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Europe in Its Own Eyes, Europe in the Eyes of the Other

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Chapter 3

The Legal Culture of Civilization: Hegel and His Categorization of Indigenous Americans

William E. Conklin

The notion of "civilization" in European Enlightenment and post-Enlightenment writings has recently been reassessed. Critics have especially reread the works of Immanuel Kant (1724–1804) by highlighting his racial categories.[1] However, something is missing in this contemporary literature: how European legal culture developed a racial and ethnic hierarchy of societies, and how they understood "civilized society." This chapter highlights this connection by engaging with the work of one of the most important jurists of the nineteenth and twentieth centuries, Georg W.F. Hegel (1770–1831). Hegel took for granted a sense of a legal culture that excluded the Indigenous inhabitants of the Americas.

This focus upon the relation of a legal culture to an understanding of what one took as civilization in Hegel's day, to my knowledge, has largely been left to the side.[2] Unlike Kant and other Enlightenment writers, Hegel did more than concentrate upon the identity of a discrete law; he offered a theory as to why such a law was binding or obligatory to a self-reflective inhabitant. Kant, for his part, considered such a consideration as treasonous (Kant 1797/1996, 95). Hegel's explanation of the binding character of an identifiable law rested in the character or ethos of a community. An ethos, or what Hegel called a *Sittlickeit*, embodied the social assumptions and expectations shared in a community. The most important assumption of a community concerned how thinking subjects reciprocally recognized one another in the content of the identifiable laws. Today, we might better describe an ethos as a culture. A family, village, religious group, nation-state, or even an international community may possess an ethos or culture. I aim to outline what Hegel understood as a legal culture, because he considered

the legal culture as a hallmark of civilization. Such a legal culture, in Hegel's understanding, excluded the Indigenous inhabitants of the Americas from the very beginning of his analysis.

The starting point of Hegel's legal theory required an intellectual "leap" from the traditional societies, in this case of the Americas, into the legal culture of a civilized society, as Hegel conceptualized the latter. Traditional societies were described as "lawless." Lawlessness, though, took Hegel's view of "law" for granted. From his standpoint, a law had to be inscribed in codes (rather than in unwritten customs); authored by a state; the state had to possess a patriarchal structure of departments, offices, judges, and the like; each institutional office had to possess a jurisdiction or legal space separate from the next; a singular Head had to symbolize the whole structure; and territorial knowledge as well as an international legal objectivity independent of a state had to characterize legal norms. The traditional communities of the Americas lacked such attributes, according to Hegel. Without them, the Indigenous social life of the Americas could not be protected against the violence of the "civilization" of European intruders. The jurist could not even begin to understand, study, or reflect about the complex and sophisticated legal cultures of the traditional communities of the Americas, since the latter lacked the character of a law—at least as Hegel understood the nature of law. Accordingly, in his view, laws only took form *after* inhabitants leapt from a felt or immediate identity with nature to a culture of self-reflection about concepts. Hegel read this leap into his "conception" of the inhabitants of the Americas. A rupture radically separated the legal culture of the Europeans from the "lawless" "passive" "mass" of Indigenous individuals on the American continents. The implicit legal culture which he used to understand and "conceive" a civilization excluded Indigenous societies from the very start of his analysis.

This essay aims to explain why Hegel separated civilization from traditional societies. Section 1 will outline several features of what Hegel took to be a legal culture. Such features concerned Hegel's focus upon *Bildung* and an ethos, the representation of a law in writing, a self-creative author (the state), territorial knowledge, and a hierarchy of societies based upon their progress toward the legal culture. Section 2 will highlight the importance of "the leap" in Hegel's legal theory. Section 3 will outline why Hegel considered the traditional societies of the Americas as lacking the European sense of a legal culture before the leap. I shall end by returning to his view of legal culture in order to highlight why he characterized traditional societies as lacking social progress.

Hegel's Conception of European Legal Culture

Ethos and *Bildung*

Hegel's conception of a legal culture had several features. For one thing, he identified two elements that one needs to appreciate in order to understand his sense of a legal culture and of civilization. The first is his emphasis upon the contextualization of a legal rule or legal institution in the ethos of a society. Such assumptions and expectations work to confer form (that is a concept) onto a social bond among inhabitants. The challenge for the jurist, Hegel suggested, was to examine the presupposed social content of a codified rule in order to identify the extent to which the content manifests the ethos in which the rule is nested.

The second element pinpointed what Hegel considered the crucial feature of the ethos of a modern European civilization: *Bildung*[3] (that is, "cultivation" or "education") (1991a, 187). *Bildung* manifested a wide, context-specific perspective about the world external to oneself, as well as one's role in constructing such a world by her or his concepts. One's life experiences were as important as one's formal education. *Bildung* would render one aware of the separation of one's self-conscious thinking from an objective world.

Before a discrete coded law was enacted, legal objectivity was synonymous with nature (Hegel 1991a, 13R). After the leap into a legal culture, the objectivity of nature was displaced in favour of an objectivity of legal consciousness. The latter represented civilization. The objectivity of legal consciousness was the consequence of reflection about concepts. The more one became self-conscious of her or his relation to a reflective objectivity, the more one became autonomous or free from the legal objectivity. Legal knowledge, then, was not to be found in the discrete rules of some external world of statutes and treaties, but in one's subjectivity as one came to recognize the external world as the objectivity of his (Hegel had little space for women) legal consciousness (1991a, 13R). Accordingly, what was crucial was the substantive social content of a legal rule, legal procedures, legal institutions, and general attitudes toward legal objectivity.

Such social content represented the extent to which the legal culture (or ethos, to use his term) represented the *Bildung* of a civilized society. The social life of Indigenous inhabitants of the Americas lacked such an ethos, according to Hegel. This was so because the *Bildung* of a civilized society (and its legal culture) began only after individuals started to become self-conscious—that is, conscious of the relation of one's self to a legal objectivity.

A state's legal order represented such an objectivity. An international legal order represented a further advanced shape of self-consciousness than that of a state-centric legal order. Officials had to relate any discrete provision of a code to the ethos (that is, a culture) in which he was situated.

With one's self-conscious separation from legal objectivity, legal objectivity became the object of one's own thinking. Legal objectivity here was not fixed in calendar time and territorial space. Rather, one constantly developed with multiple possibilities to choose this or that personal action. Statutes and institutions were considered *indicia* of the self-conscious choices of individuals in an organic ethos. The competent jurist, then, had to be self-aware of his role in the very construction of a series of historically contingent shapes of legal objectivity. Accordingly, any legal objectivity was conditioned and historically contingent by boundaries of a structure (or what Hegel called a "shape") of legal consciousness shared with others in an ethos. Such shapes permeated one's analysis of property, contract, crimes, legal rights, legal duties, the family, civil society, the state, and international law.[4] Hegel described how the individual subtly became conscious of himself inside the socially constructed boundary of each such shape. The crucial point is that Hegel attempted to explain what a legal culture would resemble if social life represented and were the consequence of *Bildung*. *Bildung* would characterize the ethos of a civilized society. Let us identify how *Bildung* entered into Hegel's view of a legal culture.

Writing

For one thing, the legal culture of civilization, according to Hegel, was represented by codes—that is, by written laws. Hegel's idea was that an unwritten custom, as advocated by his contemporary Friedrich Carl von Savigny, lacked a discrete, assignable, and self-conscious author, such as a legislature. An unwritten law existed from "time immemorial." A custom was just "there" in a society. One could not change or "amend" a custom as a consequence of reflection, deliberation, and inscription of the custom in a statute. An author had to reflect and deliberate about the social content represented by a written law. As such, the code could reform what inhabitants had accepted as a custom since time immemorial.

The Self-creative Author of a Civilized Society

Writing highlighted a second and related feature of the legal culture. This was the presupposed importance of the author as self-creative and self-determining. Hegel assumed that a civilization was composed of self-

conscious authors. Although the author figured in Thomas Aquinas' legal theory, the author of legal authority prominently emerged in the early legal theories (Thomas Hobbes' being important) (Conklin 2001, 2011b). Michel Foucault, in his genealogical approach, asserted that the author became so important in European culture that discourses were believed to have been founded by authors (Foucault 1984, 113–17; Conklin 2001, 84–85, 107–10). Interestingly, even today, a leading twentieth-century Anglo-American legal philosopher has insisted that "in a developed legal system" a rule is legal if it refers to "the writing or inscription as 'authoritative'" (Hart 1994, 93). Hegel too articulated the importance of self-conscious writing by an author, in this case a self-creative and self-determining state. When the Europeans arrived on the shores of the Americas, Hegel claimed, indigenous inhabitants lacked self-consciously authored laws to which they were obligated. Writing again, for Hegel, expressed the will of authors who reflected about concepts.

Indigenous inhabitants would only be civilized if they came to recognize that they were separate from nature. At that moment, they would become aware of concepts that mediated between their own subjectivity and legal objectivity. And at that point, they would construct a state, the state being the product of self-conscious autonomous individuals. Inside the territorial boundary of a state, the sources of laws would be state institutions such as legislatures and courts. Such sources were surrogates or "actors," to use Hobbes' latter term. An author signified its will (or intent) in writing. The author willed concepts. The writing in the form of a statute or judicial precedent was the product of a reflective deliberation about concepts. Such writing contrasted with unstated and unwritten customs. A custom just happened unselfconsciously. One simply followed a custom while by contrast, a statute or judicial decision was the product of reflection and expression by a legislature or a court.

Now, Hegel did not attribute self-creative authorship only to civilized human beings. He also attributed such a character to the state as a product of legal consciousness. So there were two types of authors: the self-originating and self-determining human authors, and the self-creative and self-determining states constructed by the human authors. The state's statutes and treaties expressed such a state's will. The very drive to become increasingly self-conscious, whether on the part of the autonomous individual human being or of a state, created the need for self-consciously written laws and for the state that authored such laws, according to Hegel: "but we must not for a moment imagine that the physical world of nature

is of a higher order than the world of the spirit; for the state is as far above physical life as spirit is above nature" (1991a, 272A). The state, as author, was "far above physical life" because the state was the product of self-conscious thought about concepts. The state, being a self-conscious author, was not constructed by nature but by self-conscious human beings.

As such, the leaders of a stateless society, which was how Hegel viewed Indigenous governance in the Americas, might sign a treaty and its members might believe that the European state party to the treaty was obligated to adhere to its terms. But the "treaty" would be considered a "political," not a legal obligation, since the individuals of a traditional society had not yet become self-conscious of law as a humanly constructed objectivity. A treaty was considered non-binding to the European parties as a consequence. Interestingly, only as recently as 1984 did the Canadian Supreme Court hold that treaties with Indigenous leaders were "legally" obligatory rather than "political oughts."[5] As a consequence, a national government became legally obligated to abide by the terms of the treaties. Negotiation of their enforcement had to proceed in good faith as with other treaties between state parties.

Both the state and human beings, again, were subjects of the objectivity of legal consciousness. Once constructed in the collective consciousness, the state and its laws were an objectivity vis-à-vis human beings as authors of signified concepts. Indeed, the state was greater than the aggregate of the individual wills of human beings. Thus, crimes could be caused against the state, aside from crimes against other individual human beings. In the same way that the individual came to recognize that she or he was separate from nature, and then separate from the condition of legal consciousness, so too the state was separate from the objectivity of international law. The institutions and written laws were projected into objectivity of consciousness so that an individual's will would be rationally guided and constrained.

The State

The third element manifesting Hegel's sense of a legal culture highlighted the state. Human beings represented an advance over animals because we could reflect about concepts, whereas animals acted from the passions of their bodies. Unless one could think about concepts and thereby become conscious of her or his separation from nature, one could only live a "fragmented" or atomistic existence without the unifying concepts needed for a reflective *Sittlichkeit* (Conklin 2008, 43–48). A state represented such a product of human consciousness. Once a legal culture took hold in North

America, Hegel stated, slavery would be a mere "phase in man's education … whereby he gradually attains a higher ethical existence and a corresponding degree of culture" (1975a, 184). With a capacity to think about concepts, individuals could socially recognize one another by sharing concepts with the other thinking beings (Conklin 2008, 162–87).

The state, itself a concept, needed institutions to represent its will. Hegel highlighted a series of such institutions. One was the legislature, another the courts, and a third an administrative structure in which a Head (or monarch) symbolized the whole. Such institutions mediated between the human beings, as authors, and the legal objectivity of codes, treaties, and state institutions. Officials had to reason and act in a detached way, as if the written laws existed in a legal objectivity. Such institutions symbolized civilization. Each of the three structures, organized in a "patriarchal" way, was separate from the other. A monarch would join the organization into oneness at the pinnacle of the pyramidal organization, although he or she would do little but say "yes" and "dot the i" (Hegel 1991a, 280A). Hegel associated the organic character of the state with such a governmental organization (Conklin 2008, 243–54). The legal organization as a whole developed into an organic constitution.

Territorial Knowledge

This suggests a fourth element of Hegel's understanding of legal culture. Legal knowledge in European legal culture had a territorial character about it (Hegel 1975a, 122–23). Hegel's territorial knowledge had two features. First, knowledge in legal culture took territorial borders as the limit of the state's jurisdiction. Inside its own borders, the state had a totality of legal authority over all human subjects and things. Because legal objectivity was invariably separate from the author or subject, the state, as an author of such a legal objectivity, had an unlimited desire to acquire more and more territory in order to protect and widen its own self-conscious authority. The European legal culture completed itself by geographically expanding to all parts of the globe (Schmitt 2006). By Hegel's projection of his category of a consciousness of nature onto geographical areas of the globe, racial and ethnic categories became part and parcel of his exclusion of traditional societies, lacking a state-centric legal structure from what he considered "civilization" (1971, 393).

In his earliest writings, Hegel placed the Mongols and Arabs at the bottom of his hierarchy of social development because they lived a nomadic life (1975a, 156). Nothing could be more alien to the self-conscious

construction of a territorial state than a territory inhabited by nomadic inhabitants, Hegel believed. We know now that most of the traditional societies east of the Rocky Mountains were nomadic (Albers 1996). By excluding nomadic societies from what he took as legal culture because of his preoccupation with centrally organized territorial states, Hegel once again found it straightforward to categorize the traditional societies of the Americas as uncivilized.

Territorial knowledge for Hegel had a second feature. This arose from the fact that legal objectivity was a construction of legal self-consciousness. The codification of rules represented cognitive objects of the will of legal persons, whether individuals or states. Accordingly, it was not enough for a state to physically control a territory; the state had to claim a property interest in the territory. Because the legal culture of *Bildung* represented the most advanced stage of self-consciousness, according to Hegel, the invariably separate legal objectivity drove states, as authors, to occupy *terra nullius* (that is, territory belonging to no one). Although at least 11 million Indigenous people occupied North America at the time of European contact, Hegel expressed the view that such people could not be legally recognized, because they supposedly lacked the capacity to think about concepts. In particular, lacking self-consciously written laws, Indigenous peoples did not have states that could claim "radical title" (a term used today to describe the state's ownership of land) to the land.

Accordingly, the boundary between the European civilization and Indigenous traditional societies was not physical, but culturally constructed. The boundary was territorial-like rather than territorial. The state did more than physically possess territory: it owned the territory. In like vein, a legal right possessed a boundary within which a legal person could freely think, express, and act. Again, the boundary of a right was not a physical fact but a cultural construction. Legal space, not physical space, represented a right. The same could be said of a contract or of the jurisdiction of the monarch, legislature, court, or governmental agent. Even what Hegel called "world history" (or what we would call international law) protected the territorial-like legal space inside each state.

The Hierarchy of Societies

Hegel's understanding of a legal culture led to a hierarchy of societies. Each individual in a civilized society was considered a self-generating and self-conscious author. Self-consciousness measured the condition and place of a human being and a society in the European hierarchy of social progress.

More generally, much of the globe lacked any semblance of self-consciousness as represented by self-generating secular states as authors, according to Hegel. Societies, though, could progress into "advanced" stages of self-consciousness and thereby become civilized. France, England, Spain, Denmark, Sweden, Holland, and Hungary had reached such a higher stage of civilization in Hegel's time.

When Hegel turned to the Americas, however, the traditional societies lay beyond his recognition on any scale of civilization. Hegel offers no anthropological evidence, to my knowledge, about the social life of traditional societies of the Americas. European legal officials just had to make a metaphysical and epistemological "leap" from an identity with nature among individuals in traditional societies to an identity with a conceptual objectivity as in European legal culture. Settlers, religious agents, and military officers carried "the advantages of civilization" to the Americas. The problem was that Hegel conceived the Indigenous inhabitants as individuals living close to nature and, therefore, without any semblance of the *Bildung*. *Bildung*, again, embodied the ethos of a civilization.

Although Africans and Asians were described as possessing a lower category of legal culture and therefore of civilization, they could, with self-education, emerge into civilized societies, according to Hegel. The Indigenous traditional societies of the Americas, however, remained entirely outside the capacity to form a legal culture. Their social life had to be totally dissolved into the European legal culture. Law only began when its peoples and rulers were sufficiently self-conscious to enact their will in writing and to reflect about the concepts signified by the writing. Traditional societies, lacking any of the indicia of patriarchal state-centric institutions and concepts as laws, did not have any laws or legal structure (or at least, laws as Hegel understood them). They felt bonded to nature, outside any legal recognition as being capable of owning property, entering into contracts and treaties, legislating written laws, punishing offenders, or even possessing "a community." Hegel therefore described them as "pre-legal" and "pre-historical." They were just a "mass" of atomistic individuals.

Interestingly, this hierarchy, presupposed and constructed by Hegel's sense of a legal culture, recognized legal persons in terms of a bloodline or *sanguinis*.[6] One's bloodline determined whether one was a national of this or that state. Only nationals possessed legal rights vis-à-vis her or his state. *Sanguinis* reinforced the hierarchy of societies because the inhabitants of a colony lacked legal personhood if they lacked the politically dominant bloodline of the colonial state. Conversely, military and bureaucratic

officials who possessed the bloodline of the colonial state, remained nationals of a colonized society (this was so, for example, until the postwar British empire began to shrink). The dark moments of European legal culture—racial segregation, biological experimentation, Nazism, indefinite internment, apartheid, and ethnic atrocities—have taken *jus sanguinis* for legal justification. *Jus sanguinis*, reaching its ultimate consequence in the citizenship laws of European states, ironically transformed *Bildung* into institutional racism. I say "ironically" because Hegel aspired to privilege a legal culture characterized by the quest for self-consciousness. And yet, because this very quest left the Indigenous inhabitants of the Americas before law and before history, such inhabitants remained in nature and therefore external to the *Bildung* of European legal culture.

One might well ask of Hegel, "what were his anthropological sources for his categorization of the indigenous inhabitants of the Americas?" To be sure, one has to wait for over a century before anthropology took hold as a necessary study of the stranger to the European legal culture. The absence of anthropological evidence or even the absence of travels on Hegel's part (the latter being something he could ill afford), however, reinforces my argument. Hegel's hierarchization of societies is not of his own making. He elaborates an exclusionary perspective toward the Indigenous inhabitants that he shared with other European and American jurists and judges of his day.[7] Lacking a centralized state with a pyramidal structure of offices, and lacking written laws along with the other indicia of a legal culture, American and British courts also excluded the legal orders of the Indigenous Americans as uncivilized and savage.[8]

To take the leading constitutional and international law precedent of *Campbell v. Hall* (1774), the "pagans" of traditional societies had to be subject to "one state or the other."[9] The territorial claim of title to all land under its suzerainty authorized the European state to "exterminate them" if they refused to recognize the state's claim of title to the land.[10] Hegel's approach was not peculiar to himself (or to Kant). His approach manifested assumptions that one can trace through the writings of the early modern jurists (Conklin 2012, 2001, 73–170). Since Greek and Roman literature was the mainstay of the education of such jurists, Hegel's assumptions can also be traced most certainly to Roman law (Conklin 2010). Hegel's sources associated civilization with the "legal culture" much as briefly outlined above. Hegel's legal philosophy represented a legal culture that excluded a consideration of the Indigenous social and legal life from the start of "law."

The Leap

Against the background of Hegel's sense of a legal culture, he insisted that it could only begin after individuals organized according to the indicia of a legal culture of *Bildung*. The jurist, historian, and philosopher had to "leap" from the world of nature into a world of self-conscious authors. He considered the state as the ultimate such author. A deep rupture was believed to separate an unwritten and bodily transmitted social life of individuals in a traditional society from a legal culture where self-consciously authored scripts signified concepts and where the concepts, in turn, categorized social experiences. With such a leap, concepts replaced the animalistic passions of the individuals on the Americas. Again, Hegel was not alone in this regard.

Self-consciously posited laws and institutions were the mark of civil society (Hegel 1975b, 250). This was so because codification represented concepts about how one ought to act. Being humanly constructed, the rules/concepts governed and controlled the otherwise uncontrollable bodily desires of rulers and ruled alike. Even justice could only take shape *after* the leap from the uncivilized world into the European legal culture (Hegel 1975a, 124). Until that point, one would live a fragmented and "sensuous" existence driven by passions of the body rather than by thinking about concepts (1975a, 184). One's bodily actions would remain immediate with nature.

Justice, then, only took form *after* the leap from the alleged uncivilized world (Hegel 1975a, 124). That is, the customs of the traditional societies of North America simply could not be just because, for Hegel as much as our contemporary analytic jurists (Conklin 2000b), justice originated after the leap from nature into a state-centric legal structure. Such a leap was possible only once inhabitants had begun to reflect about a self-consciously conceived legal objectivity represented by writing in the form of statutes and treaties. However, with this presupposed leap into a modern legal culture, some societies failed to progress to higher and higher levels of civilization. Other societies might retract back to the "primitive" customs characteristic of a traditional society. Chronologically *after the leap* from pre-civilization, a "gray" area would intercede between the "developing" (the contemporary term) and a "developed" (again, the contemporary term) legal structure.

This "necessary" leap was elaborated in the subsequent nineteenth-century European and American juristic scholarship (Anghie 2004, 39–114). The leap historically reached its apex with the breakup of the Austro-

Hungarian Empire. The League of Nations' *Covenant* reflected the leap by highlighting formally equal sovereign states as the only legal persons in the international community. The League's *Covenant* also stated that some societies remained in a pre-legal condition, and as such, they had to be left under "the tutelage" (the term of the *Covenant*) until they eventually leapt into civilization. States were legally bound to contracts or treaties with other states, but not with Indigenous parties.[11]

The self-image of the European jurists as representing civilization just could not address the nature of law in the diverse and complex legal structures of the traditional societies. To the contrary, only the will of states could be binding. The leap permeated the domestic and international legal culture to the point that the newfound state of Canada authorized residential schools which were believed to offer the opportunity to "educate" children of Indigenous inhabitants into the *Bildung* of European legal consciousness. Millions of inhabitants of the globe have been left stateless as a consequence of the legal culture of European civilization.[12] Without being recognized as legal persons by states, their legal and social insecurity has remained profound.

The Absence of a Legal Culture in the Americas

One can now appreciate the social consequences of the leap. The leap simply left the unwritten customs and rituals of traditional societies of the Americas as legally unrecognizable, and without recognizable states, the Indigenous social life of the Americas could not be protected against outside intruders such as Europeans. A state and its laws represented an act of self-conscious willing. But Indigenous inhabitants, unlike the Europeans, were "obviously unintelligent individuals with little capacity for education." They were "like unenlightened children, living from one day to the next, and untouched by higher thoughts and aspirations" (Hegel 1975a, 164,165). Only those individuals who could think about concepts could be active, Hegel tells us. Lacking a propensity to reflect about concepts, Hegel believed, the Indigenous peoples of the Americas were "mild" and "passive." The "dullest savages," Hegel posited, were "the Pecherais and Eskimos" (Hegel 1971, 393Z 45). "It is true," he advises, "that in some parts of America at the time of its discovery, a pretty considerable civilization was to be found" (1971, 393Z 45). Hegel adds that "this was not comparable with European culture and disappeared with the original inhabitants.... The natives of America are, therefore, clearly not in a position to maintain themselves in the face of the Europeans. The latter will begin a new culture over there on the soil they

have conquered from the natives" (1971, 393Z 45). Let us identify why Hegel considered the Americas as lacking a legal culture.

For one thing, without a consciousness about the world as separate from self-reflective subjects, Indigenous inhabitants could not combat nor overcome European superiority by virtue of its capacity to think, according to Hegel (1975a, 163). Only if the inhabitants leapt from nature into the European legal culture would they begin to possess laws. Until then, they were "culturally inferior nations" to the "more advanced nations which have gone through more intensive cultural development" (163).

The Indigenous inhabitants of the Americas, in sum, lacked Hegel's sense of a legal culture needed for such cultural development. They were immediate with nature (Hegel 1975a, 177). They socially related with one another through the passions of their bodies and through the stories and myths of nature's control over their social lives. As Hegel lectures in 1817–18, "all simply did their duty, without moral consternation and without the vanity of claiming to know better. There was simple consciousness that the laws *were*" (1817b 126).

Unwritten laws were said to be all-controlling, and Indigenous Americans felt immediate with customs (Hegel 1991a, 211A). Customs constituted "a second nature." Accordingly, Hegel considered traditional societies "lawless" (1975a, 177). They lacked any capacity for *Bildung*, in contrast with the Indigenous Africans who were said to possess strong wills. The European legal culture would inevitably dominate the traditional societies of the Americas. Hegel could categorize them as "passive" and "docile," lacking in intellectual curiosity, unfamiliar with formal education, physically weak, spiritually and sexually impotent, and a dying race.[13] My point is that Hegel's racial categories, which have been the object of recent scholarly commentary, followed from the radical rupture between pre-legality and legality.[14] In sum, the Indigenous traditional societies of the Americas remained stuck in a pre-legal world, signifying that they had to be transformed by education and, if necessary, by state violence.

The Indigenous inhabitants of the Americas were said to lack self-reflection about mediating concepts between themselves and nature (Hegel 1822/23, 151; 1991a, 211A). As Hegel lectured, "some of them have visited Europe, but they are obviously unintelligent individuals with little capacity for education. Their inferiority on all respects, even in stature, can be seen in every particular" (1975a, 164).Without a capacity to reflect about concepts, their acts were arbitrary, violent, blind, irrational, and formless. Revenge rather than punishment characterized their deeds (Hegel 1991a, 102). One

could only be punished for violating concepts or self-consciously posited laws (Hegel 1817/18b, 104). With revenge, one was driven by biological motives without the constraints of acts of intellectualization (Hegel 1991a, 211A). A sense of blameworthiness and even a sense of right or wrong were lacking (Hegel 1824/25, 177). Bodily impulses had, for millennia, been attributed to nature. One acted because nature so dictated. Indigenous societies were guided by such biological drives in contrast to the European legal culture that Hegel identified. Indeed, he goes so far as to liken the absence of self-consciousness among the Indigenous inhabitants of the Americas to animals. In this respect, Hegel's description of the pre-legal world was shared by Lucretius, Cicero, and Seneca (Conklin 2010, 449–504).[15] Although racism is often associated with the Enlightenment, the exclusionary character of a legal culture can be traced to the Romans and Greeks (Conklin 2012, 2001).

As for Hegel, he distinguished two elements of experience: the physical and the spiritual. Animals were driven by physical needs, and human beings by spiritual needs (Hegel 1991a, 11A; 190A; 1975a, 39; 49). Only human beings could think about concepts. By such thinking, one came to appreciate that one was separate from the objectivity of nature. The distinction between animals and humans presupposed that each human being, unlike an animal, was driven by a desire to become self-conscious (Hegel 1991a, 260). Without a thinking legal culture, biological drives would reign supreme, according to Hegel. As such, desires would be unlimited. "Savagery and unfreedom" would thereby be characterized in social relations (Hegel 1991a, 194R; 1991b, para. 24A2). The Indigenous North Americans, lacking a European legal culture, did not have the capacity to mediate biological drives with concepts. That is, they lacked discrete wills, and because of this, they were at one with nature. There was no separation of individual and nature. Nature controlled their lives by acts of disease, starvation, storms, and wars. In Hegel's words, "after the creation of the natural universe, man appears on the scene as the antithesis of nature; he is the being who raises himself up into a second world" (1975a, 44). The second world is the objectivity of consciousness. Much like one might have experienced in learning about Euclidean geometry, a structure of legal concepts would "follow its own course" (Hegel 1991b, para. 24A2). The Indigenous "savages" of the Americas could not appreciate the importance of concepts in their respective life-worlds.

Once one became conscious of a separation of the individual from nature, the objectivity of nature shifted into the objectivity of consciousness.

Written laws, being concepts, manifested such a consciousness. This human capacity to think about concepts was possible because (Hegel believed), unlike animals, human beings possessed languages. Once one had a language, one could think (1975a, 39).

Thus, Hegel's own structure of legal consciousness pre-censored the traditional societies of the Americas as pre-legal and therefore "savage." A "civilized" society was characterized by the signification of concepts as laws. The concepts were rules. A "savage" society remained in a condition more appropriate for animals, he asserted. Hegel explained that "as soon as man emerges from nature, he stands in opposition to nature" (1975a, 177). Because a thinking being recognized that she or he was separate from nature, nature could no longer be attributed as the cause of all harm. Once one recognized that she or he was separate from nature, however, this consciousness alone did not ensure that one was civilized: "he is still at the first stage of his development: he is dominated by passion, and is nothing more than a savage" (Hegel 1975a, 177). What was necessary was that the "savage" should construct a legal objectivity. Such a humanly constructed objectivity would displace nature and the biological drives of the "savage." Although Hegel argued that the state was a mere passing moment of self-consciousness, it best represented a higher-ordered objectivity of legal consciousness in his day. A stateless community, such as a traditional society in the Americas, remained outside such objectivity.

The Alleged Absence of a Social Community

To take a second point, Hegel found it difficult to describe the Indigenous Americans as constituting a community. A community, to be one, had to be the object of self-reflecting individuals who would recognize each other as self-reflecting. Shared concepts of objectivity of consciousness constituted such a community. A community, then, was embodied in an ethos that has been described as a "reflective *Sittlichkeit*" rather than a "primitive *Sittlichkeit*." From Hegel's standpoint, it was impossible to talk about Indigenous inhabitants of the Americas as sharing a community. A reflective community could not exist for individuals who lacked the intellectual curiosity to know the concepts represented by codes and mediating institutions such as courts, legislatures, a bureaucracy, and a monarch. As noted above, Hegel believed Indigenous peoples of the Americas lacked the capacity to think and act through such mediating concepts and institutions. They lacked the capacity for self-reflection, and therefore they lacked any social consciousness "of communal existence without which no state can exist" (Hegel

1975a, 165). Without centralized institutions to author the will of the social whole, the inhabitants of the Americas were an undifferentiated mass of "savage hordes,"[16] "physically and spiritually impotent," and passively controlled by nature.[17]

When one reflected about concepts, the thinker no longer felt immediate with her or his biological drives and nature, according to Hegel. One became a legal subject of objectivity. The subject could now be recognized as a legal person with rights and duties. Concepts mediated between the immediate identity of an Indigenous inhabitant with nature on the one hand and the European legal objectivity "out there" separate from the individual on the other. The separation of the subject from the objectivity of consciousness, in turn, marked the freedom of the individual. The reflective legal person was consciously free to act independent of objectivity, whether of nature or of legal consciousness. The thinking capacity transformed the biological needs of nature into social needs of consciousness (Hegel 1991a, 194).

Hegel's self-reflecting human beings were not the same as Kant's. Kant's legal persons were located in an idealized world of a priori concepts. Such concepts were emptied of social-cultural assumptions of a phenomenal world. Rules and maxims, universal inside their boundaries, were purged of social-cultural contingencies. Hegel is very critical of Kant's preoccupation with a priori concepts in a *noumenal* world. Instead, for him, legal persons are immersed in socially and historically contingent phenomena. This explains why Hegel privileged the ethos as determinative of the obligatory character of a discrete coded law. Human action remained in the phenomenal world. Shared concepts in such a phenomenal world would make for an ethos. As such, a community would exist whose members recognized one another as self-originary and self-reflecting subjects and where the products of such self-reflecting individuals embodied with social relationships. Such socially contingent thought could thereby be rendered concrete. Abstractions of thinking individuals become immersed in a reflective social ethos (Hegel 1991a, 192).

Freedom, then, involved the reflection about the constructed objectivity of legal consciousness immersed in an ethos. As Hegel puts it, freedom is linked with the spiritual drive to reflect about the external world (1991a, 194R). The "savages" of the Americas lacked freedom because their actions did not yet manifest this spiritual drive to reflect about the objectivity of consciousness. As Hegel stated, "we do have information concerning America and its culture, especially as it developed in Mexico and Peru, but

only to the effect that it was a purely natural culture which had to perish as soon as the spirit [of European culture] approached it.... For after the Europeans had landed there, the natives were gradually destroyed by the breath of European activity" (1975a, 163). The legal person reflected about his own role in the production of legal objectivity. Precisely because the Indigenous inhabitants of the Americas lacked the recognition of their separation from the objectivity of nature, the "civilized" peoples of Europe possessed an ethical obligation to uplift them into civilization—to "educate them," to assimilate them into acceptance of European institutions, to preach to them, to teach them, and to institutionalize European legal culture.

In sum, the bonding of members of a (European) civilized society was the product of reflection about concepts. The subject *intentionally* and reflectively bonded with society as an objectivity of legal consciousness (Hegel 1991a, 94). By doing so, the legal person, as a subject of legal objectivity, would access a higher stage of civilization. So too, justice and goodness would only become possible after the individual had become self-conscious of her or his relation with others. Most importantly, Hegel expected that legislators and thinking individuals would evaluate the social-cultural content of coded rules. In particular, such discrete laws would only be obligatory if their social-cultural content manifested a reciprocal social recognition of individuals toward one another as thinking beings. At that point, the content of laws would manifest ethicality.

Lawlessness

A third feature of Hegel's legal philosophy worked to exclude Indigenous inhabitants of the Americas from Hegel's civilization. Lacking self-reflection, the "savage hordes" were said to lack the capacity to reflect about concepts and therefore, to construct a state. A state was considered an object of the self-consciousness of human beings. Much like a self-conscious autonomous legal person, a state acted as a subject opposed to another objectivity: namely, an international legal objectivity separate from state members (Conklin 2008, 270–98). Hegel called this objectivity "world history"; today, we would call it public international law. Just as the state constrained the human subject inside the territorial border of the state, the international legal order constrained and guided the actions of authors/states. States became legal subjects of the international legal objectivity.

In contrast, traditional societies were said to lack law. Their customs were categorized as pre-legal because their unwritten customs, rituals, stories, and myths were excluded from the writing authored by a state. Their

customs were unwritten and unstated; they lacked the expression of self-reflective authors. Members of a traditional society felt bonded with customs; they followed them without reflecting about their content or even whether they were self-consciously authored as acts of intellectualization. They lacked picture thoughts or mediating concepts *about* the customs, according to Hegel.

The Alleged Social Progress

The above factors suggest this point. By studying a society in terms of its level of development of legal self-consciousness, Hegel believed that he could hierarchize societies throughout the globe and throughout history. Before individuals and their societies became self-conscious, there was no law, no justice, and no culture. Outside such a vertical social/ethical hierarchy, as noted above, there were the Indigenous peoples. The Indigenous American inhabitants lacked form to intellectually join one individual with another and to join one traditional society with another. A state, as Kant argued, was such an empty form (although, for Hegel, the laws of such a form were only binding if the content of the form recognized the reciprocal recognition of individual subjects). At this point, one may well appreciate the importance of social and ethical progress according to Hegel: "it is important that we should recognize that the development of the spirit is a form of progress" (1975a, 125). Hegel continually wrote about "development," "gradual progression," "progress," "a higher plane," and "culturally inferior nations." Progress was "immanent" from within the social-cultural ethos. This contrasted with understanding "progress" as if it could be posited "out there" by some written constitution (Hegel 1975a, 131). Progress began when "the savage hordes," driven by animalistic instincts and ends, became self-conscious. One could only understand the early stages of something in the light of its *telos* in something more developed. Civilized European states, being more "developed," therefore had an ethical obligation to "uplift" the inhabitants of primordial societies into higher stages of social development.

Hegel's legal philosophy suggests that one must read a society backward from where it is today to where it began. The beginning, though, occurs after inhabitants have leapt into their self-conscious separation from nature. If a nation took the form of a sovereign state, the nation progressed toward a higher-ordered level of civilization (Hegel 1991a, 351). Ethnic nations were treated as barbaric if they were "less advanced" than the higher-ordered, self-reflective societies. Even barbarism had different stages of progress: cattle-raising peoples might regard huntsmen as barbaric, agricultural

peoples might regard both huntsmen and cattle-raising peoples as barbaric. Since customs shared the immediacy that characterized the natural being, unwritten norms marked a lower stage of progress, while acts of representation characterized a higher legal order. The role of legal philosophy was to recognize the stage of civilization that the legal consciousness of a particular society presupposed.

This "ethical" and historical progress toward higher and higher levels of self-consciousness, not toward the sovereign state per se, marked the "conquering march of the world spirit" (Hegel 1975a, 63). Such a spirit expressed "the divine process which is a graduated progression" (64). Hegel also described this movement of self-consciousness as the "march of God" of which the state was the dominant moment in his day (1991a, 258A; 1975a, 112). The state was just one higher form of development from the natural forms of "docile" "unintelligent" "savages" (the Indigenous inhabitants of the Americas), a "savage horde" (Mongols), restorative invaders (Teutonic barbarians of Rome), a traditional society (Antigone's), family (the family in civil society), despotism in the form of a state (Cicero's Rome), and civil society (possessive individualism). The intellectualization that constructed objectivity carried "uncivilized" peoples into civilization signified by authored and written "laws." This all happened at the likely erasure of the legal *ethoi* of the Indigenous inhabitants of the Americas.

Conclusion

Hegel's highlights of a legal culture—*Bildung*, writing, legislative authors, the state, the separation of governmental jurisdictions, and territorial knowledge and a hierarchy of societies—are familiar to jurists today (Conklin 2011a). We also know enough about the social life of the pre-contact traditional societies to appreciate that Hegel had re-conceptualized their own particular *ethoi*. He did so to make them fit into his starting-point of the leap. The traditional societies certainly had laws, although Hegel did not and could not recognize them as binding in what he conceived as the legal culture of a civilized society. The laws certainly had *ethoi*, although hardly Hegel's sense of an ethos as *Bildung*. The Indigenous customs were unwritten, being signified and transferred from generation to generation through gestural languages, although Hegel did not recognize such because of his association of language with writing. Indigenous languages appealed to stories and myths rather than to concepts (although, to be sure, myths and stories certainly permeated the legal culture of civilization). Higher education was experienced through the extended family and one's elders

rather than in the universities of *Bildung*. Meaning was gestural rather than cognitive (Conklin 1999, 2011a, 25–31). A child was educated through festive celebrations, rituals, dances, and play of the experiential body (Huizinga 1955, 76–88). Social rituals exalted nature because nature was so important to the very survival of the community of Indigenous inhabitants.

Hegel's distinction between intellectual passivity and thinking beings, his distinction between biology and thinking, and the difference between immediacy with nature and immediacy with a reflective legal objectivity: these differences all marked the possibility of social progress as he pictured it. Hegel believed that the Indigenous inhabitants of the Americas were at one with nature. Since nature was believed to be all-controlling of human action, the Indigenous inhabitant was thereby considered intellectually docile, mild, and passive, humble and "obsequious[ly] submissive" in the face of "degradation" (Hegel 1975a, 164). The Indigenous inhabitants of the Americas were situated outside even the lowest structure of civilized societies.

Even today, what is taken as a pre-civilized society has been considered anthropologically, phenomenologically and analytically, prior to the civilized society. The state-centric legal objectivity excludes the pre-legal stateless social life. We have colonized others, schooled their children, assimilated them into our state-centric legal order, interned them, and killed them in order to institutionalize what we have taken as a higher stage of ethicality. Once the Europeans became civilized, they had an ethical duty to educate and elevate the Indigenous inhabitants into civilization. Colonialism and post-colonialism just seemed "natural" to the higher ordered societies that had progressed into civilization.

Built into Hegel's belief about European civilization, then, was the exclusion of societies that had failed to progress to what he felt were higher and higher levels of civilization. An untranslatable gap pierced the relationship of the civilized European legal culture and the Indigenous inhabitants of the Americas. For most societies, it was always possible to leap into a civilized condition. Only a society that had emerged into the condition of civilization could make a judgment about the stage of civilization in which Indigenous inhabitants found themselves. They could not assess and evaluate their own stage of consciousness and, therefore, of civilization.

The legal culture of European civilization required a leap into civilization. This priority remains an important feature of contemporary legal philosophy (Conklin 2001, 2011a, 2011b). Questions thus come to the fore even for the contemporary self-conscious "civilized" jurist. Why did Hegel begin

a social theory about the importance of the state without a state? Why were the Indigenous inhabitants stuck in a pre-legal condition that left them outside legal protection unless they became "like the European civilization"? Why was a state-centric European society at a higher stage of social progress than a stateless society such as Hegel characterized of the Indigenous inhabitants of the Americas? Once Indigenous inhabitants became "civilized" into legal culture, could they return to their former pre-legal society, or were they invariably destined to remain civilized and alienated from their own *ethoi*? Such issues remain with jurists today.

Hegel was right on one point, however. His pre-legal world of traditional societies remained a concept signified by the legal culture of European civilization. This being so, Hegel was entrapped in his own image of *Bildung* as self-consciousness. This image pre-censored the voices of the Indigenous inhabitants of the Americas without a hearing among jurists. Hegel's image of legal culture remains our own, two hundred years later, because we lawyers tragically share with Hegel the legal culture of European civilization.

Notes

1 See generally, Kant (1997); Harvey (2000, 532–36; 2011, 267–84); Bernasconi (1979; 1998; 2000; 2001; 2003; 2007); Buck-Morss (2000; 2009); Hoffheimer (2001), Eze (1997); Serequeberhan (1979).

2 For an examination of Hegel's racial categories, however, see Hoffheimer (2001).

3 This notion is elaborated in Conklin (2008, 27–29).

4 I have retrieved such shapes from Conklin (2008).

5 *Guerin v. The Queen* [1984] 2 SCR 335; 13 DLR (4th) 321.

6 Today, nationality according to *sanguinis* is traced to the relation of an individual to the nationality of the parents (often the male parent). The problems of such a view are examined in Conklin (forthcoming 2014).

7 See Anghie (2004, 39–114); B. Williams (2004, 20–39). Indeed, even in our own day, a leading Anglo-American jurist, H.L.A. Hart, has written that the leap (he calls it a "step") is necessary as a matter of "faith" (1994, 94, 170).

8 *Campbell v. Hall*, [1774] 1 Cowp. 204 at 210, 212; 98 E.R. 1045 at 1049, 1050; [1774] Lofft 655; *The Antelope*, 23 US (10 Wheaton) 5 [1825]; *Johnson and Graham's Lease v. M'Intosh*, [1823] 8 Wheaton 543, 21 US 240; *Cherokee Nation v. State of Georgia*, [1831] 30 US 1 at 17. Also see the documentation in Williams (1990, 227–32, 235–38); Ferguson (2011, 103–40); Pagden (1986, 1–12); Asad (2002, 133–39); Hill (1996, 7–13).

9 *Campbell v. Hall*, [1774] 1 Cowp. 204 at 212; 98 E.R. 1045 at1049.

10 *Campbell v. Hall*, [1774] 1 Cowp. 204 at 209–210; 98 E.R. 1045 at 1048.
11 *R. v. Vincent*, [1993] 12 OR (3d) 427 (CA), at 437a, 437h, 440c–h (CA).
12 See generally Conklin (forthcoming 2014), Chapter 3.
13 Hoffheimer (2001) documents Hegel's views of the Indigenous Americans being the lowest territorial group with reference to European civilization.
14 Hegel distinguishes between pre-legality and civilization throughout the *Philosophy of Right* (75A, 78–79, 107A, 330, 349–360) and in his *Lectures on the Philosophy of History*.
15 For an example of the Epicurean view, see Lucretius, *De Rerum Natura*, Book 5, esp. lines 1446, 1157. For an example of the Stoic view see Seneca, *Epistulae Morales*, vol. 2, letter 76.9–10; vol. 3, letter 124.13–14.
16 See esp. Luce Irigaray, "The Necessity for Sexate Rights," in *The Irigaray Reader*, 198–203.
17 They were barbarians who, in turn, were described as dull, open to "solitary brooding," clumsy, not in control of one's actions, driven by habit, and lazy (Hegel 1991a, 197A; cf. Conklin 1999).

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