Jeanne Lorraine Schroeder

The Four Lacanian Discourses

or Turning Law Inside-Out

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This book proposes a taxonomy of jurisprudence and legal practice, based on the discourse theory of Jacques Lacan. In the anglophone academy, the positivist jurisprudence of H.L.A. Hart provides the most influential account of law. But just as positivism ignores the practice of law by lawyers, even within the academy, the majority of professors are also not pursuing Hart's positivist project. Rather, they are engaged in policy-oriented scholarship—that tries to explain law in terms of society's collective goals—or in doctrinal legal scholarship—that does not try to describe what law is, or to supply justifications for it—but which examines the "internal" logic of law. Lacan's discourse theory has the power to differentiate the various roles of the practicing lawyer and the legal scholar. It is also able to explain the striking lack of communication between diverse schools of legal scholarship and between legal academia and the legal profession.

Although extremely influential in Europe and South America, Lacanian theory remains largely unexplored (in the English-speaking world) outside of the field of comparative literature. In taking up the jurisprudential ramifications of Lacan's work, *The Four Lacanian Discourses* thus constitutes an original contribution to current theoretical and practical understandings of law.

Jeanne Lorraine Schroeder is Professor of Law at the Benjamin N. Cardozo School of Law, Yeshiva University, New York.

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Introduction

Jurists disagree on the nature of law, no doubt because of its different and seemingly contradictory aspects. Jacques Lacan's theory of discourse, however, provides a means to explain the interrelations between these different dimensions.

Lacan's discourse theory appears first in his Seventeenth Seminar, *L'envers de la psychanalyse*[1] delivered in the 1969–70 academic year. (It was, incidentally, delivered in a law school.) Russell Griggs translates *l'envers,* as "other side." It has, however, the additional connotations of reverse, inverse, or lining or facing (as of a jacket). Perhaps the English title should be "*Psychoanalysis Inside-Out*."

Lacan defines "discourse" as "a social link, founded on language."[2] In *L'envers de la psychanalyse* Lacan proposes four discourses: the master, the university, the analyst, and the hysteric.[3]

Each discourse is the inverse of another discourse. Lacan identifies the master's discourse as the inverse of the analyst's. The master is, therefore, the "other side" of psychoanalysis referred to in the title.[4] Although Lacan did not address the issue, implicitly the university's discourse is the "other side" of the hysteric's. Just as Lacan thinks that the analyst's discourse is uniquely positioned to critique the master's, I argue that the hysteric's discourse provides a unique perspective for criticizing the university's.

This inverted relation of discourse is an example of a single paradox that underlies every aspect of Lacan's theory, the "sexual impasse." At first blush, this phrase invokes naive feminism, condemning "phallocentrism" and embracing idealized womanly values. Nothing could be further from the truth. Lacan's concept is divorced from both anatomy and "gender." The terms masculine-feminine do not refer to persons either biologically or socially identified as male or female. Rather, they refer to incompatible ways of confronting alienation and contradiction. The "masculine" attitude is denial. It attempts to resolve contradiction in order to create a complete and closed social universe. The feminine attitude is acceptance of contradiction's inevitability.

From the perspective of the sexual impasse, the master's and university's discourses are structurally discourses of *power* and, therefore, masculine. The

analyst and hysteric are structurally discourses of *critique* and, therefore, feminine. The masculine does not merely fail to hear, it affirmatively refuses to acknowledge the feminine. Indeed, the masculine side of personality creates itself through *repression* of the feminine.

Based on these definitions, no individual could be exclusively masculine or feminine. Similarly, no one can speak within only one discourse.[5] Every individual moves from discourse to discourse.[6]

It has been suggested that from a Lacanian perspective, law is located within the two discourses of power.[7] I disagree. Law cannot be so limited. Being part of the symbolic order it contains all four discourses and reflects the feminine, as well as the masculine, position. Consequently, jurists and lawyers engage in all four discourses.

In terms of law, the power discourses take the perspective of the governor, the critical discourses, that of the governed. The governor seeks power over others; the governed seeks power over self—i.e. personal freedom.

This book proceeds as follows. In the first chapter, I introduce discourse theory and certain related concepts of Lacanian theory. This book is addressed to a non-clinical audience and, therefore, I have tried to translate Lacan's technical terminology into ordinary language.

I then devote a chapter to each of the four discourses showing how they relate to legal scholarship and practice. Of course, just as no individual can limit herself to one discourse, no legal theory or practice can do so completely. Nevertheless, because they can be dominated by one discourse, discourse theory serves a useful analytical function.

The first discourse, that of the master, is exemplified by H.L.A. Hart's concept of law. Law is separate from morality in the sense that law's status as law is logically independent from its moral or other substantive content. It is generally assumed that Anglo-American analytic philosophy, in which Hart's positivism is situated, is antithetical to speculative or critical theory. I show that, in fact, there are unexpected agreements between them. Consequently, from a Lacanian perspective Hart's concept of law is accurate. It is, however, incomplete.

Even in the academy, the majority of professors are not engaged in Hart's positivist project. Policy oriented scholarship explains law in terms of society's collective goals. Policy-oriented scholarship and, in particular, the law-and-economics movement which dominates in America, falls primarily within the university's discourse—i.e. rule by experts. Lacan argues that, although (as its name suggests) the university discourse dominates academia, it is not the search for truth it claims to be. Rather, it is a veiled attempt to gain power by manipulating others to achieve a goal. It claims expertise to explain and justify the law. It defines rationality as ends-means reasoning—the ability to choose an appropriate way of achieving a pre-given end. This is completely diverse from the definition of rationality adopted by the speculative moral philosophy and psychoanalysis—harbingers of the critical discourses. These

define rationality as the ability to choose *ends*. The university's discourse fundamentally fears the freedom to choose ends: subjects must be coerced to achieve *society's* ends. The critical discourses try to help the subject to achieve freedom and reconcile her subjective desires with the objective ends of society.

Lacan, as an analyst, and I, as an hysteric, are harsh in our critiques of the power discourses. Indeed, the chapter on university discourse is largely a polemic. I should not, however, be misinterpreted as wishing to do away with the power discourses. Nor because I identify myself as a feminist and the power discourse as masculine should I be misinterpreted as a Gilliganesque "cultural" or "different voice" feminist who extols supposedly feminine values. The individual subject and the social order require both the masculine and feminine positions and all four discourses, and none can be understood except with respect to the others. All societies require a regime of positive law which officials recognize and apply without regard to their subjective opinion as to its content. Societies need to identify collective goals and adopt rules designed to force their members to act in ways as to achieve their policies. A Lacanian critique, therefore, cannot attack the *existence* of discourses of power. It can only point out their tendency to repress the two critical discourses which are necessary for the actualization of human freedom. As I discuss, the relationships of the discourses are cyclical. Although the two critical discourses critique the discourses of power, they will necessarily also regenerate *new* discourses of power.

In the chapter on the analyst's discourse, I relate analysis not only to the counseling of clients but also to legal interpretation. As the analyst's discourse is the inverse of the master's, Lacan turns Hart's metaphor of interpretation inside-out. Hart thinks there is a large core of determinate "easy cases" surrounded by a small penumbra of indeterminacy. Lacan insists that the symbolic is always in a state of flux and slippage. There can be no Hartian "core" of certainty. Rather, through interpretation we build a temporary shell of meaning around the uncertainty of the symbolic.

Given his attitude toward signification, Lacan is easily misunderstood as a post-modernist who does not believe in objective truth. But he is no sophist who believes that texts are infinitely malleable. Lacan's goal is precisely to show how truth can be found and meaning produced *despite* slippage in signification. Lacan implies that although the law may be indeterminate *ex ante*, it is nevertheless determined *ex post*. The analyst's discourse is the process through which the subject establishes determinate meaning out of multiple potential significations.

In the last chapter, I turn to my personal favorite, the hysteric's discourse. It is the only discourse in which the subject subjected to the law speaks in her own voice. It is also the one that directly challenges the regime of positive law established by the master's discourse. The hysteric's discourse reverses the process of separation imposed by the master's discourse and submits positive law to moral critique.

In *L'enverse de la psychanalyse* Lacan calls Hegel the "most sublime hysteric."[8] And so I consider Hegel's conception of morality or more accurately "right". This enables me to complete the analysis raised in the chapters on the master's and university's analysis—what is morality and how does it relate to law?

For Hegel and Lacan, right is not a fact, but an act—a verb, not a noun. It does not pre-exist descriptions but is something one does. Right only appears in the righting of wrong. It can never be established as a matter of positive law, but only through its challenge.

The hysteric is no anarchist, however. Law is her desire. The feminine does not seek to supplant the masculine but to *supplement* it. Consequently, the hysteric critique of law never seeks to abolish law, but to make it live up to its claims to justice. As soon as it rights a specific wrong or overturns a specific unjust law, as certain as night follows day, a new master's discourse of positive law is established and the cycle of discourse begins anew.

This book is written primarily in the hysteric's discourse. Like all subjects, however, I on occasion write in other discourses as well. I seek to understand the various ways that law is spoken by both academic and practicing lawyers. Although I believe that my typology is useful for legal analysis I do not in this book make concrete policy recommendations. To do so would be to write in the university's discourse. The university's discourse is necessary for any legal system to exist, but it is antithetical to individual freedom in that it treats the subject subjected to the law as a means to the ends of others. In contrast the hysteric's discourse, along with the analyst's discourse, tries to help the legal subject subjected to the law decide what *she* wishes from the law in order to actualize her freedom.

My project is different from Lacan's. I am a lawyer trying to develop a feminist jurisprudence. To state the obvious, Lacan was a clinical psychoanalyst, not a jurist. Although he occasionally refers to law in the abstract, he evinces no particular knowledge of legal systems or jurisprudence. However, following Slavoj Žižek and others, I believe there is implicit political, ethical, and I would add, legal content in his work.

Lacan famously presented an ethics of psychoanalysis in his Seventh Seminar of the same name.[9] While I am highly influenced by that work, an ethics of psychoanalysis cannot be an ethics of law which, in my formulation, must be an ethics of hysteria. Moreover, I am equally influenced by other theorists in the speculative tradition, particularly Immanuel Kant and G.W.F. Hegel. Accordingly, this book is application, not an explication, of certain aspects of Lacanian theory in ways that Lacan would not have anticipated. If Lacanian theory purports to explain the relationship between the subject and the symbolic order of intersubjective relationships, then, by its own terms, it should be extendible to the relationship to the legal subject and law. Nevertheless, the theories I propose and conclusions I make are purely my own.[10]

Notes

1 Jacques Lacan, The Seminar of Jacques Lacan Book XVII: The Other Side of Psychoanalysis (Russell Grigg trans., Jacques-Alain Miller ed. 2007) [hereinafter, Lacan, Seminar XVII].

2 Quoted in Ellie Ragland, *The Discourse of the Master*, *in* Lacan, Politics, Aesthetics 127, 128 (Willy Apollon and Richard Feldstein eds 1996).

3 Lacan, Seminar XVII, *supra* note 1, at 19–20. Lacan expanded on these discourses in later seminars. See e.g. Jacques Lacan, the Seminar of Jacques Lacan Book XX: Encore, On Feminine Sexuality, the Limits of Love and Knowledge 1972–3 73 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998). I concentrate on Lacan's initial elegant schema.
Lacan left open the possibility of other discourses, but he thought that the four he identified had especial significance in modern society. See e.g. Bruce Fink, The Lacanian Subject: Between Language and Jouissance 198 n.5 (1995) [hereinafter, Fink, Subject].

4 Lacan, Seminar XVII, *supra* note 1, at 99.

5 Fink, Subject, *supra* note 3, at 129–30.

6 *Id*. at 130.

7 See Jamie Murray, *An Erotics of Law: Lacanian Psychoanalysis and Legal Theory* 105 (1999) (unpublished Ph.D. thesis, Birkbeck College, University of London) (on file with author). I served as the external examiner at Dr Murray's defense of his dissertation.

8 Lacan, Seminar XVII, *supra* note 1, at 38.

9 Jacques Lacan, The Seminar of Jacques Lacan, Book VII: The Ethics of Psychoanalysis 1959–60 319 (Jacques-Alain Miller ed. Dennis Porter trans. 1986).

10 Earlier versions of some of the ideas in this book were in Jeanne L. Schroeder, *His Master's Voice: H.L.A. Hart and Lacanian Discourses Theory,*18 Law and Critique 107 (2007); Jeanne L. Schroeder and David Gray Carlson, *Does God Exist?: Hegel and Things,* 4 (*a*): The Journal of Culture and the Unconscious 1 (2005); Jeanne L. Schroeder, *The Lacanomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability* 15 Yale J. L. and Human. 347 (2003); Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality and Legal Scholarship* 44 Wm and Mary L. Rev. 263 (2002); Jeanne L Schroeder, *Just So Stories: Posnerian Methodology*, 22 Cardozo L. Rev. 351 (2001); and Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship,* 79 Tex. L. Rev. 15 (2000).

Chapter 1

Quadripodes and mathemes

Structure

The quadripode

Attempting to systemize psychoanalysis, Lacan frequently expresses his theories in quasi-mathematical formulations—mathemes. These mathemes can be mystifying.[1] The mathemes relevant to the four discourses, however, reveal a single shared structure vividly illustrating the relationships between and among them: one discourse can be positioned to critique another, and how one discourse can or cannot speak or listen to another directly. Specifically, they reveal how one discourse can be the other side (*l'envers*) of another.

Each discourse is illustrated by a four-footed matrix—the quadripode:

$$\frac{\text{agent}}{\text{truth}} \longrightarrow \frac{\text{other}}{\text{product/loss}^2}$$

The four positions that form the feet of the quadripode remain fixed while four terms rotate through the positions. In the upper left-hand corner is always the "agent"—the person (or institution) "speaking" in the discourse.[3] The agent addresses the "other," in the upper right-hand corner. This other could be a person, institution, or social structure.[4] The relationship of "addressing" is designated by the arrow moving from the agent to the other as addressee.[5]

On the lower left, beneath the agent, is the agent's truth.[6] The agent is separated from its truth by a "bar."[7] This indicates that the term in the upper register is radically separated from the term in the lower register.[8] In this case, the bar between the agent and the truth designates that the agent is separated from his own truth.[9] There is a disjunction between expressed message and true meaning, between appearance and actuality.[10] When an individual acts as the agent it could represent his inability to recognize his motive.

The concept of the bar—a constitutive gap, non-relationship, or impasse—is fundamental to Lacanian psychoanalysis.[11] Most remarkably, sometimes

this bar does not merely separate two ideas, but is internal to one single idea. It is, for example, the same bar that bifurcates the "S" of subjectivity in the matheme of the split or barred subject ($), to which I soon turn.

On the lower right, beneath the addressed other, is the result of the discourse.[12] This result can be positive or negative—something may be produced by or lost in (excluded from) the discourse. In the case of the two power discourses (the master's and university's) the result is never intended. In contrast, the two critical discourses—which are *l'envers* of the power discourses—are aimed precisely at producing the result. There is no arrow connecting truth to product. This is because no direct relationship exists below the bar. Indeed, there is a fundamental, impossible non-relationship between truth and product. Later, I will identify this as the "sexual impasse." Any relationship between them only comes about indirectly through the mediation of discourse.

The four mathemes

Four mathemes revolve counterclockwise through four positions of the quadripode: S_1, S_2, $, and *a*. These are the: i) the "master signifier"; ii) "knowledge" or the "signifying chain"; iii) the "barred subject"; and iv) the "*objet petit a*," respectively.[13]

Matheme	Concept designated
S_1	master signifier
S_2	knowledge
a	*objet petit a*
$	barred subject

Lacan starts with the master's discourse—*l'envers de psychanalyse*—in which the master signifier gives orders to the signifying chain of knowledge:[14]

$$\frac{S_1}{\$} \longrightarrow \frac{S_2}{a}$$

By rotating this founding discourse counter-clockwise we produce, first, the university's discourse; in which the agent of knowledge addresses an absence—the *objet petit a*:

$$\frac{S_2}{S_1} \longrightarrow \frac{a}{\$}$$

Next, by another counter-clockwise rotation, we obtain the analyst's discourse in which the analyst questions the split subject from the position of the subject's own negativity:

$$\frac{a}{S_2} \longrightarrow \frac{\$}{S_1}$$

Finally, we come to the hysteric's discourse, in which the split subject rails against the master:

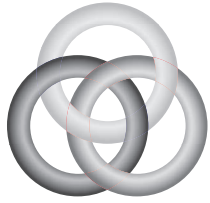
$$\frac{\$}{a} \longrightarrow \frac{S_1}{S_2}$$

This process is circular. A further rotation of the hysteric's discourse brings us back to the master's. The cycle begins anew. Here I raise two points about the process. First, each discourse necessarily proceeds from an earlier discourse, and creates a succeeding discourse. Each needs the other three—there can be no isolated discourse. Second, the circle of discourse threatens to be vicious. A means must be found to stop temporarily the vertiginous spinning so that the subject might clear her head and actualize her freedom by taking control of, and responsibility for, her life. Creating these means is one of the goals of the analyst's discourse. A similar means will be needed to stop the slippage of signification in order for us to fix temporarily the meaning of law in order to right wrongs. This is interpretation.

How can the process of discourse both be circular yet "start" with the master's discourse? One must consider the nature of the progression proposed by Lacan. Lacan works within the Hegelian philosophical tradition.[15] In my reading, he does not purport to give a prospective, predictive account of the empirical process whereby an actual individual gains knowledge. Nor does he give an historical account of the discourses throughout Western history. Rather, his is a retroactive (speculative) reconstruction of the internal logic of our culture (and human subjectivity) from a modern perspective. Today we have (at least) four discourses that have a certain relationship to each other. This suggests that each discourse logically requires that each of the others will eventually be developed, not that they actually have developed in any specific order.

Linguistics: the three orders

Before we consider the four mathemes, I briefly introduce Lacanian linguistic theory. Lacan posits that the subject is split between three orders—the symbolic, the imaginary, and the real.[16] The symbolic order consists of intersubjective relations including language, law, sexuality, and signification.[17] Another term for the symbolic order is the Big Other. As it includes law, the symbolic is my primary focus. However, the symbolic is inextricably linked to the other two orders. Lacan illustrates the inter-relationship of the three orders with the metaphor of the interlinked rings of the "Borromean knot:"[18]



The imaginary order is that of imagery, complementarity, and meaning.[19] The real order is that which cannot be reduced to, or which escapes, the other two.[20] The real is our sense that there is an external reality that cannot be reduced to our words or pictures. Our intuition that there is an object world outside of our psyche is located within the real. But so is our understanding of God (in the sense of the Absolute), death, and everything else that we sense is beyond the limitations of human speech and imagery.[21] The real can be thought of as Kant's misunderstanding that there is a noumenon, a thing-in-itself, that is beyond our phenomenological understanding. By this I mean that "real" is not the noumenon itself but the misperception that there is a noumenon distinct from the empirical phenomenal world. The "real" is not, therefore, the physical reality or the "object world" *per se*. All three Lacanian orders are human reinterpretations of experience.

Empirical reality falls within Kant's category of phenomena. Lacan's conception of the real does not question the existence of phenomena, but questions Kant's theory that there exists in addition to empirical reality, some nonempirical, purely rational thing-in-itself that exists outside human understanding (the noumena).[22] This sense that the thing-in-itself exists outside of empirical phenomena is itself only an appearance generated by our misunderstanding.[23]

Kant believes that only noumena are hidden, and one can know phenomena through experience. For Lacan, in contrast, the real is not an affirmative thing-in-itself. It is negativity as such which is not *beyond* the symbolic, but entirely within it. The real is the *limit* to the symbolic, logically required for its very existence.[24] The positivity of the symbolic can only be perceived because of the negativity of the real. As such, Lacan is an unwitting Hegelian.

Positive law is symbolic. Law, therefore, should have a similar structure to language. Thus, Lacan agrees with H.L.A. Hart that a concept of law requires a theory of language. However, in contrast to Hart, a Lacanian jurisprudence insists that the symbolic of positive law must necessarily require an imaginary and real law. Specifically, although Lacan agrees with Hart that positive law (the symbolic) must be distinguished from what Hart confusingly calls "morality," Lacan insists that the symbolic of law cannot exist or be understood without the real of morality *per se*. I discuss the similarities and differences between Lacanian and Hartian thought, as well as the vocabulary of morality, in subsequent chapters.

The symbolic order is characterized by signification. Modifying Ferdinand de Saussure's linguistic theory, Lacan expresses signification as S/*s*—a signifier (S) stands for a signified (*s*).[25] This idea has been parodied as a crude one-to-one identification of a word (a signifier) with some form of pre-existing "thing" or concept (a signified).[26] This is a grave misunderstanding giving precedence to the thing signified. I call such one-to-one mirror image identification "meaning," which characterizes the imaginary, not the symbolic.[27]

Signification's matheme (S/*s*) invokes the *bar* between S and *s*. This bar is not the mathematical division sign—signifier and signified do not form a ratio or any other relationship.[28] Rather, it is the same bar that appears in the quadripode of the discourses and that splits the barred subject. It indicates that there is no necessary, natural, or simple one-to-one relationship between signified and signifier.[29] Any relationship is logically arbitrary and contingent and is only temporarily imposed by the speaker's will. Or, more radically, the bar is the split subject herself who associates signifier with signified.

The bar further illustrates that language does not have any *direct* relationship to the external world. Although a signifier stands for a signified, each signified is itself a signifier, standing for another signified, in turn standing for another signifier *ad infinitum* in an unending chain of signification.[30] This may, somewhat simplistically, be reflected in the familiar concept that no word has meaning in the abstract, but only within the context of a language having a vocabulary and grammar. Similarly, no individual law has meaning in the abstract, but only within the concept of a legal system having secondary rules (of change, recognition and adjudication) and principles of interpretation.

Consequently, signification is always in a state of "slippage" and ambiguity.[31] Signification is, therefore, a state of anxiety—signifiers are fraught with meaning. Lacan is, however, no vulgar post-modernist[32] or simple-minded college-sophomore deconstructionist who denies the efficacy of language. To communicate and interpret is to momentarily stop slippage. In legal terminology, although laws may be indeterminate *ex ante*, they are nevertheless determined *ex post* in their application. Thus, Lacan deviates from Hart by denying that there could be easy cases completely within a hard core of law. All cases fall within the penumbra. Interpretation is the process by which we move them into the core.

More accurately, just as the analyst's discourse is the other side of the master's discourse, Lacan turns Hart's metaphor inside-out. There is no core of determinate law surrounded by a penumbra of indeterminacy. Rather, within the symbolic order of signification, there remains an indigestible kernel of indeterminacy; the "real"[33] around which we build a temporary imaginary shell of determinate meaning.

The simple point that satisfies our present purposes is that the symbolic is in a state of flux. It is a work in progress and, therefore, always incomplete.

In contrast, the real is a wholeness, a completion, a permanence, and an integrity that the symbolic can never achieve.[34] It includes Kant's vision of an eternal noumenon lying beneath ephemeral phenomena. The real is a subject who is not split (castrated). The real, however, is also a horrifying nightmare: a world of no distinctions, no consciousness, and no subjectivity.[35] It is a mythical primal unity with the universe that must have existed before one was born, and to which one might return when one dies. The real is where all movement stops.[36]

We seek relief from the ever-changing, partial world of the symbolic, and from the primal, dead fullness of the real, in the imaginary—the realm of meaning. The imaginary is a reassuring daydream designed to cover up the banal disappointment of the symbolic and the horrifying nightmare of the real. Meaning, in contrast to contingent context-bound signification, is a dream of perfect correspondence, well-ordering, commensuration, and self-identity between sign and object.[37] It is not "X stands for Y," but "X is Y." Lacan associates the imaginary to animalistic thinking.[38]

The imaginary is mirror images and simple negations where everything always is or is not.[39] The imaginary is a world without contradiction or ambiguity. It is the fantasy that one can preserve the reassuringly static aspect of the real without submitting to its terrifying deadly aspect of atemporal negativity. The imaginary is the fantasy that one can achieve the freedom, moral responsibility and positivity of the symbolic without risking its unpredictability and ceaseless change.[40]

In the imaginary, the subject builds fantasy structures to bind the three orders together in order to convince himself that the symbolic order in which he acts is like the real he desires and dreads.[41] It is these fantasies, these fictions, that enable him to get through the day, and live his life.[42] Despite the terminology, one should not condemn the imaginary as delusion—it is also creativity. The imaginary requires *acts* of *imagination* that temporarily stop the slippage of signification to allow communication to occur. Interpretation is not a passive reception of meaning, but an act of will by which one subject reaches out to communicate with another.

Discourse

The master signifier

The quadripode's first matheme is S_1, the "master signifier." Although the symbolic order is in a state of flux or slippage, it is necessary to freeze the shifting of the unending chain of signifiers, albeit contingently and temporarily, in order for communication to occur and the symbolic to function.[43] One way we do this is through the adoption of "master signifiers."[44] These signifiers are the keys that give meaning to the other signifiers. A master signifier can stop the chain of signification because it stands for

nothing but itself. In it signifier and signified are one and the same.[45] It, therefore, can serve as the period that momentarily ends the run-on sentence of signification. It is crucial that a symbolic order has master signifiers. It may also be the case that all master signifiers have content as an empirical matter. This master signifier's content, however, is from a formal analytical perspective, contingent, and therefore structurally irrelevant.[46] The S_1 as such forms the structure of the symbolic.

The classic example of master signifiers are political masters who rule through a cult of personality, such as *Der Führer* or *Il Duce*. But signifiers are not necessarily people, but functions and, as such, can take the form of abstract concepts. Mark Bracher maintains that "quite common master signifiers would include words like 'God,' 'Satan,' 'sin,' 'heaven,' and 'hell' in religious discourse and terms such as 'American,' 'freedom,' 'democracy,' and 'communism' in political discourse."[47]

Master signifiers of the law-and-economics movement might include such words as "efficiency" and "rationality." For Hartian positivists they include "order" and "certainty"—Hart's core of easy cases.

A perfect example of a master signifier is money in a market economy. Money is the only thing in an economy that has no substance (use value) of its own. It exists only as a placeholder for the use value of other things. By doing so, it ties down the market by treating incommensurable things as though they were commensurable, thereby giving them exchange value.[48]

Probably the single most important master signifier, or unifying idea, in America is the ego: the self-identical, autonomous individual of liberal political philosophy. Lacan emphasizes that because this is a master signifier of modern political and jurisprudential theory, it is an important master signifier in the university's discourse.[49] It is, of course, the rational actor who is of central importance to the neo-classical price theory that underlies much of law-and-economics which I discuss later. The ego is an imaginary construct. The ideal ego is the image one forms of oneself in order to make sense of one's sense of self—it is the image of what one wants to be. Although one's imaginary self is a necessary part of one's personality, one's "true" (or complete) self cannot be reduced to the ego.

Because the master signifier stands for nothing but itself, it signifies nothing. Having no signified, it is by definition "nonsensical . . . devoid of reasoning."[50] Lacan's master signifier is functionally an idiot. He doesn't mean anything, and he doesn't want to know anything—meaning and knowledge are functions proper to a slave. The master just is. In the immortal words of Mr Bumble, "the law is a ass."[51] Consequently, the symbolic order is "a tale told by an idiot, signifying nothing."[52] The content of the symbolic must be supplied by the imaginary and the real.

It may sound like I am disparaging the master, and the master signifier, or that I identify mastery with totalitarianism. Although totalitarianism is mastery extended to its obscene logical extreme, this is not Lacan's point.

The moment of mastery is necessary for *all* discourses—all intersubjective relations—to function.[53] The master's discourse can be thought of as the founding "irrational" *Grundnorm*—the leap of faith—that is necessary for the acceptance of any theory.

The crucial point, on which I will expand in the chapter on the master's discourse, is that any particular master signifier is such solely because it serves a function, not because it "deserves" to be a master signifier. Indeed, master signifiers can serve their function in a society even though there is not a shred of evidence supporting the stereotypes on which they are supposedly based.[54] Indeed, as Slavoj Žižek has vigorously argued in his analysis of traditional European anti-semitism—which revolves on a spectral image of "the Jew" secretly pulling the strings—the very lack of evidence for, and the utter vacuity and fantasmic quality of, the stereotype actually make it more powerful.[55]

In theory, anything could be a master signifier—and any rule could be adopted as positive law. In practice, the choice of master signifier is crucial. To say that a master signifier is arbitrary means only that no specific master signifier is *logically* mandated. Rather, a master signifier is always *chosen* by individuals and societies, although sometimes this choice is forced.[56] Hart may be right that we do not identify law by its content but, nevertheless, every law has content. Every choice of a master signifier and every act of legislation is, therefore, an ethical act. This notion means both that one can choose an evil master signifier and that each person bears moral responsibility for her choice of signifiers. In Hart's words, "laws may be law but be too evil to be obeyed."[57]

Knowledge

Ths second matheme is S_2: knowledge, understood as the entire chain of signifiers for which S_1 acts as the master signifier. Although this might at first blush seem to be the most intuitive of the four mathemes, there are some subtleties. "Knowledge" is not limited to that which a subject consciously knows, or of which a subject is aware.[58] Rather, as the entire set of connections within a signifying chain, knowledge is always at least partially unconscious.[59] The subject does not know knowledge, yet knowledge is known by the subject. Consequently, as Bracher explains, "One undergoes psychoanalysis in order to discover this knowledge that is the unconscious—that is, 'in order to know what [one] doesn't know, all in knowing it.'"[60] The subject is, therefore, frequently passive rather than active with respect to a knowledge to which he is subjected.[61]

Once again, Lacan's ideas are subtle and can best be understood in the context of their functions within the discourses. For example, in the master's discourse, in which S_2 takes the position of the other addressed by the master signifier as agent, knowledge is *savoir faire* or know-how. However,

in the university's discourse, in which S_2 takes the position of the addressing agent, it is the claim to expertise.

The barred subject

Although the third matheme in the quadripode is *a*, the *objet petit a*, I discuss it last because an introduction to Lacan's theory of subjectivity is required before we can comprehend this notoriously difficult concept. So, for the moment we will move on to the barred subject.

In the matheme of the split or barred subject ($) the capital "S," stands for the subject. The line, or "bar" that bifurcates it refers to the constituent split that creates subjectivity.[62]

A fundamental thesis of Lacanian psychoanalysis is that the subject is split—castrated, negative, empty, and alienated.[63] Following the Hegelian tradition, the subject is not natural. She is not the autonomous individual existing in the state of nature posited by classical liberal philosophy.[64] This liberal individual or "ego" is an imaginary construct and an essential master signifier of modern democratic theory.

The subject only exists within a specific society. She is formed through the intersubjective relations of the symbolic. Moreover, the subject cannot be limited to the conscious self, but necessarily includes an unconscious as well.[65] Unlike the neo-classic economically rational actor who knows what he wants (or acts as though he does), the Lacanian subject frequently does not know his true desire, may not even want to know and may act self-destructively. The psychoanalytic subject is the speaking subject who functions through language. Similarly, the legal subject is not the liberal individual, but a creation of intersubjectivity.[66] She functions as a subject only insofar as she has rights and duties, and the very concept of rights and duties requires that these must be enforceable against or by the legal subject by or against other legal subjects.[67]

The subject is created by submission to the symbolic order. Biographically, this happens when the child learns first to speak, is otherwise socialized, and becomes an adult with a recognized sexuality and legal rights. This means that, paradoxically, that which seems most internal to the subject—her subjectivity understood as her sense of self—comes from others. Lacan expresses this with the neologism "extimacy."[68] As a result, the subject feels not simply empty, but split and barred from her true self. Moreover, she feels that this state of alienation is something that has been imposed upon her.

Because adults feel split now, but cannot formulate a conscious memory of their infancy prior to the acquisition of speech, the subject forms the unconscious belief that there once was a time when she was not split (i.e. during her infancy).[69] This nostalgic dream of a time before alienation is posited as a primordial unity with the universe, identified with the maternal body.[70]

Because the subject feels that she was once whole but now is split, and because her consciousness and feeling of split came about when she submitted to the symbolic order (the Big Other), the subject concludes that the Big Other did something to her to cause the split—hence the term "castration." This is, of course, partially correct—the split subject was created through submission to the symbolic order. What is delusional is the fantasy that the subject once existed *as a subject* before the splitting—that wholeness is a lost *former* state rather than a hope, aspiration, or fantasy of a *future* state.

Consequently, as Bruce Fink suggests, the expression "split subject" is somewhat misleading. It implies that there could be an unsplit subject. Rather, the subject is not merely created by splitting, the fundamental split is subjectivity.[71] "Split" is not an adjective modifying the noun "subject," but a synonym (split = subject). The term "split subject" is a self-conscious pleonasm much like such contractual legalisms as "I hereby sell, assign, transfer, etc." Lacan, in effect, gives a psychoanalytic spin to the Hegelian understanding of subjectivity as pure negativity.[72] In other words, the statement that the subject is split is not merely an assertion about how empirical individuals feel in modern society (e.g. that contemporary Americans feel alienated). Rather it is a definition of what a subject is.

This explains the matheme $: the "S" of subjectivity is bifurcated by the Lacanian bar. Unlike those concepts we have seen so far that are contingently barred from others (as the agent is barred from his truth in the discourse quadripode, or the signifier is barred from the signified in the matheme of signification), here the bar is internal to and constitutive of the subject itself. Indeed, one might think of all the other bars we have seen so far as standing for the perspective of the subject in the specific concept. For example, as I suggested, the bar between the signifier and signified is the presence of the speaking subject identifying a signifier with a specific signified.

As Lacan's thinking progressed, the idea of an internal constitutive split took on increasing importance. Eventually the matheme for the symbolic order of law, language, and sexuality itself, the "A" (*Autre*, the Big Other), appears in a barred form—"Ⱥ"—indicating its constantly changing, open-ended nature. Although such an idea of law is not surprising to a lawyer inculcated in the common law, it is an extraordinary intuition for a non-lawyer in a civil law country.

Sexuality and castration

Lacan uses a male anatomical metaphor and calls the splitting of the subject "castration."[73] Lacan's terminology is at least in part, an unfortunate legacy from Freud. Famously, or infamously, Sigmund Freud often seems to take a literal, anatomic view toward the relationship between sexuality and personality. As Lacan developed his theory over the course of his life, however, he sought to distinguish sexuality from biology by locating it in the

intersubjective order of the symbolic. Consequently, a subject's sexual identity is only roughly correlated with anatomy.

Nevertheless, Lacan retains Freud's biological terminology. On the one hand, this has the disadvantage of being confusing to the literal minded. For example, Alan Sokal and Jean Bricmont ridiculed Lacan for insisting that the penis is the square root of negative one.[74] In fact, Lacan did not speak of the penis, but of the *phallus*, which is his notoriously misleading term of art for the signifier of radical negativity of subjectivity.

On the other hand, from a Lacanian perspective, this very possibility of confusion is the terminology's advantage. Lacan does not deny biology, although he thinks that we only have indirect access to biological actuality. Our intuition that there must be biological reality outside of our subjective (symbolic and imaginary) interpretations is real. This does not mean, however, that Lacan adopts a simplistic post-modern view that divorces the social role of gender from biological sexuality. Sexuality cannot be reduced to biology, but it is "figured" by biology—we adopt biological metaphors for symbolic concepts. The problem with the post-modern (or simplistic pseudo-feminist) distinction between gender and sexuality is that it suggests either that it is possible to tell where one begins and the other ends or that we could develop a notion of sexuality that is not figured by biological imagery. Lacan, in contrast, insists that the symbolic and the real, although theoretically distinct, can never be separated and must always be interpreted through the imaginary.

I interpret late Lacanian theory as not purporting to tell how infants empirically develop into adults. Rather, it theorizes how adults, looking at themselves from their current "castrated" condition, retroactively reconstruct what they believe "must have happened" for this to occur.[75] That is, if people feel castrated by the law today, they imagine this means that the law must have done it to them. This seems to imply that it is possible that one could escape castration by escaping law. This is the romantic myth. In Lacan's view, however, although romanticism is personality's founding myth in contemporary Western society, it is a myth in the negative sense of a delusion. The autobiography the subject writes to explain his current condition is false.

Lacan's analysis originates in Freud's theory of the Oedipus complex. The Oedipus complex is vulgarly thought of as a literal, prospective account of childhood development.[76] Lacan, in contrast, points out that even Oedipus did not have an Oedipus complex.[77] The Oedipus complex is merely "Freud's dream. Like any dream, it needs to be interpreted."[78]

One Lacanian reinterpretation of the romantic Freudian dream is that "law" (the Big Other) does not exist![79] This phrase is completely mysterious unless one understands the speculative definition of existence (as contrasted with essence) which I discuss later.

Of course, Lacan understands that positive law exists as an empirical matter, but positive law is not preexistent, objective, necessary, determinate, closed,

or permanent. Instead, all legal systems (as well as language and sexuality) are artificial, intersubjective, contingent, indeterminate, open, and shifting. Positive law is not "Law" with a capital "L"—(what I will later call morality *per se* or the ethical law). At first blush this seems remarkably consistent with the romantic view that I criticize. At further consideration, however, one can see that the conclusions Lacan draws from this are much different.

A crucial point is that, despite the fact that law "does not exist," *the subject cannot completely escape the law.*[80] Neither law nor subjectivity preexist the other; they are mutually constituting; they come into being together.[81] If the subject is barred, then the Big Other, that both creates and is created by subjects, must also be barred. This is why his later matheme for the Big Other is "Ⱥ." In contrast to libertarianism, but consistent with utilitarianism, law is conceived as unnatural and artificial. The law cannot be reformed "to exist." In other words, although it is necessary to subjectivity that there be "Law," no specific positive laws are essential. Following Kant and Hegel, Lacan posits that it is precisely positive law's "non-existence," i.e. its failure, that enables it to function, subjectivity to exist, and freedom to be actualized.[82] I return to this topic later.

Castration is the feeling that "I was once complete but the Big Other maimed me by splitting off my most precious part—that which is most myself is now external and cut off from my self." The terminology reflects the "masculine" interpretation of the subject's constitutive split—the loss of a precious part or thing. I have argued extensively elsewhere that, insofar as Lacan considers masculine and feminine sexuality to be two different ways of coping with alienation (the feeling of being split) there should also be an anatomical metaphor to describe the feminine interpretation.[83] I have suggested that this would be rape or violation.[84] The subject feels: "I was once pure, and intact, but the Big Other forced itself on me and left me violated and polluted." The masculine subject expresses his feeling of loss as "I no longer have what I once had,"[85] the feminine subject expresses her feeling as "I no longer am what I once was." Castration/violation is universal because it is both the process and the effect of the subject's entering into the symbolic order.[86] In Žižek's formulation: "Castration is *symbolic*: by means of it, the subject exchanges his being (an object) for a place in the symbolic exchange, for a signifier which represents him."[87]

I briefly introduce Lacan's notion of sexuality here because later I come to the initially surprising conclusion that, contrary to dominant stereotypes, the proper role of the attorney in representing clients, and of the critical scholar in analyzing the law, is feminine. Moreover, the very reason law-and-economics is fundamentally unable to acknowledge its (feminine) critics is because it speaks the radically masculine discourse of the university. To Lacan, masculine subjects do not merely fail to hear feminine ones, masculinity is defined and created through the repression of the feminine. The masculine cannot listen to the feminine without losing his masculinity.

The objet petit a

This brings us to the little other—the *objet petit a.* If the Big Other stands for alterity itself and includes the entire symbolic order, the little other (*petit autre*) refers to specific others. Lacan thought that the little *a* object was his single most important contribution to psychoanalytic theory. It is also his most difficult and subtle idea.[88] The following is, by necessity, an *extremely* simplified and partial account of only those aspects of the concept directly related to my thesis.

The French term *objet petit a*—literally "little a object—is not precisely translatable into English because of differences in spelling. *Objet petit a* means, roughly, the "object spelled with an a (rather than with an o) because it is identified with the little other (*autre*)." That is, the subject designates a specific other thing—which Lacan calls a little, or lower case, other—to serve the function of the object of desire.

The *objet petit a* serves as the object *cause* of desire. Because the subject is split, he desires. He desires not to be split, but to be whole. Indeed, the split of subjectivity can be thought of as nothing more than this desire. Because the subject desires to be whole, he does not want to acknowledge that his split is constituent of his subjectivity. He wants to be an "unsplit" subject. He wants to believe that there must be some specific external thing that would explain his split.[89] This hypothesized explanatory object—"the little a"—is an attempt to positivize or to give body to negativity. Kant's concept of the noumenon or "thing-in-itself" is technically an *objet petit a*: an attempt to give positive body to the radical negativity of essence.

The subject seeks to identify an actual object to explain his desire.[90] Although the true desire of man is the desire of the Other—i.e. to be recognized in intersubjective relations—the subject attributes her desire to the *objet petit a.*[91] In this way, intersubjective relations are replaced by object relations.

This is fantasy. The logic of desire, like the logic of castration, is retrospective—desire precedes its "cause."[92] The subject does not desire because he lacks an object. Subjectivity is nothing but desire. Desire is lack. Desire seeks its own annihilation through satisfaction. Consequently, the subject seeks that which will sate her desire. She hypothesizes that, because desire is present, some*thing* must be absent. She therefore tries to identify a *specific* absent thing to explain desire. This fantasy is reassuring because it purports to give a simple account of, and solution to, the universal sense of alienation (castration). The dream of the *objet petit a* is the vain hope that the desire's flame can be quenched.

This is expressed in the words of the familiar song from one of the most resonant works of fantasy in popular American culture, the movie version of *The Wizard of Oz:*

I would not be just a nuffin'
My head all full of stuffin'
My heart all full of pain.
I would dance and be merry
Life would be a ding-a-derry
If I only had a brain . . .

If the Wizard is a wizard who will serve.
Then I'm sure to get a brain; a heart; a home; the *noive*![93]

In these familiar lyrics, each of Dorothy's fellow travelers takes the masculine position with respect to alienation and imagines that he lacks a special part and that all his problems could be solved if the Big Other, personified by the great and powerful Oz, would fill his lack by supplying him with this part. Of course, as the movie makes clear, none of the three lacked the object that he imagines caused his desire. Their acts during their rescue of Dorothy prove that the Scarecrow was always already the most intelligent, the Tinman the most loving, and the Cowardly Lion the most courageous of creatures. The "missing" brain, heart, and nerve were merely *objets petit a* that stood for their feelings of inadequacy.[94] Dorothy, in contrast, takes the feminine position that identifies alienation as a deeper level of dislocation and loss of innocence. She does not want a thing. When she was in Kansas, she longed to go "Somewhere Over the Rainbow;" when she was in Oz, she just wanted to go home. Similarly, although she identifies herself as "Dorothy the small and meek," her acts during her "rescue" demonstrate that the feminine is not the passive object of patriarchy but the active subject—it is Dorothy who frees both her self and her companions by "liquidating" her *doppelganger*, the Wicked Witch of the West.

In the movie, the Scarecrow, Tinman, and Lion were satisfied when the Wizard gave them meaningless trinkets (a diploma, testimonial, and medal, respectively) to stand in for their supposedly missing attributes; Dorothy was happy to leave the magical, colorful riches of Oz and return to the grim, black-and-white poverty of Kansas. This is because the movie is a fantasy in both the colloquial and Lacanian senses. It is precisely the fantasmic element of the happy ending that makes the film so enjoyable to the split subjects in the audience.[95] Obviously, as a fantasy, this strategy could never successfully satisfy desire in the symbolic world of intersubjective relations in which people live. If one were ever to attain one's *objet petit a*, one would find that one still desires and would, therefore, immediately have to find another object to serve this role.

This is why the book is so much braver, and more disturbing, than the movie. In L. Frank Baum's work, Dorothy does not return to Kansas when the Wizard bestows the tokens because they do not bring the anticipated satisfaction to their recipients. Being self-conscious of brain, heart, and

courage, respectively, "the Scarecrow has grown conceited and the Tinman self-absorbed, the Lion has become a bully."[96] They must go on a second journey of self-discovery before they can find their true vocations (as Steward of Oz, Emperor of the Winkies, and King of the Beasts, respectively). Similarly, although Baum ends *The Wonderful Wizard of Oz* with Dorothy's return to Kansas he implicitly understood that if that sweet optimistic girl remained in the bleak Kansas depicted in the book (and movie) she would be doomed to wither into a bitter old hag like her Auntie Em[97] and Toto's nemesis, Miss Gulch. Consequently, Baum, and his successors, brought Dorothy back to Oz (and even redeemed the shrewish Em) in numerous sequels.

Following traditional philosophic terminology, the word "object" does not mean a tangible "thing." Rather, an object is anything that is not the subject herself. Although it is possible for a tangible thing to serve as an *objet petit a*, so could intangibles, objects that are not conventionally desirable,[98] or even other subjects—such as the unattainable lady of chivalric romance. Most importantly, as I discuss in the next chapter, an *objet petit a* can be a complete abstraction such as specific moralistic values, substantive goals, or social polices that stand in for the morality *per se* (ethical law) expelled by positive law.

Economists Gary Becker and George Stigler propose a theory that could be interpreted as an intuition of the "little a."[99] They posit that all human beings have a few universal preferences involving intersubjective relationships, such as a desire for status. Rather than pursuing these goals directly, however, economic actors seek to acquire specific objects or commodities as proxies for their true desire.[100] For example, one person may think he wants a fancy sports car and another a fancy house, but in fact they both really want the same thing: the admiration of others, or more precisely, reassurance that the self exists.

What is important to note at this point is that, by definition, the object that supposedly causes desire must be missing; if we had it, we would no longer desire it. As Žižek notes:

> For Lacan, human desire (in contrast to animal instinct) is always, constitutively, mediated by reference to Nothingness: the true object-cause of desire (as opposed to the objects that satisfy our needs) is, by definition, a "metonymy of lack," a stand-in for Nothingness. Which is why, for Lacan, *objet petit a* as the object-cause of desire is the originally lost object: it not only that we desire it in so far as it is lost—this object is nothing but a loss positivized.[101]

In other words, "the 'cause of desire' must be in itself a metonymy of lack—that is to say, an object which is not simply lacking but, in its very positivity, gives body to a lack . . . a 'something that stands for nothing' . . . ."[102]

Consequently, the object *a* is produced by its very exclusion from a discourse. It is desired precisely because it is missing.

But let me explain more thoroughly. The *objet petit a* is not actually the absence the subject identifies in herself and the Big Other. That absence is the radical negativity or lack of the real. Rather, the *objet petit a* is, as Žižek notes, a *metonymy* of lack, or loss positivized. It is not real but imaginary. It is something affirmative that is actually missing in the subject's life that stands in for the internal lack (real) that the symbolic expels, but around which the symbolic is structured. Another way of saying this is the *objet petit a* is the place where the three orders overlap—an imaginary object that stands for the real within the symbolic.

Notes

1 Lacan's mathemes often seem designed more to obfuscate than to illuminate his ideas. Stuart Schneiderman quotes Lacan as saying, "he would not alter his notoriously impenetrable style because he simply did not care to speak to idiots." STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 18 (1983).

2 BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 131 (1995) [hereinafter, FINK, SUBJECT].

3 *Id.* at 130–1.

4 Mark Bracher elaborates:

> On the right, the side of the receiver, the top position is designated as that of the other, which is occupied by the factor called into action by the dominant factor in the message. The activation of this factor is a prerequisite for receiving and understanding a given message or discourse.

Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, *in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 109 (Mark Bracher *et al*. eds 1994) [hereinafter, THEORY OF DISCOURSE]. He continues, "The right-hand positions are occupied by the factors that the subject receiving the message is summoned to assume." *Id*. at 109.

5 FINK, SUBJECT, supra note 2, at 131.

6 Again, Bracher explains:

> The top position on each side represents the overt or manifest factor, the bottom position the covert, latent, implicit, or repressed factor—the factor that acts or occurs beneath the surface. More specifically, the top left position is the place of agency or dominance; it is occupied by the factor in a discourse that is most active and obvious. The bottom left position is the place of hidden truth—the factor that underlies, supports, and gives rise to the dominant factor, or constitutes the condition of its possibility, but is repressed by it.

Bracher, *supra* note 4, at 109.

7 See FINK, SUBJECT, *supra* note 2, at 130–6.

8 See William J. Richardson, *Lacan and the Subject of Psychoanalysis in* INTERPRETING LACAN, 6 PSYCHIATRY AND THE HUMANITIES 51, 54 (Joseph Smith and William Kerrigan, eds 1983).

9 See, FINK, SUBJECT, *supra* note 2, at 131.

10 See *id.*

11 See *id.*
12 "What is produced as a result of [those who are placed in the position of the other] allowing themselves to be thus interpellated by the dominant factor of a discourse is represented by the position of production, the bottom right." Bracher, *supra* note 4, at 109.
13 Fink, Subject, *supra* note 2, at 173.
14 According to Fink, Lacan did this:

> both for historical reasons and because it embodies the alienating functioning of the signifier to which we are all subject. As such, it holds a privileged place in the four discourses; it constitutes a sort of primary discourse (both pyhlogenetically and ontogenetically).

Fink, Subject, *supra* note 2, at 130.
15 Slavoj Žižek is probably the foremost proponent of the retroactive reading of Hegel and Lacan. I discuss the retroactivity elsewhere. See Jeanne Lorraine Schroeder, The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine 13–14, 31–2, 52–4, 311–12 (1998) [hereinafter, Schroeder, Vestal].
16 See Jacques Lacan, The Seminar of Jacques Lacan, Book I: Freud's Papers on Technique 1953–4 80 (Jacques-Alain Miller ed. and John Forrester trans. 1988) [hereinafter, Lacan, Seminar I]; Jacqueline Rose, *Introduction II to* Jacques Lacan and the école freudienne, Feminine Sexuality 27, 31 (Juliet Mitchell and Jacqueline Rose eds, Jacqueline Rose trans. 1985) [hereinafter, Lacan, Feminine Sexuality]; Elizabeth Grosz, Jacques Lacan: A Feminist Introduction 10 (1990).
17 See Lacan, Seminar I, *supra* note 17, at 80.
18 Schneiderman, *supra* note 1, at 33. For a brief description of the metaphor of the Borromean knot, see Slavoj Žižek, Looking Awry: An Introduction to Jacques Lacan Through Popular Culture 5, 143 (1991) [hereinafter, Žižek, Looking Awry]. I discuss the Borromean knot in my final chapter.
19 Slavoj Žižek, Tarrying With the Negative: Kant, Hegel, and the Critique of Ideology 123 (1993) [hereinafter, Žižek, Tarrying With the Negative]; Jeanne Lorraine Schroeder, The Triumph of Venus: The Erotics of the Market 87, 114–15, 245 (2004) [hereinafter, Schroeder, Venus].
20 In Elizabeth Grosz's words: "The Real is not however the same as reality; reality is lived as and known through imaginary and symbolic representations." Grosz, *supra* note 16 at 34. She states: "The Real cannot be experienced as such: it is capable of representation or conceptualization only through the reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as 'the lack of a lack.'" *Id.*
21 See e.g. Jacques Lacan, The Four Fundamental Concepts of Psycho-Analysis 45 (Jacques-Alain Miller and Alan Sheridan trans. 1977) [hereinafter, Lacan, The Four Fundamental Concepts]; Schneiderman, *supra* note 1, at 76. Any attempt to give affirmative content to the idea of God (as in religions) is imaginary, not in the sense that such a God is not actual, but that our understanding of such a God is located in the imaginary order.
22 Although we experience it in this way, "the Real is not a hard external kernel which resists symbolization, but the product of a deadlock in the process of symbolization." Slavoj Žižek, The Indivisible Remainder: An Essay on Schelling and Related Matters 110 (1996) [hereinafter, Žižek, The Indivisible Remainder]. That is, the kernel of the real is produced as a necessary byproduct of symbolization.
23 Actual markets, like law, are located in the symbolic. In contrast, the economic ideal of the perfect market is "real." The perfect market is the realm beyond distinctions

of time and space and where each subject has perfect information about himself and all other subjects (including perfect knowledge of his own preferences and desires). Because all objects instantaneously flow to the highest valuing user, all subjects are perfectly indifferent between what they have and any other combination of goods. In the perfect market all actual market transactions stop. I set out this argument in full in SCHROEDER, VENUS, *supra* note 19, at 83–148.

24 In the words of Linda Belau:

> The real—correlate to the "beyond the signified" of the trauma—is not "beyond" the symbolic. It is rather the very limit of the symbolic, the impossible kernel of the symbolic around which it circles, what the symbolic attempts to cover over as its very industry. To posit the real as somehow separate from the symbolic entirely misses the point of its significance. The real is nothing other than the point of its significance. The real is nothing other than the point at which the symbolic fails; it is not some idealized content beyond the symbolic. Its very structure precludes that possibility.

Linda Belau, *Trauma and the Material Signifier,* 11 POSTMODERN CULTURE: AN ELECTRONIC JOURNAL OF INTERDISCIPLINARY CRITICISM (2001) HTTP: <http://muse.jhu.edu/journals/pmc/v011/11.2belau.html> (accessed Oct. 17, 2007).

25 JACQUES LACAN, ÉCRITS: A SELECTION 149 (Alan Sheridan trans. 1977) [hereinafter, LACAN, ÉCRITS].

26 For example, in an otherwise insightful book, Terence W. Deacon criticizes the linguistic theory of Ferdinand de Saussure (which forms the basis of Lacan's theory) as a simplistic mapping of signifier to signified. TERENCE W. DEACON, THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN 69–70 (1977). Whether or not Deacon's characterization of de Saussure's original thesis is accurate, it is wrong with respect to Lacan's variation.

27 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK III: THE PSYCHOSES 1955–6 45 (Jacques-Alain Miller ed. and Russell Grigg trans. 1993) [hereinafter, LACAN, SEMINAR III]. Lacan (at least in English translation) does not use this terminology consistently. Similarly, as this book is not intended for a clinical audience, I occasionally use the term "meaning" in the colloquial sense that may include signification, rather than in the technical sense, except when I am specifically referring to this distinction.

28 "According to Lacan, there is no mutuality between signifier and signified, no reciprocal penetration or determination of the one by the other," BRUCE FINK, LACAN TO THE LETTER: READING ÉCRITS CLOSELY 80 (2004).

29 The bar indicates the

> arbitrary nature of the relation between the [signifier and signified]. But Lacan stresses the importance of this "bar," conceiving it as indeed a "barrier" to any one-to-one relationship between signifier and signified, insisting that any given signifier refers not to any corresponding signified but rather to another signifier . . .

Richardson, *supra* note 8, at 54.

30 "Lacan compared this chain of signifiers as 'rings of a necklace that is a ring in another necklace made of rings'." *Id.* at 54 (quoting LACAN, ÉCRITS, *supra* note 25). As Richardson explains.

> The meaning of this chain does not "consist" in any one of these elements but rather "insists" in the whole, where the "whole" may be taken to be the entire interlude as described, whose meaning, or rather whose "effect" of meaning, is discerned retroactively . . .

Id. at 55.

31 LACAN, ÉCRITS, *supra* note 25, at 154.

32 I have on occasion referred to Lacanianism as though it were postmodern. See *e.g.* SCHROEDER, VENUS, *supra* note 19, at 276, 298. This is because from the perspective of the classical liberal tradition that dominates Anglophone legal scholarship, the similarities among various schools of Continental thought are greater than the differences and I have not wished to disparage postmoderns who I view as fellow travelers. Within the world of Continental theory, however, Lacanians contrast their theory to postmodernism.

For example, Alain Badiou, who is influenced by Lacan, lumps postmodernism along with hermeneutics and analytic philosophy as the three dominant modern philosophies which share:

> two common fundamental axioms . . . The first is that the metaphysics of truth has become impossible . . . . The second axiom is that language is the crucial site of thought because that is where the question of meaning is at stake. Consequently, the question of meaning replaces the classical question of truth.

ALAIN BADIOU, INFINITE THOUGHT: TRUTH AND THE RETURN OF PHILOSOPHY 46–7 (Oliver Feltham and Justin Clemens, trans. and eds 2003). In contrast he believes, following Lacan, that theory must return to the fundamental question of what is truth. See also Žižek's comments on postmodernism in SLAVOJ ŽIŽEK, ON BELIEF 11–12, 39–40, 81 (2001).

33 The real is the sense that there is something on the other side of the boundaries to the symbolic and the imaginary. ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 19, at 35–9; Jacques-Alain Miller, *Microscopia: An Introduction to the Reading of Television*, in JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT xi, xxiv (Joan Copjec ed. and Dennis Hollier *et al*. trans. 1990). The realm of the real is, therefore, only established by the erection of the boundaries at the moment of the creation of the imaginary and the symbolic. We only retroactively posit the existence of the "lost" real by examining what seems to be clues, traces, stains left in the symbolic by its retreat. ŽIŽEK, TARRYING WITH THE NEGATIVE, at 36–7.

34 SCHROEDER, VENUS, *supra* note 19, at 87, 91–3, 141–5.

35 *Id*. "The concept of the real implies the annihilation of the subject." SCHNEIDERMAN, *supra* note 1, at 76.

36 SCHROEDER, VENUS, *supra* note 19, at 141–5.

37 *Id*.; see also ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 19, at 123; SCHROEDER, VENUS, *supra* note 20, at 245.

38 See LACAN, SEMINAR III, *supra* note 17, at 93–5.

39 Alan Sheridan, *Translator's Notes to* LACAN, ÉCRITS, *supra* note 25, at vii, ix. Lacan first developed his notion of the imaginary in his famous early work on the mirror stage. See Jacques Lacan, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience in* LACAN, ÉCRITS, *supra* note 30, at 1, 2; see ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 20, at 123.

40 SCHROEDER, VENUS, *supra* note 20, at 87, 91–2, 305.

41 *Id*.

42 In Žižek's word, fantasy:

> is the ultimate support of reality: "reality" stabilizes itself when some fantasy-frame of a "symbolic bliss" closes off the view into the abyss of the Real . . . fantasy constitutes what we call reality: the most common bodily "reality" is constituted via a detour through the cobweb of fantasy.

ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 20, at 119–29.

43 As explained by Žižek:

> [I]n order for the series of signifiers to signify something (to have a determinate meaning), there must be a signifier (a "something") that stands for "nothing," a signifying element whose very presence stands for the absence of meaning (or, rather, for absence *tout court*).

Slavoj Žižek, The Abyss of Freedom/Ages of the World 39 (1997) [hereinafter, Žižek, Abyss of Freedom].

44 Slavoj Žižek, For They Know Not What They Do: Enjoyment as a Political Factor 23 (1991) [hereinafter, Žižek, For They Know Not What They Do].

45 In Žižek's words:

> Because of this inherent tension, every language contains a paradoxical element which, within its field, stands in for what eludes it—in lacunaes, in every set of signifiers, there is always "at least one" which functions as the signifier of the very lack of the signifier. This signifier is the Master Signifier: the "empty signifier" that totalizes ("quilts")—the dispersed field—in it, the infinite chain of causes ("knowledge") is interrupted with an abyssal, nonfounded, founding act of violence.

Slavoj Žižek, Enjoy Your Symptom!: Jacques Lacan in Hollywood and Out 102–3 (1992) [hereinafter, Žižek, Enjoy Your Symptom].

46 Bracher, *supra* note 4, at 111–12.

47 *Id.* at 112.

48 *Id.* at 749–60. In a market economy, economic subjects seek to acquire or trade commodities because of their use value, which is both unique to the commodity and subjective to the person using the commodity. However, in order for trade to occur, it is necessary to "objectify" value so that we can commensurate the two commodities to be exchanged. Money is the one commodity that has no use value of its own. It only exists as the repository or place holder for the exchange value of other commodities. As Georg Simmel says in his Kantian analysis of money:

> This condition of money is obviously the same as what is called its lack of qualities and lack of individuality. Since it stands between individual objects and in an equal relation to each of them, it has to be completely neutral.

Georg Simmel, The Philosophy of Money 123 (David Frisby ed. Tom Bottomore and David Frisby trans. 2d. ed. 1990). Simmel continues, "money is not only the absolutely interchangeable object, each quantity of which can be replaced without distinction by any other; it is, so to speak, interchangeability personified." *Id.* at 124. Money is, therefore, a master signifier for the chain of value because it is the pure negativity that defines the value of all the positive commodities.

49 Lacan explains:

> The myth of the ideal I, of the I that masters, of the I whereby at least . . . something is identical to itself, namely the speaker, is very precisely what the university discourse is unable to eliminate from the place in which its truth is found. From every university statement by any philosophy whatever, even a philosophy that strictly speaking could be pointed to as being the most opposed to philosophy, namely, if it were philosophy, Lacan's discourse—the I-*cracy* emerges, irreducibly.

Jacques Lacan, The Seminar of Jacques Lacan, Book XVII: The Other Side of Psychoanalysis 63 (Russell Grigg trans., Jacques-Alain Miller ed. 2007) [hereinafter, Lacan, Seminar XVII].

50 FINK, SUBJECT, *supra* note 2, at 75.
51 CHARLES DICKENS, OLIVER TWIST, *Chapter li* (1848).
52 WILLIAM SHAKESPEARE, MACBETH *Act V, Scene 5.*
53 As Žižek says, "There is thus no reason to be dismissive of the discourse of the Master, to identify it too hastily with 'authoritarian repression': the Master's gesture is the founding gesture of every social link." Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], *in* SIC 2: COGITO AND THE UNCONSCIOUS 74, 77 (Slavoj Žižek ed. 1998).
54 Slavoj Žižek, *Ideology Between Fiction and Fantasy,* 16 CARDOZO LAW. REV. 1511, 1518–20 (1995) [hereinafter, Žižek, *Ideology*].
55 See e.g. ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 19, at 149–50; Žižek, *Ideology*, *supra* note 54, at 1519–23.
56 As Bracher says, "As master signifier is any signifier that a subject has invested his or her identity in." Bracher, *supra* note 4, at 111. In Renata Salecl's words, "it proceeds in an unconditional manner and requires to be obeyed on the sole authority of its enunciation; . . . not because there are good reasons to obey it." Renata Salecl, *Deference to the Great Other: The Discourse of Education* in THEORY OF DISCOURSE, *supra* note 4, at 163.
57 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 620 (1958).
58 In Bracher's words, "Although knowledge has two aspects—that of the articulated systematic apparatus and that of the more intuitive savoir-faire . . . —all knowledge is based on a signifying articulation, even if it can at first be approached only as savoir-faire . . . ." Bracher, *supra* note 4, at 110. He continues:

> In the first place, knowledge is necessary in establishing identity for the subject. When knowledge of any type articulates itself within a subject, the subject itself is caught up in the signifying apparatus in a position that is in certain ways unique, not common to all subjects . . . These invisible links, that is, make up the network of the subject's pleasure and pain, likes and dislikes, allies and enemies, etc., and thus constitute the subject's sense of itself. Knowledge thus also determines the nature of the enjoyment—jouissance—that the subject is able to obtain.

Id.
59 Indeed, as Bracher notes, "the unconscious is nothing other than 'knowledge that speaks all by itself' . . . independently of, and at times in conflict with, the ego." *Id.* at 110.
60 *Id.* at 111 (citation omitted) (quoting LACAN, SEMINAR XVII, *supra* note 49).
61 FINK, SUBJECT, *supra* note 2, at 35–58.
62 *Id.* at 45, 173.
63 I explain this phenomenon at length elsewhere. See, SCHROEDER, VENUS, *supra* note 19, at 55, 79–80, 94–103.
64 See SCHROEDER, VESTAL, *supra* note 15, at 52–4.
65 FINK, SUBJECT, *supra* note 2, at 36–7.
66 I set out this analysis in full elsewhere. See SCHROEDER, VESTAL, *supra* note 15, at 19–24, 27–34.
67 This self-evident proposition is associated in American jurisprudence with Wesley Newcomb Hohfeld. See generally WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING (Walter Wheeler Cook ed. 1919).
68 Jeanne L. Schroeder and David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 660 n.31 (2000). See generally Jacques-Alain Miller, *Extimité*

(Francoise Massardier-Kenney trans.) in THEORY OF DISCOURSE, *supra* note 4, at 74.

69 SCHROEDER, VENUS, *supra* note 19, at 95–6.

70 As Belau says about subjectivity

> The signifier comes into being only insofar as it marks the subject with a certain lack; something of an originary or primal plenitude is lost. This, according to psychoanalysis, is always imagined as the symbiotic relationship between the child and the mother.

Belau, *supra* note 24.

71 FINK, SUBJECT, *supra* note 2, at 45.

72 As elaborated by Žižek:

> This "nothing," of course, is the subject itself, the subject *qua* $ (the Lacanian matheme, designating the subject with all content removed), the empty set, the void that emerges as the result of the contraction in the form of expansion: when I contract myself outside myself, I deprive myself of my substantial content.

ŽIŽEK, ABYSS OF FREEDOM, *supra* note 43 at 39 (emphasis in original).

73 SCHROEDER, VENUS, *supra* note 19, at 79–80, 95. In Žižek's words, "what, precisely, is symbolic castration? It is the prohibition of incest in the precise sense of the loss of something which the subject never possessed in the first place." SLAVOJ ŽIŽEK, THE PLAGUE OF FANTASIES 15 (1997) [hereinafter, ŽIŽEK, PLAGUE OF FANTASIES].

74 See e.g. ALAN SOKAL AND JEAN BRICMONT, FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS' ABUSE OF SCIENCE (1998).

75 SCHROEDER, VESTAL, *supra* note 15, at 54, 56–7.

76 Freud himself seems to waver between naturalistic and fictional accounts. See GROSZ, *supra* note 16, at 24–31; Anthony Wilden, *Lacan and the Discourse of the Other,* in JACQUES LACAN, SPEECH AND LANGUAGE IN PSYCHOANALYSIS 159, 199 (Anthony Wilden trans. 1981).

77 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959–60 304 (Jacques-Alain Miller ed. and Dennis Porter trans. 1992) 314 (1988) [hereinafter, LACAN, SEMINAR VII].

78 LACAN, SEMINAR XVII, *supra* note 49, at 137.

79 *Id*. at 74; see Miller, *supra* note 68, at 81. This prefigured Lacan's even more infamous pronouncement that Woman does not exist. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 1972–3 72–4 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998).

80 Those unlucky individuals who escape the symbolic order are not subjects but, literally, madmen. See e.g. SCHROEDER, VESTAL, *supra* note15, at 88–9; ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 44, at 101; ŽIŽEK, LOOKING AWRY, *supra* note 18, at 20; SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 172 (1999) [hereinafter, ŽIŽEK, TICKLISH SUBJECT].

81 This is, famously, Hegel's theory as set forth in the first section of the *Philosophy of Right*. See SCHROEDER, VESTAL, *supra* note 15, at 15–52. I argue that Lacan's account of the creation of subjectivity and the symbolic order parallels Hegel's account. *Id*. at 52–106.

82 SCHROEDER, VENUS, *supra* note 19, at 55–6, 77–8.

83 *Id.* at 240–2; Schroeder, Vestal, *supra* note 15, at 33.

84 *Id.* at 73–34.

85 One way the masculine subject tries to deny castration is by redefining it in terms of exchange. He tries to tell himself that the reason he does not have the phallus

is not because the Big Other took it away, but because the subject gave it to the Big Other in exchange for something else. *Id.* at 85. But, as Žižek explains, this strategy is always necessarily a failure:

> That is to say, insofar as "castration" is defined as an act of exchange, one would expect the subject to obtain something in exchange for the renunciation (cultural progress, symbolic recognition, material goods, or the like); yet all that the second part of this strange act of exchange brings about is an additional loss—in thanks for handing over "everything," for sacrificing the very kernel of his being, the object in himself, i.e. that in which is "in himself more than himself," the subject himself is made into an object, becomes an object of exchange.

ŽIŽEK, ENJOY YOUR SYMPTOM, *supra* note 45, at 171 (emphasis in original). As I explain elsewhere: "The son exchanges something he does not have (access to the Phallic Mother, identity with the Feminine) for something that does not exist (the Phallus, access to the Feminine) in order to achieve something with no content (subjectivity)." SCHROEDER, VESTAL, *supra* note 15, at 85. See also ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 44, at 230–1.

86 Žižek summarizes several of Lacan's cryptic pronouncements on castration:

> "Castration is ultimately structured like this—we take away from somebody his desire, and in exchange for it we hand him over to somebody else—in this case, to the social order." A couple of lines later, there is another formulation: "We deprive the subject of his desire, and in exchange for it we send him to the market where he becomes the object of the general auction." At the bottom of the same page, the third and more general formulation: "The effects on a human being of the fact he becomes a subject of law are, in short, that he is deprived of what matters to him most, and in exchange for it, he is himself delivered to the texture which is woven between generations."

ŽIŽEK, ENJOY YOUR SYMPTOM, *supra* note 45, at 170–1 (quoting JACQUES LACAN, LA SEMINAIRE LIVER VII LE TRANSFERT 380–1 (1991)). Lacan insisted on the "universality of the process of castration as the unique path of access to desire and to sexual normativisation . . . ." LACAN, FEMININE SEXUALITY, *supra* note 16, at 118.

87 ŽIŽEK, ENJOY YOUR SYMPTOM, *supra* note 45, at 171.

88 "With object *a*, Lacan felt he had made his most significant contribution to psychoanalysis. Few concepts in Lacanian *opus* are elaborated so extensively, revised so significantly . . . , [and] worked over from so many different perspectives . . ." FINK, SUBJECT, *supra* note 2, at 83 (citations omitted).

89 That is, "the subject calls for recognition on the appropriate level of authentic symbolic exchange—which is not so easy to attain since it's always interfered with—is replaced by a recognition of the imaginary, of fantasy." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK II: THE EGO IN FREUD'S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS 1954–5 15 (J.-A. Miller ed. S. Tomaselli trans. 1988). See also SCHROEDER, VESTAL, *supra* note 15, at 109. In Lacan's words, "The fantasy is the support of desire; it is not the object that is the support of desire." LACAN, THE FOUR FUNDAMENTAL CONCEPTS, *supra* note 21, at 185.

90 ŽIŽEK, ABYSS OF FREEDOM, *supra* note 43, at 79.

91 The *objet petit a* is "the chimerical object of Fantasy, the object causing our desire and at the same time—this is the paradox—posed retroactively as this desire . . . ." SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 65 (1989). "The paradox of desire is that it posits retroactively its own cause, i.e. the object a . . . ." ŽIŽEK,

LOOKING AWRY, *supra* note 18, at 12. See also ŽIŽEK, ABYSS OF FREEDOM, *supra* note 43, at 79.

92 See *id.* at 79.

93 Yip Harburg, *If I Only Had a Brain, in* THE WIZARD OF OZ (MGM 1939).

94 Michael Patrick Hearn, in his decidedly un-postmodern annotations to *The Wonderful Wizard of Oz*, makes a similar point based on M.L. Franz's Jungian analysis of the fairytale tradition:

> A hero . . . often seeks that one talisman . . . that will make one whole . . . [T]he desired object will restore meaning to the afflicted person . . . The Scarecrow, the Tinman and the Cowardly Lion all suffer from these feelings of inadequacy; each one must find that one special thing that will make him complete. But the talisman is only a symbol and has no value of its own.

Michael Patrick Hearn, Note 18 in L. FRANK BAUM, THE ANNOTATED WIZARD OF OZ: THE WONDERFUL WIZARD OF OZ 273 (Michael Patrick Hearn ed. 2000).

95 This is why, at the end of the movie, we learn that Dorothy's adventures were only a dream. By contrast, in the book, the adventures "really" happened.

96 *Id.* at 309 n.2.

97 The movie accurately reproduces the book's presentation of Em as an overworked farm wife, too worn out from chores to give the affection that her foster daughter craves and projects onto her little dog Toto. Although the Wicked Witch of the West shows Dorothy an image of a loving, grieving Em in her crystal ball, the earlier parallel scene with Prof Marvel warned us that crystal ball images are fraudulent. It is only when Dorothy returns that Em first reveals any sympathetic emotion—too little, too late.

98 Bracher, *supra* note 4, at 114.

99 I explicate this argument in full elsewhere. See Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 ORE. L. REV. 147, 243–6 (2000).

100 GARY S. BECKER, ACCOUNTING FOR TASTES 5, 87 (1996); George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 77 (1977).

101 ŽIŽEK, TICKLISH SUBJECT, *supra* note 80, at 107.

102 ŽIŽEK, PLAGUE, *supra* note 74, at 81.

Chapter 2

The master's discourse

The quadripode

The master's discourse is the easiest to translate into jurisprudential concepts. To legal academics it should be recognizable as the positivist jurisprudence of H.L.A. Hart.[1]

The master's discourse is diagramed as follows:[2]

$$\frac{S_1}{\$} \longrightarrow \frac{S_2}{a}$$

The speaking agent is S_1, the "master signifier." In this context, it is the person or institution acting as a master. Applying Lacan to Hart, the master signifier is positive law itself. The master signifier is not necessarily an individual sovereign commanding obedience, but the position or function that must be obeyed. The addressee is designated by the matheme S_2 (knowledge) because it gains knowledge, in the sense of know-how, from the experience. In the context of Hart, S_2 is what he calls the "officials" who recognize the law. The hidden truth of the master discourse is $, the barred subject. Despite his claim to power, the master has feet of clay—the Great and Powerful Oz is really the man behind the curtain. The product of the master's discourse is the *objet petit a*. The master's discourse creates itself by expelling something. Because it is missing, the expelled "thing" serves as its object cause of desire.

Hart avec Lacan

Although close contemporaries,[3] it is hard to imagine two more different men then the British lawyer and the French doctor. Nicola Lacey[4] presents Hart as a modest man, a repressed and closeted homosexual who could never reconcile his public success with his internal sense of inadequacy.[5] In Elisabeth Roudinesco's biography,[6] Lacan appears as an egomaniac, libertine, and womanizer who could never reconcile his sense of self-importance with the

institutional strictures of his profession. Despite his self doubts, Hart became the ultimate Oxford insider, hailed as his generation's greatest anglophone legal theorist.[7] Despite his self-confidence, Lacan's career was marked by feuds and ostracism. Many consider him a charlatan.

Hartian jurisprudence seems completely antithetical to Lacanian psychoanalysis. Hart works in the analytic school that dominates Anglo-American philosophy. Lacan falls within the speculative tradition of Continental theory.

This contrast is overly simplistic. Hart's concept of law has surprising similarities to Lacan's master's discourse. Both attempt to confront fundamental contradictions within law. Hart splits jurisprudence between the formalist "noble dream" of law as complete and determinate and the skeptical "nightmare" of indeterminacy.[8] Lacan thinks that the law (the symbolic order) is necessarily internally split. Hart thinks that positive law must be distinguished from moral content. Lacan argues that the symbolic repression of the real guarantees its return.[9] Hart separates morality from law so that it can return and critique law.[10]

Accordingly, anyone seeking to develop a psychoanalytically sophisticated theory of law should reconsider Hart. As insightful as Lacan's theory of the symbolic is, he had no expertise in legal systems in general, or common law practice. He does not develop an account of legal right, justice, or what Hart misleadingly calls "morality." Nevertheless, I argue that seeds of an ethics of law is implicit in his discourse theory. A Lacanian analysis of law, however, needs to be supplemented by other sources.

Nor should legal positivists dismiss psychoanalysis. As insightful as Hart's jurisprudence is, his theories of subjectivity and linguistics are simplistic and his concept of law too narrow. He describes only one aspect of legal experience: obedience to the law, and perhaps, only obedience by "officials" who "recognize" the law. He ignores what most legal practices actually do. Hart's *concept* of law excludes the *practice* of law.

Although the "master's discourse" surprisingly parallels Hart's concept of law, Lacan does not reduce the symbolic to the master's discourse. Being symbolic, law must entail all four "discourses." Lacan, therefore, supplements Hart. Specifically, the hysteric's discourse describes the excluded practice of law and provides a mechanism by which "morality" excluded from positive law can critique law. My reading of Lacan does not merely identify an ethics beyond the law as a theoretical matter, it describes the concrete interactions of "morality" with positive law in practical ways that can be used not only by scholars, but by practicing attorneys counseling and representing clients.

I identify affinities between Hart and Lacan, but do not deny their differences. Hart's legal subject is the autonomous, self-identical, affirmative individual posited by classical liberalism. He was appalled by the introduction of critical theory into British legal academia in the 1970s.[11] In contrast, Lacan rejects liberalism's concept and posits a radically negative subject —having no pre-existing affirmative content, she is nothing but pure

potentiality.[12] Liberal freedom is natural and pre-social. Lacanian freedom is a hard-won achievement of a subject within society.

Hart and Lacan disagree as to the status of contradiction. Hart seeks to reconcile contradictions. He wants law to sail unscathed between the Scylla of formalism and Charybdis of skepticism.[13] In contrast, Lacan sees contradiction as logically necessary. It cannot be avoided, only embraced as the engine of change.[14]

Hart and Lacan see different implications in the separation of law and morality. Hart claims his account is descriptive.[15] He observes that the status of positive law as law is independent from its content. Lacan's account might be descriptively correct, but is primarily conceptual. He argues that the symbolic order of law is created through the repression of the real (morality *per se*). As such, law and morality are necessarily distinct, but can never be divorced—the existence of each depends on the existence of the other.

Lacan thinks that the master's discourse is the most primitive discourse in two senses of the term. It is primal; logically first—it must exist for the other three discourses to come into being and function.[16] It is also simple and crude. Lacan assumes it must have been largely superseded by the other more sophisticated discourses. We are, therefore, unlikely to find modern legal systems based on it.[17]

Lacan is no lawyer. Hartian analysis shows that Lacan was right on the first point, but wrong on the second. Although primal, the master's discourse has evolved and thrives. This is, in fact, predicated by Lacan's own theory. If, as Lacan predicts, in a modern society, the pure form of a master's discourse is fated to be supplanted by a university's discourse, by his own reasoning, the chain of discourse must revolve to produce a new, more sophisticated, master's discourse.

In what follows, I give an account of Hart's separation thesis and his "rules of recognition." I then compare Hart's account with Lacan's master's discourse to show how Hart and Lacan, working in different intellectual traditions, agree. Finally, I show how Lacan goes beyond Hart.

The separation thesis

To understand Hart's separation thesis, one must understand his postivist project—*description*. He wishes "to distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be."[18] We will consider Hart's misleading, confused, and multiple uses of the term "morality" shortly.[19] At this stage, it is enough to note that the term connotes the judgment of what ought to be.[20] Consequently, to include a moral dimension in the definition of law—to say that an immoral law is not *law*—is to "blur[] this apparently simple but vital distinction"[21] between the is and the ought. Hart does not deny that law and morality might have much in common. He sees them both as forms of obligation that "share a vocabulary."[22] Positivism does not deny that:

> as a matter of historical fact, the development of legal systems had been powerfully influenced by moral opinion, and conversely, [or] that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles.[23]

But this does not mean that the two are the same or even necessarily related. Laws may have moral or other substantive content. But a law's status *as law* is independent from its content.

Morality as critique

Hart defends himself from critics, most notably Lon Fuller, who view the separation of law and morality as, well, immoral. Hart insists that it is not the separation of the ought from the is but their conflation that is the danger. "[L]aws may be law but too evil to be obeyed."[24] Hart argues that distinguishing and separating morality helps us make moral decisions:

> There are therefore two dangers between which insistence on this distinction will help us to steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.[25]

On the one hand, the positivist worries about the anarchist

> who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it." On the other hand he [thinks] of the reactionary who argues: "This is the law, therefore it is what it ought to be," and thus stifles criticism at its birth.[26]

This demonstrates that, despite his claim that his separation of law and morality is merely descriptive, it, in fact, has a normative if not aspirational aspect as well.

Moreover, although Hart separates law from morality, he claims not to subordinate the latter from the former:

> Surely the truly liberal answer to any sinister use of the slogan "law is law" or of the distinction between law and morals is "Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality."[27]

Hart wants "morality" to critique and limit law. To do this, he must keep morality pure. He immures virgin morality behind convent walls to preserve her from temptation.

Unfortunately, although Hart says that sometimes one must disobey an evil law, he does not offer an account of how one can *effectively* defeat an evil law *within* his concept of law. This relates to his confused and inconsistent use of the word "morality", which I discuss shortly.

Command theory

Hart believes that in order to define law he must identify what law is not. "Definition, as the word suggests, is primarily a matter of drawing lines or distinguishing between one kind of thing and another, which language marks off by a separate word."[28] Hart tries to distinguish his positivism from those of Jeremy Bentham and John Austin.

Hart adopts as a foil a simplified version of Austin and Bentham's theory that law is a *command*—"expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience."[29] This notion must be supplemented by a "habit of obedience" by those who are commanded.[30]

Hart finds this inadequate for several reasons not directly relevant to my argument. What interests me here is Hart's rejection of punishment as obligation's *source*. He does not believe that people obey laws primarily out of fear, as the command theory suggests.[31] "Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion."[32] Contract and marriage law are two counter-examples.[33]

Despite denying that obedience results from external compulsion, Hart is not a rule skeptic. Skeptics think that if obligation is not externally imposed, it is a matter of mere "feelings." Accordingly, its binding effect is illusional.[34] Hart wants to argue that law is a true obligation. This raises two new issues. First, how does obligation arise if not from compulsion?[35] Second, how do we distinguish law from morality conceived of as another form of obligation?[36]

In *Positivism and the Separation of Law and Morals* Hart rather quickly raises the concept that he will later develop in *The Concept of Law*—laws are those rules adopted *as law* through a society's secondary rules of recognition, adjudication, and change:

> These fundamental accepted rules specifying what the legislature must do to legislate are not commands habitually obeyed, nor can they be expressed as habits of obedience to persons. They lie at the root of a legal system, and what is most missing in the utilitarian scheme is an analysis of what it is for a social group and its officials to accept such rules.

Morality

Hart presents the separation thesis as defining law by distinguishing it from morality. What is "morality" in this context? One of my fundamental points

is that Hart's analysis becomes hopelessly confusing because he uses the word "morality" in at least two fundamentally different ways. Consequently, Hart's choice of the term "morality" is not merely unfortunate, it misleads not only others but Hart himself.[37]

Hart and Lon Fuller famously debated the relationship of law and morality at Harvard Law School in 1957. Although neither man defined what he meant by "morality," in the context of the debate it is clear that it related to some conception of "the ought"—what law *should* be (the specific question Fuller raised was whether an evil law was still law).

Later in the *Concept of Law*, Hart believed that in order to achieve his goal of describing what law is, he must also describe what law is *not*. Because in the Harvard debate he argued that law was separate from morality, he thought that he had to describe "morality." The problem is that it is impossible to *describe* morality in the earlier sense of "the ought" (morality *per se*) precisely because it is not something that exists. In Lacanian terms, that which is expelled from the symbolic of law is *real* and, by definition, cannot be captured in language. Later I argue that the real of the morality *per se* expelled by law can be understood through Hegel's ethical theory, generally, and his concept of "right," specifically. Right is not a thing, but a process. As such, it cannot be described prospectively. It only appears retroactively in the righting of a wrong.

Consequently, Hart's attempt to describe morality *per se* was doomed. All he was able to do in the *Concept of Law* was to describe how people *use* the word "morality" in everyday conversation. As a result, he ends up conflating morality *per se* with conventional morality or moralism—the conventional rules of everyday behavior, particularly those relating to sexual conduct. This definition is too narrow to identify the subject of many branches of moral philosophy including Kantianism and Hart's own preferred moral theory of utilitarianism. This is implicitly one of Ronald Dworkin's criticisms of the *Concept of Law*—one that Hart took to heart, but did not resolve.[38] But, more importantly it fails adequately to distinguish law because moralism, like law, is part of the intersubjective ordering of society—they are both symbolic.

This regrettable conflation was arguably pre-ordained by Hart's positivist project of merely *describing* its objects. Mere description of existing moral systems cannot capture the aspirational aspect of the ought. For this reason, analytic philosophy, which limits itself to description, may not be an appropriate tool for moral theory. Indeed, this seems to have been Hart's conclusion elsewhere in that his own work on moral or ethical jurisprudence is based not on analytical theory, but Benthamite utilitarianism.[39]

Hart's conflation of law with moralism eviscerates the analytic power of his theory. The separation thesis can be restated more strongly as the proposition that the status of law as law is *logically* independent from its *substantive* content. I am using "substance" in the broadest most radical sense

as anything: any goal, purposes, ethical or pragmatic consideration that might justify or condemn any specific positive law.

The advantages of reformulating the separation thesis from "law is distinguishable from morality" to "the status of law is independent from its content" is three-fold. First, it more accurately expresses Hart's notion that to adopt the internal perspective toward law is to view it as rules that are to be followed regardless or whether one agrees with their goodness, wisdom, or effectiveness. Second, it obviates the impossible task of *describing* morality *per se* understood as what ought to be, as opposed to what it is.

Finally, it maps onto Hart's other great innovation: his distinction between primary rules (that have substantive content) and secondary rules (that govern primary rules). As such, this latter distinction is revealed as the necessary corollary of the separation thesis.

For simplicity, in this chapter, I shall generally follow Hart's questionable choice and use the word "morality" to refer to that which is expelled by the separation thesis (i.e. the substantive content of positive law, any substantive criteria that might justify it, and all considerations as to what law should be). The reader should always keep in mind, however, that I am rejecting Hart's conflation of the term morality with positive moralisms.

Primary and secondary rules

Hart tries to solve the problems of command theory by dividing laws between primary and secondary rules. Primary rules include most of what the average layperson thinks of as laws—rules which require people to perform or abstain from, or that specify the legal significance of, certain actions. Primary rules impose duties on people.[40] Secondary rules, in contrast, go to the operation of the legal system itself.

According to Hart, traditional command theory makes obligation purely psychological or subjective[41] in the sense that coercion provides a *motive* for obedience. Hart implicitly sees legal obligation as *intersubjective*—accepted as such by society generally (even if it is rejected by specific individuals). The command theory assumes that people respond to the law as an external constraint, while Hart believes that obedience requires what he calls an "internal view point."[42]

Hart inverts command theory's relationship between coercion and obligation. He maintains that

> where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.[43]

A legal system must "presuppose belief in the continued normal operation of the system of sanctions . . . ."[44] Social rules involve "a combination of

regular conduct with a distinctive attitude to that conduct as a standard."[45] In other words, legal obligations are *normative*[46]—we punish people for disobeying the law because we think that people *should* obey the law out of more than the fear of punishment. (Of course, the same might be said about conventional moral standards, exposing another flaw in Hart's terminology).

To simplify what seems to be Hart's point, people constitute themselves as a society by adopting social norms. For this purpose norms' *existence*, not their substance, is important. In developed societies these are regularized as laws—primary rules. For society's members to know how to obey laws, and for its government to know how to apply them, there must be a way of distinguishing law from non-law. They need secondary rules. Accordingly, the separation thesis and Hart's theory of secondary rules are two sides of the same coin. That is, if we cannot distinguish law from non-law by its content (morality), then we need another means of identifying valid law.

I find Hart's attempt to describe precisely why individuals decide to obey laws incomplete, at best, and ultimately unconvincing. Implicitly, Hart does as well, because he suggests that perhaps only "officials" have the internal viewpoint toward law (thus, implicitly, conceding that the command theory might be true with respect to the general populace).[47]

Nevertheless, a Lacanian analysis agrees that legal obligation is qualitatively different from acting out of fear. It is a matter of decision and *recognition*. As such, it is intersubjective, symbolic.

Secondary rules and the separation thesis

Hart argues that law functions as Rumpole's wife: "She Who Must Be Obeyed." If so, the question is not "What is the substantive content or purpose of the law?" but "How do we identify those rules that must—or more accurately—*should*, be obeyed?" Hart identifies three types of secondary rules: rules of recognition, change, and adjudication.[48] Hart thinks these three rules are necessary to solve three problems that he believes the command theory of law cannot explain: "How do we make law certain?," "How do we allow law to be dynamic?," and "How do we make law efficient?"[49]

Only Hart's rule of recognition is directly relevant here. A rule of recognition "specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."[50] He gives examples but does not try to define what such rules might be, insisting that they vary from society to society. In other words, the secondary rules are identified by *function*, not content.

The master's discourse

We are now in a position to analyze the master's discourse in detail and compare it to Hart's concept of law. A Lacanian analysis similarly insists

that positive law *per se* (the master) is identifiable by function, not content. This is Lacan's notion that the contentless master signifier (S_1) is the agent of the master's discourse. However, in contrast to Hart, a Lacanian would argue that the positive law cannot remain alone. It necessarily generates the university's discourse that seeks to justify the master's discourse in terms of the purposes of society generally[51]—i.e. its content.

Mastery and knowledge

Lacan bases his master discourse on Hegel's master–slave[52] dialectic from the *Phenomenology of Spirit.* To understand Lacan's theory of mastery, therefore, one needs to make some reference to Hegel. What interests me is that a Hegelian master—like Lacan's master signifier and Hart's positive law—insists on being recognized as such purely because of his claim to that status. "The master must be obeyed—not because we'll all be better off that way or for some other such rationale—but because he or she says so. No justification is given for his or her power; it just is."[53] He is master not because he deserves his status but purely because he is recognized as such. The master does not claim to be wise, or good, or beautiful or have any virtue that would justify his position. In other words, Hegel's master is Hart's positive law and Lacan's master signifier.

The authority of Lacan's master parallels that of Hart's positive law. Positive law is not law because of any moral or other substantive justification, but merely because it meets the appropriate rule of recognition. As Renata Salecl explains, "law must be obeyed *because it is law* and not because there are good reasons to obey it . . . ."[54] In Lacan's words:

> Take the dominant in the master's discourse, whose place is occupied by S_1. If we called it "the law" we would be doing something that has great subjective value, and that would not fail to open the door to a number of interesting observations. It is certain, for example, that the law—I mean the law as articulated, that very law within whose walls we are finding shelter, this law (*cette loi*) that constitutes law (*le droit*)—must certainly not be taken as a homonym for what can be spoken of elsewhere under the heading of justice. On the contrary, the ambiguity and the trappings that this law adopts by virtue of the fact that it derives its authority from justice is very precisely a point on which our discourse can perhaps give a better sense of where our real resources are, I mean those that make the ambiguity possible and bring it about that the law remains something that is, first and foremost, inscribed in the structure. There are not thirty-six ways to make laws, whether motivated by good intention, justice, or not, for there are perhaps laws of structure that make it the case that the law will always be the law located in this place that I am calling dominant in the master's discourses.[55]

The other addressed by the master is S_2; the entire signifying chain of law and language that constitutes knowledge. Specifically, the master addresses those who are subjected to, and obey, the law of the master.

Knowledge, in this context, is not wisdom, but *savoir faire*—know-how.[56] The slave learns how to get things done. "A real master . . . doesn't desire to know anything at all—he desires that things work."[57] The master is an idiot, the law is a ass. In Renata Salecl's words:

> Knowledge does not belong to the Master but to those who obey. The discourse of the master is thus always characterized by a kind of fundamental ignorance with regard to its conditions; it proceeds in an unconditional manner and requires to be obeyed on the sole authority of its enunciation . . .[58]

Moreover, as Marc Bracher maintains:

> When one reads or hears such a discourse, one is forced, in order to understand the message, to accord full explanatory power and/or moral authority to the proffered master signifiers and to refer all other signifiers (objects, concepts, or issues) back to them. In doing this, the receiver of the message enacts the function of knowledge, S_2.[59]

The subject subjected to the law does not necessarily know the underlying wisdom or morality of the law—as Hart understands, this is irrelevant. Knowledge is frequently unconscious knowledge. The subject subjected to law recognizes the body of the law. She learns what to do in order to do the master's bidding. S_2 is Hart's "official" having an internal viewpoint, recognizing and obeying positive law.[60]

Hart rejects the command theory of law. Subjects do not habitually obey the law out of fear of coercion. Lacan, similarly does not argue that the S_2's obey the S_1 out of fear. Rather, they do so because they recognize the S_1 as the master and a master is defined as he who should be obeyed. This is the very logic of the master–slave relation. For those who are not familiar with Hegel's analysis this may seem strange. Hegel, of course, recognizes that, once enslaved, the slave fears his master, as an empirical matter. The slave does not, however, become a slave out of fear. To explain what Lacan means, we need to take another brief detour through Hegel.

Hegel's master–slave dialectic

Lacan's interpretation of Hegel can be seen in his adoption of the matheme "S_1" to represent the addresser of the master's discourse. As discussed, the master signifier serves a necessary function in language—enabling

communication to occur by temporarily stopping the slippage of signification. Paradoxically, a master signifier serves its function not because of, but irregardless of, its content. Indeed, the master signifier is structurally "nonsensical . . . devoid of reasoning."[61] This is Hegel's mastery and Hart's positive law. The master is a master, and the law is law, because he/it serves a function, not because he/it deserves to play this role, and least of all not because the master/law coerces the fearful slave/citizen into obedience.

The essential point of Hegel's moral philosophy is that personality (self-consciousness) can only be actualized through mutual recognition—one becomes a subject capable of bearing legal rights and duties by being recognized as such by another subject. The master–slave dialectic illustrates a failed attempt to achieve subjectivity.

Hegel hypothesizes a primitive society—modeled on archaic Greece—prior to the development of modern subjectivity. In ancient societies slaves were typically persons captured in battle. In Hegel's "state of nature" warriors try to obtain recognition through the fight to the death.[62] Each man claims to be a self-consciousness and seeks to have this claim confirmed by another.[63] However, each also mistakenly thinks that the other's claim to self-consciousness is an impediment to his claim—as though self-consciousness were a zero-sum game of "winner take all." Consequently, they battle until only one is left standing.

This is self-defeating. If a warrior dies he cannot be recognized. If he kills his rival, there is no one to recognize him.[64] Eventually one warriors realizes this contradiction. Because he realizes that there can be no self-consciousness without life (both his and the other's) he lays down his arms and submits.[65]

Note that Hegel is rejecting a command theory of obedience based on coercion. The slave does not submit to the master out of fear but out of choice. He was unafraid to die to achieve his goal. But he now understands that neither his death nor that of his rival will further his goal. In other words, he does not fear death; he treasures life; he is not afraid to die, *he is unwilling to kill.* Killing is understood as a self-defeating program.

Further, the slave obeys the master not because of the master's substantive qualifications. The master is not necessarily stronger—he does not defeat the slave, the slave voluntarily lays down his arms. The master is not wiser, more skilled, or intelligent. The master who does nothing but fight and command, proudly knows nothing else. He makes his ignorance his wantonness.

The slave gains know-how. He learns how to execute the master's will. Ironically, Hegel insists that it is the slave who develops a higher level of self-consciousness.

Lacan's master's discourse adopts Hart's separation thesis at its most radical. The master's discourse is created by expelling *all* substantive considerations. This is represented by the *a*—the *objet petit a*—that is placed below the bar in the lower right-hand corner of the quadripode.

The truth

In the lower left-hand corner of the quadripode, and barred from the agent, lurks the agent's hidden truth. The truth of the master is $, the barred subject.

On a trivial level, this repeats my point that the master does not deserve his position. The master is just another flawed, neurotic human being—a barred subject. The emperor has no clothes. The Big Other does not exist. The Great and Powerful Oz is the man behind the curtain.

But, more subtly, it means that no symbolic order, no language, or positive law can be complete, closed, clear, and unambiguous. I have already referred to Lacan's slogan "the Big Other does not exist" and the matheme "Ⱥ." The entire social order is split or barred in precisely the same way as every individual subject.[66]

Hart tries to capture this concept in his insistence of the "open texture" of language and positive law.[67] Hart believes that it is not practicable for us to create a language or write a law that will cover all potential situations. Consequently, although there may be a core of easy cases where law is determinate, it will inevitably be surrounded by a penumbra of hard cases in which a judge will be forced to use her discretion.[68]

As I discuss in my chapter on the analyst's discourse, Lacan differs in that Hart thinks the "open texture" of the symbolic order is *empirically* true, not logically required. Lacan, in contrast, believes that a closed symbolic is logically impossible. By its nature the symbolic is open, dynamic, and changing. Inverting Hart's metaphor, the core of the symbolic order is a hard kernel of impossibility, the real. I return to this in the chapter on the analyst's discourse.

The product: morality and desire

Returning to the quadripode we see that the result of the discourse hidden underneath the addressee is the *objet petit a*, the object cause of desire.

Lacan's master's discourse illustrates the separation thesis in its most radical form. This discourse creates an *objet petit a* by expelling something—its result is a loss. It does so by its own structural logic. The discourse creates itself through this expulsion. Moreover, that which is expelled can function as the object cause of the discourse's desire precisely because it is missing. Consequently, the loss is designated as *"a."* How does this relate to Hart?

Of course, the master expels the slave's freedom and might posit that there is nothing that the slave desires more than his lost freedom. Similarly, Hart's concept expels the judge's discretion (freedom) in the core of easy cases. This is a correct, but inadequate, analysis. Freedom is not the Hegelian slave's ultimate desire; he willingly exchanged freedom for self-consciousness. Hart's judge lacks discretion, but would we say he *desires* discretion?

Lacan's point is that the master's discourse *necessarily* excludes *any and all* substantive justifications for the master's status. The master needs complete

unconditional subordination—this is what mastery means. Any justification makes mastery conditional. If he claims to be master because he is strong, he ceases to be master when he weakens. If he is master because he is wise, he will cease to be master if outwitted. He must be obeyed not because it is *just*, but *just because*.

Similarly the separation thesis holds that the laws are law not because of any justificatory substantive content, but because they are identified as such by rules of recognition. In positivism, there can be no appeal to right or justice that are beyond the law. Specific justifications—moral rules of behavior, legislative intent, social policy, and so on—that also cannot be discussed within positivism can serve as the law's *objet petit a.*

In the *Postscript* to *The Concept of Law*, Hart as an old man goes "soft" on positivism: he suggests that although there is no *necessary* connection between law's status and its content, perhaps a society *could* adopt rules of recognition referencing content.[69] A Lacanian, however, would agree with Joseph Raz that the logic of Hart's argument requires a "hard" positivism: laws must be identifiable without justification.[70] But a Lacanian would digress from Raz in concluding that positivism is a complete account of law. The master's discourse of positivism must be supplemented by other discourses in order to capture law's complexity as a cultural practice.

As discussed, one of Hart's original stated rationales for separating morality from positive law was to preserve morality (a normative, rather than a descriptive, goal). Distinguishing legality from morality allows for the use of morality to critique law—we can justify disobedience to an evil law despite its validity. In this way, morality *perse* is law's desire—it is that which lies beyond yet drives it. Morality would complete law by making the "is" equivalent to the "ought."[71]

The morality *per se*, what I will refer to as ethical (as opposed to positive) law or right, expelled by the symbolic of positive law is real—impossible, a trauma. It cannot be described prospectively, only recognized retroactively. Consequently, the legal subject looks toward other specific things excluded from positivist discourse to stand in as the cause for the law's true desire—to serve as the *objet petit a*, the object cause of the law's desire. This function is served by the law's specific *empirical* content and goals that positivism refuses to discuss. These can include the moralistic principles or social policies that the legal subject believes should underlie and could justify a legal regime.[72] The university's discourse of expertise will try to devise rationalizations for the status quo of the master's rule by addressing itself to these goals.

Lacan's supplement

Lacanian theory supplements Hart's in a number of ways. Hart claims his separation of law and morality is merely descriptively true. Lacan agrees,

but goes further in arguing that it is structurally necessary for this discourse to function. Moreover, Lacan shows how excluding morality *per se* (ethical law) enables it to function. The imaginary identification of specific moral content or policy goals as the *objet petit a* serves to sustain the desire for the attainment of a true ethical law or right. In the words of Costas Douzinas, it is "The substitute given to the subject . . . a phantasmatic supplement that arouses but never satiates the subject's desire."[73] Because the achievement of any specific goal can never quench desire, they:

> keep desire going. Every success . . . leads to new and further claims in a spiral of demands that cannot be fulfilled . . . . [T]heir main task is to keep the legal subject in the position of desiring, in other words to help maintain it as subject.[74]

This separation of morality *per se* from law is not a true "expulsion" but a *repression*. What is repressed in the symbolic, always returns in the real.[75] Consequently, by being exiled from positive law, morality is located partially in the real. As such, the repression of morality calls it into being.

The real serves as the border of the symbolic (and the imaginary) and, therefore, defines the symbolic. Similarly, the expelled "morality" (justification, content) defines law. Hart's terminology of "separation" is misleading if he thinks that morality ceases to function within positive law.

It is tempting to think of morality *per se* as the "beyond the law." In Lacanian terms, however, it is more accurately the "beyond *within* the law." As Lacan says enigmatically, the expulsion of the real from the symbolic order does not mean that the real is not there within the symbolic order. Lacanian repression is a double negative. Morality is "not *not* there" in positive law. It is "there in full."[76] Positive law requires morality because it can only be understood in contrast to morality. In other words, although the symbolic of law expels the real of content, the two can never be separated.[77] Neither can be understood except through the other. Morality is, in effect, the negative law opposed to positive law.

Hart asserts that morality can serve as a critique of law, but cannot explain why this should be so, given his definitions. This is implicit in Fuller's criticism. It suggests a possible reason why Hart abandoned this intuitively attractive defense of the separation thesis late in life. That is, when Hart says that one may be morally obligated to disobey an immoral, yet valid, law he assumes that moral obligations are superior to legal ones. However, merely separating the two supplies no justification for exalting one over the other. Why shouldn't legal obligations—which are intersubjectively imposed by society as a whole—trump moral ones? This problem is exacerbated if one conflates, as Hart does, morality with conventional moralism, as they are both symbolic.

Trauma

To put this in Lacanian terms, the morality *per se* (as opposed to moralism) that positive law expels is the law's *trauma.* In psychoanalysis, a trauma is not something horrible that happens to someone (the colloquial sense of the term). Rather, it is whatever the subject cannot integrate into the social order of the symbolic. The traumatized subject is doomed to repeat her trauma precisely because she cannot exorcize it by speaking its name. Morality is traumatic to the positivist precisely because it is that which may not be discussed—it cannot be described. As such, "trauma opens up an ethical space beyond the symbolic which is, nevertheless, intimately tied to the materiality of the signifier and, therefore, to our social and linguistic destiny."[78]

If content is law's trauma, then Hegelian right is its symptom. I will develop these ideas in later chapters.

What is important to understand about trauma at this stage is that it is retroactive—trauma precedes its cause, in precisely the same way as desire precedes the little *a* object that is supposed to be its object cause. Indeed, in Lacan's later work, he suggests an affinity between the traumatic sinthome and the little *a* object. They both appear at the node at which the three orders of the symbolic, imaginary and real overlap.

In psychoanalytic theory, trauma is distinct from its colloquial definition of a historical event. The trauma only retroactively appears at the moment of its iteration by the subject—in the subject's very "re-living" of the trauma through her failure to articulate it in the symbolic. These appearances are its symptoms.[79] Analysis is nothing but the subject's attempt to integrate the trauma in the symbolic order through articulation.

No doubt all traumas are initiated by historical events. Indeed, traumas are historically over-determined. But the memory that is trauma should not be thought of as a simple, literal recording of the event as it actually occurred in history. Rather, trauma is a reinterpretation by the subject in light of her subsequent life—it is in this sense, that trauma obtains its status as trauma retroactively.[80] The subject tries to tell a story explaining the trauma which is, necessarily or even definitionally, a hypothetical account. In other words, to articulate a trauma is nothing but to assign it a cause. Lacan calls the assignment of the cause of trauma the "psychoanalytic act" to which I will return.

Although trauma is defined as that which is not integrated into the symbolic order, it is not separate from or external to the symbolic. Trauma is within the real. It is not *not* in the symbolic order but is there in full. To think of trauma as being external to or distinct from the symbolic and imaginary orders would be to transform the real into transcendence—Kant's concept of the noumenon. But Lacan, like Hegel, rejects any and all concepts of transcendence. Nothing is potential that is not also actual. All ideals must be manifest. To Lacan the real only has potentiality in the effects it has in the actual behavior and speech of the subject—her symptoms.

This means that although the subject cannot articulate her trauma, trauma structures the subject. To play on a metaphor introduced by Freud, trauma is like the real grain of sand around which the oyster of subjectivity builds her symbolic pearl.[81] Similarly, the repressed morality, law's trauma, structures positive law.

Hart avec Fuller

This leads to a closely related point. Hart says that excluded morality can serve as an external critique of law, but has no theory as to *how* it performs this function. This is implicit in Fuller's criticism. Hart offers no examples, or even hypotheticals of how this could occur *within* his system. The critique of law is, to Hart, not itself legal.

The famous example of immoral law debated with Fuller does not involve disobedience to, or an attempt to change, an immoral law. Rather, they consider whether a society can lawfully punish someone for an earlier exploitation of a former law now judged evil *after* a regime-change.[82]

Fuller refers to "a series of cases involving informers who had taken advantage of the Nazi terror to get rid of personal enemies or unwanted spouses" and concentrates on the lurid case of an adulterous wife who denounced an inconvenient husband who, even more inconveniently, survived the Nazi regime to challenge her attempt at eliminating him.[83] Fuller maintains that:

> [i]f all Nazi statutes and judicial decisions were indiscriminately "law," then these despicable creatures were guiltless since they had turned their victims over to processes which the Nazis themselves knew by the name of law. Yet it was intolerable, especially for the surviving relatives and friends of the victims, that these people should go about unpunished . . . .[84]

In other words, even though Nazi "laws" had the form of law, some were too evil in substance to be true law.

Hart argues that this analysis confuses the true issue: the legitimacy of a *retroactive* application of a new criminal statute.[85] Trying to ignore the fact that both Hart and Fuller reduce the horror of Naziism to a misogynistic revenge fantasy, I agree with this aspect of Hart's analysis. But neither Hart nor Fuller grapple with the issue of how a court could use their respective theories of law in order to challenge an *existing* evil law. They do not even discuss transitional law. Rather, they discuss the important issue of how a moral society confronts its evil past in order to build a good future, not how a moral individual can live in an evil present.

Hart, of course, includes in his three secondary rules of law, "rules of change.[86]" He does not give any examples of these other than to say that

there will be a "very close connection"[87] between rules of change and rules of recognition. However, being "secondary rules" Hart's rules of change are necessarily *internal* to the legal system itself. They are purely formal and procedural, not substantive in nature. Rules of change cannot serve as an *external* critique. Hart, as a soft positivist, might counter that it is conceivable for a society to incorporate references to moral standards within that society's rules of change. This does not, of course, answer Fuller's concern because it makes moral review a matter of positive law, not morality *per se*.

Tellingly, the only examples Hart gives of law truly in flux are the "pathological" cases of revolution and enemy occupation in which the secondary rules of change do not apply.[88] There is no empirical way to *change* the evil law within Hart's legal system in accordance with one's desire to attain morality. Change, presumably, must come from outside of law. It is the hysteric's discourse, the subject of my last chapter, which allows for this. It turns the master's discourse of positive law inside-out, thereby welcoming that which positive law expels to the outside back inside.

Consequently, although positivism traditionally sees speculative theory as its antithesis,[89] Lacanian analysis can be its supplement. It explains why Hart's analysis seems so empty and inadequate to non-positivists. Perhaps because he and his followers are so obsessed with developing an exact description of law as rules they, in fact, exclude the vast majority of legal culture from their jurisprudence. This analysis seems irrelevant to those who wish to affect legal policy, critique the power of law, or understand legal practice.

Nevertheless, Lacanian analysis does not reject Hartian analysis. The Hartian concept of law surprisingly falls four-square (or, more accurately, on one of four squares) within Lacanian discourse theory. Hart's account of the discourse of the master is not only correct, but absolutely necessary for a critical understanding of law.

The symbolic cannot exist without expelling the real and creating a master signifier. Every society needs a regime of positive law which officials will enforce regardless of whether they agree with its substantive content. However, the separation of law and morality is not, as Hart insists, merely an empirical description of all developed legal systems. It is, instead, the normative program of a classical liberal legal system. Liberalism's great innovation was to insist that each subject is entitled to develop her own vision of the good. Accordingly, a liberal state must strive to adopt laws, which are generally applicable, that do not depend for their validity on any *specific* moral theory.[90] In practice, however, this is an impossible goal because all laws necessarily have substantive content—the repression of the real always guarantees its return. Consequently, liberalism is revealed as taking the masculine position of denial. Accordingly, speculative jurisprudence insists that we must take on the feminine position to honestly and bravely accept and confront the terrifying and traumatic moral dimension of law.[91]

Notes

1 H.L.A. HART, THE CONCEPT OF LAW 117 (2d. edn 1994) [hereinafter, HART, CONCEPT OF LAW].
2 BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 130 (1995) [hereinafter, Fink, Subject].
3 Hart was born in 1907 and died in 1992, while Lacan was born in 1901 and died in 1981.
4 NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004).
5 I explore this aspect of Hart's personality and Lacey's analysis of how it affected his scholarship in Jeanne L. Schroeder, *Beautiful Dreamer: A Book Review of LACEY, supra* note 4, 77 U. COLO. L. REV. 803 (2006) [hereinafter, Schroeder, *Beautiful Dreamer*].
6 ELISABETH ROUDINESCO, JACQUES LACAN, (Barbara Bray trans. 1997).
7 LACEY, *supra* note 4, at 3–4.
8 This terminology, which Lacey adopted for her biography of Hart (LACEY, *supra* note 4), comes from his article H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 5 GA. L. REV. 969 (1977).
9 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK III: THE PSYCHOSES 1955–6 86 (Jacques-Alain Miller ed. and Russell Grigg trans. 1993) [hereinafter, LACAN, SEMINAR III]; JEANNE LORRAINE SCHROEDER, THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET 203 (2004) [hereinafter, SCHROEDER, VENUS]).
10 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618 (1958) [hereinafter, Hart, *Positivism*].
11 LACEY, *supra* note 4, at 288.
12 SCHROEDER, VENUS, *supra* note 9, at 45–7. As discussed in the proceeding chapter, liberalism's individual is the ego, not the subject.
13 The classical allusion is Hart's. Hart, Concept of Law, *supra* note 1, at 147.
14 Jeanne L. Schroeder, *The Lacanomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability* 15 YALE J. L. AND HUMAN. 347, 362–4, 69 (2003).
15 The word "positivist" connotes descriptive. Hart claims the separation of law and morality is necessitated by his descriptive task. That is, he argues that those who wish to include moral considerations in a definition of law are confusing law as it is and law as it should be. Hart, *Positivism*, *supra* note 10, at 594–8.

Lon Fuller, probably Hart's best known critic, disparages Hart's claims to description on at least two grounds. First, Hart himself conflates the descriptive and the normative. That is, at times Hart "seem[s] to be warning us that the reality of the distinction [between law and morality] is itself in danger . . . ." Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). "There is indeed no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its prescriptive powers precisely to the fact that it disclaims prescriptive intentions." *Id.* at 632. I agree.

Second, Hart's description is wrong. Fuller recognizes the point I make in the chapter on the analyst's discourse that Hart's argument by example, cannot be expected to persuade and is destined to disintegrate into a shouting match.

> When we ask what purpose these definitions serve, we receive the answer, "Why, no purpose, except to describe the social reality that corresponds to the word 'law.'" When we reply, "But it doesn't look like that to me," the answer comes back, "Well, it does to me." There the matter has to rest.

Id. at 631.
16 FINK, SUBJECT, *supra* note 2, at 130.

17 "[W]e no longer know it now except in a considerably modified form." *Id.* at 203. "Lacan almost goes so far as suggest a sort of historical movement from the master's discourse to the university discourse, the university discourse providing a sort of legitimation or rationalization of the master's will." FINK, SUBJECT, *supra* note 2, at 132. As Bracher says:

> The discourse of the Master, Lacan says, is known by us today only in a considerably modified form, but it is nonetheless active and visible in the various discourses that promote mastery—that is, discourses that valorize and attempt to enact an autonomous, self-identical ego.

Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, *in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 117 (Mark Bracher *et al*. eds 1994) [hereinafter, THEORY OF DISCOURSE].

18 Hart, *Positivism*, *supra* note 10, at 594.

19 Fuller complains that positivists, including Hart, do not adequately define morality but use the word "indiscriminately for almost every conceivable standard by which human conduct may be judged that is not itself law." Fuller, *supra* note 15, at 635. It is my position that, far from being a flaw in positivist theory, it is one of its strongest points. Unfortunately, Hart took this criticism to heart and, in *The Concept of Law*, tries to offer a description of morality, that he contrasts to his description of law.

20 JULES COLEMAN, MARKETS, MORALS AND THE LAW 11 (1988).

21 Hart, *Positivism*, *supra* note 10, at 594. He agrees with earlier positivists that "it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law." *Id.* at 599.

22 HART, CONCEPT OF LAW, *supra* note 1, at 7.

23 *Id.* at 598.

24 Hart, *Positivism*, *supra* note 10, at 620.

25 *Id.* 598.

26 *Id*. (specifically referring with approval to the impetus behind Jeremy Bentham's motivations in developing a positivist account of law). As Robin West describes the Hartian position:

> If we "fuse" law and morality, if we fuse the "is" of the positive law with the "ought" of moral ideals, we will not be able to criticize what is by reference to what ought to be. If we think erroneously that law and justice—that which is posited and that which ought to be—are one, we will not be able to identify, much less rectify, those laws that are unjust. When we commit the "naturalistic fallacy" in this way, we look at the law through Panglossian, rose colored glasses: We see only justice and truth, rather than acts of power. As a consequence, we incapacitate ourselves for meaningful, enlightened legal reform; we lose the ability to speak truth to power when we confuse the two.

Robin West, *Three Positivisms*, 78 B.U.L. REV. 791, 793 (1998).

27 Hart, *Positivism*, *supra* note 10, at 618.

28 HART, CONCEPT OF LAW, *supra* note 1, at 13.

29 Hart, *Positivism*, *supra* note 10, at 602.

30 *Id.*

31 He states

> It is obvious that predictability of punishment is one important aspect of legal rules; but it is not possible to accept this as an exhaustive account of what is meant by the statement that a social rule exists or of the element of "must" or "ought" involved in rules.

HART, CONCEPT OF LAW, *supra* note 1, at 10.

32 Hart, *Positivism*, *supra* note 10, at 603. See also HART, CONCEPT OF LAW, *supra* note 1, at 20–4.
33 *Id.* at 28
34 *Id.* at 11–12.
35 Hart tries to support his position by asserting a distinction between "being obliged" and "being obligated" to do something. *Id.* at v, 66, 83–5. I doubt whether the two expressions really have different connotations, at least in American English. Nevertheless, I am sympathetic to Hart's distinction between what one *must* do and what one *should* do.
36 *Id.* at 7. Hart also needs to distinguish the obligation of law from other rule obeying behavior such as games. *Id.* at 9–10. This is beyond the scope of this work.
37 I explain my reasoning in Schroeder, *Beautiful Dreamer*, *supra* note 5.
38 LACEY, *supra* note 4, at 337.
39 *Id.* at 6–7, 256–7.
40 HART, CONCEPT OF LAW, *supra* note 1, at 81.
41 *Id.* at 83.
42 *Id.* at 89–91.
43 *Id.* at 84. See also, *id*. at 90.
44 *Id.* at 84–5.
45 *Id.* at 85.
46 *Id.*
47 "In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world." HART, CONCEPT OF LAW, *supra* note 1, 117. In this extraordinary passage, Hart seems to leap from the unsurprising empirical observation that the vast majority of the population might be largely ignorant of the secondary rules of the relevant legal system, to the startling proposition that, therefore, the command theory of law might be correct for everyone but "officials."

Hart is, at best, ambivalent about the implications of this conclusion. "The society in which this was so might be deplorably sheeplike: the sheep might end up in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system." *Id*.

As Peter Fitzpatrick has pointed out, what is so inexplicable about this passage is that, earlier in the *Concept of Law* Hart suggests, that "the internal aspect of rules [is] 'distinctive . . . of human thought, speech and action'." PETER FITZPATRICK, The MYTHOLOGY OF MODERN LAW 200 (1992). This is similar to the Lacanian concept that one only becomes as a subject through submission to the symbolic order. Accordingly, when Hart calls these people "sheeplike" he is not merely resorting to cliche. By his own definition, persons who lack an internal point of view are not fully human.
48 *Id.* at 94–7.
49 *Id.* at 91–3.
50 *Id.* at 94.
51 > [T]he Master is the one who invents a new signifier, the famous "quilting point," which again stabilizes the situation and makes it readable; the university discourse that then elaborates the network of Knowledge that sustains this readability by definition presupposes and relies on the initial gesture of the Master. The Master adds no new positive content—he merely adds a *signifier*, which all of a sudden turns disorder into order . . .

Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], *in* SIC 2: COGITO AND THE UNCONSCIOUS 74, 77–8 (Slavoj Žižek ed. 1998). I discuss the quilting point in the chapter on the analyst's discourse.
52 I reluctantly follow Lacan's practice (following Alexandre Kojève) of referring to this as the "master–slave" dialectic. Hegel uses the terms *Herr* and *Knecht* which in

the standard English translations of the *Phenomenology* are referred to as lord and bondsman. Unfortunately, many Hegelians consider Kojève's interpretation (known as the "anthropological" interpretation) of this very dialectic to be a fundamental misreading, (Roudinesco, *supra* note 6, at 102). A more accurate understanding of Hegel in France had to wait until Jean Hyppolite's French translation of *The Phenomonology of Spirit* in the mid-1940s.

53 FINK, SUBJECT, *supra* note 2, at 131 (citations omitted).

54 Renata Salecl, *Deference to the Great Other: The Discourse of Education,* in THEORY OF DISCOURSE, *supra* note 17, at 163.

55 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XVII, THE OTHER SIDE OF PSYCHOANALYSIS 43 (Russell Grigg trans., Jacques-Alain Miller ed. 2007).

56 *Id.* at 21.

> The slave knows many things, but what he knows even better still is what the master wants, even if the master does not know it himself, which is the usual case, for otherwise he would not be a master. The slave knows what it is, and that's what his function as slave is.

Id at 32.

57 *Id.* at 24.

58 Salecl, *supra* note 54, at 163.

59 Bracher, *supra* note 17, at 120.

60 HART, CONCEPT OF LAW, *supra* note 1, at 114–17.

61 FINK, SUBJECT, *supra* note 2, at 75.

62 G.W.F. HEGEL, HEGEL'S PHENOMENOLOGY OF SPIRIT 112–13 (A.V. Miller trans.).

63 *Id.* at 113.

64 *Id.*

65 *Id.* at 115.

66 See Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 TEX. L. REV. 15, 34 (2000).

67 HART, CONCEPT OF LAW, *supra* note 1, at 123–8.

68 *Id.* at 128.

69 *Id.* at 250–1.

70 Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 25 (2003); Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE *CONCEPT OF LAW* 355, 356–9 (Jules Coleman ed. 2001).

71 Costas Douzinas has recently made a related point to mine that the concept of human rights flows from the psychoanalytic understanding of desire. Desire, however, is always necessarily that which is excluded from, and therefore in conflict with, positive law. COSTAS DOUZINAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM 298 (2007).

72 Douzinas similarly argues that human rights—one example of an empirical moral principle—serves "a function for the subject . . . like the little object." *Id.* at 48.

73 *Id.* at 49. Douzinas is speaking specifically about "rights" as understood by the modern human rights movement. In my analysis such "human rights," which refer to specific empirical claims, are not equivalent to what I am calling "right."

74 *Id.*

75 LACAN, SEMINAR III, *supra* note 9 at 86.

76 Lacan makes this statement specifically about Woman (the feminine) who Lacan notoriously says does not exist and is not wholly within the symbolic order. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 1972–3 73 (Jacques-Alain

Miller ed. and Bruce Fink trans. 1998). He continues. "It's not because she is not-wholly in the [symbolic order] that she is not there at all. She is *not* not at all there. She is there in full (*a plein*). But there is something more (*en plus*)." *Id.* at 74.

77 In Linda Belau's words

> The real—correlate to the "beyond the signified" of the trauma—is not "beyond" the symbolic. It is rather the very limit of the symbolic, the impossible kernel of the symbolic around which it circles, what the symbolic attempts to cover over as its very industry. To posit the real as somehow separate from the symbolic entirely misses the point of its significance. The real is nothing other than the point at which the symbolic fails; it is not some idealized content beyond the symbolic. Its very structure precludes that possibility.

Linda Belau, *Trauma and the Material Signifier,* 11 POSTMODERN CULTURE: AN ELECTRONIC JOURNAL OF INTERDISCIPLINARY CRITICISM (2001) HTTP: <http://muse.jhu.edu/journals/pmc/v011/11.2belau.html> (accessed Oct. 17, 2007) (citations omitted).

78 *Id.*

79 Ellie Ragland, *The Psychical Nature of Trauma: Freud's Dora, The Young Homosexual Woman, and the Fort! Da! Paradigm*, 11 POSTMODERN CULTURE: AN ELECTRONIC JOURNAL OF INTERDISCIPLINARY CRITICISM HTTP: http://muse.jhu.edu/journals/pmc/v011/11.2ragland.html

80 Slavoj Žižek, How to Read Lacan 72–2 (2006).

81 Ragland, *supra* note 79 (referring to Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria*, in 7 STANDARD EDITION 3, 83 (James Strachey *et al*. trans. 1953)).

82 The example that Hart and Fuller choose to debate seems particularly odd given Fuller's more broad criticism. Fuller raises the "frightful predicament" of courts in post-Nazi Germany who had to deal with Nazi-era laws that were still on the books. Fuller declares that:

> [i]t was impossible for them to declare the whole dictatorship illegal or to treat as void every decision and legal enactment that had emanated from Hitler's government. Intolerable dislocation would have resulted from any such wholesale outlawing of all that occurred over a span of twelve years.

Fuller, *supra* note 15, at 648. To my mind the most obvious examples of "laws" that are too heinous to be recognized would be Nazi racial laws.

83 *Id*. at 648–9. For the purposes of this discussion, I will assume that Fuller is correct and the treacherous informants could not have been prosecuted for intentionally mis-using the legal system as an instrument of murder.

84 *Id.* at 649.

85 Hart, *Positivism*, *supra* note 10, at 619.

86 HART, CONCEPT OF LAW, *supra* note 1, at 95–6.

87 *Id.* at 96.

88 *Id.* at 118.

89 The Oxford philosophy curriculum under which Hart was educated all but ignored the Continental theoretical tradition. "Inevitably, Kant and Descartes sat alongside Aristotle and Plato in the Oxford under-graduate syllabus. But Nietzsche, Marx, Kierkegaard, and Hegel were notably absent." LACEY, *supra* note 4, at 141.

90 In the words of Costas Douzinas and Adam Gearey:

> In the absence of any widely shared vision of the good life, liberalism relies on formal procedures: on positive law and general criteria of distribution . . . . The law becomes the main substitute for absent ethics and the emptied normative realm . . . . Morality—as much as politics—must be kept at a distance; indeed,

> the main requirement of the rule of law in its contemporary version of legality is that all subjective and relative value should be excluded from the operation of the legal system.

COSTAS DOUZINAS AND ADAM GEAREY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE 133 (2005).

91 See generally, David Gray Carlson, *The Traumatic Dimension in Law*, 24 CARDOZO L. REV. 2287 (2003).

Chapter 3

The university's discourse

Introduction

In my self-appointed role of hysteric, my task is to critique law, not make policy recommendations. Although the spirit is willing, the flesh is weak. In this chapter I can't resist and proffer one policy recommendation: "Stop recommending policy!" Or, to put this more plausibly, policy scholarship should not dominate legal academia as it does now. Jurisprudential, theoretical, and doctrinal scholarship should have equal prestige and presence if for no other reason than these forms of scholarship more closely relate to the practice of law that engages most of our students. Indeed, despite a prevailing, self-serving perception that policy-oriented scholarship is pragmatic and hard-headed, other forms have greater practical application. Policy scholarship speaks in the university's discourse whereas truly critical theory and legal practice speaks in the hysteric's and the analyst's discourses.

The quadripode

The master's discourse generates the discourse of the university. This is accomplished by rotating the mathemes in the quadripode one turn counter-clockwise:[1]

$$\frac{S_2}{S_1} \longrightarrow \frac{a}{\$}$$

S_2 now occupies the position formally held by S_1, *a* occupies the position formally held by S_2, etc. Consequently, the agent of this discourse is S_2—he who has knowledge.[2] In this context, knowledge is not merely implicit (i.e. *savoir faire*), but is expressly claimed (*expertise*). The university's discourse is meritocracy—rule by experts who (are supposed to) deserve their position by virtue of their superior knowledge[3] like the Scarecrow who becomes Steward of Oz *because of his superior brain* after the Wizard, outed as a barred subject, returns to Omaha.[4]

The university's discourse is spoken not only by professors in universities but by all who claim expertise necessary to set policy. It is spoken by the governor, not when she acts as an "official" recognizing positive law, but when she seeks to *justify* her rule. A judicial opinion that *explains* the judge's verdict also falls within the realm of university's discourse.

Why does the master's discourse generate the university's? Because of the impetus that drives Lon Fuller to insist on law's moral content, Ronald Dworkin to demand that law be interpreted so that it best "fits,"[5] and judges to write elaborate opinions. That is, the fact that positive law's status as law is logically contentless makes it unsatisfactory even from the internal viewpoint. Every law has content as an empirical matter. The legislators enacting positive law presumably have some purpose in mind. Even the official who believes that he should obey law just because it is law nevertheless *also* wants to be a moral agent who does the right thing—he wants to obey the law because it is just. Being excluded from the law, "morality" (i.e. purpose, content) serves as its desire. The subject desires to be moral rather than merely legal.

The agent of the university's discourse addresses the a[6]—that which stands in for what is lacking in the master's discourse produced by exclusion.[7] In the context of law, the little a is the specific purpose, substantive, or moralistic content of positive law that Lon Fuller invokes, but H.L.A. Hart refuses to recognize in their Harvard debate. It is social policy. If the master's discourse merely identifies the primary rules that must be obeyed, the university's discourse *justifies* the primary rules with respect to its substantive content.

The truth, hidden in the lower left, is S_1, the master signifier[8]—power. The discourse that claims to explain and rationalize the aims of society always ends up justifying existing order—either the status quo, or a substitute one.[9] Rather than seeking morality *per se* the university's discourse imposes social policies (moralisms) as its little a. In Fink's words, the university "has always served the master, has always placed itself in the service of rationalizing and propping up the master's discourse, as has the worst kind of science."[10] Consequently, the university's discourse is a discourse of power.

Lacan suggests a historical relationship between the master's and university's discourses, the latter being a "sort of legitimation or rationalization of the master's will."[11] The university makes a master's claims to brute power more palatable through veiling. Lacan suggests that the university's discourse has largely superseded the master's as the dominant discourse of modernity. As the persistence of positivism shows, however, Lacan is partly wrong. The university does not supersede the master, but rules as Steward, preserving the master's place.[12]

The product in the lower right position in the quadripode is the alienated barred subject herself.[13] The university's discourse that scientizes and explains the subject's desire has no room for the individual subject and her suffering.[14]

The expert seeks to maximize the desideratum of society generally, and subjects all subjects to this goal. By making society's object cause of desire into a subject of study, this discourse splits the individual subject from her subjective desire. This is the violence of this discourse of power.[15] Of course, in actual universities the most obvious subject identified by Lacan as split and alienated from himself is the student himself. [16]

Lacan calls this the university's discourse not because it *should* be spoken in the university, but because it is too often spoken there. Lacan believes that when one speaks the university's discourse one is indifferent to whether the speaker or the person addressed actually achieves a true understanding.[17] Professors (perhaps unconsciously) frequently care more about their prestige in academia and in society; students are merely a means to that end. Consequently, students become alienated from the enterprise, parroting what their teachers say rather than seeking to create their own knowledge. Of course, I write this not as a outsider, but as a participant in this system.

Lacan universalizes this analysis, arguing that the university's discourse (rule by experts) dominates modern society policy. Experts do not address the subjects subjected to law directly to ask what their subjective desires are. The expert's concern is "objective" – he addresses the collective goals ("little *a*") of society as a whole. In the name of a free society, policy science fundamentally mistrusts the individualistic freedom of its members who might interfere with its grand plans.

In the preceding chapter I damn the master's discourse of Hartian positivism with the faint praise that it is a necessary but inadequate aspect of a legal system. It necessarily leads to the university's discourse that addresses itself precisely to the substantive content that positive law refuses to acknowledge. Although I acknowledge that the university's discourse is also a necessary aspect of any legal system, this chapter is a polemic proclaiming it not merely inadequate but hegemonic. As the second power discourse the university's discourse despises individual freedom as much as the master's discourse. It is more subtle and potentially more dangerous. If the master merely asserts that he must be obeyed, the university insists that it *deserves* to be obeyed. This means that despite the fact that the university addresses itself to the law's substantive content, and occasionally critiques the content of specific laws, it is not in a position to critique the power of law *per se.* Rather, its function is to provide justifications and rationalizations for the status quo and, by suggesting incremental improvements, to assure that the status quo is more effective in imposing its power over others.

Context

One needs to keep in mind the context of Lacan's original formulation of this discourse. The *Seventeenth Seminar* was delivered in a Paris law school during 1969–70, following the 1968 student uprising.[18] Lacan lost his

teaching privileges at the École Normale Superieure in part because the "director of that august institution decided that the student uprising of May 1968 had been spawned by Lacan's Seminar."[19] The director's suspicion seemed confirmed when student demonstrators protested Lacan's dismissal.

Nevertheless, much of the *Seventeenth Seminar* is a reproof to those students who claimed to be his followers. In Lacan's eyes, even though the students were, on the one hand, victims or the split subjects created by the university,[20] on the other hand, these very same students, with their neo-Marxist rhetoric, were part and parcel of the same power discourse spoken by the professors they claimed to be criticizing.[21] Indeed, to Lacan, the epitome of the university's discourse was the Soviet Union—government by experts.[22] All so-called revolutionary discourses ended up justifying a new master. Lacan's harshest words are addressed to these students precisely because they professed to be following his theories. They wanted to make *him* into a master. Despite his insufferable arrogance and egotism, this was a role he refused to play.[23]

By attacking the "university," Lacan is not condemning all teachers or science. How could he, since he spent his entire adult life in such pursuits? Rather, distinguishing the search for truth from much of what goes on in academia. Lacan locates true science in the critical discourses of the analyst and hysteric whereas the university's discourse is:

> mere rationalization, in the most pejorative Freudian sense of the term. We can imagine it, not as the kind of thought that tries to come to grips with the real, to maintain the difficulties posed by apparent logical and/or physical contradictions, but rather as a kind of encyclopedic endeavor to exhaust a field . . .[24]

Although this is a damning analysis, one should understand what Lacan *isn't* saying. He is no romantic. He does not believe that, but for the castrating violence of the university's discourse, the subject (or student or citizen) would be whole and unalienated, and, therefore, we should sweep aside the existing educational system. This is precisely the erroneous conclusion he was accusing the student radicals of reaching. True, the university's discourse is castrating, *but the subject does not pre-exist her castration.* Psychic castration is the initiation rite of maturity—the price for admission into the inter-subjective order. To be a part of society one must adopt collective standards and goals, control one's emotions, and repress one's passions.

Consequently, when Lacan addresses the students who accuse the French university system of being oppressive, he is saying, in effect, "You are right, but what did you expect?" Of course, this does not mean that we should give up and passively submit to oppression. The goal of psychoanalysis is to increase human freedom. However, to actualize freedom we must first be aware of and understand the limitations of human institutions. The feminine discourses cannot seek to supplant, but supplement, the masculine discourses

that are necessary, but inadequate. Critique of law cannot be to do away with law or expertise. That is romantic nonsense.

Application

Policy scholarship

Application of the university's discourse to the legal academy should be obvious. Most contemporary anglophone legal scholarship is normative and policy oriented. The scholar speaks from the position of expertise (S_2). He claims to identify and address the goals (*a*) of a specific law or of society. He positions himself as governor creating, applying, and interpreting the law and recommending how the law should be changed (or not changed) and applied in order to achieve these goals. This splits the subject because a law designed to achieve a specific result necessarily must try to cause those subjected to the law to act in a prescribed manner. The subject must repress her subjective desire and submit herself to society's objective desire. Consequently, even though legal literature often speaks in the language of libertarianism and consumer sovereignty, it betrays an intention of controlling others. The truth of this discourse is power.

That legal academia is an extremely "conservative" institution, ultimately supporting the master discourse of positive law, is hardly news. This is so even though the majority of law professors might identify themselves as being somewhat left of the political center.[25] Leftists can be as "conservative" as rightists when they speak in the university discourse: the former Soviet Union, with its central planning and five-year plans, was the very model of the Lacanian university.[26] This is also the case even when an expert's analysis leads to the conclusion that any specific legal doctrine is incorrect or unjust and should be changed. The point is that virtually all law professors are working within a single dominant paradigm: classical liberalism which depends on the rule of law. Although there might be disagreement within this paradigm, there are few, if any, true anarchists in academe. I do not claim to be any different.

In our era, the most grandiose project within the university's discourse is the law-and-economics movement, and the work of its doyen, Richard Posner, who uses neo-classical price theory as both a descriptive and normative lodestar for legal doctrine.[27] Recently, other practitioners of legal economics have surpassed Posner himself in developing the university's discourse of legal academia by claiming to import the insights of so-called behavioral economics.

Different images; different discourses

Ever since Posner and others proposed an economic analysis of law in the 1970s, scholars from the critical-legal-studies movement and other schools

have offered trenchant criticism of its methodology and assumptions. And yet self-styled legal economists have famously regarded these attacks as irrelevant or external to their paradigm. This essential failure to communicate is so great as to suggest that the different schools might be speaking different languages. From a Lacanian perspective this is almost true. Policy scholarship and speculative scholarship are engaging in diametrically different discourses, namely the university's and hysteric's, respectively. Each discourse is the inverse of the other. As such, neither directly addresses the other. To hear, let alone understand, the speculative scholar's criticism of law-and-economics, the legal economist must, at least temporarily, step outside the university's discourse.

Policy scholars address law's goals. Critical theory addresses law's power. Schematically, each is the other side (*l'envers*)—its structural reverse. The university's discourse claims to speak from the position of knowledge, but produces alienation. The hysteric's discourse speaks from the position of alienation and produces knowledge.

Even within the so-called American "critical-legal-studies" movement, to the extent this 1980s enthusiasm still exists, the dominant paradigm reigns. As David Gray Carlson writes[28] (specifically in connection with the work of Pierre Schlag, one of the most thoughtful, eloquent, and prolific critics of normative scholarship), the CLS critique of mainstream jurisprudence may be seen as a form of failed Lacanianism which, because of its failure, ends up inadvertently reasserting the status quo in the following sense.

The crit correctly recognizes that the law is not complete or coherent in the way that mainstream jurisprudes either claim it is, or hope to make it. Moreover, the crit correctly recognizes that the legal subject is alienated and "split" and that this split relates to law. Nevertheless, CLS fails in the sense that it—like the students Lacan chides—implicitly assumes that law and the legal subject *could be otherwise*. He implicitly assumes that there could be an unsplit legal subject; a natural uncastrated personhood that could bloom forth but for the injustice of the current law.[29] This approach ultimately is unintentionally supportive of the status quo, because its vision of law is precisely the perfectly closed system envisioned by the mainstream scholar.[30]

By this I mean that the crit doesn't *critique* law, he *criticizes* it because it is incomplete and the subject is split. By doing so the crit invokes an ideal of a complete and perfectly just law. Actual positive laws (and legal practice), being imperfect, must be non-law, i.e. politics. Hart correctly accuses the legal sceptic of being

> a disappointed absolutist . . . [whose] conception of what it is for a rule to exist, may thus be an unattainable ideal, and when he discovers that it is not attained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.[31]

This leads to either Hart's Scylla of obsessive formalism (the failed attempt to fill in the gaps of law) or his Charybdis of nihilism that he associates with legal realism.[32] This is why few positivists or formalists propose such a pure vision of their own theories and why it was inevitable that American CLS ran out of gas when it did.

A true and sustainable critique of law comes not from within the university's discourse, but from the analyst's and hysteric's discourses. Law is flawed, because the entire symbolic order necessarily must be so. To a Lacanian, even when the judge departs from precedent she is not necessarily leaving law and engaging in politics, but is engaging in law because every application of law necessarily must include an unlawful moment.[33] Nevertheless, Lacan requires us to ask the radical question: What does it mean to be true to the law when the law is always in a state of flux? What can the words "justice," "freedom," and "ethics" mean in a world when law always has, and always will, miss its mark? Consequently, just as the master's discourse generates the university's discourse, the university's discourse generates the analyst's discourse.

As Jamie Murray correctly argues, the university's discourse is not limited to legal academia.[34] Every practicing lawyer and every judge who tries to reconcile cases and explain law necessarily engages in the same discourse. Murray goes so far as to suggest that the university's discourse is the characteristic discourse of law and that it reflects the masculine neurosis of obsession.[35] This is not as depressing as it might sound at first blush. The very nature of a rule of law is the continuation and protection of a status quo. This is inherent in the concepts of legitimate law creation and precedent. Just as any civilized society requires the master's discourse of positive law, so does it need a university's discourse to supplement the master's discourse. Society must identify collective goals law should serve, and to fashion laws to achieve them. Moreover, just as the master's discourse negatively creates the desire for freedom and morality by exclusion, the university's discourse creates the legal subject through her abjection. This is the person who will seek to actualize her freedom both through and in opposition to the law that abjects her.

Like the master's discourse, the university's discourse is necessary but insufficient for the functioning of any legal system, let alone the actualization of freedom. It is a step beyond positive law which had nothing to say about law's desire for moral content. The university's discourse confronts the content of law directly. Nevertheless, because it hides the truth—because it is in the business of protecting the power of the master—all it can do is try to integrate the little *a* within the existing chain of signification. As a result, it explicates the master's claims to power, rather than undermining them.

The stumbling block

> The concept of freedom is the stone of stumbling for all empiricists, but at the same time the key to the loftiest practical principles for critical moralists, who perceive by its means that they must necessarily proceed by a rational method.
>
> Immanuel Kant[36]

Fear of freedom

The fundamental difference between the university's discourse, on the one hand, and critical jurisprudence, on the other, is their respective concepts of freedom, personality, and rationality. In the United States the university's discourse is associated with classical liberalism. In contrast, the analyst's and hysteric's discourse are based on a concept of personality found in the speculative philosophical tradition.

Policy scholars address law from the position of the legislatures and judges who write the law in the name of the governor to further society's "objective" purposes. They use law as a tool to achieve a desired policy. To do this, they must claim to predict the empirical behavior of legal actors subjected to the law. Spontaneous and unpredictable behavior is antithetic to policy. Consequently, policy scholars seek to define rationality as predictable behavior and dismiss unpredictablity as irrational. They define rationality as the ability to choose an appropriate means to achieve a pre-given end, but have no theory of the unpredictable choice of ends.

When legal actors evince behavior that does not comport with this definition of rationality, policy scholars suggest legal rules designed to manipulate these actors into behaving in ways closer to those predicted by their theory. The university's discourse thus reflects a fundamental fear of freedom. As Kant suggests, freedom is the stumbling block on which policy scholarship founders.[37]

In contrast, as I show in the last chapter, speculative theorists and doctrinal scholars, like practicing attorneys, are hysterics. They address the law from the position of the governed—those subjected to the law's power. They seek to understand how the law affects those subjected to its power in order to help them use the law to achieve their own "subjective" purposes. Their definition of rationality is completely diverse from that adopted by the university's discourse. Speculative theory suggests that it is irrational behavior that is rigidly predictable. Rationality is understood as the capacity for pure spontaneity.

Posner has loosed a blistering tirade on neo-Kantian moral theory in legal policymaking.[38] This attack is of a piece with the utilitarian grounds of the neo-classical economics that Posner preaches. Kant's theory of freedom and rationality is antithetical to the economic understanding of rationality which is limited to ends-means reasoning. Posner is absolutely correct, therefore,

that in order to adopt a theory of economic rationality, one must also reject Kantianism. The utilitarianism fear of freedom and hatred of Kantianism are one and the same. Nevertheless, despite my promotion of speculative theory, I partially defend Posner from neo-Kantian attacks.[39] The type of detailed normative policy advice often proffered in the name of neo-Kantianism is inconsistent with Kantian theory and the speculative tradition it engendered.

Neo-classical price theory and behavioral economics

Controlling behavior

The law-and-economics movement has traditionally been dominated by Chicago School neo-classical price theory. Price theory makes predictions based on the assumption that economic subjects are, or act as though they were, economically rational.[40] In the late 1990s, the law-and-economics movement discovered the work of the rival Carnegie School of behavioral economics associated with Herbert Simon. It claims to have altered its position.[41] Unfortunately, by and large, it has completely misinterpreted Simon's project.

In contrast to neo-classical price theory, behavioral economics does not accept the rationality postulate, but instead conducts empirical studies of how economic subjects actually behave. Behavioral economists believe that the data suggest people are only "boundedly rational;" they consistently deviate from the neo-classical model of economic rationality in specific, observable ways.[42]

What is striking, however, is that the lessons most legal economists purport to draw from bounded rationality are diametrically opposed to those Simon draws. Simon is not merely challenging the empirical claim that economic actors are, or act as though they were, "rational." He questions the very neo-classical definition of rationality. That is, Simon is not an expert speaking in the university's discourse justifying economic theory, but a hysteric critiquing its very foundations.

Simon rejects the preconception that economic rationality is either a superior or paradigmatic mode of reasoning.[43] More strongly, he thinks it is impossible in the real world. He studies actual market behavior for two reasons. First, like most economists outside of law schools, he strongly disagrees with Milton Friedman's notorious assertion that the empirical accuracy of assumptions underlying an economic model are irrelevant so long as the model predicts behavior.[44] Even if one were to accept arguendo the dubious proposition that prediction is the only valid test of economic theory, which Simon and many others do not,[45] the rationality postulate fails on these grounds. Neo-classical economics is a notoriously poor predictor of actual behavior.[46] Simon suggests that models based on more empirically accurate assumptions are likely to be superior predictors.[47]

Second, Simon believes that one appropriate goal of economics is to help economic actors achieve their *personal* goals,[48] something neo-classical price theory neglects. Simon, like Ronald Coase, questions the assumption that one can derive "real world" advice from the abstract perfect market assumptions of price theory.[49] For example, if maximization is impossible in the real world of imperfect markets and limited information, then it is equally impossible to try to approximate maximization with abstract economic models based on perfect markets and information. Consequently, so-called economic rationality is in fact irrational in the colloquial sense of being ineffective, if not outright crazy.

Simon argues that in order for economists to give good advice they must examine how actual successful and unsuccessful economic subjects make decisions. For example, because a real producer can never have access to the perfect information needed to maximize profits, any decision process based on an attempt to maximize is doomed to failure.[50] Simon believes successful entrepreneurs engage in a form of common sense—"satisficing."[51]

In contrast, Christine Jolls, Cass Sunstein, and Richard Thaler,[52] and some other self-identified legal economists seek to graft Simon's empirical observations onto that very aspect of neo-classical economics Simon rejects. In other words, they accept the assumption that economic rationality is the superior mode of decision making. The policy suggestions made by Jolls, Sunstein, Thaler, and others are designed to *force* economically irrational subjects to act *as though* they were economically rational maximizers. In their words, although "the legal system ought always to respect informed choice, . . . government decisionmakers . . . can be relied upon to make better choices than citizens."[53] That is, the experts—S_2—should tell you not only what to do, but also what you *should* want.

Jolls *et al.*'s position is the reverse (*l'envers*) of Simon's. Rather than giving subjects information that they themselves can evaluate to help them make decisions, they would have experts decide how subjects should act and, if necessary, deceive the subjects so that they act "appropriately." This illustrates how the university's discourse uses claims of expertise to justify and veil an exercise of power over others. It is the position of the governor who wishes to control others, rather than that of the governed who seeks to free herself and achieve self-control. It represents not merely a fear of freedom by the experts themselves, but a fundamental hatred of freedom in others.

Policy scholarship

According to Jolls *et al.*, the subjects they study do not know the best way to achieve their desires and they do not even understand what their proper desires are. They identify "three functions of any proposed approach to law: positive, prescriptive, and normative."[54] By positive they mean: "How will law affect human behavior?" "The prescriptive task is to see how law might

be used to achieve specified ends, such as deterring socially undesirable behavior."[55] They state:

> [The] normative task is to assess more broadly the ends of the legal system. In conventional economic analysis, normative analysis is no different from prescriptive analysis, since the goal of the legal system is to maximize "social welfare," usually measured by people's revealed preferences . . . But from the perspective of behavioral economics, the ends of the legal system are more complex. This is so because people's revealed preferences are a less certain ground on which to build; obviously issues of paternalism become central here.[56]

That is, to Jolls *et al.* all legal scholarship should be addressed toward a policy goal—an *objet petit a*. Note, they do not include an analysis of how the law operates at the individual level as a possible function of legal scholarship. They never consider the question of how an individual can use the law for her *own* purposes.

For example, Jolls *et al.* suggest that when the government wishes to provide citizens with information so that they can make choices, the government should not merely be aware of bounded rationality.[57] Nor do they merely suggest that government regulators study rhetoric and communication skills.[58] Rather, they would have the government take its cue from advertising and actively seek to exploit people's cognitive failures and manipulate behavior.[59] Indeed, they call into question one of the primary bases of a free economy:

> The idea of "consumer sovereignty" plays a large role [i.e. in normative law and economics scholarship]; citizens, assuming they have reasonable access to relevant information, are thought to be the best judges of what will promote their own welfare. Yet many of the instances of bounded rationality discussed . . . call into question the idea . . . In this way bounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism.[60]

Once again, this illustrates what is bad about the university's discourse. Despite the pretense of experts to be engaged in the exploration of truth and education of others, they really seek to exercise power over others by telling them what to do, even using deceit and trickery where necessary.

Another example of the university's attitude toward those subjected to its control is its treatment of the "endowment effect." Empirical evidence suggests that people become attached to objects they own and are loath to exchange them for their market price or even for virtually identical objects.[61] According to the experts, this sentimental attachment is irrational (or an

example of bounded rationality). Jolls *et al.* suggest legal rules intended to dispel the endowment effects.[62] In other words, although the experts give lip service to the proposition that there is no accounting for tastes and that rationality is limited to the determination of the most efficient means to achieve subjective ends, by calling the endowment effect "irrational" they sneak in a professional judgment as to taste.[63] As the subject to be produced by the university's discourse inevitably has her own goals and desires, she is, inevitably, split and alienated.

Gary Becker makes a criticism similar to mine but from the perspective of economic theory.[64] Becker insists that in order for neo-classical economics to be both internally consistent and an effective predictor of behavior, it needs to develop a theory of subjective preference formation and to develop a definition of rationality that encompasses actual behavior of economic actors. He proposes a "new home-economics" of "capital formation" to explain how a wide variety of behavior, including habits and drug addiction, might be economically rational (even if harmful, and therefore, irrational in the colloquial sense).[65] This is because Becker believes that individuals and households should not be considered passive *consumers* but active *producers* of utility.[66] One way to produce utility is by imbuing one's possessions with personal significance, thereby increasing their subjective use value to the individual over their objective market exchange value.[67] It is rational to form sentimental attachments to things because to do so is pleasurable. Consequently, it is not irrational to ask for more money to sell one's car than one would pay for an "identical" car, because no other car is associated with the owner's subjective memories and associations. The two cars, therefore, are not identical.[68] In other words, the endowment effect may be a means by which rational actors achieve the ends of increasing the utility derived from their possessions.

In contrast, rather than helping individuals determine how to confront the law from their own subjective positions, Jolls *et al.* want the experts both to tell people what they should do and manipulate people to further the experts' goals. The experts also determine what people should and will want. They do not seek to educate those subjected to the law. If the experts think that it will bring them closer to their goal ("little *a*"), the experts will actually withhold information from the subjects. It is the experts who identify society's goals and the appropriate preferences of the populace, and then use the law to manipulate individuals (provide incentives and disincentives) to achieve these goals.

Rationality

The balance of this chapter proceeds as follows. First, I briefly describe the familiar rationality postulate of neo-classic price theory reflected in mainstream law-and-economics literature. Second, I contrast it to the quite different

concept of rationality encountered in speculative theory. Last, I demonstrate how Lacanian discourse theory offers both a more coherent critique of policy-oriented scholarship and an account of why policy scholars are unable to hear external criticism.

Economic rationality

The American law-and-economics movement, based on neo-classical price theory, posits that legal subjects are (or act as though they were) economically "rational."[69] This proposition has long been subject to critique from both supporters and opponents of the economic approach to law.[70] Frequently, critics challenge the empirical validity of the hypothesis and/or its analytic usefulness. Some question the extension of the hypothesis of economic rationality beyond the scope of express market transactions[71] on moral, philosophic, or aesthetic grounds.[72] Others quibble with the particular vision of economic rationality offered by a specific author.[73] As just discussed, recently legal scholars sympathetic to the law-and-economics movement cite empirical work done by behavioral economists and argue that the rationality of economic actors is bounded—people tend to display economically "irrational" behavior in certain predictable situations.[74] Nevertheless, in stark contrast to true behavioral economists, they do not abandon the assumption that economic rationality is the optimal form of reasoning, and propose legal rules that would make people act *as though* they were economically rational. I do not criticize the rationality postulate *per se*. Instead, I seek to shed some light on the question of why the rationality postulate is so attractive to some and so objectionable to others.

One reason might be that the definition of "rationality" adopted by legal economists is radically different from that used in other disciplines and philosophies. To suggest that this debate is characterized by a semantic breakdown is not to say that the differences between the two sides can be reduced entirely to semantics. Rather, the difference between different definitions of "rationality" reflects the fact that the different Lacanian discourses require different conceptions of human nature and understandings of the goals of legal and jurisprudential analysis.

Neo-classical theory in legal academia

Even Chicago-school economists adopt diverse definitions of economic rationality which differ in significant ways. I limit myself to the version promulgated by Posner as this has had the greatest impact on legal scholarship. Because this concept is so familiar, and because I cover this ground elsewhere,[75] my description is brief and serves mainly as an introduction to my subsequent discussion of speculative rationality which is less well known in legal circles.

Ends-means reasoning

Economic rationality is, according to Posner, instrumental or ends-means reasoning.[76] Simon describes this as "substantive" rationality: it is aimed at achieving a specific substantive goal.[77]

More accurately, as understood by Posner, economic rationality does not involve reasoning at all, but is better described as ends-means *behavior*.[78] The colloquial sense of "rationality" means the use of reason. Posner completely avoids any notion of cogitation. In his formulation, "it would not be a solecism to speak of a rational frog"[79] or rat[80] insofar as these creatures instinctively act in ways that further their simple ends such as eating and mating. Posner dips into evolutionary theory and locates economic rationality at the level of the gene,[81] a mindless thing incapable of even the most rudimentary cognitive activity, let alone reason. Indeed, following Friedman, Posner proudly boasts that his theory completely lacks psychological content.[82]

Economic rationality is typically equated with "maximization." Once a subject identifies what she wants, she will act in such a way as to maximize her desideratum. The desideratum of producers is usually considered to be profit and that of consumers to be utility (very roughly, happiness).[83] Posner suggests that wealth is, or should be, the desideratum furthered by law.[84]

As introduced, neo-classical economics traditionally claims that economic rationality does not involve a choice of ends.[85] Ends are deemed subjective, idiosyncratic, and pre-given.[86] Although consumers wish to maximize their utility, neo-classical economists usually claim to have nothing to say about what would make any specific consumer "happy." This is the usual meaning of the cliche "there is no arguing about tastes."[87] From this, Posner concludes that economic rationality is not merely consistent with irrationality, it requires irrationality because the desires of economic subjects are considered beyond rational explanation.[88]

Note what this implies. One's ends (tastes, desires, etc.) are purely idiosyncratic, not rational. Neo-classical economics, therefore, assumes that freedom and rationality are two very different things. Rationality (instrumental or ends-means reasoning) can be, but is not necessarily, a way of implementing one's freedom in the world, but it is not freedom *per se*.

Indeed, economic rationality is the opposite of freedom. Economic rationality is in thrall to irrational ends: what Kant calls pathology. Posner implicitly recognizes this when he ascribes economic rationality to rats and frogs—creatures that, as far as he knows, are not capable of free will, but are slaves to their biological instincts—as well as genes—automata that mechanically reproduce themselves.

Irrationality of ends

Notwithstanding the claims of legal economists that they have nothing to say about people's preferences, they can't be trusted in this regard. In order

to make an economic model based on ends-means reasoning, economists must, by necessity, make assumptions about, or observations of, people's ends. Traditional economic models are based on the assumption that economic subjects are self-interested (i.e. that a consumer's utility will be maximized if she considers her wants, narrowly construed).[89] Nevertheless, as Posner is the first to point out, there is no theoretical reason why one could not posit that subjects might have a "taste" for altruism so that utility maximization could be other-directed or even self-destructive.[90] Moreover, although it is usually assumed that individual tastes are independent, one could theoretically posit that tastes are affected by outside influences such as sympathy or antipathy toward others.[91] Although lip service is given to the possibility of interdependent tastes, models based on them are rare. Indeed, it is hard to see how assumptions such as altruism or sympathy can be added to the model without turning it into a truism.[92] Adding these factors to the traditional economic model risks making all conceivable behavior rational in the trivial sense that the actor must have felt his choice was a good idea at the time, regardless of his later reevaluation.[93]

Legal scholarship tends to accept Posner and Friedman's assertion that, as a science, the only valid test of an economic theory is prediction, even though this is wildly controversial among other economists and philosophers of science.[94] This, of course, helps to explain the overwhelming acceptance of law and economics within legal academia. If, as I have suggested, many legal scholars see their task as policy science, then they need to be able to predict what the likely effects of their advice might be. Neo-classical economics claims to be the type of predictive tool policymakers need.

As Stigler and Becker recognize, traditional economics' insistence that tastes are irrational creates an irreconcilable conflict with its goal of predicting economic behavior. If rational people are supposed to act instrumentally to achieve their preferences, then one cannot predict their actions unless one can predict their preferences. This observation raises an implicit but fundamental paradox in neo-classical economics' relationship to the ideal of free will. The very goal of predictability, which is a necessary part of policy science, requires that one break down the barrier protecting the privacy of tastes that is libertarianism's definition of negative freedom. Tastes must be predictable and "objective," not free and "subjective."

The new "behavioral" legal economists go beyond merely realizing that their policy science requires that they identify, predict, and thereby restrain the freedom to choose one's individual ends. The proposition that economic rationality is bounded suggests that economic subjects are not necessarily able to choose the best means to their ends. Consequently, Jolls *et al*. teeter on taking a step further, recommending that experts manipulate not merely the means that individuals choose, but the choice of ends as well.

The natural and the positive

The approach of utilitarianism, the founding philosophy of legal economics, with respect to the relationship between subjectivity and individual rights is half-way between those of libertarianism and Hegelianism. Libertarianism sees both the legal subject and certain basic legal rights as natural. The legal subject is the self-identical, autonomous individual who has the right to life, liberty, and property in the state of nature.

The intuitive appeal of this approach is obvious. It claims to protect certain cherished rights as inviolable. Any existing regime of positive law can be justified only insofar as it respects these basic natural rights. The problem with this approach is also obvious. What could it mean to have rights, particularly the right to property, in a state of nature prior to the formation of a regime of positive law?

As Wesley Newcomb Hohfeld notes, rights can only be conceptualized in correlation with other legal subjects—I have rights against another person that will be recognized and enforced by other persons.[95] Rights cannot pre-exist society; they exist within the inter-subjective context of a given society and given legal regime. This observation leads to the classic criticism of libertarianism. The natural right to property is supposed to serve as the bulwark that protects the private individual from the violence of the state, but by necessity, it is the state that sets the scope of individuals' property rights.[96]

Utilitarianism shares the libertarian belief that the legal subject is natural. Preferences are "pre-given" in the sense that they are external to law. Utilitarianism deems legal rights to be merely a means of achieving the ends of maximum aggregate utility. This approach obviously has the advantage of solving the libertarian paradox of rights. One obvious disadvantage, however, is that it makes rights contingent (and therefore merely privileges). Another classic reproach to utilitarianism is moral monstrousness. If utilitarianism's only standard is aggregate utility, then it would have to support any number of monstrous institutions such as slavery or torture if it could be shown that the aggregate pleasure experienced by the masters or sadists exceeded the pain suffered by the slaves and torture victims.[97] Both history and current events give us ample incidents of this tendency.

Moreover, this criticism reveals an internal inconsistency within utilitarian theory. Utilitarian law is supposed to reflect the preferences of the appropriate populace. Utilitarianism (at least as practiced by legal academics), however, has no theory of preferences. As Posner correctly notes, legal economists have been forced to abandon as empirically inaccurate the traditional utilitarian vision of the legal subject as the self-interested, autonomous individual. Posner has also recently questioned whether the legal subject is even self-identical.[98] It is not clear what is left.[99]

One possible competitor to utilitarianism is what I call romanticism,[100] a barren hybrid achieved by crossing libertarian and utilitarian instincts.

The romantic shares with the libertarian and the utilitarian the liberal intuition that the subject is natural. The romantic, like the utilitarian, recognizes that law can only be positive, yet, like the libertarian, nostalgically longs for a "natural" pre-legal state in which one could breathe free. The utilitarian emphasizes the use of positive law as a tool to achieve society's goals (i.e. aggregate utility). The romantic concludes that positive law is a tool of oppression because it ignores the happiness of any specific individual. The romantic sees moral monstrousness not as a theoretical problem of utilitarian philosophy, but as a necessary, if banal, everyday evil of a policy-oriented law. In other words, the romantic agrees with the basic propositions of utilitarianism, but merely comes to a different moral evaluation of its implications. Unfortunately, the romantic's agenda of a society without law is utopian. As a result, romanticism generally, and critical legal studies specifically, fail as effective critique of utilitarianism.

In contrast, speculative theory is a true alternative to utilitarianism. It shares utilitarianism's critique of natural rights. Rights are not natural, but human inventions that can only exist within an empirical legal regime. Speculative theory also rejects the liberal presupposition that the legal subject is natural. Subjectivity is as much an artifact as law. Speculative theory, therefore, rejects both the utilitarian conclusion of completely contingent rights and the romantic dream that the individual can achieve freedom if released from the law's chains. Hegelian theory views legal rights, legal subjectivity, and positive freedom as mutually constitutive; none cannot exist without the others.[101] Legal rights, being artificial, can be changed as an empirical matter, but one cannot abrogate rights without changing the subject. This Hegelian analysis leads to the psychoanalytic theory of the fraught interrelationship between the barred subject and the big Other.

Speculative rationality

In this section, I introduce the concept of rationality encountered in speculative philosophy and critical theory. Because the speculative tradition begins with Kant, I give a brief account of certain aspects of his theories of rationality, freedom, and morality as found in his first two critiques and *The Metaphysics of Morals.*

Negative freedom or liberty

For Kant, rationality, freedom, and spontaneity are, if not identical, so closely interrelated that one cannot conceive of one without the others. They form a sort of Holy Trinity—three separate concepts that form one unity. Kant, of course, recognizes that rational persons necessarily engage in instrumental reasoning, but he does not reduce rationality to consequentialism. His entire *oeuvre* on rationality can be seen as an attack on utilitarianism *avant la lettre*.

Kant introduces his concept of freedom and its necessity for rationality in his first critique as part of his analysis of the four antinomies. Kant argues that reason yields two equally persuasive, yet mutually inconsistent, conclusions on four fundamental cosmological questions.[102] Each antinomy consists of a dogmatic thesis derived from *a priori* propositions, and an antithesis drawn from empirical experience.[103]

Each thesis and its antithesis are supported by apogogic reasoning, "that is, each side attempts to establish its case by demonstrating the impossibility of the alternative. Thus, the operative assumption shared by both sides is that the opposing claims are contradictories."[104] They are both mutually exclusive yet the only two possibilities. Kant believes that these conflicting positions lead to the "euthanasia of reason,"[105] which can only be overcome by another approach to antinomy.[106] Kant's argues that the thesis and antithesis of each antinomy are not true contradictories but exist in "dialectical opposition" to each other.[107]

It is Kant's third antinomy that concerns us. The thesis is: "Causality according to the laws of nature is not the only causality operating to originate the phenomena of the world. A causality of freedom is also necessary to account fully for these phenomena."[108] The antithesis is: "There is no such thing as freedom, but everything in the world happens solely according to the laws of nature."[109] The issue at stake here is "whether I am a free agent, or, like other beings, am bound in the chains of nature and fate."[110]

Kant purports to resolve this antinomy by showing "that no real contradiction exists between [the thesis and the antithesis], and that, consequently, both may be true."[111] He claims his solution to the third antinomy shows the possibility, if not the necessity, of free will.[112]

Kant's resolution, and his resulting analysis of the inter-relationship among rationality, freedom, and spontaneity, is based on his distinction between the phenomenon and the thing-in-itself or noumenon. Roughly speaking, the phenomenon is the empirical or sensible world of our experience, while the noumenon is the essential or intelligible world with which we have no direct experience.[113] An explanation and defense of these notoriously difficult concepts is beyond the scope of this work.[114] Nevertheless, the distinction between the noumenon and the phenomenon should become apparent in the context of the following discussion.

Kant decides that the empirical antithesis, i.e. that everything is caused (and freedom does not exist), is true of nature (phenomena).[115] He states, "if phenomena are things in themselves, freedom is impossible. In this case, nature is the complete and all-sufficient cause of every event."[116] But, according to Kant, the universal natural rule of causality does not apply to noumena, which are not empirical but intelligible.[117]

One might be tempted to derive from these propositions the conclusion that freedom is only of theoretical interest because it cannot exist in the sensible world in which we live. Insofar as each person is an empirical

individual (i.e. a human animal), she is herself a phenomenon who is bound by the chains of nature.[118] Even if the soul were free in heaven, how could man be free on earth? To pose this issue in Kantian terminology, is freedom merely transcendental, or can it also be made practical?

The fundamental Kantian distinction between the noumenon and the phenomenon might suggest either that the existence of transcendental freedom at the noumenal level explains nothing about practical freedom's possibility at the phenomenal level or that the existence of transcendental freedom implies, by negative pregnant, the nonexistence of practical freedom. Kant's point in the *Critique of Pure Reason*, however, is precisely to show that practical freedom is *possible*. He leaves it to his second critique, the *Critique of Practical Reason*, to argue how practical freedom flows from the concept of transcendental freedom.[119]

Kant's theorizes a necessary relationship between phenomena and noumena. "If . . . phenomena are held to be, as they are in fact, nothing more than mere representations, connected with other[s] in accordance with empirical laws, they must have a ground which is not phenomenal."[120] Indeed, this relationship seems definitional. The noumenon is the thing-in-itself; the phenomenon is a mere representation of something else. If a phenomenon were not the representation of something else, it would be a thing-in-itself, i.e. a noumenon rather than a phenomenon. But "[p]henomena—not being things in themselves—must have a transcendental object as a foundation, which determines them as mere representations."[121] In other words, each phenomenon refers to, and depends on, an underlying noumemon.

If one accepts this proposition, then "there seems to be no reason why we should not ascribe to this transcendental object, in addition to the property of self-phenomenization, a causality whose effects are to be met with in the world of phenomena, although it is not itself a phenomenon."[122] In other words, although all phenomena, being natural, must have a cause, this cause does not have to be phenomenal. It might be possible for a phenomenon to have a noumenal cause. A noumenon can be the uncaused cause of a phenomenon. Kant asks, "Is it not . . . possible that, although every effect in the phenomenal world must be connected with an empirical cause, according to the universal law of nature, this empirical causality may be itself the effect of a non-empirical and intelligible causality – its connection with natural causes remaining nevertheless intact?"[123]

Although freedom, if it existed, would be noumenal, not phenomenal, noumenal freedom could have practical effects in the phenomenal world despite the laws of nature. Most importantly, freedom could have a role in human action. Although man as an empirical creature is phenomenal, he is not *merely* phenomenal. The essence of the Kantian subject is noumenal. In Christian terms, man is soul as well as body. "He is thus to himself, on the one hand, a phenomenon, but on the other hand in respect of certain faculties, a purely intelligible object – intelligible, because its action cannot

be ascribed to sensuous receptivity. These faculties are understanding and reason."[124] As Robert Merrihew Adams characterizes Kant's argument:

> How then can the demands of empirical knowledge be reconciled with the demands of morality? To simplify, Kant asserts that both can be satisfied if we are subject to causal determinism as phenomena (as we appear to ourselves and to each other) but free from causal determination as noumena (as we are in ourselves). We cannot be experienced (not even by ourselves) except as subject to a thoroughgoing causal determinism; but since objects of experience as such are only phenomena, it does not follow that we are causally determined as we are in ourselves. As a phenomenon the self is causally determined, but as a noumenon the self of the same person can still be the free agent that morality requires.[125]

In other words, Kant proves to be the father of speculative thought. Kant's differs from other forms of liberalism by sharply distinguishing the essential from the natural. Whereas libertarianism, utilitarianism, and romanticism believe that man is *naturally* free, Kant believes that man is free *despite nature* which is fundamentally *unfree*.

Positive freedom or spontaneity

We can now consider Kant's conception of freedom and how it relates to his conception of reason. So far we have encountered Kantian freedom as a purely negative entity—the absence of natural causality. However, if human noumenal rationality can cause the phenomenon of human action, then practical freedom could be more than the mere negative freedom to slip loose the causal chains of nature. There could be a positive aspect of freedom as the uncaused cause of action in the world, i.e. spontaneity. Reason is equivalent to positive freedom.[126]

Paradoxically, Kant's concept of the "ought"—obedience to the moral law—is the source of, if not equivalent to, freedom understood as spontaneity. Reason, freedom, law, and morality are inextricably linked. Consequently, Posner's attack on neo-Kantian moral theory is an inevitable consequence of his life-long fear of Kantian freedom.

Since reason can contemplate what ought to be, reason can also contemplate that things could be other than they are. Kant believes this conception of reason implies that man is capable of the volition to act and change things.[127] "[T]he idea of an ought or of a duty indicates a possible action, the ground of which is a pure conception; while the ground of a merely natural action is, on the contrary, always a phenomenon."[128] The noumenon of reason can cause the phenomenal effect of human action; freedom is not merely transcendental, but practical.[129] Reason can become a positive conception of

freedom as spontaneity—the ability to change and remake the world.[130] In his later work, Kant refers to negative freedom as autonomy or independence and positive freedom as self-legislation.[131]

From this brief analysis, we can see the two ways that the speculative conception of reason differs from economic rationality. First, economic rationality is merely the characteristic behavior of natural creatures (and genes) to act in ways that further their goals. Economic rationality does not, therefore, require conscious thought. Kantian reason, in contrast, is the intelligible cognition that separates man from nature. There are no rational frogs or rats in Kant's universe. Second, economically rational behavior is rigidly predictable. Kantian reason is the capacity for pure spontaneity. This is not to suggest that all human actions are free and spontaneous.[132] Kant only argues that *some* degree of human freedom is theoretically possible. The practical expression of human freedom comprises one of the primary themes of Kant's second critique, the *Critique of Practical Reason*. In this work we encounter the third difference between economic and speculative rationality, the relationship between rationality and instrumental ends-means reasoning.

Can freedom be practical?

For Kant, reason is "practical" insofar as it "can of itself determine the will independently of anything empirical."[133] Practical reason is reason that causes human action (i.e. has an effect in the phenomenal world). In other words, the title of the second critique, the *Critique of Practical Reason*, indicates that it is intended to be a critical analysis of the question left open in the *Critique of Pure Reason*: Can freedom exist in the empirical world? As Kant states in the preface to the second critique:

> With th[e] faculty [of pure reason], transcendental *freedom* is also established; freedom, namely in that absolute sense in which speculative reason required it in its use of the concept of causality in order to escape the antinomy into which it inevitably falls, when in the chain of cause and effect it tries to think the *unconditioned*. Speculative reason could only exhibit this concept (of freedom) problematically as not impossible to thought, without assuring it any objective reality, and merely lest the supposed impossibility of what it must at least allow to be thinkable should endanger its very being and plunge it into an abyss of skepticism.[134]

The goal of this inquiry is to demonstrate the actuality of pure reason by showing that it has empirical effects and therefore is practical.[135] Freedom is "the keystone of the whole system of pure reason."[136] Consequently, the possibility of reason will be "proved by the fact that freedom actually exists, for this idea is revealed by the moral law."[137] "[I]f we can now discover

means of proving that [freedom] does in fact belong to the human will . . . then it will not only be shown that pure reason can be practical, but that it alone, and not reason empirically limited, is indubitably practical."[138] Consequently, in the second critique Kant attempts to argue that there are good reasons to believe that practical freedom, and therefore the capacity for morality, does in fact exist.

In the course of analyzing practical reason, Kant says many harsh things about the empiricist's conception of ends-means reasoning and what is known today as utilitarianism. He does not, however, condemn ends-means reasoning in all situations. Instrumental reasoning is obviously an important component of cognition, which is absolutely necessary for everyday pragmatic decisions. Kantian moral law—the categorical imperative—is noumenal, not phenomenal. Pragmatic reasoning is, therefore, necessary in providing the substantive empirical content necessary to make concrete decisions.

Kant's concept of "maxims" reflects a conception of ends-means reasoning that is quite different from Posner's. According to Kant, man does not act blindly out of instinct like a frog or rat. Even when man follows his inclinations, he *chooses* to do so. These choices as to what behavior to follow are "maxims:"

> The crucial point here is that . . . the empirical character [of human behavior] involves not simply a disposition to behave or to respond in certain predictable ways in given situations but a disposition to act on the basis of certain maxims, to pursue certain ends, and to select certain means for the realization of these ends.[139]

Practical reasoning cannot be reduced to mere ends-means reasoning, which is a form of servitude. Although one uses ends-means reasoning when one chooses how to implement one's maxims, the adoption of maxims is the choice of ends, not means. Moreover, rationality consists not merely of a choice of maxims (which always involve ends-means reasoning), but also a choice of what Kant calls "laws" (objective rules), which, if moral, are non-instrumental and are adopted regardless of their anticipated consequences.

Kant distinguishes between laws and maxims as follows:

> Practical principles are propositions which contain a general determination of the will, having under it several practical rules. They are subjective, or Maxims, when the condition is regarded by the subject as valid only for his own will, but are objective, or practical laws, when the condition is recognized as objective, that is, valid for the will of every rational being.[140]

Maxims are therefore subjective in the sense that they are idiosyncratic to an individual subject. Laws are objective in the sense that they are generally

applicable to all subjects. This distinction looks forward to Kant's famous "categorical imperative," or universal moral law: "Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation."[141] The question posed by the categorical imperative is: How can one reconcile the subjectivity of maxims with the objectivity of law?

The problem with utilitarianism

Rather than proceeding directly to a discussion of the categorical imperative, Kant first considers, and then rejects, utilitarianism as a governing principle. Kant purports to show that consequentialism cannot serve as a moral principle, even when the desired consequence is the substantively good goal of the greatest happiness for the greatest number of people. Kant, writing in the 1780s, could not address utilitarianism *per se* for the obvious reason that Jeremy Bentham would not publish his *Principles of Morals and Legislation* until 1789. Instead, Kant addresses the empiricist philosophical tradition through the work of David Hume.[142] The salient points of this philosophic approach are substantially similar to those of modern utilitarianism and consequently, neo-classical price theory.[143] Consequently, I anachronistically refer to the position Kant rejects as "utilitarianism."

Kant's criticism of utilitarianism is markedly different from that found in most contemporary legal literature. Critics usually attack utilitarianism on a number of substantive grounds, such as moral monstrousness. Kant cannot use this criticism because it relates to the substantive content of utilitarianism. In contrast, Kant famously makes morality a purely procedural principle, totally devoid of substantive content. Kant distinguishes the right (what one ought to do because it is the moral law) from the good (what one wants to do because it will have a desired beneficial effect). Consequently, Kant cannot use a substantive argument to defeat a candidate for a moral law, but must develop a purely formal one.

Kant starts by agreeing with a number of propositions that we would today associate with utilitarianism. Kant agrees that rational beings seek to fulfill their preferences,[144] and to increase, if not maximize, their utility.[145] This observation reflects the fact that a governing principle of personality is self-interest, or what Kant calls "self-love."[146] He also agrees with the concept that a law that "promote[s] the happiness of others" might be substantively good.[147] In other words, as a classical liberal, Kant's empirical observation of man as phenomenon is remarkably consistent with the utilitarian conception.

In order for utilitarianism to meet Kant's criterion for a universal moral principle, however, the proposition that the law should maximize aggregate utility must be defended on formal grounds. Kant believes that utilitarianism fails his formal test. This failure springs from Kant's distinction between maxims and laws.[148] It also relates to the proposition adopted by utilitarianism

that desires (preferences) are purely empirical and, therefore, subjective. Idiosyncratic preferences cannot serve as the basis of objective law because one could never achieve the unanimity that would meet Kant's test of universality:

> Even supposing, however, that on any given date all finite rational beings agreed as to what were the objects of their feelings of pleasure and pain, and also as to the means which they must employ to attain the one and avoid the other; still, they could *by no means* set up the *principle of self-love* as a *practical law*, for this unanimity itself would be only contingent.[149]

Limiting moral law and rationality to the satisfaction of preferences would not be consistent with Kant's goal of finding practical reason and practical freedom in the world. Kant concludes, as I do, that utilitarianism, as a moral system, leads to a conclusion that man is not free.

> The principle of private happiness, however much understanding and reason may be used in it, cannot contain any other determining principle for the will than those which belong to [sic] the lower desires . . . Then only, when reason of itself determines the will (not as the servant of this inclination), it is really a higher desire to which that which is pathologically determined is subordinate, and is really, and even specifically, distinct from the latter, so that even the slightest admixture of the motives of the latter impairs its strength and superiority.[150]

Let me interpret this cryptic but crucial passage with the terminology that I have been using. Freedom is, negatively, the liberation from nature's causal laws and, positively, the capacity for spontaneity, i.e. the ability to do something uncaused by nature. Inclinations, being empirical, are phenomenal and part of nature. They are, therefore, subject to the laws of causality. If rationality is reduced to ends-means reasoning or the satisfaction of desires, then reason is not free, but is subservient to inclination. If reason is subservient to inclination, it is subject to the causal laws of nature, i.e. unfree.

This is the point that I made earlier: from a speculative position, economics views rationality as enslavement to inclination and, therefore, essentially unfree. Only if reason can choose its own ends, totally divorced from the ends forced upon it by inclination, can reason be truly noumenal and free.[151]

Freedom is, therefore, the stumbling block on which all empiricism, including law-and-economics, founders. The paradoxical question that Kant faces, however, is whether empiricism is the stumbling block on which his concept of freedom founders. If utilitarianism is empirically "true," then not only is freedom impossible, but the conclusions of speculative philosophy reached in the first critique are contradicted. In order for Kant to defend

the proposition that man is capable of practical freedom, he must first destroy utilitarianism.

To do so, rationality must be redefined as the capacity to choose one's own ends rather than accepting ends dictated by inclination. In Kant's terms, for reason to be practical, it must be "self-legislative."[152] Freedom requires that one be subject only to those laws that one writes for oneself. "An end is an object of the choice (of a rational being)."[153] "What end anyone wants to set for his action is left to his free choice."[154] "Hence in ethics the concept of duty will lead to ends and will have to establish maxims with respect to ends we ought to set ourselves, grounding them in accordance with moral principles."[155] "Every action, therefore, has its end; and since no one can have an end without himself making the object of his choice into an end, to have any end of action whatsoever is an act of freedom on the part of the acting subject, not an effect of nature."[156] In other words, virtue is the choice of subjective maxims that are consistent with objective laws.

Scholars disagree as to whether Kant is successful in his task or whether Kantian freedom remains purely noumenal with no real practical effect.[157] This debate is beyond the scope of this work. Here I will only note certain conclusions reached by Kant.

A problem with utilitarianism as a moral principle is that it cannot be made universal. If inclinations are empirical and idiosyncratic, then they are by definition subjective.[158] Agreement about goals can only be empirical and, therefore, contingent. Consequently, there is no way of achieving a permanent consensus or "harmony."

> For whereas in other cases a universal law of nature makes everything harmonious; here, on the contrary, if we attribute to the maxim the universality of law, the extreme opposite of harmony will follow, the greatest opposition, and the complete destruction of the maxim itself, and its purpose. For, in that case, the will of all has not one and the same object, but everyone has his own (his private welfare), which may accidentally accord with the purposes of others which are equally selfish, but it is far from sufficing for a law.[159]

This is a formal way of restating a number of familiar substantive objections to utilitarianism. Because not all people will have the same preferences, any organized society will have to impose the preferences of some members (such as the sovereign or majority) on others. This means that utilitarianism has no limiting concept of inalienable and inviolable human rights. Bentham famously penned one of history's most enduring insults to ridicule the concept of universal, natural human rights: "nonsense upon stilts."[160] For the utilitarian, individual rights are only contingently granted as a means to a collective end. Rights should, therefore, be rescinded if society's calculation of the utility of these rights changes.

Kant's criticism is a more sophisticated variation of the libertarian objection that utilitarianism views rights as contingent. Although utilitarianism is supposed to be based on a concern for each individual's happiness, it is not universal precisely because it is willing to sacrifice the happiness of some for the happiness of others. Also, implicit in Kant's argument is the familiar objection that because utilitarianism posits that tastes are subjective, there is no way of making interpersonal comparisons of relative utility. Consequently, there is no way of rewriting utilitarianism from "promoting the happiness of all" to "promoting the greatest aggregate happiness in society (even if it results in pain for some or even most)" because there is no way of aggregating happiness.[161] This admission makes any policy purportedly made on utilitarian grounds a lie by definition. And so although utilitarianism is supposed to be an empirically-based moral system, not only freedom, but empiricism itself, is a stumbling block to utilitarianism on its own terms.[162]

The right v. the good

At first blush Kant's notion of the moral law might seem to have some similarity to H.L.A. Hart's separation thesis in that both expel substantive content. In fact, this resemblance is a mirror image. Kant is the reverse or other side of Hart. Lacan identifies Kant as the father of psychoanalysis.[163] As the analysts's discourse is the other side of the master's discourse, it is not surprising to see that Kant turns Hart's concept of law inside-out. Hart calls the content that law expels "morality," whereas Kant thinks that morality is itself the expulsion of content. To Hart, law is distinct from the morality it expels. To Kant, true law is morality. In order to distinguish Kant's concept of true law in harmony with morality (the right as opposed to the good), from Hart's positive law, I shall, idiosyncratically, call it ethical law (a term, so far as I know, that Kant himself did not use).

Kant argues that it impossible for positive law to be equivalent to ethical law, because the former is empirical and contingent. Ethical law cannot be discovered by experience—recognized by officials through the application of secondary rules—but must be deduced by reason:

> Since the bare form of [ethical law] can only be conceived by reason, and is, therefore, not an object of the senses, and consequently does not belong to the class of phenomena, it follows that the idea of it, which determines the will, is distinct from all the principles that determine events in nature according to the law of causality, because in their case the determining principles must themselves be phenomena.[164]

If ethical law must be independent from natural causality, then it is "freedom in the strictest, that is in the transcendental sense; consequently, a will which can have its law in nothing but the mere legislative form of the maxim is a free will."[165]

One surprising conclusion at which Kant arrives is the apparent paradox that freedom requires law, and vice versa. "[F]reedom and an unconditional practical law reciprocally imply each other."[166] Because ethical law is not empirical (the "is"), but must be imperative (the "ought"), it cannot be bound by nature but must be created spontaneously. To be free, one must have the ability to choose to disobey one's natural inclinations and instead create one's own standards of behavior. "That choice which can be determined by pure reason is called free choice. That which can be determined only by inclination (sensible impulse, stimulus) would be animal choice . . . ."[167] ethical law must be self-legislated by reason. This concept raises a more interesting paradox: how can any specific person's choice of his law be ethical law (universal, objective) and not merely a maxim (individual, subjective) if each rational person self-legislates her own law? Kant's answer is that morality consists of freely self-legislating a subjective doctrine which complies with the objective universal ethical law. This is, of course, the categorical imperative of universality.

Because Kant distinguishes between the "right" and the "good," his test of whether a proposed law is moral (and therefore ethical law) must be purely formal, therefore objective and universal. "[N]othing is contained in [the matter of the ethical law] except the legislative form. It is the legislative form, then, contained in the maxim, which can alone constitute a principle of determination of the [free] will."[168] This formal test is the categorical imperative—one should "[a]ct so that the maxim of thy will can always at the same time hold good as a principle of universal legislation."[169] Another expression of this test is the principal of humanity set forth in Kant's *Groundwork of the Metaphysics of Morals*: "Act in accordance with a maxim of ends that it can be a universal law for everyone."[170] In other words, rationality, and therefore freedom, consists not merely in formulating the appropriate means for achieving one's ends, but in formulating an appropriate ends. However, both means and ends must meet the test of universality. Because no phenomenon is universal, the test for both the ends and means of morality must be purely formal and without substantive content. In contrast, the utilitarian's goal of utility is empirical and, therefore, cannot serve as the basis of morality.

Of course, Kant recognizes that in ordinary life, as well as in the course of adopting public policy, maxims and positive laws must have substantive content. Many substantive rules, such as the utilitarian's directive to increase happiness, may very well be good, but good is empirical and contingent, not moral. To be moral, a "good" rule must be justified by some reason other than its beneficial consequences, i.e. it must meet the formal test of universality that characterizes the noumena.[171]

Good relates to policy—what should be done to achieve a specific goal. Good is, therefore, economic rationality as ends-means reasoning. It can appropriately be a subject of debate. Morality, in contrast, is an imperative.

It is what ought to be done. If a rule passes the formal test of morality, there can be no debate. Consequently, "[t]he maxim of self-love (prudence) only advises; the law of morality commands. Now there is a great difference between that which we are advised to do and that to which we are obliged."[172]

Or, to put this another way, if the philosopher were to adopt the principles of utilitarianism and seek to increase pleasure and reduce pain, "the foundation of his practical judgments would call that good which is a means to the pleasant, and evil, what is a cause of unpleasantness and pain."[173] Kant completely agrees with the utilitarian proposition that "reason is alone capable of discerning the connection of means with their ends."[174] Rationality thus includes, *but cannot be limited to*, ends-means reasoning:

> [Y]et the practical maxims which would follow from the aforesaid principle of the good being merely a means, would never contain as the object of the will anything good in itself, but only something good for something; the good would always be merely the useful, and that for which it is useful must always lie outside the will, in sensation.[175]

In other words, "The end itself, the pleasure that we seek, is . . . a welfare; not a concept of reason, but an empirical concept of an object of sensation."[176] To adopt utilitarianism would mean that:

> the possession of reason would not raise [man's] worth above that of the brutes, if it is to serve him only for the same purpose that instinct serves in them; it would in that case be only a particular method which nature had employed to equip man for the same ends for which it has qualified brutes, without qualifying him for any higher purpose.[177]

This observation, of course, looks forward to Posner's assertion that, from an economic perspective, rats, frogs, and genes are rational. It also predicts that utilitarianism will become the basis of a radical animal "rights" advocacy because utilitarianism cannot make a moral distinction between man and beast.[178] To Kant, brutes might be good or bad, but they cannot be moral or evil.

The moral law and radical evil

I believe the single most interesting aspect of Kantian moral philosophy is the fundamental, unresolvable contradiction between morality and evil that constitutes the human condition. This problem, which dates back at least to St Augustine's account of Original Sin, becomes a central focus of Hegelian philosophy and Lacanian psychoanalysis. This tension is the foundation of human freedom.

Kant's qualitative distinction between the noumenal right and the phenomenal good leads to the proposition that any maxim adopted in

accordance with empirical reasons is stained with pathology. Consequently, whether or not the act is good, it is never purely *right*:

> The essential point in every determination of the will by the moral law, is that being a free will it is determined simply by the moral law, not only without the cooperation of sensible impulses, but even to the rejection of all such, and to the checking of all inclination so far as they might be opposed to that law. So far, then, the effect of the moral law as a motive is only negative.[179]

He continues:

> The notion of duty, therefore, requires in the action, objectively, agreement with the law, and subjectively in its maxim, that respect for the law shall be the sole mode in which the will is determined thereby . . . [M]oral worth, can be placed only in this, that the action is done from duty, that is, simply for the sake of the law.[180]

Moreover:

> What is essential in the moral worth of actions is that the moral law should directly determine the will. If the determination of the will takes place in conformity indeed to the moral law, but only by means of a feeling, no matter of what kind, which has to be presupposed in order that the law may be sufficient to determine the will, and therefore not for the sake of the law, then the action will possess legality but not morality.[181]

Thus, if you feed a starving child out of compassion, rather than duty, your action, no matter how good, is not purely moral. It is, therefore, corrupt.[182] Compassion is an empirical fact and, therefore, phenomenal and natural. Kant asserts that the:

> very feeling of compassion and tender sympathy, if it precedes the deliberation on the question of duty and becomes a determining principle, is even annoying to right-thinking persons, brings their deliberate maxims into confusion, and makes them wish to be delivered from it and to be subject to law-giving reason alone.[183]

As I discuss elsewhere, the problem is that every actual moral decision we make has to be made in a concrete situation:

> By definition, concrete personality is constituted by pathology. That is, to take a concrete action is precisely to pour a content into the empty

> form of the moral law. Unhappily, this means that every concrete choice is inescapably pathological; the act always has an instrumental reason. Consequently, Kant insists that every attempt by man to act ethically and to obey the moral law is stained by the "evil" of pathological motives.[184]

We are never entirely free, but always partly subject to the causal chains of nature. Consequently, in a late work on the problematics of morality, *Religion Within the Boundaries of Mere Reason*, Kant rewrites the doctrine of Original Sin and concludes that man is "radically" evil in the sense that a trace of non-moral pathology must necessarily lie at the root (*radix*) of all human actions.[185]

Of course, it is not inconsistent with the moral law to perform an act which one is *both* inclined to perform (in the sense that it will increase one's happiness) *and* which complies with the ethical law. Indeed, there is no logical reason why an ethical law could not also have substantively beneficial effects that make one feel good. One cannot assume, however, either that the fact an action makes one happy or that it requires self-sacrifice is any evidence of its morality. Morality is indifferent to pleasure and pain. Ethical laws "command for everyone, without taking account of his inclinations, merely because and insofar as he is free and has practical reason."[186]

More fundamentally, even if one *could* determine that one's actions did comply with the ethical law, one could still never be sure of one's motives. If a person feeds a starving child both because she feels compassion and because she decides that she is duty-bound to do so, she can never know whether she would have done her duty if she did not *also* feel compassion.[187] In the words of Slavoj Žižek, "[W]e never know if the determinate content that accounts for the specificity of our acts is the right one, that is, if we have actually acted in accordance with the Law and have not been guided by some hidden pathological motives."[188] Kant concludes that a person who adopts a maxim that is consistent with ethical law, but is only adopted because of a pathological (empirical) motive, is guilty of the form of radical evil he calls "impurity."[189]

Being finite, we can never really know our "true" motives. In Henry Allison's words, "[F]ar from asserting a doctrine of unqualified noumenal freedom . . . Kant explicitly asserts that since the intelligible character is inaccessible to us, we can never be certain whether, or to what extent, a given action is due to nature or freedom."[190] The pure reason that is essential to man is itself a noumenon, a thing-in-itself. Each person as an empirical individual is a phenomenon who does not have direct contact with his own noumenal, essential self. In Kant's words, "The depths of the human heart are unfathomable."[191] No one can directly know his own self. "For a human being cannot see into the depths of his own heart so as to be quite certain, in even a single action, of the purity of his moral intention and the sincerity

of his disposition, even when he has no doubt about the legality of the action."[192] Kant's idea of a radical split between our conscious selves and another essential "true" inner self will reappear in Lacan's rewriting of Freud in light of speculative thought.

The congruence of one's maxims and the ethical law is virtue.[193] A perfect congruence is holiness, "a perfection of which no rational being of the sensible world is capable at any moment of his existence."[194] Holiness is an attribute of God alone. Man is always in a state of sin. Kant's conclusion can most strikingly be seen in the subtitle he gave to Part One of *Religion Within the Boundaries of Mere Reason*, "Concerning the indwelling of the evil principle alongside the good or Of the radical evil in human nature."[195] The more moral a person is, the more he desires to comply with the ethical law solely out of duty, but the more aware he is of the stain of his own pathology. According to Kant, "In view of what has been said above, the statement, 'The human being is evil,' cannot mean anything else than that he is conscious of the moral law and yet has incorporated into his maxim the (occasional) deviation from it."[196] For a utilitarian to say that a Kantian has a "preference" for morality, therefore, is to either disavow or completely misinterpret Kantian theory. For a Kantian, a preference is an inclination and is antithetical to morality, which must be served regardless of preferences. For these reasons, utilitarianism and Kantianism are radically different ways of conceptualizing human motivation.

The dialectical relationship between law and freedom

Kant recognizes that it is precisely this impossibility of knowing and achieving the morality which is the reciprocal of freedom, that creates the actuality of human free will in the world. If man could actually see into the mind of God and know the ethical law, he would no longer be self-legislating (i.e. free). He would be submitting himself to an external force. In Kant's metaphor, "Man would be a marionette or an automaton."[197] Ironically, it is man's sin, his failure, his radical evilness, his inability to be truly free, that results in his practical freedom. As the common law tradition understands, law, as well as freedom, is a work in process. In order for the subject to be free, she must be self-legislating, constantly creating new law. If, however, she ever succeeded in the task of finishing and completely filling her world with law, it would bind her and prevent her from spontaneously creating new law. She would no longer be free.

Paradoxically, the reason the individual is able to liberate herself from nature's causal chains, so that she might freely bind herself to the ethical law, is that every time she tries to bind herself to the ethical law, its chains slip her wrists. Man is always a moral Houdini despite himself. Lacan identifies this fundamental paradox that characterizes the moral universe as the sexual impasse. The part of personality that imagines itself completely bound by

law is the "masculine," and the part that knows that she slips away is the "feminine."[198]

One sees the Kantian moral paradox in the myth of the fall as recounted in *Genesis*. The serpent tempted Eve by telling her that if she ate from the tree of knowledge of good and evil (i.e. if she could know the ethical law) she would be like God.[199] Of course, there can be but a single Absolute. If the serpent's promise were true, Eve would not become "like God," but would lose her individuality and be subsumed into God—at most she would be God's puppet. Consequently, when Eve and the man ate the forbidden fruit, mankind did not attain holiness. Rather, they were stained by the Original Sin that Kant calls radical evil.[200] As God warned, if mankind obtained the knowledge of good and evil, it would also become subjected to death.[201] Mortality (limitation) is the necessary condition of morality.[202] One cannot have the *knowledge* of good *and evil* without having the *capacity for evil*. Exiled from the Garden, the first couple's inability to be sure of either the ethical law or the motivations of their own hearts became the basis of their free will.

I leave this fascinating subject at this point. I am not about to resolve the paradox of freedom. Kant never truly resolved this issue, which remains the central problem of all speculative philosophy that follows. In this tradition, freedom and law have a dialectic relationship. Each necessarily requires the other, even as each necessarily contradicts the other. As Roger Sullivan notes, Kant begins his discussion in the *Metaphysics of Morals* with the antinomy he set up in the second critique, which "requires that person be both passively constrained (by such duties) and simultaneously actively constraining (by legislating the same duties)."[203] In Kant's words:

> The moral law, which itself does not require a justification, proves not merely the possibility of freedom, but that it really belongs to beings who recognize this law as binding on themselves. The moral law is in fact a law of the causality of free agents . . . .[204]

The speculative tradition

The speculative tradition explores the logical implications of Kant's theories and in some cases comes to very different conclusions. Hegel universalizes Kant's concept of antinomies. By doing so, he ends up rejecting Kant's dichotomies between the noumenal and phenomenal and the ethical and pathological.[205] There is no pure unchanging noumenon that escapes the contradiction and flux one observes in the empirical world. In Hegel's words, contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement . . ."[206] Lacan makes the Kantian dialectic between freedom and law the basis of his rewriting of Freudian

psychoanalytic theory. Lacanian theory holds that subjectivity and sexuality are nothing but this fundamental dialectical relationship between freedom and the moral law.

In the final chapter, I discuss Hegel's development of Kant's intuition. To Hegel, right is not an artifact to be discovered, but is the act of writing the ethical law. Perhaps one should not say "a right" only "to right a wrong."

Kant avec Hegel

Kant defines the subject in terms of absolute free will: the capacity of being one's own end, not the means to the end of another. Hegel reformulates Kant's categorical imperative as "be a person and respect others as persons."[207] This notion is precisely the opposite of what happens to law-and-economics' liberal subject, who is the means to society's ends.

Hegel agrees with Kant that the liberal, autonomous individual, understood as free will, is an appropriate starting place for any theory of subjectivity.[208] He concludes, however, that it could not serve as a full account of subjectivity because it contains its own internal contradictions that need resolution.[209] I rehearse Hegel's argument as to how the liberal individual develops into the Hegelian subject elsewhere,[210] and only touch on certain aspects here.

Hegel subverts Kant's dichotomy between freedom and right, on the one hand, and pathology, on the other. Kant's concern was how to achieve the abstract ideals of freedom and right despite the concrete context of pathology. Hegel, in contrast, believes that ideals can only be actualized through the concrete. That is, freedom and right only appear within, and not despite, pathology. Hegel similarly subverts Kant's dichotomy between rationality and morality, on the one hand, and desire and pathology, on the other.

Though Hegel agrees with Kant that the essence of personality is free will, he thinks that the freedom of the Kantian individual in the state of nature could only be potential. Pure Kantian freedom is radically negative; indeed it is negativity *per se*.[211] To be completely free in the Kantian sense is to be totally without bounds of any kind. To be completely free from bounds is to be totally lacking in content, to be a pure abstraction without individuality (i.e. noumenal).[212] Hegel believes that in order for freedom to become actual, the individual must become concrete (i.e. phenomenal).[213] As I shall discuss, Hegel thinks that this can only be achieved through intersubjective relationships with other subjects. Consequently, because the individual rationally seeks to actualize her freedom, she passionately desires human contact. Lacan will rephrase Hegel's sublime hysteria as "the desire of man is the desire of the Other." This is the theme of my last chapter.

Appearance all the way down

Hegel believes that Kant did not have the courage of his convictions to take his theory to its logical extreme. This is because Kant persists in the

misconception that there is an eternal, unchanging, and ideal noumenon radically different from the ceaselessly changing, empirical, phenomenal world. To put the difference between Kant and Hegel in colloquial terms, when one considers what the "thing-in-itself" could be, one encounters a blank or void. That is, we have the intuition that there must be more to the objective world than that which mortals can subjectively capture in words and imagery. Kant assumes that the reason we encounter this void or missing reality is because the thing-in-itself is hidden from or inaccessible to human experience. Hegel, in effect, rhetorically asks Kant, "If you really believe we can never know the thing-in-itself, how come you have been able to tell us so much about it?"[214]

Consequently, although known as an idealist, Hegel is not a neo-platonist who distinguishes the ideal from the empirical world.[215] Hegel rejects Kant's radical separation of noumena and phenomena.[216] To Hegel, for a concept to exist—i.e. to be possible—the ideal must manifest itself in the world. It must be actual. The noumenal and the phenomenal are one and the same.[217] This concept is one of the correct meanings of Hegel's frequently misunderstood assertion: "What is rational is actual; and what is actual is rational."[218] This should not be misinterpreted as a Panglossian defense of the Prussian status quo. Rather, it is a rejection of the Kantian dichotomy and can be restated as "the noumenon is the phenomenon and the phenomenon is the noumenon."

Hegel argues that the reason why we encounter a blank when we consider the thing-in-itself is not because it is hidden. Rather it is because potentiality (the ideal or noumenon), when abstracted from actuality (phenomena), is negativity *per se*.[219] Kant's thing-in-itself is an attempt to positivize negativity.[220] It is his *objet petit a.* Rather than only the four antinomies identified in Kant's *Critique of Pure Reason*, Hegel asserts that all concepts are antinomies.[221] Dialectical opposition—a radical constituent split—characterizes the entire intelligible universe.

Contradictions are unstable; they cannot stand and must be resolved. As we have seen, Kant assumes this means that there must be a static noumenal world "out there" beyond contradiction. Hegel, in contrast, argues that it means that the entire world, even the so-called thing-in-itself, is in a constant state of flux.[222] Specific contradictions are temporarily resolved until a new contradiction is identified in the supposed resolution leading to a new temporary resolution, *ad infinitum*.[223] In a passage that is obviously addressed to Kant and his followers, Hegel accuses certain philosophers of assuming that one can solve the antinomies by concluding:

> that the world is in its own self not self-contradictory, not self-sublating, but that it is only consciousness in its intuition and in the relation of intuition to understanding and reason that is a self-contradictory being. It shows an excessive tenderness for the world to remove contradiction

> from it and then to transfer the contradiction to spirit, to reason, where it is allowed to remain unresolved. In point of fact it is spirit which is so strong that it can endure contradiction, but it is spirit, too, that knows how to resolve it. But the so-called world . . . is never and nowhere without contradiction, but it is unable to endure it and is, therefore, subject to coming-to-be and ceasing-to-be.[224]

To put this another way, rather than positing that there is a sharp break between appearance and essence, Hegel argues that appearance is essence.[225] In the words of my colleague Arthur Jacobson, Hegel believes "it is appearance all the way down."[226] As we have seen, Kant argues that man's essential freedom is noumenal, which means pre-legal, and unchanging, not empirical, positive, and contingent. Hegel rejects the concept of the noumenal and concludes that the free subject is herself an empirical, artificial, contradictory, and changing entity.

To make a long story short, in the *Philosophy of Right*, Hegel argues that the freedom that is only a "becoming" in the state of nature can be actualized through an empirical, intersubjective relationship with other persons.[227] It is only through such relationships that the abstract autonomous Kantian individual becomes a concrete subject.[228] Specifically, an abstract individual only becomes a subject if and when another subject recognizes her as an equal subject.[229] Consequently, freedom and desire are not opposed, because one can only actualize freedom through our desire of the desire of others.[230] To Hegel, private law (i.e. property and contract) is the logically most primitive form of interrelationship in the sense that it is the simplest and most basic.[231] Far from being primitive in a temporal sense, however, our modern concept of legal rights is relatively recent, as a historical matter. Indeed, one of the points of the *Philosophy of Right* is that the reason human freedom was only first becoming an actuality at the time he was writing (i.e. in the early nineteenth century) is because it requires the type of capitalistic economic system, modern constitutional state, and resulting rule of law that only started developing in the eighteenth century.[232]

Policy as the other side of critique

I revisit one point and raise another. First, speculative philosophy conceives of rationality not as predictable instrumental reasoning, but as freedom as the capacity for spontaneity. Rationality is not merely the capacity to choose an appropriate means to achieve a pre-given, nonrational end because that notion makes rationality the slave to inclination. Rationality must also include the capacity to choose an appropriate end to pursue.

One can now better understand why speculative thought is too modest to engage in policymaking. Speculative thought is painfully aware of its own incapacity to make substantive recommendations that comply with its

own moral criteria. Since the speculative philosopher and critical legal scholar believe that true freedom requires self-legislation, they are wary of imposing rules designed to manipulate the behavior of others. Roger Sullivan avers that:

> Kant held that positive ethical obligations to others do *not* belong to the public domain, to be enacted into law and enforced with punitive incentives by the state, as utilitarians . . . later held and as the majority of people today also hold.[233]

In Hegel's formulation, philosophy:

> can save itself the trouble of giving good advice on the subject. Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms; and Fichte likewise need not have perfected his passport regulations . . . In deliberations of this kind, no trace of philosophy remains . . .[234]

In stark contrast to Friedman and Posner's understanding of economics, speculative thought does not pretend to be able to predict the future. Rather it seeks to understand the world as it is by developing a retroactive account of how it came to be, and not to predict what will be.

In probably the most well-known passage in all of Hegel's work:

> A further word on the subject of issuing instructions on how the world ought to be: philosophy, at any rate, always comes too late to perform this function. As the thought of the world, it appears only at a time when actuality has gone through its formative process and attained its completed state. This lesson of the concept is necessarily also apparent from history, namely that it is only when actuality has reached maturity that the ideal appears opposite the real and reconstructs this real world, which it has grasped in its substance, in the shape of an intellectual realm. When philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk.[235]

Of course this leads to a quandary. The speculative scholar, as a human being and a member of society, also desires to do good (promote the happiness of herself and others) and recognizes that, as a practical matter, the state needs to have positive laws and public policy.[236] As the cliche states, although one can only study history retroactively, one is forced to live it prospectively. Consequently, far from pragmatism being antithetical to speculative idealism, it is, in fact, a necessary corollary. We must use pragmatism to write positive law precisely because pure reason is not empirical.

In other words, Hegel anticipates Lacan's assertion that each discourse requires the others. If speculative thought speaks in the critical discourses of the analyst and hysteric, it recognizes the power discourses of the master and university as necessary evils.

Consequently, I wish partially to rehabilitate Posner's attack on the attempted use of neo-Kantian theory to make practical legal policy recommendations and judicial decisions. I concur that any attempt to derive specific concrete "pathological" legal doctrines from the abstract and formal moral law is doomed by the logic of Kantianism. Nevertheless, Posner is incorrect to conclude from this that Kantian moral theory is irrelevant to practical decision making. Speculative theory can demonstrate how alternative ways of making decisions such as utilitarianism or Posnerian "pragmatism" also fail by their own terms.

Finally, the critical discourses are needed to make the powerful discourses more effective in their own goals. As we shall see, although the hysteric will critique any master's discourse (positive regime of law), she will in the end always help establish a new master's discourse.

And so, like the hero in a melodrama, I untie normativity from the railway tracks in the last reel. After all my ranting against policy making I agree individuals who are also legal scholars can never abandon normative considerations of the law. The university's discourse needs to be spoken. Nevertheless, although I generally condemn romanticism, I sympathize with Schlag's romantic intuition that there is something fundamentally flawed with the unreflexive form of normative discussion in legal scholarship in that it assumes (as Jolls, Sunstein, and Thaler expressly state) that the university's discourse is the only, or the most appropriate, type of scholarship. The hysteric's discourse is another mode of normative discourse that must be heard. It is the other side of the university's discourse, its reverse or inverted form. This is why they have so much trouble communicating.

The policy scholar speaking in the university's discourse wants to use law to manipulate other subjects to achieve society's objective goals. The attorney and the speculative theorist seek to help the subject learn how to change or use the law to achieve her own subjective goals.

The former subjects the individual to the law, thereby making her the law's object. The latter objects to the individual's objectification, thereby freeing the subject from the law and making the law the subject's object.

Notes

1 Bruce Fink, The Lacanian Subject: Between Language and Jouissance 132 (1995) [hereinafter, Fink, Subject].

2 Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], *in* Sic 2: Cogito and the Unconscious 74, 78 (Slavoj Žižek ed. 1998).

3 "Systematic knowledge is the ultimate authority, reigning in the stead of blind will, and everything has its reason." Fink, Subject, *supra* note 1, at 132.

4 L. Frank Baum, The Annotated Wizard of Oz: The wonderful Wizard of Oz 273 (Michael Patrick Hearn ed. 2000).
5 See generally, David Gray Carlson, *Dworkin in the Desert of the Real*, 60 U. Miami L. Rev. 505 (2006).
6 Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, in Lacanian Theory of Discourse: Subject, Structure, and Society 107, 115 (Mark Bracher *et al*. eds 1994) [hereinafter, Theory of Discourse]; Žižek, *Four Discourses*, *supra* note 2, at 78–9.
7 The expert (S_2) "addresses the remainder of the real (say, in the case of pedagogical knowledge, the 'raw, uncultivated child'), turning it into the subject ($\$$)." *Id.* at 78.
8 As Žižek puts it:

> The "truth" of the university discourse, hidden beneath the bar, of course, is power (i.e. the Master-Signifier): the constitutive lie of the university discourse is that it disavows its performative dimension, presenting what effectively amounts to a political decision based on power as a simple insight into the factual state of things.

Žižek, *Four Discourses*, *supra* note 2, at 78. In Lacan's words:

> S_2 occupies the dominant place in that it is in the place of the order, the command, the commandment, this place initially held by the master, that knowledge has come to occupy. Why does it come about that one finds nothing else at the level of its truth than the master signifier, insofar as it brings the master's order?

Jacques Lacan, The Seminar of Jacques Lacan, Book XVII: The Other Side of Psychoanalysis 104 (Jacques-Alain Miller ed., Russell Grigg, trans. 2007) [hereinafter, Lacan, Seminar XVII].
9 Bracher explains this process:

> Lacan . . . interrogates the ground of this master signifier and finds that it consists in an even more fundamental master signifier—that of an "I" that is identical to itself and transcendental . . . Anyone who enunciates scientific knowledge automatically assumes the position of subject of this coherent, totalized knowledge, a subject that must itself be stable, consistent, self-identical. And this assumption is neither more nor less than the assumption of the self-identical "I" as its master signifier, its ultimate value and truth . . . [The university discourse] is in a way subservient to the discourse of the Master.

Bracher, *supra* note 6, at 116–17 (citation omitted).
10 Fink, Subject, *supra* note 1, at 132.
11 *Id.*
12 Of course, as the history of the Capetians and Stuarts shows, stewards sometimes graduate to masters in their own right.
13 Bracher explains the dynamic between knowledge and identity in the context of the discourse of the university engaged in by the parent teaching the child:

> Subjected, in this position, to a dominating totalized system of knowledge/belief (S_2), we are made to produce ourselves as (alienated) subjects, $\$$, of this system. This means, in the first instance, that our preverbal experience of ourselves and the world, mediated as it is by the actions and demeanor of our primary caretakers, is partially determined by the system of knowledge/belief, or language, inhabited by them, and by the position they attribute to us within that system . . . . In the second instance, it means that when we begin to understand language and to speak it, we must fashion our sense of ourselves (our identity) out of

> the subject positions made available by the signifiers (i.e. categories) of the system, S_2.

Bracher, *supra* note 6, at 115. But, Žižek warns:

> What one should avoid here is the Foucauldian misreading: the produced subject is not simply the subjectivity that arises as the result of the disciplinary application of knowledge-power, but its remainder, that which eludes the grasp of knowledge-power[,] . . . the excess that resists being included in the discursive network . . .

Žižek, *Four Discourses*, *supra* note 2, at 78.

14 Žižek gives the following example from medical practice:

> At the surface level, we are dealing with pure objective knowledge that desubjectivizes the subject-patient, reducing him to an object of research, of diagnosis and treatment; however, beneath it, one can easily discern a worried hystericized subject, obsessed with anxiety, addressing the doctor as a Master and asking for reassurance from him.

Id. at 78–9.

15 In the words of Lacan:

> Take, for instance, in the university discourse, the initial term, the one that is articulated here under the term of S_2, and is in this position of unheard-of pretension of having a thinking being, a subject, as its production. As subject, in its production, there is no question of it being able to see itself for a single instant as the master of knowledge.

Lacan, Seminar XVII, *supra* note 8, at 174.

16 *Id.* at 172.

17 In Bracher's words: "No provision is made for individual subjects and their desires and idiosyncracies. Individuals are to act." Bracher, *supra* note 6, at 115. This is not to suggest that academics never struggle to achieve truth. Rather, Lacan thinks that when they do so, they leave the university's discourse and speak in the analyst's or hysteric's discourse.

18 See *id.* at 107.

19 Stuart Schneiderman, Jacques Lacan: The Death of an Intellectual Hero 29 (1983).

20 Lacan, Seminar XVII, *supra* note 8, at 201.

21 According to Bracher, Lacan thinks the 1968 Paris student uprising revolved around such master signifiers as "imperialism," "domination," "freedom," and "oppression." Bracher, *supra* note 6, at 119.

22 Lacan, Seminar XVII, *supra* note 8, at 206.

23 Lacan taunted the Parisian student radicals: "What you aspire to as revolutionaries is a master. You will have one." *Id.* at 239. In so saying, Lacan was condemning the students as being hysterics. I suggest that Lacan does not fully internalize the implications of his own theory. He is right that the hysteric, after her critique of the old master, always adopts a new master. But it could be no other way. Lacan believes his analyst's discourse is more radical in its critique of the status quo, but, in fact, has no means of changing the social order. The hysteric, in contrast, can make incremental changes.

24 Bruce Fink: Lacan to the Letter: Reading *Écrits* Closely 132–3 (2004) (hereinafter, Fink, Letter).

25 See, e.g. Richard A. Posner, Overcoming Law 86–7 (1995) [hereafter, Posner, Overcoming Law].

26 Lacan, Seminar XVII, *supra* note 8, at 206.

27 See, e.g. POSNER, OVERCOMING LAW, *supra* note 25, at 172–3.
28 See generally David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1915–19 (1999) [hereinafter, Carlson, *Duellism*]. I join Carlson in critiquing of Schlag in Jeanne L. Schroeder and David Gray Carlson, *Law's Nonexisting Empire*, 56 U. MIAMI L. REV. 767 (2003). See also Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality and Legal Scholarship* 44 WM. AND MARY L. REV. 263, 357–9 (2002) [hereinafter, Schroeder, *The Stumbling Block*] and Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. REV. 815, 824–9, 883–4, 897–903 (1999) [hereinafter, Schroeder, *Pandora's Amphora*].
29 See Carlson, *Duellism*, *supra* note 28, at 1915–19; Schroeder, *Pandora's Amphora, supra* note 28, at 886, 895.
30 Carlson, *Duellism*, *supra* note 28, at 1912–24.
31 H.L.A. HART, THE CONCEPT OF LAW 139 (2d. ed. 1994).
32 *Id.* at 147.
33 See David Gray Carlson, *The Tragic Dimension in Law*, 24 CARDOZO L. REV. 2287 (2003).
34 JAMIE MURRAY, AN EROTICS OF LAW: LACANIAN PSYCHOANALYSIS AND LEGAL THEORY 120–5 (1999) (unpublished Ph.D. thesis, Birkbeck College, University of London) (on file with author).
35 *Id.* at 120–5. In Murray's words:

> The feverish activity [of the legal obsessive] is that of the identification of legitimate sources, the remembering, the endlessly detailed interpretations, the particularities of grammar and syntax, citation upon citation. The task is to ensure that there are no gaps in the law, that there is always already an answer, and that the word will always name the thing in accordance with practice and lay it to rest.

Id at 144–5.
36 IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 18 (T.K. Abbott trans. 1996) [hereinafter, KANT, PRACTICAL REASON].
37 *Id.* at 18.
38 See generally, Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).
39 See Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).
40 See generally Milton Friedman, *The Methodology of Positive Economics* in MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 3 (1953).
41 See generally, HERBERT A. SIMON, AN EMPIRICALLY BASED MICROECONOMICS (1997) [hereinafter, SIMON, MICROECONOMICS]; HERBERT A. SIMON, MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION (1982) [hereinafter, SIMON, BOUNDED RATIONALITY].
42 Christine Jolls *et al.*, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476–8 (1998) [hereinafter, Jolls *et al.*, *Behavioral Approach*]. This essay was later republished as the lead essay in BEHAVIORAL LAW AND ECONOMICS 13 (Cass Sunstein ed. 2000).
43 Simon discusses the diverse notions of rationality adopted by different theorists, and compares them with the rationality postulated in his essays: *From Substantive to Procedural Rationality,* in METHOD AND APPRAISAL IN ECONOMICS 129 (S.J. Latsis ed. 1976), reprinted in SIMON, BOUNDED RATIONALITY, *supra* note 41, at 424; *Rationality,* in A DICTIONARY OF THE SOCIAL SCIENCES 573 (J. Gould and W.L. Kolb eds 1964), reprinted in SIMON, BOUNDED RATIONALITY, *supra* note 41, at 405; *Theories of Bounded Rationality*, *Decision and Organization* 161 (C.B. Radner and R. Radner eds 1972), reprinted in SIMON, BOUNDED RATIONALITY, *supra* note 41, at 408.

44 "The ultimate goal of a positive science is the development of a 'theory' or 'hypothesis' that yields valid and meaningful (i.e. not truistic) predictions about phenomena not yet observed." Friedman, *supra* note 40, at 3, 7. Friedman asserts that the "widely held view" that "the conformity of . . . 'assumptions' to 'reality' is a test of the validity of the hypothesis" is "fundamentally wrong and productive of much mischief." *Id*. at 14. He goes even further and maintains that "[t]o be important . . . a hypothesis must be descriptively false in its assumptions." *Id.* at 14.

45 Despite Posner's assertions, Friedman's methodology is, in fact, wildly controversial in economic quarters. See Jeanne L. Schroeder, *Just So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001) [hereinafter, Schroeder, *Just-So Stories*]. Simon disparages Friedman's assertion as "the unreality principle." SIMON, BOUNDED RATIONALITY, *supra* note 41, at 61–2. Mark Blaug belittles it as the F-twist. MARK BLAUG, THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN 97 (2d edn 1992). Paul Samuelson calls Friedman's methodology "a monstrous perversion of science." PAUL A. SAMUELSON, THE COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 1774 (R.C. Merton ed. 1972).

46 For all his talk about prediction, falsification, and testing, Friedman's argument in favor of the rationality postulate is notoriously lacking in empirical support. For example, Friedman claims that the maximization-of-returns hypothesis is supported by an "important body of evidence" culled "from countless applications of the hypothesis to specific problems and the repeated failure of its implications to be contradicted." FRIEDMAN, *supra* note 40, at 22. Blaug rightfully describes this as "without doubt the most frustrating passage in Friedman's entire essay because it is unaccompanied by even a single instance of these 'countless applications.'" BLAUG, *supra* note 45, at 101. Friedman's defense is that the "evidence is extremely hard to document [because] it is scattered . . . ." FRIEDMAN, at 22. This answer seems lame at best and disingenuous at worst. See BLAUG at 101. Gary Becker points out that when economists talk about the predictions made by the rationality postulate, they usually have in mind the well-documented phenomenon of downward sloping demand curves. GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 157–8 (1976) [hereinafter, BECKER, ECONOMIC APPROACH]. True, research has yet to discover any meaningful exceptions to the "rule." *Id*. at 156. As Becker points out, however, this is itself not a reason to accept the rationality postulate since the phenomena of downward sloping demand curves is equally consistent with any number of other simpler and less controversial assumptions (such as the existence of budgetary restraints). *Id.* at 156–7. "Hence the market would act as if 'it' were rational [i.e. demand curves would be negatively inclined] not only when households were rational, but also when they were inert, impulsive, or otherwise irrational." *Id.* at 161. Jolls *et al.* emphasize neo-classical economics' notoriously poor predictive track records as one of the primary reasons to investigate behavioral economics as an alterative. See Jolls *et al*., *Behavioral Approach, supra* note 42, at 1487–8.

47 For a theory to make good predictions, Simon argues:

> [I]t must be a theory that describes [the operations of firms] realistically, not an "as if" theory. In both its descriptive and its normative aspects, it must describe, and prescribe for, the decision making processes of managers with close attention to the kinds of knowledge that are attainable and the kinds of computations that can actually be carried out

SIMON, MICROECONOMICS, *supra* note 41, at 63.

48 *Id*. at 62.

49 Ronald Coase similarly disagrees with the neo-classical assumption that one could give advice in the real world based on perfect market assumptions. Indeed, a careful reading shows that this forms the basis of his famous "Coase Theorem." I set forth

this analysis in JEANNE LORRAINE SCHROEDER, THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET 87, 112–46 (2004) [hereinafter, SCHROEDER, VENUS]. Although law-and-economics scholars claim to invoke the spirit of Coase and the "Coase Theorem," Coase himself is particularly critical of the notions of economic rationality, generally, and the concept of maximization, specifically. He states, "There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success." R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 4 (1988) [hereinafter, COASE, THE FIRM]. Coase's point is that economics should cease using ideal models of economic rationality and perfect markets precisely because they are impossible in the real world. Like Simon, he believes that economists should study how economic decisions are in fact made in the real world. He notes:

> One result of this divorce of the theory from its subject matter has been that the entities whose decisions economists are engaged in analyzing have not been made the subject of study and in consequence lack any substance . . . We have consumers without humanity, firms without organization, and even exchange without markets.

Id. at 3.

50 See SIMON, BOUNDED RATIONALITY, *supra* note 41, at 369–70.

51 *Id.* at 219, 417. Blaug describes Simon's theory of "satisficing" as an alternate to the classical rationality postulate that can be "described as a non-fully-rational theory of individual action under both certainty and uncertainty." BLAUG, *supra* note 45, at 233.

52 See, e.g. Jolls *et al.*, *Behavioral Approach*, *supra* note 42, at 1471. See also Christine Jolls *et al.*, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593 (1998).

53 Jolls *et al.*, *Behavioral Approach*, *supra* note 42, at 1475 (emphasis added).

54 *Id.* at 1474.

55 *Id.*

56 *Id.* at 1474–5.

57 See *id.* at 1533–5.

58 See *id.*

59 *Id.* at 1536–7.

60 *Id.* at 1541.

61 See *id.* at 1483–4.

62 *Id.* at 1565–7.

63 Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 ORE. L. REV. 147, 214–16 (2000) [hereinafter, Schroeder, *Rationality*].

64 In Becker's words, "Economists are so conditioned to identifying rational choice with separable preferences that we often call 'irrational' quite rational behavior that is the result of past experience." GARY S. BECKER, ACCOUNTING FOR TASTES 128 (1996).

65 See *id.* at 128–9.

66 See *id.* at 5; see also BLAUG, *supra* note 44, at 240.

67 Prior to reading Becker's work, I intuited a similar critique of the concepts of use value adopted both by Posner and his arch-critic, Ronald Dworkin. In their famous debate in the *Journal of Legal Studies*, both Dworkin and Posner assume that non-remunerative activity such as gardening constituted consumption of utility. See Ronald M. Dworkin, *Is Wealth a Value?,* 9 J. LEGAL STUD. 191 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter, Posner, *Utilitarianism*]. I suggest, in contrast, that it could be better seen as an investment by an individual calculated to increase her use value of her home (and therefore, her wealth). Despite his claims to the contrary, Posner's concept

of wealth maximization is incapable of recognizing use value in excess of exchange value. See SCHROEDER, VENUS, *supra* note 49, at 216, 223–7, 229, 246–55.

68 BECKER, ECONOMIC APPROACH, *supra* note 46, at 128–9.

69 As expressed by Blaug:

> [T]he most characteristic feature of neoclassical economics [is], namely, its insistence on methodological individualism: the attempt to derive all economic behavior from the action of individuals seeking to maximize their utility, subject to the constraints of technology and endowments. This is the so-called rationality postulate, which figures as a minor premise in every neoclassical argument.

BLAUG, *supra* note 45, at 229. See generally, Schroeder, *Rationality*, *supra* note 63. Perhaps this is more accurately expressed as the proposition that if economic subjects in the aggregate act as though they were economically rational a sufficiently large percentage of the time, one can make reasonably good economic predictions based on the assumption that economic subjects act as if they were rational. FRIEDMAN *supra* note 40, at 21–2. Blaug emphasizes that this rationality postulate has become so strongly embedded in economic theory "that some have seriously denied that it is possible to construct any economic theory not based on utility maximization." BLAUG, at 230. Blaug contends that this assertion is "obviously" false and cites not merely Marxism but Keynesian theory as counter-examples. *Id.*

70 "Objections to the rational actor model in law and economics are almost as old as the field itself." Jolls *et al*., *Behavioral Approach*, *supra* note 43, at 1474.

71 I discuss various criticisms of, and alternatives to, the rationality postulate as formulated by Posner in Schroeder, *Rationality*, *supra* note 64, at 147. I discuss the methodology purportedly adopted by Friedman and Posner in defending the rationality postulate in Schroeder, *Just So Stories*, *supra* note 45, at 351.

72 For example, Margaret Jane Radin has gone so far as to condemn the economic approach even to property law issues as being alienating and destructive of human flourishing. See e.g. MARGARET JANE RADIN, CONTESTED COMMODITIES 93 (1996). I criticize Radin's romanticism extensively elsewhere. See e.g. Schroeder, Venus, *supra* note 49 at 24–6, 63–74; JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE 229–92 (1998) [hereinafter, SCHROEDER, VESTAL]; Schroeder, *Pandora's Amphora*, *supra* note 28 at 815, 883–98.

73 Amartya Sen suggests that even among neo-classical economists there is disagreement as to whether the economic rationality requirement is an axiom to be assumed or a hypothesis to be falsified. "If today you were to poll economists of different schools, you would almost certainly find the coexistence of beliefs (i) that the rational behaviour theory is unfalsifiable, (ii) that it is falsifiable and so far unfalsified, and (ii) [sic] that it is falsifiable and indeed patently false." AMARTYA SEN, CHOICE, WELFARE AND MEASUREMENT 91 (1982).

74 As Simon says:

> If we regard this model as a description of the actual behavior of some entrepreneur, we see that if we are to predict his behavior, the knowledge that he is rational is only a small part—almost an insignificant part—of the information that we require. His intention to be rational leads to particular behavior only in the context of conditions in which his behavior takes place . . . Indeed, our principal use for such models is in predicting how the entrepreneur's behavior will be affected by a change in the environment that conditions or "bounds" his rationality.

SIMON, BOUNDED RATIONALITY, *supra* note 41, at 214.

75 See Schroeder, *Rationality*, *supra* note 63 at 159–85.

76 "[R]ationality is the ability and inclination to use instrumental reasoning to get on in life." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 17 (5th edn 1992) [hereinafter, POSNER, ECONOMIC ANALYSIS]. Blaug describes the neo-classic notion of rationality as follows:

> For the economist, . . . rationality means choosing in accordance with a preference ordering that is complete and transitive, subject to perfect and costlessly acquired information; where there is uncertainty about future outcomes, rationality means maximizing expected utility, that is, the utility of an outcome multiplied by the probability of its occurrence.

BLAUG, *supra* note 45 at 229.

77 Substantive rationality "is concerned only with finding what action maximizes utility in the given situation, hence is concerned with analyzing the situation but not the decision-maker." SIMON, MICROECONOMICS, *supra* note 41 at 18.

78 "Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have . . . It does not assume consciousness; it certainly does not assume omniscience." POSNER, ECONOMIC ANALYSIS, *supra* note 76, at 17.

79 *Id.*

80 Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551 (1998) [hereinafter, Posner, *Behavioral Economics*].

81 *Id.* at 1561–4, 1570.

82 Friedman dismisses criticisms of the rationality postulate on the grounds that "it rests on outmoded psychology and must be reconstructed in line with each new development in psychology." Friedman, *supra* note 40t 30. Indeed, Posner thinks that it is a critique of Jolls *et al.* to point out that the behavioral economic approach is psychological in nature. See Posner, *Behavioral Economics*, *supra* note 80, at 1558. As Simon notes, psychological theory is irrelevant to the neo-classical model of rationality since it does not depend on an "understanding of human thought processes." SIMON, MICROECONOMICS, *supra* note 41, at 18.

83 The definition of utility is, in fact, problematic, as economists realize. This debate is beyond the scope of this work.

84 As Posner himself notes, wealth maximization has both positive and normative aspects. The former posits "that the common law is best understood on the 'as if' assumption that judges try to maximize the wealth of society." POSNER, OVERCOMING LAW, *supra* note 25 at 172–73. The latter posits "that judges should interpret . . . statutes to make them conform to the dictates of wealth maximization." *Id*. at 173; see also Lewis A. Kornhauser, *Wealth Maximization*, in THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS 679 (1998). Even Posner now admits that "[n]ot all questions that come up in law, however, can be effortlessly recast as economic questions." POSNER, OVERCOMING LAW, *supra* note 25, at 22 (discussing abortion specifically). "In recent years, Posner has weakened his claim from one that asserted that common law courts should be exclusively concerned with wealth maximization to one that asserts that wealth maximization is one of the values that common law courts ought to pursue." Kornhauser, at 682.

85 Becker is a notable exception—an economist who criticizes his fellow economists for assuming that preferences are pre-given and, therefore, "independent of both past and future consumption, and of the behavior of everyone else" when experience shows otherwise. BECKER, ECONOMIC APPROACH, *supra* note 45, at 4.

86 As Posner says, "A preference can be taken as a given, and economic analysis proceed as usual, even if the preference is irrational." Posner, *Behavioral Economics*, *supra* note 80, at 1554.

87 Schroeder, *Rationality*, *supra* note 63, at 210. Becker and Stigler turn this cliche inside-out and give it a fascinating new meaning. They assert that there is no arguing about tastes not because they are idiosyncratic, but because they are universal. That is, the true desires of all human beings are for things such as relationships with others, prestige, etc. People seek to acquire specific objects (fancy cars, etc.) as a means of achieving these broader ends. See George J. Stigler and Gary S. Becker, *De Gustibus Non Est Disputandum* 67 AM. ECON. REV. 76 (1977). As I discuss elsewhere, Stigler and Becker unwittingly intuit Lacan's theory that the subject's true desire is the desire of the Other and specific objects only retroactively serve as the little *a*—the object cause of desire. Schroeder, *Rationality*, *supra* note 63 at 208–25.

88 Posner states:

> [P]references cannot be divorced from emotion, or emotion from their stimuli, and so instrumental reasoning cannot be thought pervaded with irrationality merely because a frequent goal of such reasoning is a preference that we would not have if we were not emotional beings.

POSNER, BEHAVIORAL ECONOMICS, *supra* note 80, at 1554.

89 Although this is the traditional model, Posner claims that the "economic analysis of law . . . long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman)." *Id.* at 1552.

90 *Id*. at 1557.

91 *Id*. at 1557–8.

92 Sen is probably the most noted economist who has written extensively on this issue. See SEN, *supra* note 73, at 92.

93 Although these are points typically associated with critics of economics, they also form the basis of Gary Becker and George Stigler's "new home economics." BLAUG, *supra* note 45, at 220.

94 Schroeder, *Just So Stories*, *supra* note 45, at 360–3.

95 See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING 65 (Walter Wheeler Cook ed. 1919).

96 See, for example, Jennifer Nedelsky's discussion of the paradox of libertarian tradition in the context of the U.S. Constitution. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990). As I have written extensively elsewhere, this paradox is the reason for the incoherence of taking jurisprudence under the U.S. Constitution. See SCHROEDER, VESTAL, *supra* note 72, at 293–9, 312–21.

97 Indeed, Posner gives moral monstrousness as one of the reasons he rejects utility as the desideratum of law and proposes wealth maximization as an alternative. Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 251 (1980) [hereinafter, Posner, *Value*].

98 He speculates that perhaps, "the person is a succession of separate selves, 'time sharing' the same body; each self is rational, but each has is own interest and they are not identical across the selves." POSNER, ECONOMIC ANALYSIS, *supra* note 76, at 20–1.

99 See Schroeder, *Rationality*, *supra* note 63 at 149–52.

100 I have developed this argument more fully in SCHROEDER, VENUS, *supra* note 49, at 2–4, 13–17, 23–6, 80–1 Schroeder, *The Stumbling Block, supra* note 28, at 315–16, 357–9.

101 SCHROEDER, VESTAL, *supra* note 72, at 20–4.

102 IMMANUEL KANT, CRITIQUE OF PURE REASON 235–6 (J.M.D. Meiklejohn trans. 1900) [hereinafter, KANT, PURE REASON].

103 See *id.* at 262–70; HENRY E. ALLISON, KANT'S THEORY OF FREEDOM 13 (1990).
104 *Id.* at 14.
105 KANT, PURE REASON, *supra* note 102, at 231.
106 See *id.* at 275–8.
107 ALLISON, *supra* note 103, at 13.
108 KANT, PURE REASON, *supra* note 102, at 252.
109 *Id.*
110 *Id.* at 263. The questions raised by the other three antinomies are:

> whether the world has a beginning and a limit to its extension in space; whether there exists anywhere, or perhaps, in my own thinking Self an indivisible and indestructible unity – or whether nothing but what is divisible and transitory exists; . . . whether, finally, there is a supreme cause of the world, or all our thought and speculation must end with nature and the order of external things.

Id.
111 *Id.* at 316. The third, along with the fourth (concerning the existence of God) are the two "dynamical" antinomies which are solved in this fashion. Kant resolves the first two "mathematical" antimonies by showing that neither pole is true. *Id.* at 298–9; Allison, *supra* note 103, at 13–14.
112 KANT, PURE REASON, *supra* note 102, at 313.
113 As Robert Merrihew Adams puts it:

> [Kant] argues, on the one hand, that we can know that any world that we can experience must necessarily conform to certain principles of mathematics and natural philosophy, connected with these forms and concepts; and on the other hand, that since our knowledge of the experienced world is so profoundly shaped by the needs of our cognitive faculties, we cannot reasonably take it as knowledge of things as they are in themselves [i.e. noumena], but only of things as they must and do appear to us [i.e. phenomena].

Robert Merrihew Adams, *Introduction* to IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON vii, ix (Allen Wood ed. and George Di Giovanni trans. 1998) [hereinafter, Kant, Religion].
114 As Adams notes, his explanation "is a gross oversimplification of a famously complex argument, but . . . it will do for present purposes." *Id.* at n. 3.
115 KANT, PURE REASON, *supra* note 102, at 305.
116 *Id.* at 302.
117 *Id.*
118 "Man is a phenomenon of the sensuous world, and at the same time, therefore, a natural cause, the causality of which must be regulated by empirical laws. As such, he must possess an empirical character, like all other natural phenomena." *Id.* at 307.
119 Whether Kant, despite his disclaimers, did show that freedom is necessary as well as possible in the *Critique of Practical Reason* and whether Kant was successful in his argument for the existence of a meaningful concept of practical freedom, are matters of dispute among Kantian scholars. See generally Allison, *supra* note 103.
120 KANT, PURE REASON, *supra* note 102, at 302.
121 *Id.* at 303.
122 *Id.*
123 *Id.* at 306.
124 *Id.* at 307.
125 Adams, *supra* note 113, at x.

126 Kant concludes:

> That reason possesses the faculty of causality, or that at least we are compelled so to represent it, is evident from the imperatives, which in the sphere of the practical we impose on many of our executive powers. The words ought to express a species of necessity, and imply a connection with grounds which nature does not and cannot present to the mind of man. Understanding knows nothing in nature but that which is, or has been, or will be. It would be absurd to say that anything in nature ought to be other than it is in the relations of time in which it stands.

KANT, PURE REASON, *supra* note 102, at 307.

127 *Id.* at 308.

128 *Id.*

129 "Thus the volition of every man has an empirical character, which is nothing more than the causality of his reason." *Id.* at 309. As Alenka Zupančič frames the dilemma:

> Kant often stresses that the subject as a phenomenon is never free, and that freedom "belongs" to subjectivity only in its noumenal "aspect". This position, according to some critics leads to an impossible dilemma: either freedom is strictly confined to the realm of noumena, and thus becomes a totally empty concept when it comes to understanding real human agents. Or freedom has to be capable of effecting real changes in *this* world—but in this case the idea that is non-temporal and noumenal must be rejected. In other words, the question becomes: how can one attribute to one and the same agent, and the same time, both an empirical and a purely intelligible character? How can one hold an act to be necessary and free at the same time?

ALENKA ZUPANČIČ, ETHICS OF THE REAL: KANT, LACAN 32–3 (2000).

130 "Reason will not follow the order of things presented by experience, but, with perfect spontaneity, rearrange them according to ideas, with which it compels empirical conditions to agree." KANT, PURE REASON, *supra* note 102, at 308.

131 KANT, PRACTICAL REASON, *supra* note 36, at 49.

132 KANT, PURE REASON, *supra* note 102, at 310.

133 KANT, PRACTICAL REASON, *supra* note 36 at 59.

134 *Id*. at 13–14.

135 *Id*. at 13.

136 *Id*. at 14.

137 *Id*.

138 *Id*. at 26.

139 ALLISON, *supra* note 103, at 33.

140 KANT, PRACTICAL REASON, *supra* note 36, at 31.

141 *Id*. at 46; See also IMMANUEL KANT, THE METAPHYSICS OF MORALS 17 (Mary Gregor trans. and ed. 1996) [hereinafter, KANT, MORALS].

142 The quote on empiricism at the head of this section was addressed specifically to Humean empiricism. KANT, PRACTICAL REASON, *supra* note 36, at 23–4.

143 For example, Kant attributes to epicureanism the principles that "[t]o be conscious that one's maxims lead to happiness is virtue . . . Prudence was equivalent to morality." *Id.* at 136. "The Epicurean maintained that happiness was the whole *summum bonum*, and virtue only the form of the maxim for its pursuit, viz., the rational use of the means for attaining it." *Id.* at 137.

144 As in economics theory, Kant assumes that preferences are pre-given in the sense that they are idiosyncratic, empirical, and emotional, and are not determined by rational deliberation:

> [I]f the desire for this object precedes the practical rule, and is the condition of our making it a principle, then I say . . . this principle is in that case wholly empirical, for then what determines the choice is the idea of an object, and that relation of this idea to the subject by which its faculty of desire is determined to its realization.

Id. at 34. The satisfaction of preferences leads to happiness—what economists call utility and Kant calls "pleasure." *Id.*

145 "To be happy is necessarily the wish of every finite rational being, and this, therefore, is inevitably a determining principle of its faculty of desire." *Id.* at 39.

146 "All material principles, then, which place the determining ground of the will in the pleasure or pain to be received from the existence of any object are all of the same kind, inasmuch as they all belong to the principle of self-love or private happiness." *Id.* at 35.

147 *Id.* at 51.

148 A *maxim* is a *subjective* principle of action, a principle which the subject himself makes his rule (how he wills to act). A principle of duty, on the other hand, is a principle that reason prescribes to him absolutely and so objectively (how he *ought* to act).

KANT, MORALS, *supra* note 141, at 17–18.

149 KANT, PRACTICAL REASON, *supra* note 36, at 40.

150 *Id.* at 38. Within the Kantian tradition, the term "pathological" carries none of the negative connotations of diseased or unusual. Rather, based on the Greek *pathos* (suffering), pathology merely designates that which relates to emotions and feelings—as opposed to pure reason. *Id.* at 95. In Zupančič's words "We must stress, however, that the notion of the pathological must not be considered the opposite of the 'normal'. On the contrary, in Kant's view, it is our 'normal' everyday actions that are more or less always pathological." ZUPANČIČ, *supra* note 129, at 7.

151 "An end is an object of the choice (of a rational being), though the representation of which choice is determined to an action to bring this object about." KANT, MORALS, *supra* note 141, at 146. Kant continues:

> But if I am under obligation to make my end something that lies in concepts of practical reason, and so to have, besides the formal determining ground of choice (such as right contains), a material one as well, an end that could be set against the end arising from sensible impulses, this would be the concept of an end that is in itself a duty . . . . That is to say, determination to an end is the only determination of choice the very concept of which excludes the possibility of constraint through natural means by the choice of another.

Id. at 146. In other words, freedom is precisely the ability to use reason to choose ends, rather than having ends forced upon us by nature.

152 See KANT, PRACTICAL REASON, *supra* note 36, at 38.

153 KANT MORALS, *supra* note 141, at 146.

154 *Id.* at 147.

155 *Id.*

156 *Id.* at 149.

157 See generally ALLISON, *supra* note 103.

158 "The capacity for having pleasure or displeasure in a representation is called feeling because both of them involve what is merely subjective . . ." KANT, MORALS, *supra* note 141, at 12.

159 KANT, PRACTICAL REASON, *supra* note 36, at 42.

160 JEREMY BENTHAM, 2 THE WORKS OF JEREMY BENTHAM 500–1 (J. Bowring ed. 1962).

161 Although I have spoken of utilitarianism's willingness to sacrifice the minority for the sake of the majority, such a position implicitly assumes both that we can measure and compare the utilities of different persons, and that all persons have comparable capacities for pleasure and pain. Once one jettisons these assumptions, it is theoretically conceivable that there could be one fabulous sadist who gets such intense delight in torturing others that the goal of aggregate happiness would require the sacrifice of all for the one.

162 This problem led Posner to propose that wealth maximization supplant utilitarianism as the guiding principle of an economically-based legal system. One cannot compare, and therefore cannot measure, aggregate subjective utility. One can, according to Posner, at least measure wealth in monetary terms. "Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically." Posner, *Value*, *supra* note 97, at 247; see also Posner, *Utilitarianism, supra* note 67, at 115.

Posner's critics point out that the fact that one might be able to measure aggregate wealth does not in and of itself suggest any reason why one should want to do so. "Wealth maximization . . . is neither more defensible than utilitarianism nor is it an alternative efficiency criterion. Indeed it is not an efficiency criterion at all." Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521 (1980).

> The only area in which wealth maximization escapes the condemnation accorded utilitarianism is in measurement. It is much easier to measure wealth than utility, although the need to hypothesize markets reveals that even wealth measurement is not without difficulty.

Lewis A. Kornhauser, *A Guide to the Perplexed: Claims of Efficiency in the Law* 8 HOFSTRA LAW REV. 591, 603 (1980). I challenge this assumption that wealth is itself a relatively unambiguous concept and is readily measurable. It ignores the fact that Posner's definition of wealth includes not merely the exchange value of all of the good things in the world, but also all consumer surplus defined as the amount by which the idiosyncratic use value of things owned by economic subjects exceeds the exchange value. By definition, since consumer surplus is subjective, it is idiosyncratic and non-comparative in precisely the same way as utility. Consequently, wealth maximization suffers from the same impossibility as utilitarianism. See SCHROEDER, VENUS, *supra* note 49, at 213–29, 251–5.

163 Indeed, according to Slavoj Žižek, Lacan identifies the *Critique of Practical Reason* as the "birth of psychoanalysis." SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 229 (1991).

164 KANT, PRACTICAL REASON, *supra* note 36, at 43.

165 *Id.*

166 *Id.* at 44.

167 KANT, MORALS, *supra* note 141, at 13.

168 KANT, PRACTICAL REASON, *supra* note 36, at 44.

169 *Id.* at 46.

170 Roger J. Sullivan, *Introduction* to KANT, MORALS, *supra* note 141, at vii, xviii.

171 Therefore, the law that we should promote the happiness of other[s] does not arise from the assumption that this is an object of everyone's choice, but merely from this, that the form of universality which reason requires as the condition of giving to a maxim of self-love the objective validity of a law, is the principle that determines the will.

KANT, PRACTICAL REASON, *supra* note 36, at 51.

172 *Id.* at 53.
173 *Id*. at 77.
174 *Id*.
175 *Id.*
176 *Id*. at 81.
177 *Id.* at 80–1.
178 Which is why Peter Singer, the preeminent utilitarian philosopher living today, is also the foremost theorist of the animal rights movement. See PETER SINGER, ANIMAL LIBERATION (2d edn 2001).
179 KANT, PRACTICAL REASON, *supra* note 36, at 93.
180 *Id*. at 102.
181 *Id.* at 92.
182 See ALLISON, *supra* note 103, at 186; Jeanne L. Schroeder and David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 671 (2000) [hereinafter, Schroeder and Carlson, *Kenneth Starr*].
183 KANT, PRACTICAL REASON, *supra* note 36, at 144.
184 Schroeder and Carlson, *Kenneth Starr*, *supra* note 182, at 672.
185 See KANT, RELIGION, *supra* note 113, at 117. "This evil is radical, since it corrupts the ground of all maxims; as natural propensity, it is also not to be extirpated through human forces." *Id.* at 59. As I explain elsewhere (Schroeder and Carlson, *Kenneth Starr*, *supra* note 182, at 657 n.19) it is a common misperception that the Kantian term "radical" evil bears the colloquial connotation of really, really extreme evil (i.e. diabolical evil), perhaps because of Hannah Arendt's terminology in her famous work on the banality of evil. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1994).
186 KANT, MORALS, *supra* note 141, at 10.
187 See KANT, RELIGION, *supra* note 113, at 58–9.
188 SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 365 (1999) [hereinafter, ŽIŽEK, TICKLISH SUBJECT].
189 As Kant states:

> [T]he impurity . . . of the human heart consists in this, that although the maxim is good with respect to its object (the intended compliance with the law) and perhaps even powerful enough in practice, it is not purely moral, i.e. it has not, as it should be [the case], adopted the law alone as its sufficient incentive but, on the contrary, often (and perhaps always) needs still other incentives besides it . . . in other words, actions conforming to duty are not done purely from duty.

KANT, RELIGION, *supra* note 113, at 53–4. Impurity is the intermediate of Kant's three grades of radical evil. The most venial is weakness, the self-deluded claim that one could not help oneself (i.e. the devil made me do it). The most serious is wickedness, the self-deception that one's own pathological desire is the ethical law. Schroeder and Carlson, *Kenneth Starr*, *supra* note 182, at 675–7.
190 ALLISON, *supra* note 103, at 43.
191 KANT, MORALS, *supra* note 141, at 196.
192 *Id*. at 155.
193 *Id* at 56; KANT, RELIGION, *supra* note 113, at 67.
194 KANT, PRACTICAL REASON, *supra* note 36, at 148.
195 KANT, RELIGION, *supra* note 113, at 45.
196 *Id.* at 55.
197 KANT, PRACTICAL REASON, *supra* note 36, at 123. As Carlson and I have said:

> If this self were noumenal, then God (a noumenon) would be our equal. God would stand before our eyes as directly perceivable. We would lose our freedom,

> if we could directly know God's law. We would be mere puppets in the thrall of the moral law. Ironically, morality would become legality, and morality would be thoroughly pathological—that is natural.

Schroeder and Carlson, *Kenneth Starr*, *supra* note 182, at 667.

198 The formula for the masculine is: for the class of X, all X's are submitted to the phallic function. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 1972–3 78–81 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998).

199 The serpent told Eve, "For God knows that in the day you eat from it your eyes will be opened, and you will be like God, knowing good and evil." GENESIS 3:5. Of course, from a Kantian perspective the mystery of Genesis is how could Adam and Eve be capable of sin (and deserving of punishment) prior to having the knowledge of good and evil. Prior to eating of the tree they would have been like beasts—good or bad, but neither moral nor evil.

200 KANT, RELIGION, *supra* note 113, at 61–5.

201 "And the Lord God commanded the man, saying, 'From any tree of the garden you may eat freely, but from the tree of the knowledge of good and evil you shall not eat, for in the day that you eat from it you shall surely die.'" GENESIS 2:16–17.

202 Indeed, God exiled the first couple precisely so that they would not become immortal and, therefore, truly godlike:

> Then the Lord God said, Behold, the man has become as one with us, to know good and evil: and now, lest he put forth his hand, and take also from the tree of life, and eat, and live forever: Therefore the Lord God sent him out from the garden of Eden . . .

GENESIS 3:22–3.

203 Sullivan, *supra* note 170, at xx.

204 KANT, PRACTICAL REASON, *supra* note 36, at 65.

205 JEAN HYPPOLITE, FIGURES DE LA PENSEE PHILOSOPHIQUE 1 (1971); ROBERT B. PIPPIN, HEGEL'S IDEALISM: THE SATISFACTION OF SELF-CONSCIOUSNESS (1989); Jeanne L. Schroeder and David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law,* 24 CARDOZO L. REV. 2481 (2003) [hereinafter, Schroeder and Carlson, *Appearance*].

206 G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 440 (A.V. Miller trans. 1969) [hereinafter, HEGEL, LOGIC].

207 G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 67–9 (Allen W. Wood ed. and H.B. Nisbet trans. 1991) [hereinafter, HEGEL, PHILOSOPHY OF RIGHT].

208 *Id.* at 37, 67–8. See also SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 37 (1984).

209 Alan Brudner, *The Unity of Property Law*, 4 CANADIAN J. OF L. AND JURIS. 3, 14–15 (1991).

210 My most complete account appears in SCHROEDER, VENUS, *supra* note 49, at 42–64, 74–6: *and* SCHROEDER, VESTAL, *supra* note 72, at 27–52, 262–85.

211 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 207, at 67–70.

212 *Id.*

213 *Id.* at 73; SCHROEDER, VESTAL, *supra* note 72, at 31–4.

214 See David Gray Carlson, *Hegel's Theory of Quality*, 22 CARDOZO LAW REV. 425 (2001).

215 In Hyppolite's words, "Hegelian philosophy rejects all transcendence . . . There is no world, nothing in itself, no transcendence . . ." HYPPOLITE, *supra* note 205, at 1.

216 Or in Roger Pippin's words, "there is literally nothing 'beyond' or 'behind' or responsible for the human experience . . . ." PIPPIN, *supra* note 205, at 206.

217 As Allison explains, "the Hegelian critique of Kantian morality is essentially a protest against its location of supreme value (a good will) in an inner realm of 'purity' that is divorced from the real 'objective' world of actions and events." ALLISON, *supra* note 103, at 187. Hegel rejected Kant's theory of moral law as empty formalism because, for Hegel, "there can be no action without passion . . ." *Id.* at 186. As Wood says, "Hegel's fundamental concern in rejecting the Kantian conception of the good will is to prevent our conceiving of the good will as an essentially alienated form of existence, cut off both from its own sensuous nature and from the real world in which it acts." *Id.* at 187 (quoting Allen Wood). This is part and parcel of Hegel's "wholesale rejection of the metaphysics of transcendental idealism . . ." *Id.* at 188.

218 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 207, at 20.

219 HEGEL, LOGIC, *supra* note 206, at 543.

220 Kant's thing-in-itself serves, therefore, as his *objet petit a*.

221 DAVID GRAY CARLSON, A COMMENTARY TO HEGEL'S *SCIENCE OF LOGIC* 149 (2006).

222 Contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement . . . ." HEGEL, LOGIC, *supra* note 206, at 438.

223 As I explain elsewhere:

> If contradiction could be permanently resolved, the world would become eternal, unchanging, necessary, and essential. That is, the phenomena would eventually graduate to noumena. Speculative reason, however, preserves a moment of contradiction which the understanding must resolve by an immediate proposition. As such, dialectic reasoning will show that this new understanding will imply and generate its own negation and the process will continue indefinitely.

Jeanne L. Schroeder, The Lacanomics of Apples and Oranges: A Speculative Account of the Economic Concept of Commensurability, 15 YALE J. LAW AND HUMAN. 347, 366 (2003).

224 HEGEL, LOGIC, *supra* note 206, at 237–8.

225 See Schroeder and Carlson, *Appearance*, *supra* note 205, at 2.

226 Conversations with Arthur Jacobson. See also ERMANNO BENCIVENGA, HEGEL'S DIALECTICAL LOGIC 41 (2002) ("Reality is structure (form) all the way down.") They are, of course, referring to the classic metaphor for infinite regress. The seeker of truth asks the guru about the universe. The guru states that the world is supported on four columns on the back of a giant elephant who stands on the shell of the cosmic turtle. The student asks, "And on what does the cosmic turtle stand?" The guru replies, "On the shell of an even greater turtle." The student inquires further, "And on what does the even greater turtle stand?" "On a still greater turtle." "But, oh master, on what does that turtle stand?" "Listen buster, it's turtles all the way down!" I discuss the genealogy of this great anecdote, and its variations, in SCHROEDER, VESTAL, *supra* note 72, at 5–6 n.12. In the words of Pippen, in Hegel's system "there are no 'essences' beyond or behind the appearances, at least none that can do any cognitive work. There are just the appearances . . ." PIPPIN, *supra* note 205, at 211.

227 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 207, at 57, 73; SCHROEDER, VESTAL, *supra* note 72, at 31.

228 "The passionately right-seeking creature respects the rights of others . . . because only by respecting the rights of others can it achieve recognition." Arthur J. Jacobson, *Hegel's Legal Plenum*, in HEGEL AND LEGAL THEORY 97, 115 (Drucilla Cornell, Michel Rosenfeld and David Gray Carlson eds 1991).

229 SCHROEDER, VESTAL, *supra* note 72, at 19–20, 31–4; Michel Rosenfeld, *Hegel and the Dialectic of Contract*, 10 CARDOZO L. REV. 1199, 1220–1 (1989).

230 "Hegel gives the name 'freedom' to the reciprocal recognition of individuals in ethical institutions governed by ethical laws." Jacobson, *supra* note 228, at 896. For a technical description of the logic of mutual recognition, see David Gray Carlson, *How to Do Things With Hegel*, 78 TEX L. REV. 1377 (2000).

231 "The creatures at the beginning of the *Philosophy of Right* thus hunger for legal relations more powerfully than they hunger for food, shelter, or sex." Jacobson, *supra* note 228, at 114; see also SCHROEDER, VESTAL, *supra* note 72, at 51.

232 I mention this because it is an important point frequently missed by critics of Hegel. For example, Margaret Radin misinterprets Hegel's dialectic of property as though he was trying to describe the empirical process by which human beings become mature adults through object relations. *Id.* at 26–73. The *Philosophy of Right* is an attempt to explain the internal logic of the modern constitutional state which was becoming the norm in Europe at the time Hegel was writing in the early nineteenth century. As his famous metaphor of retroactivity indicates, philosophy cannot predict the future, but only explain the present and the past. HEGEL, PHILOSOPHY OF RIGHT, *supra* note 207, at 23. By starting his analysis with an explanation of the logic of contract and property—the legal foundations of capitalist economics—and then turning to civil society—the market economy—he indicates that the constitutional state—the subject of the last section of the book—could not exist until our modern conceptions of contract and property came into being.

233 Sullivan, *supra* note 170, at xxiv.

234 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 207, at 21.

235 *Id.*

236 Kant himself falls off the wagon occasionally. For example, the *Metaphysics of Morals* finds him moving from a discussion of how the moral duty of self-control suggests that one not abuse alcohol or overeat to a consideration of the proper number of people to invite to a dinner party! KANT, MORALS, *supra* note 141, at 180–1. I personally find that a number of passages in the *Philosophy of Right* come close to the type of practical minutiae that Hegel claims philosophy must avoid.

Chapter 4

The analyst's discourse

Introduction

Lacan gives pre-eminence to the analyst's discourse. Though it figures third in the schema, he discusses it last. This is not because it is powerful socially[1] or "a totalizing world view" theoretically.[2] The university's discourse is today's dominant discourse of social power.[3] Moreover, Lacan believes the analyst's discourse is "but one discourse among many, not the final, ultimate discourse."[4]

Nevertheless, Bruce Fink argues that psychoanalysis claims our particular attention because it is the means by which the other discourses are understood.[5] As Lacan says, "The analytic discourse, at the level of structure . . . halts the giddiness of the three others . . . ."[6] This giddiness no doubt results from the fact that the very relationship among the discourses is cyclical. Each inexorably implies the next, so that "we are still going around in circles—the signifier, the Other, knowledge, the signifier, the Other, knowledge, and so on."[7] The analyst's discourse, with its emphasis on desire and *jouissance*, permits us temporarily to stop this rotary motion and escape the vicious circle. It allows us to slip the causal chains of the symbolic and achieve a moment of Kantian practical freedom in what Lacan calls the "act."

With due respect to Lacan, I return the analyst's discourse back to its third position. First and most importantly, I do this because of Lacan's own structural argument. The analyst's is not the final discourse. If it stops the giddiness of discourse, it does so only momentarily and the rotary motion begins anew. The goal of psychoanalysis, like speculative philosophy, is to help the subject actualize her freedom by writing her own ethical law. The analyst's discourse addresses the barred subject and hystericizes her. It helps the analysand change from a masculine subject who believes he is completely bound by the symbolic order, to a feminine one who understands she partially escapes it. Analysis must then set the analysand free and allow her to speak. This creates the hysteric's discourse.

Second, more mundanely, I restore the logical order of the discourses because of the difference between mine and Lacan's projects. Lacan, as an analyst, wants to end by talking about his home discourse. And so I, as a hysterical attorney, want to have the last word.

The psychoanalyst analyses the analysand and helps her reach a cure. The psychoanalytical cure is internal—the analysand learns to symbolize her trauma and cope better with the circumstances that contributed to her problem. Legal problem solving, in contrast, is external as well as internal. Once the attorney helps the client interpret the law and identify his legal problem, she then helps him determine the appropriate response. Sometimes, this is the internal decision to cope. But, perhaps more frequently, legal counseling is only the prelude to legal representation in which the attorney steps into the client's shoes and represents him in trying to change the client's external circumstances through negotiation, litigation, or otherwise.

Because the attorney typically engages in the analytic's discourse as a preliminary stage to another discourse, counseling may be primitive and shallow when compared to psychoanalysis. However, the analyst's discourse appears in law not merely in counseling, but in the mysterious process of interpretation.

Even Lacan distinguishes between the pure analyst's discourse and actual psychoanalytic practice.[8] Modifying Freud, Lacan concludes that (psycho)-analyzing is the third "impossible profession" along with governing and educating.[9] These professions correspond to the analyst's, master's, and university's discourses, respectively.[10] I suggest that there is a "possible profession," one that corresponds to the final discourse of the hysteric; a profession that succeeds in momentarily actualizing the subject's freedom in the world. This is the practice of law.

The quadripode

Lacan's analysis

Once again, the new discourse is schematized by turning the previous discourse one quarter-turn counter-clockwise:

$$\frac{a}{S_2} \longrightarrow \frac{\not{S}}{S_1}^{11}$$

The analyst, sitting in the upper left-hand corner as addresser, takes on the role of the *objet petit a* itself.[12] "[T]he agent (analyst) reduces himself to the void that provokes the subject into confronting the truth of his desire."[13] This is significantly different from the two discourses of power. Both the master and university address the other with the voice of positivity. The master speaks from the position of authority telling you what to do. The university speaks from the position of expertise lecturing you why you should do it. The analyst and the hysteric, in contrast, speak from radical negativity. In the analysts's discourse "the analyst plays the part of pure desireousness."[14] The analyst asks, "What do *you* want to do?" Positioning

herself as the analysand's little *a* she reframes this as "What am I?" Similarly the attorney in her role as counselor must empty herself of her positive content to identify with her client's needs.

Because Lacan uses the terms "discourse" and "address" one might assume that the addresser is always actively speaking. In psychoanalysis, however, the analyst primarily listens.[15] By addressing the analysand from the position of the cause of the analysand's own desire, she stands in for that which is missing.[16] If the master commands and university lectures, the analyst interrogates. Consequently, the analyst's address consists largely of silence—through an absence of speech. The analysand speaks to fill in the gap represented by the analyst.[17] When the analyst does speak, it is not in her own voice as master or teacher. She tries to articulate the analysand's voice, helping him to articulate his desire—to dissolve the traumatic symptom lost in the real by integrating it into the symbolic.

The other addressed by the object of desire is the barred subject himself.[18] The analyst "interrogates the subject in his or her division, precisely at those points where the split between consciousness and unconscious shows through."[19]

The truth hidden beneath the analyst is knowledge.[20] Lacan calls the analyst "the subject supposed to know."[21] The analysand goes to the analyst because the analysand is a barred subject—he is traumatized, unhappy, and alienated. The analyst is the expert who is supposed to know what is wrong.

The knowledge that is the truth underlying the little *a* is neither *savoir faire* nor expertise. Rather, this hidden knowledge is the analysand's own unconscious knowledge.[22] The truth of the analysand's desire is within himself.[23] This is not to deny that the person who is a psychoanalyst also has *savoir faire*—she knows how to treat patients—and expertise—she is a highly educated professional. Nevertheless, these forms of knowledge are not the truth of analysis.

The result of analysis is the master signifier. But this time, it is not the master signifier imposed upon her by the Big Other[24] (as in the master's discourse) but his own "new master signifiers (S_1), ultimate values, formulations of their identity or being."[25]

The symptom

The master signifier produced by psychoanalysis is the articulation of the analysand's "symptom."[26] Perhaps the term "symptom" should be viewed as an unfortunate remnant from pre-Lacanian Freudianism that treated psychoanalysis as a branch of medicine, rather than a *sui generis* discipline. In the medical understanding, a symptom is a physical manifestation, sign or effect of an underlying disease, as opposed to the disease itself. This is reflected in the cliche about distinguishing treatment of symptoms from cure of the underlying disease.

If one considers a psychoanalytic disorder to be a medical disease, then one would expect that it would also produce external symptoms distinct from the organic disease itself. To treat the symptom might temporarily alleviate the patient's suffering, but not lead to a permanent cure. Lacan, in contrast, does not so strictly distinguish the symptom from the disease. If anything, Lacan's retroactive method reverses the relationship between disease and symptom.

A symptom is the actualization of that which blocks a subject from his desire which he cannot put into words. As a result, the symptom serves to explain the signifying chain of his neurosis. The symptom is that which structures the subject by giving him consistency—that is, a symptom has an imaginary moment. We have seen that the symbolic, and therefore subjectivity, is structured by the trauma of the real. Lacan, like Hegel, rejects transcendence. For something to have reality, it must become actual by appearing—it is factual only insofar as it is actual. What is repressed in the symbolic returns in the real. The symptom is the appearance of trauma through the subject's repetitive, consistent, characteristic behaviors and speech patterns. Symptoms are, therefore, the actuality of trauma. Trauma is only retroactively established through its symptoms.

This means that the symptom is essential to the subject. What makes a symptom *seem* inessential in the colloquial sense of the term is that it is appearance. But, as I discuss in the last chapter, essence is appearance all the way down. The continued existence of the traumatized subject requires the persistent appearance of her symptom.

The symptom is a master signifier not only because it explains the other signifiers, but because it is vacuous. In his *Twentieth Seminar* on feminine sexuality, Lacan calls this S_1 produced by the analyst's discourse, the *betisse*; roughly, the little stupidity or funny business.[27] It functions as a symptom precisely because it lacks meaning—it is a trauma, a bit of the real that has not yet been symbolized and, therefore, has no proper signification to the subject.[28] Nevertheless, it is the block, the unsymbolized traumatic event, around which the analysand has organized his life. The analysand's unconscious knowledge is the chain of signification, whereas his symptom is the trauma that he has not yet been able to place in the symbolic order. This is why the symptom is represented by the matheme for the master signifier. The master signifier itself is nonsensical by definition yet it structures and gives sense to the chain of signifiers. Psychoanalysis is supposed to enable the analysand to identify his symptom and integrate it within his symbolic order.[29]

The act

The symptom's articulation is the retroactive assignment of a cause to the subject's trauma—the identification of the object cause of her desire—through its articulation. This assignment is called the "act." The act itself is

spontaneous and free in the sense that it is caused neither by the original trauma nor by the psychoanalyst. The analysand *chooses* which of the many potential causes to recognize and adopt as his own. As such, the act is always an ethical choice by which the analysand takes responsibility for his trauma.

Lacan states that "every truth has the structure of a fiction."[30] He does not, however, say that trauma is *fictional.* Only its *structure* is fiction-like in that it is a narrative created by the analysand. Having an imaginary aspect, the act requires imagination—creativity. For the traumatized subject, the trauma functions as her truth. That is, the truth of trauma is nothing but the suffering of the traumatized and the meaning he gives it in articulation. It is a truth that can be known, even if the memory created in analysis may not be literally, historically accurate. Consequently, to some extent all memories recovered in psychoanalysis, on one level, have the *form* of false-memory syndrome.

Lacan does not deny that horrible things happen to people, that these horrible things can be related to trauma, or that there are objective, historic, empirical truths "out there." The story told in a successful psychoanalysis is fictional in *form*, not in substance—psychoanalysis is a search for truth. Rather, the point is that the pain of trauma cannot be mechanically reduced to, or explained entirely by, external historical events. An external event can be a catalyst for trauma only because the subject has an innate, pre-existing capacity to be traumatized. The pain of trauma is, therefore, deeper than the event and is fundamental to the very constitution of the traumatized person's subjectivity. Indeed, all traumas are no doubt over-determined. Trauma cannot be fully explained by history, but is always articulated as *her story.*

The sinthome

Lacan's metaphor for the relationship between the three orders is the Borromean knot—three circles overlapping in such a way that if one is broken, the knot comes undone. This expresses the idea that each order—and subjectivity itself—necessarily requires the others. Unfortunately, Lacan found that his theory of the knotting of subjectivity ran aground with respect to empirical evidence. Clinical experience indicated that breaking one ring of the knot does not always throw the analysand into psychosis. His theory would be falsified unless he could hypothesize an ancillary theory that would explain this apparent empirical anomaly.

Late in life Lacan proposed that the empirical problem of the Borromean metaphor was in fact the same as the empirical problem of the Freudian theory of trauma and symptoms. Freud and Lacan originally hypothesized that a trauma and its symptoms should dissolve in analysis. This seemed true by definition: if a trauma is that which is real because it has not been integrated into the symbolic, its symptoms should no longer occur once a trauma is articulated. Nevertheless, some analysands lovingly cling to their

symptoms even after "successful" analysis.[31] Once again, this observation threatened to falsify the theory, unless Lacan could develop an ancillary hypothesis explaining this apparent empirical anomaly. Lacan's late revelation was that the *same* ancillary hypothesis could solve both the mystery of the persistence of subjectivity and the mystery of the persistence of symptoms.

Studying the mathematical field of topology, Lacan realized that the traditional terminology of the Borromean knot is misleading. The figure is not technically a knot, but a chain[32]—which is why it should fall apart when the weakest link is broken. Lacan posited that there might be a fourth category—a true knot—keeping the three orders bound together in the event of breakage. Using what he claims is an old French word for symptom, he called this fourth the *sinthome*.[33] Metaphorically, the sinthome is like the safety chain on a bracelet that keeps it from falling off in the event the clasp breaks.

The knot of the sinthome ties together his earlier understanding that it is the real of the symptom that gives structure to the subject. Understood in this way, the sinthome is not *merely* real. Like the *objet petit a*, it *also* participates in the imaginary and the symbolic. The sinthome is located where the three orders meet. It is precisely the limit where the fantasies of the imaginary are unable to cover up the holes in the symbolic that constitutes the trauma. This is why symptoms can linger even after trauma is articulated. Even though the trauma is integrated into the symbolic through its interpretation, there is a part that remains supplementary to the symbolic and, therefore, serves as the real of trauma. This symptom that is at the center of the Borromean chain knitting together the three orders is in effect nothing but the subject herself. The persistence of the symptom actually explains the persistence of the subject despite the breaking of the Borromean chain. In other words, it is neurosis itself that keeps psychosis at bay.

Through this theory of the sinthome, Lacan was able to expand on his earlier insights into the feminine subject. In my final chapter, I will put them all together to explain the trauma at the heart of law and the femininity of practicing law.

The analyst's discourse and legal counseling

In this chapter I suggest two areas where the analyst's discourse is spoken in law. The first, and most obvious, is counseling—an immature and unsophisticated little sister of psychoanalysis. Second, and more surprisingly, Lacan's concept of the analyst's discourse, combined with his theory of signification, sheds light on legal interpretation. Interpretation is an "act."

Introduction

Several years ago, my law school hosted a conference, *Law and the Post-modern Mind*, exploring the intersections of contemporary psychoanalytic theory and

law. My colleague Charles Yablon presented a humorous paper, *Freud as Law Professor: An Alternate History*,[34] inspired by the anecdote that Sigmund Freud briefly considered a legal career prior to attending medical school. Yablon hypothesized a subjunctive universe in which Freud did attend law school and went on to revolutionize legal theory and practice. Yablon's presentation was in the form of a speech dedicating an imaginary Sigmund Freud School of Law of Yeshiva University.[35] Yablon described Freud's transformation of law into "the foremost of the healing professions"[36] devoted to solving problems, resolving conflict, and increasing personal happiness, The audience (consisting primarily of academic lawyers, largely refugees from practice) roared with laughter. What could be more absurd?

Of course Yablon, like all great humorists, is deadly serious. Despite the low opinion of lawyers among the public generally, and among lawyers (and legal academics) specifically, Yablon's satirical description of a counterfactual legal profession should be the ideal. Unfortunately, our education, and competitive pressures, emphasize our roles as hired guns doing whatever the client asks, rather than our roles as counselors helping clients to identify their true goals.

The counselor supposed to know

The American Bar frequently distinguishes between "lawyers" and "attorneys." The former are those who are educated in the law. The latter are lawyers who represent clients. The "good" lawyer should adopt the discourse of the analyst when she becomes an attorney and counsels her client. The attorney as counselor should not primarily act as a master telling the client what to do, or as a teacher explaining and justifying the law to the client—although in the course of representation she must also take on these lawyerly roles. Rather, she should help her client decide what his problem is so that he can decide the best way of dealing with that problem. She helps him articulate his needs and resolve his trauma.

The counselor is not in the position of arbitrary power—like the master—or of abstract expertise—like the university. The counselor/analyst is supposed to know the client's *specific* desire, his secret or *agalma*. Clients never ask what the law is in the abstract. The client sees law as a means to reach his ends. To do this, the counselor must be in the position of the client's true desire.

Accordingly, the attorney addresses the client from the position of the little *a*—the position of the client's own desire. The attorney addresses the client as the barred subject—the subject that is alienated from her desire. As with the analyst, the way the counseling attorney addresses her client is primarily through listening and helping the client to speak, rather than speaking, commanding, and lecturing. Or, as the slang term for an attorney suggests, she is the client's mouthpiece—a tool of articulation.

The client lacks something but only the client can know what he lacks. Frequently, like the suffering analysand, the client not only does not know what he wants, he knows that he does not know. He might feel that he has been injured in some way and wishes to know if he has in fact been wronged before the law and, if so, if and how the wrong can be righted. He might wish to form a business organization or enter into a contractual relation but only have a general idea of what he needs. Other times, the client thinks he knows exactly what he wants. It is common for an educated analysand to come to sessions with his own ready-made diagnoses. Day-time TV illustrates the phenomena that even the most uneducated segment of society is familiar with psychobabble. Similarly, the corporate client represented by officers, inside counsel, accountants, and investment bankers often engages in extensive preliminary analysis prior to engaging an outside attorney. It seeks confirmation from the attorney of its conclusions, and help in executing them. Nevertheless, even in these cases the very fact that the client approaches the attorney means that the client has a desire, believes the attorney understands his desire, and, further, believes that he cannot attain his desire without the help of the subject-supposed-to-know.

The truth lying under the attorney standing in the position of the client's desire is S_2—the signifying chain of knowledge. Because the client approaches the attorney as the subject-supposed-to-know, and because the attorney, like the analyst, is a highly trained professional, it is tempting to think that the attorney's truth is legal expertise. This is a grave misunderstanding. When one stands in the place of one's professional expertise one is speaking either the master's discourse (I say the law is X) or the university's discourse (I know why the law is X and what the law should be). Of course, an attorney is always also a lawyer who plays these roles—but she is something more. If law is symbolic, it requires all four discourses.

Rather, as in psychoanalysis, the truth is the self-knowledge of the client/analysand. The knowledge that the barred subject supposes the subject-supposed-to-know has the answer to the question of the barred subject's own desire. As we have seen, the analyst helps the analysand find his own truth: "The knowledge in question here is unconscious knowledge, that knowledge that is caught up in the signifying chain and has yet to be subjectified. Where that knowledge was, the subject must come to be."[37] Similarly, the knowledge that is the truth of the attorney when she counsels the client is how the client as barred-subject can symbolize his own desire within the signifying chain of law. The *attorney* should not tell the client what to do. This is the university's function. Rather, she should help him decide what he wants given the available legal alternatives. As we are supposed to learn in our professional responsibility classes, the attorney must allow her client to make all decisions.

The product of the analyst's discourse, which lies under the client as barred subject, is S_1, a master signifier—the signifier that gives meaning to

the chain of signification. S_1 in this position is not, however, the master signifier as master—as brute power imposed upon the subject. Rather, it is the barred subject's own, individual symptom.

As we have seen with respect to all the discourses, although the agent located in the top left-hand corner addresses the other in the upper right-hand corner, there is no such communication in the lower half of the diagram. The relationship of the truth in the lower left-hand corner and the product in the lower right-hand corner is an impossible non-relation. This is precisely why the analysand seeks help from analysis. His symptom (his personal little stupidity, senseless because it is not yet symbolized) is the key to the truth of his personal knowledge within the signifying chain. To say that this little stupidity is the analysand's symptom is to say precisely that it blocks the barred-subject from direct access to his own self-knowledge. The door to self-knowledge has been locked by the key of the hidden symptom. Psychoanalysis helps the analysand recognize the symptom as the key that can unlock the door. The hope is that if the analysand symbolizes his unconscious knowledge, he will eventually shed the symptom that could act as a key that might relock the door.

Similarly, the counselor does not merely help the client recognize the nature of her desire. She helps the client identify that which is blocking the client's access to her desire—the client's master signifier—in order to help the client get beyond that block and articulate her legal trauma. The client's symptom can be the law itself. This does not mean, of course, that the counselor should help the client to do anything and everything he *thinks* he wants to do. To do so would not serve the client and may violate professional ethics.

The whole point of helping the client to understand how to symbolize his desire and place it within the signifying chain of law is so that the client can understand what his alternatives are and how to deal with them. Some problems can be solved. Some cannot and must instead be coped with. The secret of a successful counseling relationship is helping the client recognize the difference between these alternatives.

Of course, some clients cannot be counseled, just as some analysands are beyond analysis, as Freud himself noted. Slavoj Žižek, a Slovene, rather proudly points out that the only time one of his countrymen is mentioned in Freud's writings is in connection with just such an incorrigible case. Freud advised a friend, another analyst, with respect to a particularly difficult analysand:

> The second case, the Slovene, is obviously a good-for-nothing who does not warrant your efforts. Our analytical art fails when faced with such people, our perspicacity alone cannot break through to the dynamic relation which controls them.[38]

If the client continues to believe that his true desire is to engage in activity in violation of the law, rather than conforming his behavior to fit within the law or seeking to change the law,[39] the counseling relationship is a failure and the attorney must resign.

The analyst's discourse and interpretation

Interpretation

At first blush it might seem odd to suggest legal interpretation might fall within the analyst's discourse with the interpreter acting as the speaking agent of the discourse. When one interprets legal material, isn't it the material, not the reader, who is speaking? Of course. But just as psychoanalysis is a collaboration between an analysand and an analyst, interpretation is collaboration between an author/speaker and a reader/listener.

In the analyst's discourse, the agent *interrogates* the barred subject, as addressee of the discourse. The agent does not convey information. Rather, the agent tries to help the barred subject name her trauma. This is why the analyst puts herself in the position of the analysand's little *a*—his desire. Similarly, the legal interpreter must try to place herself in the position of the desire of the material being interpreted—that is, the place of the meaning that is lacking because the material has not yet been interpreted. She is trying to figure out its substance, its goal, by asking questions of it. In interpretation, the material to be interpreted is in the position of $, the barred subject. It initially presents itself as an enigma, an emptiness, a broken whole—a hole that needs to be filled in.

The truth below the analyst/interpreter is knowledge. Once again, this is not the knowledge of the analyst herself, either in the form of know-how or expertise. As the addressee's own as-yet unarticulated knowledge it is the content of the material to be interpreted. Signification, for Lacan, is objective in that the signification of the object to be interpreted is in the object. However, just as the cause of a trauma is over-determined, the problem of interpretation is not that the text lacks meaning. Rather, it has a plethora, a surplus of potential meanings.[40]

Interpretation is the temporary stoppage of the slippage of signification that establishes meaning. This is the same operation by which the analyst's discourse temporarily stops the giddiness of the vicious circle of discourse. Nevertheless, because of the surplus of potential meanings objectively within a text, the interpreter must always choose a meaning through a subjective and creative act. Slippery signification can only be congealed into meaning in the imaginary. Interpretation is the interaction of subject/reader and object/text. It requires the interpreter's judgment. Meaning is always established retroactively once the text is read. Laws are indeterminate *ex ante*, but are determined *ex post*. Consequently, it might be more accurate to say that interpretation is not *merely* objective, or subjective, but *inter*subjective.

Consequently, the product of interpretation and application is S_1—the meaning of the text. It is the expression of that which is only implicit before it is articulated.

To understand the retroactive establishment of objective meaning by Lacan, it is useful to contrast it to H.L.A. Hart's theory of interpretation and his concepts of the core and penumbra of law. In the chapter on the master's discourse, Hart's separation thesis was shown to fall within the master's discourse. As such, it is an inadequate account of the system as a whole. Here I argue that Hart's theory of interpretation is also a failure because it is an attempt to apply the separation thesis of the master's discourse to the analyst's discourse.

Hart's theory of language fails because the analyst's discourse is the other side of the master's discourse—the former turns the latter inside-out. The goal of the analyst's discourse is precisely to *reverse* the process of separation carried out by the master's discourse by articulating that which the master silenced.

A reconsideration of Hart with Lacan

In the chapter on the master's discourse, I revealed unexpected similarities between Hart's separation thesis and Lacan's discourse of the master. In both, law's authority is independent from its content. Subjects obey the law not out of habit enforced through coercion, as the command-theory of positivism would have it. Rather, people constitute themselves as members of society by recognizing laws as rules to be obeyed—by submitting their particularity to the universality of society in order to be recognized as individuals.

Here I suggest another way Lacan supplements Hart by addressing what many non-positivists find to be the most unconvincing aspects of Hart's theory—his notion of the core and penumbra of law. Indeed, even Hart's most vigorous followers play down the significance of his unsuccessful linguistic theory and shift their attention from Hart's theory of the application of law to that of the mere identification of law.[41]

Hart's positivist concept of interpretation, at first blush, might seem to share a few points in common with Lacan's neo-Sausseurian linguistics. Hart recognizes that the "open texture" (i.e. incompleteness) of language and laws necessitates a penumbra of uncertain cases. This is reminiscent of Lacan's insistence on the necessary slippage of signification and lacunae of meaning in the symbolic order of law and language. Further, Hart's core of certainty might seem to echo Lacan's quilting point, which is discussed later.

Nevertheless, Hart and Lacan's theories are based on fundamentally different assumptions. Following J.L. Austin, Hart presents the open-texture of language and law as empirical in nature. He suggests it is theoretically possible for a language to be so specific, and a legal system so complete, that all circumstances will have always already been anticipated and there

would never be uncertainty. That is, one could imagine the elimination of the penumbra so that all law falls within the core. Hart thinks that it is, however, impracticable.

Lacan, in contrast, believes that the slippage and gaps in the symbolic are structurally necessary. No amount of legislation could even theoretically fill them in. Appropriately, as the analyst's discourse is the other side of the master's, Lacan inverts Hart's metaphor, turning it inside-out. Hart thinks that there is a hard *core* of law that can be determined purely within the boundaries of positive law. This is surrounded by a penumbra in which the law is not completely determined and the judge must use his discretion and look to other sources of authority—such as morality—to come to a decision. In contrast, Lacan believes that there is a hard undigested kernel—the real—that lies at the heart of the symbolic like the grain of sand within the pearl. Positive law, including legislation, adjudication, and legal practice, is nothing but the attempt to build a shell of temporary certainty around this uncertain center.

Hart's presumption that law *could* be complete is imaginary. Certainty lies not within the symbolic of positive law itself, but is imposed on law by the imaginative act of the interpreting subject. Thus, Lacan unwittingly makes common cause with Ronald Dworkin who holds that judges can arrive at "right answers" (correct determinations of the law), but only through interpretation.[42] Consequently, from a Lacanian perspective, Hart's concept of law is incomplete precisely because he fails to recognize the necessary imaginary component.

One of Hart's primary goals is the reconciliation of two apparently conflicting jurisprudential positions: formalism—law is determinate—and rule skepticism—law is indeterminate. In contrast, Lacan, following Hegel, believes contradiction is inevitable; Hart's core and penumbra are two sides of a single universal impasse that can neither be reconciled nor avoided. *All* intellectual concepts and social systems contain moments of both determinacy and indeterminacy that uneasily coexist in a contradiction that keeps the system in flux, thereby making it dynamic.

The core and the penumbra

Hart developed his core-penumbra analysis to counter a perennial problem in Anglo-American jurisprudence. Hart correctly chides both those who say that law is always indeterminate or determinate.[43] Both sides of this debate in fact share the same erroneous assumption that law must either be determinate or indeterminate, but merely disagree as to which it is.[44]

Experience shows us that law has both an indeterminate and determinate aspect. Without a determinate moment of law, a legal system would lack the predictability that enables it to function; lawyers would not be able to counsel their clients. However, if there were no indeterminate moments as

well, there would be no litigation. Indeed, the very fact that legal theorists argue about legal indeterminacy is itself proof that it exists.

Unfortunately, Hart replicates his targets' mistake. He asserts that most cases are determinate but some cases are indeterminate. This reveals that he assumes that determinacy/indeterminacy is an either/or proposition.[45] Moreover, Hart compounds his error by adopting a misleading geographical metaphor. He argues that easy, determinative cases form the core of law, which is surrounded by a penumbra of hard, indeterminate ones. In his words:

> the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines. If this were not so the notion of rules controlling courts' decisions would be senseless as some "Realists"—in their most extreme moods, and, I think, on bad grounds—claimed.[46]

To paraphrase Hart: cases are determinate, except when they're not. This is an argument that cannot hope to convince either formalist or skeptic.

The core as the corollary of the separation thesis

Hart's notion of the core is essential to the separation thesis because it attempts to explain how one can recognize a law without considering its content. Under Hart's concept of law, a judge identifies a law through appropriate rules of recognition and follows the rule by applying it to the case. In "plain cases, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic'"[47] no discretion is necessary, or permitted. This is the "core" of law.[48]

Hart admits that there is, however, a penumbra of uncertain cases that surround this core where law does not clearly determine an answer.[49] In these "hard cases"[50] the judge "must exercise the restricted law-making function which [Hart] call[s] 'discretion'."[51] Although Hart's concept of legal discretion constitutes a major subject of the disagreement between Hart and Ronald Dworkin, its exact contours do not concern me here. Let it suffice to say, that since the determinacy of the positive law gives out within the penumbra, in exercising his discretion, the judge may now consider the substantive content of rules—that is morality.[52] What interests me, is that Hart believes that most legal cases fall within the core of certainty, and the penumbra of discretion is comparatively small.[53]

Although Hart claims to describe the core and penumbra as empirical facts, he tries to justify his observation through a language theory. This theory, however, merely posits practical limitations on the ability of human language to be precise. That is, his "theory" of language is, more accurately, another unsupported empirical assertion. Lacan, in contrast, argues that language (the symbolic) must be imprecise by its own internal logic.

Hart maintains that the penumbra exists because of the "open texture"[54] of law and language:

> Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules. This imparts to all rules a fringe of vagueness or "open texture", and this may affect the rule of recognition specifying the ultimate criteria used in the identification of the law as much as a particular statute.[55]

Although this passage invokes impossibility, context shows Hart is not arguing that the open texture is logically generated by the concept of language. Rather, he asserts that some degree of indeterminacy is always generated by *practical* limitations—it is "impossible" to make law and language completely determinable only in the sense that it is insurmountably impracticable.

> Put shortly, the reason [for this open texture is] because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim.[56]

That is, Hart believes that an open texture is merely a function of human limitation, not a limitation of the symbolic. It is *theoretically* possible for the symbolic to have a closed texture given unlimited time and effort:

> If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done or specified in advance by rule. This would be a world fit for "mechanical" jurisprudence.[57]

Hart believes, then, that the openness of law's texture derives from empirical limitations. Laws, and the cases arising under them, can be either determinate or not based on the circumstances. Thus, he claims to reject both the formalist noble dream that law is completely determinate and the realist nightmare that it is completely indeterminate and declares that law is determinate, except when it isn't:

> Legal theory has in this matter a curious history; for it is apt either to ignore or to exaggerate the indeterminacies of legal rules. To escape this oscillation between extremes we need to remind ourselves that human inability to anticipate the future, which is at the root of this indeterminacy, varies in degree in different fields of conduct, and that legal systems cater for this inability by a corresponding variety of techniques.[58]

Hart argues that, insofar as we can anticipate that law will be indeterminate in some circumstances, we can devise techniques that lessen the effects of indeterminacy. For example, if the legislature thinks that the facts of certain categories of cases are likely to diverge so greatly that it is not efficient to develop a general rule, it can leave specific rule to administrative agencies.[59] Alternately, it can promulgate standards such as "reasonableness" for courts to determine by balancing competing factors, as they do in negligence actions.[60] The common law approach which directs a judge to look to precedent is itself another source of indeterminacy because there is no precise way to determine which precedents to apply and how.[61]

Because of this, Hart maintains that rules work "smoothly . . . over the great mass of ordinary cases . . ."[62] despite the indeterminacy that results from law's open texture:

> None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgement from case to case. This salient fact of social life remains true, even though uncertainties may break out . . . .[63]

One should, therefore, not give in to what he calls "'rule skepticism' or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them . . . ."[64] Such a rule skepticism characterizes much of the legal realism of the earlier twentieth century and the critical legal studies movement of the later. Despite the existence of examples of indeterminacy:

> the fact [is] that both the framework within which [indeterminacy and judicial discretion] take place and their chief end-product is one of general rules. These are rules the application of which individuals can see for themselves in case after case, without further recourse to official direction or discretion.[65]

Indeterminacy lies "at the margins" of the law.[66]

Nevertheless, neither Hart, nor to my knowledge any of his opponents, attempt to support their empirical claims through rigorous empirical research, but rely purely on hypothetical examples. Either one intuitively agrees with

the advocate that the case is, indeed, certain or uncertain, and that the case is typical or atypical of the types of real world cases or not. This type of argument has the quality of a classic "are too!—am not!" playground argument unlikely to persuade either side or arrive at a conclusion. As Kant suggests, "perhaps, after [the opponents] have wearied more than injured each other, they will discover the nothingness of their cause of quarrel, and part as good friends."[67]

Hart asserts the proposition that cases usually fall within the core as though it were self-evident. Most famously he raises the hypothetical of a statute that is supposed to demonstrate both a clear core and penumbral ambiguities—a prohibition of vehicles in a park.[68] This example from the Hart-Fuller debate has taken on a life of its own. It is discussed seemingly endlessly in the literature both supporting and disputing Hart. My quick-and-dirty *LEXIS* search located 118 law review articles involving this hypothetical. Given this debate appeared in 1958, not all jurisprudential literature is published in law reviews, and not all law reviews, or issues of law reviews, are published on LEXIS, one can safely surmise that this is a fraction of the discussions of this hypothetical.

What interests me about the so-called arguments that use this example is that they are not arguments at all—at least not in the sense of the use of reasons to support one's propositions or empirical evidence to falsify or verify one hypothesis. Rather, they are merely warring anecdotal counter-examples presented as though they were self-evident.

For example, Hart asserts that an automobile clearly falls within the prohibition of vehicles[69], but suggests that "bicycles, airplanes, [and] roller skates"[70] pose interpretive problems. Unfortunately, Fuller does little more than meet Hart with counter assertions. Fuller accuses Hart of thinking that a "judge faced with a novel situation is like a library clerk who has to decide where to shelve a new book."[71] He states that "Surely the judicial process is something more than a cataloguing procedure. The judge does not discharge his responsibility when he pins an apt diagnostic label on the case."[72] Fuller tries to counter Hart's assertion of the existence of a core by proposing the counter-example of a war memorial made from a World War II military truck.[73]

This counter-example is proffered as an obvious illustration of indeterminacy (or, more simply, the necessity for judicial discretion). It is hard to imagine how the proliferation of such counter-examples could change anyone's mind. No matter how many examples of an easy case a Hartian might propose, a proponent of the indeterminacy thesis can always hypothesize a variant that raises questions (as the Jeep-war memorial hypothetical demonstrates). To a Hartian, the very extravagance of the skeptic's hypotheticals is itself evidence that determinacy is the norm.

Hart thinks his approach (the law is basically determinate, despite occasional indeterminate moments) enables him to sail between "[f]ormalism and rule-skepticism [which] are the Scylla and Charybdis of juristic theory".[74] Needless

to say, this assertion is unlikely to convince the proponents of either camp, who, presumably, do not view their own positions as monstrous. To the Scyllian jurisprude seeking right answers, Hart's acceptance of some indeterminacy and judicial discretion threatens to make law arbitrary and, therefore, non-lawful. Such an objection would seem to underline much of Dworkin's critique of Hart.

Hart's approach also does not answer the stereotypical Charybdean legal realist, who believes that law is merely the prediction of judicial behavior, or the wild-eyed "crit," who believes that law is merely disguised politics. This is because Hart only gives lip service to the concept of indeterminacy in that he insists that the core is the norm. The very term "penumbra"—meaning shadow or outlying area—gives Hart away. Although Hart claims that cases in the penumbra are not determined by law, in fact, he never exiles penumbral cases to the inky midnight of no-law, only to the shadowy twilight of partial law. From this perspective, Hart looks like a closet formalist.[75] Needless to say, this is a proposition Hartians vehemently deny.

I do not weigh in on either side of this issue.[76] Debates of this sort necessarily flow from their unproven empirical nature. To play on Hart's hackneyed cliche, his proposed solution to the formalism/rule-skepticism dilemma—that is, the law is determinate, except when it isn't—does not enable him to sail *between* Scylla and Charybdis. Rather, he ricochets from one to the other, succumbing to, rather than avoiding, both dangers.

I am not unsympathetic to Hart's plight. Even wily Odysseus was unsuccessful in navigating the straits of Messina. In Odysseus' first perilous passage, he lost six men to Scylla's jaws.[77] On his return, his raft was sucked into Charybdis, and he barely escaped a watery fate by holding fast to a tree overhanging the whirlpool.[78]

The antinomy of determinacy and indeterminacy

As a positivist, Hart views his mission as descriptive, not conceptual (despite the title of his book). Hart tries to capture the way many lawyers experience practice. Even Fuller admits that it

> is a matter of everyday experience for the lawyer, namely, that in the interpretation of legal rules it is typically the case (though not universally so) that there are some situations which will seem to fall rather clearly within the rule, while others will be more doubtful.[79]

In other words, regardless of one's *theoretical* position as to the determinacy, lawyers face some legal issues that intuitively *feel* absolutely clear and others which *feel* absolutely undecidable. Or to put this another way, despite my insistence on the need for interpretation, I rarely have difficulty marking certain exam answers as clearly wrong. However, as Fuller states, Hart

claims to go beyond this anecdotal observation and wishes to base his analysis on an Austinian theory of language.[80]

Lacanian jurisprudence recognizes the paradox faced by Hart, but approaches it from another position. As viewed by speculative thought, the problem of determinacy and indeterminacy is not an empirical problem that bedevils law and language because of practical limitations. Rather, it is merely one example of a logically necessary, universal, internal contradiction that inhabits all concepts. Kant called such contradictions antinomy, Hegel, sublation, and I, the sexual impasse. Consequently, the Scylla of formalism and the Charybdis of skepticism can never be avoided or eliminated. They are both necessary aspects of legal life that we, like Odysseus, must confront. And like Odysseus, we may survive the encounter, but we will never escape completely unscathed.

Kant redux

Antinomy

Lacanian psychoanalysis and Hegelian philosophy can be seen as the universalization of Kant's analysis of antinomies.[81] As introduced, an antinomy is a form of paradox consisting of two propositions that seem to be contradictories—they: i) seem equally necessitated by logic; ii) are mutually inconsistent; and iii) constitute the only two logically possible choices. Because the proponent of each side of an antinomy cannot successfully use logic to convince the proponent of the other of the truth of his position, he tries to demonstrate it indirectly by asserting the falsity of the other side. The true proposition is the one left standing after they battle it out. This argument by process of elimination is known as apogogic reasoning.

Kant maintains such a debate inevitably deteriorates into impotent iterations of examples and counter-examples and can never be resolved. The later person to speak temporarily takes the field, but only until the other party responds with a counter example.

> These sophistical assertions of dialectic open, as it were, a battlefield, where that side obtains the victory which has been permitted to make the attack, and he is compelled to yield who has been unfortunately obliged to stand on the defensive. And hence, champions of ability, whether on the right or on the wrong side, are certain to carry away the crown of victory, if they only take care to have the right to make the last attack and are not obliged to sustain another onset from their opponents.[82]

If continued, the arguers are doomed to descend into either "a despairing skepticism, or . . . an obstinate persistence"[83] These are precisely the twin

monsters of rule skepticism and formalism that Hart is trying to avoid by proposing his compromise (the law is basically determinate, except on the occasions that it is not). Both are, in Kant's term, forms of the "Euthanasia of pure reason."[84]

As shown by the continuing debate about Hart, Kant is correct that a proposed compromise between two seemingly logical inconsistent positions is not a solution to the antinomy and cannot result in a resolution to the debate. This is why he urges people engaged in such a debate to recognize its sterility, stop it, and part as friends.

Kant believes that his four antinomies could be resolved by demonstrating how participants in the debate were addressing the problem from the wrong angle. Both sides are mistaken in their assumptions that either their positions are the only two possible solutions or that the two positions are mutually exclusive. Consequently, both sides could be right in thinking that the other side is false without proving his own case. Both poles could be false if there were a third alternate.[85] Or both sides could be correct in thinking that their own pole is true without disproving the other side if the two positions can, in fact, be simultaneously maintained.[86] In other words, Kant shows that the two sides are not, in fact, contradictories. This means that there are no *true* antinomies, only apparent ones.

Even many Kantians are embarrassed by Kant's specific examples. Hegel calls Kant's analysis "a whole nest . . . of faulty reasoning".[87] Nevertheless, Kant's identification of the problem of antinomy should be seen as one of the founding moments of speculative theory and Lacanian psychoanalysis.

Lacan and Hegel implicitly fault Kant on at least two grounds. First, Kant only identifies four antinomies, revealing that he lacks the courage of his analytic convictions. The logical implication of Kant's approach is that all intellectual concepts—and Lacan would add, all intersubjective relations—are characterized by contradiction. Second, Kant's attempted solutions of his four antinomies are much too modest. Kant thinks antinomies can be solved by showing *how either* both poles could be false *or* both sides could be true. In contrast, in Hegel's speculative logic, both the two poles of contradiction are simultaneously both false in one sense, and both true in another. This is the basis of the speculative logic known as "sublation."

Sublation

Hegel's logic is frequently crudely characterized as "thesis-antithesis-synthesis." In fact, Hegel never used these terms but referred to terms better translated as the understanding, dialectic reason, and speculative reason. The difference in terminology is significant.[88]

The terminology "thesis, antithesis, and synthesis" suggests an empirical phenomenon by which one party makes a proposal, the opposing party makes a counter proposal denying the original proposal, and then a third

party proposes a compromise. Hart's core-penumbra analysis can be seen as demonstrating thesis-antithesis-synthesis—the formalists propose that law is determinate, the rule skeptic denies its determinacy, and Hart offers a compromise. In contrast, the terminology "understanding, dialectic reason, and speculative reason" suggests immanence. Each step is already embedded in the prior step.

Hegel asserts that in order to confront a concept, one necessarily first generates a proposition about its nature. This is an *understanding*—an affirmative statement about what the concept is.[89] But, because all things are a conjunction of being and nothing, the understanding necessarily omits the negative. The dialectic confronts the understanding with the omitted negation which is needed to complete the understanding's proposition.[90] As the etymology of the term indicates, the dialectic is more complex than the under-standing—it reads the understanding *twice*[91]—the understanding's affirmative proposition and the negativity that it suppresses. To use the vernacular, the understanding is what one thinks "at first blush" and the dialectic what one thinks "at second thought." The understanding and the dialectic, standing alone, are like the warring poles of Kant's antinomies. They incorrectly see themselves as being contradictories: mutually inconsistent and the only two alternatives.

Speculative reasoning proposes a third interpretation to break this logjam. The understanding and the dialectic are in contradiction. Contradiction is unstable and, therefore, any specific contradiction must go under. On the one hand, speculative reasoning shows how both the understanding and the dialectic are false in the sense that each is an inadequate way of thinking about the concept.[92] On the other hand, speculative reasoning also shows that, nevertheless, both the understanding and the dialectic are partly true in that each captures certain aspects of the concept.[93] They both tell the truth, but neither tells the whole truth nor limits itself to nothing but the truth.

Speculative reasoning is speculative in two senses of the term. It is a speculation—a proposed hypothetical resolution of the paradox posed by the understanding and the dialectic.[94] It is also an investment that reaps a surplus return—the speculative adds something.[95] Its truth of the whole is more than the sum of the truth of its parts. The speculative resolves the contradictions between the understanding and the dialectic, but only temporarily.

As I suggested, Hegel thinks that antinomy (contradiction) is universal and can never be eliminated. Speculative reasoning paradoxically maintains that some fundamental kernel of difference between the understanding and the dialectic remains despite their resolution. Moreover, as soon as one contradiction is resolved, another contradiction immediately springs up to take its place.[96]

As soon as the speculative is accepted it is no longer a mere speculation but has turned into an understanding—an affirmative proposition. Dialectic

reasoning will negate this new understanding which will lead to a new speculative resolution that will produce a new understanding, *ad infinitum.* Like signification, and like the four discourses, the process of sublation is never ending. Hegel is arguing that, despite this, sublation is not a vicious circle of sterile iteration. Rather it is a spiraling, progressive process that adds content with each revolution.

Sublation is the traditional, and completely inadequate, English translation (borrowed from chemistry) of the German *Aufhebung*. Hegel favors the term *Aufhebung* because it paradoxically means *both* negation and preservation.[97] It reflects Hegel's insistence that contradiction is universal. Sublation is negation in that the speculative shows the falsity of both the understanding and the dialectic and supersedes them. However, one should not assume, as critics of Hegel sometimes do, that this means that everything will eventually be subsumed into, and subordinated by, a crushing complete totality. Hegel is, indeed, a totalizing philosopher but his totality is incomplete—there is a radical negativity at the heart of the totality. The whole is built around a hole. The totality itself reflects the internal paradox that constitutes each concept that forms its parts. Hegel anticipates Lacan's analysis of the relationship between the symbolic and real orders. The unsymbolizable real remains as a kernel within the symbolic.[98]

Sublation must preserve as well as negate every understanding and every dialectic generated by the system. Each lower step of the logic is a building block of each higher stage and, therefore, must remain even after the higher stage is generated. To use a metaphor I have suggested before,[99] the lower stages of the logic are like the foundation of the higher stages which are like the building. A foundation is only a hole in the ground, and not a foundation, until it becomes a part of the building built above it. Its status as foundation is only retroactively imposed after the building "negates" its previous status as mere hole. Nevertheless, even after the building is built, the foundation must be preserved or the entire edifice will come tumbling down.

Similarly, the speculative always recognizes that each of the understanding and the dialectic had, and continues to have, a moment of truth standing on its own. Consequently, a moment of its self-standing individuality must remain. Although the speculative on one level "resolves" the contradiction between the two, on another level it continues to recognize that each of the understanding and the dialectic nevertheless has a valid point so that the contradiction between them remains.

To someone who has not yet encountered the speculative tradition it can at first seem absurd. Am I saying that Hegel argues that both X and not-X exist? Isn't this logically impossible? Yes and no. Yes, in the sense that no specific contradiction between X and not-X can remain—every specific contradiction must go under. But contradiction *per se* persists. Hegel views the universe not as closed and static, but open and dynamic. To resort, once again, to metaphor, to say that the Hegelian analysis of contradiction is

logically impossible is like saying that a car is impossible because on the one hand it has an accelerator, but this is contradicted by the brake.[100] In fact, the car's very utility as a vehicle (to invoke Hart and Fuller) necessitates both. Another example would be to say that a thermostat is impossible because it turns the furnace both on and off, or that planetary orbits are impossible because, on the one hand, gravity draws the planet to the sun and, on the other, momentum bids it to fly away.

Because contradiction is universal, the universe is in a constant state of flux as one contradiction is resolved in sublation only to create a new contradiction that must be resolved, *ad infinitum*. Hegel, though an idealist, is also a radical materialist.[101] To Hegel, no idea is possible unless it becomes actual through its manifestation in the material world. What it manifests is its own sublation. We know from both reason and experience that, whether or not one believes that the universe itself is eternal, nothing specific in the material world is permanent, everything is in a contradictory state of coming-to-be and ceasing-to-be. Life always stands against its contradiction, i.e. death. Similarly, to Hegel, every concept, even God Itself, is in a state of flux.[102]

Commensuration and incommensuration

Hart's central problem—determinacy v. indeterminacy—is just one manifestation of the universal contradiction. In Freudian psychoanalytic theory this contradiction manifests itself as the contrast between condensation and displacement; in linguistics it plays out as the contrast between metaphor and metonymy. Lacanian psychoanalysis identifies this universal contradiction as the sexual impasse—with the "masculine" position being the positions of determinablity, commensurability, condensation, and metaphor, and the "feminine" position being that of indeterminability, incommensurability, displacement, and metonymy.[103] Indeed, one can think of the two sexes as the two sides one can take in this argument. The masculine position of denying castration is precisely to say that the law is complete, every legal question has always, already been determined, everything can be measured and compared with everything else, and placed in order. The feminine position of accepting castration is to insist on the incompleteness of the law, the inadequacy of all comparisons, and the slippage of signification. Both positions are equally right and equally inadequate.

One way this contradiction plays out in law is in the debate as to whether certain "goods" are commensurable (i.e. that they can be compared using a common metric so that cost-benefit analysis is possible) or incommensurable (i.e. everything—or at least certain important things such as life, liberty, the environment, etc.—is unique or of unlimited value so that cost-benefit analysis is impossible or immoral).[104] The former position is, obviously, necessary for utilitarianism and neo-classical economics. I refer to the latter position as romanticism.

From a speculative perspective such a debate is meaningless—one can't be for or against determinability or indeterminability, or commensurability or incommensurability because both concepts just *are*. We can't deny or permanently resolve them, merely learn to deal with them. Hart intuits this, but thinks he solves the contradiction by positing that some cases are determinate and some are indeterminate—and that one can tell which is which. To a Hegelian, this merely replicates the logical problem Hart seeks to solve.

Hegel would say it is wrong to presume that something is or is not incommensurable. At some level of generality, everything is commensurate and, at some level of specificity, incommensurate. The economist is absolutely correct that, despite the romantic's denial, when one makes "tragic" choices—such as driving one's car to work despite the fact that fossil fuels may accelerate global warming and there is a non-trivial statistical chance that one might have a serious accident during one's life time—one commensurates the environment and human life, on the one hand, with the utility of driving, on the other. Actions speak louder—or more truly—than words.

On the other hand, romantics are equally correct that there is nevertheless something unique about every different thing that cannot be captured in comparison. That is why the economist's choice is *tragic*. The legal economist is like the cynic who "knows the price of everything but the value of nothing."[105]

The persistence of both poles of contradiction is demonstrated each time a market transaction takes place.[106] Both economists and romantics naively assume that the fact that a market exists indicates that we are only commensurating the two things exchanged. This is why romantics wish to prohibit express markets in certain sacred things, such as bodily organs, or reproductive capacity. This is only one half of the story, however. Exchange is the sublation of the understanding of commensuration and the dialectic of incommensuration.

Market exchange implies only that the parties to the exchange have decided that the things exchanged have *equivalent* exchange value. No actual exchange exists, however, unless the parties simultaneously believe that the two items exchanged are different in some way. That is, the only reason why I will exchange my widget for your doodad is because I think a doodad is different from a widget. In economicese, exchange occurs only if use value is different from exchange value. Moreover, the *use* value of the two objects exchanged is incommensurable *between* the exchanging parties. I must think the use value of a widget is greater than that of a doodad and you must think just the opposite.

Market exchange is, therefore, paradoxical. It proves the simultaneous existence of both commensurability and incommensurability. It is precisely the dynamic nature of this contradiction that makes markets dynamic. If everything were only commensurable or only incommensurable there would

be no exchange and no markets. Exchange is an example of sublation—the speculative conclusion that two things are simultaneously true and false, the same and different.

One implication of the persistence of contradiction is that one cannot choose between the two poles and eliminate one. Hart recognizes this in his attempted rejection of the Scylla of formalism (every case is determinate) and the Charybdis of rule-skepticism (no case is determinate). But another implication Hart doesn't recognize is that one cannot keep the two poles separate and assign examples to them. The Straits of Messina are created by, and can only be understood in terms of, *both* Scylla *and* Charybdis—understood as its defining limits. Hart's attempt to solve this problem (by asserting that some cases are determinate, some cases are indeterminate, and some cases fall in between) fails because indeterminacy and determinacy persist in all cases.

Although I have used the metaphor of "poles" of a paradox, this can be misleading in that it implies a geographic or quantitative difference between them so that one can be located on one end or the other or somewhere in between. If this were so, there would be no contradiction. The two ideas would be opposites or complements. This is the traditional, and I would say, romantic concept of the sexes as yin and yang, active and passive, etc. so that the two fit together to make a whole.

The speculative understanding of paradox and contradiction is completely different. As in the Kantian antinomies, Hegelian-Lacanian contradictions are fundamentally inconsistent ways of looking at a concept that cannot be fit together. Each side by its nature claims not to describe certain members of a class, but the entire class as a whole. In Lacan's terminology, there can be no sexual rapport.[107] A more precise restatement of Lacan's idea is that sexuality is a non-relation; an impasse.[108] Man and Woman do not fit together to make a whole because each is itself a failed attempt to be a whole.[109] Nevertheless, neither sexuated position can be understood without the other as its defining supplement.

How then, does Lacanian theory deal with the assertion that a moment of determinacy and indeterminacy exists in every case with our intuitions that some cases "feel" clear while others don't and the fact that cases are determined and the law functions?

Core, penumbra, and the sexual impasse

Lacanian theory may largely be viewed as the application of the Hegelian understanding of the universality of contradiction to the human subject and social institutions. Like Hegel, Lacan seeks to show not merely that the subject and society function *despite* paradox. Rather, the interior constituent paradox *enables* them to function. Contradiction is the *engine* that drives both personality and the symbolic order.

Return to the three orders

We have seen that Lacan identifies three orders: the symbolic, the imaginary, and the real. Although each is separate and distinct, none can exist or function without the others. This means that, although Lacan would agree with Hart that positive law, which exists in the symbolic, can only be understood in *opposition to* morality, which exists in the real, Lacan would draw from this the un-Hartian conclusion that positive law requires morality. The relationship between the symbolic (positive law) and the real (morality) is in fact a type of non-relation—Lacan's sexual impasse. The symbolic order, and therefore positive law, is structurally indeterminate. It is the third order of the imaginary that brings determinability and certainty to the system. In other words, although Hart is correct as far as he goes, his theory is incomplete as an account of law as a functioning system and practice. That is, although positive law may be conceptually separate from its moral content, the *practice* of law cannot be reduced to positive law.

To reiterate points already made, the symbolic is the intersubjective realm of signification that includes language, sexuality, positive law, and markets. The imaginary is the realm of imagery and consistency.[110] The real is that which escapes the other two orders. It is logically necessitated by the very concepts of the symbolic and imaginary. Signification requires differentiation—for something to signify is to say that it differentiates one thing from another.[111] The very concept of sense creates a realm of nonsense; signification requires a master signifier with no meaning of its own; positive law must be distinguished from its content. Light is only perceived in contrast to shadow and vice versa.

Lacan famously maintains that which is repressed in the symbolic returns in the real.[112] Consequently, repression and the return of the repressed are two sides of the same coin.[113] This suggests not merely that the symbolic is defined only in terms of what it represses, but also that the real comes into being only through its repression in the symbolic. As Hegel says, what comes to be is found by being left behind.[114] If an accurate description of positive law requires that we separate it from morality, morality can only be moral insofar as it is distinguished from empirical, positive law.

Although the real is that which is *beyond* the borders of the symbolic and imaginary it is also, paradoxically, the *border itself.* Serving as the non-symbolic/imaginary, the real is the limit that defines and creates the symbolic and imaginary. In Žižek's words, the real is "*simultaneously* the Thing to which direct access is not possible and the obstacle that prevents direct access . . . ."[115] This is why Žižek says that the real is a hard kernel that lies at the center of the other two orders—it is that which the other orders cannot digest.[116] To play on Freud's metaphor for the symptom, the real is like the tiny irritant grain of sand around which the oyster of subjectivity builds symbolic and imaginary pearls.

Shifting signification

Lacan disagrees with Hart's proposition that the "open texture" of language and law is merely an empirical limitation. For Lacan, the symbolic is *structurally* open, shifting, and indeterminate. We can now see that the formula of signification ("S/*s*")[117] actually represents the universality of the sexual impasse. The bar separating the signifier and the signified is nothing but the barred subject herself who contingently ties the two together despite the lack of necessary relationship between them.

One thing the matheme of signification implies is that there is no stable, one-to-one correspondence between any specific signifier with any specific signified, let alone with an objective reality that exists outside of language. Signification resides within the symbolic order itself. A case can only be understood in the context not only of the dispute in question, but as part of an unending chain of statutory law and precedent.

Fuller partially recognizes this in his criticism of Hart's notion of core and penumbra. As we have seen, Hart seems to believe that words have an undisputed core meaning on which all can agree. At first blush this seems to follow from the very concept that languages and the symbolic are not subjective, but *inter*subjective. Communication could not occur unless there were a shared consensus of a community about the signification of signifiers. Consequently, according to Hart, when we read a statute prohibiting vehicles in the park, it is uncontroversial that an operating automobile is the prototypical form of vehicle and, therefore, presumptively prohibited by the statute. It is only when we get to "things" that lie in the penumbra of this classic example—such as a bicycle, toy car, or Jeep placed on a pedestal—that the judge must leave law and use his discretion. It is only at this point that the judge looks to the purpose of the statute and other sources of content. In Saussurean terms, Hart thinks that the signified of the English word "vehicle" is actually physical automobiles (and things "like" them).

In contrast, Fuller argues that one cannot understand the meaning of the vehicle outside of the context in which it is used—specifically the prohibition of its presence in the park.

> When questions of this sort are decided there is at least an "intersection" of "is" and "ought," since the judge, in deciding what the rule "is," does so in the light of his options of what "it ought to be" in order to carry out its purpose.[118]

To understand what is prohibited, one must form some opinion as to the purpose of the prohibition, which itself requires some understanding of context.

Unfortunately, Fuller falls back on arguing by example: his hypothetical of a war memorial made out of an old military truck. As I have already

suggested, such an example cannot hope to convince a Hartian who will repeat that the core meaning of car is one capable of being driven, etc., and a truck that is made inoperable by placing it on a pedestal no longer falls within that core meaning. Moreover, he might argue that as an *empirical* matter the vast majority of potential things that might enter the park would clearly fall within or without the core meaning of vehicle—i.e. for every hypothetical war memorial made out of an old truck there can be expected to be thousands of conventional automobiles. The very extravagance of Fuller's hypothetical arguably supports Hart's position.

If we must fall back on examples, however, there are better ones that illustrate the radically contextual nature of words. Temporarily conceding *arguendo* that automobiles clearly falls within the core meaning of "vehicle" *in the context* of roads, "vehicle" has other core meanings in other contexts. For example, in the entertainment industry, the word "vehicle" refers to a theatrical piece written and/or produced primarily to showcase the talents of a specific performer such as *The Boy From Oz*[119], starring Hugh Jackman which ran on Broadway during the 2003–4 theatrical season. Suppose that there were an amphitheater in a park, such as the Delacorte Theater in New York City's Central Park, in which outdoor theatrical productions are occasionally presented. Although delightful to the audience, these performances might be perceived as nuisances to people living in apartments on the border of the park who are subjected to the resulting noise, crowds, and traffic. Suppose, further, that these disgruntled residents had been trying for years to find a way to stop performances. One summer it is announced that the amphitheater will present *The Boy From Oz*. Could the disgruntled residents have the production enjoined on the grounds that it would be a prohibited "vehicle" in the park?[120]

If this example sounds absurd, it is only because you, like Hart, are already implicitly doing what Fuller says he must do—reading the word "vehicle" in the context of the statute and its possible purposes. There *could be* other contexts in which a prohibition of *theatrical* vehicles might make sense. For example, imagine a not-for-profit theater dedicated to the production of dramas of the highest artistic standards. I can imagine writing a charter for such an organization prohibiting vehicles on stage in order to prevent productions like *The Boy From Oz* yet permit use of a functioning automobile as a prop.

The imaginary and the imagination

If Hart wants to argue that signification is more certain than it is, Lacan should not be mistaken as arguing that there can be no certainty. Despite insisting on the necessary slippage of signification, he also insists that certainty can be established. The point of psychoanalysis is the belief that analysand can identify the meaning of her trauma. For a language to make sense we

must find some way of temporarily stopping the slippage and make language somehow relate to something outside of it. This is the function of the *imaginary.*

The imaginary position is that of imagery, but it is also the order of consistency, wholeness, stases, and *meaning* (as opposed to signification). Meaning, like a snapshot, claims not to stand for something, but to present the thing itself. The imaginary is the type of instinctive thinking that we associate with animals. Lacan gives the example of the male bird that will attack anything that is the same color red as another male.[121] This poor dumb creature is not capable of reasoning "my rivals are red, that object is red, therefore, I better attack first in case it turns out to be a rival who might try to attack me or steal my mate." Rather in the avian mind red = attack. There is no symbolic thought, no logic, no indeterminacy, it just is. This is the nature of our intuition that some easy cases are, in fact, determinate.

Unlike the term "real" which Lacan uses as a term of art, the Lacanian imaginary is imaginary in both the colloquial, as well as the technical, senses of the term. It is a fantasy. When applied to language, the assumptions of the imaginary are just false—symbolic orders are not closed and clear, they are open and shifting. The imaginary is an attempt to suppress the true nature of the symbolic and the real. Fantasy is defined as the imaginary proposition that the barred subject actually achieves a relationship with the object cause of her desire.[122] In language, this fantasy is the proposition that a signifier is actually attached to a signified located in the object world beyond language itself. In law, it is Hart's dream that there is a determinative core of easy cases that require no interpretation and permit no discretion.

But the goal of satisfying desire is, in fact, impossible and, therefore, real. As we have seen, by definition, the object of desire is always beyond the subject's grasp, and anything within her grasp cannot function as an object of desire. Fantasy is an attempt to paper over the holes that the real rips into the symbolic. Of course, this characterization makes the imaginary seem to be a delusion or a self-deception.

On the one hand, this is correct. Insofar as our imagination presumes that a single, determinate meaning pre-exists in the material to be interpreted *ab initio*, it is a fantasy. Nevertheless, the fantasies of the imaginary are absolutely necessary for the symbolic order—or indeed, for any human subject—to function. The interpreter does not passively recognize order in the material to be interpreted, she imposes it. Even though at some level we understand that language is not "reality" (so that no signified can truly be tied permanently to any signifier), signification is by definition a momentary identification of a specific signifier to a specific signified. Although signification is symbolic, communication always requires an imaginary moment. In order to function, we must take a leap of faith and act as though we can briefly stop slippage. In the imaginary, however, we try to hide our role in producing meaning.

Frederick Schauer offers a bizarre hypothetical—one that makes my theatrical-vehicle-in-the-park example look positively reasonable—in an attempt to illustrate his formalist theory of signification. It is worth examining because, from a Lacanian perspective, Schauer misses as much as he explains about signification. Schauer imagines that he is walking along a beach when "shells wash up . . . in the shape of C-A-T" and he thinks of "small house pets and not frogs or automobiles".[123] He uses this example to argue that there is a fundamentally objective aspect of signification that is independent of any speaker—obviously, the formation of the word was purely serendipitous as the ocean is incapable of forming an intent.[124] Moreover, he believes that he did not engage in the *act* of interpretation; the image of the pet *popped* into his head unbidden.

Lacan and Hegel do not deny that signification has objectivity. Interpretation means recognizing the signification of a signifier which is itself an object, as that term is understood in speculative literature (i.e. something other than a subject). More importantly, even though the symbolic order is, by definition, intersubjective, it has a life of its own that exceeds the subjects who speak and understand it. As Fink notes, in his commentary on Lacan's theory:

> [I]t might be said to exist outside of and apart from any given set of human subjects. For a newly discovered form of writing found on parchments in the desert somewhere, that no one can yet decipher is still considered to imply the existence of a language. It may well be a dead language that no speaks anymore, or even a language no one understands at all anymore. That does not stop it from having its own lexicon, grammar and rules.[125]

Schauer is willing to recognize only the most minimal intersubjective or contextual aspect of interpretation. "The community of speakers of the English language is itself a context. Yet meaning can be 'acontextual' in the sense that meaning draws on no other context besides those understandings shared among virtually all speakers of English."[126]

But Schauer squelches the fact that interpretation of a text is always more fundamentally intersubjective (symbolic) and assumes that there is an (individual or collective) author who intends to convey meaning to the reader. That is, interpretation is not merely an encounter of subject with an object (text) within the context of a language. It is a collaboration between subjects—a listener/reader and a speaker/writer mediated by the text. Schauer's example, therefore, is not interpretation at all, but a sort of verbal pareidolia—the mistaken identification of patterns in random material—such as seeing a face in a cloud, or the image of the Blessed Virgin Mary in a grilled-cheese sandwich that was once auctioned on Ebay.[127]

Indeed, Schauer's view of language is an interpretation of Saussure that Lacan rejects. In Fink's words this view posits that "[w]henever the word 'tree' is pronounced, it will indissociably conjure up the image of a tree, and whenever a tree is seen it will ineluctably conjure up the signifier 'tree.'"[128] To put this in another way, Schauer assumes from the fact that he was not consciously aware that he was interpreting the word "cat"—the image of house pet popped into his head—means that he was not engaging in the interpretative act of tying signifier to signified. Perhaps, needless to say, psychoanalysis emphasizes how much of our thought processes occur unconsciously so that we are not aware of the process. This does not mean the process did not occur.[129]

Determining meaning

Lacan's most sustained discussion of signification occurs in his 1960 essay *The Instance of the Letter in the Unconscious or Reason Since Freud*.[130] This essay on interpretation looks forward to his later concept of the analyst's discourse.

The *Instance of the Letter* is difficult, even by Lacan's standards.[131] In Fink's words, "Lacan's writing style . . . is *performative not demonstrative*."[132] That is, Lacan does not try to describe how the reader creates meaning. Rather, he writes an essay that appears almost meaningless at first but which retroactively reveals meaning after repeated, careful readings. The intentional difficulty of Lacan's presentation is designed to make obvious a process that takes place in all readings, but frequently happens so quickly that we are not conscious of it.

Fink wishes to counter the misunderstanding, common even among Lacanians, that Lacan's insistence on the slippage of signification:

> the fact that it is virtually impossible to say anything that is devoid of all ambiguity and that does not play off all the resonances that individual words and expressions have in the language one employs and in one's cultural environment[133]

implies that Lacan believes that meaning does not get fixed. The analyst's discourse—like psychoanalysis—is aimed precisely at the fixing of meaning. In Fink's words, "There are points where at which the potential sliding of the signified under the signifier is *stopped.*"[134] As I have already suggested, if language and law are indeterminate, they are only so *ex ante* because meaning can be determined *ex post.*

Fink argues that a hyper-literal reading of Lacan's essay reveals that Lacan's point is that when a subject reads or listens to a sentence, she *initially* encounters slippage in that she identifies the numerous potential meanings of each word and phrase that render the meaning of the single element, but also of the whole, ambiguous. However, by the time the

subject comes to the end of the sentence, the later elements "*put*[] *a stop to the sliding of meaning . . .* That sliding being equivalent here to the listener's uncertainty as to which of a number of possible meanings should be preferred."[135] He continues:

> The end of the sentence determines how the listener understands or "rereads" the beginning of the sentence; the end of the sentence fixes the meanings, putting an end to the sliding (without necessarily reducing multiple meanings to one single meaning). And I may well play with my audience by generating assumptions early on in my sentence that I go on to undermine later in the sentence; indeed, much of humor works in this way.[136]

That is, "[t]here are moments, according to Lacan, at which a certain meaning precipitates out, or crystallizes, so to speak, either by anticipation or retroaction."[137]

Fink captures both Hart's and Fuller's points about meaning—on the one hand, meaning often seems clear but, on the other, the creation of meaning always takes interpretation. He gives as an example of how ambiguity is resolved:

> If I say that "Dick and Jane were exposed, when they were young children and in a repeated manner, to . . ." the listener does not know how to understand "exposed" until I finish the sentence with "harmful radiation," "foreign languages," or even "their uncle the exhibitionist" . . . The end of the sentence determines how the listener understands or "rereads" the beginning of the sentence; the end of the sentence fixes the meaning(s), putting an end to the sliding (without necessarily reducing multiple meanings to one single meaning) "At a young age, the children were exposed to . . ."[138]

Initially meaning is not fixed in the words standing alone and the reader slips among various potential significations—"exposed" has negative, positive, and neutral connotations. However, by the time one gets to the end of the sentence, the meaning of the earlier words retroactively seems clear to the reader.[139] In many if not most everyday conversations, this happens so fast that one experiences it as instantaneous. When one reads more difficult material, such as a complex statute or legal problem—or a Lacanian essay—it becomes more obvious. The complexity of Lacan's writing style is intended to make one focus on how one assigns meaning to a text. The "act" of interpretation is an interaction of the reader and the text. When one finishes reading Lacan, one adopts a potential interpretation, one believes that the interpretation reflects Lacan's intent to some extent, yet one is well aware that other readers may reach different interpretations.

The implications of Fink's point are that Hart and Fuller are both right and both wrong. Fuller is right in that all legal interpretation requires just that, *interpretation* within a specific context. Hart is right that sometimes there is so broad a consensus as to meaning of a text that the reader is not conscious of his interpretation. Hart is wrong, however, if he thinks that this lack of consciousness of interpretation means that it does not occur.

What is important to note here, is that meaning requires collaboration. It requires *an act of will* by both the author/speaker and the reader/listener, even though this act is rarely fully conscious. In other words, as a *creation*, it is uncaused and, within Kant's definition of freedom as spontaneity, the meaning created is imaginary in the sense that it requires imagination.

We see a similar process in judging. Although the judge recognizes that he is making a decision—using his discretion, to use Hart's terminology—when he decides a "hard case" that he recognizes as ambiguous, he also does so in the cases that seem "easy." When a judge decides that the easy case is easy, this is *his choice.* Meaning does not reside solely in the language of the statute itself. The meaning of the case is never independent of the judge's announcement of the meaning—which is precisely why his act of pronouncing is called a "decision" and the pronouncement itself an "opinion."

The quilting point and the return to Hart

Why, then does one perceive some cases as "easier" than others? Because there is another way to explain how we periodically anchor signification. This is Lacan's concepts of the quilting point and master signifier. Once again, the similarity of Lacan's and Hart's theories is surprising.

To reiterate, because every signified is in fact another signifier that points to yet another signifier in an unending chain of signification, the upper register of signification above the bar is not permanently attached to the lower register below the bar. This means that any specific signifier can slip above or below the bar at any time.

Signification can, however, be fixed at least temporarily by the process that Lacan sometimes calls the *point de capiton* (upholstery button or quilting point).[140] By doing so, Lacan invokes the metaphor of the two layers of a duvet or comforter enclosing the eiderdown of signification. On the one hand, if the two layers are not attached at all, the down will escape and one will not have a comforter, but merely two sheets and a pile of feathers. If one attaches the sheets only at the edges, the down will slide and bunch at one end and will not keep the sleeper warm. On the other hand, if one were to connect the two layers at every point one would no longer have something that functions as a comforter. A comforter is comfy only because the down in the open space between the two layers traps air. The puzzle facing the upholsterer is how to balance these two problems. The answer is quilting. The two layers will be attached only at certain intervals or quilting points.

The overwhelming majority—perhaps 99 per cent or more—of the area of the two layers of the quilt will remain unattached, which is essential, but so are the few exceptional points of attachment.

What is a quilting point in language and law? The only way for a signifier and signified to remain permanently fixed together is for them to be one and the same. That is, we must create signifieds that stand for nothing but themselves—and therefore nothing. This is, of course, the master signifier.

This brings us full circle to Hart's separation thesis and master's discourse—the other side of the analyst's discourse. The result of the analyst's discourse is S_1, a new master signifier that acts as a new quilting point that will enable meaning to be established. Hart contends that the status and authority of positive law as law is separate from morality—a law functions as law regardless of its content. Hart is not denying that laws have content—legislatures adopt laws to achieve some purpose, and legal subjects and judges should examine the content of a positive law in deciding whether they have a *moral* obligation to disobey it. Indeed, Hart argues that the separation thesis is, if not necessary to, then supportive of moral critique because it enables us to distinguish what a law is from what it should be.

This is precisely Lacan's concept of a master signifier. Of course there is an ethical difference between a society organized around the master signifiers of "liberty, equality, and fraternity" and one organized around that of racial superiority. As Žižek says "[w]hat is at stake in the ideological struggle is which of the 'nodal points', *points de capiton*, will totalize, include in its series of equivalences, these free-floating elements."[141] The point is that the *content* of a master signifier is irrelevant to its *function* as a *master* signifier. Once chosen, a master signifier does not shift. Rather other signifiers shift around it. The master signifier has ethical content as an empirical matter, but it is *structurally* meaningless in the sense that it signifies nothing but itself.

Consequently, although every symbolic order structurally needs the function of a master signifier, no specific choice of which signifiers should serve this function is mandated. This means that the choice of master signfier is a true choice—a free, uncaused, spontaneous act, and therefore, a matter of ethics. A society is justly to be condemned if it chooses evil master signifiers. In Hart's words, a positive law "may be law but too evil to be obeyed."[142]

Lacan's master signifiers with respect to symbolic orders seems superficially analogous to Hart's core of determinate easy cases of positive law. However, Lacan's analysis differs from Hart's in several important respects. One obvious difference is that Hart thinks that the core constitutes the norm of legal cases, whereas Lacan argues that a master signifier is the theoretical exception to the norm of sliding signifiers. Certainty in language does not pre-exist its reading.

The reversal of norm and exception may be empirical (in the sense that Hart thinks that core cases predominate over penumbral ones while Lacan thinks that sliding signifiers are the norm and master signifiers are

exceptional), but Lacan would argue that they are not *merely* empirical. Hart thinks that positive law has a core of easy cases-master signifiers, that nevertheless is surrounded by an uncertain penumbra necessitated by practical limitations. Lacan thinks that positive law, being symbolic, is structurally open and indeterminative, built around a "real" kernel of impossibility. The certainty, coherence, and consistency of the master signifiers are not symbolic, but imaginary. This means that certainty does not lie within positive law, but is built around it by the interpreter himself. Positive law is not determinative in and of itself, yet it gets determined through its application. The reason for this is that to attempt to articulate the (imaginary) meaning of a master signifier is, by definition, to restate it in the symbolic order of sliding signifiers. By doing so the fantasy veil of determinability imposed in the imaginary slips away.

This can be seen in the act of judging. As soon as the judge declares what the law *is* in any case, through the creative act of his imagination, he imposes certainty and closure on *that case*. However, as soon as we try to articulate what the decision means for the *next case*, we are back in the symbolic world of uncertainty.

Notes

1 See BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 129, 136–7 (1995) [hereinafter, Fink, Subject].
2 *Id*. at 129.
3 *Id*.
4 *Id*.
5 *Id*.
6 The reference to giddiness is the translation of Lacan's "*boucle le tournis*" offered by Russell Grigg in an earlier draft that he most graciously provided me. In the final published translation he opted for the less evocative phrasing that "the analytic discourse completes the three others." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XVII: THE OTHER SIDE OF PSYCHOANALYSIS 54 (Jacques-Alain Miller ed. Russell Grigg trans. 2007) [hereinafter, LACAN, SEMINAR XVII].
7 *Id.* at 15.
8 Lacan states:

> I hear a lot said about the discourse of psychoanalysis, as if that meant something. If we characterize a discourse by focusing on what is dominant in it, there is the discourse of the analyst, and this is not to be confused with the psychoanalyzing discourse, with the discourse effectively engaged in the analytic experience. What the analyst institutes as analytic experience can be said simply—it is the hystericization of discourse.

Id. at 35.
9 *Id.* at 193–4.
10 *Id*.
11 FINK, SUBJECT, *supra* note 1, at 135.
12 See LACAN, SEMINAR XVII, *supra* note 6, at 38.
13 Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], *in* SIC 2: COGITO AND THE UNCONSCIOUS 77, 80 (Slavoj Žižek ed. 1998).

14 FINK, SUBJECT, *supra* note 1, at 135. Lacan explains:

> In the way I characterize the structure of discourse, insofar as it interests us, and let's say, insofar as it is taken at the radical level it has attained for the psychoanalytic discourse, this position is, substantially, that of the object *a*, insofar as this object *a* designates precisely what presents itself as the most opaque in the effects of the discourse, as having been misrecognized for a long time, and yet essential. It is a question of the effect of discourse that produces a reject.

LACAN, SEMINAR XVII, *supra* note 6, at 42–3. He further elaborates:

> Concerning the position called that of the analyst—in cases that are moreover improbable, for is there even a single analyst? Who knows? But one can raise it theoretically—it is the object *a* itself that comes to the place of the command. It's as identical with the object *a*, that is to say with what presents itself for subject as the cause of desire, that the psychoanalyst offers himself as the end point for this insane operation, a psychoanalysis, insofar as it sets out on the trace of the desire to know.

Id. at 106.

15 According to Mark Bracher, "the discourse of the Analyst is able to promote such a response and production because it is opposed to all will of mastery . . . , engaging in a continuous flight from meaning and closure, in a displacement that never ceases . . . ." Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, *in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 124. (Mark Bracher *et al.* eds 1994) [hereinafter, THEORY OF DISCOURSE].

16 See *id.*

17 Bracher emphasizes: "Whatever the specific response of the analyst, it is efficacious to the extent that it represents to the patient the effect of what has been left out of discourse—that is, the *a* . . . , the cause of the patient's desire . . . ." *Id.* at 125.

18 According to Bracher, the discourse of the analyst "puts receivers of its message in the position of assuming and enacting the $—that is, their own alienation, anxiety, shame, desire, symptom." *Id.* at 123.

19 FINK, SUBJECT, *supra* note 1, at 135.

20 See Bracher, *supra* note 15, at 125.

21 FINK, SUBJECT, *supra* note 1, at 87; see also SLAVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 39 (1992). Lacan identified a/S_2 as the matheme for the analyst as the "subject supposed to know" in earlier work (see *e.g.* JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT 29 (Joan Copjec ed. and Dennis Hollier *et al.* trans. 1990) but only related it to a system of discourses in *Seminar XVII*.

22 Žižek describes the nature of this knowledge:

> Knowledge in the position of "truth" below the bar under the "agent," of course, refers to the supposed knowledge of the analyst, and, simultaneously, signals that the knowledge gained here will not be the neutral "objective" knowledge of scientific adequacy, but the knowledge that concerns the subject (analysand) in the truth of his subjective position.

Žižek, *Four Discourses*, *supra* note 13, at 80.

23 As Bracher states:

> This knowledge, Lacan says, can be either the analyst's already acquired knowledge . . . which functions as the basis of analytic *savoir-faire*, or it may

> be knowledge . . . of the analysand's particular psychic economy and of the nature of the analysand's *a* . . . . It is what Lacan calls a mythic knowledge . . . Mythic knowledge . . . is . . . the form of the knowledge that constitutes the truth of the discourse of the Analyst, and is repressed by the patient—is a disjoint knowledge, a form that is completely alien to the discourse of science . . . .
>
> It is this basis in the mythic, unconscious knowledge that allows the enactor of the discourse of the Analyst to discover and express the *a*, cause of desire, to which this knowledge bears mute witness.

Bracher, *supra* note 15, at 125–6.

24 Bracher distinguishes the discourses of the master and the analyst:

> This means that what is produced in the discourse of the Analyst is another discourse of the Master, thus rendering the process circular rather than progressive.
>
> There is a crucial difference, however, in this new discourse of the Master: its master signifiers are produced by the subject rather than imposed upon the subject from the outside.

Id. at 123–4.

25 *Id*. at 123.

26 See Žižek, *Four Discourses, supra* note 13, at 80 (citation omitted).

27 Jacques Lacan, the Seminar of Jacques Lacan Book XX: Encore, On Feminine Sexuality, the Limits of Love and Knowledge 1972–3 13 n. 47 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998). [hereinafter, Lacan, Seminar XX].

28 In Žižek's words:

> Symptoms are meaningless traces, their meaning is not discovered, excavated from the hidden depth of the past, but constructed retroactively—the analysis produces the truth; that is, the signifying frame which gives the symptoms their symbolic place and meaning.

Slavoj Žižek, The Sublime Object of Ideology 55–6 (1989) [hereinafter Žižek, Sublime Object].

29 See Žižek, *Four Discourses*, *supra* note 13 at 80. The very symbolization of the symptom leads to its disintegration as a symptom:

> The symptom arises . . . where the circuit of symbolic communication was broken . . . Precisely as an enigma, the symptom, so to speak, announces its dissolution through interpretation: the aim of psychoanalysis is to reestablish the broken network of communication by allowing the patient to verbalize the meaning of the symptom: through this verbalization the symptom is automatically dissolved.

Žižek, Sublime Object, *supra* note 28, at 73.

30 Jacques Lacan, The Seminar of Jacques Lacan. Book VII: The Ethics of Psychoanalysis 1959–60 304 (Jacques-Alain Miller ed. and Dennis Porter trans. 1992) 12 (1988).

31 In Žižek's words:

> The symptom is not only a ciphered message, it is at the same time a way for the subject to organize his enjoyment—that is why, even after the completed interpretation, the subject is not prepared to renounce his symptom; that is why he "loves his symptom more than himself."

Žižek, Sublime Object, *supra* note 28, at 74 (1989).

32 Jacques Lacan, *The Sinthome: Les embrouilles du vrai, Seminaire du 10 Fevrier* 1976, 8 ORNICAR? 6, 12–13 (1977).
33 Ellie Ragland, *The Psychical Nature of Trauma: Freud's Dora, The Young Homosexual Woman, and the Fort! Da! Paradigm*, 11 POSTMODERN CULTURE: AN ELECTRONIC JOURNAL OF INTERDISCIPLINARY CRITICISM 75 (2001) <HTTP: http://muse.jhu.edu/journals/pmc/v011/11.2ragland.html> (accessed Oct. 17, 2007).
34 Charles Yablon, *Freud as Law Professor: An Alternate History*, 16 CARDOZO L. REV. 1439 (1995).
35 Of course, Yeshiva's law school is named after Benjamin N. Cardozo, the second Jewish Supreme Court Justice. Yablon's conceit was that had Freud been a lawyer, he would have eclipsed Cardozo as the foremost Jewish jurisprude of the early twentieth century.
36 *Id.* at 1444.
37 FINK, SUBJECT, *supra* note 1, at 136.
38 SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 8 (1991) [hereinafter, ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO] (quoting Sigmund Freud to Edoardo Weiss in LETTRES SUR LA PRATIQUE PSYCHOANALYTIQUE (1977)).
39 I would include in this category a client who intends to engage in peaceful civil disobedience as a means of attempting to change an unjust law.
40 BRUCE FINK, LACAN TO THE LETTER: READING ÉCRITS CLOSELY 88 (2004) [hereinafter, FINK, LETTER].
41 See e.g. Jules Coleman, *Incorporation and the Practical Difference Thesis,* in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 99, 111–13 (Jules Coleman ed. 2001).
42 RONALD DWORKIN, A MATTER OF PRINCIPLE 119–41 (1985).
43 H.L.A. HART, THE CONCEPT OF LAW 129–41 (2d. ed. 1994) [hereinafter, HART, CONCEPT OF LAW].
44 I argue extensively elsewhere that most of the debate in American jurisprudence between the law-and-economics movement and its romantic critics is based, in fact, on shared erroneous assumptions about the conflict between rational economic behavior and emotional, erotic, and spiritual tendencies. Continental theory, in contrast, posits a completely different way of approaching the relationship between law and desire. See JEANNE LORRAINE SCHROEDER, THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET (2004) [hereinafter, SCHROEDER, VENUS]. Desmond Manderson has argued this tendency of modern jurisprudence follows classic religious disputes between orthodoxy and heresy. A heresy is a heresy vis à vis orthodoxy only insofar as it shares certain basic theological assumptions. He suggests that the reason that continental theory is not understood by mainstream jurisprudence is because it is neither orthodox nor heretical, but falls within a third term, which he calls apocryphal jurisprudence, that challenges the entire theoretical underpinnings. Desmond Manderson, *Apocryphal Jurisprudences*, 23 STUD. IN L. AND SOC. 81 (2001).
45 I am sympathetic to Frederick Schauer's plaint that too often participants in the determinacy/indeterminacy debate confuse unsupported empirical assumption with principles:

> Just as it is a mistake to assume that because some judges ignore rules most judges do so, it is also a mistake to assume that because rules sometimes constrain, they usually constrain. The truth, an empirical rather than a logical one, plainly lies between the extremes of always and never, or even between the lesser extremes of rarely and usually. Although this is not the place to examine the rudimentary empirical work that has been done on the question, it is sufficient for my purposes to note that this research has, not surprisingly, yielded the result of "sometimes."

Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 530–1 (1988).

I disagree with Schauer in that he thinks that determinacy is an *empirical* issue and implies that we should be able to locate any case somewhere on a continuous spectrum between perfect determinacy and complete indeterminacy. I believe that determinacy is a logical concept and that every case has a moment of both determinacy and indeterminacy.

46 H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 614–15 (1958) [hereinafter, Hart, *Positivism*].

47 HART, CONCEPT OF LAW, *supra* note 43, at 126.

48 "Legal rules may have a central core of undisputed meaning, and in some cases it may be difficult to imagine a dispute as to the meaning of a rule breaking out." *Id.* at 12.

49 "Yet all rules have a penumbra of uncertainty where the judge must choose between alternatives." *Id.*

50 *Id*. at 252.

51 *Id.* at 252.

52 [A judge's] powers are *interstitial* as well as subject to many substantive constraints. Nonetheless there will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and must act as a conscientious legislator would by deciding according to his own beliefs and values.

Id. at 273.

53 Nevertheless, Hart recognizes the obvious point that "the vast majority of cases *that trouble the courts* (emphasis added)" fall within the penumbra. *Id.* at 12.

54 *Id.* at 128.

55 *Id.* at 123.

56 *Id.* at 128.

57 *Id.*

58 *Id.* at 130–1.

59 *Id*. at 131.

60 *Id*. at 132.

61 *Id*. at 133–4.

62 *Id.* at 128.

63 *Id.* at 135 (discussing the application of precedent, specifically).

64 *Id.* at 136.

65 *Id.* at 136.

66 *Id.* at 135.

67 IMMANUEL KANT, CRITIQUE OF PURE REASON 240 (J.M.D. Meiklejohn trans. 1900) [hereinafter, KANT, PURE REASON].

68 Hart, *Positivism*, *supra* note 46, at 607; HART, CONCEPT OF LAW, *supra* note 43, at 126–7.

69 *Id.* at 126.

70 *Id.*

71 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 666 (1958).

72 *Id.*

73 *Id.* at 663.

74 HART, CONCEPT OF LAW, *supra* note 43, at 147.

75 For example, Fuller so accuses Hart. Fuller, *supra* note 71, at 638.

76 Moreover, by criticizing Hart and Fuller's "war by example" I am not attacking the traditional common law method of analogical reasoning that relies on examples,

precedents, and hypotheticals. Hart and Fuller are not debating this technique *per se* but are arguing as to whether or not it leads to results that are so clear that a judge usually does not need to use discretion, or whether discretion is always required.

77 THE ODYSSEY OF HOMER 191 (Richmond Lattimore trans. 1965).
78 *Id*. at 196.
79 Fuller, *supra* note 71, at 661.
80 *Id.* at 661–2.
81 Jeanne L. Schroeder, *The Lacanomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability* 15 YALE J. L. AND HUMAN. 364 (2003) [hereinafter, Schroeder, *Lacanomics*].
82 KANT, PURE REASON, *supra* note 67, at 231.
83 *Id*.
84 *Id.*
85 For example, one antinomy is the war between the propositions that the universe has a beginning and an end and that the universe is eternal. Kant argues that both are inapplicable to the universe because they are categories of *existence*. The universe does not, however, exist. Rather it is a becoming. *Id.* at 286. This looks forward to Hegel's insistence that God and Right, and Lacan's insistence that the Woman and the Big Other, do not exist. I explain what this means in the last chapter.
86 *Id.* at 352.
87 G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 195 (A.V. Miller trans. 1969) [hereinafter, HEGEL, LOGIC]. Hegel is using Kant's own phrase against him. Kant critiques the cosmological proof of God as "a perfect nest of dialectical assumptions." KANT, PURE REASON, *supra* note 67, at 340.
88 Allen Wood writes of this notorious triad:

> The regrettable tradition of expounding this theme in the Hegelian dialectic through the grotesque jargon of "thesis," "antithesis," and "synthesis" began in 1837 with Heinrich Moritz Chalybäus, a bowdlerizer of German idealist philosophy, whose ridiculous expositor devices should have been forgotten along with his name. [T]o my knowledge, it is never used by Hegel, not even once, for this purpose or for any other. The use of Chalybäus's terminology to expound the Hegelian dialectic is nearly always an unwitting confession that the expositor has little or no firsthand knowledge of Hegel.

ALLEN W. WOOD, HEGEL'S ETHICAL THOUGHT 3–4 (1990). Fichte and Schelling, however, used these terms. WALTER KAUFMANN, HEGEL, A REINTERPRETATION 154 (1978). Michael Inwood points out that an endorsement of the thesis-antithesis-synthesis appears in Hegel's *Lectures on the History of Philosophy*. M.J. INWOOD, HEGEL 500 n. 100 (1983).

89 DAVID GRAY CARLSON, A COMMENTARY TO HEGEL'S SCIENCE OF LOGIC 19–21 (2007); Schroeder, *Lacanomics*, *supra* note 81, at 364.
90 CARLSON, *supra* note 89, at 21; Schroeder, *Lacanomics*, *supra* note 81, at 364–5.
91 CARLSON, *supra* note 89, at 21.
92 Schroeder, *Lacanomics*, *supra* note 81, at 365–6.
93 *Id*.
94 *Id*.
95 CARLSON, *supra* note 89, at 24.
96 Schroeder, *Lacanomics*, *supra* note 81, at 366.
97 HEGEL, LOGIC, *supra* note 87, at 107. As Žižek says the speculative synthesis:

> "sublates" contradiction: not by establishing a new unity encompassing both poles of a contradiction, but by retracting the very frame of identity and affirming the difference a constitutive of identity. The idea that the concluding moment

> of a dialectical process ("synthesis") consists of the advent of an identity which encompasses the difference, reducing it to its passing moment, is thus totally misleading: *it is only with "synthesis" that the difference is acknowledged as such.*

SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 124 (1994) [hereinafter, ŽIŽEK, TARRYING WITH THE NEGATIVE].

98 The real is "a fundamental deadlock ('antagonism'), a kernel resisting symbolic integration-dissolution . . . ." ŽIŽEK, THE SUBLIME OBJECT, *supra* note 28, at 3. "The Lacanian thesis is . . . that there is always a hard kernel, a leftover which persists and cannot be reduced . . . ." *Id.* at 47.

99 JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE 312 (1998).

100 This metaphor was suggested to me by Donald Brosnan's *Serious But Not Critical*, 20 SO. CAL. L. REV. 262, 316 (1987). Brosnan intended to show why a certain critical legal theory argument that liberal jurisprudence was incoherent because it was based on a fundamental contradiction, was itself incoherent.

101 See e.g. LUCIO COLLETTI, MARXISM AND HEGEL 52–67 (Lawrence Grarner trans. 1973).

102 Jeanne L. Schroeder and David Gray Carlson, *Does God Exist?: Hegel and Things*, 4 (a): THE JOURNAL OF THE UNCONSCIOUS 1(2005).

103 Schroeder, *Lacanomics*, *supra* note 81, at 349–51.

104 *Id.* at 347–9.

105 OSCAR WILDE, LADY WINDERMERE'S FAN, Third Act, Scene 1(1892).

106 I set forth my analysis of non-relation between exchange value and use value and of market exchange as sublation in greater detail in SCHROEDER, VENUS, *supra* note 44, at 74–7, 249–72; and Schroeder, *Lacanomics*, *supra* note 81, at 382–6.

107 LACAN, SEMINAR XX, *supra* note 27, at 9.

108 Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in LACAN AND THE SUBJECT OF LANGUAGE 49, 67 (E. Ragland-Sullivan and M. Bracher eds 1991); ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 137 (1990). In the words of Renata Salecl:

> For Lacan, sexual difference is . . . the name of a deadlock, or a trauma, or an open question, or something that resists any attempt at its symbolization. Every translation of sexual difference into a set of symbolic opposition(s) is doomed to fail . . . . What we call "sexual difference" is first and above all the name of a certain fundamental deadlock inherent in the symbolic order.

Renata Salecl, *Introduction* to SEXUATION 3 SIC 1,2 (Renata Salecl ed. 2000).

109 RENATA SELACL, THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM 116 (1994).

110 Žižek describes the imaginary as "the level of illusory entities whose consistency is the effect of a kind of mirror-play" ŽIŽEK, THE SUBLIME OBJECT, *supra* note 28, at 162. "In the *imaginary* relation, the two poles of opposition are complementary; together they build a harmonious totality . . . ." *Id.* at 171. "What defines the imaginary order is the appearance of a complementary relationship between thesis and antithesis, the illusion that they form a harmonious whole . . ." ŽIŽEK, TARRYING WITH THE NEGATIVE , *supra* note 97, at 123.

111 Hart recognizes this point when he says "even if there are borderlines, there must first be lines." Hart, *Positivism*, *supra* note 46, at 614.

112 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK III: THE PSYCHOSES 1955–6 86 (Jacques-Alain Miller ed. and Russell Grigg trans. 1993) [hereinafter, LACAN, SEMINAR III], SCHROEDER, VENUS; *supra* note 44, at 203.

113 LACAN, SEMINAR III, *supra* note 112, at 12.
114 HEGEL, LOGIC, *supra* note 87, at 402.
115 SLAVOJ ŽIŽEK, THE PUPPET AND THE DWARF: THE PERVERSE CORE OF CHRISTIANITY 77 (2003).
116 ŽIŽEK, THE SUBLIME OBJECT, *supra* note 28, at 47. Symbolization always:

> stumbles on to a rock upon which it becomes suspended. The rock is of course the Real, that which resists symbolization: the traumatic point which is always missed but none the less always returns, although we try—through a set of different strategies—to neutralize it, to integrate it into the symbolic.

Id. at 69.
117 JACQUES LACAN, ÉCRITS: A SELECTION 149 (Alan Sheridan trans. 1977) [hereinafter, LACAN, ÉCRITS].
118 Fuller, *supra* note 71, at 662.
119 Peter Allen music and lyrics, Nick Enright and Martin Sherman, book.
120 Or to go a step further, in Charles Taylor's well-known commentary on Hegel, he refers to human beings as "vehicles" of *Geist* (spirit). CHARLES TAYLOR, HEGEL 89, 562 (1975). Would a Hegelian official be justified in ordering human beings out of the park?
121 LACAN, SEMINAR III, *supra* note 112, at 9–10.
122 As I explain in the last chapter, Lacan used his mathemes to write a formula of fantasy: ($ <> *a*). FINK, SUBJECT, *supra* note 1, at 174.
123 Schauer, *supra* note 45, at 527–8.
124 "[T]hose marks, themselves, convey meaning independently of what might have been meant by any speaker. Of course there can never be *totally* acontextual meaning." *Id.* at 528.
125 FINK, LETTER, *supra* note 40, at 76–7.
126 Schauer, *supra* note 45, at 528.
127 *'Virgin Mary grilled cheese' sells for $28,000*, MSNBC.COM, HTTP: <http://www.msnbc.msn.com/id/6511148/> (accessed Oct. 23, 2007).
128 FINK: LETTER, *supra* note 40, at 82–3.
129 Indeed, a recent best selling middle-brow book (MALCOLM GLADWELL, BLINK: THE POWER OF THINKING ABOUT THINKING (2005)) consists of nothing but illustrating such thinking processes.
130 JACQUES LACAN, ÉCRITS: A SELECTION at 138 (Bruce Fink trans. in collaboration with Heloise Fink and Russell Grigg 2004).
131 In his commentary on his recent retranslation of this essay, Fink admits its "astonishing rhetorical opacity." FINK, LETTER, *supra* note 40, at 63.
132 *Id.* at 81.
133 *Id.* at 88.
134 *Id.* at 89.
135 *Id.* at 90.
136 *Id.*
137 *Id.* at 113.
138 *Id.* at 90.
139 Meaning insists in a sentence or series (chain) of sentences, without our being able to localize exactly which element gives rise to the meaning: It is their combination in a certain way and order, which includes temporal aspects that do not fall under the heading of grammar, that gives rise to a meaning that we cannot attribute to any of its parts.

Id. at 87. See also David Gray Carlson, *The Traumatic Dimension in Law*, 24 CARDOZO L. REV. 2287 (2003).

140 "[I]he multitude of 'floating signfiiers' . . . is structured into a unified field through the intervention of a certain 'nodal point' (the Lacanian *point de* capiton) which 'quilts' them, stops their sliding and fixes their meaning." ŽIŽEK, SUBLIME OBJECT, *supra* note 28, at 87. See also, ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 38, at 16–20. In Alenka Zupančič's words:

> The effect of the operations of such a "quilting point" [*point de capiton*] is that the subject recognizes, in a contingent series of signifiers, the Meaning (of his existence). The moment of the recognition of Meaning is the moment of subjectivation.

ALENKA ZUPANČIČ, ETHICS OF THE REAL: KANT, LACAN 209 (2000).

141 ŽIŽEK, SUBLIME OBJECT, *supra* note 28, at 88.

142 Hart, *Positivism*, *supra* note 46, at 620.

Chapter 5

The hysteric's discourse

Introduction

A jurisprudential discussion of the Lacanian discourses properly ends with the hysteric's discourse in which the barred subject speaks. I maintain that the *practice* of law—the representation of clients—speaks this discourse. Practice is, therefore, feminine. An attorney is, structurally, a woman. On a more abstract level, I argue that the hysteric's discourse allows us to create right understood as the righting of the wrong—the temporary resolution of the trauma that positive law causes through the expulsion of "morality" (ethical law).

The quadripode

Lacan's diagram of the master's discourse shows two things, *pace* Hart. First, the separation thesis paradoxically makes law dependent on morality—that which is repressed in the symbolic returns in the real. Second, although Hart originally argued that morality could serve as an *external* critique to positive law, it is functionally impossible for morality to act upon the law *within* the master's discourse of positivism. Diagrammatically this is shown by the fact that the *objet petit a* is at the diagonal extreme from the master signifier of law and barred from it. Hart may have intuited this because late in life he seems to have abandoned his attempt to defend the separation thesis on moral grounds.[1] Consequently, the master's discourse cannot be the *only* discourse of the symbolic order of law.

Law can only be understood in terms of the excluded morality that serves as its desire. This desire leads to the university's discourse that seeks to understand and justify the content suppressed by the master. However, the university's discourse, despite its pretense to scholarly inquiry, proves inadequate to the critique of law. Like the master's it is a discourse of power. Its hidden truth is the master signifier—the status quo. The university's discourse can examine law's goals, and even make incremental changes in the law, but ultimate purpose is to form rationalizations for the law.

The university's discourse in turn inspires the analyst's discourse which interprets the law and helps the subject understand its effects. Although the analyst's discourse does not directly challenge law, it is a necessary prior step toward doing so. The analyst's discourse leads to the hysteric's because the former results in "the hystericization of discourse".[2] That is, it helps the barred subject understand that her desire is the desire of the Other. Learning of her fraught relationship with the Big Other, she is compelled to confront it.

The new discourse is, once again, created by turning the previous discourse one quarter-turn:[3]

$$\frac{\$}{a} \longrightarrow \frac{S_1}{S_2}$$

Now—and only now—the barred subject acts as an agent. Up to now she has been acted upon as the subject subjected to discourse. The master ordered her, the university lectured her, and even the analyst, supposedly on her side, interrogated her. Now she finally has a voice.

The hysteric's discourse is the discourse of the barred subject. In law's domain, it is the discourse of each of us who is subjected to the law. It is the discourse of the governed, not the governor. It is the discourse of the client and of the attorney who speaks on his behalf. The practice of law is located within the hysteric's discourse.[4] This reflects my proposition that Hart's concept of law excludes the practice of law.

Abstractly, the hysteric's discourse is itself an attempt to actualize right. If the analyst's discourse is a discourse about the other discourses, the hysteric's discourse challenges and critiques the other discourses. The master declares law, telling you what to do. The university justifies law, explaining why you should obey. The analyst interprets law, asking you what you want from it.

The hysteric questions the law.[5] "The hysterical subject is the subject whose very existence involves radical doubt and questioning, her entire being is sustained by the uncertainty as to what she is for the Other."[6] The hysteric's question for the big Other is "What do you want from me?"

The other addressed in the hysteric's discourse is the Big Other, which takes on the place of the master signifier. This can be her own individual master signifier (her symptom), or the master signifier of society generally. In the legal context, the master signifier is positive law and its injustice.

The truth of the discourse is the object cause of desire law (the little *a*) which sits beneath the speaking barred subject. In the case of positive law, the missing little *a* is nothing but the morality (content) that positive law has barred. In this case, however, the object of desire is not necessarily the collective goals of society identified in the university's discourse. It is the subjective desire of the barred subject. In other words, the agent speaks from the position of the pain of this barring and her truth is that which is barred.

The product of this discourse is a new type of knowledge—represented by S_2. In this discourse S_2 is the barred subject's own knowledge which now, for the first time, becomes accessible. An indirect result is that, just as the internal contradictions of the master's discourse cause it to go under and generate the other discourses, the internal contradictions of any hysteric discourse will likewise cause it to go under. From a Hegelian-Lacanian perspective it could not be any other way. Right—the actualization of morality understood as the ethical law—does not pre-exist its expulsion from the master's discourse. Specific moral principles or policy goals (the moralism Hart conflates with morality) are *objets petit a*—imaginary stand-ins for the real of the ethical law. It only comes in to being as the act of righting a wrong, i.e. curing the injustice of its own expulsion. Once a right is established as a new rule, however, it becomes a new positive law that must be obeyed because it is law. This is the logic of sublation, whereby the resolution of contradiction proposed by speculative reasoning, becomes a new understanding, regenerating the cycle of sublation.

The hysteric can learn several things through her discourse. First, mundanely, she can learn what the Other wants from her—what she needs to do or say to fit better into the symbolic. It is, however, a fundamental Lacanian point that a perfect fit is never possible—every normal subject remains split and castrated. Consequently, and more critically, the hysteric can learn what is *lacking* in the symbolic—to identify its flaws and decide whether to cope or seek to change them.

This can lead to the final stage of knowledge—the knowledge that the Big Other does not exist. The reason the Big Other can never truly answer the hysteric's question; "What do you want?" is explained by its alternate version as the accusation, "You are wanting!" The Big Other—the symbolic—is not a pre-existing "thing." It is a human creation, a work in process.

The subject learns, in effect, that only the subject herself can answer the question of how to follow her own desire and how to change the Big Other better to accomplish this. In this discourse, once again, there is no direct relationship, under the bar, between the subject's desire as the discourse's truth and the subject's knowledge that is the discourse's product. This is because this knowledge is precisely that the Big Other does not hold the truth of the subject's desire. It is the hysteric's discourse that allows this indirect relationship to come about. This ultimate knowledge the subject seeks is the answer to the question, what is the ethical law? The answer was given by Kant: every subject must self-legislate her own law.

The Other is not merely incomplete, but necessarily so. This knowledge can lead to two results. The first is depression and impotence.[7] The Lacanian feminine is the sadder but wiser sex. Why should the hysteric try, when the task of completing the Other is doomed to failure? How can the hysteric face the fact that she is partially responsible for the imperfection (and resulting violence and injustice) of the social order she cannot cure?

Alternately, this knowledge gives the hysteric the courage to go on. The feminine subject is not just sadder, *but wiser.* Once one rejects the impossible goal of making the Other perfect, the hysteric's profession of building the Other becomes possible. The fact that the Other is not natural means that it is a work of art—an artifact. The fact that it is not complete means that it is a work in progress. The hysteric can express her creative freedom by furthering its progress. The hysteric can harbor the hope that she can at least partially expiate her guilt for participating in the injustice of the status quo. She knows that she cannot create perfect justice, but she might be able to right specific wrongs.

The process is circular. When the discourse of the hysteric goes under, it creates a new master's discourse. That is, in the hysteric's discourse, the subject decides what the law is and what it wants from her. The law, then, tells her what to do in accordance with her decision. Hart is right. Society cannot exist without a regime of positive law that is obeyed merely because it is law. The hysteric's discourse, however, can lead to a change in the positive law. That is, the hysteric directs her discourse to primary rules of law. The hope is that the cycle of discourse is not a vicious circle and that incremental progress can be made.

Hysteria

I use "hysteric" as a term of art, not in the colloquial sense of someone gripped by uncontrollable emotion. A (colloquially) hysterical attorney is incompetent. Indeed, it is precisely the client's inability to distance himself from his hysterical relation to his legal symptom that prompts him to retain an attorney to speak on his behalf—it is why he needs a "mouthpiece." This explains the cliche that any lawyer who represents herself has a fool for a client.

Sexuality

We must now examine Lacan's theory of sexuality in greater detail. As its name suggests, hysteria[8]—from the Greek *hyster*, or womb—is structurally "feminine."[9] Historically, hysteria was associated with anatomically female people; but persons of either biological sex can be hysterics, or engage in the hysteric's discourse.[10]

All subjects are sexuated—there is no such thing as a neuter subject. Sexuality is a symbolic, rather than an anatomic, category. The two sexes are two ways of confronting the universal condition of castration (alienation): denial (the masculine) and acceptance (the feminine).

The masculine is the aspect of subjectivity that claims to be completely integrated into the Big Other (i.e. to be not castrated). The corollary to this is that he must also insist that the Big Other "exists"—i.e. is complete and

integral. The masculine subject claims to be integrated into the law because he also claims that nothing escapes the law.[11] He is the spectator who loudly praises the emperor's nonexistent clothes. He claims that most law is safely located within the core of certainty. As a result, the masculine is in a constant state of anxiety. He is haunted by the threat of the indeterminacy of the penumbra. Whenever he finds a hole in the Other (which he inevitably must) he cannot face the possibility of freedom and desperately tries to cover it over.[12] Consequently, if hysteria is the characteristic feminine neurosis,[13] obsession is the characteristic masculine neurosis.

The feminine, in contrast, is the aspect of subjectivity that accepts the fact that she is not wholly within, and is not totally constrained by, language, law, and sexuality. Moreover, she also understands that this implies that the Big Other is incomplete—she could not have escaped the symbolic unless it had loopholes. This is why Lacan called the feminine *pas toute*: not all or not whole. Not all subjects are subjected to the symbolic order or, more accurately, that the feminine subject is not wholly so subjected.[14] In Fink's formulation, "While a man is always subjected to a master signifier, a woman's relation thereto seems radically different. A master signifier serves as a limit to a man; not so for [the lack in the Other] in relation to a woman."[15]

The masculine wants to be the Kantian noumenal subject who is able to conform his maxims to the ethical law. But Lacan, like Hegel, insists that there are no transcendent noumena. The feminine understands that she is the actual Kantian phenomenal subject who never achieves pure conformance with the moral law.

Being partially exiled from the social order dominated by men, the feminine subject desperately seeks to fit in. This is why the hysteric constantly tries to express herself in language, engages in legal relationships, and looks for love. In other words, she is hyper-articulate because she is fixated on the symbolic order that partially excludes her. To put this another way, the obsessive masculine subject is constantly locking the doors of the symbolic order through which he might slip, while the feminine is constantly knocking on the doors in hopes of being allowed in. This is why the masculine cannot respond to the feminine—she is the reminder of the open door.

The hysteric's discourse critiques the status quo precisely because hysteria is the one position that can recognize the non-existence or artificiality of the Big Other:[16] The true subject understands that she, like the Other, does not exist (is negativity itself).[17]

Desire

In the chapter on the university's discourse, we saw how Kant thinks that morality—the ethical law—must be purged of pathology, including desire. We also saw that Hegel and Lacan, by rejecting Kantian transcendence, also necessarily reject the separation of morality and pathology.[18] Freedom can

only be achieved through, not despite, the phenomenal world and human pathology. Ethical law and right are inextricably linked to desire. Hegel and Lacan, however, distinguish desire from the pursuit of pleasure, or the lust for physical sexual contact (which follows from Lacan's insistence that sexuality is symbolic, not anatomic).

The hysteric understands Hegel's lesson that subjectivity can only be created through recognition in the symbolic of intersubjective relationships. A famous Lacanian slogan is "the desire of man is the desire of the Other."[19] As Žižek notes, Lacan is speaking not about just any subject, but of the hysteric specifically. But the point is that "the status of the subject as such is ultimately hysterical"[20] so that "the hysterical 'desire to desire', far from being a defective mode of desire, is, rather, its paradigmatic case, desire *tout court*."[21] Masculine subjectivity is, therefore, a form of failed feminine subjectivity, rather than the other way around.[22] In Žižek's words, "a man is perhaps simply a woman who thinks that she does exist"[23] (i.e. is not castrated).

The intentional ambiguity of the phrase "the desire of man is the desire of the Other" is the same in the original French and English. As Lacan's theory concerns the subject of language, puns and word play are essential parts of his analysis. The hysteric desires the Other. She desires to be desired by the Other. She experiences her desire as not coming from herself but as in some way created, and forced upon her, by the Other.

Who is the "Other"? Hegel posits that because one can only achieve the concrete subjectivity necessary for the actualization of freedom through recognition from other subjects, each person passionately desires to be so recognized—he desires others because he desires to be desired by them.[24] This is why Lacan identifies Hegel as the "most sublime of hysterics."[25] Hegel argues that the most primitive intersubjective relationship that serves this desire is private law—property and contract.[26] Consequently, in the context of law I identify the Big Other not just with the symbolic, generally, but with positive law, specifically.

As already introduced, Lacan notoriously proposes in his seminar on the discourses that the Big Other does not exist.[27] To understand this, one needs to understand the distinction that Hegel makes between existence and essence. I turn to this soon, but at this stage in the argument, all one needs to remember is a point made previously that Lacan is not making the palpably silly assertion that the legal system, language, or society at large does not function.

Lacan tries to capture the fact that the Big Other functions, despite—or perhaps because of—the fact it does not "exist," by stating that it nevertheless has a "body." The Other does not exist only in the sense that it is not a pre-given, essential natural object. On one level, this is merely to repeat that the Big Other is artificial—a human creation:

> It's simply that. The hysteric's discourse reveals the master's discourse's relation to *jouissance*, in the sense that in it knowledge occupies the place of *jouissance*. The subject himself, the hysteric, is alienated from the master signifier as being he whom this signifier divides . . .[28]

The hysterical question

Because the hysteric's desire is the desire of the Other, the question the hysteric asks the Big Other is "Che vuoi?"("What do you want i.e. from me)?"[29] This can be restated as "What do I lack?" or "Just tell me what I should do to make you love me?" As Žižek explains:

> [T]he status of the subject as such is hysterical: the subject "is" only through its confrontation with the enigma of Che voui? ("What do you want?") insofar as the Other's desire remains impenetrable, insofar as the subject doesn't know what object it is for the Other.[30]

In Žižek's rewriting, the traumatized hysteric asks the Big Other "'Why am I what you're saying that I am?' or, to quote Shakespeare's Juliet 'Why am I that name?'"[31]

In the hysteric's discourse, as in "real life," unrequited desire can in a snap of the fingers change to fury. By asking "What do you want?", "What do you desire?" the hysteric comes to realize that the Big Other wants and desires. This means it must be wanting. The Big Other (the symbolic, the law) is not complete and totalizing as it, the masculine subject and the power discourses insist. In other words, first the hysteric addresses the Other because she thinks it has what she lacks. Now she knows the Other also lacks what she lacks. The feminine hysteric learns that her love, the Big Other, does not exist. And she cannot forgive his betrayal.

Consequently, the hysteric's question "What do you want? What do I lack?" becomes the accusation "You are wanting!" "How must I change to accommodate you?" is now "You must change to accommodate me!" The hysteric's discourse is that of the true critique. It opens up, not revolution or the impossible search for perfection, but the possibility of imperfect reform.

The hysterical practice of law

The possible profession

Once the hysteric realizes not only that the Big Other as it (non)exists is not inevitable and understands her role in creating and sustaining that Big Other, she is in a position of challenging and seeking to change the Big Other: "She unmasks . . . the master's function, with which she remains united, through emphasizing what there is of the master in what is of the

One with a capital 'O,' which she evades in her capacity as object of his desire."[32] She cannot, of course, destroy the Big Other without destroying herself. Her subjectivity—her very ability to speak—depends on the existence of a symbolic of language, law, and sexuality. Only the psychotic—literally the screaming madman—is outside the symbolic order.[33] Accordingly, the hysteric is not seeking to do away with the law, but to be let inside. This is why, in the passage just quoted, Lacan states that although the hysteric unmasks the Other (here in the position of the master), she nevertheless remains united with him in the symbolic order, whatever it may be.

She not only desires the Big Other, she loves it not despite, but because, of all its flaws. Lacan distinguishes love from desire—love is a response to the failure of desire. Love is seeing in the beloved more than she has[34]—it is, therefore, predicated on the fact that the other is lacking. Love is nothing but the lover's attempt to make the beloved not all that she can be, but more.

For this reason, Lacan thinks that the hysteric discourse could never truly be revolutionary:[35] In Bracher's words:

> It is only with the discourse of the Analyst that the subject is in a position to assume its own alienation and desire and, on the basis of that assumption, separate from the given master signifiers and produce its own, new master signifiers—identity and values less antithetical to its fundamental fantasy and the desires arising from that fantasy.[36]

Lacan once taunted the Parisian student radicals, who were acting as hysterics, "What you aspire to as revolutionaries is a master. You will get one."[37] He is correct. Although the hysteric challenges the status quo of positive law, by establishing a new rule of law, she establishes a new master's discourse. Legal practice is always conservative by definition because it cannot be anarchic. By Lacan's terms, to address an issue within the framework of law is to accept law to some extent.

Nevertheless, Lacan is being uncharacteristically romantic in ending *L'envers de psychanalyse* with the analyst's discourse. If psychoanalysis hystericizes the analysand, the hysteric must be given the opportunity to speak in her own voice. Consequently, once analysis is completed, it can only be given effect through the hysteric discourse.

Lacan admits that governing, teaching, and psychoanalyzing are impossible professions. The only discourse that Lacan does not identify as impossible is the hysteric's. Unlike the master's discourse that seeks pure power, the university's discourse that seeks pure knowledge, and the analyst's discourse that seeks pure desire, the hysteric understands that purity is impossible. She claims to be precisely what she is—castrated—or to put this within a feminine metaphor, impure. The hysteric's discourse is the discourse of possibility because it embraces imperfection. I stated that the representation

of clients speaks the hysteric's discourse. As such, legal practice is the one possible profession. It is possible precisely because its goals are always necessarily limited, its results always necessarily imperfect compromises. Insofar as it is ever successful, it is because it accepts some degree of failure as inevitable.

The fact that justice is always a work in progress is itself the possibility of freedom. If justice were ever achieved, the world would be inscribed within a perfect legal system with all cases within Hart's core. All subjects would be "men" perfectly circumscribed within the symbolic order—Kant's automatons. But Hegel and Lacan take Kant to his logical extreme and insist that freedom requires a moment of pure spontaneity unrestrained by all bounds. This is the radical negativity that Hegel believed constituted the heart and soul of personality. This is the feminine.

At first blush, the hysteric's discourse might seem to bear some resemblance to the university's in that they both can involve legal reform. But, as illustrated in the quadripode, this is because the hysteric's discourse is the other side of the university's. The resemblance is a mirror image that reflects a reversed perspective toward freedom. The expert addresses himself toward society's goals generally in order to justify the power of law that is his hidden truth. In order to achieve these goals the expert necessarily tries to restrain and manipulate those who are *subjected to*, and split by, the law. Consequently, the university is the enemy of freedom. The hysteric, in contrast, challenges the law itself from the position of the subject subjected to the law whose truth is the pain and violence that law causes in the name of a greater good. She seeks the freedom that comes from the knowledge this challenge produces. Paradoxically, part of this knowledge is that freedom and law have a dialectical relationship, and that as a member of society who desires the Other, she must sometimes subordinate her individual subjective wants to the objective goals of the collective.

Advocacy

Representation

The attorney's representation of a client is properly a hysteric's discourse. Through counseling (the analyst's discourse) the attorney hystericizes her client. In order to represent her client—to stand in his shoes, and to speak on his behalf—the attorney must also become a hysteric. In other words, the attorney as advocate must become radically feminine.

When an attorney acts *for* a client, as opposed to counseling him, she does not address the client. She is his mouthpiece. As the client's alter ego she takes over the client's position and stands as agent in the upper left of the quadripode. She is now the hysterical barred subject who realizes that she is not whole. She addresses the other party who stands for the Big Other

as the master signifier that explains and gives meaning to the barred subject's problem. This is the aspect of the symbolic order that, in the client and attorney belief, causes the client's suffering while falsely claiming to be in the right. The truth of the situation (the lower left corner of the matheme) is the *objet petit a*. This is the client's subjective desire that he seeks to satisfy in the legal action. It is desired because it is lacking in the Big Other. The product of this discourse is the knowledge it produces.

The hysteric's discourse enables us to complete the task that Hart started in his account of positive law. As we saw, Hart originally argued that separating morality from law would preserve morality as an independent value that could be used to critique intolerable law. The problem was, of course, that once he excludes morality from law, Hart does not suggest how morality could be brought back *into the legal system* to actualize its critique. To Hart, the substance of legal change is not itself law. His secondary rule of change is a purely formal procedure that effectuates a substantive change determined externally.

Nor does Hart offer a critical morality. Rather he conflates morality with the "moralism" of traditions and the status quo. Lacan's discourse provides a solution. By being excluded from the symbolic order of positive law, morality can serve as an *objet petit a*. Or more accurately, morality *per se* (the ethical law, not moralism) is the real of law's desire, and specific moralistic principles and policy goals are the little *a* that stand in as the cause of that desire. Morality becomes law's desire—its hidden goal. The hysteric's discourse enables us to identify how the substantive content that has been excluded from the law serves to harm the subjects subjected to the law.

I divide legal practice into two ideal forms that relate to the two different forms of the hysteric's discourse. The first question, "What do you want from me?" (i.e. "What do I lack?" or "Please make me whole."), is spoken in what I will call "negotiation". The accusation "You are wanting!" is spoken in litigation. Actual legal practice is a continuum. Most legal representation falls somewhere between the extremes of these two ideals.

Negotiation

Within "negotiation" I include contract negotiation and other forms of legal representation (such as drafting securities law disclosure documents) in which the parties see each other as having at least some shared interests. In negotiation one asks the other the less hostile, indeed loving, questions "What do you want from me?", "Please give me what I desire." From a Hegelian perspective, contract is a primitive form of "love".[38] Just as Lacan based his master's discourse on Hegel's lord-bondsman dialectic from the *Phenomenology*, which is a failed attempt at achieving intersubjective recognition through violence, Lacan's analysis of the hysteric's desire parallels Hegel's analysis of abstract right (private law, property, contract, and crime), which begins the

Philosophy of Right. Both are means by which people seek to achieve subjectivity through intersubjective recognition. In abstract right the subject is partially successful in achieving the intersubjective recognition she desires through mutuality.[39] Hegel's analysis is sublimely hysteric.

The Hegelian hysteric seeks to achieve her desire for recognition through contract. It should not be surprising, therefore, to find that the discourse of the hysteric encompasses the communication aimed at the formation of contracts. It is also appropriate to find that the failed attempt to achieve recognition of the master's discourse eventually leads to the possibility of the more successful recognition through the hysteric's discourse.

Insofar as a client wishes to engage in negotiation and enter into a contractual relation with another party, she is in the position of the barred subject. She knows she lacks, and she believes that her lack can be addressed by the other party. This concrete other serves as a master signifier. That is, she wishes to achieve some goal and she believes that it can be achieved through the other. The fact that there is a bar between the barred subject and the little *a* that is her truth in the quadripode of the hysteric's discourse ($/*a*), represents the fact that she believes that she is somehow barred from her desire. The arrow that extends from the barred subject to the other as her master signifier ($ \rightarrow S_1$) represents the fact that she thinks that the Other can somehow lower this bar. The basis of contract is the mutual belief that each party can benefit the other by entering into the contract. The truth of the client is desire—both hers and that of her counterparty. Her desire is to accomplish a specific goal. She believes that this desire can be accomplished through the other party. But in order to negotiate a contract, the client must believe that the other party also has an unfulfilled desire to accomplish a goal that the client can fill.

This mutual desire can be simple: the client has a widget and desires cash while the counterparty has cash and desires a widget. In complex relational contracts that continue for years—such as joint ventures—the mutual desires can be much more complex. Indeed, from a Hegelian analysis, the true desire of parties in contracts is mutual recognition as legal subjects. The exchange of goods and services in contract is merely a means for this ultimate end. Nevertheless, as Lacanian psychoanalysis insists, the intersubjective relationship of love and recognition always takes the form of object relations[40]—the actual substance of the contracts serves as the object cause of the parties' desires that stands in for the real of the desire for recognition.

Negotiation proceeds as the two parties mutually explore their respective goals and desires to formulate a single shared object of desire. Of course, at times even the friendliest negotiation has moments of hostility as the hysterical attorney's discourse vacillates between the question "What do you want?" and the accusation "You are wanting!" The attorney seeks not only to know what the counterparty wants, but must be willing to challenge the value of what the counterparty claims to offer as well as the counterparty's claims

to entitlements. Negotiation produces the signifying chain of knowledge. If it is successful, it leads to a contract—a new intersubjective relationship creating a new signifying chain. Even when unsuccessful, the client obtains the knowledge that the two parties cannot or will not satisfy each other's desires and either moves on or proceeds to litigation.

Litigation

Within "litigation" I include those confrontations in which the parties see their interests as fundamentally diverse. Examples include criminal prosecution, civil litigation and administrative proceedings. Mediation and, to a lesser extent, arbitration probably lie somewhere between litigation and negotiation. In litigation, the attorney bringing the action claims that the client (which, in the case of the prosecutor or administrative agency, is the abstract concept of the people or the state) has been wronged—is split, harmed, barred from the object of desire that is her truth. The defendant is in the position of the master signifier that seems to personify the Big Other—its wrongdoing explains the client's problem. This dynamic is perhaps most clear when the plaintiff is a citizen and the defendant is the government—clearly a manifestation of the Big Other—and the plaintiff seeks to have a statute ruled unconstitutional or otherwise unlawful. It is equally the case, however, in any other form of litigation. By defending the status quo the defendant becomes identified with, and embodies, the Big Other. The plaintiff believes that the truth of the situation is the object of desire that is kept from the plaintiff—the overthrowing of the unlawful law, or the remedy sought in litigation—as well as the very lack, holes, and untruths of the defendant's case. In litigation the plaintiff (prosecutor) makes the hysteric's accusation against the defendant positioned as master signifier: "You are wanting!"

What is produced in litigation is knowledge. This takes the form most immediately of the opinion that declares the outcome of the case. Of course, what the Big Other lacks is precisely that which had been ejected by the master discourse, for example, such non-legal qualities as morality and justice. By seeking to make critique effective in law by, if need be, changing the law, the hysteric's discourse completes the critical circle that the master's discourse started by expelling morality from law.

Although not as immediately obvious, the hysteric's discourse can also characterize legal defense. Having been sued by the plaintiff, the defendant and her attorney find themselves in the position of the barred subject. The defendant feels wronged by what she believes are the false claims of the plaintiff. Vis-à-vis the defendant, it is the plaintiff (or prosecutor) who is placed in the role of the Big Other insofar as she claims that the law is on her side. It is the inequitable action of the plaintiff (or prosecutor) that explains this harm. The defendant throws back the hysterical accusation at the plaintiff.

Speculative and doctrinal scholarship

The hysteric's discourse is also the discourse of truly critical scholarship. The speaker places herself in the position of the desiring subject who questions or challenges the law. The speculative scholar seeks to address the internal logic of the law to see how either real or hypothetical subject fits into the law. Do these subjects have desires that the law could fulfill if we better understood the law? Or does the law, instead, thwart the subject's desire?

Perhaps surprisingly, I also believe that true doctrinal scholarship falls within the hysteric's discourse. I say "true" doctrinalism to distinguish it from much scholarship that discusses doctrine—such as much of law-and-economics scholarship—but which, in fact, is a form of policy scholarship. "False" doctrinal scholarship is addressed to "officials" (judges, legislators, etc.) and asks how doctrine serves the purposes of society generally (i.e. society's goals and desire, its little *a*). "True" doctrinal scholarship is directed primarily to attorneys representing clients. The "true" doctrinal scholar, like the attorney, puts herself in the position of a hypothetical legal subject with a desire—a potential problem that she thinks either might be solved or caused by the law.

The doctrinal scholar identifies a problem with existing positive law—the law is broken, split. However, unlike the university's discourse of policy scholarship, she does not address the problem in terms of some supposed external policy goal that doctrine is supposed to serve. Rather, the doctrinist looks to the law's own internal logic to see how it can be made more coherent on its own terms.

In speculative and doctrinal scholarship the result that is intended to be produced is knowledge in the sense of a greater understanding of the relationship between the law and the subject. Sometimes the understanding is intersubjective in that the doctrinal or speculative scholar might throw new light on a legal problem that enlightens not only the scholar herself but other practitioners or scholars. Sometimes this new understanding will result in an actual change in the law—as when litigation invalidates a law or leads to a new interpretation of the law. Sometimes, this understanding results in a call to change the law. If the doctrinal or speculative scholarship leads to a conclusion that the law's effect on the subjects subjected to the law is unjust or even unintended, this suggests the law should be changed.

Hysteria and right

The hysteric's discourse helps us develop an ethics of law and the complex relationship among positive law, specific moralistic principles or policies, ethical law, and right. My ethics of law builds on, but is distinct from, Lacan's ethics of psychoanalysis. I argued that Hart's choice of the term "morality" for that which was expelled from law is a misnomer. This is partly because he defines "morality" as conventional moralism—a notion

much too narrow to encompass all that positive law expels. Consequently, I argued that his separation thesis was more strongly reformulated as the proposition that the status of positive law as law is logically independent from its substantive content. From a Lacanian perspective, however, although this is true, the psychoanalytic purpose of adopting positive law is *precisely* to repress morality understood in the Kantian sense.

Because Hart's attempt to define "morality" is so inadequate, I now refer to the Kantian concept of morality (as that to which we are duty bound) as the ethical law to distinguish it from positive laws. Kant related the ethical law to his concept of the right, as opposed to the pathological concept of the good. I will explain Hegel's development of the concept of right. Specifically, I argue that ethical law is the trauma of positive law, and right is its symptom. Right—the actualization of the ethical law—is not a fact that can be described prospectively, but an act that can only be recognized retroactively. This is why Hart, as a positivist, could not adequately describe morality.

Kant thinks that ethical law is distinct from the pathology of desire. Because no one can ever purge herself of desire no human act can ever be perfectly ethical—mankind is radically evil. Nevertheless, Kantian analysis shows that it is man's capacity for evil that creates the free will that makes him an ethical agent. Hegel and Lacan insist that the implication of this insight is that, far from desire being distinct from the ethical law, it is *its very foundation*.

The woman does not exist[41]

Probably Lacan's most infamous saying—at least among non-Lacanians—is that "Woman does not exist."[42] I have frequently heard this quoted as proof of Lacan's fundamental misogyny. Alternately, I have heard supporters argue that this is a misinterpretation. A correct reading reveals a feminist understanding of the plight of women.

What both positions have in common is their fixation on the subject of the sentence—"Woman." They both assume that Lacan's point, whatever it might be, primarily concerns women or the feminine. This is hardly surprising since Lacan made this startling announcement in his *Twentieth Seminar* entitled *Encore: On Feminine Sexuality.* But to do so reduces Lacan's statement to the college sophomore's question "Does God exist?" By posing this jejune question the sophomore assumes she is capable of saying something meaningful about God. But, from an Hegelian perspective, to even suggest that God "exists" is idolatrous.

This shared approach represses the fact that the adage "Woman does not exist" was presaged by Lacan's earlier pronouncement that the Big Other does not exist. It is also presaged by Hegel's conclusions in his *Science of Logic* that God does not exist and in his *Philosophy of Right* that right does not exist. It also ignores the fact that Lacan insists that the quintessential

subject is feminine so anything he says about Woman is, by necessity, a universal statement about subjectivty. To say that Woman does not exist is to say that the subject does not exist. More simply, to say that the subject "does not exist" is, in fact, a clarification of Lacan's basic proposition that the subject is "barred" or radically negative. Moreover, since the subject and the Big Other are mutually constituting, it should have been obvious that, if Lacan was right that the Big Other does not exist, then it follows that neither does the subject, generally, nor the feminine subject, specifically.

Lacan is frequently associated with the "death of the subject."[43] Once again, this slogan can be misleading. To say that the subject does not "exist" in no way implies that there is no subject. Although psychoanalysis is inconsistent with the subject understood as the familiar self-identical autonomous individual posited by classical liberalism (i.e. the ego), Lacan hardly does away with subjectivity, or the ego. From his earliest seminars, $, the split or "barred" subject, has been the central figure of his study. Even though the subject may not exist, she nevertheless functions. In Lacan's words, she "in-sists" or "ex-sists."[44]

Consequently, to understand what it means that "Woman"—and the Big Other, God and right—"do not exist," we must concentrate not on the subjects of these judgements, but on their predicate "existence." As Bill Clinton reminded us, everything "depends on what the meaning of 'is' is."[45]

To understand Lacan, we need to examine Hegel's distinction between "existence" and "essence." Essence—non-existence—is traumatic.[46] Woman—i.e. all subjects—is structured around a fundamental internal trauma—a so-called *primal scene*. This analysis will be crucial for jurisprudence because Hegel—anticipating Lacan—argues that right does not exist because it is essential.

Essence must be contrasted to existence because it is not a being, but a *doing*—or in Lacan's terminology, an insistence. Being is the passive state of things, not the active realm of subjects.[47] Unlike existence which is merely *fact*ual, essence is *act*ual. Existence is the claim to be self-identical, necessary, permanent, whole—it is the masculine position of being completely located within the symbolic order. As such, man declares himself to be a thing—Kant's automaton. But Woman—and God—are not mere things. They can never be completely captured in the symbolic. This is why it is idolatrous to say that God exists—it is either to treat God as an object or to attribute divinity to things.

Hegel shows that existence cannot live up to its own claims. Existence always implies non-being—its negation. Whatever is, is doomed to pass away. Existence is, therefore, not what it claims to be; it is always in a state of ceasing to be. Consequently, existence is at best a semblance—the false claim of permanence.

To understand Hegelian essence fully, one must compare it to his notion of appearance. This distinction will be crucial when we turn to the question of law and right.

Obviously, the term "essence" implies difference from "mere appearance." Appearance, by definition, is that which merely appears, and then disappears. In the chapter on the university's discourse I referred to Kant's theory of the noumenon and the phenomenon. The entire sensible world that we can know directly is phenomenal—contingent, accidental, and temporary. Everything that is, is destined to cease to be. Kant concludes from this that there must be a necessary, permanent, transcendental world beyond the phenomena—the noumenal realm.

Hegel and Lacan reject not only Kant's theory of the noumena but any and all concepts of transcendence. There is nothing that exists other than through the material world. Nothing is possible—i.e. factual—that isn't also actual. Essence must, therefore, appear. However, they agree with Kant that everything that is material (phenomenal) is doomed to pass away. This means not simply that the entire world is appearance, but that there can be nothing beneath, above, or beyond appearance—it is appearance all the way down.

Then what is essence for Hegel? Essence is nothing but the understanding that everything is appearance.[48] That is, if everything that is possible must be actual, then for essence to be possible, essence must become actual by appearing. But if everything that appears is doomed to disappear, then essence will disappear as soon as it appears. Essence is an impossible state. Essence is the Lacanian real. It is traumatic in the psychoanalytic sense of the term in that it can never be fully integrated into the symbolic. Nevertheless, essence appears and structures the symbolic—it insists.

I have just said, on the one hand, that Hegel argues that essence can only be understood in opposition to appearance. I have also said, on the other hand, that Hegel argues that there is nothing but appearance. To what, then, is essence opposed?

Essence is nothing but the *true* understanding of appearance that is contrasted to its misunderstanding of "semblance." Essence states that it does not exist, it only appears—it is not a fact, but an act. Semblance is appearance posing as being—it is the Kantian phenomenon masquerading as noumenon.[49] Appearance as semblance treats that which is contingent, accidental, and temporary *as though* it were necessary, essential and permanent. Semblance is Lacan's concept of existence. Semblance is precisely the fallacious masculine claim to exist—to be whole (have the phallus). As I discuss, Hegel explains that legal "wrongs" are also a form of appearance as semblance—they are false claims to right that disrupt law.

Essence is, in contrast, the understanding that *nothing* is necessary, essential, and permanent except change. Essence is the feminine that does not "exist" but insists that all subjects are split. Hegel reveals that right is nothing more than essence understood as appearance. Right will be revealed as an act, not a fact, that appears only at the moment of the righting of a wrong.

This brings us to Lacan's concept of the feminine masquerade which turns out to be yet another way of explaining the Hegelian notion of essence.

Lacan's concept of the feminine masquerade is not merely an account of stereotypical womanly traits as coquetry, adornment, display, etc. (although it may help explain such empirical behavior). Rather, it is an account of the feminine subject's understanding that she is essential, not existing.

The simplistic understanding of a masquerade is that a mask conceals the "true" face. This is the Kantian delusion that beneath every phenomenon lies a "true" noumenon. The truth of the feminine masquerade, however, is that there is nothing beneath the mask but more masks. It is essence understood as appearances all the way down. This is another way of saying that the subject is split or barred—her true essence is radically negative. Consequently, the feminine subject is a true person—a *persona* understood in its original meaning of a mask. In the words of Slavoj Žižek, "this nothingness behind the mask is the very absolute negativity on account of which women is the subject *par excellence*, not a limited object opposed to the force of subjectivity!"[50] The feminine secret is precisely that there is no secret—which is itself the deepest and most mysterious secret of all.[51]

Hegel makes precisely the same point in his *Phenomenology of Spirit*:

> Behind the so-called curtain which is supposed to conceal the inner world, there is nothing to be seen unless *we* go behind it ourselves, as much in order that we may see, as that there may be something behind there which can be seen.[52]

In the imaginary, we pretend that there is an affirmative masculine subject who, like Oz, is hidden behind the curtain. The feminine subject, however, understands that she is so negative that there would still be nothing behind the curtain even after she steps behind it.

As Alain Badiou insists, Lacanian ethics is a rejection of a Levinasian theory of the other.[53] Levinas insists that we respect the absolute otherness of the other that the I of the subject can never fathom. But to do so, is precisely to treat the other as a transcendental thing—a noumenon. It is to assume that the other exists. To a Lacanian this is mystification. It is telling that Levinas insists that we are ethically called on to recognize the other's face, and have a face-to-face conversation with the other.[54] From a Lacanian perspective, Levinas is completely taken in by the feminine masquerade and thinks that a true face exists beneath the other's opaque mask! He thinks that God exists. As such, Levinas is guilty of idolatry.

Right is the symptom of law's trauma

Lacan infamously claimed that woman is the symptom of man.[55] As discussed in the chapter on the analyst's discourse, a symptom structures the traumatized subject. Consequently, by identifying woman as man's symptom, he posits that the masculine subject is dependent on and can only exist through the

feminine. The man who claims to exist is merely an effect of Woman who insists. Similarly, positive law is dependent on and can only exist through the content it expels. The positive law that claims to exist independent of its content is merely an effect of the content who continues to insist on its presence. We are now ready to knot together many of the threads that have been spun throughout this book and to explore the relationships among freedom, ethical law, and positive laws.

The truth of the hysteric is nothing but desire—that which positive law tries to repress. The ethical law is real and, therefore, cannot be presented, but only *represented* by her *petit a*—the object cause of her desire. This is the specific remedy the client seeks from the law. The attorney stands in the position of the barred subject—the client seeking help from the law to redress her split. But note that Lacan insists that the truth is barred and inaccessible to the hysteric subject directly. This is because it has been repressed by the master's discourse. She knows that her desire is the desire of the Other. This is why she addresses the Big Other of the symbolic order with the hysteric's question: "What is your desire?" "What do you want from me?"

For Lacan, this is not mere curiosity, but the founding moment of ethics. If Kant tries to distinguish ethics from desire, Lacan declares that the only ethical injunction is do not *give way* with respect to your desire.[56] To be true to one's desire one must first know, however, *what* one desires. Because the subject's desire is the desire of the Other, the challenge of the other is ethically mandated. In other words, although the Lacanian injunction to be true to one's desire at first blush seems both hedonistic and egotistical, it, in fact, is completely dependent on the Other. Lacan's ethical injunction is revealed to be a rewriting of Kant's: do your duty. Consequently, Lacanian ethics generates the same paradox underlying the Kantian categorical imperative.

Freud famously asked "*Was will das Weib?*"[57] What does the woman want? This turns out to be the very question of the analyst's discourse. The analyst, sitting in the place of the analysand's desire, asks "What do you want; what am I?"

The true subject is Woman. The subject and the Big Other are mutually constituting because they are mutually wanting. The barred subject wants what the Big Other wants because her desire is the desire of the Other. Consequently, Freud's question generates the hysteric's question: "What does the Big Other want?" This is why the analyst's discourse inevitably leads to the hysteric's discourse.

Freud thought that woman's desire was a mystery that he had not yet solved. Lacan's analysis shows that Freud has been taken in by the feminine masquerade. The secret of the feminine masquerade is that there is no secret, no noumenon, and no answer to the ethical question that pre-exists its asking. This is the biggest secret of all. Consequently, the answer to the question "What does the woman want?" is revealed by rewording it as "What the

woman *does is want*"—the subject is nothing *but* desire—*pure wanting per se.* She is essential and, as such, her subjectivity is a *doing* not a being. In other words, in contrast to the traditional identification of the feminine as the passive principal, the Lacanian feminine is pure activity.

The hysteric comes to understand this through her discourse. By asking what the Big Other wants, the hysteric reveals that the Big Other, like Woman, is wanting. This means that the Big Other can never answer the question of the subject's own desire. This is why in the quadripode Lacan replaces his usual matheme for the Big Other (Ⱥ) with that of the master signifier (S_1). The Big Other standing alone and stripped naked by the hysteric, lacks meaning and is, therefore, a master signifier. The desire of the Other is opaque. Lacan says that the result of the hysteric's question is knowledge. But the knowledge learned is precisely that there is no knowledge "out there" (i.e. not noumenon); only the knowledge we produce.

We should have anticipated this conclusion because it replicates Lacan's analysis of the *objet petit a—the object cause of desire.* When Freud asks "What does the Woman want?" he is asking "What is her little *a*?" When the hysteric asks the Other "What do you want from me?" she is asking "How can I become your little *a*?" But Lacan's point is that desire *precedes* its cause. We do not desire because of the little *a*, rather we *choose* a little *a* because we desire. This means that the question "What do you desire?" precedes its answer. By asking the question, you never discover, rather you *produce*, the answer—or at least a temporary stand-in for an answer that only appears in the real.

The opacity of the other's desire is the fundamental trauma of the Lacanian subject and of law. But this trauma is simultaneously the moment of uncaused, spontaneous freedom that constitutes subjectivity. The fact that the Other cannot reply means that the subject is not constrained. She is not merely free to choose her own desire—she is condemned to the freedom of answering her own question. Ethics mandates that she act in order to be true to her desire, but cannot tell her what to do. The psychoanalytic "act" is nothing but the subject's free choice of her desire—the telling of the narrative of her trauma.

This is why Badiou insists that the only truly subjective moment is the recognition and naming of what he calls the event—his term for the defining moment in which the contradictions of existing society are laid bare.[58] Lacan insists that all ethical choices are coerced, in that the subject has no choice but to choose. Nevertheless, her choice is always free in the sense that the specific content of the subject's choice is not predetermined.[59]

This is why Badiou insists that to be true to the event—the political equivalent of Lacan's ethical dictate to be true to one's desire—always requires a risk. It is a wager.[60] Just as common law jurisdictions recognize, one never knows what the law is until the next case is decided, one never knows whether one has taken an ethical act until one's decision is made. In this way Lacan

rewrites the Christian-Kantian doctrine that free will is inextricably tied to Original Sin (radical evil).

Lacan is revealed as the anti-Levinas.[61] Justice requires not that we respect the ineffable otherness of the Other because to do so is to objectify the Other, and reduce her to what Badiou calls suffering animality.[62] As Badiou insists, otherness, diversity, and multiplicity are mere empirical facts that have no moral purchase. Otherness understood this way merely exists—it is the status of a thing.[63] In contrast, justice insists on a notion of a radical equality that goes beyond mere empiricism.[64] Consequently, Badiou, despite his avowed atheism, states that our ethical duty to other humans does not spring from our sympathy for their empirical suffering (animality), but from our recognition of their potential for "immortality."[65] Political equality requires that we decide to recognize the sameness—our shared capacity for immortality—in the other *despite* her empirical otherness. This takes an act.

Lacan insists that the subject cannot hold the Other apart as Levinas would want us to, precisely because the desire of the subject is the desire of the Other. Indeed, to proclaim the Other to be other consists in nothing but the subject's attempt to export her internal split into the Other, thereby abjecting him. In other words, the subject is in the impossible situation of having to both engage the Other while keeping her distance. The Other is extimate, simultaneously external and internal to the barred subject.

Kant avec Lacan

Hegel and, implicitly, Lacan rewrite Kant, for whom ethics and the right must be contrasted to desire and the good. Reason tells us that we are duty bound to do the right thing purely because it is right, not because it would do any good. I suggested that, at first reading, Kantian formalism might sound a lot like Hartian positivism. On further thought, however, they are revealed to be radically opposed—Kant is the other side of Hart. Unlike Hart, Kant understood that formalism necessarily generates both morality and freedom.

To recapitulate, Kantian morality is defined by the formal demands of universality imposed by the categorical imperative. Therefore, it has no pre-existing content. The concept of good relates to substantive content—pathology. Morality consists of adopting maxims for action that are consistent with right regardless of the consequences. Kant goes so far as to posit that doing an act that is consistent with right because one desires to achieve a *good* result is smeared with pathology and, therefore, is not purely moral—in Christian terms it is sinful.

As we saw, a problem facing Kant is that if the criterion for ethical law is purely formal, how can we recognize the ethical law and achieve right? More importantly, even if our souls were noumenal, as *empirical* human beings each of us is a phenomenon defined by her pathological content. Moreover,

it is impossible for any human being to fully know her own intentions—in Kant's words, "The depths of the human heart are unfathomable."[66] Consequently, it is not merely that we can't identify what right might be, we can never know whether we are acting rightfully in accordance with the ethical law which is real.

Nevertheless, Kant also understands that it is precisely this impossibility to know the ethical law that makes the subject an ethical creature capable of making ethical decisions. This trauma is the condition of human freedom. If we knew what we had to do, we would not be free—we would not be making choices so we would have no moral responsibility for our acts. If we could see the mind of God we would become automatons. Our capacity for sin creates the possibility of holiness.

Lacan considers Kant the father of psychoanalysis.[67] The problem with psychoanalytic ethics is precisely that we are duty bound to be true to our desire. Our desire is the desire of the Other, but the Other never answers our question, "What do you want from me?" We can never see the mind of God. Consequently we are forced to choose what to do. Although the choice is forced on us, it is radically free. It is the freedom of choice that makes the choice a moral act. And it is the fact that the act is our choice that makes it our own and imposes ethical responsibility if we choose wrongly. As Badiou says, ethics is a wager on which we must bet everything.

Hegel explains why. God does not exist—God is essence. The mystery of God's face is that there is no face beneath the mask that God presents to us. In his late seminar on the *Sinthome* Lacan finally comes to agree with Hegel. He says that God does not exist—but insists. This means that one of the names of God is "Woman."[68]

There are a number of implications to draw from the paradox of ethics and freedom that are relevant to jurisprudence. The ethical law constitutes a trauma.[69] It is the repressed real to which we have no direct access, but which structures our lives. We are in a constant state of anxiety because we are duty bound to obey an ethical law we can never know. Indeed, as Kant insists, the only thing we can know is that we are always at least partially wrong and sinning against the ethical law.

We have seen that master's and university's discourses that characterize most modern jurisprudence reflect a profound fear of freedom. The master claims that we are obligated to obey the law merely because it is law, and not because we decide that it deserves to be obeyed. Positive laws are proposed precisely to limit the freedom of the subjects who are subjected to the law.

Being goal driven, the university's discourse of law-and-economics seeks predictability. Consequently, it defines "rationality" in terms of predictable ends-means reasoning and seeks to squelch spontaneity. Classic law-and-economics at least pays lip-service to freedom in that it claims to merely respect the aggregate pre-existing goals of its members. It is just that sometimes we need to use the law to help—i.e. force—people to act rationally

and choose the most appropriate means of achieving these ends. But note that insofar as the economist believes that the subject's goals are pre-existing and are incapable of being rationally chosen, there is no Kantian freedom in this system at all.

From a Lacanian perspective, the fear of freedom is perfectly understandable. Freedom is terrifying. It is the abyss of the real where there are no answers.

Infancy itself is a form of psychoanalysis in that the child learns how to integrate the facts of his life into the symbolic. Positive law is in the realm of the symbolic. By adopting positive law we try to integrate the facts of our ethical life into the symbolic order. We adopt positive law precisely in an attempt to relieve us from the impossible demands of ethical law—to free us *from* our freedom. The symbolic is only created by the repression of the real that is its limit. Positive law is structured around a founding repression of not merely content, generally, but ethical law, specifically.

Hegelian trauma

The essence of right and the appearance of wrong

If ethical law is the trauma of positive law, then it must appear within positive law as its symptom. What is law's symptom? Hegel anticipates this question in his *Philosophy of Right* when he states that right is essence and wrong is appearance:

> The principle of rightness, the universal will, receives its essential determinate character through the particular will, and so stands in relation to something inessential. This is the relation of essence to its appearance . . . In wrong however, appearance proceeds to become mere semblance or show. A semblance is a determinate existence inappropriate to the essence, namely an empty detachment and positing of the essence, as the power and authority over the semblance. The essence has negated that which negated it, and is thereby confirmed. Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid.[70]

It is easy to misinterpret this quote within the framework of classical liberalism. Essence is the deeper truth of appearance. It is "what is permanent and enduring in things."[71] Essence is what is left when one strips away the inessential. Appearance, in contrast, is fleeting and false. Wrong is likewise an error, a subjective, temporary mistake that is doomed to pass away. Putting these together, Hegel seems to be saying that right will be achieved when wrong passes away; by implication, one should hasten this process by clearing the underbrush of wrong in order to reveal the right that otherwise would be obscured. Even such an eminent Hegel scholar as R.C. Williams has read this passage in this way.[72]

Such a reading, however, would be inconsistent with the central Hegelian tenet that essence *is* appearance. We are now in a position to understand what he means. As always, Hegel begins his analysis with Kant's and brings it to a higher level. Most important for us here, in the *Philosophy of Right* Hegel generates an entire jurisprudence and political theory from moral philosophy. Hegel argues that Kant's single category of morality (or as the title of Hegel's book indicates, what Hegel calls "right") must be divided into three increasingly complex categories: abstract right, morality, and ethical life. It is this first, most primitive, category—abstract right—that explains the relationship between positive laws and what I have been calling the ethical law.

It is crucial to Hegelian jurisprudence that although law is necessary, all specific positive laws and claims to right are contingent. As such, positive laws exists, but ethical law insists. It is essential. If positive law is symbolic, ethical law is real. *Claims* to right are imaginary—*objets petit a.*

To say that law is necessary is not to evoke a natural right theory of law because Hegel does not adopt a natural theory of necessity. Hegel agrees with Kant that in nature necessity is the iron-clad law of cause and effect—if X happens then Y must follow. Hegel accepts Kant's understanding that the simplest understanding of personality is free will. But, since nature is not free, a human being can actualize his freedom only if he can free himself from nature's causal chains. Indeed, following Kant and looking forward to Lacan, the most basic concept of freedom and morality is precisely the capacity for uncaused action. Law is conceptualized as a tool man creates in order to help him achieve this. If any specific positive law were mandated then it could not serve this purpose because man would not be free. This means that, to Hegel, positive laws can only be "necessary" in a functional sense. That is, logic can only tell us that we must adopt *some* regime of positive laws if our freedom is to be actualized, but cannot tell us what specific law to adopt.

Hegel agrees with Lacan that symbolic cause can only be established retroactively through the narrative told by the subject. Hegel concludes that the rule of law helps to create the type of subject that can act as a free person. Consequently, if one wants to become a free person, one must, as a practical matter, adopt and follow a rule of law.

Hegel sets up the paradox of the Lacanian real and the symbolic *avant la lettre*. This should not surprise us because, being social and intersubjective, any regime of positive law is located in the symbolic. As such, it must be structured by a traumatic real kernel. This is the trauma of the freedom that will appear through the symptom of right. That is, right—the appearance of ethical law—is only created in order for mankind to actualize our freedom. But all positive laws are, by definition, constraints external to the subject. Positive law seeks either to cause or prevent the behavior of the subjects who are subjected to its reign or to establish rules or causation for our

actions. Positive law, therefore, expels the very freedom that lies at its heart. Freedom is, therefore, real. It is the repressed limit to positive law.

To return to Freud's metaphor, the symbolic is to the real like the pearl is to the grain of sand at its center. The oyster builds its pearl in a vain attempt to save itself from the pain the irritant grain of sand causes. Similarly, the subject builds a symbolic order of positive laws to protect itself from the pain of the real of freedom. In fact, just as the pearl ends up being a larger and more painful foreign object within the oyster, similarly, the symbolic—the positive law without morality—is extimate. It is the alien within; ethical law is the trauma of positive law and right is its symptom.

When I discussed Lacan and Kant, I said that they show how the fact that ethical law has no pre-existent content forces us to be free. Hegel takes this a step further. Logic tells us that we must create an ethical law as a tool for breaking the causal laws of nature in order to make the potential freedom that is our essence actual. He argues that the same logic also dictates that, even if ethical law is the content that positive law expels, there can be no necessary *pre-existent* content to ethical law. This is why Hart failed in his attempt to describe "morality." If a specific law were logically mandated, then it would not be a free creation—it would be merely positive law identified by a rule of recognition. It would be a fact, not an act (existing, not essential). Each subject must be free to write her own ethical law. Each subject must be true to her own unique desire. Kant says the just society must be a kingdom of ends in which each citizen is self-legislating.[73] But this freedom can be unbearably painful because *self*-legislation means that each of us is ethically responsible for her actions and, therefore, are justly condemned if we choose wrongly. Consequently, we enact positive laws in the symbolic, and policy justifications in the imaginary, precisely to relieve us of this burden.

The symptom of right

We are now in the position to see how ethical law makes its appearance in the symbolic realm of positive laws through its symptom, right. Hegel states that right is essence and wrong is appearance. This means that legality is based on a necessary internal trauma—the ethical law that it represses. Right is the symptom of this trauma that appears in the symbolic order as the righting of a wrong. That is, wrong exists, but right insists. Right is the symptom of positive law's trauma in the same sense as Woman who is the symptom of man's trauma. To repeat Lacan's realization in his seminar on the *Sinthome*—the other of the Other who does not exist is God, and that one of God's names is Woman.

When Hegel says that wrong is appearance, in context, he means that it is appearance as semblance—i.e. wrong treats that which is subjective, contingent, and temporary as though it were objective, necessary, and

permanent. Essence is the understanding that the only objective, necessary, and permanent truth is the fact that everything is subjective, contingent, and temporary. Essence is that which lasts, but the only thing that lasts is change.

Although the first section of the *Philosophy of Right* is devoted to a discussion of the logical origin and function of abstract right (i.e. the private law of personal property and contract), Hegel does not define right until after he defines wrong. This is necessarily so because right is real and only appears in opposition to wrong in the symbolic. Consequently, we can only understand right through wrong. Or, more radically, wrong is the pre-condition of right. It is only through wrong that right can appear. This is why Hart was doomed to failure when he tried to describe "morality." All he was able to do was to invoke conventional moralisms—a Hegelian wrong in the sense of semblance posing as essence.

The three types of wrongs

Hegel divides legal wrong into three degrees: crime, fraud, and civil wrong. Crime is the complete denial of law—when the criminal acts he negates the law.[74] Fraud is somewhat less obliterative because the fraudster recognizes law, but intentionally makes wrongful claims about it in order to deceive her victim[75]. Civil wrong is venial in that the wrongdoer respects the rule of law but is deluded as to its content or application.

I concentrate on civil wrong. Hegel's shocking proposition is that *all* unilateral claims to right are *in fact civil wrongs*! A claim to a right is precisely the fallacious masculine claim to have the phallus. It is a claim that the ethical law *exists* in the symbolic realm of positive laws. But the ethical law does not exist, it insists—it is essential. A claim to a right is, therefore, a semblance.

Civil wrong is the:

> negative judgment pure and simple where merely the particular law is violated, while law in general is so far acknowledged. Such a dispute is precisely paralleled by a negative judgment, like, "This flower is not red": by which we merely deny the particular colour of the flower, but not its colour in general.[76]

How is a civil wrong the same as the non-redness of the flower? This negative predicate is the form of a judgment which, in effect, denies that the predicate can be known completely. The negative judgment implies that there is a relation of subject to predicate, but that external reflection—positive law—must tell the subject what it is.[77]

Now Hegel makes clear that the negative judgment is in fact also a positive judgment. It names at least one predicate ("not red"). But this very naming

of the predicate is inadequate to the subject. It is therefore a wrong, in the sense that the positivization of the predicate is one-sided and incomplete. In short, the status of civil wrong as the negative judgment reinforces the thesis of this chapter—wrong always precedes right, and right is not positivizable. To positivize is to phenomenalize the law, and this is precisely *wrong*.

Civil wrong, Hegel says, is to be considered "right in itself."[78] "What is right in itself has a determinate ground, and the wrong which I hold to be reason I also defend on some ground or other."[79] In other words, a civil wrongdoer bases his claim of right on legal research—on some ground in the positive law of statutes or judicial precedents. Such a legal claim, however, is fixed and rigid—or, as Hegel says, finite.[80] As such, it is not "true" or "right." The true and the right are precisely the *disappearance* of such fixities. "It is in the nature of the finite and particular that it leaves room for contingencies; collisions must therefore occur."[81] Wrong in the sense of grounded claims to right are therefore logically built into the system of right. Without the legal research to produce fixed wrongs, there could be no right to fix the wrong.

A claim to right is a wrong because it is unilateral. It thereby violates the Hegelian understanding that right must be *inter*subjective—a right is only right insofar as it is recognized by other subjects—the Big Other itself. This is dictated by Hegel's re-writing of the Kantian ethical law as the categorical imperative—be a person and treat other persons as persons. This means, you must treat other persons as their own ends, and not as the means to your ends.

Hegel presents his discussion of civil wrong in the aftermath of contract, but there is a way in which property itself, which logically precedes contract, is a wrong. If so, then the very emergence of subjectivity in the first place is founded on wrong—retroactively made right by contract.

All claims to right are wrongs

Hegel is frequently misinterpreted as adopting a Lockean first-occupier theory of property rights. This misreading is based on the following passage in his discussion of possession:

> That a thing . . . belongs to the person who happens *to be the first* to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else.[82]

In context, however, it is clear that this passage is intended merely as a definition of "possession," not any assertion as to the *rightfulness* of any specific claim to possession. Possession *is* the claim of first-in-time, first-in-right—the claim of the party already in "possession" to exclude any second-in-time

party. As Hegel states, "The first is not the rightful owner because he is the first, but because he is a free will, for it is only the fact that another comes after him which makes him the first."[83] As any lawyer knows, a strict universal first-in-time, first-in-right regime is not, and could not be, the rule of any actual legal system. Even Locke had his "proviso": that first possession is rightful only if one leaves behind enough resources to provide for persons with no first possessory rights.[84]

Moreover, a consideration of Hegel's analysis of the role of property in the creation of personality should make it clear that Hegel could not adopt a first-occupier justification of property. For Hegel, a claim to possession is only the logically first element of property. It is the particular action of a single subjective will and therefore a wrong against all other such wills. Right only comes into being with contract. Consequently, at the simplest level, claims of a first possessor cannot be rightful since they arrive prior to the creation of right. Hegel's point is that *all* claims to possession, even after the development of a sophisticated regime of positive law, are wrongful in the sense that the essence of right can only be actualized indirectly in contrast to the semblance of wrong. This means that wrong precedes right.

Hegel expressly addresses the first-occupier theory of property in his discussion of the necessary presence of civil wrong in the regime of right. Prior to contract, there can only be a collision of claims.[85] Different persons may claim "possession" of the same thing, but they have no *logical* justification for imposing their particular will against each other. Insofar as any claimant successfully excludes others from a contested object, this is merely a result of brute force. All such claims to possession are, therefore, merely appearance as semblance. It is only when persons mutually agree to recognize each other's respective claims that particular wills are joined together as a common will and become objective and essential. As such, it is only at this moment that claims to possession can for the first time be seen as rightful, and legal (i.e. property):

> For the parties involved, the recognition of right is bound up with their particular opposing interests and points of view. In opposition to this *semblance,* yet at the same time *within the semblance itself* . . . right *in itself* emerges as something represented and required. But it appears at first only as an *obligation*, because the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view.[86]

One can see at this early stage of Hegel's discussion, that wrong (appearance) is not an error or illusion that will disappear when right (essence) is revealed,

but that the former is a necessary building block of the latter. Prior to right each person's particular claim to possession was mere appearance because it had no purchase against any other person.

In the above account, contract is the foundation of property itself. Until contract, the free self's claim to property was criminal because it denied all right to any other free self. Retroactively, property became legitimate when it was bestowed on the free self by the other.[87] What initially began as wrong retroactively became legal possession of property.[88]

The practicing lawyer, and lay person for that matter, might be tempted to argue that whether or not the foregoing account is a convincing justification for the modern capitalist economy from the starting place of the hypothetical state of nature, it does not describe the actual practice of property and contract. As an empirical matter, most contract and property claims are clear from the start (and therefore right) and only a very tiny proportion are initially disputed and then determined in a court of law.[89] Indeed, no commercial society could function otherwise. This argument misses what Hegel means by the structural logic of the concepts of right and wrong.

Hegel expresses the dependency of right upon civil wrong in another way. As we have seen, contract establishes right in that it is the formation of a general will that is more objective than the particular will of the two contracting parties. But this common will can only be created through the fusion of two or more particular wills each of which are contingent, particular, and subjective—a semblance and, therefore, wrong. The right of contract can only be understood as the resolution of the conflict between two wrongs:

> Right in itself, the universal will, is essentially determined by the particular will, and thus stands in relation . . . to something inessential. This is the relationship . . . of the essence to its appearance . . . appearance is the stage of contingency, or essence in relation . . . to the inessential. But in the case of wrong, appearance goes on to become a semblance. A semblance is existence inappropriate to the essence . . . . Semblance is therefore the untruth which disappears because it seeks to exist for itself, and in this disappearance, essence has shown itself as essence, that is, as the power over semblance . . . . Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid . . . . Whereas right previously had only an immediate being, it now becomes *actual* as it returns out of its negation; for actuality is that which is effective and sustains itself in its otherness, whereas the immediate still remains liable to negation.[90]

If wrong is semblance, then the actualization of right in contract is the negation of that negation—a sublation. That is, although wrong is conventionally thought of simply as the negation of right, in fact, right only exists

in the negation of wrong—a negation of a negation. In sublation, that which is negated is not destroyed but is preserved.[91] Consequently, even actualized right must preserve some element of wrong—the seed of its own corruption. Contract is the formation of a common will but this common will is itself necessarily contingent. That is, the logic of personality demands that individuals seek to enter into contract in order to gain the recognition that will make them into subjects. As an empirical matter, however, the two contracting parties are not conscious of this. Each party experiences himself only as seeking to impose his particular will on the world. A common will is created if, by coincidence, the respective particular wills of two or more parties happen to overlap:

> For the parties involved, the recognition of right is bound up with their particular opposing interests and points of view. In opposition to this *semblance*, yet at the same time *within the semblance itself* . . . , with *in itself* emerges as something represented . . . and required. But it appears at first only as an *obligation*, because the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view.[92]

That is, when I go to the grocery store, I don't consciously say to myself "In order to achieve and maintain my self-consciousness over time, I shall seek recognition from the grocer whom I shall recognize as an equal free self-consciousness." Rather, I think something like "I want milk." As a result, I rarely give much thought to the identity of the individual grocer and will probably choose what store to go to on other particular and contingent grounds such as quality, service, location, or price. The grocer's conscious thoughts are no doubt equally as self-involved—"I want money."[93] If it just so happens I walk into a store that has the type of milk I want at a price that I feel is appropriate, the grocer and I will join in a common will and I will buy the milk. But this commonality—this universality, necessity, and objectivity—is itself contingent and fleeting.[94]

Wrong as the condition precedent of right

But Hegel is even more radical than this. From a Hegelian perspective, imperfection is a necessary aspect of perfection, itself the condition of human freedom. Moreover, wrong is necessary for right not merely because right can only be actualized as the righting of a wrong. It is also the case that every righting of a wrong itself necessarily must include a "wrongful" moment in order for right to be effective.

Hegel's dilemma reappears in the ethics of psychoanalysis. One must be true to one's desire but, because our desire is the desire of the Other, we can never know in advance what the desire is to which we must be true.[95] Similarly, to Hegel, logic can only show us that the symbolic order of social relations requires ethical law. It cannot tell us what specific positive laws to enact. Remember, Hegel thinks one can become a subject only through recognition as such by a person she recognizes as a subject. A subject, to Hegel, is a person who is capable of following the rule of right. Consequently, subjectivity requires that we establish and respect a regime of reciprocal rights, but logic cannot tell us the specific content this regime. This means that no unilateral claim to an entitlement under the law can have any true ethical status—it is claimed to be what it is not. We need (ethical) law, but can only achieve (positive) laws.

According to Hegel, in order to be recognized as a subject by another subject, one must first recognize other persons as subjects. This requires us to grant rights *to others*, rather than claiming rights for ourselves. The problem is that every other person in society is in the same situation—no one standing alone can know what rights are since they must be intersubjective. To Hegel, the right of the subject is the right of the other. This means that the ethics of law parallels the ethics of psychoanalysis.

Ethics demands that the subject be true to her desire by acting. How can the legal subject be true to the opaque right of the Other? How can right appear in the legal regime? The answer is that right appears when the hysterical subject challenges the S_1 of the positive law that has wrongfully refused to confront the moral implications of its own content—i.e when she asks the hysterical question. Because the Other cannot satisfactorily reply, the subject must wager an answer to her own question and risk being wrong. If the Other agrees by recognizing the subject's interpretation of right, then the opacity of the desires of the subject and the other miraculously turns transparent when they overlap in consensus.

In other words, the legal subject can never unilaterally claim a right, only achieve wrong. Right only comes into existence through the Other. This is why Hegel insists that right is always external to the subject. Or, to put it in Lacanian terminology, it is *extimate*. This is why I insist that right is not a fact—it does not exist. Wrong is a semblance—a mistaken assertion that right exists as a fact. Right only appears retroactively in the *act* of righting such a wrong. And as soon as it appears, it immediately disappears.

The sexual impasse and the fantasy of communication

The master's and university's discourses are masculine while the analyst's and hysteric's discourses are feminine. The masculine is the subject who is totally identified with the symbolic order of law, and the feminine is the

subject who is not wholly so subject—who is to some extent excluded or alienated from the symbolic order.

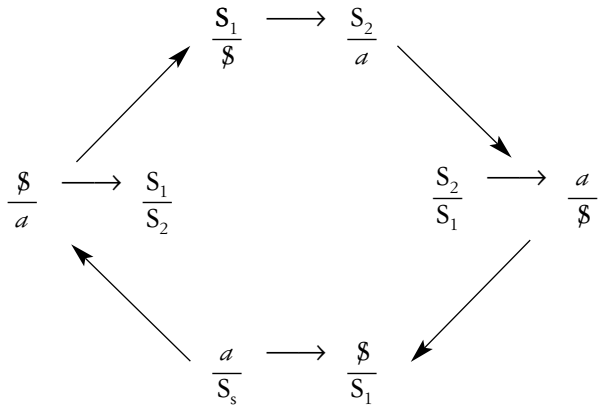
"[T]here are no sexual relations."[96] Sexuality is an impossibility, a fundamental impasse that cannot be bridged in the symbolic order. The two sexes are not complements, like yin and yang, that can fit together to form a perfect whole.[97] When combined, the sexes result not in a single whole, but a melange of fulsome overlaps and obscene gaps. This sounds depressing, but it has its positive side. If two people could really satisfy each other and join as one, they would lose their individuality and subjectivity. The individuation that remains despite our desire to merge allows us occasionally to achieve something much more valuable than any object of desire—love. I present Lacan's analysis as to why this is the case extensively elsewhere and it is not the subject of this book.[98] Here I wish to show how this idea is captured in the idea of the four discourses and is vividly illustrated in the quadripodes.

The masculine and the feminine seek to have a relationship but always fail. There is no sexual rapport. Discourses are an attempt to communicate, but direct communication between certain discourses is impossible. Hart, the positivist speaking the master's discourse, claims to want morality to critique law, but was unable to explain how it could do so. Lacan's quadripode illustrates that it is impossible for morality to do so within the master's discourse for positivism—morality (ethical law) is expelled from the discourse and produces an *objet petit a.*

The hysterical critic of law and economics wants the legal economist to listen to her and reply to her. But it is not merely that he fails to do either as a practical matter, it is impossible for him to do either as a theoretical matter so long as he remains within his own discourse. The critic, speaking the hysteric's discourse, does not address the legal economist in his public persona as an expert (S_2). Rather she addresses the truth hidden below this pretense—power (S_1). The legal economist, speaking the university discourse, does not address the subjects subjected to law, but rather what he sees as the collective goals of society and the law. The hysteric cries, "Look what your law is doing to me!" The university replies, "The law has a purpose." The university might be "correct" in his justification of the law in that societies do necessarily have collective purposes, positive laws are adopted instrumentally to achieve these purposes by affecting the behavior—thereby restricting the freedom—of those subjected to the law, and this might conflict with the subjective desires of any specific subject. Nevertheless, the university's reply is not an answer to the hysteric's question arising out of the truth of her pain. It is equivalent to Ring Lardner's immortal conversation ender, "Shut up," he explained.[99] It does not help her integrate within the symbolic order of law but further alienates her.

To hear the call of the hysteric, one must step out of the university discourse and back into the master's discourse to which the hysteric discourse leads.

To communicate with the hysteric, one must step out of the university's discourse and forward into the analyst's discourse. This can be seen if we graph the relationships of the discourses to each other:



These two discourses are opposed to each other, in the way the two sexes are. The masculine and feminine are two sides of the same coin. Although the obverse and reverse only exist relative to each other, the same coin cannot be both heads and tails at the same time.[100] Communication between them must be mediated through the other two discourses. The idea that there can be a direct relationship between the two discourses is a fantasy in the technical sense of the term.

Lacan's theory is one of negativity and gaps. The subject is barred, split, castrated. As a consequence, the subject always desires. The *objet petit a* as object cause of desire is by definition a lost, excluded object that stands in for the radical negativity of the subject's soul. If it were not excluded, if the subject ever obtained his true desire, he would cease to be castrated, and lose his subjectivity. Consequently, the relationship between the barred subject and the *objet petit a* is, necessarily, an impossibility, a non-relationship. There can be no connection between the two in the symbolic order. The barred subject, however, finds this gap between him and the object of his desire intolerable. He, therefore, imagines that he can bridge this gap and attain the object. This is "fantasy"—imagining that one obtains and has a relationship with the object cause of one's desire.

Fantasy is expressed by the formula: $ <> *a*.[101] In fantasy the barred subject has an imaginary relationship with the cause of his desire. Lacan's symbol of the lozenge "designates the following relations: 'envelopment-development-conjunction-disjunction', alienation (∨) and separation (∧), greater than (>), less than (<), and so on."[102] Simply put, "In the basic structure of fantasy, . . . the lozenge between the subject and the object represents the cut, the impossibility of suture or encounter between the two."[103]

Lacan states that the master's discourse is the one discourse that precludes fantasy.[104] This is illustrated in the master's quadripode. The two elements of the formula of fantasy appear in the lower register: on the lower left is the barred subject, on the lower right is the *objet petit a*. There is no arrow between them, indicating a fundamental non-relation between the two:

$$\frac{S_1}{\$} \longrightarrow \frac{S_2}{a}$$

This is because when the master speaks, he does so from a position of ideal, confidence, and self-identity: the law is law, and I am what I say I am. But this does not mean that fantasy has no role in the master's discourse. Fantasy is merely repressed. It remains below the bar, and as such is the fundamental support of the discourse. The master claims a self-identity and integrity that cannot exist—fantasy is the truth and the product of any such discourse that claims to be without gaps:[105]

> This formula, as defining the master's discourse, has the interest of showing that it is the only one that makes impossible this articulation that we have pointed out elsewhere as fantasy, insofar as it is the relationship *a* has with the division of the subject—$\$ \diamond a$.[106]

That is, fantasy cannot be articulated within the master's discourse in the sense that neither of its elements ($ and *a*) are acknowledged above the bar that separates the express and the implicit aspects of this discourse. Nevertheless, fantasy is created by the master's discourse in that it comprises the (non)relationship between the unacknowledged truth and product of the discourse hidden beneath the bar of repression. Consequently, the four discourses begin with the creation of fantasy.

Fantasy reappears when the four discourses are put together. This is the relationship between the hysteric's and university's discourses. The four discourses form one giant lozenge. The term at the far left corner is the barred subject. The term at the far right corner is the *objet petit a*. The conceit that the hysteric can have a direct relationship to the university is a fantasy.

How then can communication come about? Lacan suggested that fantasy could only be understood and traversed through analysis. Lacan's formulas make clear that analysis is the reverse of fantasy. If in fantasy the barred subject imagines he has a relationship to the object of desire ($\$ \diamond a$), in the analyst's discourse the barred subject is addressed by the analyst from the position of the subject's own desire ($a \rightarrow \$$). Analysis reverses the production of fantasy because the discourse of the analyst is the other side of the master's discourse.

Similarly, the hysteric's discourse, as the other side of the university's discourse, reverses the latter's production. The university's discourse uses

knowledge to manipulate and split the subject subjected by law through her desire. The hysteric's discourse, however, liberates the barred subject who confronts the raw power that is the expert's truth in order to produce her own knowledge.

Notes

1 Jeanne L. Schroeder, *Beautiful Dreamer* (Book Review of NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM), 77 U. COLO. L. REV. 803 (2006).

2 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XVII: THE OTHER SIDE OF PSYCHOANALYSIS 33 (Jacques-Alain Miller ed., Russell Grigg trans. 2007) [hereinafter, LACAN, SEMINAR XVII].

3 BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 133 (1995) [hereinafter, FINK, LACANIAN SUBJECT].

4 *Id.* at 83–9.

5 In Bracher's words:

> In his schemata of the four discourses, Lacan demonstrates how differently structured discourses mobilize, order, repress, and produce four key psychological factors—knowledge/belief, values/ideals, self-division/alienation, and jouissance/enjoyment—in ways that produce the four fundamental social effects of educating/indoctrinating, governing/brain-washing, desiring/protesting, and analyzing/revolutionizing.

Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 109 (Mark Bracher *et al*. eds 1994) [hereinafter, THEORY OF DISCOURSE].

6 Slavoj Žižek, *Four Discourses, Four Subjects* [hereinafter, Žižek, *Four Discourses*], *in* SIC 2: COGITO AND THE UNCONSCIOUS 77, 81 (Slavoj Žižek ed. 1998).

7 Indeed, my analysis that effective attorneys are hysterics may explain why law has traditionally been a lugubrious profession. One commentator writes: "The study of law has always traveled under the sign of Saturn, and the sages both of common and civil law have seldom paused to doubt the depressing character of legal study." PETER GOODRICH, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY AND LAW 1 (1995). Goodrich's book proposes, among other things, a psychoanalytical account of the melancholy of law and lawyers. Indeed, one empirical study indicates that unlike all other professions in which optimism is an advantage in practice, the most successful law students tend to be the most pessimistic. Jason M. Satterfield *et al*., *Law School Performance Predicted by Explanatory Style,* 15 BEHAV. SCI. AND L. 95, 98 (1997). See also Paul R. Verkuil *et al*., *Countering Lawyer Unhappiness: Pessimism Decision Latitude, and the Zero-Sum Dilemma*, HTTP: <http://papers.ssrn.com/ paper?abstract id=241942> (accessed 24 October 2007).

8 The word derives from the Greek *hyster* (womb) because medieval doctors speculated that hysteria was caused by a malfunctioning uterus (which had a nasty habit of becoming literally unmoored and wandering throughout women's bodies to ill effect). See Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, IOWA L. REV. 1135, 1185 n. 182 (1990).

9 See LACAN, SEMINAR XVII, *supra* note 2, at 33.

10 See Jacques Lacan, the Seminar of Jacques Lacan Book XX: Encore, On Feminine Sexuality, the Limits of Love and Knowledge 1972–3 36 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998) [hereinafter, LACAN, SEMINAR XX].

11 Jeanne Lorraine Schroeder, The Triumph of Venus: The Erotics of the Market 305–6 (2004) [hereinafter, Schroeder, Venus]. "Man, the male, the virile, such as we know him, is a creation of discourse—at least none of what is analyzable in him can be defined in any other way." Lacan, Seminar XVII, *supra* note 2, at 62.

12 Jamie Murray, An Erotics of Law: Lacanian Psychoanalysis and Legal Theory 144–5 (1999) (unpublished Ph.D. thesis, Birkbeck College, University of London).

13 Lacan, Seminar XVII, *supra* note 2, at 33.

14 Previous translations rendered *pas toute* as "not-all." See, e.g. Jacques Lacan and the École Freudienne, Feminine Sexuality 144 (Juliet Mitchell and Jacqueline Rose eds, Jacqueline Rose trans. 1985) (hereinafter, Lacan, Feminine Sexuality]. Bruce Fink's "not whole" better reflects the idea that the feminine is the possibility of partial escape subjection to the symbolic. Lacan, Seminar XX, *supra* note 10, at 72–4. Lacan expands on the feminine acceptance of the state of being split:

> When I write [the matheme of the feminine], a never-before-seen function in which the negation is placed on the quantifier, which should be read "not whole," it means that when any speaking being whatsoever situates itself under the banner "women," it is on the basis of the following—that is grounds itself as being not-whole in situating itself in the phallic function.

Lacan, Seminar XX, at 72. And again:

> The fact remains that if she is excluded by the nature of things, it is precisely in the following respect: being not-whole, she has a supplementary jouissance compared to what the phallic function designates by way of jouissance.

Id. at 73. Consequently, the formula of the feminine is: for the class of X, not all Xs are submitted to the phallic function. Lacan, Seminar XX, at 73.

15 Fink, Subject, *supra* note 3, at 116.

16 As Bracher says:

> The hysterical structure is in force whenever a discourse is dominated by the speaker's symptom—that is, his or her unique mode of experiencing jouissance, a uniqueness that is manifested . . . as a failure of the subject, S, to coincide with or be satisfied by the master signifiers offered by society and embraced as the subject's ideals.

Bracher, *supra* note 5, at 122.

17 As Žižek rhetorically asks, "Does this not mean that subjectivity is in its most basic dimension, in an unheard-of way 'feminine?'" Slavoj Žižek, The Abyss of Freedom/Ages of the World 18 (1997) [hereinafter, Žižek, The Abyss of Freedom]. See also, Jeanne Lorraine Schroeder, The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine 326–9 (1998) [hereinafter, Schroeder, Vestal] and Žižek, *Four Discourses*, *supra* note 6, at 81.

18 As Hegel famously said, "nothing great has been accomplished in the world without passion." G.W.F. Hegel, Lectures on the Philosophy of World History 73 (H.B. Nisbet trans. 1998).

19 As Lacan elaborates:

> To put it in a nutshell, nowhere does it appear more clearly that man's desire finds its meaning in the desire of the other, not so much because the other holds the key to the object desired, as because the first object of desire is to be recognized by the other.

Jacques Lacan, Speech and Language in Psychoanalysis 31 (Anthony Wilden trans. 1981). As Žižek explains:

> In other words, when Lacan claims that there is no desire without an object-cause, this does not amount to the banality according to which every desire is attached to its objective correlative: the "lost object" which sets the subject's desire in motion is ultimately the subject herself, and the lack in question concerns her uncertainty as to her status for the Other's desire. In this precise sense, desire is always desire of the Other: the subject's desire is the desire to ascertain her status as object of the other's desire.

SLAVOJ ŽIŽEK, THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS 164 (1996) [hereinafter, ŽIŽEK, THE INDIVISIBLE REMAINDER].

20 *Id.*
21 *Id.* at 167.
22 See Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference,* in LACAN AND THE SUBJECT OF LANGUAGE 49, 62 (Ellie Ragland-Sullivan and Mark Bracher eds 1991).
23 SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 75 (1989).
24 *Id.* at 33–4; SCHROEDER, VENUS, *supra* note 11, at 42–64.
25 LACAN, SEMINAR XVII, *supra* note 2, at 35. I argue extensively elsewhere that if one reads Lacan with Hegel, one can see that private law is hysterically erotic. See e.g. SCHROEDER, VENUS, *supra* note 11, at 48–9.
26 G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 68–132 (Allen W. Wood ed. and H.B. Nisbet trans. 1991) [hereinafter, HEGEL, PHILOSOPHY OF RIGHT].
27 "What has a body and does not exist? Answer—the big Other." LACAN, SEMINAR XVII, *supra* note 2, at 66.
28 LACAN SEMINAR XVII, *supra* note 2, at 107.
29 See ŽIŽEK, THE ABYSS OF FREEDOM, *supra* note 17, at 81–2.
30 *Id* at 79. Lacan posits that the subject addresses the Big Other with this question at least as early as his 1960 paper, *The Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious*, JACQUES LACAN, ÉCRITS: A SELECTION 292, 312 (Alan Sheridan trans. 1977).
31 Žižek, *Four Discourses*, *supra* note 6, at 79. Žižek's allusion is incorrect. It is Desdemona, not Juliet, who asks, "Am I that name, Iago?" WILLIAM SHAKESPEARE, OTHELLO: MOOR OF VENICE, *Act V, Scene 2.*
32 LACAN, SEMINAR XVII, *supra* note 2, at 94.
33 As Žižek says, "psychosis [is] the maintenance of an external distance from the symbolic order." SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 101 (1991) [hereinafter, ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO]. Elsewhere he says, "this level of 'forced choice' [i.e. the submission to the symbolic order] is precisely what the psychotic position *lacks:* the psychotic subject acts as if he has a truly free choice 'all the way along.'" SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTER OF POLITICAL ONTOLOGY 19 (1999). See also, SCHROEDER, VESTAL, *supra* note 17, at 88–9; ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 20 (1992).
34 SCHROEDER, VENUS, *supra* note 11, at 47.
35 See Bracher, *supra* note 5, at 123.
36 *Id.*
37 LACAN, SEMINAR XVII, *supra* note 2, at 207.
38 I explicate this argument in more detail elsewhere. SCHROEDER, VENUS, *supra* note 11, at 47, 53–4, 225–6.
39 *Id.* at 42–56.
40 Elsewhere, I have expressed this as subjectivity is intersubjectivity mediated by objectivity. See e.g. SCHROEDER, VESTAL, *supra* note 17, at 9–11.

41 I first explored these ideas with David Gray Carlson in *Does God Exist?: Hegel and Things*, 4 (*a):* THE JOURNAL OF THE UNCONSCIOUS 1 (2004) [hereinafter Schroder and Carlson, *Does God Exist?*].

42 Jacques Lacan, *God and the Jouissance of The Woman* in LACAN, FEMININE SEXUALITY, *supra* note 14, at 137, 144.

43 As Žižek argues, it is the death of the Enlightenment concept of an affirmative subject that gives birth to the speculative concept of a radically negative subject. ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 134 (1992).

44 SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 188 (1994) (footnote omitted).

45 Timothy Noah, *Bill Clinton and the Meaning of "is"*, HTTP: <http://www.slate.msn.com/id/1000162 (accessed 23 October 2007).

46 *Things* are finite. On their own logic, they are doomed to pass away. For this very reason, God is no mere *Thing*. Rather, God is *Notion* or *Concept* (*Begriff*). According to Hegel:

> It is the *definition of finite things* that in them the Notion is different from being, that Notion and reality, soul and body, are separable and hence that they are perishable and mortal; the abstract definition of God, on the other hand, is precisely that his Notion and his being are *unseparated* and *inseparable*.

G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 89–90 (A.V. Miller trans. 1969) [hereinafter, HEGEL, LOGIC]. See also Schroeder and Carlson, *Does God Exist?*, *supra* note 41.

47 Schroeder and Carlson, *Does God Exist?*, *supra* note 41, at 3.

48 See DAVID GRAY CARLSON, A COMMENTARY ON HEGEL'S LOGIC 48 (2006) *and* Jeanne L. Schroeder and David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law,* 24 CARDOZO L. REV. 2481, 2482 (2003) [hereinafter, Schroeder and Carlson, *Appearance of Right*].

49 *Id.* at 2483.

50 SLAVOJ ŽIŽEK, THE METASTASIS OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY 143 (1994). See also ŽIŽEK, INDIVISIBLE REMAINDER, *supra* note 19, at 161–2 and JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 111–12 (J. Miller, ed. A. Sheridan trans. 1981).

51 As Žižek says, this means that woman "is all surface lacking any depth, *and* the unfathomable abyss." ŽIŽEK, INDIVISIBLE REMAINDER, *supra* note 19, at 159. This also explains the meaning of Lacan's assertion that the phallus functions only so long as it is veiled. In Žižek's words:

> The phallus can perform its function only as veiled—the moment it is unveiled, it is no longer the phallus; what the mask of femininity conceals, therefore, is not directly the phallus, but, rather, the fact that there is nothing behind the mask.

Id. at 162. The veil is the feminine masquerade that hides the phallus's non-existence.

52 G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT para. 165 (A.V. Miller trans. 1977).

53 ALAIN BADIOU, ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL 20–1(Peter Hallward trans. 2002) [hereinafter, BADIOU, ETHICS].

54 EMMANUEL LEVINAS, TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY 104–204 (Alphonoso Lingis trans.1969).

55 Jacques Lacan, *Seminar of 21 January 1975 in* FEMININE SEXUALITY, *supra* note 14, 162–71, at 168.

56 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959–60 319 (Jacques-Alain Miller ed. Dennis Porter trans. 1986).

57 Ernest Jones, 2 Sigmund Freud: Life and Work 468 (1955).

58 Oliver Feltham, *Introduction*, Alain Badiou, Infinite thought 1 (Oliver Feltham and Justin Clemens, trans. and eds 2003) [hereinafter, Badiou, Infinite Thought].

59 This is why Kant identified weakness as the first form of radical evil.

60 On the basis of the undecidability of an event's belonging to a situation a *wager* has to be made. This is why a truth begins with an *axiom of truth*. It belongs with a groundless decision—the decision to *say* that the event has taken place:

> The undecidability of the event induces the appearance of a *subject* of the event. Such a subject is constituted by an utterance in the form of a wager. This utterance is as follows: "This event has taken place, it is something which I can neither evaluate, nor demonstrate, but to which I shall be faithful.

Alain Badiou, *Philosophy and Truth*, in Badiou, Infinite Thought, *supra* note 58, at 8.

61 Simon Critchley argues that Lacan and Levinas have much in common. Simon Critchley, *Das Ding: Lacan and Levinas* in Ethics-Politics-Subjectivity 198 (1999).

Despite the elegance of this essay, I believe that the similarities flow primarily from the fact that they were both working within a particular intellectual tradition in a single time and country but that there are profound disagreements between their theories. My disagreements with Critchley are not directly related to my argument.

62 Peter Hallward describes Badiou's analysis of Levinas as being:

> attuned to the irreducible alterity of the Other: ethics here is expressed in an equally abstract respect for mainly cultural "difference" . . . . *{T}his* alterity, Badiou suggests can [not] be rigorously founded without tacit reference to theology. Either way, the ethical ideology conceives of "man" as a fundamentally passive, fragile and *mortal* entity—as a potential victim to be protected (most often, as a "marginalized", "excluded" or "Third World" victim, to be protected by a dutiful, efficient, and invariably "Western" benefactor/exploiter).

Peter Hallward, *Translator's Introduction*, *in* Badiou, Ethics, *supra* note 53, at vii, xiii (Peter Hallward trans. 2002). In Badiou's words

> We have seen that ethics subordinates the identification of this subject to the universal recognition of the evil that is done to him. Ethics thus defines *man as a victim* . . . .
>
> In the first place, because the status of victim, of suffering beast, of emaciated, dying body, equates man with this animal substructure, it reduces him to the level of a living organism pure and simple . . . .

Badiou, Ethics, at 10–11.

63 "Infinite alterity is quite simply *what there is.*" *Id.* at 25.

64 Philosophically, if the other doesn't matter it is indeed because the difficulty lies on the side of the Same. The Same, in effect, is not what is (i.e. the infinite multiplicity of differences) but what *comes to be*. I have already named that in regard to which only the advent of the Same occurs: it is a *truth*. Only a truth is, as such, *indifferent to differences.* This is something we have always known, even if sophists of every age have always attempted to obscure its certainty: a truth is *the same for all.*

Id. at 27. "It is very important to note that 'equality' does not refer to anything objective." Alain Badiou, *Philosophy and Politics*, in Badiou, Infinite Thought, *supra* note 58, at 71 "For equality is not the objective for action, it is an axiom of action." *Id.* at 72 "Equality is not something to be researched or verified but a principle to be upheld." Peter Hallward, Badiou: A Subject to Truth (2003). In Žižek's words:

> Against the politically correct identity politics that focuses on the right to difference, Badiou emphatically insists that the justification of any political demand by the substantial features that define the contingent particularity of a group . . . violates the fundamental democratic axiom of principled equality, that is, the right to be defended today is not the "right to difference," but, on the contrary and more than ever, the right to Sameness.

Slavoj Žižek, *Forward: Hallward's Fidelity to the Badiou Event*, in HALLWARD, *supra* note 64, at ix, xi.

65 BADIOU, ETHICS, *supra* note 53, at 10–14.

66 IMMANUEL KANT, THE METAPHYSICS OF MORALS 196 (Mary Gregor trans. and ed. 1996).

67 ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 33, at 229.

68 Jacques Lacan, *Le Sinthome: Seminaire Du 19 Novembre 1975*, 6 ORNICAR? 3, 5 (1976), Jacques Lacan, *Le Sinthome: Seminaire Du 16 Mars 1976,* 9 ORNICAR? 32, 39 (1977).

69 Žižek characterizes Kant's position as:

> the subject experiences moral Law in himself as an unbearable traumatic pressure that humiliates his self-esteem and self-love—so there must be something in the very nature of the Self that resists the moral Law, that is, that gives preference to the egotistical, "pathological" leanings over following the moral Law.

Slavoj Žižek, *A Hair of the Dog That Bit You,* in THEORY OF DISCOURSE, *supra* note 5, at 46, 48.

70 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 26, at 67.

71 ROBERT C. WILLIAMS, HEGEL'S ETHICS OF RECOGNITION 156 (1997).

72 *Id.*

73 IMMANUEL KANT, THE GROUNDWORK OF THE METAPHYSICS OF MORALS 41 (Mary Gregor trans. 1997).

74 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 26, at 122–3.

75 *Id.* at 118–19. Just as "hypocrisy is the homage vice pays to virtue" (FRANÇOIS DE LA ROCHEFOUCAULD, COLLECTED MAXIMS AND OTHER REFLECTIONS 63 (E.H. Blackmore *et al*. trans. 2002)), "[b]y cultivating the semblance of right, the fraudster pays homage to it." Schroeder and Carlson, *Appearance of Right*, *supra* note 48, at 2497.

76 G.W.F. HEGEL, HEGEL'S LOGIC 238 (William Wallace trans. 1975).

77 CARLSON, *supra* note 48, at 469–70.

78 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 26, at 113.

79 *Id*. at 117.

80 *Id*. at 118.

81 *Id.*

82 *Id.* at 81.

83 *Id.*

84 According to Locke, there is a natural right to acquire property "at least where there is enough, and as good left in common for others." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Laslett ed. 2d edn 1967).

85 HEGEL, PHILOSOPHY OF RIGHT, *supra* note 26, at 117.

86 *Id.*

87 For this reason, Hegel remarks, "In contract, right *in itself* is present as something *posited* . . ." *Id.* at 115. That is to say, absent contract, right is *not* posited. Right only appears with establishment of the contract. *Id*. Prior to the contract, everything is wrong.

88 Alan Brudner, The Unity of the Common Law: Essays in Hegelian Jurisprudence 23 (1995) Hegel emphasizes that, in contract, the properties deem the commodities actually swapped to have equal exchange value. To Hegel, in exchange one *retains* value but gives up property. Hegel, Philosophy of Right, *supra* note 26, at 107.

89 This is H.L.A. Hart's pseudo-empirical claim that law is determinate "most" of the time. H.L.A. Hart, The Concept of Law 148 (1961).

90 Hegel, Philosophy of Right, *supra* note 26, at 115–16.

91 Hegel, Logic, *supra* note 46, at 834.

92 Hegel, Philosophy of Right, *supra* note 26, at 117.

93 Indeed, as the grocer is more likely than not a corporate entity that is not capable of conscious thoughts. The employees of the grocer with whom I come in contact are probably thinking that they want to earn their pay check and, perhaps, do a good job.

94 "It is in the nature of the finite and particular that it leaves room for contingencies; collision must therefore occur, for we are here at the level of the finite." Hegel, Philosophy of Right, *supra* note 26, at 117–18.

95 As Alenka Zupančič, says:

> Only if we admit that the desire of the Other does not present itself in the form of an answer or a commandment ("I want this or that!"), but—as Lacan points out—in the form of a question or an enigma, comparable to the one that the Sphinx posed to Oedipus. The subject will reply and, replying in one way or another, he will write the destiny of his desire. The statement "desire is the desire of the Other" postulates the Other as the *site* where the question of desire originally emerges. The point is not that the desire of the Other exists somewhere else, with the subject knowing what it is and making it the model of his own desire. Exactly the same thing can be said about the Kantian moral law. The subject does not know what the law *wants*. It is at this point that we can situate a convergence or an encounter between Kant and Lacan. "*The law is a law of the unknown*" is the fundamental proposition to an ethics worthy of the name.

Alenka Zupančič, Ethics of the Real: Kant, Lacan 174 (2000).

96 Lacan, Seminar XX, *supra* note 10, at 9; Ragland-Sullivan, supra note 22, at 67; see also Elizabeth Grosz, Jacques Lacan: A Feminist Introduction 137 (1990).

97 As so clearly explained by Renata Salecl:

> Lacan thus moves as far as possible from the notion of sexual difference as the relationship of two opposite poles which complement each other, together forming the whole of "Man." "Masculine" and "feminine" are not the two species of the genus Man but rather the two modes of the subject's failure to achieve the full identity of Man. "Man" and "Woman" together do not form a whole, since each of them is already in itself a failed whole.

Renata Selacl, The Spoils of Freedom: Psychoanalysis and Feminism After the Fall of Socialism 116 (1994).

98 Schroeder, Venus, *supra* note 11, at 16, 47–50, 54–6, 225–6.

99 Ring Lardner, The Young Immigrants (1920).

100 Schroeder, Venus, *supra* note 11, at 243, 251.

101 Fink, Subject, *supra* note 3, at 174.

102 *Id*. (citation omitted).

103 Bracher, *Introduction to* Theory of Discourse, *supra* note 5, at 1, 9.

104 Žižek, *Four Discourses*, *supra* note 6, at 76. Lacan at one point goes so far as to impose a barrier (represented as ▲) in the lower register of the master's discourse, separating the $ and the *a*. LACAN, SEMINAR XVII, *supra* note 2, at 108.

105 Bracher explains that "[t]he speaker, or master, is oblivious to the cause of his own desire (*a*), and has even repressed his own self-division, $, as experienced in such subjective states as shame, anxiety, meaninglessness, and unsatisfied desire." Bracher, *supra* note 5, at 121.

106 LACAN, SEMINAR XX, *supra* note 10, at 108.

Bibliography

Allison, Henry E, *Kant's Theory of Freedom* (1990).

Arendt, Hannah, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994).

Avineri, Shlomo, *Hegel's Theory of the Modern State* (1984).

Badiou, Alain, *Ethics: An Essay on the Understanding of Evil* (Peter Hallward trans. 2002).

Badiou, Alain, *Infinite Thought: Truth and the Return of Philosophy* (Oliver Feltham and Justin Clemens, trans. and eds 2003).

Baum, L Frank, The Annotated Wizard of Oz: The Wonderful Wizard of Oz (Michael Patrick Hearn ed. 2000).

Becker, Gary S, The Economic Approach to Human Behavior (1976).

Becker, Gary S, Accounting For Tastes (1996).

Belau, Linda, *Trauma and the Material Signifier,* 11 Postmodern Culture: An Electronic Journal of Interdisciplinary Criticism (2001) HTTP: <http://muse.jhu.edu/journals/pmc/v011/11.2belau.html> (accessed Oct. 17, 2007).

Bencivenga, Ermanno, Hegel's Dialectical Logic (2002).

Bentham, Jeremy, The Works of Jeremy Bentham (J. Bowring ed. 1962).

Blaug, Mark, The Methodology of Economics or How Economists Explain (2d ed. 1992).

Bracher, Mark, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, *in* Lacanian Theory of Discourse: Subject, Structure, and Society 107 (Mark Bracher *et al.* eds 1994).

Brudner, Alan, *The Unity of Property Law*, 4 Canadian J. of L. & Juris. 3 (1991).

Brudner, Alan, The Unity of the Common Law: Essays in Hegelian Jurisprudence (1995).

Carlson, David Gray, *Duellism in Modern American Jurisprudence*, 99 Colum. L. Rev. 1908 (1999).

Carlson, David Gray, *How to Do Things With Hegel*, 78 Tex. L. Rev. 1377 (2000).

Carlson, David Gray, *Hegel's Theory of Quality*, 22 Cardozo Law Rev. 425 (2001).

Carlson, David Gray, *The Traumatic Dimension in Law*, 24 Cardozo L. Rev. 2287 (2003).

Carlson, David Gray, A Commentary to Hegel's Science of Logic 149 (2006).

Coase, RH, The Firm, the Market, and the Law (1988).

Coleman, Jules, Markets, Morals and the Law (1988).

Coleman, Jules, *Incorporation and the Practical Difference Thesis, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 99 (Jules Coleman ed. 2001).

CRITCHLEY, SIMON, ETHICS-POLITICS-SUBJECTIVITY (1999).

DEACON, TERENCE W, THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN (1977).

DOUZINAS, COSTAS, HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM (2007).

DOUZINAS, COSTAS AND GEAREY, ADAM, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE (2005).

Dworkin, Ronald, *Is Wealth a Value?,* 9 J. LEGAL STUD. 191 (1980).

DWORKIN, RONALD, A MATTER OF PRINCIPLE (1985).

Dworkin, Ronald, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

FINK, BRUCE, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE (1995).

FINK, BRUCE, LACAN TO THE LETTER: READING ÉCRITS CLOSELY (2004).

FITZPATRICK, PETER, THE MYTHOLOGY OF MODERN LAW (1992).

FRIEDMAN, MILTON, ESSAYS IN POSITIVE ECONOMICS (1953).

Fuller, Lon L, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

GOODRICH, PETER, OEDIPUS LEX: PSYCHOANALYSIS, HISTORY AND LAW (1995).

GROSZ, ELIZABETH, JACQUES LACAN: A FEMINIST INTRODUCTION (1990).

HALLWARD, PETER, BADIOU: A SUBJECT TO TRUTH (2003).

Hart, HLA, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

Hart, HLA, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 5 GA. L. REV. 969 (1977).

HART, HLA, THE CONCEPT OF LAW (2d. ed. 1994).

HOHFELD, WESLEY NEWCOMB, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING (Walter Wheeler Cook ed. 1919).

HEGEL, GWF, HEGEL'S SCIENCE OF LOGIC (A.V. Miller trans. 1969).

HEGEL, GWF, HEGEL'S LOGIC (William Wallace trans. 1975).

HEGEL, GWF, HEGEL'S PHENOMENOLOGY OF SPIRIT (A.V. Miller trans. 5th ed. 1977).

HEGEL, GWF, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed. and H.B. Nisbet trans. 1991).

HEGEL, GWF, LECTURES ON THE PHILOSOPHY OF WORLD HISTORY (H.B. Nisbet trans. 1998).

HYPPOLITE, JEAN, FIGURES DE LA PENSEE PHILOSOPHIQUE (1971).

Jacobson, Arthur J, *Hegel's Legal Plenum*, *in* HEGEL AND LEGAL THEORY 97 (Drucilla Cornell, Michel Rosenfeld and David Gray Carlson eds 1991).

Jolls, Christine, Susntein, Cass and Thaler, Richard, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

Jolls, Christine, Susntein, Cass and Thaler, Richard, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593 (1998).

JONES, ERNEST, 2 SIGMUND FREUD: LIFE AND WORK (1955).

KANT, IMMANUEL, CRITIQUE OF PURE REASON (J.M.D. Meiklejohn trans. 1900).

KANT, IMMANUEL, CRITIQUE OF PRACTICAL REASON (T.K. Abbott trans. 1996).

KANT, IMMANUEL, THE METAPHYSICS OF MORALS (Mary Gregor trans. and ed. 1996).

KANT, IMMANUEL, THE GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor trans. 1997).

KANT, IMMANUEL, RELIGION WITHIN THE BOUNDARIES OF MERE REASON (Allen Wood ed. and George Di Giovanni trans. 1998).

Kornhauser, Lewis A, *A Guide to the Perplexed: Claims of Efficiency in the Law* 8 HOFSTRA LAW REV. 591 (1980).

Lacan, Jacques, *Le Sinthome: Seminaire Du 19 Novembre 1975*, 6 ORNICAR? 3 (1976).

Lacan, Jacques, *Le Sinthome: Seminaire Du 16 Mars 1976,* 9 ORNICAR? 32 (1977).

Lacan, Jacques, *The Sinthome: Les embrouilles du vrai, Seminaire du 10 Fevrier* 1976, 8 ORNICAR? 6 (1977).

LACAN, JACQUES, ÉCRITS: A SELECTION (Alan Sheridan trans.1977).

LACAN, JACQUES, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS (Jacques-Alain Miller trans. and Alan Sheridan trans. 1977).

LACAN, JACQUES, SPEECH AND LANGUAGE IN PSYCHOANALYSIS (Anthony Wilden trans. 1981).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK I: FREUD'S PAPERS ON TECHNIQUE 1953–54 (Jacques-Alain Miller ed. and John Forrester trans. 1988).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK II: THE EGO IN FREUD'S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS 1954–1955 (J.-A. Miller ed., S. Tomaselli trans. 1988).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK III: THE PSYCHOSES 1955–56 (Jacques-Alain Miller ed. and Russell Grigg trans. 1993).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959–1960 (Jacques-Alain Miller ed., Dennis Porter trans. 1986).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK XVII, THE OTHER SIDE OF PSYCHOANALYSIS (Russell Grigg trans., Jacques-Alain Miller ed. 2007).

LACAN, JACQUES, THE SEMINAR OF JACQUES LACAN: BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 1972–1973 (Jacques-Alain Miller ed. and Bruce Fink trans. 1998).

LACAN, JACQUES, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT (Joan Copjec ed. and Dennis Hollier *et al.* trans. 1990).

LACAN, JACQUES AND THE ÉCOLE FREUDIENNE, *FEMININE SEXUALITY* (Juliet Mitchell and Jacqueline Rose eds, Jacqueline Rose trans. 1985).

LACEY, NICOLA, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM (2004).

Leiter, Brian, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355 (Jules Coleman ed. 2001).

Leiter, Brian, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17 (2003).

LOCKE, JOHN, TWO TREATISES OF GOVERNMENT (Laslett ed. 2d ed, 1967).

Miller, Jacques-Alain, *Microscopia: An Introduction to the Reading of Television*, *in* JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT xi (Joan Copjec ed. and Dennis Hollier *et al.* trans. 1990).

Miller, Jacques-Alain, *Exstimité* (Francoise Massardier-Kenney trans.) *in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 74 (Mark Bracher *et al.* eds 1994).

Jamie, *An Erotics of Law: Lacanian Psychoanalysis and Legal Theory* (1999) (unpublished Ph.D. thesis, Birkbeck College, University of London).

Nedelsky, Jennifer, Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy (1990).

Pippin, Robert B, Hegel's Idealism: The Satisfaction of Self-Consciousness (1989).

Posner, Richard A, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103 (1979).

Posner, Richard A, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. Legal Stud. 243 (1980).

Posner, Richard A, Economic Analysis of Law (5th ed. 1992).

Posner, Richard A, Overcoming Law (1995).

Posner, Richard A, *The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1637 (1998)

Posner, Richard A, *Rational Choice, Behavioral Economics and the Law*, 50 Stan. L. Rev. 1551 (1998).

Radin, Margaret Jane, Contested Commodities (1996).

Ragland, Ellie, *The Discourse of the Master*, *in* Lacan, Politics, Aesthetics 127 (Willy Apollon and Richard Feldstein eds 1996).

Ragland, Ellie, *The Psychical Nature of Trauma: Freud's Dora, The Young Homosexual Woman, and the Fort! Da! Paradigm*,11 Postmodern Culture: An Electronic Journal of Interdisciplinary Criticism 75 (2001) <HTTP: http://muse.jhu.edu/journals/pmc/v011/11.2ragland.html> (accessed Oct. 17, 2007).

Ragland-Sullivan, Ellie, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference, in* Lacan and the Subject of Language 49 (Ellie Ragland-Sullivan and Mark Bracher eds 1991).

Richardson, William J, *Lacan and the Subject of Psychoanalysis*, Interpreting Lacan, 6 Psychiatry and the Humanities 51 (Joseph Smith and William Kerrigan eds 1983).

Rosenfeld, Michel, *Hegel and the Dialectic of Contract*, 10 Cardozo L. Rev. 1199 (1989).

Roudinesco, Elisabeth, Jacques Lacan (Barbara Bray trans. 1997).

Salecl, Renata, *Deference to the Great Other: The Discourse of Education*, *in* Lacanian Theory of Discourse: Subject, Structure, and Society 163 (Mark Bracher *et al.* eds 1994).

Salecl, Renata, The Spoils of Freedom: Psychoanalysis and Feminism After the Fall of Socialism (1994).

Samuelson, Paul A, The Collected Scientific Papers of Paul A. Samuelson (R.C. Merton ed. 1972).

Satterfield, Jason M, *et al.*, *Law School Performance Predicted by Explanatory Style,* 15 Behav. Sci. & L. 95 (1997).

Schauer, Frederick, *Formalism*, 97 Yale L. J. 509 (1988).

Schneiderman, Stuart, Jacques Lacan: The Death of an Intellectual Hero (1983).

Schroeder, Jeanne L, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 85 Iowa L. Rev. 1135, (1990).

Schroeder, Jeanne Lorraine, The Vestal and the Fasces: Hegel, Lacan, Property and the Feminine (1998).

Schroeder, Jeanne L, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. Rev. 815 (1999).

Schroeder, Jeanne L, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship,* 79 Tex. L. Rev. 15 (2000).
Schroeder, Jeanne L, *Rationality in Law and Economics Scholarship*, 79 Ore. L. Rev. 147 (2000).
Schroeder, Jeanne L, *Just So Stories: Posnerian Methodology* 22 Cardozo L. Rev. 351 (2001).
Schroeder, Jeanne L, *The Stumbling Block: Freedom, Rationality and Legal Scholarship* 44 Wm & Mary L. Rev. 263 (2002).
Schroeder, Jeanne L, *The Lacanomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability* 15 Yale J. L. & Human. 347 (2003).
Schroeder, Jeanne Lorraine, The Triumph of Venus: The Erotics of the Market (2004).
Schroeder, Jeanne L, *Beautiful Dreamer* (Book Review of Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream) 77 U. Colo. L. Rev. 803 (2006).
Schroeder, Jeanne L, *His Master's Voice: H.L.A. Hart and Lacanian Discourses Theory,*18 Law & Critique 107 (2007).
Schroeder, Jeanne L, and Gray Carlson, David, *Kenneth Starr: Diabolically Evil?*, 88 Cal. L. Rev. 653 (2000).
Schroeder, Jeanne L, and Gray Carlson, David, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law,* 24 Cardozo L. Rev. 2481 (2003).
Schroeder, Jeanne L, and Gray Carlson, David, *Law's Nonexisting Empire*, 56 U. Miami L. Rev. 767 (2003).
Schroeder, Jeanne L, and Gray Carlson, David, *Does God Exist?: Hegel and Things,* 4 (*a*): The Journal of Culture and the Unconscious 1 (2005).
Sen, Amartya, Choice, Welfare and Measurement (1982).
Simmel, Georg, The Philosophy of Money (David Frisby ed., Tom Bottomore and David Frisby trans. 2d. ed. 1990).
Simon, Herbert A, Models of Bounded Rationality: Behavioral Economics and Business Organization (1982).
Simon, Herbert A, An Empirically Based Microeconomics (1997).
Singer,Peter, Animal Liberation (2d ed. 2001)
Sokal, Alan and Bricmont, Jean, Fashionable Nonsense: Postmodern Intellectuals' Abuse of Science (1998).
Stigler, George J, and Becker, Gary S, *De Gustibus Non Est Disputandum*, 67 Am. Econ. Rev. 76 (1977).
Verkuil, Paul R *et al.*, *Why Lawyers are Unhappy* 23 Cardozo L. Rev. 33 (2001).
West, Robin, *Three Positivisms*, 78 B.U. L. Rev. 791 (1998).
Williams, Robert C, Hegel's Ethics of Recognition (1997).
Yablon, Charles, *Freud as Law Professor: An Alternate History*, 16 Cardozo L. Rev. 1439 (1995).
Žižek, Slavoj, The Sublime Object of Ideology (1989).
Žižek, Slavoj, For They Know Not What They Do: Enjoyment as A Political Factor (1991).
Žižek, Slavoj, Enjoy Your Symptom!: Jacques Lacan in Hollywood and Out (1992).
Žižek, Slavoj, Looking Awry: An Introduction to Jacques Lacan through Popular Culture (1992).

ŽIŽEK, SLAVOJ, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY (1993).
Žižek, Slavoj, *A Hair of the Dog That Bit You, in* LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 46 (Mark Bracher *et al.* eds 1994).
ŽIŽEK, SLAVOJ, THE METASTASIS OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY (1994).
Žižek, Slavoj, *Ideology Between Fiction and Fantasy,* 16 CARDOZO LAW. REV. 1511 (1995).
ŽIŽEK, SLAVOJ, THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS (1996).
ŽIŽEK, SLAVOJ, THE ABYSS OF FREEDOM/AGES OF THE WORLD (1997).
ŽIŽEK, SLAVOJ, THE PLAGUE OF FANTASIES (1997).
Žižek, Slavoj, *Four Discourses, Four Subjects*, *in* SIC 2: COGITO AND THE UNCONSCIOUS 74 (Slavoj Žižek ed. 1998).
ŽIŽEK, SLAVOJ, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY (1999).
ŽIŽEK, SLAVOJ, ON BELIEF (2001).
ŽIŽEK, SLAVOJ, HOW TO READ LACAN (2006).
ALENKA ZUPANČIČ, ETHICS OF THE REAL: KANT, LACAN (2000).

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