

The Laconomics of Apples and Oranges: A Speculative Analysis of the Economic Concept of Commensurability

Jeanne L. Schroeder*

I. INTRODUCTION: AS COMPARED TO WHAT?

Much recent debate on the economic analysis of law has focused on “commensurability”—the proposition that all options can be compared by reference to a single metric—such as utility or money.¹ Legal economists² argue not only that we can, but that we should, compare alternatives and make choices based on commensuration. Indeed, neo-classical price theory holds that only choices made on the basis of commensurability are economically rational.³ Critics of this position argue that certain

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

1. See generally *Symposium: Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998). Matthew Adler suggests:

Roughly speaking, “incommensurability” means the absence of a scale or metric. But what, more precisely, nonmetricity involves can be fleshed out in a large number of different ways, as the existing philosophical and legal literature on incommensurability shows. . . . The incommensurability of options or choices might mean: (1) the *incomparability* of options or choices, such that no numerical ranking of the options in the order of their comparative worth is possible; (2) the failure of a particular kind of scale, such as a monetary scale or a consequentialist scale, to track the comparative worth of options; and (3) the fact that a *scaling procedure* (either a particular scaling procedure or any scaling procedure at all) is not the best procedure by which to choose among options.

The incommensurability of options or choices, in one sense, means their incomparability. Two options are incomparable if it is false that one option is better than the other . . . false that one is worse than the other, but also false that the two are equally good.

Matthew Adler, *Symposium: Law and Incommensurability: Introduction*, 146 U. PA. L. REV. 1169, 1170 (1998).

Different participants in this debate differ somewhat on their definitions of commensurability. Because I critique the basic philosophical assumptions underlying the commensurability-incommensurability antinomy, this Article will not offer a comprehensive account of the literature.

2. For simplicity, in this Article when I refer to law-and-economics and legal economists I am referring primarily to the strain that is based on neo-classical price theory most closely associated with Judge Richard Posner.

3. According to Ruth Chang, “Conventional wisdom has it that the comparability of alternatives is necessary for the possibility of justified choice. After all, if two items cannot be compared, what ground could there be for choosing one rather than the other.” Ruth Chang, *Comparison and the*

alternatives cannot or perhaps should not be ranked according to some single metric or lowest common denominator because no single metric can capture the rich diversity of values. Indeed, to even attempt such a utilitarian calculus is to diminish our humanity.

Unfortunately, as demonstrated by the symposium on *Law and Incommensurability* held at the University of Pennsylvania Law School in 1998, this has largely been a debate without dialogue. Both proponents and opponents of commensurability tend to assert that their position must be true because the presuppositions on which their opposition's position is based are self-evidently false. Consequently, the debate resembles an "is not," "is too" playground argument. Rather than making logical arguments derived from a set of first principles, both sides of the arguments rely primarily on empirical examples that supposedly disprove the tenets of their opponent.⁴

The proponents of both sides of the argument do agree, however, that commensurability and incommensurability form an either-or choice. Accordingly, they presume that the truth of their own side can be established by pointing out the flaws of the other side. The debate is owned, but only temporarily, by whoever makes the last argument. Both sides are, therefore, ultimately equally unconvincing. We have before us a classic Kantian antinomy based on apagogic reasoning.

The legal economist temporarily persuades by asserting that, despite the denials of incommensurabilists, they in fact commensurate alternatives every time they make a choice. The cliché "you can't compare apples and oranges" may be popular, but it is disproved every time one goes to the grocery store and chooses to buy—and pay for—an orange rather than an apple. The economist's romantic opponent temporarily regains the field by arguing that the mere fact that we can and do make choices does not mean that we equate alternatives for all, or even most, purposes. It would be a culinary disaster if "Mom" tried to substitute oranges for apples in her traditional pie. The economist might counter that the fact that one can determine that the "apple" pie recipe made with oranges is inferior to that made with apple shows, once again, that one is commensurating the alternatives (*i.e.* comparing the two via some specific metric like tastiness,

Justification of Choice, 146 U. PA. L. REV. 1569, 1569 (1998). In Matthew Adler's words, "comparability is a necessary condition for justified choice. On this view, *justified choice between incomparables is impossible* . . ." Adler, *supra* note 1, at 1172. Adler considers comparability to be one of the possible definitions of commensurability found in the literature. *Id.* at 1170.

4. A similar point has been made by Donald Regan even though he takes a strong commensurabilist position ("the incomparabilist's strongest argument is still the exhibition of examples where making a comparison seems virtually impossible"). Donald Regan, *Value, Comparability, and Choice*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASONING 129, 137 (Ruth Chang ed., 1997) [hereinafter INCOMMENSURABILITY]. Consequently, he despairs that "nothing I have said will change the mind of someone who just finds it obvious that goods are often incomparable. I cannot even retort that *I* find it obvious they are always comparable." *Id.* at 150.

or a general one like utility). An on and on and on. Both sides assume that something crucial hangs on the question of commensurability—specifically that one’s position on commensurability has a necessary relationship to one’s position on the economic analysis of law. That is, if one agrees that commensuration is possible or appropriate, then one should—or must—also accept a utilitarian, cost-benefit analysis of legal regimes. A rejection of utilitarianism, therefore, seems to require a rejection of commensuration. Consequently, both sides assume that if they lose the debate on commensurability then they must also give up their most cherished legal and political ideals.

It is the thesis of this Article that absolutely nothing depends on this debate precisely because the debate itself is inept. Indeed, Immanuel Kant predicted that arguments based on such “antinomies” must inevitably devolve into an intellectual ping-pong game of alternating assertions.

The commensurability debate is firmly located within the classical, liberal philosophical tradition that includes utilitarianism, libertarianism, egalitarianism, contractarianism,⁵ and some forms of neo-Kantian moral theory.⁶ There is an alternative super- or post-liberal tradition—the speculative tradition—that begins with Immanuel Kant, continues through G.W.F. Hegel and is developed in the later twentieth-century in Continental critical thought, generally, and the psychoanalytic theory of Jacques Lacan, specifically.

In contrast to classical liberalism, speculative theory does not assume that one side of the commensurability debate is the opposite or simple negative of the other. Rather, the speculative tradition has its origin in Kant’s insight that certain propositions that seem to be logically inconsistent with each other may necessarily require each other in the sense that each is a true *but incomplete and inadequate* description of the world. Hegel famously expressed Kant’s paradox as the doctrine of the identity of identity and difference.⁷ Interestingly for the purposes of this Article, Hegel developed this through the specific example of the dialectical relationship between quantity (commensurability) and quality (incommensurability). In the twentieth century, psychoanalyst Lacan goes further and interprets this paradox as the very heart of human subjectivity—a subjectivity formed by an essential non-relationship between the masculine (commensurability) and the feminine (incommensurability). However, in a few evocative paragraphs in his

5. These are the four categories of classical liberalism identified by Michel Rosenfeld. MICHEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 52-53, 65-66, 94-95, 116-18 (1991).

6. The neo-Kantian work that probably has had the most influence on American jurisprudence is JOHN RAWLS, THEORY OF JUSTICE (1999).

7. JEAN HYPPOLITE, GENESIS AND STRUCTURE OF HEGEL’S PHENOMENOLOGY OF SPIRIT 109-10 (Samuel Cherniak & John Heckman trans., 1974).

Groundwork of the Metaphysics of Morals,⁸ Kant anticipated how the commensurability debate might reply to the relationship of the market to personality.

It is the radical proposition of speculative theory that the paradox that lies at the heart of the commensurability debate is a logically necessary aspect of *all* symbolic orders—a category that includes not only social systems and language, but also sexuality, law, and markets. That is, from a speculative position, the examples I will discuss in this article are not relevant to law by mere analogy. Legal and sexual categories are not similar as an empirical matter; rather they are equivalent from a logical one in that they are sub-categories of the symbolic.

In this Article, I do not pretend to offer a complete or comprehensive survey of the literature in the commensurability/incommensurability debate. Nor shall I discuss the slightly differing definitions of commensurability, incommensurability, and comparability offered by the participants. Nor, finally, do I investigate the nature of economic choice and the ethics of “selling out.”

What I shall do is first introduce the commensuration debate in legal scholarship. I then trace the speculative relationship between commensuration and incommensuration from its initial formulation by Kant, through its universalization by Hegel, and to its radical extreme as proposed by Lacan. I argue that, even though the two concepts or commensurability and incommensurability are logically incompatible, every choice—legal or otherwise—necessarily reflects a moment of both commensuration (the recognition of quantitative difference) and incommensuration (the recognition of qualitative difference).

That is, from the speculative perspective, there is no way to *resolve* the commensurability debate because it reflects a logically necessary paradox that constitutes all symbolic thought, and perhaps the entire universe as it can be understood by human reason. Consequently, this paradox is something we can only learn to “deal with.” Moreover, freedom and morality consist precisely of the problem of what it means to make choices given the irresolvability of this paradox.

Proponents of both sides of the commensurability debate in law assume that their position have necessary policy implications. In contrast, the speculative thinker believes that philosophy can never dictate *specific* policy advice. Policy is a moral decision that necessarily requires the free and subjective act of decision. We cannot escape our moral responsibility by invoking necessity. We are responsible for our decisions precisely because they are our decisions. Consequently, although the participants in the commensurability debate *assume* it has policy implications, the

8. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785).

speculative position rejects this conclusion. The debate is merely a way of obfuscating the real issues involved and avoiding responsibility.

The question of what it means to come to a judgment is one of the central concerns of speculative theory. A speculative analysis shows that, on the one hand, insofar as we can identify alternatives, we recognize that each alternative has a unique “quality” that distinguishes and differentiates it from others. This means that, at some level, the very recognition of two alternatives as distinct is itself an example of incommensurability. On the other hand, all alternatives are also quantitatively related and, therefore, can be commensurated. When one chooses one alternative over another, one is, at that moment, comparing them based on some criterion and, therefore, commensurating. Paradoxically, to choose is, once again, to recognize the qualitative difference or incommensurability. But to exchange one alternative for another is simultaneously the recognition of equivalence or commensuration. In other words, choice and exchange form the place at which commensuration and incommensuration meet.

A speculative theorist, therefore, agrees with the utilitarian that commensuration is both possible and a necessary aspect of choice. Nevertheless, she disagrees with the utilitarian’s assertion that rational choice is determined by commensuration. Commensurability along a single metric is never a *reason* to make a choice or engage in an exchange because rationality is defined as the very capacity for spontaneous, free—and therefore incommensurate—action. Commensurable values merely represent a limitation on the choices one can make in the sense that one is limited to choosing what one can afford. Incommensurable or qualitative values always drive choice. Consequently, the speculative theorist agrees with the romantic that human dignity and freedom require the recognition of one, irreducible moment of incommensurability in human personality.

II. COMMENSURABILITY IN THE LAW REVIEWS

Legal academic interest in commensuration⁹ was sparked in 1994 when Mary Chang organized a symposium that eventually produced a volume of essays published under the name *Incommensurability, Incomparability,*

9. This is not to say that other legal theorists have not anticipated this debate before. As I discuss *infra* text accompanying notes 15-16, much of Posner’s legal economics depends on an acceptance of some form of the commensuration proposition, although he does not regularly use this term. On the other side, since the 1980s Margaret Jane Radin has based her vigorous romantic critique of legal economics largely in terms of a denial of commensuration, although she more frequently uses the terminology of “market-alienation” and “commodification.” See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993) [hereinafter RADIN, *REINTERPRETING PROPERTY*]; Margaret Jane Radin, *Compensation and Commensurability*, 1993 DUKE L.J. 56 (1993); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) [hereinafter Radin, *Market-Inalienability*].

and Practical Reason,¹⁰ and Cass Sunstein published an article entitled *Incommensurability and Valuation in Law*.¹¹ This in turn led to the major symposium on commensuration at the University of Pennsylvania Law School to which I have already referred.

Although the essays differ in many ways, they tend to share a similar structure. First, the vast majority¹² of both the supporters and opponents of commensurability assume that they are discussing a strict, either-or choice: rational decision makers either do, or should, make decisions through commensuration. This, in turn, leads to a second assumption that one can prove one's side of the argument by disproving the other side. These proofs and disproofs typically consist not of reasoned arguments from first principles, but of examples and counter-examples designed to appeal to our intuitions.

Commensuration is closely related to the variant of "economic rationality" adopted by that strain of neo-classical economics that dominates American "law-and-economics" literature.¹³ According to this theory, economically rational actors seek to maximize some desideratum—usually utility or wealth. In order to do so they must compare different alternatives with respect to this desideratum. Some form of commensurability is also a necessary component of "cost benefit analysis" advocated by many legal economists. Consequently, the arguments for or against commensurability have been presented largely as arguments about the validity or appropriateness of the economic analysis of law. For simplicity, I will refer to the proponents of commensuration as "utilitarians" regardless of what desideratum of commensuration they adopt. For lack of a better term, based on an analysis I have developed elsewhere, I will refer to their opponents as "romantics."¹⁴

The problem with the duel by example is precisely that predicted by Kant: He who speaks last wins—but only temporarily. When the romantic gives his examples, one is initially drawn to agree that there is something unique about the alternatives that cannot be reduced to such prosaic metrics as utility or money. The romantic examples appeal to our intuition that the utilitarian account of how we choose does not match our individual subjective experience.

10. *Supra* note 4.

11. Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

12. One refreshing exception that proves this general rule is Frederick Schauer. He states that commensurability and incommensurability have "the character or attitudes, dispositions, presumptions, or conceptual frameworks, and, as such, they are best thought of as being chosen rather than as simply existing and, furthermore, as being chosen for instrumental and not intrinsic reasons." Frederick Schauer, *Instrumental Commensurability*, 146 U. PA. L. REV. 1215, 1217 (1998).

13. As I discuss elsewhere, this definition of rationality is far from being universally accepted among economists. *See generally* Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147 (2000).

14. I explain my choice of terminology in Jeanne L. Schroeder, *Pandora's Amphora: The Ambiguity of Gift*, 46 UCLA L. REV. 815, 824-26 (1999).

And yet, when one reads the utilitarian riposte it is hard to deny that the romantic's claims are to some extent disingenuous: in fact, we commensurate when we make choices all the time, we just do not like to face this fact. Indeed, we have no choice but to commensurate when we choose. To choose is to commensurate. But, when the romantic replies, once again one feels that one has to admit that commensuration misses something about both our valuation of alternatives and the actuality of choosing.

For example, let us turn to the debate about whether such intimate interpersonal relationships as love and friendship can be accurately analyzed in terms of commensuration. Richard Posner tries to analyze all human relations in economic terms. In his notorious book, *Sex and Reason*,¹⁵ he argues that even with respect to sexuality—the aspect of personality often assumed to be irrational—most persons act, on the average, as though they were economically rational actors. Writing in the early 1990s, Posner does not speak expressly in terms of commensuration but, as I have just suggested, the type of comparisons necessary to engage in the maximization behavior described by Posner assumes that decision makers are able to rank alternatives according to a single metric. Although I find many of Posner's specific arguments to be fanciful “just-so stories” without any empirical support,¹⁶ my own empirical observation of competition in the “marriage” market makes certain broad contours of his approach initially convincing.

In response, Cass Sunstein maintains that attempts to explain certain choices in terms of commensurability do not capture our subjective experience. The commensuration of interpersonal relationships described by Posner and his followers is either impossible, or, perhaps more accurately, constitutes an inadequate account of empirical human behavior. We should not, therefore, adopt legal rules that assume that people commensurate such things, or that incentivizes them to do so. Sunstein asserts that “[i]f someone really thought about dating and romance as participation in a ‘marriage market,’ he would be a strange creature indeed (and unlikely, perhaps, to fare especially well in the relevant practices).”¹⁷ Three of his examples of incommensurable

15. RICHARD POSNER, *SEX AND REASON* (1992).

16. I set forth my criticism of Posner at length in Jeanne L. Schroeder, *Just-So Stories: Posnerian Methodology*, 22 *CARDOZO L. REV.* 351 (2001)

17. Sunstein, *supra* note 11, at 816. To state the obvious, although such expressly mercenary motives may be frowned upon in modern American society that places a premium on romance, Sunstein is declaring “strange” the majority of people in many modern, and probably the majority of historical, societies in which arranged marriages are the norm. His other examples in this paragraph also reveal that Sunstein is viewing life from the extremely narrow perspective of a privileged, upper middle-class American academic. For example, he also thinks that it is “odd,” “barely recognizable,” and even “debased” to think of publishing as “selling an idea” of education in oneself or one's children as “investing in human capital.” *Id.* at 816. Once again, I suspect that he is dismissing a large

alternatives involve interpersonal relationships. If one were to cancel a social engagement with a friend, offering a “cash payment would be inconsistent with the way that someone values a friend.”¹⁸ If someone offered to pay a person a salary “to spend a month away from home and family, [she] will probably feel insulted and degraded and [she] may well turn him down.”¹⁹ “If someone offers to pay an adult neighbor to mow his lawn, the neighbor will often regard the request as an insult, because it reflects an inappropriate valuation of the neighbor.”²⁰ Such monetization of relationships is inconsistent with affection. In Joseph Raz’s words, “[o]nly those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of having friends.”²¹ These statements have great intuitive appeal. Who can think of trading one’s love for money?

However, as Jason Scott Johnston points out, if one looks more closely at Sunstein’s examples they are revealed as persuasive examples of commensuration, rather than incommensuration.²² For example, when one breaks off a social engagement one is, in fact, expected to compensate the jilted party in some way—perhaps by sending flowers, setting a new date, or offering to pick up the tab the next time. One would be considered a boor not to. Moreover, rather than being unusual or insulting, employers regularly offer, and employees regularly negotiate, excess compensation for unusual expenditures of the employees’ time—and rightfully so. Indeed, in contradiction to Sunstein, I would expect that most employees would be angered and insulted if their employers did *not* offer to recompense the employees for their time. Expecting someone to toil for you without compensation is exploitation, if not slavery.

Johnston persuasively notes that whether or not Sunstein is correct that it is “uncommon for one neighbor to offer to pay another to mow her lawn . . . it would be equally uncommon for the neighbor not to offer to pay her neighbor’s son or daughter to do the job.”²³ I know that I appreciated being asked to mow my neighbors’ lawns, babysit their kids, walk their dogs, feed their cats, water their plants and do other chores to earn spending money as a young girl. Sunstein might counter that he expressly limited his hypothesis to an “adult” offeree for whom “the request embodies an improper conception of what the relationship is, or of

percentage, if not the majority, of authors and students in this country, let alone parents in traditional or “third world” countries in which children are, quite literally, the only retirement program available.

18. *Id.* at 786.

19. *Id.* at 786.

20. *Id.* at 787.

21. Joseph Raz, *THE MORALITY OF FREEDOM* 352 (1986), *quoted in* Richard Wagner, *Does Incommensurability Matter: In Commensurability and Public Policy*, 146 U. PA. L. REV. 1287, 1291 (1998).

22. Jason Scott Johnston, *Million-Dollar Mountains: Prices, Sanctions, and the Legal Regulation of Collective Social and Environmental Goods*, 146 U. PA. L. REV. 1327, 1332-34 (1998).

23. *Id.* at 1332.

the attitude with which neighbors render services for each other. The impropriety remains even if the offeree ordinarily would regard the offered wage as a fair price for an hour of mowing services."²⁴ In this example, Sunstein implicitly assumes that his neighbor is a well-to-do professional like himself who would be insulted if asked to perform a menial task for money. I suspect that the primary reason why Sunstein claims that the offer would be insulting even if the neighbor offered to pay him a fair price for mowing services is because Sunstein can charge a much higher hourly rate for legal services and is not accustomed to performing physical labor. In contrast, if the neighbor were a groundskeeper—or out of work—he might be delighted, rather than insulted, by such a cash offer. I know that if one of my neighbors offered to pay me my usual hourly rate to act as an expert witness in a commercial litigation I would be far from insulted. Rather, I would be flattered. Referring work is one of the things professional friends do for each other. Indeed, I would be upset only if my neighbor asked me to do significant legal work *without* offering to compensate me.

Johnston maintains that “[w]hat the examples tell us is not that there are incommensurable goods, but that . . . at least some of us prefer not to exchange some things for money, or at least not too explicitly. . . .”²⁵

That is, the very interesting issue raised by Sunstein’s examples is not if or when people should commensurate when making certain decisions, but *why* we sometimes consider it socially necessary to disguise bargaining. That is, perhaps I should rephrase my earlier rhetorical question, “who can think of trading one’s love for money?” as “who would be willing to admit in public that one would trade one’s love for money?”

Eric Posner goes even further and argues that not only do people always commensurate, but that claims to incommensurability may themselves be a mere pretense that can be explained in terms of market forces—that is, there are competitive advantages to be gained by appearing to be altruistic.²⁶ Eric Posner’s argument, perhaps unintentionally, reveals that all he and his romantic opponents are doing is arguing about what are the more intuitively appealing descriptions of empirical behavior. Consequently, he opens up the field for romantics to propose another set of intuitively appealing counter-examples and counter-explanations. He admits that he “has not refuted the arguments advanced by philosophers who believe in the incommensurability of values. Instead it has shown that the evidence on which they base their arguments—including statements

24. Sunstein, *supra* note 11, at 787.

25. Johnston, *supra* note 22, at 1333.

26. He states that “[a]lthough the incommensurability thesis often describes peoples’ *representations* about themselves, it does not describe their actual *behavior*—that is, the choices they make in everyday life—although their representations sometimes influence their behavior.” Eric A. Posner, *The Strategic Basis of Principled Behavior: A Critique of the Incommensurability Thesis*, 146 U. PA. L. REV. 1185, 1186 (1998).

people make, and the moral uneasiness they feel about these choices—is susceptible to another interpretation.”²⁷ That is, just as Posner finds that the romantic examples are intuitively unconvincing, he implicitly realizes that he is unlikely to persuade romantics who find his examples and explanations to be intuitively unattractive.

III. THE KANTIAN ANTINOMIES

The speculative approach differs from the either/or dilemma posed in the commensuration debate. In this tradition, the problem of commensuration has its origins in Kant’s concept of “antinomies” set forth in his *Critique of Pure Reason*.²⁸ An antinomy is a pair of contradictory positions that seem equally necessitated by reasoning. As such, an antinomy seems to be a conflict within logic itself. Kant claims to solve antinomies by showing that the apparent contradiction between the two poles is a misconception. When correctly analyzed, they are seen to exist in a dialectical, rather than a contradictory, relationship.

Kant identifies only four antinomies. Hegel universalizes this idea and argues that all categories of thought, and, indeed, the entire universe, is in antinomy. Consequently, all *legal* and *economic* categories will necessarily exhibit the paradoxical non-relation of commensurability and incommensurability. Lacan applies Hegel’s universalization to the particular example of human thought and what he called the symbolic order or the “Big Other,”²⁹ which includes all intersubjective relationships and social orders. Lacan, as a psychoanalyst, concentrated primarily on sexuality and language. However, for Lacan, sexuality is not a matter of anatomy, but a name for the fundamental logical paradox that underlies the commensurability debate. In the words of Renata Salecl:

For Lacan, sexual difference is . . . the name of a deadlock, or a trauma, or an open question, or something that *resists* any attempt at its symbolization. Every translation of sexual difference into a set of symbolic opposition(s) is doomed to fail What we call “sexual difference” is first and above all the name of a certain fundamental *deadlock* inherent in the symbolic order.³⁰

Consequently, Lacan’s analysis of sexuality is relevant to law not because it is merely analogous to the commensurability debate. Rather, it

27. *Id.* at 1214.

28. IMMANUEL KANT, *THE CRITIQUE OF PURE REASON* (J.M.D. Meiklejohn trans., 1990) (1781).

29. As Renata Salecl says, “*le grand Autre* (the “Big “Other”) is Lacan’s designation for the symbolic order—not only the order of language, in the narrow linguistic sense, but the entire cobweb of symbolic relations that form the ‘substance’ of our social being.” Renata Salecl, *Introduction to Sexuation*, 3 SIC 1,3 (Renata Salecl ed., 2000). I explore the implications of analyzing law and economics as Lacanian symbolic order extensively elsewhere. See, e.g., JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* (forthcoming 2003).

30. Salecl, *supra* note 29, at 2.

is on its own terms an attempt to understand not only the antinomy that characterizes the debate, but also why we continue to engage in such a hopeless debate. As we shall see, the masculine position is nothing but the aspect of human reasoning that engages in commensuration, while the feminine position is nothing but the aspect that denies the adequacy of commensuration. Just as both the masculine and the feminine are necessary, albeit logically incompatible, moments of every person's subjectivity, so are they necessary, albeit logically incompatible, moment of every legal and economic decision. We can never permanently choose one and reject the other; we can only vacillate between them. Nevertheless, all of us, at least temporarily or contingently, adopt a sexual identity in order to enter the symbolic order and engage in intersubjective relations.³¹

A. The Euthanasia of Reason

Kant demonstrates how each antinomy seemingly appears to be an irresolvable paradox: two propositions both seem to be mutually inconsistent, yet equally supported by logic. Consequently, proponents of each pole of the antinomy try to prove its truth by showing the falsity of the other. Kant argued that such arguments are doomed to degenerate into alternating assertions that fail to persuade the other side or lead to resolution. In Kant's words, "while each successfully demonstrates the falsity of the other, neither is able to establish convincingly its own truth."³² One cannot, therefore, logically decide between the two and the debate continues to seesaw indefinitely.

These sophistical assertions of dialectic open, as it were, a battlefield, where that side obtains the victory which has been permitted to make the attack, and he is compelled to yield who has been unfortunately obliged to stand on the defensive. And hence, champions of ability, whether on the right or on the wrong side, are certain to carry away the crown of victory, if they only take care to have the right to make the last attack and are not obliged to sustain another onset from their opponents.³³

31. Sexual identity *per se* is beyond the scope of this Article. It is a common misinterpretation to conclude from the fact that Lacan identifies two sexual positions that his theory is heterosexist (Judith Butler is the probably the most prominent proponent of this position). As should become clear from my analysis in this Article, I believe that Lacan's idea of sexual difference is the Hegelian assertion that contradiction is universal applied to subjectivity. This does not mean that there are two, and only two, "normal" ways for this contradiction to manifest itself in empirical sexual experience. Rather, I believe that it implies that although there are only two Lacanian sexes (in the sense that there are only two poles), these abstract sexes can be manifested empirically in a potentially infinite number of ways. Indeed, as a Lacanian, I do not find homosexuality, transexuality, intersexuality, etc. to be difficult to understand. What is difficult to explain is the persistence of the empirical norm of traditional heterosexuality.

32. JOAN COPJEC, READ MY DESIRE: LACAN AGAINST THE HISTORICISTS 218 (1994).

33. KANT, *supra* note 28, at 239-40.

As such, this battle can never be finally determined, and should be given up. Kant warns that the insistence on maintaining either of these one-sided illusions is disastrous to discourse. It inevitably leads to either “a despairing skepticism, or . . . an obstinate persistence in certain assertions, without granting a fair hearing to the other side of the question.”³⁴ In Kant’s memorable turn of phrase, either result—skepticism or zealotry—is “the Euthanasia of pure reason.”³⁵ Kant suggests that rather than continuing this sterile debate, “[p]erhaps, after [the opponents] have wearied more than injured each other, they will discover the nothingness of their cause of quarrel, and part as good friends.”³⁶

This is the structure of the debate about commensurability and incommensurability. Both sides of the argument assume that their two positions are contradictories. Utilitarians assume they can prove commensurability by disproving the supposedly incommensurable examples offered by romantics, and romantics try to prove incommensurability by disproving that certain alternatives can be commensurated.

Kant seeks to save pure reason from this undeserved fate. Consequently, he needs to find a way to break free from this sterile iteration. He does this by challenging the basic assumptions about the nature of the antinomies adopted by the proponents of both poles. If one could discard these assumptions, then the apparent paradox would fall away. In other words, Kant proposes a new way of looking at contradiction that Hegel will eventually develop into dialectic reasoning and Lacan will propose as the explanation of sexual difference.

Kant claims to solve his antinomies by showing that while certain propositions might at first blush seem to be logically irreconcilable, further reflection will show that they are not in contradictory opposition at all. Contradictories are two propositions that are not merely mutually exclusive, but which also form the entire universe of choice such that they exhaust the universe of possibilities. Consequently, “one is the simple denial of the other [which implies that] the truth of one establishes the falsity of the other and vice versa.”³⁷ If Kant can show that there are heretofore unrecognized alternatives to the thesis and antithesis, then they would no longer be contradictories in the sense that it would be logically possible for both poles to be true, or for both be false. To understand Kant’s argument it is helpful to take a brief look his analysis of two of his antinomies.

34. *Id.* at 231.

35. *Id.*

36. *Id.* at 240.

37. COPJEC, *supra* note 32, at 218.

B. The Mathematical Antinomies

Kant identifies four antinomies. Each Kantian antinomy contrasts two apparently contradictory binary poles. The thesis of each antinomy is *dogmatic*—it is derived purely from reason.³⁸ In contrast, each antithesis is *empirical*—it is based on experience as well as reason.³⁹ Kant further divides his four antinomies into two dyads: the mathematical and dynamical antinomies. The reason for Kant's peculiar terminology does not concern us here. What does concern us is that he believes the two types of antinomies can be solved in two different ways.

Simplistically put, Kant “solves” the mathematical antinomies by showing that the apparent conflict between the thesis and antithesis is false because neither alternative is true. That is possible because they do not exhaust the possibilities that could exist. In other words, the two poles of the mathematical antinomies are not contradictories, but merely contraries in dialectic relationship.

In a dialectic opposition, one contrary merely denies the truth of the other solution, but this negation “does not exhaust all the possibilities but leaves behind something on which it does not pronounce.”⁴⁰ There is at least one alternative beyond the scope of the two poles. Consequently, “rather than despairing over the fact that we cannot chose between the two alternatives, we must come to the realization that we need not choose, since both alternatives are false.”⁴¹ Let us look at an example.

Each of Kant's four antinomies involves a cosmological issue that concerned philosophers in the late eighteenth century.⁴² The thesis of the first mathematical antinomy is that the world has a beginning and end and is limited in time and space.⁴³ Its antithesis is that the world is eternal and infinite.⁴⁴ Kant argues that one does not have to decide whether the world is either infinite or finite, because there is a third category that he calls “indefiniteness.”⁴⁵ The concepts of infinity and finitude implicit in the

38. KANT, *supra* note 28, at 236-37.

39. *Id.* at 266.

40. COPJEC, *supra* note 32, at 219.

41. *Id.* at 218.

42. They are 1) the world has a beginning and end/the world is infinite and eternal with no limits in time or space; 2) there are indivisible simples in the world/everything in the world is infinitely divisible; 3) freedom is possible/everything in the world is subject to the causal laws of nature; and 4) there is a necessary cause of the world (God)/there is no necessary cause.

43. KANT, *supra* note 28, at 241.

44. *Id.*

45. Kant gives the example of the geometrical concept of a line. When we produce a straight line—it is more correct to say *in indefinitum* than *in infinitum*; because the former means, produce it as far as you *please*, the second, you *must* not cease to produce it; the expression *in infinitum* is, when we are speaking of the *power* to do it, perfectly correct, for we can always make it longer if we please—on to infinity. And this remark holds good in all cases when we speak of a *progressus*, that is, an advancement from the condition to the conditioned; this possible advancement always proceeds to infinity.

antinomy both depend on certain simplistic assumptions about what it means for the world to exist. Kant—presaging Lacan’s notorious pronouncements that the Woman⁴⁶ and the Big Other (*i.e.*, the symbolic order)⁴⁷ do not exist—argues that “*the world cannot and does not exist.*”⁴⁸ That is, the usual understanding of “existence” is a stable state with definite borders. The world, in contrast, is a dynamic, changing, evolving entity. Because there is a third alternative, neither pole of the antinomy is proven by disproving the other.

C. The Dynamical Antinomies

Kant “solves” the two dynamical antinomies in a different way. He argues that “no real contradiction exists between them, and that, consequently, *both may be true.*”⁴⁹

For example, the thesis of the third antinomy (which is also the first dynamical antinomy) is that freedom is possible because the causal laws of nature cannot explain everything.⁵⁰ The antithesis is that every phenomenon is subject to the causal laws of nature and, therefore, freedom is impossible.⁵¹ Kant argues that both sides of the third antinomy are true, but of different aspects of the world.⁵² In making his argument Kant relies on his well known distinction between noumena and the phenomena.

A complete discussion of this distinction is beyond the scope of this Article. For present purposes it is sufficient to say that the empirical world

Id. at 289. Kant admits that in the case of a line, the difference between infinity and indefiniteness is “a mere piece of subtlety,” but he believes that it has significance elsewhere, as in the analysis of the antinomies. *Id.* Hegel famously criticizes Kant’s definition of infinity (and one more) as a false or bad infinity, and formulates a very different definition of a “true” infinity. Hegel discusses “infinity” in G.W.F. HEGEL, HEGEL’S SCIENCE OF LOGIC 137-56 (A.V. Miller trans., 1969). This debate, however, is beyond the scope of this Article.

46. JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK XX: ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE (ENCORE) 1972-73 72-74 (Jacques-Alain Miller ed., Bruce Fink trans., 1998).

47. JACQUES LACAN, SEMINAIRE LIVRE XVII: L’ENVERS DE LA PSYCHANALYSE 74 (Jacques-Alain Miller ed., 1991); Jacques-Alain Miller, *Extimite* (Elisabeth Doisneau ed., Françoise Massardier-Kenney trans.), in LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE AND SOCIETY 74, 81 (March Bracher et al. trans., 1994); Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 TEX. L. REV. 15, 74-75 (2000). I will discuss what Lacan means by these extraordinary pronouncements *infra* in text accompanying notes 97-99.

48. COPJEC, *supra* note 32, at 220. In Kant’s words:

If the world is a whole existing in its self, it must be either finite or infinite. But it is neither finite nor infinite—as has been shown on the one side by the thesis, on the other side by the antithesis. Therefore the world—the content of all phenomena—is not a whole existing in itself. It follows that phenomena are nothing, apart from our representations.

KANT, *supra* note 28, at 286.

49. *Id.* at 316.

50. *Id.* at 252.

51. *Id.*

52. I give a more detailed account of his argument in Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality and Legal Scholarship*, 44 WM. & MARY L. REV. 263 (2002); Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Wrong and the Essence of Right: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. (forthcoming 2003).

that we can know through our senses and experience consists of phenomena. The phenomena are mere temporary, contingent appearance. Kant posits that there must be a true, eternal, and necessary essence underlying the phenomena which he refers to as the “thing-in-itself” or the noumena. Although our intellect can propose that noumena must exist, we can have no direct knowledge of the noumena precisely because they are not empirical.⁵³

Kant asserts that the empirical antithesis of the third antinomy (*i.e.* that everything is subjected to the causal laws of nature) is only true of the phenomenal (*i.e.* natural, empirical) world—indeed, it is a truism.⁵⁴ If phenomena were not caused, they would be necessary, not contingent, and eternal, not temporal—*i.e.* they would be noumena.⁵⁵ The dogmatic thesis—that freedom (*i.e.* uncaused action, spontaneity) is possible—is equally true with respect to the noumenal world.⁵⁶ Indeed, if noumena were caused, then they would be contingent and temporal, not necessary and eternal—*i.e.* they would be phenomena.

One might be tempted to conclude from this that freedom is a mere theoretical abstraction (in Kantian terminology, transcendental).⁵⁷ Freedom could only exist in the world of the intellect and not the sensible empirical world in which we live. Kant argues, however, that it is at least theoretically possible for freedom to have empirical existence (in Kantian terminology, for freedom to be “practical”). This is because nature can insist only that the *empirical* world be subject to her law of causality, but she cannot limit the source of causality. The cause of empirical phenomena need not itself be empirical (phenomenal). The free, spontaneous noumena can be the cause of phenomena.⁵⁸ Individual men, as empirical creatures, are phenomenal, and therefore, subject to the laws of nature.⁵⁹ Man’s reason, however, is noumenal and, therefore, free.⁶⁰ Rationality, the noumenal essence of mankind, might therefore, cause empirical persons to act freely in the world.⁶¹ The empirical effects of noumenal freedom is what Kant calls “practical” freedom.⁶²

53. Robert Merrihew Adams, *Introduction* to IMMANUEL KANT, *RELIGION WITHIN THE BOUNDARIES OF MERE REASON* vi, ix (Allen Wood ed., George Di Giovanni trans., 1998); Schroeder, *supra* note 52, at 285.

54. KANT, *supra* note 28, at 302; Schroeder, *supra* note 52, at 286.

55. KANT, *supra* note 28 at 302-03; Schroeder, *supra* note 52, at 287.

56. KANT, *supra* note 28, at 302; Schroeder, *supra* note 52, at 286.

57. Schroeder, *supra* note 52, at 286

58. “Is it not . . . possible that, although every effect in the phenomenal world must be connected with an empirical cause, according to the universal law of nature, this empirical causality may be itself the effect of a non-empirical and intelligible causality—its connection with natural causes remaining nevertheless intact?” KANT, *supra* note 28, at 306; *see also* Schroeder, *supra* note 52, at 287-88.

59. KANT, *supra* note 28, at 307.

60. *Id.*

61. In his *Critique of Pure Reason* Kant claims only to show that practical freedom is theoretically possible. In his *Critique of Practical Reason* he seeks either to prove that practical reason

The persuasiveness of Kant's specific analysis of his four antinomies does not concern us here. It has been widely criticized even by Kantians.⁶³ Hegel doesn't spare the vitriol when he declares Kant's argument "a whole *nest . . .* of faulty procedure."⁶⁴ This is why I do not dwell in detail on his specific antinomies, but instead only discuss his general approach. Nevertheless, whatever Kant's inadequacies, his identification of the misleading nature of antinomies can be seen as the basis of the Hegelian dialectic, specifically, and much of speculative thought, generally. Consequently, before Hegel demolishes Kant's account, he first praises it as "the downfall of previous metaphysics."⁶⁵ Kant's contribution in this regard is his invitation for us to rethink our preconceptions about apparent contradiction. Moreover, as I discuss later,⁶⁶ Kant specifically anticipated one aspect of the commensurability debate of law and economics.

IV. THE HEGELIAN DIALECTIC

If Hegel is Kant's harshest critic, this is because he is Kant's most sincere student. He takes Kant seriously on his own terms. Lacan, in turn, will not only take Kant and Hegel seriously, he will suggest the implications of their theory for the purposes of language, sexuality, and law. Although Hegel's theory differs greatly from Kant's, it is grounded in the issues raised and analysis proposed by Kant. Indeed, Hegel's *Greater Logic* can be read as a long response to the *Critique of Pure Reason*. Consequently, to understand Hegel's notion of the relationship of quantity (commensuration) and quality (incommensuration) that he developed in the *Greater Logic*, it is useful to first take a brief look at Kant.

Hegel believes Kant does not grasp the full implications of the antinomies. First, the number of antinomies cannot be limited to the four identified by Kant. As mentioned above, the first Kantian antinomy asks how far the universe extends outward: does it extend infinitely, or does it have boundaries in time and space? The second antinomy, which I have not discussed, is the inverse of this question. It asks how far the universe extends inward: is the universe comprised of discrete, indivisible entities

does in fact exist, or that we have very good reason to think that it is likely to exist. Kantian scholars disagree as to the success of this latter enterprise.

62. IMMANUEL KANT, *THE CRITIQUE OF PRACTICAL REASON* 138 (T.K. Abbott trans., 1996).

63. For example, Henry Allison prefaces his half-hearted defense of Kant's analysis of the antinomies by stating that his "goal is to show that, although hardly free from difficulty, they are not as hopelessly confused as Kant's critics generally assume." HENRY ALLISON, *KANT'S TRANSCENDENTAL IDEALISM: AN INTERPRETATION AND DEFENSE* 36 (1983).

64. HEGEL, *supra* note 45, at 195. Hegel accuses Kant of committing the logical error of *quaternio terminorum*—a kind of failed syllogism. See David Gray Carlson, *Hegel's Theory of Quantity*, 23 *CARDOZO L. REV.* 2027 (2002).

65. HEGEL, *supra* note 64, at 190.

66. See *infra* text accompanying notes 152-69.

or atoms, which he called “simples,” or is everything infinitely divisible?⁶⁷ If the entire external and internal scope of the world are antinomies, doesn’t this imply that the world and everything in it are also characterized by antinomy? Or, more accurately, it implies that reality consists of one fundamental antinomy—or dialectic—that is actualized in a limitless number of both fundamental and empirical variations in the world. This realization constitutes the basis for Hegel’s speculative logic to which I turn shortly.

Hegel concludes that all concepts necessarily require their own negation as the condition of their possibility. Therefore, the universe is in a state of contradiction. If antinomy is universal, then no *specific* antinomy is a problem to be *solved*. Rather, antinomy, as a necessary fact of the world, is a process to be studied, *understood and dealt with*. Morality is nothing but the dealing with and the making of choices when this dispute cannot be resolved as a logical matter. Kant is correct that every specific contradiction is unstable and must eventually go under. The resolution itself, however, will also be unstable and lead to a new contradiction. This means that the universe is dynamic—in a constant state of becoming and ceasing to be as each contradiction is temporarily resolved only to reveal new contradictions to be temporarily resolved, *ad infinitum*. Kant intuited this point in his analysis of the first antinomy. However, he did not have the courage to face the implication of his analysis—one that disproves one of the most basic axioms of his metaphysics: there can be no eternal, static parallel universe of noumena beyond contradiction.

Hegel’s entire logic is based on this fundamental proposition that all intelligible concepts—which means all legal concepts—are characterized by constituent internal antinomies or “contradictions.”⁶⁸ The entire world is characterized by contradiction. Contradiction “is not to be taken merely as an abnormality which only occurs here and there, but is rather the negative as determined in the sphere of essence, the principle of all self-movement”⁶⁹ For the purposes of this Article, the point is that both sides of the commensurability debate assume they can solve policy

67. Hegel criticizes Kant for not realizing that the first and second antinomies are really asking the same question. HEGEL, *supra* note 74, at 192.

68. Carlson, *supra* note 64.

69. HEGEL, *supra* note 64, at 438. Hegel is particularly critical of those philosophers who try to deny or do away with contradiction. He says about Kant (specifically with respect to Kant’s attempt to resolve his second antinomy):

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

Id. at 237-39.

disputes by proving that their side, and only their side, of the debate is correct. To a speculative thinker, however, this debate is inept precisely because it is logically impossible to resolve. Both sides are equally right in identifying a true moment in their position and equally wrong in thinking that their position disproves the other side.

To Hegel, the very instability of contradiction is its strength. Hegel rejects the classical view of the universe as static, or cyclical. This is the world that Kant called the noumena. Hegel, working within the Christian theological tradition, sees the world as both dynamic and progressive—moving through different, and higher, stages. Contradiction is precisely the engine of change in this dynamic ever-changing world.

Hegel's analysis also requires that we reject Kant's distinction between mathematical and dynamical antinomies. As we have seen, Kant thinks he "solves" the mathematical antinomies by arguing how both poles are equally false, and thinks he solves the mathematical antinomies by arguing how both poles are equally true. Hegel argues, instead, that *both* poles of *all* antinomies are equally false and true. That is, each pole reflects a true moment of the underlying concept, even as each is only a partial and incomplete account of that concept. To understand this requires a quick digression into Hegel's speculative logical method.

A. Speculative Logic

Hegel's speculative logic can be seen as a reworking and universalization of Kant's antinomies. As we have seen, each Kantian antinomy starts with a dogmatic thesis (reached purely through reason) contrasted with an empirical antithesis (which was based on reason applied to experience). Kant tries to resolve this apparent contradiction by showing that the relationship between the thesis and antithesis is not contradictory, but dialectic.

Hegel proceeds somewhat differently. He starts his analysis of every philosophic concept with a thesis reached by a thought process he calls "understanding—the intuition that 'immediately' perceives a concept as an uncomplicated entity."⁷⁰ Understanding is "common sense."⁷¹ It abstracts an immediate affirmative moment of a concept and assumes that it is its entire truth.⁷²

An antithesis to the understanding's thesis is created by a process he calls "dialectic reasoning." Dialectic reasoning sees that all concepts are, in fact, mediated "and the understanding has merely isolated the affirmative existent part of the concept."⁷³ It points out that the thesis

70. David Gray Carlson, *Hegel's Theory of Quality*, 22 *CARDOZO L. REV.* 423, 443 (2001).

71. *Id.* at 444.

72. *Id.*

73. *Id.*

always leaves out, and therefore implies, its negation. Consequently, “[a]s its name suggests, dialectical reasoning always reads double.”⁷⁴ The process of understanding is relatively simplistic and static; dialectical reasoning is more advanced. Because it opposes the thesis to the antithesis, it is dynamic, creating a modulation between these two poles. Nevertheless, as understanding’s negation, dialectical reasoning mirrors its errors.⁷⁵ It opposes to understanding’s inadequate thesis, an equally inadequate oppositional abstraction.⁷⁶ In David Gray Carlson’s words, “We have a kind of autism that gets us nowhere because drawing attention to the lack in understanding merely replicates the understanding’s own error.”⁷⁷ In other words, at the level of dialectical reasoning we face the potential “euthanasia of reason” that Kant warns would result from the simplistic analysis of the four antinomies and that I identify as the ping-pong nature of the debate about commensuration and incommensuration. Thesis and antithesis threaten to engage in an endless, unprofitable exchange of insults.

Hegel, like Kant, seeks a new way of viewing thesis and antithesis other than through the sterile modulation of immediate contradictories. This third way is speculative reasoning. Speculative reasoning “brings forth the truth that between the two extremes . . . there is difference.”⁷⁸ Difference is, paradoxically, what the two extremes have in common. Speculative reasoning recognizes this difference as a surplus implied by the thesis and antithesis. This form of reasoning is “speculative” in the sense of investment: it is the excess return on—the beyond of—the thesis and antithesis.⁷⁹ The synthesis reached through speculative reasoning is higher than the thesis and antithesis. “It affirms their difference . . . as such (which paradoxically, is the *same identical* lack in each of the subordinate terms).”⁸⁰ The synthesis is more than the sum of its parts, because it recognizes a universality, or unity, between the two. This is, however, a negative unity, “precisely because the unity is not to be found in the parts. It must be added (i.e. positivized).”⁸¹

Speculative reasoning does not so much “solve” as it does temporarily and contingently “resolve” the contradiction in a process which Hegel called *Aufhebung*. This is awkwardly translated into English as “sublation,” an obscure term borrowed from chemistry. Hegel adopts this

74. *Id.* at 445.

75. *Id.*

76. *Id.*

77. *Id.* at 446.

78. *Id.* at 447.

79. *Id.*

80. *Id.* at 447-48.

81. *Id.*

relatively common, but ambiguous, German word because it paradoxically means both negation and preservation.⁸²

Speculative reasoning shows that both the understanding and the dialectic are simultaneously false and true. That is, every contradiction is shown to be both a mathematical and a dynamic antinomy. Each says something true about the concept, but insofar as it claims to tell the whole truth, it lies because it denies the other's equally valid moment of truth. The "sublation" of the two concepts leads to a third concept that reflects the true aspect of both, thereby arriving at a purer and more complete truth.

By revealing the inadequacy of both the understanding and the dialectic, speculative reasoning negates them. In so far as speculative reasoning recognizes the moments of truth of the understanding and the dialectic, it preserves them. Sublation, therefore, continues to recognize the contradiction between the understanding and dialectic even as it resolves this distinction. This must be the case because the speculative is nothing but the sublation of the understanding and the dialectic. They are the building blocks of the speculative. If these building blocks were to be completely negated, the speculative would itself cease to be. This is why Hegel's philosophy is based on the insistence on the identity of identity (the thesis and the antithesis can be resolved into a single synthesis) and difference (yet an essential moment of difference between the two remains). In other words, sublation includes, and occurs at, *all three steps* of the logic.

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

B. Quality and Quantity

Hegel considers the supposed contradiction between commensuration and incommensuration, in his analysis of the dialectical relationship between what he called quantity and quality. Hegel fully recognized the difficulty of this analysis—over one-third of the *Greater Logic* is devoted to a discussion of quantity, quality and their relationship, which he called "measure."⁸³

82. HEGEL, *supra* note 64, at 107.

83. Hegel's analysis can be seen as a long criticism of Kant's second mathematical antinomy—are there indivisible simples in the world, or is everything infinitely divisible.

Hegel argues that quantity and quality are dialectically related—simultaneously identical yet different.⁸⁴ Quantitative changes are gradual; qualitative changes are sudden. That is, quantity is pure continuity—the proposition that everything is infinitely divisible—whereas quality is discrete—the proposition that things can be reduced to irreducible simples. Something can have more or less of a quantity, but it either has or does not have a quality. Described this way, what legal economists call “commensuration”—the idea that everything can be compared in terms of whether they have more or less of a single metric—is an example of quantitative difference. The romantic idea of incommensuration—that despite the fact we are sometimes forced into making tragic choices, certain values are unique—is an example of qualitative difference. That is, as my colleague Kyron Huigens has so forcefully argued in his defense of an Aristotelian, anti-consequentialist understanding of incommensurability, it is precisely the existence of an unsublated remainder of qualitative difference that cannot be completely reduced to and captured by quantitative value, that renders choice “tragic.”⁸⁵

The Hegelian concept of the identity of identity and difference, however, means that quantitative change reveals qualitative change, and vice versa.

Hegel gives the familiar example of hair loss to illustrate the paradoxical relationship between quality and quantity.⁸⁶ As we are all well aware, society makes a strong qualitative distinction between baldness and hairiness but within this distinction lies a paradox. On the one hand, a mere quantitative change in the amount of a man’s hair is not *per se* a qualitative change—a hairy man who loses one hair remains hairy. At some point, however, quantitative change becomes qualitative—if the man loses too many hairs he will be considered bald. It is not, *logically* possible to determine the exact moment when this transition occurs. This

I do not attempt to reproduce Kant’s sketchy argument here. Many commentators find it to be a failure. Indeed, after literally dozens of readings I still find that it consists of a series of non-sequiturs and was gratified to discover Hegel’s assessment of it as logical error. *See supra* note 63. For our purposes it is sufficient to know that Kant concludes that the issue is undecidable. This undecidability is not, however, because of the nature of the object itself. Rather, Kant believes that it flows from the very internal limitations of reason itself. In other words, this contradiction is not “objective” (in the object itself) but “subjective” (in our ability to understand the object).

Hegel lambastes Kant for lack of intellectual fortitude. As explained in the quote set forth *supra* in note 69. Kant could not face the possibility that the world itself is contradictory (mere phenomena with no underlying noumena). Consequently, he thought that the perception of contradiction in the world must be an illusion resulting from the weakness of his intellect.

84. The following discussion closely parallels my account of quantity and quality in Schroeder. JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY AND THE FEMININE* 305-09 (1998); Jeanne L. Schroeder, *Never Jam To-Day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L. J. 1531, 1555-56 (1996).

85. Kyron Huigens, *Law, Economics, and the Skeleton of Value Fallacy*, 89 CAL. L. REV. 537, 545-47 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)).

86. HEGEL, *supra* note 64, at 335; Schroeder, *supra* note 84, at 1554-55.

is because (by definition) the identification of a specific point of transition is to assign a quality to the transition point. Rather, this distinction is a matter of judgment—pragmatic reasoning. You and I may disagree whether a man with the receding hairline is bald or merely balding.

As I have explained elsewhere:

Quantity is the sublation of quality: quantity is what results when one overcomes quality's finitude. Finitude is quality's dependence on otherness; *i.e.* the sense that a quality can only be understood in terms of what it is not, of what is fenced off. Because quantity is the expulsion of otherness, the quantity achieved by sublating any one quality is indistinguishable and continuous with all other "ones" that similarly result from sublating all other qualities (determinate beings). In other words, qualities are plural, but quantity is unity. By definition, there must be many qualities, each separate and distinguishable from the others in the sense that the quality of baldness is different from the quality of hairiness, or for that matter, the qualities of being hot, sweet, or whatever. In contradistinction, the concept of more or less is the same regardless of whether we are talking about more of this, or less of that—whether it be the number of hairs on a man's head, the temperature, or sweetness. Quantity is, therefore, indifferent to quality.

In simple English, quality is differentiation, quantity is commensuration. Quality is difference; quantity is identity. The identity of quality and quantity is the famous Hegelian doctrine of the identity of identity and difference. Qualities are the differences of self from other. Quantity, in contradistinction, is what self and other have in common. Qualitative difference is a matter of is or is not. Quantitative difference is a matter of more or less. Quality asks "is it X or Y?" Quantity asks "how much Z do X and Y have?" This is why changes in quality are sudden even though changes in quantity are gradual. Nevertheless, changes in quantity eventually lead to changes in quality. This relationship between quality and quantity is called "measure."⁸⁷

To say that quantity is the "sublation" of quality means, in Hegel's difficult terminology, that quantity temporarily overcomes the internal contradictions within the concept of quality and, therefore, supersedes quality. This fact is intuited by those commensurabilists who point out that, in fact, despite our denials we overcome supposedly incommensurable qualitative differences all the time when we make choices—to choose between two options on other than purely random grounds (like flipping the coins), is to compare them quantitatively. But, the incommensurabilists are equally correct when they intuit that the fact that choices are made does not mean that qualitative differences can or

87. Schroeder, *supra* note 84, at 1556-57; SCHROEDER, *supra* note 84, at 307-08.

should be subsumed into quantity. The rigid commensurabilist position shows a lack of understanding of sublation.

As I have already introduced, sublation—the overcoming or resolving of contradictions—should not be confused with obliteration. Sublation is preservation as well as negation. In other words, true commensurability must always respect and preserve incommensurability—qualitative difference must always be recognized for true quantitative equality to be realized. This dynamic can be seen in the Hegelian analysis of market exchange which I will discuss shortly.

V. LACAN

If Hegel universalizes Kantian antinomy to encompass the entire intelligible world, then Lacan internalizes it as a theory of the psyche. Indeed, Lacan posits that subjectivity is nothing but a fundamental constituent antinomy. This antinomy is the sexual impasse: the necessary impossible relation—or non-relation—between the masculine and the feminine. What I intend to show is that Lacan's sexual impasse is precisely the impasse between commensurability and incommensurability. Just as the subject is *defined* as the incommensurability of masculine and feminine, so the universe of human values is defined as the split between commensurability and incommensurability. This means that Lacan's theory of sexuality *is* a theory of the symbolic order as a whole, and therefore, a theory of law and of economics.

A. *The Symbolic Nature of Sexuality*

Psychoanalytically speaking, sexuality cannot be reduced to anatomic fact. Sexuality is a linguistic or “symbolic” position. Specifically, sexuality is precisely the argumentative position one takes with respect to the dialectic between commensurability and incommensurability.⁸⁸ Lacan, however, rewrites this irreconcilable debate as the linguistic tropes of metaphor and metonymy, respectively.

The fundamental thesis of Lacanian psychoanalysis is that the subject is split.⁸⁹ This does not mean that the subject has (or once had) an affirmative content that has been broken in half. Lacan implicitly follows in Hegel's footsteps in thinking that the world is constituted by a necessary contradiction or fundamental negativity, such that there is no noumenal essence that underlies appearance. Consequently, Lacanian subjectivity is conceived as a radical negativity—personality is constituted

88. COPJEC, *supra* note 32, at 215.

89. See, e.g., ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 137 (1990).

by that radical internal rift which Kant called antinomy. Consequently, the phrase “the subject is split” is not a description but a definition.⁹⁰

Because the subject is split, he desires. Specifically he desires not to be split, to be whole. Consequently, when Lacan posits the split subject he is repeating Hegel’s insight that subjectivity, as pure negativity, is nothing but desire. Note that by definition, this desire can never be satisfied in the sense that if the subject became whole she would no longer be a subject.⁹¹

The subject is also split within three orders that Lacan called the symbolic, the imaginary and the real.⁹² The symbolic—which will be our focus, is the social, intersubjective order that includes language, law and sexuality. The imaginary is, as its name suggests, the order of imagery and fantasy. The confusingly named “real” is not physical reality *per se*,⁹³ but our sense that an objective world that cannot be fully captured in words and pictures exists beyond our subjective experience.⁹⁴ That is, properly understood, Lacanianism is a rejection of the silly proposition often ascribed to post-modernists that there is no objective reality or truth. What Lacan questions is man’s capacity as a conscious being to have direct access to the object world or knowledge of the complete truth. The instant we become conscious of our sensuous experience of the object world, we have already reinterpreted through words or images. By exploring the limitations of human knowledge, Lacan is working within such traditional

90. In his excellent introduction to Lacan’s theory of the subject, Bruce Fink, one of the current translators of Lacan’s seminars into English, gives an unusually clear description of Lacan’s notion of the split subject. The metaphor of the split subject inevitably suggests a positive content (subjectivity), albeit with a rupture in the center. Lacan’s point, which I believe exactly reflects Hegel’s understanding of both human personality and Geist, is more extreme than this. The split *is* subjectivity. BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 45 (1995).

91. An empirical human being, however, can become desubjectified. This is not because her desire can ever be filled, but because she can give up on her desire. Psychoanalytic “cure” is nothing but the replacement of desire with the urge Lacan called “drive.” Jeanne L. Schroeder, *Can Lawyer’s Be Cured?: Nietzsche’s Eternal Recurrence and the Lacanian Death Drive*, 24 *CARDOZO L. REV.* 925, 957-58. Consequently, another term for cure is “subjective destitution.” In Žižek’s words:

“[S]ubjective destitution” changes the register from desire to drive. Desire is historical and subjectivized, always and by definition unsatisfied, metonymical, shifting from one object to another since I do not actually desire what I want. What I actually desire is to sustain desire itself, to postpone the dreaded moment of its satisfaction. Drive, on the other hand, involves a kind of interest satisfaction that always finds its way; drive is nonsubjectivized (“acephalous”).

SLAVOJ ŽIŽEK/F.W.J. VON SCHELLING, *THE ABYSS OF FREEDOM/THE AGES OF THE WORLD* 80 (1997).

92. See Jacqueline Rose, *Introduction II*, in JACQUES LACAN AND THE ÉCOLE FREUDIENNE, *FEMININE SEXUALITY* 27, 31 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985); JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN. BOOK I: FREUD’S PAPERS ON TECHNIQUE* 80 (J.-A. Miller ed., J. Forrester trans., 1988). See generally, GROSZ, *supra* note 89, at 10. In one of Lacan’s last seminars, he uses the metaphor of a “Borromean Knot” to describe the relationships between these three orders. STUART SCHNEIDERMAN, *JACQUES LACAN: DEATH OF AN INTELLECTUAL HERO* 33 (1983); SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* 32 (1992).

93. In Grosz’s words: “The Real is not however the same as reality; reality is lived as and known through imaginary and symbolic representations.” GROSZ, *supra* note 89, at 34.

94. “The Real cannot be experienced as such: it is capable of representation or conceptualization only through the reconstructive or inferential work of the imaginary and symbolic orders. Lacan himself refers to the Real as ‘the lack of a ‘lack.’” *Id.*

Western intellectual traditions as the philosophy of science and Christian theology.

A corollary of the proposition that the subject is split is that the intersubjective social order of the symbolic—sometimes called the big Other—is also split. In Lacan’s notorious formulation, “the Other does not exist.”⁹⁵ Lacan is not proposing that there is no such thing as law, language, or sexuality, or that the social order does not function. Rather he is expanding on Kant’s and Hegel’s earlier insights that the symbolic order is characterized by logically necessary paradoxes or antinomies.

As discussed,⁹⁶ Kant “solves” the first antinomy (the world is finite, with a beginning and an end—the world is infinite and eternal), by positing that neither category applies to the world because these are the characteristics of *existence*. The world, however, does not “exist.” That is, the world as a whole is not a static thing so that one could potentially measure its borders, or lack thereof. The world is indefinite—an open and ever changing thing that is always coming to be and ceasing to be. Hegel universalizes this insight, even going so far as to propose that the very concept of being that Kant presupposed was simplistic and incoherent. Being contains non-being and is quickly sublated into becoming—a ceaseless coming to be and ceasing to be.

Lacan agrees with Hegel and posits that not only the world, but the subject and the symbolic order (the Other) do not “exist” in the simplistic way that Kant imagines existence. The symbolic order is not objective in the senses of pre-existing, necessary, static, or closed. As a human creation it is intersubjective and therefore contingent, temporary, changing, and open. Rather than “existing” it is constituted by a radical negativity of fundamental antinomies and dialectical contradictions.

B. The Masculine and the Feminine

Sexuality is nothing but the subject’s reaction to the proposition that the subject and the big Other are split. On the one hand, this proposition is extremely disturbing. We desire to have integrity, to be whole, to have our desires filled. Yet, Lacanian theory states that all of these goals are structurally impossible for the conscious speaking subject. On the other hand, this proposition can be liberating. The fact that the subject is not a completed, affirmative existing thing but a radical, split negativity means that the subject is pure potentiality. As Kant and Hegel argue, the incompleteness of the subject is the very pre-condition to human freedom.⁹⁷

95. Miller, *supra* note 47, at 81.

96. See *supra* notes 41-47 and accompanying text.

97. In Kant’s moving metaphor, if man was truly complete and did know the true moral law, “[m]an would be a marionette or an automaton.” KANT, *supra* note 62, at 123. As I and my co-author have said elsewhere,

The two “sexes” are two reactions to the Lacanian proposition that the subject is split. In other words, Lacan’s theory of sexuality is not merely relevant to the commensurability debate by analogy. Rather, it is his name for the debate.

The masculine position cannot bear the disturbing implications of split subjectivity and so he tries to deny the truth of the proposition. The masculine position uses a number of strategies to try to convince himself and others that he is not really split. In other words, the masculine is the part of personality that insists on commensurability (the ability to contain and measure the world).

Another term for the split of subjectivity is “castration.”⁹⁸ The masculine subject tries to claim that he is not castrated because he has the “phallus”—a technical term defined negatively as the lack of a lack or that which is the opposite of our constituent split.⁹⁹ Forced to confront the concept of split subjectivity, the masculine subject adopts a second avoidance mechanism. He admits that *other* subjects—specifically feminine subjects—are split. Consequently, the male human being who takes on the masculine position tries to identify something that he, and other male persons, has, but which “feminine” persons do not have as proof that they (women), and not he, are split. Consequently, the male person tries to reassure himself with the fact that men have penises, and that women do not, as proof that he has the elusive phallus.

Men do not have the phallus, however, and the phallus is not masculine. The thing that the split subject supposedly lacks (the hypothesized negative thing that would fill his hole and make him whole), is only called the phallus because male human beings falsely claim to have it.¹⁰⁰

In contrast, the feminine subject accepts and internalizes the “fact” that the subject is split. She understands that the phallus is not something that

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

Jeanne L. Schroeder & David Gray Carlson, *Kenneth Starr: Diabolically Evil?*, 88 CAL. L. REV. 653, 667 (2000) (reviewing SLAVOJ ŽIŽEK, *THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY; SIC 2: COGITO AND THE UNCONSCIOUS* (Slavoj Žižek ed., 1998) and SLAVOJ ŽIŽEK, *THE PLAGUE OF FANTASIES* (1997))(citations omitted).

98. The terminology reflects the fact that the subject mistakenly feels that he is split because someone or something (*i.e.* the Other) did something to him. That is, he imagines that he was once whole and satisfied until the symbolic order took something away from him. This is obviously false, in the sense that there is no subjectivity without its constituent split. “That is to say: What precisely is symbolic castration? It is . . . the sense of the loss of something which the subject never possessed in the first place.” ŽIŽEK, *supra* note 97, at 15.

99. Lacan has been ridiculed for saying that the phallus is *literally* (not metaphorically) the *square root* of negative one. *See, e.g.*, ALAN SOKAL & JEAN BRICOURT, *FASHIONABLE NONSENSE: POSTMODERN INTELLECTUALS* (1998). But it is precisely his point that the phallus is that which remains negative even when multiplied by itself. In his essay *Subversion of the Subject and Dialectic of Desire*, Lacan explains the square root of negative one as “what the subject lacks.” JACQUES LACAN, *ÉCRITS: A SELECTION* 307, 317 (Alan Sheridan trans., 1977).

100. SCHROEDER, *supra* note 84, at 87-94.

one could have to make her complete, but rather the symbol of her own lack. As the lack of a lack the phallus is doubly negative. Consequently, the feminine does not claim to have the phallus, rather she steps into the position of the phallus—both the realization of her own lack of content and the masculine's object of desire. Of course, if one concentrates on the disturbing aspects of castration, this position can be extremely depressing—and indeed depression is thought to be more common among women than men.¹⁰¹ It can, however, be liberating. As we shall see, the feminine is the aspect of personality that insists on a moment of incommensurability.

As I discuss in the next section, the feminine is the potential for freedom. The masculine position claims that both he and the symbolic order are complete. This means that the masculine subject is completely integrated into, and therefore subjected to, the law. The feminine, in contrast, is the part of personality that is not perfectly so subjected, precisely because she understands that neither she nor the law is complete. They are both works in process. This is why Lacan, (perhaps unconsciously)¹⁰² looks backwards to Kant's analysis of the world of his first antinomy in which he determines that the world does not exist, but is in a state of becoming and ceasing to be. Lacan, similarly, declares that not only the Big Other¹⁰³ but the Woman (the feminine, *per se*) do not exist.¹⁰⁴ They do not have a static affirmative presence, but are merely a contingent negative unity.

Lacan's analysis also looks backwards to Kant's third antinomy. As we have seen, Kant thought that all phenomena were completely subject to the causal chains of nature. Similarly, the Lacanian masculine subject is completely subjected to the chains of law. Kant, thought that practical freedom was theoretically possible even in the empirical world of phenomena because a phenomenon might be caused by a noumenon, and noumena are not completely subject to causality—that is noumena are the uncaused cause. Although Lacan, like Hegel, does not rely on a distinction between phenomena and noumena, to Lacan, the feminine, like the noumena, stands for the possibility of freedom—that some aspect of

101. It is thought that clinical depression affects approximately twice as many women as men. See www.nami.org/helpline/women, www.med.umich.edu/womensguide, www.intimacyanddepression.com/brochure, www.aaafp.org/afp/9907000p225. Žižek offers a Lacanian account of feminine depression in his essay SLAVOJ ŽIŽEK, *David Lynch, or the Feminine Depression*, THE METASTASIS OF ENJOYMENT: SIX ESSAYS ON WOMEN AND CAUSALITY 113 (1994). He argues that depression is not something that women fall into, but the "original fact" of the feminine position out of which women must emerge. *Id.* at 121. This is because "the philosophical name for this 'depression' is absolute negativity." *Id.* at 122. The prevalence of feminine depression does not indicate that women are more delicate or inferior than men, but that "woman, not man, is the subject *par excellence*." *Id.*

102. Lacan is heavily influenced by Kant, and frequently cites him—most famously in his seventh seminar on the ethics of psychoanalysis and his notorious essay *Kant With Sade*. Jacques Lacan, *Kant with Sade* (James B. Swenson, Jr. trans.), 51 OCTOBER 55 (1989).

103. LACAN, *supra* note 47, at 74. Miller, *supra* note 47, at 91.

104. LACAN, *supra* note 46, at 72-74.

personality is not subjected to the chains of law and is an uncaused cause.¹⁰⁵

I have introduced the Lacanian conception of the two sexuated positions. I will now explain how they require each other. I will then introduce Lacan's concept of the sexuation of metaphor and metonymy and how this relates to commensuration and incommensuration.

C. *The Paradox of the Sexual Impasse*

The masculine and the feminine are, obviously, in contradiction. I have just shown how the two sexuated positions can be thought of as the two poles of the third Kantian antinomy—either the subject is bound by law or she is not. As I discuss in the next section on signification, the sexes can also be described as the two poles of the antinomy of commensuration and incommensuration. Lacan implicitly agrees with Hegel that Kant was wrong in limiting antinomies to the four he identified in his *Critique of Pure Reason*. All of the universe is characterized by antinomy, as Hegel thought. Sexuality is nothing but this central fact of universal antinomy.

Nevertheless, although the two sexes are in opposition, they should not be thought of as simple negations. The masculine and the feminine are not yin and yang which together could form a satisfying whole. Nor are they contradictories. Rather, the masculine and the feminine are two different ways by which the subject can fail to be a whole in and by him or herself.¹⁰⁶ Consequently, when the masculine and feminine attempt to come together, they do not fit together like pieces in a jigsaw, but create an imperfect amalgam with excessive overlaps and inadequate coverage. As is the case of the physical act of sexual intercourse, psychoanalytic sexual relations confront us with a baffling juxtaposition of obscene fulsomeness and embarrassing inadequacy. Sexual climax is always too much too bear and too little to satisfy. Consequently, another of Lacan's

105. I would note at this juncture that Lacanian psychoanalytic theory is often accused of phallogentrism. I believe that this is a grave misreading. Lacan's is not a misogynistic theory, but a theory of misogyny in the sense that it tries to explain the persistence of this phenomena. In fact, Lacan subverts traditional patriarchal gender roles from within. In patriarchy, the archetypal human being is masculine. In contrast, to Lacan subjectivity is feminine. Men only falsely claim to have the phallus, which is the symbol of subjectivity. It is only women in their radical negativity who can take on the role of the phallus and be a subject. As Žižek rhetorically asks, "[d]oes this not mean that subjectivity is in its most basic dimension, in an unheard-of-way 'feminine?'" ŽIŽEK, *supra* note 91, at 8. See also SCHROEDER, *supra* note 84, at 326-29. Masculinity can be seen, therefore, as a form of failed femininity. Or, in Žižek's phrase, "a man is perhaps simply a woman who thinks that she does exist." SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 75 (1989). See also *supra* note 101.

106. As Renata Salecl so clearly explains:

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

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

notorious slogans is “there are no sexual relations”¹⁰⁷—sexuality is an essential non-relation. Once again, the reason this sounds extremely depressing is because it is.¹⁰⁸ On the one hand, even though subjectivity is nothing but the longing for wholeness, we can never achieve wholeness either in the form of integrity within ourselves or perfect union with another. On the other hand, there is an affirmative, albeit tragic, side of the sexual impasse. If we could achieve perfect wholeness we would cease to desire (to want wholeness). Because subjectivity is nothing but the split of desire, to be fulfilled would be the loss of subjectivity and freedom. The very fact that desire is always unfulfilled enables us to achieve something much more precious—love.¹⁰⁹ This is why we experience sexual union as a miracle; it is logically impossible, yet it occurs. If, however, sexual encounters were ever completely fulfilling, all we could ever do with any partner is to mate and then (at best) part as friends like dogs and many other animals.

Each of the two sexes requires the other as its defining dialectic negative, even as they cannot appear simultaneously. To borrow a metaphor that Lacan uses in another, albeit related, context, they are two sides of the same coin.¹¹⁰ A coin must have two sides, but at any given time, the coin must be either heads or tails. To draw parallels from physics, although light is both particle and wave it cannot be both at the same time. Similarly, the Heisenberg uncertainty principle tells us that sub-atomic particles cannot simultaneously have exact position and momentum. However, to refer once again to another Lacanian metaphor, the two oppositional sexes are two sides of a mobius strip—each constantly flows into the other.¹¹¹

The masculine maintains his fiction that he and the symbolic order are whole, essential, necessary, objective and not castrated by exporting the very concept of incompleteness, appearance, contingency, subjectivity and castration to the feminine. The feminine, indeed, is defined purely negatively in these terms. Because the masculine cannot accept the

107. Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in *LACAN AND THE SUBJECT OF LANGUAGE* 49, 67 (E. Ragland-Sullivan & M. Bracher eds., 1991); GROSZ, *supra* note 89, at 137.

108. In Salecl's words:

For Lacan, sexual difference is . . . the name of a deadlock, of a trauma, of an open question, of something that *resists* every attempt at its symbolization. . . . The reassertion of sexual difference in Lacanian psychoanalysis is thus not a return to biology but a way to stress that what we all “sexual difference” is first and above all the name for a certain fundamental *deadlock* inherent in the symbolic order.

Renata Salecl, *Introduction to SEXUATION: SIC* 3, at 1, 3 (Renata Salecl ed., 2000).

109. Schroeder, *supra* note 14, at 863-64, 873, 898-99. I discuss the Lacanian understanding of love *infra* at notes 130-36 and accompanying text.

110. See JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN. BOOK III: THE PSYCHOSES 1955-1956*, at 12 (Jacques-Alain Miller ed., Russell Grigg trans., 1993); Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 *WIS. L. REV.* 687, 747-78.

111. FINK, *supra* note 90, at 123-25.

existence of feminine negativity in his symbolic world, the feminine must be repressed. By definition if the feminine is that which is not completely captured and bound by the symbolic order, she is, by definition, not capable of being fully described in language. The masculine's positive existence is maintained only by the expulsion of the feminine's negativity. In other words, the masculine side of personality insists on commensuration—everything must be explained, measured, and brought under control.

The masculine may repress the feminine, but repression is not destruction. Repression is preservation. In Lacan's famous slogan, what is repressed in the symbolic returns in the real.¹¹² Because the masculine is only created by the expulsion of the feminine, the feminine must continue to exist in order for the masculine to create itself. One need not expel or repress that which does not function. Consequently, by denying the feminine, the masculine calls her into being.¹¹³

This concept is expressed in Lacan's formula of masculinity—"all subjects are submitted to the phallic order" (*i.e.* the symbolic).¹¹⁴ The negation of this formula is that there is at least one subject who is not so subjected.

Obversely, the feminine's insistence on the inevitability of castration contradicts the masculine position of wholeness. Lacan calls Woman *pas toute*—not all or not whole.¹¹⁵ This is because the formula of the feminine is "not all x's are subject to the phallic order."¹¹⁶ This might alternately be translated as the subject is not wholly so subjected. This does not mean that any specific subject actually escapes the chains of law, but merely that it may be possible that some subjects are not completely so confined. The negation of the feminine formula is "there is no subject who is not subjected to the symbolic order." In other words, the feminine is the insistence on incommensurability—there is always something that escapes all of our attempts at explanation, measurement, and control.

Just as the negation of the masculine formula implies the feminine, the negation of the feminine formula implies the masculine. But note that the

112. LACAN, *supra* note 110, at 86; Schroeder, *supra* note 110, at 747-48.

113. Jeanne L. Schroeder, *The Eumenides: The Foundation of Law in the Repression of the Feminine* (2000) (unpublished manuscript on file with author); SCHROEDER, *supra* note 29.

114. LACAN, *supra* note 46, at 78-81.

115.

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

Id. at 72. Lacan continues: "The fact remains that if she is excluded by the nature of things, it is precisely in the following respect: being not-whole, she has a supplementary jouissance compared to what the phallic function designates by way of jouissance." *Id.* at 73. See also Schroeder, *supra* note 113.

116. LACAN, *supra* note 46, at 78-81.

negation of the two formulae do not operate in the same way. The masculine formula is a classic scientific hypothesis that can be falsified—it is an induction. Indeed, its negation is its falsification: the proposition that all subjects are subject to the symbolic order is disproved by the observation of one unsubjected subject. One woman, disproves man. This is why the very concept of the masculine is dependent on and incompatible with the feminine. The masculine position can be conceived as the anxiety that it will eventually be proven that any specific rule is not necessary; that he is free and, therefore, responsible for his actions.

The feminine formula is a classic unfalsifiable proposition—it is a deduction. It is not bound by the causal laws of science, but is free. The feminine proposes that one subject might escape, or at least partially escape, the symbolic order. But this proposition cannot be falsified, only verified—we could only disprove it if we could observe every subject in the universe who has ever existed or will exist. No matter how many subjects we observe who are completely bound by the symbolic order, this does not disprove the possibility that the next one might escape.¹¹⁷ The feminine position is the unquenchable hope that we eventually might experience freedom.

D. Metaphor and Metonymy

The sexual impasse is of the very nature of signification. Here we find the fundamental dialectic between commensuration and incommensuration.

1. Linguistic Theory

Lacan theory of the symbolic is highly influenced by Ferdinand deSaussure's linguistic theory. A complete understanding of Lacan's rewriting of Saussure is unnecessary, however, for the point I am making in this Article. What is relevant is Lacan's concept that all symbolic orders (including law and language) depend on what he calls "signification," which in turn requires the two tropes of metaphor and metonymy. In Lacan's terminology, commensuration is a form of metaphor and incommensuration is a form of metonymy. Consequently, Lacanian theory posits that a legal order can no more choose between the concepts of

117. Schauer also notes this "asymmetry" within the commensurability debate:

The asymmetry is that a belief in the position commonly known as incommensurability does not commit the believer to the position that all conflicts of values, reasons or options involve conflicts of incommensurable values or norms, but only to the position that there is at least one conflict between incommensurable values or norms. In contrast, however, a belief in the position commonly known as commensurability commits the believer to the position that *all* reasons or values are commensurable. Consequently, the existence of one incommensurable pair renders commensurability false, but the existence of one commensurable pair does not even come close to rendering incommensurability false.

Schauer, *supra* note 12, at 1230.

commensurability and incommensurability than a language can choose between metaphor and metonymy.

Following Saussure, Lacan expresses signification by the formula S/s , or “the signifier stands over the signified.”¹¹⁸ A seemingly simple example of this is the idea that a word (a signifier, S) is separate from, but nevertheless represents, something else (a signified, s). Lacan and Saussure’s proposition, is that not only is there no necessary or natural relationship between any specific signifier and any specific signified, but also that signifiers never relate to external reality *per se*, but always to other signifiers—each signified is, in fact, a signifier. That signifier, in turn, stands for another signifier *ad infinitum* in an unchanging chain of signification.¹¹⁹ This is the familiar idea that no word has any independent signification but can only be understood in the context of sentences composed of other words in a conversation, within a language with a specific vocabulary and grammar. No legal rule can be understood in isolation, but only in the context of a specific legal system, with chains of precedence and application, rules of interpretation, and so forth.

To understand signification, it is helpful to distinguish it from “meaning,” which Lacan locates in the imaginary (as opposed to the symbolic) order.¹²⁰ Meaning is picture thinking or the pure, simple one-on-one identification of two concepts.¹²¹ It is the simplistic, unmediated thought we associate with animals. An example of meaning is a bull charging at a matador’s cape. The bull does not think that the cape stands for the matador, but rather the cape is just that which makes him angry.

The implications of this is that signification is temporary and contingent. No signified has any necessary or permanent relationship to any specific signifier. Rather, both the speaker and the listener must connect the signified to a signifier within a specific context. It is the speaking subject herself who contingently assigns a signifier to a signified. But it is the subjective nature of this assignment that reveals that there is no permanent, objective relationship between the upper and lower register of signification.

118. LACAN, *supra* note 99, at 149. Lacan modifies Saussure’s formula slightly, but the modification is not relevant to my present analysis.

119. See Schroeder, *supra* note 47, at 26-28. “Lacan compared this chain of signifiers as ‘rings of a necklace that is a ring in another necklace made of rings.’” William J. Richardson, *Lacan and the Subject of Psychoanalysis*, INTERPRETING LACAN, 6 PSYCHIATRY & THE HUMAN. 54 (Joseph Smith & William Kerrigan eds., 1983) (quoting LACAN, *ÉCRITS*). As Richardson explains, “The meaning of this chain does not ‘consist’ in any one of these elements but rather ‘insists’ in the whole, where the ‘whole’ may be taken to be the entire interlude as described, whose meaning, or rather whose ‘effect’ of meaning, is discerned retroactively. . .” *Id.* at 55.

120. JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK III: THE PSYCHOSES 1955-56*, 54 (Jacques-Alain Miller ed., Russell Grigg trans., 1993).

121. LACAN, *supra* note 110, at 54; SLAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY* 123 (1994); Schroeder, *supra* note 107.

2. *The Sexuality of Signification*

Nevertheless, in order to speak, one must somehow temporarily relate signifiers to signifieds and pause the giddy movement of the chain of signification. The two tropes of signification are the “masculine” trope of metaphor and the “feminine” trope of metonymy. In metaphor, the speaking subject takes on the masculine position and, if only temporarily, denies that the big Other is castrated. The masculine speaker temporarily crosses the bar that separates the signifier and signified, freezing the relationship between the two.¹²² It momentarily reduces symbolic signification to imaginary meaning. That is, metaphor maintains that the word is equivalent to its meaning. For example, in the context of a specific sentence, one might treat the word “frog” as though it really were the little bug-eyed, hopping amphibian one imagines in one’s mind’s eye. But doing so represses the fact that in other contexts, even in English, the signifier “frog” might stand for a raspy throat, a device to hold flowers, an ornamental button loop, part of a horse’s hoof, part of a violin bow, or a disparaging term for a Frenchman, among other meanings. In other contexts and languages, “frog” may have different significations or none at all.

Metaphor is quantitative equivalence and, therefore, commensuration. It is an insistence on a true relationship between the signifier and the signified. The signified and the signifier share some essential factor in common. The signifier and signified can be reduced to and compared in relationship to a common denominator.

In metonymy, however, the speaker realizes that the symbolic order is castrated and that the signifier can never capture the truth of the signified. Metonymy recognizes the sliding of the universe of signifiers above the bar of signification, and of the universe of potential signifieds below the bar.¹²³ Rather than trying to capture the signified directly, in metonymy, the speaker only refers to the signified indirectly—by referring to its context, to its attributes or to its parts.¹²⁴ One familiar form of metonymy is synecdoche—the use of a part to refer a whole. Lacan’s gives the literary example of referring to a fleet of ships as thirty sails.¹²⁵

Metonymy is qualitative difference and, therefore, incommensuration. It insists that the signified and signifier can never be simply reduced and equated to each other; each always remains unique.

Both metaphor and metonymy are inadequate descriptions of the universe. As I have discussed elsewhere,¹²⁶ although neither metaphor nor

122. FINK, *supra* note 90, at 70.

123. LACAN, *supra* note 99 at 157.

124. Schroeder, *supra* note 110, at 762-63.

125. LACAN, *supra* note 90, at 156.

126. Jeanne L. Schroeder & David Gray Carlson, *The Law’s Nonexistent Empire*, 56 U. MIAMI L. REV. (forthcoming 2002).

metonymy can maintain its claim of truth, each fails for a different reason. When using metaphor, the speaker insists that it is saying something true about the signified in that there is an essential equivalence between the signifier and the signified. When Romeo said that “Juliet is the sun,”¹²⁷ he meant that she was truly beautiful, brilliant, and warm. However, by reducing the signified to this one common denominator metaphor also lies about the signified. Indeed, if the signified and the signifier were truly equivalent, the trope would not be a metaphor. No matter what other similarities there might be, it is untrue that Juliet is a giant ball of burning gas.

In contrast, metonymy is careful never to lie about the signified. But metonymy is inadequate because she never says anything affirmative about the signified. She cannot bear witness even though she can swear to tell the truth and nothing but the truth, because she is unable to tell the whole truth.

The most important point to learn from this discussion is that both metaphor (commensurability) and metonymy (incommensurability) are essential to language. Indeed, as the common denominator of language, metaphor/commensuration *is* communication between subjects. Despite romantic fears that commensuration causes alienation and depersonalization, Lacan shows that without commensuration there can be no human relations.

VI. COMMENSURATION, INCOMMENSURATION, AND PERSONALITY

A. Exchange

To recapitulate, Kant conceives of freedom and the rule of law as antinomies in that both can be true at the same time. For Hegel, all concepts are qualitative (incommensurate) and quantitative (commensurate)—a contradiction that is constitutive of every concept. For Lacan, metaphor stands for the commensuration of signified and signifier, while metonymy stands for their incommensuration.

Given these insights, it should be possible to show that the prime economic concept—market exchange—requires both commensurability and incommensurability. This will show that the either/or structure of the commensurability debate is inadequate.

Both utilitarians and their romantic opponents believe that market exchange is an example of pure commensuration. It supposedly flattens out the qualitative universe and reduces everything to pure quantity. This process is sometimes called “commodification” the process by which, at the appropriate relative price structure, any object is indistinguishable

127. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act II, sc. 1.

from any other. As I have written elsewhere, “both the utilitarian and the romantic think markets lead to commodification and that commodification is the suppression of difference. The romantic fears this vision as a perversion of human freedom while the utilitarian embraces it as the fulfillment of human freedom”¹²⁸ [*i.e.* the development of the efficient market that can lead to utility or wealth maximization]. This is a grave misunderstanding. The doctrine of the identity of identity and difference reveals that contract exchange is the actualization of quantitative identity *and* qualitative difference.¹²⁹ It is the paradoxical point of intersection between commensurability and incommensurability.

I have argued extensively in the past that markets are essentially erotic and that, from a Hegelian perspective, contract is a primitive form of the relationship that Lacan called “love.”¹³⁰ Love is a mode of intersubjective relationship in which lover initially sees in his beloved more than she is. When love is requited, the beloved fulfills her lover’s expectations and becomes more than she once was. The parties reverse roles so that the beloved—now a lover—sees in her lover—now her beloved—more than he is.¹³¹ That is, love is a form of alchemy that creates something out of nothing.¹³²

Students of Hegel will recognize this theory of love as parallel to the dialectic of recognition introduced in the *Phenomenology of Spirit*¹³³ and developed in the *Philosophy of Right*.¹³⁴ According to Hegel, the abstract person identified by liberal philosophy can only become a subject when he is recognized as such by another subject.¹³⁵ In order for this process to start, one abstract person must first recognize a second abstract person as a subject by granting her rights—that is, the first person must see in the second person more than she is. The second person fulfills the first’s expectation by acting as a subject and by turning around and granting the first the recognition of subjectivity that he craves by granting him reciprocal rights. For reasons that I explore elsewhere, Hegel argues that the most “primitive” form of mutual recognition occurs in the private

128. Schroeder, *supra* note 14, at 884.

129. See HEGEL, *supra* note 64, at 419.

130. This is the central thesis of my two books SCHROEDER, *supra* note 113 and SCHROEDER, *supra* note 84.

131. ŽIŽEK, *supra* note 101, at 103; see also Milan Božovic, *The Bonds of Love: Lacan and Spinoza*, 23 NEW FORMATION 69 (1994); Schroeder, *supra* note 14, at 863.

132. Schroeder, *supra* note 14, at 863.

133. W.G.F. HEGEL, HEGEL’S PHENOMENOLOGY OF SPIRIT (A.V. Miller trans., Oxford Univ. Press 1977) (1807).

134. W.G.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 67-69 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

135. Hegel’s reasoning is beyond the scope of this Article. I explain Hegel’s analysis in Schroeder, *supra* note 14, at 860-63.

regime of property and contract whereby two market participants temporarily recognize each other in the mutual exchange of value.¹³⁶

We now can see that market exchange is, from a Lacanian perspective a form of sexual relationship (love). It is the paradoxical moment when the two sexuated positions of commensurability and incommensurability come together and unite—albeit only temporarily and imperfectly.

Both the utilitarian and the romantic forget that the economic notion of indifference—where one is really indifferent between two correctly priced “commodities”¹³⁷—exists only in the impossible, “real” hypothetical universe known as the perfect market.¹³⁸ According to neo-classical price theory, in the perfect market all goods instantaneously move to the highest valuing user—indeed, they have always already done so. No one has any reason to engage in additional exchange because no future exchange could bring any party greater satisfaction. This is not because market participants have become perfectly happy, but that they have become perfectly apathetic. If the perfect market could be achieved, then all desire will have been satisfied and all activity—and subjectivity—would grind to a halt. The perfect market is pure entropy. Participants in the perfect market no longer participate, but withdraw. They do not exchange because, like *Bartleby*, they “prefer not to.”¹³⁹ They are the living dead. The perfect market is not merely empirically impossible, it is theoretically impossible as well. It is what Lacan paradoxically called the “real.” Actual markets, however, are “symbolic.”

All actual exchange presupposes that the parties form ratios of value—comparing the objects to be exchanged to some third value—as the commensurabilists insist. But both sides of the argument come to different, and inverse errors, based on this false assumption. The utilitarian is so concerned with the fact that comparison is made that he places all emphasis on the denominator. The importance and uniqueness of the numerator is repressed. That is, he declares the numerator to be subsumed into the denominator so that everything is reduced to the metric—whether conceived as money, utils, or whatever. He forgets that the comparative value of the two ratios, and the reason exchange exists, is not due to the universality of the denominator, but because of the particularity of the numerator. In contrast, the romantic correctly insists on the particularity of the numerator but feels that, she must repress the very existence of the denominator in order to give the numerator its due.

136. *Id.* at 863-64, 870-73.

137. *Id.* at 897-98.

138. The following is an abbreviated version of an argument I develop at length in Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998).

139. HERMAN MELVILLE, *Bartleby, the Scrivener*, in HERMAN MELVILLE, *THE COMPLETE SHORTER FICTION* 18, 25 (John Updike ed., 1997).

The perfect market is a system that, like utilitarianism, can only accommodate the denominator of value. Commensuration reduces all ratios of exchange to a common denominator so that they can be compared and equated. Therefore, it is a truism that the very fact that exchange occurs conclusively demonstrates that the exchange parties are not indifferent between the “commodities” exchanged. Each party to the exchange would prefer to have what the other has and vice versa. The parties to exchange concentrate on the numerator; each object remains unique and non-reducible to the other despite the fact that both objects exchanged are compared to a common denominator.

In other words, although commensuration is a necessary precondition to exchange, it is insufficient. If two objects were completely commensurate, there would be no reason to exchange them. As contradiction is the engine of change and growth in the universe, then incommensurability is the engine of market activity in the economy.

The utilitarian would answer that commensurability does give a reason for exchange—indeed the only rational reason. The reason one exchanges one’s widget for another’s whoozit is because one believes that the whoozit contains *more* of the common denominator of exchange than the widget—*i.e.* it has a bigger numerator. That is, the choice is based on *quantitative* difference reflected in the relative size of the numerators: this is what commensuration means.

But this utilitarian understanding of the exchange process misses the point: in order for exchange to occur, each party to the exchange must necessarily base her determination of the relative quantitative value of the two objects of exchange on her *subjective* valuation of the *qualitative* difference between them. That is, the *quantitative* relationship between the two objects is determined by the unique *qualitative* difference between them. In economic terms, each party’s subjective use value in the object to be acquired must exceed not only the intersubjective exchange value assigned to it, but also her subjective use value of the object to be relinquished. As Elijah Millgram correctly puts it, “commensurability is the result, rather than the precondition of practical deliberation.”¹⁴⁰

This repression of the source of the value of the numerator relates to neo-classical economics’ famous inability to account for taste.¹⁴¹ Neo-

140. Elijah Millgram, *Incommensurability and Practical Reasoning*, in *INCOMMENSURABILITY*, *supra* note 4, at 151.

141. George J. Stigler and Gary S. Becker the exceptions that prove this rule. They argue that economics cannot achieve its goal of being a predictive science until it understands how preferences are formed. In their famous essay *De Gustibus Non Est Disputandum* (67 AM. ECON. REV. 76 (1977)), they turn the famous cliché “there is no arguing about tastes” on its head. They posit that rather than tastes being disparate and purely subjective—so that argument would be meaningless—tastes are in fact discrete and objective—and, therefore, there is no disagreement after all. They posit that all mankind shares a limited number of very general desiderata such as social status. Specific commodities are only acquired as means to achieve these general ends. In other words, Carrie on *Sex*

classical economic theory posits that the rational person seeks the most efficient means to achieve his ends.¹⁴² It has, however, no theory as to how ends are chosen. Rather, ends are treated as purely idiosyncratic, pre-given and beyond rational thought. That is, economic rationality (the choice of means) requires irrationality (the choice of ends) as its necessary correlate.¹⁴³ As I have discussed elsewhere,¹⁴⁴ this is in stark contrast to speculative theory which sees rationality as nothing but the capacity for a subject to choose an appropriate ends, and relegates the choice of means to the necessary, but less exalted, category of practical reasoning.¹⁴⁵ In other words, neo-classical economics is incapable of fully accounting for the numerator of exchange because it is largely the product of “irrational” preferences.¹⁴⁶

and the City does not desire Manolo Blahnik shoes *per se*, but only as a means of achieving her true desire of being perceived as fashionable and sexy. See Schroeder, *Rationality*, *supra* note 14, at 221.

142. “[R]ationality is the ability and inclination to use instrumental reasoning to get on in life.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (1992). Philosopher of economics Mark Blaug describes the neo-classic notion of rationality as follows:

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

MARK BLAUG, *THE METHODOLOGY OF ECONOMICS OR HOW ECONOMISTS EXPLAIN* 229 (2d. ed. 1992).

143. Posner states: “preferences cannot be divorced from emotion, or emotion from their stimuli, and so instrumental reasoning cannot be thought pervaded with irrationality merely because a frequent goal of such reasoning is a preference that we would not have if we were not emotional beings.” Richard A. Posner, *Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1554 (1998).

144. Schroeder, *supra* note 52.

145. Joseph Raz calls these two diverse

conceptions of human agency . . . the *rationalist* and the *classical*. In broad outline the rationalist holds that paradigmatic human action is action taken because of all the options open to the agent, it was, in the agent’s view, supported by the strongest reason. The classical conception holds that the paradigmatic human action is one taken because of all the options the agent considers rationally eligible, he chooses to perform it. . . . First, the rationalist conception regards reasons as requiring action, whereas the classical conception regards reasons as rendering options eligible. Second, the rationalist conception regards the agent’s own desire as a reason, whereas the classical conception regards the will as an independent factor. Third, the classical conception presupposes the existence of widespread incommensurabilities of reasons for action, whereas the rationalist conception, if not committed to complete commensurability, is committed to the view that incommensurabilities are relatively rare anomalies.

Joseph Raz, *Incommensurability and Agency*, in *INCOMMENSURABILITY*, *supra* note 4, at 110, 111.

146. This repression of the numerator’s origins also relates to the inability of the wealth-maximization paradigm to account fully for use value. Posner has suggested that law should seek to maximize wealth, rather than utility. This is supposed to avoid many of the classic evils of utilitarianism, including the inability to make intersubjective comparisons among economic actors. Wealth is defined as the total goods in a society measured by money. Wealth maximization only gives credence to those preferences that an economic actor can actualize by actually paying for. Posner claims that this does not mean that wealth maximizers only recognize exchange value. Rather, he claims that his definition of wealth includes consumer surplus—the excess by which each member of society’s subjective use value exceeds society’s objective exchange value for the objects he owns. As I explain in Schroeder, *The Midas Touch*, *supra* note 110, at 757-60, in fact Posner’s system has no way to make this calculation prospectively. One can only posit that an individual has some consumer surplus in her possessions by the fact that she does not exchange them. We can only retroactively calculate her past consumer surplus after she trades a possession after the exchange value has risen.

The utilitarian also ignores the fact that even if the denominator of exchange is objective, at least in the weak sense of “intersubjective” (it is determined only by the contingent agreement of the parties who set an exchange ratio or price), nevertheless, for exchange to occur the numerators of value must be subjective in the sense of unique to each party. That is, if both parties agreed that the ratio of item 1 to the common value is greater than the ratio of item 2, no exchange would occur. Rather, it is necessary for one party to decide that the ratio of item 1 is greater than the ratio of item 2, and for the other party to decide that the ratio of item 2 is greater than the ratio of item 1. This is, of course, the commonly-cited, but poorly understood, distinction between subjective “use value” and objective “exchange value.” It is always the unique, subjective use value (incommensuration) that determines whether an exchange occurs or not. As Huigens says, it is precisely the inability of price (exchange value) fully to capture (use) value that gives choice its tragic dimension.¹⁴⁷

As I have analyzed in greater detail elsewhere,¹⁴⁸ this is why market exchange falls within Lacan’s category of “love.” Each party sees in the other more than she has (that is, each non-possessory party recognizes a use value in the object owned by the possessory party that is greater than either the exchange value or the use value to the possessor). And each party fulfills the expectations of the other by giving more than she had (*i.e.* she transfers this greater use value). Consequently, market exchange is a form of alchemy that in effect makes something out of nothing in that that the aggregate of use value owned by both parties is greater after the exchange than it was before the exchange.¹⁴⁹

It is, however, as wrongheaded for the romantic to look only to the numerator and deny the denominator as it is for the utilitarian to privilege the denominator over the numerator. On the one hand, if the commensuration or equalization of two objects can only occur if we first recognize their difference, paradoxically, the uniqueness of the two that can only be actualized in comparing them by use of a denominator.¹⁵⁰

147. Huigens, *supra* note 85, at 546-47.

148. Schroeder, *supra* note 14, at 863, 870-73.

149. Note, I am not making the assumption frequently made by proponents of market transactions that this will result in an aggregate increase in the use value, utility or wealth of society as a whole. The transaction could cause negative externalities that might cause a reduction of the use value, utility or wealth of third parties so that there is a net loss to society. A vivid example of this problem often arises in love affairs. An affair might bring great joy to the lovers, but also terrible pain to others such as jilted old lovers, abandoned spouses, neglected children, disappointed parents, etc. Moreover, as Huigens correctly notes, the fact that use value can never be completely captured in exchange value can also result in “tragic choices” in which on part to a forced exchange loses something that can never be recaptured. *See supra* text at note 85.

150. As I have stated elsewhere:

It is true that by agreeing to an exchange, the parties recognize the objects exchanged are equivalent in the sense of having the same exchange value. But the only reason why exchange occurs is because the parties recognize an essential difference between the objects to which they are not indifferent. In other words, when I enter into the widget contract I am simultaneously

In other words, in the real world of actual markets and pragmatic problems, one cannot choose between commensurability or incommensurability because they are both necessary, albeit in conflict. As is the case with the two sexes, each concept necessarily presupposes the existence of the other. Because they are incompatible, the relationship between the two is logically impossible, yet the two positions meet—albeit temporarily, contingently, imperfectly, and miraculously—at the moment of exchange.

The arguments that commensurability is “true” and that market exchanges actualize qualitative as well as quantitative difference do not, however, mandate that we accept the arch-commensurabilist position that we should make choices solely on which of two choices is quantitatively superior based on a common metric (let alone the common metric of money). Quantitative equality is merely a restraint on exchange.¹⁵¹ In the real world, we are rarely, if ever, truly indifferent between choices. Choice is always made based on quality.

B. Dignity and Price

In addition to identifying the logical paradoxes of antinomies, Kant also anticipates the moral implications of the commensurability debate in a few famous, but elusive, paragraphs in his *Groundwork of the Metaphysics of Morals*.¹⁵² What I find interesting about Kant’s analysis of incommensurability is that his conclusion is precisely the reverse of that reached by the romantic proponents of incommensurability in the contemporary jurisprudential debate. As a Lacanian, I am influenced by, but not a proponent of, Kantian moral philosophy. I suggest, however, that Kant’s analysis should give pause to incommensurabilists in that it might

recognizing that my money and your widget are essentially equivalent while demonstrating that my money is fundamentally different from widgets in that I prefer the latter over the former. The establishment of identity in commodification [quantitative equality, commensuration] and contract is not, therefore, the suppression of difference, but the actualization of difference [quality, incommensuration].

Both the utilitarian and the romantic go astray because they forget that the economic concept of indifference is not an empirical description of any conceivable actual market. Rather, it is a hypothetical result of the ideal of the perfect market. Classical price theory posits the truism that exchange will occur between market participants until they are indifferent between the market basket of objects that each one of them owns, and all available objects potentially on the market at the given price ratio. As Ronald Coase has correctly stated, . . . if the hypothetical perfect market were ever achieved, all actual market exchange would immediately stop. Actual markets exist because market participants are not indifferent between the objects they have and the objects offered in the market. By definition, the only reason why exchange occurs is because each participant believes that she would rather have the latter than the former. Consequently, . . . commodification can never be perfect and universal—commensuration always necessarily implies a moment of non-commensurability.

Schroeder, *supra* note 14, at 897-88.

151. I am adopting what Raz calls a “classical” conception of human action. Reasons do not require action, they merely render certain options eligible. *See supra* note 145.

152. *Supra* note 8.

suggest that the policy implications of this position may not be what they assume.

Kant insists that

every rational being *exists* as an end in itself, *not merely as a means* to be used by this or that will at its direction; instead he must in all his actions, whether directed to himself or also to other rational beings, always be regarded *at the same time as an end*.¹⁵³

Kant's moral question is: how can we have a moral law of duty when each person, as an end, must be self-legislating? Kant's answer is the categorical imperative—although each person adopts his own maxims, the test of morality the rational person uses in adopting maxims is the rule of universality.¹⁵⁴ This leads to a concept of liberal society as a “kingdom of ends.”¹⁵⁵ It is a kingdom in that each citizen has a duty to obey its laws, but each citizen is also a sovereign law-giver who legislates the universal law he is duty-bound to follow.¹⁵⁶

It is in this connection that Kant distinguishes between that which is commensurable and that which is incommensurable. “In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.”¹⁵⁷ What is it that has a dignity? “[M]orality, and humanity insofar as it is capable of morality.”¹⁵⁸ That is, because it is law that determines the worth of other things,

the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature.¹⁵⁹

On initial reading Kant would seem to be siding with the romantic incommensurabilists in that he is asserting that there are some things that cannot, or at least may not morally, be commensurated. On a more careful consideration, however, Kant's point is more subtle and radically anti-romantic.

One corollary to Kant's concept of the kingdom of ends is that things that are not rational beings are to be treated as means and not as ends.¹⁶⁰

153. *Id.* at 39.

154. *Id.*

155. *Id.* at 41.

156. *Id.* at 41-42.

157. *Id.* at 42.

158. *Id.*

159. *Id.* at 43.

160. *Id.* at 37.

These things that are means by definition do not have a dignity and, therefore, do have a price. In other words, in Kant's view all things other than morality and humanity can, or morally should, be deemed commensurable.

The romantic might still be tempted to reply that, nevertheless, Kant recognizes that *humanity* is incommensurable. However, what Kant means by this is probably less than what most opponents of the commensurability proposition would suppose. Indeed, when considered in context, Kant's analysis looks forward to Lacan's paradox of the sexual impasse.

First, note that Kant does not say that "humanity" is incommensurable, but only that "humanity insofar as it is capable of morality" is.¹⁶¹ He continues "skill and diligence in work have a . . . price; wit, lively imagination and humour have a . . . price; on the other hand, fidelity in promises and benevolence from basic principles have an inner worth."¹⁶² In the *Metaphysics of Morals*,¹⁶³ Kant expands on this distinction. He distinguishes between the empirical human being as an animal and a human being "as a *person*, that is, as the subject of a morally practical reason."¹⁶⁴ It is only this latter aspect of man that has dignity and deserves to be treated as an ends in and for himself.¹⁶⁵ In his former animalistic capacity, however, humans have a price "that is to say [his usefulness] gives one man a higher value than another, that is, a *price* as of a commodity in exchange . . . though he still has a lower value than the universal medium of exchange, money."¹⁶⁶ In other words, human beings are both commensurable and incommensurable. But, in contrast to the romantic position, it is our particularity that is commensurable, and only our participation in universality that is incommensurable.

To understand the paradoxical implications of this analysis one needs, once again, to have reference to Kant's metaphysics. As introduced above in the discussion of Kant's antinomy of freedom and causation,¹⁶⁷ Kant distinguishes between the intellectual, abstract, objective, eternal, necessary and unchanging realm of the noumena, and the empirical, concrete, subjective, temporal, contingent, and changing realm of the phenomena. Only the former is free, while the latter is subject to the causal rules of nature. Man is a paradoxical negative union between the noumenal and the phenomenal. Insofar as he is a rational being capable of moral reasoning, he is a *neumonon*. Insofar as he is an empirical

161. *Id.* at 42.

162. *Id.* at 42.

163. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1798).

164. *Id.* at 186.

165. *Id.*

166. *Id.*

167. *See supra* notes 49-62 and accompanying text.

individual, he is a phenomenon. It is only the noumenal aspect of human nature that has a dignity, whereas, his phenomenal nature has a price.

In other words, the romantic insists on incommensurability because she wants to preserve and recognize the unique particularity of each individual.¹⁶⁸ Kant, like Lacan, is radically unromantic. He insists that it is precisely the unique, phenomenal, pathological, concrete, and empirical aspects of identifiable people that have a price and can be commensurated. That it is only those affirmative qualities that distinguishes one person from another that enables different persons to be compared and ranked. To put this even more strongly, for Kant, to differentiate something *is* to compare and, therefore, to commensurate it. Paradoxically, our dignity consists of an undifferentiated abstraction that cannot be reduced to some other lower common denominator. To put this in Lacanian language, it is the feminine moment of personality—in her radical negativity who refuses to be defined or bound by any specific content—who is the true free subject. To make this more concrete, the reason it is wrong to sell an individual into slavery is just because she is a human being like any other human being and participates in the universal dignity of rational beings, not because of any individual qualities she might have. It is immoral even to consider, as our ancestors did, that any individual might deserve to be enslaved because of her personal characteristics.

Kant's paradox of dignity (incommensurability) and price (commensurability) is a restatement of the basic Kantian moral paradox: how do we apply the moral law or right understood as being purely noumenal and nonempirical when all moral decisions necessarily must be made in concrete, empirical, phenomenal circumstances?

Hence everything empirical, as an addition to the principle of morality, is not only quite inept for this; it is also highly prejudicial to the purity of morals, where the proper worth of an absolute good will—a worth raised above all price—consists just in the principle of action being free from all influences of contingent grounds, which only experience can furnish. One cannot give too many or too frequent warnings against this laxity, or even mean cast of mind, which seeks its principle among empirical motives and laws; for, human reason in its weariness gladly rests on this pillow and in a dream of sweet illusions (which allow it to embrace a cloud instead of Juno) it substitutes for morality a bastard patched up from limbs of quite diverse ancestry, which looks like whatever one wants to see in it but not like virtue for him who has once seen virtue in her true form.¹⁶⁹

168. For example, Radin is concerned that the commensuration (or what she refers to as commodification) of certain privileged tangible objects (which she calls "personal property") might lead to the commodification and alienation of people. RADIN, REINTERPRETING PROPERTY, *supra* note 9, at 198-99; Radin *Market-Inalienability*, *supra* note 9, at 1857, 1870-74, 1888, 1904, 1921-22; Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 345-46 (1991).

169. KANT, *supra* note 8, at 35.

In other words, how can we give effect to the incommensurable dignity of noumenal man while at the same time understanding that every empirical aspect of every individual man is phenomenal and, therefore, commensurable?

The first section of Hegel's *Philosophy of Right* can be seen as an attempt to grapple with this issue. Hegel agrees with Kant that minimal essence of man must be something like Kant's noumenal rational being—personality understood as free will.¹⁷⁰ This is the familiar free, autonomous individual in the state of nature posited by classical liberal philosophy. Hegel also agrees that the person understood as free will must remain an end in and of himself and cannot rightfully be alienated (commensurated).¹⁷¹ As discussed,¹⁷² unlike Kant, he does not believe in a realm of noumena distinct from the empirical phenomenal world. Consequently, if freedom exists, it must be actualized in the world (in Kant's terms, it must be practical). He believes that freedom can only be potential in a theoretical abstract "state of nature,"¹⁷³ and can only be actualized in the empirical world through intersubjective recognition.¹⁷⁴ He further concludes that the necessary most primitive form of intersubjective recognition takes the form of abstract right¹⁷⁵—property, contract, and the market regime of the commensuration of objects. However, he also agrees with Kant that everything empirical about individual people is an "object" and, therefore, property, the commodifiable (commensurable). In Hegel's words, "Intellectual . . . accomplishments, sciences, arts, even religious observances (such as sermons, masses, prayers, and blessings at consecrations), inventions, and the like, become objects . . . of contract; in the way they are bought and sold, etc., they are treated as equivalent to acknowledged *things*."¹⁷⁶

In other words, the actualization of the incommensurable dignity of essential human nature can only occur in the commensuration of objects that include most aspects of concrete personality. Subjectivity is

170. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 67-69 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

171. *Id.* at 74-75.

172. *See supra* note 69 and accompanying text.

173. For example, he points out that the abstract will that "wills only the abstract universal, wills *nothing* and is therefore not a will at all." HEGEL, *supra* note 17, at 40. Consequently, this abstract freedom is "arbitrary." *Id.* at 48.

174.

If it is not to remain abstract, the free will must first give itself an existence . . . and the primary sensuous constituents of this existence are things . . . , i.e. external objects. This first mode of freedom is the one which should know as *property*, the sphere of formal and abstract right; property as its mediated shape as *contract*.

Id. at 63.

175. Hegel describes right as "the realm of actualized freedom, the world of spirit produced from within itself as a second nature." *Id.* at 35.

176. *Id.* at 74.

constituted by the internal contradiction of what Lacan will identify as the sexual impasse—incommensurability requires commensurability.

VII. THE PERSISTENCE OF A NON-DEBATE

The speculative tradition seeks to consider whether apparent irreconcilable contradictions are in fact necessary dialectical relations. It also seeks to understand why people cling to this oppositional mode of thinking and arguing. In Kant's words, this theory seeks to enable us "to comprehend, how those who have taken part in the struggle, adopt the one view rather than the other . . . [and] explain . . . the fiery zeal on the one side and cold maintenance of their cause on the other."¹⁷⁷

Why, then, are the participants in the commensurability debate so passionate about a non-existent choice? I suggest that one reason is that this debate unintentionally serves as a proxy both for other deep-seated political and philosophical divisions between the participants as well as a suspicion that the other side is acting in bad faith

Utilitarians, on the one hand, are reacting to a lack of intellectual rigor and an implicit moral cowardice of romantics who fail to face and take the responsibility for the trade-offs they inevitably make.¹⁷⁸ In a classic example, although romantics often say that one cannot put a price on human life, one in fact, does so every time one decides to drive a private automobile rather than taking public transportation.¹⁷⁹ The utilitarian's slogan forms the title of Guido Calabresi's classic book *Tragic Choices*.¹⁸⁰

On the other hand, the romantics rhetorically ask "is nothing sacred?" They claim that the language of utilitarianism is incapable of even grasping the tragic dimension of choice. They recoil from what they see as an opportunistic and disingenuous attempt by utilitarians to disguise naked political choices behind a facade of pseudo-scientific decision-making. As Margaret Jane Radin insists, the very rhetoric of alienability is alienating.¹⁸¹ To the romantic, the utilitarian is like Oscar Wilde's cynic who "knows the price of everything and the value of nothing."¹⁸² Utilitarians may claim neutrally to be applying cost-benefit analysis to generate policy suggestions, but it is impossible to develop all—or even

177. KANT, *supra* note 28, at 264.

178. We see this implicitly in Johnston's argument that we are socially constrained from making commensuration explicit in some cases. Eric Posner goes further and argues that claims for incommensuration are strategic (although sometimes unconscious) attempts to hide one's true motives.

179. Indeed, this is basically the argument expressly made by Arianna Huffington's recent crusade against sport utility vehicles.

180. As discussed *supra* in notes 85 and 147 and accompanying text, the utilitarian's emphasis on commensuration fails to grasp why a tragic choice is "tragic."

181. See Radin, *supra* note 9, at 1877-87.

182. Oscar Wilde, *Lady Windemere's Fan*, THE PLAYS OF OSCAR WILDE, VOL. I (1999).

most—of the empirical data necessary to do so.¹⁸³ Romantics suspect that utilitarians inevitably engage in ex-post rationalizations of their pre-given prejudices by use of pseudo-scientific references to fictional costs and benefits.¹⁸⁴

Finally, and most importantly, both sides in this failed debate claim that their stances with respect to commensurability necessitate the position they take with respect to specific policy issues. The utilitarian argues, in effect, that the various alternatives society faces can be directly compared based on a specific metric and, based on this metric, one choice is clearly better in the other. A familiar example might be the utilitarian assertion that a cost-benefit analysis indicates that a proposed anti-pollution law should not be adopted. In contrast, the romantic maintains that she has no choice but to favor a specific position—such as an anti-pollution law—because the value that law would further—in this case a clean environment—cannot be compared to financial costs. As Wagner says in a defense of the romantic position, the point of incommensuration is precisely to take some alternatives off the table.¹⁸⁵ The strategy adopted by both sides is guaranteed to avoid, rather than join, an effective conversation on important societal issues.

Consequently, it is my conclusion that both the utilitarian defense of commensuration and the romantic rejection reflects the fundamental fear of freedom that typically characterizes policy arguments.¹⁸⁶ Both sides want to argue that the choices they advocate are *mandated*. The economist does this most expressly when he argues that the only *rational* means of making choices is by ranking alternatives on a single scale.¹⁸⁷ Once this is done, one cannot rationally choose otherwise.

The romantic might be tempted to protest that she, unlike the utilitarian, is a champion of freedom. Indeed, she opposes commensuration precisely because it presupposes a crabbed vision of human potentiality. Unfortunately, the romantic's procedure defeats her noble purpose. The romantic tries to force choice by declaring some alternatives impermissible—incommensurability is seen to be reason excluding.

183. James Griffin makes this criticism of the utilitarian embrace of commensuration explicit. "But a doubt about indirect utilitarianism is whether we could ever perform the tremendously large-scale cost-benefit calculations that it requires or even arrive at probabilities reliable enough for action. We can do those calculations in fairly extreme or fairly small-scale cases, but often not otherwise." James Griffin, *Incommensurability: What's the Problem?*, in *INCOMMENSURABILITY*, *supra* note 4, at 34, 46.

184. For example, Matthew Adler argues that whether or not commensurability is an appropriate way for individuals to make personal moral decisions, commensurating the preferences of the citizenry is an, or perhaps the, appropriate mode of decision making for a democratic government. Adler is completely silent as to how a government would go about gathering the information necessary to make these decisions, however. Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371 (1998).

185. Wagner, *supra* note 21, at 1295, 1321.

186. See generally Schroeder, *supra* note 52.

187. See *supra* note 3 and accompanying text.

In other words, although both sides speak in terms of “choice,” they actually seek to avoid free choice. Both propose a form of argument that would mandate the alternative choice preferable to them for other reasons. Choice is, however, always an ethical act. To say that a choice is mandated is to shirk ethical responsibility.

The speculative thinker, in contrast, defines rationality as the capacity for pure spontaneity—the ability to be free from the causal chains of nature and to make choices.

Most directly relevant to this Article, the speculative thinker believes that one should not—indeed cannot—take a simplistic position for or against commensurability, as it is necessarily and logically true on some level, and necessarily and logically false on another. As such, commensurability and incommensurability are not simple negations of each other. One cannot prove the truth of one by asserting the falsity of the other, or vice versa. Rather, the very concepts of commensurability and incommensurability are dialectically related—each can only be understood in terms of the other.

Consequently, both sides should drop this non-debate. To paraphrase Kant, they should either part as friends or they should engage in honest debate by developing their positions on the underlying political and legal issues that the commensurability debate merely obscures.

The commensurability debate is another example of the sexual impasse—the two sexuated positions are paradoxically and dialectically related so that each requires yet contradicts the other. Commensurability reflects the masculine position while incommensurability reflects the feminine. But we must remember that both sexes are failed attempts to achieve subjectivity. Similarly, both commensurability and incommensurability are failed attempts to account for truth.

