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Juno Moneta: On the Erotics of the Marketplace

Jeanne Lorraine Schroeder

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Juno Moneta: On the Erotics of the Marketplace

Jeanne Lorraine Schroeder*

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* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. Parts of this Article are being published in different form in JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* (forthcoming 1998). Other ideas raised in this Article are developed more completely in Jeanne L. Schroeder, *Three's a Crowd: Calabresi and Melamed's Repression of the Feminine* (1997) (unpublished manuscript, on file with the *Washington and Lee Law Review*) and Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics* (1997) (unpublished manuscript, on file with the *Washington and Lee Law Review*). This Article is based on an address presented at the Washington and Lee School of Law on March 28, 1997, in connection with the *Lacan and the Subject of Law* Symposium.

I. Introduction

Over two hundred years ago, William Blackstone began his famous *Commentaries* on property by observing that "[t]here is nothing which so generally strikes the imagination, and engages the affection of mankind, as the right of property."¹ Blackstone's desire for wealth should not surprise us. Etymology tells us that money is a woman. Our word "money" derives from *Juno Moneta*. Juno, queen of the gods, was the Roman goddess of Womanhood, the personification of the feminine. Her title "Moneta" means She Who Reminds and Warns.² The word "money" tells us that the feminine is a reminder — a warning. This reflects the Hegelian insistence not only that the market is fundamentally erotic, but that market relations are the most basic and primitive form of eroticism. It also echoes the Lacanian understanding that the feminine is the primal commodity.³

My work as a lawyer and a legal scholar is an encounter with Hegelian and Lacanian theory. I posit that property — the law of the market place — and the feminine are both *phallic*. They serve parallel functions in the creation of subjectivity (i.e., the capability of being both a legal actor who can bear rights and assume duties as well as a sexed being who can speak and engage in social relations). In both theories, subjectivity is intersubjectivity mediated by objectivity. Property, according to Hegelian philosophy, and the feminine, according to Lacanian psychoanalysis, are fictions that serve as the defining external objects that enable us to make ourselves into acting subjects. By serving as objects of exchange between subjects, property and the feminine simultaneously enable subjects to recognize other humans as individual subjects — as the mediators of relationship, they enable us to desire and be desired. This creation of subjectivity is simultaneously the

1. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (A.W. Brian Simpson ed., 1979).

2. OXFORD ENGLISH DICTIONARY 992 (9th ed. 1989). Another theory is that her surname might have been the Roman translation of the Greek title which meant "Mother of the Muses."

3. The etymology is evocative. Juno's title as the Reminder and Warner seems to have related specifically to her role as counselor to those considering marriage. THE NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY 204 (F. Giraud ed., R. Aldington & D. Ames trans., 1968). It also reflects her more general role as guardian of Rome. For example, it was the cackling of her sacred geese kept at the temple of Juno Moneta that woke the sleeping Romans, enabling them to fight off a surprise night raid by the Gauls. *Id.* Typically, however, the mechanism by which the word was transmitted is mundane. The ancient Romans coined their money in the temple of Juno Moneta. Our word "mint" is also a corruption of the temple's name. Money is that which was made in the temple. OXFORD ENGLISH DICTIONARY, *supra* note 2, at 992.

creation of the realm which Lacan called the symbolic: law, language and sexuality. I will explain my terminology in more detail shortly.

Lacan interests me as a feminist because he simultaneously divorced sexuality from anatomy while explaining how sexuality is not only confused with, but figured by, anatomy. By reading Lacan together with Hegelian property jurisprudence, I show how property and markets are erotic and, therefore, are also figured in legal discourse by bodily metaphors.

My theory is a thorough-going reconstruction of both feminist and property theory. I believe my theory gives a more complex and faithful account of sexual difference than do either of the two dominant schools of legal feminism — cultural feminism and so-called radical feminism — which are simple negations or mirror images of masculinism reflecting back traditional gender stereotypes. That is, both implicitly accept the American imagery of masculinity as atomistic individuality and femininity as the opposite or complement of masculinity. The primary difference is that cultural feminists embrace the resulting vision of femininity as authentic, while radical feminists reject it as the abased condition of women imposed upon us by men in patriarchal society.

My theory also helps to explain why we as a society tenaciously cling to certain property law doctrines despite their disutility and stubbornly continue to maintain certain legal theories despite overwhelming empirical evidence to the contrary. This article is intended for attorneys as well as jurists and critical theorists, although different aspects will no doubt appeal to different segments of my audience. I believe that my theory is not merely of theoretical interest. I have personally found that my approach has been extremely useful not only in my teaching but also in my doctrinal scholarship and in my legal practice as a commercial lawyer.

Readers of my doctrinal scholarship, as well as lawyers with whom I practice, are often surprised that I see an intimate connection between the work and my admittedly *outré* theorizing. Let me try to explain. Hegelian-Lacanian theory is an account not only of the structure of law, but of the unconscious thinking processes which underlay our conscious legal thinking. Think of a compass. A compass can not only help me locate my position when I know I'm lost, it can also occasionally reveal that I am actually heading in a different direction from which I thought. Once my position is located and my direction is reoriented, however, there is no immediate use for the compass; I can safely put it away temporarily and use other markers to continue my journey. If I were to write a travelogue, a reader could appreciate the resulting description of the my ultimate destination even if she does not know how I got there. She could not retrace the route and repro-

duce the trip — nor successfully engage in a new but similar journey — without this information, however.

Similarly, I believe that Hegelian-Lacanian theory helps us not only to determine what is wrong with legal theories or doctrines that we intuit are faulty (such as, in my case, the so-called "bundle of sticks" theory of property), but also to re-evaluate and critique theories and doctrines to which we cling because they are so intuitively attractive despite empirical evidence to the contrary (such as the commercial law doctrine of ostensible ownership). Most recently, I have been applying my analysis to a number of so-called "law and economic" doctrines, such as the Calabresi and Melamed taxonomy of environmental dispute regimes and the concept of the "perfect" market. Hegelian-Lacanian theory helps us do this by revealing the unacknowledged, unconscious but implicit assumptions, metaphors, and imagery — similar to what Thomas Kuhn would call paradigms — underlying the law. Once this initial analysis is completed, psychoanalysis, like a compass, can be temporarily put away in favor of the familiar conscious thought process of traditional legal analysis. Consequently, the lawyer reading my doctrinal analysis, like the reader of my travelogue, may appreciate my ultimate legal analysis even if he does not know or understand the path that led me there. But, he could not fully understand, reproduce or critique my analysis, nor engage in similar analysis or critique, without this information. Let me explain in greater detail.

I see myself as first and last a lawyer writing about law, not a philosopher. I had a successful practice as a finance lawyer in New York City for twelve years prior to entering academia and continue to consult in commercial litigation. Although much of my scholarship consists of highly abstract jurisprudential theory, I also write highly technical, commercial law articles for the practicing attorney and consult on lawsuits as an expert on Article 8 of the Uniform Commercial Code. This work is intimately related to my developing jurisprudential theory. That is, I do not view myself as a Lacanian academic who happens to apply her theory to law. Rather, I am a lawyer who turned to Lacan and Hegel in order better to understand and practice law.

In my opinion, law to a large part is a subset of rhetoric. By this I do not mean that it is contentless cant, or am I cynically accusing lawyers of being sophists or prostitutes, who can and will say anything for a buck. Rather, I mean that law is social; it governs relationships between and among people and, therefore, must be communicated to function. As such, law only exists in its expression — whether in statute, opinion, argument or contract. Law's content, therefore, is inextricably linked to its form. Consequently, I believe that understanding the symbolic order of language can

greatly enhance our understanding of both the symbolic order of law as well as lawyering.

It has become a banal cliché to claim that self-hood is socially constructed. Probably no expression has become so shop-worn and meaningless so fast. Indeed, Lacanian theorist Slavoj Žižek slights social construction theory as "the typical vulgar misunderstanding of Lacan."⁴ Nevertheless, I believe that in our postmodern economy it is increasingly true that we define our personality in terms of legal rights and responsibilities (legal subjectivity). This can perhaps be most graphically seen in the civil rights, women's rights, and more recently disabled rights and gay rights movements, where the claims of a group for social recognition and equality have been largely played out (as the common terminology suggests) in terms of claims for legal rights. This is even more true in so-called "private" law (i.e., contract, property, commercial law, etc.), which interests me because it is the law of everyday life. Private law governs our relationships with almost all people other than our casual friends — such as our employers, coworkers, students, landlords, and shopkeepers to name a few — where legal rights increasingly replace status. Even (or especially) our family relationships have important legal and economic, as well as emotive and cultural, components. My relationship to my husband as a wife overlaps with, but is not the same as, my relationship with him as lover or friend. At least in our society, law and personality are, therefore, intimately, if not inextricably, interconnected. This suggests both that the study of personality (psychoanalysis) should enrich our understanding of law, and that the study of law should enrich our understanding of personality.

Specifically, as a practicing lawyer, I had long been troubled by the inadequacies of the law of intangible property, most specifically the law governing security interests in investment securities. I was particularly troubled by the continued use of what seemed to me inappropriate and unsuccessful analogies to physical relations with tangible property. And yet I could simultaneously neither account for the use of such analogies nor imagine any other way of thinking about intangibles. Indeed, the very term "intangibles" indicates how hard it is to think of intangibility, except in terms of tangibility. It is this precise problem that led me to seek a different way to analyze the structure of property law, specifically, and legal thinking, generally.

In addition, when I graduated law school in 1978, it was quite uncommon for women to practice finance law. I found that although I was skilled in understanding conventional legal analysis, I seemed to have a talent for

4. Conversation with Slavoj Žižek (Spring 1997).

formulating novel modes of analysis, lines of arguments, and structures for transactions. Although I would have liked to attribute this to my own individual creativity, I believed that something more was going on. As a feminist, I was interested in the role of women lawyers and how this was affected by actual or illusory gender and sexual differences. I believed that I was perceiving a marked empirical difference in the type of imagery and metaphors which I and the few other women lawyers I knew tended to find, at least initially, appropriate to describe a legal problem on the one hand, and those initiated by my male colleagues on the other. This is not to suggest that male and female lawyers could or did not understand each other after a discussion. Indeed, our success as lawyers shows the contrary. But, I observed that male and female lawyers would often join a discussion from different starting places. This led me to suspect that the problem of legal imagery and metaphors with which I had been struggling might also be related to sexuality. This seemed consistent with my other underlying assumptions that law is rhetorical in nature, and personality is in large part legal subjectivity.

That women and men tend to speak differently as an empirical matter is a phenomenon widely recognized among linguists, although there is substantial disagreement as to the essential nature of these differences, let alone their cause. Nevertheless, I perceived that the differences in masculine and feminine legal rhetoric did not follow traditional sexual stereotypes such as the cliché embraced by "different voice" feminists, that women think more in terms of relationship and men more in terms of individual rights. I believe that traditional finance law (i.e., as practiced primarily by men) is intensely and expressly concerned with building and maintaining relationships of the type celebrated by different voice feminism. (Indeed, in my analysis, it is the dream of immediate relationship which characterizes the masculine imaginary.) I also observed that a large percentage of women finance lawyers were intensely individualistic, competitive, and self-involved.

After several years, my interest in feminism led me to explore Lacanian theory. At around the same time, my interest in property led me to read Hegel. Eventually, I began developing my theory of the legal nature of sexuality and the erotics of property.

Law is a practice as well as a theory, which is why I find it such an intensely fascinating field. As the cliché goes, the proof of the pudding is in the eating. Consequently, I have set about the task of applying my analysis to a large number of property issues. Many of these applications which I have completed to date have been published in law reviews and will appear in a book I have written which will be published within the next year.

I have also incorporated other applications in my practice as an expert in the law of investment securities and have recently begun a new long term project of applying my analysis to law and economic theory. If the reader finds my analysis of specific legal questions covered in my work to be insightful, then this is some evidence (but, of course, not proof) of the validity of my approach.

As is obvious from my introductory paragraph, I tend to make use of mythology and classical allusions, word play, and true and folk etymologies. This is relatively unusual in jurisprudential writings. I fear this might be off-putting to some lawyers and that I may be accused, as Hegel sometimes is, of confusing puns with analysis, finding too much significance in purely accidental and inconsequential similarities between words and images. This accusation misses the point that in Hegelian and Lacanian theory; subjectivity, law, and language are considered to be mutually constituting. The structure of language, therefore, should be expected to reflect the unconscious structure of law and personality. As a result, the similarities identified in word play and humor may not be merely accidental in the sense of random. They may be serendipitous — unexpected but happy revelations of hidden connections between ideas and words.

II. Hegelian Property and Lacanian Sexuality

A. Hegel

From a Hegelian-Lacanian perspective, property and the law are desperately erotic — indeed, hysterically so in the technical sense of the word. Hegelian theory is often misunderstood by Americans because it parts company with the political and jurisprudential tradition predominant in this country — i.e., the various Enlightenment philosophies generally grouped under the umbrella "classical liberalism" — which takes as its starting place the concept of the state of nature as the free, autonomous individual endowed with natural rights.⁵ In contradistinction, to both Hegel and Lacan, "subjectivity" — the capacity to speak and bear legal rights — is not a pre-existing, natural status.

In my reading, Hegelian thought is not, however, *antiliberal*, but *extraliberal*.⁶ Hegel agreed with liberalism that freedom is the essence of human

5. I refer, of course, to the philosophical term "classical liberalism" and not the colloquial terminology of "political liberalism." The vast majority of political conservatives in this country are classical liberals. For example, both libertarianism and utilitarianism are forms of classical liberalism.

6. I place myself in the "leftist" tradition of Hegelian scholarship, which emphasizes the concepts of individual freedom and liberty within the state. A rival "rightist" tradition exists as well, which emphasizes the state over the individual.

nature and no state could be called just which did not preserve individual liberty. Hegel thought, however, that the liberal individual is too empty and fragile a concept to be a "subject" (i.e., to be capable of legal rights or language). Freedom can only be abstract and potential in the state of nature. The question to Hegel (and to feminists) is how to make freedom concrete and actual in human life.

According to Hegel, classical liberal thought is internally inconsistent with respect to the concepts of individuality and rights. As Wesley Newcomb Hohfeld reminds us, rights can only be understood as relationships between and among people.⁷ Similarly, language can only be understood in terms of society. Consequently, the autonomous individual in the state of nature can neither speak nor bear legal rights as liberalism claims. The freedom that is human potential can only become actual through social relationships.⁸

Subjectivity does not, and cannot, pre-exist society, therefore, but can only be achieved within society. To put this in theological terms, the subject is not a being — something that pre-exists — but a creature — something that is created. The subject is not natural in the liberal sense, but artificial. To say it is "artificial," however, in no way implies that it is not "actual" or that it is inauthentic. Artificial means, literally, "made by art." Nothing could be more authentic to man than the artist. If subjectivity is a fiction, it is the fiction in which we live.

Because Hegel argued that the abstract person posited by liberalism is driven to make his potential freedom actual, the person passionately desires to enter into social relations and achieve first subjectivity and then higher states of human consciousness.⁹ To Hegel, the logically most primitive, first

7. Hohfeld's system of relational legal conceptions organized in pairs jural opposites and correlatives is collected as WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING* (W. Cook ed., 1919).

8. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 35 (Allen W. Wood ed., H.B. Nisbet trans., 1991) ("[T]he system of right [i.e., property, contract, law] is the realm of actualized freedom."). This is one of the meanings of Hegel's (wrongly) notorious assertion that "[w]hat is rational is actual; and what is actual is rational." *Id.* at 20. I discuss the Hegelian concepts of potentiality and actuality in JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* (forthcoming 1998). See also Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 85 GEO. L. J. 1531, 1559-61 (1996).

9. As Michel Rosenfeld has put it:

The struggle for recognition is part of the dialectic of self-consciousness. Self-consciousness for Hegel is desire. . . .

Indeed, once it is understood that the aim of desire is the preservation of self-consciousness, then it seems logical to conclude, as Hegel does, that self-consciousness can only achieve satisfaction in another self-consciousness. If desire

step in the process of actualizing freedom is the regime of law (abstract right) in the sense of property and contract. Property does not exist to satisfy the physical needs or sensuous longings of human beings. Rather, we create property in order to fulfill our insatiable desire for self-actualization. Although property law can govern physical relations between owner and tangible objects (among other things), it cannot be reduced to such relations. For example, the owner of an apple has the right to possess the apple and eat it. But these rights are distinguishable from the sensuous experience of touching, tasting, and digesting it. In Lacanian terminology, property is symbolic, not real.

Specifically, Hegel believed that a person can attain subjectivity only by being recognized as a worthy human being by another worthy human being.¹⁰ The abstract person in the state of nature, having no social relations is unrecognizable. That is, each abstract person (i.e., the atomistic individual of liberalism) is indistinguishable from any other. The person, therefore, needs to take on individuating characteristics. In philosophical terminology, anything other than the subject is an object. The word object includes not merely tangible things, such as land or cattle, but intangibles, such as rights to payment and intellectual property, as well as everything that makes us individuals — our bodies, our beliefs, and our personalities.¹¹

seeks to maintain identity, then self-consciousness must seek an object which provides it with recognition. And the only object which can provide sustained recognition to a self-consciousness is another self-consciousness.

Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199, 1220-21 (1989).

IN THE PHILOSOPHY OF RIGHT, *see generally* HEGEL, *supra* note 8, Hegel starts with an introductory consideration of the Kantian concept of the abstract free person as the most basic notion of human nature and shows in subsequent chapters how this abstract person is driven, first, to achieve subjectivity in the realm of right and, eventually, to become an individual of a modern constitutional state in the realm of ethical life.

Let me at this point very quickly digress and point out another way Hegelian philosophy departs from many versions of liberalism. To oversimplify, in liberalism legal subjectivity — the ability to bear legal rights and to participate in the market regime of property and contract — roughly equates to individual freedom. To the Hegelian, subjectivity (and the capitalist market regime) amounts only to the most primitive actualization of individual freedom. Thus, although a necessary aspect of human freedom, subjectivity is only the most abstract and inadequate version of freedom. Consequently, subjectivity is one necessary aspect of human nature, but not the be all and end all of human capacity.

10. *See* Rosenfeld, *supra* note 9, at 1220-21. "Property is . . . to Hegel a moment in man's struggle for recognition." SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 89 (1972).

11. Anything that "can be conceived as immediately different from free personality" can be an "object" of property. Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L.

To be recognized by other subjects and have interrelationships, a person must form object relations (i.e., take on specific recognizable characteristics). Property is the most primitive form of interrelationship from a logical matter. (Note, I did not say historical or biographical — modern property rights and capitalistic markets are relatively modern inventions.)¹² In property, subjects mutually recognize each other through a regime of possession, enjoyment, and alienation of a desired mediating object.¹³ Consequently, I have defined the Hegelian conception of subjectivity as intersubjectivity mediated by objectivity.¹⁴ Property is a necessary moment in man's unquenchable search for recognition by others. Property is therefore desperately erotic. We seek to acquire property not for its own sake, but derivatively, in order to achieve our true desire, the desire of the Other.

Hegelian jurisprudence differs from conventional liberal jurisprudence in other ways as well. The traditional American understanding of the legal world is closed and complementary. In the words of Frank Michelman and

REV. 1077, 1164 (1989).

Intellectual . . . accomplishments, sciences, arts, even religious observances (such as sermons, masses, prayers, and blessings at consecrations), inventions, and the like, become objects . . . of contract; in the way they are bought and sold, etc., they are treated as equivalent to acknowledged *things*.

HEGEL, *supra* note 8, at 74.

Anything, capacity or activity 'external' to the person, can become an object of property. Externality does not mean simply that the thing is physically distinct from the person. Objects like books, works of art and mechanical invention are external to the person, not in virtue of being physically distinct from him, but in virtue of being objectifications (*Entäusserungen*), i.e. concrete embodiments of human skills, talents and abilities.

Seyla Benhabib, *Obligation, Contract and Exchange: On the Significance of Hegel's Abstract Right*, in *THE STATE & CIVIL SOCIETY: STUDIES IN HEGEL'S POLITICAL PHILOSOPHY* 159, 163 (Z.A. Pelczynski ed., 1984).

12. Consequently, the dialectic of property constitutes the first part of the PHILOSOPHY OF RIGHT, *see generally* HEGEL, *supra* note 8, and precedes Hegel's discussion of the family, civil society, and the state. By primitive, Hegel makes a logical, not an empirical point. The development of the liberal state (necessary for the actualization of freedom) did not even begin until the late eighteenth century precisely because the *logically* first requirement of subjectivity (private property) was *empirically* late to develop. Critiques of Hegel frequently miss this point. For example, as I discuss in Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 114-51 (1994), 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.

13. *See* HEGEL, *supra* note 8, at 84-103; SCHROEDER, *supra* note 8; Schroeder, *supra* note 8, at 1535-44; Schroeder, *supra* note 12, at 55, 133-40.

14. *See* SCHROEDER, *supra* note 8; Schroeder, *supra* note 12, at 58.

Duncan Kennedy, it is governed by a law of conservation of legal exposures.¹⁵ That is, to oversimplify Hohfeld's classic formulation, every legal entitlement must be precisely balanced by an equivalent obligation (or obligations) imposed upon other the person (or persons). A Hohfeldian would say that when we claim a right for ourselves, we necessarily impose duties upon others, and that we recognize rights of others because we are under legal duties to do so. Using Lacanian terminology, this vision of a closed world, where subjects have perfectly complementary, mirror image rights and duties, is imaginary.¹⁶ In the imaginary, meaning is stable. In the imaginary, as in cultural and radical feminism, the masculine and the feminine are either opposites or complements.

In contradistinction, Hegel's conception of law is symbolic. Law is open and expanding. Legal signification, unlike imaginary meaning, is a process of slippage and movement. We neither claim rights for ourselves, nor do we recognize rights of others out of duties imposed upon us. Rather, we are engaged in an ongoing process of legal creation. We grant rights to others out of love.¹⁷ A claim to a right — a relationship between and among legal subjects — can be actualized only if recognized and respected by other subjects. One can only become a subject by being recognized as such by another subject. Consequently, to become a subject, an abstract person (i.e., the individual posited by liberalism) must first seek to make another abstract

15. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 759 (1980).

16. SCHROEDER, *supra* note 8. The imaginary is the least worked out of the Lacanian orders. Like all great thinkers, Lacan refined his theories constantly throughout his life. In his early work, Lacan concentrated on the distinction between the symbolic and the imaginary. In his late work, however, Lacan had changed his concentration to the distinction between the symbolic and the real, with the real taking over some of the function which had originally been ascribed to the imaginary. Compare, e.g., JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK I: FREUD'S PAPERS ON TECHNIQUE 80 (J.A. Miller ed., J. Forrester trans., 1988) [hereinafter LACAN, SEMINAR I], with Jacques Lacan, *God and the Jouissance of the Woman* [hereinafter Lacan, *Jouissance*], in FEMININE SEXUALITY: JACQUES LACAN AND THE ÉCOLE FREUDIENNE 127 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985) (translating portions of Lacan's twentieth seminar, ENCORE) [hereinafter FEMININE SEXUALITY], and Jacques Lacan, *A Love Letter (Une Lettre d'Amour)*, in FEMININE SEXUALITY, *supra*, at 149. See also SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 162 (1989) ("With the development of Lacanian teaching in the sixties and seventies, what he calls 'the Real' approaches more and more what he called, in the fifties, the Imaginary"). Consequently, it is not absolutely clear what functions were left to the imaginary in the late Lacan. Because my theories are based largely on the late Lacanian theories of feminine sexuality, and the works of Slavoj Žižek, this Article reflects this change of emphasis to the real.

17. Arthur J. Jacobson, *Hegel's Legal Plenum*, in HEGEL AND LEGAL THEORY 97, 110 (Drucilla Cornell et al. eds., 1991).

person into a subject. This is an act of creation; love is alchemy. Love is the desire to be desired (to be recognized).¹⁸ The lover is not like the U.S. Army which is satisfied if you be all that you can be. The lover requires the beloved to become more in the hope that she might love him back and make him her equal. To love someone is to see in the beloved more than she is. This can have the magic effect of enabling her to give back more than she had.¹⁹ The Hegelian legal universe, like the heart, has the capacity for infinite expansion as we lavish our love and grant more and more rights to others.

The Hegelian rights of property are possession, enjoyment, and alienation, understood in the most broad and abstract terms. Possession is the taking on of identifying characteristics by identifying an object to a specific subject who can exclude others from the object. Enjoyment is the expression of one's freedom (in the sense of sovereignty over the object) through the exploitation of the object. Alienation is the expression of one's freedom (in the sense of separate existence from and indifference to any specific object) by severing one's relation to the object.

The property right of possession is not the empirical fact that I seek to acquire objects in order to make myself recognizable. Rather, it is my recognition that the other has the right to possess and to exclude me from objects so that she can attain unique distinguishing characteristics. Similarly, the property of enjoyment is not an empirical expression of my freedom in enjoying my objects. It is my recognition that the other has the right to actualize her freedom by enjoying her objects, even when her enjoyment necessarily impinges on mine. Finally, the right to alienation is not the empirical fact that I can abandon an object, or give it to the other. Rather, alienation only truly becomes actualized when I exchange an object with another in contract. It is only at this juncture of the market that I finally meet the other as an equal and obtain legal subjectivity. In contract I do not merely recognize the other's rights of possession, enjoyment, and alienation, but, by agreeing to contract with me, the other person in turn grants me the same rights. Paradoxically, it is only at this moment, when we are joined in a common shared act of will, that we can now recognize each other as unique. This is yet another example of the doctrine of the identity of identity and difference which underlies the entire Hegelian dialectic.

18. "To love is, essentially, the wish to be loved." JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 253 (J. Miller ed. & A. Sheridan trans., 1981).

19. Miran Božovič, *The Bond of Love: Lacan and Spinoza*, 23 *FORMATIONS* 69, 69 (1994).

The corollary to the theory that the legal universe is expanding because we are involved in a constant act of legal creation is that the subject is never complete. If we were complete, we could not grow, create, or love. To Hegel, freedom requires a moment of absence of restraints, boundaries, and content. If freedom is the essence of human nature, then negativity is the heart and sole of subjectivity.²⁰ This concept of radical essential negativity is equivalent to the Lacanian feminine.²¹

B. From Hegel to Lacan

Lacan, who was deeply influenced by Hegel, thought that psychic subjectivity — the ability to become a speaking actor capable of love — is artificial. Like legal subjectivity, psychic subjectivity is intersubjectivity mediated by objectivity. It is created through a regime of possession, enjoyment, and alienation of the object of desire among subjects. As I shall explain, the technical term for this object is the "phallus."²²

Lacan explained how sexuality is created by the imaginary identification of the symbolic concept of the phallus with seemingly real biological analogs — the male organ and the female body. I argue that a parallel conflation occurs in jurisprudence and legal doctrine — the symbolic or legal concept of property is described through elaborate metaphors of the penis and the virgin. This is an intuition or "abduction" which comes to us so easily as to seem natural. Indeed as a psychoanalytic matter, we may not be capable of speaking about property without resorting to phallic concepts. What do I mean by sexuality and phallic metaphors?²³

20. See HEGEL, *supra* note 8, at 37-39.

21. See generally SCHROEDER, *supra* note 8.

22. See Jacques Lacan, *The Signification of the Phallus*, in JACQUES LACAN, *ÉCRITS: A SELECTION* 281 (Alan Sheridan trans., 1977); see also Juliet Mitchell, *Introduction I to FEMININE SEXUALITY*, *supra* note 16, at 1, 38-40; ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* 116-26 (1990).

23. I must point out one apparent difference between the Hegelian regime of property and the Hegelian regime of sexuality. In Hegel's system, every subject takes on all positions with respect to the object of desire. Each subject possesses, enjoys and engages in alienation through exchange of the object of property. According to Lacan, it is impossible for any person to achieve all these necessary positions at one time. Either he takes on the masculine positions of possessing (having) and exchanging the phallic object of desire, or of identifying with (being) and enjoying the phallic object of desire. There is a fundamental failure, therefore, at the heart of Lacanian subjectivity. (As an aside, one should not assume from this that the Hegelian person is full and complete. As I have mentioned, the heart of the Hegelian person represents pure negativity. The failure of integration of personality in Hegel is a complex, subtle idea which lies beyond the limited purposes of this Article, however. See *infra* text accompanying notes 31-35.)

C. Lacan

1. *Sexuality as the Response to Loss*

Lacan said that subjects are split.²⁴ As in Hegel, the proposition that subjectivity can only be achieved through the social (i.e., through law and language) creates a paradox. That which is most ourselves — our subjectivity, our sexuality — is simultaneously that which comes from the outside, it is that which is not ourselves. As we mature and are initiated into language and law and achieve sexuality, we first experience the sense that we have lost something which we can no longer explain in words or images. This sense that our wholeness is lost and that this loss has been imposed upon us by something outside of us is what Lacan calls "castration."²⁵ Castration is the universal initiation rite of subjectivity. We feel that we must have once been an object which is now lost because "someone" has taken it away. Lacan calls the object which we feel has been lost in castration, of course, the phallus. This is another Lacanian paradox; the object that is necessary for the creation subjectivity is experienced as being lost. The loss of the phallus as object of desire creates desire, or desire creates the idea that there must have once been a phallic object of desire that it now lost.

24. See, e.g., GROSZ, *supra* note 22, at 137.

25. Castration is the loss of the mythical object of desire (the "Phallus" — the symbol of subjectivity). JACQUES LACAN, *The École Freudienne, the Phallic Phase and the Subjective Import of the Castration Complex*, in FEMININE SEXUALITY, *supra* note 16, at 99, 116-17; Jacques Lacan, *The Direction of Treatment and Principles of Its Power*, in JACQUES LACAN, *ÉCRITS: A SELECTION* 226, 265 (Alan Sheridan trans., 1977).

Castration is not any natural (real) loss as object relations psychologists have wrongly concluded. It is, rather, the moment our sense of loss acquires sexual signification.

There is a fundamental distinction between recognizing that the castration complex may refer back to other separations and technically seeing these separations as castrations. . . . Freud's [i.e. Lacan's interpretation of the non-naturalistic side of Freud] account is retroactive: fearing phallic castration the child may "recollect" previous losses, castration gives them relevance. . . . For Freud, history and the psychoanalytic experience is always a reconstruction, a retrospective account.

Mitchell, *supra* note 22, at 18-19. In Lacan's words,

The fear of castration is like a thread that perforates all the stages of development. It orientates the relations that are anterior to its actual appearance — weaning, toilet training, etc. It crystallizes each of these moments in a dialectic that has as its center a bad encounter. If the stages are consistent, it is in accordance with their possible registration in terms of bad encounters. The central bad encounter is at the level of the sexual.

LACAN, *supra* note 18, at 64. I discuss castration and the concept of sexuality as the response to castration *infra* in text accompanying notes 25-27.

This phallic terminology reflects Lacan's theory that sexuality is our response to this sense of loss. Sexuality is, therefore, essential to subjectivity. The masculine and the feminine are not anatomical facts, but two possible positions which one can take in our society with respect to the universal experience of castration. We are "masculine" when we try to deny castration and "feminine" when we accept castration. The masculine pretends that he has and exchanges the lost phallus. In contradistinction, by recognizing that loss, emptiness, and negativity are the at the center of human experience, the feminine identifies with the lost phallus and is positioned as lack. By doing so, the feminine becomes identified with radical negativity which is necessary for Hegelian freedom. Sexuality is not anatomy; all humans assume both positions from time to time.

This is not a denial of the physical world nor of biological sexuality. It is an acknowledgment that conscious beings can never have direct access to our biology. The instant that we speak or envision our sexuality, we are already interpreting it through the orders of the imaginary and the symbolic. Consequently, according to Lacan, one cannot distinguish biological "sexuality" from social "gender." "Sexuality" is always already socialized — symbolic.

Nevertheless, this purely "symbolic" concept of sexuality — like the purely symbolic concept of property — becomes mapped upon or "figured" by anatomy.²⁶ We will confuse sexuality with biology and use biological

26. "[A]natomy is what figures in the account: 'for me "anatomy is not destiny", but that does not mean that anatomy does not "figure" . . . , but it *only figures* (it is a sham)." Jacqueline Rose, *Introduction II* to FEMININE SEXUALITY, *supra* note 16, at 27, 44 (citations omitted). These positions are only generally associated with the biological sexes.

This account of sexual desire led Lacan, as it led Freud, to his adamant rejection of any theory of the difference between the sexes in terms of pre-given male or female entities which complete and satisfy each other. Sexual difference can only be the consequence of a division; without this division it would cease to exist. But it must exist because no human being can become a subject outside the division into two sexes. One must take up a position as either a man or a woman. Such a position is by no means identical with one's biological sexual characteristics, nor is it a position of which one can be very confident — as the psychoanalytical experience demonstrates.

Mitchell, *supra* note 22, at 6. That is:

For Lacan, men and women are only ever in language ('Men and women are signifiers bound to the common usage of language', . . .). All speaking beings must line themselves up on one side or the other of this division, but anyone can cross over and inscribe themselves on the opposite side from that to which they are anatomically destined.

Rose, *supra*, at 49.

imagery to describe sexuality. As a result, biological male persons are more likely to take on the masculine position and biologically female persons, the feminine.

At first blush, Lacan's terminology seems to privilege the masculine. Accordingly, Lacan's theory is often condemned by feminists as misogynist. I think this is incorrect. I believe that instead of being a misogynist theory, it is a theory of misogyny. The terminology does not posit essential masculine superiority. It reflects the fact that Western society *is* patriarchal and misogynist as an empirical matter. Rather than supporting the sexual status quo, however, Lacanian theory undermines it from within.

2. *The Three Orders of Subjectivity*

In order to follow the Lacanian dialectic of sexuality, it is helpful to stop and consider the terminology in more detail here since I will return to these terms later in the discussion of the efficient market at the end of this Article. I have already used the terminology "symbolic," "imaginary," and "real." According to Lacan, these are the three psychic orders of consciousness.²⁷ The imaginary is the realm of imagery, fantasy, meaning, and complementarity. The symbolic is the cultural order of law and language, of signification and sexuality. The real is our sense that there is something beyond or prior to the other two. The real is not the same as the natural world. Yet,

To say that Lacan sought to destroy any lingering biological determinism in Freud's theories while explaining how gender difference becomes mapped upon biological sexual difference, *see* GROSZ, *supra* note 22, at 13; Drucilla Cornell, *The Doubly-Prized World: Myth Allegory and the Feminine*, 75 CORN. L. REV. 644, 660 (1990), is not to imply that biological sexual difference does not exist or is not important. Lacan's point is that our experience of sexuality as speaking, conscious subjects can never be simply reduced to our biological sex for the same reason that property cannot be reduced to our sensuous relationship with physical things. Sexuality is artificial and therefore authentic to man the artist. The sexual status quo is neither natural nor inevitable in the sense that anatomy is destiny. Nevertheless, Lacan hypothesizes a mechanism by which a sexual status quo — once in place — is able to reproduce itself.

27. Jacqueline Rose states:

Lacan termed the order of language the symbolic, that of the ego and its identifications the imaginary (the stress, therefore, is quite deliberately on symbol and image, the idea of something which 'stands in'). The real was then his term for the moment of impossibility onto which both are grafted, the point of that moment's endless return.

Rose, *supra* note 26, at 31; *see* LACAN, SEMINAR I, *supra* note 16, at 80. In one of Lacan's last seminars, he uses the metaphor of a "Borromean Knot" to describe the relationships between these three orders. *See* STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 33 (1983).

for many purposes it functions as though it were the natural world because the real includes our sense that there is a natural world. (Consequently, for the very limited purposes of this Article, I find it sufficient essentially to oversimplify and use the word "real" as though it meant the natural or anatomical.) The real, however, also includes such concepts as God and death and everything else which is beyond ourselves. It includes the common frustration that one can not express one's feeling in words (the symbolic order) or in pictures (the imaginary order).

The real is, therefore, impossible.²⁸ We experience the real as though it is something we have lost. It includes that which we feel we have lost in castration — the false memory of completeness, for instance, of a oneness with mother which we feel we must have experienced as an infant. This is not really true because the real is necessarily created with the symbolic and the real.

By this I mean that any system of law (signification, the symbolic) and imagery (meaning, the imaginary) require boundaries. The real is the sense that there is something on the other side of the boundaries. The order 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.²⁹ Castration is the term for this process because we feel that it has deprived us of the real. In fact, the real was only created by castration.

D. Sexuality as the Response to Castration

The two sexes are two positions one can take with respect to the universal condition of castration.

28. "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.'" GROSZ, *supra* note 22, at 34. Grosz explains:

The child, in other words, is born into the order of the Real. The Real is the order preceding the ego and the organization of the drives. It is an anatomical, 'natural' order (nature in the sense of resistance rather than positive substance), a pure plenitude or fullness The Real is not however the same as reality; reality is lived as and known through imaginary and symbolic representations.

Id.

29. See generally SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 35-39 (1993); Jacques-Alain Miller, *Microscopia: An Introduction to the Reading of Television*, in JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT at xi, xxiv (Joan Copjec ed., Dennis Hollier et al. trans., 1990).

1. *The Masculine*

The masculine position is the vain attempt to deny the castration which has already occurred. The masculine is not an attempt to *achieve* a sense of wholeness, but a false claim to have "it," whatever "it" is that will fill up the hole. This is done through simultaneously adopting two mutually inconsistent stories. On the one hand, the masculine subject tells himself: "Castration has occurred, but (thank God) it was not me who was castrated but someone else. I still possess the phallus. It must be the feminine who lost it." This position is untenable because, deep in our hearts, we all feel the reality of castration. When confronted with castration, the masculine must adopt a second strategy. The masculine now tells himself: "True, I no longer have the original phallus, but it was not taken from me. Rather, I (retroactively) agreed to give it up to the symbolic order in exchange for a new object of desire."³⁰ Therefore, the masculine in this second mode is the claim that no one object of desire is significant because it can always be replaced in exchange. In economic terms, the masculine claims to be indifferent between two objects. This, of course, is also untenable. If the masculine were indifferent to the object of desire, he would not desire it; he would not be so anxious to engage in exchange. As Hegel insisted, exchange is the actualization of desire, not indifference. As in Hegel, it is the moment of recognition in this imaginary exchange which constitutes subjectivity.

2. *Hegelian Versus Lacanian Contract*

At first blush, Lacan's pessimistic account of exchange seems at odds with Hegel's optimistic one. Hegel's abstract person eagerly seeks a future exchange as the means of achieving a satisfactory subjectivity and the inter-

30. The infant entering the symbolic world of language and law feels castrated by the function known as the father. Masculine society allows the male child to adopt the fantasy that he is making a bargain with the father. He will "consent" to his castration from the phallic mother (the feminine) in exchange for access to empirical women's bodies in the future in physical sexual relations and marriage. In Lacan, men attempt to achieve recognition as subjects, speaking members of society, through the possession and exchange of the object of desire with other subjects, in the same way that, in Hegel, persons achieve recognition as legal subjects through the possession, enjoyment, and exchange of property with other legal subjects. And so, as chronicled by structuralist anthropologists such as Claude Lévi-Strauss, societies are structured by the literal exchange of women among men of different clans or tribes. This strategy is doomed, in Lacan, because the object of desire — the phallic mother — is lost. The possession of the penis and the exchange of women are poor substitutes. Moreover, the last element of recognition is denied in the masculine position. Nevertheless, although necessarily unsuccessful, this may be the best that society can do.

relationship relationship of abstract right. Lacan's subject reluctantly accepts an imaginary past exchange as an explanation for an unsatisfactorily hollow subjectivity and lack of immediate sexual relations. Upon further consideration, we can see that Lacanianism and Hegelianism represent the negative and affirmative moments of the same dialectic of subjectivity.

The vulgar misunderstanding of the Hegelian dialectic is as follows: First, one identifies a concept (thesis). Second, one identifies the internal contradiction that the concept necessarily implies its negation (antithesis). Third, through the process known as sublation (*Aufhebung*), the thesis and antithesis are reconciled into a satisfactory and totalizing reconciliation (synthesis).³¹ Under this oversimplistic approach, one first identifies the internal contradictions of the abstract person. (For example, on one hand, the essence of the abstract person is freedom, but freedom can only be potential and not actual in the state of nature.) These contradictions would then be resolved by the creation of subjectivity in which the potential of freedom becomes actual.

Such a reading represses the fact that the German word *Aufheben* means to preserve, as well as to negate. It also reflects a failure to comprehend the fundamental Hegelian doctrine of the identity of identity and difference. That is, it is not true that when thesis and antithesis are sublated they are totally absorbed into and replaced by the new synthesis. They are preserved as well.

Sublation is the recognition that two concepts which seemed necessarily contradictory, are at one moment the same. Sublation is the actualization of the identity, which is only potential in the original concepts, considered separately. But, this does not mean that sublation destroys or denies the difference between the original concepts. Rather, for something to be actual, it must be potential. The original concepts which represent the potentiality of the sublated concept must retain a moment of separate existence so that they can continue to serve as the necessary constituents or building blocks of the synthesis. In other words, in order for the sublated concept to exist (be actual), the conditions of its potentiality must also exist.³²

31. The thesis-antithesis-synthesis terminology is not genuine Hegel, but seems to be a vulgarized version of Karl Marx's appropriation of the Hegelian dialectical method.

32. To use a metaphor which I have used elsewhere, the relationship between the potentiality and actuality in Hegel can be compared to the relationship between a foundation and a building. When one digs a hole, it is in actuality only a hole. But, it is potentially a foundation. We can only say retroactively that it is in fact a foundation once the building is built upon it. The building actualizes the foundation. But it does not follow from this that once the building is built the foundation is no longer necessary and can be filled in. Rather, the foundation made the building possible. As any engineer knows, if one were to destroy

The doctrine of the identity of identity and difference also requires a recognition that there is an essential moment of unsublated difference which remains between the two original concepts. Indeed, if there was not, they would not be different concepts. As emphasized by Slavoj Žižek, sublation is not just a proactive process predicting a future coherent and necessary resolution which will supersede present contradictions. Sublation is also simultaneously the retroactive breakdown of what initially appeared as a harmonious whole into unresolved inherent contradiction.³³ This is a necessary result of the circularity of the dialectic. Consequently, sublation is quadratic, not trilateral in nature. It cannot be reduced to thesis-antithesis-synthesis. Rather, there remains the original concept, its negation, the moment when they are revealed to be the same, and the simultaneous recognition that there always remains a moment of essential negativity, an unsublated kernel which Jacques Derrida calls "*differance*"³⁴ and Slavoj Žižek calls the indivisible remainder.³⁵ Both the moment of resolution and the moment of irresolvability are equally true and essential.

Consequently, the Hegelian analysis of the dialectic of property represents the progressive future oriented aspect of sublation as the contradictions of abstract personhood looks forward to the moment of their future resolution into subjectivity. The Lacanian analysis of the dialectic of sexuality represents the retroactive past-oriented aspect of sublation when the subject looks back and recognizes the moment of the past irresolvability of the fundamental contradiction of personality known as castration.

Moreover, the Hegelian dialectic is one of constant movement. Each time a contradistinction is sublated into a new concept, the new concept will be analyzed in terms of its negation. This recognition of internal contradiction will require a new sublation and the creation of a new resolution, which will lead to a new negation and so on. Any apparent resolution in sublation is, therefore, necessarily only temporary. The dialectic of property initially stops at the resolution known as subjectivity and abstract right, but Hegel immediately demonstrates the inadequacy of these concepts. Consequently, the *Philosophy of Right* continues the dialectic of relationship from abstract right to the more adequate regimes of morality and ethical life as society

the foundation, the building would come crashing down. See SCHROEDER, *supra* note 8; Schroeder, *supra* note 8, at 1561.

33. See ŽIŽEK, *supra* note 29, at 122-23.

34. JACQUES DERRIDA, *Semiology and Grammatology, Interview with Julia Kristeva*, in POSITIONS 15, 24-29 (Alan Bass trans., 1981).

35. The concept of the "hard kernel of the real" pervades Žižek's work. See, e.g., SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 145 (1996).

progresses from civil society to the liberal state and the subject becomes the free individual.

This means that the satisfaction of the achievement of subjectivity is only tentative and temporary in both Hegel and Lacan. It is precisely this fundamental failure of interrelationality — this essential negativity at the heart of subjectivity — which both enables desire to function and allows us the space to act freely.

3. *The Feminine*

The phallic object of desire exchanged by masculine subjects in the symbolic order is the feminine. The masculine is the fantasy that one can regain the whole lost in castration by finding the perfect mate who will fill the hole left by castration. The feminine is, therefore, the mediatrix of subjectivity — the third which men use to make themselves into subjects.

And so what is the feminine? First, a caveat. The feminine as radical negativity has no positive content. *All* attempts to give positive content to the feminine — such as cultural feminism — are masculine fantasies (i.e., the imaginary). Nevertheless, there are certain things we can say about it. The Lacanian feminine is a different way of confronting the universal experience of castration; it is another mode of failure. If we are masculine when we try to deny castration, we are feminine when we accept castration, loss, and negativity. Lacan rewrote Freud's concept of penis envy not as the actual longing of women to have a penis, but as a nostalgic, depressive mourning for lost wholeness.³⁶ It is a common error to assume that the proposition that the feminine is the acceptance of castration is a judgment that the feminine is inferior to the masculine. Instead, the feminine can be seen as superior in that it is more honest³⁷ and, therefore, stronger than the cowardly masculine which runs from the truth. The feminine must be repressed precisely because she is a reminder that the masculine is a lie. She is *Juno Moneta*.

The feminine acceptance of castration is the understanding that we are no longer and can never again be self-sufficient, complete, and whole by ourselves. The phallic object of desire is our former integrity which we feel has been lost in castration but which, in fact, has never existed. No "thing" which we ever had, or could hold or exchange in the future could take

36. See JANE GALLOP, *READING LACAN* 148 (1985); SCHROEDER, *supra* note 8.

37. See SCHROEDER, *supra* note 8. By identifying castration with the feminine, the masculine tries to pretend that women are incomplete men. But, as Ellie Ragland-Sullivan explains, the Lacanian interpretation is that it is men that are failed women. Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in LACAN AND THE SUBJECT OF LANGUAGE 49, 62 (E. Ragland-Sullivan & Mark Bracher eds., 1991).

its place. Biographically, our subjectivity first starts to develop when we initially become aware that our mother (or mother substitute)³⁸ is not literally an extension of ourselves. Consequently, because our first experience of subjectivity is separation (castration) from another, we retroactively posit that prior to subjectivity-castration, we must have been one with the mother. Consequently, our symbolic order names the first other — the other with whom we were once joined prior to castration — as the mother. This all powerful, all embracing mother is what is lost in castration. She is therefore a phallus, the phallic mother. The search for wholeness is, therefore, retroactively rewritten as the desire to regress back into the maternal womb of the mythical phallic mother. The phallus is, therefore, the feminine as phallic mother.

When the phallus is thought of as the signifier of subjectivity or that which the masculine has and exchanges, it was conflated with that which men have — the penis — and exchange — women. When the phallus is thought of as the feminine, it is conflated with the physical analog that women are and enjoy — the female body.

E. Sexuality and Anatomy

Why do we call the position of having and exchanging the phallus "masculine" and the position of being and enjoying the phallus "feminine?" How does sexuality become linked to biology? We are unsatisfied with the symbolic because it is artificial, fleeting, incomplete, and the cause of our castration. We desire the integrity and permanence of the real. Although the concept of the phallus is symbolic, the phallus can never be attained in

38. This terminology reflects the fact that in our society, that which we feel we have lost in castration is immediate access to the "mother." The "mother" is our first nurturer who is the first "other" the infant confronts. The first seeds of infantile consciousness amount to the realization that other things exist, that the object world — mother — is not merely an extension of himself. Of course, empirically, in our (and perhaps every empirical) society the infant's biological mother usually occupies the role of first nurturer. Even when someone else empirically occupies that role, such as the infant's father or a nursemaid, society recognizes that person as a mother surrogate — not merely serving the psychoanalytic role of mother, but filling the role empirically normally filled by mothers. Consequently, it is not specifically relevant to any individual's psychoanalytic development that his or her first nurturer was or was not his or her mother. Lacanian psychoanalysis is a story told retroactively. It is not the child looking forward who recognizes his nurturer as a mother surrogate. Rather, it is the adult located in a society which has already assigned sexuated positions and gender roles looks back and remembers the nurturer as a mother surrogate. I discuss the retroactive nature of both Hegel and Lacan's dialectics essentially in SCHROEDER, *supra* note 8. Probably the foremost proponent of a retroactive reading of Hegel and Lacan is Slavoj Žižek. See, e.g., SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 129-31 (1991).

the symbolic precisely because it is that which was lost in the moment of castration that created the symbolic. That is, the phallus is the real that the symbolic expels. Consequently, we need to get beyond the symbolic in order to get to the real. We try to do this in the imaginary order by identifying natural analogs (which seem "real") to stand in for the symbolic concepts.³⁹ As in Hegel, our true desire is the desire of the Other — the achievement of subjectivity through recognition. We desire the phallus derivatively as the mediatrix of subjectivity. But the phallus is unobtainable (lost) by definition. Our strategy is to pretend that it is some *obtainable* object (not the phallus) that we desire instead. We tell ourselves "if I could just possess . . . [fill in the blank: that handsome man's penis or his child, that beautiful woman's body, that fancy new car, that promotion, etc.], *then* I will be satisfied." This imaginary object, the "*objet petit a*" serves retroactively as the object cause of our desire.

For unexplained historical reasons, anatomical males are dominant in our society.⁴⁰ As a result, we conflate what at first blush seems to be the more powerful position of sexuality — having and exchanging the phallus — with maleness. This is why Lacan calls this position the masculine. Because the masculine pretends to possess the phallus, we conflate the phallus with some part of the anatomy that men have and women do not — specifically, the penis. Note, that the reason why the penis (rather than some other male characteristic, such as the beard) is chosen as the privileged organ is not because it is impressive, but because it is fragile.⁴¹ Since the phallus is the

39. This idea of the imaginary object which takes a place in the real in order to serve as the cause of desire is called the "*objet petit a*." This is probably the most difficult and contradictory idea in all of Lacan's infuriatingly difficult system. The limited purposes of this article fortunately do not necessitate a full discussion. See SCHROEDER, *supra* note 8. For the limited purposes of this article, it represents the place where the three psychic orders overlap.

40. Some feminists think they critique Lacan when they point out the implicit misogyny of his choice of terminology. They think this contradicts his claim that his definition of sexuality is non-anatomical and, therefore, neutral. I argue that Lacan's terminology is not neutral, because Lacan tries to define sexuality in a non-neutral society. See *id.*

41. *Id.* Lacan's theory of castration subtly echoes St. Augustine's theory of sexuality, which has so greatly influenced traditional Christian teaching. (For a discussion of Augustinian theory and how it is unconsciously reflected in Catharine MacKinnon's supposedly radical theory of sexuality, see generally Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123 (1992).) Saint Augustine, like Lacan, insisted that human beings are irreparably split. Adam's sin sundered the pre-lapsarian harmony between man and God, man and woman, and soul and body. See PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY* 405, 407, 418 (1988); see also AUGUSTINE, *THE CITY OF GOD* 413-14, 416-17, 457, 471 (Marcus Dods trans., 1950). God literally inscribed Adam's Fall into the

lost object of desire, it must be identified with something that could be lost. The penis can serve this role not just because women do not have one (suggesting that humans can lose them) and not just because men can be, and sometimes are, physically castrated. Rather, it is because the penis seems to have developed a mind of its own. Being out of control, the penis is already partly lost. Like subjectivity, it is what a man simultaneously feels is most himself, and yet alien to him. The penis can stand in for the phallus because of its unpredictable failure to stand up.

By conflating the phallus with the penis, the masculine not only tries to refuse to see his own castration, he tries to account for the sense of castration by exiling it to women. The masculine further tries to deny castration by pretending that the masculine community is engaged in exchanging phallic objects of desire. And so, the phallic object of desire is also conflated with that which is other than men, so that men can exchange it among each other. Because the sense of castration is associated with the false memory that the infant was once one with his mother, the phallic object of wholeness is associated with the maternal body. The phallus is not only conflated with the male organ, but also with the female body. This has been played out literally in traditional family structures in which men exchange women in marriage.⁴² I would note in passing at this time that the English word "tradition" comes from the Latin *traditio*, "to hand over." Among other meanings, the

male body as a constant reminder of Original Sin. Augustine called sexuality the *poena reciproca*. The human body serves as a "tiny mirror, in which men and women could catch a glimpse of themselves." BROWN, *supra*, at 418. Before the Fall, the penis was a limb subject to the conscious control of the soul like an arm and a leg. AUGUSTINE, *supra*, at 470-72. As soon as Adam and Eve ate of the Forbidden Fruit they "knew that they were naked." *Genesis* 3:7. Augustine interpreted this to mean that Adam had the first involuntary erection. AUGUSTINE, *supra*, at 422, 440, 465; BROWN, *supra*, at 416. The loss of control of the penis is, therefore, the holy symbol of the debased and split nature of man in the state of sin — in Augustine's words, man's desire "is divided against itself." AUGUSTINE, *supra*, at 465; BROWN, *supra*, at 417. Although this can be seen in the embarrassing masculinity of inopportune tumescence, it can be seen more forcefully in the humiliating failure or lack of impotence.

[S]ometimes this lust importunes them in spite of themselves, and sometimes fails them when they desire to feel it, so that though lust rages in the mind, it stirs not in the body. Thus, strangely enough, this emotion not only fails to obey the legitimate desire to beget offspring, but also refuses to serve lascivious lust; . . .

AUGUSTINE, *supra*, at 465.

42. Early Lacan was influenced by the structuralist anthropology of Claude Lévi-Strauss who held that societies are formed through arrangements by which men of different clans exchange women. Late Lacan moved further and further away from claims that his theory was an empirical account of individual or societal development. Rather, like Hegel's, it is a speculative account, which often plays itself out in our empirical lives.

Traditio was the name of the medieval European marriage ceremony whereby the bride was transferred to her husband.⁴³ It also means "treason."

Of course, the masculine strategy doesn't work. The phallus never really existed; it is a retroactive invention to account for our sense of loss. The masculine claims to trade something it never had (immediate unity with the feminine as the phallic mother) in exchange for something that does not exist (immediate relations) in order to achieve something with no content (subjectivity).⁴⁴ Men lie to themselves when they claim to possess the phallus when they merely have the penis. Every man in his depth knows he is castrated and that the object of desire is not within his grasp. Men lie to themselves and others when they claim to be indifferent to the phallic woman as the object of exchange. Exchange only occurs because the masculine cares about nothing else.

Masculinity, therefore, is a type of failure (as is, of course, femininity). Each of the two masculine strategies are untenable when taken alone, but they are mutually inconsistent when taken together. Lacan, therefore, rewrites Sigmund Freud's concept of castration anxiety not as the fear of being physically mutilated, but the fear of having to confront one's own castration, or even worse, the fear that one will not be able to keep up appearances so that other men will learn that he is castrated.

Subjectivity is a fiction. Specifically, it is the tale of the Emperor's New Clothes⁴⁵ — a universal adult conspiracy that that which does not exist does exist and that the king (the masculine subject) has "it." But being fictional, or artificial, does not imply that subjectivity doesn't exist. Artificial means literally made by art. The creation of subjectivity is alchemy. It is the magic by which we make that which does not exist function.

43. JAMES A. BRUNDAGE, *LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 262, 266-68 (1987).

44. ŽIŽEK explains:

Lacan rejects all usual attempts to account for the prohibition of incest: from utilitarianism to Levi-Strauss, they all promise something in exchange for this radical renunciation; they all present it as a 'reasonable' decision which provides a greater amount of long-term pleasure, a multitude of women, and so on — in [short], they all refer to some Good as its ground, contrary to Lacan for whom the prohibition of incest is unconditional, since it is radically unaccountable. It, I give *something in exchange for nothing* — or (and therein consists its fundamental paradox) in so far as the incestuous object is in itself impossible, I give *nothing in exchange for something* (the 'permitted' non-incestuous object).

ŽIŽEK, *supra* note 38, at 230-31.

45. See ŽIŽEK, *supra* note 38, at 11-12; Jeanne L. Schroeder & David Gray Carlson, *The Subject is Nothing*, 5 *LAW AND CRITIQUE* 93, 100-01 (1994).

From a feminine standpoint, the physical analog for perfect integrity is the idealized image of perfect virgin motherhood (the "phallic mother") which of course no actual woman can ever achieve. The physical analog for loss of integrity is, of course, loss of virginity — just as a woman's initiation into sexual intercourse requires permanent physical disfigurement, so initiation into social intercourse (the symbolic order of law and language) requires permanent psychic disfigurement. Only the Goddesses (including the Virgin Mary) achieved motherhood without loss. This is why the divine is real.

Lacan is not a restatement of the traditional misogynist imagery of the masculine as the active subject and the feminine as passive object. Rather, it is both an account of how this stereotypical imagery arises as well as a subversive rewriting of this imagery. First, although the masculine claims to be the position of the free acting subject, in fact, it is only the feminine which can actualize the negativity which is the essence of freedom and subjectivity. The masculine *claims to have* subjectivity, but the subject *is* the feminine.

Second, although the masculine's claim to have "it" enables him to speak and act as a legal subject, the masculine is, in fact, trapped in the symbolic order of law. The masculine only seems to act, but actually travels around in a circle.

The masculine is totally caught up in the symbolic order. The masculine subject is not merely the subject of law and language, he is *subject to* law and language. The feminine in contrast is *subjected by* the symbolic order. The symbolic order tries to abject the feminine object by exiling her. But by being located at least partly in the real, the feminine opens up the possibility of escape from the symbolic order (i.e., freedom). It is true that the feminine, as the acceptance of castration, can be the position of inertia — depression. But as Freud taught, it is the acceptance of loss which enables us to mourn. And it is only mourning which allows us to bury the dead, and move on. The impossible feminine is simultaneously the possibility of freedom — the dream of creating something entirely new.

F. The Necessary Repression of the Feminine by the Masculine and the Law

The masculine position represses the feminine. If the masculine is the position of having "it," then the masculine sees himself as the position of subjectivity in terms of the speaking, active subject who bears legal rights. The feminine, who does not have "it," must be the position of objectivity — the silent object of men's rights and desires without rights of her own. If she represents the castration that men try to deny, she must be put out of sight.

The feminine is the knowledge that signification is never fixed like meaning, that we never achieve immediate relationship (i.e., have "it"). We must forget the feminine position in order to speak. Although this is a purely symbolic concept, we play it out in the real through a myriad of historical institutions which impose modesty and privacy on the feminine. Examples include the Islamic chador and harem, the nineteenth century Western cult of feminine domesticity, and its contemporary descendent, the Robin West-Carol Gilligan cultural "feminism" of female relationality, which all implicitly impose modesty and privacy on the feminine. The so-called female "different voice" is, in fact, just the feminine's silent miming of the masculine voice.⁴⁶

Indeed, law *necessarily* represses the feminine. The feminine, as the acceptance of castration/violation, is the false memory of a mythical past integrity and the impossible dream of future reintegration. The feminine is the past and the future; simultaneously the always already lost, and the not yet found. The masculine as the denial of castration is the claim of having "it," of being intact now. The masculine is the vain attempt to capture the present — to stop the flow of time. The masculine is the position of speech and of judgment because it is the necessary fiction that meaning is static, that rules have black letters, and that justice can be achieved now which enables us to speak and act. To do so, we must repress the fact that the masculine claim to subjectivity is a fiction and silence the feminine reminders that we are castrated, that law and language are artificial, contingent and always slipping, and that justice is an ideal, an ought, to which we must always strive precisely because it can never be reached.

Since the feminine is also the mediating object of desire that the masculine exchanges to create subjectivity, the necessity of mediation and the third must also be repressed by the masculine. In an attempt to achieve the immediate relation to the phallic mother lost in castration, the masculine pretends that all relations are immediate and binary. This is imaginary. This requires the masculine simultaneously to take two mutually inconsistent positions which mirror the two inconsistent masculine responses to castration. First, the subject claims an immediate subject-object relation to the phallus-penis in possession. Second, the subject claims immediate subject-subject relations with other men in exchange. This is binary because, in exchange, the feminine object herself loses independent significance. She just becomes a ghostly place holder for the relationship between the exchanging subjects.

46. SCHROEDER, *supra* note 8.

But, it is a fundamental thesis of psychoanalysis that whatever is repressed in the symbolic necessarily returns in the real. The more the masculine denies feminine subjectivity, the more he admits she exists. Indeed, it is the feminine, not the masculine, which can claim to be the true position of subjectivity. She is in the position of the radical negativity at the center of the split castrated subject which is the condition of freedom posited by Hegel. The feminine as negativity is created by her very repression, the very denial of her existence. Consequently, the more the feminine is denied, the stronger she is. In Lacan's terms, the feminine does not "exist, she insists."⁴⁷ To paraphrase Žižek, the problem with the feminine is not that she is unattainable, but that she won't go away.⁴⁸ She is *Juno Moneta* — the Woman who Reminds.

III. Applications in Law and Jurisprudence

A. The Masculine and Feminine Phallic Metaphors For Property

What does my identification of the phallic nature of property and the Lacanian insistence that the reduction of sexuality to anatomy is a conflation specifically have to do with law?

From a Lacanian standpoint, property is phallic. It is the creation of subjectivity with respect to the possession, enjoyment, and exchange of an object of desire. Property, being legal, is of course symbolic. However, as with subjectivity, our desire to achieve the wholeness we call the real leads us to try to identify the symbolic with natural analogs. We are drawn to identify property with the physical. Since property is sexual, we are drawn to apply the same anatomic metaphors to describe property that we use to describe sexuality. When we stand in the masculine position, we concentrate on the masculine elements of possessing and alienating, and we confuse possessing and alienating with holding, exchanging, and taking tangible things

47. ŽIŽEK states:

"Woman is a symptom of man" means that *Man himself exists only through woman qua his symptom*: all his ontological consistency hangs on, is suspended from, is "externalized" in his symptom. In other words, man literally *ex-sists*: his entire being lies "out there," in woman. Woman on the other hand, does *not* exist, she *insists*, which is why she does not come to be only through man. Something in her escapes the relation to Man, the reference to the phallic enjoyment; and, as is well known, Lacan endeavored to capture this excess by the notion of a "non-all" feminine *jouissance*.

ŽIŽEK, *supra* note 29, at 188 (footnote omitted).

48. "[T]he trouble with *jouissance* is not that it is unattainable . . . but, rather, that *one can never get rid of it*. . . ." ŽIŽEK, *supra* note 35, at 93.

that remind us of the penis and the female body. Further, when we stand in the masculine position, we tend to repress the feminine element of enjoyment. Under the masculine metaphor, losses of property are seen as castrations — the taking of possession. We try to deny castration by preventing takings through equitable remedies, or by pretending that it can be cured through exchange (i.e., legal remedies).

But, whatever is repressed in the symbolic returns in the real. And so, a feminine phallic metaphor for property is also implicit, but usually hidden, in property discourse. The feminine metaphor for property concentrates on the subject's identification with, and ecstatic enjoyment of, property. It is that which we enter and enjoy and protect from invasion by others. Loss of property is seen as permanent, as loss of self, rape, violation, and pollution. These are losses that cannot be cured, only mourned.

Because the law and judging are psychoanalytically masculine, law tends to privilege the masculine metaphors and to repress feminine metaphors. Specifically, there is a strong tendency to describe property disputes in terms of one of the two masculine elements (possession and exchange) even when they involve the feminine elements (identification and enjoyment). The law further tries to deny castration and the feminine necessity of mediation by analyzing property as a binary immediate relationship and repressing the feminine understanding that property is always a trilateral (or even quadrilateral) mediated relationship.

When property is reduced to possession, it is not described in the Hegelian, symbolic concept of the right of one subject to exclude other subjects from his object of desire — i.e., a trilateral relationship in which the legal relationship between the two subjects is mediated by the object in dispute. Rather, it is described in terms of the seemingly real binary relationship by which one subject physically holds a tangible object in the way a man "possesses" his organ. Other subjects are irrelevant to this purely physical relation.

This is obviously untenable because for something to be a legal right it must, by definition, be enforceable *against others*. Consequently, the masculine position alternately describes property in terms of the single element of exchange. But once again, in this discourse, exchange is not described in terms of the trilateral symbolic relationship of intersubjectivity mediated by objectivity. Rather, the significance of the object is minimized so that exchange can be described as an immediate binary relationship between two subjects. Probably the most obvious example of this is Hohfeld's insistence that property does not necessarily relate to objects at all,

a position widely accepted in contemporary property scholarship.⁴⁹ A variant of this is the cliché (or more accurately, canard) that the Uniform Commercial Code has not merely eliminated the object from property, but has disaggregated property entirely into an arbitrary "bundle of sticks."⁵⁰ Another variation of this is the law and economics concept of indifference which reduces property to its "exchange" value.⁵¹ That is, in the perfect market, objects lose all independent significance because exchange continues until everybody is indifferent between owning the object itself or its exchange value embodied in its market price. In its most extreme form, this approach mimics the second masculine strategy for confronting castration — the assertion that one has not been castrated because one has (retroactively) given up the phallus in exchange for some promised future object of desire. For example, Judge Richard Posner analyzes damage awards in terms of contract. This implies, in the case of tort, that the consent of the victim requisite to contract is deemed to be given retroactively and constructively when the court awards damages in an amount which supposedly makes the victim indifferent to her loss.⁵²

These most common approaches to property repress the feminine element in several ways. First, there is a strong tendency to ignore or downplay the feminine element of enjoyment. Property disputes do not always involve the right of possession of a single object (e.g., Which of two claimants is entitled to the object of desire? Who can exclude whom?) or the right of alienation/exchange (e.g., Has one party agreed to transfer her property to the other? What are the terms of the transfer?). Sometimes, the dispute concerns defining the borders of inconsistent uses of different objects. For example, consider a simple example of an environmental nuisance. A consumer has a spring on her land. A widget factory is located next door. When the widget producer enjoys his factory by making widgets,

49. HOHFELD, *supra* note 7, at 75-78, 85. I critique the attempt by Hohfeld and his followers to deny the object of property extensively in Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 271-305 (1994).

50. See Schroeder, *supra* note 49, at 242-44, 305-12; Jeanne L. Schroeder, *Death and Transfiguration: The Myth That the U.C.C. Disaggregated Property*, 69 TEMP. L. REV. 1281, 1282 (1996).

51. This view is implicit in Calabresi and Melamed's notion of "liability regimes" which views damages awarded in environmental nuisance disputes as forced sales of the plaintiff's entitlement to be free of pollution to the polluter at a purchase price equal to the damages. See Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1357 (1986).

52. Coleman and Kraus recognize that Posner does not state this view expressly, but argue that it is implicit in and required by the internal logic of his argument. *Id.* at 1356-61.

industrial waste flows into the aquifer, making it impossible for the consumer to enjoy her property by drinking her water. The consumer's enjoyment also reciprocally, but not symmetrically, affects the producer's enjoyment in the sense that insofar as she has an enforceable legal right to clean water, the producer is hindered in his ability to enjoy his factory. As a society, we must decide the respective borders of these two parties competing but necessarily inconsistent rights to enjoy their respective objects of property. And yet, the predominant tradition for analyzing just such environmental issues, founded by Guido Calabresi and Douglas Melamed, insists that the parties are disputing the possession, or terms of exchange, of a single object of property which they call an entitlement.⁵³

Second, property jurisprudence tends to repress the feminine element of identification with the object of desire. Interference with property rights is implicitly analogized to castration — in constitutional language, the taking of a thing. In the masculine denial of castration, castration can be cured by giving back the thing taken (or an identical substitute) and restoring possession, or claiming to be indifferent to the object taken and to be satisfied with its monetary value in exchange. Traditional notions of damages and takings do not take into account the sense of loss of self in addition to loss of property. Who has not heard a victim of theft who has described the crime in terms of feeling violated?

Third, the law has a tendency to repress the feminine as the silent or absent third. I have already discussed how the identification of property with possession or exchange tries to reduce the trilateral mediated aspect of property into a simple binary immediate relation. Property law also ignores the fact that property disputes can never be limited to the two litigants. Rather, property always implicates other silent and absent third parties, such as the creditors and heirs of the parties.

B. *Thanatos of the Perfect Market*

My latest project is to explore the erotics of the law and economic movement. This movement has long mystified me. This is not because I am insensitive to the elegant appeal of economics or doubt that it might offer insights on the law of the market. Indeed, my undergraduate degree is in economics, and when I began law school in the mid 1970s, I was surprised

53. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). I discuss this extensively in Jeanne L. Schroeder, *Three's a Crowd: Calabresi and Melamed's Repression of the Feminine* (1997) (unpublished manuscript, on file with *Washington and Lee Law Review*).

at the degree of ignorance of economic doctrine in legal academia. Unfortunately, today economics is in ill repute among progressives in the academy. I believe this is because the term has been co-opted by one school which is generally characterized by lack of self-critical awareness and has bred sloppy law with naive economics to create a misshapen and barren offspring. Let me again return to Blackstone. Blackstone began his inquiry into property law by noting how it inflamed man's desire. He continued:

And yet there are very few, that will give themselves the trouble to consider the original and foundation of [property]. Pleased as we are with the possession, we seem afraid to look back . . . as if fearful. . . .⁵⁴

Law and economics literature revolves around an ideal called the "perfect market." Much of this scholarship is based on a vulgarized interpretation of the Coase Theorem, stating that in a perfect market law makes no difference from an economic matter because all legal entitlements would be immediately and costlessly transferred to the higher valuing user, ensuring an efficient allocation of entitlements. They conclude that the law should be interpreted or amended either to eliminate as many market imperfections as possible, or otherwise to ensure that outcomes mimic that which would come about if the market were perfect.

And yet, as Blackstone observed with respect to property, the literature simultaneously is curiously reticent in discussing the characteristics of this ideal. Law and economics seems afraid to look back and consider its origins, as though fearful. Or, more accurately, it turns away from this primal scene with the same embarrassment and the shame each of us feels when we contemplate the details our own personal origins in the parental bed. I suspect that this resemblance is not merely coincidental. The perfect market, like one's own conception, is "real" in the Lacanian sense. As we shall see, to look back, to confront the real, is not merely frightening, it can be deadly.

1. Eros and Thanatos

Before I turn to the desire of law and economics, I need to speak very briefly and inadequately about the Lacanian concept of *jouissance* and the twin desires of Eros and Thanatos. In his late work, Lacan posited that the feminine was capable of what he called "*jouissance*." The French word "*jouissance*," which can be literally translated as "enjoyment," includes both the legal concept of quiet enjoyment of property as well as sexual orgasm.⁵⁵

54. 2 BLACKSTONE, *supra* note 1, at 2.

55. There is no precise English cognate for the French word "*jouissance*" used by Lacan. Literally, it refers to enjoyment or joyfulness generally. It includes the legal right of

In *jouissance* the subject takes on the feminine position of being and enjoying the object of desire and submerges into the real. Being and enjoying the phallus become one and the same.

The order of the real is that which is beyond and, therefore, limits the symbolic realm of language and law. By submerging with the real, the subject loses her subjectivity in the sense of losing her place in the symbolic. She cannot speak to others and achieve the intersubjective recognition, which is the condition of subjectivity, while standing in the feminine position of *jouissance*. This is because the moment she tries to describe her experience of *jouissance*, she is no longer in an unmediated relationship with the real. To speak is to interpret experience in the symbolic. To picture it is to interpret it in the imaginary. In order to attain subjectivity she must reject her enjoyment, submit herself to the symbolic, and take on the masculine role.⁵⁶ This is why the speaking subject is not merely the subject *of* the symbolic, he is always also subject *to* the symbolic.

This, in turn, makes *jouissance*, like Hegelian enjoyment, necessary to subjectivity, even though it is inadequate. Subjectivity is only created by castration which walls off the real from the symbolic. One cannot forbid what is impossible. *Jouissance* — the momentary achievement of femininity as merger with the real — is the transgression of the incest taboo which proves that what was once impossible is now merely forbidden. Prohibition calls the feminine into existence.

Lacan recognized that use as enjoyment, *jouissance*, reflects the feminine position. It is a concept of enjoyment that includes not only pleasure, but obscene delight in pain and death.⁵⁷ *Jouissance* may be thought of as the

"enjoyment" of property, but it is also a slang term for sexual orgasm specifically. BICE BENVENUTO & ROGER KENNEDY, *THE WORKS OF JACQUES LACAN: AN INTRODUCTION* 179 (1986). Lacan's term is not perfectly translatable because it is defined as that which is beyond the masculine, symbolic order of language.

If, as Lacan taught, unconscious drives do not always wish one's good, feminist theories that have equated *jouissance* with pleasure and the erotic pleasure of sexual freedom to gender liberation, have missed the meaning of Lacan's rethinking of the links between repetition, the death *beyond* the pleasure principle, and *jouissance*.

Ragland-Sullivan, *supra* note 37, at 70. *Jouissance*, is not the same as what Lacan calls "pleasure" (*plaisir*). "Pleasure, for Lacan, is bound to desire as a defence against *jouissance*, and is a prohibition against going beyond a certain limit of *jouissance*. *Jouissance*, like death, represents *something whose limits cannot be overcome*." BENEVENUTO & KENNEDY, *supra*, at 179.

56. See GROSZ, *supra* note 22, at 139.

57. Because enjoyment is a forbidden domain and obscene, pleasure always involves a certain displeasure. See ŽIŽEK, *supra* note 38, at 239.

fulfillment of desire in the sense of the breakdown of the subject/object distinction. It is the psychoanalytic experience of breaking out from the symbolic order of speech and the imaginary order of imagery and achieving direct, unmediated contact with the real. Although anatomical men are capable of *jouissance*, *jouissance* requires one to take on the position of the feminine⁵⁸ as speaking requires one to take on the position of the masculine.⁵⁹ Exchange is Eros. *Jouissance* is Thanatos. In the masculine story of Lacanian psychoanalysis, the destruction of the subject/object distinction would be suicidal in the sense that it also destroys subjectivity, consciousness, and language.

Eros is the masculine fiction that we could heal the hole left by castration if we could just obtain the perfect mate through exchange and achieve a perfect immediate union. *Eros* is the desire to achieve the lost feminine. The lost feminine has no positive content; she is nothing in the sense of radical negativity. To achieve a perfect union with the lost feminine would destroy the very separation and mediation that permits subjectivity. We rightly desire the promise of freedom offered by the radical negativity of the feminine, but to *achieve* radical negativity is, obviously, to negate everything including our subjectivity. Such a yearning is the morbid nostalgia of *Thanatos* — the death wish. It is an attempt to deny castration by regressing back to a preconscious union with the m(o)ther in the real. Even if we could achieve the real of *jouissance* by denying the symbolic, we also destroy the real which does not pre-exist the symbolic, but is constituted by it. Desire is the attempt to achieve wholeness. *Eros* is the masculine position of desire — the attempt to acquire and join with the perfect complementary mate who in the imaginary will fill out the hole left by castration. *Thanatos* is the feminine position of desire — the attempt to once again become unviolated and complete within ourselves by merging back into the real. This is why the feminine only becomes possible through her prohibition.

The Greek myth of Persephone illustrates the Lacanian feminine and desire. It often seems paradoxical to us moderns that Persephone was both the goddess of Spring and the queen of the dead.⁶⁰ From a Lacanian perspective, however, these two roles necessarily and inevitably go together.

58. See Lacan, *Jouissance*, *supra* note 16, at 137, 144-45; Rose, *supra* note 26, at 51.

59. GROSZ, *supra* note 22, at 71-72.

60. Usually, scholars explain this paradox as a simplistic metaphor for the plants which grow in Spring and die in Fall. This is overly simplistic, however. Unlike Persephone, the same plant does not come back to life every year. Consequently, the plant metaphor accurately describes the corn gods described by Sir James Frazer who are sacrificed every Fall, but not Persephone. See generally SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* (T.H. Gaster ed., abr. ed. 1951).

Feminine enjoyment is simultaneously that which has not yet come and is always already lost. It is the future and the past, but never the present.⁶¹

Once Persephone was called "Core," which is not a name, but merely the generic term for "maiden."⁶² She was the virgin daughter of Demeter, the goddess of the harvest. Demeter is the phallic mother as ripeness or completion. Hades, the lord of the dead, abducted and raped Core so that she would rule beside him on his infernal throne. Demeter refused to allow anything to grow until Core was restored to her. In light of this threat, Zeus was forced to intervene and ordered Hades to return Core.

Persephone's return was impossible. Core had eaten of the food of the dead seven pomegranate seeds. She was no longer a core. Consequently, although she was recalled to the upper world each Spring, she returned to the underworld every Fall. The moment she was recalled to life, she was immediately dying and leaving her mother's embrace to return to Hades.

But she used this pain to buy herself an inestimable present — subjectivity. Before her violation (castration) she had her virgin integrity and was as one with the phallic mother in the perfect harmony of immediate relationship. But this meant that she had no separate existence. She did not even have a name. Like the imaginary feminine posited by "different voice" feminism, as Core, she never fully separated from her mother. Now she is Persephone, an individual speaking person. She is no longer overshadowed by her mother, but neither is she passively raped by her husband. Try as he might to hold her in his icy grasp, she was always slipping away to return to life and the warmth of her mother's arms. As a subject, she is free and sovereign. She is a queen, but by necessity a queen of death. Her very name, Persephone, means "The Bringer of Destruction."

Persephone is obviously the personification of the seed who sprouts from the earth in Spring and returns to the earth in Fall. Her perfection is the fleeting momentary enjoyment or ripeness — union with her phallic mother. But the moment she merges back with mother-ripeness, she no longer exists because she once again loses her personality. She is, therefore, even more dead when she is with the goddess of life who subsumes her, than she is in the land of the dead, where she is merely imprisoned and can dream of escape. Neither Demeter nor Hades succeed in embracing her, but now worship her simultaneously as both the goddess of spring — the future wholeness which is promised — and the queen of death — the past integrity which can only be mourned.

61. I discuss this aspect of the Lacanian feminine extensively in Schroeder, *supra* note 8.

62. ROBERT GRAVES, *THE GREEK MYTHS* 89-96 (1955).

Death seeks life, and life seeks death in the eternal, iterative sterility of the fort-da game. Hades, the god of death, experiences his desire for Persephone in the masculine form of *Eros*. He seeks to cure his castration in the imaginary by finding a perfect mate who will make him whole by perfectly filling his hole. Demeter, the goddess of life, experiences her desire for Persephone in the feminine form of *Thanatos*. She nostalgically longs to retreat back to the time before her violation into the undifferentiated, impersonal integrity of the real — turning Persephone back into Core, the perfect virgin who is the one with the perfect mother. From the standpoint of Demeter and Hades, Persephone is like Eurydice, the feminine twice lost.⁶³ From Persephone's own impossible position, she is feminine subjectivity finally found.

2. *The Desire of the Market*

If markets are erotic, the desire of law and economics ideal would, at first blush, seem to be *Eros*. Although there are various definitions of efficiency, they all share a belief that utility or wealth could be increased by shifting objects to the higher valuing user. The masculine pretends that the hole of castration could be healed if he could just acquire the perfect mate or object through exchange with whom he could join in a perfect, immediate relationship. The lawyer/economist believes that the inefficiencies of the economy can be cured if each subject can obtain his desired object through exchange. This is misleading. *Eros* always turns into *Thanatos* — the desire to dissolve back into the real. If the masculine achieves his desire by obtaining an immediate relationship with the feminine, he loses the separation of castration which creates his subjectivity.

Law and economics scholars tend to use the word "perfect market" as shorthand for the conditions under which the Coase Theorem is supposed to

63. LACAN, *supra* note 18, at 25. Orpheus desired Eurydice because he never had her. He was fiancé and widower, but never husband. The beautiful Eurydice died from a snake bite at their wedding. Although Orpheus had lost Eurydice once through death, he could not accept that she was forever lost and persisted in the impossible dream that she could again be embraced. And so, Orpheus descended to the underworld in order to retrieve her.

Persephone, the queen of death, promised Orpheus that he could have Eurydice, but only in the future. Eurydice would follow behind Orpheus as he climbed the long passage out of Tartarus back to life but Orpheus was forbidden to turn back and look at her. Orpheus's anticipation was stirred by the soft sound of footsteps following behind him. He finally could not control himself and turned around to embrace his beloved. As he did so, as Persephone warned, she was already gone. He only knew that she had been there from the trace of her loss — the fading echo of her farewell. See Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics* (1997) (unpublished manuscript, on file with *Washington and Lee Law Review*).

be true.⁶⁴ In his original article, Ronald Coase mentioned that the initial allocation of legal entitlements is irrelevant in a world without transaction costs.⁶⁵ A perfect market is a world without transaction costs. The concepts of transaction costs and the perfect market are briefly discussed below.⁶⁶

The perfect market exists in the real. The real is that which can not be captured in the symbolic or the imaginary. The real is the wholeness lost in castration. Consequently, it is the collapse of all castrating distinctions of time and space into an ideal, immediate uterine unity. The real is, therefore, an event, not a process. It is the universe which must have existed before the big bang, and may exist again after some hypothesized future big crunch. The real is the perfect resolution of the subject-object, and the self-other, distinctions. It is pure being without distinctions. And, as Hegel explained in his *Greater Logic*,⁶⁷ absolutely pure being is identical to absolutely pure nothingness. The real is the person before subjectivity — which of course is created by the big bang we call castration. There is no individual personality in the real. There is no lack in the real, so there can be no desire. Without individuality and without desire, not only is there no need for speech, but speech is impossible: there is no one to speak, no one to speak to, and nothing to speak about. As the Bible tells us: In the beginning, the world was without form and void.⁶⁸

Similarly, the perfect market is a place with no costs. According to self-proclaimed Coaseans, the initial legal regime is irrelevant only if all misallocations (or inefficient allocations) of entitlements can be costlessly corrected. In other words, they must be corrected instantaneously.

The perfect market is a place without time because "time spent" is a "major factor"⁶⁹ in price differentiation, and price differentiation is, by definition, a market imperfection. From an economic standpoint, one of the most important costs is time itself. The first thing one learns in any finance course is the "time value of money" and the corresponding "money value of time." A dollar tomorrow is worth less than a dollar today. All delays in time must, therefore, be compensated. We call this "interest."

64. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

65. *Id.* at 19.

66. See Schroeder, *supra* note 63.

67. The work colloquially referred to by Hegelians as THE GREATER LOGIC has been published in English under the title G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC (A.U. Miller trans., 1969). Hegel also wrote LESSER LOGIC, published in the U.S. under the confusingly similar name G.W.F. HEGEL, HEGEL'S LOGIC (William Wallace trans., 1975). To avoid confusion in texts I use colloquial names.

68. *Genesis* 1:2.

69. MICHA GISSER & PETER S. BARTH, BASIC ECONOMICS 41 (1970).

It follows from the fact that there is no time in the perfect market, that there can also be no space and no movement. All differences in geography must be done away with because distance not only means transportation costs, but necessarily results in differentiation between different producers and their products.

In the perfect market, there can be no distinctions between objects. Product differentiation is an imperfection by definition.⁷⁰ At the efficient price, all objects are perfect substitutes for all other objects. The fact that there are no differentiated mediating objects for persons to use to individuate themselves implies that there can be no subjectivity in the perfect market. This also turns out to be the case.

In the perfect market, there is not merely perfect, but complete information — "free, complete, instantaneous and universally available."⁷¹ But this requires that there be no individual subjectivity — there is no distinction between persons. That is, many opponents of the Coase Theorem try to use game theory to show that efficient reallocation of entitlements may not occur if the parties can use strategic behavior — hiding their true desires, and true valuations. From a Coasean point of view, *if* the ability to use strategic behavior impedes reallocations, *then* strategic behavior is a transaction cost *by definition* which cannot exist in the perfect market. There can be no secrets. Consequently, in the truly perfect, each party in a market must know everything in the mind of every other party in the market. There is no reason to speak, because everything has already been said. In the words of Robert Cooter, "[T]he type of disclosure and certification of intent required by the perfect market destroys a player's freedom."⁷²

Indeed, the perfect market is totally unfree. Since all legal rights must be clear and ambiguous, there is no room for the creation of legal rights. Since every member of the market polices and monitors every other member, the market is perfectly coercive. All information is public, so not only the public-private distinction essential to liberalism, but the private individuality necessary for differentiation among, and recognition by, persons disappears. If everyone has perfect information about everyone else, then there can be no surprises in the perfect market. All action must be pre-ordained. Without freedom, there can be no individuality, no subjectivity.

In a perfect market, there are no transactions, no movement, no market intercourse. Actual markets depend on information being imperfect, "costly,

70. *Id.* at 41.

71. James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1414, 1443 (1992).

72. Robert Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 17 (1982).

partial, and deliberately restricted in its availability."⁷³ By definition, in the perfect market, all entitlements have always already flowed to the highest valuing user. The exchange price of all entitlements equal the use value of all users. The economic theory of marginalism holds that in the perfect market exchange will continue until all subjects become perfectly indifferent to all objects. There is no desire. Without desire, there is no exchange.

Once the perfect market is achieved, all markets stop. This is why we cannot bear to confront the perfect market or describe it in law and language. To achieve the perfect market is *jouissance*, the transgression of the market, law, and language. To achieve the perfect market would be to regress back to the state before the birth of subjectivity. The perfect market is death. For the symbolic order of the actual market to work, the perfect market must be forever postponed. It must be forbidden.

This is the Lacanian paradox of the feminine. The perfect market is the real. It is the impossible realm where castration is cured — where nothing is cut off from anything else. We desire the perfect market precisely because we long for the perfect wholeness we feel we have lost. The perfect market, like the dream of our own conception, is the image of the final attainment of the phallus — ecstatic union with the phallic mother. But the achievement of the perfect market, simultaneously makes the feminine — the negativity necessary for human freedom — impossible. The real which is now lost was only created by castration. The freedom which is the feminine only becomes possible through her prohibition.

The desire of law and economics is wealth maximization — the desire for money. The ancients knew that money is *Juno Moneta* — the feminine who reminds and warns. She fills our memories with the image of lost freedom, enabling us to desire future freedom. But she also warns us not to give in to our desire because total freedom is total negation, our desire is *Thanatos*. The feminine captured becomes Persephone — The Bringer of Destruction. To fulfill your desire for the feminine is to lose both her and yourself.

73. Boyle, *supra* note 71, at 1443.

