

University of Miami Law Review

Volume 57
Number 3 *SYMPOSIUM Beyond Right and Reason: Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason*

Article 15

4-1-2003

Law's Non-Existent Empire

Jeanne L. Schroeder

David Gray Carlson

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

Jeanne L. Schroeder and David Gray Carlson, *Law's Non-Existent Empire*, 57 U. Miami L. Rev. 767 (2003)
Available at: <https://repository.law.miami.edu/umlr/vol57/iss3/15>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Law's Non-Existent Empire

JEANNE L. SCHROEDER & DAVID GRAY CARLSON*

Anticipating the fall of the Berlin wall by over a decade and foreseeing the absence of a left social program, Critical Legal Studies (CLS), to its credit, lost faith in policy science and instead has pursued a program of liberation. This is a perfectly fine (though upper-middle-class) program. According to Hegel, it is the *only* program history has ever had. According to Hegel, in the ancient "oriental" monarchies, only one man was free—the king. In Greece, a few were free—the elite citizens of the *polis*. But in modernity, *everyone* is free.¹ In Hegel's view, history is based on this very teleology.

Probably the salient theorist of liberation in American legal academics is Pierre Schlag. His observations of the legal scene are very acute. For this, he well deserves this remarkable *festschrift* in his honor, and we are honored to participate in it.

We will argue, however, that Schlag's critique is only half-correct. Descriptively, it is excellent. He has intuited precisely what law "is"—non-existent. Normatively, however, the critique is contradictory. In this paper we address the normative contradictions. We believe Schlag has failed to follow the logic of his ideas to their ultimate conclusion. Normativity still lives and reigns in the work of Schlag himself. Only when it is finally gone can we count our gains.

In this paper, we first give a brief description of Schlag's critique of policy science and show that this critique, while partially true, ultimately fails to be thoroughgoing enough. We then discuss how a Lacanian analysis can take Schlag's analysis a few more steps toward the goal of completely abolishing normativity.

I. NORMATIVITY

As suggested by the title of his article, *Normative and Nowhere to Go*, Schlag is critical of normativity in legal scholarship.² In describing the normative project, Schlag writes: "Typically, it takes some truly wonderful normative value, like justice or liberty or equality or whatever, and then tries its damndest to give the abstract value a con-

* Professors of Law, The Benjamin N. Cardozo School of Law, Yeshiva University, New York City.

1. See Peter Singer, *Hegel*, in *GERMAN PHILOSOPHERS* 124-38 (Keith Thomas ed., 1997).

2. See generally Pierre Schlag, *Normative and Nowhere to Go*, 43 *STAN. L. REV.* 167 (1990).

tent that is as determinate and concrete, and yet as encompassing, as possible.”³

In short, the fault is reasoning from a subjective “ought” to an objective “is.” Schlag does not merely predict the imminent doom of such endeavors; that doom, Schlag thinks, is here: “The normative jurisprudential world is about to crash. More accurately, it has already crashed, and it is just a matter of time before the entire legal academy takes notice.”⁴

But wait! The apocalypse is not present after all:

Indeed, it is one of the vexations of the condition in the legal academy, as elsewhere, that various kinds of thought remain socially and institutionally operative (in fact dominant) long after their intellectual vitality has dissipated. And so it is with normative legal thought. It remains socially and institutionally operative within the legal academy, though it is a jurisprudential world that has already crashed.⁵

Why has normative legal scholarship cheated its fate and sustained itself after death? Because of a de-centered bureaucracy whose interest demands that normative legal scholarship be perpetuated: “It now becomes evident that the value (if any) of normative legal thought depends on a decentered economy of bureaucratic institutions and practices . . . that define and represent their own operations, their own character, their own performances, in the normative currency.”⁶

This bureaucracy fears freedom. Yet bureaucracy is clever. It uses the language of freedom to fight freedom. Normative legal thought is a technique of rhetorical manipulation by which the language of freedom is used to disguise a fundamental fear of freedom. As a result “the ‘freedom’ word doesn’t mean much of anything. . . . [F]reedom’s just another word for getting you to do something you don’t want to do.”⁷

Yet, when we read Schlag, we find that he inadvertently addresses the very questions he insists must not even be posed: “What should we do? What’s the point?” . . . “If normative legal thought isn’t going anywhere, what should we do instead?” “What do you propose?” “What’s the solution?”⁸

Schlag calls these questions an “interruption” from what the task at hand should be—deconstruction of the very project of normative legal scholarship.

3. PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 19 (1996) [hereinafter SCHLAG, *LAYING DOWN THE LAW*].

4. *Id.* at 31.

5. *Id.*

6. *Id.* at 34.

7. *Id.* at 33.

8. *Id.* at 26-27.

Yet, in spite of this apparent opposition to normativity, we find that Schlag is himself normative. His program is that we should stop being normative. This is as much normativity as the normativity he attacks.

In fact, we believe that Schlag's attack on legal academics and the legal profession generally is a mere by-product of the main point: an attack on law as such.⁹ Accordingly, Schlag blames the law for failing to deliver what it promises—a "robust referent."¹⁰ Instead of delivering this robust referent, law instead proffers a chain of signifiers (which Schlag calls "ontological entities"¹¹). Each signifier disappointingly refers only to other signifiers. None of these signifiers is a robust referent. Schlag reveals that law is a tale told by an idiot, signifying nothing. It literally does not exist. Law engages in the petty pace of infinite regress—a bad infinity—without ever reaching the ultimate signified.¹² For this reason, law is pseudoscience, nonsense, madness, "faked, bluffed, or simulated."¹³

The core of this attack on law is well taken. Law *is* a fiction, as Bentham¹⁴ and Lacan¹⁵ have strongly emphasized. But what is the normative payoff to this observation? Schlag ends one of his books by tentatively suggesting that "[m]aybe what comes next is that we stop treating 'law' as something to celebrate, expand, and worship. May we learn to lay down the law."¹⁶

Is there not an enormous problem with this suggestion? Even while he suggests that we lay down the law and legal scholarship about the law, Schlag *actually does legal scholarship*. His opponents are well justified in accusing Pierre of an inconsistency in this regard. As Henry V

9. It is not just legal academics who should stop doing what they do. He seemingly does not want us to practice law. Indeed, Schlag's comments about practicing attorneys are almost as vociferous as his comments about academics. See, e.g., *id.* at 38-39.

10. Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 908, 919 (1997) (noting that law's "fundamental units of analysis . . . are a locus of non-determination"); Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 960 (1988) ("As members of a service industry devoted to the manipulation of endless webs of intricately intertwined texts, it may be doubted whether many of us often encounter anything (professionally) that might actually qualify as a real object.").

11. Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1, 3 (1997).

12. SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 166.

13. PIERRE SCHLAG, THE ENCHANTMENT OF REASON 13 (1998).

14. On Bentham, see JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE 216 n.270 (1998) [hereinafter SCHROEDER, THE VESTAL]; SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 85-88 (1993).

15. This is one of Lacan's notorious pronouncements: that the Big Other does not exist. See Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 337-38 (2002) [hereinafter Schroeder, *Stumbling Block*].

16. SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 166.

put it, "Tis good for men to love their present pains *upon example*."¹⁷ Yet Schlag has not given the troops a very good example of his program; he has remained a productive legal scholar. The very passion, let alone the sheer volume, of his writing belies Schlag's recommendation that we should lay down the law. How could he tell us what to do—to lay down the law—if he himself were to lay down the law? The only way he can successfully get us to lay down the law is if he himself does *not* lay down the law.

Beyond laying down the law, another normative program emerges from Schlag's work: "What is missing in normative legal thought is any serious questioning, let alone tracing, of the relations that the practice, the rhetoric, the routine of normative legal thought have (or do not have) to the field of pain and death."¹⁸ The suggestion is that we should come to realize that law itself is the very ground for the field of pain and death. When this is realized, the normative program to lay down the law becomes a high moral imperative. It appears from Schlag's work that the proper project for legal scholarship is to expose law's responsibility for pain and death. *This* is what we should do. When legal scholarship has achieved this task, presumably pain and death will have been eliminated. Turning the tables on law and economics, Pierre implies that it would be efficient (*i.e.*, useful to human utility) if law would abolish itself.

But, stranded on a field exfoliated of pain and death, what next? The implicit program seems to be that, once the distortions of law are removed, the subject simply does not have to be told to do anything. Whatever the subject does will be authentic. This is the free, liberated subject that Schlag's normativity implies—a *natural* subject from whom completeness and authenticity has been unfairly denied by the legal bureaucracy. If we are right, then underlying Schlag's polemic against law is an uncritical romantic psychology. This would in turn mean that Schlag is not so much a critical scholar as a romantic one.

This implicit psychology means that Schlag has something in common with the political liberals he attacks. Both Schlag and liberals believe in the autonomy of the human subject—and the possibility that the subject can achieve this desired state of freedom. Furthermore, they both believe in the existence of subjectivity in a state of nature on which positive law or social engineering cannot possibly improve.

Law, then, has become a tool for oppressing the bureaucratic society that legal academia unwittingly serves. Legal subjects, subjected to the law, are alienated from themselves by the law. The corollary to this

17. WILLIAM SHAKESPEARE, HENRY V act 4, sc. 1 (emphasis added).

18. SCHLAG, LAYING DOWN THE LAW, *supra* note 3, at 36-37.

is that there must be at least the possibility that subjectivity could be other than it is now—distorted by law.

Lest we be misunderstood, we emphasize that we agree with much of the above account. We agree with Schlag's suggestion that normativity cannot succeed. Virtually every observation that Schlag makes about law and policy scholarship (normativity) is correct. Where we disagree is that there *is* a subject left standing once legal normativity is abolished. Unfortunately, although Schlag ostensibly bases much of his analysis on the post-modern critique of the liberal conception of the autonomous self-identical subject, he, in fact, falls back on a liberal conception of a *natural* self.

Romanticism implies that the self-identical individual of liberalism is real—but disfigured by law and hence on a field of pain and death. The post-modern position is quite different. It denies the pre-legality of personality and suggests that personality is itself a legal idea. On this view, the self-identical subject of liberalism *cannot* exist as a theoretical matter.

Lacanian psychoanalysis agrees with half of Schlag's proposition. The subject is on a field of pain and death, where it is not self-identical, but severely wounded by law. It is precisely law (broadly understood as the symbolic order) that castrates the subject, as Schlag maintains. Breaking the chains of the law, however, would not free but would obliterate the subject. Subjectivity is nothing but the split, the gap, the rift in the natural subject torn by law. If law is removed, the rift that creates subjectivity is obliterated.

What was Lacan's name for a person who successfully follows Schlag's normative program and slips the chains of law? His term for such a person was "psychotic."¹⁹ For Lacan, the normative program is precisely *not* to let go of the symbolic order, for that would be the death of subjectivity, not its liberation.

What we now show is how very differently psychoanalysis schematizes the same insight Schlag has intuited. The Lacanians agree that law "does not exist" and nevertheless oppresses the subject. Following Kant and Hegel, Lacan concludes that law's very failure to meet its own standards is what enables it to function.²⁰ The legal subject is indeed "castrated" by the law, but this very castration—the failure of the Kantian subject truly to know the moral law—is the condition of possibility for the actualization of freedom.

19. See *infra* note 39.

20. Schroeder, *Stumbling Block*, *supra* note 15, at 309-10, 338.

II. READING LACAN

Lacan is not an easy read. He often uses familiar Freudian vocabulary but assigns unexpected meanings to them. Sometimes he seems to be not merely idiosyncratic, but intentionally and infuriatingly confusing. Statements that at first seem to say one thing, on further consideration reveal themselves to say something else completely diverse if not contradictory. He engages in elaborate punning and wordplay. Unpleasant and graphic anatomically sexual terms (*i.e.*, phallus and castration) denote highly abstract, theoretical concepts. To make matters worse, the complexity of his terminology was exacerbated by his penchant for schematizing his theories through quasi-mathematical symbols and formulae called "mathemes."²¹ Needless to say, these factors makes Lacan extremely difficult to understand, and he is subject to multiple conflicting interpretations and misinterpretations. Whether it is because of our "pragmatic" American education or our too-too Teutonic ancestry, we have little patience with Lacan's style.

Interpreting Lacan over time is made more difficult by the fact that he produced relatively little formal written works setting out his theory. Most of his work consists of edited transcripts of the annual seminars he delivered in Paris from 1954 until circa 1980. His lecture style, like his terminology, is based on indirection, allusion, and elaborate wordplay rather than formal exposition. Consequently, his books have a looser structure than one would expect from a composed work. The fact that Lacan constantly made substantial modifications to his theories over the years without expressly announcing that he had changed his mind also complicates matters.

Nevertheless, Lacan's work taken as a whole²² eventually reveals a well developed speculative system. As painful as Lacan is to read, he is, as Michelin would say, *vaut le voyage*.

a. *The Three Orders*

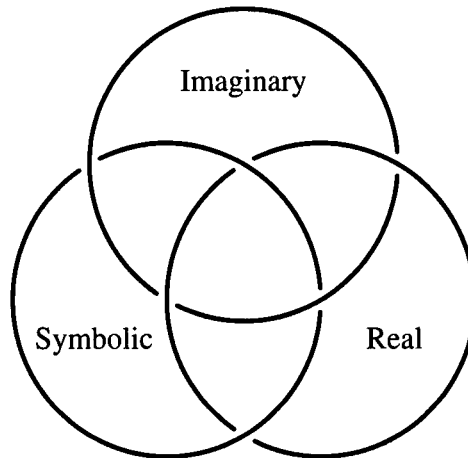
Lacan posits that the subject is split between three orders which he called the symbolic, the imaginary, and the real.²³

21. A glossary of mathemes can be found in BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 173-74 (1995).

22. Or at least as much as is available in English. As of the current date, only fourteen out of twenty-seven seminars have appeared in French editions, of which only six complete seminars (and various sessions of a few others) have appeared in official English translations. A number of English translations are in production.

23. See Jacqueline Rose, *Introduction II*, in *FEMININE SEXUALITY: JACQUES LACAN AND THE ÉCOLE FREUDIENNE* 27-31 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1983) [hereinafter *FEMININE SEXUALITY*]; see also JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN BOOK I: FREUD'S PAPERS ON TECHNIQUE* 80 (Jacques-Alain Miller ed., John Forrester trans.,

The symbolic order is that of language, law, and signification.²⁴ Lacan often calls this order “the big Other.”²⁵ As it includes law, the symbolic is the focus of the remaining portion of this article. To understand the symbolic, however, one needs to understand the other two orders to which it is inextricably linked. Indeed, Lacan explained the relationship of the three to subjectivity with the metaphor of the overlapping rings of the figure known as the Borromean knot.²⁶



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

The imaginary order is that of imagery, complementarily, and meaning.²⁷ The imaginary order is the law in its closed fixity. The world of right answers in law, or any other totalizing vision of reality, is

1988) [hereinafter LACAN, SEMINAR I]; see also generally, ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 10 (1990). As is the case with virtually all of Lacan's concepts, not only are three orders extremely complex, Lacan's thinking about them developed over time. For example, in the early seminars of the 1950s, Lacan concentrated more on the contrast between the symbolic and the imaginary, whereas his later seminars put more emphasis on the real. Indeed, it seems that over time, Lacan shifted some of the functions he originally assigned to the imaginary over to the real.

24. Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 659, 667 (2000).

25. See David Caudill, *Lacan and Law: Networking with the Big Other*, 1 STUD. IN PSYCHOANALYTIC THEORY 25 (1992).

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

27. SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 123 (1994) [hereinafter ŽIŽEK, TARRYING WITH THE NEGATIVE]; Jeanne L. Schroeder, *The Eumenides: The Foundation of Law in the Repression of the Feminine* (2000) (unpublished manuscript) [hereinafter Schroeder, *The Eumenides*].

imaginary.²⁸

The real is that which cannot be reduced to, or which seems to escape, the other two orders.²⁹ The real is our sense that there is an external reality that cannot be reduced to words or pictures. Consequently, our intuitive understanding that there is an object world outside of us is located within the real. But so is our understanding of God (in the sense of the Absolute), death, and everything else that we sense is beyond the domain of human speech and imagery.³⁰ In Kantian terms, the real is our sense that there is a noumenon, a thing-in-itself, that is beyond our phenomenological understanding.³¹

Following Hegel,³² the Lacanian "real" should not be thought of as the noumenon itself but as the illusion of a noumenon.³³ Nor can the "real" be taken as physical reality or the "object world" *per se*. Lacan does not doubt that there is an objective material, empirical reality external to man's perception and interpretation. Being empirical, however, *this* reality falls within Kant's category of phenomena. Consequently, Lacan's conception of the real does not question the existence of phenomena, but Kant's theory of the noumena—that there exists in addition to empirical reality, some non-empirical, purely rational thing-in-itself that exists outside human understanding. This sense that the thing-in-itself exists outside our understanding is itself only an appearance generated by our mis-understanding—*i.e.*, the real.³⁴

28. SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 43 (1989).

29. In Elisabeth Grosz's words: "The Real is not however the same as reality; reality is lived as and known through imaginary and symbolic representations." GROSZ, *supra* note 23, at 34. She continues: "The Real cannot be experienced a such: it is capable of representation or conceptualization only through the reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as "'the lack of a 'lack.''" *Id.*

30. "The gods belong to the field of the real." See, e.g., JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 45 (Jacques-Alain Miller ed., Alan Sheridan trans., 1981) (1977) [hereinafter LACAN, *THE FOUR FUNDAMENTALS*].

The gods and the dead are real because the only encounter we have with the real is based on the canceling of our perceptual conscious, or our sense of being alive: the real is real whether we experience it or not and regardless of how we experience it. The real is most real when we are not there; and when we are there, the real does not adapt itself or accommodate itself to our being there. The concept of the real implies the annihilation of the subject.

SCHNEIDERMAN, *supra* note 26, at 76. As discussed in Lacan's seminar of feminine sexuality, the mystic's experience of God is feminine *jouissance*. Of course, this means that any attempt to give affirmative content to the idea of God (as in religions) is imaginary, not in the sense that such a God does not exist, but that our understanding of such a God is located in the imaginary order.

31. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 164, 280 (J.M.D. Merklejohn trans., 1990).

32. ROBERT B. PIPPIN, *HEGEL'S IDEALISM: THE SATISFACTIONS OF SELF-CONSCIOUSNESS* 206 (1989) ("The major point . . . is to argue that there is literally *nothing* 'beyond' or 'behind' or responsible for the human experience of the world of appearances.").

33. Schroeder, *Stumbling Block*, *supra* note 15, at 329.

34. Actual markets, like law, are located in the order of the symbolic. In contrast, the

Although Lacan does not question the existence of an objective empirical world, he does question our ability to have a direct understanding of it. All three Lacanian orders are human *reinterpretations* of experience. The real is therefore not that which is "out there" but that which we *think* is "out there." The real includes the dream of a wholeness, a completion, a permanence, and an integrity. The promise of such completion (we think) is "out there," beyond the symbolic order. The real includes the dream of a subject who is not split (castrated).

This dream of the real is not always utopian. It can be a horrifying nightmare. The real is the world of no distinctions, no consciousness, and no subjectivity. It is a mythical primal unity with the universe that must have existed before we are born, and to which we might return when we die. The real is where all movement stops.

We seek relief from the ever-changing, partial world of the symbolic, and the primal, dead fullness of the real in the third order of the imaginary. The imaginary is not merely the realm of images, but of meaning.³⁵ Meaning, in contrast to the contingent context bound concept of signification, is perfect correspondence, commensuration, or self-identity between sign and object. It is not "X stands for Y," but "X is Y." The liberal legalist conception of law is imaginary. Lacan associates the imaginary to animalistic thinking.³⁶ The imaginary is the order of mirror images, and simple negations where everything always is or is not. The imaginary is the fantasy that we can somehow preserve the reassuringly static aspect of the real, without submitting to its terrifyingly deadly aspect. The imaginary is the fantasy that we can somehow achieve the freedom of the symbolic, without risking its unpredictability and ceaseless change.

Using the imaginary, we build fantasy structures which seem to bind the symbolic order together so it precludes the (horrific) real and

economic ideal of the perfect market is "real" (or noumenal) in the technical sense. The perfect market is the realm beyond distinctions of time and space, where each subject has perfect information about himself and all other subjects, including perfect knowledge of his own preferences and desires, where all objects immediately flow to the highest valuing user so that all subjects eventually become perfectly indifferent between what they have and any other combination of goods at the perfect price ratios. In the perfect market all actual market transaction stops. Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 500 (1998) [hereinafter, Schroeder, *End of the Market*].

35. LACAN, THE FOUR FUNDAMENTALS, *supra* note 30, at 212 (1977).

36. Lacan gives the example of a male fish who attacks anything that displays the coloring that distinguishes the male of his species. This is not because he is capable of deciding that he should fight rival males for mates or determining that, since males of his species are a certain color, as a rule of thumb he should start attacking whenever he sees this color. Rather, in the piscine mind, this color is just that which must be attacked. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK III: THE PSYCHOSES 1955-1956 93-95 (Jacques-Alain Miller ed., Russell Grigg trans., 1993) [hereinafter LACAN, SEMINAR III].

becomes the (utopian) real. It is these fantasies, these fictions, that enable us to get through the day and through our lives. Note, however, because the fantasies only contingently bind together three very different aspects of the psyche—the symbolic, the imaginary, and the real—there is going to be an inevitable split between what we imagine we desire (the “little other” that we think will make us whole) and our ultimate meta-desire (wholeness and completion).

b. *Castration*

The Lacanian subject is not merely “split,” but castrated. This term does not refer to medical procedure. It refers to the permanent wound that the split subject feels because part of his self is beyond his self—in the symbolic realm of law.³⁷

Lacan agrees with Kant that the human subject is the “faculty of desire.”³⁸ What does it mean for the subject to desire? First, and most simply, the fact that the normal adult subject desires (or in economic terms, has preferences and utilities he seeks to maximize) means that at some level he feels unsatisfied, partial, and lacking. The subject compares his feeling of “lack” with an imagined state of what it would be to be full. In other words, he fantasizes about what it would take to satisfy his desire, what it would be like to be whole, to lack his lack.

Lacan uses masculine anatomic metaphors to describe this process because the “masculine” position is the imaginary vision of being whole. Of course, women desire as much as men and, when they do, it is evidence that they embrace the masculine position. The desiring subject who takes this position is “castrated.”³⁹ Lacan calls that which is

37. SLAVOJ ŽIŽEK, *THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS* 46-47 (1996).

38. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 32 (Thomas Kingsmill Abbott trans. 1996) (1873) [hereinafter *CRITIQUE OF PRACTICAL REASON*].

39. In this essay, we limit ourselves to brief discussions of the normal “neurotic” subject, who can be either an obsessional or an hysteric. Not all subjects are adequately castrated, however. Some are perverts or psychotics. Psychotics are the only ones who truly see through the artificiality of the symbolic order because they are unable to maintain the separation of the three orders. As Žižek says, “psychosis [is] the maintenance of an external distance from the symbolic order” SLAVOJ ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* 101 (1991) [hereinafter ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*]. Elsewhere he says that “this level of ‘forced choice’ [i.e. the submission to the symbolic order] is precisely what the psychotic position *lacks* the psychotic subject acts as if he has a truly free choice ‘all the way along.’” SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY* 19 (1999) [hereinafter ŽIŽEK, *TICKLISH SUBJECT*]; see also ŽIŽEK, *LOOKING AWRY*, *supra* note 26, at 20; SCHROEDER, *THE VESTAL*, *supra* note 14, at 88-89. Consequently, on the one hand, the psychotic raves because the symbolic order of language loses signification. On the other hand, “real” inanimate objects begin to talk to him.

The pervert is someone who, because he cannot achieve subjectivity, seeks to be the object of the Big Other's desire. As Jacques-Alain Miller explains:

deemed to have been lost in castration the "phallus."⁴⁰ The phallus is Lacan's term for the lack of a lack.⁴¹ It is the symbol of whatever it would be that would take away the subject's feeling of incompleteness—it is lost wholeness itself.⁴²

A second point about castration is that the desiring subject imagines that he must have been whole in the past. Wholeness is experienced as a lost state. One express example of this is the fantasy of once having perfect unity with the mother in the womb. Another might be the myths common in many religions that mankind has fallen from a primeval state of grace. This is, of course, an imaginary autobiography.⁴³

It is commonly thought that the pervert uses other people, other peoples' bodies, without due respect for their status as subjects. Lacan's fundamental clinical thesis regarding perversion is the opposite. Lacan asserts that the pervert devotes himself to the Other's jouissance, the Other's sexual enjoyment, trying to restore lost sexual enjoyment to the Other.

Jacques-Alain Miller, *A Discussion of Lacan's "Kant with Sade,"* in *READING SEMINARS I AND II: LACAN'S RETURN TO FREUD* 212, 213 (Richard Feldstein et al. eds., 1996) [hereinafter Miller, *A Discussion of Lacan's Kant with Sade*]. A masochist is a pervert who does not feel completely castrated and, therefore, tries to get his lover to complete the process. RENATA SALECL, (PER)VERSIONS OF LOVE AND HATE 156 (1998).

40. SCHROEDER, *THE VESTAL*, *supra* note 14, at 87-89.

41. Lacan specifically used the phrase "lack of a lack" to describe the order of the real. GROSZ, *supra* note 23, at 34. Insofar as the phallus is that which is lost in the orders of the symbolic and the imaginary, it is located in the real.

42. Insofar as Lacan argues that all subjects are either masculine or feminine and that sexuality is the position a subject takes with respect to castration, the negative unspoken pregnant of Lacan's use of a masculine metaphor to describe the experience of castration is the necessity of a feminine metaphor to capture a different experience. The masculine subject feels that he is not whole because he has lost his most precious part (*i.e.*, his phallus). But, this interpretation seems to hold out the hope that either castration is not inevitable or that it is a temporary condition that the subject can cure by obtaining either the initial lost object or some substitute object (such as a perfect mate). SCHROEDER, *THE VESTAL*, *supra* note 14, at 232-36, 243-45, 303-04, 328-34.

As we shall see, the masculine position is an attempt to deny castration. In contrast, the feminine feels that she is not whole, not because she has lost a part, but somehow her very self has been changed; she is not so much dismembered as shattered. Like Humpty-Dumpty, the feminine position is that no one will ever be able to put her together again. The woman does not identify the phallus as separable object that has been lost. Rather she identifies with the phallus; it is not that *something* is lost, *she* is lost. As such, castration is seen as a permanent and irreparable loss of innocence and integrity. Accordingly, when speaking of the feminine position we could use metaphors of violent defloration, rape, pollution, and corruption.

43. Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gifts*, 46 UCLA L. Rev. 815, 899-903 (1999) [hereinafter Schroeder, *Pandora's Amphora*]. This is true in the technical psychoanalytic, not religious, sense. Freud seems to have thought that religion was a sham. In contrast, Lacan can be read consistently with religious belief. We read Lacan as being deeply influenced by Saint Augustine and his entire theory as revolving about the Christian problem of the unrequited longing of the soul for God. After all, Lacan owes heavy debts to Kant and Hegel, whose theories are deeply Christian. When Lacan uses the terms "symbolic, imaginary, and real" he is speaking about our perception or our interpretation of ourselves and the object world, not the ontological state of the object world to which we do not have direct contact. Our perception of the abstract concept of God as the Absolute beyond all limits is "real" and our vision of specific aspects of a personal God is probably "imaginary." This no more suggests that God in either

Third, the subject deduces from his current sense of lack and from his fantasy that he was once whole, the false conclusion that the reason why he is not whole now is that someone has done something to him. The subject did not merely *lose* his wholeness; wholeness was *taken* from him. This is the concept of stolen enjoyment.⁴⁴ More precisely, the idea that someone has stolen enjoyment is a paranoid construction. Paranoia is the fantasy that someone is in charge of the big Other and bears the blame for imposing the wound of castration.⁴⁵

Lacan's account of castration describes Schlag's romantic attack on the law. Schlag notes that the legal subject is alienated and oppressed within the legal system and concludes from this that it is the law that is responsible for the subject's condition. Lacan would agree with this part of Schlag's analysis. In our judgment, however, Schlag jumps from the observation that the law castrates the legal subject to the false corollary that the subject would be uncastrated *but for the law*, or but for the de-centered bureaucracy that perpetuates law. Lacan, in contrast, posits that not only are there no uncastrated subjects in fact, but there could be no uncastrated subject in theory. Castration is the process that *creates* the subject, and the subject is nothing but his own castration.

The Lacanian false autobiography (reflected in Schlag's paranoid romanticism) is a "just-so" story we tell ourselves of how we came to be the way we are. The story of castration is curiously satisfying not only because it seems to give a reason for our present condition, but because it seems to add agency or subjectivity to an otherwise un-enchanted world. This, of course, is the great appeal of conspiracy theory. To be able to change "I just happen to be lacking," to "I *feel* lack because someone did something to me," suggests that: (1) even though I am not in control, at least *someone* is in control; and (2) because my condition is the result of the acts of this controlling person, perhaps this condition can be remedied and prevented in the future if only I could wrest control away from him. That is, the feeling of inadequacy is transformed into a sense of injustice. If nothing else, the Lacanian just-so story gives us a figure against which we can channel our frustration and/or admiration. That is, the idea of castration presumes a powerful "someone" out there who does the castrating. Who is this someone? As we shall discuss in a subsequent section, one of the names of this imaginary castrator is the

sense is necessarily a mere figment of our imagination than it suggests that the planet earth does not exist because our understanding of the earth is always filtered through the real, the imaginary, and the symbolic.

44. RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 28 (1994).

45. SLAVOJ ŽIŽEK, *THE ABYSS OF FREEDOM* 9 (1997).

Other—the symbolic order of law and language itself. We are castrated by law.

c. *The Initiation Rite of Subjectivity*

Another way of capturing the complex concept of castration is to state that the subject feels split because that which is most himself is also outside of himself.

Following Hegel, Lacan posited that subjectivity is intersubjectivity.⁴⁶ We become conscious thinking beings (and, accordingly, unconscious desiring beings) through inter-personal relations—by being recognized by other persons.⁴⁷ Specifically, recognition in the eyes of others requires submission to the law, which also implies the acquisition of language and the adoption of a sexual identity. Even though there are anatomical differences between the two biological sexes, “appropriate” sex-identifying behavior, courting and mating rituals, have cultural components that must be learned—indeed, much of popular culture and *all* of popular music is devoted to precisely this process. Our identity—sexual and otherwise—is not under our control. Consequently, we feel that our most intimate selves are, in fact, external to us. Lacan expresses this with the neologism that our subjectivity is “extimate.”⁴⁸

46. Hegel memorably referred to the “I that is we and the we that is I”:

What still lies ahead for consciousness is the experience of what Spirit is—this absolute substance which is the unity of the different independent self-consciousnesses which, in their opposition, enjoy perfect freedom and independence: “I” that is “We” and “We” that is “I.” It is in self-consciousness, in the Notion of Spirit that consciousness first finds its turning-point, where it leaves behind it the colourful show of the sensuous here-and-now and the nightlike void of the supersensible beyond, and steps out into the spiritual daylight of the present.

GEORG W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 110-11 (A.V. Miller trans., 1977) [hereinafter HEGEL, PHENOMENOLOGY].

47. We analyze the role of recognition in the *Bildungsroman* of subjectivity in Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Wrong and the Essence of Right*, 24 CARDOZO L. REV. (forthcoming 2002), and David Gray Carlson, *How to Do Things with Hegel*, 78 TEX. L. REV. 1377 (2000).

48. “Ex-timate” is a Lacanian neologism, representing that which is foreign but within us. ŽIŽEK, TICKLISH SUBJECT, *supra* note 39, at 45. The “ex-timate” is what we are “more than ourselves.” *Id.* at 375. It reflects the proposition that what we feel is *most* ourselves—our subjectivity, our sexuality, our desire, our moral conscience, etc.—are all created through intersubjective relationships, language, and law (*i.e.* the symbolic order) and is, therefore, in some way outside of ourselves as well. Schroeder, *End of the Market*, *supra* note 34, at 502-03; *see also generally* Jacques-Alain Miller, *Extimite* (Elizabeth Doisneau ed., Françoise Massardier-Kenney trans.), in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY 74 (March Bracher et al. trans., 1994) [hereinafter THEORY OF DISCOURSE].

d. *The Other Does Not Exist*

According to psychoanalysis, subjectivity is created by acculturation—by submitting to the big Other. The big Other is the entire symbolic order of intersubjective relationships including, most importantly, language, law, sexuality, and the market.⁴⁹ The subject subjected to the big Other is split or castrated. This does not mean, however, that once the subject was whole or that it could be whole again. Rather, subjectivity is precisely the gap, the split, the negativity, and unquenchable desire for recognition resulting from this submission.⁵⁰ Without this split there is no subjectivity. Indeed, from a Lacanian perspective psychosis is precisely the inability to maintain this constituent split. Hence, Schlag is correct in concluding that law is a violent, alienating institution, but far from correct in implying that it could be otherwise, that the subject could ever “lay down the law,” or that some bureaucratic agency is the only thing that keeps the symbolic order from flying apart.

It is initially surprising, therefore, to learn that another one of Lacan’s most notorious dicta is that the Other does not exist. Although this might sound inconsistent with the proposition that the Other splits the subject, it is, in fact, a corollary to Lacan’s notion of the split subject. The Lacanian subject *and the law* are mutually constituting—if one is split, then so is the other. “This is the *big secret* of psychoanalysis.”⁵¹

One of Lacan’s earliest mathemes is that of the split subject. This is a capital letter “S” bifurcated by a line or bar representing its essential split “\$” (pronounced “the barred S”).⁵² Lacan originally represented the symbolic order as big Other by a capital “A” (for the French *Autre*). In his later seminars, however, Lacan added to this “A” the same bar that bifurcates the “S” of subjectivity. “A” (pronounced the “barred A”)⁵³ graphically represents that the fundamental gap of castration that creates the barred subject also exists in the symbolic order that castrates the barred subject.⁵⁴

As we have seen, part of Schlag’s attack on normativity consists of the accusation that law does not exist.⁵⁵ In this section, we argue that from a Lacanian viewpoint, Schlag is correct. Law does not exist in the sense that material objects exist. Unfortunately, Schlag fails to grasp the implications of his point. Obviously, part of the debate springs from

49. See Schroeder, *End of the Market*, *supra* note 34, at 504.

50. FINK, *supra* note 21, at 45 (“The subject is nothing but this very split.”).

51. YANNIS STAURAKAKIS, *LACAN AND THE POLITICAL* 39 (1999).

52. FINK, *supra* note 21, at 173.

53. *Id.*

54. On the barred A, see *id.*

55. See *supra* text accompanying notes 9-13.

terminology. To understand what Lacan means when he says the law does not exist, we must resort to linguistic theory.

I. LINGUISTICS

Lacan says that the symbolic order does not exist, and later, even more notoriously, he says that Woman does not exist.⁵⁶ Such statements appeal to the common sense view of "existence" that equates it with sensuality or sense certainty—what Hegel called "the most abstract and poorest *truth*. All that it says about what it knows is just that it is"⁵⁷ Typically, both liberals and critics of liberal legalism implicitly accept this impoverished definition. This is existence as something "objective" in the sense of entirely external to the subject, pre-existing and permanent.⁵⁸

Schlag shares the usage described above (though Lacan's usage is designed to be ironic). In Schlag's unironic view, for law to exist it must have a "robust referent."⁵⁹ Although Schlag does not offer a definition, in context he seems to mean that law must refer to something permanent and pre-existing. This is, of course, similar to Kant's idea of the unchanging noumenon, or thing-in-itself—the thing that is beyond thought or appearance, time or space.

The symbolic order is not objective in the sense that it refers to some external and permanent "object"—some "robust referent" or noumenon. Indeed, from a Hegelian-Lacanian standpoint, no object is "robust." The symbolic order is only objective in the more modest sense that it is not entirely subjective or unique and idiosyncratic to any one individual subject. Rather, the symbolic order is intersubjective.⁶⁰ Law, like language, is by definition a human creation. More precisely, it is a collective creation created by a society as a whole and applied generally to a class of subjects. No one person commands it.

56. SCHROEDER, *THE VESTAL*, *supra* note 14, at 326-29.

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 27, at 188 (footnote omitted).

57. HEGEL, *PHENOMENOLOGY*, *supra* note 46, ¶ 91, at 58.

58. For a description of Hegel's theory of existence, see David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908 (1999).

59. Schlag, *Law and Phrenology*, *supra* note 10, at 919.

60. This is one of the many possible definitions of objectivity. Jeanne L. Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1, 50-52 (1992) (cataloguing the many types of objectivity).

The symbolic order of law, language, and sexuality is extimate.⁶¹ It is that which is most ourselves (i.e., intimate), in that our subjectivity is created through law. Yet law is experienced as being external to ourselves. Subjectivity is nothing but extimacy—our alienation or castration from the law that creates us. This is why Lacan calls the symbolic order the Other. Although it is internalized (i.e., extimate) we *misunderstand* it as something external that is imposed upon us.

Surprisingly, because Lacan worked under a regime of civil law and betrayed no discernable familiarity with Anglo-American legal traditions, his conception of the symbolic order is much more in keeping with common law conceptions. The symbolic order is in a state of constant creation and, therefore, of constant destruction and change. Law, like language, can never refer directly to external reality, but can ultimately refer directly only to other law. Simple one-to-one identifications are imaginary (picture thinking), not symbolic (linguistic). For Lacan, “meaning,” as opposed to signification, is strictly imaginary.⁶²

II. THE BAR

Lacan’s conception of the symbolic owes much to Ferdinand de Saussure’s linguistic theory. Like Saussure, Lacan diagrammed signification as a relationship between a signifier and a signified: S/s, or “a signifier stands for a signified.”⁶³ The signifier (S) is placed above the signified (s) to indicate its pre-eminence.

This by no means represents a direct, unmediated relation between signifier and signified.⁶⁴ Such a naive view is as remote as possible from Lacan’s view. One of the primary insights of psychoanalysis (and, indeed, of most traditional Western philosophy and theology since at least Plato) is that we, as conscious, speaking beings do not have direct access to the object world. True we do have immediate sense impressions of the object world, but the moment we become aware that we are sensing something we are already interpreting, and thereby altering, the experience through the symbolic and the imaginary orders.⁶⁵ Kant drew from the intermediation of a “transcendental unity of apperception”⁶⁶ the

61. ŽIŽEK, TICKLISH SUBJECT, *supra* note 39, at 45.

62. LACAN, SEMINAR III, *supra* note 36, at 54.

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

64. Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 TEX. L. REV. 15, 26-28 (2000) [hereinafter Schroeder, *Four Discourses*].

65. For an excellent essay explaining this point from the perspective of Hegel’s theory of reflection, see Michael Kosok, *The Formalization of Hegel’s Dialectic Logic*, in *HEGEL: A COLLECTION OF CRITICAL ESSAYS* 237 (Alistair MacIntyre ed., 1972).

66. KANT, *supra* note 31, at 122.

lesson that there is an unchanging noumenal world "out there" that we could rationally deduce, but not know directly.

Lacan transformed this intuition—that there is an external object world irreducible to language—into the third psychic order of the "real." This "real" is itself a part of subjectivity and is neither empirical "reality" nor Kant's non-empirical thing-in-itself. Consistent with his rejection of noumena, Lacan also rejects the concept that the signified to which a signifier refers is some reality external to language. Instead, the signified to which a signifier refers is revealed to be itself yet another signifier, that in turn refers to another signifier, *ad infinitum* in an unending chain of signification.⁶⁷ It is signification all the way down. This means that no word (signifier) directly refers to any "natural" object or concept, but can only be understood in the context of the rest of the language. That is, every signifier refers not directly to the desired signified, but to another signified in an unending chain of signification.

The line or "bar" that separates the signifier (S) from the signified (s) in the matheme of signification designates the fact that there is no direct immediate relationship between the two. One is split or barred from the other.⁶⁸ This is the same concept of radical separation that is indicated by the "bar" we have already seen that bifurcates the mathemes of subjectivity and the Other who does not exist. Because signification takes place only in an unending chain of signifiers, the relationship between any one signifier and one signified is temporary and contingent. Signification is in a state of constant slippage as signifiers replace each other above the bar, signifieds replace each other beneath the bar, and signifiers and signifieds exchange places with respect to the bar (so that the signified becomes a signifier).⁶⁹

67. Lacan compared this "chain of signifiers . . . as . . . 'rings of a necklace that is a ring in another necklace made of rings.'" William J. Richardson, *Lacan and the Subject of Psychoanalysis, Interpreting Lacan*, 6 PSYCHIATRY & HUMAN. 54 (Joseph Smith & William Kerrigan eds., 1983) (quoting LACAN, *ÉCRITS*, *supra* note 63). As Richardson explains: "The meaning of this chain does not 'consist' in any one of these elements but rather 'insists' in the whole, where the 'whole' may be taken to be the entire interlude as described, whose meaning, or rather whose 'effect' of meaning, is discerned retroactively . . ." *Id.* at 55.

68. Saussure also meant for the bar 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 . . .

Id. at 54.

69. LACAN, *ÉCRITS*, *supra* note 63, at 154.

III. METAPHOR AND METONYMY

The two tropes of signification are metaphor and metonymy. Metaphor is the fantasy of crossing the bar that separates the signifier and signified.⁷⁰ It stands for the immediate relation between the two. Metaphors emphasize identity over difference. Metaphor asserts $A = B$, but it suppresses $A \neq B$. Metaphors are therefore not entirely false, but they are not entirely true.⁷¹

Metonymy, in contrast, honors the bar that forever separates the two registers of signification.⁷² If metaphor is the attempt to cross this bar, metonymy is the sliding of meaning above and below the bar. Recognizing that the signifier cannot capture the whole truth of the signified, the speaker instead attempts to refer to the signified by indirection—by referring to what it is not. Once again, the truth of metonymy is partial, but for a different reason than metaphoric truth is partial. Metaphor (this is like *that*) always combines a true and a false statement about the signified. In contrast, everything a metonymy says about the signified is true but incomplete.

70. That is, "[t]he 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." JANE GALLOP, *READING LACAN* 119 (1985) (citations omitted).

Metaphor is the temporary identification of a specific signifier above the line with a specific signified below—it is the assertion that although the signifier and the signified are different, we can identify a similarity between the two which allows us to identify one to the other for a specific purpose. That is, metaphor emphasizes the similarity or trait shared between two different concepts and de-emphasizes the differences. Metaphor is Lacan's term for the Freudian concept of "condensation." Schroeder, *Four Discourses*, *supra* note 64, at 28 n.47.

71. According to Hegel, "[j]udgment [i.e., metaphor] is an *identical* relation between subject and predicate." GEORG W.F. HEGEL, *HEGEL'S SCIENCE OF LOGIC* 90 (A.V. Miller trans., 1969). For example, the rose is red. Judgments, however, fail to capture the whole truth:

[T]he subject has a number of determinatenesses other than that of the predicate, and also that the predicate is more extensive than the subject. Now if the content is speculative, the *non-identical* aspect of subject and predicate is also an essential moment, but in the judgement this is not expressed.

Id. at 90-91. In other words, the rose is many things other than red, yet this "speculative content" is suppressed. In addition, many things are red besides roses. This too is suppressed.

To fill out the inadequacy of the judgment, the opposite judgment should be added: the rose is *not* (just) red. The moment of identity (sameness) is legitimate but incomplete. The moment of difference (unsameness) is likewise legitimate but not complete.

72. Metonymy is the "feminine" trope of signification. LACAN, *ÉCRITS*, *supra* note 63, at 157. Metonymy emphasizes the difference between the signifier and the signified over the similarity; it insists that the signifier can never capture the totality of the concept of the signified in totality. Metonymy is the insistence that the bar of signification cannot be crossed. Consequently, in metonymy the signifier does not attempt to describe the essential nature of the signified, it only suggests it. Metonymy is Lacan's rewriting of the Freudian concept of "displacement." Schroeder, *Four Discourses*, *supra* note 64, at 28 n.47. The classic case of metonymy used by Lacan is synecdoche—the designation of the one concept by reference to only one aspect, or the whole for the part. LACAN, *ÉCRITS*, *supra* note 63, at 156.

Consequently, neither metaphor or metonymy can take the witness stand without perjuring itself. Metaphor can “swear to tell the truth,” but it lies if it implies that it tells “nothing but the truth.” In contrast, metonymy can “swear to tell the truth . . . and nothing but the truth” but is quite incapable of telling “the whole truth.” Both metaphor and metonymy are unable to conform to the federal securities laws which makes it unlawful “to make any untrue statement of a material fact or to omit a material fact necessary in order to make the statements made . . . not misleading.”⁷³ Metaphor always makes material misstatements and metonymy always makes material omissions.⁷⁴ Normative legal scholarship is, basically, metaphor, while both Lacanian psychoanalysis and speculative theory are metonymy.

IV. LAW DOES NOT EXIST — IT INSISTS

Schlag has intuited the Lacanian perspective when he asserts the fictitious nature of law. Law has no robust referent but always refers only to other law. He is also absolutely correct to chastise liberal legal scholars insofar as they expressly assert otherwise, or if they implicitly do so through their normative policy recommendations. In Lacanian terms, policy science is suspect not because it adopts the masculine position of metaphor that claims to have the truth. This is an inevitable part of all language. Rather, policy science is suspect because it adopts the masculine position without self-consciousness and self-understanding.⁷⁵ Schlag, then, goes beyond what Lacanianism licenses. He condemns law for not existing, which is fine. But his (normative) calls for justice seem to reflect an assumption or intuition that law *could be made to exist*. He wants the slippage of the symbolic order to stop. He wants the metaphor of law to be *completely* true and not *partially* false. Law, Schlag implies, should tell the truth, the whole truth, and nothing but the truth. The master signifiers of the law should be real or “noumenal.” Both law and the legal subject should be uncastrated—unbarred.

Lacan’s point is not simply that law—indeed, the entire symbolic order—does not exist, *but that it cannot exist* in sensual form. To condemn the law for its failure to exist is like condemning grass for failing

73. This is, of course, the disclosure standard that reappears throughout the federal securities laws, including Rule 10b-5 of the Securities Exchange Act of 1934. 17 C.F.R. § 240.10b-5.

74. Metaphor is masculine from a psychoanalytic perspective in that it is a form of denial of castration. That is, in metaphor we temporarily claim to have direct access to meaning, to be whole. Metonymy is feminine in the sense that it is an acceptance of castration. It is the realization that signification is always partially a failure. See Schroeder, *The Eumenides*, *supra* note 27.

75. Schroeder, *Four Discourses*, *supra* note 64, at 79-82; Schroeder, *Stumbling Block*, *supra* note 15, at 363.

to be red. Or, to use a closer metaphor, it is like condemning a house, a painting, a novel, or any other human creation for not being natural. Even Kant understood that for law to exist as a thing-in-itself (to be noumenal), it cannot have content. Content added to the empty noumenon renders it imperfect⁷⁶ and therefore, in Lacanian and Schlegelian terms, non-existent—merely phenomenal.

In other words, law functions only to the extent it is castrated—deprived of its robust referent. It functions just because it does not exist. Law is artificial—a work of art made by people. For the symbolic language to continue to function as an artifact it must constantly be made by people. There is no one “out there” who invents the English language, who imposes culture on the rest of us, and who establishes the legal system.⁷⁷ To at least some extent each and every one of us is constantly in the process of adding to society’s creation of the symbolic order. By obeying the law—and even by disobeying it—we write the law.

Each one of us is engaged in a continuing project to create and recreate the symbolic order precisely because no one is completely integrated within the symbolic order. We are either castrated or mad. That is the choice. This is another meaning of the observation that the law is not intimate but extimate—what is most ourselves is also most external and alien to us. We constantly ask the law the hysteric’s questions: “What do you want (from me)? Why don’t I fit in? How can I fit in? Why won’t you fit me in? Why won’t you fit me? Which is the misfit, me or the law?” It is precisely these questions—this constantly questioning of the law’s existence and our relationship to the law—that is simultaneously the creation of law and the creation of our subjectivity.

Our relation to law can be compared to the fairy tale of the emperor’s new clothes.⁷⁸ In this tale, a pair of con men convinced the emperor that they would make him a suit out of magic fabric that could not be seen by fools or persons unworthy of their position. When the non-existent suit was delivered, the emperor was too mortified to admit that he could not see it when his similarly embarrassed courtiers insisted that they could. The emperor transferred funds to the fraudsters, who

76. It then becomes a “hypothetical imperative.” CRITIQUE OF PRACTICAL REASON, *supra* note 38, at 32.

77. The contrary assertion—that there is an “other of the Other” who is in control—is “paranoia.” See Carlson, *How to Do Things with Hegel*, *supra* note 47, at 1946; see also ŽIŽEK, LOOKING AWRY, *supra* note 26, at 8.

78. Schroeder, *The Eumenides*, *supra* note 27. See also Hans Christian Andersen, *The Emperor’s New Suit*, in THE COMPLETE ANDERSEN’S FAIRY TALES 438 (Lily Owens ed., 1981); Jeanne L. Schroeder & David Gray Carlson, *The Subject is Nothing*, 5 LAW & CRITIQUE 93, 100-01 (1994). Žižek introduces this fairy tale as a metaphor for the Lacanian understanding of subjectivity in ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO, *supra* note 39, at 11-12.

promptly relocated. The emperor thought that his new suit of clothes offered a perfect opportunity for him to test the competence of his subjects. He had the properties of the magic fabric announced to the populace and then declared that he would lead a parade in order to display his new clothes. Although everyone saw a naked emperor, no one remarked on this fact. Instead they loudly praised the splendor of the imperial raiment. This is because each person assumed that he was the only one who could not see the clothes and to admit this fact would prove him a fool or unworthy. What is not to be missed is that the crowd praises the emperor's new clothes not despite, but just *because*, they do not exist.

In Lacanian terms, the emperor's new clothes served the crowd as a master signifier. This charade came to an end only when an innocent child—i.e., a pre-oedipal infant who had not yet been inculcated within the symbolic order—pointed to the fact that the emperor was naked.⁷⁹

Law's empire is sustained by a vast conspiracy of silence. None of us believes in it, but we do believe that everyone else believes in it, so we act *as if* it exists. To give an example from our own experience, many of New York City's day spas are manned by Russian immigrants. Many of these women had relatively prestigious jobs in their homeland but are unable to find work in their former professions because of deficiencies in language, licensing requirements, or whatever. Consequently, rather than designing bridges they are giving manicures. They often tell a variation on the following story:

Despite terrible hardships, deprivations, and injustices, most people were very happy in the former Soviet Union (at least until the very end) because everyone believed they were engaged in a glorious collective project to build a future perfect society. I alone (or I and my family) could see that it was all a cruel lie and had to leave. Things are hard in the United States, and I don't completely fit in, but my children will be true Americans.

We took these stories at face value until we attended a faculty workshop given by Renata Salecl, a Lacanian philosopher from Slovenia who has written extensively on the fall of Communism in Eastern Europe. She stated that in the former Yugoslavia most people assumed that everyone else believed in the Communist cause and they were the only one who could see it was a house of cards. Very few people dared to say this out loud, however, precisely because they thought that they were one of the very few who thought so. Communism was a master signifier that seemed to unify and give meaning to absurdity despite—or more accurately, just because—of its vapidness. The symbolic order of

79. Žižek insists that the innocent child is the villain of the piece. The crowd *needs* to believe in the symbolic order. ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO*, *supra* note 39, at 11.

communism fell quickly when a critical mass of people were willing to say out loud that the emperor had no clothes.

It is not the case that there is no symbolic order in Russia or Slovenia. The story illustrates that if we all stop believing in some specific regime, the regime must fall; but it does not follow that we can do without the symbolic order. That way madness lies.

V. THE TRUTH OF CASTRATION'S LIE

Castration is the initiation rite of subjectivity.⁸⁰ We have already emphasized the Lacanian point that sexuality is symbolic, not natural (*i.e.*, it is the way we interpret our actuality). The two sexual positions have different ways of confronting castration.

The masculine is the sexuated position that fears and therefore tries to deny castration and insist on perfection.⁸¹ The feminine, in contrast, accepts the inevitability of castration.⁸² The feminine position can lead to two results. The first is impotent, passive, feminine depression. The second is an introspection that enables the subject directly to confront the actuality of castration.⁸³ This leads to yet another Lacanian paradox. By examining castration closely, the feminine position learns the truth of castration: It is a lie—castration never happened! This is the truth that the romantic (the masculine) is unable to accept.

How can the Lacanian feminine insist that castration is a lie when Lacan insists on its universality? Because, although castration *insists* (functions), it does not *exist*. The feminine position does not deny the split nature of subjectivity and the symbolic order. Nor does she deny that the split subject was created through submission to the symbolic order. Rather, she understands that the masculine metaphor for this process is a fundamental mistake.

The metaphor of castration implies that wholeness is a lost state that has been taken away by the Big Other. In truth, however, subjectivity has not *been* split by some external, pre-existing Big Other; subjectivity *is* this constituent split. As Kant understood, it is the very imperfection of the present that makes freedom and change possible. By simply rejecting the impossible romantic masculine goal of perfection (curing castration), the feminine is able to formulate alternative goals—

80. SCHROEDER, *THE VESTAL*, *supra* note 14, at 80.

81. Schroeder, *End of the Market*, *supra* note 34, at 307-08; Schroeder, *Four Discourses*, *supra* note 64, at 78-79.

82. Schroeder, *End of the Market*, *supra* note 34, at 509.

83. Schroeder, *Four Discourses*, *supra* note 64, at 79; Schroeder, *Stumbling Block*, *supra* note 15, at 363-64.

goals that do not presuppose completeness, wholeness, personal glory, and masculine dominance.

Understanding the truth of castration's lie allows feminine depression to evolve into a hope for peace. This is the truth of the Greek myth of Pandora.⁸⁴ According to the story, originally all humans were males living in a golden age. Pandora, the first woman, inadvertently brought sorrow and illness into the world when she opened a chest given to her by the malevolent gods at her wedding. Nevertheless, the myth also tells us that Pandora is responsible for mankind's greatest treasure. While she released the ills of the world to plague the world, her quick thinking enabled her to trap hope inside her box.

Masculine mythology blames the feminine for our current castrated state.⁸⁵ The feminine understanding of this myth, in contrast, is that there never was a golden age of masculine subjectivity that existed prior to sexual difference. Mankind only exists insofar as we are castrated and sexualized; it is only the feminine who is able to understand that this is not a curse, but a promise.

Hope was never among the gifts which the gods placed in her [box]. Rather, hope was Pandora's gift to herself—bought and paid for with her tears. It was only her release of the ills which made hope necessary that caused her retroactively to imagine that she had captured the hope that she now needed. It is the hope that hope exists that calls hope into being. Hope, like love, is alchemy—it makes something out of nothing. . . . By creating hope, she recreated herself into an active subject.

This is why the myth insists that Pandora is the mother of us all. Feminine negativity is the center of both Hegelian philosophy and Lacanian psychoanalysis. Negativity is the womb of subjectivity. It is the empty, and therefore potentially fertile, space in the deterministic universe that makes freedom possible and enables us to give birth to ourselves. The Bible reminds us, however, that "in sorrow [the Woman] shalt bring forth."^[86] Without tears the eye is blind. Hope is created by suffering, desire by castration, love by loneliness, subjectivity by objectivity, law by injustice, the ideal of perfection by the fact of imperfection.⁸⁷

The masculine metaphor of castration fears that wholeness, integrity, justice, and freedom are always already lost; the feminine position

84. Schroeder, *Pandora's Amphora*, *supra* note 43, at 816-19, 903-04 (1999).

85. This is the judgement of Hesiod in his authoritative account of the myth. *Id.* at 818.

86. *Genesis* 3:16.

87. Schroeder, *Pandora's Amphora*, *supra* note 43, at 904 (citations omitted). Originally, Pandora's fateful container was an amphora. Following Erasmus's mistranslation, most modern accounts refer to Pandora's box.

reveals that, in fact, they have not yet been achieved, nor could they be. Imperfection is our lot—and our condition of being.

CONCLUSION

Lacanian theory shows the defects in both normative policy scholarship and romanticism—the two dominant modes of thinking in American law schools. As for the latter, the Lacanian concept of the subject's false autobiography helps explain why a romantic faith in the wholeness of the subject apart from the law cannot be accepted. We find that although Pierre Schlag intuits the Lacanian insight of the split subject castrated by artificial law, he implies a romantic liberal vision of a self-identical, uncastrated subject who could exist in a mythical state of nature free from law's corrupting influence.

Lacan teaches otherwise. He suggests that law is a constituent part of the constitution of the subject. To lay down the law, as Schlag suggests, is to lay down our subjectivity. The law cannot be escaped. Better to make it our work product, so that we recognize ourselves in the law.