

‘We Want to Live’: Metaphor and Ethical Life in F. W. Maitland’s Jurisprudence of the Trust

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This essay argues that reading F. W. Maitland's jurisprudence of the trust alongside Hegel's philosophy of social recognition offers insights into the way in which metaphors 'structure' the modes of ethical life that inform legal and social institutions. Conventional ways of reading Maitland (and John Neville Figgis) have obscured the affinities their work shares with Hegel, and limited the impact of a way of thinking about law and society.

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‘[A] theme from the borderland where ethical speculation marches with jurisprudence.’ F. W. Maitland¹

‘On the crossroads between magic and positivism’ Theodore Adorno²

INTRODUCTION

The main thesis of this essay may seem somewhat Quixotic. We will argue that reading Maitland’s jurisprudence through the Hegelian concept of social recognition can tell us something significant about law and metaphor. But, why read this most English of historians through German metaphysics? Our argument will be that the received ideas about the differences between Maitland and Hegel conceal a much greater affinity. Reading Maitland and Hegel together can direct our attention to an understanding of metaphor that must inform any proper engagement with law, society and ethics.

Hegel’s thinking of the dialectic of recognition shows how an inherently metaphorical process articulates the ethos of legal institutions. Thus, although it is something of a free translation, we will use the Hegelian notion of *sittlichkeit* (or the social world in which ‘we’ recognise each other as citizens) as a way of thinking about the ethical life that is articulated by Maitland’s idea of the trust. As we will see, thinking about ethical life is inseparable from the study of metaphor. In fact one might say that ethical life is defined by those metaphors by which we live. Maitland understood this truth. To read a metaphor is to be able to work between the literal and figurative, between the hidden and the revealed. But, as Maitland was also careful to point out, it is not ‘always easy to say where metaphor begins’³ and ends. The correct reading of history requires sensibility and discrimination. Indeed, we will pick up on Maitland’s resistance to German metaphysics as central to an issue of style that is fundamental to his writing. Maitland’s work is significant precisely because his writing has a certain ‘grain of voice.’ He is concerned with the presentation of a particular vision of equity to his fellow Englishmen. We will draw on Maitland’s exercise in language to make some final points about the reception of his work in the early decades of the twentieth century. In particular we will examine how those developing a sociological jurisprudence misunderstood his relationship with Hegel and thus failed appreciate the centrality of metaphors to the way in which we live the law.

The essay will develop as follows. The first section will focus on notions of social recognition and ethical life. We will make reference to thinking on metaphor to show how the theory of *sittlichkeit* provides a distinctively ‘modern’ form of the social bond. Elaborating our understanding of social recognition, we will show how metaphors are central to the struggle over the definition of a social ethos. These arguments extend into Maitland’s opposition between the artificial idea of corporation and the law of trust. Whilst Roman law thinking on the fiction of corporation feeds into theories of the social contract, the trust articulate a form of ethical life that rivals that great Latin fiction of the state. The trust provides a legal ‘shell’ which nurtures

¹ F. W. Maitland, ‘Ethical Personality and Legal Personality’ in *The Collected Papers of Frederick William Maitland*, ed. H.A.L Fisher (1911) 304. The account of *sittlichkeit* is taken from G.W.F. Hegel, *The Phenomenology of Spirit* (1967), 466-482.

² Theodore Adorno in a letter to Walter Benjamin 10th November, 1938 cited by G.Rose, *The Melancholy Science* (1978), 41.

³ Maitland, *op. cit.*, n.1, 403.

the genius of civil life. A final section will engage with the reception of Maitland through sociological jurisprudence and suggest that any development of his insights must take seriously the concern with a social ethos in which legal institutions are rooted.

METAPHOR AND ETHICAL LIFE

Our starting point is Hegel's theory of social recognition. *Sittlichkeit* can be thought of as the way in which a society 'comes into being' by recognising itself as such. This might seem somewhat obscure but if we compare the concept of *sittlichkeit* with the more familiar notion of the social contract, we can get a good sense of its distinctive contribution to the analysis of 'modern' society. Liberal political theory sees the social contract as a way of thinking about the origins of mutual rights and obligations. The social contract defines the legal foundations of an order of association that considers itself rational, legitimate and self-founding. However, the contract is only one way in which the concept of a social bond can be articulated. The theory of *sittlichkeit* seeks to discover 'something' that underlies the very idea of a social bond in the first place. Whatever form the legal or cultural vehicle takes (trust, contract or other device) it must be able to articulate a much broader ethos. Oliver Wendell Holmes (to whom we will return) provide us with a working notion of ethos as describing those 'felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious...the prejudices which judges share with their fellow-men [...]'⁴ For Hegel, this complex of beliefs, values, representations, norms and practices provide the terms in which 'we' recognise ourselves. As 'moderns' - or self-conscious, reasoning actors we need to see ourselves reflected in our actions and in the institutions that form our world. Law will not bind rational people together unless it is embedded in an ethos that enables mutual recognition. So, in Hegel's social philosophy the interiority of reason must be able to find itself in the external world of others. In other words, 'I' must see myself in 'you' and 'you' must recognise yourself in 'me' and (to return to our first point) our institutions must give form to our mutual recognition.

We can think of this process of social recognition as mobilising a complex of metaphors. The institutions of the social world provide us with metaphors of ourselves. 'We are' the institutions that we have created: we are our metaphors. The creative, negating power of reason thus enables us to recognise or 'come to' ourselves in what we are not: the external forms that give shape to our inner selves. This argument can be elaborated still further. Metaphor is a device or figure that presents one thing as another. The comparison is then suppressed (metaphor is not simile). Metaphor thus takes on a special meaning in our reading of Hegel's philosophy. In ethical life our institutions are effectively a metaphorical prosthesis or 'stand in' for ourselves. We will return to the second feature of metaphor (the suppression of comparison) in a moment as we want to summarise our argument so far. Metaphor has to be understood in a special sense to think about the dialectic of recognition. We need to stress the inherently social nature of recognition and the fact that it is an activity or set of practices and norms in and through which we work to create both ourselves and our world. The term spirit can also be used to describe this complex of recognition. We do not want to overuse this expression, but we will make reference to spirit as a way of thinking about the social complex of recognition. Spirit can thus be

⁴ O. W. Holmes, *The Common Law* (1881), 5.

understood in its more or less common sense application (as in the spirit of a culture) - or- in this more precise Hegelian use (a slightly more sophisticated form of common sense) as an understanding of the dialectic of social recognition. Thus when we speak of the spirit of a culture, or the spirit of the law, we are referring to the complex of metaphorical substitutions where a set of institutions and doctrines 'stand in for' or represent our understanding of ourselves as rational subjects rooted in our 'own' traditions and mores.

We can now turn to the suppression of comparison in metaphor. We have described rational ethical life as a 'stand in.' As such it must replace previous, historical modes of recognition, and, by the same token, must also resist rival modes of recognition (Hegel is primarily concerned with the emotive bond of the family) in order to mandate the universal terms of recognition and belonging as subjects of a rational state. We can thus appreciate that an account of hegemony is implicit in Hegel's understanding of *sittlichkeit*. Most importantly, the dominant mode of ethical life must present itself as the best possible way in which social life can be articulated. This underlies the hegemonic notion that modern societies are best organised around rational markets structured by law and the state. Precisely because this claim rests on the forgetting of its metaphorical nature, any rival metaphor could challenge its hegemonic hold. This is exactly what is at stake in Maitland's work. The trust provides a 'plural' way of organising social life and an alternative to the overwhelming might of the sovereign state. It also provides a different way of thinking about markets and the role that social actors play in commerce. Any engagement with metaphor is thus an examination of the terms of communal life.

Hegel is often misread on this point and it appears that Maitland and other 'English pluralists' failed to understand the true import of Hegel's philosophy. Hegel is not an apologist for the absolute state. The absolute state is only one form that *sittlichkeit* might take. Hegel shows that the hegemonic form of state, law and market is, in part, a historical effect. Very crudely, this is why *The Phenomenology of Spirit* is such a big book. *The Phenomenology* shows that any account of the mode of recognition must present itself as the authentic working out of a historical pattern. However, history does not run towards some immanent telos. To return to our earlier point, any claim about the nature of the ethical bond is itself an interpretation of history by a hegemonic power. A brief reference to Hegel's understanding of metaphor can help us to appreciate why the construction of the social bond is such a careful construction-and entirely precarious.

In his discussion of metaphor in *The Aesthetics*, Hegel makes a distinction between invisible inner spirit and sensuous, material form. The inner and the outer have no necessary link, but are brought together by the 'wit' of the poet in metaphor (and allegory, parables, similes and stories). Thus, a metaphor that compares a hero to an eagle or a lion does not embody the spirit of a hero so described. The lion or the eagle 'stands in' for something that it is not.⁵ The link, then, is entirely contingent: a matter of invention. Scholars and poets who make use of metaphors might allow us to grasp something, but, they could also mislead us. For instance, in the nine flights of an Egyptian stair, the 'cognoscenti' may be able to 'sniff out' something recondite-but- this may be a matter of pure invention: a problem in the work of the neo Platonists, as well as that of literary critics. Metaphors are inherently slippery. Power is, in brief, the ability to mandate meanings and to limit the inherent play of metaphor. By analogy, any account of the social bond will be a dispute over the extent to which

⁵ G.W.F. Hegel, (*Aesthetics*, 1: 306).

certain metaphors can reflect spirit. Poets, philosophers, historians and lawmakers are involved in the same hermeneutic endeavours.

This takes us to Maitland. Maitland links the trust to the spirit or genius of English law. Despite what pluralist scholarship tells us this is an application of Hegel's thinking rather than its avoidance. It is also an attempt to define the metaphors by which 'we' should live. Admittedly, Maitland is writing against Austin's sovereign (which the pluralists took to be an anglicised Hegel) - but- he is entirely Hegelian in his desire to press into service an alternative account of social life. However, there is a second important point and this does takes us to something distinctive that Maitland brings to the articulation of a vision of *sittlichkeit*. If the articulation of the social bond is an invention, and in particular if one is arguing for a 'counter hegemonic' metaphor as Maitland is doing, then one needs to adopt a certain style, a way of discriminating. One needs to produce a 'great work'- and- in this sense Maitland's legal history rivals Hegel's philosophy of law. Style is authentic to an argument that must link together spirit and form and present itself in a public form to an audience who might be persuaded. Above all, the persona that animates the writing must summon a spirit that speaks through dogmas. Maitland seeks, in the words of T.S. Eliot, to give form to the desires of the tribe.

DOGMA AND DESIRE

Our starting point is Maitland's pithy statement that '[a] dogma is of no importance unless and until there is some great desire within it.'⁶ A dogma, a body of doctrine or ideas conceals and gives form to something else: 'desire.' Maitland's 'desire' reaches towards something that needs to be captured and given form. Desire follows traces and echoes; memories of life buried in archived documents, medieval legal doctrines, the year books and court records. Whilst traces of ethical life might be recoverable from documents and records, ethical life is 'lived.' Maitland's desire to uncover this complex informs his practice as a historian.⁷ Indeed, his quest for ethical life is motivated by the sense that all is not well with the contemporary social and political situation. The forms that law and government have taken 'shroud'⁸ or distort more vital understandings that 'Englishmen' may recover by reflecting on their own history:

When we speak of a body of law, we use a metaphor so apt that it is hardly a metaphor. We picture to ourselves a being that lives and grows, that preserves its identity while every atom of which it is composed is subject to a ceaseless process of change, decay, and renewal. At any given moment of time—for example, in the present year—it may, indeed, seem to us that our legislators have, and freely exercise, an almost boundless power of doing what they will with the laws under which we live; and yet we know that, do what they may, their work will become an organic part of an already existing system.⁹

⁶ Maitland, op. cit., n.1, p.66.

⁷ See M.B. Nolan, 'Metaphoric History: Narrative and New Science in the Work of F.W. Maitland' (2003) 18 *PMLA*. 557-572.

⁸ Maitland, op. cit., n.1, p. 305.

⁹ F. W. Maitland, 'Outlines of English Legal History' in *The Collected Papers of Frederick William Maitland*, ed. H.A.L Fisher (1911) 417.

The metaphor of organic growth is more than an example of figurative language. The figure is so 'apt' because it is true. Law is a living thing. The present is part of a historical pattern. If we have lost our common sense or our sense of our own history, we need to learn how to see things for what they are. This does not mean that one should abandon literal for figurative sense. To read metaphors is to understand how to translate or how to work from one thing to another. The voice that speaks in the passage above 'knows that' the organic pattern of the law will ultimately include into itself the work of those legislators who are unconscious of its greater power. But, who is it that knows? Maitland, of course. But Maitland as 'knower' is the one who can read the pattern. Above all, he knows that the law is the 'external' or revealed form of an 'inner' or concealed spirit: a spirit that speaks through Maitland's knowledge. But this knowledge is not (despite appearances) mystical or metaphysical. It is the work of a historian who has studied the records. The knowledge is that of the institutions of the law and their material, historical development. The spirit (which remains hidden) is 'there' in law's empirical reality provided that one can read its trace. To understand what Maitland is saying is to be able to distinguish between reality and metaphor and thus to share his vision. Dogmatic texts thus engage their reader's desires. Whilst, at the level of Maitland's text one aspect of content may appear clear (the trust, for instance) it may also gesture beyond itself to forms of life and social activity. To think of the spirit of the trust, for instance, we must grasp a complex sense of continuity and change, adaption and refinement rooted in the practices of social actors. We must also concern ourselves with dry, technical debates within jurisprudence. Our desire will discover the animating spirit of legal doctrine.

CORPORATION, CONTRACT, FELLOWSHIP, TRUST

What, then, can we learn from the common law about 'our' spirit? In the introduction to Gierke's *Political Theories of the Middle Age*, we find the following argument. Maitland asserts that lawyers outside the common law tradition struggled with the idea that individuals are 'real' and 'natural' persons. How, Maitland asks, can lawyers within the civilian tradition account for social aggregates; and, more specifically, in what way can they understand real political relationships such as that of the monarch, as a real person, to the office of the Crown and the body politic? In the terms of Roman law, the state becomes thought of as an 'artificial person.' This suggests that any form of group being as determined by law is ultimately a legal fiction. Maitland objects to this approach. The state is only one 'highly specific' expression of a more general phenomenon: 'permanently organized groups of men'¹⁰ which are credited with will and intention. The state only becomes a template for this form of organisation if we flatten out our understanding of the social world. Alternative forms of social and political organisation will remain ill understood if group being is coordinated with the 'unicellular' state. Struggling against these artificial constructions means rejecting the inheritances of Roman legal concepts, and in particular the legal fiction of the corporation.

Why should incorporation have such a hold over the legal imagination? Maitland writes that 'at the end of the middle ages.... a great change in men's thought about groups' took place. The catalysts for this transformation are the Roman law concepts of *corpora* and *universitates*. From the *Corpus Juris* the legists and canonists exhumed a theory of the corporation that became the dominant way of

¹⁰ F.W. Maitland, Introduction to Otto Von Gierke, *Political Theories of the Middle Ages* (1900) ix.

articulating group being. Most importantly, this theory breaks the link between the corporation and the individual: the ‘personality of the *universitas*... is not natural- it is fictitious.’¹¹ Maitland credits this doctrine to Pope Innocent IV. The next link in the argument takes us from spiritual to temporal power and the adoption by the former of the latter’s doctrine of the corporation. Theorists of temporal power pointed out that the fictitious corporation must rest on a power that, out of its beneficence, allows the group to assume its identity. This is the power of the prince: ‘[o]nly the prince may create by fiction what does not exist in reality’¹² Armed with the new doctrine of the fictitious personality of groups, the prince could challenge the federal structure of the medieval polity. It became more difficult to think of political community as ‘*communitas communitatum*’ (the community of groups). The prince represents the political community and grants it corporate legal being in his name.¹³ If the corporation is an alien fiction, how can group life authentically express its own legal and institutional form?

We can focus these questions on Maitland’s analysis of the corporation sole. Motivating this scholarly engagement with the year books and the texts of Coke, Blackstone and Littleton is a quest for the concepts that might replace the fiction of corporation. The problem of the corporation sole is the starting point of an ‘English Law of Persons’ that has been in existence since ‘the days of Sir Edward Coke.’¹⁴ Sir Frederick Pollock is credited with the observation that Roman jurisprudence contains the ‘fiction’ whereby momentary holders of office are turned into artificial persons who bear rights and duties. Roman law thus contains the mechanism or ‘fictitious substance’ that gives continuity and institutional longevity its form, albeit in a concept that creates as many problems as it solves.

For Blackstone, the roots of the corporation sole can be found in the work of Sir Richard Broke and the resolution of an issue in ecclesiastical law: the legal nature of the parson. It might seem somewhat strange that the jurisprudence of the corporation sole can be traced to such a lowly office of the church, but, the legal status of the parson takes us to the relationship of the office to church lands and thus to the issue of the church’s control the transmission of its wealth and its identity as an institution.

One central debate was over the powers of the patron who could present to the office of parson. The church increasingly objected to this lay power. A papal doctrine allowed the ‘right to present’ to be seen not so much in terms of the patron’s ownership, but, as based on the power of the church to reward a patron for his piety. Henry II managed to assert a counter doctrine that gave the crown a far greater influence over the award of advowsons. Somewhat later, the need to resolve certain issues over tenure of land meant that those endowing chantries went to seek the licence of the king. This gave rise to the fiction that it was the crown itself that allowed the parson to have title to land and to pass land to successors. It would thus appear that the legal status of the parson was at the sufferance of the earthly power of the crown and did not rest on ecclesiastical foundations. Cases at law suggest a slightly different approach. There was resistance to the doctrine that the power of the king could determine the form of an office of the church.

Let us try to follow what Maitland means by posing the following question: ‘[w]hy should not an advowson be vested in trustees upon trust to present such clerk

¹¹ *id.*, at p. 65.

¹² *id.*, at p. 65, citing Gierke.

¹³ *id.*, at p. xxi.

¹⁴ F.W. Maitland, ‘The Corporation Sole’ in *State, Trust, Corporation*, ed D.Runciman (2003) 13.

as the parishioners should choose?’¹⁵ The force of this question comes from the implicit assertion that people should define their own institutions. In explicitly religious terms, this means that parishioners should be able to define their faith, and the concrete forms that it takes as opposed to the Church of England or the crown. It only seems an obscure concern if we forget that religious affiliation is a potent source of identity. But note that the claim to religious ‘self-determination’ is a claim that the advowson can be held on trust. The trust makes the self- definition of the religious group possible. It does not need to refer to papal fiction or to the power of the sovereign state.

Early modern political theory inherited these debates. The crucial concern became the idea of the state as an artificial person. We can link the question of the nature of the state with the central theme of liberal political thinking: the social contract. The notion of the social contract returns to the idea of the *societas*. In the classical tradition, *societas* and agreement or contract were fundamentally linked. A term drawn from jurisprudence was thus pressed into service to present ‘civil society [as a] partnership of citizens.’¹⁶ Following Gierke, Maitland pointed out that conceiving the nature of the social bond in terms of contract rather than incorporation is intriguing. The contract model becomes dominant because of the limits of the theory of corporation. The essentially artificial nature of corporation meant it never moved beyond private law. The possibility remains that (provided an adequate account of incorporation can be worked out) the private law of persons, focused upon the trust, could provide a way of thinking about group being without being dependent the social contract or sovereign power.

Why should this approach be necessary? An answer to this question can be found in the elaboration of themes from Maitland in the work of John Neville Figgis. Figgis gives us a very clear sense of how certain themes in Roman law terminate in modern positivist state theory:

The great Leviathan of Hobbes, the plenitude potestatis of the canonists, the *arcana Imperii*, the sovereignty of Austin, are all names of the same thing—the unlimited and illimitable power of the law-giver in the State, deduced from the notion of its unity.¹⁷

The consequences of this meeting of Roman law and Austinian sovereignty are entirely negative:

The theory of government which is at the root of all the trouble is briefly this. All and every right is the creation of the one and indivisible sovereign; whether the sovereign be a monarch or an assembly is not material. No prescription, no conscience, no corporate life can be pleaded against its authority, which is without legal limitation.¹⁸

Sovereign power squeezes out the diverse forms of associational life that constitute ‘civil society’ imposing a tyrannical government power on the network of rights and duties that have arisen organically in the community. Figgis saw this problem in terms of the freedom of conscience and the corporate life of the church. We might say, then,

¹⁵ *id.*, at p. 57.

¹⁶ Maitland, *op. cit.*, n. 10, p. xxiii.

¹⁷ J. N. Figgis, *Churches in the Modern State* (1913) 79.

¹⁸ *id.*, at p. 85.

that for both Maitland and Figgis, sovereign power was a force that alienated social being from itself. In the place of life developing through its own plural patterns and complexity, the bogus ‘one size fits all’ of the modern state was imposed and justified by an artificial jurisprudence.

Against the theory of corporation, the common law treated aggregates of people as collections of individuals. This, for Maitland, is a thoroughly common sense approach that understands the group as a collection of individual wills. The group may achieve an identity that goes beyond that of the individual, but, this is a matter for the individuals who compose the group. It is always necessary to begin with the reality of the single person, and, as far as possible, to see the nature of the group as the negotiation of these singular identities:

....we Englishmen expect that the organised group, whether it is called a corporation or not, will be treated as a person: that is, as a right-and-duty-bearing unit.¹⁹

For the common law, the ‘primal’ sense of associational being lies in the reciprocal relations of individuals. The rights and duties that all enjoy and owe to each other. Maitland seeks to denounce ‘the absolute individual’ as much as he criticises the ‘absolute state’²⁰ as rigid legalism. In *Trust and Corporation*, Maitland wrote that an ‘Englishman’ would think seriously about ‘appeal[ing]’ a decision of a ‘committee or the general meeting’ that had inconvenienced him. This is because ‘the thought of a ‘jurisdiction’ inherent in the *Genossenschaft* is strong in us’²¹ and moreover is ‘strongest’ where ‘there is no formal corporation.’ This point seems entirely coherent with the argument about rights and duties. Rights and duties are compelling to the Englishman because they come from forms of association that are part of the ‘face to face’ reality of civil society. This is a valorisation of the quotidian, of daily life. It is as if the notion of an everyday Englishness is the touchstone for obligations rather than the ‘petrifying action of juristic theory.’²² We can read this as a resistance to theory; or rather, a resistance to any theory that cannot describe the genius of institutions created in such a spirit that the social life that they sustain and inform is not abstract but empirical. The unincorporated association or club is its figure.

Long before Hart produced his metaphor of the external and internal point of view, Maitland imagined the tourist visiting London and asking questions about its great legal institutions. Maitland, the imaginary tour guide, replies:

I believe that in the eyes of a large number of my fellow-countrymen the most important and august tribunal in England is not the House of Lords but the Jockey Club ; and in this case we might see ‘jurisdiction ‘‘they would use that word-exercised by the Verein over those who stand outside it.’²³

Lincoln’s Inn, with its ‘ancient constitution’²⁴ is one of the great unincorporated bodies. Thus, if the Inn has to disbar one of its members for unprofessional conduct, an appeal may lie to the High Court, but, the court’s jurisdiction in this kind of case is

¹⁹ Maitland, op. cit., n. 10, p. 63.

²⁰ Id., at p. 67.

²¹ Maitland, op. cit., n. 14, p.106

²² id.

²³ id.

²⁴ id.

as a 'visitor' or 'a second instance of the domestic forum.'²⁵ The problem should be sorted out by the members of the Inn themselves ordering the terms of their own association. It is certainly worth stressing that this is 'no purely legal phenomenon',²⁶ Even though one may dismiss this argument as one of 'ethical sentiment' the real life of the group exists. Although the 'ethical philosopher' may have the task of explaining it in more detail, Maitland prefers to look at the way in which a concrete legal institution- the trust- provides a viable way of arranging social life.²⁷

The problem is that the device seems so technical, so dryly legal that it appears 'unworthy of exploration.'²⁸ We can borrow from adventures in German jurisprudence and legal history. In Germany the new account of group being labelled itself the theory of *Genossenschaft*. How should this word be translated? Neither 'company' nor 'society' is quite right. 'Fellowship', although not exactly right, may be the least inaccurate. We are concerned, then, with a law of friendship or fellowship. This theory does not see the fellowship as a 'fiction' or a 'symbol' neither is it 'a piece of the State's machinery' or a 'collective name for individuals.' It is a 'living organism' with 'a will of its own.'²⁹ In short, it is a 'group person [with] a group will.' Why, though, does Maitland comment that a similar theory could never come out of English law? Why is it unlikely that we will ever see a volume entitled 'English Fellowship Law'? The forms of life, or the forms of group being are simply too wide to be described in a single theory, no matter how sophisticated. The problem of reconciling 'the manyness of the members' with 'the oneness of the body' can only be studied in specific instances across manifold fields of life. Philosophical speculation aside, the reason why such a law of fellowship has not taken root in England may also be down to historical circumstance. There was no political need for a theory of fellowship to champion a notion of 'organic form.'³⁰ There was already an institution that performed a great many of the functions required by organicist theory of the fellowship: the trust. The trust provides a 'substitute for a law about personified institutions.'³¹

Maitland argues that the trust allowed English law to depart from the 'orthodox...lore of the fictitious person'³² Through the device of the trust, English law arrives at the notion of the foundation or the institute 'without troubling the State to concede or deny the mysterious boon of personality.'³³ Most specifically, the trust allows a bypassing of the state's 'sovereign power.' What, though, is the point of this ancient jurisprudence? The pattern is there for those who want to read it:

Now we in England have lived for a long while in an atmosphere of 'trust,' and the effects that it has had upon us have become *so* much part of ourselves that we ourselves are not likely to detect them.³⁴

What is it that is so close to us that we cannot see it; so close to us that it might be us? We need to go back to medieval jurisprudence in order to see ourselves. Let us, then,

²⁵ *id.*

²⁶ *id.*, at p. 68.

²⁷ *id.*, at p. 69.

²⁸ *id.*, at p. 70.

²⁹ Maitland, *op. cit.*, n. 10, p. xxvi

³⁰ *id.*, at p. xxviii

³¹ *id.*, at p. 57.

³² *id.*, at p. 58.

³³ *id.*, at p. 59.

³⁴ Maitland, *op. cit.*, n.1, p. 402.

recount Maitland's story of the trust. The trust does not fit in to the divisions of Roman law. It is a creation of English equity lawyers- exemplary of their solutions to practical problems thrown up by the historical and political circumstances in which they were working. At the doctrinal level it brings together rights *in rem* and rights *in personam*. The trust is a 'dilemma'³⁵ as it belongs to two 'rubrics': the law of obligations and the law of things. Roman law kept separate and distinct the concept of rights against persons and rights over things. The beneficiary had certain rights against the trustee and over the property in trust. Perhaps the genius of the lawyers who devised the trust was to realise that social life is always lived within a network of rights and duties.

The development of the rights of the *cestui que trust* is inseparable from the history of the Court of Chancery for it was the Lord Chancellor who presided over the jurisprudence that transformed rights *in personam* into rights *in rem*. Thanks to the Court of Chancery it became possible to speak of the existence of 'equitable estates in land.'³⁶ The notion of conscience was a central doctrinal development. Conscience underlies the concept of an equitable estate as the interest can be enforced against those whose 'conscience is affected' by the equitable estate.³⁷ Thus, a person obtaining title to trust property from a trustee is bound by the beneficial interest if he knew or should have known of them. The Court of Chancery also developed the doctrine that if the beneficiary could not recover the trust property itself, he could pursue the value of the fund into other into which it had been transformed.

Why should we concern ourselves with these technical issues? The answer is that they represent a peculiar form of 'theory.' Far from the abstractions of philosophy, they are the practical elaboration of the way in which reciprocal rights and create viable forms of social life around property. Thus, unless we can grasp the precise way in which the trust becomes delineated, we will never appreciate the philosophy of social being in which it is embedded. To the extent that the law of trust is a law of friendship it can be thought of as the emotional life of estates in land. The concepts of the friend and conscience are central to the historical structure of trust as a feoffment to uses. To repeat Maitland's own oft used metaphor- the trust is a shell in which life is both hidden and protected from the power of the Lord or the Crown.

To understand this point, we need to follow Maitland's technical analysis of the trust. In the fourteenth century, the 'feoffment for uses' became a common legal equitable device.³⁸ A fee is an inheritable estate in land. The feoffment, or transfer of land created a tenant who has 'seisin.' This term derives from the French/Norman verb 'saisire'- to give or deliver into someone's hands; to render into someone's possession. The feoffment for uses would create a tenant who was seised of land, but, 'use' or enjoyment rested with another, the *cestui que use*. Equity lawyers exploited this structure of ownership to provide a practical way of avoiding inheritance dues payable to the feudal lord at the point at which the fee passed to the tenant's heir or on the occurrence of other events such as ward-ship or marriage.³⁹ Land could be conveyed 'to use' to 'friends.'⁴⁰ This meant that the friend –or more precisely the friends had possession of the land. If one of the seised friends died, then, provided that a number of friends had been seised as tenants in common, there was no change

³⁵ Maitland, op. cit, n.1, at p. 53.

³⁶ id., at p. 55.

³⁷ id.

³⁸ id.

³⁹ id.

⁴⁰ id.

of ownership and the dues payable on death were avoided. Provided that the *cestui que trust* had confidence in the friends that held the property, the heir of the original tenants could ‘enjoy’ the benefits that title to property brought whilst avoiding the duties that were linked to seisin. The ‘demand for personality’⁴¹ is thus satisfied- the assets have an owner and the state has not had to ‘bestow’ personality.

After this examination of medieval jurisprudence, we can return to Maitland’s main point:

It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends.⁴²

This passage uses a very interesting set of metaphors that contrasts the living and the dead, the honourable and the dis-honourable. The reality of ethical personality is evoked through the metaphor of the club as a living body, the unincorporated association (holding its property in trust) whose identity comes from those real human beings who compose it. Their honesty and honour can be translated into the good name and reputation of the institution. The technical argument would be that the trust allows the unincorporated association to have a legal form that articulates its ‘real’ being. To understand this argument one needs to know where metaphors begin and end. The figure of the club as ‘living being’ is apt. It expresses a doctrine that gives form to desire. Unless such doctrines and vehicles (such as the joint stock company) are re-united with honesty and honour they express the mere instrumental utilitarianism of commercial life: contracts and dividends. Hinted at in such a sentiment is a critique of market relationships. Commerce might be necessary but without spirit is, it is death in life.

If we allow that in the passages above we have been following Maitland’s desire we can see that his jurisprudence of the trust traces a path through medieval and early modern history to arrive at the present. In the passage quoted in the paragraph directly above, we can see that Maitland presents this vision as one of ‘honour.’ We now want to examine this theme a little further. At this point we want to move away from doctrinal discussions of the history of equity and examine how Maitland’s metaphors operate as both part of his rhetoric, and how his work was received in Anglo-American jurisprudence. It is indeed intriguing that Maitland’s work was a point of reference at the end of nineteenth and the beginning of the early twentieth centuries. The question of the relationship between law and society had become pressing for a jurisprudence that sought to distinguish itself from the rigid legalism of dominant formalist approaches. The issue- which brought together an engagement with the texts of Maitland and Hegel- was how to carry forward a new way of thinking about the form of the state and the nature of legal institutions. What language should jurisprudence use to speak of new realities?

How to Talk About Ethical Life

⁴¹ *id.*, at p. 58.

⁴² *id.*, at p. 303.

Metaphors are constructed through intellectual labour. It is the task of the historian who uses metaphor to articulate a compelling vision of the community as coherent and whole. Rather than an exercise in ideological mystification, this is the work of sensibility. The historian brings together themes drawn from philosophy, history and law – not in indigestible lumps- but in a language that can be understood by English gentlemen. As a writer who concerns himself with what might seem obscure legal doctrines, the historian faces a particular problem in speaking to his audience. In *Trust and Corporation*, Maitland constantly returns to the peculiar distance between technical terms and the language of honest men with commercial sense. He acknowledges the differences between the lawyer, the business man and the professor. Despite their different concerns, these men are united in a culture that, whilst it might be organised around markets, is so much more than buying and selling:

What the foreign observer should specially remember (if I may be bold enough to give advice) is that English law does not naturally fall into a number of independent pieces, one of which can be mastered while the others are ignored. It may be a clumsy whole ; but it is a whole, and every part is closely connected with every other part.... let us [consider the legal form of] the Church of Rome (as seen by English law), the Wesleyan ‘‘ Connexion,’ Lincoln’s Inn, the London Stock Exchange, the London Library, the Jockey Club, and a Trade Union. Also it is to be remembered that the making of grand theories is not and never has been our strong point. The theory that lies upon the surface is sometimes a borrowed theory which has never penetrated far, while the really vital principles must be sought for in out-of-the-way places.....⁴³

Law is a ‘clumsy whole’- a complex set of inter-relations. Now, however, we also ‘have to remember’ that ‘grand theory’ gets in the way of a proper sense of this ‘whole.’ Its ‘vital principles’ must be found in the study of specifics. These are really only ‘out of the way places’ for the sweeping analysis of ‘grand’ theory that would prefer metaphysical abstraction. The ‘out of the way places’ are actually not out of the way at all. They are those institutions that give form to our lives: ‘the Wesleyan...Lincoln’s Inn, the London Stock Exchange, the London Library, the Jockey Club, and...Trade Union[s].’ This approach does not reject philosophical speculation. Rather, it is an exercise in what might be called ‘rooted’ speculation, or a questioning of the institutions that we define, and which define our lives. Maitland is elaborating a way of writing and thinking that captures the true spirit of English institutions (which, interestingly, includes Trade Unions as well as the London Stock Exchange).

So, conversations between professors, lawyers and men of business reveal, in myriad different ways that the spirit of ethical life is at work within English history. If history is animated by spirit, the past is never gone or forgotten. However, this concern with spirit or ethos may still seem like tilting at windmills. Why trouble oneself with such a perverse endeavour; reading against the grain of received wisdom that opposes the pluralist historian with the abstruse metaphysician? Our response to this question is that the very ‘separation’ of Hegel and Maitland has effectively prevented the development of a way of thinking that is alive to the fundamental problem with which we have been grappling. It has obscured the role that metaphors

⁴³ Maitland, op. cit., n.1, p. 401.

play in the creation and sustenance of ethical modes of life. Indeed, it has resulted in a jurisprudence where questions of metaphor and sensibility, of voice and style are seen as secondary – ‘rhetorical trappings’ - rather than central to the articulation of institutions in which we find ourselves. These are, of course, old themes, but reading Maitland and Hegel together directs our attention to something relatively new.

Given the complexity of this concern we can focus only on one particularly significant moment: the attempt to develop a sociological jurisprudence at the turn of the nineteenth century. The problem of a jurisprudence capable of addressing sociological and historical realities takes us to a particular set of questions about the ‘spirit’ of the institutions of the common law. We will follow these themes through some brief comments on the work of Holmes, Thayer and Pound. Maitland was significant for these scholars because he had an instructive faith in the way in which institutions could develop organically to serve social ends. However, for all Holmes’ concern with law in ‘the lives of men’⁴⁴ a prejudice against metaphor (and Hegel)⁴⁵ narrowed the critical space in which Maitland could be understood. Perhaps there is another reason that meant that metaphor had to be downplayed and ignored. This takes us to ethics, but to deal with this point we need to go back to the fundamental reason why Maitland was misread.

Even those open to Maitland and alive to his organic vision of the common law tended to read his work in a somewhat narrow way. For Thayer, Maitland might be able to direct our attention to the detailed, historical study of sources, but any concern with metaphor was an irrelevance.⁴⁶ This theme emerges in a somewhat different but more pronounced way in Pound’s criticisms of mechanical jurisprudence that were the leitmotif of his influential account of sociological jurisprudence. Sociological jurisprudence saw through mechanical jurisprudence. It presented itself as flexible, scientific and pragmatic. Mechanical jurisprudence was something of a catch all phrase. It covered the thinking of formalist and analytical schools, as well as philosophical jurisprudence. The latter was in some ways the most suspect. It dealt with abstractions and ingenuity, creating schemes of conceptual niceties that bore no relation to the pragmatics of law or a legal science.⁴⁷ It was also probably the case that mechanical jurisprudence was responsible for bringing about equity’s ‘decadence.’⁴⁸ Sure, Maitland’s careful, positivist work on the sources of English law was a vital resource but, broader concerns with questions of spirit could be dismissed as dangerous abstractions.

Why was Maitland so dramatically misread? The answer by now should be obvious. It was because Hegel was misread. Discounting Hegel’s insights, meant Maitland’s work was received in a most restricted way. If the task of sociological jurisprudence was to allow people to ‘feel and see’⁴⁹ the spirit that animates the law, then these questions of affect would forever remain invisible to this most materialistic of sciences. In its most nightmarish form Hegelian jurisprudence was alien to the spirit of the common law. Hegel’s philosophical jurisprudence represented a ‘form of over-abstractness’ which ‘instead of resulting in a healthy critique of dogmas and

⁴⁴O.W Holmes, ‘The Path of the Law’ (1907) 110 *Harvard Law Review*. 1005.

⁴⁵ *id.*

⁴⁶ J.B. Thayer, ‘The Teaching of English Law at Universities’ (1895) 9. *Harvard Law Review*. 169

⁴⁷ R. Pound, ‘Mechanical Jurisprudence’ (1908) 8. *Columbia Law Review*, 605.

⁴⁸ R. Pound, ‘The Decadence of Equity’ (1905) 5. *Columbia Law Review*, 20.

⁴⁹ Pound, *op. cit.*, n. 47, p. 608. Quoting Sir George Jessel.

institutions...lead[s] to empty generalities.’⁵⁰ However, it was precisely through its refusal of ingenuity and sensibility that sociological jurisprudence failed to engage with the ethos of the institutions that it was studying and fell victim to the very mechanistic nature of thought that it denounced. At the same time, ignoring Hegel had a positive payoff. Any critical examination of law and society prompting difficult ethical and political questions could be left to one side. Policy scientists would be able to dispute technicalities with other policy scientists.

Our point is not so much that jurisprudence stopped speaking to ‘gentlemen’ and became an increasingly specialist language, but that a way in which law could have been studied and talked about was shut down (whether or not critical legal studies picked up on these themes in a somewhat later period is a moot point). Sociological jurisprudence might have been constituted as a study of law and metaphor. The emergent field at least had the potential to deal with the ‘structuring’ of legal subjectivity through modes of recognition linked to nascent market forms. In the end, perhaps the institutional and disciplinary spaces were simply not available and the intellectual and political prejudices of the protagonists ill-suited to ethical enquiry. After all, to read Maitland and Hegel properly is to see jurisprudence (sociological, philosophical or otherwise) as animated by a set of ethical questions: how should we live; what do we want to become? These are necessarily speculative concerns, but, for this line of thought, such questions of social being cannot be separated from normative concerns. As Maitland and Hegel showed, this does not mean that we must accept the form of the state, nor the seemingly autonomous rules of the market. Social and economic life is not defined by rules that are somehow ‘there’ or immanent in the phenomena observed. Institutions are creations. Behind them are the metaphors that fashion how the expression of our inner lives. Anything made can be re-made.

Indeed, reflecting on the art of writing history, Maitland asserted that ‘[s]omething not unworthy of philosophic discussion’ is necessary in thinking about law and ethics.⁵¹ In *Ethical Personality and Legal Personality* Maitland went on to argue that ‘ethical philosophy’ and the ‘English’ concern with ‘ethics’ is ‘a byproduct of the specifically English history of English law.’⁵² Rather than following Pound and Holmes and criticising the ‘empty generalities’ in such thinking, we can read it as an application of ‘Hegelian’ critique where metaphor, ethics and history are fused together. This, then, is the key to ethical life. Ethical life is an invention, a cultural creation; a club or class; a way of belonging; something that can be passed from father to son, teacher to pupil. Ethical life is a way of writing history, of talking to an audience. It is the way in which men relate to each other and get things done. Ethical life is an English version of *sittlichkeit*. Maitland’s ‘Englishmen’ reflecting on themselves and their history are versions of Hegel’s notion of the thinking/doing subject rooted in a culture of mutual recognition.

So, where does this leave us? Where does a metaphor begin and end? The ideas that travel under the names of Hegel and Maitland are themselves perhaps metaphors and can be animated by different desires. It may be that a more authentic account of an ethics of law must take us beyond Hegel and Maitland’s rather limited critique of the market and further interrogate the voices, concepts and texts define ‘us’. However, even if we are to press ahead with such a critique, it may be that we

⁵⁰ R. Pound, ‘The Scope and Purpose of Sociological Jurisprudence’ (1911) 24. *Harvard Law Review*.610.

⁵¹ Maitland, *op. cit.*, n.10, p. xii

⁵² *id.*

must also carry forward the fundamental insights of philosophical jurisprudence.
Ethics are about living well. And writing well.