2003

The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law

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INTRODUCTION:
RIGHT AND WRONG; ESSENCE AND APPEARANCE

In the first part of the *Philosophy of Right*, Hegel identifies right with essence and wrong with mere appearance.

The principle of rightness, the universal will, receives its essential determinate character through the particular will, and so stands in relation to something inessential. This is the relation of essence to its appearance... In wrong however, appearance proceeds to become mere semblance or show. A semblance is a determinate existence inappropriate to the essence, namely an empty detachment and positing of the essence, as the power and authority over the semblance. The essence has negated that which negated it, and is thereby confirmed. Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid.1

At first reading this passage seems to express a concept that is refreshingly simple and intuitive—at least by Hegelian standards. According to the common colloquial understanding, essence is the deeper truth of appearance. It is “what is permanent and enduring in things.”2 Essence is what is left when one strips away the inessential. Appearance, in contrast, is fleeting and false. Wrong is likewise an error, a subjective, temporary mistake that is doomed to pass away. Putting these two definitions together, Hegel seems to be saying that right will be achieved when wrong passes away; by implication, one

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should hasten this process by clearing the underbrush of wrong in order to reveal the right that otherwise would be obscured. Even such an eminent Hegel scholar as R.C. Williams has interpreted this passage in this way.\(^3\)

To a reader of Hegel’s *Science of Logic*,\(^4\) however, this interpretation is troublesome. It would seem to make Hegel into a Kantian who distinguishes between an inessential, contingent and empirical phenomenon (wrong) and an essential, eternal and intelligible noumenon (right). In the *Logic*, however, Hegel completely rejects this aspect of Kant’s metaphysics and develops a theory of essence and appearance that is totally diverse from (and yet the deeper truth of) everyday notions. The payoff to Hegel’s discussion of essence and appearance is that there is no mystical beyond of appearance. Essence is appearance, and essence always appears. The law of appearance is that it always disappears. He portrays essence as that which cannot be named. Yet, in the above passage, essence seems to have been given a name—right.

One might be tempted to argue that Hegel was just using the terms differently in these two different books. Since Hegel’s focus in the *Philosophy of Right* was on jurisprudential and political theory, as opposed to metaphysics, he thought it sufficient to use colloquial, rather than technical, definitions of essence and appearance. The problem with this approach is that Hegel’s philosophy is famously, or infamously, totalizing. Each of his books is designed as an integral part of a single internally consistent whole. Each sheds light on all of the others and none can be completely understood in isolation.

Moreover, the *Philosophy of Right* was written after the *Logic* and its discussion of wrong frequently assumes familiarity with Hegel’s unique terminology developed in the *Logic*.\(^5\) Furthermore, in his discussion of morality in the second part of the *Philosophy of Right*, Hegel expressly criticizes Kant’s moral theory for its dependence upon the phenomenon-noumenon distinction.\(^6\) The question therefore arises as to how one can interpret Hegel’s theory of the relationship between right and wrong set forth in *Philosophy of Right* consistently with his understanding of essence and appearance explicated in the *Logic*.

We believe that, Hegel can best be understood by looking back to Kant and forward to Lacan. Hegel is Kant’s most vociferous critic and, as such, his most faithful student. Consequently, one of the best ways of

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\(^3\) *Id.*

\(^4\) G. W. F. HEGEL, HEGEL’S SCIENCE OF LOGIC (A. V. Miller trans., 1969) [hereinafter *HEGEL, SCIENCE OF LOGIC*].

\(^5\) For an example, see section 95, where Hegel refers to crime as a “negative infinite judgment.” *HEGEL, PHILOSOPHY OF RIGHT*, supra note 1, at 121.

\(^6\) *Id.* at 162-63.
understanding Hegel is use Kant as a starting place and then study how Hegel diverged from his predecessor. Lacan's ethical theory, in turn, can be seen as a re-examination of Kant through a Hegelian prism.

In this essay, we argue against the notion that right is a body of legal doctrines that remain once wrongs have been erased. Rather, we wish to argue that what Hegel means in the above passage is that right is indeterminate without wrong. Without wrong, right could never be perceived. Right can only be understood as the negation of wrong. Right has no more affirmative meaning than this.

But what is wrong? It is simply the negative of right, and no more than this. Neither has any content on its own. There can be no question of erasing all the wrongs to reveal a collection of rights. If all the wrongs are erased, right itself is erased as well.

How can wrong be the negative of right if both essence and appearance, are, in fact, appearance? The answer is that wrong is appearance as "semblance" or appearance posing as essence. That is, wrong is the contingent, particular and subjective posing as necessary, universal and objective. Wrong is the very claim to presence, in the Derridean sense. Right, in contrast, is the very dissolution of presence—the understanding that nothing "is" but was and will be. Right is, therefore, not what is left over when wrong is revealed to be mere semblance. It is the process of wrong vanishing. Right is not a fact, but an act.

Because right is the dissolution of wrong, right depends on wrong. If all wrong were to be eliminated, "right and wrong—Between whose endless jar justice resides Should lose their names, and so should justice too." Yet, ironically, it is the very naming of right that is wrong. That matter can be put this way. Wrong is the naming of right. It is metaphor—a claim to have captured right in some static way. Dissolution of metaphor is right. Right can never be named and so it can only be known metonymically. Metonymy—the inability to name the thing but only to describe the context in which the thing appears—is the trope appropriate to right.

This dialectic of right and wrong, between whose endless jar justice resides, reflects a single paradox at the heart of Hegelian legal philosophy, Kantian ethical thought, Lacanian psychoanalytical theory and, indeed, Christian theology. St. Augustine called the dialectic Original Sin. To Kant, it was Radical Evil. To Lacan, the sexual impasse. Every attempt by fallen man to act rightfully is always a failure. Right is always smeared with wrong. But it is this very failure to achieve right calls right into being. Wrong is the precondition of (and always precedes) right.

7 6 WILLIAM SHAKESPEARE, Troilus and Cressida, in THE WORKS OF WILLIAM SHAKESPEARE act 1, sc. 3 (1909).
Such a reading reconciles Hegel’s *Science of Logic* with his remarks about right and wrong in the *Philosophy of Right*. Furthermore, Hegel’s analysis of right as essence and wrong as appearance looks forward to the Lacanian concepts of the masculine and feminine, metaphor and metonymy. Like the Lacanian feminine, right is never present. Wrong is the masculine position. The masculine insists upon presence; he claims to be totally constrained by the law. This is semblance: the false claim that law is not appearance (contingent, particular and subjective) but essence (necessary, universal and objective). In Lacanian terms, wrong is a denial that law is only symbolic. It is the delusion that law is real. The masculine position requires the feminine because he can only maintain his position by repressing the feminine as that which would disprove the masculine claim of universal law. This exclusion of the feminine, however, actually brings her into being, as the feminine is understood as precisely that which has been excluded. In the same way, right can only “appear” as that which wrong has heretofore tried to foreclose.

This essay constitutes another installment in our ongoing project of developing a Hegelian-Lacanian jurisprudence. In pursuit of this project, Part I of this paper briefly describes Hegel’s mysterious theory of essence in the *Science of Logic*. In Part II, we explore Kant’s theory of the relationship between the moral law and radical evil which is a precursor to Hegel’s jurisprudential philosophy. In Part III, aided by our understanding of Kant we return to Hegel and discuss his theory of right and crime, in order to show how the quotation that opens this essay is illuminated by the *Science of Logic*. Finally, we introduce Lacanian concepts of feminine metonymy and masculine metaphor and apply them to respectively to the positions of unnameable right and imperialistic wrong as another step in the development of a Lacanian jurisprudence.

I. **THE SCIENCE OF LOGIC**

In the *Philosophy of Right*, right is essence, wrong is appearance. But this does not mean that right is something positive. In fact, positivization of essence is precisely the view that Hegel denounces in the *Science of Logic*.

By way of quick introduction, Hegel conceived of the *Science of Logic* as the principal work upon which all other work was based. The *Phenomenology of Spirit*, in contrast, is merely an introduction to the *Science of Logic*—it shows consciousness to be an inadequate ground for philosophy, thereby setting the stage for the *Science of Logic*. 


Arguably, these are the only two books Hegel wrote. Everything else (such as the *Philosophy of Right*) are lectures, or student guides to lectures.

Each section of the *Science of Logic* proceeds according to a three-part process. First, the “understanding” makes an “immediate” proposition. Dialectical reason then points out that the understanding has suppressed its own history in mediation. Dialectical reason sees “double”—the immediacy together with the suppressed history of mediation. By emphasizing mediation instead of immediacy, dialectical reason *negates* immediacy. Speculative reason is able to think immediacy and mediation/negation together.

In the *Science of Logic*, the doctrine of being corresponds with the understanding. It stands for one-sided immediacy. Its fate, however, is to go under; it cannot endure, because it is irretrievably mediated by nothingness. Nothingness is the truth of being. That is to say, being is “finite”; its death constitutes its being as much as its life. Non-being is the secret code of being. When its implicit core—its “in-itself”—becomes “for-itself,” then being has negated itself.

Essence stands for dialectical reason—immediacy negated. Because essence is dialectical, there are two things true of it. First of all, it is a negation of being and hence a mediated idea. That is, there is being and its negation. Second, because essence is mediated by being (and vice versa), essence depends on being, for without being, essence would have nothing to negate.

Being, therefore, is the stuff of essence. When essence negates being, essence negates itself. It says, in effect, “I am not *that*. I *was* being, but being is dead and in the past. Now *I am*, and what I am is *not that*.” This is *all essence is*—it is not being, just as right simply is the negation of wrong. Paradoxically essence is when it announces what it is not. This is very paradoxical, but it is a paradox inherent in the common sense notion of negation. Suppose we say that “not x” is the negation of x. It is wrong to think of “not x” as nothing. “Not x” has affirmative being. It is a fundamental precept of Hegel that “nothing is, after all, something.”

Essence, then, is not a *thing*—a being. It is a process. It is the act of the thing vanishing. If we take being as appearance, essence appears when appearance disappears. When this act of negating occurs, essence *is* actual. Essence is as essence does.

For present purposes, then, there are two lessons to be drawn from the doctrine of essence: (1) Essence is a process—an act, not a thing, (2) Because essence is the negation of being, essence is in correlation with being; it is what it is *not*.

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Hegel compares this view of essence with a false view, in which essence is positivized into something unmediated. According to this false view, essence is "the indeterminate, simple unity from which what is determinate has been eliminated in an external manner." According to this false view, appearance ("what is determinate") is subjectively wished away ("eliminated in an external manner"). Appearance does not destroy (or sublate) itself but is subjectively negated. What is left standing is some affirmative thing falsely supposed to be essence. In Kantian philosophy, this essence is forever beyond our knowledge. According to Kant, we can only know the phenomena—never the thing-in-itself.

To Hegel, the Kantian thing-in-itself is simply another appearance. Only when this appearance disappears is essence actualized. For this reason, with Hegel it is appearance all the way down. Any attempt to establish essence as a transcendental "thing" is simply trafficking in yet more appearances. It is the process of appearance’s self-negation that is essence as such.

In other words, essence can only be actualized through, and as, mere appearance—its very negation. And what is the enduring truth that essence announces when it appears? "I am not essence. I am mere appearance, and I shall pass away." Appearance is false or a semblance only insofar as it pretends that it, or anything, can endure as is.

The false "Kantian" view of essence—that essence is a self-identical immediacy—is also the false view of right. According to this false view, right is what is left standing when all wrong has been pruned away. This is precisely what Hegel is not saying in the Philosophy of Right. But in order better to see how Hegel’s analysis of right and wrong reflects the foregoing account of essence and appearance, we must first consider Kant’s moral theory.

Hegel’s jurisprudence is largely a response to Kant’s moral theory. Consequently, we can acquire a better understanding of Hegel’s project.
by considering both what Hegel rejected—much of Kant’s metaphysical framework—and what he adopted and reinterpreted—Kant’s insight that there is a foundational paradoxical relationship between reason and wrong.

II. KANTIAN RADICAL EVIL

Hegel differs in many fundamental ways from Kant’s moral philosophy as set forth in his three Critiques, his Metaphysics of Morals and his later and lesser known Religion Within the Boundaries of Mere Reason. Most obviously, Hegel divides what Kant considered a single category of morality into three: the more primitive realm of right, which has been our concern up to this time, then morality and finally ethics. Consequently, some of the concerns that Kant raises in his consideration of moral law, which we discuss in this section, are not considered by Hegel in his chapter on right. Nevertheless, the fundamental paradox that Kant identified in the moral law looks forward to Hegel’s analysis of the necessary interrelationship between right and wrong, as well as the later necessary interrelationship between morality and evil.

A. Kantian Metaphysics

1. Noumena and Phenomena. As emphasized earlier, Kant’s moral philosophy relies heavily on a distinction between the thing-in-itself (or noumenon) and the phenomenon. Roughly speaking, the phenomenon is the fleeting, contingent empirical and sensible world of our experience; the noumenon, or “thing-in-itself,” is the eternal, unchanging, essential or intelligible world of which we have no experience. Kant posits 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 each other in accordance with empirical laws, they must have a ground which is not phenomenal.”11 Indeed, he thinks that this is definitional. Because Kant defines phenomena as mere appearance, they must represent something else which is not a mere appearance. Otherwise, a phenomenon is not the representation but the actual thing. As we shall see, Hegel argues that Kant’s thing-in-itself is just another phenomenon, at the same level as other phenomena. Essence is not opposed to appearance, but is the unending chain of appearances.

11 IMMANUEL KANT, CRITIQUE OF PURE REASON 302 (J. M. D. Meiklejohn trans., 1990) [hereinafter KANT, PURE REASON].
Hegel will nevertheless adopt Kant's starting proposition that rationality, freedom and spontaneity are, if not identical, so closely interrelated that one cannot conceive of one without the others. However, because Hegel rejects Kant's notion of the noumenon, he will also draw different conclusions from this proposition. Kant thinks that the existence of freedom—which is noumenal—in the phenomenal world is problematic. He will, therefore, struggle with the question as to whether freedom is even possible. In contrast, Hegel will argue that freedom in the empirical world is not merely possible or actual, but necessary—required by the internal logic of the individual as free will.

2. Transcendental and Practical Freedom. Kant first raises the issue of freedom in his discussion of the third of the four famous antinomies. The dogmatic thesis is "Causality according to the laws of nature is not the only causality operating to originate the phenomena of the world. A causality of freedom is also necessary to account fully for these phenomena." The empirical antithesis is "There is no such thing as freedom, but everything in the world happens solely according to the laws of nature." 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."

Causation v. freedom is one of the two so-called "dynamical" antinomies. This means that it can be resolved by showing that the thesis and the antithesis do not, in fact, contradict each other but are true at different levels of abstraction. Kant agrees with the thesis in the sense that all empirical phenomena have causes, but this leaves open the possibility that noumena could be uncaused. This would, at first glance, imply that freedom could only be purely transcendental, existing only as a noumenon (i.e., contradicting the antithesis). But one must not forget

12 "Problematic" is a quintessential Kantian term. What is problematic is merely thinkable or possible, not necessarily existent. See IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 161 (T. K. Abbott trans., 1996) [hereinafter KANT, PRACTICAL REASON].

13 In the Critique of Pure Reason, Kant struggles to formulate an argument as to how freedom might be at least theoretically possible in the empirical world. In his Critique of Practical Reason Kant tries to go further and proposes that we have good reason to believe that empirical freedom does exist.

14 KANT, PURE REASON, supra note 11, at 252.

15 Id.

16 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.

17 See KANT, PRACTICAL REASON, supra note 12, at 127. In contrast, Kant resolves the "mathematical" antinomies by showing that neither the thesis nor antithesis is true.
the necessary relationship that phenomena bear to noumena. Although all phenomena have causes, the fact that phenomena always reflect noumena means that the cause of a phenomenon does not itself have to be phenomenal but could be noumenal. It is, therefore, theoretically possible that transcendental freedom could manifest itself—or in Kant’s terminology, become “practical”—in the phenomenal world.

Human beings, being both intelligible and sensible creatures, are both noumenal and phenomenal. The noumenal aspect of man is reason. Consequently, if reason can cause phenomenal human action, then practical freedom is more than the mere negative freedom to slip loose from the causal chains of nature. There could be a positive (or practical) aspect of freedom as the spontaneous uncaused cause of action in the world.19

B. Kantian Morality

Kant’s theory of morality relies on a distinction between maxims and laws. Because man is intelligible and not merely sensible, he acts out of will, not out of instinct like an animal. Animals have no choice but to follow their inclinations, but a man gives in to his inclinations only because he has chosen to do so. The general pattern by which man surrenders to inclination is described by a person’s “maxims.” Maxims are subjective to specific persons, and are, therefore, empirical, sensible and particular—phenomenal. Moral laws, in contrast, are objective, transcendental intelligible and universal—noumenal. Virtue consists in adopting maxims that conform with the moral law. This leads to the “categorical imperative,” or moral law as universality:

Act so that the maxim of thy will can always at the same time hold good as a principle of universal legislation.20

That which is empirical is particular. Consequently, empiricism makes it impossible for any specific positive law to be Law (i.e.,

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18 Kant, Pure Reason, supra note 11, at 307. As Kant states: “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 actions cannot be ascribed to sensuous receptivity. These faculties are understanding and reason.” Id.

19 Therefore, “the volition of every man has an empirical character, which is nothing more than the causality of his reason.” Id. at 309.

20 See Kant, Practical Reason, supra note 12, at 46. See also Immanuel Kant, The Metaphysics of morals 17 (Mary Gregor trans. & ed., 1996) [hereinafter Kant, Morals]. Probably lesser known is the categorical imperative expressed as the principal of humanity set forth in his Groundwork of the Metaphysics of Morals: “Act in accordance with a maxim of ends that it can be a universal law for everyone.” Quoted in Roger J. Sullivan, Introduction to Kant, Morals, supra at xviii.
universal). Positive law is phenomenal. The true moral law is noumenal—intelligible not sensible. This means that moral law cannot be discovered by experience but must be deduced by reason.\textsuperscript{21} As a noumenon moral law must be independent from natural causality. This implies that "freedom in the strictest, that is in the transcendental sense [is] a will which can have its law in nothing but the mere legislative form of the maxim is a free will."\textsuperscript{22}

Kant concludes with the seeming paradox that freedom requires law, and vice versa. "[F]reedom and an unconditional practical law reciprocally imply each other."\textsuperscript{23} In other words, law must be spontaneously created. It must be legislated by reason. This raises a paradox: how can law be universal and objective if each rational person self-legislates her own law?

1. The Right and the Good. Kant famously claims to reconcile the universal with the particular (i.e., how is it that everyone is a legislator of a universal law?) by distinguishing right (moral law, the "ought") from the good (that which is substantively, or empirically beneficial). Kant’s distinction is, however, quite different from the distinction that Hegel will draw between right and morality. As we discuss below, Hegel argues that right is more primitive than morality. Mere legal right is enforced through external coercion whereas morality is an internalized sense of obligation. The necessary dialectical relationship between right and wrong, on the one hand, and morality and evil, on the other, are forms of a necessary relationship that reflect the relation of essence and appearance.

In contrast, Kant identifies right with morality, and grounds the distinction between right and the good on the distinction between the noumenon and the phenomenon. The good is that which is beneficial as an empirical matter and, therefore, phenomenal. This implies that right can have no substantive content because content is phenomenal. The test of whether something is right (i.e., is moral and law) is, therefore, purely formal.\textsuperscript{24} This formal test is the famous categorical imperative.

Of course, Kant completely recognizes that in ordinary life,

\textsuperscript{21} 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.

KANT, PRACTICAL REASON, supra note 12, at 43.

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 44.

\textsuperscript{24} "[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." Id. at 44.
maxims and positive laws must have substantive content. Many of these may very well be good, but good is empirical, and therefore merely contingent, not moral. To be moral, a “good” rule must be justified by something more profound than beneficial consequences—i.e., it must meet the formal test of universality that characterizes the noumena.

2. The Moral Law and Radical Evil. We now come to the aspect of Kantian moral philosophy that will inspire Hegel’s theory of wrong and Lacan’s psychoanalysis—the fundamental unresolvable contradiction between morality and evil that constitutes the human condition. This tension is the foundation of human freedom.

To repeat, Kant distinguishes between morality—which is purely objective formal and abstract—and the good—which is subjective, substantive, concrete and (in Kant’s terminology) “pathological.” The problem is, as we discuss extensively elsewhere, that every moral decision has to be made in a concrete situation. It is, therefore, necessarily empirical and smeared with pathology. As such, even though a specific act might be “good” it is never truly moral or purely free, but is partly subject to the causal chains of nature. Kant thus rewrites the doctrine of Original Sin and concludes that man is “radically” evil in the sense that a trace of non-moral pathology must necessarily lie at the root (radix) of all human actions.

Of course, it is not inconsistent with the moral law to perform an act which we both desire to perform (in the sense that it will increase our happiness) and which is in compliance with the moral law. One cannot assume, however, that the mere fact that an action would either make us happy or that it would require self-sacrifice is any evidence of whether it is moral or not. Morality is completely indifferent to

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26 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. KANT, PRACTICAL REASON, supra note 12, at 92.

27 “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 & George Di Giovanni ed. & trans., 1998) [hereinafter, KANT, RELIGION]. As we explain elsewhere, see Schroeder & Carlson, supra note 25, at 657 n.19, it is a common mis-perception 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 (1964).
pleasure and pain.28

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.29 As finite humans, we can never really know our "true" motives.30 That is, the pure reason that is essential to man is itself a noumenon—a thing-in-itself. The empirical individual is a phenomenon who does not have direct contact with his own noumenal essential self. In Kant's words, "[t]he depths of the human heart are unfathomable."31 Consequently, none of us can directly know his own self.32 Holiness—the state of achieving virtue understood as the perfect congruence of one's maxims and the moral law—is, like mercy, an attribute to God alone.33 Like Augustine before him, Kant concludes that man is always in a state of sin.34 The more moral a man is, the more he desires to comply with the moral law for the sake of morality, the more aware he is of the stain of his own pathology.35

Kant's idea of a radical split between our conscious selves and another essential "true" inner self—the unconscious—will reappear in Lacan's attempt to rewrite Freud's psychoanalytic theory in light of speculative thought.

C. The Dialectical Relationship Between Law and Freedom

For Kant, the impossibility of knowing and achieving morality and

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28 Moral laws "command for everyone without taking account of his inclinations, merely because and insofar as he is free and has practical reason." KANT, MORALS, supra note 20, at 10.
29 In the words of Žižek, "we never know if the determinate content that accounts for the specificity of our acts is the right one, that is, if we have really acted in accordance with the Law and have not been guided by some hidden pathological motives." SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 365 (1999). [hereinafter ŽIŽEK, TICKLISH SUBJECT].
30 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." HENRY E. ALLISON, KANT'S THEORY OF FREEDOM 43 (1990).
31 KANT, MORALS, supra note 20, at 196.
32 "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." Id. at 155.
33 Kant calls holiness "a perfection of which no rational being of the sensible world is capable at any moment of his existence." KANT, PRACTICAL REASON, supra note 12, at 148.
34 Kant's conclusion can most strikingly be seen in the title he gave to Part One of Religion Within the Bounds of Mere Reason; namely "Concerning the indwelling of the evil principle alongside the good or Of the radical evil in human nature." KANT, RELIGION, supra note 27, at 45.
35 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." Id. at 55.
hence freedom implies free will. 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 to an external force. As Kant puts it, “Man would be a marionette or an automaton...”36 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 knows, law, as well as freedom, is a work in process. In order for the subject to be free, she must be self-legislating—constantly creating new law. If, however, she ever succeeded in the task of finishing and completely filling her world with law, this 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 the causal chains of nature so that she might freely bind herself to the moral law, is that every time she tries to bind herself to the moral law the chains slip her wrists. Man is always a moral Houdini despite herself. As we shall see due course,37 Lacan will identify this fundamental paradox as the sexual impasse—the part of personality that is bound by law is the masculine, and the part that slips away—like Eurydice and Hegelian essence—is the feminine.

Kant’s concept of “radical” evil should not be confused with his very different concept of “diabolical” evil. As we have discussed elsewhere,38 although man is always in the state of radical evil, Kant’s terminiology is intended to express the conclusion that man is no more capable of diabolism as he is of holiness. If virtue is the choice of maxims that always comply with the moral law, then to be diabolical is to adopt maxims that always violate the moral law. As morality’s inverse, diabolical evil is noumenal, and the test for diabolical evil is also purely formal, not substantive. In his famous essay Kant avec Sade, Lacan made the startling and correct conclusion that, as such, diabolical evil is indistinguishable from morality—they both satisfy the categorical imperative.

In fact, as so often happened, Hegel anticipated Lacan. In the Philosophy of Right Hegel argues that morality is internally contradictory and monstrous. It must be sublated into ethics precisely for this reason.39

36 KANT, PRACTICAL REASON, supra note 12, at 123. As we have said elsewhere: If the 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 thrill of the moral law. Ironically, morality would become legality, and morality would be thoroughly pathological—that is natural. Schroeder & Carlson, supra note 25, at 667 (citations omitted).
37 See infra text at notes 88–103.
38 See Schroeder & Carlson, supra note 25.
39 HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 174–84.
III. THE PHILOSOPHY OF RIGHT

Having explored Kantian moral theory, we are now in the position to read Hegel’s account of right and wrong in the *Philosophy of Right* and reconcile it to his understanding of the notions of essence and appearance presented in the *Science of Logic*.

A. The Bildungsroman of Personality

The *Philosophy of Right* is Hegel’s extended critique of liberal political philosophy. Hegel starts by adopting liberalism’s grounding principle—the Kantian autonomous individual in the state of nature. Hegel then shows how this seemingly simple concept is, in fact, self-contradictory and inadequate to the task assigned to it by Kant.

As Kant understood, free will must have no constraints whatever. This implies that the completely free will is a totally negative conception. The Kantian person has no properties, talents, bodily manifestations or other phenomena because any such contingent, empirical and subjective characteristics would be a limit on the potentiality of the will. In other words, the autonomous person is a noumenon. That is to say, autonomy implies that the person has been stripped of all appearances. Such a person is literally invisible.

How can such a creature have self-consciousness? If a person is to be conscious of her own self—to contemplate her subjectivity as an object—she must perceive herself. Yet if she has no appearance in the world, she can neither perceive herself nor can anyone else do so. Hegel’s insight is that the Kantian autonomous person is not “objective” to itself and therefore is not self-conscious. Self-consciousness requires attributes. This means that moral philosophy can not be based on the abstract noumenal person, as Kant would have it, but must account for actual concrete phenomenal subjects. The task that Hegel takes on is how can he move from Kant’s true, but partial, insight that free will lies at the heart of personality to an account of concrete subjectivity that is capable of morality.

Hegel argues that right, and its negative corollary wrong, are the means by which this initial primitive and abstract conception of personality as free will develops into the more sophisticated and concrete one of the moral subject. Consequently, the *Philosophy of Right*...
Right can be read as the Bildungsroman of personality.\textsuperscript{41}

B. \textit{Property, Contract and Subjectivity}

We have extensively explicated Hegel’s theory of how the process by which free will obtains attributes and becomes a subject through right elsewhere,\textsuperscript{42} and will only touch lightly on this aspect of his theory. To make a long story short, in the \textit{Philosophy of Right} Hegel argues that freedom in the state of nature is purely negative and, therefore, only potential. Freedom becomes actual (what Kant would call “practical”) through intersubjective relationship with other persons. Specifically, an abstract individual only becomes a subject if and when another subject recognizes her as an equal subject. The problem should be obvious. The abstract person understood as free will lacks all individuating pathological characteristics—each abstract person is identical to every other.\textsuperscript{43} Just as the abstract person can not recognize itself and achieve self-consciousness, it cannot recognize any of its similarly characterless brethren. It is as though there is only one abstract person in the state of nature.

The abstract individual engages in object relations in order to achieve the recognizability necessary for relationships with other subjects. The primitive object relations of abstract right are called “property” and “contract.” Hegel posits that the object relations of property consist of possession, enjoyment, and alienation, understood in the most general and abstract sense.\textsuperscript{44}

Possession is the identification of an object to an individual person. Although possession attaches individuating characteristics to the possessor, possession fails to prove to the subject its own existence. The person is now the slave to the object, when the point was to master


\textsuperscript{43}See Hegel, \textit{PHILOSOPHY OF RIGHT}, supra note 1, at 42, 44, 54-57, 70. The problem is that the concept of “absolutely free will” is empty, abstract, arbitrary and negative—it is, by definition, totally stripped of all distinguishing characteristics. \textit{Id.} at 27.

\textsuperscript{44}As discussed in detail elsewhere, it is a common modern error to conclude from the observation that property comes in many different forms as an empirical matter, that there is either no essential core of property as a logical or jurisprudential matter, or that property consists of an arbitrary bundle of a number of rights picked from a long laundry list. See Jeanne L. Schroeder, \textit{Never Jam To-Day: On the Impossibility of Takings Jurisprudence}, 84 GEO. L. J. 1531, 1537-50 (1996) [hereinafter, Schroeder, \textit{Never Jam To-day}]. A Hegelian position argues that one can identify a minimum definition of property so long as one stays at the appropriate level of abstraction. For example, the rights to sell, pledge, bequeath, and so forth can be analyzed as specific examples of the more general concept of the right of alienation.
the object. Person and object are identified with each other so that one can not tell which is which. The person tries to prove his mastery by enjoying or consuming the object. But if the object is consumed, the subject is right back where it started from. Moreover, insofar as the person’s claim to mastery depends on its relationship to the object through enjoyment, the claim is revealed to be hollow. The person is dependent on his enjoyment in precisely the same way an addict is dependent on his drug. Such abject dependency is a denial of freedom. Consequently, the subject must prove its independence from the object. Only then is it a subject separate and apart from the object.

The person, therefore, must disencumber herself from any specific object while still maintaining the object relations necessary for recognizability. Hegel discussed three possible modes of alienation: abandonment, gift, and contract. For reasons that we explain elsewhere, only contract is adequate for the goal of recognizability.45

In contract, two persons exchange objects with each other. By doing so, each demonstrates his status of a subject independent of any specific object while simultaneously maintaining the continuity of object relations necessary for recognizability. More importantly, because contract is mutual, each party necessarily recognizes the other as a free subject like himself. At the moment of contract, the subjective particular wills of each person for a moment come together as a single objective common will.

It is incorrect, however, to think that in contract two “subjects” exchange “property.” Both subjectivity46 and property only come into existence for the first time through the recognition of contract.47 Indeed, Hegel’s point is that which is really exchanged is recognition as such.48

C. Wrong

Before defining right, Hegel first describes its function. By necessity, he can only do this indirectly by discussing its negative—wrong.

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46 More accurately, the contracting parties, although no longer merely abstract free will, are not yet completely subjects. Full subjectivity—which comprises the capacity for moral reasoning as well as the recognition of right—when right is fully actualized and sublated and the person internalizes the universality of right’s morality.
47 See HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 104 (in exchange, “I am and remain an owner of property, having being for myself and excluding the will of another, only in so far as, in identifying my will with that of another, I cease to be an owner of property”).
48 Carlson, supra note 42, at 1391.
At the end of the analysis of contract, two particular wills have produced the mutual recognition of right, which can be viewed as a middle term between two particular extremes. The middle term is the common will.

Wrong constitutes the reassertion of particularity at the expense of the common will. Wrong is the false assertion that what is merely contingent, particular and subjective has the status of that which is necessary, universal and objective. As such, wrong can be seen as an impossible attempt to regress to the pre-contractual state while retaining the indviduation and recognizability that can only be attained in contract. In wrong, the person treats the other subject as a nullity, but since a person's very cognizability must be bestowed by the other, nullification of the other is nullification of self.

There are three levels of wrong, judged qualitatively by the extent to which the regime of right is negated. First is basic civil wrong. A claims a right to B's thing. B denies it. Each claims right is on her side. "Both parties agree that universal right should be realized, even though it may be temporarily thwarted."\(^49\) This is the least serious form of wrong because the wrongdoer does not deny the concept of right. He merely confounds his particular will with the common will. In other word, civil wrong is a form of error.

More ominous is fraud.

[Here the universal right . . . is reduced to a mere semblance. The perpetrator of fraud tacitly withdraws from intersubjective agreements and treats right as a means to his own private end. He thereby reduces the outward manifestation of right to a mere semblance while concealing his private interest. The particular person who is deceived is "shown respect" in the sense that he is offered the semblance of right as part of the deception.\(^50\)

Fraud is more serious than civil wrong in that the fraudster does not erroneously confuse his particular will with the common will, but intentionally imposes the former over the latter. And yet, in his attempt to defraud others, the fraudster necessarily poses his false claims as though justified by law. In other words, in fraud the wrongdoer cares about what the victims thinks. By cultivating the semblance of right, the fraudster pays homage to it.

Most serious of all is crime. In crime, the wrongdoer sets up his own particular will as the absolute criterion. In crime, "[t]he other person against whom the crime is committed is not expected to regard the wrong, which has being in and for itself, as right."\(^51\)

Unlike civil wrong and fraud, crime is, therefore, an attempt to

\(^{49}\) WILLIAMS, supra note 2, at 153.

\(^{50}\) Id.

\(^{51}\) HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 116.
negate right itself. This criminal attempt to consume the entire field of right must necessarily fail. Just as the subject who consumes his objects entirely vanishes into a state of indeterminacy, so the criminal who denies the regime of right negates herself. This leads Hegel to the conclusion that the very personhood of the criminal demands her own punishment.\footnote{Punishment stands for the common will in predominance over the private will. But since the person is just as much the public will as she is the private will, the demand for punishment is a self-demand.}

It is in this context that Hegel equates essence with right and semblance or illusory being with wrong. As we have discussed, Hegel should not be interpreted as saying that, when wrong falls apart of its own accord, rightness will appear. A careful reading of the Philosophy of Right, supplemented with an understanding of the vocabulary developed in the Science of Logic, shows something rather different.

Right is not that which remains when wrong is revealed as illusion. Rather, right only becomes actualized in dissolving wrongs — it is nothing but the act of righting wrong. Any other affirmative definition of right is itself a wrong. A specific claim to a particular right is always empirical and, therefore, contingent and particular. Any such assertion is always wrong. As we shall see, this is precisely the Lacanian analysis of the relationship of the masculine and the feminine to the symbolic order.

Let us look more carefully at how this works in Hegel’s specific analysis of the three species of wrong.

1. Crime. Hegel starts his discussion of wrong with a consideration of the least of evils and moves up to the worst. We reverse the order, in imitation of Hamlet,\footnote{“I must be cruel only to be kind. Thus bad begins and worse remains behind.” 5 WILLIAM SHAKESPEARE, Hamlet, in THE WORKS OF WILLIAM SHAKESPEARE act 3, sc. 5 (1909).} and start with crime.

As we have seen, both civil wrong and deception manifest some respect for right. Crime, in contrast, is a complete denial or negation of right. It is a “negatively infinite judgment.”\footnote{HEGEL, THE PHILOSOPHY OF RIGHT, supra note 1, at 121.} Some examples:

“‘The mind is no elephant’”; “‘A lion is no table’”; propositions which are correct but absurd . . . . [T]hey are not judgments at all, and can only occur in a subjective thought where even an untrue abstraction may hold its ground.\footnote{G. W. F. HEGEL, HEGEL’S LOGIC 238 (William Wallace trans., 1975) [hereinafter, HEGEL, THE LESSER LOGIC].}

This seems bizarre at first impression. In what sense is crime the same as the proposition, “The mind is no elephant?” And why is such a statement said to be not a judgment?

The answer is that this absurd phrase is simply the form for a
certain logical relation between subject and predicate. The negative infinite judgment’s theory is that there is no relation whatsoever—the subject is absolutely independent of the predicate.

A very brief tour of Hegel’s theory of subjectivity in the Science of Logic will help make clear the role of negative infinite judgment. At the end of his discussion of essence, immediacy is finally obliterated. “Reality” finally comes to an end, and we are left with a mad subjectivity—a subjectivity absolutely separate and apart from nature. What the subject—Hegel calls it Begriff (notion or concept)—must do is to legislate its own reality, so that reality is no alien “beyond” but rather subjectivity’s own free creation. In short, it is the job of the Notion to will, for itself, an objective reality, in which it is both subject (active and self-sublating) and object (passive and enduring).

Why must the notion do this? For the same reason that, in the Philosophy of Right, the autonomous subject reaches out to another autonomous subject for recognition. A subject facing no reality at all cannot perceive itself, because it lacks any appearance by which it can perceive itself. Yet it wishes to know itself. It wishes to be. It craves self-certainty.

At first, Notion is the abstract understanding, which must now make the same old mistakes we saw demolished earlier in the objective logic, except that this time it will be performed subjectively. The first set of judgments are the judgments of existence. These judgments are not properly judgments at all, but merely subjective propositions.

When diverse words are merely conjoined, we have only proposition. A proposition asserts A = B, but this is just as much A ≠ B, since A is held to be completely diverse from B. In a judgment, A is B in a more essential way than the mere subjective conjunction of A and B by external reflection. That is, in a true judgment, A is universally B. If a statement enunciates something non-universal about a subject, then we have a mere proposition. Judgments function as the determination of the “universal” truth of the subject. In short judgments purport to be complete.56

In effect, the “judgments” of existence assert the immediacy and hence the diversity of the subject, compared to the predicate. For this reason, Hegel reveals that these “judgments” are, in fact, not properly judgments at all, precisely because they do not traffic in universality.

The first of these judgments is the positive judgment. It asserts that the subject is the predicate. But which predicate? It is impossible to name them all. Something must be left out because there is an infinity of predicates. Therefore positive judgment yields the negative judgment—subject is not the predicate, or can not be reduced to any one

predicate. The predicate cannot be entirely named. Some of the predicates inevitably escape. The form of the negative judgment is “The rose is not red.” Negative judgment implies, however, that there is a predicate. It’s just that it doesn’t happen to be red. Beyond that it says nothing. Negative judgment therefore depends on external reflection—or positive law—to determine what the subject is.

Notion must make its own reality if it is to be free. It cannot accept a reality imposed on it from the outside. One-sided understanding therefore proposes the negative infinite judgment: the subject is absolutely free and independent of predication in general. This denial of predication is what Hegel thinks crime is.

Why does the negative infinite judgment take the form of “spirit is not red,” or “the rose is not an elephant?” Recall that the negative judgment was “the rose is not red.” The negative judgment negated red but admitted predication—the rose had some color. The absurdity of the negative infinite judgment prevents the inference of any predication at all. Therefore, it refuses to negate something sensible. It negates something so absurd that nothing can be deduced from the negation of a single predicate.

Applying the negative infinite judgment to the Philosophy of Right, the person was shown to be predicated in the recognition of another person. In contract, each person recognizes the other person by the other’s properties. Without this exchange of recognition, the person would be an indeterminate nothing. The other person is therefore the predicate on which the subject is dependent.

The criminal denies the importance of predication altogether. She insists the she is a subject separate and apart from any recognition. In this guise, she attempts to coerce her victim into following her will. Crime is the “initial use of coercion.”

The criminal turns her back on the other, whose recognition was the very foundation of her personality. Yet without that recognition, the criminal loses all her properties and reverts to the invisibility of the autonomous subject prior to the exchange of properties.

Because crime implies the invisibility of the subject—the retrogression of the person back into the realm of the pre-symbolic “real”—crime negates itself and demands its own punishment. Punishment is the negation of the negation. It is coercion against crime, and so “coercion is cancelled . . . by coercion.” For this reason:

Abstract right is a coercive right, because a wrong committed against it is a force directed against the existence . . . of my freedom in an external thing. . . .To define abstract right—or right in the strict sense—from the start as a right which justifies the use of coercion is

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57 HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 121.
58 Id. at 120.
to interpret... it in the light of a consequence which arises only indirectly by way of wrong. 59

That is, if right is that which is enforced by coercion, then right can only be discerned when it is enforced, and enforcement requires that the right first be violated in wrong. Paradoxically, wrong precedes right. Punishment—the empirical negation of crime—is both the truth of crime and the actualization of right. "The manifestation of its nullity is that the nullification of the infringement likewise comes into existence; this is the actuality of right, as its necessity which mediates itself with itself through the cancellation... of its infringement." 60

In other words, Hegel argues not merely that right will be actualized in the punishment of crime, but that crime itself requires this punishment. 61 In Hegel's metaphor "The Eumenides sleep, but crime awakens them; thus the deed brings its own retribution with it." 62

The practice of the American press in reporting crimes and trials intuits this point. American journalists avoid referring to a suspect or a defendant as a criminal and resort to euphemisms such as "the accused" or "the alleged assailant." Sometimes they take this seemingly to the point of absurdity such as when, in the case of workplace violence when one employee "goes postal" and shoots co-workers while witnessed by a large number of other persons. The violence might even be caught on film. And yet, even though there is no question that the person in question committed the act in question, the press will persist on referring to him as the "purported gunman" until he is actually convicted and sentenced.

Journalists tend to assume their practice springs from the constitutional presumption that defendants are presumed innocent unless their guilt is proven in a court of law. Yet this explanation is not completely satisfactory. The constitutional limitations only apply to the government and the constitutional freedoms of press and speech should generally protect the media's truthful reporting. 63 This practice does, however, imperfectly and clumsily reflects the Hegelian understanding of crime. Both crime and right can only be actualized retroactively when the criminal law is enforced. We call the defendant the "alleged

59 Id. at 121.
60 Id. at 123.
61 Crime claims an affirmative characteristic, and indeed "[w]hen an infringement of right as right occurs, it does have a positive external existence." Id. at 123. Nevertheless, this is semblance because "this existence within itself is null and void." Id. "The nullity is [the presumption] that right as right has been cancelled... For right as an absolute, cannot be cancelled, so that the expression of crime is within itself null and void." Id. That is, although crime does have affirmative effects in the world, crime itself is not an affirmation, but a negation of right. Insofar as there is such a thing as right, however, this negation asserted by crime has no content, it is totally negative.
62 Id. at 129.
63 Although, in relatively rare occasions, the press will cross the line and commit libel.
murderer” not merely because there is the possibility that an individual sitting in the dock might be wrongfully accused or might be found not guilty by reason of insanity or because of some procedural error. Rather, it is because until the conviction, there is no murder—although there might be an individual who has killed another individual. The term “murder” is a legal conclusion, not a matter of fact. Right blooms forth only after it cancels the wrong—negates the negation—in enforcement.

2. Civil Wrong. Most commentators on the Philosophy of Right pass quickly from his dialectic of the creation of right in property and contract to his highly original analysis of crime without an extended examination of his intervening discussion of civil wrong. This is unfortunate because, although very short, it is absolutely necessary for an understanding of what Hegel means when he says that wrong is appearance and right is essence.

a. Civil Wrong as Negative Judgment. Civil wrong is the negative judgment pure and simple where merely the particular law is violated, while law in general is so far acknowledged. Such a dispute is precisely paralleled by a negative judgment, like, “‘This flower is not red’”: by which we merely deny the particular colour of the flower, but not its colour in general.

How is a civil wrong the same as the non-redness of the flower? Once again, this negative predicate is the form of a judgment which, in effect, denies that the predicate can be known completely. The negative judgment implies that there is a relation of subject to predicate, but that external reflection—positive law—must tell the subject what it is.

Now Hegel makes clear that the negative judgment is in fact also a positive judgment. It names at least one predicate (“not red”). But this very naming of the predicate is inadequate to the subject. It is therefore a wrong, in the sense that the positivization of the predicate is one-sided and incomplete. In short, the status of civil wrong as the negative judgment reinforces the thesis of this essay—wrong always precedes right, and right is not positivizable. To positivize is to phenomenalize the law, and this is precisely wrong.

Civil wrong, Hegel says, is to be considered “right in itself.”65 “What is right in itself has a determinate ground, and the wrong which I hold to be right I also defend on some ground or other.”66 In other words, a civil wrongdoer bases his claim of right on legal research—on some ground in the positive law of statutes or judicial precedents.  

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64 HEGEL, THE LESSER LOGIC, supra note 55, at 238.
65 HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 113.
66 Id. at 117.
a legal claim, however, is fixed and rigid—or, as Hegel says, finite. As such, it is not "true" or "right." The true and the right are precisely the disappearance of such fixities. "It is in the nature of the finite and particular that it leaves room for contingencies; collisions must therefore occur..." Wrong in the sense of grounded claims to right are therefore logically built into the system of right. Without the legal research to produce fixed wrongs, there could be no right to fix the wrong.

b. Wrong Always Precedes Right. Hegel presents his discussion of civil wrong in the aftermath of contract, but there is a way in which property itself, which logically precedes contract, is a wrong. If so, then the very emergence of subjectivity in the first place is founded on wrong—retroactively made right by contract.

Hegel is frequently misinterpreted as adopting a first-occupier theory of property rights, much like Locke. This reading is based on the following passage in his discussion of possession:

That a thing... belongs to the person who happens to be the first to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else.

In context, however, it is clear that this passage is intended merely as a definition of what possession is, not any assertion as to the rightfulness of any specific claim to possession. Possession is the rule of first-in-time, first-in-right—the claim of the party already in "possession" to exclude any second-in-time party. As Hegel states "The first is not the rightful owner because he is the first, but because he is a free will, for it is only the fact that another comes after him which makes him the first." As any lawyer knows, a strict universal first-in-time, first-in-right regime is not, and could not be, the rule of any actual legal system. Even Locke had his "proviso": that first possession is rightful only if one leaves behind enough resources to provide for persons with no first possessory rights.

Moreover, a consideration of Hegel's analysis of the role of property in the creation of personality should make it clear that Hegel could not adopt a first-occupier justification of property. For Hegel, a claim to possession is only the logically first element of property. It is the particular action of a single subjective will and therefore a wrong

67 See id. at 118.
68 Id. at 117.
69 Id. at 81.
70 Id.
71 According to Locke, there is a natural right to acquire property "at least where there is enough, and as good left in common for others." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 306 (Peter Laslett ed., 2d ed. 1967).
against all other such wills. Right only comes into being with contract. Consequently, at the simplest level, claims of a first possessor can not be rightful since they arrive prior to the creation of rights. Hegel’s point will be that all claims to possession, even after the development of sophisticated regime of positive law, are wrongful in the sense that the essence of right can only be actualized indirectly in contrast to the appearance of wrong. This means that wrong precedes right.

Hegel expressly addresses—and rejects—the first-occupier theory of property in his discussion of the necessary presence of civil wrong in the regime of right. Prior to contract, there can only be a collision of claims to right. Different persons may claim “possession” of the same thing, but they have no logical justification for imposing their particular will against each other. Insofar as any claimant successfully excludes others from a contested object, this is merely a result of brute force. All such claims to possession are, therefore, merely appearance, semblance. It is only when persons mutually agree to recognize each other’s respective claims that possession can for the first time can seen as rightful, and legal (i.e. property).

For the parties involved, the recognition of right is bound up with their particular opposing interests and points of view. In opposition to this semblance, yet at the same time within the semblance itself. Right in itself emerges as something represented and required. But it appears at first only as an obligation, because the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view.

One can see at this early stage of Hegel’s discussion, that wrong (appearance) is not an error or illusion that will disappear when right (essence) is revealed, but that the former is a necessary building block of the latter.

In the above account, contract is the foundation of property itself. Until contract, any claim to property was criminal because it denied all right to any other free self. Retroactively, property became legitimate when it was bestowed on the free self by the other. What initially began as wrong retroactively became legal possession of property.

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72 HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 117.
73 Id.
74 For this reason, Hegel remarks, “In contract, right in itself is present as something posited.” Id. at 115. That is to say, absent contract, right is not posited. Right only appears with establishment of the contract. Id. Prior to the contract, everything is wrong.
75 BRUDNER, supra note, 45, at 23 (“Property . . . is thus perfected in exchange.”). Hegel emphasizes that, in contract, the properties deem the commodities actually swapped have equal exchange value. As he puts it, A retains value but gives up property. HEGEL, PHILOSOPHY OF RIGHT, supra note 1, at 107. But, if we are right that recognition (not property) is exchanged,
One might be tempted to argue that whether or not the foregoing account is a convincing justification for the modern capitalist economy from the starting place of the hypothetical state of nature, it does not describe the actual practice of property and contract. That is, as an empirical matter, most contract and property claims are clear from the start (and therefore right) and a only a very tiny proportion are initially disputed and then determined in a court of law. Indeed, no commercial society could function otherwise. This argument misses what Hegel means by the structural logic of the concepts of right and wrong.

Let us take an extremely simple property contract of the type most of us transact on a daily business. We go to a grocery store, take a carton of milk out of the refrigerator case, bring it to the check-out. The cashier rings up a price. We hand cash to the cashier in the amount of the price and then take the carton of milk home. Can’t we say that, at least here, the property rights are clear? Before the sale, the grocer clearly “owned” the milk, and after the sale we do? Aren’t the contract rights equally clear? By putting the milk in the refrigerator case is the grocer making an offer to sell the milk to anyone who will tender the purchase price; by bringing the carton to the cashier and handing cash in the amount rung up on the cash register to the cashier do we simultaneously accept the offer and tender performance, giving us the right to enforce the contract against the grocer by taking possession of the milk? Yes, for all practical purposes. But the internal logic of the transaction is as Hegel describes.

Prior to the transaction, the grocer claims a particular right to the milk—that is, to exclude the entire world including myself. But there is always the very real possibility that the grocer’s claim is not rightful against all other competing claims; perhaps the grocer has purchased stolen milk. When we pick up the carton of milk and bring legal tender to the cashier we are also making a particular claim to the milk not merely against the world generally, but against the grocer specifically. Our claim and the grocer’s claim are potentially in conflict so that at this moment only one of them can be rightful or, perhaps more accurately, both are in question and, therefore, at least partially wrongful in the Hegelian sense.

In the vast majority of cases, we will usually agree that we will recognize the grocer’s right to the milk unless we pay for it (exchange money for it) and the grocer will recognize that we will have the right to the milk after the exchange. That is, our two warring particular wills have now been resolved through the formation of a common will—what

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76 This is H.L.A. Hart’s pseudo-empirical claim that law is determinate “most” of the time. H.L.A. HART, THE CONCEPT OF LAW 148 (1961).
American lawyers call a meeting of minds. Empirically this will also resolve all other claims against the “world” so that the determination at that moment becomes universal and objective and, therefore, right. The whole dialectic occurs so quickly in these easy cases that the contract parties never become aware of the conflict that initially existed. Nevertheless, contract must be seen as the dissolution of wrong.

Moreover, even if the grocer and I form a contract with a common will, this common will is only potentially universal and objective. If the milk had been stolen neither the grocer nor I have any right enforceable against the original owner regardless of how innocent any of us are as to the theft.\(^77\) Our respective claims to the milk are mere semblance, or wrong. Often, the value of the transaction is so small that the parties make no attempt to resolve the conflict. No one is going to sue over one carton of milk that will probably have spoiled by the time one can write and file a complaint. As the value and permanence of the object increases, however, these potential claims take on real significance.

The point in all these cases is that the right of these transactions does not pre-exist the transaction. Rather the transaction is right because there is a voluntary resolution of the potential conflicting claims that lead up to the transaction. To say we leave the grocery store with “our” milk, can only be understood as saying that we have reached a consensus that anybody else’s claim to the same milk would be wrong. Right can only be defined in this negative sense.

Once again, one might be tempted to say that, even if the sales transaction starts from an initial state of inherent conflict, once the sales contract has been performed by both sides (and assuming that the object to the contract had not been stolen), then all wrongs have been resolved and buyer can rightfully claim to be the owner of the object. Doesn’t right at this point takes on an affirmative determinate aspect so that it can be defined positively and not merely negatively as the righting of wrongs? Isn’t the buyer’s claim to ownership now permanent, objective, necessary and universal, and no longer mere appearance?

The Hegelian answer is that although right is actualized at this moment and is therefore affirmatively manifested in the empirical

\(^{77}\) If the grocer has voidable title in the milk, his initial claim to the milk is once again wrongful vis-à-vis the original owner. After the transaction, our claim to the milk vis-à-vis the original owner will depend on whether we can establish that we are good faith purchaser for value within §2-403(1) of the Uniform Commercial Code (UCC). As an empirical matter this will probably be the case more often than not so we do not have to consciously think about this rule. Nevertheless, the conflict still exists. Finally, if the grocer has granted a security interest in the milk to a bank our right to the milk will depend on whether the grocer continues to pay his loan as it becomes due or, if not, whether we can establish that we are buyers in the ordinary course entitled to the protections of §§ 9-320(a) or 9-315(a)(1) of the UCC. Once again, in the grocery store case, the facts are usually so simple that the potential conflicts (wrong) are resolved virtually instantaneously.
world, *all* actualizations, being *empirical*, are immediately revealed to be contingent and, therefore, mere appearance. That is, although right comes into being at the time the buyer's claim for the object is recognized in contract, any claim that this right is permanently good against everyone else in the world is a potential cause of conflict and a semblance.78

### a. The Contingency of Right

Hegel expresses the dependency of right upon civil wrong in another way. As we have seen, contract is right in that it is the formation of a general will that is more necessary and objective than the particular will of the two contracting parties. But, this common will can only be created through the fusion of two or more particular wills each of which is contingent, particular and subjective—a semblance and, therefore, wrong. The right of contract can only be understood as the resolution of the conflict between these two wrongs.

Right in itself, the universal will, is essentially determined by the particular will, and thus stands in relation . . . to something inessential. This is the relationship . . . of the essence to its appearance. . . . appearance is the stage of contingency, or essence in relation . . . to the inessential. But in the case of wrong, appearance goes on to become a semblance. A semblance is existence inappropriate to the essence. . . . Semblance is therefore the untruth which disappears because it seeks to exist for itself, and in this the untruth which disappears because it seeks to exist for itself, and in this disappearance, essence has shown itself as essence, that is, as the power over semblance. . . . —Wrong is a semblance of this kind, and through its disappearance, right acquires the determination of something fixed and valid. . . . Whereas right previously had only an immediate being, it now becomes *actual* as it returns out of its negation; for actuality is that which is effective and sustains itself in its otherness, whereas the immediate still remains liable to negation.79

If wrong is semblance, then the actualization of right in contract is the negation of that negation—a sublation. In sublation, that which is negated is not destroyed but is preserved.80 Consequently, even

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78 The fact that all property claims are relative and contingent becomes obvious by the fact that, if the owner fails to pay her debts as they become due, her creditors might have the right to take the object. The government might impose zoning, licensing and other restrictions on the rights to use and alienate the object. Or it might take the object under its power of eminent domain. Or it might have the right to confiscate the object if, for example, it is used in the promulgation of certain crimes. The owner may wish to use the object to raise money by selling, leasing or hypothecating it, creating new classes of rival claimants. The object may be stolen or taken away from the original owner by fraud. And finally, all natural owners die and their property is transferred to an estate to be distributed among rival claimants.

79 Hegel, *Philosophy of Right*, supra note 1, at 115-16.

80 Carlson, *Quality*, supra note 8, at 452-53.
actualized right must preserve some element of wrong—the seed of its own corruption. Contract is the formation of a common will but this common will is itself necessarily contingent. That is, the logic of personality demands that individuals seek to enter into contract in order to gain the recognition that will make them into subjects. As an empirical matter, however, the two contracting parties are not conscious of this. Each party experiences himself only as seeking to impose his particular will on the world. A common will is created if, by coincidence, the respective particular wills of two or more parties just happen to overlap.

For the parties involved, the recognition of right is bound up with their particular opposing interests and points of view. In opposition to this semblance, yet at the same time within the semblance itself . . ., with in itself emerges as something represented . . . and required. But it appears at first only as an obligation, because the will is not yet present as a will which has freed itself from the immediacy of interest in such a way that, as a particular will, it has the universal will as its end. Nor is it here determined as a recognized actuality of such a kind that, when confronted with it, the parties would have to renounce their particular points of view.\(^{81}\)

That is, when one goes to the grocery store, one does not say to oneself “In order to achieve and maintain my self-consciousness over time, I shall seek recognition from the grocer who I shall recognize as an equal free self-consciousness.” Rather, one thinks something like “I want milk.” As a result, in most cases one gives little thought as to the identity of the grocer and will probably choose what store to go to on other particular and contingent grounds such as location or price. The grocer’s conscious thoughts are no doubt equally as self-involved—“I want money.” If it just so happens one walks into a store that has the type of milk she wants at a price that she feels is appropriate, the grocer and the customer will join in a common will and she will buy the milk. But this commonality is itself contingent and fleeting.\(^{82}\)

But Hegel is even more radical than this. From a Hegelian perspective, imperfection is a necessary aspect of perfection itself and of human freedom. Moreover, wrong is necessary for right not merely because right can only be actualized as the righting of a wrong. It is also the case that every righting of a wrong itself necessarily must include a “wrongful” moment in order for right to be effective.

b. The Necessary Imperfection of Perfection. Where is the necessary but ghostly “wrong” that haunts Hegel’s abstract right

\(^{81}\) Hegel, Philosophy of Right, supra note 1, at 117.
\(^{82}\) “It is in the nature of the finite and particular that it leaves room for contingencies; collision must therefore occur, for we are here at the level of the finite.” Id. at 117-18.
understood as private law?

As one of us has explained elsewhere, the desire of the abstract person to achieve subjectivity through intersubjective recognition is fundamentally erotic. Yet, to paraphrase Lacan, there are no contractual relations; there must be always a partially failed encounter.

This idea can be glimpsed in the concept of the perfect market as developed in the price theory of neo-classical economics. The perfect market is the end of actual markets in both senses of the term: its ideal and its doom. Supposedly, under competitive conditions, actual markets will tend to become more and more like the perfect market. This perfect market, however, is that hypothetical state in which all objects in the market have always already been transferred to the highest valuing user, at which time all distinction between market participants and objects, and time and space themselves, disappear. This means that the actual market would end if it reached perfection. For actual markets to function they must be imperfect. This reflects the Hegelian-Lacanian insight that the ideal of perfection is only generated by recognition of the fact of imperfection. When all imperfections and all wrongs disappear, then all markets and all right disappear as well.

The existence of an abstract right that is always generated by wrong, like the imperfection of actual market, enables us to create ourselves as inter-relational subjects and allows us occasionally to actualize our freedom. We experience ecstasy at these moments, albeit fleetingly. The fact that wrong exists means that our freedom is not perfect, that exploitation occurs, that alienation is a universal experience of modern man—but it also means that the market regime establishes the conditions under which we occasionally glimpse and exercise freedom, attain equality, and experience love. As Lacan would say, without tears, the eye is blind.

Wrong is always a necessary component of right because in order for the dialectic of right to function, it is necessary that it fail. Indeed, its continued success requires its continuing failure. We interrelate because we desire to end our separation, but in order for us to interrelate we must continue to be separate. If we failed to remain separate we


84 Lacan famously said that there are no sexual relations.


would regress back to the undifferentiated negative state of the free will before contract. If we did not feel restrained, we would not fight for and actualize our freedom.

IV. LACAN: THE CREATION OF LAW IN THE REPRESSION OF THE FEMININE

We are now in a position to analyze the Lacanian ideas of masculine metaphor, on one hand, and feminine metonymy, on the other.

A. Constraint Creates Freedom

In Lacan’s terminology, sexuality is not a biological category, but a symbolic one. The masculine is the aspect of subjectivity completely circumscribed by the symbolic order of language and law, while the feminine is the aspect that cannot be so confined.

As understood by Kant and Hegel, freedom is, at least initially, totally negative. It is merely the absence of restraints, but as such it has no affirmative content. Liberal freedom is, therefore, in the Lacanian order of the real—that which is hypothesized as existing outside of the borders of the symbolic and imaginary orders. Nevertheless, the Lacanian-Hegelian understanding of personality is precisely that the boundaries formed by the symbolic and the imaginary (i.e. social constructs) produce an excessive unbound moment as well. Paradoxically, the real is necessary for the existence of the symbolic and the imaginary. In order for the symbolic and the imaginary to function, they must repress the real (wall it out). Similarly, perfect freedom without any restraints is purely negative. In order for freedom to be actualized, there must be a constraint for freedom to negate.

It is our hypothesis that, even when a regime of positive law embraces the liberal proposition that all humans are inherently free, in order to function, the law must act as though it is a closed system that constrains all human activities. It is in the nature of law that it must always be known in advance of its application. This means that law

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88 This should not be interpreted as a naive denial of biological differences or of the possibility that biology might affect behavior. It is a recognition of the fact that human beings have no immediate conscious connection to their biology, but always interpret and mediate their physical experiences through language and imagery (the symbolic and the imaginary). The terminology reflects the fact that we conflate symbolic sexuality with biological “reality” so that people have a tendency to adopt the sexual position that corresponds to their biology.

must have always already have anticipated and established a rule for any and all possible behavior. The law is in this sense masculine—it constrains completely, all of the time. But for this to be so, law must repress the subjective, particular and contingent aspect. This reflects the Hegelian analysis that any positive legal claims is mere appearance, and therefore, a wrong.

Why do we say that law is a masculine proposition and therefore wrong? As is well known, it is a basic Lacanian proposition that the subject is a pure negativity—castrated and split. The two sexes are two positions one take with respect to this universal fact: denial (masculinity) and acceptance (femininity).

The masculine falsely (or, more accurately, delusionally) claims to have the phallus, the symbol of subjectivity. That is, he claims to have “it”, whatever “it” might be that could him positive, not negative, split or castrated; that which would make him potent and make action possible. The masculine position claims to be complete. Lack, failure, emptiness, mediation, the possibility of unplanned contingencies, arbitrariness and unmotivated behavior—anything and everything that would reveal the lie of the masculine claim to be in control—are prohibited by the masculine.

If the masculine is nothing but the denial of lack, then the feminine is nothing but its acceptance. Consequently, both sexes identify lack, negativity, and subjectivity with the feminine. In order for the masculine to maintain his position, he must necessarily represses the feminine that is its denial.90 In the application of law, “it” is certainty; the judge knows what the law “is”—knows which particular claim will be recognized as universal and, therefore, right. Consequently, in order for the judge to pronounce judgment “he” must become masculine.

This creates several paradoxes, only a few of which we raise here. To say that one knows what the law “is” is to imagine that the law is “objective”—it is to declare that one is bound by the law, and that one is not exercising subjectivity. Consequently, by proclaiming his active subjectivity, the masculine finds himself in the position of passive objectivity. The subjectivity that is repressed is the feminine.

This is why the masculine claims to subjectivity, freedom and activity are hollow. The masculine is not merely castrated, but totally constrained by the symbolic order and is, therefore, objective, bound, impotent and passive. He is the caused phenomenon—the merely

90 A woman can but be excluded by the nature of things, which is the nature of words, and it must be said that if there is something that women themselves complain about enough for the time being, that’s it.

LACAN, SEMINAR XX, supra note 87, at 73.
empirical side of Kant's third antinomy. He has boxed himself in so tightly he has no room left to move.

These paradoxes of sexuality parallel the Hegelian paradoxes of wrong and right. As we have seen, from a Hegelian perspective, right can only be understood as the negation of wrongs—the resolution of necessarily conflicting claims. This means, however, that not only is right created by wrong, it can only be known indirectly through wrong. For a judge to resolve a conflict and declare one rival's claim to be "right" is, by definition, to declare it universal, objective, essential. But, from a Hegelian perspective, all such claims are necessarily fleeting because they immediately create possibility for new conflict. The judgment, which seemed essential when declared, is immediately revealed to be mere appearance in the sense of contingent and particular to the specific claimants and the specific dispute adjudicated. The common law intuits this when it always insists on calling a judicial order a mere "opinion." Insofar as the law insists that it is right and objective, it is declaring appearance to be to be its essence. This is semblance, the definition of wrong.

Any restatement of right, therefore, always turns into its opposite—a wrong. Right can only be understood as the resolution of the next wrong. This is reflected in the common law's concept of "precedent." In the common law system, the law is not something that exists, but is in a state of becoming. Although one might judge that a prior interpretation of the law in a specific case was correct given what had gone before, one never knows what the law is now until the next case is decided. This is the paradox that Lewis Carroll put in the mouth of the White Queen: jam yesterday, jam tomorrow, but never jam today.91

The necessary truth of right is that every application is subjective, particular and contingent. Application requires the judge to forget for a moment and act as though his opinion were fact, and his judgment objective. He must repress the nature of right in order to actualize right, even as this repression, as a semblance, is always wrong.

91 One of us has used this passage to illustrate the Hegelian concept of sublation, and the impossibility of drawing clear borders in the law. Schroeder, Never Jam To-day, supra note 44. Unfortunately, we did not realize at the time that Carroll's joke was not intended merely as an illustration of a certain logical paradox, but a clever Latin pun. Latin has two words for the English word "now". Nunc and iam (which can, alternatively, be spelled jam). The former is only used in the present tense, while the latter is only used in the past and future tenses. Consequently, from a grammarians's point of view iam is only permissible yesterday and tomorrow, but not today. MARTIN GARDNER, THE ANNOTATED ALICE (Rev. ed. 2000).
B. Metaphor and Metonymy

A legal opinion is a metaphor, but right is a metonym. Metaphor and metonymy are important terms in Lacan’s theory of language. Law is, of course, located in the order of the symbolic. Consequently, an explanation of our hypothesis as to masculine nature of judging needs to make some reference to Lacanian linguistics.

Lacan describes language as a matter of signification, whereby a signifier refers to a signified. Signification, however, must be distinguished from meaning—the simple correspondence of language (signifiers) to pre-existing notions or reality. Meaning is the hallmark of the imaginary. The imaginary is the realm of simple mirror images, negation, correspondence and picture thinking that we associate with common sense. Meaning represents the myth that we can have direct, unmediated, uninterpreted knowledge of the world outside of the symbolic. It assumes direct correspondence between signifier and signified. In language, however, the very fact that signification is divided between a signifier and a signified indicates that such direct contact has been lost. Modifying Saussure’s symbols, Lacan expresses language as the matheme S/s. The signifier (represented by the big S) is not only above the signified (the small s), it is forever barred from the signified.

Signification concentrates on the signifier, not the signified. There is no direct contact with the signified in the symbolic order. Indeed, “the barrier separating the Symbolic from the Real is impossible to trespass, since the Symbolic is this very barrier.” No signifier can, therefore, refer directly to the object world. Instead, each signified is itself another signifier. Each signification merely points to another

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91 JACQUES LACAN, ÉCRITS: A SELECTION 149 (Alan Sheridan trans., 1977): Lacan reverses Saussure’s formula, signified/signifier, giving primacy to the material element (the signifier) in the genesis of the concept (the signified). His own formula for the sign is thus ‘S/s’, ‘which is read as: the signifier over the signified, “over” corresponding to the bar separating the two stages.” The signifier is granted priority because, in Lacan’s understanding, the signified is in fact simply another signifier occupying a different position, a position ‘below the bar’ within signification.


92 Saussure also meant for the bar to indicate the arbitrary nature of the relation between the signifier and signified.

92 But Lacan stresses the importance of this “bar,” conceiving it as indeed a “barrier” to any one-to-one relationship between signifier and signified, insisting that any given signifier refers not to any corresponding signified but rather to another signifier in a sequence or “chain” of signifiers.


signification *ad infinitum*. With no "real" ground, language is always in a constant state of flux, with signifiers unendingly moving over an infinite stream of signifieds which themselves are signifiers referring to signifieds, etc.\(^94\)

The two operations by which signifiers are contingently linked to signifieds are metaphor and metonymy.\(^95\) The first is the masculine trope which is necessary for judgment, while the second is the feminine, that enables the possibility of freedom and right.

Metaphor is the substitution of one word *for* another.\(^96\) It is the imaginary attempt to turn signification into meaning.\(^97\) It is the fiction that we can freeze meaning, create a quilting point\(^98\) between the upper level of signifier and the lower level of signified and sew them together in some permanent fashion so that the one becomes equivalent to the other. Metaphor is an attempt to cross the mediating bar that separates signifier and signified in order in pursuit of the dream of erotic immediacy.\(^99\) This operation is masculine because it denies castration. Castration is the loss of immediate relation. Metaphor, in contrast, is the statement that there is an immediate relation between a signifier and signified. A metaphor is the claim to have "it"—in this case "meaning"—that would cure the wound of castration.

Metonymy is the substitution of word for mere word, of slidings

\(^{93}\) "One cannot go further along this line of thought than to demonstrate that no signification can be sustained other than by reference to another signification. . . ." LACAN, ÉCRITS, *supra* note 91, at 150.

\(^{94}\) "We are forced, then, to accept the notion of an incessant sliding of the signified under the signifier . . . ." *Id.* at 154. Lacan compares the unending chain of signification to "rings of a necklace that is a ring in another necklace made of rings." *Id.* at 153.

\(^{95}\) *Id.* at 156-58. Lacan identifies metaphor and metonymy with Freud's concepts of condensation and displacement, respectively. *Id.* at 160.

\(^{96}\) *Id.* at 157.

\(^{97}\) "Metaphor presupposes that a meaning is the dominant datum and that it deflects, commands, the use of the signifier to such an extent that the entire species of preestablished, I should say lexical, connections comes undone." JACQUES LACAN, THE SEMINAR OF JACQUES LACAN. BOOK III: THE PSYCHOSES 1955-56, at 218 (Jacques-Alain Miller ed. Russell Grigg trans., 1993).

\(^{98}\) Lacan calls the temporary freezing of signification by attaching the sliding of signified's under signifier's as a "point de capiton." LACAN, ÉCRITS, *supra* note 91, at 154. The English version of ÉCRITS translates this as "anchoring points" although it more exactly means "upholstery button." Žižek, emphasizing Lacan's metaphor of sewing, suggests "suture" or "quilting point" as appropriate English equivalents. See, e.g., ŽIŽEK, *supra* note 92, at 18-19. In Žižek's work, the quilting point refers not merely to the moment of signification, but the idee fixe, or central idea that an individual or society adopts to give his or itself meaning and structure. Anti-semitism is a classic example of such aquilting point.

\(^{99}\) The formula for metaphor contains an addition sign: +. Lacan writes of this "the + sign . . . here manifesting the crossing of the bar" . . . The "bar" is always represented in Lacan's notations as a horizontal line; it is therefore "crossed" by the vertical line in the + sign.

of meaning below and above the bar of signification. In metaphor, the signifier stands for the signified. In metonymy, the signifier stands by the signified. It implies that one cannot freeze or capture the essence of meaning. Consequently, it is the attempt to invoke indirectly that which cannot be captured directly. In metonymy one describes parts of the signified, or that which surrounds or accompanies it, or the traces of its retreat. Metonymy is feminine, therefore, in that it is the acceptance of the inevitability of castration, the understanding that the real can never be captured. It reflects the fact that we only retroactively hypothesize the existence of the real by its traces—our sense that there is something walled off from the symbolic order itself.

A verdict resolving conflicting claims in favor of the “right” one is metaphor. It is the freezing of the relationship between the signifier of the particular claim and the signified of universal right. Of course, the truth of metaphor is partial at best. Even though a metaphor asserts some essential similarity between the signifier and the signified, “likeness” always implies that the signifier is never identical with the signified. The assertion of sameness is therefore always partially false. Similarly, a judicial decision that a claim is “right” is true, because by enforcing the claim, the judge is making it objective, universal and necessary in the sense that other claimants must recognize it or be punished. However, insofar as the determination implies that the claim is universal, not just particular, it is false and hence a wrong.

Metonymy, in contrast, is the recognition that the bar forever separates the two registers of signification. It is the realization that right can never be permanently captured, but is only a process in a constant state of change. As is the case of metaphor, the truth of metonymy is partial but for a different reason than with metaphor. Metaphor juxtaposes a true and a false affirmative assertion in the same statement. In contrast, metonymy is a true but partial and negative assertion. As one of us has written elsewhere:

Consequently, neither metaphor and metonymy can take the stand as witness without perjuring itself. Metaphor can “swear to tell the truth, the whole truth” but would lie if it implied that it also tells “nothing but the truth.” In contrast, metonymy can “swear to tell the truth . . . and nothing but the truth” but is unable to promise to tell “the whole truth.” Both metaphor and metonymy are always in violation of the federal securities laws which makes it unlawful “to

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102 See Robert M. Cover, Nomos and Narrative, 92 HARV. L. REV. 4 (1982) (“The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary.”).
make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." Metaphor always makes material misstatements and metonymy always makes material omissions.103

CONCLUSION

In this paper, we have argued that the appearance of right is the essence of wrong. Any legal claim is a claim to meaning. As such it suppresses the feminine—subjectivity itself, and hence is wrong. What is right is the very failure of a legal claim. When such a mediate fades away, right has manifested itself. Right is a metonym and can never be captured entirely in symbolic order.

103 SCHROEDER, THE TRIUMPH OF VENUS, supra note 83 (footnotes omitted).