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## The Midas Touch: The Lethal Effect of Wealth Maximization

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# THE MIDAS TOUCH: THE LETHAL EFFECT OF WEALTH MAXIMIZATION

JEANNE L. SCHROEDER\*

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\* Professor of Law, Benjamin N. Cardozo School of Law. This Article is one of a series that applies Lacanian theory to law and economics, including Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998) [hereinafter Schroeder, *The End of the Market*]; Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394 (1999) [hereinafter Schroeder, *Three's a Crowd*]; Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815 (1999) [hereinafter Schroeder, *Pandora's Amphora*]; and Jeanne L. Schroeder, *The Eumenides: On the Founding of Law Through the Repression of the Feminine* (1999) (unpublished manuscript, on file with the author) [hereinafter Schroeder, *The Eumenides*]. These articles will form the basis of my forthcoming book JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: AN EROTICS OF LAW AND MARKETS* (1999) (unpublished manuscript, on file with the author).

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## I. INTRODUCTION: THE GOLDEN TOUCH

In *The Metamorphoses*,<sup>1</sup> Ovid related two myths about King Midas that on first reading seem quite diverse. Lacanian psychoanalysis explains their hidden connection.

The first myth is *Midas Aureus*—literally *Golden Midas*, but more commonly known as the *Golden* or *Midas Touch*. This tale is so familiar that it has led to a common English expression. As is so often the case, however, the cliché represses the myth's original, and true, meaning. When someone is said to have "the Midas touch," we intend to express admiration for or envy of the person who seemingly profits through an uncanny combination of business acumen and good luck. Yet according to Ovid, no man was ever so foolish and unfortunate as poor Midas.

Midas was king of Phrygia. One day he came upon an obese satyr incapacitated by alcohol. Midas brought the satyr home to the royal palace where he "recuperated" by spending several more days in drunken revels, amusing the king with fantastic anecdotes about a continent across the Atlantic Ocean "where splendid cities abound . . . [with] a remarkable legal system."<sup>2</sup> It turned out that the satyr was none other than Silenus—Falstaff to Dionysus's Prince Hal. In gratitude for the king's hospitality toward his old friend, Dionysus, god of wine and ecstasy, granted Midas one wish.<sup>3</sup>

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1. See 11 OVID, *THE METAMORPHOSES* (More trans.), on *Tufts University Perseus Project: Ovid Metamorphoses init.* (visited Oct. 15, 1999) <<http://www.perseus.tufts.edu/cgi-bin/text?lookup=Ov.+Met+init>>.

2. 1 ROBERT GRAVES, *THE GREEK MYTHS* 281 (1955). Although I rely primarily on Ovid's account, my retelling of the Midas myths is derived from a number of sources. Omitted by Ovid, Robert Graves cites "Aelian: *Varia Historia* iii. 18" for Silenus's tales of a continent that seems more like America than Atlantis. *Id.* at 283 n.3.

3. Shakespeare tells us that Henry V could only assume his role as king by renouncing not only his youthful excesses but also his companion in debauchery:

I know thee not, old man. . . .

. . . .

For God doth know, so shall the world perceive,  
That I have turned away my former self;  
So will I those that kept me company.  
When thou dost hear I am as I have been,  
Approach me, and thou shalt be as thou wast,  
The tutor and the feeder of my riots.  
Til then I banish thee, on pain of death . . . .

His avarice having been whetted by Silenus's tales, Midas asked that everything he touched be turned to gold. Dionysus pleaded with Midas to reconsider his hasty request, but Midas was adamant. Dionysus sadly granted the foolish king his wish and laughed at his folly.<sup>4</sup> Within minutes Midas became the richest man in all history.

What he desired in haste, Midas learned to regret at leisure. When he started to drink to his wisdom and blessings he was initially delighted when the goblet turned to gold. Delight quickly changed to horror when the wine itself also became liquefied gold the moment it passed his lips.

Midas was the law and economist of ancient Greece. He sought to change worldly possessions that he enjoyed into gold he could spend. By doing so, however, he found that he destroyed the ability to enjoy. Similarly, the wealth maximizer would have society maximize not goodness, morality, or happiness, but rather wealth—the goods of the world expressed in money. The wealth maximizer requires that subjective use value be translated into objective exchange value.

Like Midas, the law and economics scholar has neglected to think through the logic of his own position. Indeed, there is surprisingly little literature even discussing how to define wealth, and the necessarily related definitions of money and time. Midas did not pause to consider that the golden touch would destroy not only his ability to enjoy, but to live. Similarly, the law and economics movement fails to see that its goal of wealth maximization, when coupled with its ideal of the perfect market and classic price theory, would also destroy not only all use value or utility, but also freedom and subjectivity. In the perfect market all use value would be reduced to exchange value—all things reduced to useless gold—at which point market participants would become perfectly indifferent to all goods in the marketplace and all exchange must cease. If wealth maximization is the end (i.e., the goal) of the market, the market will end (i.e., terminate) when its end is reached.<sup>5</sup>

Both the logic of this dialectic, and the reason why the proponents of wealth maximization repress it, are explained by Lacanian theory. Midas, the wealth maximizer, is driven by the desire to achieve the ideal of perfect immediacy, the instantaneous fulfillment of desire. In Lacanian psychoanalysis, this ideal is in the psychic order of "the real."<sup>6</sup> By contrast, law and actual markets, like language and sexuality, exist in the

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WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY IV*, act 5, sc. 5, ll. 47, 57-63 (David Benington ed., Bantam Books 1988). Dionysus, in contrast, was destined to become not a mortal monarch, but the divine personification of inebriation itself. He, therefore, continued to cherish the silly old man who introduced him to the pleasures of the cup even after his apotheosis.

4. See GRAVES, *supra* note 2, at 282.

5. For a similar argument in connection with the economic ideal of the perfect market, see Schroeder, *The End of the Market*, *supra* note \*, at 492.

6. For a discussion of these terms of art, see *infra* text accompanying notes 149-69, 194-200.

order of "the symbolic." As Hegel and Lacan have shown, it is only friction, separation, and desire that create human subjectivity.<sup>7</sup> As Coase has shown, it is only transaction costs that create the market.<sup>8</sup> To achieve the real—to gain the golden touch and maximize wealth—is to destroy the market, lose subjectivity and achieve oblivion.

Lacanian analysis also reveals that the paradox that lies at the heart of the failure of wealth maximization reflects the fundamental paradox of human subjectivity: the sexual impasse. In psychoanalysis, sexuality is not understood in terms of anatomy, but is a technical term referring to different psychic positions a subject can take with respect to the loss, separation, and desire that characterize participation in the symbolic.<sup>9</sup> The wealth maximizer takes on the "masculine" position while repressing the equally necessary "feminine" one. He does this by elevating the masculine property elements of possession and exchange, while ignoring or de-emphasizing the feminine elements of identification and enjoyment. The reason for this is that the two sexual positions are fundamentally incompatible. In Lacan's terms, "[I]t is impossible to found (*poser*) a sexual relationship."<sup>10</sup> Consequently, one seeks to take on one position, and eliminate the other.

The Lacanian paradox, however, is that despite their incompatibility, the two sexes simultaneously require each other: Each is created by its failure to relate to the other.<sup>11</sup> It is precisely this contradiction and tension between the sexes that causes desire. Desire is the engine of movement in the symbolic order necessary for the operation of actual markets and law, and the actualization of human freedom. It is lucky that all attempts to resolve the sexual impasse and eliminate either sexual position are impossible, because success would be lethal. Thus, the imaginary regime of wealth maximization is characterized not by desire, like actual markets, but rather by what Lacan called the death drive.

7. See Schroeder, *Pandora's Amphora*, *supra* note \* at 895-904.

8. Coase believes that markets are merely one of a number of devices created to deal with transaction costs. See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 5-10 (1988). Consequently, he understands that if a so-called Coasean universe without transaction costs could be achieved, there would be no need for markets, "Markets are institutions that exist to facilitate exchange, that is, they exist in order to reduce the cost of carrying out exchange transactions. In an economic theory which assumes that transaction costs are nonexistent, markets have no function to perform . . . ." *Id.* at 7-8; see also Schroeder, *The End of the Market*, *supra* note \*, at 520-21.

9. See *infra* text accompanying notes 53-55.

10. 20 JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE* 1972-73, at 9 (Jacques-Alain Miller ed. & Bruce Fink trans., W.W. Norton & Co. 1998) (1975) [hereinafter LACAN, *SEMINAR XX*]; see also Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in LACAN AND THE SUBJECT OF LANGUAGE 49, 67-68 (Ellie Ragland-Sullivan & Mark Bracher eds., 1991); ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* 137 (1990).

11. See *infra* text accompanying notes 53-55.

This Article will show that law and economics's analysis of wealth and wealth maximization ostensibly privileges the masculine regime of possession and exchange and represses the feminine act of enjoyment, but that actual markets function only because of the continued hidden presence of the ghostly repressed feminine. Further, this Article compares the legal economic concept of wealth maximization with Georges Bataille's analysis of capitalism as the continuous postponement of the "sovereign" moment of enjoyment. Or, more accurately, wealth maximization reflects a characterization of enjoyment as drive, not desire. Drive is the idiotic satisfaction achieved through repetitive purposeless activity divorced from any attempt to achieve a goal.

First, this Article examines the scanty law and economics literature on the definition of wealth and wealth maximization in order to explore its implicit, if repressed, internal logic. This necessitates an examination of the subsidiary concepts of money and time, by which this Article shows that if wealth maximization were possible, it would have the Midas touch. This Article then turns to Lacanian-Hegelian theory to show why law and economics continues to make Midas's foolish decision not in spite of, but exactly because of, its self-destructive implications. Finally, this Article relates Ovid's second myth of Midas as a fitting coda. This story warns that the errors of wealth maximization theory cannot be avoided through a romantic rejection of market values in favor of the cultivation of immediate enjoyment. Romanticism, as the simple negation of wealth maximization, is its mirror image reflecting it back in inverted form. As an attempt to privilege the feminine and to repress the masculine, romanticism is as deluded, and lethal, as wealth maximization.

## II. DEFINING WEALTH

What distinguishes *avarice* (as a vice) from thrift (as a virtue) is not that avarice carries thrift *too far* but that avarice has an entirely different principle (maxim): that of economizing, not for the sake of *enjoying* one's wealth, but merely for the sake of *possessing* it, while denying oneself any enjoyment from it.<sup>12</sup>

### A. Introduction

The proposition that law should maximize wealth, most closely associated with Judge Richard Posner,<sup>13</sup> has consumed an enormous

12. IMMANUEL KANT, THE METAPHYSICS OF MORALS 404 n.65 (Henry E. Allison trans.), *quoted in* Henry E. Allison, KANT'S THEORY OF FREEDOM 168 (1990).

13. As Posner himself notes, wealth maximization has both positive and normative aspects. The former posits "that the common law is best understood on the 'as if' assumption that judges try to maximize the wealth of society." RICHARD A. POSNER, OVERCOMING LAW 172-73 (1995) [hereinafter POSNER, OVERCOMING LAW]. The latter

number of law review pages. Much of the critical literature concentrates on either the accuracy of the descriptive claim or the desirability of the normative one. Some question Posner's claim that wealth maximization cures the perceived flaws of utilitarianism or, indeed, differs in any fundamental way from utilitarianism.<sup>14</sup> Even some of the literature that accepts Posner's general economic approach disagrees with Posner's adoption of the Kaldor-Hicks definition of efficiency, as opposed to Pareto superiority.<sup>15</sup> Many of these are apt critiques worthy of scholarly expansion and elaboration.

This Article, however, aims to achieve something different and very specific. It is part of an on-going project of analyzing the underlying structure of a variety of legal and economic doctrines and schools of thought from the perspective of the philosophy of G.W.F. Hegel and the psychoanalytic theory of Jacques Lacan.<sup>16</sup> Although the analysis here is

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posits that "judges should interpret . . . antitrust statutes to make them conform to the dictates of wealth maximization." *Id.* at 173; see also Lewis A. Kornhauser, *Wealth Maximization*, in THE DICTIONARY OF LAW AND ECONOMICS 679 (1998). Even Posner now admits, "Not all questions that come up in law, however, can be effortlessly recast as economic questions." POSNER, *OVERCOMING LAW*, *supra* at 22 (discussing abortion specifically). "In recent years, Posner has weakened his claim from one that asserted that common law courts should be exclusively concerned with wealth maximization to one that asserts that wealth maximization is one of the values that common law courts ought to pursue." Kornhauser, *supra* at 682 (citations omitted).

14. See, e.g., Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 521 (1980) [hereinafter Coleman, *Efficiency*] ("Wealth maximization . . . is neither more defensible than utilitarianism nor is it an alternative efficiency criterion. Indeed it is not an efficiency criterion at all."); Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 603 (1980) [hereinafter Kornhauser, *Guide*] ("The only area in which wealth maximization escapes the condemnation accorded utilitarianism is in measurement. It is much easier to measure wealth than utility, although the need to hypothesize markets reveals that even wealth measurement is not without difficulty."). For an excellent critique of Posner's claim to distinguish wealth maximization from utilitarianism, see Robin F. Grant, *Judge Richard Posner's Wealth Maximization Principle: Another Form of Utilitarianism?*, 10 CARDOZO L. REV. 815 (1989).

15. For example, Guido Calabresi has traditionally adopted a Pareto standard, see, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972), although more recently he has questioned the utility of such an approach, see generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991). Because nothing in this Article turns on the difference between the different standards of efficiency, I will not discuss them in this Article. For a useful introduction to the various efficiency standards used in legal literature, see Jules L. Coleman, *Economics and the Law: A Critical Review of the Foundations of the Economic Approach to Law*, 1984 ETHICS 649 (1994).

16. I set forth my underlying theory of the relationship between property relations and sexuality in JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (1998) [hereinafter SCHROEDER, *THE VESTAL AND THE FASCES*]. I have applied this theory to an analysis of the perfect market in Schroeder, *The End of the Market*, *supra* note \*; to the theory of gifts in Schroeder, *Pandora's Amphora*, *supra* note \*; to the Calabresi-Melamed analysis of environmental

based on the critical theoretical tradition frequently associated with left wing or even Marxist economics, this analysis advocates free markets and does not critique capitalism per se. Hegelian philosophy argues that market transactions play a fundamental role in the development of subjectivity and the actualization of human freedom.<sup>17</sup> Indeed, contract is seen as a primitive form of “love”—the creative relationship in which each party sees in the other more than she is, enabling her to give back and become more than she has.<sup>18</sup> Nor does this Article deny that economics, or any other branch of knowledge, might have a useful role to play in jurisprudence or legal analysis. Consequently, the last section of this Article returns to an argument that has been developed elsewhere.<sup>19</sup> A simplistic romantic rejection of economic values and market relations is merely the mirror image of utilitarianism or wealth maximization that replicates its errors. This Article does, however, criticize much of the analysis associated with the self-described “law and economics” movement in the American legal academy generally, as well as that subsection of that movement that adopts some variation of the wealth maximization criterion. This Article instead examines the central concept underlying this scholarly debate over wealth maximization, which is also the *least* discussed in the literature: the definitions of “wealth” itself, and of its components, money and time.

The ideal of the perfect market, despite its centrality in one school of law and economics theory, has never been discussed in any detail.<sup>20</sup> Scholars tend to assume that the definition of the perfect market was both self-evident and non-controversial. As this author has argued elsewhere, one reason why scholars resist examining the perfect market is that on close examination it reveals itself to be as frightening as it is alluring. The perfect market is an impossible realm without any distinctions of time, space, subjectivity, objectivity—indeed, of no market exchange at all. The perfect market is located in the psychic order that Lacan called the real, while actual markets, like law, language and sexuality, are located in the symbolic.<sup>21</sup> In refusing to confront these alarming features of the perfect market, legal economic scholarship displays its “anxiety”—fear of getting too close to the real.<sup>22</sup>

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nuisances in Schroeder, *Three's a Crowd*, *supra* note \*; and to the relationship of subjectivity and objectivity in judging in Schroeder, *The Eumenides*, *supra* note \*.

17. See generally SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16.

18. See generally Schroeder, *Pandora's Amphora*, *supra* note \*.

19. See *id.* at 824-27, 839, 860-61, 883-84, 897-98.

20. See generally Schroeder, *The End of the Market*, *supra* note \*

21. See *id.* at 550-55. I discuss the concept of the “real” briefly *infra* in text accompanying notes 149-69, 194-200. I have given a more detailed account in Schroeder, *The End of the Market*, *supra* note \*, at 500-01, 510-13.

22. As explained by Lacanian philosopher Slavoj Žižek, “[A]nxiety occurs not when the object-cause of desire is lacking; it is not the lack of the object that gives rise to anxiety but, on the contrast, the danger of our getting too close to the object and thus



If the literature about the ideal of the perfect market is scant, it is positively voluminous when compared to that on the definition of wealth. Virtually all that is written about the subject is comprised of a few passing paragraphs in a small number of articles written by Posner and his critics in the early 1980s. Since that time, legal scholars have squared off as being either for or against the economic analysis of law promoted by Posner, apparently assuming that the underlying conception of wealth is itself as simple as it is coherent. A quick computer search will locate scores of articles that merely quote Posner's and then move on without further analysis of the definition itself.

A Lacanian analysis of these few cryptic discussions of wealth reveals that these concepts are paradoxical, if not impossible. Nevertheless, there are powerful psychoanalytical reasons why one is both drawn to the chimera of wealth, yet fears to examine it.

To maximize wealth is to achieve market perfection and, therefore, to merge into the deadly order of the real. This will never happen, however, because the concept of wealth includes two mutually inconsistent positions concerning money and time that replicate the two positions of subjectivity that Lacan identifies with the masculine and the feminine. In other words, the paradox of wealth maximization reflects the sexual impasse that characterizes all human relations. The two sexual positions, like the two concepts of money, paradoxically require and create each other, even as they can never exist simultaneously. It is this failure of sexual relations that maintains the symbolic order of language, law, and actual markets that prevent one from submerging in the deadly immediacy of the real of the perfect market and wealth maximization.

### *B. Definitions*

#### 1. WEALTH MAXIMIZATION AS CONSTRAINED UTILITARIANISM

Richard Posner, the foremost proponent of wealth maximization as an economic and legal goal, argues that his theory avoids the perceived problems of classic utilitarianism.<sup>23</sup> He calls his wealth maximization criterion a form of "constrained utilitarianism"<sup>24</sup>—a sort of conceptual plastic surgery that lopped off the grotesque features of utilitarianism

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losing lack itself." SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* 8 (1998) [hereinafter ŽIŽEK, *LOOKING AWRY*]. "[W]hat provokes anxiety is not the loss [of the object of desire], but, on the contrary, its very proximity." *Id.* at 146.

23. See Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103-05 (1979) [hereinafter Posner, *Utilitarianism*].

24. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 497 (1980) [hereinafter Posner, *Efficiency Norm*].

while preserving the attractive ones intact. Some critics argue that the line Posner attempts to draw between wealth maximization and utilitarianism is a distinction without meaningful difference in the sense that wealth maximization shares all of the perceived problems of utilitarianism identified by Posner.<sup>25</sup> This argument is beyond the scope of this Article.<sup>26</sup> Posner's claim will be taken seriously here because the secret to the deadly failure of wealth maximization lies precisely in the distinction that Posner tries to draw between it and utilitarianism—namely, wealth maximization's repression of enjoyment.

Other critics have argued that insofar as Posner is successful in distinguishing the two criteria, his surgery so mutilated the patient as to leave post-op wealth maximization more grotesque than pre-op utilitarianism.<sup>27</sup> For example, Ronald Dworkin has recognized that despite its problems, the basic premise of utilitarianism—one should work to increase happiness in the world—has great intuitive appeal.<sup>28</sup> If wealth maximization can be distinguished from utilitarianism, it is only because it lacks this one saving grace.<sup>29</sup> There is nothing intuitively appealing about the proposition that one should increase the amount of wealth in the world. It contradicts the intuition that wealth should only be desired instrumentally as a means of achieving other ends.<sup>30</sup> In the words

25. See *supra* note 14.

26. I am sympathetic to this argument, however; I have elsewhere described Posner as a utilitarian for the limited purposes of a specific analysis. See generally Schroeder, *Pandora's Amphora*, *supra* note \*.

27. See, e.g., Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 228 (1980) ("Wealth maximization is not a happy compromise between utilitarianism and Pareto superiority, a compromise which somehow retains the best and eliminates the worst features of these other two principles. If anything, just the opposite is true: wealth maximization exhibits the vices of both and the virtues of neither.").

28. See Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 200-01 (1980) [hereinafter Dworkin, *Is Wealth a Value?*]; see also Coleman, *Efficiency*, *supra* note 14, at 527 ("Unlike happiness or well-being, wealth is not something of intrinsic value.").

29. See Dworkin, *Is Wealth a Value?*, *supra* note 28, at 200 ("Once social wealth is divorced from utility, at least, it loses all plausibility as a component of value. It loses even the spurious appeal given to utilitarianism . . .").

30. See GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 210 (David Frisby ed. & Tom Bottomore & David Frisby trans., 2d ed. 1990) ("Money is the purest form of the tool . . . it is an institution through which the individual concentrates his activity and possessions in order to attain goals that he could not attain directly.").

In Dworkin's words, "Money or its equivalent is useful so far as it enables someone to lead a more valuable, successful, happier, or more moral life. Anyone who counts it for more than that is a fetishist of little green paper." Dworkin, *Is Wealth a Value?*, *supra* note 28, at 201. "If the pursuit of wealth is a good, it must be because pursuing wealth promotes other things of value." Coleman, *Efficiency*, *supra* note 14, at 527. "[S]imple 'desire for wealth' is not a meaningful starting point, because while one may be able to give meaning to a desire for happiness, say, apart from other characteristics, one cannot give meaning to 'wealth' and hence to a desire for wealth in such an abstract state."

of Richard Schmalbeck, "The problem [with wealth maximization], it seems, is that hardly anyone since King Midas has really believed that wealth is an ultimate goal."<sup>31</sup> This Article, while sympathetic to the critique that wealth maximization confuses means with ends, argues instead that the seeds of wealth maximization's doom lie in its chosen ends.

As Posner defines wealth maximization by contrasting it to utilitarianism, so the latter must be analyzed in order to understand the former.

## 2. DISTINGUISHING WEALTH MAXIMIZATION FROM UTILITARIANISM

Posner identifies utilitarianism as a philosophy—or at least a policy—that seeks to maximize the aggregate amount of happiness or "utility" in the world, understood as the surplus of pleasure over pain.<sup>32</sup> For the limited purposes of this Article, this is an adequate definition of utilitarianism.<sup>33</sup>

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Guido Calabresi, *About Law and Economics: A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553, 555 (1980) [hereinafter Calabresi, *About Law and Economics*]. "[E]ven with a starting point it is hard to see how an increase in wealth constitutes an improvement in a society unless it furthers some other goal, like utility or equality." *Id.* at 556. "[B]efore one can normatively employ the wealth-maximization criterion, one must show that wealth, as contrasted to utility for example, is a proper measure of value; or, at least, one must show that wealth is something that society, whatever its other concerns, should seek to increase." C. Edwin Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 939-40 (1980).

At least one supporter of Posner has defended wealth maximization on the grounds that wealth is not merely a value that can serve as an appropriate ends, but that properly understood, it is the only criterion of value. See D. Bruce Johnsen, *Wealth Is Value*, 15 J. LEGAL STUD. 263 (1986).

31. Richard Schmalbeck, *The Justice of Economics: An Analysis of Wealth Maximization as a Normative Goal*, 83 COLUM. L. REV. 488, 493 (1983) (reviewing RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981)).

32. See Posner, *Utilitarianism*, *supra* note 23, at 104. Posner writes: Utilitarianism, as ordinarily understood and as I shall use the term in this paper, holds that the moral worth of an action (or of a practice, institution, law, etc.) is to be judged by its effect in promoting happiness—"the surplus of pleasure over pain"—aggregated across all of the inhabitants . . . of "society"

. . . .  
*Id.* (footnotes omitted). Posner continues, "Happiness, utility, is maximized when people (or creatures) are able to satisfy their preferences, whatever those preferences may be, to the greatest possible extent." *Id.* at 111-12.

33. I accept this because the purpose of this Article is not to develop a correct account of utilitarianism, but rather to understand Posner's understanding of utilitarianism as a foil for wealth maximization. It is arguably an impoverished and inadequate account of this philosophy. For example, I read much of the economic literature as implicitly assuming that utilitarianism posits that individuals are atomistic, egoistic utility maximizers. In fact, utilitarianism is radically anti-individualistic because the utilitarian stands ready and willing to sacrifice his own individual utility for the sake of the aggregate utility of others.

Posner's formulation of wealth maximization is designed to avoid certain widely recognized problems of utilitarianism. Two classic criticisms of this notion of utilitarianism are the difficulty or impossibility of measuring utilities and the possibility of monstrous results.<sup>34</sup> The first problem relates to the suspicion (or assertion) that there is no way to know whether the pleasure or pain of any individual is commensurable with that of any other.<sup>35</sup> Consequently, there is no way to know whether subjective utilities will translate into a single objective standard. In the absence of such eommensurability, utilitarianism is impossible to apply. The second problem is that if the only standard to be applied is *aggregate* utility, then utilitarianism would support any number of monstrous institutions such as slavery or torture *if* it could be shown that aggregate pleasure experienced by the masters or sadists would exceed the pain suffered by the slaves and other victims.<sup>36</sup> Indeed, no proposal is off the table in utilitarianism. Utilitarianism stands ready to abolish itself if that would increase utility in the world.

The Posnerian "solution" to these problems is to sever the direct connection between the objective criterion to be maximized by society in the aggregate and the subjective enjoyment of society's members as individuals.<sup>37</sup> Rather than maximizing pleasure, wealth maximization, as its name implies, seeks to maximize the aggregate "wealth" of society. According to Posner, "Wealth is the value in dollars or dollar equivalents (an important qualification, as will be discussed shortly) of everything in society. It is measured by what people are willing to pay for something or, if they already own it, what they demand in money to give it up."<sup>38</sup> As

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34. See Richard A. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 251 (1980) [hereinafter Posner, *Value*] ("I reject utilitarianism because of its problems of measurement (how is one to measure subjective satisfaction objectively?), of boundaries (whose satisfactions are to count?), and of 'moral monstrousness' (how should we weight the satisfactions of the criminal and the unproductive?)."). The second problem raised by Posner regarding boundaries (must we include all feeling beings including sheep and rats in the utility calculus?) is beyond the scope of this Article because it does not directly relate to the definition of wealth.

35. See *id.* at 247 ("Partly because there is no common currency in which to compare happiness, sharing, and protection of rights, it is unclear how to make the necessary trade-offs among these things in the design of a social system. Wealth maximization makes the trade-offs automatically."); cf. Posner, *Utilitarianism*, *supra* note 23, at 115.

36. Posner calls this the problem of "moral monstrousness." Posner, *Utilitarianism*, *supra* note 23, at 115-17. Such historical institutions as slavery and ancient Roman gladiatorial contests indicate that some societies have made precisely this type of "monstrous" utilitarian calculus in the past.

37. Posner admits that wealth maximization might have an indirect relationship to enjoyment. See, e.g., Posner, *Value*, *supra* note 34, at 245 ("Of course, in [making certain arguments] I am 'hitching' wealth maximization to utility maximization, but I am willing to do this because happiness is one of the ultimate goods to which wealth maximization is conducive.").

38. Posner, *Utilitarianism*, *supra* note 23, at 119.

recapitulated by Dworkin, "Society maximizes its wealth when all the resources of that society are so distributed that the sum of all such individual valuations is as high as possible."<sup>39</sup> Although Posner seeks to distinguish his theory from utilitarianism by emphasizing wealth over utility, the use of money "as a proxy for utility"<sup>40</sup> dates back to Jeremy Bentham, the founder of modern utilitarianism. As Ian Shapiro explains, however, "whereas Bentham saw preserving abundance as one necessary condition for maximizing utility," Posner's wealth maximization criterion makes "any connection with happiness purely contingent."<sup>41</sup>

Posner presents wealth maximization's estrangement from enjoyment as a mark of its ethical superiority over utilitarianism. "What is missing from utilitarianism is any very direct concern with the productive side of human activity; all the focus is on the consuming, the appetitive . . . . Wealth maximization reverses the order, and this is a mark in its favor."<sup>42</sup> Indeed, one of the problems with utilitarianism, according to Posner, is that if entitlements were assigned on the basis of pleasure, "[p]eople would cultivate the faculty of enjoyment rather than of hard work."<sup>43</sup> Indeed, he finds it "odd to give consumption moral precedence over production, to sacrifice the frugal for the pleasure-loving."<sup>44</sup> Posner does not, however, adopt a neo-Marxian labor theory that locates the source of value in production. Rather, Posnerian value is created entirely through exchange:

To summarize, the wealth-maximization principle encourages and rewards the traditional "Calvinist" or "Protestant" virtues and capacities associated with economic progress. It may be doubted whether the happiness principle also implies the same constellation of virtues and capacities, especially given the degree of self-denial implicit in adherence to them. Utilitarians would have to give capacity for enjoyment, self-indulgence, and other hedonistic and epicurean values at least equal emphasis with diligence and honesty, which the utilitarian

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39. Dworkin, *Is Wealth a Value?*, *supra* note 28, at 192.

40. Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1002 (1987).

41. *Id.*

42. Richard A. Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 97 (1985) [hereinafter Posner, *Wealth Maximization Revisited*]. Elsewhere he has written:

Utilitarianism can be purged of its absurdities by the substitution of wealth for happiness as the social maximand. This substitution excludes the claims of the unproductive and thus gets rid of the thief, the "utility monster," and other unappealing claimants to whom the strict utilitarian must, however reluctantly, give ear.

Posner, *Value*, *supra* note 34, at 248.

43. Posner, *Wealth Maximization Revisited*, *supra* note 42, at 93.

44. *Id.* at 97.

values only because they tend to increase wealth and hence *might* increase happiness.<sup>45</sup>

One should not assume from this definition, however, that Posner limits "wealth" to what a lay person would think of as economic goods traded in the market. Rather, his definition includes any good thing, tangible or intangible, that a member of society would be willing to pay to have, or would have to be paid to be willing to give up.<sup>46</sup> Consequently, it is not necessary for there to be an explicit market for the good thing.<sup>47</sup> As Posner states: "Even today, much of economic life is organized on barter principles; the 'marriage market,' child rearing, and a friendly game of bridge are some examples. These services have value which could be monetized by reference to substitute services sold in explicit markets or in other ways."<sup>48</sup>

In the absence of actual markets, Posner argues, monetary value of other good things can be determined by reference to hypothetical markets, although these should be used sparingly for practical reasons.<sup>49</sup> Posner asserts:

Since, however, the determination of value (that is, of willingness to pay) made by a court is less accurate than that made by a market, the hypothetical-market approach should be reserved for cases, such as the typical accident case, where market-transaction costs preclude use of an actual market to allocate resources efficiently.<sup>50</sup>

The fact that any and all good things a person might want—as opposed to those things exchanged in explicit markets—could be included in the maximand would risk reducing wealth maximization to utilitarianism but for one important restraint:

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45. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 68-69 (1981) (footnote omitted).

46. See ERIC RAKOWSKI, *EQUAL JUSTICE* 202 (1991) ("A person's wealth includes not only those goods, rights, or services that he could sell on an established market, but also those objects of value, such as friendship or free time, that could conceivably be monetized.").

47. See Johnsen, *supra* note 30, at 268. Johnsen writes: Posner defines value as willingness to pay. To be exact, value is defined as willingness to forgo other valued goods. The distinction is far from trivial since much of what an individual forgoes in competing to establish exclusive use of valued goods is not always transferred to others as payment; rather, it may be dissipated.

*Id.*

48. Posner, *Utilitarianism*, *supra* note 23, at 120.

49. See *id.*

50. *Id.*

The difference between wealth and utility is that wanting something very much, but not being able to pay more for it than its owner or competing demanders, does not establish a claim to a good in a system of wealth maximization, although it might do so in a system of utility maximization. Wealth maximization thus excludes claims based on pure desire—claims not backed up by willingness (implying ability) to pay.<sup>51</sup>

In other words, for a preference to be counted in a wealth maximization regime, it is not enough that an object of desire would make a member of the relevant population more happy or that the member be able to monetize his desire or even that he be theoretically willing to pay for it. The member must also actually *be able* to pay for it.<sup>52</sup> Wealth maximization thereby severs the direct relationship between society's members and their enjoyment of the objects of desire, and replaces it with possession of the means of exchange and the ability to engage in exchange.<sup>53</sup> Although the concept of being able to "pay for something" seems simple and intuitive at first blush, upon further examination it is complex and paradoxical.

### 3. VOLUNTARISM AND INEFFICIENT MARKETS

Wealth maximization is not a rights-based philosophy. Unlike, for example, Lockean libertarianism and Kantianism, wealth maximization does not make an a priori argument in favor of property rights and liberty, or out of duty to the moral law. Nevertheless, in his early work Posner argued that wealth maximization could be expected to support the voluntary transactions and relatively free markets intuitively favored by libertarians, albeit for pragmatic, rather than foundationalist, reasons.

Wealth maximization seeks to allocate goods to the highest valuing user. This goal is, therefore, dependent on the individual subjectivity of each member of society. In this respect, wealth maximization is similar to

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51. Posner, *Value*, *supra* note 34, at 243 (footnote omitted).

52. See Dworkin, *Is Wealth a Value?*, *supra* note 28, at 209. Dworkin writes: Posner is very strict about how economic analysis must understand the verb "to value." Someone values something more than someone else (and the system of economic analysis depends on this) only if he is willing (and able) to pay more for it. If (for reasons other than market imperfections) the natural owner is unable to pay what the owner of the right would take, then he does *not* value it more.

*Id.*

53. Simmel, writing at the beginning of the twentieth century, anticipated this concept of money when he stated: "[M]oney has no inherent relation to the specific purpose the attainment of which it aids. Money is totally indifferent to the objects because it is separated from them by the fact of exchange. What money mediates is not the possession of an object but the exchange of objects." SIMMEL, *supra* note 30, at 211.

utilitarianism. But this is problematic in light of Posner's assumption that one can never directly know the private, subjective valuation of another person, let alone make a comparison.<sup>54</sup> Consequently, Posner champions wealth maximization over utilitarianism partly because the former supplies a universal standard of measurement to use to determine whether resources have been allocated efficiently. But having a standard does not alone solve the problem of measurement. One must also have a methodology for applying the standard to the thing to be measured. The paradox of wealth maximization that this Article shall explore is that while Posner purports to find an "objective" standard of measurement, the thing to be measured is still the "subjective" valuation of market participants.

According to Posner, voluntary market transactions in a perfect market—in which each market participant must individually translate her own subjective valuation into the objective standard of exchange value—serve an important evidentiary function.<sup>55</sup> The fact that two fully informed participants engage in an efficient market contract to a transfer is more than mere evidence that the purchaser values the object transferred more than the seller.<sup>56</sup> It is the definition of what market preferences are. Unfortunately, no actual markets are perfect. Even if the two parties to an exchange could correctly measure their own valuations in the object exchange, two-party transactions inevitably create externalities so that the aggregate wealth of society as a whole might, in fact, be diminished, rather than increased, by the transfer. But Posner nevertheless proposes that voluntary transfers are the best evidence of wealth maximizing activity and that, coincidentally, favoring contractual transfers also has the advantage of serving the intuitively attractive goals

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54. Indeed, the psychoanalytic theory of the subconscious would suggest that we can never even be sure of our own subjective valuations.

55. See Dworkin, *Is Wealth a Value?*, *supra* note 28, at 197 ("It is true that Posner and others recommend market transactions except in cases in which the transaction costs . . . are high. But it is crucial that they recommend market transactions for their *evidentiary* value.").

56. The alternate device of adopting legal rules that "mimic" market transactions is consistent with wealth maximization principles but is not to be favored for practical reasons. Posner writes:

A coerced exchange, with the legal system later trying to guess whether the exchange increased or reduced efficiency, is a less efficient method of allocating resources than a market transaction—where market transactions are feasible. But often they are not, and then the choice is between a necessarily crude system of legally regulated forced exchanges and the even greater inefficiencies of forbidding all forced exchanges, which could mean all exchanges, as all have some third-party effects.

RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 15 (Richard A. Epstein et al. eds., 4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*].



of autonomy and negative freedom.<sup>57</sup> As this Article shall discuss,<sup>58</sup> Posner's analysis, in fact, goes beyond assigning a mere evidentiary function to exchange. Not merely actual subjective use value, but enjoyment itself, is excluded from his system so that exchange value becomes the *only* criterion of value that wealth maximization can recognize.<sup>59</sup> Use value is implicitly excluded.

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57. In his early work in which he tried to justify wealth maximization on moral grounds, Posner argued that his theory was consistent with traditional Kantian consent theory. See Posner, *Efficiency Norm*, *supra* note 24. But Posner's concept of "consent" is hypothetical rather than express. After all, common law rules are announced by judges rather than enacted by unanimous acclamation of those acted by them." Kornhauser, *Guide*, *supra* note 14, at 681. But even early Posner maintained that "[v]oluntariness is, however, too restrictive a condition to impose on the wealth-maximization criterion." Posner, *Utilitarianism*, *supra* note 23, at 130.

As the quote at the head of this Part indicates, Posner's economic approach is antithetical to Kantian ethical philosophy by definition. Kantian ethics insist on a total divorce between the good (substantive results) and the right. The rational person obeys the internal call of the moral law purely out of a freely accepted duty, not for substantive (pathological) reasons and without regard for the consequences. Kant defined action taken in accordance with pathological maxims (such as wealth maximization) rather than with the ethical maxim (the categorical imperative) as "radical . . . evil." IMMANUEL KANT, *Religion Within the Boundaries of Mere Reason*, in *RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS* 31, 52-61 (Allen Wood & George Di Giovanni eds. & trans., 1998). This is true even if the action taken in fact corresponds to that demanded by the moral law because this correspondence is purely coincidental. See *id.*; Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?* CAL. L. REV. (forthcoming 1999) (book review). If Posner had been successful in showing that his radically consequentialist analysis would result in the same proscriptions as Kant's radically anti-consequentialist moral philosophy, it would have been an intellectual triumph approaching Jacques Lacan's tour de force in showing that if one were to read Kant along with his notorious contemporary, the Marquis de Sade, one could argue that Kant's concept of pure morality is indistinguishable from his definition of pure or diabolical (as opposed to radical) evil. See Jacques Lacan, *Kant with Sade*, 51 OCTOBER 55 (James B. Swenson, Jr. trans., 1989); 7 JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: THE ETHICS OF PSYCHOANALYSIS 1959-1960*, at 76-80 (Jacques-Alain Miller ed. & Dennis Porter trans., W.W. Norton & Co. 1992) (1986) [hereinafter LACAN, *SEMINAR VII*].

58. See *infra* text accompanying notes 78-113, 264-68.

59. This, of course, raises one of the most common criticisms of the wealth maximization criterion. The proposition that voluntary transfers are favored by wealth maximization only instrumentally as a means toward the end of efficient transfers, coupled with the dependency of voluntary transfers on the relative efficiency of the empirical market for their evidentiary function, raises questions as to the practicality and intuitive attractiveness of wealth maximization as a criterion when significant transaction costs or other forms of market failure exist. If transfers in a perfect market are equivalent to Kaldor-Hicks efficiency transfers, then wealth maximization would suggest that the law should not support just any voluntary transfers in an imperfect market, but rather only transfers that the approximate transfers that *would* hypothetically occur in a perfect market. Those who favor voluntarism per se (either on the philosophical grounds that autonomy is a fundamental right or on the practical grounds that even imperfect involuntary transactions still serve some evidentiary function of revealing the preferences of the parties), seek legal devices that may either reduce potential transaction costs or

## 4. HYPOTHETICAL MARKETS AND AUCTIONS

Before this Article continues, an aside is necessary as to the context of the discussions that will be analyzed. In the early 1980s, Posner replied to criticism from moral philosophers by arguing that wealth maximization would, in fact, be expected to yield results that were consistent with the moral intuitions of his critics.<sup>60</sup> Wealth maximization would generally support contractual transactions over forced reallocations of resources, protect traditional property rights and criminalize theft, support personal freedom and prohibit slavery, and protect a woman's sexual autonomy and criminalize rape. It is in connection with this discussion that Posner and his critics discussed their implied definition of wealth.<sup>61</sup>

One such moment in Posner's writing is his attempt to appease libertarian intuitions by showing that a wealth maximization regime

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cause the participants to act in ways that mimic the actions they would take in a perfect market, such as forcing them to reveal information about their preferences, or otherwise prevent them from exploiting market imperfections through strategic behavior. The true wealth maximizer, however, would also support a legal regime that enforced involuntary transfers if they could be shown to be efficient. This argument has been made eloquently elsewhere, see, e.g., Dworkin, *Is Wealth a Values?*, *supra* note 28, at 196-98; Ronald Dworkin, *Why Efficiency? A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563, 574-75 (1980), and will not be explored further here. In any event, Posner has finally granted the force of the rights-based critique and therefore no longer purports to defend wealth maximization on the grounds that it leads to the same results as libertarianism. See *infra* text accompanying notes 61.

60. See Posner, *Efficiency Norm*, *supra* note 24; Posner, *Utilitarianism*, *supra* note 23; Posner, *Wealth Maximization Revisited*, *supra* note 42; Posner, *Value*, *supra* note 34. These discussions were later rewritten and published as a chapter in POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45.

61. Recently, in two Holmes lectures delivered at Harvard Law School, Posner has partially renounced his earlier position. He now concedes that legal and public policy decisions cannot be justified by moral theory. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669-70 (1998). These lectures form the basis of RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999). Posner has not, however, rejected an economic analysis of law. Rather, he continues to support economic analysis on the grounds that it is a form of pragmatic reasoning—a tool for achieving society's goals, whatever they might be. See, e.g., *id.* ("What the economist can say, which is a lot but not everything, is that if a society values prosperity (or freedom or equality), these are the various policies that will conduce to that goal . . ."); see also POSNER, *OVERCOMING LAW*, *supra* note 13, at 15-17 (identifying economic reasoning as a form of pragmatism). He continues to apply the standard of wealth maximization in his legal analysis. See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 56, at 14-15, 17.

Insofar as he still supports wealth maximization, however, he still requires a definition of wealth. As far as I am able to determine from his recent work, Posner has not attempted to reformulate his definition of wealth. Consequently, I believe these early articles that introduce wealth maximization analysis remain a valid indicator of Posner's implied definition of wealth.

would support freedom on the grounds that, in the state of nature, slaves could be expected to purchase their freedom.<sup>62</sup> Libertarians, following Locke, start with the intuition that each individual has the natural right to own her self and the products of her labor.<sup>63</sup> In other words, nature demands that society prohibit slavery and protect property rights. Posner, who does not base his theory on a notion of natural rights but on wealth maximization, must try to justify this regime through instrumental

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62. A literal-minded approach to a libertarian conception of deserts would lead to a form of economic montanism whereby no present allocation of resources today would be justified unless one could trace it back through an unbroken string of legitimate transfers to a legitimate first acquirer. Indeed, some radical libertarians seem to adopt something close to this extreme view. See, e.g., ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 150-53, 174-82 (1974). As this is clearly impossible as a practical matter, wealth maximizers seek to develop some other basic principles of allocation and transfer.

Posner in effect argues that the Coase Theorem obviates the libertarian's preoccupation with initial legitimate acquisition. As is well known, the Coase theorem is usually read to say that in a world without transaction costs, the initial allocation of resources is irrelevant because all parties will immediately contract to reallocate resources in an efficient manner.

In Posner's formulation, "[I]f transaction costs are low, the law's assignment of rights and liabilities is unlikely to affect the allocation of resources significantly . . . ." POSNER, *OVERCOMING LAW*, *supra* note 13, at 406-07. What Coase actually said was, "It is always possible to modify by transactions on the market the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production." R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

As I have argued in Schroeder, *The End of the Market*, *supra* note \*, at 521, 526-27, this famous passage by Coase is typically taken out of context (as Posner does in the passage quoted) and used as support for a position that is diametrically opposed to Coase's point. Rather than positing that the initial allocation of legal rights could be made immaterial if the market could be made more efficient, Coase says that the initial allocation of legal rights is always crucial because it is impossible to eliminate transaction costs and one cannot predict a priori what the empirical effect of the reduction of any one transaction cost might be.

Nevertheless, based on his misreading of the Coase Theorem, Posner believes he can legitimately skip the libertarian's founding assumptions as to property rights and allocate resources in the hypothetically most efficient manner, since this is the way resources would eventually be allocated in any event. In this way Posner tries to argue that wealth maximization is consistent with Lockean or Kantian consent theory even though it assigns property without actual consent:

If there is no reliable mechanism for eliciting express consent, it follows, not that we must abandon the principle of consent, but rather that we should look for implied consent, as by trying to answer the hypothetical question whether, if transaction costs were zero, the affected parties would have agreed to the institution.

Posner, *Efficiency Norm*, *supra* note 24, at 494.

63. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. 2 § 27 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (1690) ("[E]very Man has a *Property* in his own *Person*. . . . Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

reasoning through reference to a hypothetical market.<sup>64</sup> Moreover, because Posner is not a utilitarian, it will not be enough to argue that each man values his own freedom more than any other man values his servitude. To argue that wealth maximization would support freedom, Posner must also show how each individual would be able to outbid every potential rival for his freedom.

Posner initially posited that each individual's labor can, as a general rule, be expected to be worth more (to generate a larger income stream) in the hands of the individual laborer than it would if held by a "master" who owned that individual as a "slave."<sup>65</sup> This is because it is empirically observable (and consistent with an understanding of human nature) that people are willing to work harder when they own the fruit of their labors and more likely to slack off when others own the fruit. Consequently, in a hypothetical auction market, the average individual can be expected to try to outbid any other potential claimant to purchase himself.<sup>66</sup>

At first blush, one may be tempted to object that this result will not come about given the criterion that a valuation will only be recognized if the bidder is *able* to pay the purchase price. One may assume that by definition a slave always will be impoverished because anything the slave claims as property must necessarily ultimately belong to his master. This would seem to suggest that the master must always have the ability to outbid the slave and preserve the status quo.

This conclusion does not, however, consider that wealth maximization analysis refers not merely to actual markets, but also to hypothetical markets. To understand Posner's argument one must, therefore, consider the radical conditions of Posner's hypothetical.

First, because the issue of freedom versus slavery relates to the establishment of basic rights, the hypothetical auction must be held before the establishment of the state—that is, the state of nature, prior to the allocation of resources. In other words, before the auction, neither the

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64. See Posner, *Utilitarianism*, *supra* note 23, at 127 ("The rights derived from economic theory are not, to be sure, bestowed by God or otherwise transcendental; they are 'mere' instruments of wealth maximization.").

65. See *id.* at 125 ("If assigned randomly to strangers these rights [that is, the right of a worker to sell his labor, and the right of a woman to determine her sexual partners] would generally (not invariably) be repurchased by the worker and woman respectively.") Because Posner is trying to establish generally applicable principles or default rules, he needs only to posit how people can be expected to act on the average, not how each individual would actually act in any given case.

66. As I have stated, Posner no longer tries to justify wealth maximization on the grounds that it can be expected to yield results that are attractive to our moral intuitions. It is, therefore, unclear whether he still holds to his assumption as to the relative value of a person's labor if free or if enslaved. This assumption is not necessary for a description of how a hypothetical auction would work, merely to the outcome of any specific hypothetical auction. Consequently, we might, for example, posit that because free men have a taste for leisure, slaves might be expected to be more productive, in which case the hypothetical auction would continue as described, but the master would win.

potential slave nor the potential master own any property or money whatsoever—neither owns the “slave’s” productive capacity. All potential property in the state of nature—including each person’s productive capacity—is held contingently by a hypothetically perfect auctioneer who will auction off all entitlements.<sup>67</sup> Consequently, the “slave” will not attempt to purchase his freedom from his “master.” Rather, the potential master will bid for the right to be a master, and the potential slave will bid for his freedom. This means it is potentially misleading to refer to the participants in the auction as “slave” and “master,” because these terms presuppose that the “master” will win the bid and become the owner of the “slave’s” productive capacity. Indeed, in the state of nature each man simultaneously bids for the productive capacity of every other man so that any man may become a slave, a master owning a man as his slave, or a freeman who owns no slaves. Nevertheless, this Article shall follow Posner and Dworkin in calling one participant the “slave” and one the “master” to avoid more awkward alternatives.

Second, since this is a hypothetically “perfect” market, all market participants must have perfect knowledge of all relative information.<sup>68</sup> This includes knowledge not only of the relative subjective valuations of all the market participants but also the objective future income stream that each market participant would be able to earn from owning the disputed object.

Third, because neither the potential slave nor the potential master own any property before the auction, each must borrow the purchase price he is willing to pay for the slave’s productive capacity.<sup>69</sup> This being a perfect market, there can be no barriers to financing efficient transactions. Consequently, the theoretically perfect auctioneer (or some hypothetically perfect banker) is ready, willing, and able to make a “purchase money” loan<sup>70</sup> to the higher-bidding (or higher profit-making) user in an amount

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67. See *infra* note 142-44, and text accompanying notes—for a brief discussion of the problems of circularity engendered by this assumption.

68. See Schroeder, *The End of the Market*, *supra* note \*, at 532-34 (discussing the idea that perfect information is one of the conditions of the perfect market).

69. Actually, if one really took Posner’s perfect market assumptions seriously there would be no need for such purchase money financing. As I shall discuss, one of the conditions of the perfect market is that there is no time. See *infra* text accompanying notes 115-17, 287-89; see also Schroeder, *The End of the Market*, *supra* note \*, at 534-56. The winning bidder would, therefore, receive the income attributable to the slave’s labor instantaneously upon the assignment of the entitlement of his labor to the bidder. The bidder would, therefore, be able to pay the purchase price in cash. Since neither Posner nor his critics have realized this implication of perfect market theory, I will not discuss it in the text. Nevertheless, the true purpose of including an auctioneer in the hypothetical is not to provide financing, but to ensure that use value (enjoyment) is not part of the calculation of bids. See *infra* text accompanying notes \_\_\_\_.

70. A purchase money loan is a loan advanced for the purpose of allowing the borrower to acquire rights in an object. See, e.g., U.C.C. § 9-103(b) (1999). As in the

equal to his valuation secured by a security interest in the future income stream to be earned by the bidder through exploitation of the object being auctioned.<sup>71</sup> In other words, the ability of each participant to bid will not be based on his wealth prior to the auction (because no man has any wealth before the auction), but rather on the predicted future wealth that which he would have if he were to win the auction.

If, as Posner assumes, the potential "slave" is expected to earn more from his labor if he were the owner than the potential master would earn from the slave's labor, the auctioneer would be willing to make a larger

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hypothetical, purchase money loans are typically secured by a "purchase money security interest" in the property acquired.

71. Neither Posner nor Dworkin discuss the express terms of the auction, but they both implicitly assume that the parties have to borrow the purchase price of the entitlement auctioned. For example, Posner cites the lack of an efficient credit market for human capital as a high transaction cost that justifies our allocation of individuals' productive capacity and access to feminine sexuality by law, rather than leaving this matter to the market:

No doubt the inherent difficulties of borrowing against human capital would defeat some efforts by the natural owner to buy back the right of his labor or body even from someone who did not really value it more highly than he did—but that is simply a further reason for initially vesting the right in the natural owner.

Posner, *Utilitarianism*, *supra* note 23, at 125-26 (footnote omitted). In other passages Posner refers to the financing of the slave's ransom for her freedom by purchase money lending:

Suppose the value of her output to [her master] is \$1 million, but if she were free she could produce [economic activity] worth \$1.2 million in the same amount of time . . . . Then presumably she could produce [economic activity] worth \$1 million in less time and have time left over for [leisure activity]. If so, she could and would buy her freedom. Having done so, she will be worse off than if she had been free from the outset (she owes \$1 million, plus interest, to whoever financed the purchase of her freedom). But that is not the point. The point is that wealth maximization leads to a determinate solution in the [slave-master] case once it is assumed that she could produce more if she were free than if she were a slave. Since she would retain her freedom if given it from the first and would purchase it if she began as [her master's] slave, the initial assignment does not determine the final assignment.

Posner, *Value*, *supra* note 34, at 246-47.

Anthony Kronman has deduced a description of the Posnerian auction similar to mine:

Let us assume the auctioneer is prepared to extend credit to each of the bidders by assigning them rights before the rights have been paid for (in the same way a seller of goods might extend credit to his buyer). Of course, the amount of credit the auctioneer extends to a particular bidder bidding on a particular entitlement will depend upon the auctioneer's estimate of the magnitude of the income which the asset in question is likely to generate if its ownership is given to that bidder rather than another. Thus, for example, *on the assumption that X's labor power will generate more revenue if he is its owner rather than someone else* (because of well-known difficulties involved in the extraction of slave labor), X will receive a larger loan from the auctioneer and will, therefore, be able to outbid his competitors and obtain the entitlement himself.

Kronman, *supra* note 27, at 240-41.

loan to the slave than to the master, enabling the slave to win the auction. Consequently, wealth maximization suggests that freedom to own the fruits of one's own labor would be the default rule in an efficient society.

This brief introduction raises many issues for this analysis to address, including the question of what it means to bid in the state of nature before one has any assets to bid, and why the freedman would not be equally as likely to cheat his creditor as he would to cheat his master. This Article shall return to this hypothetical and its implications when Posner's repression of enjoyment is discussed in more detail,<sup>72</sup> but from this hypothetical it is possible to tease out the definition of wealth that underlies Posner's work.

### 5. MONEY

To analyze the definition of wealth implicit in the slavery parable, one must also uncover the implicit definitions of money and time beneath it. The necessity to examine money should be obvious: If wealth is to be measured only in terms of money or money's worth, there must be a conception of money. Wealth is not the same thing as money, however.<sup>73</sup> "[M]oney . . . is . . . just a measure of one's entitlement to houses, cars, rewarding work, leisure, privacy and countless other 'things' that constitute a person's wealth."<sup>74</sup>

Even though Posner speaks of wealth in terms of "value in dollars or dollar equivalents,"<sup>75</sup> Posner obviously is not proposing that money can be reduced to any specific currency. Otherwise, as has been suggested by Jules Coleman, wealth maximization would support scarcity or other economic policies that would increase the price of goods.<sup>76</sup> Rather, Posner insists that "value is not the same thing as price."<sup>77</sup>

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72. The libertarian objection to this proposition should be obvious. The libertarian believes the rights to liberty and property are natural and inviolate. The wealth maximizer supports liberty and property only contingently as a means of achieving efficiency. If, for example, one could empirically falsify Posner's hypothesis that in the vast majority of cases each individual's labor would be worth more in the hands of the individual than in someone else's hands, then wealth maximization would no longer support liberty and property. In other words, under wealth maximization, liberty and property are not so much "rights" but temporary accommodations. I will return to the example of slavery but critique it from within Posner's own assumptions.

As Shapiro correctly states, "There is in fact no particular reason to respect property rights at all from the standpoint of this radically consequentialist ethic; if state ownership of the means of production could be shown to maximize overall wealth it should be preferred on [Posner's] theory." Shapiro, *supra* note 40, at 1006.

73. See Posner, *Wealth Maximization Revisited*, *supra* note 42, at 85-86.

74. *Id.* at 86.

75. Posner, *Utilitarianism*, *supra* note 23, at 119.

76. See Coleman, *Efficiency*, *supra* note 14, at 524. Coleman writes: Because the principle of wealth maximization necessarily involves the existence of prices, a proponent of wealth maximization would have to

Instead, as the language quoted earlier<sup>78</sup> suggests, “money” stands for the general concept of a neutral measure of the comparative valuation of the goods in society that may be stated in terms of a currency, such as dollars.<sup>79</sup> Consequently, Posner states that “when [he] used money as a component of wealth . . . it was[] just as a shorthand for the things money can buy.”<sup>80</sup>

Posner describes shadow prices and hypothetical markets as tradeoffs. Consequently, this neutral measure called money is equivalent to “exchange value.” He describes wealth maximization as a normative policy that helps “people make correct . . . judgments by pointing out how much of one value, economic welfare, they must give up to attain another.”<sup>81</sup> He describes wealth in terms of “what people are willing to pay for something or, if they already own it, what they demand in money to give it up.”<sup>82</sup> Economic goods not traded in actual markets “have value which could be monetized by reference to substitute services sold in explicit markets or in other ways.”<sup>83</sup>

In other words, money is another term for value understood as that which one would give or accept in exchange for an object. As sociologist Georg Simmel argues in his *Philosophy of Money*:

[M]oney has been defined as ‘abstract value.’ . . . [M]oney is the substance that embodies abstract economic value. . . . If the economic value of objects is constituted by their mutual relationship of exchangeability, then money is the autonomous expression of this relationship. . . .

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condemn as wealth reducing any recommendation to eliminate scarcity. Prices, after all, are necessary only in so far as scarce goods must be allocated. The elimination of scarcity eliminates the need for prices. The elimination of scarcity eliminates prices and, therefore, wealth.

*Id.* Despite the flippancy of his comment, Coleman intuits the point I make later in this Article: If one takes the logic of wealth maximization to its logical extreme, and if the perfect market were achieved and wealth maximized, wealth would immediately evaporate. See *infra* text accompanying notes 95-113; see also David Gray Carlson, *Secured Lending as a Zero-Sum Game*, 19 CARDOZO L. REV. 1635, 1703 (1998) (“[I]ncreased price as such cannot be taken as a wealth gain in any case. If it did, famine would be efficient because it raises the price of corn.”).

77. POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 60.

78. See *supra* text accompanying notes 74.

79. See Johnsen, *supra* note 30, at 270 (“Dollars or dollar equivalents provide a convenient way of expressing the measurement. They serve as a common denominator of value.”).

80. *Id.* at 87.

81. Posner, *Utilitarianism*, *supra* note 23, at 109-110.

82. *Id.* at 119.

83. *Id.* at 120.



The money price of a commodity indicates the degree of exchangeability between this commodity and the aggregate of all other commodities.<sup>84</sup>

Simmel continues, "Money is simply 'that which is valuable', and economic value means 'to be exchangeable for something else.'"<sup>85</sup>

This concept of money/value is the corollary to the familiar economic doctrine that all costs can be analyzed in terms of opportunity costs. If costs are the existence of foregone alternatives, then value is the existence of acceptable alternatives.<sup>86</sup> In other words, value is the absence and cost is the presence of a better alternative.

Note that despite his claim that wealth maximization favors productive activity,<sup>87</sup> Posner does not, in fact, adopt a labor or other theory of value that sees production as the source or measure of value.<sup>88</sup> Rather, value is created only in exchange.

Money understood as the repository of value has no characteristics of its own. It is a purely transparent mediator of exchange. Money is pure negativity in the Hegelian sense of that term.<sup>89</sup> Value is defined not in terms of what it is, but in terms of what it is not—the alternative for which it can be traded. In Lacanian terms, money so conceptualized is a "master signifier."

Elsewhere, however, Posner seems to give money an affirmative character—to treat it as a repository of use value in addition to exchange value. Specifically, he claims to include consumer surplus within his definition of wealth.<sup>90</sup> Consumer surplus is the amount by which a person subjectively values her property, such as her house, over the market price.

84. SIMMEL, *supra* note 30, at 120. As Mark Hager has noted, "This neoclassical market model stresses that wealth is created in the sphere of circulation, not production." Mark M. Hager, *The Emperor's Clothes Are Not Efficient: Posner's Jurisprudence of Class*, 41 AM. U. L. REV. 7, 31 (1991) (citation omitted). Unfortunately, Hager draws from this correct characterization the non sequitur that Posnerian wealth maximization would support an increased number of exchanges. *See id.*

85. SIMMEL, *supra* note 30, at 121.

86. *See* GEORGE J. STIGLER, *THE THEORY OF PRICE* 112 (4th ed. 1987); Schroeder, *The End of the Market*, *supra* note \*; *see also* SIMMEL, *supra* note 30, at 80 ("Value is determined not by the relation to the demanding subject, but by the fact that this relation depends on the cost of a sacrifice which, for the other party, appears as a value to be enjoyed while the object itself appears as a sacrifice.").

87. *See supra* text accompanying notes 42-45.

88. I compare Posner's theory of value to Simmel's because Simmel, writing in Germany at the turn of the nineteenth century, offers his theory of value as exchange as an alternative to Marx's labor theory of value. Surprisingly, even though he started from a different definition of value than Marx, Simmel came to a conclusion similar to Marx's that the cash nexus does away with difference and turns all objects into interchangeable objects leading to the alienation of subjects. *See infra* note 120 and text at notes 118, 250.

89. *See infra* text accompanying notes 239-49.

90. *See* POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 56, at 16; Posner, *Wealth Maximization Revisited*, *supra* note 42, at 88-89.

When an individual does not sell a good at the prevailing market price, she must subjectively value the good at least as much, if not more, than the objective, exchange value.

How to reconcile these two different concepts of value/money? As this Article shall discuss in detail below,<sup>91</sup> although Posner gives lip service to enjoyment indirectly in his references to consumer surplus, wealth maximization is incapable of acknowledging use value directly. The subjective valuation of any member of society is only given recognition if, and only if, she can translate it into the objective valuation of the market, exchange value. And as shall become apparent when this Article returns to Posner's analysis of slavery and adds his analysis of rape,<sup>92</sup> no market participant is ever permitted to enjoy her goods. She must exploit them commercially and only temporarily possess goods in anticipation of future exchange to produce a future income stream. Consequently, Posner asserts that one's buying capacity almost always springs from productive activity, either by the buyer or her ancestors.<sup>93</sup>

This assertion seems, at first blush, to be inconsistent with Posner's insistence that wealth includes enjoyment in the form of consumer surplus. If one already owns an object, such as a house, should one not be able to increase one's consumer surplus—and society's wealth—by increasing one's use value of the house? For example, one could learn to cook, take up gardening, or otherwise cultivate the domestic arts that give one pleasure in the home. Yet, Posner condemns incentives toward hedonism as the vice of utilitarianism that wealth maximization must stamp out (the cultivation of the faculty of enjoyment). In the hypothetical that Posner and Dworkin use to debate the wealth-maximization analysis of slavery discussed later in this Article,<sup>94</sup> Posner treats the pleasures of gardening as a luxury that one must purchase through other productive activities, rather than as an increase in consumer surplus.

The reconciliation of the negativity of exchange value and the positivity of use value can only occur in the perfect market. In the perfect market, it is hypothesized, all goods are priced so that the use value and exchange value of every subject with respect to every object in the market is equalized.<sup>95</sup> Of course, if this happens, all objects are equivalent to all others. Each subject becomes perfectly indifferent between owning any specific object in the market and owning its exchange value. The particularity essential to enjoyment ceases and use value evaporates.

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91. See *infra* text accompanying notes 261-68.

92. See *infra* text accompanying notes 126-45.

93. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 66; Posner, *Utilitarianism*, *supra* note 23, at 135.

94. See *infra* text accompanying notes 130-31.

95. See Schroeder, *The End of the Market*, *supra* note \*, at 547; PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS*, 87, 90 (15th ed. 1995).

Moreover, since all market participants are indifferent, all exchange ceases. If exchange ceases, then there is no exchange value. Thus, paradoxically, at the moment when wealth is maximized, wealth (value measured in either negative or positive money) immediately evaporates.<sup>96</sup>

This result is already implicit in the very definition of money as the transparent medium of exchange. To express the value of goods into money is to translate use value into exchange value. But as the medium of exchange, money has no positive value. It is radical negativity. Value requires exchange if value is defined as the acceptance of an equivalent alternative. Goods, valued in money, lose their individualistic characteristics and become equivalents. In other words, goods valued in money become equivalent to money—totally negative without any positive content. Having no individuating positive characteristics, monetized goods cannot be enjoyed—they are merely repositories of value that can be temporarily possessed in anticipation of future exchange. Expressing the value of goods in money means precisely that one would be indifferent between having the good and having money—with money being defined that which has no content.

A perfect monetization of goods, therefore, would have the lethal effect of the Midas touch. At the moment of wealth maximization, all actual market exchanges would cease and all wealth would evaporate. The only reason why one engages in market exchange is because one is *not* indifferent between having the object to be transferred and the object to be acquired.

Actual market exchanges require that objects *not* be perfectly monetized in the way that Posner insists.<sup>97</sup> Exchange reflects the fundamental Hegelian doctrine of the unity of identity and difference.<sup>98</sup> On the one hand, exchange only occurs if the two parties recognize an essential equivalence between the two objects to be exchanged.<sup>99</sup> This

96. As mentioned earlier, Coleman briefly raises this point. See *supra* note 76.

97. See Schroeder, *Pandora's Amphora*, *supra* note \*, at 883-84, 897-98.

98. See G.W.F. HEGEL, HEGEL'S SCIENCE OF LOGIC 424 (A.V. Miller trans., George Allen & Unwin Ltd. 1969) [hereinafter HEGEL, SCIENCE OF LOGIC].

99. The economic theory that I discuss in this Article and elsewhere privileges the masculine elements of possession and exchange and represses the feminine element of enjoyment. See *infra* text accompanying notes 261-71. By contrast, Margaret Radin's feminine theory of property for personhood privileges the feminine element of enjoyment and disparages the masculine elements of exchange and possession (except to the extent that property is necessary for enjoyment). See *infra* text at notes 219-22. In addition, the Hegelian theory of property recognizes that each element is an equally necessary moment of property. Possession is the identification of an object with a subject in the sense of excluding other subjects. It is the means by which a subject takes on the individualistic characteristics that enable him to be recognized and engage in intersubjective relations. Enjoyment is the means by which the subject exercises her freedom by mastering the object. As economic theory recognizes, exchange is the moment in which the subject actualizes her freedom by proving that she is indifferent to any specific object, but is a self-standing person. For an extensive discussion of the Hegelian dialectic of property,

equivalence is express and shared by the two parties in the single "objective" valuation of the two goods in terms of money. On the other hand, exchange only occurs if the parties each recognize a fundamental differentiation between the two objects to be exchanged so that each party prefers the object to be acquired over the object to be transferred.<sup>100</sup> This differentiation is implicit and private in each party's "subjective" valuation of the two goods.

Consequently, although the market can only directly recognize money in terms of the public and objective realm of exchange value, it must implicitly preserve the possibility of a separate category of use value. Use value exists as the boundary of exchange value. Although exchange value cannot capture use value, exchange only occurs insofar as each party believes that he can thereby realize a surplus of use value over exchange value. Indeed, this is the very reason why exchange is supposed to lead in the increase of wealth. As stated by Simmel, "It is the object of exchange to increase the sum of value; each party offers to the other more than he possessed before."<sup>101</sup>

From a Hegelian perspective, contract is the most primitive form of the relationship Lacan called "love."<sup>102</sup> In love, the lover sees in his beloved more than she is.<sup>103</sup> When love is requited it has the alchemical effect of enabling the beloved to give back more than she has.<sup>104</sup> The lover and beloved change places so the lover knows himself as the recipient of love.<sup>105</sup> Both parties are enriched, becoming more than they once were.

Similarly, contractual exchange only occurs if each party sees that the other potentially has more than she has. That is, the first party sees that the object owned by the second party would have a greater use value

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see SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 1-52; see also Schroeder, *Pandora's Amphora*, *supra* note \*, at 860-84.

100. In the formulation of my colleague Michel Rosenfeld, market exchange constitutes the abstraction of the particular and the particularization of the abstract. See Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 807-08 (1985).

101. SIMMEL, *supra* note 30, at 82. Although Simmel was writing before the full development of classic price theory, his neo-Kantian theory of value looks forward to later developments. Simmel's analysis of the increase in value through exchange reflects my analysis that from an Hegelian-Lacanian viewpoint, contract is a primitive form of love. See Schroeder, *Pandora's Amphora*, *supra* note \*, at 828, 870-73.

102. See Schroeder, *Pandora's Amphora*, *supra* note \*, at 828, 870-73.

103. See Miran Božovič, *The Bond of Love: Lacan and Spinoza*, 23 NEW FORMATIONS 69, 75 (1994).

104. See Schroeder, *Pandora's Amphora*, *supra* note \*, at 863; SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 49.

105. See SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 103 (1994) ("It is only at this point that true love emerges, love as a metaphor in the precise Lacanian sense: we witness the sublime moment when *eromenos* (the loved one) changes into *erastes* (the loving one) by stretching out her hand and 'returning love'.") (footnote omitted).

in the hands of the first party. Conversely, the second party can only fulfill the first party's desire if she also sees that the first party owns an object that would have a greater use value in the hands of the second party. In exchange, each party gives to the other something that does not exist when the object is held in her own hands, creating the alchemical effect of increasing the total amount of value. As in love, the successful consummation of a contract results in each party attaining more than she had at the beginning of the transaction. Necessarily, there would be no exchange unless the parties disagreed as to the relative use values of the objects to be exchanged, even as they come to a temporary and contingent meeting of minds as to their equivalent exchange values.

Consequently, if objective exchange value were to become equivalent to the subjective use value of all parties, all exchange—and all value—would come to an end. Paradoxically, for the market to function, use value must exist, but the market never completely captures use value. Meanwhile, the former existence of surplus use value can only be retroactively posited by the fact that an exchange has occurred.<sup>106</sup>

This necessarily follows from Posner's definition of wealth as the goods of the world measured in money. As discussed earlier, Posner defines money as purely a means of exchange. As such, it has no qualities of its own or, to put this another way, its only quality is quantity.<sup>107</sup> Enjoyment of an object, however, is precisely the recognition of the unique qualities of the object. From a Hegelian standpoint, "[q]uality refers to the specific, affirmative aspect of a thing which distinguishes it from other things that exist—i.e., it is the aspect of a thing which is not shared; it is that which enables us to tell two 'things' apart."<sup>108</sup> Quantity, by contrast, is indifferent to qualitative difference.<sup>109</sup>

106. See *infra* text accompanying notes 261-68.

107. See SIMMEL, *supra* note 30, at 259. In Simmel's words:

Since money is nothing but the indifferent means for concrete and infinitely varied purposes, its quantity is its only important determination as far as we are concerned. With reference to money, we do not ask what and how, but how much. This quality or lack of quality of money first emerges in all its psychological purity, however, only after it has been acquired. Only when money is transformed into positive values does it become evident that the quantity exclusively determines the importance of money, namely its power as a means.

*Id.*

108. Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531, 1556 (1996) [hereinafter Schroeder, *Never Jam To-day*]. Quality is what Hegel called "determinate being." HEGEL, *SCIENCE OF LOGIC*, *supra* note 98, at 111. It is being "*in-itself*." *Id.* at 131. Hegel's understanding of the relationship between quality and quantity is extremely complex, filling approximately 200 pages of his *Science of Logic*. Necessarily, I barely touch the tip of the iceberg in this Article. For a more detailed discussion of the Hegelian distinction between quality and quantity, see Schroeder, *Never Jam To-day*, *supra*, at 1554-66.

To translate one's use value of an object into exchange value, however, would be to erase the qualitative distinctions between objects necessary for enjoyment and replace them with mere contentless quantity. This is reflected in Posner's attempt to account for consumer surplus (enjoyment) as the amount one would accept in exchange for the objects one possesses—that is, in Posner's system, the owner never enjoys her objects, but only holds them temporarily in anticipation of future sale.<sup>110</sup> Indeed, insofar as enjoyment of an object frequently results in the consumption of the object and, therefore, the reduction of the aggregate amount of wealth in the world, the very concept of present enjoyment is antithetical to wealth maximization. Insofar as wealth maximization opposes consumption, it embraces the Midas Touch.

As will become apparent, the relationship between exchange value and use value precisely parallels the relationship between the symbolic and the real, and the masculine and the feminine.<sup>111</sup> Consequently, it is appropriate to refer to the concept of exchange value as "masculine" money and the concept of use value as "feminine" money. In each pair, the latter serves as the limit of the former; the latter is defined as that which the former is not. "Masculine" exchange value simultaneously requires the existence of "feminine" use value as its defining other, while it can never capture the other. The relationship within the dyad is, therefore, an essential failure of relationship—an impasse. The subject of the market, like the subject of law and sexuality, is split between the masculine and the feminine; the symbolic and the real. Lacan locates in the order he calls the "imaginary" the dream that this split can be overcome.<sup>112</sup>

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109. If quality is "being *in-itself*," quantity is "being *for self*." Schroeder, *Never Jam To-day*, *supra* note 108, at 1558; see HEGEL, *SCIENCE OF LOGIC*, *supra* note 98, at 177-78.

110. See *infra* text accompanying notes 267-68. Posner defines a property right as "a right to exclude everyone else from the use of some scarce resource." POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 70. As I discuss elsewhere, this is the Hegelian definition of the single property element of "possession." See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 42, 146; Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455, 509-16 (1996). Tellingly, this definition fails to recognize the owner's additional right of enjoyment. More interestingly, however, is its failure to account for the right of alienation, given that the Posnerian owner only possesses his property temporarily and contingently until he receives an offer for exchange at the appropriate price.

111. See *infra* text accompanying notes 223-27.

112. See Schroeder, *The End of the Market*, *supra* note \*, at 494, 506. What defines the imaginary order is the appearance of a complementary relationship between theses and antithesis, the illusion that they form a harmonious whole, filling out each other's lack; what the thesis lacks is provided by an antithesis and vice versa (the idea that man and woman form a harmonious whole, for example). See SLAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE; KANT, HEGEL AND THE CRITIQUE OF IDEOLOGY* 123 (1994).

In fact, if the split could ever be overcome—if wealth were maximized and the perfect market were achieved—all markets would cease. Consequently, although Posnerian wealth maximization tries to deny, destroy or suppress enjoyment, it can only *repress* it in the technical psychoanalytical sense.<sup>113</sup> The market refuses to recognize enjoyment directly, yet it secretly preserves it and allows it to operate *sub rosa*.

## 6. TIME

The relationship of wealth to time may not be as obvious at first blush, but is just as necessary. First, wealth itself is defined as having a particular relationship with dilatory time:

“Income” is a flow concept, “wealth” the corresponding stock concept. The important thing to bear in mind is that income (and therefore wealth, which is the discounted present value of anticipated future income) refers to real rather than monetary phenomena—to housing or transportation services or leisure, not to wages or dividends.<sup>114</sup>

In other words, unlike income, wealth does not exist in and over time. Rather, it is outside of time in the sense that it collapses all future time into present value. Actual markets, however, always exist within time.

Second, the negative concept of money as exchange value can also be seen as an attempt to freeze the time that necessarily exists in actual markets—to collapse the future into the present. One accumulates money today as a means of acquiring the object of desire tomorrow:

A person who accumulates more money than he spends during his lifetime is, in effect, deferring some of his spending until after his death, when it will be done by surrogates, his heirs. . . . If, after taking [agency costs of ne'er-do-well-children] into account, he nevertheless leaves them money, they become, in effect, his agents to spend it after his death.<sup>115</sup>

As shall be discussed below, because market transactions require time and the goal of markets is to maximize wealth, time is a transaction

113. See *infra* text accompanying notes 227, 267-69.

114. Posner, *Wealth Maximization Revisited*, *supra* note 42, at 87 n.5.

115. *Id.* at 98; see also Posner, *Utilitarianism*, *supra* note 23, at 135 (“Nor is the justice of this reward system undermined when some people live off inherited wealth and make no personal contribution to augmenting the wealth of society. The expenditure of inherited wealth represents simply the deferral of part of the accumulator’s consumption beyond his lifetime.”).

cost in the Coasean sense.<sup>116</sup> It stands between the market and its goal. Money as exchange value only exists as a way of dealing with this transaction cost. By definition, there are no transaction costs in the perfect market. Consequently, there is no time in the perfect market.<sup>117</sup> If there is no time in the perfect market, there is no money. If wealth is the aggregate goods of the world valued in money, there is no wealth in the perfect market. Paradoxically, therefore, if the perfect market were ever achieved, and wealth maximized, all wealth would vanish.

There is a long tradition of condemning the money economy as destructive of human nature and freedom:

Money . . . also destroys, necessarily replacing personal bonds with calculative instrumental ties, corrupting cultural meanings with materialist concerns. Indeed, from Karl Marx to Jurgen Habermas, from Georg Simmel to Robert Bellah, observers of commercialization in Western countries have thought they saw devastating consequences of money's irresistible spread: the inexorable homogenization and flattening of social ties. Conservatives have deplored the moral decay brought by prosperity while radicals have condemned capitalism's dehumanization, but both have seen the swelling cash nexus as the source of evil.<sup>118</sup>

The most prominent proponent of what is here called "romanticism"—the fear that market transactions will result in an alienating universal commodification of subjects as well as objects—is Margaret Jane Radin.<sup>119</sup> This Article agrees with this analysis, which holds that the logic of the Posnerian conception of money as exchange value ("masculine" money) is equivalent to the deadly golden touch that destroys the differentiation necessary for use value ("feminine" money). Nevertheless, the analysis in this Article breaks from these critics and supports market relations. The mistake of these market critics is the same one made by those proponents of wealth maximization who seek to defend markets: They assume the money economy is, or could be, successful in destroying differentiation and breaking the connection with enjoyment. Not only is Gresham wrong in this case, for masculine money is never successful in driving out feminine money; wealth maximization's very attempt to repress enjoyment and to define money as exchange value makes the

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116. See *infra* text accompanying notes 287-90.

117. See Schroeder, *The End of the Market*, *supra* note \*, at 534-36.

118. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 2 (1994).

119. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 93 (1996). I critique this view of commodification, which is equally shared by romantics and utilitarians/wealth maximizers, in Schroeder, *Pandora's Amphora*, *supra* note \*, at 851.



feminine money as use value necessary. In other words, the myth of the golden touch is just that—only a myth.

### III. THE DENIAL OF ENJOYMENT

#### A. Introduction

Wealth is utility, or subjective use value, translated into money's worth, or objective exchange value. The criterion of wealth maximization is not what one wants or would enjoy, but rather what someone else would pay for it. To apply wealth maximization, therefore, an individual's valuation of the object of desire only has value insofar as he can express it in terms of money he has (with respect to objects he does not yet own) or would take (with respect to objects he does). This necessarily follows from the definition of value as the existence of acceptable alternatives—that which one would exchange to acquire what one does not have, or that which one would accept to give up what one does have. Wealth maximization, therefore, requires the repression of enjoyment (use value) in favor of possession and exchange (exchange value). In other words, nothing may be "used" because everything is held for future exchange. Moreover, as the enjoyment of an object frequently leads to its consumption, enjoyment can actually lead to a decrease in the amount of wealth in the world.

Simmel, who adopts a concept of money similar to Posner's concept of wealth, insists that this conception necessarily leads to a break from present enjoyment:

[M]oney, as the *absolute* means, provides unlimited possibilities for enjoyment, while at the same time, as the absolute *means* it leaves enjoyment as yet completely untouched during the stage of its unused ownership. In this respect the significance of money coincides with that of power; money, like power, is a mere potentiality which stores up a merely subjectively anticipatable future in the form of an objectively existing present.<sup>120</sup>

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120. SIMMEL, *supra* note 30, at 242. Simmel had mixed feelings about what he thought were the necessary implications of money as exchange value that forever separates us from direct enjoyment. On the one hand, the modern monetized capitalist economy was leading to an increase in human freedom, as the interchangeability of the market releases people from the rigidity of status and allows the development of individuality. See, e.g., *id.* at 285-86 ("[T]he replacement of payment in kind by money payment . . . has been regarded, to some extent, as a *magna charta* of personal freedom in the domain of civil law."). Simmel continues:

Money's importance in gaining individual freedom serves to illustrate a very far-reaching definition of the concept of freedom. At first glance, freedom seems to possess a merely negative character. It only has meaning in contrast

Because money is a means of congealing time, wealth maximization is always a postponement of enjoyment.

Posner presents the severance of wealth maximization from utilitarianism's connection with enjoyment as an untrammelled good.<sup>121</sup> He argues that utilitarianism incentivizes cultivation of the capacity for enjoyment, whereas wealth maximization incentivizes cultivation of the capacity for thrift and hard work. He claims that wealth maximization reflects the "Protestant" work ethic; yet in sharp contrast to Protestantism, wealth maximization makes no room for the Sabbath, a day of rest and enjoyment beyond economic activity.

Although Posner denies enjoyment, he in fact only succeeds in repressing it. Psychoanalysis holds that repression is not destruction, but preservation;<sup>122</sup> what is not spoken or acknowledged always returns to function elsewhere. Indeed, repression can actually call into being that which is repressed and increase its efficacy. This is because when one seeks to repress something, one always implicitly admits that it both exists and is powerful. Although wealth maximization officially denigrates enjoyment, the hidden possibility of enjoyment is the engine that drives the market.

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to a form of bondage; it is always freedom from something and corresponds to the concept by expressing the absence of obstacles. However, the concept of freedom is not confined to this negative meaning. Freedom would be without meaning and value if the casting off of commitments were not, at the same time, supplemented by a gain in possessions or power: freedom from something implies, at the same time, freedom to do something.

*Id.* at 400. On the other hand, Simmel thinks that (masculine) money inevitability leads to the interchangeability of people as well as objects, making relationships impersonal, and leading to universal alienation: "Yet however much money encourages such freedom, it cannot be denied that, from the standpoint of a free, independent and self-sufficient existence, the exchange of property and achievements for money depersonalizes life after a tight network of transactions originally enclosed and intertwined people." *Id.* at 407. Simmel elaborates:

Money thoroughly destroys that self-respect that characterizes the distinguished person and becomes embedded in certain objects and their appreciation; it forces an extraneous standard upon things, a standard that is quite alien to distinction. By arranging things in a series in which only quantitative differences are valid, it deprives them, on the one hand, of their difference and distance of one from another and on the other of the right to reject any relationship or any qualification by comparison with others—these are precisely the two factors whose combination determines the peculiar ideal of distinction.

*Id.* at 394.

Simmel comes to this depressing conclusion precisely because he believes that masculine money is successful in its goal of driving out feminine money. He does not recognize that the masculine's attempted repression of the feminine not only preserves, but also strengthens the feminine.

121. See *supra* text accompanying notes 42-44.

122. See *infra* text accompanying notes 223-27.

Indeed, when Posner celebrates the squelching of enjoyment by wealth maximization, he forgets what he implies elsewhere: One seeks wealth in order to effectuate one's preferences and obtain the object of desire. In other words, according to Posner's atomistic individualistic calculus, the reason why economic actors want the object of desire is so they can enjoy it.<sup>123</sup>

Without a capacity for enjoyment, there would be no reason for the wealth maximizer to work hard to earn the purchasing power to buy anything beyond mere subsistence. The entire market system requires the economic subject to develop the paradoxical combination of an exquisitely cultivated capacity for enjoyment and the iron will to resist temptation in order to continually postpone enjoyment: it requires *eros*. As shall be discussed below, Posner's conception of wealth maximization unintentionally echoes Georges Bataille's Marxist analysis of capitalism.<sup>124</sup>

A Lacanian analysis can shed light on the process of wealth maximization and reveal its deadly internal paradox.<sup>125</sup> Wealth maximization is an attempt to take on the "masculine" position of subjectivity that privileges possession and exchange. The masculine position is created through the repression of the "feminine" position that includes the concept of enjoyment. If wealth maximization (the masculine position) were ever successful in achieving its goal and destroying enjoyment (the feminine position), it would destroy itself as well. Luckily, the masculine position is always a failure, the repressed feminine always returns, and markets continue to function. Actual markets are quite impervious to the implosions of economic theory.

### *B. Slavery*

Posner's repression of enjoyment and his implicit antipathy to what Lacanian analysis calls the "feminine" can be seen in his discussion of slavery. As noted earlier, Posner has argued in the past that wealth maximization would prohibit slavery on efficiency grounds.<sup>126</sup> Posner argued that if the right to one's productive capacity were to be allocated to a master, and if there were a perfect market with no transaction costs and perfect financing, the slave, as the higher valuing user of his own productive capacity, would outbid any potential master in a hypothetical

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123. Take, for example, Posner's analysis of inherited wealth. Posner suggests that wealth is always acquired for consumption, but sometimes we appoint proxies to do our enjoyment for us, as when the testator leaves his wealth to his heirs. See Posner, *Wealth Maximization Revisited*, *supra* note 42, at 98; POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 82.

124. See *infra* text accompanying notes 302-27.

125. See *infra* text accompanying notes 223-27.

126. See *supra* text accompanying notes 62-72.

market. Consequently, productive capacity should be allocated to the "natural" owner *ab initio*.

This argument relies on certain assumptions expressly made by Posner that have already been discussed. First, the slave's productive capacity is worth more in the slave's hands than the master's. This is because one will be willing to work harder if one is able to retain the fruits of one's labors than if one works for others. Second, one can borrow the purchase price of one's labor from some hypothetical banker, securing the debt with the former slave's future earnings.

The structure of the hypothetical auction is designed to eliminate certain problems that arise in actual markets. First, in an actual market one cannot assume that the master will frame the asking price for his slave in terms of the present value of the expected fruits of the slave's productive capacity in the hands of the master, which likely will be less than the slave's own price equal to the present value of the expected fruits of his productive capacity in the hands of the slave. The master might also value the social status of the continued existence of slavery. This surplus enjoyment by the master might be greater or less than the value the slave might place on his autonomy, in excess of the value of his productive capacity.

In the hypothetical market, however, the relative hedonic pleasure of the master and slave will not be given any weight. This is because no resources have yet been allocated in the state of nature: Neither party owns any money or any other property. All purchases must be financed through purchase money loans made by the hypothetical auctioneer. The auctioneer will only lend money up to the amount of the collateral that the buyer can supply. Neither the slave nor the master will be able to borrow against his anticipated hedonic pleasure precisely because it is subjective, and cannot be turned into objective exchange value that can be used to pay down the loan.<sup>127</sup> The only collateral that either party can put up is

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127. Simmel made a similar argument that value understood in terms of money does not directly reflect the capacity for enjoyment:

The intensity of demand by itself does not necessarily increase the economic value of objects; since value is expressed only through exchange, demand can affect the value only to the extent that it modifies exchange. Even though I crave an object this does not determine its equivalent in exchange. Either I do not yet possess the object, in which case my desire for the object, unless I express it, will not exert any influence upon the demand of the present owner and he will ask a price in accordance with his own or the average interest in the object; or I do possess the object, and in that case my price may be so high that the object cannot be exchanged at all (i.e., it is no longer an economic value), or else I shall have to reduce the price to correspond with the degree of interest shown by a prospective buyer.

SIMMEL, *supra* note 30, at 92. Posner would, of course, disagree with the second half or Simmel's analysis because Posner, in his definition of wealth, includes consumer surplus—the amount of money the possessor would demand to give up her object even

the relative future income streams that the slave and master can earn out of exploitation of the slave's labor.

Indeed, the true function the auctioneer plays in the hypothetical market is as a means of eliminating the parties' enjoyment or utility from the calculation. Within the criterion of wealth maximization, the auctioneer could be eliminated and the slave's labor could be assigned initially to either the slave or the master, only as long as they were both perfectly rational and cared about increasing their wealth (as opposed to utility). The "rational" wealth maximizing master would understand that slavery creates the negative incentive that causes the slave to "shirk." The rational master would therefore seek to incentivize the slave to work harder by giving the slave at least partial freedom and making the slave his partner. This would be the same result that would occur under the hypothetical auction.

Posner recognizes, however, that individuals are more likely to be utility-maximizers than wealth-maximizers.<sup>128</sup> The "rational," utility-maximizing master might decide that the pleasure he would get from dominating the slave exceeds any additional pleasure he might get if a more autonomous slave earned him more money. If so, the master would

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though this price is greater than the market price. See *supra* text accompanying notes 90. Nevertheless, I believe that Simmel's analysis has bite.

First, in this context, Simmel implicitly defines economic value in terms of market value or price. This is reflected in our legal system, which awards damages for violations of property rights in terms of objective standards—either the third party valuation determined by the market or the two-party intersubjective value or price set by contract—not in terms of the victim's idiosyncratic, subjective valuation. Second, Simmel is correct that subjective valuation can only be given economic recognition when it is revealed in price, and the concept of price requires the owner to enter into a contract to exchange the object. This intuitively reflects the analysis below, which concludes that in Posner's system, consumer surplus (excess feminine enjoyment) can only be retroactively hypothesized as having existed in the past after the owner contracts to sell it. See *infra* text accompanying notes 260-66.

128. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 64. Posner writes:

Not only can wealth not be equated to happiness, but, to state the same point in the language of economics, people are not just wealth maximizers. Wealth is an important element in most people's preferences, and wealth maximization thus resembles utilitarianism in assigning substantial weight to preferences, but it is not the sum total of those preferences.

*Id.*

This, arguably, reflects a lapse in Posner's perfect market assumptions. As I have demonstrated elsewhere, one of the conditions of a perfect market is that all parties be economically rational. See Schroeder, *The End of the Market*, *supra* note \*, at 540 n.201. The appropriate definition of economic rationality depends on the goals one ascribes to the perfect market. If one is a utilitarian, then market participants should be rational utility maximizers. If one is a wealth maximizer, then rationality should be similarly based on wealth maximization. Although Posner's market is otherwise perfect, he posits that his market participants will be utility maximizers (and, therefore, irrational from a wealth maximization standpoint). Hence, the auctioneer is required to account for this flaw.

not agree to transfer the slave's autonomy.<sup>129</sup> Consequently, the presence of an auctioneer who requires payment in money serves to prevent the parties from actualizing an excess of use value over exchange value. From a Lacanian analysis, the auctioneer serves as the guardian of the symbolic order—the Name-of-the-Father himself—that prohibits enjoyment.

To recapitulate, each party must borrow the purchase price for the slave's productive capacity from someone else and must pay it back, with interest at the appropriate rate. The transaction between the master and the slave results in a purchase price somewhere between the master's asking price and the slave's offer price—but wealth maximization is indifferent as to how the difference is allocated. However, as Dworkin has argued, the slave will only obtain any enjoyment if the purchase price is something below his maximum offer price; otherwise he merely exchanges one master for another. In other words, if the auctioneer has a purchase money security interest in all of the worker's income from his labor, then the auctioneer is just as much the owner of the worker's productive capacity as a master, and the worker would have the exact same incentive to shirk. Consequently, one must suppose the worker will be able to earn and keep at least some income in excess of the amount he must earn to pay back the auctioneer to incentivize the worker to work hard enough to increase society's wealth.

Rather than drawing from the historic American experience of plantation slavery, Dworkin poses the hypothetical of the slave, Agatha, who is owned by the master, Sir George, and has an extraordinary talent for writing murder mysteries, but a preference to engage in the non-remunerative hobby of gardening.<sup>130</sup> As mentioned earlier, both Dworkin and Posner ignore the possibility that by gardening Agatha may increase her consumer surplus in her home and thereby increase the wealth of society.<sup>131</sup> This omission is perhaps an unconscious recognition that, in fact, there can be no consumer surplus in the Posnerian ideal market.

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129. Rakowski criticizes Posner's assertion that the master will sell the slave if he could receive a purchase price higher than the expected future income stream of the slave's labor in his hands:

Posner manages to lend some credibility to his example by stipulating that [the master] views [the slave] as a productive asset. But once this arbitrary stipulation is removed, [the slave's] hopes of gaining release rapidly fade. If [the master] regards her not only as a pulp mill but also as a sexual plaything, or if he simply takes delight in the feeling of domination that slaveholding fosters, then he might demand more to part with [the slave] than she could ever earn on her own.

RAKOWSKI, *supra* note 46, at 206-07 (footnotes omitted). Rakowski correctly concludes that this means the initial allocation of the slave's personhood does matter. *See id.* This is why I argue that the Posnerian analysis requires the hypothetical auction to be held in the state of nature.

130. *See* Dworkin, *Is Wealth a Value?*, *supra* note 28, at 209-10.

131. *See supra* text accompanying notes 94.

Dworkin suggests that Agatha would not buy her freedom under wealth maximization because, if she did, she would have to continue to engage the hateful activity of writing mysteries in order to pay back her loan to the hypothetical auctioneer. In other words, she would merely be exchanging masters.<sup>132</sup> Posner counters that so long as one assumes a free Agatha would be sufficiently more productive than an enslaved Agatha, she would buy her freedom.<sup>133</sup>

The question is whether the incremental difference between the slave's expected return and the master's expected return is great enough to make this transaction occur. Consequently, as Posner realized, his early argument that wealth maximization would probably support the elimination of slavery requires not merely the assumption that the

132. See Dworkin, *Is Wealth a Value?*, *supra* note 28, at 210. In describing the transaction between Sir George and Agatha, Rakowski writes:

As Dworkin notes, Agatha would have to forfeit her financial security for a slight increase in the control she exercises over her life, and many people would doubtless consider this an unattractive trade. Third, to the extent that Agatha's productivity would be affected by the actuality or the prospect of liberation, it is hard to imagine the paper freedom she would have if Sir George originally owned her labor and sold it to her at its net present value making any difference at all. She would, as Dworkin points out, remain the slave, formalities apart, of either Sir George or some moneylender.

RAKOWSKI, *supra* note 46, at 206 (footnotes omitted).

133. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 110. This hypothetical raises another problem with the "state of nature" assumption used by the early Posner to allocate resources which is beyond the scope of this Article. This, as Posner admits, is the extreme version of the "wealth" effect of varying allocations of resources. See *id.* at 111.

That is, the amount of money Agatha will be able to earn through the exploitation of her productive capacity depends on the market for her goods and services. The market for her goods and services depends, in turn, on the supply and demand curves for identical goods and services generated by all other persons in the market, and also (because exchange value is determined with respect to alternatives) the supply and demand curves of any substitute goods and services. These depend on the allocation of resources. In the state of nature, however, resources are not yet allocated, so we do not know what the supply and demand curves will be for any goods and services. In other words, we have defined value in terms of alternatives, but in the state of nature we do not yet know what alternatives will exist once an industrialized society is developed.

To say this more concretely, Agatha writes murder mysteries. Although popular in late twentieth-century developed economies, murder mysteries are a relatively recent literary genre. Conventional accounts tend to identify Edgar Allan Poe as the inventor of modern mystery story. See, e.g., Nancy Harrowitz, *The Body of the Detective Model*, in *THE SIGN OF THREE: DUPIN, HOLMES, PEIRCE* 179, 179 (Umberto Eco & Thomas A. Sebeok eds., 1983). What could it even mean to say there is a market for mystery novels in the state of nature before the allocation of goods and the formation of the state? By definition, since rights have not yet been allocated, there can be no concept of investigating a crime since we have not yet determined the rights to life and property which could be infringed. The noble savages roaming the forest primeval are not yet social and therefore do not yet have language, let alone the ability to read books, necessary for the formation of a demand for novels. Coleman has made a related point. See *infra* note 142.

productive value of the slave's labor is higher in the slave's hands than in the master's, but also the assumption that the former exceeds the latter in an amount sufficient to pay interest on the purchase money loan incurred by the slave to acquire his freedom and to provide enough excess capacity for the slave to spend for his own purposes. Perhaps it is the inability to generate any meaningful empirical support for these fanciful assumptions that has led Posner eventually to abandon the moralistic argument for wealth maximization in favor of a self-proclaimed, pragmatic one.

### C. Rape

Wealth maximization excludes all enjoyment and is, therefore, the Midas Touch. This point can be seen more starkly in Posner's argument that wealth maximization explains the legal prohibition of rape. He tries to make his analysis parallel to his explanation of the legal prohibition of slavery. Posner might complain that this Article places too much emphasis on his analysis of rape, which is at the margin of his theory. As Jacques Derrida has argued, however, it is often the marginal case that establishes the essence of a theory.<sup>134</sup>

Posner hypothesizes that access to feminine sexuality would be auctioned off in the state of nature. He argues that just as each individual would be expected to outbid any potential rival to his productive capacity, each woman would be expected to outbid any potential rival for her sexual integrity. Posner argues that even if one were initially to allocate women's bodily integrity to rapists,<sup>135</sup> in the vast majority of cases each woman would buy her own sexuality back.<sup>136</sup> This would be an efficient reallocation of sexuality. According to the Coase Theorem, this efficient reallocation can only be guaranteed in a perfect market with no transaction costs.<sup>137</sup> In the presence of transaction costs, therefore, resources should initially be allocated in a way that is efficient *ab initio*.<sup>138</sup>

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134. JACQUES DERRIDA, *Tympan*, in MARGINS OF PHILOSOPHY ix, xxiii (Alan Bass trans., University of Chicago Press 1982) (1972).

135. As I mentioned in my introduction to the slavery hypothetical, it is hard to come up with appropriate language to discuss these hypotheticals, since our terminology reflects the status quo. See *supra* text accompanying notes 67. If we were, in fact, to allocate a woman's sexuality to a man, he would not be a "rapist" if he were to exploit his valid property right over the unlawful protests of the woman.

136. See POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 71 ("If assigned randomly to strangers, [this right to determine sexual partners] would generally (not invariably) be repurchased by . . . the woman; the costs of the rectifying transaction can be avoided if the right is assigned at the outset to the user who values it . . . most."). Note, because this Article analyzes the internal structure of Posner's argument, it does not raise the obvious question as to why a woman's sexuality is not comprised within her anatomy.

137. See *supra* note 62.

138. See POSNER *ECONOMICS OF JUSTICE*, *supra* note 45, at 71. Posner writes: If transaction costs are positive (though presumably low, for otherwise it would be inefficient to create an absolute right), the wealth-maximization



Consequently, wealth maximization suggests that each woman's bodily integrity should be allocated to that woman.

Posner forgets, however, that this is the utilitarian, not the wealth maximization, answer. It is not enough that the woman value her sexual autonomy; she must be able to pay for it. In contradistinction to Posner's analysis of the case of slavery, it is hard to argue that the woman would be able to borrow the purchase price, since the value of her bodily integrity to her is not related to productive capacity *per se*. In other words, a woman's preference for sexual integrity is subjective. She seeks to enjoy herself, for herself.<sup>139</sup>

By contrast, Posner's analysis can only think of women and feminine sexuality as commodities exchanged by men, and never as property of a woman for herself. This necessarily follows as a psychoanalytic matter from the Posnerian definition of the market that represses the feminine element of enjoyment. According to both Lacanian and economic analysis, when viewed from the woman's standpoint, chastity is as much an enjoyment or use of a woman's body as is sexual congress. To equate the enjoyment of sexuality with sexual congress or more sensual pleasure is to take the masculine position towards feminine sexuality.

In the hypothetical auction of feminine sexuality, the rapist himself, first of all, cannot bid for the woman because his interest is also purely hedonistic; he wishes to enjoy her.<sup>140</sup> But certainly the madam and procurer who make their living by selling women's sexuality to men would be "willing" (i.e., able) to bid. Consequently, in the hypothetical market for the initial allocation of feminine sexuality in the state of nature, expects to be an effective bidding war for women's sexuality by pimps.

Second, although it may be true that the woman has a greater capacity to enjoy her sexual integrity than any potential procurer and his customer, under wealth maximization no weight is given to her subjective

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principle requires the initial vesting of rights in those who are likely to value them most, so as to minimize transaction costs. This is the economic reason for giving a worker the right to sell his labor and a woman the right to determine her sexual partners.

*Id.*

139. Surprisingly, Posner *does* recognize the necessity of excluding utility in the rapist's calculation. See *infra* note 140.

140. See Richard S. Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency: A Response to Professor Posner's Reply*, 11 HOFSTRA L. REV. 667, 674-75 (1983). As Markovits notes:

Posner acknowledges that a prospective rapist might obtain extra pleasure from the dominance he would be exercising by imposing himself on his victim . . . . However, Posner claims that this extra pleasure should not count in any evaluation of rape because under his approach, value must be measured by the price that would be established through a voluntary market transaction or contract (unless conventional transaction costs would preclude such an arrangement).

*Id.*

capacity to enjoy herself. A woman's claims to her own sexuality will not be recognized unless she can turn her desire to bid into an ability to bid. She has no power to bid for her sexuality unless she intends to use her sexuality as a means of production that will produce an income stream to secure the auctioneer's purchase money loan.

In order to do so, the woman may offer to become a free-lance prostitute. She could outbid the procurer if she would be expected to make more money turning tricks as a free agent than as the employee of a procurer because she would be willing to work "harder" and resist "shirking."<sup>141</sup>

Alternately, she may move to a traditional society that places a premium on feminine virginity and use her chastity as a bargaining chip to negotiate a favorable marriage (or concubinage) that will result in a greater income stream than her exploitation by a procurer. She will be able to outbid the procurer (or more accurately, her future husband will be able to outbid the procurer) if she can argue that her chaste body has greater economic value when exclusively exploited by her husband, perhaps in the production of sons, than if promiscuously exploited in prostitution.

One should note, however, that the hypothetical auction leads to infinite regress.<sup>142</sup> On the one hand, if the husband purchases the virgin

141. Ironically, in order to buy his freedom the male slave must argue that he is less likely to lie down on the job if he is free than if he is enslaved, while the prostitute must argue just the opposite. As Iago obscenely taunted his wife, "Nay it is true, or else I am a Turk: / You rise to play, and go to bed to work." WILLIAM SHAKESPEARE, *OTHELLO*, act 2, sc. 1, ll. 114-15.

142. Coleman has made a similar point:

Wealth maximization requires a fixed set of relative prices. The prices of goods depend, among other things, on the relative demand for them. The demand for goods depends in turn on the distribution of wealth. And the distribution of wealth is of course a function of what individuals are entitled to. Therefore, the system of wealth maximization must presuppose a set of initial entitlements in order to get started; and these initial entitlements cannot, by hypothesis, be accounted for on wealth-maximizing grounds. The system of wealth maximization therefore cannot provide a basis for an initial assignment of entitlements.

Coleman, *Efficiency*, *supra* note 14, at 524-25.

This is known in the literature as the problem of "wealth effects." Dworkin briefly raises and disposes of this issue when he proposes the slavery hypothetical. See Dworkin, *Is Wealth a Value?*, *supra* note 28, at 192. Posner himself chides Dworkin for not having the courage of his convictions in proposing his hypothetical slave auction in the state of nature:

A problem of indeterminacy may arise, however, if rights are being assigned when a society first comes into existence. In the [slave-master] example it was easy to obtain a determinate rights assignment, because only one good in society was unowned—[the slave's] labor. With every other good having a market or shadow price, one could compute, in principle at least, the effects on aggregate wealth of assigning [the slave's] labor to herself or to [the master]. But suppose no goods are yet owned: land, labor, sexual access—

bride purely for his own sexual pleasure or love, he cannot outbid the procurer. This is because, according to the hypothetical, the husband does not start out with any money that he could use to buy an object purely for consumption. Consequently, he must buy her for money-making activities. But, what could it possibly mean to do anything to make money before resources are allocated when there is no one who yet owns money to buy any goods and services? How could the husband offer to breed his wife in order to produce children who could engage in productive labor when, at this point, it is not known who will end up as the owner of the children's labor? On the other hand, how could the procurer offer to sell the woman's sexual services when, no one has any value to give in exchange for her services? The potential johns do not yet own any money in the state of nature. Indeed, a potential customer cannot even offer to pay for the woman's sexual services in kind by working for the procurer because, in the state of nature, no individual productive capacity has been allocated. No customer, therefore, knows whether or not he will be a free man who can offer his services to the procurer, or the slave of another.<sup>143</sup>

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everything is up for grabs. How can each good be assigned to its most valuable use when no values—no market or shadow prices—exist? This is the problem of wealth effects with a vengeance. All rights have yet to be assigned; assignment of rights on so massive a scale is bound to affect prices; and prices in turn will affect the question of whom the rights should be assigned to.

POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 111. Posner proffers the rather unconvincing argument (given the radical nature of hypothetical market assumptions) that:

The problem is exaggerated in two respects. First we need not be troubled in any case where the particular issue of policy that we are concerned with is marginal to the society as a whole. . . . Second, the assignment of rights at the outset of social development is unlikely to determine the allocation of resources many generations later.

*Id.* According to Posner, no empirical study has found, and no one has proposed a realistic hypothetical, that has found extreme wealth effects of this type. *See* Posner, *Value*, *supra* note 34, at 246. Posner's answer ignores the fact that his own hypothetical is not intended to be a realistic description of any empirical market, but is based on the highly abstract conditions of the state of nature in which all values are up for grabs. Consequently, several of Posner's critics maintain that wealth effects make it impossible to use wealth maximization as a means of determining initial allocation of rights. *See, e.g.,* Coleman, *Efficiency*, *supra* note 14, at 526; Calabresi, *About Law and Economics*, *supra* note 30, at 555; Mario J. Rizzo, *The Mirage of Efficiency*, 8 *HOFSTRA L. REV.* 641, 651 (1980) ("The preceding analysis indicates that the efficiency norm is incapable of uniquely assigning fundamental rights. Pure wealth effects make it possible to find that any existing allocation of rights will be efficient."); *see also* Kornhauser, *Guide*, *supra* note 14, at 679-80.

143. *See* RAKOWSKI, *supra* note 46, at 208. In the words of Rakowski: This difficulty [i.e., the problem of wealth effects] cannot be removed by Posner's suggestion that people should be thought of as able to borrow against their future incomes in bidding for rights at the moment when they are initially assigned. For the amount that people will later be capable of earning is in turn a function of how entitlements, including labor rights, are first distributed. To

Even assuming one could get beyond the circularity of what it means to bid for an entitlement in the state of nature, any Posnerian alternative would still require the woman to realize the financial value of her sexuality by selling it, presumably to men.<sup>144</sup> If, instead, the woman wished not to have sex with men, or, wished not to live in a world where her social and financial status depended on her marriage, or even if she accepts such a marital arrangement but rejects the concept that financial considerations should be the paramount consideration for choosing a husband, she would not be able to raise money to secure a loan from an auctioneer. Posner's is a world of mandatory, universal whoredom with no room for the nun,<sup>145</sup> the romantic, the feminist, the lesbian or even, for that matter, the traditional American housewife idealized in family-values rhetoric. Because of wealth maximization's repression of feminine enjoyment, it cannot accommodate woman's sexuality as belonging to woman.

There are no feminine subjects recognized in the regime of wealth maximization, only feminine objects. Under wealth maximization, feminine sexuality can only be analyzed as a commodity traded among masculine subjects. This is because, as demonstrated in the next section, Posner's definition of wealth is masculine in the technical, psychoanalytic sense, and the masculine always defines itself by expulsion or abjection of the feminine.

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appeal to future income to determine initial shares, when future income depends on initial shares, is to turn an embarrassingly tight circle.

*Id.* (footnote omitted). Posner tries to counter this type of argument by making the unsupported empirical claim that any hypothetical differences in allocations of resources resulting from wealth effects would dissipate over time:

Suppose at the beginning one man owned all the wealth in a society. To exploit that wealth, he would have to share it with other people—he would have to pay them to work for him. His remaining wealth would be divided among his children or other heirs at his death. Thus, over time, the goods and services produced and consumed in the society would be determined not by his preferences but by those of his employees and heirs. Probably after several generations most prices in this society, both market and shadow prices, would be similar to those in societies in which the initial distribution of wealth was more equal. If so, it means the initial distribution of wealth will eventually cease to have an important effect on the society's aggregate wealth.

POSNER, *ECONOMICS OF JUSTICE*, *supra* note 45, at 111-12.

144. Theoretically, she may be able to sell her body in lesbian prostitution as well. As Posner states in setting forth the parameters of his hypothetical, however, the "usual case" which one needs to use to hypothesize a rule of general applicability is of female prostitutes and male customers.

145. John Finnis has suggested in a conversation with this author another possible alternative based on Catholic tradition. A woman may offer to become a consecrated virgin who will pray for the souls of the faithful. The faithful might then be willing to give alms to "purchase" the nun's chastity in the same way as they have traditionally contributed to the establishment of nunneries. This, of course, raises the same infinite regress problem discussed below: Where do the faithful get their money when they do not wish to exploit the nun for financial gain, but for the sake of their souls?

This should not be surprising. Not only do structuralist anthropologists following Claude Lévi-Strauss argue that most primitive cultures are based on literal exchanges of brides among men of different kinship group; they suggest the exchange of women is the beginning of culture.<sup>146</sup> As this author has discussed elsewhere, Lacanian theory argues more generally that the masculine subject and the symbolic order are created through an imagined exchange of a feminine object of desire.<sup>147</sup>

#### IV. LACAN AVEC POSNER

##### *A. A Whirlwind Introduction to Lacanian Economics*

The previous Sections have explicated Lacanian and Hegelian theory and have suggested how it relates to an economic analysis of law discussed at length elsewhere.<sup>148</sup> Readers who are already familiar with Lacanian theory may wish to skip directly to Section B, in which Lacanian theory is applied to Posnerian wealth maximization.

This section will paraphrase a more detailed account of Lacanian economics presented elsewhere, to introduce briefly certain concepts necessary for the specific analysis of this Article. These include (1) the "split" of the subject into the three psychic orders of the symbolic, the imaginary, and the real; (2) castration understood as the universal sense of dislocation and loss resulting from this split; (3) sexuality as the set of positions one can take with respect to castration, denial (the masculine) and acceptance (the feminine); (4) the way the subject and sexuality are

146. As has been widely noted, Lacan's theory of sexuality has its origins in Lévi-Straussian structuralism of the role of the exchange of women as the origin of culture. See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF GENDER* 36-43 (1990); GROSZ, *supra* note 10, at 126.

147. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16.

148. The following is a summary of my analysis of the sexual nature of property relations developed in *id.* I have further developed my theory of the psychoanalytic function of market relations and how it explains utilitarianism (wealth maximization) and romanticism in Schroeder, *Pandora's Amphora*, *supra* note \*, at 860-904. I explicate a Hegelian-Lacanian analysis of the ideal of the perfect market and the Coase Theorem in detail in Schroeder, *The End of the Market*, *supra* note \*, at 484-513, 515-18, 531-58. I explicate the relationship of the feminine understood as radical subjectivity and its relationship to the masculine objectivity of law in Schroeder, *The Eumenides*, *supra* note \*.

Not only is Lacan's theory complex and controversial, his style is intentionally and infuriatingly obscure. This is exacerbated by the fact that his most influential works are not writings at all, but edited transcripts of year-long "seminars" (more accurately, extended lectures) which he delivered over a twenty-two year period. Consequently, there are probably as many interpretations of Lacan as there are readers. My reading is heavily influenced by the writings of Slavoj Žižek. Because in this Article I am only giving an abbreviated account of an analysis I develop at great length elsewhere, I am omitting most of the citations to sources on which I have relied.

played out in object relations generally; and (5) the function of symbolic object relations in law and markets specifically. To oversimplify, just as Lacanian theory posits that the masculine position is created by repressing the feminine (that is, one cannot deny castration, unless once represses its acceptance), so it predicts that a market theory such as wealth maximization emphasizing the masculine property elements of possession and exchange cannot directly acknowledge the feminine element of enjoyment. Repression is not destruction, however. The masculine must always (at some level, intentionally) fail in meeting his goal of destroying the feminine because the masculine can only define himself in contrast to the feminine. Similarly, for actual markets to function, the ideal of wealth maximization must fail, and enjoyment must secretly remain the guiding force of the market.

Both Lacan and Hegel posit that the subject who has the capability to be a speaking actor and interacts with others within modern society, is not in a natural state. Rather, the subject is created through intersubjective relationships revolving around a hypothesized object of desire. Hegel explains how the subject is created through the regime of “abstract right”—private law, contract, and property. Lacan, building upon Hegel, describes the development of the subject through sexuality.

Sexuality in the psychoanalytic sense should not be confused with anatomy, however. Sexuality is a system that is located, along with law and language, in the psychoanalytic order of the symbolic. Specifically, sexuality is the set of positions one takes in response to a universal sense of loss that Lacan calls “castration.”

### 1. CASTRATION

According to Lacan, as one matures, learns to speak, and takes on a sexual identity—that is, as one becomes a subject—one’s subjectivity is split between three orders called the symbolic, the imaginary, and the real.<sup>149</sup> The symbolic is the order of language, law, sexuality, and signification. The imaginary is the order of imagery, fantasy, captivation, and meaning. The real is the border to the other two orders. The real is not merely empirically impossible; it is the concept of impossibility per se.<sup>150</sup> It includes the sense that there is something that cannot be captured

149. See Jacqueline Rose, *Introduction II*, in JACQUES LACAN AND THE *ÉCOLE FREUDIENNE*, FEMININE SEXUALITY (Juliet Mitchell & Jacqueline Rose eds. & Jacqueline Rose trans., 1985) [hereinafter LACAN, FEMININE SEXUALITY]; 1 JACQUES LACAN, THE SEMINAR OF JACQUES LACAN: FREUD’S PAPERS ON TECHNIQUE 80 (Jacques-Alain Miller ed., & J. Forrester trans. 1988) [hereinafter LACAN, SEMINAR I]; Grosz, *supra* note 10, at 34–47, 50, 59; Schroeder, *The End of the Market*, *supra* note \*, at 500.

150. See Schroeder, *The End of the Market*, *supra* note \*, at 500–501, 517–18; Grosz, *supra* note 10, at 34 (“The Real cannot be experienced as such: it is capable of representation or conceptualization only through reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as ‘the lack of a lack’.”).

in words and images, as well as intuition of such concepts as the object world, death, God, and everything else beyond full comprehension that human beings dream of and dread.<sup>151</sup>

The subject is split because to achieve subjectivity, he must submit to the language, law, and sexuality necessary for intersubjective relations. The subject feels that that which is most himself—his subjectivity—is outside of himself in the intersubjective order of the symbolic.<sup>152</sup> In other words, even though man's capacity to speak, bear legal rights and have sexuality may be inherent, any specific language must be learned, any specific legal right requires a legal regime, and any specific sexual identity requires comparison to and recognition by others. When understood in this sense, the symbolic order takes on the role known as the Other.<sup>153</sup>

The subject experiences his split not as a "fact of life," but rather as the tragic result of a hypothesized primal act of violence. In other words, it is not just that the subject in the symbolic order of the Other happens to feel split; he feels that he has been split by the Other.<sup>154</sup>

Before each person achieves subjectivity and consciousness, he is an infant. Because no one has conscious memory of infancy, and because consciousness is experienced as a split, each person develops a vague sense that infancy was a time when he was not yet split.<sup>155</sup> The subject, therefore, retroactively, but incorrectly, hypothesizes that there was once a time when he was not split, when he was still whole and integral—not only whole in and of himself, but whole in the sense of being one with the natural world associated with his mother. Since it is the symbolic that is the source of the subject's splitting, the subject feels that it must have been the Other who has destroyed his wholeness.<sup>156</sup> Lacan, using the metaphor of male anatomy, calls this sense "castration": It is the sense that the Other has taken away one's most precious part, the part that is

151. See Schroeder, *The End of the Market*, *supra* note \*, at 500; JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS 45 (Jacques-Alain Miller ed. & Alan Sheridan trans., The Hogarth Press 1981) (1973) [hereinafter LACAN, THE FOUR FUNDAMENTAL CONCEPTS]; STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 76 (1983); HEGEL, SCIENCE OF LOGIC, *supra* note 98; LACAN, SEMINAR XX, *supra* note 10, at 76-77.

152. See Schroeder, *The End of the Market*, *supra* note \*, at 504.

153. A full explication of Lacan's complex and paradoxical notion of the Other (with a capital "O") is beyond the scope of this Article. It includes the symbolic order itself as well as the concept of other concrete people. See BRUCE FINK, THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE 13 (1995).

154. See Schroeder, *The End of the Market*, *supra* note \*, at 504.

155. Lacan calls this the "mirror stage." LACAN, ÉCRITS, A SELECTION 2 (Alan Sheridan trans., W.W. Norton & Co. 1977) (1966) [hereinafter LACAN, ÉCRITS]. The mirror stage typically begins at around six months of age and lasts to around eighteen months. See GROSZ, *supra* note 10, at 35.

156. I explain this dynamic in Schroeder, *The End of the Market*, *supra* note \*, at 505-06.

more the subject than the subject himself, the part that would make him whole.<sup>157</sup> Lacan uses a masculine metaphor and calls the hypothesized lost object of desire the "phallus," and its loss, "castration."

Castration is, therefore, the universal initiation rite of subjectivity experienced by all normal persons of either sex.<sup>158</sup> Sexuality is the position the subject takes in response to castration. The masculine position is denial. The feminine position is acceptance. The masculine subject claims, falsely, to possess the phallus and to exchange it with other masculine subjects.<sup>159</sup> The feminine knows that the phallus is forever lost and can only nostalgically pine for it. Rather than seeking to attain the phallus, like the masculine, the feminine identifies with the lost phallus, and longs to enjoy it ecstatically.<sup>160</sup>

In the imaginary order of picture-thinking, the purely symbolic concept of the phallus is conflated with apparently real counterparts. For reasons beyond the scope of this Article, the masculine position is conflated with maleness and the feminine position with femaleness (hence Lacan's terminology). The phallus, as that which men have and women are, is figured by the male organ and the female body.<sup>161</sup>

Lacan's castration terminology reflects the masculine position. If there are two sexuated positions, there should also be a metaphor that expresses the universal sense of loss from the feminine side. This author has suggested elsewhere that this concept, when filtered through the feminine position, should not be translated in terms of the female genitalia and genital mutilation. The feminine, in her acceptance of castration, does not feel the pain of castration as the loss of a part that could theoretically be remedied through an exchange that results in the acquisition of a new part. Castration is, instead, understood as a fundamental, irreversible change of condition in the person herself that can never be cured, only mourned. Consequently, what the feminine loses in castration is not a part like the penis, but the integrity of the female body as a whole. She feels that she lost her virginity, her girlish innocence, when she was brutally violated by the Other. By teaching the maiden to speak and obey law, the Other forcibly "made a woman out of her." As such, she is no longer self-sufficient, but is now defined only by the intersubjective (sexual) relationships of the symbolic. Because these

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157. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 87-94.

158. See Schroeder, *The Eumenides*, *supra* note \*; Schroeder, *The End of the Market*, *supra* note \*, at 507.

159. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 85-86; Schroeder, *The End of the Market*, *supra* note \*, at 507-08.

160. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 83-84, 96-101; Schroeder, *The End of the Market*, *supra* note \*, at 509.

161. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 87-89. This book is an expansive explication of the conflation of the phallus with anatomical counterparts and of how such phallic metaphors play out in the law of property.



defining sexual relations are always failures, she experiences herself as incomplete.<sup>162</sup>

This concept of sexuality as the result of castration can be seen in the Biblical creation myth. According to the first chapter of *Genesis*, God "created man in his own image . . . male and female created he them."<sup>163</sup> But chapter two relates that the Lord God created Eve out of Adam's rib.<sup>164</sup>

One way theologians have tried to reconcile these facially inconsistent creation stories is to propose that the second story is not the story of the creation of woman, but the story of the creation of sexual difference.<sup>165</sup> In this view, God initially created a single human being, *ha-'adam*,<sup>166</sup> who was, as *Genesis 1* relates, both male and female; therefore, bi-sexual (or perhaps more accurately, non-sexual). Subsequently, as recounted in *Genesis 2*, God created sexuality by separating this single complete creature into two incomplete ones.<sup>167</sup>

To put this in Lacanian terminology, the subject was once perfectly whole and, therefore, self-sufficient. God castrated *ha-'adam* by taking away a precious part of his/her body—the (phallic) rib—and building it into another being. The resulting subject who feels that he has lost a part of himself is man. The resulting subject who identifies herself with that which the other has lost is woman. In other words, through castration, the masculine subject feels that he no longer has what he once *had*. Through violation, the feminine subject feels that she no longer is what she once *was*. The difference between the masculine and the feminine is the difference between having and being reflected in the verb forms found in all Western language.

Because one feels the loss of the phallus when one enters the symbolic, and because the real is whatever is beyond the symbolic, the phallus is in the real. This Section now turns to the nature of the phallus, the real, and desire, and then to the implications for law and economics which, like language and the sexuality, are located in the symbolic.

162. See *id.* at 232-36, 243-45, 303-04, 328-34.

163. *Genesis* 1:27.

164. See *id.* 2:21-22.

165. Biblical historians have, of course, tried to explain this textually by positing that the Pentateuch is a later redaction of a number of earlier texts including the E text in which God is called Elohim and the J text in which God is called YHWH. For a good introduction to this tradition, see RICHARD ELLIOTT FRIEDMAN, *WHO WROTE THE BIBLE?* (1997). This approach does not, of course, explain how one should approach the Bible as a religious text either in the believer's terms as the Word of God or the historian's terms as the fundamental inspirational source of Western civilization. The Bible as it comes down to us is a single work, whether written by Moses or by a redactor.

166. The Hebrew word is not a proper name. It means "human being."

167. See JONATHAN SAWDAY, *THE BODY EMBLAZONED: DISSECTION AND THE HUMAN BODY IN RENAISSANCE CULTURE* 185 (1995).

The phallus, defined as that which no longer exists in the symbolic but is exiled to the real, is perfect integrity, wholeness, and satisfaction; i.e., that is, the subject before the split of castration. Because human beings are now separated from, yet drawn to and long for, other persons and things, the perfection of the real includes the ideal of immediate relations with others. The real is the hypothesized uterine union with the mother that must have existed before the subject was split. The real is where one is not merely complete but at one with the universe. In the real, there are no alienating distinctions that separate humans from themselves, other persons, and other things. Because there is no separation in the real, there is no space. Because there is immediate gratification in the real, there is no time. Because subjectivity is only created through intersubjective relations, and relations require the ability to distinguish between oneself and others, there is no subjectivity in the real. Without space or time (Kant's transcendental aesthetic), there is no subjectivity, no consciousness, no thought.<sup>168</sup>

The real is not merely death, it is oblivion. It is radical negativity *per se* in the Hegelian sense. Paradoxically, in the capacity of the subject, one understands the self to be nothing—the lost phallus *is* the soul. The subject is not merely split; it is the split itself that constitutes the subject.<sup>169</sup> Consequently, Lacan, following Hegel, argues that self-consciousness is purely a negative concept. It is the understanding that “I am not that” that enables one to achieve an awareness of existence as a separate person. This conception of personality as the lack of boundaries is simultaneously terrifying and liberating. This is why humans vacillate between the masculine position of denying it and the feminine one of embracing it.

## 2. DESIRE IN THE GARDEN OF EDEN

Desire—like the phallus, castration, and sexuality—is a term of art with a meaning quite diverse from the economic concept of “preference.” Desire is a purely symbolic form of longing that should not be confused with the anatomic mating urge,<sup>170</sup> or the romantic longing for an idealized beloved. Desire is specifically the longing to have what is missing in the symbolic—the wholeness lost when the subject was split. There are two

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168. I explore the concept of the real as immediacy and its implications for economics extensively in Schroeder, *The End of the Market*, *supra* note \*, at 511-13, 519-20, 548-59; see also SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 87-89, 107-08.

169. See Schroeder, *The End of the Market*, *supra* note \*, at 501-02 n.58; see also FINK, *supra* note 153, at 45.

170. For a discussion on the difference between desire, the animal mating urge, and the uniquely human urge called “drive,” see *infra* text accompanying notes 328-31. As I shall discuss, Posner's regime of wealth maximization is characterized by drive rather than desire.

forms of desire corresponding to the two sexuated positions: *eros* and *thanatos*.

As previously discussed, the masculine position tries to deny castration. He inconsistently brags (falsely) that he possesses the phallus, and that he will obtain the lost phallus through exchange with other masculine subjects. To the masculine, that which is lost is conceptualized as the piece that will make him whole. The phallus is whatever is lost in the present, including enjoyment or use value. In other words, the masculine is the deluded proposition that one can somehow attain satisfaction while remaining a conscious, speaking subject in the symbolic. The masculine form of desire is, therefore, *eros*: the longing for a perfect mate that will paradoxically complete him while allowing him to remain separate.

A perfect example of the dream of *eros* can, surprisingly, be found in an orthodox Catholic interpretation of the Biblical account of the Fall. According to St. Augustine, it is a vulgar and dirty-minded misunderstanding to think that either there was no sex in the Garden of Eden or that sexual intercourse was Original Sin.<sup>171</sup> Original Sin consisted of Adam and Eve's pride in wishing to be like God and disobedience in eating the fruit of the Tree of the Knowledge of Good and Evil. Lust is the punishment for, not the cause of, Original Sin.<sup>172</sup>

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171. See PETER BROWN, *THE BODY AND SOCIETY: MEN, WOMEN AND SEXUAL RENUNCIATION IN EARLY CHRISTIANITY 400-02* (1988). As man was created with both spirit and flesh, he was intended to experience both mental and physical pleasure:

For neither was it a paradise only physical for the advantage of the body, and not also spiritual for the advantage of the mind; nor was it only spiritual to afford enjoyment to man by his internal sensations, and not also physical to afford him enjoyment through his external senses. But obviously it was for both ends.

SAINT AUGUSTINE, *THE CITY OF GOD* 458 (Marcus Dods ed. & trans., 1950) [hereinafter AUGUSTINE, *CITY OF GOD*]. Thomas Aquinas agreed about the existence of sexual pleasure in the Garden. See SLAVOJ ŽIŽEK, *THE PLAGUE OF FANTASIES* 15 (1997) [hereinafter ŽIŽEK, *PLAGUE OF FANTASIES*].

172. See AUGUSTINE, *CITY OF GOD*, *supra* note 171, at 444 ("For the corruption of the body, which weighs down the soul, is not the cause but the punishment of the first sin; and it was not the corruptible flesh that made the soul sinful, but the sinful soul that made the flesh corruptible."). The Garden was a place of perfect, albeit hierarchical, harmony between God and man, man and woman, and soul and body. When Adam and Eve turned away from God, they destroyed this harmony:

The twisted human will, not marriage, not even the sexual drive, was what was new in the human condition after Adam's Fall. The fallen will subjected the original, God-given bonds of human society—friendship, marriage, and paternal command—to sickening shocks of willfulness, that caused these to sway, to fissure, and to change their nature."

BROWN, *supra* note 171, at 404. As I shall discuss shortly, before the Fall, the body followed the dictates of the soul. See *id.* at 405. After the Fall, the body gained a mind of its own and now rebels against the soul through uncalled-for lust and embarrassing impotence. See AUGUSTINE, *CITY OF GOD*, *supra* note 171, at 465, 422; see also BROWN, *supra* note 171, at 417.

Eve was created as the perfect mate to make Adam whole,<sup>173</sup> to replace the piece that God took away from him. Because God created two sexes and commanded Adam and Eve to be "fruitful and multiply," sexual intercourse must have been part of the Divine plan.<sup>174</sup> Consequently, Adam and Eve did have sexual intercourse in the Garden.<sup>175</sup> Moreover, since the Garden was the land of perfect relationships, pre-lapsarian sexual relations would have been infinitely more pleasurable than they are now in the post-lapsarian world.<sup>176</sup> The difference, however, is that sex would not have been ecstatic—there could be no *jouissance* in the Garden. During orgasm, Adam and Eve would retain perfect control and distance; that is, they would feel completion without losing their separate consciousness.<sup>177</sup>

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Sexuality and death are linked because they are the two ways in which the rift between spirit and flesh (symbolizing as well the rift between God and man, and between man and woman) are physically manifest: in death the spirit is involuntarily deprived of its beloved spouse, flesh; in sex, the spirit loses its harmonious governance over the rebellious flesh. Death comes to us at the end of our lives and we can try not to think about it. Sexuality, on the other hand, is always with us.

Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123, 170-71 (1992) [hereinafter Schroeder, *The Taming of the Shrew*] (footnotes omitted).

173. See SAINT AUGUSTINE, *The Good of Marriage*, in TREATISES ON MARRIAGE AND OTHER SUBJECTS 9, 9 (Roy J. Deferrari ed. & Charles T. Wilcox et. al. trans., 1955). Augustine writes:

Since every man is a part of the human race, and human nature is something social and possesses the capacity for friendship as a great and natural good, for this reason God wished to create all men from one, so that they might be held together in their society . . . And so it is that the first natural tie of human society is man and wife.

*Id.* Augustine continues, "This [the good of marriage] does not seem to me to be a good solely because of the procreation of children, but also because of the natural companionship between the two sexes." *Id.* at 12.

174. "[B]ut it is quite clear that they were created male and female with bodies of different sexes for the very purpose of begetting offspring . . . and it is great folly to oppose so plain a fact." *Id.* at 469. "And it is by this original example, which God Himself instituted, that the apostle admonishes all husbands to love their own wives in particular." *Id.* at 470.

175. See ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 171, at 15. Or, as Augustine suggests, they would have if they had not been expelled so rapidly. Apparently, Eve ate of the Tree of the Knowledge of Good and Evil soon after she was created. See BROWN, *supra* note 171, at 402.

176. "[T]he married intercourse of Adam and Eve . . . would have been an object lesson in the balanced rapture with which human beings might have used the physical joys showered upon them by their Creator." BROWN, *supra* note 171, at 407; see ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 171, at 15.

177. See ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 171, at 15; AUGUSTINE, CITY OF GOD, *supra* note 171, at 457. Augustine writes:

As happy, then, as were these our first parents, who were agitated by no mental perturbations, and annoyed by no bodily discomforts, so happy should the whole human race have been . . . this original blessedness continuing until,

The Fall was a form of castration whereby the subject became split and perfect relationships became impossible. As Augustine lamented in his *Confessions*, "Surely I have not ceased to be my own self . . . and yet there is still a great gap between myself and myself . . . Oh that my soul might follow my own self . . . that it might not be a rebel to itself."<sup>178</sup>

The imaginary relationship posited by *eros* cannot occur precisely because castration is a lie. Woman is not man's lost phallus. There never was, nor will there ever be, a piece that was taken away from the subject that would make him whole. In addition, the fantasy of *eros* imagines that the two sexes are complementary—that the feminine is the helpmate that will complete the masculine. By contrast, the two sexes are symbolic, not imaginary. They do not form two halves of a single subject, but are each themselves split subjects.<sup>179</sup>

The masculine fantasy of *eros*, moreover, is incorrect in thinking that one can be both separate and complete, like Adam and Eve in the Garden of Eden. Indeed, the fantasy of the Garden of Eden is a perversion, in the technical sense of the term.<sup>180</sup> One cannot heal castration—the split

in virtue of that benediction which said, 'Increase and multiply,' . . . there would then have been bestowed that higher felicity which is enjoyed by the most blessed angels . . .

*Id.* "The man, then, would have sown the seed, and the woman received it, as need required, the generative organs being moved by the will, not excited by lust." *Id.* at 472. Augustine continues:

In such happy circumstances and general human well-being we should be far from suspecting that offspring could not have been begotten without the disease of lust, but those parts, like all the rest, would be set in motion at the command of the will; and without the seductive stimulus of passion, with calmness of mind and with no corrupting of the integrity of the body, the husband would lie upon the bosom of his wife.

*Id.* at 475; see also BROWN, *supra* note 171, at 402, 407-08; Schroeder, *The Taming of the Shrew*, *supra* note 172, at 169-70.

178. SAINT AUGUSTINE, *CONFESSIONS* 10.30.41-42 (R.S. Pine-Coffin trans., 1961). As I have discussed elsewhere, Lacan was following Augustine when Lacan declared that the phallus was the symbol of loss. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 90.

179. See RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 116 (1994). Salecl writes:

Lacan thus moves as far as possible from the notion of sexual difference as the relationship of two opposite poles which complement each other, together forming the whole of 'Man.' 'Masculine' and 'feminine' are not the two species of the genus Man but rather the two modes of the subject's failure to achieve the full identity of Man. 'Man' and 'Woman' together do not form a whole, since *each of them is already in itself a failed whole*.

*Id.*

180. See ŽIŽEK, *PLAGUE OF FANTASIES*, *supra* note 171, at 15. Žižek writes: [Adam and Eve's] pleasure was even greater than ours (i.e., the pleasure of having sex after the Fall), the only and crucial difference being that, while copulating, they maintained proper measure and distance, and never lost self-control—this assertion unknowingly reveals the secret of Paradise: it was the kingdom of *perversity*. That is to say: does not the fundamental paradox of

which is subjectivity—without destroying subjectivity and the symbolic realm of speech, law, and sexuality. To achieve wholeness is to lose oneself; to rejoin the primordial unity of the real. This is the feminine acceptance of castration. To be a subject is to be castrated; to not be castrated is to lose one's subjectivity.

Indeed, to return to the creation myth,<sup>181</sup> by the logic of *Genesis* itself, if Adam and Eve were to achieve perfect sexual relations, they would merge back into the single bi-sexual creature of the initial creation prior to the creation of sexual difference. As the Bible suggests, God created sexual difference precisely to enable humans to love: "It is not good that the man should be alone; I will make him an help meet for him."<sup>182</sup> As a result, "shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh."<sup>183</sup> Love requires not only that there be two separate persons, but also that they each lack something and, therefore, desire each other. Sexual relations must be impossible in the sense that lovers always fail to achieve their goal of achieving union.

Nevertheless, all subjects continue nostalgically to long for the hypothesized pre-castrated, pre-violated integrity, wholeness, and satisfaction. The masculine desire of *eros*, based on denial, eventually becomes the feminine desire of *thanatos*, which is based on acceptance. The ultimate desire is the death wish: the desire to merge with the real.

### 3. THE SEXUATED POSITIONS

This Article earlier noted that the feminine position with respect to the object of desire is identification and enjoyment. This concept can now be explored in more detail. The lost object of desire—the phallus—is exiled to the real. The feminine, in so far as she accepts castration, identifies with this aspect of selfhood that is lost in the real. Because the real is that which, by definition, cannot be captured in words and images, it is literally everything that is unspeakable and unimaginable. The feminine as the phallus is, therefore, impossibility or radical negativity. This corresponds to the feminine desire of *thanatos*; the identification with the phallus is the desire to achieve the negativity of the real.<sup>184</sup>

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perversion reside in the fact that the pervert successfully avoids the deadlock of the 'states which are essentially by-products.'

*Id.*

181. See *supra* text accompanying notes 163-67.

182. *Genesis* 2:18.

183. *Id.* 2:24.

184. I identified *thanatos*, understood as the desire for death (as opposed to the death drive), as feminine in Schroeder, *The End of the Market*, *supra* note \*, at 486-88, 493-94, 510.

Paradoxically, the feminine portion of the personality is the ability to cross over occasionally from the symbolic realm of speech to the real. Lacan calls this temporary achievement of the real feminine "*jouissance*."<sup>185</sup> The French word, which literally means enjoyment, is also a euphemism for sexual orgasm and, therefore, has a connotation of ecstasy. Feminine *jouissance* is not, however, enjoyable in the conventional sense of the term. Enjoyment is ecstasy, the achievement of desire; but since the desire described here is *thanatos*, enjoyment comes while staring into the abyss. Enjoyment is gut-wrenching horror as well as sublime joy. It is pleasure in pain.<sup>186</sup>

This Article will now consider the relations of the sexes to each other. When this task is completed, this Article will apply Lacanian theory to law and market relations.

As described earlier, the two sexes are positions one can take with respect to castration: denial and acceptance. The masculine, who feels that he has lost a precious part of himself, falsely claims to possess and exchange the object of desire.<sup>187</sup> The feminine, who feels she has lost her selfhood, accepts the role of identification with and enjoyment of the object of desire.<sup>188</sup> The masculine must lie to himself and pretend as though nothing has been lost. He must deny the existence of the real and act as though the symbolic were complete. The formula for masculinity is, therefore, "all subjects are submitted to the symbolic order."<sup>189</sup>

How does the masculine reconcile this with his feeling of castration? He identifies castration with the feminine, and then represses the feminine.<sup>190</sup> If the feminine is that aspect of personality that is identified with castration, then one can avoid dealing with castration by not

185. Lacan used the term "*jouissance*" in many different ways over his career. Jacques-Alain Miller, Lacan's son-in-law and editor of Lacan's seminars, has identified at least six different "paradigms" of *jouissance* adopted by Lacan over time. See Jacques-Alain Miller, Address at University of California at Los Angeles, Symposium: The Subject: Encore, The Formation of the American Lacanian Link (Mar. 6, 1999) (unpublished address attended by the author). The analysis in this Article is based on my interpretation of one aspect of *jouissance* as discussed in Lacan's later work, particularly his seminar on feminine sexuality. See LACAN, SEMINAR XX, *supra* note 10, at 61-77.

186. Žižek has written extensively about the horrifying aspect of *jouissance*. See, e.g., ŽIŽEK, LOOKING AWRY, *supra* note 22, at 3-48 (examining confrontation with the Real through analyses of popular culture); ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 171, at 48-54 (describing the traumatic nature of *jouissance*); see also Schroeder, *The End of the Market*, *supra* note \*, at 509-11.

187. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 88-90, 91-92, 102-103; Schroeder, *Three's a Crowd*, *supra* note \*, at 401-04; see also LACAN, FEMININE SEXUALITY, *supra* note 149, at 121.

188. See GROSZ, *supra* note 10, at 69; SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 82-85, 86, 288-89; Schroeder, *The End of the Market*, *supra* note \*, at 509; Schroeder, *The Eumenides*, *supra* note \*.

189. See LACAN, SEMINAR XX, *supra* note 10, at 78-81; *infra* notes 296-97.

190. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 86; Schroeder, *The Eumenides*, *supra* note \*.

acknowledging the feminine. The feminine is, therefore, that aspect of personality that cannot be directly acknowledged in the symbolic realm. In Lacan's notorious formulation, The Woman [sic] does not exist.<sup>191</sup> She is that which is literally unspeakable in the symbolic order, and unseeable in the imaginary. She is the lost phallus and the lack per se; the radical negativity and the impossibility of the real.

Consequently, although the masculine creates himself by distinguishing himself from the feminine, he can never directly acknowledge the feminine since the feminine is precisely the part of his personality that he denies. Similarly, although the feminine is created by the masculine, the feminine cannot fully accept the masculine since the feminine position is the realization that the masculine position is a lie. If the masculine formula claims "all subjects are subjected to the symbolic order," the feminine is the opposite claim, "*pas-toute*," which can be translated either as "not-all subjects are subjected to the symbolic order" or "the subject is not wholly so subjected."<sup>192</sup> The two sexes require each other but can never exist simultaneously. In Lacan's terms, there are no sexual relations. Or, perhaps more accurately, sexuality *is* constituted by the fundamental non-relation between the two sexes.<sup>193</sup>

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191. The slogan "woman does not exist" is a potentially misleading paraphrase of one of the most famous passages from Lacan's twentieth seminar. This formulation obscures the point that Lacan is not speaking about female human beings, but the radical negativity of "the feminine":

[T]he woman can only be written with *The* crossed through. There is no such thing as *The* woman, where the definite article stands for the universal. There is no such thing as *The* woman since of her essence—having already risked the term, why think twice about it?—of her essence, is not all.

LACAN, FEMININE SEXUALITY, *supra* note 149, at 144. Clément points out that this quote is frequently used by the ill-informed as evidence of Lacan's "deep seated misogyny": "He doesn't like women. He said they don't exist." This is an interpretation that is "nonsense of monumental proportions." CATHERINE CLÉMENT, THE LIVES AND LEGENDS OF JACQUES LACAN 51 (A. Goldhammer trans., 1983). As Žižek explains:

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

ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 112, at 188 (footnote omitted).

192. See LACAN, SEMINAR XX, *supra* note 10, at 70, 80. Lacan's term "*pas-toute*" has also been translated as "not-all"; see LACAN, FEMININE SEXUALITY, *supra* note 149, at 145.

193. At first blush, Lacanian theory seems to replicate traditional misogynistic stereotypes of active masculinity as the position of subjectivity to be contrasted to passive feminine objectivity. In fact, Lacan turns these stereotypes inside-out and subverts the sexual status quo from within. I shall only introduce this now because I shall discuss this in detail when I turn to the difference between the masculine and feminine tropes of time and money.



## 4. THE REAL

Before Lacan may be applied to economics, there remains one additional aspect of the concept of the "real" relevant to a discussion of enjoyment and use value in wealth maximization. This Article has described the real as the order that serves as the impossible border of the other two orders: as that which can literally not be captured in words or pictures. One experiences the real as that which was "lost" or left behind upon entering the symbolic: as the "hard kernel" of reality that resists sublation.<sup>194</sup>

This is a delusion. The real was created at the same time as the other two orders when language was learned. In other words, the symbolic (law, language, sexuality) and the imaginary (imagery, meaning) are limited, bounded orders. The real is created solely to act as their border.<sup>195</sup> It is that part of one's experience that cannot be reduced to words or pictures. The real is the radical negativity and loss of consciousness that is the other of the symbolic and the imaginary. One retroactively hypothesizes, however, that the real must have an affirmative content by clues, which are interpreted as the "stains" or "traces" of its retreat in the symbolic and the imaginary.<sup>196</sup> Whenever one encounters the uncanny—the sense that language and imagery is incompetent—rather than realizing that this is the inevitable failure of language and imagery, one interprets this as evidence that there is something beyond language and imagery. In the words of the advertising slogan for *The X-Files*, "The truth is out there."<sup>197</sup>

The Lacanian understanding of the real is reflected in the traditional male preoccupation with female virginity.<sup>198</sup> Virginity in and of itself is a purely negative quality—it is the lack of sexual relations. It only achieves a positive significance retroactively from the judgment that it is something "lost" by women. Sexually active women are considered

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The masculine, who completely submits himself to the symbolic order, is the part of personality that is totally bound and unfree. By being identified with the real—the realm beyond the bounds of the symbolic—the feminine is the possibility of the existence of free will in a determinate universe. The masculine claims subjectivity through his pretense that he possesses the phallus. But the heart and soul of subjectivity is its constituent split—the moment of freedom as radical negativity. It is only the feminine, therefore, that can actually be the active subject. See Schroeder, *The Eumenides*, *supra* note \*.

194. Although we experience it in this way, "the Real is not a hard external kernel which resists symbolization, but the *product* of a deadlock in the process of symbolization." SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 110 (1996).

195. See Schroeder, *The End of the Market*, *supra* note \*, at 501 n.57.

196. See SLAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE*, *supra* note 112, at 36-37.

197. *The X-Files* (Fox television broadcast, 1998).

198. I suggest this "feminine" reinterpretation of castration as defloration in SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 87.

split—deflowered. Defloration, like the achievement of language when one enters into the symbolic, is in fact a gain: the achievement of the ability to engage in intersubjective (sexual) relations (however imperfect they must necessarily be). Nevertheless, defloration is retroactively described as a loss of a pre-symbolic integrity and wholeness. In the words of Shakespeare, “Loss of virginity is rational increase, and there was never virgin got till virginity was first lost . . . . Virginity by being once lost may be ten times found; by being ever kept it is ever lost.”<sup>199</sup> Thus, in traditional societies, the state of virginity could never be affirmatively proven because it was always at risk of being lost—the virgin could never claim to be chaste because tomorrow’s indiscretion would be conclusive proof of yesterday’s bawdy predilection. Past virginity could literally only be posited retroactively by the stain of its loss.

In other words, there was never a time when each person was one with the world. It is only the feeling of being split in the symbolic, that enables one to imagine what wholeness must be like.<sup>200</sup> It is only the feeling of loneliness that enables one to imagine love and experience desire. The real is, therefore, not that which is not yet lost, but that which has not yet been gained. Its traces in the symbolic are not what is left in its retreat, but rather the building blocks of its creation.

## 5. HEGEL

Hegel provides the link between psychoanalysis on the one hand and law and markets on the other. Lacan’s initial theory of the development of subjectivity derives in large part from Hegel. As this author has discussed elsewhere, Hegel argued that one can only become a subject (that is, a legal actor capable of bearing rights and duties) by being recognized as such by another person whom one recognizes as a subject.<sup>201</sup> In other words, legal rights can only be understood as relations between and among legal subjects.<sup>202</sup> The most logically primitive relationship of recognition is the realm of abstract right: property and contract.<sup>203</sup> In abstract right, persons become legal subjects through

199. WILLIAM SHAKESPEARE, *ALL’S WELL THAT ENDS WELL*, act 1, sc. 1.

200. See Schroeder, *Pandora’s Amphora*, *supra* note \*, at 902.

201. I present this analysis in full in SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 15-54; Schroeder, *Three’s a Crowd*, *supra* note \*, at 860-82.

202. This legal truism is often identified with Wesley Newcomb Hohfeld, although he was clearly not its originator. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN LEGAL REASONING* 27-35 (W. Cook ed., 1919).

203. See Schroeder, *Pandora’s Amphora*, *supra* note \*, at 861. Hegel’s dialectic of abstract right comprises the first chapter of his *Philosophy of Right*. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 65-132 (Allen W. Wood ed. & H.B. Nisbet trans., 1991) [hereinafter HEGEL, *PHILOSOPHY OF RIGHT*]. He begins with a consideration of the

mutual recognition of a regime of possessing, enjoying, and exchanging an object of desire.<sup>204</sup> Private law (the rights of property and contract) and subjectivity (the ability to have rights) are mutually constituting.<sup>205</sup> Lacanian analysis shows that possession and exchange are masculine elements of property and that identification with and enjoyment of property are feminine elements.<sup>206</sup> In sexuality, the phallus as object of desire is conflated with the male organ and the female body; similarly, "phallic" metaphors of the male organ and the female body describe property as the object of desire. Consequently, in masculine mode one tends to think of property as a tangible thing that is seen and wielded by its owner, and in feminine mode, one thinks of property as that with which to identify, enter, protect, and ecstatically enjoy. When one is masculine, one thinks of losses of property in terms of castration, as physical takings; when one is feminine, one thinks of losses of property in terms of violation and loss of self.<sup>207</sup> Just as the symbolic realm of sexuality is created through repression of the feminine, the symbolic realm of law privileges the masculine imagery of property and tends to repress the feminine. Consequently, legal analysis has a strong tendency to analyze property in terms of tangibility, possession, and exchange, even when discussing intangible property and the right of enjoyment.<sup>208</sup>

The great insight of late Lacanian thought is that even though personality is created through the intersubjective relationships of the symbolic (language, law, and sexuality), the self is experienced in terms of a hypothesized lost object of desire. Subjectivity as intersubjectivity is

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abstract person, *see id.* at 67-72, proceeds with a consideration of how the abstract person takes on the concrete characteristics necessary for recognition through property, *see id.* at 73-103, then argues how contract enables the person to achieve subjectivity through intersubjective exchange, *see id.* at 104-14. The final section, which analyzes the necessary relationship between abstract right and wrong (i.e., crime), is beyond the scope of this Article.

204. In the formulation I have used elsewhere, in both Lacan and Hegel subjectivity is intersubjectivity mediated by objectivity. *See* Schroeder, *The End of the Market*, *supra* note \*, at 498-99; SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 14, 19, 33-34.

205. *See* SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 50, 863; Schroeder, *Pandora's Amphora*, *supra* note \*, at 821. In Hegel's words:

[Contract] is the process in which the following contradiction is represented and mediated: 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 the owner of property.

HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 203, at 104.

206. *See* SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 107-14, 231-36; Schroeder, *Three's a Crowd*, *supra* note \*, at 403-04.

207. *See* Schroeder, *Three's a Crowd*, *supra* note \*, at 403-04; Jeanne Lorraine Schroeder, *Juno Moneta: On the Erotics of the Marketplace*, 54 WASH. & LEE L. REV. 995, 1016, 1022 (1997) [hereinafter Schroeder, *Juno Moneta*].

208. *See* *Three's a Crowd*, *supra* note \*, at 405-07. I explore this is the context of the famous Calabresi-Melamed analysis of environmental nuisances. *Id.* at 443-67.

mediated by objectivity in the sense that the subjects claim to possess and exchange or identify with and enjoy the object of desire.<sup>209</sup> In other words, object relations take the place of intersubjective relations.<sup>210</sup> Because the true object of desire—the phallus—is lost in the real, one tries to find other objects that may be obtainable in the symbolic and the imaginary to take its place. In other words, one attempts to make seemingly attainable object relations stand in for impossible intersubjective relations.

Most famously, in the imaginary, is the object that Lacan called the *objet petit a*: the object spelled with an “a” in order to sit in the place of the other (*autre*) that is the true desire.<sup>211</sup> The *objet petit a* is created to serve retroactively as the object cause of desire.<sup>212</sup> In truth, one desires because one does not feel whole and the hypothesized object that would satisfy desire does not exist. To realize this would be the feminine acceptance of castration. In order for the masculine self to avoid this, one pretends that what is really desired is some identifiable, actual object. Any “object” can take on this role. The *objet petit a* can be a conventionally pleasurable object, such as a woman’s body (or a part object, such as her breasts), or Proust’s Madeleine, but it can just as easily be an object of disgust, or a completely abstract concept such as the voice or the gaze. The point is, this external “object” serves as an explanation for feelings.<sup>213</sup>

## 6. OBJECT RELATIONS IN LAW AND ECONOMICS

Similarly, in the symbolic realm of law, one loses sight of the purely intersubjective nature of legal relationships and concentrates on the object relations that are only the mediators of intersubjectivity. In the dominant masculine phallic metaphor for property, it is seen archetypically as the

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209 As I have argued elsewhere, see Schroeder, *The End of the Market*, *supra* note \*, at 498, the proposition that intersubjective relations must always be mediated by object relations is one of the meanings of Lacan’s famous slogan, “There is no [*i.e.* direct and unmediated] sexual relationship.” See LACAN, SEMINAR XX, *supra* note 10, at 9; Ragland-Sullivan, *supra* note 10, at 67; GROSZ, *supra* note 10, at 137.

210. As accurately described by Žižek, this is an understanding that Lacan only developed over time. In his early seminars, Lacan tended to concentrate on the role of intersubjective relationships in the formation of personality. As the years progressed, he shifted his emphasis more and more to the object relations we form in response to the failure of intersubjectivity. See ŽIŽEK, *THE PLAGUE OF FANTASIES*, *supra* note 171, at 8.

211. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 108 n.1.

212. Lacan spent the latter part of his career explicating his theory of the *objet petit a*. My discussion here necessarily touches only on one limited aspect of this very complex idea. For a succinct account of the function of the *objet petit a* as the object cause of desire, see FINK, *supra* note 153, at 83-94.

213. See Schroeder, *The End of the Market*, *supra* note \*, at 506-07.

sensuous grasp of a tangible thing.<sup>214</sup> This metaphor comes in a positive and negative version. In the positive version, only relations that can be reduced to sensuous grasp are considered true property interests, and other forms of "property" are enforceable insofar as they can be analogized to the tangible archetype.<sup>215</sup> In the negative version, the analyst correctly realizes that such a tangible notion of property is untenable in modern society, but, assuming that sensuous grasp is the only possible way of explaining property, he incorrectly concludes that property does not or should not continue to exist as a coherent legal category.<sup>216</sup> Both of the masculine approaches are attempts to reduce the mediated trilateral relationship of property (subject-object-subject) to a bilateral one (either subject-object or subject-subject).<sup>217</sup> The positive masculine metaphor is an attempt to analyze property as a simple relationship between an owning subject and an object, and emphasizes the single masculine element of possession. The negative masculine metaphor tries to analyze property as a contractual relationship between two subjects that do not require an object and emphasizes the single masculine element of exchange. This reflects the masculine desire of *eros*: the attempt of the subject to achieve wholeness by finding the missing piece, whether imagined as the object of desire or perfect helpmate.<sup>218</sup>

Express uses of the feminine phallic metaphor for property are less common in law, although they do arise more frequently in colloquial conversation. Margaret Radin's theory of property for personhood is the most widely known example.<sup>219</sup> Reflecting the feminine desire of *thanatos*, the feminine moment of property is an attempt to regress to the perfect virginal integrity that supposedly existed before castration-violation. It is an attempt to reduce the trilateral relationship of property to a simple unity of subject merged with object. One's property becomes so necessary to one's personhood, and one's identification so complete,

214. I present my analysis of the masculine metaphor for property in Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239 (1994); SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 107-228; and Schroeder, *Three's a Crowd*, *supra* note \*.

215. This approach can be seen in the commercial law doctrine of "ostensible ownership." See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 130-43.

216. Hohfeld and Thomas Gray are probably the two most prominent proponents of this position. See *id.* at 156-79.

217. See Schroeder, *Three's a Crowd*, *supra* note \*, at 403-04; SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 107-14.

218. See Schroeder, *The End of the Market*, *supra* note \*, at 486-87, 493, 497, 507, 513.

219. I set forth my analysis of Radin's use of the feminine metaphor for property in Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55 (1994); see also SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 229-92.

that one cannot distinguish personhood from personal property.<sup>220</sup> In other words, in contrast to the masculine imagery of property as a bilateral relationship of subject possessing object, the feminine imagery of property as identification of subject with object is not based on the proposition that the subject will remain separate; there is no relationship between subjects, only union with the object. The feminine approach emphasizes the single feminine element of enjoyment of property. Possession is acknowledged only insofar as it is necessary for enjoyment.<sup>221</sup> Exchange in the form of market alienation is to be discouraged to the extent practicable as alienating to personhood.<sup>222</sup> Within the feminine metaphor, losses of property are described not in terms of taking that can be cured through damages, but rather as a permanent loss of self. One encounters this use of the feminine metaphor when one hears of feeling “violated” when one’s house is broken into.

### B. The Sexual Impasse of Wealth Maximization

The basic point of this Article is that wealth maximization privileges the masculine position and thus necessarily represses the feminine position. Although wealth maximization ostensibly seeks to eschew enjoyment, it merely represses it.<sup>223</sup> Repression is not destruction but preservation. It is a form of what is called in English translations of Hegel, “sublation.”<sup>224</sup> In Lacan’s famous slogan, what is repressed in the

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220. See SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 232. As expressed by Radin, personal property ‘bridge[s] the gap or blur[s] the boundary . . . between what is subject and what is object.’ RADIN, *supra* note 119, at 57.

221. I so critique Radin’s analysis of possession in SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 240-301.

222. See *id.* at 241-43.

223. See *supra* text accompanying notes 37-45, and *infra* text at notes 261-71.

224. Sublation, or *aufheben*, is Hegel’s characteristic form of reasoning. As reflected in the double meaning of the original German word, sublation both negates and preserves a concept. To over-simplify, Hegel first identifies a concept, then shows how this concept necessarily implies its own negation, then, through sublation, develops a new concept that “resolves” this contradiction. This new concept, however, also implies its negation, causing a new contradiction requiring resolution through sublation. See HEGEL, SCIENCE OF LOGIC, *supra* note 98, at 107.

Although the resolution of sublation negates the contradiction between the original concept and its negation, it does not totally do away with the contradiction, but rather preserves it. This is the famous doctrine of the unity of identity and difference, whereby one simultaneously understands that two concepts share an essential unity, even as they are essentially differentiated.

As Žižek has eloquently explained, it is incorrect to see sublation as predicting logically necessary prospective resolutions of existing contradiction. Hegelianism is a philosophy of freedom that cannot accommodate such predestination.

Rather, sublation is a retroactive account logically derived by a free subject to understand past events. In other words, sublation is the process by which a concept is revealed to be the resolution of two contradictory constituent concepts. See ŽIŽEK,

symbolic returns in the real.<sup>225</sup> Interestingly, Lacan himself adopts a monetary metaphor to express this idea. He states that "repression and the return of the repressed are just two sides of the same coin."<sup>226</sup>

Consequently, the masculine creates itself through the repression of the feminine, and the feminine only comes into being through her own repression by the masculine.<sup>227</sup> Thus, the Posnerian system depends on the repressed feminine to function. The masculine element of exchange only occurs because of the hidden possibility of future feminine enjoyment: The masculine vision of money as exchange value implicitly requires its feminine shadow of money as use value; the masculine vision of time as a transaction cost to be eliminated requires a competing feminine vision of time as object of desire to be cherished and prolonged.

As in the psyche, however, the feminine moment of wealth maximization cannot be resolved with the masculine moment. Actual markets—exchange—are in the order of the symbolic. They can only recognize exchange value. By contrast, use value—feminine enjoyment—is in the real. The symbolic order of exchange cannot, therefore, directly express use value. Nevertheless, just as the symbolic requires the real to act as its border, exchange requires enjoyment even if it cannot capture it. Just as the real is only retroactively posited by the stain of its retreat left in the symbolic, the existence of a prior, lost enjoyment can only be indirectly posited after an exchange has been made. In other words, one only retroactively recognizes the seller's subjective use value in the good as having once exceeded the objective exchange value, but that such surplus enjoyment must no longer exist. As in the Lacanian theory of desire, the effect precedes the cause.

Sexuality is an impasse. But it is precisely this impasse—this moment of contradiction—that is the dynamic source of life in the symbolic order. The masculine is the moment of subjectivity that is

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TARRYING WITH THE NEGATIVE, *supra* note 112, at 122-23. As the constituent concepts are the building blocks of the sublated concepts, the very existence of the sublated concept requires a moment of the continued separate existence of the constituents. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 25-27.

225. See 3 JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: THE PSYCHOSES* 1955-56, at 86 (Jacques-Alain Miller ed. & Russell Grigg trans., W.W. Norton & Co. 1993) (1981) [hereinafter LACAN, *SEMINAR III*].

226. *Id.* at 12.

227. See Schroeder, *The Eumenides*, *supra* note \*.

In other words, the sexes are mutually constituted. The masculine is created by feminine freedom, and the feminine by masculine abjection. Only the feminine can give birth to the masculine, but the feminine cannot function without the masculine generative act. In the depressing Lacanian formulation, however, even though the two sexes require each other, they can never fit together. The masculine is passive and impotent. He can neither procreate nor satisfy the feminine just because he is castrated. The feminine is active and fertile. But she only brings forth because she has been violated and can never forgive the masculine.

unfree in that it is totally constrained by the symbolic order of law, language, and markets. The feminine, being at least partially exiled from the symbolic into the real, is the moment of freedom in subjectivity. It is wealth maximization's failure to acknowledge the paradoxical necessity of the feminine that threatens to make it deadly.

# 1. EXCHANGE VALUE AND USE VALUE

This Section will now develop the analysis of wealth and money introduced earlier.<sup>228</sup> When Posner speaks of money, he is using it as short hand for the trade-offs one makes in order to obtain, or retain, one's objects of desires.<sup>229</sup> It is the acceptance of alternatives. Money is, therefore, only a temporary receptacle of exchange value. This concept of money as exchange value is "masculine" money.

Law and economics scholarship views time as a transaction cost.<sup>230</sup> Time is an impediment that interferes with the instantaneous satisfaction of desires that is characteristic of the perfect market. In the case of wealth maximization, the desire to be satisfied is the movement of goods to the highest valuing user. If value is conceptualized in terms of alternatives, it can only be identified at the moment of exchange.<sup>231</sup> Immediate exchange of alternatives—barter—is impracticable in a developed, modern economy. For example, workers sell their productive capacity now in order to purchase alternatives later. Money serves as the mediator between the object sold today (in this case, a worker's productive capacity) and the unknown alternative to be acquired tomorrow.

Money, conceptualized as the transparent medium of exchange, can be seen as a means for solving the problems posed by time conceived as a transaction cost. Money coagulates exchange value over time; it makes two transactions occurring at different moments of time (the sale of labor for money and the use of money to purchase goods) equivalent to a single transaction occurring at one time (the exchange of labor for goods).<sup>232</sup>

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228. See *supra* text accompanying notes 33-113.

229. See *supra* text accompanying notes 73-86.

230. I develop this analysis at length in Schroeder, *The End of the Market*, *supra* note \*, at 534-36. In this section, when I refer to law and economics scholarship I am referring to that dominant school (of which Posner is the founder) that adopts the perfect market ideal of classic price theory. I am not condemning any and all uses of economic analysis in law or elsewhere.

231. Simmel intuitively that this is the inevitable result of defining money in terms of exchange value:

Just as money is real money only at the moment when it buys something, i.e., when it exercises the function of money, so the commodity becomes a commodity only when it is sold; until that time, it is only a possible object for sale, an ideal anticipation.

SIMMEL, *supra* note 30, at 138.

232. See JACK WEATHERFORD, *THE HISTORY OF MONEY* 119 (1997).



Intriguingly, this implicit conceptualization of money as a form of time was made explicit on the very first coin minted by the new United States in 1787. The copper cent piece pictured a sun above an hourglass and the word "Fugio", Latin for "I fly."<sup>233</sup> The personified unit of money identifies itself with time in the well-known adage *tempus fugit* (time flies).

Posner's view of money as the means of exchange—as the acceptance of future but unknown alternatives—is consistent with Slavoj Žižek's analysis of money as an illustration of Lacan's theory of signification and subjectivity. Ironically, although Posner reaches his conclusions as a means of supporting capitalist markets and the American free enterprise system, Lacanian theory owes a debt to the writings of Karl Marx.

According to Lacan, the symbolic order of language, law, and sexuality is characterized by what he calls "signification."<sup>234</sup> Signification is the relationship of one word, the signifier, to another concept, the signified. This relationship should not be confused with a simplistic, unchanging, one-to-one relation between a name and an external object.<sup>235</sup> Such a simple identification and perfect correlation is what Lacan called "meaning" which characterizes the order of the imaginary.<sup>236</sup>

Signification, by contrast, exists entirely within the symbolic realm. There can be no direct relationship between speaking subjects within the symbolic order and external objects in the real because the real is defined as that which is beyond the border of the symbolic.<sup>237</sup> Consequently, in signification, each signified is itself a signifier that refers to another signifier, which, in turn, refers to another signifier in an unending chain that Lacan describes as "rings of a necklace that is a ring in another necklace made of rings."<sup>238</sup> Thus, in markets, exchange value never refers

233. *Id.* The coin also bore the punning motto, "Mind your business." *Id.*

234. See JACQUES LACAN, *The Agency of the Letter in the Unconscious or Reason Since Freud*, in ÉCRITS, *supra* note 155, at 146 (providing Lacan's early but most sustained discussion of his linguistic theory).

235. See Schroeder, *The Eumenides*, *supra* note \*. For example, in his otherwise excellent book on the brain science of language, Terence Deacon summarily dismisses de Saussure (Lacan's precursor) for a naive "mapping" view of language. See TERENCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN* 69-70 (1997). From his description, however, it is clear that Deacon could not have read Lacan or any of his followers because Lacan's actual theory of language reflects many similarities to Deacon's notion of symbolization.

236. LACAN, SEMINAR III, *supra* note 225, at 54.

237. See SLAVOJ ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* 201 (1991) [hereinafter ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*] ("[T]he barrier separating the Symbolic from the Real is impossible to trespass, since the Symbolic is this very barrier.").

238. William J. Richardson, *Lacan and the Subject of Psychoanalysis*, 6 PSYCHIATRY & HUMAN, 51, 55 (Joseph Smith & William Kerrigan eds., 1983) (quoting

directly to the use value of the thing itself; it always refers to the exchange value of another object, which, in turn, is understood only in terms of the exchange value of yet another object *ad infinitum* in the unending signifying chain of available alternatives.

Following Hegel, Lacan posited that a concept can only be understood in terms of what it is not; by its own negation. That is, each signifier relates to its signified not merely in terms of the similarity between the latter to the former, but also in terms of their essential differences.<sup>239</sup> Language is unified through a "master signifier" that can serve as the negative to all other signifiers.<sup>240</sup> The master signifier is the signifier with no signified.<sup>241</sup> Because the master signifier stands for nothing, it can serve as the starting point for the chain of signification.<sup>242</sup> Having no affirmative content of its own, only the negative split subject can serve as the master signifier.<sup>243</sup>

In other words, it is the speaking subject that gives signification to language. The symbolic order is, therefore, always in the process of being made. Unlike the imaginary relationship of meaning, the symbolic interrelationship of signification is in a state of flux, slippage, and growth. Each subject gives signification to language by acting as the master subject and distinguishing herself from the language she uses to define herself. On the one hand, the subject is only a subject insofar as he is able to speak and engage in other symbolic interrelations with others, such as

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LACAN, *ÉCRITS*, *supra* note 155, at 153). "The meaning of this chain does not 'consist' in any one of these elements but rather 'insists' in the whole, where the 'whole' may be taken to be the entire interlude as described, whose meaning, or rather whose 'effect' of meaning, is discerned retroactively . . ." *Id.*

239. See ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 237, at 22 ("Within a signifier's dyad, a signifier thus always appears against the background of its possible absence which is materialized—which assumes positive existence—is the presence of its opposite."). In other words, signification is yet another example of the unity of identity and difference.

240. See *id.* at 23. Žižek writes:

The only possible way out of this impasse [that is, the dispersal of signification] is that we simply *reverse* the series of equivalences and ascribe to *one* signifier the function of representing the subject (the place of inscription) for all of the others (which thereby become "all"—that is, are totalized): in this way, the proper *Master-Signifier* is produced.

*Id.*

241. See *id.* at 24-25. Žižek elaborates:

This signifier is, on the contrary, a "reflective" one: in it, the very failure, the very impossibility of the signifier's representation is reflected into this representation itself. In other words, this paradoxical signifier represents (gives body to) the very impossibility of the subject's signifying representation—to resort to the worn-out Lacanian formula, it functions as the "signifier of the lack of the signifier," as the place of the reflective inversion of the lacking signifier into the signifier of the lack.

*Id.*

242. See *id.* at 23.

243. See *id.* at 22, 76.

bearing legal rights, trading in the market, and having sex. On the other hand, each subject also experiences herself as external to and separate from the language, law, market relations, and sexuality that defines her. In other words, everyone feels that there is a part of him or her that cannot be captured in words or reduced to a role in society—an essential essence that endures over time, above one's ephemeral and accidental position in the symbolic order. This is another way of saying that the subject is split between the orders of the symbolic, the imaginary, and the real, and the masculine and the feminine. The part of the subject that is totally defined in speech is the masculine; the part of the subject that cannot be so captured is the feminine.

Žižek compares Lacan's reasoning to Marx's account of how society moves from barter, in which each commodity is valued directly in terms of the specific other object for which it is exchanged, to a monetary economy, in which exchange value is generalized by reference to money understood as the means of exchange:

First, the commodity which serves as "general equivalent" is the one which is most often exchanged, which has the greatest use value (furs, corn, and so on); then, the relationship is inverted and the role of "general equivalent" is taken over by a commodity with no use value (or at least with negligible use value)—*money* (the "money form"). Following the same logic, the "general form" of the signifying equivalence ("a signifier represents the subject for *all of the other* signifiers").<sup>244</sup>

In other words, money thought of as the medium of exchange is the one thing that cannot be enjoyed.<sup>245</sup> Just as the speaking subject is the master

244. *Id.* at 23-24. (citations omitted).

245. *See id.* at 26 ("[Money is the] commodity with no use value (or at least with negligible use value).").

I analogize Lacan's analysis of the subject as master signifier with Marx's analysis of money as the master commodity. Interestingly, Fink points out how Marx's analysis of the alienation of the worker through the commodification of his labor prefigures Lacan's theory of the split subject. Fink states:

Castration can thus be associated with other processes in other domains: in the economic register, capitalism requires the extraction or subtraction from the worker of a certain quantum of value, "surplus value." That value (which is not so much a plus or surplus as a minus from the worker's point of view) is taken away from the worker—the worker is subjected to an experience of loss—and transferred to the Other qua "free" market. Surplus value, equated in the last chapter with surplus jouissance (Lacan's *plus-de-jouir*), circulates in an "alien" world of "abstract market forces." Capitalism creates a loss in its field, which allows an enormous market mechanism to develop. Similarly, our advent as speaking beings creates a loss, and that loss is at the center of civilization and culture.

FINK, *supra* note 153, at 100.

signifier with no independent significance that serves to give signification to other signifiers, money is the master commodity. Money can serve as the universal unit of value for other commodities because it has no independent value of its own. Money can only be created through exchange for another commodity, temporarily possessed, and then exchanged for another object.<sup>246</sup> Simmel, who was trying to develop an alternative to Marx's labor theory of value, nevertheless comes to a similar conclusion. Simmel writes: "Th[e] condition of money is obviously the same as what is called its lack of qualities and lack of individuality. Since it stands between individual objects and in an equal relation to each of them, it has to be completely neutral."<sup>247</sup> Simmel

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246. See Johnsen, *supra* note 30, at 270 ("In addition [dollars or dollar equivalents] are valued by market participants not in and of themselves but in the sense that they represent exclusive command over scarce goods.").

Jason Scott Johnston similarly concludes that money as exchange value is a means of eliminating the differentiation among commodities from a very different vantage point. He tries to explain why many scholars resist valuing intimate relations in money:

Money is money precisely because the cost of ascertaining what money will do is low. Under a barter system, by contrast, each side to a transaction must determine both the physical and market characteristics of the good or service. . . . But as the complexity of the economy and the number of goods and services multiply, it will become more and more difficult for traders to execute in-kind transactions. . . . Without money, asymmetric information about the physical and market qualities of goods will act as a tax on transactions, thus preventing many value-enhancing deals.

Jason Scott Johnston, *Million-Dollar Mountains: Prices, Sanctions, and the Legal Regulation of Collective Social and Environmental Goods*, 146 U. PA. L. REV. 1327, 1337-38 (1998). In other words, Johnston considers distinction to be inimicable to markets because exchange necessarily requires that we treat the objects to be exchanged as equivalent. In contrast, we view intimate relations as unique—the idiosyncrasies of a potential mate is of the utmost importance. Consequently, money, which eliminates or hides differences, has little role to play in these relations. See *id.* at 1338.

Of course, Johnston's analysis of exchange overlooks my point that exchange actualizes the unity of identity and difference—that the parties must simultaneously treat the objects to be exchanged as equivalent and distinguishable. See *supra* text accompanying notes 97-110. Perhaps a better analysis is that the phenomenon Johnston tries to describe relates to money conceptualized as a way of congealing time. See *infra* text accompanying notes 287-90. In a barter economy—what Karl Llewellyn called a "farmer's" transaction, K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 727 (1939)—there is no time dimension in the sense that the relinquishment of the object to be transferred and the receipt of the object to be acquired happen roughly simultaneously. Time, however, is an important factor in a modern mercantile (or post-modern information) economy. See Jeanne L. Schroeder, *Death and Transfiguration: The Myth That the U.C.C. Killed "Property"*, 69 TEMP. L. REV. 1281, 1307-11 (1996). When one sells an object, one does not expect to use the proceeds to purchase a new object until sometime in the future. Indeed, one frequently does not even know what object(s) one will decide to purchase in the future. Money not only congeals value over time, allowing one to use the past sales proceeds for a future purchase, but by having no characteristics itself, it also reduces the multiplicity of all unknown future commodities to a single known, but empty, quality.

247. SIMMEL, *supra* note 30, at 123.

continues, "[m]oney is not only the absolutely interchangeable object, each quantity of which can be replaced without distinction by any other; it is, so to speak, interchangeability personified."<sup>248</sup> In Hegelian terms, quantity is indifferent to quality in the sense that the concept of "more or less" does not require one to know more or less "of what."<sup>249</sup>

Such a conception of money epitomizes the Posnerian concept of wealth maximization in which subjects repress enjoyment in favor of the productive activity of possession and exchange. In Simmel's analysis, the interchangeability of money threatens to make all objects interchangeable—robbing them of their unique characteristics.<sup>250</sup> Money so imagined is masculine in the Lacanian sense.

By treating money as though it were perfectly transparent, the wealth maximizer seeks to transform the trilateral, mediated relationships of the market whereby two subjects exchange two objects into bilateral, immediate relationships whereby two subjects interrelate. In Simmel's formulation, "money represents pure interaction in its purest form; it makes comprehensible the most abstract concept; it is an individual thing whose essential significance is to reach beyond individualities."<sup>251</sup> This is another example of the masculine desire as *eros*. But note that the result of this is that the exchanged objects of desire lose all positive particularity—being monetized, they, like money, are purely negative. At the moment of exchange, goods cannot be enjoyed; even exchange will never occur but for the possibility of future enjoyment.

A Hegelian analysis shows that Simmel's fears (and Posner's hopes) are unfounded in that the interchangeability of objects in monetization does not destroy the differentiation of objects. Indeed, when two subjects engage in exchange it is conclusive evidence that they recognize a fundamental difference between the objects of exchange.<sup>252</sup>

Although a complete exegesis of Hegel's logic and the process of sublation is beyond the scope of this Article, a Hegelian analysis suggests that the relationship of exchange and use value necessarily flows from the logical connection between quality and quantity, which he called

248. *Id.* at 124.

249. *See supra* text accompanying notes 108-10.

250. *See* SIMMEL, *supra* note 30, at 123.

251. *Id.* at 129.

252. *See* Schroeder, *Pandora's Amphora*, *supra* note \*, at 883-84, 897-98. As Žižek notes, "Claude Lévi-Strauss pointed out how the very fact of exchange attests a structural flaw, an imbalance that pertains to the Symbolic . . ." SLOVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 18 (1992) [hereinafter ŽIŽEK, ENJOY YOUR SYMPTOM!]. Actual markets, being symbolic, are always characterized by imperfection and differentiation; hence, exchange. The perfect market, by contrast, is real. Because there can be no differentiation in the perfect market, and everyone is always satisfied with what they have and indifferent to everything else, there can be no exchange. *See* Schroeder, *The End of the Market*, *supra* note \*, at 545-48.

“measure.”<sup>253</sup> Masculine money, which is money conceived as exchange value, is quantitative in nature. Feminine money, which is enjoyment or use value, is qualitative. Quantity as commensuration is the suppression of quality as differentiation, in the same sense that the masculine position is the denial of the feminine.<sup>254</sup> But this should not be read as implying that quantity (or masculinity, or exchange value) can exist without quality (or femininity, or use value). Rather, it means the opposite: Quantity can only be understood with respect to quality. Quantity is the sublation of the contradictions of quality and, therefore, it requires quality as the condition of its existence.<sup>255</sup> If quality is difference and quantity is identity, then, according to the Hegelian doctrine of the unity of identity and difference, quality and quantity share a moment of unity despite their difference.<sup>256</sup> Put another way, to make a quantitative judgment is to assert that there is a moment of essential similarity between two things despite their difference. A quantitative statement is, therefore, always an implicit acknowledgement of qualitative difference.

Market exchange requires a concept of masculine money understood as an objective metric of exchange value, then, as a tool that enables market participants to commensurate and connect different commodities. This is required precisely because the things to be exchanged are distinguishable by quality as well as by time and space. If all commodities were in fact interchangeable, one would not engage in exchange and would not need money as a universal metric of value. Money exists as a means to fill a gap, and therefore can only exist insofar as there is a gap that needs to be filled. To use another metaphor, money is a translator: The fact of translation is not an assertion that two languages are the same, but rather testimony to the fact that they are not.

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253. I give a brief explanation of this dialectic in Schroeder, *Never Jam To-day* *supra* note 108, at 1557.

254. See *supra* text accompanying notes 187-92.

255. See Schroeder, *Never Jam To-day*, *supra* note 108, at 1556. As discussed *supra* in note 225, sublation understood as the resolution of contradiction is not the destruction of contradiction. On the one hand, insofar as a solution of synthesis claims to resolve a contradiction, it negates the contradiction of thesis and antithesis. On the other hand, insofar as a synthesis only comes about as a means of resolving a contradiction, the synthesis also preserves the early contradiction as the foundation on which it is built. Hegel writes:

“To sublate” [i.e., “*Aufhebung*”] has a twofold meaning in [German]: on the one hand it means to preserve, to maintain, and equally it also means to cause to cease, to put an end to. Even “to preserve” includes a negative element, namely, that something is removed from its immediacy and so from an existence which is open to external influences, in order to preserve it. Thus what is sublated is at the same time preserved; it has only lost its immediacy but is not on that account annihilated.

HEGEL, *SCIENCE OF LOGIC*, *supra* note 98, at 107. See also SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 24-27. Consequently, sublation is better thought of as a retrospective, not a prospective, form of logic.

256. See Schroeder, *Never Jam To-day*, *supra* note 108, at 1557.

To paraphrase Derrida, translation is necessary not in spite of, but just because of, its impossibility.<sup>257</sup>

The Hegelian analysis of the relationship of quantity to quality seeks to break the logjam seen in contemporary discussions of commensurability and difference that so often degenerates into the trading of "is too," "is not" assertions of a typical playground argument.<sup>258</sup> Both proponents and opponents of commensurability implicitly tend to assume that an acknowledgement of the proposition that people frequently make tragic choices so they can and do measure things with respect to a common metric, despite their assertions to the contrary, would necessarily lead to universal commodification of both subjects and objects. Consequently, wealth maximizer Eric Posner uses the assertion of commensurability as support for an economic or cost-benefit analysis of all areas of law and morality,<sup>259</sup> while romantic Margaret Radin couches much of her condemnation of commodification in terms of a denial of commensurability.<sup>260</sup> The Hegelian analysis, in contrast, recognizes that we frequently and necessarily commensurate in the sense of comparing two qualitatively different objects, while insisting that this neither leads to the destruction of qualitative differences nor suggests that an economic approach that privileges the moment of quantitative commensuration and represses the moment of qualitative differentiation is appropriate for the analysis of all human relations. Hegel reveals that quantity and quality—like repression and the return of the repressed—are always two sides of the same coin.

The Hegelian-Lacanian analysis suggests the ghost of the repressed feminine vision of money as use value, or the congealment of enjoyment,

257. Derrida refers to the myth of the tower of Babel as "the necessary and impossible task of translation, its necessity *as* impossibility." Jacques Derrida, *Des Tours de Babel*, in *DIFFERENCE IN TRANSLATION* 165, 171 (Joseph F. Graham ed. & trans., 1985), quoted by Drucilla Cornell, *Taking Hegel Seriously*, 7 *CARDOZO L. REV.* 139, 148 (1992).

258. See generally, Symposium, *Law and Incommensurability*, 146 *U. PA. L. REV.* 1169 (1998). In a refreshing but only partially successful attempt to break out of the sterile iteration that forms so much of this dreary argument, Frederick Schauer has suggested:

[C]ommensurability and comparability often have, or can be constructed to have, the character of attitudes, dispositions, presumptions, or conceptual frameworks, and, as such, they are best thought of as being chosen rather than as simply existing and, furthermore, a being chosen for instrumental and not intrinsic reasons.

Frederick Schauer, *Instrumental Commensurability*, 146 *U. PA. L. REV.* 1215, 1217 (1998). To paraphrase Schauer's point, although most writers assume that one must choose between commensurability and incommensurability for all purposes, in fact, two things may be commensurable in some contexts but incommensurable in others. The Hegelian analysis agrees with this claim, but goes a step further in suggesting that the very concepts of commensurability and incommensurability necessarily require each other.

259. See generally Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 *U. PA. L. REV.* 1185 (1998).

260. See, e.g., RADIN, *supra* note 119, at 1-15.

can always be glimpsed flitting behind the express masculine vision of money as exchange value, or the congealment of time. Being real, enjoyment must be hypothesized to exist as the boundary of exchange. Judge Richard Posner does occasionally recognize the existence of this feminine twin to money as exchange value, but is unsuccessful in integrating the two precisely because the sexual impasse makes them logically inconsistent. Being two sides of the same coin, only one of masculine money and feminine money can be "heads" at any given time.

Posner flirts with the feminine when he states that wealth cannot be reduced to the Gross Domestic Product or any other gauge that tries to measure the good things of the economy in terms of their market price (exchange value), but it must also include consumer surplus—the excess by which any individual's subjective use valuation of her possessions exceeds the market's objective exchange value.<sup>261</sup> This admission by Posner reflects a shift in the definition of money from the medium of exchange to the congealment of enjoyment. This concession reflects the repressed, unconscious understanding that capitalist markets cannot, as Posner suggests, suppress the capacity for enjoyment, but rather they implicitly requires their members to cultivate an exquisite capacity for future enjoyment.

It is only the possibility of surplus enjoyment (the excess of use value over exchange value) that allows market transfers to occur. One will not engage in exchange unless one thinks that one's use value in the good to be acquired will exceed the exchange value to be given up in exchange. Once wealth is maximized, and all goods are in the hands of the highest valuing user, all use value for all goods will equal all exchange value for all goods and the market will end.

Nevertheless, despite these occasional fleeting glimpses of enjoyment (feminine money as use value) in Posner's writings, his system of wealth maximization, which necessarily conceptualizes money as exchange value, cannot recognize or fully account for use value. In a wealth maximization world, a party's preferences can only be maximized in so far as the party is able to actualize them in market relations. In other words, it is not enough that she desire the object,; she must have enough money to buy it.

Posner's critics have suggested that Posner's system depends on an asymmetric recognition of exchange value.<sup>262</sup> Posner recognizes and protects the present enjoyment of the rich, while forbidding the future enjoyment of the poor.<sup>263</sup> This critique is based on Posner's definition of the value of the good things in the world as the amount of money one would spend to acquire a good that one does not yet possess, plus the

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261. See *supra* text accompanying notes 90-93.

262. See, e.g., RAKOWSKI, *supra* note 46, at 210.

263. See *id.* at 210-11.



amount of money one would require in order to give up what one already possesses. This analysis would assert that although Posner recognizes only the exchange value of the have-nots, he does recognize both the exchange and use value of the haves.

A more subtle analysis, however, shows that even in the case of the rich, Posner never fully recognizes the feminine element of enjoyment or truly values objects in terms of use value. Rather, he only expressly recognizes the two masculine elements of exchange and possession and the masculine form of money as exchange value.

The Posnerian analysis of slavery and rape<sup>264</sup> shows how his models are incapable of recognizing enjoyment but can only conceptualize money in terms of exchange value. To repeat, in the state of nature, resources, including money, have not yet been allocated. The rival parties must, therefore, obtain purchase money financing to pay the purchase price in the auction. This requires that each party commercially exploit the object purchased. It is irrelevant if the object would have greater use value than exchange value in one of the party's hands because this use value is totally subjective and cannot be used to raise money to pay back the purchase money loan. This means that the purchase price in the Posnerian auction is always capped by the exchange value of the object.

In other words, although Posner, on the one hand, insists on including use value in the form of enjoyment in his definition of the aggregate wealth that exists in the economy, he, on the other hand, does not include it in the amount of value that may be exchanged to create additional value. Use value *seems* passive in that it cannot itself be spent, unless it is first converted into exchange value. At first blush, this may not seem like a contradiction. If a person's use value in an object exceeds its exchange value, she would have no reason to want to exchange it. But this means that use value cannot be conceptualized in terms of masculine money understood as the means of exchange. As discussed earlier, however, Posner states that money is a "measure of one's entitlement" to good things—that is, what one can spend in order to make one's preferences "count."<sup>265</sup> Consequently, even though wealth is supposed to include consumer surplus (enjoyment), and even though wealth is supposed to be the good things of the world measured in money, his definition of money is limited to exchange value.

This result is duplicated in one of Posner's criticisms of utilitarianism. Utilitarianism seeks to maximize the aggregate utility—enjoyment, use value—of all members of society. But, by Posner's own definition, utilities are incommensurable. Enjoyment is purely individualistic, solipsistic—subjective.<sup>266</sup> A quality cannot be aggregated

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264. See *supra* text accompanying notes 126-47.

265. See *supra* text accompanying notes 51-53.

266. See *supra* text accompanying notes 34-35.

unless it is made general, interrelational, commensurable—objective. Wealth maximization is precisely an attempt to replace the subjective standard of enjoyment with the objective standard of wealth. On its own terms, wealth maximization cannot directly recognize utility.

This is obvious in the case of Posner's analysis of money in the hands of the "have-not." Because the have-not does not possess the object of his desire, he wishes to engage in exchange in order to acquire it. Under a wealth maximization regime, however, the have-not's desire will only be recognized insofar as he has the means of actualizing his desire—he possesses the exchange value of the object of desire.

But Posner's analysis is equally masculine with respect to the "have." This party is the "have" because in Posner's analysis this party never enjoys his object of desire, he merely "has" it: He excludes others from the object of desire.<sup>267</sup> Moreover, he only hypothetically possesses the object of desire temporarily and contingently until another party offers him money sufficient to persuade him to part with it. In other words, even in the hands of the rich possessor, valuation never refers to the solipsistic, subjective use value of any one party, but is always defined in terms of a future intersubjective, objective exchange value of multiple parties. This necessarily follows from a definition of value as the acceptance of alternatives—one always values things not in terms of what they are (enjoyment, use value), but what they are not (exchange value).

Current enjoyment is antithetical to wealth maximization. As reflected in the old saw "you can't have your cake and eat it too," the enjoyment of an object of desire eventually leads to its consumption. Once it has been consumed, the object can no longer be possessed or exchanged because it does not exist. Consequently, the enjoyment of the object reduces the aggregate amount of wealth in society. In the Posnerian auction of feminine sexuality, under wealth maximization, no party can ever obtain an object for his own hedonic purposes. One always acquires the object of desire for future productive activity. Enjoyment, therefore, must always be postponed to the future.

This symbolic order can only directly recognize the masculine position of the speaking subject and necessarily represses the feminine subject and exiles her to the real. Nevertheless, the symbolic order only exists because it is bounded by the real; the masculine only exists because of the continued shadow existence of the feminine that serves as his defining other. Similarly, wealth maximization can only recognize

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267. As discussed *supra* in note 110, this is Posner's definition of property. As I have discussed extensively elsewhere, a Hegelian analysis reveals the right of exclusion is not the right of property as a whole, but only of the single property element of possession. Possession consists of the identification of an object of desire to a specific subject, in the sense of the legally enforceable right to exclude other subjects. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 38-43, 146-53; Schroeder, *Three's a Crowd*, *supra* note \*, at 453-60.

masculine money as exchange value, and cannot directly recognize feminine money (enjoyment as use value). Nevertheless, actual markets, being symbolic, require the continued existence of feminine money, in that exchange occurs only because market participants long to enjoy the objects of their desires. As a result, although at first blush it is tempting to interpret the silence of feminine negativity as passivity, in fact, the feminine is the active engine that drives the entire symbolic order.<sup>268</sup>

The English word "money" derives from *Juno Moneta* —the title of Juno, queen of heaven and goddess of womanhood, in her tutelary role as "She Who Reminds and Warns."<sup>269</sup> No matter how severely feminine money is repressed, she always returns as a nagging reminder of her existence and a warning of the lethal effects of ignoring her.

Lacan notoriously asserted that a woman is a symptom of man.<sup>270</sup> Similarly, use value is the "symptom" of exchange value within the technical meaning of that term. This is not to say that feminine enjoyment is merely an unfortunate, unintended and inessential result or a consequence of masculine exchange that could be cured. Rather, in Lacanian theory:

[T]he symptom . . . [is] a particular signifying formation which confers on the subject its very ontological consistency, enabling it to structure its basic, constitutive relationship to *enjoyment* (*jouissance*), . . . if the symptom is dissolved, the subject itself loses the ground under his feet, disintegrates. In this sense, "woman is a symptom of man" means that *man himself exists only through woman qua his symptom*: all his ontological consistency hangs on, is suspended from his symptom, is "externalized" in his symptom.<sup>271</sup>

Exchange value requires the use value it expels as the very grounds of its possibility.

## 2. METAPHOR AND METONYMY

Lacanian linguistics suggests another reason why wealth maximization is unable directly to capture use value, although it does on occasion try to refer to it indirectly. It follows from the proposition that there are two positions the speaking subject can take in the symbolic order

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268. See ŽIŽEK, ENJOY YOUR SYMPTOM!, *supra* note 252, at 156 ("Woman is therefore no longer conceived as fundamentally 'passive' in contrast to male activity: the act as such, in its most fundamental dimension, is 'feminine.'").

269. Schroeder, *Juno Moneta*, *supra* note 207, at 996.

270. See LACAN, FEMININE SEXUALITY, *supra* note 149, at 168; ŽIŽEK, ENJOY YOUR SYMPTOM!, *supra* note 252, at 155.

271. ŽIŽEK, ENJOY YOUR SYMPTOM!, *supra* note 252, at 155.

that there are probably two modes of signification one can use when one speaks. And so there are the masculine trope of metaphor and the feminine trope of metonymy.<sup>272</sup>

According to Lacan, in signification, each signifier refers to a signified that is, in fact, another signifier in an unending chain of shifting signification.<sup>273</sup> Lacan modifies de Saussure's system and expresses this as "S/s."<sup>274</sup> The bar between the signifier on top and the signified on the bottom represents the fact that there can be no direct, immediate, or "natural" connection between the two (as there would be in the imaginary relationship of meaning) and, therefore, signification always contains an arbitrary, subjective and contingent aspect.<sup>275</sup> Similarly, there can be no direct relationship between the exchange value of an object and the object itself because exchange value is defined solely in terms of alternatives. Meaning constantly slips as signifiers shift above and below the bar, and signifieds shift below.

Metaphor is the impossible crossing of the bar of signification.<sup>276</sup> In metaphor, the subject creates a *point de capiton*, or upholstery button by which he temporarily "quilts" the two layers of signification together.<sup>277</sup>

272. See JANE GALLOP, *READING LACAN* 114-32 (1985).

273. See LACAN, *ÉCRITS*, *supra* note 155, at 150 ("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 . . ."); *Id.* at 154 ("We are forced, then, to accept the notion of an incessant sliding of the signified under the signifier . . ."); *supra* text accompanying notes 234-43.

274. LACAN, *ÉCRITS*, *supra* note 155, at 149. Grosz explains:

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 . . .

GROSZ, *supra* note 10, at 94 (citation omitted).

275. See Richardson, *supra* note 238, at 54. Richardson writes:

The bar . . . is meant now to indicate the arbitrary nature of the relation between the [signifier and signified]. But Lacan stresses the importance of this "bar," conceiving it as indeed a "barrier" to any one-to-one relationship between signifier and signified, insisting that any given signifier refers not to any corresponding signified but rather to another signifier in a sequence or "chain" of signifiers . . .

*Id.*; see Schroeder, *The Eumenides*, *supra* note \*.

276. See GALLOP, *supra* note 272, at 119. Gallop writes, "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." *Id.* (citations omitted); see also LACAN, *ÉCRITS*, *supra* note 155, at 156-58.

277. See ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 237, at 16-20. In this passage, Žižek speaks specifically about the broader concept of the quilting point as the central idea that one adopts to unify and explain the symbolic order as a whole, such as the fear of God, or racism or anti-Semitism. See also LACAN, *ÉCRITS*, *supra* note 155, at

In other words, the subject insists that *S* (the signifier) *is* like *s* (the signified)—that there is a fundamental essential identity between the two, that signification can be frozen into meaning. This temporary quilting of signification into meaning, which requires a willful forgetting of the shifting contingency of signification, is necessary for speech.<sup>278</sup>

Metaphor is appropriate to exchange value because they are both dependent on quantitative distinctions. As discussed here, quantity is identity, commensuration and the suppression of difference.<sup>279</sup> Metaphor is an example of what Freud called condensation. Similarly, both exchange and metaphor are the insistence that two “things” are essentially identical despite surface differences. Money as exchange value, like metaphor, is a temporary and contingent “quilting” or binding of two different things together in a moment of equivalence. But, the very fact that one needs the invisible needle of masculine money to sew two objects together as commodities in order for them to be exchanged as equivalents, suggests, by negative implication that for all other purposes the two objects are fundamentally different. If there were no essential differences between the two objects, there would be no reason to exchange them.

Metaphor is masculine because it is a type of denial of castration. Castration means that immediate relationships are impossible. And yet, in order to speak, one claims to have the immediate relationship between thoughts and words, between the signifier and the signified that characterizes meaning. When the masculine subject denies castration, he claims to have the Phallus, understood as whatever it is that is missing. To speak is to claim to have “it,” meaning, to speak is to commensurate the incommensurable. Metaphor is the spending of masculine money—the acceptance that two alternatives are equivalent. It is the claim to be able to capture meaning, and relate to it directly. Of course, it is impossible to freeze signification entirely and to have the immediate relations with others implied by the ideal of perfect communication. Nevertheless, through the masculine trope of metaphor, one at least contingently achieves the goal of some degree of mediated relationship and imperfect communication. Through money, exchange occurs not despite, but just because of, the fundamental qualitative differentiation between commodities.

Metonymy, in contrast, does not cross the line of signification. Metonymy is an example of what Freud called displacement.<sup>280</sup>

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158 (“[M]etaphor occurs at the precise point at which sense emerges from non-sense . . .”).

278. Consequently, the subject as master-signifier is itself the quilting point which ties together the symbolic order. See ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 237, at 78.

279. See *supra* text accompanying notes 107-109, 253-56.

280. See LACAN, *ÉCRITS*, *supra* note 155, at 160. In contrast, Lacan identified metaphor with Freud’s concept of condensation. See *id.*

Metonymy is the shifting of signifiers above the line of signification.<sup>281</sup> In other words, in metonymy, one does not claim to be able to match a specific signifier with a signified. Rather, through metonymy one indirectly suggests the existence of the signified through reference to that which surrounds, or is associated with the signified. Perhaps the most well known form of metonymy is synecdoche—the use of the whole for the part.<sup>282</sup> In metonymy, the signified always remains hidden, and negative. It is only inferred from the traces of its absence.<sup>283</sup>

Metonymy is appropriate to enjoyment because they are both dependent on qualitative distinctions. As previously discussed, the differentiation necessary for enjoyment is what Hegel called “quality” or “determinate being.”<sup>284</sup> “But a quality can only be defined in terms of what it is not—it is defined by its own negation in the sense of “this is not that.”<sup>285</sup> Quality, and therefore enjoyment, can never be described directly.

Metonymy is feminine in that it is an acceptance of castration. It is a reminder and a warning like *Juno Moneta*. When one uses metonymy she remembers that signification is not meaning, and that one can never have direct access or immediate relationships. One does not arrogantly claim to have “it”; one only modestly refers to what it is not. Metonymy is the minting of feminine money—it is the realization that enjoyment requires the insistence on uniqueness and the rejection of alternatives. As this

281. See *id.* at 156; Schroeder, *The Eumenides*, *supra* note \*.

282. Lacan arguably uses synecdoche to illustrate metonymy. He quotes from a grammar book he used as a child that refers to thirty ships as thirty sails. See *id.* at 156. The part (the sail) implies the whole (the ship). Lacan probably chose this example because it is somewhat more complex and ambiguous than a simple synecdoche. A sailing ship frequently has more than one sail. Consequently, a literal minded reference to thirty sails does not necessarily imply thirty ships—it could be one ship with thirty sails:

The part taken for the whole . . . and if the thing is to be taken seriously, we are left with very little idea of the importance of this fleet, which ‘thirty sails’ is precisely supposed to give us: for each ship to have just one sail is in fact the least likely possibility.

*Id.*

James Thurber pondered metonymy in his memory of an experience he had as a young student of a pedantic grammarian who loved figures of speech. “There are several kinds of metonymies, you may recall, but the one that will come to mind most easily, I think, is Container for the Thing Contained.” JAMES THURBER, *Here Lies Miss Groby*, in *THE THURBER CARNIVAL* 52, 52 (1945). Thurber claims he became obsessed with locating an inverse synecdoche. “I finally hit on one, which I still remember. If a woman were to grab up a bottle of Grade A and say to her husband, ‘Get away from me or I’ll hit you with the milk,’ that would be a Thing Contained for the Container.” *Id.* at 53. His teacher was not amused. See *id.* at 54.

283. See Michel Rosenfeld, *The Identity of the Constitutional Subject*, in *LAW AND THE POSTMODERN MIND* 157-65 (Peter Goodrich & David Gray Carlson eds., 1998).

284. See *supra* text accompanying note 108.

285. See *id.*; SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 307; Schroeder, *Never Jam To-day*, *supra* note 108, at 1556; see also HEGEL, *SCIENCE OF LOGIC*, *supra* note 98, at 129.

author has suggested elsewhere, in metaphor the signifier stands for the signified, whereas in metonymy, the signifier stands by the signified.<sup>286</sup>

Accordingly, one may use the masculine trope of metaphor and claim to describe masculine money (exchange value) directly in words. Conversely, feminine money (use value) can only be alluded to indirectly through the feminine trope of metonymy. This explains why wealth maximization can capture masculine money, but feminine money always slips through its fingers. Feminine money is the fundamental fact of differentiation between commodities that persists despite their temporary commensuration in exchange value (masculine money)—feminine money is the reason for the exchange made possible through masculine money.

### 3. TIME IS MONEY; MONEY IS TIME

Masculine money—money as the “means” of exchange—is revealed to be the way the market deals with time—the problem that exchange is not immediate. Money is, in this sense, congealed time. Money is both time and the negation of time. As time is a transaction cost, the need for money is itself a transaction cost. If, however, there is also a necessarily repressed feminine conception of money, this suggests that the wealth maximization must also have a repressed feminine understanding of time as well. The sexual impasse suggests that masculine and feminine time, like masculine and feminine subjectivity, and masculine and feminine money, must both require each other yet to be mutually inconsistent.<sup>287</sup>

To recapitulate, the ideal of the perfect market underlying his wealth maximization analysis views time as a transaction cost. In a perfect market, all resources must be instantaneously reallocated in an efficient manner. As Ronald Coase says, in a truly perfect market, time would be eliminated or, to say the same thing, there would either be no time so that

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286. See Schroeder, *Three's a Crowd*, *supra* note \*, at 400. In Lacan's formulation, metonymy is “word-to-word connexion.” LACAN, *ÉCRITS*, *supra* note 155, at 156. Metaphor, on the other hand, is “[o]ne word for another.” *Id.* at 157.

287. In this Article I explore the continued existence of feminine money conceptualized as use value or excess value. Sociologist Viviana Zelizer suggests another way the feminine concepts of particularity and enjoyment continue to thrive in our economy, but which is beyond the scope of my analysis and thus will be mentioned only briefly here.

Zelizer posits that the economic assumption that money is a transparent embodiment of exchange value is empirically incorrect. In fact, through a process that she gives the generic name “ear marking,” not only individuals, but society generally through the government, treat different pools of money as not merely being differentiated, but being differentiated precisely in terms of their eventual use. See ZELIZER, *supra* note 118, at 18.

Although Zelizer does not mention it, the law frequently treats money as non-fungible. For example, trustees are required to sequester and protect from commingling moneys held in trust with other moneys held by the trustee. By extension, debtor-creditor law only allows creditors to take money equal to cash proceeds received by the debtor if they are not commingled or can be “traced” through rules developed under trust law.

all desires are instantaneously fulfilled, or there would be an infinite amount of time so that all desires will eventually be fulfilled.<sup>288</sup> This fear and loathing of time explains Posner's repression of enjoyment. .

To explain: If one concentrates on the masculine elements of possession and exchange, time can only be conceptualized as a cost. All costs are opportunity costs—the existence of better alternatives. Value is created when an object is equated with an alternative. Time is a cost because it is the gap between the identification of a better alternative and the exchange that enables one to acquire the better alternative.<sup>289</sup> Money is a means of filling in the gap—as a way of making two alternatives equivalent despite their separation by time.

One engages in exchange in order to obtain possession of one's object of desire. Time is a delay in the consummation of exchange that prevents the instantaneous satisfaction of one's desire. Exchange therefore wants to destroy time. But exchange can only take place during time. The purpose of money is to make two commodities equivalent, but exchange only takes place insofar as commodities are perceived as different. Difference only exists at the level of enjoyment since exchange is the moment of equality. Exchange always looks forward to future enjoyment. Exchange, therefore, requires enjoyment, differentiation and time. Exchange wishes to expunge time but can only exist within time. Exchange wants to exist in the present, as an unmediated moment of unity of the two things exchanged. However, as has been recognized since at least Kant, time and space are the basic units of thought.<sup>290</sup> The conscious act of exchange, therefore, requires time. Exchange requires mediation in that the differentiated commodities exchanged only become equivalent through the mediation of the means of exchange—money.

In contrast, enjoyment requires time in that experience takes place over time. Nevertheless, there can be no time in enjoyment.<sup>291</sup> To enjoy is to become one with the experience—to have an immediate relationship, to merge with the real. The moment one realizes that one is having an experience, one's relationship with the experience is already mediated. One is thrown back into time as one either anticipates or remembers enjoyment—and enjoyment is lost.

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288. See COASE, *supra* note 8, at 15. Coase noted that a "consequence of the assumption of zero transaction costs, not usually noticed, is that, when there are no costs of making transactions, it costs nothing to speed them up, so that eternity can be experienced in a split second." *Id.* Coase intended this statement to show the absurdity of using a perfect market analysis.

289. See Schroeder, *The End of the Market*, *supra* note \*, at 534-36; see also David Gray Carlson, *On the Margins of Microeconomics*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 265, 277-79 (Drucilla Cornell et al. eds., 1992).

290. See IMMANUEL KANT, CRITIQUE OF PURE REASON 41-61 (J.M.D. Meiklejohn trans., 1934); see also Schroeder, *The End of the Market*, *supra* note \*, at 554-55.

291. See *infra* text accompanying notes 297-98, 309-18.



Exchange does not want time, but cannot get rid of it since it is located in and defined by time. Enjoyment needs time, but cannot have it since enjoyment is located outside of, and is defined as the lack of, time. Exchange is masculine and enjoyment is feminine. Not surprisingly, the paradoxical relationship of the masculine and feminine elements of property and time reflect the Lacanian paradoxes of sexuation.

#### 4. TIME AND THE CARTESIAN *COGITO*

Lacan's concept of the sexuated positions is based in part on Hegel's critique (following Kant) of the Cartesian *cogito*.<sup>292</sup> According to Hegel and Lacan, there are two inconsistent ways of reading Descartes's statement of subjectivity: "I think, therefore I am." These two readings reflect the proposition that one can be in the position of existing *or* thinking, but one cannot be in both at the same time.

The Lacanian re-reading of the Cartesian *cogito* reflects the Heisenberg Uncertainty Principle. This principle asserts that one can know either a subatomic particle's exact position (being) or its exact momentum (doing), but it is impossible for one to know both simultaneously.<sup>293</sup>

The masculine is the aspect of personality that claims to be that which exists (that has positive content), but in so claiming, the masculine puts himself in the position of conscious thinking (i.e., speaking), rather than of being. In other words, by trying to contemplate his own existence, the masculine is always in the position of losing immediate relationship with existence. When he reinterprets his existence by thinking about it, he is the thing-thinking who finds himself saying: I think "therefore I am."<sup>294</sup> The masculine subject is the master signifier that gives signification to the symbolic order through speech.

Conversely, the feminine is the aspect of personality that seeks to be the active position of thinking, speaking and acting. By concentrating solely on her action, however, she becomes lost in her activity (achieves ecstasy). She achieves immediate relationship with her activity and momentarily ceases to interpret it. She becomes pure existence: "I think (therefore I am)."<sup>295</sup> The feminine subject serves as the master signifier

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292. See ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 112, at 58-73.

293. See FINK, *supra* note 153, at 133-34. The Heisenberg Uncertainty Principle is not merely a matter of empirical impossibility—that any attempt to measure position inevitably results in a change in momentum and vice versa. The principle, in fact, is much more radical, arguing that it was theoretically, not merely empirically, impossible for a subatomic object to have exact position and momentum simultaneously. See NORWOOD RUSSELL HANSON, PATTERNS OF DISCOVERY: AN INQUIRY INTO THE CONCEPTUAL FOUNDATIONS OF SCIENCE 136 (1965).

294. See ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 112, at 59-61.

295. *Id.* at 61-62.

whose radical negativity gives affirmative signification to other signifiers through contrast.

In both sexuated positions, one loses what one seeks.<sup>296</sup> The masculine who claims to be the free acting subject wielding the phallus is totally constrained by, and subject to, the symbolic order (the mediated relationships of speech and law).<sup>297</sup> The feminine accepts the objectified position of the lost phallus. But by doing so, she at least partially escapes the constraints of the symbolic order and has access to the real order of immediacy—she achieves the possibility of free subjectivity.<sup>298</sup>

The masculine (who seeks the immediacy—pure existence—that he can never achieve) wishes to do away with time so that he can engage in market exchange and possess the object of desire. But he can never do so. He is always located within time. The moment he thinks he is either anticipating future enjoyment or remembering past enjoyment. He is the thing-thinking and time is a basic unit of thought. The masculine is the position of the economist positing the ideal of the perfect market. The feminine, in contrast, wishes to have time to engage in the ecstatic

296. See LACAN, *ÉCRITS*, *supra* note 155, at 166 (“I think where I am not, therefore, I am where I do not think.”); see also FINK, *supra* note 153, at 44-48; ŽIŽEK, *TARRYING WITH THE NEGATIVE*, *supra* note 112, at 61-62. In Žižek’s words:

-The “masculine” *cogito* chooses being, the “I am,” yet what it gets is being which is merely thought, not real being (*cogito* “*ergo sum*,” I think “therefore I am,” as Lacan writes it), i.e., it gets the fantasy-being, the being of a “person,” the being in “reality” whose frame is structured by fantasy.

-The “feminine” *cogito* chooses thought, the pure “I think,” yet what it gets is thought bereft of any further predicates, thought which coincides with pure being, or, more precisely, the hyperbolic point which is neither thought nor being.

*Id.*

297. Consequently, the matheme for the masculine position is:  $\forall x \Phi x$ . This can be translated as “for the class of X, all X’s are submitted to the phallic function.” See LACAN, *SEMINAR XX*, *supra* note 10, at 78-81. See also Schroeder, *The Eumenides*, *supra* note \*.

298. Consequently, the matheme of the feminine is:  $\bar{\forall} \bar{x} \Phi x$ . “For the class of X, not all X’s are submitted to the phallic function.” See LACAN, *SEMINAR XX*, *supra* note 10, at 78-81. Previous translations have rendered Lacan’s definition of woman as *pas-toute* as “not all.” See, e.g. LACAN, *FEMININE SEXUALITY*, *supra* note 149, at 144-45. More recently, Bruce Fink has translated this as “not whole.” This better reflects the idea that the feminine is the possibility of escape from the symbolic order. Lacan writes:

[W]hen I write [the matheme of the feminine], a never-before-seen function in which the negation is placed on the quantifier, which should be read “not-whole,” it means that when any speaking being whatsoever situates itself under the banner “women,” it is on the basis of the following—that it grounds itself as being not-whole in situating itself in the phallic function.

LACAN, *SEMINAR XX*, *supra* note 10, at 72. Additionally:

The fact remains that if she is excluded by the nature of things, it is precisely in the following respect: being not-whole, she has a supplementary jouissance compared to what the phallic function designates by way of jouissance.

*Id.* at 73; see also Schroeder, *The Eumenides*, *supra* note \*.

enjoyment of *jouissance*. But upon the achievement of *jouissance* she loses access to time. At the moment of ecstasy, in the position of pure existence, one is experiencing, not interpreting. There can be no time where there is no thought. Law and economics tends to repress this feminine side of the dialectic for the good reason that is impossible to reconcile with the masculine one.

Consequently, Simmel based his definition of money as exchange value (masculine money) and his rejection of use value (feminine money) in part on the proposition that there can be no consciousness, and, therefore, no intersubjective relationship in the purely subjective experience of enjoyment:

Human enjoyment of an object is a completely undivided act. At such moments we have an experience that does not include an awareness of an object confronting us or an awareness of the self as distinct from its present condition. Phenomena of the basest and the highest kind meet here.<sup>299</sup>

Being heavily influenced by Kant, Simmel accepts the proposition that space and time are attributes of thought.<sup>300</sup> In order for a subject to desire, therefore, he must never achieve enjoyment in the present. "The possibility of enjoyment must be separated, as an image of the future, from our present condition in order for us to desire things that now stand at a distance from us."<sup>301</sup>

*Eros* is the vain hope that one can solve the failure of one's own sexuality by combining the two sexuated positions—to achieve wholeness and immediacy by finding the perfect mate of the other sex. This is always a failure because the two sexes are mutually inconsistent. They are not two halves of a single whole, but each an imperfect attempt at wholeness. Consequently, the dilemma of desire can never be resolved but only ended with death—*Eros* eventually gives way to *thanatos* understood as the desire for wholeness that can only be achieved by regressing to the time before birth.

## 5. THE SOVEREIGN: QUEEN OF WEALTH MAXIMIZATION

This Article's analysis of the uneasy relationship between wealth maximization and enjoyment has strong affinities to Georges Bataille's theory of the relationship between capitalism and what he called "sovereignty."<sup>302</sup> American economics is supposed to be driven by the

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299. SIMMEL, *supra* note 30, at 65.

300. *See id.* at 104.

301. *Id.* at 71.

302. Bataille first introduced his concept of sovereignty in the early 1950's. *See* GEORGES BATAILLE, *INNER EXPERIENCE* (Leslie Anne Boldt trans., 1988) (1954); *see also*

rational Appollonian ideal of investment and increased production. By contrast, Bataille's theory of the "accursed share" is that economies are, in fact, driven by a Dionysian frenzy for non-productive consumption and destruction. Bataille reflects, however, the thesis of this Article that the repressed desire of the market is its own destruction—the perfect market is the end of the actual market. The Dionysian frenzy extolled by Bataille is feminine *jouissance*—enjoyment.

As should be obvious from even this brief introduction, Bataille's concept of sovereignty is not limited to the simplistic idea of actual empirical individuals serving as king. His terminology is intended to reflect the role played by kings in monarchies, and by other individuals or institutions in other societies. Bataille does not adopt the more common jurisprudential definition of the general concept of the sovereign as he (or it) who is not subject to the rules imposed by another.<sup>303</sup> Rather, as a philosopher of economics, he adopts an economic conception of sovereignty.

Sovereignty is that which "is opposed to the servile and the subordinate."<sup>304</sup> It is the free subjectivity that is the essence of human nature.<sup>305</sup> Sovereignty is radical freedom as total negativity. It is *jouissance* as the fulfillment of all desires. Sovereignty, therefore, is the end of the market and capitalism—both its goal and its doom. Bataille believed that the secret of capitalism's incredible productivity is precisely that it has no place in the present for a sovereign, as he defines it. Rather, sovereignty, like the feminine, is always postponed. It is yesterday and tomorrow, but never today.

To Bataille, the sovereign is "he who consumes" as opposed to "he who produces."<sup>306</sup> Most members of society are involved in what Bataille called useful or productive activity. Confusingly for the purposes of this Article, Bataille, writing in the context of the Marxist dominated intellectual life of France in the 1960's, calls this productive activity by a term that is translated into English as "utility." Obviously, Bataille was not invoking the American economic definition of utility (happiness). Rather his terminology is closer to the colloquial or lay definition of useful.

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JACQUES DERRIDA, *From Restricted to General Economy: A Hegelianism Without Reserve*, in *WRITING AND DIFFERENCE* 251 (Alan Bass trans., 1978). Bataille's final theory of sovereignty was published posthumously in the mid-1970's. See 3 GEORGES BATAILLE, *THE ACCURSED SHARE: AN ESSAY ON GENERAL ECONOMY* (Robert Hurley trans., 1993) (1976) [hereinafter BATAILLE, *ACCURSED SHARE*].

303. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 50-71 (1961).

304. BATAILLE, *ACCURSED SHARE*, *supra* note 302, at 197.

305. See *id.* at 237-57 (providing an extended discussion of the relationship between sovereignty and subjectivity).

306. See *id.* at 198 ("What distinguishes sovereignty is the consumption of wealth, as against labor and servitude, which produce wealth without consuming it. The sovereign consumes and doesn't labor . . .").

Moreover, Posner's analysis reveals that Bataille's use of the term "utility" is almost precisely the opposite from that used in American utilitarianism. Posner identifies utility with the capacity for enjoyment, in contrast to wealth, with is the capacity for production and exchange. Bataille identifies utility with production and exchange, in contrast to the capacity for enjoyment that he calls sovereignty. In other words, Bataille's "utility" is equivalent to Posner's wealth maximizing activity, and Bataille's "sovereignty" to Posner's utility.

Productive activity, according to Bataille, is useful in the sense that it serves some goal; it is the means to an end. Hegel agreed with Kant that freedom consists precisely in being one's own ends and not the means to the ends of another.<sup>307</sup> To serve another's ends is, by definition, servile. To serve as means is always to postpone one's desire "to employ the *present time* for the sake of the *future*. . . ."<sup>308</sup> Consequently, there is always an inevitably servile aspect of productive activity.

According to Bataille, "Life *beyond utility* [productive activity] is the domain of sovereignty."<sup>309</sup> Sovereignty (enjoyment) is the total negation of utility (wealth maximization).<sup>310</sup> To be the sovereign is to be one's own ends. It is to live in the present, and not to anticipate the future or dwell in the past. It is the ethical decision that further postponement of desire is procrastination. Sovereignty is experienced as "miraculous"—ecstatic.<sup>311</sup>

The sovereign moment reflects Lacan's concept of the temporary achievement of the real in feminine *jouissance*. To be totally in the present is to lose consciousness. That is, to be aware of one's experience is to interpret it in either anticipation or memory, to postpone into the future, or to relegate it to the past.<sup>312</sup> "Consciousness of the moment is not truly such, is not sovereign, except in *unknowing*. Only by canceling, or at least neutralizing, every operation of knowledge within ourselves are we in the moment, without fleeing it."<sup>313</sup> All individuals occasionally experience this as when they are suddenly overcome by tears or laughter.<sup>314</sup> "The miraculous moment when anticipation dissolves into

307. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 203, at 67.

308. BATAILLE, *ACCURSED SHARE*, *supra* note 302, at 198.

309. *Id.*

310. See *id.* at 343.

311. *Id.* at 207.

312. See Schroeder, *Three's a Crowd*, *supra* note \*, at 396-401.

313. BATAILLE, *ACCURSED SHARE*, *supra* note 302, at 203.

314. See *id.* Lacan also sees a fundamental relationship between laughter and oblivion. Laughter is, in effect, the confrontation of the real—the realm of the phallus:

One must simply remember that the element in comedy that satisfies us, the element that makes us laugh, that makes us appreciate it in its full human dimension, not excluding the unconscious, is not so much the triumph of life as its flight, the fact that life slips away, runs off, escapes all those barriers that oppose it, including precisely those that are the most essential, those that are constituted by the agency of the signifier.

*nothing*, detaching us from the ground on which we were groveling, in the concatenation of useful activity.”<sup>315</sup> The sovereign moment as the realization of desire is the breakdown of the subject-object distinction that destroys both subject and object. The subject consumes the object, and loses the object that defines the subject. In other words, Bataille agrees with Kant that time and space are necessary for thought. In so far as the sovereign exists only in the present, he is outside time. In so far as the sovereign destroys the separation of objects, he is beyond space. Consequently, sovereignty is unconsciousness. The sovereign moment is real: impossible,<sup>316</sup> sacred,<sup>317</sup> deadly.<sup>318</sup> To actually achieve sovereignty as a permanent state is, therefore, obliteration.

Every individual occasionally achieves the sovereign moment. But, most individuals are not positioned in the role of the sovereign *per se*. Traditional monarchical (or in Bataille’s Marxist influenced terminology, “feudal”) societies positioned certain individuals, or classes, in the role of “the sovereign.” This does not mean, of course, that these individuals were always experiencing the silent ecstasy of *jouissance*. Rather, as an institution, they were placed beyond the necessity of leading a useful life. They were the ones who had the right to consume what the rest of society produced. As the end, rather than the means, they were positioned as those who were free from the restraints of society, who had the right and ability to act arbitrarily. Being free from restraints, the sovereign was in the position of subjectivity. Being merely useful, the means to the sovereign’s ends, most of society were in the position of objectivity. They were the sovereign’s “subjects” in the sense that they are *subject to* the will of the one sovereign subject.<sup>319</sup>

But once again this creates a paradox. Sovereignty is freedom in the sense of radical negativity. It is the achievement of the end of absolute subjectivity that necessarily ends subjectivity. The instant sovereignty—*jouissance*—is achieved, the sovereign is obliterated. Sovereignty is the freedom that destroys freedom.

Bataille’s analysis reveals that the genius of capitalism is the denial of sovereignty. Bataille thinks this means that capitalism’s goal is not the consumption of productivity, but the accumulation of productivity. In Posnerian terminology, capitalization does not seek to cultivate the

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The phallus is nothing more than a signifier, the signifier of this flight.

LACAN, SEMINAR VII, *supra* note 57, at 314.

315. BATAILLE, ACCURSED SHARE, *supra* note 302, at 203.

316. *See id.* at 215.

317. *See id.*

318. *See id.* at 213.

319. Bataille apologizes for this “awkward” but “unavoidable play on words,” which inevitability arises out of the necessarily contradictory meanings of subject and object. *Id.* at 240. The subjects project their subjectivity onto the sovereign and, therefore, experience it vicariously through him in the spectacle of public displays of court life.

capacity for enjoyment, but to maximize wealth. Accumulated productivity is capital, which is then reinvested to increase productivity, which is then accumulated, etc. This does not mean, of course, that no individual in capitalism ever experiences the sovereign moment, or that all production is reinvested as capital. To the contrary, capitalism allows for increased consumption on luxury and the increase in freedom and subjectivity in representative governments. Bataille's point is that no person, class or institution in a truly capitalist society is positioned as the sovereign—as he who consumes and enjoys; as he who is beyond utility understood as the need to maximize wealth.

In capitalism, the rich and powerful are not the leisure class of feudalism. The dominant class of capitalism—what he would call the bourgeoisie—sees itself as the preeminent productive class. Wealthy Americans take pride in being called workaholics. Their role is not to consume, but to invest, to increase productivity and profitability and to reinvest these profits. This is not to deny that capitalists often achieve the sovereign moment in the sense of actually consuming. Bataille's point is that in contradistinction to feudalism, such subjective moments are not essential but only accidental to capitalism.

One may be tempted to argue that Bataille's analysis ignores (or, given that he was writing in the 1950's failed to anticipate) the oft-cited sovereignty of the consumer in modern American society. Does the economy not revolve around satisfying consumer desires? This critique does not adequately address Bataille's point, which is not a denial of the fact of consumption, but rather an analysis of the theoretical political-economic role of consumption. To the capitalist, the fulfillment of consumer desire is not the end, but one means to his desire. The desire of the capitalist is the production, accumulation, and reinvestment of profits. One way a business can make profits is by creating consumer goods and services. But, this is only one segment of the economy.<sup>320</sup>

Nevertheless, Bataille's theory of the "accursed share" posits that the sovereign moment is necessary to all successful societies. That is, all healthy organisms, including societies, produce more energy than they need for their own survival.<sup>321</sup> They must, therefore, find a way of dealing with this excess. The simplest way is to use this energy for reproduction, however the ability to reproduce is bounded by any number of physical limitations (such as inadequate space). Consequently,

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320. In my home state of New York, by far the largest industry is what is generically referred to as Wall Street—lending, raising capital, securities trading, investment banking, mergers and acquisitions, financial services, etc. As Bataille described, capitalism is a means that sees its ends as the accumulation of capital in order to serve as the means to the end of the accumulation of capital and so on.

321. As much as I admire Bataille's analysis of capitalism, I find his attempts to universalize his concept of the accursed share not only to all human societies, but to the physical world as well to be dubious, at best, if not outright fanciful.

societies must develop a means of non-productive consumption or destruction—the sovereign moment.<sup>322</sup>

As demonstrated in this Article, however, for capitalism to continue to function it can never make a place for sovereignty in the present. In this sense sovereignty and capitalism are inconsistent. This explains why the ideal of absolute monarchies was replaced by that of representative democratic government quickly upon the development of capitalism in early modern European history.<sup>323</sup> At first blush, capitalism seems, therefore, to be an anomaly—a society that avoids the curse of the accursed share.

Bataille errs, however, when he infers from his analysis that capitalism must deny enjoyment and cannot accommodate sovereignty in the present that “[t]oday, sovereignty is no longer alive except in the perspectives of communism”<sup>324</sup> and that sovereignty does not function in capitalism. In contradistinction, sovereignty is absolutely necessary for capitalism.

Sovereign enjoyment is what capitalism claims to expel in order to define itself. This is why wealth maximization represses the capacity to enjoy and forever postpones the moment of consumption. Actual markets are erotic, and desire is created by the perpetually unsuccessful attempt to achieve the impossible goal of *jouissance*. By ostensibly postponing and repressing present enjoyment, capitalism actually produces the possibility

322. In the first volume of *The Accursed Share*, Bataille explores the variant institutions that many historical societies have developed to deal with the problem of this excess. Ancient Aztec society, for example, developed a religion founded on human sacrifice as a means of destroying this excess. Potlatch and war are other examples of institutions whose economic function is destruction.

In his last volume on sovereignty, Bataille analyzes mid-twentieth century capitalism and Stalinist communism as both sharing a unique solution to this “problem”—postponement. That is, they both turned the accursed share into “capital” that was used to increase production, thereby increasing the accursed share, which was turned into capital, etc. Bataille saw the primary difference between capitalism and Stalinism is that the former repressed any express role for the sovereign, while the latter accepted it but transfigured it in a new and terrifying way. Stalinism identified the sovereign with the abstract concept of “the people” and then declared that “the people” exercised its sovereignty by “freely” renouncing its own freedom. As a result, Stalinism was able to change sovereignty from the moment of subjective freedom into pure objective power and restraint.

323. Hegel would, of course, agree. His entire *PHILOSOPHY OF RIGHT*, *supra* note 203, is an analysis of how capitalism (i.e., the regime of abstract right which comprises private property, contract and the market place) is a necessary moment in the creation of human freedom and the development of the just state, which Hegel identified with the constitutional representative governments that were developing in Europe at the time he was writing. I describe Hegel’s analysis in detail in SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 8-52. Although abstract right is the logically most primitive form of human intersubjectivity, it was historically the last to develop. *Id.* at 319; Schroeder, *Never Jam To-day*, *supra* note 108, at 1567-68.

324. BATAILLE, *ACCURSED SHARE*, *supra* note 302, at 261.



of a future enjoyment that can serve as its goal. The sovereign, consequently, serves the function of the Lacanian feminine, the real. That is, capitalism's sovereign is not a king, but a queen whose very presence is denied and deferred.

Specifically, the sovereign is Persephone, the goddess of the hope of Spring who is also necessarily the queen of death whose very name means "she who brings destruction."<sup>325</sup> Sovereignty is not presently alive in capitalism precisely because it performs the "real" function of its own future death. Capitalism does not, therefore, destroy but represses the sovereign. It is this very repression of the sovereign that creates both the sovereign and the possibility of capitalism. The endless means of the accumulation of capital must implicitly have an end. This end is the ideal of the perfect market. The perfect market is the sovereign.

This ideal of the perfect market is efficiency in the sense of the fulfillment of all desire through the maximization of wealth. The perfect market is, therefore, universal consumption. In the perfect market, consumers instantly finance, produce and consume production.<sup>326</sup> Production and consumption become the same thing. Sovereignty is the ability to consume and achieve one's desire. In the perfect market, all participants will, therefore, achieve sovereignty. Efficiency is, therefore, the achievement of universal sovereignty.

To be sovereign, however, is to be beyond usefulness, to cease to be a means, but to be an end. Once one achieves sovereignty, one ceases to produce. The market economy by necessity stops. Similarly, as Coase insists, markets are a means to achieve the ends of efficiency.<sup>327</sup> Once wealth is maximized through the transfer of all objects to the highest valuing user, all exchange will stop. Only then, can market participants finally stop procrastinating and enjoy the objects of desire. The achievement of the perfect market would fulfill the end of the actual market and result in the end of the actual market. For capitalism to continue, therefore, it must continue to postpone the fulfillment of its desire. Sovereignty—the perfect market—is simultaneously necessary to and inconsistent with desire, freedom and creation. Because the feminine moment of sovereignty is both necessary and impossible, she can only be made possible and functioning by her prohibition and postponement.

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325. GRAVES, *supra* note 2, at 93; *see also* SCHROEDER, THE VESTAL AND THE FASCES, *supra* note 16, at 332-34 (providing a Lacanian reading of the myth of the Rape of Persephone).

326. *See* David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179, 2183 (1994).

327. *See* COASE, *supra* note 8, at 7.

## 6. JOUISSANCE AND DRIVE

Now that this Article has analyzed the Lacanian concept of the relationship of desire and enjoyment; the erotic, sexual nature of actual markets; the Posnerian fantasy of a market without enjoyment; and compared the Posnerian fantasy to Bataille's theory of capitalism's attempt to postpone enjoyment, the discussion is now in a position to analyze more fully the relationship of Posner's fantasy and enjoyment. By doing so this Article suggests a reason why models such as wealth enjoyment are attractive despite their unrealistic assumptions and potentially lethal implications. This reason is that these models themselves create a *jouissance* or enjoyment, albeit in a different form from that of actual markets.

Until now, when this Article has discussed enjoyment, it has been examined in terms of the relationship one has to enjoyment in desire—desire being the longing for wholeness achieved through recognition achieved through intersubjective relationships mediated by relationships of possession, exchange and enjoyment of a hypothesized object of desire. Although the hypothetical phallic object of desire is always already lost, one substitutes other objects to serve as the object cause of desire (the *objet petite a*). In desire, *jouissance*, enjoyment in the sense of achieving the object of desire is the goal—albeit one that is never completely achieved. This is the impulse that impels actual markets.

The Posnerian wealth maximization fantasy, in contrast, is not impelled by desire, but by what Lacan called libido, the myth of the lamella, but most frequently the “drive.”<sup>328</sup> Distancing himself from Freud, Lacan did not equate drive either with the animal mating instinct or with human sexuality, which is characterized by desire. Rather, drive is a uniquely human, non-sexual impulse—it may be thought of as what is left over of the primordial “real” animal instinct *after* its sexual aspect has been symbolized as desire.<sup>329</sup>

Both animal instinct and desire have goals. In the former, this goal is always easily fulfilled by the physical act of mating (or eating, or whatever). In the latter, the goal (the object of desire, *jouissance*, immediate sexual relationship, wholeness, escape into death) is never fully achieved, but always pursued. In contrast, drive has no goal, it only

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328. RENATA SALECL, (PER)VERSIONS OF LOVE AND HATE 48 (1999) [hereinafter SALECL, LOVE AND HATE]. Lacan's most thorough discussion of the drive are contained in his eleventh seminar, LACAN, THE FOUR FUNDAMENTAL CONCEPTS, *supra* note 151, and in the essay Jacques Lacan, *Positions of the Unconscious*, in READING SEMINAR XI: LACAN'S FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 259 (Richard Feldstein et al. eds., 1995) [hereinafter Lacan, *Positions*].

329. SALECL, LOVE AND HATE, *supra* note 328, at 48. In Lacan's words, “My lamella [Lacan's mythic personification of the drive] represents here the part of a living being that is lost when that being is produced through the straits of sex.” Lacan, *Positions*, *supra* note 328, at 274.

has *aim*.<sup>330</sup> The subject of drive is driven to do what he does not because he wants to, but because he cannot help himself.<sup>331</sup>

By this Lacan means that drive has impulse or thrust, but no purpose. Drive does not impel one to achieve a goal (possible in the case of instinct, and impossible in the case of desire), but rather, it exerts pressures to keep to the current path. Drive has no purpose but its own activity.

Drive is an attempt to get beyond the impossibility of satisfying desire by forswearing desire entirely. The relationship of drive to enjoyment is the obverse of that of desire and enjoyment.<sup>332</sup> Enjoyment is the elusive object of desire that impels human beings on and allows for (admittedly imperfect) intersubjective relations and love. It is always the partial failure of desire that is the engine of desire. In drive, however, the subject always achieves a certain idiotic enjoyment merely by endlessly engaging in the activity itself without any purpose.<sup>333</sup> Rather than trying to achieve the object of desire, drive doesn't even try, but merely circles around it. Because it has no goal that can be thwarted, the subject driven by the drive of wealth maximization achieve a certain type of satisfaction (or perhaps more accurately, can never be unsatisfied).<sup>334</sup> The drive

330. See Marie-Helene Brousse, *The Drive (II)*, in READING SEMINAR XI: LACAN'S FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 109, 112 (Richard Feldstein et al. eds., 1995); Antonio Quinet, *The Gaze as an Object*, in READING SEMINAR XI: LACAN'S FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 139, 140-41 (Richard Feldstein et al. eds., 1995).

331. See SALECL, LOVE AND HATE, *supra* note 328, at 50. One desires something because one cannot have it. One does something out of drive merely because it feels good. The logic of desire is, "It is prohibited to do this, but I will nonetheless do it." Drive, in contrast, does not care about prohibition: it is not concerned about overcoming the law [i.e., the symbolic order]. Drive's logic is: "I do not want to do this, but I am nonetheless doing it." *Id.* at 49-50.

332. See SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 291 (1999) [hereinafter ŽIŽEK, THE TICKLISH SUBJECT]. ŽIŽEK writes:

Desire and drive are clearly opposed with respect to the way they relate to *jouissance*. . . . Desire stands for the economy in which whatever object we get hold of is 'never it', the 'Real Thing', that which the subject is forever trying to attain but which eludes him again and again, while drive stands for the opposite economy, within which the stain of *jouissance* always accompanies our acts.

*Id.*

333. See *id.* at 295. ("[A]n idiotic-happy circuit of the apparatus which produces *jouissance*, is this not the very definition of *drive*?").

334. See SALECL, LOVE AND HATE, *supra* note 328, at 50. In Salecl's words:

Drive paradoxically always finds satisfaction, while desire has to remain unsatisfied, endlessly going from one object to another, positing new limits and prohibitions. Drive is thus a constant pressure, a circulation around the object *a*, which produces *jouissance*—a painful satisfaction. The object *a*, the object around which drive circulates, thus needs to be understood as a special kind of satisfaction: "The object that corresponds to drive is

results in an obscene enjoyment through compulsive repetitive activity to its utter destructive limit, no matter what the consequences. In other words, Lacan presents the paradox that the very denial of *jouissance* causes its own *jouissance*—the repressed and the return of the repressed are two sides of the same coin.<sup>335</sup>

It is *this* sterile, asexual, solipsistic satisfaction that is the enjoyment of wealth maximization. Consequently, the point was oversimplified earlier in this Article that there is *no* enjoyment in his system, but that enjoyment takes on a different form from the enjoyment of desire and actual markets. Actual markets, being characterized by desire, aim towards the achievement of enjoyment—one engages in trade in order to acquire eventually those objects that one thinks he will eventually enjoy. Because no *objet petite a* ever really substitutes for the lost phallic object of desire, one continually engages in market transactions in the vain hope that the next object acquired will in fact lead to the desired level of *jouissance*.

In Posner's imaginary system, market participants do *not* engage in market transactions in order to attain objects to be enjoyed, because no objects are ever enjoyed in his system. Rather, they engage in market transactions for the purpose of engaging in market transactions—i.e., they exchange one object in order to achieve its exchange value to acquire another object that, in turn, is exchanged in order to achieve its exchange value, *ad infinitum*. As Posner's terminology makes clear, what is maximized is *wealth*—the ability to enter into future exchanges in order to produce more wealth. In other words, Posner's imaginary market has no goal other than its self-perpetuation. In Lacan's terms, wealth maximization has an aim, but not a goal. By the logic of drive, wealth

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*satisfaction as object.*" In this search for satisfaction, drive resembles perversion.

*Id.* (quoting Jacques-Alain Miller, *On Perversion*, in *READING SEMINARS I AND II: LACAN'S RETURN TO FREUD*, 313 (Richard Feldstein et al. eds. 1996)); *see also* LACAN, *THE FOUR FUNDAMENTAL CONCEPTS*, *supra* note 151, at 166-67; Brousse, *supra* note 330, at 112; Quinet, *supra* note 330, at 140-41.

335. *See* ŽIŽEK, *THE TICKLISH SUBJECT*, *supra* note 332, at 291. Žižek describes the logic of drive as follows:

For Lacan, the trouble with *jouissance* is not only that it is unattainable, always-already lost, that it forever eludes our grasp, but, even more, that *one can never get rid of it*, that its stain drags on for ever—that is the point of Lacan's concept of surplus-enjoyment: the very renunciation of *jouissance* brings about a remainder/surplus of *jouissance*. . . . [D]rive . . . finds satisfaction in (i.e., besmirches with the stain of satisfaction) the very movement destined to 'repress' satisfaction.

*Id.* Later he says "desire desperately strives to achieve *jouissance*, its ultimate object which forever eludes it; while drive, on the contrary, involves the opposite impossibility—not the impossibility of attaining *jouissance*, but the impossibility of getting *rid of it*." *Id.* at 293.

maximization achieves a perverse enjoyment from expressly rejecting enjoyment as a goal.

Most significantly for the thesis of this Article, Lacan, once again departing from Freud, always insisted that all drives are *death* drives.<sup>336</sup> Drives do not have any creative or reproductive goal. They ceaselessly continue circling around the subject's painful pleasure of always being satisfied, because he has no goal. Consequently, Lacan's subject of the death drive is curiously immortal—in the sense that the living dead are immortal. The subject of the drive is always dead, because he is unable to live.<sup>337</sup> Being obsessively and mindlessly driven, the subject of a drive loses her freedom and becomes a passive object.

## 7. MONEY AND SUBJECTIVITY

Actual markets, like law, language and sexuality, are in the psychic order of the symbolic. The symbolic implies castration that results in the paradox that has been described here as the sexual impasse. The subject is necessarily split between masculinity and femininity perceived as two different failed attempts at achieving wholeness. The masculine is created by the repression of the feminine. Consequently, the masculine requires the feminine even as it is structurally impossible for him to recognize her directly.

This is the paradox of wealth, time, and money revisited. The symbolic order of capitalist markets and wealth maximization is created by privileging the masculine and repressing the feminine. The market must ostensibly emphasize productive activities, exchange value and the elimination of time as a transaction cost. But for any actual market to function, all parties must look forward to enjoyment, and money must be understood as congealed future use value. Because enjoyment and use

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336. See Lacan, *Positions*, *supra* note 328, at 275. In Lacan's rewriting of Freud, the death drive has nothing to do with the "desire" to die. In fact, Žižek intimates that the death drive is the immortal part of our soul—its universality. See ŽIŽEK, *THE TICKLISH SUBJECT*, *supra* note 332, at 292-94. The death drive is the same as the pleasure principle. The death drive as compulsion is the very inability to die, or to realize *thanatos*, the desire for death as release.

The death drive is the "satisfaction in aberration, and even in aberrant acts directed against yourself, that is, finding satisfaction in aggression for the sake of aggression." Jacques-Alain Miller, *A Discussion of Lacan's "Kant With Sade"*, in *READING SEMINARS I AND II: LACAN'S RETURN TO FREUD* 212, 220 (Richard Feldstein et al. eds., 1996).

337. In Žižek's words, "[T]he 'death drive' designates the dimension of what horror fiction calls the 'undead', a strange, immortal, indestructible life that persists beyond death." ŽIŽEK, *THE TICKLISH SUBJECT*, *supra* note 332, at 294. Caught in this unending circle of perverse satisfaction and pressure, the subject of drive—like the legendary vampire of fiction—yearns to escape into true death. Lacan introduces this uncanny aspect of the death drive in his famously bizarre myth of the lamella—the monstrous, immortal living dead, asexual twin born with each human subject. See Lacan, *Positions*, *supra* note 328, at 273-76.

value are always in the future, time must be preserved. The masculine, public, intersubjective order of economics, therefore, requires that there be a hidden and only partially acknowledged feminine, private, world of ecstatic and solipsistic enjoyment.

The feminine is the defining other of the masculine order. Not only is the feminine the moment of unbounded freedom necessary for any market to exist, the impossibility of fulfilling desire is what makes desire function. The masculine position that seeks to repress the feminine is, therefore, both cruel and hypocritical.

It would be equally futile, however, to try to reverse the sexual status quo and privilege the feminine and repress the masculine. The feminine as the freedom of the real is only created through her repression. To destroy the masculine would destroy the conditions of femininity. In other words, the repression of the feminine is the masculine generative act that enables the feminine to give birth to the masculine. The paradox of the feminine part of personality is that she is only free and creative because she has been violated and rejected by the masculine. Pure enjoyment, without possession and exchange, is pure nothingness. Pure enjoyment would be the satisfaction of all desires, the cure of castration, and the loss of consciousness. The capitalist market could not function if its members demanded present enjoyment.<sup>338</sup>

The impossibility of overcoming the sexual impasse is one reason why Lacan said the subject was split. It also explains the workings of the economy.

As Bataille has shown, this does not mean that individuals in a wealth maximization regime do not in fact enjoy their property as an empirical matter.<sup>339</sup> But, this enjoyment is merely accidental to the theoretical ideal of wealth maximization. Indeed, enjoyment only occurs because of transaction costs that inhibit the achievement of the perfect market in which all use value is reduced to exchange value. This is why transaction costs serve the same function in economics as castration does in psychoanalysis—they are the “cut” or gap that separates actual markets that exist in the symbolic from the perfect market that exists in the real.<sup>340</sup> This means paradoxically that transaction costs—the flaws of actual markets—are necessary for the operation of actual markets. Indeed, as wealth (exchange value) evaporates in the perfect market, wealth itself is revealed as an imperfection—the detritus of transaction costs.

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338. Consequently, if I criticize Posner in this Article for privileging exchange over enjoyment, I have elsewhere chided Radin for doing the opposite. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 259. In other words, I agree with Posner's assessment that there is ethical value in an economic system that seeks to increase productive activity by favoring the proverbial ant over the grasshopper. See *supra* text accompanying notes 41-45.

339. See *supra* text accompanying notes 319-20.

340. See Schroeder, *The End of the Market*, *supra* note \*, at 484.

Enjoyment—which must be denied by wealth maximization—is necessary for wealth maximization.

One of Lacan's most famous depictions of the workings of the three orders of the symbolic, the imaginary and the real is based on an analysis of Edgar Allan Poe's *The Purloined Letter*.<sup>341</sup> As is well known, the thief is able to hide the stolen missive of the title from the police by changing its appearance, but displaying it in the most obvious place in his office.

Lacan was a notoriously difficult writer—indeed he claimed that he was intentionally obscure because he did not want to speak to idiots.<sup>342</sup> He frequently adopted the method he identified in *The Purloined Letter* by hiding his meaning by disguising it slightly and then placing it in plain sight.<sup>343</sup> Similarly the secret of a Lacanian analysis of money in post-industrial capitalist society is hidden in plain sight.

One of Lacan's most annoying affectations is his use of quasi-mathematical symbols called "mathemes" to stand for his central concepts. Although they are supposedly designed to provide mathematical rigor, and therefore clarity, to his theories these mathemes often have the opposite effect of making his presentation unnecessarily difficult. Difficult, that is, until one remembers Lacan's love of hide-and-seek.

One of his earliest and most consistently used mathemes was that devised for the split subject. This consists of a capital S standing for the subject and the (master) signifier, bifurcated by a line representing its constituent split. The matheme of subjectivity is: "\$".<sup>344</sup>

This author has never read one commentator who has acknowledged the striking resemblance between the matheme for subjectivity and the American dollar sign.<sup>345</sup> Nevertheless, once it is seen, it is clear that Lacan has hidden in plain sight the message that money and the subject serve parallel roles in the creation of the symbolic order of law, language, sexuality and markets. They are both master signifiers that can give signification to other signifiers precisely because they have no content in

341. See Jacques Lacan, *Seminar on "The Purloined Letter"* (Jeffrey Mehlman trans.), in *THE PURLOINED POE: LACAN, DERRIDA & PSYCHOANALYTIC READING* 28 (John P. Muller & William J. Richardson eds., 1988).

342. See SCHNEIDERMAN, *supra* note 151, at 18-19.

343. I have used this example to show how the widespread impression that the archetypical Lacanian subject is masculine ignores the clues Lacan has placed in plain sight. In Lacan, the masculine only claims to have subjectivity. The split subject is the woman. See SCHROEDER, *THE VESTAL AND THE FASCES*, *supra* note 16, at 329.

344. FINK, *supra* note 153, at 45. Lacan's alteration in this case is slight. The line bifurcating or barring the S of subjectivity is usually drawn at an angle, rather than the strictly perpendicular of the dollar sign.

345. Even though Žižek discusses Lacan's matheme for subjectivity the page before he compares the subject as master signifier to money as master commodity and even though his book prints the matheme with a perpendicular bar like a dollar sign, he fails to note the remarkable resemblance between the two. See ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 237, at 22.

and of themselves. The masculine speaking subject in the symbolic order of language, law and sexuality is only defined by silent repressed feminine subject in the real. The masculine concept of money as exchange value in the symbolic order of the market is similarly only defined by the unacknowledged, forever postponed feminine concept of money as use value. To maximize wealth in the Posnerian sense of suppressing, rather than repressing enjoyment, would destroy exchange. Wealth maximization is the golden touch. Luckily, the golden touch is only a myth. Despite its denials, the masculine is only successful in repressing the feminine because he requires her for his very existence.

#### V. CONCLUSION: THE ASS'S EARS

The golden touch was not Midas's only foolish decision. After receiving the golden touch, Dionysus had mercy on Midas and answered his prayer to have it taken away. But Midas's story does not stop with this happy ending. Relieved of his burden, Midas renounced wealth maximization and became a romantic—he abdicated his crown, took to the hills, and became a devotee of the rustic god Pan.

One day he was asked to help decide an unusual dispute. Pan, having invented his eponymous pipe, bragged that he was a better musician than Apollo, god of reason, culture, and the arts. When Apollo objected to Pan's boast, the gods decided that the dispute should be decided by the ancient god Tmolus, the Old Man of the Mountain. Tmolus asked Midas to assist him. The trial took the form of a music contest pitting Pan and his panpipe against Apollo and his lyre.

Consistent with his newfound romanticism, Midas announced that he preferred the simpleminded, earthy tooting of vulgar Pan over the sophisticated, celestial lyrics of Olympian Apollo. Tmolus ignored Midas's ignorant advice and decided for Apollo. After all, the true gravamen of the dispute was not one of aesthetics, which can be judged by man, but blasphemy, which can only be determined by god. Apollo punished Midas for his bad counsel by changing his ears into those of an ass.

For a time Midas succeeded in hiding his deformity by wearing a Phrygian cap—the ancient symbol of liberty—at all times.<sup>346</sup> Of course, this is the typical romantic position that tries to cloak foolish license through its claims to freedom. Even Midas's wife was fooled by his eccentric insistence on wearing his hat to bed.<sup>347</sup> He could not keep his shame from his barber, however; Midas assured his barber that he would

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346. See GRAVES, *supra* note 2, at 283.

347. Not everyone can believe this. The ever practical Wife of Bath insisted that it was Midas's queen, not his barber, who must have discovered and inadvertently revealed the secret. See GEOFFREY CHAUCER, *The Wife of Bath's Tale*, in *THE CANTERBURY TALES* 240, 243 (David Wright trans., 1985).



experience a slow, painful death if he ever revealed the royal embarrassment.

Like all men, the poor barber desired nothing more than to be able to spread this delicious gossip. The barber felt he was about to burst and was terrified that he would slip and blurt out the truth. He finally arrived at a solution. He crept out in the middle of the night, dug a hole in the side of the riverbank, and unburdened himself by whispering into the hole and filling it in. Relieved of his linguistic constipation, the barber went home and slept soundly for the first time in months.

In the spring, a reed sprung from the riverbank. When it swayed in the wind, it made a tiny rustling noise. The nearby grasses, swaying in rhythm, picked up the sound. The sound spread in turn to the bushes and eventually to the trees, growing louder with every repetition. Finally, whenever the wind blew, the entire country echoed with the "secret": "King Midas has ass's ears!"

What could this strange myth mean? At first blush, a simple explanation seems sufficient. Apollo punished the foolish judge by branding him in the flesh with a visible sign of his own bad decision. This reflects the Lacanian understanding that what is repressed in the symbolic returns in the real. The real includes an understanding of the physical world, and one's sense of one's own body. One example of the return of the repressed in the real, is the hysteric who experiences the memories she represses in the symbolic as psychosomatic symptoms in the body. Myth reveals psychoanalytic truth by giving them literal form. Midas in his capacity of judge acting in the symbolic order of law tried to repress the inconvenient legal evidence presented to him. Consequently, as Midas sinned in the symbolic through his ears, his ears took on the real form of his sin. As he stubbornly refused to examine and critique his own prejudices, his ears took on the form of the most stubborn of all creatures.

A more satisfactory interpretation of the two stories is suggested by the fact that Ovid gave them almost perfectly homonymic titles to the two myths: *Midas aureus* (Golden Midas) and *Midae aures* (Midas's Ears). In the poet's words, these two seemingly diverse stories are actually two retellings of one and the same story of how Midas, "still obtuse remained, from which his foolish mind again, by an absurd decision, harmed his life."<sup>348</sup> This is further revealed by the parallel structures of the two myths. More accurately, the two stories are mirror images. The potentially tragic story of golden Midas has a happy ending when Midas realizes his error and the god lifts the curse. The potentially comic story of Midas's ears has a sad one as the god's curse leads to Midas's public humiliation. This may relate to the fact that the story of golden Midas reflects the masculine position that is characterized by the comic desire of

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348. OVID, *supra* note 1, ll. 231-32.

*eros*, whereas the story of Midas's ears reflects the feminine position that is characterized by the tragic desire of *thanatos*.

Classical mythology presents the human condition as hovering between the divine, represented by the anthropomorphic Olympian gods, and the bestial, represented by various half-animal races such as centaurs and satyrs. In both tales, Midas first meets a goat-man who tempts him with his brutish, simpleminded ways. God then appears and asks Midas to make a decision as to his true nature. In each case, Midas foolishly follows the example of a goat-man and chooses his animal nature over the divine to his own peril.<sup>349</sup>

In the tale of Golden Midas, Midas was seduced by Silenus's tales of the wealthy land beyond the Atlantic that so eerily prefigures capitalist America. God took the form of Dionysus, the personification of ecstasy—the real. When God offered Midas the opportunity to join with the real and achieve immediacy, Midas foolishly chose to postpone enjoyment. He followed the satyr and chose the simplistic rationality of wealth maximization that privileges possession and exchange and denies the enjoyment necessary to make the other two elements valuable. He took on the masculine position and repressed the feminine personified by Dionysus.<sup>350</sup>

In the tale of Midas's Ears, Midas was seduced by Pan's promise of simple pleasures. God took the form of Apollo, the personification of reason—the symbolic. The crucial aspect of the musical content is the difference in the two performances. Pan played a pipe and Apollo a lyre. Pan could produce only one note at a time on the panpipe enabling him to play only the simplest melody. Apollo could not only produce harmony with his lyre but he could also sing along with the music. When God spoke to Midas and offered him the opportunity to stop and hear divine words—to submit to the symbolic order—Midas instead chose immediate enjoyment. He followed goat-footed Pan and chose the simplistic

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349. Midas apparently had a soft spot in his heart for goat-men. Pan, the god of the forest, was of course half man and half goat. The satyrs were mythological forest dwellers who were also half man and half goat. Dionysus's mentor, Silenus, was an obese drunken old man who was often depicted as a satyr. Indeed, some versions of his myth have tried to explain this predilection by suggesting that Midas's father was a satyr. GRAVES, *supra* note 2, at 281.

350. Although Dionysus is a male god who is usually presented as the heterosexual lover of Ariadne, his myth insists that he was ostentatiously effeminate, wearing long hair, makeup, perfume and long feminine robes and leading women in orgiastic rites. In *THE VESTAL AND THE FASCES*, *supra* note 16, at 335-38. I have suggested that the mysterious, silent, faceless goddess Hestia (the Roman Vesta) was a personification of the Lacanian feminine. Tellingly, upon his ascension to Olympus upon his apotheosis, Hestia let Dionysus sit in her throne among the Olympians thereby insuring that the number of the high gods would remain at the magic number of twelve and not be increased to the unlucky one of thirteen. That is, Dionysus is, mysteriously, identical to Hestia. This is why the Vestal Virgins of Rome administered the obscene rites of orgiastic Bacchus (Dionysus) as well as the pure rites of chaste Vesta (Hestia). See *id.* at xiii n.11.

emotionality of romanticism that privileges the immediate enjoyment of flute music over the complex, mediated, intersubjective communication of Apollo's lyrics. He took on the feminine position and rejected the masculine personified by Apollo.

In both tales, Midas made the error that equally characterizes utilitarianism and romanticism: the idea that passion and reason are opposites between which one must choose. This simplistic, mirror-image world of complements and simple negation is, of course, the animalistic order of the Imaginary—the order of the goat. Moreover, in both stories Midas is the author of his own fate. Midas expressly asked for the golden touch and nearly starved to death when his feminine enjoyment was postponed forever. But Midas was equally the author of his fate after the musical contest. Apollo in fact did nothing to Midas. Midas made an ass of himself. All Apollo did was to note that Midas was a fool and accurately predicted that Midas's foolishness would soon be apparent to other men.

There is, however, a "divine," fuller understanding of these myths. Paradoxically, like the sexuated positions, passion and reason create and require each other, even though they cannot exist simultaneously. They are the two sides of the single coin of human subjectivity. As the Greeks understood, Apollo and Dionysus are equally God. One can never choose, only dynamically vacillate between them. This is the contradiction that enables humans to love and gives them the divine capacity of freedom. Consequently, according to the myth, what initially appears as passion is revealed to require reason, and reason is only accessible through passion. As Hegel understood, the potential for passion is created only by reason, and reason can be actualized only through passion.<sup>351</sup>

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351. See Schroeder, *Pandora's Amphora*, *supra* note \*, at 827-29, 850-61, 864-67. As Clark Butler states, "The concretely rational human [being's] . . . rationality is essentially expressed in and through passion . . . ." CLARK BUTLER, *HEGEL'S LOGIC: BETWEEN DIALECTIC AND HISTORY* 162 (1996).