

## THE TRAUMATIC DIMENSION IN LAW

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Legal knowledge can only be expressed in the future anterior tense. This concept is familiar enough to lawyers when the circuits are badly split and the Supreme Court seeks to cure the split by granting certiorari. Under these conditions, no one is sure what the law is today, but later, when the Supreme Court resolves the split, we *will have known* what the law was all along.

This undeniable legal experience of the future anterior tense is not the exception—it is the very condition of possibility for all legal reasoning. Law is not sometimes, but always, spoken in the future anterior tense. The split in the circuits is always already resolved—by an antecedent law whose revelation is always deferred.

The purpose of this essay is to describe legal reasoning in future anterior terms. In this account, future anteriority is the point at which legal reasoning coincides with the judicial opinion. This is the very point where we can find that law *does* determine the outcome of litigation.

A legal opinion, whether by judge or lawyer, is what psychoanalysis refers to as an “act.” The act, it seems, is always beyond the law. Paradoxically, law makes its appearance only through the medium of the act. Only when the judge exceeds the law and disrupts it by acting will we know what the law is.

In psychoanalysis, with its emphasis on unconscious motivation, an act precedes its reason—the effect precedes its cause. Only in after-the-f(act) narration—*i.e.*, the written opinion of the judge—does reason *precede* the act. Nevertheless, the act is a “real” event. It is pre-symbolic and, for that very reason, open to *a posteriori* narration, in which the judge claims that the act was “caused” by law.

Acts are “traumatic.” A trauma is a “residual experience that has

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become a stumbling block to the patient.”<sup>1</sup> It is “that which interrupts the smooth functioning of law and the automatic unfolding of the signifying chain.”<sup>2</sup> It is “the rupture in the symbolic narrative continuum.”<sup>3</sup> It is “the object that cannot be swallowed, as it were, which remains stuck in the gullet of the signifier.”<sup>4</sup> It disrupts and continues to disrupt, until it is gentrified into the symbolic order. This gentrification is what psychoanalysis refers to as “cure” and what lawyers call legal reasoning.

In law, every judicial decision is traumatic. *A posteriori* legal reasoning is the cure. It gentrifies the trauma by providing causal narrative after the fact for the judge’s fundamentally spontaneous, free act. But from the premise that acts are always pre-rational the reader should not think that she is in for yet another rehearsal of bad legal realism, according to which will displaces law, and words mean whatever the judge wants them to mean. Legal realism holds that cases are decided pathologically—by what the judge had for breakfast. Legal reasoning is portrayed as just a mask for power. Law is reduced to mere politics.

This “Foucaultian” position<sup>5</sup> is precisely the opposite of what psychoanalysis makes of legal reasoning. Lacanian theory<sup>6</sup> explains legal reasoning’s true and vital role in legal (and other) decisionmaking. The point here is absolutely not that legal decisionmaking is just politics. Judicial decisionmaking could not escape legality even if it made a concerted effort to do so. To turn the tables on Critical Legal Studies, politics is always a continuation of law by other means.<sup>7</sup> Only in romantic jurisprudence (of which the legal academic left is usually guilty) can we dispense with reasoned law.<sup>8</sup> The point of this essay, then, is to *vindicate* not just the possibility but the very necessity of good old-fashioned legal reasoning. Its intent is therefore fundamentally conservative. But, unlike other conservative accounts, which fear and therefore deny the Freudian unconscious, this account

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<sup>1</sup> BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 26 (1995).

<sup>2</sup> *Id.* at 83.

<sup>3</sup> SLAVOJ ŽIŽEK, *ON BELIEF* 101 (2001).

<sup>4</sup> JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 270 (Jacques-Alain Miller ed., Alan Sheridan trans., 1977).

<sup>5</sup> On the Foucaultian, or “historicist,” position, see JOAN COPJEC, *READ MY DESIRE: LACAN AGAINST THE HISTORICISTS* 1-14 (1994) [hereinafter COPJEC, *READ MY DESIRE*].

<sup>6</sup> For a biographical sketch of Jacques Marie Emile Lacan, see YANNIS STAVRAKAKIS, *LACAN AND THE POLITICAL* 10-12 (1999).

<sup>7</sup> *Cf.* Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427 (1997).

<sup>8</sup> On the covert tendency for romanticism in leftist American scholarship, see David Gray Carlson, Review Essay, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908 (1999); Jeanne L. Schroeder, *Pandora’s Amphora: The Ambiguity of Gifts*, 46 UCLA L. REV. 815 (1999).

embraces it as the very place where a judicial act coincides with the legal reasoning that caused it. In this vision, the subject is not pre-legal, as policy scientists hope. Nor is the subject entirely the product of the legal regime, as the Foucaultians would have it. Rather, the subject's existence is in the future anterior tense. It is what it will have done. Its presence is always a deferral.

This Article exploits the psychoanalytic insight that all acts are traumatic (including the act of forming a legal opinion). In the act is the past, future, and present of the relation between law and outcome. First, law is in the past. In the judge's account of her opinion, the judge read the law and then followed it, producing the judicial outcome. Second, law comes too late; it is always deferred into the future. Legal reasoning is epiphenomenal to the act, and legal reasoning is epiphenomenal to the judicial decision. The act causes reason, and not reason the act. This is not just occasionally so. It is always so, on the view that the free act is *spontaneous* and uncaused.<sup>9</sup> Third, and most important for our present purpose, law is present—*i.e.*, coterminous with the judicial outcome. Given that acts are spontaneous (*i.e.*, uncaused), we can see infinite causes of an act—and hence never all of them. Acts are always over-determined.<sup>10</sup> This opacity of the agent's motivation—our inability to fathom our own motives—is precisely what it means for human beings to be free (*i.e.*, not “caused”).<sup>11</sup> We are accorded the privilege of assigning meaning to our own acts (selected from an infinite set of possible causes).<sup>12</sup> It is paradoxically this very over-determination (or freedom from reason) that permits the possibility that post hoc justification accurately describes the judicial decision. In the end, our freedom from reason underwrites the possibility of our free submission to reason. This third point therefore establishes the possibility that legal reasoning is the noble enterprise the pre-realists thought it was.

I begin with some psychoanalytic information about the subject and her act. Thereafter, I discuss the Freudian superego and its impact

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<sup>9</sup> “Spontaneity” is a Kantian term associated with freedom vs. self-causation. See IMMANUEL KANT, CRITIQUE OF PURE REASON 33 (J.M.D. Meiklejohn trans., 1990) (liberty is absolute spontaneity, an unconditioned as first member of a causal series) [hereinafter CRITIQUE OF PURE REASON].

<sup>10</sup> See IMMANUEL KANT, RELIGION WITHIN THE BOUNDARIES OF MERE REASON AND OTHER WRITINGS 121 (Allen Wood & George di Giovanni trans., 1998) [hereinafter KANT, RELIGION].

<sup>11</sup> See SLAVOJ ŽIŽEK, DID SOMEBODY SAY TOTALITARIANISM? FIVE INTERVENTIONS IN THE (MIS)USE OF A NOTION 58 (2001) (“Freedom is ultimately *nothing but* the space opened up by the traumatic encounter, the space to be filled in by its contingent/inadequate symbolizations/translations”) [hereinafter ŽIŽEK, TOTALITARIANISM].

<sup>12</sup> G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT § 114 Addition (Allen W. Wood ed., H.B. Nisbet trans., 1991) (“it is the right of the moral will to recognize . . . only what was inwardly present as purpose”) [hereinafter HEGEL, PHILOSOPHY OF RIGHT].

on interpretation. I will make the surprising claim that the superego coincides precisely with the legal regime in which law precedes the act—the regime where “right” legal answers are possible. The “right” legal answer is “Guilty!”

Legal reasoning will then be described as narration in response to the trauma of legal decisionmaking. Various asides will be made at the expense of H.L.A. Hart and of what falsely passes as philosophy under the name of “pragmatism.” Finally, the future anterior quality of law will be used to describe the content of that elusive concept—justice.

The point of this essay is to account for the possibility of legal reasoning. Its intent is therefore fundamentally conservative and vindicative of the traditional legal enterprise. But, unlike other accounts, which deny the Freudian unconscious, this account embraces the unconscious and makes it the very place where a judicial act coincides with the legal reasoning that caused it. In this vision, the subject is not pre-legal, as the social policy scientists hope. Nor is the subject entirely the product of the legal regime, as the Foucaultians would have it. Rather, the subject is in the future anterior tense. It is what it will have done. Its presence is always a deferral. In short, the subject *is* the law, and the law *is* our freedom.

### THE SUBJECT

What is the operative psychological theory in the ordinary science of legal scholarship, whether it be utilitarian, communitarian or libertarian in its outlook? It is undoubtedly this: law is “positive”—a fiction imposed by human beings on other human beings—but the subject is “natural.”<sup>13</sup> The subject is self-identical, self-present, and, above all, rational. This rational subject knows himself completely. In Lacanian terms, this subject “has the phallus.”<sup>14</sup> There is no unconscious in this self-present entity. In effect, the subject coincides with the ego.<sup>15</sup>

Psychoanalysis disagrees with this presupposition of self-identity

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<sup>13</sup> STAVRAKAKIS, *supra* note 6, at 17. There is of course a natural law tradition but, of late, overt naturalism is scandalous and has become *a priori* grounds to disqualify its practitioners from nomination to the Supreme Court. See Lawrence Tribe, *The Case Judge Thomas Shouldn't Have Heard: Natural Law*, N.Y. TIMES, Aug. 30, 1991. Paradoxically, natural *psychology* is accepted as a matter of course by run-of-the-mill legal scholarship, even while natural *law* is scorned as naive.

<sup>14</sup> See JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* 87-94 (1998). The masculine position of *having* implies a complete self-identity and a denial of castration. The feminine position, in contrast, is *being*. Woman *is* the phallus. See *id.* at 89.

<sup>15</sup> See generally David Gray Carlson, *Jurisprudence and Personality in the Work of John Rawls*, 94 COLUM. L. REV. 1828 (1994).

and the implicit renunciation of the unconscious. In the Lacanian tradition, the subject is not self-identical. Indeed, “[t]he subject who coincides entirely with herself is not yet a subject, and once she becomes a subject she no longer coincides with herself. . . .”<sup>16</sup>

Unlike the self-identical subject of utilitarianism and other forms of “common sense,”<sup>17</sup> the psychoanalytic subject is split between the Symbolic and the Real. It participates in the symbolic order. This is the public realm of language, law and ethics. The Symbolic is the realm of positive being—of concepts and thought. This is where the Ego thinks it resides in its self-identity.

Lacanian deny that the symbolic “I” is the subject.<sup>18</sup> Rather, the subject is constituted by a negative something that language, reason and law never can describe. Lacan called this negativity the Real—the “unfathomable limit that prevents the Particular from achieving identity with itself.”<sup>19</sup> As limit, the Real is not *beyond* the Symbolic realm, for there is no such beyond.<sup>20</sup> The Real inheres *within* the realm of the symbolic.<sup>21</sup> The Real stands for the inability of the Symbolic realm to be fully present. It stands *against* the presupposition that any object—including the subject—can be self-identical.<sup>22</sup> When limit is imagined to be utterly external to a concept, we have the presupposition of self-identity, not to mention the Kantian presupposition of a beyond impervious to thought. For the Lacanians, the subject *is* the limit and

<sup>16</sup> ALENKA ZUPANČIČ, *ETHICS OF THE REAL: KANT, LACAN* 143 (2000).

<sup>17</sup> For the view that utilitarian psychology is normative and aspirational rather than descriptive, see COPJEC, *READ MY DESIRE*, *supra* note 5, at 65-116.

<sup>18</sup> For this reason, Lacanians insist that “[t]he ‘I’ is not the subject.” Mladen Dolar, *Cogito as the Subject of the Unconscious*, in *SIC 2: COGITO AND THE UNCONSCIOUS* 12 (Slavoj Žižek ed., 1998).

<sup>19</sup> SLAVOJ ŽIŽEK, *FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR* 105 (2d ed. 2002) [hereinafter ŽIŽEK, *ENJOYMENT AS A POLITICAL FACTOR*].

<sup>20</sup> That there is no beyond—(i.e., that its appearance all the way down) ends up being the very punchline of Hegel’s entire philosophy. As Hegel remarks in the *Phenomenology*, “behind the so-called curtain which is supposed to conceal the inner world, there is nothing to be seen unless we go behind it ourselves, as much in order that we may see, as that there may be something behind there which can be seen.” G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* § 165 (A.V. Miller trans., 1977) [hereinafter *PHENOMENOLOGY OF SPIRIT*]. See 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, and certainly not an Absolute Spirit.”); KENNETH R. WESTPHAL, *HEGEL’S EPISTEMOLOGICAL REALISM: A STUDY OF THE AIM AND METHOD OF HEGEL’S PHENOMENOLOGY OF SPIRIT* 165 (1989) (“If Hegel’s arguments in the consciousness section [of the *Phenomenology*] are successful, then the world has been found to be cognitively accessible; there isn’t anything more to the world than what it manifests.”).

<sup>21</sup> See Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 *HARV. L. REV.* 483, 500 (1998).

<sup>22</sup> Hegel emphasizes that limit always inheres *within*—not outside of—finite concepts. See HEGEL’S *SCIENCE OF LOGIC* 117 (A.V. Miller trans., 1969) (“This *limit* is . . . the immanent determination of the something itself, which latter is thus the *finite*.”) [hereinafter *SCIENCE OF LOGIC*]. On Hegel’s theory of limit, see David Gray Carlson, *Hegel’s Theory of Quality*, 22 *CARDOZO L. REV.* 425, 520-23 (2001).

not constituted within or inside of a limit.

The real is connected with *jouissance*—the momentary sense a subject feels in complete, triumphant self-identity. In *jouissance*, all alienation and pain ends. “*Jouissance* is proof of the subject’s existence,”<sup>23</sup> but it is also lethal. If the subject is the split between the symbolic and the real, the surrender of the Symbolic is the death of the subject—pure psychosis.

Because the real is the negation of the symbolic, it is pre-ontological<sup>24</sup> and pre-historical.<sup>25</sup> Although the Lacanians tell a certain noospheric story about the emergence of the subject from nature,<sup>26</sup> it must be strictly understood that the symbolic and real do not antedate the subject. The symbolic and the real are equiprimordial—they come into existence only simultaneously with the subject. This must be so, as the subject is simply the split between the symbolic and the real.

The subject always faces the risk of slipping away from the symbolic into the real. A final merger with the Real is “ceasing-to-be”—negative becoming, or psychosis. The subject resists this descent into darkness by striving to recognize itself symbolically. To distinguish itself and thereby to stave off death, the subject must body forth and find its shape in the symbolic. There the subject finds the public materials out of which it can build a “fantasy”—the narrative in which the subject has positive existence to others. The Imaginary is thus the third great realm in Lacan’s empire, alongside the Real and the Symbolic. In the Imaginary, the subject constructs a story in which he is whole and integral. It is for this reason that fantasy is on the side of “reality” and against the real.<sup>27</sup> “[W]hen the phantasmic frame disintegrates,” Slavoj Žižek warns, “the subject undergoes a ‘loss of reality’ and starts to perceive reality as an ‘unreal’ nightmarish universe with no firm ontological foundation.”<sup>28</sup> This loss of fantasy is psychosis.<sup>29</sup>

Language and law provide a refuge against psychosis. Yet the materials found there are never adequate to the subject. If I am purely

<sup>23</sup> ZUPANČIČ, *supra* note 16, at 30.

<sup>24</sup> See SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 33, 42, 63, 65 (1999) [hereinafter ŽIŽEK, TICKLISH SUBJECT].

<sup>25</sup> See DANIEL BERTHOLD-BOND, HEGEL’S THEORY OF MADNESS 29 (1995).

<sup>26</sup> See generally SLAVOJ ŽIŽEK, THE ABYSS OF FREEDOM / AGES OF THE WORLD (1997) [hereinafter ŽIŽEK, ABYSS OF FREEDOM].

<sup>27</sup> See SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 43 (1989) [hereinafter ŽIŽEK, SUBLIME OBJECT].

<sup>28</sup> ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 51. See ŽIŽEK, SUBLIME OBJECT *supra* note 27, at 35 (suggesting that fantasy is the soul of paranoia).

<sup>29</sup> See FINK, *supra* note 1, at 45-46. According to Daniel Berthold-Bond, “the mad self does not seek to destroy its own desire, but to emancipate its desire from any pretense of finding unity with what lies outside it.” BERTHOLD-BOND, *supra* note 25, at 82. In other words, madness is a defense against painful encounters with the symbolic realm, which only the Imaginary can mediate.

symbolic, I have no individuality whatever. Rather, I reduce myself to the point where I am just an object to others. Too much objectification is a bad thing—the indicium of hysteria.<sup>30</sup> It is pornography as such. Hence, if I am to maintain my existence as a private individual, I must keep my distance from the symbolic. I cannot reveal all. Whatever words I use to describe myself, I somehow always leave something out.<sup>31</sup> If I show too much, I become the mere object to the *jouissance* of others.<sup>32</sup>

But neither must I do the opposite. I must not merge with the Real (the incest taboo). This is a retreat into psychosis. In the Real I am not merely unfree. I am dead.

As I am literally the gap between the Symbolic (where the subject finds a positive existence) and the Real (which is beyond language),<sup>33</sup> I cannot surrender to either extreme. If this gap closes (in favor of either realm), I no longer exist as a subject.

Yet, if I am *a gap*, I am a void—a nothing. I desire to “be,” but I am not. To be fully something, a supplement is needed. This feeling that something is missing is the above-mentioned castration.<sup>34</sup>

As a subject, I desire to close the gap by manucaption of my missing parts. Only in the resurrection of the body can I be whole. But if I succeed—if I establish a self-identity free and clear of the symbolic

<sup>30</sup> See SLAVOJ ŽIŽEK, THE INDIVISIBLE REMAINDER: AN ESSAY ON SCHELLING AND RELATED MATTERS 164 (1996) [hereinafter ŽIŽEK, INDIVISIBLE REMAINDER]; SLAVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 131 (1991) [hereinafter ŽIŽEK, LOOKING AWRY].

<sup>31</sup> Woman, for the Lacanians, is the “not-all” who does not submit to the phallic function of complete knowledge. According to Collette Soler, “Man is the subject entirely submitted to the phallic function, from which it follows that castration is his lot. . . . Woman is the opposite, the Other who has not fully [*pas tout*] submitted to the reign of phallic *jouissance*. . . .” Collette Soler, *The Curse on Sex*, in SEXUATION SIC 3 41 (Renata Salecl ed., 2000).

<sup>32</sup> This is, I think, at the heart of feminist opposition to pornography. See COPJEC, READ MY DESIRE, *supra* note 5, at 35. Žižek insinuates that the superego is pornographic, since it sees all. See SLAVOJ ŽIŽEK, THE PLAGUE OF FANTASIES 177-92 (1997) [hereinafter ŽIŽEK, PLAGUE OF FANTASIES]. Our individuality, then, depends upon our refusal to give into this obscene demand to surrender our opacity. See *id.* at 114. More precisely, what we are ashamed to reveal are our fantasies, in which we see ourselves uncastrated. ŽIŽEK, SUBLIME OBJECT, *supra* note 27, at 74.

<sup>33</sup> See FINK, *supra* note 1, at 45.

<sup>34</sup> Žižek describes castration as follows:

In short, by means of the Word, the subject finally *finds* himself, comes to himself: he is no longer a mere obscure longing for himself since, in the Word, he directly attains himself, posits himself as such. The price, however, is the irretrievable *loss* of the subject’s self-identity: the verbal sign that stands for the subject—in which the subject posits himself as self-identical—bears the mark of an irreducible dissonance; it never “fits” the subject. This paradoxical necessity on account of which the act of returning-to-oneself, of finding oneself, immediately, in its very actualization, assumes the form of its opposite, of the radical loss of one’s self-identity, displays the structure of what Lacan calls “symbolic castration.”

ŽIŽEK, INDIVISIBLE REMAINDER, *supra* note 30, at 46-47. In other words, I obtain my being in the symbolic. Yet the symbolic is *not me*; I am alienated from my own being.

realm—I rejoin the Real. Therefore, I cannot succeed. Rather, I succeed only by failing.

### ACTS

In the real, there is no time. As Kant emphasizes, time and space are precisely the attributes of the subject that can distinguish things.<sup>35</sup> Yet, in every act, the subject gains a taste of the real. In the act is a glimpse of wholeness—what Lacan called enjoyment. When I enjoy, I am fulfilled and feel whole. Time is suspended. Everything (and therefore nothing) is present. The gap between the symbolic and the real closes for an instant.

Enjoyment is fleeting, however (though time flies when you are having fun). Enjoyment can never be “synchronized” with “the symbolic order.”<sup>36</sup> If enjoyment were perpetual, I would be dead. I would have merged with the Real. Temporalization of experience will have ceased. The superego therefore enjoins, “Do not close the gap. Do not merge with the Real. You are castrated. Stay that way. In short, do not act.” This is how Lacan interprets the Incest Taboo. Merging again with Mother is reinterpreted by Lacan to mean merging with the Real. Such an aspiration is lethal. Its prohibition is the very condition of the subject’s continuance.

Yet the subject, suspended between the Real and the Symbolic, *desires* to be whole. The act is designed to fulfill desire and procure enjoyment. The subject—a “faculty of desire”<sup>37</sup>—cannot help but act—all the time. Every thought, every image generated in the brain is an act, aiming at self-wholeness.

In order to enjoy, we must act. In the words of Georg Simmel, a turn-of-the-century sociologist:

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

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<sup>35</sup> For Kant, time and space are pure *a priori* intuition. Time inheres not in the objects themselves, but solely in the subject which intuits them. See CRITIQUE OF PURE REASON, *supra* note 9, at 33. In Hegelian terms, time is “pure freedom in face of an ‘other.’” G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT § 679 (A.V. Miller trans., 1977) [hereinafter PHENOMENOLOGY OF SPIRIT]. The “other” may be translated here as the real, and also as the symbolic. Thus, spirit in its freedom appears only in time, but once it fully grasps what it is, it abolishes time. See *id.* § 801.

<sup>36</sup> ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 322.

<sup>37</sup> IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 32 (T.K. Abbott trans., 1996) [hereinafter CRITIQUE OF PRACTICAL REASON].



highest kind meet here.<sup>38</sup>

An “act” is some observable effect in the world, caused by a free human being.<sup>39</sup> An act suspends the symbolic and ethical truth and hence violates it.<sup>40</sup> Acts are thus traumatic.<sup>41</sup> They disturb the underlying fantasy of the audience.<sup>42</sup> The audience that observes the act must now reconstruct the disrupted symbolic order in light of what it has witnessed. In short, the act must be interpreted. Through interpretation, the symbolic order is reconstituted in light of the act.

Transposed to law, we can say that acts are never lawful. As Žižek has put it: “from the perspective of the existing positive Laws of a symbolic community, an act appears by definition as Crime, since it violates its symbolic limits and introduces an unheard-of element which turns everything topsy-turvy.”<sup>43</sup>

Such a conclusion may seem shocking at first. Surely not every act is a crime.<sup>44</sup> If I decide to buy a carton of milk and if I tender the asked-for price and take the milk home, have I committed a crime? The answer is yes, on a certain psychoanalytic definition of law: *the law of the superego*. This definition will appear extraordinary, but the definition simply takes to its logical conclusion a feature of which American jurisprudence is very fond indeed—right answers.

#### THE PATERNAL SUPEREGO

The element of law that the superego exploits to the hilt is the requirement that action is to be judged according to pre-existing rules. *Ex post facto* law does not even deserve the name “law.”<sup>45</sup> It is tyranny

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<sup>38</sup> GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 65 (David Frisby ed., Tom Bottomore & David Frisby trans., 2d ed. 1990).

<sup>39</sup> How do we know that there is such a thing as a free human being? Kant, the philosopher of freedom *par excellence*, was not entirely sure. He could only “postulate” that it existed. That is, no one can prove it does *not* exist and, therefore, we are licensed to believe in it (along with God and immortality of the soul). See HENRY E. ALLISON, *KANT’S THEORY OF FREEDOM* 230-38 (1990). On the role of postulation in Kant’s thought, see GILLIAN ROSE, *HEGEL CONTRA SOCIOLOGY* 95-97 (1981).

<sup>40</sup> See ŽIŽEK, *LOOKING AWRY*, *supra* note 30, at 140; ŽIŽEK, *TOTALITARIANISM*, *supra* note 9, at 161.

<sup>41</sup> See SLAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY* 89 (1993) [hereinafter ŽIŽEK, *TARRYING WITH THE NEGATIVE*].

<sup>42</sup> See ŽIŽEK, *TICKLISH SUBJECT*, *supra* note 24, at 200.

<sup>43</sup> ŽIŽEK, *ENJOYMENT AS A POLITICAL FACTOR*, *supra* note 19, at 192.

<sup>44</sup> Even the normally intrepid Žižek shies away from this conclusion and aims at a distinction between speech acts (which are sustained by a fantasy built from symbolic materials) and other acts (which are ethical because they exceed the symbolic law). See ŽIŽEK, *TICKLISH SUBJECT*, *supra* note 24, at 374-77; ŽIŽEK, *TOTALITARIANISM*, *supra* note 11, at 173. This distinction must be renounced. Every act—speech acts and even thoughts—are subject to same dynamic of action being described here.

<sup>45</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 85 (1986).

as such.<sup>46</sup> Hence, first there must be a law. Then the act. The act will be judged according to this pre-existent law.

The Superego rests upon this ordinary conservative notion. When conservatives defend law, they usually insist that it is possible (at least some of the time) for law to constrain judges. Indeed, it is a conservative commonplace that judges should follow, and not make, the law. All psychoanalysis does is to take that notion very, very seriously.

It is said that the surest way to subvert a philosophical system is to take it too seriously—to be over-orthodox, to show the secret cards of ideology.<sup>47</sup> Accordingly, we take to its extreme the principle that law must precede action. We will be more Bork than Bork. Under this principle, law is always perfectly certain and determinate. Right legal answers exist. These are high virtues in right-wing jurisprudence, and psychoanalysis adopts this view with a vengeance.

Prohibition and permission must exist in a strict correlation with each other, if there are to be right answers. An act is either permitted or prohibited. There can be no penumbra in which acts may or may not be legal. Correlation is the key to jurisprudence itself. In a pathbreaking work, Arthur Jacobson identifies five possible jurisprudences: Initially we have (1) positive and (2) natural law. These are the *correlative* jurisprudences. In these jurisprudences the legal field is completely full, and right answers always exist (if only they could be found). The other three are dynamic in nature. The dynamic legal universe is not full but in the process of filling. The dynamic possibilities are (3) the jurisprudence of right (Hegel), (4) jurisprudence of duty (Kant), and (5) the jurisprudence of performativity (Anglo-American common law).<sup>48</sup> Ultimately, the last position—performativity—will be the Lacanian position.<sup>49</sup> For now, we focus on the correlative jurisprudences—positive and natural law. These systems (taken seriously) guarantee a right answer. Whether law is “posited” by mere human beings or by nature/God does not matter here. The dispute between positivists and naturalists is a dispute about mere origin. Wherever law comes from, we insist only that it fill the field completely. This law has no gaps. There is always a right answer.

Outside of Dworkin, who courageously takes this position,<sup>50</sup> few

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<sup>46</sup> Oddly, this is precisely the Lacanian view of the law of the superego. See *infra* text accompanying notes 72-94.

<sup>47</sup> See Slavoj Žižek, *Why Does the Law Need an Obscene Supplement?*, in LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHANALYSIS AND JURISPRUDENCE 75, 89 (Peter Goodrich & David Gray Carlson eds., 1998) [hereinafter Žižek, *Obscene Supplement*].

<sup>48</sup> See Arthur J. Jacobson, *Hegel's Legal Plenum*, in HEGEL AND LEGAL THEORY 97 (Drucilla Cornell et al. eds., 1991).

<sup>49</sup> See *infra* text accompanying notes 115-53.

<sup>50</sup> See DWORKIN, *supra* note 45, at 412; RONALD DWORKIN, A MATTER OF PRINCIPLE 144-45 (1985).

would acknowledge the existence of brutally correlative law. Even conservative lawyers, consulting their experience, would say that the law includes unruly cases of first impression, which are ungoverned by pre-existing law. On this view, there are gaps in the law that must be filled in. There is room for the law to grow.

Any such concession, however, is a betrayal of conservative principle. Conservatives may object at this point that no empirical conservative (outside of Dworkin) believes the law is completely present; what I describe is merely an ideal type of no descriptive worth. To this claim, I respond that such a reaction only signals a profound fear of confronting the true implication of conservative belief. The dearth of empirical instances is of no matter, if conservatism as such is implicated in the ideal type. All psychoanalysis does is to adhere to the stringent requirement that law must precede action—the very foundation of conservative jurisprudence. That empirical conservatives have no courage of their convictions cannot serve to refute what follows. Therefore, on ordinary tort law principles,<sup>51</sup> conservatives are absolutely responsible for the consequences of what I am about to explain. The authentic conservative is “not afraid to *pass to the act*, to assume all the consequences . . . .”<sup>52</sup>

What I now would like to suggest is that correlative jurisprudence (where law always precedes the act) has a precise psychoanalytic interpretation: *it is the Freudian superego*. The superego is absolute perfect knowledge of pre-existing law. Proof of this proposition is an important task of this Article. That proof will be coming in due course.<sup>53</sup>

Meanwhile, I have said that, for the superego, there is always a right answer, per Dworkin. I now wish to go Dworkin one better and suggest there is only *one* right answer: *if you act, you are guilty*. A law that always precedes action has the effect of abolishing all action—unless an act is a perfect repetition of some earlier act we know to be legal. According to this Prussian, superegoic definition of law, originality and spontaneity—freedom itself—are banished, because freedom produces acts which are never vouchsafed by pre-existing law.<sup>54</sup> In Joan Copjec’s words, “The phenomenon of guilt is our proof

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<sup>51</sup> See RESTATEMENT (SECOND) OF TORTS § 8A (stating that an act is intentional when “the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it”).

<sup>52</sup> ŽIŽEK, *supra* note 3, at 4.

<sup>53</sup> See *infra*.

<sup>54</sup> This is Kant’s position:

Now, moral evil . . . brings with it an *infinity* of violations of the law, and hence an *infinity* of guilt . . . not so much because of the *infinity* of the highest lawgiver whose authority is thereby offended . . . but because the evil is in the *disposition* . . .

KANT, RELIGION, *supra* note 10, at 89. See Joan Copjec, *Introduction: Evil in the Time of the Finite World*, in RADICAL EVIL xiv (Joan Copjec ed., 1996) (“Common to Freud and Kant is the

that the subject is free, that it exceeds the historical content in which alone it realizes itself.”<sup>55</sup>

The free act is original and spontaneous. If perfect repetition were possible, legality would likewise be possible. Perfect repetition was possible in the Garden of Eden, until Eve ate of the tree of knowledge.<sup>56</sup> Since then, repetition has been ruled out. Nowadays, sin is strictly original. And what is sin? Precisely the *jouissance* of the act, in which the bounds of the Symbolic realm are transcended.<sup>57</sup>

It is because of freedom’s *jouissance* that all actions are condemned by superegoic law. In every act, there is at least one original element—its authorship by a unique individual. The freedom of the individual to act is a radically incommensurate element always infused into the act itself. This element guarantees that no act can be underwritten in advance by the law. Quite the opposite is true. All acts are by definition creative and hence condemned.

Radical freedom, then, is a noumenal concept postulated as

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unexpected assertion not only that moral conscience is always certain, but that it is, moreover, certain of only one thing: its guilt.”). It is also Hegel’s position. See PHENOMENOLOGY OF SPIRIT, *supra* note 35, §§ 398-400. Thus, Hegel describes the act as the “original determinacy” and the birth of individuality: “*action* is itself nothing else but negativity.” *Id.* § 399.

<sup>55</sup> COPJEC, READ MY DESIRE, *supra* note 5, at xvi. The universality of guilt also implies that guilt is not a moral term but, instead, an ontological one. See BERTHOLD-BOND, *supra* note 25, at 171.

<sup>56</sup> Augustine suggests that paradise is the union of *jouissance* and knowledge. AUGUSTINE, THE CITY OF GOD 457-75 (Marcus Dods trans., 1950). That is to say, when Adam and Eve acted (i.e., engaged in sexual intercourse), they did not lose themselves or blank out. In effect, the omnipresence of knowledge, even during the act, meant that Adam and Eve were “perfectly” rational. They had no hidden unconsciousness. They had perfect control over their bodies. They could therefore be sure that their acts were lawful and fully vouchsafed by pre-existent law—i.e., perfectly repetitive. See Miran Božovič, *Malebranche’s Occasionalism, or, Philosophy in the Garden of Eden*, in SIC 2: COGITO AND THE UNCONSCIOUS 148, 157-63 (Slavoj Žižek ed., 1998); SCHROEDER, *supra* note 14, at 90. This is the conceit of sexual perversion: “the fundamental illusion of the pervert is that he possesses a (symbolic) knowledge that enables him to regulate his access to *jouissance*.” ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 322.

<sup>57</sup> According to Miran Božovič:

What was it that Adam did? Or, more precisely, what was it that he did *not* do? . . . What Adam did not do was to make use of the power he had over his body: upon joining himself to . . . “the forbidden fruit,” Adam did not suppress the sensation of pleasure that God was producing in his mind, but rather, abandoned himself to it. And it was precisely by not renouncing the pleasure immediately after it fulfilled its advisory function, that Adam crossed the line between innocence and sin. . . . Adam allowed his mind’s capacity to be exhausted by the sensation of pleasure, to the extent that the darkness . . . obscured the light of reason. Having thus been distracted, Adam never regained his mind’s attention. What the sensation of pleasure, which Adam was unwilling to renounce, erased from his mind, was the mind’s “clear perception, which informed him that God was his good, the sole cause of his pleasures and joy, and that he was to love only Him.” . . . It was, therefore, nothing less than the very truth of occasionalism [i.e., the position that God is the only cause of things] that was erased from Adam’s mind. And therein lies Adam’s sin.

Božovič, *supra* note 56, at 163 (internal citation omitted).

existing separate and apart from the chain of causal being.<sup>58</sup> Only conscious, speaking human beings are free and hence guilty in the all-seeing eye of superegoic law. Animals—or psychotic human beings—are acquitted because they lack this freedom. Animals and psychotics conform to the law precisely because they are incapable of acting. The proper act is an act of freedom—inherently illegal and beyond the bounds of the symbolic order. Nothing done by a free individual can live up to the demands of superegoic law, which despises (but requires) freedom itself.

I have said that law as experienced even by conservative lawyers has gaps in it. But the law in which there are *always* right answers is the Freudian superego.<sup>59</sup> What this implies is that *there is no distinction between positive and natural law*. Positivists claim that law and morality are not necessarily connected.<sup>60</sup> What they do not grasp is that positive law and morality are the same thing, so long as one insists that law always precedes human action and there are right legal answers. One must, however, distinguish between external social regulation (law experienced as full of gaps) and internal moral law (which has no gaps). The difference between these two laws is the difference between reality and the Real.<sup>61</sup> Conservatives who admit there are not always right answers are talking about social reality. But the realm in which right answers are guaranteed is where the superego emerges to condemn all acts. This Real moment, as we shall see, is the traumatic dimension in law.<sup>62</sup>

#### HART

Superegoic law admits to no gaps. Its perfection consists precisely of its opposition to all action. But no living legal theorist will admit that superegoic law is in effect in society. The vision is simply too extreme. It violates the experience that all lawyers attest to—there is not always a

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<sup>58</sup> See CRITIQUE OF PRACTICAL REASON, *supra* note 37, at 32 (causality not determinable by physical laws); CRITIQUE OF PURE REASON, *supra* note 9, at 33 (liberty is absolute spontaneity, an unconditioned as first member of a causal series); *id.* at 300 (the causality of freedom is not subordinated to another cause determining it in time; freedom is not given in experience and is independent of impulse).

<sup>59</sup> See Alenka Zupančič, *The Subject of the Law*, in SIC 2: COGITO AND THE UNCONSCIOUS 41, 41 (Slavoj Žižek ed., 1998) (stating that “what philosophy calls the moral law and, more precisely, what Kant calls the categorical imperative, is in fact nothing other than the superego”).

<sup>60</sup> See ANOTHY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 272, 314-15 (1998).

<sup>61</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 132. On the role of social regulation as relieving the unbearable pressure of the superego, see Jeanne L. Schroeder & David Gray Carlson, Review Essay, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653 (2000).

<sup>62</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 280.

correct legal answer.

Still, only bad legal realism goes to the other extreme by denying the existence of *any* right answer. Empirically, most Anglo-American legal theorists are in the middle. They think that there are *usually* right answers, although sometimes the law is unclear. In other words, law *mostly* but not always precedes action.

Such a vision most famously can be found in the work of H.L.A. Hart.<sup>63</sup> In an approach that aims to be “descriptive,” rather than “conceptual,”<sup>64</sup> Hart supposedly accounts for uncertainty in the law. He emphasized that law was *mostly* determinate.<sup>65</sup> At such moments, law had a certain, core meaning.<sup>66</sup> The core is where judges have immediate knowledge.<sup>67</sup> Here is where legal phenomenon perfectly coincides with legal noumenon.<sup>68</sup>

Sometimes, however, Hart claimed that no right answer precedes the case. These cases are located in law’s penumbra, where the judge has discretion to make new law—*i.e.*, legislate.<sup>69</sup> Thus, Hart attempted to account for the uncanny feeling that all lawyers have—there is no clear answer out there, at least some of the time. Because this experience is proclaimed (though never proven) to be “penumbral,” the Rule of Law is preserved.

Paradoxically, in spite of his emphasis on law’s “open texture,”<sup>70</sup> Hart nevertheless subscribes fully to superegoic law—law with no gaps, law in which there are only unique right answers. Hart tries to account for legal uncertainty, but he never abandons the premise of correlative superegoic law. In Hart’s thought—and contrary to psychoanalytic theory—these gaps are determinate gaps. If law has gaps in it, then there must be a law of the gap. We must know in advance which acts are in the core and which acts are in the penumbra. But to really know an act is to know everything about an act—to know its complete context. This is radical knowledge indeed—superegoic knowledge. Once the act’s complete context is known, we certainly know whether the act is in the core or in the penumbra. Hence, law knows precisely

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<sup>63</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* (1961).

<sup>64</sup> And this in spite of the title of Hart’s book. See Gerald P. Moran, *A Radical Theory of Jurisprudence: The “Decisionmaker” as the Source of Law—The Ohio Supreme Court’s Adoption of the Spendthrift Trust Doctrine as a Model*, 30 AKRON L. REV. 393, 411 (1997).

<sup>65</sup> HART, *supra* note 63, at 148 (“overwhelming majority of cases”). This is, of course, asserted and not proved.

<sup>66</sup> *Id.* at 121-32. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

<sup>67</sup> See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 802 (1988).

<sup>68</sup> A Hegelian coincidence that I will very much defend later on.

<sup>69</sup> “If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction.” Hart, *supra* note 66, at 607.

<sup>70</sup> HART, *supra* note 63, at 133.

where the boundary is between core and penumbra, and it knows precisely where any given act is to be located. Even when an act falls in the penumbra, it is fully regulated in advance. The law of the penumbra is simply that the actor is subjected to the caprice of the judge. The superegoic “correlative” aspect of law is therefore at the “core” of Hart’s positivist jurisprudence.<sup>71</sup>

Under our extreme version of positive law (*i.e.*, positive law taken seriously), whether we apply Hart’s innovation or not, full law precedes every act. The law is completely determinate (even if it determines certain acts to be in the penumbra where judges are invited to enjoy). Every act that has ever been performed has already been judged. The number of permitted acts is strictly finite. Hence, the only acts permitted by such a law are pure repetitions—mechanical acts. Creativity is unlawful. Yet no act is repetitive, because it is always authored by a spontaneous free individual. In short, all acts are crimes.

#### THE MATERNAL SUPEREGO

No matter what we do, we fail to live up to the law of the superego. More familiarly, it is impossible to please our parents or God (*i.e.*, what Lacan calls the big Other).<sup>72</sup> Nothing is good enough for this big Other. We are condemned in advance. As Hegel emphasized, innocence is just a name for non-action. Action as such is guilt.<sup>73</sup> This explains why we feel so guilty all the time—why “[o]ur guilt is all we know of the law.”<sup>74</sup> Hegel puts it this way:

No man is a hero to his valet; not, however, because the man is not a hero, but because the valet—is a valet, whose dealings are with the man, not as a hero, but as one who eats, drinks, and wears clothes, in general, with his individual wants and fancies. Thus, for the judging consciousness, there is no action in which it could not oppose to the universal aspect of the action, the personal aspect of the individuality, and play the part of the *moral* valet towards the

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<sup>71</sup> See generally Carlson, *supra* note 46.

<sup>72</sup> See ŽIŽEK, LOOKING AWRY, *supra* note 30, at 139, 152; SLAVOJ ŽIŽEK, THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY 42 (1994) [hereinafter ŽIŽEK, METASTASES OF ENJOYMENT].

<sup>73</sup> In *Phenomenology of Spirit*, Hegel writes of consciousness splitting itself in two when it raises itself to action:

[I]t gives up the specific quality of the ethical life, of being the simple certainty of immediate truth, and initiates the division of itself into itself as the active principle, and into the reality over against it, a reality which, for it, is negative. By the deed, therefore, it becomes guilt.

PHENOMENOLOGY OF SPIRIT, *supra* note 35, § 468.

<sup>74</sup> COPJEC, READ MY DESIRE, *supra* note 5, at xiv.

agent.<sup>75</sup>

In other words, because every act is individual the moral valet finds it wanting in purity.

What we now have before us *tout court* is the Freudian superego. This “‘severe master’ of the ego”<sup>76</sup> is the part of personality that prohibits. It is quite totalitarian in its attitude.<sup>77</sup> What does the superego prohibit? In Lacanian theory, it prohibits enjoyment. We enjoy our own acts and for that reason we are condemned in advance if we act. We are always at war with our own superego when we act.<sup>78</sup>

Wholeness is what “acts” aim at. In action, the subject seeks to satisfy desire—to provoke a merger with the Real.<sup>79</sup> If the subject is the gap between the Symbolic and the Real (*i.e.*, a faculty of desire), the subject acts precisely to fill the gap. Yet this is what the superego prohibits. In action, the subject literally (but fleetingly) withdraws from the symbolic order entirely.<sup>80</sup> It is for this reason that we can say that all action is prohibited. Action is incestuous, in the Lacanian sense. It is psychotic<sup>81</sup> and terroristic.<sup>82</sup> We enjoy ourselves when we act, and this is precisely what is prohibited.

The superego that prohibits is the paternal superego—the superego that knows and sees all.<sup>83</sup> It condemns everything. But what it condemns happens not to be possible. A merger with the real would constitute our obliteration. Hence, it is said, suicide is the only successful act. Only in suicide is the gap between the real and the symbolic finally closed.<sup>84</sup> Any act short of this is doomed to fail.

This leads to a strange inversion in the superego. The paternal superego which deprives the subject of all enjoyment expropriates this surplus and uses it in aid of its perverse maternal side.<sup>85</sup> Thus, the superego (which prohibits) simultaneously says, “Go ahead and enjoy, you failure. Nothing will come of it.”<sup>86</sup> The superego dares us to act,

<sup>75</sup> PHENOMENOLOGY OF SPIRIT, *supra* note 35, § 665 (footnote omitted).

<sup>76</sup> ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 171.

<sup>77</sup> *See id.* at 14.

<sup>78</sup> If, however, we listen to the superego and fail to act, we suffer from “obsession,” ŽIŽEK, SUBLIME OBJECT, *supra* note 27, at 59, or “neuroses.” ŽIŽEK, METASTASES OF ENJOYMENT, *supra* note 72, at 13.

<sup>79</sup> STANLEY ROSEN, G.W.F. HEGEL: AN INTRODUCTION TO THE SCIENCE OF WISDOM 155 (1974) (“The desire for satisfaction is a desire for complete self-consciousness.”).

<sup>80</sup> “In action,” Hamlet says, “how like an angel! In apprehension, how like a god!” WILLIAM SHAKESPEARE, HAMLET, Act II, Scene 2.

<sup>81</sup> *See* ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 60.

<sup>82</sup> *See id.* at 377-78.

<sup>83</sup> ZUPANČIČ, *supra* note 16, at 147.

<sup>84</sup> ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 41, at 31.

<sup>85</sup> This is emphasized by St. Paul in *Romans 7:7*. *See also Romans 5:20* (“law came in, with the result that the trespass multiplied”).

<sup>86</sup> *See* Renata Salecl, *The Silence of the Feminine Jouissance*, in *SIC 2: COGITO AND THE UNCONSCIOUS* 175, 189 (Slavoj Žižek ed., 1998).



knowing that we cannot succeed.

This second aspect of the superego is quite as necessary as the first. In the first aspect, the superego condemns all acts. Yet, if we took the superegoic program too seriously, the subject would do nothing. Such a subject would suffer from “obsessional neurosis”—paralysis in the face of the big Other’s disapproval.<sup>87</sup> The subject who takes the superego too seriously thus undermines the superegoic regime. A certain distance between the subject and the regime is needed, if the regime of the superego is to perform its function of condemnation. Law as such can never appear unless the subject acts. Without action, the superego would disappear. Therefore, the superego requires a carnival, or a Mardi Gras, during which the subject turns everything topsy-turvy and acts.<sup>88</sup> Yet, ironically, when the subject acts, she disrupts the very superegoic regime that required the act. All acts are therefore “death” drives. This is why Žižek writes: “the very existence of subjectivity involves the ‘false’, ‘abstract’ choice of Evil, of Crime—that is, an excessive ‘unilateral’ gesture which throws the harmonious Order of the Whole out of balance.”<sup>89</sup> In effect, the law sacrifices itself in requiring the subject to act in contravention of law. It is therefore our grim duty to the law that we enjoy its transgression.<sup>90</sup>

This maternal side of the superego, taken to its extreme, incites the subject to absolute rage and enjoyment, where everything is obliterated in Dionysian frenzy.<sup>91</sup> Thanks to the maternal superego, we feel guilty when we do *not* enjoy.<sup>92</sup> The superego condemns us both for acting and not acting.

The fact that superegoic law requires the obscene enjoyment of the subject is precisely what must not be revealed. This is the prohibition against (but covert sponsorship of) pornography—*i.e.*, reduction of the subject to an object for the enjoyment of the big Other. Should it be revealed that the superego depends on the act’s obscenity, then the superegoic law’s complicity in the very crimes it condemns would be exposed.

<sup>87</sup> See ŽIŽEK, METASTASES OF ENJOYMENT, *supra* note 72, at 13.

<sup>88</sup> See Žižek, *Obscene Supplement*, *supra* note 47, at 90-91.

<sup>89</sup> ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 96.; See *id.* at 99, 160.

<sup>90</sup> The Lacanians call this the “forced choice.” On the necessity of this, see Schroeder & Carlson, *supra* note 61.

<sup>91</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 97, 126, 156. See also JUDITH BUTLER, THE PSYCHIC LIFE OF POWER: THEORIES IN SUBJECTION 49 (1997) (“The repressive law is not external to the libido that it represses, but the repressive law represses to the extent that repression becomes a libidinal activity.”).

<sup>92</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 160. This is the double guilt of the death of God. When God dies, it is upon us to enjoy and we cannot. See SLAVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 167 (1992) [hereinafter ŽIŽEK, ENJOY YOUR SYMPTOM]. Thus, Lacan turns Dostoevski around: If God does not exist, then nothing is permitted. See THE SEMINAR OF JACQUES LACAN, BOOK II, *The Ego in Freud’s Theory and in the Technique of Psychoanalysis* 128 (1988).

Jeanne Schroeder beautifully describes the injunction of the superego to enjoy. The law must, on the one hand, deny its complicity in crime. On the other hand, the law will not function without feminine enjoyment—*i.e.*, the act.<sup>93</sup> Accordingly, the “act” is the primordial crime and also the crime that is constantly with us. It is diabolical evil—a necessary obscene underside of superegoic law.<sup>94</sup>

To summarize our progress so far, we took an aspect of law that everyone agrees is admirable. Law must precede action. The judge cannot simply make up the law on the spot, or what we have is tyranny, not law. Every conservative believes this—and suspects the Supreme Court tyrannizes us with made-up constitutional doctrines falsely attributed to the penumbra of the Constitutional text. We have taken this conservative belief and, and although it went hard on us, we have bettered the instruction. We have rendered this aspect of law truly extreme—well beyond that which the covert wimp Robert Bork would allow—and we have discovered that we have outlawed all human freedom—defined as the subject’s spontaneity.<sup>95</sup> Perfectly determinate law turned out to be the superego, which opposes the idea of action. But also, in its maternal phase, superegoic law requires action in order to perpetuate itself.

### CRIME

I have suggested that every act is original. It exceeds the symbolic order of law. All action is therefore crime. But what is crime?

A crime is that which denies universality to the symbolic order. Crime announces that law is not law. For Hegel, crime “constitutes a *negatively infinite judgement*”<sup>96</sup> (e.g., “the rose is not an elephant”). As Hegel puts it:

Crime may be quoted as an objective instance of the negatively infinite judgement. The person committing a crime . . . does not . . . merely deny the particular right of another person . . . . He denies the right of that person in general, and therefore he is not merely forced to restore what he has stolen, but is punished in addition, because he has violated law as law . . . .<sup>97</sup>

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<sup>93</sup> See JEANNE L. SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (forthcoming).

<sup>94</sup> Diabolical evil is evil done for nonpathological reasons. It therefore meets Kant’s categorical imperative and is therefore indistinguishable from morality. See *generally* Schroeder & Carlson, *supra* note 61.

<sup>95</sup> See *CRITIQUE OF PRACTICAL REASON*, *supra* note 37, at 66; *CRITIQUE OF PURE REASON*, *supra* note 9, at 87-88, 227, 230.

<sup>96</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 12, § 95.

<sup>97</sup> HEGEL’S *LOGIC* § 173 (William Wallace trans., 1975) (1873). On why crime is a negative

On this definition, all acts are crimes. When a subject acts, the symbolic order is denied all its force. Yet acts are likewise the very attribute of a free subject. We are free to act. Therefore, we may conclude that (superegoic) law is absolutely incompatible with human freedom.

Paradoxically, law itself must be legislated. In other words, for there to be law, there must be a legislative “act.” This means that positive law itself is a crime—the primordial crime. It is the murder of Father Enjoyment and the institution of the Name-of-the-Father in his place.<sup>98</sup> Yet positive law has the bad manners to denounce us for *our* crimes.

The foundational violence of law has by now engendered an enormous philosophical literature.<sup>99</sup> Such literature must be understood precisely in the Lacanian sense of “act.” Which is to say that law is not necessarily “violent” in the lay sense of the term. In legal circles, Robert Cover has made fashionable the notion that law is violent,<sup>100</sup> but he usually does not refer to the speculative content of “law as act.” Thus, he writes:

Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispthic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.<sup>101</sup>

While Cover’s work is no doubt justly celebrated for its profound depth of noble feeling, it certainly does not operate at the Lacanian level. In Cover’s view, law is de-centered. It is not the property of the state. Rather, it encompasses the norms of diverse communities. Communities, not the state, are the hallmarks of political virtue.<sup>102</sup> In short, what we have here is basically the new age theme of “let a thousand flowers bloom.”<sup>103</sup> What is missing from this account is the judge’s very *act* of deciding always kills all law, even the law it

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infinite judgment, see Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Wrong and the Essence of Right*, 24 CARDOZO L. REV. 2481 (2003).

<sup>98</sup> SIGMUND FREUD, TOTEM AND TABOO (STANDARD EDITION) (James Strachey trans., 1996). For Lacan’s rewriting of this myth, see Jacques Lacan, *Introduction to the Names-of-the-Father Seminar*, in JACQUES LACAN, TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT 81 (Jeffrey Mehlman trans., Joan Copjec ed., 1990) (1974); ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 314-18.

<sup>99</sup> See, e.g., Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3 (Drucilla Cornell et al. eds., Mary Quaintance trans., 1992).

<sup>100</sup> See Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>101</sup> *Id.* at 53.

<sup>102</sup> See Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 57-59 (1989).

<sup>103</sup> See generally Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 823-32 (1993).

purports to uphold,<sup>104</sup> and that legal reasoning is the psychoanalytic cure the judge must undertake to assuage the guilt.<sup>105</sup>

The speculative inquiry inspired by Hegel and Lacan shows law to be much more violent than Cover imagined and also less so. It is more so in that every act of judge and subject alike traumatizes the symbolic order. Hegel and Lacan exult in the violence of law at this level. Cover abhorred it (thus revealing his fundamental romanticism).<sup>106</sup> It is less violent than Cover imagined because submission to and transgression of law constitutes the ordinary course of social growth. For Cover, when law is violent, it is catastrophic to its victims. Hence, Cover implies a division between violent and non-violent judicial acts. Lacan saw the violence in every single act—judicial or laic.

#### INTERPRETATION

Once a human being acts in violation of the law, a traumatic event has occurred. Trauma is that which disturbs the equilibrium of the symbolic order. In order to re-establish this equilibrium, the subject must “interpret” or “subjectify” the act, if she can.<sup>107</sup>

This interpretation constitutes the rearrangement of the symbolic order of law. Interpretation always entails the discovery of a rule—of cause.<sup>108</sup> It establishes a new symbolic network by means of which “[h]istory again acquires the self-evidence of a linear evolution.”<sup>109</sup> Once the act is symbolized—made subject to the rule of law—the trauma disappears. This is “the moment of closure when the subject’s act of decision changes into its opposite.”<sup>110</sup> The trauma is “cured.”

The interpretation may well be, “She acted legally, even morally.” Thus, when you bought your carton of milk for the required price with valid currency, you are subsequently judged innocent. Any such judgment, after the deed, claims that you had no spark of originality in

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<sup>104</sup> Thus, legal interpretation merely threatens violence, implying that nonviolent interpretation might be possible. See Robert M. Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815 (1986).

<sup>105</sup> One may also complain of Cover that, although he celebrates the particularism of insular communities, he speaks in the name of a universality that he does not acknowledge. Yet universalism is the violence Cover abhors. Hence, he is just as violent as those he criticizes. See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 170.

<sup>106</sup> Cover thus exhibits the pose of the “beautiful soul” who wrings his hands at the world and wishes to be aloof from it, but is, contrary to this pose, just as implicated in it as is anyone else. See *id.* at 77.

<sup>107</sup> See FINK, *supra* note 1, at 63. Of course, the subject may attempt to repress the trauma and refuse to confront it—a less healthy alternative. See ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 79.

<sup>108</sup> See ŽIŽEK, ENJOYMENT AS A POLITICAL FACTOR, *supra* note 19, at 153.

<sup>109</sup> *Id.* at 190.

<sup>110</sup> *Id.*

your act. In effect, you are treated as an unfree object incapable of creativity. You are accused of perfect plagiarism, as it were. Thus, in your acquittal lurks the accusation of yet another high crime and misdemeanor.<sup>111</sup>

This judgment, however, is more in the nature of a pardon than an acquittal. Such a judgment deliberately overlooks the act's lawlessness. The truth of your acquittal is that you really deserved to be condemned. Instead of condemning you, the underlying law has been retroactively conformed to accommodate your earlier lawless act. Presume not that the law is the thing it was. Rather, the trauma of your act disrupted the former law. Your act has been fully symbolized in a brand new law.<sup>112</sup> The innocence you have been accorded is the *mercy* of the big Other, which has elected to sacrifice and transform itself in order to smooth over your criminal act—your *jouissance* of that pathological carton of milk.

What we have here is not legal judgment but mercy, precisely because it cannot be demanded. Subjects are constantly demanding “justice” from the symbolic order—the missing part to which the subject is entitled and which would make the subject whole.<sup>113</sup> The symbolic order never listens to the demand for justice. It is no “strict court of Venice.” Only when the subject learns not to demand justice does the symbolic order condescend to forgive the subject's crime.<sup>114</sup>

If the pattern keeps up—if action wins forgiveness after the fact—we invoke a rather different, more flexible notion of what law is. The conclusion that an act was consistent with pre-existent law means that law is defined differently from its strict correlative form of superegoic law. In such a definition, law is not an aggregate of particulars, but an aggregate of universal principles, under which a legal actor is accorded some scope of freedom. So conceived, law no longer represents the superego. But the price is the betrayal of conservative principles. Law no longer precedes the act.

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<sup>111</sup> In Hegel's words, the strictness of the superego (what Hegel calls “fate”) “often seems to pass over into the most crying injustice when it makes its appearance, more terrible than ever, over against the most exalted form of guilty, the guilt of innocence.” G.W.F. HEGEL, *The Spirit of Christianity and its Fate*, in EARLY THEOLOGICAL WRITINGS 232 (T.M. Knox trans., 1948).

<sup>112</sup> See FINK, *supra* note 1, at 71 (“To understand means to locate or embed one configuration of signifiers within another. . . . [S]omething makes sense when it fits into the pre-existing chain.”).

<sup>113</sup> On this aspect of justice, see generally Carlson, *supra* note 8.

<sup>114</sup> See ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 41, at 169. Why, then, should one do “good” acts when there is no guaranty that the symbolic order will render the deeds of mercy? Grace is like the rain. It falls where it falls. Perhaps it will fall on the fertile plain, perhaps on the barren hillside. If the peasant does the good deed of cultivating the plain, the peasant will profit if the rain happens to fall on the plain. But cultivation never guarantees the rainfall. See ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 79. The very possibility of the good act presupposes that the subject can rebel against the existing order in the name of a better order. See ŽIŽEK, ABYSS OF FREEDOM, *supra* note 26, at 54.

## NARRATIVE

In the above account, every act violates the pre-existing, determinate law of the superego. The subject must, in effect, forget the law in order to act.<sup>115</sup> The act is a pre-rational, “Real” event that crashes through the trappings of the symbolic realm and encounters the Real.

The subject, in this account, is always alienated from her own act. This follows from the Lacanian definition of the subject. In Lacanian terms, the subject is the gap between the symbolic and the Real. If the subject is this gap, and if acts are in the Real, then it follows that the agent is always alienated and separate from (yet author of) its act. Furthermore, as the act contains the element of subjective responsibility, the subject alienated from the act is always self-alienated. The subject is literally caught *in the act*.

When a subject acts, she is always, to some degree, surprised by what she has wrought. The act teaches the subject who she is and what she is capable of. One might say that an actress performs for an audience, but, uncannily, the actress is always in the audience herself, witnessing her own act—a wonder wounded hearer amidst the groundsmen.<sup>116</sup>

Phenomenologically, the subject is a series of traumatic acts recollected across time.<sup>117</sup> The *self-conscious* subject is the negative unity that strings together all these acts into a coherent whole over time. Memory of what she did requires a continuity of self from day to day. This implies that the subject breaks free from the present and recognizes herself as a “universal” that is separate and apart from the present. In other words, in her acts, the subject transcends the natural present and becomes historicized. Acts, in contrast, being Real events, do not exist in time. Only the self-conscious subject, remembering the now-symbolized act, has any sense of time. Self-consciousness is nothing but unity over time. What it unites are the symbolized acts of a lifetime.

Every act by the subject is a trauma. The act is at bottom an

<sup>115</sup> See ŽIŽEK, *LOOKING AWRY*, *supra* note 30, at 212.

<sup>116</sup> See COPJEC, *READ MY DESIRE*, *supra* note 5, at xvi (“human will can only realize itself in a content that alienates it from itself . . . .”); ZUPANČIČ, *supra* note 16, at 225 (“I experience my own enjoyment . . . as strange and hostile.”). This explains why Žižek can write of the act as a foreign body or intruder in the subject, and why the actor must always keep a distance from her own acts. See ŽIŽEK, *TICKLISH SUBJECT*, *supra* note 24, at 374. “The act thus designates the level at which the fundamental division and displacements usually associated with the ‘Lacanian subject’ . . . are momentarily suspended . . . .” *Id.* at 375. If it were otherwise, the agent would then be at the level of the act. See *id.* at 376. Here we would have Adam and Eve (i.e., sexual perversion), and Kant’s puppet of God. See *supra* note 56.

<sup>117</sup> See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 12, § 124.; see also JOSEPH C. FLAY, *HEGEL’S QUEST FOR CERTAINTY* 137 (1984).

unconscious act<sup>118</sup> that disrupts the fantasy realm. Fantasy is in turn the narrative the subject has constructed about herself and what she is. Thus, a subject learns what she is by contemplating her acts.<sup>119</sup> Together, the others—and the actress herself—will symbolize the traumatic act and reestablish a new order.<sup>120</sup> Once the act is symbolized, “[t]he pricks of conscience have become blunt, since the deed’s evil spirit has been chased away; there is no longer anything hostile in the man, and the deed remains at most as a soulless carcass lying in the charnel-house of actualities, in memories.”<sup>121</sup> This exorcism of the act is what narration aims at.<sup>122</sup>

The narrative that the agent constructs about her acts constitutes the very stuff of legal reasoning. In the narrative, the subject learns that she acted because of reasons A, B, and C. Cause is retroactively posited to explain the act so that the trauma of acting can be integrated into the fantasy in which the subject lives.<sup>123</sup> Thus, cause is much more radically conceived in psychoanalysis than in ordinary science. Cause in science *is* the law. Cause in psychoanalysis is precisely that which *disrupts* the law.<sup>124</sup>

Narrative acts are always failures. They never completely remove the trauma of the act. Recall that, in Lacanian terms, the subject is always a gap between the symbolic and the Real. Entry into the symbolic realm of law constitutes the historicization of acts by the subject. The symbolic materials expropriated by the subject to describe her acts do not constitute a positive whole. Rather, the subject is a negative unity holding together various shards of symbolic material, but there is always something missing to fill out the gap.<sup>125</sup> What is missing

<sup>118</sup> See FINK, *supra* note 1, at 37.

<sup>119</sup> See PHENOMENOLOGY OF SPIRIT, *supra* note 35, § 401 (“Consciousness must act merely in order that what it is *in itself* may become explicit *for it* . . . action is simply the coming-to-be of Spirit as *consciousness*”); JEAN HYPOLITE, GENESIS AND STRUCTURE OF HEGEL’S *PHENOMENOLOGY OF SPIRIT* 72 (Samuel Cherniak & John Heckman trans., 1974) (“But action is necessary, and through it the self of self-consciousness emerges from its obscurity and becomes actual.”).

<sup>120</sup> Slavoj Žižek, *The Cartesian Subject versus the Cartesian Theater*, in SIC 2: COGITO AND THE UNCONSCIOUS 246, 256 (Slavoj Žižek ed., 1998) (“[T]he answer to the question ‘Why do we tell stories?’ is that the *narrative as such* emerges in order to resolve some fundamental antagonism by way of rearranging its terms into a temporal succession.”); see also STAVRAKAKIS, *supra* note 6, at 86 (“In the face of the irreducibility of the real we have no other option but to symbolize . . .”).

<sup>121</sup> HEGEL, *supra* note 111, at 232.

<sup>122</sup> Needless to say, there is voluminous literature on law and narrative. One of the leading progenitors of this movement, Richard Delgado, recognizes the therapeutic nature of narrative (for the “out” groups), but he also adds that the narratives of the “outs” are traumatic for the “ins.” See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

<sup>123</sup> See FINK, *supra* note 1, at 28, 64.

<sup>124</sup> See *id.* at 140-41.

<sup>125</sup> See COPJEC, READ MY DESIRE, *supra* note 5, at 125 (“In response to anxiety’s signal of

is the *objet petit a*.

The *objet petit a* is one of Lacan's profound contributions to philosophy.<sup>126</sup> This object is the "little other"<sup>127</sup>—the material that, if acquired, supposedly would make the subject whole. The "act" is always an attempt to obtain this *objet petit a*.

The *objet petit a*, however, is a paradoxical object. It is in fact a non-object—a metonym.<sup>128</sup> In short, the idea of the Thing that would make the subject whole is a falsehood, a "not," and an impossibility. We search in vain for it in positive reality. Yet the *objet petit a* can only be perceived if it has a positive content. Hence, the subject constantly "sublimates." Sublimation is integration of the *objet petit a* into the order of the signifier.<sup>129</sup> That is, a positive thing is associated with the *objet petit a*. It is "'elevated to the dignity of the Thing.'"<sup>130</sup> We feel pain because we don't have some thing—an unrequited love or a really "good" law review acceptance. If only we could get this one thing, everything would be all right.<sup>131</sup> In fact, this Thing is simply a placeholder for the negative *objet petit a*.

The "act," always an attempt to obtain the Thing, is doomed to fail. Even if we win a token of love or a prestigious academic position, we only discover that the thing obtained was not really the *objet petit a*. An uncaptured surplus enjoyment exceeds that actual sublimated object we have obtained.<sup>132</sup> The act is destined to fail, even when it succeeds. Indeed, a truly successful act would mean closure and death.

Not only is the act unsuccessful, but the narrative account of the act is likewise unsuccessful. This is because every attempt to fill this gap with words—the post hoc narrative to excuse our act—is itself an

danger, one flees or avoids the real. But one flees into a symbolic whose hedge against the real is secured only through its negation of the real, that is, through its failure to coincide with itself, to guarantee itself.").

<sup>126</sup> See FINK, *supra* note 1, at 83.

<sup>127</sup> The small letter *a* stands for *autre*, or other.

<sup>128</sup> Metonymy is the inability to name the thing directly, but only the context surrounding the thing. Metonymy so defined recognizes the negative constitution of things. See Michel Rosenfeld, *The Identity of the Constitutional Subject*, in *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* 157-65 (Peter Goodrich & David Gray Carlson eds., 1998); Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 763 ("In metonymy, the signified always remains hidden, and negative.") [hereinafter Schroeder, *Midas Touch*].

<sup>129</sup> See ŽIŽEK, *ABYSS OF FREEDOM*, *supra* note 26, at 78.

<sup>130</sup> SLAVOJ ŽIŽEK, *THE FRAGILE ABSOLUTE OR, WHY IS THE CHRISTIAN LEGACY WORTH FIGHTING FOR?* 26 (2000).

<sup>131</sup> The *objet petit a* as lost object only comes to be by being left behind. Narrative occludes the paradox by describing the process in which the object is first given and then gets lost. See ŽIŽEK, *PLAGUE OF FANTASIES*, *supra* note 32, at 13. Fullness is "a retroactively produced fiction." STAVRAKAKIS, *supra* note 6, at 44.

<sup>132</sup> Perhaps someone *stole* this surplus enjoyment. If so, we have the architectonic of racism or anti-semitism. See RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* (1994).



act. Acts are doomed to fail. That is, narrative is “performance” which, by definition, must fail.

In short, speaking or even thinking<sup>133</sup> is an act. Far from being the stuff of rationality, thinking—no matter how logical or programmatic—is paradoxically unconscious activity.<sup>134</sup> It is for this reason that Descartes was disastrously wrong when he hazarded the proposition, “I think, therefore I am.”<sup>135</sup> If we focus solely the result “I am,” the “I” has symbolic reality. It is a concept. It “is.” But this I is radically incommensurate with the I that thinks. This I “is not.” Hence, what Descartes should have written is, “I think, therefore I am not,”<sup>136</sup> or “I am not where I think,”<sup>137</sup> or “I do not think, therefore I am,”<sup>138</sup> or “either I think or I am,”<sup>139</sup> or “I am, therefore *it* thinks,”<sup>140</sup> or “I think, therefore an obscene, sadistic superego specter is watching me,”<sup>141</sup> or Freud’s “*Wo es war, soll Ich werden.*”<sup>142</sup> Ironically, Descartes said the one thing that cannot be sustained: “I think, therefore I am.”<sup>143</sup>

In spite of the paradox of the *Cogito*, the “thing that thinks”<sup>144</sup> always “posits” itself as existent—a negative (positing) unity with infinite positive properties. The cogito cannot sustain itself in negativity alone. It must return to the symbolic order if it is to be.

<sup>133</sup> See FINK, *supra* note 1, at 106 (stating that thought itself is *jouissance*-laden); Žižek, *supra* note 120, at 266 (“The conclusion to be drawn is thus . . . that *self-consciousness itself is radically unconscious.*”); ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 97 (stating that knowledge is performative).

<sup>134</sup> Or as Žižek puts it: “[I]n order to be ‘effective’ at the ontic level, one must disregard the ontological horizon of one’s activity. (In this sense, Heidegger emphasizes that ‘science doesn’t think’ and that, far from being its limitation, this inability is the very motor of scientific progress.)” ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 15. See also Stephen M. Feldman, *Playing with the Pieces: Postmodernism in the Lawyer’s Toolbox*, 85 VA. L. REV. 151, 179 (1999) (“Regardless of how postmodern a writer seeks to be, if she writes an essay or, for that matter, communicates in any matter at all, then she must somehow domesticate postmodernism.”).

<sup>135</sup> René Descartes, *Meditation II: Of the Nature of the Human Mind*, in THE MEDIATIONS AND SELECTIONS FROM THE PRINCIPLES OF RENÉ DESCARTES (John Veitch trans., 1962) (1901).

<sup>136</sup> See Jeanne L. Schroeder, *Three’s a Crowd: A Feminist Critique of Calabresi & Melamed’s One View of the Cathedral*, 84 CORNELL L. REV. 394, 396 (1999).

<sup>137</sup> See Dolar, *supra* note 18, at 28.

<sup>138</sup> See ANDREW HAAS, HEGEL AND THE PROBLEM OF MULTIPLICITY 236 (2000) (“I negate, therefore, I am.”).

<sup>139</sup> See Dolar, *supra* note 18, at 18; LACAN, *supra* note 4, at 211.

<sup>140</sup> ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 41, at 59 (emphasis added). According to Žižek, this is the masculine version of the *cogito*, which insists on self-presence and relegates thinking to the unconscious. The feminine position chooses thought and therefore vanishes to an empty point of apperception, as in the myth of Echo and Narcissus. See *id.*

<sup>141</sup> ŽIŽEK, ENJOY YOUR SYMPTOM, *supra* note 92, at 127.

<sup>142</sup> FINK, *supra* note 1, at 47 (translated as “where it was, there I shall be”).

<sup>143</sup> The precise error of Descartes “consists in substantializing this empty spot of cogito by turning it into *res cogitans*.” Dolar, *supra* note 18, at 16.

<sup>144</sup> See SCIENCE OF LOGIC, *supra* note 22, at 776 (“[B]y this ‘I’, or if you like, it (the *thing*) that thinks, nothing further is represented than a transcendent subject of thoughts = x, which is cognized only through the thoughts which are its *predicates*. . .”).

“What eventually remains, is a pure vanishing point without a counterpart, which can only be sustained in a minimal gesture of enunciation.”<sup>145</sup> In short, thinking ultimately depends on its product—the thought, the signifier.<sup>146</sup>

This existent which the thinking subject must become is always fully present to the acting subject (even as the non-acting subject stands aloof from this all-encompassing present). In her act, the subject always totalizes.<sup>147</sup> Suppose the thinking subject contemplates itself—the symbolic “I” that “is.” This I is not only present, but fully so. Yet, while she contemplates her own self in its totality, the subject is not truly self-conscious. The thinking self is *not* self-conscious when it acts (*i.e.*, thinks).<sup>148</sup> This capacity for the unity of action and knowledge (what Kant called an “intellectual intuition”)<sup>149</sup> was, according to Augustine, lost for us when Eve ate the apple.<sup>150</sup> Rather, the thing that thinks presupposes a totalized universe and an all-consuming presence, but from this totality it has itself withdrawn.

Totalization is vital to the logic of “meaning.” Meaning is the precise, successful coincidence between signifier and signified. Meaning is only successful in a thoroughly static symbolic order. By way of an example, if I have a mental picture that I wish to communicate, I must describe the picture completely in words. There must be nothing left out. Nor must the words add anything to the picture. I tell my vision to you. You understand my meaning when you receive these words and the corresponding picture to which they refer completely. There can be no room for slippage or surplus. This is what “meaning” requires. Anything less demotes meaning to mere interpretation.<sup>151</sup>

Yet a surplus is always there to betray meaning.<sup>152</sup> The surplus is precisely the “I think” who speaks the words that “are” and is hence alienated from them. The attempt to “mean” is itself an act and must always fail. The thing that thinks always stands over against her totalizing activity. His words are never complete. Furthermore, words,

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<sup>145</sup> Dolar, *supra* note 18, at 15.

<sup>146</sup> *See id.* at 19.

<sup>147</sup> On the totalizing nature of thinking, see FLAY, *supra* note 117, at 57, 137.

<sup>148</sup> *See* ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 62 (noting that *cogito* is the subject of the unconscious).

<sup>149</sup> CRITIQUE OF PURE REASON, *supra* note 9, at 163-64.

<sup>150</sup> *See* ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 14-16.

<sup>151</sup> *See* LACAN, *supra* note 4, at 212 (interpretation reduces signifiers to their nonmeaning “so as to find the determinants of the whole of the subject’s behavior”).

<sup>152</sup> *See* ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 33, 106. Žižek portrays meaning as a fantasy structure that papers over the suture of the Real so that the Real becomes a kind of screen onto which meaningful “movies” can be projected. *See* ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 160 (“There is no meaning without some dark spot, without some forbidden/impenetrable domain into which we project fantasies which guarantee our horizon of meaning.”).

being public commodities, are *pret à porter*—never tailor-made. They never fit the subject. Hence, they bring extra content to the fore that exceeds the subject.

#### PRAGMATISM

So far, cognitive thought has been revealed to be irrational, impulsive, unthinking action.<sup>153</sup> Descartes has been denounced for inferring that, just because he thought, he perforce “existed.” Surely something must be wrong with this account. In particular, you may think the following: the account may be adequate for “impulsive” acts, but not for “deliberative” act. I have occasionally acted impulsively. On such occasions, the meaning of the acts could only be retrieved after the fact. And admittedly, if I truly act under the constraint of impulse, the act’s legality is a matter of good fortune or dumb luck. But, unlike my impulsive acts, my deliberative acts have been rationally thought out. Especially with regard to important decisions, such as changing jobs or getting married, I have weighed the costs and benefits. I have pondered hard and I have reached a decision. I acted according to this decision. No doubt, my deliberated acts sometimes turn out badly. For example, I was fired and got divorced. Nevertheless, at the time I acted, I acted from grounds of sufficient reason.

This account, based on the experience of deliberating and then acting in accordance with pragmatic reason, must be interpreted as the deceptive product of “self and vain conceit.”<sup>154</sup> What is portrayed as a forward-looking reasoning process is in fact a retroactively created narration no different from the process admitted with regard to the impulsive act. Action is always impulsive and never deliberated.<sup>155</sup> If you think otherwise, then you deny the fact of the unconscious and claim the possibility of an intellectual intuition.

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<sup>153</sup> See ŽIŽEK, *PLAGUE OF FANTASIES*, *supra* note 32, at 223 (describing that the act occurs as a crazy, unaccountable event which is precisely not willed).

<sup>154</sup> According to Shakespeare:

For within the hollow crown  
That rounds the mortal temples of a king  
Keeps Death his court, and there the antic sits  
Scoffing at his state and grinning at his pomp,  
Allowing him a breath, a scene or two,  
To monarchise, be feared, and kill with looks,  
Infusing him with self and vain conceit . . .

WILLIAM SHAKESPEARE, *RICHARD II* act 3, § 2.

<sup>155</sup> See FRIEDRICH NIETZSCHE, *Beyond Good and Evil*, in *BASIC WRITINGS OF NIETZSCHE* § 32 (Walter Kaufmann ed., 1968) (“The intention as the whole origin and pre-history of an action—almost to the present day this prejudice dominated moral praise, blame, judgment, and philosophy on earth.”).

The problem with pragmatic conceit is that, like strictly legal discourse, it denies human freedom. According to the pragmatic account, the deliberated act was not freely done. Rather, the subject was “bound” by the reasons developed in advance of the act. If true, this means that the act was not an act. Rather, it was just a mechanical, unfree “repetition” of its ground. The act was not free at all but entirely pathological, as Kant would say.<sup>156</sup>

At best, all that pragmatic reality achieves is to throw the true act back to a point earlier in time. When a pragmatist contemplates what to do and then does it in obedience to his earlier deliberations, no free human being was responsible for this so-called act. Rather, the “reasons” are to blame. The pragmatist who blames his reasons for his act is simply trying to avoid responsibility—to win acquittal before the superegoic court. But, as we have seen, the pragmatist’s unseemly whining and finger pointing at his so-called reasons can never win him an acquittal. The pragmatist who pins the tail of blame on the donkey of reason slanders his own freedom by such behavior. As Shakespeare put it:

This is the excellent foppery of the world, that, when we are sick in fortune,—often the surfeit of our own behaviour,—we make guilty

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<sup>156</sup> See CRITIQUE OF PRACTICAL REASON, *supra* note 37, at 48. Kant suggests that the very existence of ethics depends on our finite natures—our inability to sustain an immediate relation to God:

But instead of the conflict that the moral disposition has now to carry on with the inclinations, . . . *God and eternity* . . . would stand unceasingly *before our eyes* . . . Transgression of the law, would, no doubt, be avoided. . . . but the mental *disposition*, from which actions ought to proceed, cannot be infused by any command, and in this case the spur of action is ever active and *external*, so that reason has no need to exert itself in order to gather strength to resist the inclinations by a lively representation of the dignity of the law: hence most of the actions that conformed to the law would be done from fear, a few only from hope, and none at all from duty, and the moral worth of actions . . . would cease to exist. As long as the nature of man remains what it is, his conduct would thus be changed into mere mechanism, in which, as in a puppet show, everything would *gesticulate* well, but there would be *no life* in the figures. Now, when it is quite otherwise with us, when with all the effort of our reason we have only a very obscure and doubtful view into the future, when the Governor of the world allows us only to conjecture His existence and His majesty, not to behold them or prove them clearly; and, on the other hand, the moral law within us, without promising or threatening anything with certainty, demands of us disinterested respect; and only when this respect has become active and dominant does it allow us by means of it a prospect into the world of the supersensible, and then only with weak glances; all this being so, there is room for true moral disposition, immediately devoted to the law, and a rational creature can become worthy of sharing in the *summum bonum* that corresponds to the worth of his person and not merely to his actions. Thus what the study of nature and of man teaches us sufficiently elsewhere may well be true here also; that the unsearchable wisdom by which we exist is not less worthy of admiration in what it has denied than in what it has granted.

*Id.* at 175-76. See also ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 325 (attributing the same point to Malebranche).

of our disasters the sun, the moon, and the stars. . . .<sup>157</sup>

A pragmatist can no more blame her reasons for the act than the traitor can blame the stars. The fault, however, is not in the stars.

In pragmatic philosophy, the act is not the product of reason. Rather, the act occurs in the development of the reasons. The adoption of reasons was the irrational, unconscious act. Having “acted” by formulating reasons, the pragmatic subject surrenders her freedom to these reasons, goes to sleep, as it were, and proceeds mechanically.<sup>158</sup> Reason therefore is made to take the blame.

Pragmatism, the illusion that we can follow our reasons, therefore can be seen as a hatred of freedom and dread of responsibility. In short, it is just another version of superegoic law. Like the superego, the conceit of pragmatic intentionality presupposes the possibility that it can fill the legal universe and know with certainty its own consequences.

In truth, whether the pragmatist likes it or not, the adoption of reasons was an act, but following the reasons was yet another. As Nietzsche put it:

everything about [action] that is intentional, everything about it that can be seen, known, “conscious,” still belongs to its surface and skin—which, like every skin, betrays something but *conceals* even more. In short . . . intention is merely a sign and symptom that still requires interpretation. . . .<sup>159</sup>

Even upon careful deliberation, the subject was indeed free to ignore the reasons developed earlier. Having deliberated, the subject can pause and change her mind at any time. Indeed, given the fact that the subject’s act exceeds the prior symbolic order, the pragmatic act must likewise exceed the prior reasons. The act is always overdetermined. The pragmatist can never list *all* the reasons that truly caused the act.

From the above account, it should be clear that the myth of the deliberative act presupposes a subject with no unconscious. Such a subject supposes herself to be fully present, fully transparent to herself. She is successfully self-identical. She knows why she acted. There is no gap between the Real and the Symbolic, in such a subject.

Self-identity, however, is an impossible position. Subjectivity is precisely the *very failure* of self-identity—it is distance from the symbolic order and likewise distance from the Real. Hence, the myth of the deliberative act—and of the self-identity of the subject—is what

<sup>157</sup> WILLIAM SHAKESPEARE, KING LEAR act 1, § 2.

<sup>158</sup> In Shakespearean terms:

Nay, if we talk of reason,  
Let’s shut the gates and sleep: manhood and honour  
Should have harehearts, would they but fat their thoughts  
With this cramm’d reason.

WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 2, § 2.

<sup>159</sup> NIETZSCHE, *supra* note 155, § 32.

psychoanalysis calls a fantasy. If deliberation validly captures the reality of the situation, there is no subject in the first place. The “thing that thinks” is left out. We have only the poorer, passive, impotent half of the *Cogito*.

In short, the subject is not licensed to warrant in advance that an act is purely caused by deliberative reason. The act occurs for whatever reason it occurs (not necessarily the reasons we put forth).<sup>160</sup> Our account of the matter is not necessarily its truth. Indeed, there is always a surplus beyond the reasons stated, no matter how exhaustive the reasoning process has been. The act is doomed to be traumatic. The act becomes truly symbolized only after the fact.<sup>161</sup>

#### EFFECT AND CAUSE

Causation may be defined as *necessary temporal sequence*.<sup>162</sup> Supposedly, cause precedes effect. Yet, in the above account, the act (effect) was first and its cause (as narrated) a distant second.

Yet cause can simultaneously precede effect,, thanks to the future anterior grammar of performativity.<sup>163</sup> The act was a performance—an unconscious act that presupposed a totalizing presence. Coeval and synchronous to the act was the *objet petit a*—that which caused the act. The narration excusing the act was likewise a performance. It gave content to the *objet petit a*. But this does not mean that narration is unstructured. Žižek puts it this way:

“[P]erformativity” in no way designates the power of freely

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<sup>160</sup> Accord RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 149-50 (1990).

<sup>161</sup> Thus, Žižek describes the *noir* philosopher Blaise Pascal as putting forth the proposition that ideology always implies irrational obedience. The network of reasons masks the unbearable fact that law is always “positive”—grounded only in its own act of enunciation. Argumentation is for the crowd of ordinary people who need the illusion that there are good and proper reasons for the orders they must obey. The true secret, known only to the elite, is that the dogma of power is grounded only in itself. See ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 175. See also Žižek, *Obscene Supplement*, *supra* note 47, at 76:

[O]ne should reserve the Enlightenment notion according to which, to the ordinary people unable to grasp the need for their religious belief, the truth of their religion has to be asserted in an authoritarian way, as a dogma that needs no arguments, while the enlightened elite is able to obey upon being convinced by good reasons. . . . the uncanny truth is rather that argumentation is for the crowd of “ordinary people” who need the illusion that there are good and proper reasons for the order that they must obey, while the true secret known only to the elites is that the dogma of power is grounded only in itself. . . . Law is grounded only in its own act of enunciation.

*Id.* Žižek also suggests that reasons to do something are always at least minimally retroactively posited by the act of decision they ground. Only once we decide to believe do reasons become convincing to us, not vice versa. See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 19.

<sup>162</sup> CRITIQUE OF PURE REASON, *supra* note 9, at 93.

<sup>163</sup> See JACQUES LACAN, ECRITS: A SELECTION 86 (Alan Sheridan trans., 1977) (“what I shall have been for what I am in the process of becoming”).

“creating” the designated content (“words mean what we want them to mean,” etc.): the “quilting” [performativity] only structures the material which is found, externally imposed. The act of naming is “performative” only and precisely insofar as *it is always-already part of the definition of the signified content*.<sup>164</sup>

In other words, narrative is not radically separate from what it describes. Here at last we arrive at the conservative payoff of this essay. Legal reasoning is always implicated in the judicial act. The former enjoys a unity with the latter. Recall that the act was a real event, an omnipresence. If the act was an omnipresence, then “reason” must have been in the omnipresence. If reason had been excluded, we would have before us less than an omnipresence.

In the act, the subject “*posits himself as his own cause . . .*”<sup>165</sup> This is, incidentally, the secret message of the Coase theorem. Ronald Coase’s famous article, *The Problem of Social Cost*,<sup>166</sup> is usually cited for the proposition that, in a world with no transaction costs (i.e., the Lacanian Real), parties will bargain to reallocate legal entitlements efficiently.<sup>167</sup> But another way of making the same point is that cause is always “positive”—that is, a legal question. As such, effect always precedes cause; cause can only be assigned after the fact in a judgment.<sup>168</sup> Hence, if there are any lingering doubts about the conservative credentials of this article, it may be noted that retroactively posited cause is precisely the point of the Coase Theorem and hence of Law and Economics generally.

Even though causal narrative (i.e., law) is retroactively performed, it nevertheless captures something synchronous with the act. Narrative may be *post hoc*, but it describes cause, which is coterminous with *and* also precedes the act. In the narration, then, we have the past, present, and future of the act.<sup>169</sup> In short, the narration *totalizes* the act. It

<sup>164</sup> ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 41, at 150 (footnotes omitted).

<sup>165</sup> ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 375.

<sup>166</sup> 3 J. L. & ECON. 1 (1960).

<sup>167</sup> Or, more simply, in a universe that instantly corrects all legal errors, legal errors do not matter. We are setting to one side the good point that no subjects exist at all in the Lacanian real.

<sup>168</sup> In setting forth a parable about a man who builds a house with a chimney and a man who builds a wall such that the smoke does not draw correctly from the chimney (filling the house with smoke), Coase considers who is to “blame”:

The answer seems fairly clear. The smoke nuisance was caused both by the man who built the wall *and* by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall, there would have been no smoke nuisance without the fire. Eliminate the wall *or* the fire and the smoke nuisance would disappear.

*Id.* at 13.

<sup>169</sup> As Robert Cover saw:

The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative—history, fiction, tragedy, comedy—are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the

renders the act visible in the symbolic order and also historicizes it, by attributing diachrony to what is actually synchrony. Narration symbolizes the act—it is “recollection,” or retrieval of repressed material from the unconscious.<sup>170</sup> Narration retroactively separates out cause which, in the narrative, precedes the act.

But narration is itself yet another act and therefore never successful. The cause of action can never entirely be stated. Something else is always left out of the pleading, which must always be dismissed under Rule 12(b)(6) of the Superegoic Rules of Civil Procedure, because meaning—a mere fantasy structure of totality—forever eludes us. Superegoic law recognizes no cause of action. Demurrer is its only procedure.<sup>171</sup>

Instead, action can only be interpreted. In this interpretation, the action is made subject to a rule—a preexisting law.<sup>172</sup> The free act is fully symbolized and hence retroactively turns into the opposite of what it was—unfree and subject to the rule of law.<sup>173</sup>

An interpretation might be wrong. But, on the other hand, it might be right. How can we tell? Alas, whatever we decide is itself an interpretation—of the interpretation. We can never know the past directly. It becomes known to us as it is being transformed in an interpretive performance. Hence the future anterior grammar of interpretation. Interpretation always intervenes in—wades into and pervades—the object. The object observed is not unaffected by the observation. Yet only through the transformation of the object in narration does it become visible to us. We are like the Tyrannosaurus Rex. We can only see what moves. If a thing does not move, we are unable to interpret it.<sup>174</sup> That which is not interpreted is simply forgotten and truly becomes “the past.” The past we actually know is

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precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the “is” and the “ought,” but the “is,” the “ought,” and the “what might be.” Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

Cover, *supra* note 100, at 10. From a Lacanian perspective, these sentiments are imprecise. A state of affairs is never real but always imagined, and is not distinguishable from the narrative itself. Furthermore, the “ought” refers to the “in-itself” or potential of a thing. As such, it is in the set of “what might be”—along with externally produced injustices upon the thing, or the “ought not.” Finally, the collision of simplified states would appear to be what Lacan would call “trauma,” but Cover is most vague on what he means. Nevertheless, he does seem to portray narrative as an omnipresence in which past, present and future are united.

<sup>170</sup> See HEGEL’S PHILOSOPHY OF MIND § 451 (William Wallace & A.V. Miller trans., 1971); ŽIŽEK, ABYSS OF FREEDOM, *supra* note 26, at 37-38.

<sup>171</sup> This is the point of Schroeder & Carlson, *supra* note 97.

<sup>172</sup> CRITIQUE OF PURE REASON, *supra* note 9, at 71, 134.

<sup>173</sup> ŽIŽEK, ENJOYMENT AS A POLITICAL FACTOR, *supra* note 19, at 188.

<sup>174</sup> Here I extrapolate from the movie version of *Jurassic Park*—the source of most of what we know about the dinosaurs.



always present.

These observations are by no means designed to condemn the enterprise of finding correct legal answers. Quite the opposite should be apparent. Meaning is always elusive but nevertheless “real.” Interpretation of an act becomes meaning when the interpreter erases herself entirely in her act of interpretation.<sup>175</sup> In Kantian terms, the interpreter has a duty to interpret the object correctly. This requires, however, the perfect moral autonomy of the interpreter. In the pose of correct interpretation, the interpreter banishes all pathological criteria which might distort the object interpreted. The non-pathological self must let the thing speak for itself. It is the duty of the interpreter to become the vanishing mediator who makes the object perfectly transparent to the consumer of the interpretation. When the interpreter perfectly performs the moral imperative incident to interpretation, we have reached the realm of meaning.<sup>176</sup>

Why is self-erasure necessary? Žižek suggests: “Because a symbolic system has by definition the character of *totality*: there is meaning only if *everything* has meaning.”<sup>177</sup> In the realm of meaning, there is no room for subjective caprice or freedom. Right answers are possible only if human freedom erases itself. The very duty of the interpreter is to efface herself entirely—so that superegoic law can speak without distortion. In meaning, the subject finally comports with what superegoic law demands.<sup>178</sup>

Attainment of meaning requires perfect self-transparency. Yet a subject can never be sure she is perfectly transparent.<sup>179</sup> This point makes meaning into an undecidable question. But meaning is nevertheless a moment with which we cannot dispense.<sup>180</sup> Meaning can be glimpsed in the very structure of subjectivity. If the subject is the gap between the Symbolic and the Real or between the moral and the pathological, then Kantian autonomy is a constituent<sup>181</sup> element of the

<sup>175</sup> See Schroeder, *Midas Touch*, *supra* note 128, at 762 (“This temporary quilting of signification into meaning, which requires a willful forgetting of the shifting contingency of signification, is necessary for speech.”).

<sup>176</sup> Cf. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 13-14 (Mary Gregor trans., 1998) (“Now, an action from duty is to put aside entirely the influence of inclination and with it every object of the will; hence there is left from the will nothing that could determine it except . . . the law. . .”).

<sup>177</sup> ŽIŽEK, *ENJOYMENT AS A POLITICAL FACTOR*, *supra* note 19, at 215.

<sup>178</sup> This is with the proviso that the superego demands contradictory things. It says *both* “erase yourself” and “enjoy yourself.”

<sup>179</sup> See ŽIŽEK, *TICKLISH SUBJECT*, *supra* note 24, at 365 (“[W]e never know if the determinate content that accounts for the specificity of our acts is the right one, that is, if we have actually acted in accordance with the Law and have not been guided by some hidden pathological motives.”).

<sup>180</sup> See Cover, *supra* note 100, at 15 (“The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary.”).

<sup>181</sup> “Constitution” is a swear word in Kantian philosophy. I use it here nevertheless, but I

self. It is one of the poles between which the tent of self is pitched. One cannot be suspended between the poles if the poles do not exist.

Meaning is simply the exaltation of the autonomy pole at the total expense of the pathological pole. Meaning emerges when the interpreter exorcises the pathological and allows only the non-pathological, “autonomous” side to speak. When this occurs, signifier coincides with signified. The signifier thus becomes a “sign”—*i.e.*, a successful correlation.<sup>182</sup>

Meaning is achieved at the precise moment the subject interprets. Interpretation is a Real act. At this moment, the subject is unconscious. The polar opposites between which the subject resides have collapsed. The subject contracts infinitely, and the symbolic order expands accordingly:

The Word is a *contraction in the guise of its very opposite, of an expansion*; that is, in pronouncing a word, the subject contracts his being *outside* himself, he “coagulates” the core of his being in an external *sign*. In the (verbal) sign I *find myself outside myself*. . . .<sup>183</sup>

In this oracular moment, when the subject goes blank, interpretation becomes meaning. Alas, it is only a moment—a glimpse, a *jouissance*. The act of interpretation is a traumatic event beyond the symbolic realm which, in the end, cannot bear the phenomenon of “meaning.”

The unity that acts—which pole is it? Do we have corrupt, pathological interpretation, driven by selfish concerns? Or do we have an *aphanisis*—the genuine vanishing mediator that allows the thing to speak for itself?<sup>184</sup> This we must always interpret for ourselves. The key point is: interpretation rightly claims a ground of reason. Reason can never be entirely purged by pathology. But, likewise, the obverse is true: reason can never entirely purge pathology.<sup>185</sup>

It is this last point that justifies this Article’s conservative credentials. Because meaning is “necessary,” the rule of law is vindicated from the assault by the romantic utopian left. Granted, we never know completely whether the interpretation is the object’s true meaning. But at least we know that the interpretation logically captures

believe that the moral side of personality helps to “constitute” the subject. Yet because we can never experience this side directly, we can only postulate its existence. This postulation therefore “regulates” our empirical inquiry into the constitution of the subject. See CRITIQUE OF PURE REASON, *supra* note 9, at 287-88.

<sup>182</sup> On sign versus signifier, see KATHLEEN DOW MAGNUS, HEGEL AND THE SYMBOLIC MEDIATION OF SPIRIT 13-52 (2001).

<sup>183</sup> ŽIŽEK, ABYSS OF FREEDOM, *supra* note 26, at 38.

<sup>184</sup> See LACAN, *supra* note 4, at 210; ŽIŽEK, PLAGUE OF FANTASIES, *supra* note 32, at 175 (defining *aphanisis* as the self-erasure of the subject when she approaches her fantasy too closely).

<sup>185</sup> See KANT, *supra* note 176, at 19 (“[W]e can never, even by the most strenuous self-examination, get entirely behind our covert incentives . . . .”); *id.* at 56 (“[T]he human being cannot claim to cognize what he is in himself through the cognizance he has by inner sensation.”).

something from the object—some part of its meaning.

To summarize our findings of fact about the cause of action, the cause can only be pleaded (symbolized) after the act. There must be a case or controversy before we are admitted to the court of the big Other. What we, in our narrative mode, *describe* as cause is actually a *performance*. We are not merely describing the cause but also creating it as we describe it. The real substance of the cause we describe in our narrative is a non-Thing—the *objet petit a*.<sup>186</sup> It is the thing that would render us whole. The subject of desire acts in pursuit of wholeness, which it glimpses in every act. Hence, the act is *caused* by the *objet petit a*. The act never entirely precedes cause. Indeed, cause is just as much in the Real as is its effect. They “coincide” in the real and are therefore synchronous. Only retroactively do we distinguish between cause and effect, separating them temporally. Hence, cause is the act itself. Yet every attempt to articulate the cause is itself an effect, whose cause must be narrated. This is the chain of cause-and-effect—the third of Kant’s four antinomies.<sup>187</sup> The chain exists only in the symbolic order. As such, each cause and effect must be plucked from the realm of the Real and must be given body in words. Shakespeare, as always, puts it nicely:

Lovers and madmen have such seething brains,  
Such shaping fantasies, that apprehend  
More than cool reason ever comprehends.  
The lunatic, the lover, and the poet  
Are of imagination all compact:—

...

The poet’s eye, in a fine frenzy rolling,  
Doth glance from heaven and earth, from earth to heaven  
And, as imagination bodies forth  
The forms of things unknown, the poet’s pen  
Turns them to shapes, and gives to airy nothing  
A local habitation and a name.  
Such tricks hath strong imagination,  
That, if it would but apprehend some joy,  
It comprehends some bringer of that joy;  
Or in the night, imagining some fear,  
How easy is a bush supposed a bear!<sup>188</sup>

Interpreters of acts are truly madmen with seething brains who apprehend more than cool reason can comprehend. Causes and reasons

<sup>186</sup> See ŽIŽEK, TARRYING WITH THE NEGATIVE, *supra* note 41, at 31.

<sup>187</sup> CRITIQUE OF PURE REASON, *supra* note 9, at 253-56 (stating either every cause is itself caused or the chain of causes is caused by an uncaused free thing).

<sup>188</sup> WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT’S DREAM act 5, § 1.

are the product of poets' pens, who give names to airy nothing.<sup>189</sup> They "comprehend" their earlier enjoyment and therefore apprehend that "bringer"—retroactively posited cause.<sup>190</sup>

Yet the poet's words never "signify." The place of the signified can only be filled with other signifiers, dooming us to a never-ending chain of cause-and-effect. A cosmological<sup>191</sup> move is needed to totalize the chain. Cosmological solutions exceed the realm of reason, Kant teaches.<sup>192</sup> This "uncaused" thing is precisely the "totalizing" human subject in her freedom.

#### LEGAL OPINION

We are now in a position to complete our thesis quickly and efficiently. In law, a judge "acts" and then writes an opinion after the fact. The act is unthinking. The judicial opinion is a narration of the act. In the judicial decision, we learn that pre-existing law caused the judicial act.

In this pose, the judge is an oracle. She goes blank and acts. In the real, where the act resides, the act has a synchronous unity with its cause. At this moment, the judge has erased her subjectivity. Her act is legal precisely because she renounced her freedom and simply *repeated* what law demands. Nothing original inheres in the judicial act. The judge has had what Kant would call an "intellectual intuition."<sup>193</sup>

Upon awaking from her trance, the judge in her judicial opinion

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<sup>189</sup> Cf. FINK, *supra* note 1, at 41 ("a signifier marks the cancellation of what it signifies").

<sup>190</sup> On the distinction between the madman's apprehension and the subsequent comprehensive narrative, Žižek suggests that comprehension is retained apprehension over time.

[T]ime itself and the transcendental imagination in its synthetic activity of auto-affectation are not directly the same, since [transcendental imagination] already exerts a *violence* on the pure temporal dispersal—without this violence, reality itself would not retain its minimal ontological consistency. Transcendental schematism thus designates the procedure by which, already at the level of pre-discursive, purely intuitive temporal experience, the pure pre-synthetic temporal dispersal is violently subordinated to the synthetic activity of the subject, whose definitive form is the application of the discursive categories of Understanding to intuition. Schematism forges our temporal experience into a homogeneous linear succession in which past and future are subordinated to the present (which retains the past and announces the future): what transcendental schematism prevents us from thinking is precisely the paradox of *creatio ex nihilo*.

ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 43.

<sup>191</sup> A cosmological solution is a principle of totality of a series of conditions or properties, as existing in itself and given in an object. See CRITIQUE OF PURE REASON, *supra* note 9, at 231, 288.

<sup>192</sup> See *id.* at 238 (stating cosmological ideas are directed solely to the unconditioned among phenomena); *id.* at 288 (maintaining cosmological propositions said to be "constitutive"); *id.* at 300 (asserting cosmological freedom is not subordinated to another cause determining it in time).

<sup>193</sup> CRITIQUE OF PURE REASON, *supra* note 9, at 163-64.

explains the mystery of her act to us. In this opinion can be found the past, present, and future of law. (1) Law preceded the act. For this reason, the judge's opinion is objectively correct. (2) Law was present in the act. The judge acted as transparent vanishing mediator of the law. Through the judge, it was the law, not the judge, who acted. (3) Law arrives too late—after the act. The judge described the act in her after-the-fact narrative of what happened. By then, law has vanished, shattered by the trauma of judicial decision.

In writing her opinion, the judge announces that her decision was caused by the law. But this is only half-true. Judicial decision is traumatic. It disrupts the prior law. The subsequent judicial opinion ostensibly “reports” the cause of action, but it actually always reconstitutes it.<sup>194</sup> Instead of simply applying a universal rule in a unique concrete situation, the judge re-invents the universal rule in light of each unique concrete situation.<sup>195</sup>

The need to reconstitute the symbolic order after the trauma of a judicial decision is the inescapable truth of jurisprudence. A judicial act always exceeds the superegoic law and, therefore, must always be reversed on appeal. The judicial opinion, however, attempts to legislate away grounds for appeal by reconstituting the operative law in order to create the appearance that the judicial act accorded with the law.

This attempt to evade appeal by rewriting the law after the fact must always fail. If the losing side appeals, the appellate division of the superegoic court is bound to find that the judge has “acted”—*i.e.*, disrupted the pre-existing symbolic order. Needless to say, superegoic appellate procedure has but one result: “reversed!” Nor does the appeal end the matter. The judicial acts of both the trial court and the appellate panel are both constantly and repetitively appealed “as of right”<sup>196</sup> to the Supreme Court of the big Other. The common law process at work in the big Other ultimately explains (symbolizes) the prior actions. The symbolic order is constantly reworked to account for and to legalize (or perhaps condemn) the earlier judicial acts.<sup>197</sup>

Against this background, it is possible to understand precisely what justice is. Justice is the missing part whose absence makes us feel castrated. It is the *objet petit a*. As such it is entirely negative. True,

<sup>194</sup> See ŽIŽEK, ENJOYMENT AS A POLITICAL FACTOR, *supra* note 19, at 215.

<sup>195</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 365.

<sup>196</sup> See N.Y. C.P.L.R. 5301 (2002). In the court of the big Other, appeals always involve constitutional questions and are therefore “as of right” and never merely “by permission.” N.Y. C.P.L.R. 5302.

<sup>197</sup> For this reason, Pierre Schlag is wrong in his excoriations of legal scholarship as useless, “pretend” law. See, *e.g.*, PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 138 (1996). Judges are not “in charge” of the common law. Culture is. To be sure, judges are especially efficacious in shaping its content, but legal scholars participate as well. Surely, many examples could be found in which the pressure of public opinion has led to changes in the common law.

we turn the wrongs against us to shapes, and give to airy justice a local habitation and a name. But these embodied examples of justice always exceed and therefore fail to capture the object of justice. No legal victory would make us whole. Castration is our fate. Justice is impossible to achieve.<sup>198</sup>

This is the lesson Portia tries to teach Shylock in *The Merchant of Venice*. Shylock demands justice from the “strict court of Venice,” but the court refuses to give it. It renders only twice blessed mercy. Its mode of doing so is by reformulating the symbolic order, so that, if Shylock may feed his revenge with a pound of flesh, he may not shed a drop of blood in obtaining it. This “surprise” content of the law is revealed only retroactively to redeem Antonio from superegoic law, before which he was obviously guilty.

Because justice is not a positive thing but the mere absence of the Thing, justice is quite opaque to general definition. Any definition of justice occurs only by use of signifiers, yet justice is quite beyond signification. So conceived, justice must always fail.<sup>199</sup> As Renata Salecl puts it:

In terms of Lacanian psychoanalysis, the difference between law and justice is that between *symbolic knowledge* and *act as Real*. Justice is a decision, an act of judgement, which cannot be wholly founded in law. The judge must rest his judgement on the knowledge of law, yet the act of just decision is never a result of a simple application of the law—there is always a moment of singularity and contingency which clings to the act. The gap separating justice from law is thus unbridgeable: justice is done with reference to the domain of law, yet in its exercise it transgresses it.<sup>200</sup>

In this account, justice is unspeakable and quite beyond any known legal precinct—even a transgression against law. The only justice the law permits is the purely negative form of it. Any attempt to provide content to the name “justice” is strictly prohibited. One might say that law prohibits justice in its impossibility. Justice is in the quantum state between the symbolic concepts of right and wrong. It can never be quite captured by or reduced to legal concepts. Justice can exist only in the lawless interstices between these concepts.

The internal gaps within communication—Derridean archè-writing—prevent language from being a closed system. Meaning

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<sup>198</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 233 (“[T]he moment a political movement pretends fully to realize Justice, to translate it into an actual state of things, to pass from the spectral *démocratie à venir* to ‘actual democracy,’ we are in totalitarian catastrophe—in Kantian terms, the Sublime changes into the Monstrous.”).

<sup>199</sup> See Derrida, *supra* note 99, at 24-29; Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 195 (1996); Schroeder, *Eumenides*, *supra* note 89; ŽIŽEK, METASTASES OF ENJOYMENT, *supra* note 72, at 196-97.

<sup>200</sup> SALECL, *supra* note 132, at 97.

implies a closed system, yet, in a closed system, all meaning, paradoxically, would disappear. According to Žižek:

What circulates between subjects in symbolic communication is of course ultimately the lack, absence itself, and it is this absence that opens the space for “positive” meaning to constitute itself. But all these are paradoxes immanent to the field of communication *qua* meaning: the very signifier of nonsense, the “signifier without signified,” is the condition of the possibility of the meaning of all the other signifiers, i.e., we must never forget that the “nonsense” with which we are here concerned is strictly internal to the field of meaning, that it “truncates” it from within.<sup>201</sup>

In this sense, the Real is the limit within Law itself that prevents law from abolishing (or achieving) justice. Justice, as this void, participates the “ethics of the Real,” which is

the moral Law in its impenetrable aspect, as an agency that arouses anxiety by addressing me with the empty, tautological and, for that very reason, enigmatic injunction “Do your duty!”, leaving it to me to translate this injunction into a determinate moral obligation—I, the moral subject, remain forever plagued by uncertainty, since the moral Law provides no guarantee that I “got it right”. . . .<sup>202</sup>

This gap “between knowledge and decision, between the chain of reasons and the act which resolves the dilemma,” is the “ultimate deadlock” of modern times.<sup>203</sup> This gap implies that doing justice is always an act of “sublimation:”—in sublimation, the judge elevates a (non)-object to the dignity of the Thing.

The judge always practices the “ethics of the Real,” and this means there is something paradoxical about the act of judging. The judge erases herself so that law can speak through her without subjective distortion. In erasure, the judge submits to law. But law likewise requires subjectivity in general. Otherwise, law can never appear, and can never condemn anything. Therefore, self-erasure is impossible and,

<sup>201</sup> ŽIŽEK, *LOOKING AWRY*, *supra* note 30, at 131-32 (footnotes omitted).

<sup>202</sup> ŽIŽEK, *INDIVISIBLE REMAINDER*, *supra* note 30, at 168-69. See *CRITIQUE OF PURE REASON*, *supra* note 9, at 310:

The real morality of actions—their merit or demerit, and even that of our own conduct, is completely unknown to us. Our estimates can relate only to their empirical character. How much is the result of the action of free-will, how much is to be ascribed to nature and to blameless error, or to a happy constitution of temperament . . . no one can discover, nor, for this reason, determine with perfect justice.

*Id.* See also ŽIŽEK, *TARRYING WITH THE NEGATIVE*, *supra* note 41, at 70 (describing how the Kantian subject is “forever tortured by the possibility that his ethical act, although *in accordance with* duty, was not accomplished *for the sake of* duty itself . . .”); ŽIŽEK, *PLAGUE OF FANTASIES*, *supra* note 32, at 221 (stating that the ethical subject is the only guarantor of the universality of positive moral norms). “Anxiety” is defined as getting too close to the Real. See ŽIŽEK, *LOOKING AWRY*, *supra* note 30, at 8, 146. Hence, any call of the moral is by definition ridden with anxiety.

<sup>203</sup> ŽIŽEK, *TICKLISH SUBJECT*, *supra* note 24, at 337.

furthermore, prohibited. It is beyond law. Yet it is covertly required. Furthermore, when the judge acts, the erasure is paradoxical. The erased will of the judge is not erased but has positive (extra-legal) content. Here we have the crucial Hegelian point that the erased nothing is, after all, something.<sup>204</sup> This extra-legal excess of self-erasure is the “Freudian death drive,” and it describes the ultimate moral act.<sup>205</sup> In the moral act, the symbolic order is suspended and the judge is on her own. Hence, morality is strictly illegal. Yet it is only through the judge’s moral illegality that law can ever appear in its undistorted form.

The judge’s dilemma is this. She knows there *is* a law. But she never knows what the law is. A gap separates the law from its positive incarnations. The judge is thus *a priori*, in her very existence, guilty: guilty without knowing what she is guilty of, infringing the law without knowing its exact regulations.<sup>206</sup> A judge who acts cannot blame the law as her reason but must take total responsibility for what she does.<sup>207</sup> This is law’s traumatic dimension.

#### GRAPHING LEGAL REASON

Before concluding, I would like to borrow from one of Lacan’s graphic illustrations of the retroactivity of interpretation.<sup>208</sup>

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<sup>204</sup> See SCIENCE OF LOGIC, *supra* note 22, at 119:

Something *preserves* itself in the negative of its determinate being [*Nichtdasein*]; it is essentially *one* with it and essentially *not one* with it. It stands . . . in a *relation* to its otherness . . . . The otherness is at once contained in it and also still *separate* from it; it is *being-for-other*.

See *id.* at 102 (asserting “but a negative nothing is an affirmative something”).

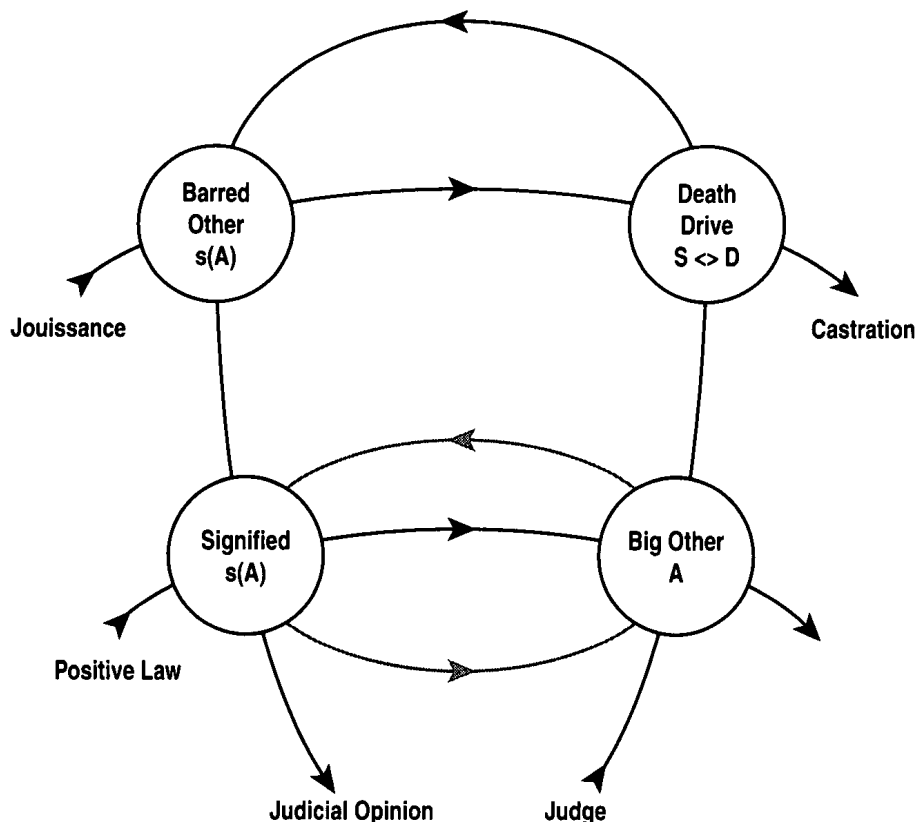
<sup>205</sup> ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 263. See generally Schroeder & Carlson, *supra* note 61.

<sup>206</sup> See ŽIŽEK, TICKLISH SUBJECT, *supra* note 24, at 265; COPJEC, READ MY DESIRE, *supra* note 5, at xv (“Guilt, our sure sense that we have transgressed the law, is the only phenomenal form in which the law makes itself known to us.”).

<sup>207</sup> Robert Cover reaches a like conclusion but on much different grounds. For Cover, there is no one law. There are many laws. When the judge asserts American positive law, the judge must take responsibility. Nevertheless, when the judge is within the community of the litigants, Cover implies that the judge *can* claim to be following the law, contrary to what has been said here. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

<sup>208</sup> This graph is described in Mladen Dolar, *The Object Voice*, in SIC 1: GAZE AND VOICE AS LOVE OBJECTS 7 (Renata Salecl & Slavoj Žižek eds. 1996); ŽIŽEK, SUBLIME OBJECT, *supra* note 27, at 101-29.





In this graph, time flows from left to right, but legal reasoning proceeds backward. We start with the judge who “acts” by deciding. The judicial act proceeds upward and encounters the big Other (*A*). This node is a totality, representing the fact that, in the act, the judge is oblivious and unconscious as she stands over against the correlative law. The judge has erased herself and, in her transparency, encounters the realm of right answers.

From this first node, the judge proceeds backwards to the bottom left node—the node of the signified (*s(A)*). What this represents is a traversing of the symbolic order. In effect, the judge, in her trance listens to legal argument from the litigants. What hits the judge is a stream of syllables—nonsensical syllables, until the argument is finished. When finished, the judge “understands” the argument. What seemed at the start of the argument as nonsense syllables now retroactively makes sense. The syllables were simply parts of a sentence that made no sense until the sentence was completed. Once completed, the syllables retroactively “signified” some legal object. Because a “signified” can exist only in a correlative universe, and because correlation is the hallmark of fantasy, we can say that

signification is dominated by the fantasy of right answers.<sup>209</sup>

Having now understood the argument, the judge, in her erasure, produces the right answer in her judicial opinion. This is how legal reasoning works at the Dworkinian level—the level at which judges do not suffer from the distortions of the unconscious.

But psychoanalysis adds an “illocutionary” aspect to judging, which is shown in the upper half of the graph. At the bottom right node, the judge, in her erasure, proceeds to the bottom left node of  $s(A)$ . But, instead of proceeding from  $A$  to  $s(A)$ , the judge’s retroactive reasoning process is portrayed as a Lacanian act. Entering the realm of illocutionary force, the judge’s act proceeds to the third node of drive ( $\exists \langle D \rangle$ ). The  $\exists \sigma\alpha\nu\delta\sigma$  for the Lacanian split subject. This is the subject who knows she is castrated and can never be whole. Nevertheless, she strives for wholeness anyway. She “acts,” knowing the act will be futile. This is the subject caught up in the death drive.

Driven to judge, she proceeds retroactively to the upper right node of  $s(\%)$ —the “barred Autre.” It is here that the thrust of this essay can be located. In effect, the judge is driven to act. In the *jouissance* of acting, the symbolic order is obliterated, producing the barred Autre or Other. The barred Other on the upper left is the truth of the bottom left node of the signified. In it, we see that the big Other (like the subject) is organized around a kernel of the Real which can never be symbolized—a trauma.<sup>210</sup> Hence, while the judge produces “right answers” in the lower half of the graph, the judge obliterates the very possibility of right answers in the unconscious upper portion of the graph.

Not only does the judge’s *jouissance* disrupt the big Other, but the big Other likewise disrupts the judge’s *jouissance*. *Jouissance* does not pass through the symbolic order unaffected. The act is a failure. It ends with castration. The judge in her act has not succeeded in capturing justice (*object petit a*). Nevertheless, at the end of the process we have a judicial opinion that purports to be the law but appears so only in a retroactive process that secretly rewrites the law. It is the judge who, in her act, made up the first node (the big Other). This big Other is reconstituted in the very act of the judge.

## CONCLUSION

The difficulty that American jurisprudence cannot solve is that law and liberty are ostensibly at war.<sup>211</sup> In Shakespearean terms, “Liberty

<sup>209</sup> See ŽIŽEK, *SUBLIME OBJECT*, *supra* note 27, at 123.

<sup>210</sup> *See id.* at 122.

<sup>211</sup> As Pierre Schlag emphasizes. *See* PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 11, 138 (1998).

plucks justice by the nose.”<sup>212</sup> In psychoanalytic theory, they are reconciled. With every free act, the law is traumatized. After-the-fact narration solves the trauma and changes the law. Because the law is dynamic and is the product of interpretation, the subject is both free *and* ruled by law. Law is not brittle but, like a reed, bends with the wind. But this is so only when law is spoken in the future anterior tense. As such, it is the solution to the traumatic dimension in law.

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<sup>212</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 1, § 3.

