

October 2002

The Stumbling Block: Freedom, Rationality, and Legal Scholarship

Jeanne L. Schroeder

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Jurisprudence Commons](#), and the [Law and Economics Commons](#)

Repository Citation

Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 Wm. & Mary L. Rev. 263 (2002), <https://scholarship.law.wm.edu/wmlr/vol44/iss1/5>

Copyright c 2002 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

THE STUMBLING BLOCK: FREEDOM, RATIONALITY, AND LEGAL SCHOLARSHIP

JEANNE L. SCHROEDER*

I. POLICY SCHOLARSHIP	265
A. <i>Introduction</i>	265
B. <i>Neo-classical Price Theory and Behavioral Economics</i>	267
II. RATIONALITY	272
A. <i>Economic Rationality</i>	274
1. <i>Rationality as Ends-Means Reasoning</i>	274
2. <i>The Irrationality of Ends</i>	277
3. <i>The Natural and the Positive</i>	279
B. <i>Speculative Rationality</i>	283
1. <i>Negative Freedom as Liberty</i>	284
2. <i>Positive Freedom as Spontaneity</i>	289
3. <i>Can Freedom Be Practical?</i>	291
4. <i>The Problem with Utilitarianism</i>	293
5. <i>The Right v. the Good</i>	301
6. <i>The Moral Law and Radical Evil</i>	304
7. <i>The Dialectical Relationship Between Law and Freedom</i>	309
8. <i>Kant's Legacy</i>	311
9. <i>Modesty with Respect to Policy</i>	312
C. <i>The Failure to Communicate</i>	314
D. <i>Speculative Thought</i>	317
1. <i>Kant and Hegel</i>	317
2. <i>Appearances All the Way Down</i>	318
3. <i>The Retroactive Nature of Speculative Theory</i>	323
III. POLICY AS THE OTHER SIDE OF CRITIQUE	325
A. <i>The Matrices of Discourse</i>	326

* Professor of Law, The Benjamin N. Cardozo School of Law, Yeshiva University, New York City. Special thanks to the participants at workshops held at the Faculties of Law at the University of Sydney and Griffith University, Brisbane, Australia, for their helpful comments on an earlier draft of this Article.

1. <i>The Mathemes</i>	326
2. <i>The Three Orders</i>	327
3. <i>The Master Signifier</i>	333
4. <i>Knowledge</i>	335
5. <i>The Split Subject</i>	335
6. <i>The objet petit a</i>	340
7. <i>The Positions</i>	343
B. <i>The Discourses of Power</i>	345
1. <i>The Discourse of the Master</i>	345
2. <i>The Discourse of the University</i>	347
a. <i>Legal Policy Scholarship</i>	350
b. <i>Examples</i>	351
c. <i>The Bureaucracy Does Not Exist</i>	357
C. <i>The Critical Discourses</i>	359
1. <i>Law as the One Possible Profession</i>	359
2. <i>The Discourse of the Analyst</i>	360
3. <i>Law as the Feminine Profession</i>	363
4. <i>The Discourse of the Hysteric</i>	365
a. <i>Hysteria</i>	366
b. <i>What Do You Want?</i>	367
c. <i>Legal Discourse</i>	368
5. <i>Policy</i>	371

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

-- Immanuel Kant¹

I. POLICY SCHOLARSHIP

A. Introduction

In this Article, I succumb to the temptation to make policy recommendations. My policy is "Stop making policy recommendations!" Or, to put this more reasonably, legal academia should realize that policy scholarship should not dominate legal scholarship as it does now. Jurisprudential, theoretical, and doctrinal scholarship should have equal prestige and presence in academia if for no other reason than these forms of scholarship more closely relate to the practice of law that engages most of our students. Indeed, I argue that despite prevailing perceptions that policy-oriented scholarship is pragmatic and hard-headed, other forms of scholarship have much greater practical application.

I address my critique specifically towards recent trends in law and economics scholarship, but it is aimed towards policy-oriented scholarship generally. I also suggest that critical legal scholarship might be revitalized by a new approach to theory informed by the Continental speculative tradition originating with the philosophy of Immanuel Kant and G.W.F. Hegel and continuing into the twentieth century with the psychoanalytic theory of Jacques Lacan. I contrast the thin concept of rationality adopted by both the law and economics and critical legal studies movements with the thicker one adopted by speculative theory.

I suggest a reason for both the overwhelming dominance of policy-oriented scholarship among legal academics and the estrangement of so much of legal academia from legal practice. Policy

1. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 18 (T.K. Abbott trans., Prometheus Books 1996) (1788) [hereinafter KANT, PRACTICAL REASON].

scholars address law from the position of the governor-legislatures and activist judges who write the law in order to further society's "objective" purposes. They use the law as a tool to achieve a desired policy. In order to do this, policy scholars must claim an ability to predict the empirical behavior of those legal actors subjected to the law. Spontaneous and unpredictable behavior is therefore anathema to the policy planner. Consequently, they seek to define rationality as predictable behavior and dismiss the unpredictable choice of ends as irrational.² When legal actors evince behavior that does not comport with this definition of rationality, policy scholars suggest legal rules designed to manipulate these actors into behaving in ways closer to those predicted by their theory.³ Policy scholarship thus reflects a fundamental fear of freedom. In Kant's words, freedom is the stumbling block on which policy scholarship founders.⁴

In contrast, speculative theorists and doctrinal scholars, like practicing attorneys, address the law from the position of the governed—those subjected to the law's power. They seek to understand how the law affects those subjected to its power in order to help them use the law to achieve their own "subjective" purposes. Speculative theory suggests that it is irrational behavior that is rigidly predictable and that rationality is nothing but the capacity for pure spontaneity.

In recent years, Richard Posner, the doyen of the law and economics movement, has loosed a blistering tirade on the use of neo-Kantian moral theory in legal policymaking.⁵ This attack is of a piece with the utilitarian grounds of the neo-classical economics that Posner preaches. Kant's theories of freedom and rationality are inextricably linked to his moral theory. Both theories are antithetical to the economic understanding of rationality which is limited to ends-means reasoning. Posner is absolutely correct, therefore, that in order to adopt a theory of economic rationality, one must also reject Kantian moral theory. Utilitarianism's fear

2. See *infra* Part II.A.1.

3. See *infra* notes 376-406 and accompanying text.

4. KANT, PRACTICAL REASON, *supra* note 1, at 18.

5. See generally RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY (1999) [hereinafter POSNER, MORAL THEORY]; Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

of freedom and hatred of Kantianism are one and the same. Nevertheless, despite my promotion of speculative theory in this Article, I wish to partially defend Posner from the attacks of neo-Kantians such as Ronald Dworkin.⁶ The type of detailed normative policy advice often proffered in the name of neo-Kantianism is inconsistent with Kantian theory and the speculative tradition it engendered.

In this Article, I explain why the law and economics movement has consistently refused to respond seriously to external criticism. From the perspective of Lacanian discourse theory, law and economics and speculative theory not only fail to address each other, they are *literally* speaking two different languages. Policy-oriented scholarship speaks what is called *the discourse of the university*. Critical theorists, doctrinal scholars, and practicing attorneys, however, speak *the discourse of the hysteric*. The two discourses cannot communicate directly because they presuppose radically different audiences. Policy scholars speak from the position of expertise and address law's goals. Critical theorists and doctrinal scholars speak from the position of the subject subjected to the law and address law's power. Schematically, each is the other side—the exact logical reverse—of the other. Consequently, Lacan argues that although those speaking the university discourse claim to speak from the position of knowledge, they only produce alienation, whereas those who speak the hysteric's discourse speak from the position of alienation and produce knowledge.⁷

B. Neo-classical Price Theory and Behavioral Economics

The law and economics movement has traditionally been dominated by the Chicago School neo-classical price theory associated with Milton Friedman. Neo-classical price theory makes predictions based on the assumption that economic subjects act as though they were economically rational.⁸ Recently, the law and economics movement has discovered the work of the rival Carnegie

6. See Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998).

7. See *infra* notes 362-75, 443-62 and accompanying text.

8. See generally Milton Friedman, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 21-22 (1953).

School of behavioral economics associated with Herbert Simon.⁹ Prominent examples of this alternative theory include an article published by Christine Jolls, Cass Sunstein, and Richard Thaler in the *Stanford Law Review*¹⁰ and most of the papers presented at the *New and Critical Approaches to Law and Economics* symposium held at the University of Oregon Law School in March 2000.¹¹ In contrast to neo-classical price theory, behavioral economics does not start with the rationality postulate as an assumption, but instead makes empirical studies of how economic subjects actually behave. As Jolls, Sunstein, and Thaler have emphasized, behavioral economists believe that empirical data suggest economic subjects are only "boundedly rational" in the sense that they consistently deviate from the neo-classical model of economic rationality in certain specific, observable ways.¹²

What is so striking, however, is that the lessons most of these legal scholars purport to draw from bounded rationality are diametrically opposed to those that Simon intends to teach. Simon does not start from a preconception that economic rationality, as classically conceived, is either a superior or paradigmatic form of reasoning.¹³ Indeed, he thinks it is impossible in the real world. He

9. See generally HERBERT A. SIMON, *AN EMPIRICALLY BASED MICROECONOMICS* (1997) [hereinafter SIMON, *MICROECONOMICS*]; HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* (1982) [hereinafter SIMON, *BOUNDED RATIONALITY*].

10. See, e.g., Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) [hereinafter Jolls et al., *Behavioral Approach*]. This essay was later republished as the lead essay in *BEHAVIORAL LAW AND ECONOMICS* 13 (Cass Sunstein ed., 2000); see also Christine Jolls, *Theories and Tropes: A Reply to Posner and Kelman*, 50 STAN. L. REV. 1593 (1998) [hereinafter Jolls et al., *Theories and Tropes*].

11. Symposium, *New and Critical Perspectives to Law and Economics*, 79 OR. L. REV. 1 (2000).

12. Jolls, et al., *Behavioral Approach*, *supra* note 10, at 1476-78.

13. Simon discusses the diverse notions of rationality adopted by different theorists, and compares them with the rationality postulated in his essays: *From Substantive to Procedural Rationality*, *METHOD AND APPRAISAL IN ECONOMICS* 129 (S.J. Latsis ed., 1976), reprinted in SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 424; *Rationality*, *A DICTIONARY OF THE SOCIAL SCIENCES* 573 (J. Gould & W.L. Kolb eds., 1964), reprinted in SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 405; *Theories of Bounded Rationality*, *DECISION AND ORGANIZATION* 161 (C.B. Radner & R. Radner eds., 1972), reprinted in SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 408. Psychologist Gregory Mitchell has recently developed a powerful critique of the behavioral economics movement in legal academia alleging that much of this scholarship fundamentally misreads or misuses the empirical studies on which it is supposed to be based. Gregory Mitchell, *Taking Behavioralism Too Seriously: The*

studies actual market behavior for two reasons. First, he, like most economists outside of law schools, strongly disagrees with Friedman's assertion that the empirical accuracy of assumptions underlying an economic model are irrelevant so long as the model is a relatively good predictor of behavior.¹⁴ Even if one were to accept *arguendo* the dubious proposition that prediction is the only valid test of an economic theory, which Simon and others do not,¹⁵ the rationality postulate fails on these grounds; neo-classical economics is a notoriously poor predictor of actual behavior.¹⁶

Unwarranted Pessimism of the New Behavioral Analysis of Law, 43 WM. & MARY L. REV. 1907 (2002)

14. "The ultimate goal of a positive science is the development of a 'theory' or 'hypothesis' that yields valid and meaningful (i.e., not truistic) predictions about phenomena not yet observed." Friedman, *supra* note 8, at 3, 7. Friedman asserts that the "widely held view" that "the conformity of ... 'assumptions' to 'reality' is a test of the validity of the hypothesis" is "fundamentally wrong and productive of much mischief." *Id.* at 14. He goes even further and maintains that "[t]o be important ... a hypothesis must be descriptively false in its assumptions." *Id.* at 14.

15. Despite Posner's assertions, Friedman's methodology is, in fact, wildly controversial in economic quarters. See Jeanne L. Schroeder, *Just-So Stories: Posnerian Methodology*, 22 CARDOZO L. REV. 351 (2001) [hereinafter Schroeder, *Just-So Stories*]. Simon disparages Friedman's assertion as "the unreality principle." SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 61-62. Mark Blaug condemns it as the *F*-twist. MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 97 (2d ed. 1992). Samuelson calls Friedman's concept of methodology "a monstrous perversion of science." PAUL A. SAMUELSON, *THE COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON* 762 (R.C. Merton ed., 1972).

16. For all his talk about prediction, falsification, and testing, Friedman's argument in favor of the rationality postulate is notoriously lacking in empirical support. For example, Friedman claims that the maximization-of-returns hypothesis is supported by an "important body of evidence" culled "from countless applications of the hypothesis to specific problems and the repeated failure of its implications to be contradicted." Friedman, *supra* note 8, at 22. Blaug rightfully describes this as "without doubt the most frustrating passage in Friedman's entire essay because it is unaccompanied by even a single instance of these 'countless applications.'" BLAUG, *supra* note 15, at 101. Friedman's defense is that the "evidence is extremely hard to document [because] it is scattered" Friedman, *supra* note 8, at 22. This answer seems lame at best and disingenuous at worst. See BLAUG, *supra* note 15, at 101.

Becker points out that when economists talk about the predictions made by the rationality postulate, they usually have in mind the well-documented phenomenon of downward sloping demand curves. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 157-58 (1976) [hereinafter BECKER, *ECONOMIC APPROACH*]. True, research has yet to discover any meaningful exceptions to the "rule." *Id.* at 156. As Becker points out, however, this is itself not a reason to accept the rationality postulate since the phenomena of downward sloping demand curves is equally consistent with any number of other simpler and less controversial assumptions (such as the existence of budgetary restraints). *Id.* at 156-57. "Hence the market would act as if 'it' were rational [i.e., demand curves would be negatively inclined] not only when households were rational, but also when they were inert, impulsive, or otherwise

Simon suggests that a model based on more empirically accurate assumptions is likely to be a superior predictor.¹⁷

Second, Simon believes that one appropriate goal of economics is to help economic actors achieve their personal economic goals,¹⁸ something that neo-classical price theory neglects. Simon, like Ronald Coase, questions the assumption that one can derive "real world" advice from the abstract perfect market assumptions of price theory.¹⁹ For example, if maximization is impossible in the real

irrational." *Id.* at 161.

Jolls, Sunstein, and Thaler emphasize neo-classical economics' notoriously poor predictive track records as one of the primary reasons to investigate behavioral economics as an alternative. See Jolls et al., *Behavioral Approach*, *supra* note 10, at 1487-88.

17. For a theory to make good predictions, Simon argues:

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

SIMON, *MICROECONOMICS*, *supra* note 9, at 63.

18. *Id.* at 62 (arguing that "we want economic theories ... to help guide the actual management and operation of firms.").

19. As I argue elsewhere, Ronald Coase similarly disagreed with the neo-classical assumption that one could give advice in the real world based on perfect market assumptions. Indeed, a careful reading shows that this disagreement forms the basis of his famous "Coase Theorem." I set forth this analysis in Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998) [hereinafter Schroeder, *The End of the Market*].

For example, neo-classical economists assume that rational producers in a perfect market seek to maximize their profits and assume that real producers should try to do so as much as possible. Although law and economics scholars claim to invoke the spirit of Ronald Coase and his famous "Coase Theorem," Coase himself is particularly critical of the whole notion of economic rationality generally and the concept of utility maximization specifically. He states, "There is no reason to suppose that most human beings are engaged in maximizing anything unless it be unhappiness, and even this with incomplete success." R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 4 (1988) [hereinafter COASE, *THE FIRM*]. As I have argued extensively elsewhere, I believe that the law and economics movement has radically misread Coase. See Schroeder, *The End of the Market*, *supra*, at 483.

As correctly described by Jules L. Coleman, the Coase Theorem can be seen as a definition of what it is to act economically rationally. Jules L. Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 225 (1980). "To act rationally ... is to promote allocative efficiency [by, in the cases discussed by Coase] ... put[ting] resources to their profit-maximizing use." *Id.*

Coase's point, however, is that economics should cease using ideal models of economic rationality and perfect markets precisely because they are impossible in the real world. Rather, he believes (like Simon) that economists should study how economic decisions are in fact made in the real world. He notes:

One result of this divorce of the theory from its subject matter has been that the

world of imperfect markets and limited information, then it is equally impossible to try to approximate maximization with abstract economic models based on perfect markets and information. Consequently, so-called economic rationality is in fact *irrational* in the colloquial sense of being ineffective, if not outright crazy. Simon argues that in order for economists to give good advice they should examine how actual successful and unsuccessful economic subjects make economic decisions in the real world. Because a real producer can never have access to the type of perfect information needed to maximize profits, Simon believes that any decision process based on an attempt to maximize is doomed to failure.²⁰ Rather, successful entrepreneurs engage in a form of common sense that Simon calls "satisficing."²¹

In contrast, Jolls, Sunstein, Thaler, and many other self-identified legal economists seek to graft Simon's empirical observations onto the very aspect of neo-classical economics Simon rejects—the assumption that economic rationality is a superior mode of decision making in the "real" world. The policy suggestions made by Jolls, Sunstein, Thaler, and others are designed to force economically irrational subjects to act as though they were economically rational maximizers.²² In their words, although "the legal system ought always to respect *informed* choice, ... government decisionmakers ... can be relied upon to *make better choices than citizens*."²³ That is, the experts should tell you not only what to do, but also what you should want.

Jolls, Sunstein, and Thaler's position is the reverse or other side of Simon's. Rather than giving economic subjects information that the subjects themselves can evaluate to help them make decisions, Jolls, Sunstein, and Thaler would have experts make decisions as

entitles whose decisions economists are engaged in analyzing have not been made the subject of study and in consequence lack any substance.... We have consumers without humanity, firms without organization, and even exchange without markets.

COASE, *THE FIRM*, *supra*, at 3.

20. See SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 369-70.

21. *Id.* at 219, 417. Blaug describes Simon's theory of "satisficing" as an alternate to the classical rationality postulate that can be "described as a non-fully-rational theory of individual action under both certainty and uncertainty." BLAUG, *supra* note 15, at 233.

22. See *infra* notes 376-406 and accompanying text.

23. Jolls et al., *Behavioral Approach*, *supra* note 10, at 1475 (emphasis added).

to how subjects should act and, if necessary, deceive the subjects so that they act "appropriately." This is what Lacan called the university discourse, in which the expert or bureaucrat makes claims to superior knowledge as a means of veiling and justifying the exercise of power.²⁴ It is the position of the governor who wishes to control others, rather than that of the governed who seek to free themselves and achieve self-control. It represents not merely a fear of freedom for the experts themselves, but a fundamental hatred of it in others.

This Article proceeds as follows. First, I briefly describe the familiar rationality postulate of neo-classic price theory reflected in mainstream law and economics literature. Second, I contrast it to the very diverse concept of rationality encountered in speculative theory. Last, I demonstrate how Lacanian discourse theory offers both a more coherent critique of policy-oriented scholarship and an account of why policy scholars are unable to hear their critics.

II. RATIONALITY

The American law and economics movement, based on neo-classical price theory, posits that legal subjects are economically "rational."²⁵ This proposition has long been the subject of critique

24. See *infra* notes 362-75 and accompanying text.

25. As expressed by Blaug:

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

BLAUG, *supra* note 15, at 229. See generally Jeanne L. Schroeder, *Rationality in Law And Economics Scholarship*, 79 OR. L. REV. 147 (2000) [hereinafter Schroeder, *Economic Rationality*]. Perhaps this is more accurately expressed as the proposition that if economic subjects in the aggregate act as though they were economically rational a sufficiently large percentage of the time, one can make reasonably good economic predictions based on the assumption that economic subjects act as if they were rational. Friedman, *supra* note 8, at 21-22.

Blaug emphasizes that this rationality postulate has become so strongly embedded in economic theory "that some have seriously denied that it is possible to construct any economic theory not based on utility maximization." BLAUG, *supra* note 15, at 230. Blaug contends that this assertion is "obviously" false and cites not merely Marxism but Keynesian theory as counterexamples. *Id.*

from both supporters and opponents of the economic approach to law.²⁶ Frequently, critics challenge the empirical validity of the hypothesis and/or its analytic usefulness.²⁷ Jolls, Sunstein, Thaler, and other scholars sympathetic with the economics movement cite empirical work done by behavioral economists and argue that the rationality of economic actors is bounded—that is, people tend to display economically “irrational” behavior in certain predictable situations.²⁸ On moral, philosophic, or aesthetic grounds some question the extension of the hypothesis of economic rationality beyond the scope of express market transactions.²⁹ Others question the particular vision of economic rationality offered by a specific author.³⁰ In this Article, I do not criticize the rationality postulate

26. “Objections to the national actor model in law and economics are almost as old as the field itself.” Jolls et al., *Behavioral Approach*, *supra* note 10, at 1474.

27. I discussed various criticism of, and alternatives to, the rationality postulate as formulated by Posner and encountered in contemporary law reviews in Schroeder, *Economic Rationality*, *supra* note 25, at 147. I discussed the methodology purportedly adopted by Friedman and Posner in defending the rationality postulate in Schroeder, *Just-So Stories*, *supra* note 15, at 351.

28. In the words of Simon:

If we regard this model as a description of the actual behavior of some entrepreneur, we see that if we are to predict his behavior, the knowledge that he is rational is only a small part—almost an insignificant part—of the information that we require. His intention to be rational leads to particular behavior only in the context of conditions in which his behavior takes place....

Indeed, our principal use for such models is in predicting how the entrepreneur's behavior will be affected by a change in the environment that conditions or “bounds” his rationality.

SIMON, *BOUNDED RATIONALITY*, *supra* note 9, at 214.

29. For example, Margaret Jane Radin has gone so far as to condemn the economic approach even to property law issues as being alienating and destructive of human flourishing. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 93 (1996). I have criticized Radin's romanticism extensively elsewhere. See, e.g., JEANNE L. SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* 229-92 (1998) [hereinafter SCHROEDER, *VESTAL*]; Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. REV. 815, 883-98 (1999) [hereinafter Schroeder, *Pandora's Amphora*]; Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55 (1994) [hereinafter Schroeder, *Virgin Territory*].

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

per se. Instead, I seek to shed some light on the question of why the rationality postulate is so attractive to some and so objectionable to others.

One reason might be that the concept of "rationality" adopted by economists is radically different from that used in certain other disciplines and philosophical systems. To suggest that this debate is characterized by a semantic breakdown is not to say that the differences between the two sides can be reduced entirely to semantics. Rather, the difference between different definitions of the term "rationality" reflect either different conceptions of human nature or different understandings of the goals of legal and jurisprudential analysis.

A. *Economic Rationality*

Even mainstream neo-classical Chicago School economists adopt various definitions of economic rationality which differ in significant ways. I shall limit myself to the version promulgated by Posner as the one that has had the greatest impact on legal scholarship. Because this concept is so familiar, and because I have covered this ground before,³¹ my description shall be brief and shall serve mainly as an introduction to my subsequent discussion of speculative rationality which is less well known in legal circles.

1. *Rationality as Ends-Means Reasoning*

Economic rationality is, according to Posner, instrumental or ends-means reasoning.³² Simon has described this definition of

31. See Schroeder, *Economic Rationality*, *supra* note 25, at 159-85.

32. "[R]ationality is the ability and inclination to use instrumental reasoning to get on in life." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (1992) [hereinafter POSNER, *ECONOMIC ANALYSIS*].

Blaug describes the neo-classic notion of rationality as follows:

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

BLAUG, *supra* note 15, at 229.

rationality as a form of "substantive" rationality, in the sense that it is aimed at achieving a specific substantive goal.³³

More accurately, as understood by Posner, economic rationality does not involve any form of reasoning at all, but may be better described as ends-means *behavior*.³⁴ Although the colloquial sense of "rationality" means the use of reason, Posner's concept completely avoids any notion of conscious cogitation. In Posner's formulation, "it would not be a solecism to speak of a rational frog"³⁵ or rat³⁶ insofar as these creatures instinctively act in ways that further their simple ends such as eating and mating. In recent work, Posner dips into evolutionary theory and locates economic rationality at the level of the gene,³⁷ a mindless thing incapable of even the most rudimentary mental activity, let alone reason. Indeed, Posner, following Friedman, almost proudly proclaims that his theory completely lacks psychological content.³⁸

It is usually assumed that economic rationality is equivalent to "maximization." Once a subject identifies what she wants, she will act in such a way as to maximize her desideratum. The desideratum of producers is usually considered to be profit and that of consumers to be utility (happiness), although Posner has

33. "[Substantive rationality] is concerned only with finding what action maximizes utility in the given situation, hence is concerned with analyzing the situation but not the decision-maker." SIMON, *MICROECONOMICS*, *supra* note 9, at 18.

34. "Rationality means little more to an economist than a disposition to choose, consciously or unconsciously, an apt means to whatever ends the chooser happens to have.... It does not assume consciousness; it certainly does not assume omniscience." POSNER, *ECONOMIC ANALYSIS*, *supra* note 32, at 17.

35. *Id.*

36. "Rats are at least as rational as human beings when rationality is defined as achieving one's ends (survival and reproduction, in the case of rats) at least cost." Richard A. Posner, *Rational Choice, Behavioral Economics and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) [hereinafter Posner, *Behavioral Economics*].

37. *Id.* at 1561-64, 1570.

38. Friedman dismisses criticisms of the rationality postulate on the grounds that "it rests on outmoded psychology and must be reconstructed in line with each new development in psychology." Friedman, *supra* note 8, at 30. Indeed, Posner thinks that it is a critique of Jolls, Sunstein, and Thaler to point out that the behavioral economic approach is psychological in nature. See Posner, *Behavioral Economics*, *supra* note 36, at 1558. As Simon notes, psychological theory is irrelevant to the neo-classical model of rationality since it does not depend on an "understanding of human thought processes." SIMON, *MICROECONOMICS*, *supra* note 9, at 18.

suggested that wealth is or should be the desideratum furthered by law.³⁹

Most neo-classical economists agree that economic rationality does not involve a choice of ends.⁴⁰ Ends are deemed to be subjective, idiosyncratic and pre-given.⁴¹ Although it is assumed that consumers wish to maximize their utility, most economists have nothing to say about what would make any specific consumer "happy." This is the usual meaning of the cliché "there is no arguing about tastes."⁴² From this, Posner concludes that economic rationality is not merely consistent with irrationality, it requires irrationality in the sense that the desires of economic subjects are considered to be beyond rational explanation.⁴³

Note what this implies. One's ends (tastes, desires, etc.) are considered the provenance of pure idiosyncratic subjectivity and are beyond rational explanation. Neo-classical economics, therefore,

39. As Posner himself notes, wealth maximization has both positive and normative aspects. The former posits "that the common law is best understood on the 'as if' assumption that judges try to maximize the wealth of society." RICHARD A. POSNER, *OVERCOMING LAW* 172-73 (1995) [hereinafter POSNER, *OVERCOMING LAW*]. The latter posits "that judges should interpret ... antitrust statutes to make them conform to the dictates of wealth maximization." *Id.* at 173; see also Lewis A. Kornhauser, *Wealth Maximization*, in *THE NEW PALGRAVE DICTIONARY OF LAW AND ECONOMICS* 679 (1998). Even Posner now admits that "[n]ot all questions that come up in law, however, can be effortlessly recast as economic questions." POSNER, *OVERCOMING LAW*, *supra*, at 22 (discussing abortion specifically). "In recent years, Posner has weakened his claim from one that asserted that common law courts should be exclusively concerned with wealth maximization to one that asserts that wealth maximization is one of the values that common law courts ought to pursue." Kornhauser, *supra*, at 682.

40. Becker is a notable exception—an economist who criticizes his fellow economists for assuming that preferences are pre-given and, therefore, "independent of both past and future consumption, and of the behavior of everyone else" when experience shows otherwise. GARY S. BECKER, *ACCOUNTING FOR TASTES* 4 (1996) [hereinafter BECKER, *ACCOUNTING FOR TASTES*].

41. As Posner says, "A preference can be taken as a given, and economic analysis proceed as usual, even if the preference is irrational." Posner, *Behavioral Economics*, *supra* note 36, at 1554.

42. Schroeder, *Economic Rationality*, *supra* note 25, at 210. Becker and Stigler turn this cliché inside-out and give it a fascinating new meaning. According to them, there is no arguing about tastes not because they are idiosyncratic, but because they are universal. See *infra* notes 51-53 and accompanying text.

43. Posner states: "[P]references cannot be divorced from emotion, or emotion from their stimuli, and so instrumental reasoning cannot be thought pervaded with irrationality merely because a frequent goal of such reasoning is a preference that we would not have if we were not emotional beings." Posner, *Behavioral Economics*, *supra* note 36, at 1554.

assumes that freedom and rationality are two very different things. Rationality (instrumental or ends-means reasoning) can be, but is not necessarily, a way of implementing one's freedom in the world, but it is not itself an exercise of freedom.

Indeed, economic rationality is the opposite of freedom. Economic rationality is in thrall or servitude to irrational ends, or what Kant calls "pathology."⁴⁴ Posner implicitly recognizes this when he ascribes economic rationality to rats and frogs,⁴⁵ creatures that, as far as he knows, are not capable of free will, but are slaves to their biological instinct. Posner even posits that genes, little automata that mechanically reproduce themselves, are economically rational.⁴⁶

2. *The Irrationality of Ends*

Notwithstanding claims of legal economists that they have nothing to say about people's preferences, one should not blindly trust such self-serving protestations. First, in order to make an economic model based on ends-means reasoning workable, economists must by necessity make assumptions or observations about ends. Traditional economic models are based on the assumption that economic subjects are self-interested (i.e., that a consumer's utility will be maximized if she considers her narrow self-interest).⁴⁷ Nevertheless, as Posner is the first to point out, there is no theoretical reason why one could not posit that subjects might have a "taste" for altruism so that utility maximization could be other-directed or even self-destructive.⁴⁸ Moreover, although it is usually assumed that individual tastes are independent, one could theoretically posit that tastes are affected by outside influences such as sympathy or antipathy towards others.⁴⁹ This is,

44. See *infra* Part II.B.6.

45. See *supra* notes 35-36 and accompanying text.

46. See *supra* note 37 and accompanying text.

47. Although this is the traditional model, Posner claims that the "economic analysis of law ... long ago abandoned the model of hyperrational, emotionless, unsocial, supremely egoistic, nonstrategic man (or woman)." Posner, *Behavioral Economics*, *supra* note 36, at 1552.

48. *Id.* at 1557.

49. *Id.* at 1557-58.

however, rarely done. Indeed, it is hard to see how assumptions such as altruism or sympathy can be added to the model without turning it into a truism.⁵⁰ Adding altruism or sympathy to an economic model risks making all conceivable behavior rational in the trivial sense that the actor must have thought his choice was a good idea at the time, regardless of his later reevaluation.

Although these are points typically associated with critics of economics, they also form the basis of Gary Becker and George Stigler's attempt to formulate a "new home economics"⁵¹ that conceptualizes households as producers, rather than consumers, of utility.⁵² As Stigler and Becker recognize, the traditional economic insistence that tastes are irrational creates an irreconcilable conflict with neo-classical economics' traditional goal of predicting economic behavior.⁵³ If rational people are supposed to act instrumentally to achieve their preferences, then one cannot predict their actions unless one can predict their preferences. This observation raises an implicit but fundamental paradox in neo-classical economics' relationship to the concept or ideal of free will.

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

In order to give advice as to what level of law making or other government intervention is appropriate for society one must be able

50. Sen is probably the most noted economist who has written extensively on this issue. See SEN, *supra* note 30, at 92.

51. BLAUG, *supra* note 15, at 220.

52. *Id.*

53. To paraphrase their argument, if economists refuse to account for tastes, they are in effect, giving up on making economics into a true predictive science. Slight changes in assumptions about tastes will result in radically different predictions, and if one's predictions turn out to be inaccurate, any and all observed anomalies can be retroactively justified by reference to changes in tastes. See George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76 (1977).

to predict the likely results of one's proposals and compare them to the likely results of alternatives. Even if one assumes that people are economically rational, one still cannot predict individual behavior unless one first knows people's goals. Moreover, if society's goal is to maximize the aggregate utilities of its individual members, one cannot even pretend to give policy advice unless one first determines what these individual utilities are likely to be.

In other words, the very goals of predictability, which are a necessary part of policy science generally and utilitarianism specifically, require that one break down the barrier protecting the privacy of tastes that is libertarianism's definition of negative freedom. One must treat these tastes as predictable and "objective" and not as free and "subjective."

As I discuss below,⁵⁴ the "new" legal economists take a further step beyond merely realizing that their policy science requires that they identify, predict, and thereby restrain the freedom to choose one's individual ends. The behavioral economists' proposition that economic rationality is bounded suggests that economic subjects are not necessarily able to choose the best means to their ends. Jolls, Sunstein, Thaler, and the participants in the Oregon symposium, however, teeter on taking a step further. If information is limited and rationality is bounded, then perhaps economic subjects are not merely incapable of choosing their means, but are also incompetent in identifying their *true* desires. The policies proposed by these scholars come close to recommending that experts not merely manipulate the means that individuals choose, but manipulate the choice of ends as well!

3. *The Natural and the Positive*

Surprisingly, the approach of utilitarianism (and romanticism) to the relationship between subjectivity and individual rights is half-way between that of libertarianism and Hegelianism.

Libertarianism sees both the legal subject and certain basic legal rights as natural. The legal subject is the self-identical,

54. See discussion *infra* Part III.B.2.a, III.B.2.b.

autonomous individual who has the right to life, liberty, and property in the state of nature.⁵⁵

The intuitive appeal of this approach is obvious. It claims to protect certain cherished rights as inviolable. Any existing regime of positive law can be justified only insofar as it respects these basic rights imposed by natural law.⁵⁶ The problem with this approach, however, is that it is hard to imagine what it could mean to have rights, particularly the right to property, in a state of nature prior to the formation of a legal regime.

As Hohfeld famously noted, rights can only be conceptualized with respect to other legal subjects—I have rights against another person or persons that will be recognized and enforced by other persons.⁵⁷ Rights can, therefore, only exist within the inter-subjective context of a given society, i.e., a given legal regime. This observation leads to the classic criticism of libertarianism. The natural right to property serves as the bulwark that protects the private individual from the violence of the state, but by necessity, it is the state that sets the scope of individuals' property rights.⁵⁸

55. For a brief account of the history of the idea of natural law from classical Greece through the Enlightenment, see COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 1-109 (2000).

56. Of course, libertarians recognize that any specific legal regime is merely positive, not natural. Nevertheless, the legitimacy of a regime of positive law depends on its consistency with a minimal set of natural rights. For example, the libertarian right to property is arguably protected by the positive law of the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution. See Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531 (1996) [hereinafter Schroeder, *Never Jam To-Day*].

57. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING* 65 (Walter Wheeler Cook ed., 1919). I raised this objection to the libertarian conception of natural rights in Schroeder, *The End of the Market*, *supra* note 19, at 502-03 and in Schroeder, *Pandora's Amphora*, *supra* note 29, at 862-63.

58. See, for example, Jennifer Nedelsky's discussion of the paradox of libertarian tradition in the context of the U.S. Constitution:

How can "the tradition" be characterized by both coherence and endurance *and* by an apparently unlimited mutability in the purported core of the structure? The paradox itself suggests the answers: it is the *myth* of property—its rhetorical power combined with the illusory nature of the image of property—that has been crucial to our system. And it is this mythic quality that current changes [i.e., disaggregation] in the concept may threaten.

JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 224 (1990).

As I have written extensively elsewhere this paradox is the reason for the famous incoherence of takings jurisprudence under the U.S. Constitution. See SCHROEDER, VESTAL,

Utilitarianism shares libertarianism's belief that the legal subject is natural. Legal subjects' preferences are "pre-given" in the sense that their preferences are external to the law. Utilitarianism deems legal rights to be merely a means of achieving the ends of maximum aggregate utility. This approach obviously has the advantage of solving the libertarian paradox of rights. One problem with this approach, however, is that it makes rights contingent (and therefore merely privileges). Another classic reproach to utilitarianism is moral monstrosity. If utilitarianism's only standard is *aggregate* utility, then it would have to support any number of monstrous institutions such as slavery or torture *if* it could be shown that the aggregate pleasure experienced by the masters or sadists exceeded the pain suffered by the slaves and torture victims.⁵⁹

Moreover, this criticism reveals an internal inconsistency within utilitarian theory. Utilitarian law is supposed to reflect the natural preferences of the appropriate populace, but utilitarianism has no theory of preferences. As Posner correctly notes, legal economists have been forced to abandon as empirically inaccurate

supra note 29, at 293-99, 312-21; Schroeder, *Never Jam To-Day*, *supra* note 56, at 1531-34, 1544-57, 1562-69. As Nedelsky states:

The idea of boundaries and of a sharp distinction between law and politics has been central to the American conception of limited government. Property was for 150 years the quintessential instance of rights as boundaries. It has been the symbol and source of a protected sphere into which the state cannot enter.

NEDELSKY, *supra*, at 8. Similarly, Vandeveld notes:

Property and its counterpart, sovereignty, have been understood as generic terms for, respectively, the collection of freedoms held by the individual and the collection of powers held by the state. In very real terms, the concept of property has marked the boundaries of individual freedom and the limits of state power.

Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328 (1980). "Therefore a concept of property is necessary to render the Constitution an effective safeguard against excessive governmental interference with individual life." Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1409 (1991).

59. Indeed, Posner gives moral monstrosity as one of the reasons he rejects utility as the desideratum of law and proposes wealth maximization as an alternative. "I reject utilitarianism because of its problems of measurement (how is one to measure subjective satisfaction objectively?), of boundaries (whose satisfactions are to count?), and of 'moral monstrosity' (how should we weight the satisfactions of the criminal and the unproductive?)." Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 251 (1980) [hereinafter Posner, *Value*].

the traditional utilitarian vision of the legal subject as the self-interested, autonomous individual.⁶⁰ Posner has also recently questioned whether the legal subject is even self-identical.⁶¹ As I discuss elsewhere, it is not clear what is left.⁶²

I believe that one reason that the critical left's attempted assault on the law and economics movement was so unsuccessful is that most self-identified "critical legal studies" scholarship is characterized by what I call romanticism.⁶³ Romanticism can be seen as a barren hybrid achieved by crossing the libertarian and utilitarian instincts. The romantic shares with the libertarian and the utilitarian the liberal intuition that the subject is natural. The romantic, like the utilitarian, recognizes that law can only be positive, yet, like the libertarian, longs for a "natural" state prior to positive law in which the natural person could breathe free. The utilitarian emphasizes the use of positive law as a tool to achieve society's goals (i.e., aggregate utility). The romantic concludes that positive law is a tool of repression because it ignores the happiness of any specific individual. The romantic sees moral monstrosity not as a theoretical problem of utilitarian philosophy, but as a necessary, if banal, everyday evil of a policy-oriented law. In other words, the romantic agrees with the basic propositions of utilitarianism, but merely comes to a different moral evaluation of its implications. Unfortunately, the romantic's agenda of a society without law as we know it seems impossible. As a result, romanticism generally, and critical legal studies specifically, fail as effective critique of utilitarianism.

In contrast, speculative theory can serve as an alternative to utilitarianism. Hegelian legal theory shares utilitarianism's critique of natural rights. Rights are not natural, but human inventions that can only exist in a legal regime. As discussed below, however, speculative theory *also* rejects the liberal presupposition that the legal subject is natural.⁶⁴ Subjectivity is as much a human artifact

60. See *id.* at 247; *infra* notes 142-44 and accompanying text.

61. See *infra* notes 142-44 and accompanying text.

62. See Schroeder, *Economic Rationality*, *supra* note 25, at 149-52.

63. I have developed this argument more fully in Schroeder, *Pandora's Amphora*, *supra* note 29, at 883-98, and in JEANNE L. SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (forthcoming 2003) [hereinafter SCHROEDER, *THE TRIUMPH OF VENUS*].

64. See *infra* notes 210-15 and accompanying text.

as law. Speculative theory, therefore, both rejects the utilitarian conclusion of completely contingent rights and the romantic dream that the individual can achieve freedom if released from the law's chains. Hegelian theory views legal rights and legal subjectivity as mutually constitutive; one cannot exist without the other.⁶⁵ Legal rights, being artificial, can be changed as an empirical matter, but one cannot abrogate rights without radically changing the individual subject.⁶⁶ This Hegelian analysis will eventually lead to the psychoanalytic theory of the necessary interrelationship between the split subject and what will be called the big Other (i.e., the symbolic order of law, language, and sexuality) which is the focus of a later section of this Article.⁶⁷

B. Speculative Rationality

In this section, I introduce the concept of rationality encountered in speculative philosophy and critical theory. Because the speculative tradition begins with Kant, I have chosen to give a brief account of certain aspects of his theories of rationality, freedom, and morality as found in his first two critiques and *The Metaphysics of Morals*.⁶⁸

65. SCHROEDER, VESTAL, *supra* note 29, at 20-24.

66. In other words, legal rights are artificial, but not arbitrary, in the sense that they are created to serve a function—the creation of legal subjectivity. Arbitrarily to change these rights in such a way as to abrogate their function would be self-defeating. To resort to metaphor, a house is artificial but its structure is not arbitrary because it has been created to serve a function—shelter. Although one can make many changes in the house, one cannot arbitrarily make certain changes (such as filling in the foundation, knocking down the weight bearing walls, etc.) that would cause the house to collapse and defeat its function.

67. See *infra* Part III.A.5.

68. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor trans. & ed., 1996) [hereinafter KANT, *MORALS*]. I do not purport to give a comprehensive account or a definitive interpretation of these extremely complex theories. I cannot hope to winnow an entire intellectual tradition down to a few law review pages. Indeed, as Henry Allison suggests “it is also no exaggeration to state that Kant’s theory of freedom is the most difficult aspect of his philosophy to interpret, let alone defend.” HENRY E. ALLISON, *KANT’S THEORY OF FREEDOM* 1 (1990). What I hope to do is to present sufficient information to illustrate the fundamental difference between the speculative and economic understanding of rationality, and the interrelationship among rationality, freedom, and morality.

1. *Negative Freedom as Liberty*

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

Kant introduced his concept of freedom and its necessary condition to rationality in his first critique, *The Critique of Pure Reason*, as part of his analysis of the four antinomies.⁶⁹ Kant argues that reason leads to two equally persuasive, yet mutually inconsistent, conclusions on four fundamental cosmological issues.⁷⁰ Each antinomy consists of a *dogmatic* thesis derived by reason purely from a priori propositions, and an *empirical* antithesis drawn from reason and applied to experience.⁷¹

Each thesis and its antithesis are supported by apogogic reasoning, "that is, each side attempts to establish its case by demonstrating the impossibility of the alternative. Thus, the operative assumption shared by both sides is that the opposing claims are contradictory."⁷² Kant believes that these conflicting positions will lead to the "euthanasia of reason,"⁷³ which can only be overcome by skepticism.⁷⁴ Kant's skeptical criticism leads to the resolution that the thesis and antithesis of each antinomy exist in "dialectical opposition" to each other.⁷⁵

It is Kant's third antinomy that concerns us. The thesis is: "Causality according to the laws of nature is not the only causality operating to originate the phenomena of the world. A causality of

69. IMMANUEL KANT, *CRITIQUE OF PURE REASON* (J.M.D. Meiklejohn trans., 1900) [hereinafter KANT, *PURE REASON*].

70. *Id.* at 235-36.

71. *See id.* at 262-70; ALLISON, *supra* note 68, at 13.

72. ALLISON, *supra* note 68, at 14.

73. KANT, *PURE REASON*, *supra* note 69, at 231.

74. *See id.* at 275-78.

75. ALLISON, *supra* note 68, at 13.

freedom is also necessary to account fully for these phenomena."⁷⁶ The antithesis is: "There is no such thing as freedom, but everything in the world happens solely according to the laws of nature."⁷⁷ The issue at stake here is "whether I am a free agent, or, like other beings, am bound in the chains of nature and fate."⁷⁸

Kant purports to resolve this antinomy by showing "that no real contradiction exists between [the thesis and the antithesis], and that, consequently, *both may be true*."⁷⁹ By doing so, Kant claims to show the possibility, if not the necessity, of free will.⁸⁰

Kant's resolution, and his resulting analysis of the inter-relationship among rationality, freedom, and spontaneity, is based on his distinction between the phenomenon and the thing-in-itself or noumenon. The phenomenon is the empirical or sensible world of our experience, while the noumenon is the essential or intelligible world with which we have no direct experience.⁸¹ An explanation and defense of these notoriously difficult concepts is beyond the scope of this Article.⁸² Nevertheless, I am hopeful that

76. KANT, *PURE REASON*, *supra* note 69, at 252.

77. *Id.*

78. *Id.* at 263. The questions raised by the other three antinomies are:

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

Id.

79. *Id.* at 316. The third, along with the fourth (concerning the existence of God) are the two "dynamical" antinomies which are solved in this fashion. Kant resolves the first two "mathematical" antinomies by showing that neither are true. *Id.* at 298-99; ALLISON, *supra* note 68, at 13-14.

80. KANT, *PURE REASON*, *supra* note 69, at 313.

81. As Robert Merrihew Adams puts it:

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

Robert Merrihew Adams, *Introduction to IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON* vii, ix (Allen Wood ed. & George Di Giovanni trans., 1998).

82. As Adams notes, his explanation "is a gross oversimplification of a famously complex argument, but ... it will do for present purposes." *Id.* at n.3.

the distinction between the noumenon and the phenomenon will become apparent in the context of the foregoing discussion.

Kant decides that the empirical antithesis, i.e., that everything is caused (and freedom does not exist), is true of nature or phenomena.⁸³ He states, "if phenomena are things in themselves, freedom is impossible. In this case, nature is the complete and all-sufficient cause of every event."⁸⁴ But, according to Kant, the universal natural rule of causality does not apply to noumena, which are not empirical but only intelligible.⁸⁵

One might be tempted to derive from these propositions the conclusion that freedom is only of theoretical interest because it cannot exist in the sensible world in which we live. Insofar as each person is an *empirical* individual (i.e., a human animal), she is herself a phenomenon who is bound by the chains of nature.⁸⁶ Even if the soul were free in heaven, how could man be free on earth? To pose this issue in Kantian terminology, is freedom merely *transcendental*, or can it also be made *practical*?

The fundamental Kantian distinction between the noumenon and the phenomenon might suggest either that the existence of transcendental freedom at the noumenal level explains nothing about practical freedom's existence at the phenomenal level or that the existence of transcendental freedom implies by negative pregnant the nonexistence of practical freedom. Kant's point in the *Critique of Pure Reason*, however, was precisely to show that practical freedom is *possible*. He left it to his second critique, the *Critique of Practical Reason*,⁸⁷ to try and demonstrate that practical

83. KANT, *PURE REASON*, *supra* note 69, at 305.

84. *Id.* at 302.

85. *Id.*

86. "Man is a phenomenon of the sensuous world, and at the same time, therefore, a natural cause, the causality of which must be regulated by empirical laws. As such, he must possess an empirical character, like all other natural phenomena." *Id.* at 307.

87. KANT, *PRACTICAL REASON*, *supra* note 1.

freedom necessarily flows from the concept of transcendental freedom.⁸⁸

Kant's theory is that there is a necessary relationship between phenomena and noumena. "If ... phenomena are held to be, as they are in fact, nothing more than mere representations, connected with other[s] in accordance with empirical laws, they must have a ground which is *not* phenomenal."⁸⁹ Indeed, he thinks that this relationship is definitional. The noumenon is the thing-in-itself; the phenomenon is a mere representation of something else. If a phenomenon were not the representation of something else, it would be a thing-in-itself, i.e., a noumenon rather than a phenomenon. But "[p]henomena—not being things in themselves— must have a transcendental object as a foundation, which determines them as mere representations."⁹⁰ In other words, each phenomenon refers to, and depends on, an underlying noumenon.

If one accepts this proposition, then "there seems to be no reason why we should not ascribe to this transcendental object, in addition to the property of self-phenomenization, a *causality* whose effects are to be met with in the world of phenomena, although it is not itself a phenomenon."⁹¹ In other words, although all phenomena, being natural, must have a cause, this *cause* does not have to be phenomenal. It might be possible for a phenomenon to have a noumenal cause. The noumenon is the uncaused cause of the phenomenon. Kant asks, "Is it not ... possible that, although every effect in the phenomenal world must be connected with an empirical cause, according to the universal law of nature, this empirical causality may be itself the effect of a non-empirical and intelligible causality—its connection with natural causes remaining nevertheless intact?"⁹² In other words, although freedom, if it exists, would be noumenal, not phenomenal, noumenal freedom could have

88. Whether Kant, despite his disclaimers, did attempt to show that freedom is necessary as well as possible in the *Critique of Practical Reason* and whether Kant was successful in his argument for the existence of a meaningful concept of practical freedom, are matters of dispute among Kantian scholars. See generally ALLISON, *supra* note 68 (reviewing the debates among Kantian scholars regarding Kant's argument for the existence of practical freedom).

89. KANT, *PURE REASON*, *supra* note 69, at 302.

90. *Id.* at 303.

91. *Id.*

92. *Id.* at 306.

practical effects in the phenomenal world despite the laws of nature. Most importantly, freedom could have a role in human action. Although man as an empirical creature is phenomenal, he is not *merely* phenomenal. The essence of the Kantian subject is noumenal.⁹³ In Christian terms, man is soul as well as body. "He is thus to himself, on the one hand, a phenomenon, but on the other hand in respect of certain faculties, a purely intelligible object—intelligible, because its action cannot be ascribed to sensuous receptivity. These faculties are understanding and reason."⁹⁴ As Robert Merrihew Adams characterizes Kant's argument:

How then can the demands of empirical knowledge be reconciled with the demands of morality? Kant's answer, in a nutshell, is that both can be satisfied if we are subject to causal determinism as phenomena (as we appear to ourselves and to each other) but free from causal determination as noumena (as we are in ourselves). We cannot be experienced (not even by ourselves) except as subject to a thoroughgoing causal determinism; but since objects of experience as such are only phenomena, it does not follow that we are causally determined as we are in ourselves. As a phenomenon the self is causally determined, but as a noumenon the self of the same person can still be the free agent that morality requires.⁹⁵

In other words, although Kant will prove to be the father of speculative thought, he is still a liberal philosopher who believes in a prelegal subject. Where Kant differs from other forms of liberalism, however, is that he sharply distinguishes the essential and the natural. Whereas libertarianism, utilitarianism, and romanticism believe that man is *naturally* free, Kant believes that man is free *despite* nature which is fundamentally unfree.

93. As a self-identified feminist, I have long opposed the general use of the term "man" to designate humanity generally, for the usual reasons. Nevertheless, in the context of discussing Kantian philosophy, on the one hand I find some available substitutes such as "person" and "mankind" too abstract and lacking in emotional resonance. The word "man" better captures Kant's conception that humans are not merely disembodied noumena, but actual concrete, phenomenal creatures. On the other, I find that the connotations of the term "human" seems to place too much emphasis on our biological reality and too little on the spiritual.

94. KANT, *PURE REASON*, *supra* note 69, at 307.

95. Adams, *supra* note 81, at x.

2. *Positive Freedom as Spontaneity*

We are now in a position to consider what Kant means by freedom and how it is necessarily related to his conception of reason. So far we have encountered freedom as a purely negative entity—as the absence of natural causality. Kant argues that freedom from natural causality is possible because noumena can affect phenomena.⁹⁶ The noumenal aspect of man is his reason. Consequently, if human noumenal rationality can cause the phenomenon of human action, then practical freedom is more than the mere negative freedom to slip loose the causal chains of nature. There could be a *positive* aspect of freedom as the uncaused cause of action in the world, i.e., spontaneity. Reason, as a noumenon, is equivalent to positive freedom. Kant concludes:

That reason possesses the faculty of causality, or that at least we are compelled so to represent it, is evident from the *imperatives*, which in the sphere of the practical we impose on many of our executive powers. The words *I ought* express a species of necessity, and imply a connection with grounds which nature does not and cannot present to the mind of man. Understanding knows nothing in nature but that *which is*, or has been, or will be. It would be absurd to say that anything in nature *ought* to be other than it is in the relations of time in which it stands.⁹⁷

Paradoxically, Kant's concept of the "ought" as obedience to the moral law, is the source of, if not equivalent to, freedom understood as spontaneity. Reason, freedom, law, and morality are inextricably linked. Consequently, Posner's recent vociferous attack on Kantian moral theory is perhaps an inevitable consequence of his life-long fear of Kantian freedom.⁹⁸

Since reason can contemplate what ought to be, reason can contemplate that things could be other than they are. Kant believes this conception of reason implies that man is capable of the volition to act and change things.⁹⁹ "[T]he idea of an *ought* or of a duty

96. See *supra* notes 89-95 and accompanying text.

97. KANT, *PURE REASON*, *supra* note 69, at 307.

98. See *supra* note 5 and accompanying text.

99. KANT, *PURE REASON*, *supra* note 69, at 308.

indicates a possible action, the ground of which is a pure conception; while the ground of a merely natural action is, on the contrary, always a phenomenon."¹⁰⁰ The noumenon of reason can cause the phenomenal effect of human action; freedom is not merely transcendental, but practical.¹⁰¹

Reason is not merely the cause of freedom in the negative sense of lacking natural constraints, but rather it becomes a positive conception of freedom as spontaneity—the ability to change and remake the world. "Reason will not follow the order of things presented by experience, but, with perfect spontaneity, rearranges them according to ideas, with which it compels empirical conditions to agree."¹⁰² In his later work, Kant refers to negative freedom as autonomy or independence and positive freedom as self-legislation.¹⁰³

From this brief analysis, we can see the two ways that the speculative conception of reason differs from economic rationality. First, economic rationality is merely the characteristic behavior of natural creatures (and genes) to act in ways that further their desires. Economic rationality does not, therefore, necessarily require conscious thought. Kantian reason is the intelligible cognition that separates man from nature. There are no rational frogs or rats in Kant's universe. Second, economically rational behavior is supposed to be rigidly predictable. Kantian reason is, in fact, nothing but the capacity for pure spontaneity. This is not to suggest that all human actions are free and spontaneous; empirical men are phenomenal and are also subject to natural causes.¹⁰⁴ At this point, Kant only argues that some degree of human freedom is theoretically possible. The practical expression of human freedom comprises one of the primary themes of Kant's second critique, the *Critique of Practical Reason*.¹⁰⁵ In this work we encounter the third difference between economic and speculative rationality, the relationship between rationality and instrumental ends-means reasoning.

100. *Id.*

101. "Thus the volition of every man has an empirical character, which is nothing more than the causality of his reason." *Id.* at 309.

102. *Id.* at 308.

103. KANT, PRACTICAL REASON, *supra* note 1, at 49.

104. KANT, PURE REASON, *supra* note 69, at 310.

105. KANT, PRACTICAL REASON, *supra* note 1.

3. *Can Freedom Be Practical?*

For Kant, reason is "practical" insofar as it "can of itself determine the will independently of anything empirical."¹⁰⁶ Practical reason is reason that causes human *action* (i.e., has an effect in the phenomenal world). In other words, the title of the second critique, *The Critique of Practical Reason*, indicates that it is intended to be a critical analysis of whether freedom can exist in the empirical world.

The second critique is a consideration of one of the crucial issues remaining from the first critique. The first critique argued that it is theoretically *possible* for noumena to cause phenomenal effects. The second critique considers whether they *in fact* do so. Because reason and freedom are either identical or inextricably linked, it is necessary to ask whether man, who is free in theory, can also be free in practice. As Kant states in the preface to the second critique:

With th[e] faculty [of pure reason], transcendental *freedom* is also established; freedom, namely in that absolute sense in which speculative reason required it in its use of the concept of causality in order to escape the antinomy into which it inevitably falls, when in the chain of cause and effect it tries to think the *unconditioned*. Speculative reason could only exhibit this concept (of freedom) problematically as not impossible to thought, without assuring it any objective reality, and merely lest the supposed impossibility of what it must at least allow to be thinkable should endanger its very being and plunge it into an abyss of skepticism.¹⁰⁷

The goal of this inquiry is to demonstrate the actuality of pure reason by showing that it has empirical effects and therefore is practical.¹⁰⁸ Freedom is "the *keystone* of the whole system of pure reason."¹⁰⁹ Consequently, the possibility of reason will be "*proved* by the fact that freedom actually exists, for this idea is revealed by the moral law."¹¹⁰ "[I]f we can now discover means of proving that

106. *Id.* at 59.

107. *Id.* at 13-14.

108. *Id.* at 13.

109. *Id.* at 14.

110. *Id.*

[freedom] does in fact belong to the human will ... then it will not only be shown that pure reason can be practical, but that it alone, and not reason empirically limited, is indubitably practical."¹¹¹ Consequently, in the second critique Kant attempts to argue that there are good reasons to believe that practical freedom, and therefore the capacity for morality, does in fact exist.

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

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

The crucial point here is that ... the empirical character [of human behavior] involves not simply a disposition to behave or to respond in certain predictable ways in given situations but a disposition to act on the basis of certain maxims, to pursue certain ends, and to select certain means for the realization of these ends.¹¹²

Kant's point is that even practical reasoning, which is a form of freedom as spontaneity, cannot be reduced to mere ends-means reasoning, which is a form of servitude. Although one uses ends-means reasoning when one chooses *how* to implement one's maxim, the *adoption* of maxims is the choice of *ends*, not means. Moreover, rationality consists not merely of a choice of maxims (which always involve ends-means reasoning), but also a choice of what Kant

111. *Id.* at 26.

112. ALLISON, *supra* note 68, at 33.

calls "laws" (objective rules), which, if moral, are totally non-instrumental and are adopted regardless of their anticipated consequences. Moreover, Kant purports to show that consequentialism cannot serve as a moral principle, even when the desired consequence is the substantively good goal of the greatest happiness for the greatest number of people (utilitarianism).

Kant's argument states that as a rational being, man acts in accordance with his will rather than by pure animal instinct. Man thus makes choices, or in Kantian terminology, adopts maxims that govern his behavior. Kant distinguishes between laws and maxims as follows:

Practical *principles* are propositions which contain a general determination of the will, having under it several practical rules. They are subjective, or *Maxims*, when the condition is regarded by the subject as valid only for his own will, but are objective, or practical *laws*, when the condition is recognized as objective, that is, valid for the will of every rational being.¹¹³

Maxims are therefore subjective in the sense that they are idiosyncratic to an individual subject. Laws are objective in the sense that they are generally applicable to all subjects (i.e., intersubjective). This distinction looks forward to Kant's famous "categorical imperative," or universal moral law: "Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation."¹¹⁴

4. *The Problem with Utilitarianism*

Rather than proceeding directly to a discussion of the categorical imperative, Kant first considers, and then rejects, utilitarianism as a governing principle. Of course, Kant, writing in the 1780s, could not address utilitarianism per se for the obvious reason that Jeremy Bentham would not coin the term and articulate its principles until the next century. Instead, Kant addresses the empiricist philosophical tradition through the work

113. KANT, *PRACTICAL REASON*, *supra* note 1, at 31.

114. *Id.* at 46; *see also* KANT, *MORALS*, *supra* note 68, at 17 ("[A]ct upon a maxim that can also hold as a universal law.").

of David Hume.¹¹⁵ The salient points of this philosophic approach are substantially similar to those of modern utilitarianism and consequently, neo-classical price theory adopted by the law and economics movement.¹¹⁶ Consequently, I anachronistically refer to the position Kant rejects as "utilitarianism."

Kant's criticism of utilitarianism is markedly different from that found in most contemporary legal literature. Critics usually attack utilitarianism on a number of substantive grounds. The most familiar of these is moral monstrosity. If society's only moral principle requires the greatest good equal the greatest happiness, then any number of unspeakable crimes would be permitted if the aggregate pleasure of the sadistic onlookers outweighed the pain of the victim.¹¹⁷ Kant cannot use this criticism because it objects to the *substantive* content of utilitarianism. In contrast, Kant famously makes morality a purely *procedural* principle, totally devoid of substantive content.¹¹⁸ Kant distinguishes the right (what one ought to do because it is the moral law) from the good (what one wants to do because it will have a desired beneficial effect). Consequently, Kant cannot use a substantive argument to defeat a candidate for a moral law, but must develop a purely formal one.

Kant starts by agreeing with a number of propositions basic to utilitarianism. Kant agrees that rational beings seek to fulfill their preferences,¹¹⁹ and to increase, if not maximize, their utility.¹²⁰

115. Indeed, the quote at the head of this Article was addressed specifically to Humean empiricism. KANT, PRACTICAL REASON, *supra* note 1, at 23-24.

116. For example, Kant attributes to epicureanism the principles that "[t]o be conscious that one's maxims lead to happiness is virtue ... *Prudence* was equivalent to morality." KANT, PRACTICAL REASON, *supra* note 1, at 136. "The Epicurean maintained that happiness was the *whole summum bonum*, and virtue only the form of the maxim for its pursuit, viz., the rational use of the means for attaining it." *Id.* at 137.

117. See Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 697 [hereinafter Schroeder, *The Midas Touch*].

118. See *infra* notes 153-71 and accompanying text.

119. As in economics theory, preferences are pre-given in the sense that they are idiosyncratic, empirical and emotional, and are not determined by rational deliberation.

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

KANT, PRACTICAL REASON, *supra* note 1, at 34. The satisfaction of preferences leads to happiness—what economists call utility and Kant calls "pleasure." *Id.*

120. "To be happy is necessarily the wish of every finite rational being, and this, therefore,

This observation reflects the fact that a governing principle of personality is self-interest, or what Kant calls "self-love."¹²¹ He also agrees with the concept that a law that "promote[s] the happiness of others" might be substantively good.¹²² In other words, as a classical liberal, Kant's vision of man as *phenomenon* is remarkably consistent with the utilitarian conception of the autonomous, self-interested individual.

In order for utilitarianism to meet Kant's criterion for a universal moral principle, however, the proposition that the law should maximize aggregate utility must be defended on formal grounds. Kant believes that utilitarianism fails his formal test. "Instead, reason commands how men are to act even though no example of this could be found, and it takes no account of the advantages we can thereby gain, which only experience could teach us."¹²³ This is because man is not merely phenomenal (substantive, concrete, empirical), but also noumenal (formal, abstract, intelligible).

The problem of utilitarianism as a moral principle springs from Kant's distinction between maxims and laws. "A *maxim* is a *subjective* principle of action, a principle which the subject himself makes his rule (how he wills to act). A principle of duty, on the other hand, is a principle that reason prescribes to him absolutely and so objectively (how he *ought* to act)."¹²⁴ It also relates to the proposition adopted by utilitarianism that desires (preferences) are purely empirical and, therefore, subjective. Idiosyncratic preferences cannot serve as the basis of objective law because one could never achieve the unanimity that would meet Kant's test of universality.

Even supposing, however, that all finite rational beings were thoroughly agreed as to what were the objects of their feelings of pleasure and pain, and also as to the means which they must employ to attain the one and avoid the other; still, they could by

is inevitably a determining principle of its faculty of desire." *Id.* at 39.

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

122. *Id.* at 51.

123. KANT, *MORALS*, *supra* note 68, at 10.

124. *Id.* at 17-18.

*no means set up the principle of self-love as a practical law, for this unanimity itself would be only contingent.*¹²⁵

Limiting moral law and rationality to the satisfaction of preferences would not be consistent with Kant's goal of finding practical reason and practical freedom in the world. Freedom is, at a minimum, the negative capacity of freedom from nature's causal chains that govern all phenomena. Kant's solution to this conundrum is to assert that although all phenomena are subject to the law of causality, phenomena can have noumenal causes. Moreover, noumena are not subject to the natural law of causality. He asserts that it is a matter of a priori knowledge that man is capable of reason and that reason is noumenal. Although man as an empirical creature is phenomenal, through his reason it is at least theoretically possible for him to form a volition which is not caused by nature. "A categorical (unconditional) imperative is one that represents an action as objectively necessary and makes it necessary not indirectly, through the representation of some *end* that can be attained by the action, but through the mere representation of this action itself (its form), and hence directly."¹²⁶ This, once again, is the conception of freedom as the *positive* capacity for spontaneity. "The ground of the possibility of categorical imperatives is this: that they refer to no other property of choice (by which some purpose can be ascribed to it) then simply to its *freedom*."¹²⁷ As a free being, any man has the capacity to change his opinion spontaneously, thereby destroying the universality of the law. Kant is trying to examine whether this theoretical possibility has practical effect. In other words, can and does man ever act freely in the empirical world?

Kant concludes, as I do, that utilitarianism, as a moral system, leads to a conclusion that man is not free.

The principle of private happiness, however much understanding and reason may be used in it, cannot contain any other determining principle for the will than those which belong tot [sic] the *lower* desires.... Then only, when reason of itself

125. KANT, PRACTICAL REASON, *supra* note 1, at 40.

126. KANT, MORALS, *supra* note 68, at 15.

127. *Id.*

determines the will (not as the servant of this inclination), it is really a *higher* desire to which that which is pathologically determined is subordinate, and is really, and even specifically, distinct from the latter, so that even the slightest admixture of the motives of the latter impairs its strength and superiority.¹²⁸

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

This is the point that I made earlier: economics views rationality as enslavement to emotionality and, therefore, essentially unfree.¹²⁹ Only if reason can choose its own ends, totally divorced from the ends forced upon it by desire, can reason be truly noumenal and free. "An *end* is an object of the choice (of a rational being), though the representation of which choice is determined to an action to bring this object about."¹³⁰

Kant believes, as I do, that freedom is the stumbling block on which all empiricism, including law and economics, founders. The

128. KANT, *PRACTICAL REASON*, *supra* note 1, at 38. Within the Kantian tradition, the term "pathological" carries none of the negative connotations of diseased or sick. Rather, based on the Greek root *pathos* (suffering), pathology merely designates that which relates to emotions and feelings—as opposed to pure reason. *Id.* at 95.

129. See *supra* notes 32-38 and accompanying text.

130. KANT, *MORALS*, *supra* note 68, at 146. Kant continues:

But if I am under obligation to make my end something that lies in concepts of practical reason, and so to have, besides the formal determining ground of choice (such as right contains), a material one as well, an end that could be set against the end arising from sensible impulses, this would be the concept of an *end that is in itself a duty*.

....

That is to say, determination to an *end* is the only determination of choice the very concept of which excludes the possibility of constraint *through natural means* by the *choice* of another.

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

paradoxical question that Kant faces, however, is whether empiricism is the stumbling block on which his concept of freedom founders. If utilitarianism is empirically "true", then not only is freedom impossible, but the conclusions of speculative philosophy reached in the first critique are contradicted. In order for Kant to defend the proposition that man is capable of practical freedom, he must first destroy utilitarianism.

In order to do so, rationality must be redefined as the capacity to choose one's own ends rather than ends dictated by desire. In Kant's terms, for reason to be practical, it must be "self-legislative."¹³¹ Freedom requires that one be subject only to laws that one writes for oneself. "An *end* is an object of the choice (of a rational being)."¹³² "What end anyone wants to set for his action is left to his free choice."¹³³ "Hence in ethics the *concept of duty* will lead to ends and will have to establish *maxims* with respect to ends we *ought* to set ourselves, grounding them in accordance with moral principles."¹³⁴ "Every action, therefore, has its end; and since no one can have an end without *himself* making the object of his choice into an end, to have any end of action whatsoever is an act of *freedom* on the part of the acting subject, not an effect of *nature*."¹³⁵ In other words, virtue is the choice of subjective maxims that are consistent with objective laws.

Scholars disagree as to whether Kant is successful in his task or whether Kantian freedom remains purely noumenal with no real practical effect.¹³⁶ This debate is beyond the scope of this Article. Here I will only note the conclusions reached by Kant.

To recap, Kant argues that the problem with utilitarianism as a moral principle is that it cannot serve as a moral "law" because it cannot be made universal. If desires are empirical and idiosyncratic, then they are by definition subjective.¹³⁷ In other words, even if all men on any given day agree as an empirical matter that

131. See KANT, PRACTICAL REASON, *supra* note 1, at 38.

132. KANT, MORALS, *supra* note 68, at 146.

133. *Id.* at 147.

134. *Id.*

135. *Id.* at 149.

136. See generally ALLISON, *supra* note 68.

137. "The capacity for having pleasure or displeasure in a representation is called *feeling* because both of them involve what is *merely subjective*" KANT, MORALS, *supra* note 68, at 12.

something is *good*, this agreement, being empirical, is merely contingent. Consequently, there is no way of achieving a permanent consensus or "harmony."

For whereas in other cases a universal law of nature makes everything harmonious; here, on the contrary, if we attribute to the maxim the universality of law, the extreme opposite of harmony will follow, the greatest opposition, and the complete destruction of the maxim itself, and its purpose. For, in that case, the will of all has not one and the same object, but everyone has his own (his private welfare), which may accidentally accord with the purposes of others which are equally selfish, but it is far from sufficing for a law.¹³⁸

This is a formal way of restating a number of classical substantive objections to utilitarianism. Because not all people will have the same preferences, any organized society will have to impose the preferences of some members (such as the sovereign or majority) on others. As discussed above, this means that utilitarianism has no limiting concept of inalienable and inviolable human rights.¹³⁹ Bentham famously penned one of the most devastating insults in history to ridicule the concept of universal, natural human rights: "nonsense upon stilts."¹⁴⁰ Individual rights are only contingently granted as a means to a collective ends. Rights should, therefore, be rescinded if society's calculation of the utility of these rights changes.

Kant's criticism is a variation of the libertarian objection that utilitarianism views rights as contingent.¹⁴¹ Although utilitarianism is supposed to be based on a concern for each individual's happiness, the rule of maximum utility is not universal precisely because it is willing to sacrifice the happiness of some for the happiness of others. Implicit in Kant's argument is the familiar objection that because utilitarianism posits that tastes are

138. KANT, *PRACTICAL REASON*, *supra* note 1, at 42.

139. See *supra* notes 57-61 and accompanying text.

140. There are "no such things as natural rights—no such things as rights anterior to the establishment of government—no such things as natural rights as opposed to ... legal [ones].... *Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." 2 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 500-01 (J. Bowring ed., 1962).

141. See *supra* note 56 and accompanying text.

subjective, there is no way of making interpersonal comparisons of relative utility. Consequently, there is no way of rewriting utilitarianism from "promoting the happiness of all" to "promoting the greatest aggregate happiness in society (even if it results in pain for some or even most)" because there is no way of aggregating happiness.¹⁴² This admission makes any policy purportedly made on utilitarian grounds a lie by definition. And so although utilitarianism is supposed to be an empirically-based moral system, not only freedom, but *empiricism* itself, is a stumbling block to utilitarianism on its own terms.

It was precisely this problem that led Posner to propose that wealth maximization supplant utilitarianism as the guiding principle of an economically-based legal system. One cannot compare, and therefore cannot measure, aggregate subjective utility. One can, according to Posner, at least measure wealth in monetary terms.¹⁴³ Posner's critics point out that because one *might* be able to measure aggregate wealth does not in and of itself suggest any reason why we *should* want to do so.¹⁴⁴

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

143. "Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically." Posner, *Value*, *supra* note 59, at 247; *see also* Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 115 (1979) [hereinafter Posner, *Utilitarianism*].

144. "Wealth maximization ... is neither more defensible than utilitarianism nor is it an alternative efficiency criterion. Indeed it is not an efficiency criterion at all." Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521 (1980) [hereinafter Coleman, *Efficiency*]. "The only area in which wealth maximization escapes the condemnation accorded utilitarianism is in measurement. It is much easier to measure wealth than utility, although the need to hypothesize markets reveals that even wealth measurement is not without difficulty." Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 603 (1980).

I would also criticize Posner's assertion that wealth is itself a relatively unambiguous concept and is readily measurable. This ignores the fact that Posner's definition of wealth includes not merely the exchange value of all of the good things in the world, but also all consumer surplus defined as the amount by which the idiosyncratic use value of things owned by economic subjects exceeds the exchange value. By definition, since consumer

5. *The Right v. the Good*

Kant argues that because empiricism makes it impossible for positive law to be "law" (i.e., universal), true law cannot be natural or phenomenal, but must be noumenal. Law cannot be discovered by experience but must be deduced by reason.

Since the bare form of the law can only be conceived by reason, and is, therefore, not an object of the senses, and consequently does not belong to the class of phenomena, it follows that the idea of it, which determines the will, is distinct from all the principles that determine events in nature according to the law of causality, because in their case the determining principles must themselves be phenomena.¹⁴⁵

If law as moral law must be independent from natural causality, law is, therefore, "*freedom* in the strictest, that is in the transcendental sense; consequently, a will which can have its law in nothing but the mere legislative form of the maxim is a free will."¹⁴⁶

The first surprising conclusion at which Kant arrives is the apparent paradox that freedom requires law, and vice versa. "[F]reedom and an unconditional practical law reciprocally imply each other."¹⁴⁷ Because law cannot be merely empirical (the "is"), but must be imperative (the "ought"), it cannot be bound by nature but must be the creation of spontaneity. To violate Kant's principle argument and give substantive content to this statement, to be free, one must have the ability to choose to disobey one's natural inclinations and instead create one's own standards of behavior. "That choice which can be determined by *pure reason* is called free choice. That which can be determined only by *inclination* (sensible impulse, *stimulus*) would be animal choice"¹⁴⁸ Law must be self-legislated by reason. This concept raises a more interesting paradox: how can law be law (universal, objective) and not merely

surplus is subjective, it is idiosyncratic and non-comparative in precisely the same way as utility. Consequently, wealth maximization suffers from the same impossibility as utilitarianism. See Schroeder, *The Midas Touch*, *supra* note 117, at 754-60.

145. KANT, PRACTICAL REASON, *supra* note 1, at 43.

146. *Id.*

147. *Id.* at 44.

148. KANT, MORALS, *supra* note 68, at 13.

a maxim (individual, subjective) if each rational person self-legislates her own law? Kant's answer is that morality consists of freely self-legislating a subjective doctrine which complies with the objective imperative of the universal moral law.

Kant famously distinguishes between the concepts of the "right" and the "good." The test of whether a proposed law is moral (and therefore a true law), is purely formal, and therefore objective and universal. "[N]othing is contained in [the matter of the law] except the legislative form. It is the legislative form, then, contained in the maxim, which can alone constitute a principle of determination of the [free] will."¹⁴⁹ This formal test is the categorical imperative. I have already given the more familiar version of this imperative, the so-called principle of universality that one should "[a]ct so that the maxim of thy will can always at the same time hold good as a principle of universal legislation."¹⁵⁰ Probably lesser known is the categorical imperative expressed as the principal of humanity set forth in Kant's *Groundwork of the Metaphysics of Morals*: "Act in accordance with a maxim of *ends* that it can be a universal law for everyone."¹⁵¹ In other words, rationality, and therefore freedom, consists not in formulating the appropriate *means* for achieving one's ends, but in formulating an appropriate *ends*. Moreover, both means and ends must meet the test of universality. Because no phenomenon is universal, the test for both the ends and means of morality must be purely formal and without substantive content. In contrast, the utilitarian's goal of utility is empirical and, therefore, cannot serve as the basis of morality.

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

149. KANT, PRACTICAL REASON, *supra* note 1, at 44.

150. *Id.* at 46.

151. Roger J. Sullivan, *Introduction to KANT, MORALS*, *supra* note 68, at vii, xviii.

Therefore, the law that we should promote the happiness of other[s] does not arise from the assumption that this is an object of everyone's choice, but merely from this, that the form of universality which reason requires as the condition of giving to a maxim of self-love the objective validity of a law, is the principle that determines the will.¹⁵²

Good relates to policy—what should be done to achieve a specific goal. Good is, therefore, economic rationality as ends-means reasoning. It can appropriately be a subject of debate. Morality, in contrast, is an imperative. It is what *ought* to be done. If a rule passes the formal test of morality, there can be no debate. Consequently, “[t]he maxim of self-love (prudence) only *advises*; the law of morality *commands*. Now there is a great difference between that which we are *advised* to do and that to which we are *obliged*.”¹⁵³

Or, to put this another way, if the philosopher were to adopt the principles of utilitarianism and seek to increase pleasure and reduce pain, “the foundation of his practical judgments would call that *good* which is a *means* to the pleasant, and *evil*, what is a cause of unpleasantness and pain.”¹⁵⁴ Kant completely agrees with the utilitarian proposition that “reason is alone capable of discerning the connection of means with their ends.”¹⁵⁵ Rationality thus includes, but cannot be limited to, ends-means reasoning.

[Y]et the practical maxims which would follow from the aforesaid principle of the good being merely a means, would never contain as the object of the will anything good in itself, but only something good *for something*; the good would always be merely the useful, and that for which it is useful must always lie outside the will, in sensation.¹⁵⁶

152. KANT, PRACTICAL REASON, *supra* note 1, at 51.

153. *Id.* at 53.

154. *Id.* at 77.

155. *Id.*

156. *Id.*

In other words, "The end itself, the pleasure that we seek, is ... a *welfare*; not a concept of reason, but an empirical concept of an object of sensation."¹⁵⁷ To adopt utilitarianism would mean that

the possession of reason would not raise [man's] worth above that of the brutes, if it is to serve him only for the same purpose that instinct serves in them; it would in that case be only a particular method which nature had employed to equip man for the same ends for which it has qualified brutes, without qualifying him for any higher purpose.¹⁵⁸

This observation, of course, looks forward to Posner's assertion that from an economic (utilitarian) position it is not a solecism to speak of a rational rat or frog.¹⁵⁹ It also predicts that utilitarianism will become the basis of a radical animal "rights" advocacy because utilitarianism cannot make a moral distinction between man and beast.¹⁶⁰ To Kant, a beast might be good or bad, but it cannot be moral or evil.

6. *The Moral Law and Radical Evil*

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

Kant insists on an essential qualitative distinction between morality, which is noumenal, and the good, which is phenomenal. Any maxim adopted in accordance with empirical reasons is stained with pathology. Consequently, whether or not the act is good, it is not moral.

157. *Id.* at 81.

158. *Id.* at 80-81.

159. *See supra* notes 35-36 and accompanying text.

160. Which is why Peter Singer, probably the preeminent utilitarian philosopher living today, is also the foremost theorist of the animal rights movement. *See* PETER SINGER, *ANIMAL LIBERATION* (2d ed. 2001).

The essential point in every determination of the will by the moral law, is that being a free will it is determined simply by the moral law, not only without the cooperation of sensible impulses, but even to the rejection of all such, and to the checking of all inclination so far as they might be opposed to that law. So far, then, the effect of the moral law as a motive is only negative.¹⁶¹

He continues:

The notion of duty, therefore, requires in the action, *objectively*, agreement with the law, and subjectively in its maxim, that respect for the law shall be the sole mode in which the will is determined thereby.... [M]oral worth, can be placed only in this, that the action is done from duty, that is, simply for the sake of the law.¹⁶²

As David Gray Carlson and I discuss elsewhere, the problem is that every actual moral decision we make has to be made in a concrete situation.¹⁶³ Every decision we make, every action we take is necessarily empirical and smeared with pathology. All pathology is natural. As such, our acts are never truly moral because they are not *purely* free, but are partly subject to the causal chains of nature.

What is essential in the moral worth of actions is *that the moral law should directly determine the will*. If the determination of the will takes place in conformity indeed to the moral law, but only by means of a feeling, no matter of what kind, which has to be presupposed in order that the law may be sufficient to determine the will, and therefore not *for the sake of the law*, then the action will possess *legality* but not *morality*.¹⁶⁴

Thus, if you feed a starving child out of compassion, rather than because it is the right thing to do, your action, no matter how good, is not purely moral. It is, therefore, to some degree corrupt.¹⁶⁵

161. KANT, PRACTICAL REASON, *supra* note 1, at 93.

162. *Id.* at 102.

163. See Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653 (2000).

164. KANT, PRACTICAL REASON, *supra* note 1, at 92.

165. See ALLISON, *supra* note 68, at 186; Schroeder & Carlson, *supra* note 163, at 671.

Compassion is an empirical fact and, therefore, phenomenal and natural. Kant goes so far as to assert that the "very feeling of compassion and tender sympathy, if it precedes the deliberation on the question of duty and becomes a determining principle, is even annoying to right-thinking persons, brings their deliberate maxims into confusion, and makes them wish to be delivered from it and to be subject to law-giving reason alone."¹⁶⁶

As a result, as Carlson and I have said:

By definition, concrete personality is constituted by pathology. That is, to take a concrete action is precisely to pour a content into the empty form of the moral law. Unhappily, this means that every concrete choice is inescapably pathological; the act always has an instrumental reason. Consequently, Kant insists that every attempt by man to act ethically and to obey the moral law is stained by the "evil" of pathological motives.¹⁶⁷

Consequently, in a late work on the problematics of morality, *Religion Within the Boundaries of Mere Reason*,¹⁶⁸ Kant rewrites the Protestant doctrine of Original Sin and concludes that man is "radically" evil in the sense that a trace of nonmoral pathology must necessarily lie at the root (*radix*) of all human actions.¹⁶⁹

Of course, it is not inconsistent with the moral law to perform an act which one *both* desires to perform (in the sense that it will increase one's happiness) *and* which complies with the moral law. Indeed, many moral laws (such as a law prohibiting murder) can have substantively beneficial effects that make one feel good. One cannot assume, however, that either the mere fact an action makes one happy or that it requires self-sacrifice is any evidence of its morality. Morality is completely indifferent to pleasure and pain.

166. KANT, PRACTICAL REASON, *supra* note 1, at 144.

167. Schroeder & Carlson, *supra* note 163, at 672.

168. "This evil is *radical*, since it corrupts the ground of all maxims; as natural propensity, it is also not to be *extirpated* through human forces." IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON 59 (Allen Wood ed. & George Di Giovanni trans., 1998) [hereinafter RELIGION]. As Carlson and I explain elsewhere, Schroeder & Carlson, *supra* note 163, at 657 n.19, it is a common misperception that the Kantian term "radical" evil bears the colloquial connotation of really, really extreme evil (i.e., diabolical evil), perhaps because of Hannah Arendt's terminology in her famous work on the banality of evil. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1994).

169. See KANT, RELIGION, *supra* note 168, at 117.

Moral laws "command for everyone, without taking account of his inclinations, merely because and insofar as he is free and has practical reason."¹⁷⁰

More radically, even if one could determine that one's *actions* complied with the moral law, one could still never be sure of one's motives. If a person feeds a starving child *both* because she feels compassion *and* because she decides that she is morally duty-bound to do so, she can never know whether she would have obeyed the moral law even if she did not feel compassion.¹⁷¹ In the words of Žižek, "[W]e never know if the determinate content that accounts for the specificity of our acts is the right one, that is, if we have actually acted in accordance with the Law and have not been guided by some hidden pathological motives."¹⁷² Kant concludes that a person who adopts a maxim that is consistent with moral law, but is only adopted because of a pathological (empirical) motive, is guilty of the form of radical evil Kant calls "impurity."¹⁷³

As finite humans, we can never really know what our "true" motives are. In Allison's words, "[F]ar from asserting a doctrine of unqualified noumenal freedom ... Kant explicitly asserts that since the intelligible character is inaccessible to us, we can never be certain whether, or to what extent, a given action is due to nature or freedom."¹⁷⁴ The pure reason that is essential to man is itself a noumenon, a thing-in-itself. Each person as an empirical individual is a phenomenon who does not have direct contact with his own noumenal, essential self. In Kant's words, "The depths of the human heart are unfathomable."¹⁷⁵ Consequently, no one can

170. KANT, *MORALS*, *supra* note 68, at 10.

171. See KANT, *RELIGION*, *supra* note 168, at 58-59.

172. SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY* 365 (1999) [hereinafter ŽIŽEK, *TICKLISH SUBJECT*].

173. As Kant stated:

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

KANT, *RELIGION*, *supra* note 168, at 53-54; see Schroeder & Carlson, *supra* note 163, at 675-77.

174. ALLISON, *supra* note 68, at 43.

175. KANT, *MORALS*, *supra* note 68, at 196.

directly know his own self. "For a human being cannot see into the depths of his own heart so as to be quite certain, in even a *single* action, of the purity of his moral intention and the sincerity of his disposition, even when he has no doubt about the legality of the action."¹⁷⁶ Kant's idea of a radical split between our conscious selves and another essential "true" inner self will reappear in Lacan's attempt to rewrite Freud's psychoanalytic theory in light of speculative thought.¹⁷⁷

A congruence of one's maxims and the moral law is virtue.¹⁷⁸ A perfect congruence of will to morality is *holiness*, "a perfection of which no rational being of the sensible world is capable at any moment of his existence."¹⁷⁹ Holiness, therefore, is an attribute of God alone. Consequently, Kant rewrites traditional Christian doctrine and finds that man is always in a state of sin. Kant's conclusion can most strikingly be seen in the title he gave to Part One of *Religion Within the Bounds of Mere Reason*, "*Concerning the indwelling of the evil principle alongside the good or Of the radical evil in human nature*."¹⁸⁰ The more moral a man is, the more he desires to comply with the moral law for the sake of morality, and the more aware he is of the stain of his own pathology. According to Kant, "In view of what has been said above, the statement, 'The human being is *evil*,' cannot mean anything else than that he is conscious of the moral law and yet has incorporated into his maxim the (occasional) deviation from it."¹⁸¹ For a utilitarian to say that a Kantian has a "preference" for morality, therefore, is to completely misinterpret Kantian theory. For a Kantian, a preference is an inclination and is antithetical to morality, which must be served regardless of preferences. In other words, utilitarianism and Kantianism are radically different ways of conceptualizing human motivation.

176. *Id.* at 155.

177. See *infra* notes 244-46 and accompanying text.

178. See KANT, *MORALS*, *supra* note 68, at 156; KANT, *RELIGION*, *supra* note 168, at 67.

179. KANT, *PRACTICAL REASON*, *supra* note 1, at 148.

180. KANT, *RELIGION*, *supra* note 168, at 45.

181. *Id.* at 55.

7. *The Dialectical Relationship Between Law and Freedom*

Kant recognizes, however, that it is precisely this impossibility of knowing and achieving the morality which is the reciprocal of freedom, that creates the *actuality* of human free will in the world. If man could actually see into the mind of God and know the moral law, he would no longer be self-legislating (i.e., free). He would be submitting himself to an external force. In Kant's moving metaphor, "Man would be a marionette or an automaton."¹⁸² Ironically, it is man's sin, his failure, his radical evilness, his inability to be truly free, that results in his practical freedom. As the common law tradition understands, law, as well as freedom, is a work in process. In order for the subject to be free, she must be self-legislating and constantly creating new law. If, however, she ever succeeded in the task of finishing and completely filling her world with law, it would bind her and prevent her from spontaneously creating new law. She would no longer be free. Paradoxically, the reason the individual is able to liberate herself from nature's causal chains so that she might freely bind herself to the moral law, is that every time she tries to bind herself to the moral law its chains slip her wrists. Man is always a moral Houdini despite himself. As I have written elsewhere,¹⁸³ Lacan will identify this fundamental paradox that characterizes the moral universe as the sexual impasse. The part of personality that is bound by law is the "masculine," and the part that slips away is the "feminine."¹⁸⁴

182. KANT, PRACTICAL REASON, *supra* note 1, at 123. As my co-author and I have said elsewhere:

If this self were noumenal, then God (a noumenon) would be our equal. God would stand before our eyes as directly perceivable. We would lose our freedom, if we could directly know God's law. We would be mere puppets in the thrall of the moral law. Ironically, morality would become legality, and morality would be thoroughly pathological—that is natural.

Schroeder & Carlson, *supra* note 163, at 667.

183. SCHROEDER, THE TRIUMPH OF VENUS, *supra* note 63; Jeanne L. Schroeder, Apples and Oranges: The Commensurability Debate in Legal Scholarship (2002) (unpublished manuscript, on file with author) [hereinafter Schroeder, Apples and Oranges].

184. "For the class of X, not all X's are submitted to the phallic function." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 1972-1973, at 78-81 (Jacques-Alain Miller ed., Bruce Fink trans., 1998) [hereinafter LACAN, SEMINAR XX].

One sees the Kantian moral paradox reflected in the myth of the Fall of Man as recounted in *Genesis*. The serpent tempted Eve by telling her that if she ate from the tree of knowledge of good and evil (i.e., if she could know the moral law) she could be like God.¹⁸⁵ Of course, there can be but a single Absolute. If the serpent's promise were true, Eve would not become "like God," but would lose her individuality and be subsumed into God. Consequently, when Eve and the man ate the forbidden fruit, mankind did not attain holiness. Rather, they committed the Original Sin that Kant reinterprets as his notion of radical evil.¹⁸⁶ As God warned, if mankind obtained the knowledge of good and evil, we would also become subjected to death.¹⁸⁷ It is *mortality* (limitation) that is the necessary condition of *morality*.¹⁸⁸ Exiled from the Garden, the first couple's inability to know both the moral law and the motivations of their own hearts became the basis of their free will.

I shall leave this fascinating subject at this point. I am not about to resolve the paradox of freedom. Indeed, Kant never truly resolved this issue,¹⁸⁹ which can be seen as the central problem of all the

185. The serpent told Eve, "For God knows that in the day you eat from it your eyes will be opened, and you will be like God, knowing good and evil." *Genesis* 3:5.

186. KANT, RELIGION, *supra* note 168, at 61-65.

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

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

Then the Lord God said, "Behold, the man has become like one of Us, knowing good and evil; and now, lest he stretch out his hand, and take also from the tree of life, and eat, and live forever" therefore the Lord God sent him out from the garden of Eden

Genesis 3:22-23.

189. In the *Critique of Practical Reason*, Kant tried to resolve this paradox by positing the immortality of the soul. KANT, PRACTICAL REASON, *supra* note 1, at 147-50. That is, every specific act fails the test of complete morality in that it is always partially stained by pathology. By constant striving one can approach morality as an asymptote that can be reached at infinity. *Id.* If the soul lives forever, it can eventually achieve holiness. *Id.* Kant does not, however, go so far as to claim that the soul is necessarily immortal. Rather, he claims that the requirements of the moral law give us a very good reason to believe that the soul must be immortal in order to meet these requirements. *Id.*

Over time, Kant may have jettisoned this simplistic solution. After all, if the soul only reaches holiness at infinity, the soul is, therefore, never holy but always in the state of sin. Every new attempt at holiness is always a new failure. The "deed is *every time* (not generally, but at each instant) defective." KANT, RELIGION, *supra* note 168, at 84. As a result, in the end, Kant seems to have concluded that some form of the Protestant concept of grace would be

speculative philosophy that follows. In this tradition, freedom and law have a dialectic relationship. Each necessarily requires the other, even as each necessarily contradicts the other. As Roger Sullivan notes, Kant begins his discussion in the *Metaphysics of Morals* with the antinomy he set up in the second critique, which "requires that person be both passively constrained (by such duties) and simultaneously actively constraining (by legislating the same duties)."¹⁹⁰ In Kant's words, "The moral law, which itself does not require a justification, proves not merely the possibility of freedom, but that it really belongs to beings who recognize this law as binding on themselves. The moral law is in fact a law of the causality of free agents"¹⁹¹

8. Kant's Legacy

The speculative tradition explores the logical implications of Kant's theories and in some cases comes to very different conclusions. Hegel universalizes Kant's concept of antinomies.¹⁹² By doing so, he ends up rejecting Kant's dichotomy between the noumenal and phenomenal.¹⁹³ There is no pure unchanging noumenon that escapes the contradiction and flux one observes in the empirical world. In Hegel's words, contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement"¹⁹⁴ Further, I will argue that Lacan makes the Kantian dialectic between freedom and law the basis of his rewriting of Freudian psychoanalytic theory. As mentioned, Lacanian theory holds that subjectivity and sexuality

necessary for man to be saved. *Id.* at 182-83; Adams, *supra* note 81, at xxi-xxv.

190. Roger J. Sullivan, *Introduction to KANT, MORALS*, *supra* note 68, at xx.

191. KANT, *PRACTICAL REASON*, *supra* note 1, at 65.

192. Schroeder, Apples and Oranges, *supra* note 183.

193. JEAN HYPPOLITE *FIGURES DE LA PENSÉE PHILOSOPHIQUE* 1 (1971); ROBERT B. PIPPIN, *HEGEL'S IDEALISM: THE SATISFACTION OF SELF-CONSCIOUSNESS* 206 (1989); Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Wrong and the Essence of Right*, 24 *CARDOZO L. REV.* (forthcoming 2002).

194. G.W.F. HEGEL, *HEGEL'S SCIENCE OF LOGIC* 440 (A.V. Miller trans., 1969) [hereinafter *HEGEL, LOGIC*]. Hegel is particularly hard on those philosophers who try to deny or do away with contradiction. *Id.*

are nothing but this fundamental dialectical relationship between freedom and the moral law.¹⁹⁵

9. *Modesty with Respect to Policy*

Before moving on, however, I would like to recap a number of points and raise a few others. First, to reiterate the primary point of this Article, speculative philosophy conceives of rationality not as predictable instrumental reasoning, but as freedom understood as the capacity for pure spontaneity. Consequently, rationality is not merely the capacity to choose an appropriate means to achieve a pregiven, nonrational end because that notion makes rationality the slave to inclination. Rationality must also include the capacity to choose an appropriate end to pursue.

Second, one can now better understand why speculative thought is more modest about policymaking than utilitarian or economic thought. Speculative thought is always critical of its own capacity to make substantive recommendations that comply with its own moral criteria. Since the speculative philosopher and critical legal scholar believes that true freedom requires self-legislation, she is wary of imposing rules designed to manipulate the behavior of others. Indeed, "Kant held that positive ethical obligations to others do *not* belong to the public domain, to be enacted into law and enforced with punitive incentives by the state, as utilitarians ... later held and as the majority of people today also hold."¹⁹⁶ As discussed below, and further developed by Hegel and Lacan, speculative thought, as an attempt to understand the world, seeks to develop a retroactive account of how what is came to be, and not to predict what will be.¹⁹⁷ In Hegel's formulation, philosophy

can save itself the trouble of giving good advice on the subject. Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms; and Fichte likewise need not have perfected his *passport regulations* In deliberations of this kind, no trace of philosophy remains¹⁹⁸

195. See *supra* notes 183-84 and accompanying text.

196. Sullivan, *supra* note 190, at xxiv.

197. See discussion *infra* Part II.D.3.

198. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 21 (Allen W. Wood ed. &

Of course this leads to a quandary. The speculative scholar, as a human being and a member of society, also desires to do good (promote the happiness of herself and others) and recognizes that, as a practical matter, the state needs to have positive laws and public policy.¹⁹⁹ As the cliché states, although one can only study history retroactively, one is forced to live it prospectively. Consequently, far from pragmatism being antithetical to speculative idealism, it is, in fact, a necessarily corollary. We must use pragmatism to write positive law precisely because pure reason is not empirical.

Nevertheless, the speculative scholar is equally wary of making policy recommendations based on the pragmatic grounds supported by utilitarianism and law and economics, because she believes that these theories fail on their own pragmatic terms. They cannot achieve the scientific "objective" measurability that is their supposed justification.

Consequently, I wish partially to rehabilitate Posner's attack on the attempted use of neo-Kantian theory to make practical legal policy recommendations and judicial decisions. I agree that from a Kantian perspective one cannot derive specific concrete "pathological" conclusions from the abstract and formal moral law. Dworkin's attempt to explain specific legal doctrines through neo-Kantian theory is doomed to failure by the logic of Kantianism. On the other hand, Posner is incorrect to conclude from this that Kantian moral theory is *irrelevant* to practical decision making. Speculative theory can demonstrate how alternative ways of making decisions such as utilitarianism or Posnerian "pragmatism," also fail by their own terms. Moreover, Kantianism can suggest some overarching principles that can necessarily limit specific decision making, e.g., that murder is immoral.²⁰⁰

H.B. Nisbet trans., 1991) [hereinafter HEGEL, *THE PHILOSOPHY OF RIGHT*].

199. Kant himself falls off the wagon occasionally. For example, the *Metaphysics of Morals* finds him moving from a discussion of how the moral duty of self-control suggests that one not abuse alcohol or overeat to a consideration of the proper number of people to invite to a dinner party! KANT, *MORALS*, *supra* note 68, at 180-81. I personally find that a number of passages in the *Philosophy of Right* come close to the type of practical minutia that Hegel claims philosophy must avoid. HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198.

200. For example, Posner says that if he was a British colonial official under the Raj, he would have had no difficulty outlawing the Hindu practice of suttee, not because it is

C. *The Failure to Communicate*

Ever since Posner and others proposed an economic analysis of law in the 1970s, scholars from the critical legal studies and other schools have offered trenchant criticism of its methodology and assumptions, including the rationality postulate. And yet law and economics has famously regarded these attacks as irrelevant or external to its paradigm. This essential failure to communicate is so great as to suggest that the different schools might be speaking distinct languages. As I discuss in the final part of this Article, from a Lacanian perspective this is almost literally true.²⁰¹ Policy scholarship and speculative scholarship are engaging in diametrically different discourses, that of the university and the hysteric, respectively. As each of these discourses is the reverse of the other, they are not directly addressed to each other. To hear, let alone understand, the speculative scholar's criticism of law and economics within the hysteric's discourse, the legal economist must, at least temporarily, leave her position in the university's discourse.

Consequently, I lay a good part of the blame for this communication failure at the door of law and economics. Although many discussions of economic rationality dutifully start with the disclaimer that the writer is using the word as a term of art with a specific technical meaning designed for a specific analytical purpose, in context they tend to use the term much more broadly. Deviations from economically "rational" behavior are frequently treated as though they were "irrational" in the colloquial sense of crazy or erratic. This position is taken by Jolls, Sunstein, Thaler, and the majority of the commentators at the Oregon symposium.²⁰² Indeed, I suspect that one of the reasons why legal economists

immoral, but because he finds it disgusting. Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1644 (1998). A Kantian analysis would have no problem in concluding that since murder and suicide are immoral, suttee, as some combination of the two, is immoral. I believe that Posner is correct that on its own terms a Kantian analysis may not be able to give specific policy advice on more subtle questions (such as whether killing in self-defense is immoral murder or permissible homicide). As mentioned above in note 199, despite Kant's insistence that philosophy not give advice, in the *Metaphysics of Morals* he occasionally violates his own dictum and purports to do just that.

201. See *infra* Part III.

202. See *supra* notes 10-12 and accompanying text.

persist in using the term "rationality" for certain economic behavior is precisely to draw on all of the connotative baggage of the term's conventional and philosophic usages.²⁰³

I do not wish to exonerate the critics of economics entirely, however. As I have written extensively before, and as I addressed briefly earlier in this Article, many critics of the economic approach to law are what I have called "romantics."²⁰⁴ Under my definition, romantics adopt many of the utilitarian assumptions they claim to criticize, but apply the opposite valorization. Romantics share several economic assumptions: They (1) define rationality as a calculation of ends-means reasoning, (2) characterize markets as cold, impersonal manifestations of rationality, (3) believe that market analysis leads to commodification in which a price can be put on everything, and (4) assume that for law to be "law," it must be determinate. While the utilitarian embraces this vision, the romantic is repulsed by it.²⁰⁵ Consequently, the romantic concludes that she must reject the concepts of economic rationality, market analysis, and commodification and that she must condemn positive law because it is indeterminate.²⁰⁶ Nevertheless, by so concluding she does nothing to challenge the fundamental form of analysis engaged in by economists; she merely disagrees with the utilitarian's opinion.

This approach fails precisely because it neither addresses the reasons why economics seems so attractive, nor the logical inconsistencies that ultimately make it a limited tool for legal analysis. Neo-classical economic theory is one of the great intellectual accomplishments of Western thought. It is a construct of exquisite elegance and beauty. It was my first academic love. It swept me off my feet as a seventeen-year-old college student and I do not regret yielding my intellectual virginity to it. With age, however, as is so often the case with the romantic object, my girlish infatuation began to look unappealingly jejune.²⁰⁷ Despite the fact that we grew estranged, I will always think of economics with

203. See Schroeder, *Economic Rationality*, *supra* note 25, at 147, 181-82.

204. I make this argument at great length in Schroeder, *Pandora's Amphora*, *supra* note 29.

205. *Id.* at 824-27.

206. *Id.* at 883-84.

207. The same year I gave a copy of Kahlil Gibran's *The Prophet* to my then boyfriend. Need I say more?

nostalgic fondness for initiating me into the ways of rigorous thought. Nevertheless, I am glad that I am not still involved with the old roué.

One of the great attractions of neo-classical economics' rationality postulate is that it matches many people's intuitions and anecdotal observations about how people behave. People frequently engage in ends-means reasoning in order to achieve their self-interests narrowly defined; they respond to economic incentives and disincentives; they make trade-offs and, occasionally, "tragic" choices. Another attraction is that the rational person envisioned by neo-classical economics is consistent with the vision of the autonomous individual posited by the classical liberal political theory that underlies our constitutional system. Despite my interest in speculative theory, I am attracted to Hegel, not Marx, and am a thoroughgoing capitalist. In other words, the economic postulate seems to say something "true" about human nature and our political system that is arguably relevant to legal analysis.

The flaw of the economics approach (and the romantic reaction) is that it assumes that the rationality postulate is a "true" account of some aspects from the intuition of human nature, inevitably implies the conclusion that it is an *adequate* (full) account of human nature and behavior. The speculative theorist, in contrast, argues that human nature is much more complex and layered than the rationality postulate assumes. It proposes that subjects might very well act as though they were economically rational for some but not all purposes. In other words, the rationality postulate might be the truth, but not the whole truth. From this standpoint, one of the failings of the law and economics movement is not so much that it tries to apply economic analysis to legal questions per se, but that it seeks to expand economic analysis beyond its proper scope and use it as an instrument of power over others.

Consequently, the speculative theorist does not reject the concept of rationality generally, nor even economic rationality as ends-means reasoning specifically, within its appropriate bailiwick. Instead, she seeks to develop a fuller account of what it means to be rational in order to understand not merely how one formulates means to achieve one's ends, but also how one formulates one's ends. She therefore studies law not merely for the purpose of

predicting economic behavior, but also to understand the experience of human freedom and spontaneity.

D. Speculative Thought

Jacques Lacan, the French psychoanalyst who died in 1982, is probably the theorist most closely associated with the supposedly postmodern concept of the death of the liberal subject.²⁰⁸ Nevertheless, Lacan's entire teaching is nothing but an extended exploration of the subject. Unlike many scholars associated with "postmodernism," however, Lacan is never dismissive of liberal forebearers. He always worked within the Western intellectual tradition and remained as likely to rely on St. Augustine, Kant, or Hegel as on Freud.

Consequently, Lacan should not be viewed as rejecting wholesale Kantianism or classical liberalism. If Lacan and Hegel spend so much time critiquing Kant, it is because of the strength, not the weakness, of his theory. Lacan and Hegel do not so much argue that Kantian liberalism is wrong, but that it is partial. Indeed, Kant took one of the early necessary steps in the journey that Hegel, and then Lacan, continue. Indeed, the beginning of psychoanalysis can be pinpointed in Kant's writings.

1. Kant and Hegel

I briefly digress to make some points about Hegel, as he is the central span in the bridge leading from Kant to Lacan.²⁰⁹ Kant

208. One might debate the definition of postmodernism and question whether Lacan should be deemed a postmodernist, but these are issues beyond the scope of this Article.

209. Lacan was not a Hegel scholar per se, and like many French intellectuals, probably first encountered Hegel through Kojève's controversial interpretation. Nevertheless, I agree with Žižek's assessment that Lacan's system can coherently be read only as a development of the Hegelian tradition. For example, he presents his discourse theory as an elaboration of Hegel's famous master-slave dialectic from *The Phenomenology of Spirit*. G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A.V. Miller trans., 1977) [hereinafter HEGEL, *PHENOMENOLOGY OF SPIRIT*]. In an amusing passage during the Seventeenth Seminar in which he first presented his discourse theory, he asks his students whether any of them have gone back and carefully reread *The Phenomenology* in light of his earlier discussions of the dialectic. Although it is hard to tell exactly what happened by reading a transcript, it seems that an awkward silence followed Lacan's question until one or two students shyly raised their hands. Lacan rips into the class for their laziness, then admits that the reason he did so was precisely because he felt that his own familiarity with Hegel was spotty. LE SÉMINAIRE DE

defined his notion of the liberal subject in terms of absolute free will: the capacity of being one's own end, not the means to the end of another. This notion is precisely the opposite of what happens to law and economics' liberal subject, who is the means to society's ends.

Hegel agrees with Kant that the liberal, autonomous individual, understood as free will, is an appropriate starting place for any theory of subjectivity.²¹⁰ He concludes, however, that it could not serve as a full account of subjectivity because it contains its own internal logical contradictions that need resolution.²¹¹ I have rehearsed Hegel's argument as to how the liberal individual develops into the Hegelian subject extensively elsewhere,²¹² and shall only touch on certain aspects in this Article.

Though Hegel agreed with Kant that the essence of personality is free will, he thought that the freedom of the Kantian individual in the state of nature could only be potential. Pure freedom is radically negative, indeed it is negativity per se.²¹³ To be completely free is to be totally without bounds of any kind. To be completely free from bounds is to be totally lacking in content, to be a pure abstraction without individuality (i.e., noumenal).²¹⁴ In order to become actual, the individual must become concrete (i.e., phenomenal).²¹⁵

2. *Appearances All the Way Down*

As discussed above, Kant recognizes that since his concept of pure or noumenal freedom is not empirical, it is without content.²¹⁶

JACQUES LACAN, LIVRE XVII: L'ENVERS DE LA PSYCHANALYSE 1969-70, at 197 (Jacques-Alain Miller ed., 1991) [hereinafter LACAN, SEMINAR XVII]. An English translation of this seminar by Russell Grigg is scheduled to be published. Professor Grigg has graciously allowed me to have access to a draft of his translation. English quotations from this seminar used in this Article are based on Grigg's translation, with some of my own modifications. At Grigg's request, page citations are to the original French edition.

210. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 198, at 37, 67-68; SHLOMO AVINERI, HEGEL'S THEORY OF THE MODERN STATE 37 (1984).

211. Alan Brudrer, *The Unity of Property Law*, 4 CAN. J. L. & JURIS. 3, 14-15 (1991).

212. My most complete account appears as Part I of SCHROEDER, VESTAL, *supra* note 29; see also Schroeder, *Pandora's Amphora*, *supra* note 29.

213. HEGEL, THE PHILOSOPHY OF RIGHT, *supra* note 198, at 67-70.

214. *Id.*

215. *Id.* at 73; SCHROEDER, VESTAL, *supra* note 29, at 31-34.

216. See *supra* text accompanying notes 81-105.

He argues that although freedom as liberation from the causal laws of nature is purely negative, freedom as spontaneity is positive. He struggles to account for how this capacity for spontaneity can have practical effect in the phenomenal world. His problem is that it followed from his distinction between noumena and phenomena, and from his observation that all content is phenomenal, that all practical action is necessarily smeared with pathology, and, therefore, partially amoral and unfree. Consequently, many Kant scholars believe that he ultimately failed in his attempt to prove that freedom can become practical (actual).²¹⁷

Hegel takes another approach. Hegel, in effect, believes that Kant did not have the courage of his convictions to take his theory to its logical extreme. This is precisely because Kant persists in the misconception that there is an eternal, unchanging and ideal noumenon radically different from the ceaselessly changing, empirical, phenomenal world. To put the difference between Kant and Hegel in colloquial terms, when one considers what the "thing-in-itself" can be, one encounters a blank or void. That is, we have the intuition that there must be more to the objective world than that which mortals can subjectively capture in words and imagery. Kant assumes that the reason we encounter this void or missing reality is because the thing-in-itself is hidden from or inaccessible to human reason. Hegel, in effect, rhetorically asks Kant, "if you really believe we can never know the thing-in-itself, how come you have been able to tell us so much about it?"

Consequently, although known as an idealist, Hegel is not a neo-platonist who distinguishes the ideal from the empirical world.²¹⁸ Hegel rejects Kant's radical separation of noumena and phenomena.²¹⁹ In other words, for a concept to exist—to be possible, the ideal must manifest itself in the world. It must be actual. The noumenal and the phenomenal are one and the same.²²⁰ This

217. Even Kantian Henry Allison admits that "Kant's theory of freedom is the most difficult aspect of his philosophy to interpret, let alone defend." ALLISON, *supra* note 68, at 1. "The consensus among Kant's critics is that the application of [the phenomenal-noumenal] distinction to the problem of freedom leads to a dilemma from which there is no ready escape." *Id.* at 2.

218. In Hyppolite's words "Hegelian philosophy rejects all transcendence ... There is no world, nothing in itself, no transcendence" HYPPOLITE, *supra* note 193, at 1.

219. Or in Pippin's characterization "there is literally *nothing* 'beyond' or 'behind' or responsible for the human experience" PIPPIN, *supra* note 193, at 206.

220. As Allison explains, "the Hegelian critique of Kantian morality is essentially a protest

concept is one of the correct meanings of Hegel's frequently misunderstood assertion: "What is rational is actual; and what is actual is rational."²²¹ This assertion should not be misinterpreted as a Panglossian defense of the Prussian status quo. Rather, it is a rejection of the Kantian dichotomy and can be translated as "the noumenon is the phenomenon and the phenomenon is the noumenon."

Hegel argues that the reason why we encounter a blank when we consider the thing-in-itself is not because it is hidden. Rather it is because potentiality (the ideal or noumenon), when abstracted from actuality (phenomena), is negativity per se.²²² Kant's thing-in-itself is an attempt to positivize negativity.²²³ Rather than only the four antinomies identified in Kant's *Critique of Pure Reason*, Hegel asserts that all concepts are antinomies.²²⁴ Dialectical opposition—a radical constituent split—characterizes the entire intelligible universe.

Contradictions are, of course, unstable; they cannot stand and must be resolved. As we have seen, Kant assumes this means that there must be a static noumenal world "out there" beyond contradiction. Hegel, in contrast, argues that it means that the entire world, even the so-called thing-in-itself, is in a constant state of flux.²²⁵ Contradictions are only temporarily resolved until a new contradiction is identified in the supposed resolution leading to a new temporary resolution, *ad infinitum*.²²⁶ In a passage that is

against its location of supreme value (a good will) in an inner realm of 'purity' that is divorced from the real 'objective' world of actions and events." ALLISON, *supra* note 68, at 187. Hegel rejected Kant's theory of moral law as empty formalism because, for Hegel, "there can be no action without passion...." *Id.* at 186. As Allen Wood says, "Hegel's fundamental concern in rejecting the Kantian conception of the good will is to prevent our conceiving of the good will as an essentially alienated form of human existence, cut off both from its own sensuous nature and from the real world in which it acts." *Id.* at 187 (quoting Allen Wood). This is part and parcel of Hegel's "wholesale rejection of the metaphysics of transcendental idealism" *Id.* at 188.

221. HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198, at 20.

222. HEGEL, *LOGIC*, *supra* note 194, at 543.

223. As should become clearer late in this Article, Kant's thing-in-itself serves, therefore, as his *objet petit a*. See *infra* Part III.A.6.

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

225. Contradiction "is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement" HEGEL, *LOGIC*, *supra* note 194, at 438.

226. As I have explained elsewhere:

obviously addressed to Kant and his followers, Hegel accuses certain philosophers of assuming that one can solve the antinomies by concluding

that the world is *in its own self* not self-contradictory, not self-sublating, but that it is only *consciousness* in its intuition and in the relation of intuition to understanding and reason that is a self-contradictory being. It shows an excessive tenderness for the world to remove contradiction from it and then to transfer the contradiction to spirit, to reason, where it is allowed to remain unresolved. In point of fact it is spirit which is so strong that it can endure contradiction, but it is spirit, too, that knows how to resolve it. But the so-called world ... is never and nowhere without contradiction, but it is unable to endure it and is, therefore, subject to coming-to-be and ceasing-to-be.²²⁷

To put this another way, rather than positing that there is a sharp break between appearance and essence, Hegel argues that appearance *is* essence.²²⁸ In the words of my colleague Arthur Jacobson, to Hegel, "it is appearance all the way down."²²⁹ As we

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

Schroeder, Apples and Oranges, *supra* note 183, at 14.

227. HEGEL, LOGIC, *supra* note 194 at 237-38.

228. See Schroeder & Carlson, *supra* note 193, at 2.

229. Conversations with Arthur Jacobson. Jacobson is, of course, referring to the classic metaphor for infinite regress. The seeker of truth asks the guru about the universe. The guru states that the world is supported on four columns on the back of a giant elephant who stands on the shell of the cosmic turtle.

The student asks, "And on what does the cosmic turtle stand?"

The guru replies, "On the shell of an even greater turtle."

The student inquires further, "And on what does the even greater turtle stand?"

"On a still greater turtle."

"But, oh master, on what does that turtle stand?"

"Listen buster, it's turtles all the way down!"

I discuss the genealogy of this great anecdote, and its variations, in SCHROEDER, VESTAL, *supra* note 29, at 5-6 n.12.

In the words of Robert Pippin, in Hegel's system "there are no 'essences' beyond or behind the appearances, at least none that can do any cognitive work. There are just the appearances" PIPPIN, *supra* note 193, at 211.

have seen, Kant argued that man's essential freedom was noumenal, which means it is pre-legal, and unchanging, not empirical, positive, and contingent. Hegel rejects the concept of the noumenal and concludes that the free subject is itself an empirical, artificial, contradictory, and changing entity.²³⁰

To make a long story short, in the *Philosophy of Right*, Hegel argues that the freedom that is only a "becoming" in the state of nature can be actualized through an empirical, intersubjective relationship with other persons.²³¹ It is only through such relationships that the abstract autonomous Kantian individual becomes a concrete subject.²³² Specifically, an abstract individual only becomes a subject if and when another subject recognizes her as an equal subject.²³³ Freedom is actualized through legal relationships in which subjects accord each other rights in a regime of private law (i.e., property and contract).²³⁴ Accordingly, to Hegel, law is the most primitive form of interrelationship in the sense that it is the simplest and most basic.²³⁵ Far from being primitive in a temporal sense, however, our modern concept of legal rights is relatively recent, as a historical matter—relating to the so-called Enlightenment. Indeed, one of the points of the *Philosophy of Right* is

230. See *supra* notes 210-15 and accompanying text.

231. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 198, at 57, 73; SCHROEDER, VESTAL, *supra* note 29, at 31.

232. "The passionately right-seeking creature respects the rights of others ... because only by respecting the rights of others can it achieve recognition." Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 897 (1989).

233. SCHROEDER, VESTAL, *supra* note 29, at 19-20, 31-34; Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199, 1220-21 (1989).

234. "Hegel gives the name 'freedom' to the reciprocal recognition of individuals in ethical institutions governed by ethical laws." Jacobson, *supra* note 232, at 896. For a technical description of the logic of mutual recognition, see David Gray Carlson, *How to Do Things With Hegel*, 78 TEX. L. REV. 1377 (2000).

235. "The creatures at the beginning of the *Philosophy of Right* thus hunger for legal relations more powerfully than they hunger for food, shelter, or sex." Jacobson, *supra* note 232, at 897; see also SCHROEDER, VESTAL, *supra* note 29, at 51.

Hegel's speculative logic purports to be a circular form of reasoning in the sense that, theoretically, one should be able to start from any point in analysis and derive the entire system. Nevertheless, for practical reasons, Hegel starts each of his books with a consideration of the simplest, most primitive conception of the topic to be analyzed. As *The Philosophy of Right* is a consideration of personality and society, he starts with the Kantian construct as the bare minimum concept of what it could mean to have personality. Alan Ryan, *Hegel on Work, Ownership and Citizenship*, in *THE STATE & CIVIL SOCIETY: HEGEL'S POLITICAL PHILOSOPHY* 178, 185 (Z. Pelczynski ed., 1984).

that the reason human freedom was only first becoming an actuality at the time he was writing (i.e., in the early nineteenth century) is that it required the type of capitalistic economic system, modern constitutional state and resulting rule of law that only started developing in the eighteenth century.²³⁶

3. *The Retroactive Nature of Speculative Theory*

Because Hegel is supposedly a totalizing philosopher, it is common to misread *The Philosophy of Right* as positing a closed totalitarian philosophy in which obedient citizens are fully integrated within and subordinated to a bureaucratic monarchy. This reading misses a number of important facts. *The Philosophy of Right* is an examination of the internal logic of the modern constitutional state that was becoming the norm in Europe at the time Hegel was writing.²³⁷ Although Hegel seeks to explain why

236. I mention this because it is an important point frequently missed by critics of Hegel. For example, as I have discussed, 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. Schroeder, *Virgin Territory*, *supra* note 29, at 55.

The *Philosophy of Right* is an attempt to explain the internal logic of the modern constitutional state which was becoming the norm in Europe at the time Hegel was writing in the early nineteenth century. As his famous metaphor of retroactivity indicates, philosophy can not predict the future, but only explain the present and the past. HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198, at 23 ("When philosophy paints its grey in grey, a shape of life has grown old, and it cannot be rejuvenated, but only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk."). By starting his analysis with an explanation of the logic of contract and property—the legal foundations of capitalist economics—and then turning to civil society—the market economy—he indicates that the constitutional state—the subject of the last section of the book—could not exist until our modern conceptions of contract and property came into being.

237. One of the aspects of *The Philosophy of Right* that disturbs many contemporary non-Hegelians is his discussion of hereditary monarchy. It is easy to misread Hegel as promoting such a form of government. For example, an old college friend of my husband who owns a small computer business in Silicon Valley and who considers himself an arch-scientific rationalist made this accusation a couple of months ago. In context, Hegel is trying to explain the general function of the office of "head of state" that all modern constitutional states have. I believe that we, in the United States, tend to miss this point because we combine two distinct functions which in most constitutional states are held by two individuals (i.e. head of government and head of state) in one individual (the President).

Unlike the substantive position of head of government, head of state is a purely empty ceremonial position—the head of state serves as the physical embodiment of the subjectivity of the state at official functions. In Lacanian terms, the king is an empty master signifier. See *infra* Part III.A.3. This is why in most constitutional states the substantive office of head of government (the prime minister or premier) is powerful while the formalistic office of head

these states developed as they did, nowhere does he argue that this was an inevitable development or that the constitutional state is theoretically the most superior form of government. Although Hegel is famous (or infamous) for arguing that certain developments are logically necessary, this necessity, however, is retroactive, not prospective. He never argues that given the current state of affairs something must necessarily develop in the future. Rather, he tries to determine from the current state of affairs what necessarily must have happened in the past.²³⁸

It is also common to assume that since Hegel speaks about the "end of history" and posits that the modern constitutional state developed because it resolved certain contradictions existing in more "primitive" societies, that Hegel believes the modern state is a final resolution.²³⁹ Once again, this is a misconception. As Hegel famously states in the preface to *The Philosophy of Right*, speculative philosophy, as he understands it, is a retroactive, not a prospective, study.²⁴⁰ This is the point of probably the most well-known passage in all of Hegel's work.

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

of state (such as the British monarch, the Japanese emperor, or the Italian president) has little or no effective power. In Hegel's words, the only function of a proper king is to dot the i's of legislation adopted by parliament. HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198, at 323. Consequently, while the head of government should be elected, the head of state can appropriately be appointed in any number of ways. Hegel thought that was a distinct advantage in making head of state a hereditary office; it made it clear that the position was arbitrary. *Id.* at 322-23.

238. See generally HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198.

239. Perhaps the most notorious example of this misreading in recent years is expressed in FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

240. See HEGEL, *THE PHILOSOPHY OF RIGHT*, *supra* note 198, at 23.

only recognized, by the grey in grey of philosophy; the owl of Minerva begins its flight only with the onset of dusk.²⁴¹

Speculative theory can only seek to explain what has happened, not predict the future or give policy advice. The only thing the philosopher can say about the future is that, given that all reality is characterized by contradiction, negativity, and change, it will probably be different than we predict. The liberal constitutional state is the end of one era of history in that it resolves the internal contradictions of feudalism.²⁴² But, over time, its internal contradictions will be revealed. Hopefully, these contradictions will be resolved in a new form of societal organization that is even more freedom loving, but there are no guarantees this will occur. Like Kant, Hegel believes that man is essentially free.²⁴³ Freedom means precisely that we are free to make wrong, immoral, even diabolically evil decisions not only about our own lives, but also about our societies. How else can one explain how Germany—the land of Kant, Hegel, Schiller, and Goethe—accepted Hitler?

III. POLICY AS THE OTHER SIDE OF CRITIQUE

Lacan rereads the speculative tradition of Kant and Hegel through a Freudian lens or, more accurately, rewrites Freud's psychoanalysis with a speculative pen. He thereby combines the two great European theories of subjectivity into a new synthesis. The heart of Lacan's theory of personality is that the subject is split, or, in Lacan's colorful and intentionally misleading terminology "castrated." Lacan's reinterpretation of Freudian theory has its origins in Kant's division of man into a noumenal and a phenomenal self and his paradox of freedom as failure,²⁴⁴ but Lacan

241. *Id.*

242. "The *Philosophy of Right* is founded on an ethical theory which identifies the human good with the self-actualization of the human spirit. Hegel's name for the essence of this spirit is *freedom*." Allen W. Wood, *Introduction to HEGEL, THE PHILOSOPHY OF RIGHT*, *supra* note 198, at vii, xi.

243. *Id.*

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

follows Kant's implications a step further than Hegel towards their logical extreme.

In the remainder of this Article, I shall concentrate on that portion of Lacan's theory that relates specifically to discourse. Lacanian discourse theory equally explains policy science's fear of freedom and its defenses to criticism. I set forth this explanation in the context of Lacan's notion of four discourses. I have explained Lacanian discourse theory in detail elsewhere,²⁴⁵ and shall only offer a very simplified account of those ideas necessary for the points I wish to raise in this Article.

A. *The Matrices of Discourse*

Lacan first developed his theory of discourses in his Seventeenth Seminar, *L'envers de la psychanalyse*.²⁴⁶ This title can be translated as the other side, reverse, invert, lining, or facing of psychoanalysis. He identifies four discourses: that of the master, the university, the analyst, and the hysteric.²⁴⁷ In the Seventeenth Seminar, Lacan argues that the master's discourse is the other side or reverse of the analyst's.²⁴⁸ I posit that, by Lacan's reasoning, the university's discourse (policy science) is, therefore, the other side of the hysteric's discourse (speculative theory, doctrinal scholarship, and legal practice).²⁴⁹

1. *The Mathemes*

In an attempt to give a more science-like rigor to his theory, Lacan formulated quasi-mathematical symbols which he called "mathemes" to express many of his core concepts. Lacan graphically expressed the four discourses as four matrices having the same

245. Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 TEX. L. REV. 15 (2000) [hereinafter Schroeder, *The Four Discourses*].

246. See *supra* note 209.

247. *Id.*

248. *Id.* at 99.

249. I first suggested the analysis that I develop here in Schroeder, *The Four Discourses*, *supra* note 245, at 16-19.

structure and each consisting of the same four mathemes placed in different positions and representing four different roles.²⁵⁰

<u>agent</u>	→	<u>other</u>
truth		product/loss ²⁵¹

I shall explain these roles below.²⁵²

The four mathemes that rotate through the four positions of matrices are "S₁, S₂, s and a."²⁵³ "S₁" stands for the master signifier.²⁵⁴ "S₂" is the chain of all signifiers or knowledge.²⁵⁵ "s" stands for the split subject.²⁵⁶ The "a", the lower case letter "a" printed in italics, represents what is perhaps Lacan's most important and difficult innovation in psychoanalysis: the *objet petit a*, the object cause of desire.²⁵⁷

2. The Three Orders

Before we can consider the definitions of these four mathemes, I must briefly introduce Lacanian linguistic theory. Lacan posits that the subject is split between three orders which he called the symbolic, the imaginary, and the real.²⁵⁸

250. I have described the four discourses in detail elsewhere and shall only give a brief account necessary to understand the following discussion. See Schroeder, *The Four Discourses*, *supra* note 245, at 40-90.

251. BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 131 (1995).

252. See *infra* Part III.A.3. to Part III.A.6.

253. FINK, *supra* note 251, at 173.

254. *Id.*

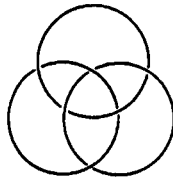
255. *Id.*

256. *Id.*

257. *Id.*

258. See *THE SEMINAR OF JACQUES LACAN, BOOK I: FREUD'S PAPERS ON TECHNIQUE* 1953-54, at 80 (Jacques-Alain Miller ed. & John Forrester trans., 1988) [hereinafter LACAN, SEMINAR I]; Jacqueline Rose, *Introduction II to JACQUES LACAN AND THE ÉCOLE FREUDIENNE, FEMININE SEXUALITY* 27, 31 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985). See generally ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* 10 (1990). As is the case with virtually all of Lacan's concepts, not only are three orders extremely complex, but Lacan's thinking about them developed over time. For example, in the early seminars of the 1950s, Lacan concentrated more on the contrast between the symbolic and the imaginary, whereas his later seminars put more emphasis on the real. Indeed, it seems that over time, Lacan shifted some of the functions he originally assigned to the imaginary over to the real. I have explained on the three orders and their implications for law and

The symbolic order is that of language, law, and signification.²⁵⁹ Another term for the symbolic order is the big Other,²⁶⁰ which is the term I will generally use in the rest of this Article. As it includes law, the symbolic is the primary focus of the remaining portion of this Article. To understand the symbolic, however, one needs to have some familiarity with the other two orders to which it is inextricably linked. Indeed, Lacan explained the relationship of the three to subjectivity with the metaphor of the overlapping rings of the figure known as the Borromean knot:²⁶¹



If any ring is removed, the entire knot of subjectivity instantly falls apart.

The imaginary order is that of imagery, complementarity, and meaning.²⁶² The real order is that which cannot be reduced to, or which seems to escape, the other two orders.²⁶³ The real is our sense that there is an external reality that cannot be reduced to our words or pictures. Consequently, our intuitive understanding that there is an object world outside of our psyche is located within the real.

economics at great length elsewhere and shall not repeat this discussion here. I will merely reiterate a few crucial points.

259. See LACAN, SEMINAR I, *supra* note 258, at 80.

260. Schroeder, *The Four Discourses*, *supra* note 245, at 32-33.

261. STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 33 (1983). For a brief description of the metaphor of the Borromean knot, see SLOVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 5, 143 (1991) [hereinafter ŽIŽEK, LOOKING AWRY].

262. SLOVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 123 (1993) [hereinafter ŽIŽEK, TARRYING WITH THE NEGATIVE]; Jeanne L. Schroeder, *The Eumenides: The Foundation of Law in the Repression of the Feminine* (2000) (unpublished manuscript, on file with author) [hereinafter Schroeder, *The Eumenides*].

263. In Grosz's words: "The Real is not however the same as reality; reality is lived as and known through imaginary and symbolic representations." GROSZ, *supra* note 258, at 34. She states: "The Real cannot be experienced as such: it is capable of representation or conceptualization only through the reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as 'the lack of a lack.'" *Id.*

But so is our understanding of God (in the sense of the Absolute), death, and everything else that we sense is beyond the limitations of human speech and imagery.²⁶⁴ The real can be thought of as Kant's *misunderstanding* that there is a noumenon, a thing-in-itself, that is beyond our phenomenological understanding.

By this I mean that "real" is not the noumenon itself but the misperception that there is a noumenon distinct from the empirical phenomenal world. The "real" is not, therefore, the physical reality or the "object world" per se. Being empirical, actuality (reality) falls within Kant's category of phenomena. Lacan's conception of the real does not question the existence of phenomena, but questions Kant's theory that there exists in addition to empirical reality, some nonempirical, purely rational thing-in-itself that exists outside human understanding (the noumena).²⁶⁵ This sense that the thing-in-itself exists outside of empirical phenomena is itself only an appearance generated by our misunderstanding.²⁶⁶

Although Lacan does not question the existence of an objective empirical world, his very idea of the real can be seen as a questioning of whether we have the ability to have a direct, immediate understanding of it. Kant believes that only the noumena are hidden, and one can know the phenomena through experience. Lacan, following Hegel, questions one's ability to know even one's own *experience* (Hegel's "sense certainty") as opposed to what one

264. See, e.g., JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 45 (Jacques-Allan Miller ed. Alan Sheridan trans., 1981) [hereinafter LACAN, *THE FOUR FUNDAMENTALS*]; SCHNEIDERMAN, *supra* note 261, at 76. Any attempt to give affirmative content to the idea of God (as in religions) is imaginary, not in the sense that such a God does not exist, but that our understanding of such a God is located in the imaginary order.

265. Although we experience it in this way, "the Real is not a hard external kernel which resists symbolization, but the *product* of a deadlock in the process of symbolization." ŽIŽEK, *THE INDIVISIBLE REMAINDER, AN ESSAY ON SCHELLING AND RELATED MATTERS* 110 (1996) [hereinafter ŽIŽEK, *INDIVISIBLE REMAINDER*]; see also Schroeder, *The End of the Market*, *supra* note 19, at 500-01.

266. Actual markets, like law, are located in the order of the symbolic. In contrast, the economic ideal of the perfect market is "real" (or noumenal) in the technical sense. The perfect market is the realm beyond distinctions of time and space, where each subject has perfect information about himself and all other subjects, including perfect knowledge of his own preferences and desires, where all objects immediately flow to the highest valuing user so that all subjects eventually become perfectly indifferent between what they have and any other combination of goods at the perfect price ratios. In the perfect market all actual market transaction stops. I set out this argument in full in Schroeder, *The End of the Market*, *supra* note 19, at 548-58.

can understand through speculative reason (or psychoanalysis).²⁶⁷ All three Lacanian orders are human *reinterpretations* of experience.

Lacan and Hegel's point is shared by such diverse philosophers of science as Charles Sanders Peirce and Karl Popper. Peirce called direct, immediate physical experience "oneness."²⁶⁸ Peirce argues, however, that the instant one, as a conscious being, becomes aware of his experience, he is already reinterpreting it through what Peirce calls "secondness" (roughly the imaginary) or "thirdness" (the symbolic).²⁶⁹ Consequently, man has no direct knowledge of

267. HEGEL, *LOGIC*, *supra* note 194, at 323.

268. Firstness may be described as pure unmediated essence, quality, unanalyzed total impression, or potentiality.

Firstness is the mode of being which consists in its subject's being positively such as it is regardless of aught else. That can only be a possibility, for as long as things do not act upon one another there is no sense of meaning in saying that they have any being, unless it be that they are such in themselves that they may perhaps come into relation with others. The mode of being a *redness*, before anything in the universe was yet red, was nevertheless a positive qualitative possibility.

CHARLES SANDERS PEIRCE, *COLLECTED PAPERS, VOLUME I, PRINCIPLES OF PHILOSOPHY* 7 (E. Hartshorne & Paul Weiss eds., 1931).

269. Secondness is the awareness of difference which suddenly thrusts itself on one's consciousness. It is mediation and difference. It is actuality.

Actuality is something *brute*. There is no reason in it. I instance putting your shoulder against a door and trying to force it open against an unseen, silent, and unknown resistance. We have a two-sided consciousness of effort and resistance, which seems to me to come tolerably near to a pure sense of actuality. On the whole, I think we have here a mode of being of one thing which consists in how a second object is. I call that Secondness.

Id. at 7.

Thirdness, is mediation, connection and law.

Thirdness, in the sense of the category, is the same as mediation. For that reason, pure dyadism is an act of arbitrary will or of blind force; for if there is any reason, or law, governing it, that mediates between the two subjects and brings about their connection.

Id. at 164.

Peirce developed a particularly clear illustration of the mediated nature of consciousness and our inability to have immediate contact with firstness.

Imagine me to make and in a slumberous condition to have a vague, unobjectified, still less unsubjectified, sense of redness, or of salt taste, or of an ache, or of grief or joy, or of a prolonged musical note. That would be, as nearly as possible, a purely monadic state of feeling.

Id. at 149. But, as soon as one becomes conscious that one is tasting something there is no longer one thing, the pure essence of the taste. There are two, the taste and the taster. You no longer have an unmediated experience of the quality of taste, but a mediated or interpretive experience. You can speculate that a few seconds before, you might have had an

oneness. Similarly, Popper argues that although the empirical world (which he called the first world) no doubt exists, man only knows it indirectly through his subjective interpretation (the second world) or the intersubjective collective reinterpretation (the third world).²⁷⁰ World Three is Popper's definition of science.²⁷¹

The symbolic is characterized by the linguistic concept of signification. In signification, a word (a signifier) is never equivalent to, and does not stand for, any "real" thing outside of language. Rather, each signifier stands only for another signifier within a chain of interpretation.²⁷² This concept means that signification is contingent because a word or a law can only be understood within a specific context. The important aspect of this for present purposes, is that the symbolic is always in a constant state of flux. The symbolic order is always a work in progress and, therefore, is always incomplete.

In contrast, the real includes the *dream* of a wholeness, a completion, a permanence, and an integrity that the symbolic can never achieve.²⁷³ It includes Kant's vision of an eternal noumenon lying beneath ephemeral phenomena. The real includes the dream of a subject who is not split (castrated).²⁷⁴ The dream of the real can, however, be a horrifying nightmare. The real is the world of no distinctions, no consciousness, and no subjectivity.²⁷⁵ It is a mythical primal unity with the universe that must have existed before one was born, and to which one might return when one dies.

immediate, purely physical, experience, but you can never know this directly.

270. KARLA POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* 106-07, 153-56 (Rev. ed. 1986).

271. *Id.* at 108.

272. "Lacan compared this chain of signifiers as 'rings of a necklace that is a ring in another necklace made of rings.'" William J. Richardson, *Lacan and the Subject of Psychoanalysis*, in 6 *INTERPRETING LACAN, PSYCHIATRY AND THE HUMANITIES* 54 (Joseph Smith & William Kerrigan eds., 1983) (quoting JACQUES LACAN, *ÉCRITS: A SELECTION* (Alan Sheridan trans., 1977)).

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

Id. at 55.

273. Schroeder, *The End of the Market*, *supra* note 19, at 511.

274. *Id.* at 511-13, 558.

275. *Id.* "The concept of the real implies the annihilation of the subject." SCHNEIDERMAN, *supra* note 261, at 76.

The real is where all movement stops.²⁷⁶ Kant anticipated this interpretation when he declared that if man could ever truly know the moral law he would not become like God, rather he would become a lifeless puppet.²⁷⁷

Man seeks relief from the ever-changing, partial world of the symbolic, and the primal, dead fullness of the real in the third order of the imaginary.²⁷⁸ The imaginary is not merely the realm of images, but of "meaning."²⁷⁹ Meaning, in contrast to contingent context-bound signification, is perfect correspondence, commensuration, or self-identity between sign and object.²⁸⁰ It is not "X stands for Y," but "X is Y." Lacan associates the imaginary to animalistic thinking.²⁸¹ In other words, economic rationality is in the imaginary in the sense that it characterizes the type of behavior characteristic of rats and frogs. The imaginary is the order of mirror images, and simple negations where everything always is or is not.²⁸² The imaginary is the fantasy that one can somehow preserve the reassuringly static aspect of the real without submitting to its terrifyingly deadly aspect. The imaginary is the fantasy that one can somehow achieve the freedom, and moral responsibility of the symbolic, without risking its unpredictability and ceaseless change.²⁸³

Using the imaginary, the subject builds fantasy structures which seem to bind the three orders together in order to convince himself that the symbolic order in which he acts is like the real which he both desires and dreads.²⁸⁴ It is these fantasies, these fictions, that enable him to get through the day, and through his

276. Schroeder, *The End of the Market*, *supra* note 19, at 511-12, 536.

277. See *supra* notes 182-89 and accompanying text.

278. Schroeder, *The End of the Market*, *supra* note 19, at 506.

279. "There is no doubt that meaning is imaginary." THE SEMINAR OF JACQUES LACAN, BOOK III: THE PSYCHOSES 1955-56, at 54 (Jacques-Alain Miller ed. & Russell Grigg trans., 1993) [hereinafter LACAN, SEMINAR III].

280. *Id.*; see also ŽIŽEK, TARRYING WITH THE NEGATIVE *supra* note 262, at 123; Schroeder, *The Eumenides*, *supra* note 262.

281. See LACAN, SEMINAR III, *supra* note 279, at 93-95.

282. Alan Sheridan, *Translator's Notes* to LACAN, ÉCRITS: A SELECTION (Alan Sheridan, trans., 1977), at vii, ix. Lacan first developed his notion of the imaginary in his famous early work on the mirror stage. See *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, LACAN, ÉCRITS: A SELECTION at 1, 2; see also ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 262, at 123.

283. Schroeder, *The End of the Market*, *supra* note 19, at 506-08.

284. *Id.*

life.²⁸⁵ Note, however, that because the fantasies only contingently bind together three very different aspects of the psyche—the symbolic, the imaginary, and the real—there is going to be an inevitable split between what man imagines he desires, and his desire created by the symbolic and the real.

3. *The Master Signifier*

The first matheme is S_1 , the “master signifier.” In order for a symbolic order to function, it is necessary to freeze the shifting of the unending chain of signifiers, if only contingently and temporarily.²⁸⁶ This “freeze” is done through the adoption of what Lacan calls a “master signifier.”²⁸⁷ This signifier holds the key that gives meaning to the other signifiers. The master signifier is the signifier that does not have a signified; only stands for itself.²⁸⁸ It, therefore, can serve as the period that at least momentarily ends the run-on sentence of signification. It is crucial that a symbolic order have master signifiers, but the content of the master signifier is, from a formal analytical perspective, irrelevant.²⁸⁹

285. In Žižek's words:

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

ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 262, at 119-29.

286. As explained by Žižek, “[I]n order for the series of signifiers to signify *something* (to have a determinate meaning), *there must be a signifier (a “something”) that stands for “nothing,”* a signifying element whose very presence stands for the absence of meaning (or, rather, for absence *tout court*). SLAVOJ ŽIŽEK, THE ABYSS OF FREEDOM 39 (1997) [hereinafter ŽIŽEK, ABYSS OF FREEDOM].

287. ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 244, at 23.

288. As explained by Žižek:

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

SLAVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 102-03 (1992) [hereinafter ŽIŽEK, ENJOY YOUR SYMPTOM].

289. Mark Bracher, *On the Psychological and Social Functions of Language: Lacan's Theory of the Four Discourses*, in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 107, 111-12 (Mark Bracher et al. eds., 1994).

The master signifier is a master signifier because it serves a function, not because it "deserves" to be a master signifier.²⁹⁰ Indeed, because it is the signifier that stands for nothing but itself, the master signifier is completely empty and vacuous. A perfect example of a master signifier is the role of money in a market economy. Money is the only thing in an economy that has no substance or use value of its own. It exists only as a placeholder for the substance or use value of other things. By doing so, it ties down the market by treating incommensurable things as though they were commensurable, thereby giving them economic value.²⁹¹

Of course, in theory anything could be a master signifier; in practice, the choice of master signifier is crucial. To say that a master signifier is arbitrary means only that no specific master signifier is logically mandated. Rather, a master signifier is always chosen by individuals and societies, although sometimes this choice is forced.²⁹² The choice of master signifier is, therefore, always an ethical act. This notion means both that one can choose an evil master signifier and that each person bears moral responsibility for her choice of signifiers. In liberal legal systems, typical master signifiers include "justice," "freedom," the "autonomous individual or ego" and, in the case of legal academia, "efficiency."²⁹³ In Nazi Germany and other anti-semitic societies, the vicious stereotype of "the Jew" (along with freemasonry and the New World Order), who supposedly caused all the evil in society, is the most important master signifier. In the 1990s, the master signifier of "Greater Serbia" served to justify genocidal war, just as today Islamic purity serves to justify terrorism. The point from a Lacanian analysis is that these master signifiers can serve their function in a society even though there is not a shred of evidence supporting the

290. FINK, *supra* note 251, at 29.

291. See Schroeder, *The Midas Touch*, *supra* note 117, at 749-60 (developing this analysis).

292. As Bracher says, "As master signifier is any signifier that a subject has invested his or identity in." Bracher, *supra* note 289, at 111. In Renata Salecl's words, "it proceeds in an unconditional manner and requires to be obeyed on the sole authority of its enunciation; ... not because there are good reasons to obey it." Renata Salecl, *Deference to the Great Other: The Discourse of Education*, in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 103 (Mark Bracher et al. eds., 1994).

293. See Schroeder, *The Four Discourses*, *supra* note 245, at 29-31.

stereotypes on which they are supposedly based.²⁹⁴ Indeed, as Žižek has vigorously argued in his analysis of anti-semitism in Europe, the very lack of evidence for, and the vacuity and fantasmic quality of, stereotypes actually make them more powerful.²⁹⁵

4. Knowledge

The second matheme, S_2 , stands for knowledge understood as the entire chain of signifiers in a symbolic order held together by the master signifier S_1 .²⁹⁶ Although this idea seems quite intuitive, there is one quirk to keep in mind. In psychoanalysis, knowledge is not necessarily, or even usually, conscious knowledge. It is characteristically unconscious.²⁹⁷

5. The Split Subject

Although the third matheme in the matrices is a , the *objet petit a*, I shall discuss it last because an introduction to Lacan's theory of subjectivity is required before we can discuss this notoriously difficult concept.

The matheme of the split or barred subject ($\$$) is one of Lacan's earliest.²⁹⁸ The capital "S," stands for the subject. The line, or "bar" that bifurcates refers to the constituent split that creates subjectivity.²⁹⁹

The statement that the subject is split is not merely an assertion about how empirical individuals feel in modern society (e.g., that contemporary Americans feel alienated). Rather it is a definition of what a subject is. Subjectivity is nothing but its constituent split, the radical negativity of pure possibility.³⁰⁰

294. Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1518-20 (1995).

295. See, e.g., ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 262, at 149-50; Žižek, *Ideology Between Fiction and Fantasy*, *supra* note 294, at 1519-23.

296. Bracher, *supra* note 289, at 111-12.

297. *Id.* at 110.

298. Lacan introduced the "S" at least as early as 1957. See LACAN, *ÉCRITS: A SELECTION* (Alan Sheridan trans., 1977) [hereinafter LACAN *ÉCRITS*].

299. FINK, *supra* note 251, at 45, 173; Schroeder, *The Four Discourses*, *supra* note 245, at 34.

300. As Žižek elaborates:

This "nothing," of course is *the subject itself*, the subject qua $\$$ (the Lacanian

Consequently, the phrase "the subject is split" is not a description, but an equation (the subject = split).³⁰¹ Our empirical *experience* of our essential constituent split is expressed in Lacan's metaphor of "castration."³⁰²

This metaphor expresses the idea that the subject does not experience himself as being split as a matter of fact, rather he feels that *he has been split by the symbolic*.³⁰³ The split is experienced as something horrible that someone else has done to the subject. Lacan's account of the birth of subjectivity, like Hegel's, is retroactive, not prospective.³⁰⁴ Lacan does not purport to tell how infants really develop into adults. Rather, he theorizes how adults, looking at themselves and their current "castrated" condition, retroactively reconstruct what they believe "must have happened" for this to occur.³⁰⁵ That is, if people feel castrated by the law today, they believe this means that the law must have castrated them. This *seems* to imply that it is possible that one could escape castration by escaping the law (the romantic myth). It is Lacan's view, however, that although the romantic myth is personality's founding myth in contemporary Western society, it is merely a myth. The autobiography society writes to explain its current condition is literally false.

Lacan's analysis originates in Freud's theory of the Oedipus complex. The Oedipus complex is typically thought of as a literal, prospective account of childhood development.³⁰⁶ Lacan, in contrast,

matheme, designating the subject with all content removed), the empty set, the void that emerges as the result of the contraction in the form of expansion: when I contract myself outside myself, I deprive myself of my substantial content.

ŽIŽEK, *ABYSS OF FREEDOM*, *supra* note 286, at 39.

301. See FINK, *supra* note 251, at 44-46.

302. SCHROEDER, VESTALN, *supra* note 29, at 87-94; Schroeder, *The End of the Market*, *supra* note 19, at 501-06. In Žižek's words: "[W]hat, precisely, is symbolic castration? It is ... the sense of the precise loss of something which the subject never possessed in the first place." ŽIŽEK, *THE PLAGUE OF FANTASIES* 15 (1997) [hereinafter ŽIŽEK, *PLAGUE OF FANTASIES*].

303. Schroeder, *The Four Discourses*, *supra* note 245, at 34-35.

304. See, e.g., LACAN, *THE FOUR FUNDAMENTALS*, *supra* note 264, at 176 ("The legibility of sex in the interpretation of the unconscious mechanisms is always retroactive.").

305. SCHROEDER, VESTAL, *supra* note 29, at 54, 56-57.

306. Freud himself seems to have wavered between naturalistic and fictional accounts. See GROSZ, *supra* note 258, at 24-31; Anthony Wilden, *Lacan and the Discourse of the Other*, in JACQUES LACAN, *SPEECH AND LANGUAGE IN PSYCHOANALYSIS* 159, 199 (Anthony Wilden

points out that even Oedipus did not have an Oedipus complex.³⁰⁷ In Lacan's reading, the Oedipus complex is merely Freud's dream and, like all dreams, must be interpreted.³⁰⁸

Lacan's reinterpretation of the romantic Freudian dream is that the "Law" (the Big Other) does not exist!³⁰⁹ Of course, laws exist as an empirical matter, but they are not preexistent, objective, necessary, determinate, closed, or permanent.³¹⁰ Instead, all legal systems (as well as language and sexuality) are artificial, intersubjective, contingent, indeterminate, open, and shifting.³¹¹ Positive law is not "Law" with a capital "L." At first blush this seems remarkably consistent with the romantic view that I criticize. At further consideration, however, one can see that the conclusions Lacan draws from this are much different.

One of Lacan's crucial points is that, despite the fact that law "does not exist," the subject cannot escape the law.³¹² In contrast to liberalism, but consistent with Hegelianism, the Lacanian subject is not natural but is a legal creation, a negative unity of positive legal attributes.³¹³ Negativity is the ground of the subject. The term "split subject" is, therefore, a self-conscious redundancy. The subject is nothing but the negativity of the split that creates it. Moreover, it is precisely the law that creates the subject by splitting it, even as it is the law that is intersubjectively written by the community

trans., 1981).

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

308. LACAN, SEMINAR XVII, *supra* note 209, at 159.

309. *Id.* at 74; see also Jacques-Alain Miller, *Extimité*, in THEORY OF DISCOURSE, *supra* note 298, at 74, 81. This prefigured Lacan's even more infamous pronouncement that Woman does not exist. LACAN, SEMINAR XX, *supra* note 184, at 72-74.

310. Lacan expresses the fact that the notion that the symbolic order functions despite, or maybe because of its nonexistence through the riddle "What has a body and does not exist? Answer—the big Other." LACAN, SEMINAIRE XVII, *supra* note 209, at 74; see also Schroeder, *The Four Discourses*, *supra* note 245, at 75.

311. See also Schroeder, *The Four Discourses*, *supra* note 245, at 34, 82-85; Jeanne L. Schroeder & David Gray Carlson, *Law's Invisible Empire*, 56 U. MIAMI L. REV. (forthcoming 2002).

312. Those unlucky individuals who escape the symbolic order are not subjects but, literally, madmen. See, e.g., SCHROEDER, VESTAL, *supra* note 29, at 88-89; ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 244, at 101; ŽIŽEK, LOOKING AWRY, *supra* note 261, at 20; ŽIŽEK, THE TICKLISH SUBJECT, *supra* note 172, at 19.

313. SCHROEDER, VESTAL, *supra* note 29, at 53-63, 277. The negative unity of positive attributes is Hegel's definition of the self. See HEGEL, LOGIC, *supra* note 194, at 583.

of split subjects.³¹⁴ Neither law nor subjectivity preexist the other; they are mutually constituting and come into being together.³¹⁵ In contrast to libertarianism, but consistent with utilitarianism, law is conceived as unnatural and artificial. The law cannot be reformed "to exist." In other words, although it is necessary to subjectivity that there be "*Law*," no *specific* positive laws are essential. Following Kant and Hegel, Lacan posits that it is precisely positive law's "non-existence," i.e., its failure, that enables the law to function, subjectivity to exist, and freedom to be actualized.³¹⁶

Even in this brief discussion, there are a number of issues which should interest economists. First, psychoanalysis shares economics' belief that the subject is nothing but a locus of unfulfilled desire.³¹⁷ As Becker and Stigler have argued, one of the great problems of neo-classical price theory is that it has lost a theory of desires (what they would call preferences).³¹⁸ Posner's changing account of economic rationality over the years demonstrates how the law and economics movement has had to abandon its traditional assumptions about selfish, atomistic behavior, but has yet to develop a coherent substitute.³¹⁹ One is left with either unexplained and unpredictable idiosyncratic pregiven preferences, or Posner's ad hoc speculations about man's prehistoric genetic heritage.³²⁰ Psychoanalysis has the potential to enrich the economic analysis by offering an account of how these desires arise and what they

314. Schroeder, *The Four Discourses*, *supra* note 245, at 74-75; Schroeder & Carlson, *Law's Invisible Empire*, *supra* note 311.

315. This is, famously, Hegel's theory set forth in the first section of *The Philosophy of Right*. See SCHROEDER, VESTAL, *supra* note 29, at 15-52. I argue that Lacan's account of the creation of subjectivity and the symbolic order parallels Hegel's account. *Id.* at 52-106.

316. SCHROEDER, THE TRIUMPH OF VENUS, *supra* note 63; Schroeder & Carlson, *Law's Invisible Empire*, *supra* note 311. I present an extended argument of how the imperfection of the symbolic enables it to function extensively (in the specific case of an analysis of markets) in Schroeder, *The End of the Market*, *supra* note 19 and Schroeder, *Pandora's Amphora*, *supra* note 29.

317. Schroeder, *The End of the Market*, *supra* note 19, at 512-13. Similarly, to Hegel self-consciousness is nothing but desire. HEGEL, PHENOMENOLOGY OF SPIRIT, *supra* note 209, ¶ 167; see also DANIEL BERTHOLD-BOND, HEGEL'S THEORY OF MADNESS 46-47 (1995).

318. See *supra* notes 51-53 and accompanying text.

319. I chronicle Posner's changing account of rationality in Schroeder, *Economic Rationality*, *supra* note 25, at 159-85.

320. Posner, *Behavioral Economics*, *supra* note 36, at 1570. I discuss Posner's recent foray into socio-biology in Schroeder, *Economic Rationality*, *supra* note 25, at 173-80.

might be. It therefore seeks to give content to Becker and Stigler's intuition about universal desires.³²¹

Psychoanalysis also provides an account of why the subject as a locus of desire is not a unitary, self-identical self. It does so, however, without resorting to Posner's intuition that the person might be a collection of warring sub-selves. The Lacanian account neither sees the split subject as an alternative to the traditional unitary subject, nor sees the split of subjectivity as an occasional exception to the norm of unity. Rather, it explains how the traditional subject of liberalism is comprised of various psychic components and seeks to help individual persons understand and thereby take control over their own desires.

Moreover, because economics has no account of unconscious thought, it has no account of economic decision making. At most, as I discuss in *Just So-Stories*, economists such as Posner and Friedman must resort to the proposition that economic subjects act "as if" they were rational.³²² Indeed, Friedman and Posner go so far as to trumpet the fact that neo-classical economics is totally devoid of psychological content.³²³ This is not an explanation, but a failure to explain behavior. To the psychoanalyst, the unconscious is a necessary complement to consciousness.³²⁴ To the economist, the unconscious is an unpredictable, "irrational," unknown process. In contrast, psychoanalysis argues that the unconscious is highly structured and predictable—perhaps even more economically "rational" than the conscious.³²⁵

321. See *supra* notes 51-53 and accompanying text.

322. See *supra* note 15 and accompanying text.

323. See *supra* notes 34-38 and accompanying text.

324. In Lacan's famous formulation, the unconscious is "structured like a language." LACAN, *THE FOUR FUNDAMENTALS*, *supra* note 264, at 20, 149.

325. For an introduction to the role of the unconscious in the creation of the subject see Jacques Lacan, *Position of the Unconscious* (Bruce Fink trans.), in *READING SEMINAR XI: LACAN'S FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* 259 (Richard Feldstein et al., eds., 1995); see also LACAN, *THE FOUR FUNDAMENTALS*, *supra* note 264, at 45-46; ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 264, at 146-49; Mladen Dolar, *Cogito as the Subject of the Unconscious*, in *2 SIC: COGITO AND THE UNCONSCIOUS* 11, 30-31 (Slavoj Žižek ed., 1998) [hereinafter, 2 SIC].

6. *The objet petit a*

The term "*objet petit a*" (the little object a) and the matheme "*a*" designate that the object referred to stands in the place of the "little other" (*autre* in French, hence the letter "*a*"). The concept of the Big Other (the symbolic order) can stand for alterity (whatever is other than the subject) per se. Little others are specific others encountered by the subject.

The *objet petit a* serves as the object cause of desire. Because the subject is split, he desires. Specifically, he desires not to be split, but to be whole. Indeed, the split of subjectivity can be thought of as nothing more than this desire. Because the subject desires to be whole, he does not want to acknowledge that his split is constituent of his subjectivity. He wants to be an "unsplit" subject. He believes that there must be some specific external thing that would explain his split.³²⁶ This hypothesized explanatory object—"the little *a*"—is an attempt to positivize or to give body to negativity. Kant's concept of the noumenon or "thing-in-itself" is technically an *objet petit a*: an attempt to give positive body to the radical negativity of essence.

The subject seeks to identify an actual object to explain why he desires.³²⁷ This object might be something conventionally considered desirable. He can then tell himself, "The reason I am not whole is that I lack that wonderful object. If I could just obtain that object, I could then be happy."³²⁸ Alternately, the object could be one of fear or disgust. "The reason I am not whole is because that terrible object is eating away at me. If I could just rid myself of the object,

326. That is, "the subject calls for recognition on the appropriate level of authentic symbolic exchange—which is not so easy to attain since it's always interfered with—is replaced by a recognition of the imaginary, of fantasy." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK II: THE EGO IN FREUD'S THEORY AND IN THE TECHNIQUE OF PSYCHOANALYSIS 1954-55, at 15 (J.-A. Miller ed. & S. Tomaselli trans., 1988) [hereinafter LACAN, SEMINAR II]; see also SCHROEDER, VESTAL, *supra* note 29, at 109. In Lacan's words, "The fantasy is the support of desire; it is not the object that is the support of desire." LACAN, THE FOUR FUNDAMENTALS, *supra* note 264, at 185.

327. ŽIŽEK, ABYSS OF FREEDOM, *supra* note 286, at 79.

328. See SCHROEDER, VESTAL, *supra* note 29, at 7-8. As explained by Žižek:

In this precise sense, *a* is the object-cause of desire: it does not effectively pre-exist desire as that which arouses it, it merely gives body to its inherent deadlock, to the fact that desire is never satisfied by any positive object; that is to say, apropos of every positive object, the subject's experience will always be a "this is not that."

ŽIŽEK, INDIVISIBLE REMAINDER, *supra* note 265, at 144.

my wound could heal." The subject, therefore, treats that object as though it caused her desire. In other words, although the desire of man is the desire of the Other³²⁹—i.e., to be recognized in intersubjective relations—the subject attributes her desire to the *objet petit a*.³³⁰ In this way, intersubjective relations are replaced by object relations.

This is a fantasy. The subject does not desire because he lacks this object, he looks for an object because he desires. In other words, the effect of desire antecedes its hypothetical cause. This fantasy is reassuring because it purports to give a simple account of and solution to the universal sense of alienation Lacan calls "castration."³³¹ In the words of the familiar song from *The Wizard of Oz*:

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

....

I'd be brave as a blizzard ...
I'd be gentle as a lizard ...
I'd be clever as a gizzard ...
If the Wizard is a wizard who will serve.
Then I'm sure to get a brain; a heart; a home; the nerve!³³²

329. See *infra* note 453 and accompanying text.

330. The *objet petit a* is "the chimerical object of Fantasy, the object causing our desire and at the same time—this is the paradox—posed retroactively as this desire" SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 65 (1989) [hereinafter ŽIŽEK, *SUBLIME OBJECT*]. "The paradox of desire is that it posits retroactively its own cause, i.e., the *object a*" ŽIŽEK, *LOOKING AWRY*, *supra* note 261, at 12; see also ŽIŽEK, *ABYSS OF FREEDOM*, *supra* note 286, at 79.

331. Lacan insisted on the "universality of the process of castration as the unique path of access to desire and to sexual normativisation" JACQUES LACAN AND THE ÉCOLE FREUDIENNE, *FEMININE SEXUALITY* 118 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985).

332. *If I Only Had a Brain*, in *THE WIZARD OF OZ* (MGM 1939). Dorothy's three fellow travelers take the masculine position with respect to castration. They believe that they are not whole because a precious part has been taken away that could be restored by the Big Other personified by the Wizard. Dorothy, in contrast, takes the feminine position that sees castration as a deeper level of dislocation and loss of innocence. She does not want a thing.

In these familiar lyrics, each of Dorothy's fellow travelers imagines that he lacks a special part and that all his problems could be solved if the Big Other, personified by the great and powerful Wizard of Oz, would fill his lack by supplying him with one. Of course, as the movie makes clear, none of the three fellow travelers lacked the object that caused their desire. Their respective actions during their rescue of Dorothy proved that the Scarecrow was always the most intelligent, the Tin Woodsman always the most loving, and the Cowardly Lion always the most courageous of creatures. The "missing" brain, heart, and nerve were merely *objets petit a* that stood for their feelings of inadequacy.³³³

In the movie, the Scarecrow, Tin Woodsman, and Cowardly Lion were satisfied when the Wizard gave them meaningless trinkets (a diploma, testimonial, and medal, respectively) and Dorothy was happy to leave the magical and colorful riches of Oz to return to the grim, black-and-white poverty of Kansas. This is because the movie is a fantasy in both the colloquial and Lacanian senses. Indeed, it is precisely the fantasmical element of the happy ending that makes the film so enjoyable to the split subjects in the audience.³³⁴ Obviously, as a fantasy, this strategy could never successfully satisfy desire in the symbolic world of intersubjective relations in which people live. If one were ever to attain one's *objet petit a*, one would find that one still desires and would, therefore, immediately have to find another object to serve this role.³³⁵

When she was in Kansas, she longed to go "Somewhere Over the Rainbow;" when she was in Oz, she just wanted to go home.

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

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

Michael Patrick Hearn, Note 18 in L. FRANK BAUM, *THE ANNOTATED WIZARD OF OZ: THE WONDERFUL WIZARD OF OZ* 273 (Michael Patrick Hearn ed., 2000). A Lacanian analysis would agree, except for the fact that an *objet petit a* is not technically a "symbol."

334. This is why, at the end of the movie, we learn that Dorothy's adventures were only a dream. By contrast, in the book, the adventures are "real." But even Frank L. Baum, the author of *The Wonderful Wizard of Oz*, ultimately could not believe the fantasy of the happy ending. He and his successors brought Dorothy back to Oz in numerous sequels.

335. Unlike the movie, the original book does not end and Dorothy does not return to

One should not assume that the class of things that can serve as “objects little a” are physical things, or even things that are conventionally desirable.³³⁶ Abstract principles can equally be “objects” for this purpose, which is to set the chain of desire into motion.³³⁷ Nobelists for economics Becker and Stigler have proposed a theory that could be interpreted as an intuitive approximation of the “little a”.³³⁸ They posit that all human beings have a few universal preferences involving intersubjective relationships, such as a desire for status. Rather than pursuing these goals directly, however, economic actors seek to acquire specific objects or commodities as means of achieving, or proxies for, their true desire.³³⁹ For example, one person may think he wants a fancy sports car and another a fancy house, but in fact what they really want is the same thing: the admiration of others, or more to the point, reassurance that the self exists.

An understanding of the subtleties of this idea is not necessary for the purposes of this Article, however. For this Article’s purposes, the *objet petit a* can be thought of simply as ends—whether as individual preferences, or as societal goals or policies.

7. The Positions

As already mentioned, the four positions of the matrix are:

<u>agent</u>	→	<u>other</u>
truth		product/loss ³⁴⁰

The upper left corner is the agent, the speaker of the discourse. The agent addresses the matheme in the upper right corner as the

Kansas when the Wizard bestows the tokens. The tokens do not bring the anticipated satisfaction to their recipients. Being self-conscious of his brain, heart, and courage, respectively, “the Scarecrow has grown conceited and the Tin Woodman self-absorbed, the Lion has become a bully.” Hearn, *supra* note 333, at 309 n.2. They must go on a second journey of self-discovery before they can find their true vocations.

336. Bracher, *supra* note 289, at 114.

337. *Id.*

338. I explicate this argument in full elsewhere. See Schroeder, *Economic Rationality*, *supra* note 25, at 243-46.

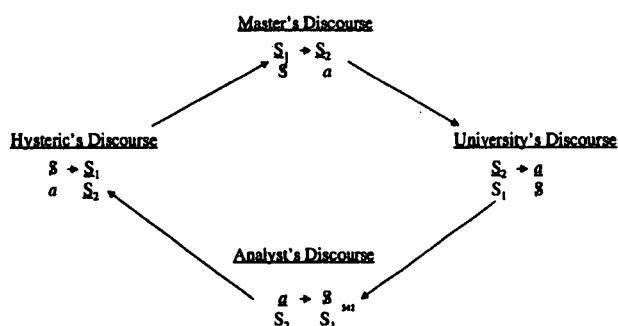
339. BECKER, ACCOUNTING FOR TASTES, *supra* note 40, at 5, 87; Stigler & Becker, *supra* note 53, at 77.

340. FINK, *supra* note 251, at 131.

agent's "other." This address is indicated by an arrow moving from the left to the right. Beneath the agent is the "truth." The line or bar between the agent and its truth indicates that the agent is forever separated from direct access to its own truth. This is the same "bar" that bifurcates the "S" of subjectivity in the matheme of the split or barred subject (\$).

Underneath, and barred from, the other is the result of the discourse. The result can be something produced or something lost. This result is underneath and barred from the other. Note that there is no arrow connecting the two mathemes in the lower register. This indicates that there is no direct relationship between them. More radically, there is a fundamentally impossible non-relationship between them. Any relationship between them only comes about indirectly through the discourse.

The starting, most primitive, discourse is that of the master.³⁴¹ Each of the other four discourses is created by revolving the four mathemes through the four positions of the matrix one quarter turn counter-clockwise. Thus, the four discourses are related as follows.



Lacan stated that the discourse of the master is the other side or reverse of psychoanalysis.³⁴³ It is directly across the diagram from the discourse of the analyst, and precisely reverses and inverts all the constituent mathemes. This diagram suggests that the university's discourse (policy science) is similarly the other side or

341. *Id.* at 130.

342. Schroeder, *The Four Discourses*, *supra* note 251, at 95.

343. LACAN, SEMINAR XVII, *supra* note 209, at 99.

reverse of the hysteric's discourse (speculative thought).³⁴⁴ I believe that when Lacan says that the discourse of the master and the analyst are the other sides of each other, he meant that the analyst is in a privileged position to critique the master.³⁴⁵ Similarly, I argue that the hysteric is in a privileged position to critique the university. Unfortunately, the master's discourse and analyst's discourse do not address each other directly. They require the other discourses to act as mediators. Similarly, the university's discourse and the hysteric's discourse fail to communicate. This is the phenomena of contemporary legal scholarship.

B. The Discourses of Power

Oh, we shall persuade them that they will only become free when they renounce their freedom to us and submit to us.... [W]e shall have an answer for all. And they will be glad to believe our answer, for it will save them from the great care and terrible agony they endure at present in making a free decision for themselves.

-- The Grand Inquisitor³⁴⁶

1. The Discourse of the Master

$$\begin{array}{c} \mathbb{S}_1 \rightarrow \mathbb{S}_2 \\ \mathbb{S} \quad a \end{array}$$

The master's discourse is, along with the university's, one of the two discourses of power.³⁴⁷ Because this Article is concerned with

344. See Schroeder, *The Four Discourses*, *supra* note 245, at 98.

345. For example, elsewhere I show how the hidden, repressed support of the discourse of the master is fantasy, in the technical Lacanian sense of the term. Lacan's *matheme* for fantasy is " $\mathbb{S} \diamond a$," which forms the lower register of the master's discourse. If analysis is successful, the analyst learns to "traverse" the fantasy that is running his life. The *matheme* for the traversing of fantasy is " $a \rightarrow \mathbb{S}$." This is, of course, the express, upper register of the analyst's discourse. Consequently, the analyst's discourse, in effect, can knock the support from out from under the master's discourse. Schroeder, *The Four Discourses*, *supra* note 245, at 96-98.

346. FYODOR MIKHAILOVICH DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 134 (Constance Garnett trans., 1952).

347. Jamie Murray, *An Erotics of Law: Lacanian Psychoanalysis and Legal Theory* 105 (1999) (unpublished Ph.D. thesis) (on file with author).

only the discourses of the university and the hysteric, it only refers to the master's discourse in passing here. The master signifier (S_1), the signifier that gives meaning to the entire chain of signifiers, is in the position of the agent or addressor of the master's discourse. The discourse of the master is based on Hegel's master-slave dialectic.³⁴⁸ In Hegel's example the master signifier is literally a master—the victorious warrior who enslaved his captive.³⁴⁹ Lacan generalized this so that it could apply to the political realm.³⁵⁰

It is important to remember that the master signifier, as the signifier without a signified, is empty and meaningless. The master asserts his authority purely by virtue of his position and power, not because he deserves his position or for any other reason.³⁵¹ Consequently, I have argued that the discourse of the master characterizes the positivist legal theory associated with H.L.A. Hart.³⁵²

The other addressee of the master signifier is S_2 , knowledge. This position is occupied by those who are subjected to the master's rule. S_2 stands specifically for practical, implicit knowledge in the sense of know how (*savoir faire*).³⁵³ In Hegel's example, the slave learns how to do things (such as farming and serving) and to make things (such as cooking food and building walls). The master, in contrast, proudly lives in ignorance as proof that he is above the mundane details of existence that he leaves to the slave.³⁵⁴ In

348. FINK, *supra* note 251, at 131.

349. HEGEL, *PHENOMENOLOGY OF SPIRIT*, *supra* note 209, at 111-18.

350. For example, Žižek describes the monarch as a master signifier. ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 244, at 82-83. Žižek also compares Lacan's concept of the master's discourse with Churchill's concept of a political *decision*. Slavoj Žižek, *Four Discourses, Four Subjects*, in 2 SIC, *supra* note 325, at 74, 76-77 [hereinafter Žižek, *Four Subjects*]. Lacan himself relates the master's discourse to Marx's theory of surplus value. FINK, *supra* note 251, at 131; LACAN, *SEMINAR XVII*, *supra* note 209, at 207. Lacan further relates the master's discourse to one notion of law. *Id.* at 48.

351. "The master must be obeyed—not because we'll all be better off that way or for some other such rationale—but because he or she says so. No justification is given for his or her power: it just is." FINK, *supra* note 251, at 131 (citations omitted).

352. See Schroeder, *The Four Discourses*, *supra* note 245, at 46-53.

353. LACAN, *SEMINAR XVII*, *supra* note 209, at 20-21, 34.

354. Salecl, *supra* note 292, at 163.

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

Id.

Lacan's words, "a real master desires to know nothing at all—he desires that it work."³⁵⁵

Underneath the master, but barred and hidden, is his truth: the master is a flawed and imperfect split subject (§). The emperor is naked and the Big Other does not exist.³⁵⁶

Underneath the governed is the result of this discourse. This result turns out to be the *objet petit a* (*a*), the object cause of desire.³⁵⁷ This result is, in fact, a loss. The "little *a*" is what is excluded from the discourse. For example, in Hegel's lord-bondsman dialectic, the "little *a*" was the slave's freedom. Freedom becomes the slave's "little *a*" precisely because it is what the master has excluded.³⁵⁸ Similarly, Hart argued that law is to be distinguished from such substantive criteria as morality and justice.³⁵⁹ Consequently, these excluded ideals become the law's desire. This was precisely Hart's intent.³⁶⁰ By divorcing law and morals, he wished to allow us to find the source of morality elsewhere so that we could use morality as an external perspective for judging legal regimes.³⁶¹

2. *The Discourse of the University*

$$\begin{array}{ccc} S_2 & \rightarrow & a \\ S_1 & & § \end{array}$$

The university's discourse is obtained by giving the master's discourse a quarter turn. Although there is a cadre of Hartian

355. LACAN, SEMINAR XVII, *supra* note 209, at 11.

356. In the words of Žižek: "Lacan's fundamental thesis is that the Master is by definition an imposter [Y]et the place occupied by him—the place of the lack in the structure—cannot be abolished" ŽIŽEK, ENJOY YOUR SYMPTOM!, *supra* note 288, at 103.

357. "Well we have always stressed that, from this trajectory there emerges something to be defined as a loss. This is what the letter that is to be read as the object *a*." LACAN, SEMINAR XVII, *supra* note 209, at 13.

358. That is, if the subject could truly capture the object that caused his desire, he would both cease to desire and cease to be a subject. Consequently, the "little *a*" is always definitionally an absent unobtained object.

359. See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

360. Schroeder, *The Four Discourses*, *supra* note 245, at 51-52.

361. That is, Hart argued that the reason why one should disobey an evil legal regime (such as that of Nazi Germany) is not because its law is not law, but because it is evil. Hart, *supra* note 359, at 620.

positivists in academia who arguably adopt the master's discourse, the university's discourse is the dominant discourse of legal scholarship. This discourse is what I call policy science.

As his terminology indicates, Lacan recognizes that this discourse is found in its most pure form within universities. He does not intend to imply that this is the discourse that scholars *should* speak. He comes to bury most of what goes on in academia in the name of scholarship, not to praise it.³⁶² The university's discourse is not, in his view, a sincere search for truth. True inquiry and understanding can only come through the discourses of the analyst and hysteric.

Specifically, Lacan developed his discourse theory in the aftermath of the Paris student riots of 1968.³⁶³ He wished to chastise the self-styled radicals who claimed to be establishing a new "free" university. Lacan argued that these "radicals" were anything but. They, in fact, were policy scientists who spoke within the same discourse as the university they claimed to despise.³⁶⁴

In the university's discourse, the addressor stands in the position of knowledge (S_2) or expertise.³⁶⁵ In contrast to the master, the expert does not claim authority purely by virtue of his position. He claims that he deserves his position because of his superior knowledge. He purports to have reasoned justification for where he is and what he does.³⁶⁶

The expert addresses the "little a," the cause of desire.³⁶⁷ Once again, in contrast to the master, the university expert claims purpose. He claims to inquire into society's goals (its desire) in order to propose policies designed to achieve these purposes. The

362. For example, although Lacan considered most scientific work done in the academy consisted of a university discourse, he disassociated it from true science, which he considered to be a hysteric's discourse. FINK, *supra* note 251, at 132.

363. See Bracher, *supra* note 289, at 115-16, 119-20.

364. According to Bracher, Lacan thought that the so-called student revolutionaries saw all phenomena in terms of master signifiers like "imperialism," 'domination,' 'freedom,' 'oppression.'" *Id.* at 119. The fact that the students he was addressing tended to be Marxists may partially explain why Lacan himself draws his examples from Marxist theory. See Schroeder, *The Four Discourses*, *supra* note 245, at 56-57.

365. LACAN, SEMINAR XVII, *supra* note 209, at 119; Žižek, *Four Subjects*, *supra* note 350, at 74, 78.

366. "Systematic knowledge is the ultimate authority, reigning in the stead of blind will, and everything has its reason." FINK, *supra* note 251, at 132.

367. Bracher, *supra* note 289, at 115; Žižek, *Four Subjects*, *supra* note 350, at 78-79.

university expert, having identified an end, now "rationally" proposes means to achieve this end.

The truth hidden under the veil of expertise is, however, the master.³⁶⁸ The claim to expertise is a rationalization for the expert's imposition of her will. The claim to superior knowledge is a means of gaining and wielding power.³⁶⁹ The purported inquiry into the ends of society and the promulgating of policies are really means to the end of controlling and manipulating others.

The result of the university's discourse is the split subject.³⁷⁰ The split subject is the one subjected to the expert's manipulation and who is thereby alienated from the enterprise.³⁷¹ Lacan argues that in the context of the actual university, one split subject is the student.³⁷² In the master's discourse, the result, the "little a," comes about through exclusion. It is, in a way, an unintended consequence. The master seeks to exclude the "little a" from his discourse, but by doing so, he causes the "little a" to function as the object of desire.³⁷³ In contrast, the goal of the university's discourse is to produce a subject who obeys the policy set by the experts.³⁷⁴ That is, the expert intends that his discourse produce a subject, whether or not the actual form this subject takes meets the expert's expectations.

368. "The 'truth' of the university discourse, hidden beneath the bar, of course, is power." FINK, *supra* note 251, at 78; see also LACAN, SEMINAR XVII, *supra* note 209, at 119.

369. FINK, *supra* note 251, at 132.

370. As Bracher explains: "Subjected, in this position, to a dominating totalized system of knowledge/belief (S_2), we are made to produce ourselves as (alienated) subjects, $\$$, of this system." Bracher, *supra* note 289, at 115. But as Žižek warns us:

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

Žižek, *Four Subjects*, *supra* note 350, at 78.

371. Žižek gives the following example from medical practice:

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

Žižek, *Four Subjects*, *supra* note 350, at 78-79.

372. LACAN, SEMINAR XVII, *supra* note 209, at 173.

373. See *supra* note 307.

374. Bracher, *supra* note 289, at 115, Žižek, *Four Subjects*, *supra* note 350, at 78.

Lacan believes that one speaking in the university discourse is indifferent to whether the expert speaker or the student addressed actually achieves a true understanding.³⁷⁵ The professors care about their prestige in academia and in society, and students are merely a means to that end. Consequently, students become alienated from the whole enterprise, parroting back what their teachers tell them rather than seeking to create their own knowledge.

In law, the split subjects are those who are to be manipulated by policy. The expert wishes to produce these subjects who will achieve the expert's goals, even if the expert does not consciously wish to alienate or "split" them. For example, Jolls, Sunstein, and Thaler want legal rules to make people act as though they were economically rational.³⁷⁶ Nevertheless, although the expert wants to produce certain types of subjects, the expert does not address these subjects directly. The expert does not ask the subjects what their goals are. The expert does not ask about their experience of the law to which they are subjected. Rather, the university's concern is "objective"—the goals ("little a") of society as a whole. The question is how to make the individuals who comprise society better achieve society's goals. In the name of a free society, policy science fundamentally mistrusts the freedom of its members.

a. Legal Policy Scholarship

Indeed, according to Jolls, Sunstein, Thaler, and the Oregon conference participants, the subjects of their study not only do not know the best way to achieve their desires, they do not understand what those desires are.³⁷⁷ Jolls, Sunstein, and Thaler identify "three functions of any proposed approach to law: positive, prescriptive, and normative."³⁷⁸ By positive they mean: "How will law affect human behavior?" "The prescriptive task is to see how law might be used to achieve specified ends, such as deterring socially undesirable behavior."³⁷⁹ They state:

375. In Bracher's words: "No provision is made for individual subjects and their desires and idiosyncracies. Individuals are to act, think, and desire only in ways that function to enact, reproduce or extend the System." Bracher, *supra* note 289, at 115.

376. See *supra* notes 22-24 and accompanying text.

377. See *supra* text at note 23.

378. *Behavioral Approach*, *supra* note 10, at 1474.

379. *Id.*

[The] normative task is to assess more broadly the ends of the legal system. In conventional economic analysis, normative analysis is no different from prescriptive analysis, since the goal of the legal system is to maximize "social welfare," usually measured by people's revealed preferences But from the perspective of behavioral economics, the ends of the legal system are more complex. This is so because people's revealed preferences are a less certain ground on which to build; obviously issues of paternalism become central here.³⁸⁰

That is, to Jolls, Sunstein, and Thaler all legal scholarship should be addressed towards a policy goal—an *objet petit a*. Note that Jolls, Sunstein, and Thaler do not include an analysis of how the law operates at the individual level as a possible function of legal scholarship. Nor do they consider the question of how the individual can use the law for her own purposes. The practicing lawyer, the doctrinalist, and the speculative scholar tackle these neglected functions.

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

b. Examples

One issue discussed by Jolls, Sunstein, and Thaler is the supposed propensity of jurors to favor plaintiffs in negligence actions.³⁸¹ Jolls, Sunstein, and Thaler suggest that part of the reason for this propensity might be cognitive errors such as

380. *Id.* at 1474-75.

381. *Id.* at 1522-33.

"hindsight bias,"³⁸² and the inappropriate desire of jurors to compensate tort victims.³⁸³

Jolls, Sunstein, and Thaler's suggestion for dealing with this problem is not to better educate jurors about probabilities or the goals of the tort system, but how to "manipulat[e] the set of information given to jurors."³⁸⁴ Indeed, they believe that it might be beneficial if information is actively withheld from the finders of fact. For example, in a product liabilities case, jurors could be asked to decide abstract questions devoid of the concrete content of the actual case in controversy, so that they do not know who was harmed and how.³⁸⁵

Of course, insofar as our society believes that our tort system is supposed to serve some purpose, such as shifting losses to the least-cost avoider, or making economic actors internalize their costs, it is important that the triers of fact in tort litigation apply the appropriate test to determine culpability and impose damages.³⁸⁶ Consequently, I am not condemning the impetus behind empirical investigation as to how juries in fact make decisions. Indeed, as Simon hoped, behavioral studies might serve as a healthy counterweight against economic rationality's assumptions that infect so much of scholarship.³⁸⁷ What I find disturbing, however, is that the "solutions" suggested by Jolls, Sunstein, and Thaler seem so antithetical to Simon's goal of helping decision makers. It is also strikingly different from the modest approach taken by the author of the jury hindsight bias study on which Jolls, Sunstein, and Thaler rely. Jeffrey Rachlinski concludes that the "legal system has a good understanding of the hindsight bias," and that courts have "developed mechanisms for taking advantage of specific circumstances that allow them to reduce the influence of the

382. *Id.* at 1523-24.

383. *Id.* at 1531.

384. *Id.* at 1527.

385. They give an example in which a company uses a chemical in its production process that allegedly causes cancer in a percentage of the people living near the plant. The company takes the position that not using the chemical would increase the likelihood of bacterial contamination of the product. The jury would be asked to make a comparative cost-benefit analysis of the two production methods without being told whether the plaintiffs are alleging that they were harmed because the chemical was used and they contracted cancer, or because the chemical was not used and they contracted a bacterial infection. *Id.* at 1527.

386. I am agnostic as to what the "purpose" of the negligence standard is or should be.

387. See *supra* notes 13-21 and accompanying text.

hindsight bias. In those cases in which the bias cannot be avoided, the courts have pursued sensible second-best strategies.³⁸⁸

Jolls, Sunstein, and Thaler also suggest that when the government wishes to provide citizens with information so that they can make informed choices, the government should not merely be aware of bounded rationality.³⁸⁹ Nor do Jolls, Sunstein, and Thaler merely suggest that government regulators study rhetoric and communication skills.³⁹⁰ Rather, they would have the government take its cue from advertising and actively seek to exploit people's cognitive failures to manipulate their behavior.³⁹¹ Indeed, Jolls, Sunstein, and Thaler call into question one of the primary basis of a free economy:

The idea of "consumer sovereignty" plays a large role [i.e. in normative law and economics scholarship]; citizens, assuming they have reasonable access to relevant information, are thought to be the best judges of what will promote their own welfare. Yet many of the instances of bounded rationality discussed ... call into question the idea In this way bounded rationality pushes toward a sort of anti-antipaternalism—a skepticism about antipaternalism, but not an affirmative defense of paternalism.³⁹²

This is a perfect illustration of everything that Lacan thinks is wrong about the university's discourse. Despite the pretense of university experts to be engaged in exploration of truth and the education of others, they are really seeking to exercise power over others by telling them what to do, even using deceit and trickery if necessary.

Another excellent example of the university's attitude toward those subjected to its control is its treatment of the so-called "endowment effect." Empirical evidence suggests that people become attached to objects they own and are loathe to exchange them for their market price or even for virtually identical objects.³⁹³

388. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in *BEHAVIORAL LAW AND ECONOMICS*, *supra* note 10, at 95, 111-12.

389. See Jolls, et al., *Behavioral Approach*, *supra* note 10, at 1533-35.

390. See *id.*

391. *Id.* at 1536-37.

392. *Id.* at 1541.

393. See *id.* at 1483-84.

According to the experts, this sentimental attachment is irrational (or an example of bounded rationality). Jolls, Sunstein, and Thaler suggest legal rules intended to dispel the endowment effects.³⁹⁴ In other words, although the experts give lip service to the proposition that there is no accounting for tastes and that rationality is limited to the determination of the most efficient means to achieve subjective ends, to call the endowment effect "irrational" is to sneak in a professional judgment as to taste.³⁹⁵ As the subject to be produced by the university discourse inevitably has goals and desires, as well as behavior imported into her, she is, inevitably, split and alienated to some extent.

Indeed, Becker criticizes traditional neo-classical economic theory on precisely these grounds.³⁹⁶ Becker insists that in order for neo-classical economics to be both internally consistent and an effective predictor of behavior, it needs to develop a theory of preference formation. In contrast, in his new home-economics, Becker has tried to formulate a theory of "capital formation" to explain how a wide variety of behavior, including habits and drug addiction might be *economically* rational (even if irrationally harmful in the colloquial sense).³⁹⁷ Becker believes that households should not be considered mere "consumers" of utility, but active producers of utility.³⁹⁸ One way one might produce utility is by investing one's possessions with personal significance, thereby increasing their subjective use value to the individual over their objective market exchange value.³⁹⁹ Consequently, it is not

394. *Id.* at 1565-67.

395. Schroeder, *Economic Rationality*, *supra* note 25, at 214-16.

396. In Becker's words, "Economists are so conditioned to identifying rational choice with separable preferences that we often call 'irrational' quite rational behavior that is the result of past experience." BECKER, ACCOUNTING FOR TASTES, *supra* note 40, at 128.

397. *See id.* at 128-29.

398. *See id.* at 5; *see also* BLAUG, *supra* note 15, at 240.

399. Prior to reading Becker and Stigler's article, I intuited a similar critique of the concepts of use value adopted both by Posner and his arch-critic, Ronald Dworkin. In their famous debate in the *Journal of Legal Studies*, they both assumed that non-remunerative activity such as gardening constituted consumption of utility. *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). I suggested, in contrast, that it could be better seen as an *investment* by an individual in her home calculated to increase her use value of her home (and therefore, her wealth). Despite his claims to the contrary, Posner's concept of wealth maximization is absolutely incapable of recognizing use value in excess of exchange value. *See* Schroeder, *The Midas Touch*, *supra* note 117, at 722-23, 749-60.

irrational to ask for more money to sell one's car than one would pay for an "identical" car, because no other car is associated with the owner's subjective memories and associations. The two cars, therefore, are not identical.⁴⁰⁰

Becker admits that other examples of the endowment effect seem more difficult than this one.⁴⁰¹ Nevertheless, he contends that economists are giving up, so to speak, if they either ignore this well-known and predictable phenomenon or if they condemn such behavior as "irrational" (as Jolls, Sunstein, and Thaler arguably do) because to do so is equivalent to abandoning the rationality postulate. Rather, they should either try to formulate arguments as to how such behavior might be explained within the rationality postulate, or they should try to modify the rationality postulate to account for this behavior.⁴⁰²

As a knee-jerk liberal, I certainly do not rule out occasional paternalistic rules. Having spent years as a securities lawyer drafting mandatory disclosure documents, I am extremely skeptical of the usual economic presumption that the way to prevent certain forms of harm is to make *more* information available.⁴⁰³ Nevertheless, I surprise myself by finding that I agree with much of Posner's critique of Jolls, Sunstein, and Thaler. He is correct to note that there is something fundamentally totalitarian about their position.⁴⁰⁴ I believe that they frequently cross the line between understanding how people think so as to more effectively

400. BECKER, ACCOUNTING FOR TASTES, *supra* note 40, at 128-29.

401. *Id.* at 129.

402. See Schroeder, *Economic Rationality*, *supra* note 25.

403. My years drafting registration statements have left me very sympathetic to the core problem of communication that Jolls, Sunstein, and Thaler address. Drowning people with information is all too prevalent. It is well known among securities lawyers that if one's client has something really bad in its background, the least conspicuous way to disclose it is by printing it in bold face and putting it in the front of the document with all the mandatory warnings and disclosures required by various state's blue sky laws. It is assumed that no investor ever reads this section of the prospectus, but that such formally prominent disclosure will protect management from potential liability.

404. Although he oversimplifies, Posner is not totally unfair in accusing Jolls, Sunstein, and Thaler as advocating that whenever the populace at large can be expected to act irrationally, a "politically insulated corps of experts that [Jolls, Sunstein, and Thaler] favor would be charged with determining the populace's authentic preferences" Posner, *Behavioral Economics*, *supra* note 36, at 1575 (1998). This approach "sounds totalitarian" to Posner. *Id.* Moreover, Posner wonders why the experts will not share the same sources of irrationality as the populace. *Id.*

communicate with them, and understanding people's vulnerabilities so that one can exploit and manipulate them.

Even some of the more modest scholars who try to adapt behavioral economics to law cannot resist the lure of the university's discourse. For example, Russell Korobkin discusses studies that indicate that the existence of norms affect contract negotiations in a way that violates the standard interpretation of the Coase Theorem.⁴⁰⁵ These data should hardly surprise the average "deal" lawyer. In my experience, the vast majority of arguments in complex contract negotiations (such as those involved in my practice areas of mergers and acquisitions, public offering underwritings, finance and technology licensing) consist of discussions as to what the norms are, accompanied with assertions either that one's client is only asking for the customary terms or that the counterparty wishes illegitimately to stray too far from industry norms.

Consequently, I would have expected Korobkin to offer some insights as to effective negotiation strategies that contract attorneys and their clients might follow. Instead, Korobkin suggests that drafters of the Uniform Commercial Code be very careful when drafting default provisions.⁴⁰⁶

In my experience, however, despite contract attorneys' predilection for norms arguments, I have never heard an attorney make an argument based on a *statutory* or other legal default rule. Rather they always refer to business and legal *customs and practices*. The very fact that the parties have decided to negotiate a contract indicates that they have already rejected the idea of being governed by default. Indeed, it is a common humorous boast of contract lawyers that they know nothing about contract law because contract law is purely a provenance of litigators who must interpret the inadequate language drafted by bad contract lawyers.

405. As I have argued vociferously elsewhere, I believe that this standard interpretation is incorrect. See Schroeder, *The End of the Market*, *supra* note 19. Nevertheless, my disagreement with the standard view is irrelevant to the points raised in this Article.

406. Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in *BEHAVIORAL LAW AND ECONOMICS*, *supra* note 10, at 116, 147-42.

c. *The Bureaucracy Does Not Exist*

I have made the university discourse seem sinister: a Kafkaesque nightmare. To some extent, from a Lacanian perspective, it is. Indeed, Lacan goes so far as to suggest that the Soviet Union was the apotheosis of the university discourse—the Stalinist government by experts produced the oppression of totalitarianism.⁴⁰⁷

Perhaps the best known critic of policy scholarship is Pierre Schlag. Schlag maintains that policy-oriented scholarship (which he refers to as “normativity”) is at its heart bureaucratic.⁴⁰⁸ Schlag is, unfortunately, ultimately a romantic who does not fully understand the implications of his intuition. He thereby unwittingly undercuts the power of his critique. As Carlson has shown, Schlag’s position is “paranoid” in the technical Lacanian sense.⁴⁰⁹ A paranoid is one who truly believes that the Big Other exists—that the social system is as strong and monolithic as it claims to be, that there is someone or something who really is in control.⁴¹⁰ The paranoid believes that there is an other of the Other.⁴¹¹ Of course, no one is truly in control of the symbolic order, as Schlag acknowledges at many points when he chides legal academics for their self-importance despite their irrelevance.⁴¹²

407. LACAN, SEMINAR XVII, *supra* note 209, at 237-38.

408.

It now becomes evident that the value (if any) of normative legal thought depends on a decentered economy of bureaucratic institutions and practices ... that define and represent their own operations, their own character, their own performances, in the normative currency.

PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 34 (1996). I set forth my critique of Schlag in Schroeder & Carlson, *Law's Invisible Empire*, *supra* note 311.

409. See David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1946-48 (1999).

410. ŽIŽEK, LOOKING AWRY, *supra* note 261, at 8.

411. The other of the Other is “a hidden subject who pulls the strings of the great Other (the symbolic order)” *Id.*

412.

Yet despite [normative scholarship's] obvious desire to have worldly effects, worldly consequences, normative legal thought remains seemingly unconcerned that for all practical purposes, its only consumers are legal academics and perhaps a few law students—persons who are virtually never in a position to put any of its wonderful normative advice into effect. The possibility that a significant number of judges might actually be reading significant quantities of this academic literature is undemonstrated and unlikely. The further possibility

Lacan's point, however, is that the Big Other (i.e., the symbolic) can function even if there is no bureaucracy or anyone else in control. Insofar as the law functions and the bureaucracy stays in place is not because the law is some objective, external force, or because the bureaucracy is truly in control. Indeed, it is this nonexistence of the Big Other that makes it function and society helps it do so. By continuing to live in society and acting as though the law were the law, one is implicitly choosing to engage in the intersubjective enterprise of creating and enforcing the law (even though this force may be a forced one).

Nevertheless, if the the university's discourse is oppressive, it is also probably necessary for any modern society. All societies need to identify collective goals and enact, apply, and interpret coercive laws in an attempt to achieve these goals. This action results in the alienating and splitting of legal subjects, but all subjects are by necessity split. One cannot have subjectivity without law, and law splits the subject. Or, most forcefully, the subject is nothing but the split of the law.

I chastise policy science on at least three grounds. First and foremost, I reject its implicit claim that it should be the predominant or only proper focus of legal academics. In the next two sections, I argue that the hysteric's discourse (and to some extent the analyst's discourse) is an equally appropriate form of legal scholarship. Indeed, as these discourses approach the law not from the position of the master who imposes the law, or the expert who justifies it, but from the position of those who are subjected to the law imposed by the master and the expert, it comes much closer to law as it is practiced by attorneys who advise and act for clients. Consequently, they can offer a better understanding of how law is actually practiced and experienced by the individuals whom the law affects.

Second, I believe that the two discourses of critique are ethically essential to the two discourses of power. Both the master and the expert intend that the law affect people. The values of liberty demand that those who wish to use laws to affect the behavior and

that judges might actually be persuaded by this academic literature to adopt a position not their own is even more undemonstrated and even more unlikely. SCHLAG, *supra* note 408, at 28-29.

desires of others should examine the law from the perspective of the individual affected, in addition to that of society.

Finally, the critical discourses are needed to make the powerful discourses more effective in their own goals.

C. The Critical Discourses

If one gives the university discourse a quarter turn counter-clockwise, one arrives at the analyst's discourse. The hysteric's discourse is achieved by yet another quarter turn. Consequently, just as the master's discourse is logically prior to that of the university, the analyst's discourse is logically prior to that of the hysteric.

Despite this, Lacan, as a psychoanalyst, saves his discussion of the analyst's discourse until after that of the hysteric. This is because he thought that the former had a privileged position. In his words, the analysts' discourse "halts the giddiness of the other three."⁴¹³ By this, Lacan means that the three other discourses are locked in a vicious circle—the subject spun impotently from one to the other.⁴¹⁴ The analyst's discourse holds up the hope of breaking this circle, if only temporarily.

1. Law as the One Possible Profession

I break with Lacan and restore the logical order of the four discourses, so that I discuss, and privilege, the hysteric's discourse last. I do this for a number of reasons. First, I believe that speculative legal scholarship, like legal representation, is primarily a hysteric discourse.

Modifying Freud slightly, Lacan posits that governing, educating, and psychoanalyzing are the three impossible professions, and that they correspond to the first three discourses of the master, university, and the analyst.⁴¹⁵ The unarticulated negative pregnant suggested in this statement is that there is a fourth "possible" profession that corresponds to the last discourse

413. LACAN, SEMINAR XVII, *supra* note 209, at 61.

414. "[W]e are going around in circles—the signifier, the Other, knowledge, the signifier, the Other, knowledge, etc." *Id.* at 14.

415. *Id.* at 193-94.

of the hysteric. I have posited that this "possible" profession is that of the attorney.⁴¹⁶

I believe that the first three professions are "impossible" in precisely the way one encounters impossibility throughout speculative thought. Following Kant, human actions and law are judged by the perfect standard of the noumena. Man is radically evil because, in order to act, he must insert phenomenal content into the moral law, thereby corrupting it. The subject feels castrated and is unsatisfied by the law because they are both necessarily incomplete. For reasons that are beyond the scope of this Article, from a Lacanian perspective, the first two discourses of power are "masculine."⁴¹⁷

2. *The Discourse of the Analyst*

$$\begin{array}{ccc} \underline{a} & \rightarrow & \underline{S} \\ S_2 & & S_1 \end{array}$$

As might be expected, Lacan, a psychoanalyst, concentrated on the discourse of the analyst. It is, however, the discourse least worked out in legal practice, and I shall only refer to it in passing. The analyst as addresser takes the position of the little *a*, the analysand's desire.⁴¹⁸ One can understand what this might mean when one considers how the mode of address in this discourse differs from that of the previous two. The master in the position of power orders the other. The university in the position of expertise instructs the other. The analyst addresses her other from the

416. Schroeder, *The Four Discourses*, *supra* note 245, at 64.

417. It should be obvious from even this passing reference that to Lacan, sexuality is not biological, but symbolic. Lacan should not be misinterpreted as advocating the silly positions that anatomy is irrelevant. Sexuality, being symbolic, is artificial, but that does not make it completely arbitrary or totally malleable. Once again, Lacan makes the traditional point that, although the object world (anatomy) exists and affects every aspect of our lives, as conscious, speaking, and imagining subjects we do not have direct access to the object world but are always interpreting it in words and pictures. That is, our sense that we have a purely biological sexuality beneath our social roles and fantasies is real.

I have written extensively about the Lacanian theory of sexuality. See SCHROEDER, VESTAL, *supra* note 29; SCHROEDER, *THE TRIUMPH OF VENUS*, *supra* note 63.

418. LACAN, SEMINAR XVII, *supra* note 209, at 41; Žižek, *Four Subjects*, *supra* note 350, at 80.

position of the other's own desire.⁴¹⁹ She inquires from the position of that which the analysand feels is missing and causes his pain. Consequently, the analyst's discourse is an interrogation, an attempt to extract information from the analysand. This is why in psychoanalysis, the analyst rarely speaks, but listens while the analysand talks. The other addressed by the object of desire is the split subject himself.⁴²⁰

The truth lying beneath the analyst is S_2 , the signifying chain of knowledge.⁴²¹ Lacan famously said that the psychoanalyst is the "subject supposed to know."⁴²² The salient word here is "supposed." Although the analysand comes to the analyst because the analyst is supposed to know what is wrong with the analysand, the true analyst does not take the position of the expert who thinks she can tell the analysand what she wants and what she should do. The knowledge which is the truth of the analyst, therefore, cannot be the analyst's expertise, but the analysand's own unconscious knowledge.⁴²³ The chain of signifiers (S_2) issue from the analysand's mouth during analysis. Only the analysand "knows" what her problem is. The purpose of psychoanalysis is to help the analysand discover this.

The result of the analyst's discourse is S_1 , the master signifier.⁴²⁴ In this context the master signifier is called the analysand's "symptom."⁴²⁵ Lacan's term of art is different from the colloquial meaning of a symptom as the external sign of a patient's illness.

The symptom is the split subject's own personal and idiosyncratic master signifier. The symptom is the key to the chain of signification that is the analysand's unconscious knowledge.⁴²⁶ It is the trauma in the client's life that she is unable to "symbolize."⁴²⁷

419. FINK, *supra* note 251, at 135; LACAN, SEMINAR XVII, *supra* note 209, at 47, 122.

420. LACAN, SEMINAR XVII, *supra* note 209, at 123.

421. Bracher, *supra* note 289, at 125.

422. See FINK, *supra* note 251, at 87; ŽIŽEK, ENJOY YOUR SYMPTOM!, *supra* note 288, at 39; ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 244, at 171. Lacan identified $\frac{d}{S}$ as the matheme for the analyst as the "subject supposed to know" in his earlier work, but only related it to a system of discourses in Seminar XVII. See JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT 89 (Denis Hollier et al., trans., 1990).

423. Žižek, *Four Subjects*, *supra* note 350, at 80.

424. *Id.* at 123-24.

425. *Id.* at 80.

426. ŽIŽEK, SUBLIME OBJECT, *supra* note 330, at 74.

427. *Id.* at 55-56.

It is that which the analysand is unable to make conscious and articulate. This is the unconscious memory about which the suffering subject organizes her illness. Importantly, like all master signifiers, the symptom is empty and meaningless in itself. Lacan called it the *betisse*, a little stupidity.⁴²⁸

To assert that the symptom is idiotic should not be misinterpreted as a disparagement of the suffering analysand. The symptom is empty and meaningless in a very specific sense. Trauma is that which the client has been heretofore unable to make sense out of by putting it into words (i.e., symbolize). Consequently, until the symptom is articulated, it, *by definition*, has no signification in the symbolic and no meaning in the imaginary. The master signifier is the signifier with no signified. By helping the analysand identify his symptom as master signifier, the analyst helps the analysand symbolize, and thereby, dissolve her symptom *as a symptom*. The analysand can then attempt to choose her own new master signifier around which to organize her life.⁴²⁹

I suggest that the parallel to this discourse is counseling. A client who perceives he has a problem comes to the attorney as the subject who is supposed to know how to solve it. The nature of this problem could be a perceived wrong, like a contract breach, tort, or other violations of his rights. Or, the client could wish to accomplish a specific goal such as buying a house, bequeathing his property, entering into a contract, or publicly offering its securities. Like the practicing analyst, the counseling attorney of course has, and uses, her expertise (i.e., speaks in the university's discourse). The attorney who truly counsels her client, however, primarily sits in the position of her client's desire. She listens and helps the client articulate what he wants. The knowledge that is the counselor's truth is not her expertise, but the client's own self-knowledge. The result of a successful counseling is the client's ability to identify, articulate, and communicate his problem as a master signifier.

428. LACAN, SEMINAR XX, *supra* note 184, at 13.

429. Žižek, *Four Subjects*, *supra* note 350, at 80. The very symbolization of the symptom leads to its disintegration as a symptom. ŽIŽEK, SUBLIME OBJECT, *supra* note 330, at 73. Lacan eventually discovered that not all symptoms dissolved through psychoanalysis. He eventually developed the concept of a "synthome" to describe these beloved symptoms that a subject is able to cling to even after symbolized. See generally JACQUES LACAN, SEMINAR XXIII: LE SYNTHOME (1977). The subtleties of this concept are beyond the scope of this Article.

3. *Law as the Feminine Profession*

The two critical discourses of the analyst and the hysteric are “feminine” and the two power discourses are “masculine.” Lacan’s theory of sexuation is beyond the scope of this Article.⁴³⁰ Suffice it to say that, to Lacan, the “feminine” is that aspect of subjectivity that accepts the fact that castration (imperfection) is inevitable, and that the Big Other does not exist. The masculine is the part of subjectivity that claims to be bound to the moral law, and the feminine is the part that understands that one always slips its chains. In contrast, the “masculine” is the part of subjectivity that can’t face this awful truth and tries to deny castration through a variety of coping mechanisms.⁴³¹

Nevertheless, Lacan groups analysis, along with governing and teaching, as the impossible professions.⁴³² These three discourses trip over the stumbling block of imperfection. The governor and the teacher, being masculine, trip over the stumbling block because they refuse to acknowledge its existence. The feminine analyst, in contrast, sees the block but cannot get over it.

This is because there are two possible reactions one can have to the realization that castration (imperfection) is inevitable. The first is passivity and depression⁴³³—negativity in the colloquial sense of pessimism. Because the impossible goal of perfection cannot be met, one can conclude that all one can do is try to cope and hold off suicide. This is the psychoanalytic notion of cure. The analyst finally gives up on her futile desire and becomes de-subjectified.⁴³⁴

430. For my analysis of Lacan’s sexual theory and how it relates to law and economics, see generally SCHROEDER, *THE TRIUMPH OF VENUS*, *supra* note 63.

431. The masculine subject falsely claims to have the “phallus”—a technical term for that which is missing in castration. The discourses of the master and the university are “masculine” in the sense that in the former the addressor claims to have authority based on power (when his truth is that he is a split subject) and in the latter the addressor claims to have authority based on knowledge (when his truth is that he maintains his position only through raw power). See Schroeder, *The Four Discourses*, *supra* note 245, at 77-82.

432. See *supra* note 415 and accompanying text.

433. The tendency of the feminine position towards depression is one of the subjects of Žižek’s essay *David Lynch, or, the Feminine Depression*, in SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 113, 119-21 (1994).

434. Lacan calls cure “subjective destitution.” In Žižek’s words:

“[S]ubjective destitution” changes the register from desire to drive. Desire is historical and subjectivized, always and by definition unsatisfied, metonymical, shifting from one object to another since I do not actually desire what I want.

No wonder Lacan maintained that cure should not be thought of as a goal of psychoanalysis, but merely as a side effect.⁴³⁵ The true goal of psychoanalysis is understanding.

The other reaction, however, is freedom.⁴³⁶ By confronting the fact of castration directly, the feminine subject can free herself from the paralyzing illusion of the goal of perfection in order to identify realizable, if imperfect, goals. This reflects the well known concept of mourning. The subject can never get over the pain of loss until she confronts it. After a period of mourning, the grieving subject can bury the dead, so to speak, and move on.⁴³⁷ The feminine is, *literally*, the sadder but wiser sex.

Consequently, although the feminine subject engaging in the analyst's discourse can perhaps accurately analyze the pain of the split subject, she cannot take action that would change the system that caused the split subject. She can only help the split subject learn to cope with his pain by abandoning her dreams. Although, as I discuss in detail elsewhere, the effective attorney necessarily engages in the analyst's discourse when she counsels her client, she usually does this merely as a prelude to her representation of the client, at which point she shifts to the hysteric's discourse.⁴³⁸ In Lacan's terms, the result of the analyst's discourse can be precisely to hystericize the subject.⁴³⁹ The attorney speaking for the counseled client, therefore, must speak the client's hysterical discourse. In other words, partly because the goals of psychoanalysis and legal representation are fundamentally different, the attorney speaks the analyst's discourse only temporarily before moving towards the hysteric's discourse. She, therefore, only learns to speak a relatively crude and primitive version.⁴⁴⁰

What I actually desire is to sustain desire itself, to postpone the dreaded moment of its satisfaction. Drive, on the other hand, involves a kind of inert satisfaction that always finds its way; drive is nonsubjectivized ("acephalous").

ŽIŽEK, *ABYSS OF FREEDOM*, *supra* note 286, at 80.

435. SCHNEIDERMAN, *supra* note 261, at 50.

436. Schroeder, *The Eumenides*, *supra* note 262.

437. SCHROEDER, VESTAL, *supra* note 29, at 328.

438. Schroeder, *The Four Discourses*, *supra* note 245, at 68-72.

439. Lacan states that the effect of analysis is the "hystericization of discourse." LACAN, *SEMINAR XVII*, *supra* note 209, at 35.

440. See Schroeder, *The Four Discourses*, *supra* note 245, at 73.

It is only in the hysteric's discourse that the subject created and split by the manipulations of the university's discourse finally speaks.⁴⁴¹ It allows one to understand how the policies of the university are experienced by these subjects. Moreover, it is only the hysteric's discourse that directly addresses the law itself and, therefore, is the only one that can effectively critique, and if need be, change the law. The master's discourse (positive law as understood by H.L.A. Hart) excludes morality, justice, and substance from the law and, therefore, inadvertently makes them serve as the law's *objets petit a*—the object of the law's desire.⁴⁴² In contrast, the hysteric's discourse of legal advocacy seeks to bring back substance to the law. It judges the law from the position of morality.

4. *The Discourse of the Hysteric*

$$\begin{array}{ccc} \underline{S} & \rightarrow & \underline{S}_1 \\ a & & S_2 \end{array}$$

The split subject finally speaks in the hysteric's discourse. Up until now, she has been ordered about by the master, instructed and manipulated by the university expert, and interrogated by the analyst.⁴⁴³ The hysteric's discourse is that of critique and accusation.⁴⁴⁴

Once again, before proceeding it is necessary to examine Lacan's unique terminology. Colloquially, hysteria connotes an inarticulate, out of control individual. Traditionally, clinical hysteria is a form of neuroses in which the patient's symptoms often take physical forms (such as hysterical paralysis). In Lacan's reworking of Freud, however, hysteria is not only the term for a clinical disease, it is the characteristic neurosis of subjectivity.

441. See *infra* Part III.C.4.a. to Part III.C.4.b.

442. See *supra* text at notes 357-60.

443. See generally Bracher, *supra* note 289, at 109; Schroeder, *The Four Discourses*, *supra* note 245.

444. "The hysterical subject is the subject whose very existence involves radical doubt and questioning, his entire being is sustained by the uncertainty as to what he is for the Other." Žižek, *Four Subjects*, *supra* note 350, at 81.

a. Hysteria

All "normal" subjects are split. They are neurotic in one way or another. The characteristic neurosis of the masculine subject is obsession. As I explain elsewhere, this is the neurosis of the university's discourse.⁴⁴⁵ Obsession is the attempt of the masculine subject to deny castration by frenetically trying to cover up and repair the holes in the Big Other.⁴⁴⁶ One sees this in legal scholarship in the preoccupation with precedents and footnotes.

Hysteria is the characteristic feminine neurosis.⁴⁴⁷ Although it is common to misinterpret Lacan's phallocentrism as a form of male supremacy, he, in fact, radically breaks from traditional sexual stereotypes. The true subject understands that she, like the Other, does not exist (is negativity itself).⁴⁴⁸ Male subjectivity, is therefore, a form of failed feminine subjectivity, rather than the other way around.⁴⁴⁹ In Žižek's words, "a man is perhaps simply a woman who thinks that she does exist"⁴⁵⁰ (i.e., is not castrated).

Rather than being inarticulate (as the colloquial meaning of the word assumes), the hysteric is consumed with language. The hysteric is the subject who understands Hegel's lesson that her subjectivity can only be created through recognition by the Big Other in the symbolic order of intersubjective relationships (i.e., language, law, sexuality). This is why Lacan called Hegel the "most sublime hysteric."⁴⁵¹ Consequently, the hysteric desires to be recognized by, and to fit into, the symbolic order.⁴⁵² This is one meaning of Lacan's famous statement that "man's desire is the desire of the Other."⁴⁵³ The hysteric desires the Big Other; she

445. Schroeder, *The Four Discourses*, *supra* note 245, at 58-59.

446. Murray, *supra* note 347.

447. LACAN, SEMINAR XVII, *supra* note 209, at 36.

448. ŽIŽEK, ABYSS OF FREEDOM, *supra* note 286, at 8; Žižek, *Four Subjects*, *supra* note 350, at 81; *see also* SCHROEDER, VESTAL, *supra* note 29, at 326-29.

449. Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in LACAN AND THE SUBJECT OF LANGUAGE 49, 62 (Ellie Ragland-Sullivan & Mark Bracher eds., 1991).

450. ŽIŽEK, SUBLIME OBJECT, *supra* note 330, at 75.

451. LACAN, SEMINAR XVII, *supra* note 209, at 38. I have argued extensively elsewhere that if one reads Lacan with Hegel then one can see that private law is hysterically erotic. Schroeder, *The End of the Market*, *supra* note 19, at 492-93; Schroeder, *Pandora's Amphora*, *supra* note 29, at 823-24, 827-28, 864-65.

452. Schroeder, *The Four Discourses*, *supra* note 245, at 75-76, 82-84.

453. In a nutshell, nowhere does it appear more clearly that man's desire finds its

desires to be desired by the Big Other; and her desire is imposed on her from the outside by the Big Other.

The masculine is the part of subjectivity that claims to be completely integrated into the Big Other (i.e., to not be castrated, to have the phallus).⁴⁵⁴ He is the spectator who loudly praises the emperor's nonexistent clothes and half convinces himself that he sees them. He is the Kantian noumenal subject who seeks to conform his maxims to the moral law. As a result, the masculine is totally bound by law and language. Whenever he confronts a hole in the incomplete and "nonexistent" Other, he obsessively tries to cover over this hole.⁴⁵⁵

The feminine is the part of subjectivity who understands that she does not completely fit within and is not totally constrained by language, law and sexuality.⁴⁵⁶ She is the Kantian phenomenal subject who never achieves pure conformance with the moral law. She is partially exiled from the social order dominated by men. She desperately seeks to find a way to fit into the symbolic order, which is why she is constantly expressing herself in language, engaging in legal relationships, and looking for love.

b. What Do You Want?

In the hysteric's discourse, the addressor positions herself in the position of the suffering split subject who has been subjugated by the master, preached to by the university, and interrogated by the analyst. As the matrix of the hysteric's discourse indicates, when the hysteric speaks as an hysteric, it is in furtherance of the desire

meaning in the desire of the other, not so much because the other holds the key to the object desired, as because the first object of desire is to be recognized by the other. Anthony Wilden, *Translator's Notes*, in JACQUES LACAN, *SPEECH AND LANGUAGE IN PSYCHOANALYSIS* 91, 114 (Anthony Wilden trans., 1981); see also ŽIŽEK, *INDIVISIBLE REMAINDER*, *supra* note 265, at 164.

454. SCHROEDER, VESTAL, *supra* note 29, at 88-90; Schroeder, *The Midas Touch*, *supra* note 117, at 740; Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 401-04 (1999); see also LACAN, *FEMININE SEXUALITY*, *supra* note 258, at 99-111.

455. Murray, *supra* note 347, at 144-45.

456. Consequently, Lacan called the feminine *pas-tout* which can be translated both as "not all" (as in, not all subjects are submitted to the symbolic order) and "not whole" (as in, some subjects are not wholly submitted to the symbolic order. LACAN, *SEMINAR XX*, *supra* note 184, at 72-73.

of the Other. Consequently, everything she says can be read as the inquiry of the Big Other, "What do you want (i.e., from me)?"⁴⁵⁷ What must I do, what must I become, what must I say in order to fit in? The hysteric's question, however, sometimes undergoes a transformation.

By asking the Other what it wants, the hysteric comes to realize that the Other could not want unless it was wanting. The Other is not the closed, powerful system that it claims to be. The Other does not exist. It is partial, shifting, and incomplete. It is as split and castrated as she is. In this mode, the hysteric's question becomes the accusation "You are wanting!"⁴⁵⁸ The hysteric sees the truth of the master's discourse. Beneath the show of mastery (S_1) lies the pathetic specter of castration ($\$$). If law is artificial, intersubjective, and open-ended, then the law can be changed. Hysteria is, therefore, the position that permits radical critique. It is the position of freedom as spontaneity.

c. Legal Discourse

In the hysteric discourse of law the feminine split subject, who knows she is incomplete, is the addressor.⁴⁵⁹ She addresses S_1 itself—the master who claims to give meaning to the symbolic order of society.⁴⁶⁰ She addresses the Other as her symptom with the hysteric question/accusation "What do you want?/ You are wanting!" Note that the Big Other in this discourse is designated this time with the empty matheme of the S_1 (master signifier) rather than the matheme of the S_2 as knowledge. This is because the hysteric recognizes that the symbolic order is not complete and is wanting

457.

One should always bear in mind that the status of the subject as such is hysterical: the subject "is" only through its confrontation with the enigma *Che vuoi?* ("What do you want?") insofar as the Other's desire remains impenetrable, insofar as the subject doesn't know what object it is for the Other.

ŽIŽEK, *ABYSS OF FREEDOM*, *supra* note 286, at 79. Lacan posited that the subject addresses the Big Other with the question "Che vuoi?" at least as early as his 1960 paper *Subversion of the Subject and the Dialectic of Desire in the Freudian Unconscious*. See LACAN, *ÉCRITS*, *supra* note 272, at 312.

458. I make this argument in greater detail in Schroeder, *The Four Discourses*, *supra* note 245, at 82-84.

459. See Žižek, *Four Subjects*, *supra* note 350, at 79.

460. Bracher, *supra* note 289, at 123.

in some sense. The symbolic order fails in its goal of bringing the entire world within its jurisdiction by completely symbolizing it. Indeed, this is evident because the master signifier itself is a signifier that lacks a signified.

The truth lying beneath the split subject is the "little a"—her own desire.⁴⁶¹ It is out of desire that she confronts the Big Other. This desire is, of course, the excluded little a, her feeling that she is incomplete and that this has been caused by the Big Other. The Big Other is barring her from the desire that is her truth.

The result produced by the discourse is S_2 —knowledge.⁴⁶² This is the point at which split subject finally gains control over her own unconscious knowledge. By confronting the artificiality and imperfection of the Big Other, the hysteric finally learns that only she herself can answer the question as to what she needs to do to satisfy her own desire and how to make the Big Other better to accomplish this. The knowledge obtained is precisely that the Big Other cannot accommodate, and does not have the truth of the subject's desire. It is the hysteric's discourse that allows this indirect relationship to come about.

What happens next might initially seem surprising. Having discovered her own unconscious knowledge, the hysteric needs to give it meaning. She needs to find a new S_1 , master signifier, to quilt signification together. Consequently, the hysteric's discourse inevitably leads to a new master's discourse.

In legal practice and scholarship the addressor places herself in the position of the subject subjected to law. In practice this subject is the client. In scholarship, this subject can be the author herself, identified individuals, a hypothetical client, or class of persons affected by the law. This is the position of the doctrinalist, as well as the speculative scholar. The subject is split, in the sense that she feels lacking (or identifies with the client who is lacking) and feels that the lack results somehow from the law. As a result she seeks a response from the law. She therefore addresses the law by either asking what it wants from her or accuses it of its failure to live up to its own ideals. Underlying the split subject as her truth is her desire. The reason she confronts the law is that she feels that she

461. FINK, *supra* note 251, at 134.

462. "What leads to knowledge is—I will be allowed to justify this in the more or less long term—the hysteric's discourse." LACAN, SEMINAR XVII, *supra* note 209, at 23.

wants something that the law can provide. She is in this position because she has been hysteritized through the analyst's discourse of legal counseling.

This dynamic is, perhaps, most easily seen in litigation. The plaintiff believes that she has been wronged. In a tort or contract breach lawsuit, she asks the hysteric's question of how the law can make her whole. If she is challenging the validity of the law itself she makes the hysteric's accusation. Similarly, the defendant in these cases feels wronged by the fact that she/it has been sued and questions or challenges the law to set things right.

This discourse, however, is equally the discourse of negotiation, doctrinal research, and speculative scholarship. In each case, the speaker is in the position (either in her own right or vicariously) of the desiring subject who questions or challenges the law. For example, in negotiation, the client wishes to accomplish some goal—to purchase a house, to enter into a joint venture with another party, to raise money in a public offering, whatever. Her truth is this personal goal. Having been hysteritized by legal counseling, she has concluded that she needs to address the law to accomplish this goal. She asks of the law, in effect, what do you want from me so that I can achieve my desire? What are my rights and what would be my potential liabilities if I proceed? How must I structure my transaction? Do I need to acquire any licenses or file with any agency or take any other actions in order to proceed?

The doctrinal scholar similarly addresses the law from the position of a hypothetical legal subject with a desire—a potential problem that she thinks either might be solved or caused by the law. In the former she addresses the law with the hysteric's question and seeks a way to fit her problem into the law by discovering the law's internal logic. In the latter, she addresses the law with the hysteric's accusation and explores how the law thwarts the subject's desire.

Similarly, speculative scholarship seeks to address the internal logic of the law to see how either real or hypothetical subject fits into the law. Do these subjects have desires that the law could fulfill if we better understood the law? Or does the law, instead, thwart the subject's desire?

In all three examples—legal representation, doctrinal scholarship, and speculative scholarship—the result that is produced

is knowledge in the sense of a greater understanding of the relationship between the law and the subject. This knowledge will frequently be subjective and personal. The subject, by winning or losing her case, by successfully or unsuccessfully engaging in a transaction, knows or changes his relationship to the law. Sometimes the understanding is intersubjective in that the doctrinal or speculative scholar might throw new light on a legal problem that enlightens not only the scholar herself but other practitioners or scholars. Sometimes this new understanding will result in an actual change in the law—as when litigation invalidates a law or leads to a new interpretation of the law. Sometimes, this understanding results in a call to change the law. If the doctrinal or speculative scholarship leads to a conclusion that the law's effect on the subjects subjected to the law is unjust or even unintended, this suggests the law should be changed. Knowledge, however, can be a dangerous thing. Sometimes one learns painful truths that one does not want to face. The client can lose the case, and sometimes this is the "right" result from a legal perspective.

5. Policy

Like the hero in a corny melodrama, I untie normativity from the railway tracks in the very last reel. After all my ranting against policy chit-chat, I come to the conclusion that the hysterical discourse of the doctrinal and speculative scholar will often result in policy recommendations. The legal scholar can never abandon normative considerations of the law.

Nevertheless, I support the romantic intuition that there is something fundamentally flawed with the unreflexive form of normative discussion in legal scholarship in that it assumes (as Jolls, Sunstein, and Thaler expressly state) that the university discourse is the only, or the most appropriate, type of scholarship. The hysteric's discourse is another mode of normative discourse. It is the other side of the university's discourse, its reverse or inverted form. This is why they have so much trouble communicating.

The hysteric's discourse is only indirectly addressed to the speaker of the university's discourse. It is not addressed to S_2 , the expert himself, but to S_1 , the grounds on which the expert relies. The expert cannot accept this criticism and continue doing what he

is doing because his expertise is undermined. Ideally the expert would listen to the criticism and respond one way or another. But to do so would require that he temporarily abandon the university's discourse and speak the analyst's discourse, which addresses and responds to the subject speaking in the hysteric's discourse. Not all criticism is correct. If the expert is successful in responding to the criticism, then he is arguably justified in resuming his university discourse. If he is unable to respond to the criticism of the grounds of his discourse, then it is intellectually dishonest to continue to make his claims to expertise. Unfortunately, too often policy scholars simply close their ears to the speculative discourse indirectly addressed to them and continue business as usual in the university discourse.

To resort to argument by anecdote, I have personally encountered this willful refusal to consider critiques of economic policymaking expressly on the grounds that it would interfere with business as usual. For example, I have on at least two occasions, including at the Oregon Law School symposium that I referred to earlier,⁴⁶³ asked a self-styled practitioner of law and economics how he answered the classic criticism of policymaking based on classical price theory known as the "second best" problem. This is the proposition that there is no logical reason to believe that one can use idealized models as a basis for making policy predictions for real world problems that do not fit the models (i.e., one can not derive what the second best solution would be from a model of the first best solution). This terminology was coined in the seminal essay *The General Theory of The Second Best*,⁴⁶⁴ but this general idea underlies such diverse work as the Coase Theorem and Simon's studies of bounded rationality. I had been troubled by this problem since I was an economics major in college. No doubt, there are attempts to answer this critique in the economic literature and I was curious to know what they might be. In both cases, however, I was met with a response to the effect that the expert had to ignore the theory of second best or he wouldn't be able to make policy recommendations. I do not understand why anyone could think that

463. See *supra* note 11 and accompanying text.

464. R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

this was a defense, rather than a condemnation, of their scholarship. In other words, the theory of the second best was a direct attack on the hidden master signifier underlying the expert's pretense of superior knowledge. The criticism threatens to blow the expert's cover because it shows how the expert maintains his position not despite, but just because of, its vacuousness.

Not only does the university discourse typically refuse to hear the address of the hysteric discourse, it also does not reply. The expert does not address the split subject herself. That is, the nature of policy talk is to identify a general societal goal, such as efficiency. This address is indirectly aimed at the split subject, just as the hysteric's address could be seen as being indirectly aimed at the expert, but in a different way. When the hysteric questions the grounds of the expert's expertise it can have one of several results: it can end up reinforcing the expert's claim to expertise; it can undermine the expert's claim to expertise; or it can lead to a new understanding of the law which will result in a new expertise. In contrast, the expert identifies the goals of law and then, by changing the law, seeks to change or manipulate the behavior of the split subjects so as to better achieve the goals.

In other words, when the hysteric speaks, she says "I (or the client) want something. I come to you because I think you are either the solution to, or the cause of, my problem." When the expert speaks, he says "I identify this as the goal of the law. You should change your behavior and desires in conformity to this goal." This is just not an answer to the hysteric's question.

Policy science engages in the discourse of the university. Its truth, however, is power. Schlag see this, but draws the lesson that policy should be abolished. A middle ground is needed. A hysterical analysis suggests that the oppressive power that results from policy grounded in the so-called expertise of the governor and its academic courtiers must be criticized and mitigated by policy grounded in the understanding of the governed.

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

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