

Hegel on Legal Philosophy and Legal History

N.W. Sage

The initial sections of Hegel's *Philosophy of Right* contain a sustained invective against those who “obscur[e] the difference between the historical and the philosophical study of law.”¹ “To consider particular laws as they appear and develop in time is a purely historical task ... appreciated and rewarded in its own sphere [but having] no relation whatsoever to the philosophical study of the subject.”² According to Hegel, legal philosophy and legal history must “preserve an attitude of mutual indifference.”³ There can be no dialogue between them—neither field should purport to improve, or to challenge, the other.

Why does Hegel insist upon this quarantine of legal philosophy from legal history? Answering that question may help to illuminate current controversies in common law scholarship, in which philosophically- and historically-minded scholars accuse each other of methodological errors that, they contend, result from mistaking the proper boundaries between distinct spheres of legal thought.⁴

Understanding Hegel's argument requires us first to ascertain what he means by legal “philosophy” and by legal “history,” in order to see how he draws the boundaries between those fields, and therefore why he insists upon keeping them distinct.⁵

For Hegel, legal philosophy endeavors to show the legal concepts that judges and lawyers apply, together with the results of the application of those concepts, to be *rational*. Opposed to legal philosophy is the *positive*

* S.J.D. Candidate, University of Toronto, nicholas.sage@utoronto.ca. This is a work in progress at a very early stage, and I would greatly appreciate any comments.

¹ G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 3R (T.M. Knox trans., 1952) (1821).

² *Id.*

³ *Id.*

⁴ See, for example, the controversy last decade over approaches to private law among Stephen Waddams, *DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS IN ANGLO-AMERICAN LEGAL REASONING* (2003); Stephen A. Smith, *A Map of the Common Law?* 40 *CAN. BUS. L.J.* 364 (2004); Stephen Waddams, *Response*, 40 *CAN. BUS. L.J.* 396 (2004); Allan Beever & Charles Rickett, *Interpretive Legal Theory and the Academic Lawyer*, 68 *MOD. L. REV.* 320 (2005); Steve Hedley, *The Shock of the Old: Interpretivism in Obligations*, in *STRUCTURE AND JUSTIFICATION IN PRIVATE LAW* (Charles Rickett & Ross Grantham eds., 2008).

⁵ Hegel generally discusses the philosophy of “right,” which for him extends beyond law to include, for example, the norms of family relations and civil society. However, this paper considers Hegel's remarks only insofar as they apply to law.

study of law: the study of legal results or concepts without regard for their rational basis. One form of positivism, according to Hegel, is legal history.

Because legal philosophy is concerned with law's rationality, and legal history with the law's historical causes irrespective of their rationality, the two fields are "mutually indifferent." Difficulties arise when one of the fields overreaches: when a legal historian purports to improve or to challenge the philosophical understanding of the law, or vice versa. For Hegel such overreaching amounts to a sort of categorial error, which yields only obscurity.

Yet, despite his admonitions against mixing legal philosophy and history, Hegel also envisages what we may call a "philosophical history" of the law. This is a story of the law's development that endeavors to show that process to be rational. (The sort of "teleology" for which Hegel is notorious.) Arguably, an exemplar of this sort of rational reconstruction is traditional common law reasoning: the marshaling of precedents that judges and lawyers undertake in order to establish what the law is. Hegel's work suggests not only that the pursuit of a philosophical history of law is legitimate, but that it may be obligatory for those who seek a full understanding of the law's rationality.

A. What is the Philosophy of Law?

In his *Encyclopedia of the Philosophical Sciences*, Hegel defines "philosophy" as the "thinking study of objects."⁶ It has been said that "Hegel's brief definitions of philosophy" along these lines "are, as he admits, usually unilluminating."⁷ However, in the Preface and first two paragraphs of his *Philosophy of Right*, Hegel elaborates what he means by the "thinking study of objects," discussing in some detail both what the "objects" of legal philosophy are, and what it means to "think" philosophically about them.

i. The Objects of Legal Philosophy: Realized Legal Concepts

The objects of Hegel's philosophy of law are the concepts that are realized in the practice of law: the concepts endorsed and acted upon by judges and lawyers in their official capacities, and which are therefore accessible to us because of their "public recognition and formulation in

⁶ G.W.F. HEGEL, *ENCYCLOPEDIA OF THE PHILOSOPHICAL SCIENCES I* § 2.

⁷ MICHAEL INWOOD, *A HEGEL DICTIONARY* 220 (1992).

the law of the land.”⁸ We might think here of the various doctrines, rules, principles, maxims, tests, and so on specified in the common law.

Hegel’s focus on *realized* legal concepts means that he is not concerned to understand concepts merely in abstraction, but in conjunction with the concrete results of their application. Indeed, for Hegel, legal concept and result are inseparable: there is a “complete interpenetration” between them.⁹ We can truly understand a given legal concept only by considering the legal results that it yields.¹⁰ Conversely, a legal result is comprehensible only when viewed through the lens of some legal concept.¹¹ We might say, in today’s jargon, that “all (legal) data is theory-laden”: even the initial isolation and characterization of a given legal result is influenced by our background conceptual assumptions. Or, to put it another way, the descriptions of a legal result and of the concept that yields that result are really just the same description stated at different levels of abstraction.

Why is it only the realized legal concept—the union of concept and result—that interests Hegel? This can be broken into two questions. *First*, why not study legal results, independently of the legal concepts whose application judges and lawyers claim yields those results? Why not take the set of legal results and then analyze them using other, non-legal concepts? Something like this approach is in fact adopted by, for example, many of today’s economic analysts of law. They take as their data a set of legal outcomes, and then seek to evaluate the efficiency of those outcomes using sophisticated economic concepts that are foreign to legal analysis.

One answer to this question connects with Hegel’s thought that there is a “complete interpenetration” between legal concept and result, theory and data. The data set of “legal results”—say, for argument’s sake, the set of decisions described in law reporters—is initially salient to us because it is a set of results picked out by legal concepts. The boundaries and

⁸ G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 1 (S.W. Dyde trans. 1896) (“The philosophic science of right has as its object the Idea of right, *i.e.*, the conception of right and the realization of that conception.”) Hegel, notoriously, is a monist, assuming there is ultimately a single “Idea,” though it may take a variety of different “shapes.” See Preface; § 1R. However this language is so obscure to our ears that it is preferable to speak of “concepts” in the plural, while bearing in mind that Hegel thinks these are ultimately in some sense unitary. See *further infra* note 34.

⁹ § 1A (Dyde, Knox).

¹⁰ § 1R (Knox) (“The shapes which the concept assumes in the course of its actualization are indispensable for the knowledge of the concept itself.”)

¹¹ *Id.* (“All else, apart from this actuality established through the working of the concept itself, is ephemeral”)

nature of the set itself (not to mention the characterization of each result within the set) are specified by concepts of legal authority (such as *stare decisis*, *ratio decidendi*, jurisdiction, and so on) and substantive legal doctrine (for example, the reporter will describe only cases that are important to a given doctrinal field). Now, we can of course apply non-legal concepts, such as the concepts of economic analysis, to evaluate the set of legal results. But if we do, we will quickly find that the set of results that the legal concepts pick out is both narrower and broader than the set of results that our non-legal concerns would naturally reach.¹² For example, the concepts of classical economic analysis relate to all instances of self-interested maximizing human conduct, and not to other forms of human conduct, irrespective of whether the conduct is described in law reporters. The conjunction of one set of concepts with the set of results picked out by another set of concepts is therefore intellectually arbitrary. And for Hegel, any genuine field of intellectual inquiry must avoid such arbitrary limitations on its scope. Each field must pursue its subject-matter systematically.¹³

Furthermore, if our aim is to explain our actual legal practices and institutions, then studying legal results using non-legal concepts will inevitably produce a failure of explanation. This is because, to the extent one seeks to explain the legal results using concepts other than those that judges and lawyers themselves use to produce those results, then one fails to explain what those legal actors are actually doing, or at least what they purport to be doing. Legal actors themselves invoke legal concepts to explain the legal results at which they arrive. If we use other, non-legal concepts to explain the legal results, then the role of the legal concepts that judges and lawyers themselves use becomes utterly mysterious.

(Perhaps the legal concepts that judges and lawyers themselves use can be *explained away* as a delusion, or a fraud—a deception that they tell themselves, or others, in order to conceal the true motivations for what they are doing.¹⁴ However, even if it is acceptable to explain away legal actors' conduct as delusional or fraudulent, this approach nevertheless fails to explain the conceptual content of the delusion or fraud itself. Why *this* delusion, *this* fraud—as opposed to others that

¹² Cf. MICHAEL OAKESHOTT, ON HUMAN CONDUCT 9-10 (1975).

¹³ See, e.g., INWOOD, *supra* note 7, at 265-68 (“Science and System”). Hegel notes in the *Philosophy of Right* that that work presupposes an acquaintance with genuinely “scientific” procedure, as set out in his *Science of Logic*. See Preface, § 2R.

¹⁴ Compare Jody Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287 (2007).

might have been just as effective?¹⁵ The legal concepts—the concepts that are “publically recognized and formulated in the law of the land”—here remain unexplained.)

Second, the question of why it is only realized legal concepts that interest Hegel can be posed in the opposite way: why not investigate abstract concepts, irrespective of whether they are realized, *i.e.*, have yielded concrete results? For Hegel, legal philosophy is unconcerned with concepts that are mere fancies or imaginings, which are as-yet unrealized in the actual practice and institutions of the law—such as the wishes of utopians or potential moral entrepreneurs, for example. But why should one not philosophize about the proposals of utopians and would-be reformers?

There are two answers to this question, each a side of the same coin. For one thing, the need to understand what some person or group happens to wish about the law is less pressing than the need to understand the law itself. We are not subject to other persons’ whims about what the law ought to be. We are, however, subject to the law. Thus, there is a *demand* to understand realized legal concepts that does not exist with respect to mere legal wishes.

Relatedly, there is no reason to *expect* persons’ mere wishes about the law to be susceptible of understanding, because there is no reason to expect mere wishes to be coherent. A judge, for example, can *wish* for the adoption of whatever legal concept she wants, regardless of whether that wish is compatible with her other legal commitments—with the ensemble of realized legal concepts that she is willing to act upon.¹⁶ For example, a judge may keenly wish that that she did not have to award damages for a breach of contract against an impecunious defendant. However, the discipline of realizing of a legal concept in a concrete result forces the judge’s hand, requiring her to reconcile the concept or result for which she wishes with other legal concepts to which she is committed, modifying or abandoning any concepts to the extent they are mutually incompatible. For example, the judge will not realize her wish that the impecunious contractual defendant be left unharmed, to the extent that that wish is incompatible with the need to compensate the plaintiff for his loss. Because the realization of a concrete result forces one’s hand in this way, the ensemble of one’s realized concepts must be

¹⁵ Cf. Michael Oakeshott, *On Misunderstanding Human Conduct*, 4 POL. THEORY 353, 361 (1976) (Nietzsche’s syphilis could not explain Zarathustra).

¹⁶ Cf. ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY* 109 (2009).

mutually coherent, in a way that one's unrealized concepts need not be. (Hence legal scholars often contrast their intellectual enterprise to that of moral philosophers, who are blissfully unconstrained by any requirement that they articulate principles capable of authoritatively resolving concrete disputes.)¹⁷

That we should demand and expect true understanding only of *realized* legal concepts explains Hegel's obsession, evident at the beginning of the *Philosophy of Right* as in much of his other work, with distinguishing genuine philosophy from the Romantic tendency to "philosophize" by articulating one's own personal sentiments or wishes.¹⁸ Such wishes are not proper objects of philosophy. Hegel's point here would seem to apply equally to much contemporary legal scholarship. Consider, for example, the innovations of contemporary economic analysts of contract law who suggest that the law ought to adopt hitherto unknown conceptions of contractual damages,¹⁹ or should impose contracts without the parties' consent,²⁰ and so on.

Finally, it is worth noting that Hegel also contrasts the study of realized concepts with another "unphilosophic" method, that of proceeding by definition.²¹ (Here we might perhaps think of the arid dogmatism or "formalism" associated by American Legal Realists with their predecessors in the legal academy.)²² Defining the legal concepts at issue at the outset of the inquiry is problematic for Hegel. For a start, this approach is likely to lead to a divergence between one's definitional concepts, on the one hand, and the legal concepts actually realized in the world, on the other. In this respect, definitional formalism would suffer from the same defect as Romanticism. Hegel, however, is more concerned with another danger of proceeding by definition: that it will yield an understanding that comports with received opinion or common sense about our concepts, but which is not truly *rational*.²³ This concern leads us to Hegel's ideas about the connection between philosophy and rationality.

¹⁷ *E.g.* RICK BIGWOOD, *EXPLOITATIVE CONTRACTS* 7-8 (2003).

¹⁸ Preface, § 2R.

¹⁹ Richard Craswell, *Against Fuller and Perdue*, U. CHI. L. REV. 99 (2000).

²⁰ Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis For Contractual Liability*, 152 U. PA. L. REV. 1829 (2004).

²¹ § 2R.

²² Hegel probably has in mind Spinoza and the German rationalists. *See* INWOOD, *supra* note 7, at 74-77.

²³ § 2R, § 215 n.68 (Knox).

ii. Thinking in Legal Philosophy: Revealing a Rational Basis

As we have seen, to philosophize about law is to think about certain objects: realized legal concepts. But what is “thinking” here—what is the activity of legal philosophy? An answer appears in the *Philosophy of Right’s* Preface, where Hegel describes the task of legal philosophy as to make our realized legal concepts “appear well-founded to untrammelled thinking.”²⁴ This, he explains, means to bring out the *implicit rationality* of those concepts.²⁵ That is, to make the implicit rationality of our realized legal concepts *explicit*.²⁶

What, then, is it for something to be, initially, “implicitly” rational, and for this rationality then to be made “explicit”? Here Hegel analogizes our realized legal concepts to the natural world.²⁷ We assume that the natural world is governed by various laws—physical, biological, chemical, and so on—that are intelligible to us. In this way the natural world can be thought of as “implicitly” rational. It awaits the thinker or scientist who will make that rationality “explicit,” by discovering and articulating the explanation or law that makes the natural phenomenon intelligible. Likewise, the Hegelian legal philosopher must proceed on the basis that the concepts realized in the law are implicitly intelligible—that they are susceptible of understanding. The philosopher’s task is to make this intelligibility “explicit” by articulating the rational basis of the legal concepts.²⁸ (In this respect, it is notable that Hegel regards philosophy as sibling to two other human enterprises, religion and art, which also seek to render the world intelligible to us, but in a less articulate or explicit manner.)²⁹

There is a sense, then, in which we can regard Hegel as a supreme rationalist.³⁰ He takes not only the natural world, but also human conduct, including law, to be inherently susceptible of understanding. This obviously runs counter to our contemporary tendency to assume that, while nature may be rationally apprehended (or not, depending on

²⁴ Preface (Knox) at 3.

²⁵ Preface (Dyde) at xii.

²⁶ This is a favorite theme of Robert Brandom’s. *E.g.* MAKING IT EXPLICIT (1998).

²⁷ Preface (Dyde) at xiii, (Knox) at 4.

²⁸ We “must develop the idea, which is the reason of an object, out of the conception.” § 2 (Dyde).

²⁹ As contended in the *Phenomenology of Spirit* VII.

³⁰ Cf. Leo Strauss, *Lectures on Hegel’s Philosophy of History*, Lecture 1 at 1:27 (Jan. 5, 1965), <http://leostrausscenter.uchicago.edu/course/hegel-philosophy-history-winter-quarter-1965> (“Hegel is surely the most radical rationalist that ever was.”)

what one thinks of quantum physics), human practices such as law need not be deeply intelligible in the same way.

If philosophizing is making our realized concepts' implicit rationality explicit, what exactly is *rationality*? It is tempting to avoid this topic altogether, since anything said about it will necessarily be crude and inadequate. But something must be said, given that the centrality of the idea of rationality to Hegel's arguments, and in order to avoid associating Hegel with views about rationality to which he would object. (In particular, any form of metaphysical realism.)

We can say that, for Hegel, a given legal result is rational if it is yielded by a legal concept that is rational. And a given legal concept is rational if it is mutually supported by our other legal concepts. That is, if the concept is required by (is inferable from), and in turn requires (yields by inference) the other legal concepts that we endorse.³¹

First, then, for a given legal result to be rational, it must flow from the application of a legal concept. A concept must be the reason for the result.³² To take a facile example, a court might hold a three-year-old defendant not liable for negligence because of the concept that persons should not be legally liable until they have reached at least the age of seven. A result such as this that flows from the application of a legal concept can contrasted with a *non*-rational result: one that is not explicable in conceptual terms because it has a nonconceptual cause. This would be the case, for example, if the judge decided there was no liability just because of "what she had for breakfast."

Second, for a given legal concept to be rational, it must be one that stands in a relation of mutual inferability with the other legal concepts that we endorse. A given concept is obviously *irrational* if it is *incompatible* with other legal concepts that we endorse: the seven-years-old-before-liability rule could not rationally stand together with the notion that everyone is fully responsible for their conduct no matter their age. In contrast, a legal concept is *rational* if it stands in a relation of *mutual support* with the other legal concepts that we endorse: if it is inferable from, and can itself be used to infer, those other conceptual commitments. The seven-years-old-before-liability rule might stand in a

³¹ See, e.g., ROBERT B. BRANDOM, REASON IN PHILOSOPHY: ANIMATING IDEAS ch. 4 § 4 (2009).

³² Of course, it may be objected that legal concepts are too indeterminate to yield concrete results. That objection cannot be adequately addressed here, but see Brandom, *infra* note 71.

rational relation of this sort to the concept that legal responsibility requires a certain level of intellectual maturity, and the concept that that stage of maturity is reached at age seven.

It might be thought that a legal concept may be rational, even if it does not stand in any relation of mutual support with our other concepts, so long as it is not incompatible with them. However, while such a concept would not be rationally negated, it would be rationally inexplicable. Since it would be unconnected with any other concept that we endorse, we would simply have no basis upon which to say that it is rational. Such a “concept” (if it could be called a concept) would have no rational significance whatsoever.³³

Because Hegelian rationality involves revealing how each of our concepts stands in a relation of mutual support with our other concepts, we are quickly propelled towards a sort of radical conceptual *holism*.³⁴ An encompassing, amorphous holism is a vice with which Hegel is often associated. However, our expectations in this respect are likely to be upset to some extent by the *Philosophy of Right*, because there Hegel cautions at the outset against a too-quick pursuit of holistic explanation. In the second paragraph of the *Philosophy of Right*, Hegel says that “the origin[s]” of the concepts of law fall “outside of” the philosophy of law, and that legal philosophy must presuppose rather than seek to prove those origins.³⁵

We might understand this remark in the following way. Eventually, given the Hegelian philosopher’s task of pursuing the rational connections between all of our concepts, it will be necessary to consider the relations between our legal concepts and non-legal concepts employed in other fields of knowledge—such as the concepts of ethics and morality generally, for example. But philosophizing must start somewhere: it must begin by investigating certain concepts, while leaving others presupposed. For example, we must be able to begin the philosophy of religion without understanding the whole of logic or linguistics.³⁶

³³ *See id.*

³⁴ *See* Robert Brandom, *Holism and Idealism in Hegel’s Phenomenology*, in *A SPIRIT OF TRUST* (draft, forthcoming). *See also* supra note 8.

³⁵ § 2 (Dyde).

³⁶ “Philosophy forms a circle. It has, since it must somehow make a beginning, a primary, directly given matter, which is not proved and is not a result.” § 2A (Dyde).

The philosopher of law's starting point is our legal concepts. And, having begun at that starting point, the legal philosopher cannot then proceed by relating the legal concepts to other concepts that she arbitrarily chooses from different domains of human experience. That would be just like the arbitrary conjunction of legal results with non-legal concepts that was rejected above. Genuine knowledge must, for Hegel, be pursued systematically. It has to respect and account for the relations between concepts that our concepts themselves suggest. Thus, it must respect and account for the way in which different kinds of concepts are grouped—the way in which they are related to other concepts of the same kind and distinguished from different kinds of concepts. Therefore the philosopher who begins with law must first understand how the concepts of law relate to each other, before relating them to other non-legal concepts.

Of course this is possible only if legal concepts are to some extent distinguishable from non-legal concepts. Today legal theorists often deny this. But a wholesale denial seems implausible. We can observe that legal reasoning at least purports to be, to some extent, distinct from other forms of reasoning. The concepts that lawyers deploy to explain legal results come from the “limited domain of the law”:³⁷ they are, for example, concepts such as *mens rea* or strict scrutiny or fair use, and not concepts such as entropy or dialectical materialism or Nash equilibrium.

B. The Positive Aspects of Law

After describing the nature of legal “philosophy” in the first two paragraphs of the *Philosophy of Right*, Hegel seems to change tack abruptly. In the third paragraph, he begins to discuss the ways in which law may be *positive*. As we shall see, it is in the Remark to this third paragraph that Hegel draws the distinction with which we are primarily concerned, between legal philosophy and legal history.

Hegel tells us that law may be “positive” both “(a) in its form” and “(b) [in] content.”³⁸ The positive *form* of law is something with which we are today familiar, thanks to contemporary legal positivism. Hegel tells us that law is positive in form when it has “the form of being valid in a particular state.”³⁹ Thus, what Hegel calls formal legal positivity calls to mind the contemporary legal positivist’s so-called “sources thesis”: the

³⁷ Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909 (2004).

³⁸ § 3 (Knox).

³⁹ § 3.

thesis that the existence or validity of a law can be determined merely by reference to the source of its promulgation (such as a parliamentary enactment or judicial opinion, for example).⁴⁰

However, Hegel's other varieties of positivism, which concern the *content* of the law, are likely less familiar to us. Hegel lists three ways in which law acquires a positive content:

- (α) through the particular national character of a people, its stage of historical development, and the whole complex of relations connected with the necessities of nature;
- (β) because a system of positive law must necessarily involve the application of the universal concept to the particular, externally given, characteristics of objects and cases ...;
- (γ) through the finally detailed provisions requisite for actually pronouncing judgment in court.⁴¹

What do all of these versions of legal positivity have in common?

For Hegel, the *positive* is anything that exists, irrespective of whether it is *rational*—that is, irrespective of whether it is the product of some concept that we endorse. In Hegel's metaphorical language, the merely positive is that "from which the spirit has flown."⁴² Thus, for example, in his early essay, *On the Positivity of the Christian Religion*, Hegel describes how the original teachings of Jesus, which Hegel takes to be rational moral principles, became over the course of the ensuing centuries largely positive as they were codified and glossed by the Catholic Church.

Thus, we can see what *legal* positivity is for Hegel: legal concepts and results that arise, or are understood, independently of any rational basis. A positive account of law explains a legal result or concept as having some basis other than its inference from a legal concept that we endorse. Or as Hegel puts it, such an account explains the law based on factors or causes that are "external" to the law's rationality.

Now we can see what it is that the different varieties of Hegelian positivism have in common. Regarding (a) law's positive "form" or source, this is, as contemporary legal positivists insist, independent of or "external to" the law's substantive rationality. Hence the other major tenet of contemporary legal positivism, the so-called "separability

⁴⁰ JOSEPH RAZ, *THE AUTHORITY OF LAW* 47-50 (1979).

⁴¹ § 3 (Knox).

⁴² *On the Recent Domestic Affairs of Württemberg*, in *HEGEL'S POLITICAL WRITINGS* 244 (T.M. Knox trans. 1964).

thesis”: the thesis that a rule may be law even if it is immoral or unjustified.⁴³

As to (b) the *content* of the law, this may also be positive, or “external to” the rationality of the legal concepts that underlie the law. To adapt an analogy of Hegel’s, we might say that realized legal concepts acquire positive content in the same way that one’s individual actions, as they are realized in the world, incorporate elements that were not fully intended. You may intend, for example, to burn down your enemy’s house, but you do not have any intentions about the particular fibers of wood that the flame of your match initially touches, nor about exactly how much of the house turns to ashes. Those details are in a way part of your action, but they are external to your intention—the concept you have of your action, or your action’s rational basis.⁴⁴

Hence Hegel’s varieties of positive legal content. Taking these in reverse order: (γ) the detailed provisions in the judgment of a court are to some extent arbitrary vis-à-vis the legal concept that the court is applying. For example, as Hegel points out in a later passage:

Reason cannot determine, nor can the [legal] concept provide any principle whose application could decide whether justice requires for an offence (i) a corporal punishment of forty lashes or thirty-nine, or (ii) a fine of five dollars or four dollars and ninety-three, four, etc., cents, or (iii) imprisonment of a year or three hundred and sixty-four, three, etc., days, or a year and one, two, or three days.⁴⁵

Such matters, since they are beyond rational determination, are not the provenance of legal philosophy. (In his Preface, Hegel mocks his contemporary Fichte for developing his purportedly philosophical analysis of “passport regulations to such a pitch of perfection as to require suspects not merely to sign their passports but to have their likenesses painted on them.”)⁴⁶

Likewise, (β) judges are required to apply the general concepts of law to the particularities of given cases—particularities whose source is the nature of the nonlegal world, and which are therefore external to the law’s rationality. The judge must subsume the particulars of a given case under some legal concept or other. But whether or not any particular

⁴³ H.L.A. HART, *THE CONCEPT OF LAW* 185-86 (1994).

⁴⁴ *E.g.* § 132R; G.W.F. HEGEL, *Introduction* to *THE PHILOSOPHY OF HISTORY* III(2)(b).

⁴⁵ § 214R (Knox). Even the fact that a judge can order only a round number (and not, say, 39.5 lashes) is external to the legal concept. *Id.*

⁴⁶ Preface at 11 (Knox).

case falls under one concept, or under another, is not always dictated by the concepts themselves. Thus, for example, Hegel notes that a court may have to settle whether or not a literary plagiarism should be regarded as a “theft.”⁴⁷ Analogizing (somewhat misleadingly) the distinction between the Roman Digest and Pandects, Hegel imagines legal concepts as statements of general principles, whose particular subdivisions and applications must be worked out in detail by positive lawyers. Again, this is something with which philosophers should not concern themselves.⁴⁸

The law also acquires positive content (α) from three other related factors. Two of these are the “national character” of the people to whom [the law] applies” and the various “relations connected with the necessities of nature.” Here we can think of factors such as the cultural traditions of a people, and a country’s climate and the fertility of its soil, which Hegel, following Montesquieu, believed may influence its laws.⁴⁹ And finally, a nation’s law acquires positive content because it is informed by the nation’s “stage of historical development.” This brings us to legal history.

C. What is Legal History?

Having set out the various kinds of legal positivity, Hegel embarks upon what can only be described as a diatribe, against those who “obscure the boundary” between legal history and legal philosophy.⁵⁰ It is here that Hegel develops his claim that these two fields are “mutually indifferent”—and must remain so, rather than purporting to inform each other.

The nature of legal history is by now clear. An historical legal explanation—which is one kind of “positive” explanation—explains a given legal result or concept independently of any rational basis it may have. Thus, an historical explanation may show a given legal result or concept to have been inferred from some other concept that we do not today endorse. Or it may show the legal result or concept to be the product of an historical cause that is nonconceptual in nature—for

⁴⁷ Compare Knox n.10, citing Hegel’s handwritten marginal notes.

⁴⁸ § 3R & n.12 (Knox).

⁴⁹ Knox n.9, citing HEGEL, PHILOSOPHY OF HISTORY, *supra* note 44. See also § 3R & n.13 (Knox), citing MONTESQUIEU, THE SPIRIT OF THE LAWS I.3 (1748).

⁵⁰ § 3R. Hegel has in mind certain academic colleagues who subscribed to the “historical school” of jurisprudence associated with Savigny. Knox § 3R n.17.

example, what a certain judge happened to have for breakfast some time in the past.

If legal philosophy is concerned with law’s rationality, and legal history” with its historical causes regardless of whether they are rational, the two fields must be “mutually indifferent” to each other. And when either legal philosophy or legal history overreaches—attempting to challenge or improve the other field—obscurity ensues.

Legal philosophy can neither challenge nor improve legal history. Cannot challenge, because even if we today regard a law as having a rational basis, flowing from concepts that we now endorse, legal history can show that as an historical matter that same law came to be on the books due to non-rational causes—such as pure happenstance or legal actors’ self-interest, for example. Legal philosophy cannot *improve* legal history, because, as today’s academic historians are acutely aware, to write our present-day rational insights into the historical record is to commit the sin of “presentism,” obscuring the true historical causes and motivations of actions and events.

Hegel, of course, is more concerned to make the opposite point: that legal history cannot challenge or improve legal philosophy. Cannot challenge, because legal philosophy can show the law to be rational—to be required by our present conceptual commitments—regardless of whether, historically, it was the product of other non-rational causes. If we have a rational basis now for a given legal rule or institution, it is irrelevant that it also has non-rational causes that led to its adoption.

For example, virtually every modern nation state was founded at least in part as a result of actions and principles that we today regard as evil. Indeed, the history of almost any state is one of successive episodes of hypocrisy, perfidy, and brutality by the persons and groups who made that state what it is today. Nevertheless, we may rationally endorse the state we live in today, if we believe that it realizes concepts (or at least endeavors to realize concepts) to which we are now committed.⁵¹

Indeed, an argument that seeks to challenge the rationality of a concept based on the way in which that concept historically came to be adopted commits what logicians call the “genetic fallacy.” The fact that someone has arrived at a belief as the result of a faulty reasoning process does not entail that their belief is false. (For example, just because John

⁵¹ Cf. IMMANUEL KANT, THE METAPHYSICS OF MORALS [6:318] (Mary J. Gregor ed. & trans., 1996) (1797-98).

Stuart Mill might have arrived at a belief in the equality of all human beings because his father pressured him into it, does not mean that the belief is false.)⁵²

Nor can legal history improve legal philosophy. If we demonstrate a law to be rational, then portraying “the manner of [its] appearance in history, along with the circumstances, cases, wants and events” that led to it adds nothing to the assessment of its rationality.⁵³ And this is true even if the law appeared as the product of a concept that everyone in the past endorsed. Because to the extent that concept is merely historical, rather than endorsed in the present, its rationality has now expired. (“The spirit has flown.”)

So, for example, Hegel suggests that many aspects of Roman private law follow inferentially from the concepts of *patria potestas* and traditional Roman matrimony. However, since those concepts are repugnant to us today, we cannot endorse any aspects of private law that purport to derive their rational basis from them.⁵⁴ Likewise, monasteries or cloisters may once have been justified on the basis that they promote learning. Hegel believed that by his time, that justification was obsolete. (Presumably the university had come to perform this function.) Therefore, Hegel points out, “since circumstances have now entirely altered, the monasteries are in this respect at least superfluous and inappropriate.”⁵⁵

Indeed, Hegel notes that when historians purport to improve legal philosophy using historical explanations, they “unconsciously achieve the very opposite of what they intend.”⁵⁶ By shifting between two fields that have nothing to contribute to each other, the historian commits a categorial error, and as a result only obscures the law’s rationality, rather than elucidating it. Following Michael Oakeshott, we can compare this kind of categorial error to another traditional logical fallacy, “*ignoratio elenchi*” or “ignoring the issue.”⁵⁷ This occurs when, for example, someone misunderstands an argument, and then employs that misunderstanding in responding to the argument. (As in, “The man who

⁵² JAMES D CARNEY & RICHARD K SCHEER, FUNDAMENTALS OF LOGIC ch. 2 (1964).

⁵³ § 3R (Dyde).

⁵⁴ § 3R. In fact, Hegel suggests, many aspects of Roman private law were not rational in Roman times either.

⁵⁵ § 3R (Knox).

⁵⁶ *Id.*

⁵⁷ MICHAEL OAKESHOTT, EXPERIENCE AND ITS MODES (1933).

said ‘Miracles don’t happen’ is blind. What about penicillin?’).⁵⁸ Because the two arguments are irrelevant to each other, their conjunction can yield only confusion. This is exactly what happens, according to Hegel, when one tries to conjoin arguments from the distinct fields of legal history and legal philosophy.

There are of course a number of possible objections that might be raised against Hegel’s demand for this strict separation of legal history from legal philosophy. Let us consider three prominent ones.

First, could a *conservative* approach to law not render legal history relevant to legal philosophy? A conservative might contend that we should approach the law today by continuing to endorse the legal concepts and results that our forebears arrived at—no matter their reasons or causes.

Such an approach would indeed make legal history relevant to legal philosophy. However, it would do so only by adopting a present-day concept, the guiding principle of conservatism (or some similar principle of epistemological or practical caution), which has the effect of incorporating the law’s history into the domain of present-day rationality. It is only this present-day principle that supplies the law’s rationality—without it, there is no reason whatsoever to think that, merely because our forebears arrived at a given legal concept or result, we should endorse that concept or result as rational.

Second, might legal philosophers not *learn* from the history of law, and vice versa? The suggestion here is that scholars in each field might use the other field instrumentally, as a means to the discovery of truths in their own field. And there is surely something to be said for the idea that history and philosophy can spur new lines of thinking in each other.

For example, understanding why lawyers in the past took certain legal concepts to be justified may suggest reasons why legal philosophers today should do the same. Our enthusiasm for this method should, however, be diminished somewhat when we consider other possible sources of good ideas for legal philosophy: for example, books picked up randomly while walking through a library, dreams, or the ravings of lunatics. Those sources may likewise be used instrumentally, to inspire philosophical ideas, though the rationality of those ideas is far from guaranteed. It is the same with legal history. Of course history is probably a more reliable source of good ideas for understanding the

⁵⁸ CARNEY & SCHEER, *supra* note 52.

rationality of our concepts than, say, dreams. But history's reliability in this respect should not be overstated. Hegel himself claimed that the only thing we learn from history is that people never learn from history: because our present circumstances are never the same as the historical ones, we cannot derive lessons of real value.⁵⁹ Likewise, today's historians stress how dangerous it is to use history to attempt understand the present, as it will lead to a "presentist" reading of the past, which itself obscures any valuable truths that history might otherwise have contained.⁶⁰ And the same is of course true of attempts to use newly minted philosophical insights in order to understand what actually happened as an historical matter.

In sum, then, it is conceivable that legal philosophy and legal history may learn from each other, but only if each field is highly cautious and selective. Each must treat the insights of the other field in much the same way as we would treat an insight yielded by a dream—never taking it at face value, but rather subjecting it to the full rigors of the applicable discipline.

Third, what about the currently fashionable method of "genealogy"? The term comes from Nietzsche's *Genealogy of Morals*, which sought to undermine the conventional view that our morality is a good thing by sketching a history in which moral concepts developed out of rival social factions' attempts to dominate each other. (The ancient Greek ruling class defined itself as "good," a Judeo-Christian underclass wrested power by re-defining "good" in terms of its own "slave morality," and so on.)⁶¹ Foucault commended this approach in his *Nietzsche, Genealogy, History*. He likewise sought to disrupt received wisdom about our social institutions, by showing them to be the product of historical accidents arising out of a continual struggle for power.⁶²

Thus, the basic method of an historical "genealogy" is to discredit existing concepts by showing them to have ignoble origins. More technically, we can say that a genealogy shows a given concept or result φ that we now endorse to be the product of some concept, or other

⁵⁹ HEGEL, PHILOSOPHY OF HISTORY, *supra* note 44, at II § 8 (on "Pragmatic History").

⁶⁰ See HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY III, VI (1931).

⁶¹ FRIEDRICH NIETZSCHE, THE GENEALOGY OF MORALS (Horace B. Samuel trans., 1913).

⁶² Michel Foucault, *Nietzsche, Genealogy, History*, in THE FOUCAULT READER (Paul Rabinow ed., 1984).

cause, that is not inferentially relatable to φ —*i.e.*, that cannot provide a *reason* for us to endorse φ .⁶³

For Hegel, a genealogical attempt to undermine the rationality of the law would be misguided. It does not matter if some law now on the books was, historically, entirely caused by, for example, the self-interested power plays of various historical actors or groups. If there is a present rational basis for the law, that cannot be impugned by legal history.

Brian Leiter, in his paper *The Hermeneutics of Suspicion*, presents a possible challenge to this way of thinking about genealogy.⁶⁴ He argues that a genealogy may generate reason to *suspect* the truth of a given person or group's belief, by showing that belief to have a "causal etiology" that is unrelated to the truth of the belief. Leiter contends:

To be sure, beliefs with the wrong causal etiology might be *true*; but ... we have no reason to presume that to be the case. To the contrary, we now have reason to be *suspicious*—nothing more—of their veritistic properties.⁶⁵

Thus, to use an example of Leiter's, we would have reason to *suspect* the truth of President George W. Bush's claim that Saddam Hussein posed a threat to the U.S., if we knew that what caused Bush to hold that belief is his knowledge "that it would be in the interests of the U.S. ruling classes to have more reliable control over large Middle East oil reserves."⁶⁶

However, for our purposes it is important to clarify precisely how the "suspicion" is generated here. In one sense, a successful genealogy does more than merely cause us to *suspect*. Rather, it *completely rebuts* the assumption that the *actual historical development* of the belief or concept in question was rational. As Leiter says, once we are aware of the genealogical account, we "have *no reason* to presume" that the historical basis for the adoption of the belief coincided with a rational basis for that belief. For example, once we know George W. Bush's actual, historical reason for taking Saddam to be a threat, we realize that Bush arrived at his belief without any rational basis whatsoever. Likewise, a genealogy of a legal concept could effectively rebut the naïve assumption that the actual historical development of that concept was rational.

⁶³ Robert Brandom, *From Irony to Trust: Modernity and Beyond*, in *A SPIRIT OF TRUST* 134 (draft, forthcoming).

⁶⁴ Brian Leiter, *The Hermeneutics of Suspicion: Recovering Marx, Nietzsche, and Freud*, in *THE FUTURE FOR PHILOSOPHY* 191-94 (Brian Leiter ed., 2004).

⁶⁵ *Id.* at 192-93.

⁶⁶ *Id.* at 193.

At the same time, a genealogy is unable in any way to impugn a *present rational basis* for a belief or concept. If a belief or concept has a present rational basis—and no claim is made that this rational basis coincides with the historical development of the belief or concept—a genealogy has no bite.⁶⁷ For example, if we had some rational ground for believing that Saddam did pose a threat to the U.S., it would be irrelevant to the truth of that belief that George W. Bush happened to arrive at it on an irrational basis.

In sum, genealogical accounts may give us reason to “suspect” the rationality of a concept only insofar as they rebut the assumption that the actual historical development of the concept was rational. They are powerless in the face of a valid understanding of the concept’s rationality.

D. A Philosophical History of Law?

Although he demands the separation of ordinary legal history from legal philosophy, in his remarks following the third paragraph of the *Philosophy of Right*, Hegel also envisages what we may call a “philosophical history” of the law.

Hegel mentions in passing that an historical account of our legal concepts may be useful to the philosopher,

insofar as the development out of historic grounds coincides with the development of the conception, and the historical exposition and justification can be made to cover a justification which is valid in itself and independently.⁶⁸

Hegel here seems to have in mind a situation where the historical development of a concept echoes the sequence of thoughts through which we, today, can come to understand the rational basis of that concept. Here we might think, for example, of negligence law, which may be taught by describing its development in the twentieth century through a series of court decisions that progressively elucidated the various

⁶⁷ The same point can be made in the context of the Gettier problems that Leiter discusses. Cf. Robert B. Brandom, *Why Truth is Not Important in Philosophy*, in *REASON IN PHILOSOPHY: ANIMATING IDEAS* ch. 6 (2009).

⁶⁸ § 3R (Dyde).

components of the cause of action.⁶⁹ The historical narrative here might happen to coincide with a philosophical understanding.

But what about where the rational understanding of a given legal concept does not coincide with the historical record—where, as a historical matter, non-rational factors contributed to the concept’s adoption? Might it nevertheless be possible or desirable for philosophers to pursue a “philosophical history” here? Hegel does not expressly address this in the opening paragraphs of the *Philosophy of Right*. However, elsewhere he is, notoriously, concerned to construct philosophical histories or “teleological” accounts of our concepts—most famously, portraying the entire course of world history as nothing other than the march of consciousness towards freedom.⁷⁰

This sort of “philosophical history” is acceptable to Hegel, notwithstanding his admonitions against mixing ordinary history and philosophy, because a philosophical history does not purport to alter our understanding of what “actually” happened historically. Whereas an ordinary history traces the actual development of our concepts and results, which are often the product of non-rational causes, a “philosophical history” is concerned only with portraying the process of the law’s development as *rational*. It undertakes a “rational reconstruction” of the process of development, in order to depict the gradual evolution of the concepts that we endorse today. (What today’s historians might call a “Whig history” of our concepts.)⁷¹ Of course, as a matter of fact, various non-rational causes may have led to the adoption of our current concepts, but a philosophical history treats those non-rational elements as mere accidental details, which do not undermine the overall story of rational development. It does not matter that a given step in the evolution of a concept was caused, for example, by an historical actor’s venality, so long as that step was also rationally demanded.

Arguably, a paradigm of this sort of rational reconstruction of the history of our concepts, or “philosophical history,” is traditional common law reasoning. A judge or lawyer, marshaling precedents in order to reach a conclusion about what the law is, will often portray the case law as having gradually progressed towards the legal concept or result that

⁶⁹ For example, from *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) (duty of care), to *The Wagon Mound (No. 1)*, [1961] A.C. 388 (P.C.) (remoteness of damage), through *The Wagon Mound (No. 2)*, [1967] 1 A.C. 617 (P.C.) (standard of care).

⁷⁰ §§ 341-60; HEGEL, *PHILOSOPHY OF HISTORY*, *supra* note 44.

⁷¹ Robert B. Brandom, *History, Reason, and Reality*, in *REASON IN PHILOSOPHY*, *supra* note 67, at III.5.

she believes ought to be reached in the present case. She will pick out of the case law a continuous thread leading to the desired concept or result, and will disregard other threads that could also be found in the decided cases. She will also disregard any non-rational causes of the desired concept or result, such as erroneous or even biased judicial reasoning in the previous cases.

This rational reconstruction of the development of the law is a familiar feature of common law method. When Sir Edward Coke sought to prove that the common law is rational, he pointed out that “an infinite number of grave and learned men” had “fined and refined” it over the centuries.⁷² A similar idea underlies Ronald Dworkin’s metaphor of the judicial chain novel, in which each successive judge seeks to interpret and develop the law in the best way possible, as if he were writing a chain novel’s latest chapter.⁷³ To conceive of the common law as continually refined in this fashion is to understand it as a progressively rational process.

Many legal academics today, who see themselves as inheritors of the hard-headed Legal Realist tradition, might be inclined to condescend to this approach, regarding it as the telling of legal fairytales. But compelling reason to reconsider any such condescension can be found in the recent work of the Hegelian philosopher Robert Brandom. Brandom suggests that the method of “rational reconstruction” or “philosophical history,” is an essential feature of human reasoning, not just in the common law, but in any field of intellectual inquiry.⁷⁴ Indeed, for Brandom, traditional common law reasoning is just a particularly explicit or well-articulated version of a method that humans deploy whenever they develop their understanding of anything.

Consider, for example, a caricature of the evolution of our concept of the sun. At one point, perhaps for the ancient Egyptians, the sun was a god. Next, for some of the Greeks, it was a luminous disc travelling through the sky, revolving around the earth. Then, in early modern Europe, it became a ball of hot metal, remaining still while the earth revolved around it. For us today, the sun is a star like many others in our

⁷² CO. LITT. 97b.

⁷³ LAW’S EMPIRE 228-38 (1986); Robert Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges’ Chain Novel* (paper presented to the Inland Northwest Philosophy Conference, Mar. 23, 2012).

⁷⁴ Hegel himself tended to impugn the rationality of the common law (*see, e.g.*, § 211R) and English law in general (*see The English Reform Bill, in* HEGEL’S POLITICAL WRITINGS, *supra* note 42).

galaxy, which radiates the energy given off by massive thermonuclear reactions.

We, endorsing the latter conception of the sun, take our conception to be (the most) true or rational, and our predecessors' conceptions to be greatly flawed but progressively improved approximations of the truth. Importantly, in taking this approach, we assume that there is a single object, "the sun," to which all of the various conceptions refer. We do not just say that humans have thought in different ways at different times about various things that appeared to them in the sky during the day.

According to Brandom, this positing of a single object underlying all of the changing conceptions of it—which is an invariable feature of intellectual inquiry in any progressive discipline—is a sign that we are undertaking a rational reconstruction of the history of our conceptions. The positing of a single object underlying the different conceptions of it allows us (a) to take our present conception to be the (most) rational one, (b) to acknowledge that our predecessors, although they also endeavored to be rational, had different conceptions, and (c) to see a rational progression from our predecessors' conceptions to our own. In contrast, if we had no need of (a)-(c)—if there was no demand to portray the development of our understanding as rational—we could be content to discard the assumption that we and our predecessors have been attempting to understand the very same object.

In this respect we may compare the way that a common lawyer or judge claims to glean "what *the law is*" from previous cases, extracting a continuous thread of conceptual development out of a series of decisions that occurred over centuries. Whereas if there were no need to understand the development of the law as rational, common lawyers could be content to regard the previous cases not as a progressive illumination of a single rule or principle, but as just a succession of different opinions about what ought to be done.

If Brandom is right that the method of rational reconstruction or "philosophical history" is not a peculiarity of the common law but a feature of rationality in general, then we ought to take this method seriously in legal philosophy. Indeed, this line of thought suggests that a dedicated Hegelian legal philosopher ought to regard the pursuit of a "philosophical history" as obligatory.

The endeavor to reveal the rational basis of our present "time-slice" of the law is fine so far as it goes: if successful, it demonstrates that our

present legal concepts are rational. Indeed the common law often proceeds in this way: a lawyer or judge addresses the rationality of the ensemble of applicable precedents as they stand today, ignoring their historical sequence. (This is the basic method of case law “synthesis” taught in law school legal reasoning classes.) However, this approach cannot ultimately be satisfactory, because it leaves unexplained how the law arrived at its present rational state—how it got here, given that it was not always here.

Legal philosophers must therefore pursue a philosophical history if they want to understand the process of the law’s development as rational.⁷⁵ (They cannot just naïvely assume that the actual historical development of the law coincides with its rational basis, because a “genealogist” will easily refute that.) And there is a pressing demand to show that the process of the law’s development is rational, because we are subject to that process. Unless we can embrace it as rational, the process will appear to us as merely *positive*. In which case its demise should be imminent, for we would have compelling reason to replace it with a new process whose rationality is intelligible to us.

⁷⁵ Cf. Robert B. Brandom, *History, Reason, and Reality*, in REASON IN PHILOSOPHY, *supra* note 67, § 5.