasi-property,¹⁵⁶ then it also constituted "property" within the meaning of the Federal Wire Fraud statute and the rules proscribing insider trading under the federal securities trading law, respectively. Commentators have roundly criticized these cases as an unwarranted extension of state law that threatens to criminalize ordinary contract disputes, contending that trade secrets are better analyzed in terms of contract and tort.¹⁵⁷

Despite the fact that trade secrets squarely fall within Hegel's understanding of property, a Hegelian analysis has little to add to this debate. Nevertheless, the fact that the states have decided to treat trade secrets as property for some purposes does not support the conclusion that the state or the federal government must, or even should, treat trade secrets as property for all purposes. Indeed, despite the fact that I frequently represented trade secret claimants while I was still in practice, and regularly maintained on my clients' behalf that trade secrets are property, I understood that this was only a negotiating position. I instinctively share the concerns of critics that *Carpenter* and *O'Hagan* are unwise and unwarranted.

What types of arguments would Hegel have us consider when

positive science of right. (b) In terms of *content*, this right acquires a positive element (4) through the particular *national character* of a people" HEGEL, *supra* note 4, at 28.

154. 484 U.S. 19, 25-27 (1987).

155. 521 U.S. 641, 642 (1997).

156. Although trade secret law can be analyzed under Hegelian property principles, it is far from clear that state legislatures and courts have interpreted them as property. Consequently, the Supreme Court's description of state law is suspect on its face.

157. See, e.g., Bone, *supra* note 2; Chiappetta, *supra* note 2; Friedman et al., *supra* note 2; Coffee, *supra* note 2.

deciding on a specific property law regime? Hegel insists that his logical method is incapable of mandating pragmatic policy decisions. If it did, it would violate the very goal of political philosophy—to explain how man can manifest his freedom within society. If our specific decisions were mandated, we would not be free. Consequently, pragmatism turns out to be the corollary to Hegelian logic.

In his discussion of copyright, Hegel mentioned in passing one of the traditional pragmatic justifications—that copyright may incentivize authors to create more copyrightable works to the benefit of society generally.¹⁵⁸ This should not be interpreted as a logical mandate, however. It is only an example of the type of practical arguments that society might, in its discretion, consider. It is based on an empirical claim and so should be empirically challenged. Indeed, as an author, Hegel is hardly disinterested in the subject of copyright, and so his instincts are not necessarily to be trusted.

This type of pragmatic argument is familiar to anyone who has read contemporary intellectual property literature. It is most closely associated with the law-and-economics movement, which frequently employs cost-benefit analysis. But these pragmatic arguments can also be found in Lockean rights-based and romantic personality analyses insofar as they discuss the supposed value and detriments of specific policy proposals. Elsewhere,¹⁵⁹ I have strongly criticized the utilitarianism of the law-and-economics movement on the Hegelian reasoning that private property can only be understood in terms of rights and freedom regardless of any cost-benefit analysis. Nevertheless, I concur with legal economists that it is appropriate for society to base its specific decision as to whether to recognize intellectual property (or any other specific claim to property) on precisely this type of practical consideration.

IV. CONCLUSION

On the one hand, Hegel's property theory is powerful not merely because it is satisfying on a metaphysical level, but also because it has surprisingly practical applications. Traditional property analysis finds many aspects of intellectual property doctrine and practice to be mysterious and wonders whether intellectual property is truly property. Hegelian analysis, however, makes these problems evaporate. These supposedly troublesome intellectual property rules are not merely consistent with property categorization; they are explained by an analysis of the foundations of property. As such, Hegelian theory offers a powerful

158. HEGEL, *supra* note 4, at 99-100. Hegel mentions that this pragmatic argument can be made to support a law against theft of any form of property.

159. See, e.g., THE TRIUMPH OF VENUS, *supra* note 10.

tool for the development of a coherent, internally consistent, positive law of intellectual property.

On the other hand, although Hegel invoked elevated ideals of personality and freedom, he proves to be a terrible disappointment to the romantic who cherishes artistic creativity. Hegel's theories cannot legitimately be used to bolster any argument that society must, or even should, adopt any form of intellectual property regime.

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