

Michigan Law Review

Volume 102 | Issue 6

2004

Spectres of Law & Economics

William H. Widen

University of Miami School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Law and Economics Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

William H. Widen, *Spectres of Law & Economics*, 102 MICH. L. REV. 1423 (2004).

Available at: <https://repository.law.umich.edu/mlr/vol102/iss6/20>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SPECTRES OF LAW & ECONOMICS

William H. Widen*

THE TRIUMPH OF VENUS, THE EROTICS OF THE MARKET. By *Jeanne Lorraine Schroeder*. Berkeley: University of California Press. 2004. Pp. 318. \$80.

INTRODUCTION

“Did you know that the first Matrix was designed to be a perfect human world? Where none suffered, where everyone would be happy? It was a disaster.”¹

There are spectres haunting law and economics — the spectres of G.W.F. Hegel² and Jacques Lacan.³ This is one of the central theses of Professor Jeanne L. Schroeder’s challenging new book: *The Triumph of Venus, The Erotics of the Market* (“*Triumph of Venus*”).⁴ Schroeder uses insights inspired by the teachings of Hegel and the French psychoanalyst, Lacan, to critique some basic assumptions made by scholars who use economic ideas to investigate the law and legal institutions — the law and economics (“L&E”) practitioners. The book devotes much space to criticism of Judge Posner’s vision of law,

* Associate Professor of Law, University of Miami School of Law, Coral Gables, Florida, wwiden@law.miami.edu; A.B. 1980, Stanford; J.D. 1983, Harvard. Professor Widen practiced corporate and commercial law from 1984 to 2001 at Cravath, Swaine & Moore in New York City (since 1991 as a member of the Firm). –Ed. I am grateful for my conversations with Reza Dibadj, Patrick Gudridge, Arthur Jacobson, George Triantis, William Maker, and Robert Wallace about this project.

1. THE MATRIX (Warner Studios 1999).

2. Hegel is best known for the caricature of his triadic logical method — proceeding by search for a thesis, antithesis, and synthesis. Hegel’s writing style is complex and obscure, particularly his treatises on logic. Fortunately, Hegel’s more accessible political treatise, *Philosophy of Right*, figures prominently in Professor Schroeder’s analysis. See G. W. F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (H. B. Nisbet trans., Allen W. Wood ed., 2003) [hereinafter, HEGEL, PHILOSOPHY OF RIGHT].

3. Lacan is known for advocating a return to the teaching of Sigmund Freud. As with Hegel, the writing style is complex and obscure. A reading of Hegel significantly influenced some of Lacan’s theories. Interestingly, it appears that Lacan did not study the Philosophy of Right but instead Alexandre Kojève’s anthropological reading of the more complex Phenomenology of Spirit. See ANTHONY ELLIOTT, SOCIAL THEORY AND PSYCHOANALYSIS IN TRANSITION 112 (1999).

4. Jeanne Lorraine Schroeder is a Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

using it as a proxy for L&E scholarship generally.⁵ Professor Schroeder succinctly states her basic problem with L&E:

In recent years, the study of markets in American jurisprudence has been expropriated by the self-styled “law-and-economics” movement, the dominant discourse of private law in America’s most elite law schools. One of its appeals is that it gives an aura of scientific certainty and objectivity to legal analysis and normative policymaking. Despite its claim to scientific status, however, this scholarship is almost entirely devoid of methodological discussion and internal criticism, as though these matters were uncontroversial. (pp. 1-2)

In Schroeder’s view, L&E fails to engage in meaningful empirical research. Instead, its members spin out analyses and policy recommendations like armchair pundits, giving advice based on non-falsifiable conclusions deduced from unexamined premises. The L&E movement is a “degenerating research program.”⁶ As such, it spends more time protecting its theoretical core than discovering facts about the world. Notwithstanding these deficiencies, L&E has thrived due to an ineffective response from the critical left perspective. Schroeder finds inadequate critiques of L&E grounded in a form of romanticism suffering from flaws similar to those afflicting the utilitarian underpinnings of L&E itself — both view markets and market transactions as spheres of cold rationality (p. 2).

Much L&E scholarship relies on the concepts of “perfect market” and “wealth maximization” to develop models designed to explain aspects of the law and legal institutions. Schroeder’s project is to expose inconsistencies in these concepts that make them ill-suited both for descriptive and normative roles in these models. Moreover, the goal of “wealth maximization” is revealed as inconsistent with basic notions of property. Schroeder finds the defects in these concepts particularly troubling because their use may inhibit human freedom. For Hegelians, promotion of human freedom is the highest aim.

From the foregoing, however, one should not get the idea that Schroeder’s program amounts either to a tirade against market economies or a call to embrace a leftist political agenda. In fact, she makes clear that her analysis actually sees markets as performing a

5. Judge Posner authored the leading text on law and economics. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2002). Recently, Professor Steven Shavell has published a competing textbook on law and economics. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (2004). Though it is beyond the scope of this essay to consider in detail whether Professor Shavell’s approach differs sufficiently from Judge Posner’s to avoid Professor Schroeder’s critique, I indicate below Shavell’s awareness of conceptual difficulties with wealth maximization and the ideal of the perfect market that Schroeder criticizes mainstream L&E for ignoring.

6. P. 3. Professor Schroeder borrows the phrase “degenerating research program” from Imre Lakatos, the philosopher of science, and expressly uses it in his sense.

central role in the development of legal subjects (p. 143). Nor does Schroeder believe that an appeal to Lacan or Hegel licenses specific or detailed policy recommendations (pp. 4-5, 10). Accordingly, her agenda risks being accused of shortcomings ascribed to the critical legal-studies movement — particularly the charge that no alternative normative agenda emerges from the analysis.⁷

This criticism may be deflected, at least partially, by Schroeder's identification of the L&E discourse as the "discourse of the university" in Lacanian parlance.⁸ University discourse claims to have scientific answers to policy questions when, in fact, this appeal to objectivity masks an ideological agenda, typically to preserve an existing allocation of power. For Schroeder, unless L&E is recognized in its true nature, it risks stifling important policy and political debate behind the veil of science. In this sense, the L&E discourse is anti-freedom. Thus, one positive consequence of Schroeder's agenda might be promotion of more vigorous public debate over important economic issues on ethical grounds where now those issues might be taken as settled by economic-policy science.⁹

By exposing the true underpinnings of L&E, Schroeder hopes that L&E practitioners will make more modest claims and return to the original teachings of Ronald Coase by shifting their focus to empirical research of actual markets.

What we can do, as Coase pleads, is to study actual costs and actual behavior in actual markets on their own terms. Although we can retain the impossible ideal of the perfect market, we must set realistic goals based on contingent, empirical judgments as to the relative efficiency of possible actual market choices. (p. 148)

Many professional economists already recognize the limitations inherent in neoclassical modeling of markets and human behavior and they are working to improve economic analysis in light of these

7. See, e.g., Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *LAW & SOC. INQUIRY* 779 (1992).

8. P. 5. Professor Schroeder provides an extensive analysis of this observation in Jeanne L. Schroeder, *The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*, 79 *TEX. L. REV.* 15 (2000); see also PAUL VERHAEGHE, *DOES THE WOMAN EXIST?* (Marc du Ry trans., rev. ed. 1999) (providing a book-length analysis of the Lacanian discourses).

9. I take Schroeder's rejection of economic policy science as having two grounds. It stems from a rejection of pure utilitarian ethics (i.e., ethics that exclude basic notions of justice and fairness) and from the technical observation that, even if our ethical intuitions were captured by notions of utility maximization, we are rarely if ever in a position to competently perform the required calculation. I do not mean to suggest that economic-policy science is divorced from ethics. See generally JOHN BROOME, *ETHICS OUT OF ECONOMICS* (1999). When pursuit of a policy is advocated because it is the "most efficient," opponents are left to advocate for the inefficient result, placing them at a rhetorical disadvantage unless they are prepared to challenge the claim of efficiency. The claim of efficiency typically is asserted as an empirical fact, thus not subject to challenge.

perceived shortcomings.¹⁰ Though Professor Schroeder's project may be of interest to these economists, her work is targeted at those using economics in the legal academy that have not yet awakened to the deficiencies of the brand of economics used by L&E.¹¹

Triumph of Venus is structured in five chapters, interlaced with references to Greek mythology that illustrate aspects of Schroeder's arguments.¹² The first chapter explores theories on the nature of gift transactions (using Pandora) as a prelude to her second-chapter critique of the concept of the perfect market (using Orpheus). The third chapter analyzes the property theories of Calabresi and Melamed¹³ (using Narcissus) as preamble to Chapter Four, which analyzes the deficiencies of the concept of wealth maximization (using

10. See, e.g., Daniel Kahneman, Maps of Bounded Rationality: A Perspective on Intuitive Judgment and Choice, Nobel Prize Lecture (December 8, 2002), available at <http://www.nobel.se/economics/laureates/2002/kahnemann-lecture.pdf>; see also BRUNO S. FREY & MATTHIAS BENZ, FROM IMPERIALISM TO INSPIRATION: A SURVEY OF ECONOMICS AND PSYCHOLOGY (Inst. for Empirical Research in Econ., Working Paper No. 118, 2002) (discussing bounded rationality, non-selfish behavior, and the economics of happiness); George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715 (2000) (exploring how to incorporate psychological and sociological concepts into economic models of behavior); Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359 (1994) (criticizing neoclassical economics for modeling a frictionless and static world that fails to explain economic performance over time). Further, some reflection on method is occurring in the legal academy. See, e.g., Donald C. Langevoort, Foreword, *Revisiting Gibson and Kraakman's Efficiency Story*, 28 J. CORP. L. 499 (2003). And, some other legal academics are, like Professor Schroeder, beginning to look for alternate approaches to L&E. See, e.g., Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for "Critical Legal Economics,"* 2003 UTAH L. REV. 1155 (2003); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al., eds., 2002)).

11. Professor Schroeder's concerns are not limited to the use of neoclassical price theory but extend to the L&E movement's misuse of new work being performed by behavioral economists. See Jeanne L. Schroeder, *The Stumbling Block: Freedom, Rationality, and Legal Scholarship*, 44 WM. & MARY L. REV. 263, 267-69 (2002). Indeed, she finds the use of behavioral economics by legal academics potentially more destructive of freedom than traditional L&E. Acceptance of behavioral economics might lead to laws discouraging activity that, though not harmful, is considered irrational. See also Donald Cooper, *Commentary: Misbehavioral Economics*, NAVIGATOR, May 2001, http://www.ios.org/text/dcooper_misbehavioral-economics.asp?navigator.

12. From an analytic-philosophy perspective, the use of myth goes hand in glove with the use of psychoanalysis. For example, Ludwig Wittgenstein considered psychoanalysis itself to be a form of myth. See JACQUES BOUVERESSE, WITTGENSTEIN READS FREUD (Carol Cosman trans., 1995). In his view, psychoanalysis could not be a science because not all mental events have causes. But, Wittgenstein did not apply the label "myth" in a negative sense. He found value in persuasive discourse. Indeed, a psychoanalytic cure may result from the analyst and patient mutually accepting a narrative that has no actual basis in the history of the individual. Verbalization in the form of narrative acceptance acts to dissolve the ill effects of the symptom. The danger identified by Wittgenstein consists of confusing psychoanalysis with science.

13. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Midas). Chapter Five locates the origins of law in desire rather than in rationality (using *The Eumenides*) and expresses the hope that society may develop social structures better suited to promote human development. Each chapter consists largely of reworked material from prior law review articles. Thus, *Triumph of Venus* might be seen as a collection of essays. Beyond the overarching theme of exploring economic rationality from a Hegelian and Lacanian perspective, a common thread links the various topics: Schroeder's desire to show how policy recommendations based on unsound conceptual analysis conflict with the exercise of human freedom.

Part I of this Review explains Schroeder's analysis of the shortcomings and paradoxes associated with the concept of "perfect market." Part II does the same for the concept of "wealth maximization." Part III shows how integration of these two concepts into a theory of human action can be seen as destructive of human freedom. Part IV provides an account of the construction of social facts to show how persons, exercising freedom, may improve the social structure. Part V discusses policy suggestions based on economic reasoning to illustrate how Schroeder's ideas might apply in practice. My method is to explain Schroeder's arguments by framing them, where possible, in terms of analytic philosophy.¹⁴

I. THE CONCEPTUAL PROBLEMS WITH PERFECT MARKETS

Professor Schroeder explains the central role of the concept of the perfect market in the formation of policy recommendations:

According to legal economists, efficiency would be achieved if the ideal of the perfect market were implemented. We should, therefore, modify our legal and political institutions so as to make the actual markets as nearly perfect as we can or, if that is impossible, to replicate the results of the perfect market as closely as possible.¹⁵

Schroeder's critique of the "perfect market" takes two forms. First, she gives a general analysis of the perfect-market concept. Second, she critiques that concept from a Hegelian/Lacanian perspective.

14. Professor Schroeder specifically states that certain of her arguments are designed to stand apart from the theories of Hegel and Lacan. I highlight these independent aspects in my discussion. Indeed, for many readers, the use of Hegel and Lacan may be an impediment to understanding. In my reading, however, I detect strains of more accessible analytic philosophy in the chosen references to Hegel and Lacan and draw upon these sources to highlight what I see at stake in her analysis.

15. P. 107. A recent textbook on L&E avoids even reference to the ideal of the perfect market in its subject index. See SHAVELL, *supra* note 5, at 736. Instead, Shavell refers to the invariance version of the Coase theorem, noting that it "needs to be carefully interpreted, and is not necessarily a good guide for thinking, even when bargaining is apparently frictionless." *Id.* at 106. The invariance version of the Coase theorem notes that, regardless of the initial allocation of property rights, parties will reallocate resources in a manner that maximizes social welfare if we assume the absence of bargaining costs. *Id.* at 102.

According to this first critique, “Once the perfect market is achieved, all markets stop. Once again, this was one of Coase’s points. Markets only exist as a means of eliminating transaction costs. When transaction costs are eliminated, markets are also necessarily eliminated.”¹⁶

In essence, Schroeder’s first critique argues that the perfect-market concept is oxymoronic — that conjoining the terms “perfect” and “market” is like conjoining the terms “round” and “square.”¹⁷ I understand her observation by conceiving of a market as a structure¹⁸ pursuant to which individuals may execute multiple bilateral contracts in a more efficient manner than would be possible in the absence of the structure.¹⁹ Just as a firm is a structure to reduce transaction costs, so too is a market. The firm reduces transaction costs by replacing bilateral contracting costs with the management structure of the firm. The market, rather than replacing bilateral contracting with an alternate structure, reduces transaction costs by lowering the costs of individual bilateral contracting activity. A perfect market, however, is characterized by the absence of transaction costs. Both firms and markets exist to reduce transaction costs, but without transaction costs there would be neither firms nor markets, as their *raison d’être* has ceased. Thus, the aspirational goal of attaining the perfect market is a wish for the end of all markets.²⁰

16. P. 143. The dynamic of the perfect market thus resembles the dynamic of desire. Complete satisfaction of desire is fatal to the subject.

17. Noam Chomsky’s famous sentence: “Colorless green ideas sleep furiously” illustrates the point. See NOAM CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* 149 (1965). Though syntactically well formed, the sentence is semantic nonsense. To ask “Do colorless green ideas sleep furiously?” is to ask a meaningless question. Similarly, to ask questions about a “perfect market” may well be to ask meaningless questions.

18. For a simple case of market as structure, think of a village market in which persons periodically meet in a single location, bringing goods to trade. By coming together in a single market “place,” at an agreed date and time, bilateral contracting costs are reduced because individuals need make only one round trip to the market and home again. The structure consists of the agreed meeting day, time, and location. This notion of an efficient structure reflects the notion in graph theory that the method using the least edges to connect multiple points in a connected graph is to designate a single point as the “center” and then connect all other points to that single point using edges. See, e.g., GARY CHARTRAND, *INTRODUCTORY GRAPH THEORY* (1977). Such a structure need not be limited to facilitating simple exchanges. In such a structure, parties may give representations and warranties relating to objects exchanged and also may contract for goods to be delivered at future market meetings.

19. Conceived of as a structure, the market is distinguished from the actual exchange or contract itself. This conception of the market differs from those advanced by some critical legal theorists who equate the institution of contract with the market itself. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 625 (1982) (equating the institution of contract with the market itself).

20. Professor Schroeder originally developed this critique in Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998) [hereinafter, Schroeder, *End of Market*].

This first critique suggests another odd conceptual feature. Though it is not uncommon to construct scientific models based on assumptions that are impossible to achieve in practice — such as assuming a perfect vacuum or a frictionless surface in the study of motion — such assumptions, if realized, would not eliminate the activity under study. In contrast, the existence of a perfect market is an assumption that, if realized, would result in the end of market activity.²¹ Thus, for Schroeder, the perfect market is not merely empirically impossible, it is theoretically impossible. L&E's shortcoming is its failure to consider the implications of using a theoretically impossible ideal.²²

Professor Schroeder's second critique follows from these first observations. Conceptually, the perfect market is an imaginary zone in which exchange of property objects between individual persons ceases. For a follower of Hegel or Lacan, however, the ongoing exchange of objects between persons functions as an essential component in the formation of human personality or subjectivity in a modern society.²³ The abstract person, as such, has no independent individuation criteria that allow its identification as a single thing.²⁴ In an attempt to distinguish itself, the abstract person infuses its particular will in objects by "acquiring" or "possessing" them, thereby asserting, in effect, "I am the thing that possesses these objects." Such a stance, however, makes the subject a slave to those objects. The abstract person only achieves a free existence when, in a free exchange of objects with another abstract person, each person recognizes the other as an individual will via recognition of the other's rights in the object subject to exchange. Thus, the formation of individual identity requires recognition by another, which derives from the free contractual exchange of things. Lacan provides a similar analysis of exchange as essential to mental development.²⁵ Further, for Lacan the

21. *Id.* at 517.

22. *Id.* at 516.

23. See David Gray Carlson, *How To Do Things With Hegel*, 78 TEX. L. REV. 1377, 1378-79 (2000) (explaining how, for Hegel, contract and exchange are essential for human subjectivity, not merely convenient). In this sense, the institution of property is essential in the formation of personality. Others have suggested that the institution of property may be essential for other reasons, such as solving the problem of "the commons." See, e.g., Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998) (discussing the problem of the commons and offering a symmetrical problem of the anticommons).

24. Individuation criteria consist of distinguishing characteristics that, among other things, allow us to identify and count particular things. The abstract person conceived of as merely an absolutely free will has no such characteristics. JEANNE L. SCHROEDER, *THE VESTAL AND THE FASCES* 27 (1998).

25. As one commentator explains Lacan, "The ego owes its identity to the other; in order to be or become someone, I have to identify with something that comes from without, and thus with something I myself am not and have not brought about." PHILIPPE VAN

existence of the unconscious is a central fact of human subjectivity. The perfect-market assumption of complete information requires that persons know their own minds, but such knowledge would result in the destruction of personality (p. 131). Thus, to advocate a goal that eliminates ongoing exchange and transaction costs is to implicitly lobby for the elimination of human personality or subjectivity.

Both of Schroeder's critiques indicate a conceptual inconsistency between the use of the perfect market as a goal and freedom. Our practical inability, though, to eradicate core transaction costs, such as time, space, and incomplete information, means that we will never face the death of the market by realizing its ideal, perfect form. Even if the perfect market is "perfectly un-free" (p. 142), something more is needed to show the incompatibility between the L&E project and actual freedom.²⁶ Professor Schroeder often speaks in ways that imply this something else might be a brand of determinism that follows from L&E's modeling activity.²⁷ That path, if taken, however, leads to trouble. To make the anti-freedom pitch along traditional deterministic lines would require Schroeder to take on the arguments of a host of philosophers who have argued for the doctrine of "compatibilism" — the notion that it is consistent to believe simultaneously in a materialistic world governed by causation and in free will.²⁸

HAUTE, AGAINST ADAPTATION: LACAN'S "SUBVERSION" OF THE SUBJECT 86 (Paul Crow & Miranda Vankerck trans., 2002).

26. Though her critique of the perfect market does not demonstrate that L&E is anti-freedom in a strong sense, her analysis does show how purported descriptions of what would happen if transaction costs were eliminated are incoherent. P. 148; *cf. infra* note 36 (noting Shavell's observation about wealth maximization).

27. *See, e.g.*, p. 311 ("If the future was perfectly determinate and predictable, we would not be free — we would be totally masculine, with no room for the feminine."). This notion implicitly requires adoption of a compositionality thesis to the effect that large-scale economic phenomena must be explained as a composite of behavior of individuals who exhibit the particular traits assumed by the model. Not all economists would accept such a restriction; some argue that large-scale economic phenomena can be modeled as if the individuals each operated in accord with particular traits exhibited by *homo economicus*. Such economists would not be encompassed by charges of determinism.

28. *See, e.g.*, DANIEL C. DENNETT, *FREEDOM EVOLVES* (2003); ROBERT NOZICK, *Newcomb's Problem and Two Principles of Choice*, in *SOCRATIC PUZZLES* 45 (1997); DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (1980). Nozick's discussion of Newcomb's problem appeared in a somewhat different form in the *Scientific American Magazine* in 1973 and sparked a huge reader response. *See* ROBERT NOZICK, *Reflections on Newcomb's Problem*, in *SOCRATIC PUZZLES* 74 (1997). Some have argued that the great Hegel himself was a compatibilist of sorts. *See* Robert B. Pippin, *Naturalness and Mindedness: Hegel's Compatibilism*, 7 *EUR. J. PHIL.* 194 (1999). I do not mean to imply that such an argument cannot be made. I merely suggest that if she wishes to take that road, Professor Schroeder has a formidable task in front of her, including possible reconciliation with Hegelian teaching. For Alexandre Kojève, Hegel envisioned two worlds: the determined, given world of nature and the historical or human world. Human freedom does not consist of a choice between two "givens" in the natural world but instead is the negation of a given through action by an individual person. ALEXANDRE KOJÈVE, *INTRODUCTION TO*

Reference to Hegel presents a possible way forward because Hegel provides a third objection to use of the perfect market as a goal for the political process. For Hegel, there are three spheres of human activity in which ethical life or *Sittlichkeit* might be realized: (i) the family, (ii) contract or market relationships (also referred to as “civil society”), and (iii) the modern state.²⁹ The structure of family life (in which individuals pursue common projects), as well as the structure of contract or market relations (in which individuals pursue private interests), are to be preserved, yet subordinated to the structure of the state (in which the overarching common project is the promotion of freedom for individuals). Though both are important aspects of human existence (and reflect aspects of the state), both the spheres of family life and the market are incomplete. They do not have the collective goal of promoting freedom and thus are inadequate to promote fully the development of human potential. From the Hegelian viewpoint, a state that concentrated solely on promoting efficient preference satisfaction in the sphere of market activity would be stuck in second gear. Such a state would fail to adopt its proper role of promoting human flourishing and, ultimately, freedom.³⁰ For Hegel, extreme poverty and extreme wealth raises serious challenges for modern society because both tend to destroy a collective allegiance to promotion of freedom. Hegel, however, did not purport to have an answer to the problem of poverty, though he tentatively suggested expansion of markets abroad to address poverty in Prussia as a partial solution. From this standpoint, the L&E movement appears to be anti-freedom, because it advocates policies that merely promote satisfaction of market desires.³¹

Pursuit of the Hegelian critique based on the proper role of the state, however, must be further developed if it is to have real impact. L&E practitioners would, I suspect, claim that efforts to improve

THE READING OF HEGEL 216, 222 (James H. Nichols, Jr. trans., 1980). Such a vision provides one basis for constructing a doctrine of compatibilism. Without more, the fact that economists construct models designed to predict human behavior does not allow the easy inference of a conflict with promotion of human freedom.

29. See HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 2. Professor Schroeder does not develop this third Hegelian point, presumably because she wishes to avoid policy recommendations and, ultimately, politics. For details on how the argument might be elaborated, see Michel Rosenfeld, *Hegel and the Dialectics of Contract*, in HEGEL AND LEGAL THEORY 228 (Drucilla Cornell et al. eds., 1991).

30. Terry Pinkard, Hegel's biographer, writes:

Whereas civil society is the sphere of free *individuals*, political life has for its purpose the establishment of the conditions necessary for a free *people*. For this goal to be actualized, the state must be articulated into a set of appropriately modern *governmental* institutions, whose legitimating principle is again that of freedom, not efficiency or preference satisfaction.

TERRY PINKARD, *HEGEL: A BIOGRAPHY* 486 (2000) (commenting on *Philosophy of Right*).

31. Though Hegel had read Adam Smith, he did not pursue the notion that unfettered markets might best achieve freedom for individuals.

market efficiency by reducing transaction costs are strongly pro-freedom because they facilitate the making of more exchanges by individuals with limited resources. As discussed above, even Schroeder states that such exchanges are a mechanism that individuals use to express their freedom. To effectively counter this type of L&E defense, one must provide an account of what further actions the state should be taking to promote freedom. In effect, Hegel's defense of the organization of the Prussian state must be updated for modern times. In part, such an approach would require an explanation of the governmental structures that allow individuals to see their own freedom reflected in the law and not merely an argument that extremes of wealth and poverty inhibit the development of this collective vision.³² Professor Schroeder, however, would like to avoid such political judgments.

Though, in its present form, Professor Schroeder's analysis of the perfect market does not, in itself, demonstrate L&E's incompatibility with freedom, it does provide a psychoanalytic account that explains how the perfect-market concept has had such staying power in theoretical analysis.

The alternate strategy for masculine economics is to compromise its desire and thereby substitute drive for desire — and, as Lacan famously asserted, all drives are death drives. . . . [T]his is the road taken by Posner, who seeks to avoid the unsatisfied eroticism of actual markets characterized by desire through the creation of a jurisprudence based on a hypothetical market characterized by the deathly drive of wealth maximization. (p. 140-41)

The perfect market is the means toward maximizing preference satisfaction. To evaluate the success or failure of the perfect market as a means to that end, we need a measuring rod for the preferences that

32. Two illustrations of proposals for structural change come to mind. A recent structural suggestion for a "Deliberation Day" comes from Bruce Ackerman and James Fishkin. See BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004). Deliberation Day is a proposal for a federally sponsored holiday in which individuals would be paid to consider candidates and issues prior to an election. Judge Posner has criticized the proposal. See Richard Posner, *Smooth Sailing*, *LEGAL AFF.*, Jan.-Feb. 2004, at 41. Another approach consistent with Hegel's admiration for Greek culture might be to explore application of Aristotelian concepts linking human flourishing to inquiries in biology. For Aristotle, it was an easy matter to examine a plant or animal and determine whether or not it was thriving in its particular condition. Similarly, we might look at our current consumer society driven by apparently ever-improving market conditions and find that individuals, in fact, are not thriving. To proceed, such an approach would require development of some measure of human flourishing. Such measurements might be found in the measurements of those engaged in comparative studies of legal systems. This, at least, might motivate the search for further conditions that might be pursued by the State. Such an approach would be consistent with attempts to identify those characteristics of a system that are associated with economic development, eradication of disease, elimination of hunger, reduction in child mortality rates, etc. through ongoing comparative studies of legal systems. Charles Taylor, *Hegel's Ambiguous Legacy for Modern Liberalism*, in *HEGEL AND LEGAL THEORY*, *supra* note 29, at 64 (describing Hegel as a "civic humanist").

we would maximize. That measure is, in general, utility, and its more specific surrogate, wealth.

II. THE CONCEPTUAL PROBLEMS WITH WEALTH MAXIMIZATION

As Professor Schroeder has elaborated elsewhere,³³ the essential elements of property consist of the exclusive right of one legal person to (i) possess, (ii) transfer, and (iii) consume (or enjoy) a property object. This conception of property goes back at least to Roman times. When society recognizes these three rights in a particular legal person with respect to an object, the person is said to have a “property” in the object. The core problem with L&E’s employment of the concept of wealth maximization is that, though the principle of wealth maximization recognizes possession and transfer as components of property, it ignores the roles of consumption and enjoyment. Professor Schroeder sets up this point in Chapter Three by her critique of Calabresi and Melamed’s analysis of property law; through six scenarios she illustrates how the component of enjoyment is absent from their theory, thus allowing for only partial explanation of the institution of property. The repression of enjoyment developed in Chapter Three is the foundation for Chapter Four’s critique of the wealth-maximization principle because consumption results in a reduction of wealth and, as a logical matter, the true wealth maximizer would forever delay consumption or enjoyment. This observation is expected by Professor Schroeder to surprise people but I do not think it is subject to simple fix via definitions. Wealth maximization and consumption simply are incommensurate.

In Posner’s imaginary system, market participants do *not* engage in market transactions in order to obtain objects to be enjoyed, because no objects are ever enjoyed in his system. Rather, they engage in market transactions for the purpose of engaging in market transactions — i.e., they exchange one object in order to achieve its exchange value to acquire another object which, in turn, is exchanged in order to achieve its exchange value, *ad infinitum* (p. 269).

Professor Schroeder uses the Midas myth to reinforce her point. In today’s society, we use the term “Midas touch” as a term of praise or approval to refer to someone with a knack for making money. But, in the original myth, the “golden touch” prevented King Midas from eating — it was a curse not a beneficial attribute. Yet, this inversion of the myth’s original meaning suggests how current ideology adopts wealth maximization as a desirable goal. In fact, as the myth teaches, emphasis on wealth maximization can be harmful rather than helpful as an end, particularly when it is the sole or primary end.

33. See SCHROEDER, *supra* note 24, at 37.

Professor Schroeder additionally notes the lack of precision associated with the concept of “utility” maximization and explains how Judge Posner hoped that the substitution of the more easily measured “wealth” maximization would provide greater certainty. On closer examination, however, she finds that the substitution does not promote certainty unless wealth is limited to a simple measurement of money or money’s worth.³⁴

Happiness (or a broad notion of utility and well-being) is notoriously difficult to measure, and any attempt to measure happiness by using a proxy such as wealth creates a distortion. The measurement heuristic destroys the very thing being measured. Wealth may be a means to achieve the end of happiness as well-being — wealth is something that enables individuals to enjoy life. But, when wealth is substituted for happiness as the measure, the logic of wealth maximization (as opposed to happiness or well-being maximization) requires the absence of enjoyment altogether. To maximize wealth is to enjoy nothing — the very opposite of happiness or well-being. Professor Schroeder sees the pure wealth maximizer as a miser who never spends or consumes.

To be fair, however, the image of the L&E practitioner unreflectively advocating wealth maximization has become a bit of a caricature. Though Judge Posner advocated use of wealth maximization at one time, his more recent work attempts to incorporate other factors in the analysis.³⁵ And, the newest L&E textbook expressly acknowledges that the concept of wealth maximization is incoherent, though Professor Shavell believes that careful use of the concept may nevertheless provide some insights.³⁶

Caricature or not, in Schroeder’s analysis we find that both the object being maximized — wealth — and the means used to maximize

34. Elsewhere, Schroeder notes that the concepts of wealth and utility maximization are sufficiently close as to be interchangeable for purposes of her critique. See SCHROEDER, *supra* note 24, at 16.

35. Compare Richard A. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (advocating wealth maximization), with RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) (advocating a pragmatic approach considering multiple factors).

36. Professor Shavell writes:

What, however, can be said of the notion of “wealth maximization,” a social goal advanced by many scholars who have analyzed legal rules in an economically oriented manner? As I will now explain, (a) the goal of wealth maximization is not one employed in welfare economics — indeed, it is not a well-defined goal, that is, it is theoretically incoherent — even though the impression in legal academic circles is that wealth maximization is the general normative goal endorsed by economists; (b) the goal of wealth maximization has been criticized by legal academics for reasons that are, ironically, largely consistent with welfare economics

SHAVELL, *supra* note 5, at 667-68. As a matter of terminology, from a pragmatic standpoint a concept that has utility is not, strictly speaking, meaningless.

it — the perfect market — conceptually display self-destructive tendencies: exchange, subjectivity, and enjoyment all cease when the logic of these two concepts is ruthlessly pursued in any model. The use of these concepts to guide policy can promote social structures that hinder freedom. To see how this is so, Schroeder employs a theory of human action.

III. A HUMAN-ACTION MODEL

From Professor Schroeder's Hegelian/Lacanian perspective, the market economy is erotic in the technical sense that the desires of individual actors drive market exchange.³⁷ Individuals experience desire as a "lack" — the lack of some lost object that, once regained, will make them whole and satisfy their desires. They pursue acquisition of objects through exchange transactions to cure this lack. The object cause of desire that each individual pursues, however — the *object a* in Lacanian parlance — does not ever truly inhere in the particular objects acquired. Thus, particular object acquisition never satisfies desire. Desires are unstable — the opposite of a type of phenomena susceptible to easy modeling. The notion that policy might be directed toward satisfaction of desires appears hopeless. How might any policymaker discern just which desires to maximize?

Professor Schroeder's analysis becomes clear against the outline of a theory of human action based on the work of analytic philosophers. Below, I sketch an outline of one such theory of human action using the concepts of information,³⁸ beliefs,³⁹ desires, preferences, and action.⁴⁰ The outline will show how, in a more familiar theoretical framework, desires display the same type of inconstancy as that theorized by Lacan, thus reflecting the challenges facing any modeling enterprise.

37. Schroeder, *End of Market*, *supra* note 20, at 492. The root desire that underpins all the particular desires that economists believe are satisfied in markets is the passionate desire for recognition. For Hegel, this desire originates with a person's love for other persons and is stronger than particular desires for food or shelter. See Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 895-900 (1989). According to Hegel, market exchange is the only mechanism suited to achieve this recognition. *Id.*

38. Information consists of the sense data received from ordinary experience.

39. Individuals form beliefs based on information. Beliefs may consist of simple propositions, such as "The cat is on the mat," or law-like conditionals, such as "If I drop this ball, then it will fall to the ground."

40. This model derives primarily from my reading of Donald Davidson. See DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* (2d ed. 2001). The model also borrows from Jon Elster, particularly JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* (1983), and Kenneth Arrow, *Mathematical Models in the Social Sciences* (Cowles Comm'n Paper No. 48, 1951), reprinted in *THE POLICY SCIENCES* 129 (Daniel Lerner & Harold D. Lasswell eds., 1951). It is substantially similar to models of the rational *homo economicus* used by economists. ◊

An individual person acquires information about the world and then forms beliefs based on this acquired information set. Separately, the individual has a set of desires.⁴¹ (We can assume that these desires vary in intensity and may be rank ordered based on this level of intensity.) Based on the individual's belief set, the individual uses means-ends reasoning to identify a subset of her desires that might be satisfied by taking one or a series of actions (the "realizable set" of desires). The individual then constructs a baseline rank ordering of desires from this realizable set. The individual, however, then modifies the baseline rank ordering by making adjustments for the perceived costs in time, money, effort, reputation, and risk associated with satisfaction of the desires in the realizable set. When adjusted for these various costs, the baseline ordering of desires from the realizable set may change, resulting in a second ordering which lists the actual preferences held by actors. An individual takes action to satisfy the desire that ranks first in the list of preferences at the end of this two-stage ordering process. Thus, the individual's action is explained.

When the action results in satisfaction of the desire (or in failure), the individual moves to the next item on the list and takes action to satisfy that second desire (which now has moved to first on the list).⁴² In the meantime, however, the individual continues to acquire information about the world that may modify the individual's set of beliefs. This modification may, in turn, lead to a modification in the adjusted rank ordering of preferences (either because the perceived realizable set of desires changes, the individual's evaluation of the costs associated with attaining these desires changes, or both). Further, the desires of the individual may change (either by a change in the set of the objects of desire, a change in the intensity of a desire, or both) for reasons unrelated to the acquisition of new information.

41. In Lacanian terms, these desires do not consist of mere animal needs for basic life requirements. Desire exceeds need. See VAN HAUTE, *supra* note 25, at 24, 104, 106. The contemporary example of McDonald's restaurants illustrates how wide the gulf may be between need and desire. The documentary *Super Size Me* recently won a directing award at Sundance film festival for chronicling the deterioration in the health of filmmaker Morgan Spurlock who ate nothing but McDonald's food for a month. See Brian Braeker, *The Real Price of a Big Mac*, NEWSWEEK, Jan. 29, 2004, <http://msnbc.msn.com/id/4078903/>. Though the McDonald's Corporation is changing its marketing emphasis toward healthier food products and elimination of the "super size" option in response to lawsuits and adverse publicity occasioned by the film, the phenomenon does indicate how an individual's desires often conflict with basic needs.

42. Note that in this model, satisfaction of one desire does not lead to satisfaction in general. The individual is never satisfied, but moves from item to item on the list. In this sense, the individual is never complete or whole. In Lacanian terms, the individual is always looking for the lost object of desire, which never is found. Instead the individual focuses on particular objects, thinking that this particular object may be the one that satisfies. It never does, except perhaps momentarily in what Lacan calls *jouissance*. Even *jouissance*, however, as actually experienced by individual persons, is ephemeral and partial.

Rationality in this model consists of means-ends reasoning with certain formal properties.⁴³ In contrast, we typically do not refer to an individual's particular set of desires (or the levels of intensity of those desires) as either rational or irrational. Instead, desires simply are taken as given. Nevertheless, we may attempt to give a causal explanation or a narrative to account for why an individual has a particular desire. In this sense, some desires might be predetermined whereas others might be the product of spontaneous free choice.

Given the forgoing, there is a surface tension that might lead one to believe it difficult or impossible to maximize satisfaction of desires in the market place. In a market setting, the possible objects of the individual's desire (as consumer) are various goods and services. Because the individual creates its ordered list of preferences by adjusting for various costs, we might imagine increased demand for a good when that good bears a lower price rather than a higher price. Similarly, in a market setting, the possible objects of the individual's desire (as producer) include wealth accumulation, so the individual would tend to produce those goods and services that will most increase her wealth. This would suggest production of goods and services that can be exchanged for a high price, relative to cost of production. Mathematical modeling, however, reveals that the contradiction between the desires of consumers and producers is only apparent.⁴⁴

The empirical reason why some desires always will go unsatisfied is scarcity. The market for production and exchange is characterized by scarcity. Scarcity exists both in limitations on goods and services that may be acquired and in limitations on the resources of individuals available to trade in the market. Thus, the desires of the market participants may not all be satisfied. The rank ordering of preferences, however, results in satisfaction of individual desires through the market in a manner that maximizes fulfillment of desire in light of this scarcity.⁴⁵

43. For example, we assume that an individual can rank order any two preferences (or express indifference) and, if A is preferred to B and B is preferred to C, then A is preferred to C. All such notions of rationality, however, are purely instrumental and do not accord with the Hegelian notion that relates rationality to free identification of ends by individual persons.

44. Kenneth Arrow demonstrates how formalization usefully reconciles the apparent contradiction between the verbal formalizations. If consumers seek to purchase products with low prices while producers seek to provide products with high prices, it would appear that the two groups work in opposite directions. This is not the case, however, as the apparently inconsistent goals actually result in creation of equilibrium. *See Arrow, supra* note 40.

45. In a few places, Professor Schroeder speaks as if realization of the perfect market would result in the end of desire. *See* p. 143. This is not clearly so. If the perfect market merely eliminates the subset of costs identified as "transaction costs" (i.e., the costs associated with bargaining) then scarcity would still exist and some desires would go unsatisfied, though all trading would cease because no individual would be able to improve her position by further exchange. Only if the set of transaction costs is broadened to include

There are several things to note about this model. First, it hypothesizes a form of abstract desire⁴⁶ uninfluenced by the world of beliefs, costs (transaction and otherwise), and scarcity. In fact, however, we only experience desire filtered through our systems of belief and means-ends reasoning in a world of scarcity. Thus, our initial ordering of desires is derivative.⁴⁷ The presence of various costs further biases our preference ordering. Thus, an actor may never correctly identify his or her “true” preference ordering as it would exist in the absence of transaction costs. As illustration, consider the Dr. Seuss story about green eggs and ham in which a fantastical creature spends the majority of the plot protesting to Sam-I-Am that he “does not like green eggs and ham.”⁴⁸ The protagonist suffers from an information problem. When the creature finally tries the product, it likes green eggs and ham and radically reorders its preferences, placing green eggs and ham at the top of the list. We are left wondering what preference ordering would result if the creature next tried blue eggs and ham. Yet, our only source of information about the creature’s desires and preferences comes from statements made by the creature and our observations of the creature’s behavior. With incomplete information, a consumer does not know her own mind (or, at least, what her preference ordering would look like in the absence of transaction costs) and neither do we.

Policy recommendations may be aimed at passing laws that affect the status-quo preference ordering of actors either by eliminating some costs or imposing others. As suggested by the model above,

all costs, including costs of production, would desire cease in a perfect market. Professor Schroeder is well aware of this point but does not always indicate when she is speaking about the narrower or broader definition of transaction costs. It is only the narrow definition of transaction costs that holds any practical interest, the latter being a world in which “manna falls from heaven” as Professor Schroeder quotes Professor Calabresi.

46. For illustrative purposes, we might tentatively identify this abstract, unfiltered desire in the model with the psychoanalytic concept of “drive.” For Lacan, all drives amount to death drives. If this abstract unfiltered desire were to be satisfied in a moment of ultimate *jouissance*, as a conceptual matter the individual would cease to exist. To be an individual in society is precisely to move between the poles of individual desires and their momentary, but ultimately incomplete, satisfaction. See Néstor A. Braunstein, *Desire and Jouissance in the Teachings of Lacan*, in THE CAMBRIDGE COMPANION TO LACAN 102 (Jean-Michel Rabaté ed., 2003). It is from this perspective that Professor Schroeder critiques L&E’s fascination with the perfect market. If the perfect market were achieved, the market would end. Pursuit of the L&E research agenda thus amounts to a strategy for dealing with drive.

47. We need to enter the world of belief and means-ends reasoning to make sense of the concepts of scarcity and preference ordering. The notion that a useful concept of acontextual preferences may not exist is not new to legal scholarship. See, e.g., Cass R. Sunstein, *Endogenous Preferences*, *Environmental Law*, 22 J. LEGAL STUD. 217 (1993). If a preference is a function of an initial entitlement allocated by law (such as illustrated by the so-called “endowment effect”), then a policymaker is unable to identify a simple preference and the best method to satisfy it. *Id.* This will be a problem whenever a preference is an artifact of given positive laws.

48. DR. SEUSS, GREEN EGGS AND HAM (1960).

however, such actions merely reshuffle preferences as finally ordered by the second preference ordering. It is not possible to say whether any particular reshuffling will bring a group of actors closer to maximizing satisfaction of their priority ordering of true, unfiltered desires. Policy recommendations also may be aimed at altering belief structures. Because an actor's structure of beliefs give rise to the first base ordering of preferences we again find a reshuffling, but without assurance that the change brings us any closer to maximization of satisfaction of unfiltered desire. We observe that actual preference orderings represent compromises — the problem of the second best.⁴⁹ We may not infer the identity of the first best or how to get there from where we stand.⁵⁰ Thus, policy recommendations framed in terms of achieving the first best either are delusional or have another aim.⁵¹

One such aim might be to influence the nature of belief sets. One direction that belief sets might be altered is in the direction of making belief sets more uniform across individuals. For example, one might attempt to foster the belief that wealth maximization should be the goal of each actor.⁵² To the extent manipulation of the belief set is successful, it simplifies modeling and enhances prediction. We find evidence of manipulation of the belief set in our popular culture toward wealth maximization; examples include the inversion of the Midas myth discussed above, the notion that “greed is good” from the famous line in the Hollywood movie “Wall Street,” and the adage “If you are so smart, why aren't you rich?” Advertisements consist of nothing but attempts to modify belief sets, by everything from providing simple information to more active influence through suggestion of counterfactual rules (e.g., if you owned this car, the opposite sex would love you). The consumer society is fueled by the notion that one should acquire ever fancier and more sophisticated physical possessions. The consumer society “works” even if consumers do not actually consume or enjoy the objects that they buy, so long as consumers purchase.

From the foregoing, we can see how the L&E movement might fit the Lacanian discourse of the university as proposed by Professor Schroeder.⁵³ It can contribute to entrenchment of a particular ideology

49. P. 110; see R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

50. P. 110; Lipsey & Lancaster, *supra* note 49, at 11.

51. See Jeanne L. Schroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147 (2000). Indeed, one of the central challenges facing policy recommendations based on economic research is the problem of the second best. In light of this theory, economics must explain how policy recommendations should be made.

52. Economists often make the simplifying assumption that persons act to maximize wealth when modeling actors operating in commercial settings.

53. See *supra* note 8 and accompanying text.

by maintaining or altering belief sets of actors in the direction of predictable market behavior that facilitates modeling.

Though the human-action model outlined above does not purport to suggest a cause for an actor's unfiltered set of desires, at the level of a system of beliefs, the initial ordering of desires may be manipulated. To the extent that the belief set includes normative judgments such as "it is rational to maximize wealth and one ought to do what is rational," then operative desires are manipulated. There is, of course, nothing wrong in the abstract with attempting to influence belief sets. Indeed, our whole political system presumes a "marketplace of ideas" in which different views may be expressed in the hope of persuading voters. Such activity, however, is identified as political, not scientific. The rhetoric of science involves the notion that you do not have a choice (e.g., what goes up, must come down). Thus, the treatment of L&E as science — the injunction that you must do X because it promotes market efficiency — amounts to a political judgment masquerading as a scientific one.

As a factual matter, preferences change over time (and, indeed, preferences may change because of the passage of time as, for example, a person's appetite for savings might increase as one approaches retirement age). Changes in the structure of our economic and political institutions may cause changes in individual preference orderings, both by altering costs of certain choices and by influencing beliefs. An individual's past attempts to satisfy desires may, themselves, influence the reordering of the current realizable set of desires. Although economic models do not focus on explaining the origin of desires (i.e., the wants of the individuals in the marketplace), the policy recommendations made by legal economists will, if implemented, in fact shape future preference orderings of the realizable set of desires of the individual.⁵⁴ We may applaud an individual's exercise of choice when the individual consciously makes that choice with a view to shaping her future preferences for the better; this is a form of character building advocated by Aristotle and discussed by Elster, among others. The implementation of a policy recommendation may have the same effect of shaping future preferences; but, it will lack the laudatory element of choice if that policy recommendation comes packaged as scientifically mandated, rather than as a choice to be made. Thus, how the policy recommendation is presented can adversely impact the exercise of

54. To be sure, this is a feature of all policy recommendations, not simply those advocated by legal economists, because implementation of policy alters relative costs of pursuing different actions. The critique aimed at L&E is aimed at the rhetoric used to advance the policy and not at the simple fact that implementation of the policy will alter preferences.

freedom. This is my take on the most serious charge Professor Schroeder makes against L&E.

IV. THINGS THAT DO NOT EXIST

Professor Schroeder expresses the hope that positive social changes may be on the horizon, echoing the Hegelian faith in progress through history. To understand how change in social structure is possible, we need to consider some of its basic features. In reading Lacan and related commentary, negative-existence claims abound: “Woman” does not exist, the “Big Other” does not exist, etc.⁵⁵ These negative-existence claims often are claims about the structure of social reality, but they typically are not explained in a manner that permits understanding of what is at stake. We need this understanding so as to evaluate Professor Schroeder’s hope expressed at the end of *Triumph of Venus* that a change for the better in the social order (the “Big Other”) may be just around the corner (p. 311). To understand how positive social change is possible, one simply needs to recognize that social reality is constructed through performative acts. Performative acts create relationships by virtue of verbal behavior such as the assertion “I do” in the marriage ceremony. In this sense we might make the negative-existence claim that social facts “do not exist” or are “unreal.”

To be sure, social reality presents an ontological challenge. The analytic philosophers clearly frame the problem.⁵⁶ What does it mean to say that “Jack and Jill are married?” When we ask such a question we are asking for an account of the metaphysical status of social and legal facts. We believe that statements expressed by sentences such as this can be true or false, yet the truth conditions for such statements differ from truth conditions for statements expressed by sentences such as “The cat is on the mat.” In the latter case, the sentence expresses a brute fact.⁵⁷ The truth or falsity of this statement can be

55. P. 306; *see also* VERHAEGHE, *supra* note 8, and almost any work by Slavoj Žižek, *see, e.g.*, SLAVOJ ŽIŽEK, ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT 58-9 (rev. ed. 2001).

56. My account is based primarily on the work of J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962), and JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995).

57. I expect a Lacanian initially might strongly disagree with my use of a correspondence theory of truth. “[For Lacan, t]he world about which we speak and in which we live is no ‘brute’ reality; it is itself already mediated and structured by the signifiers of language, which allow it to appear as a meaningful and differentiated environment (*Umwelt*).” VAN HAUTE, *supra* note 25, at 10-11. I use it here, however, for its illustrative power. Indeed, in Professor Schroeder’s view, the Lacanian Real, though not the natural world, “includes *our sense* that there is a natural world external to our thoughts and dreams, something more permanent than our fleeting human lives.” Schroeder, *End of Market*, *supra* note 20, at 500.

ascertained by looking at the world. In the case of the marriage, however, we assert a social fact and no amount of looking at the present state of the world will help us. The truth or falsity of a present-tense statement asserting a brute fact does not depend on the occurrence of a past ceremony. Rather, its truth consists in a correspondence between the statement and the state of the world.⁵⁸ In contrast, the truth or falsity of the present-tense statement asserting a social fact depends both on the present state of the world and on the successful performance of a ceremony at some past time. The ceremony, as an event with a beginning, a middle and an end, has come and gone — it no longer exists, and its very existence in the past was merely performative. Nevertheless, people take actions based on the “existence” of social facts to the same extent that they would open a door before attempting to walk through it.

Though I hope we can understand the above sense in which social facts are “unreal,” there is another sense in which various objects and concepts do not exist in the Lacanian system. For Lacan, the “Real” is that which escapes language and symbolization. It stands for that aspect of the truth that remains unspoken — that which escapes symbolization. In the abstraction of modeling, many aspects of reality escape symbolization. For Lacan, the realm of law, language, and symbolization is theorized as “masculine” whereas that aspect of truth that remains unsymbolized is theorized as “feminine.” The famous Lacanian notion that “Woman does not exist” is merely a statement that the feminine always escapes symbolization — for that which is symbolized is, by definition, masculine. “Woman” does not exist in the

58. I do not expect to sell critical theorists or anyone else on a correspondence theory of truth in this essay nor do I want to enter the debate over whether the nature of the correspondence consists of something like the structure of the sentence “picturing” a portion of the world a la Wittgenstein’s inquiries or speculate on whether the relationship is fundamental in the sense of Plato’s doctrine of “participation.” I do want to suggest that such a theory accords with our common-sense manner of speaking and thinking and that the contrast between brute and social facts has explanatory utility. Even within analytic philosophy, serious debates exist over whether a rigorous concept of truth can ever be expressed outside a purely formal language. Compare Alfred Tarski, *The Concept of Truth in Formalized Languages*, in LOGIC, SEMANTICS, META-MATHEMATICS 152 (J. H. Woodger trans., Hackett 2d ed. 1983) (arguing that formalization of truth as satisfaction by correspondence between sentences and “reality” can only occur within the confines of a formal model), with Richard Montague, *English as a Formal Language*, in FORMAL PHILOSOPHY, SELECTED PAPERS OF RICHARD MONTAGUE 188 (Richard H. Thomason ed., 2d ed. 1976) (suggesting that English may be formalized using set-theoretic semantics by providing a set-theoretic model of a fragment of English). Similarly, I accept that even the expression of a brute fact requires the use of language with whatever limitations accompany use of language. This does not, however, lead me to toss either common sense or science out the window as arbitrary or culturally relative in the way that the construction of social facts is relative. See generally RONALD N. GIERE, SCIENCE WITHOUT LAWS (1999); NORMAN LEVITT, PROMETHEUS BEDEVILED (1998) (arguing against notions of scientific relativism). As the philosopher Ian Hacking wryly notes, there is little point in writing about the social construction of the Federal Reserve Bank because it so obviously is a social construction. IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 13 (1999).

symbolic order precisely because the feminine (or at least a portion of the feminine) is not part of the symbolic order.

How do we reconcile these two very different ideas of “does not exist” in order to understand how society might be poised at a moment in history in which things might change for the better? Particularly, we need to understand the possibility of progress if the Lacanian Real is part of a human psychical structure that does not change.

Possible reconciliation comes from the simple recognition of the way in which social reality is constructed as outlined above. To express hope that things may improve, all Schroeder needs to do is acknowledge that performative acts, such as ceremonies, construct social facts. As the forms of ceremonies, as well as their aims, are contingent and malleable the possibility for change comes from education — the provision of information to persons as belief sets undergo change. Changing the parameters of ceremonies can alter contingent social structures and thereby promote human freedom in ways that physical laws determining brute facts may not be altered. Such changes can occur even if the structure of our mental life does not change. This, I take it, is the basis for Professor Schroeder’s optimism expressed at the end of *Triumph of Venus*.

Nevertheless, one implication is that *if* the symbolic order were to change in some fundamental sense, *then* our sexuality would necessarily also change — and vice versa. If men could, in fact, define their subjectivity otherwise than as superiority over an abjected femininity, if women could define their femininity rather than implicitly accepting their definition by men, and if the two sexes could recognize each other as truly equal albeit different, then the very definition of sexual identity would change. This has not yet happened, but, at least for an increasingly large segment of society, it is considered appropriate . (p. 311)

Thus, Professor Schroeder rejects the notion that Lacanian theory requires the subjection of women in the symbolic order to permit creation of masculine subjectivity. This does not mean, however, that change can be accomplished through merely willing such change to occur. Instead, a collective change in intention must occur and that change must be in the law and other symbolic structures of social reality.

V. WHAT IS TO BE DONE?

On reading *Triumph of Venus* I am left feeling as though I gained some valuable methodological insights but that, nevertheless, Professor Schroeder’s project is, as of now, incomplete. Some progress is evident: there are some traditional economists already worrying about some of the problems Professor Schroeder identifies and at least some legal economists are finally paying lip service to methodological

concerns that trend in the direction of the return to Coase that Schroeder advocates. I, too, support study of actual markets as a precursor to policy recommendations. That said, the incompleteness of Schroeder's work may stem from a lack of examples indicating how use of economic analysis of law might be helpful or harmful (in addition to the harm caused by masquerading as science). I offer two examples, both tentative and potentially controversial, to frame Schroeder's position. I find such an application of theory to concrete situations needed for more complete understanding.

Certainly one positive fallout from the L&E movement's focus on economic analysis might be its role in the demotion of the importance of antitrust law. During the 1970's, in particular, the government focused much regulatory effort on policy aimed at close management of the economy. That effort has receded and we appear to be no worse off (and many would suggest we are better off) for this development.⁵⁹ One might see the fading of the importance of antitrust law as the result of a methodological reflection prompted by L&E that led to greater modesty about what government policy can and cannot successfully achieve. The problems caused by unreflective confidence in the adequacy of results obtained from application of L&E methodology come not from such limiting results but rather from positive policy recommendations that do not differ in kind from the very ideal of management of the economy enshrined in antitrust law that the L&E movement, in its early days, helped to counteract.

A current, positive example of an appropriate return to Coase might be the approach of the economist, Hernando de Soto. De Soto conducted an exhaustive empirical study of the land registration systems in third-world countries. He identified the tremendous cost and inefficiency confronting those who would register their property interests as an obstacle that prevents full utilization of assets. In his analysis, unregistered land operates as "dead" capital, unable to function as collateral for economic expansion. The solution de Soto identified is to streamline the property-registration process so that those in the third world may convert dead capital to live capital by registering their property interests to be recognized and protected by the state.⁶⁰ His recommendations are, in scope, modest and follow

59. Some commentators not wedded to the laissez-faire L&E tradition have begun to argue that we should reinvigorate, not abandon, antitrust doctrine. See, e.g., Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745 (2004) (arguing that traditional L&E has misinterpreted the intent of antitrust law and proposing a reinvigorated competition law).

60. De Soto presents his study in HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000). Some third-world countries have listened to de Soto and preliminary indications are positive. See Kerry A. Dolan, *A New Kind of Entitlement*, FORBES, Dec. 23, 2002, at 320. De Soto's approach, however, is not without its critics. See Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000).

from empirical study of actual markets. The approach is incremental — it does not require adoption of a sweeping ideology or radical change telling people how to run their lives. Rather, the change is technical in nature and allows individuals to reap the benefits of an existing property regime at lower cost.

In addition to concrete illustrations, I would like to see some analysis of the types of social structures that promote (or at least are compatible with) the well-being of individuals. In the absence of such an analysis, I am unable to share Professor Schroeder's optimism that a positive societal paradigm shift is about to occur. Indeed, though the structure of various social realities is contingent (and thus subject to modification) in ways that the reality explored by hard sciences is not, this does not mean that social structures are easy to change. The best metaphor I have seen for characterizing social reality is its comparison to "magma," indicating both that it is a layered hierarchy, as theorized by the philosopher John Searle, but also relatively intractable.⁶¹ As indicated above, one avenue that might be developed from a Hegelian perspective would be to further define the characteristics of the state needed to promote human freedom and flourishing beyond facilitation of market exchanges. Ultimately, I believe projects of this sort must end with politics, a direction that Professor Schroeder is unwilling to travel.

Policymakers face the task of making decisions with or without analysis informed by economic thinking. I, for one, would rather have the policymakers armed with economic analysis than nothing. The caveat is that such information should not be relied upon to the exclusion of other possibly relevant considerations. We need, however, at least a hint of what those other legitimate considerations might be. Notwithstanding silence on this point, *Triumph of Venus* provides a valuable reminder that policy recommendations typically are not matters of fact but matters of choice. To the extent a particular rhetoric claims otherwise, the chances are good that an attempt is afoot to limit freedom by denying choice.

61. See CORNELIUS CASTORIADUS, *THE IMAGINARY INSTITUTION OF SOCIETY* 182 (Kathleen Blamey trans., MIT Press 1987).

