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CHIX NIX BUNDLE-O-STIX: A FEMINIST CRITIQUE OF THE DISAGGREGATION OF PROPERTY

*Jeanne L. Schroeder**

Property was dead: to begin with. There is no doubt whatever about that. The register of its burial was signed by the clergyman, the clerk, the undertaker, and the chief mourner. Hohfeld signed it: and Hohfeld's name was good . . . for anything he chose to put his hand to. Old Property was as dead as a door-nail.

Mind! I don't mean to say that I know, of my own knowledge, what there is particularly dead about a door-nail. I might have been inclined, myself, to regard a coffin-nail as the deadest piece of ironmongery in the trade. But the wisdom of our ancestors is in the simile; and my unhallowed hands shall not disturb it, or the Country's done for. You will therefore permit me to repeat, emphatically, that Property was as dead as a door-nail.

. . .

The mention of Property's funeral brings me back to the point I started from. There is no doubt that Property was dead. This must be distinctly understood, or nothing wonderful can come of the story I am going to relate. If we were not perfectly convinced that Hamlet's Father died before the play began, there would be nothing more remarkable in his taking a stroll at night, in an easterly wind, upon his own ramparts, than there would be in any other middle-aged gentleman rashly turning out after dark in a breezy spot — say Saint Paul's Churchyard for instance — literally to astonish his son's weak mind.¹

I. INTRODUCTION: THE DEATH OF PROPERTY

Property was dead, to begin with. The coroner, Wesley Newcomb Hohfeld, revealed that the unity, tangibility, and objectivity of property perceived by our ancestors was a phantom. Property is, in fact, merely a "bundle of sticks."² When conceptualized as a col-

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1. My apologies to the memory of Charles Dickens. See CHARLES DICKENS, A CHRISTMAS CAROL 1-3 (Columbia Univ. Press 1956) (1843).

2.

After all, in contemporary legal discourse the most common conception of property is the bundle of legally protected interests, held together by competing and conflicting policy goals. The removal of one or more sticks from the bundle should have no particular implications for the legally protected interests that remain.

lection of rights, property loses its distinctive qualities and its essence. It therefore does not, or at least should not, exist.³ Without unity and physicality, property loses its objectivity and can only be a myth.⁴ The rabble might still believe in the old gods of property, but the educated "specialists" now know that this was vulgar superstition. Once the populace is reeducated, property will cease to be worshiped.⁵

James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 1512 (1992). This view is designed to contrast with the supposedly classical view of "title."

To the extent that there was a replacement for this Blackstonian conception it was the familiar "bundle of rights" notion of modern property law, a vulgarization of Hohfeld's analytic scheme of jural correlates and opposites, loosely justified by a rough-and-ready utilitarianism and applied in widely varying ways to legal interest of every kind.
Id. at 1459.

One of the earliest uses of this metaphor is by Benjamin N. Cardozo: "The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time." BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928). Cardozo's conception does not use the "bundle of sticks" metaphor to argue either that any individual stick can separately be characterized as property or that just any bundle of sticks can be characterized as property. Rather, he argued that somewhat different bundles have been recognized as complete property interests at different times.

3. Among the writings attacking the viability of property are Thomas C. Grey, *The Disintegration of Property*, in XXII NOMOS, PROPERTY 69 (J. Roland Pennock & John W. Chapman eds., 1980); Charles W. Mooney, Jr., *Beyond Negotiability: A New Model for Transfer and Pledge of Interests in Securities Controlled by Intermediaries*, 12 CARDOZO L. REV. 305 (1990); James Stevens Rogers, *Negotiability, Property, Identity*, 12 CARDOZO L. REV. 471 (1990); Joseph K. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980).

4. See, for example, Jennifer Nedelsky's characterization of the commonly held American view of property in her excellent account of the significance of property to the Framers of the U.S. Constitution.

How can "the tradition" be characterized by both coherence and endurance and by an apparently unlimited mutability in the purported core of the structure? The paradox itself suggests the answers: it is the *myth* of property — its rhetorical power combined with the illusory nature of the image of property — that has been crucial to our system. And it is this mythic quality that current changes [i.e., disaggregation] in the concept may threaten.

JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 224 (1990).

5. According to Thomas Grey, "specialists" such as lawyers and economists already recognize the disintegrating nature of property, although lay people naively cling to the unitary, objective, physicalist ideal. As lay people eventually accept the specialist view, property will lose its traditional inspirational role. Grey, *supra* note 3, at 69, 76-79; but see *infra* section IV.A.

Bruce Ackerman similarly contrasts the theory of property of the Scientific Policymaker to that of the Ordinary Observer. BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 26-29, 97-100 (1977).

Other members of the legal priesthood who identify the death of "traditional" property seek to employ a technique successfully used by the early Church — harnessing the spiritual power of the discredited religion by accepting pagan ritual but changing the object of worship. That is, in order to win over the devotees of the old dead gods, the new God usurps the titles of His defeated predecessors so that He might be worshiped in a familiar form. Thus,

But if mythic unitary property of our ancestors is dead, it continues to haunt us with ghostly persistence. As Sir John Frazer illustrates, the murder of the mythic hero — whether it be Osiris, Tammuz, Adonis, Jesus, or Superman — is only a precursor to his resurrection.⁶ And so, certain theorists have recently insisted that property exists after all — but only a version of property that emphasizes tangibility and immediate relations with physical, real objects.

In this article I argue that property is alive and well. But property is also in the grip, so to speak, of a specific metaphor — an image of property as the sensuous grasping of a tangible thing.

While most contemporary legal commentators dutifully intone the insight — typically attributed to Hohfeld⁷ — that property is neither a thing nor the rights of an individual over a thing but rather a legal relationship between legal subjects, few of them successfully or consistently resist the temptation of identifying property with the owned object.⁸ I argue that property as both thing and right is described, not in terms of just any physicalist imagery, but in terms of phallic imagery. That is, property is metaphorically identified with seeing, holding, and wielding the male organ or controlling, protecting, and entering the female body. Our very terminology for nonphysical things — *intangible* or *noncorporeal* property — presumes that tangibility and corporeality are the norm. I further argue that this physicalist concept of property — what I call the phallic metaphor — is related to a more general

certain self-styled progressives do not want the memory of discredited property to wither away entirely. Rather, they wish to preserve but redirect the powerful inspirational rhetoric of property away from its traditional conservative and reactionary roles.

For example, Margaret Jane Radin argues that constitutionally protected property should be redefined as whatever furthers “human flourishing.” See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Taking*, 88 COLUM. L. REV. 1667, 1687-88 (1988). I critique Radin’s theory of property extensively in Jeanne L. Schroeder, *Virgin Territory: Margaret Radin’s Theory of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55 (1994) [hereinafter Schroeder, *Virgin Territory*].

Joseph William Singer and Jack M. Beermann similarly argue that once one accepts the proposition that property is socially constructed, one is free to redefine property in terms of what is good for human beings. Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CANADIAN J.L. & JURISPRUDENCE 217, 241 (1993). As will become obvious in this article, I believe that Singer and Beermann’s argument is a non sequitur.

6. See SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 283-397 (Theodor H. Gaster ed., abr. ed. 1951).

7. E.g., Vandevelde, *supra* note 3, at 359-61.

8. Probably the most extreme and consistent identification of property and thing in contemporary jurisprudence can be found in the work of Margaret Radin. See, e.g., Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

psychoanalytic tendency of humans to conflate legal-linguistic concepts with the physical world.⁹

My analysis presents the physicalist paradigm in property theory in two versions: the affirmative and the negative. Representing the affirmative physical property theory is Jeremy Waldron. Waldron agrees that contemporary neo-Hohfeldian analysis makes the task of defining property difficult, but he argues that it can be done by applying a Wittgensteinian family-resemblance analysis starting with the archetype of ownership of physical objects.¹⁰ Waldron represents the revival of property theory against the twenty-year assault that property has undergone from both the critical legal studies and law and economics movements.

The alternate variation of the physicalist conception of property is its negation — denial. This version reduces property to a bundle of sticks. I argue that this attempt to disaggregate the unity of property places primacy on the sensuous grasp of tangible objects. Thomas Grey is probably the most prominent among those who argue that property cannot be conceived as a unitary right with respect to tangible things and therefore must lose its meaning as a legal category. Because property cannot have this meaning, it does not exist.¹¹ But this thesis depends on the proposition that property only has meaning if conceptualized as the sensuous grasp of physical things by a single human being.

These denials of the phallic physicalist concept of property covertly reinstate it, as reflected in the very imagery of the “bundle of sticks” — a metaphor of the sensuous, possessory, and tangible. Sticks and bundles are physical things that one can, and stereotypi-

9. In *Virgin Territory: Radin's Theory of Personal Property as the Inviolable Female Body*, I explore Radin's identification of personal property literally with the female body, which must be chastely preserved from unwanted market intercourse. See Schroeder, *Virgin Territory*, *supra* note 5. To Radin, alienation of personal property — that is, of those objects of property she thinks are worthy of special solicitation — is violation and loss of feminine selfhood. See Radin, *supra* note 8, at 958-60. In other articles I explore the persistence of the masculine phallic metaphor of the sensuous grasp of physical objects in commercial law doctrine — the private law of personal property. See Jeanne L. Schroeder, *Liquid Property: The Myth That the U.C.C. Disaggregated Property* 37-50 (1994) [hereinafter Schroeder, *Liquid Property*] (unpublished manuscript, on file with author); Jeanne L. Schroeder, *Perfection as Possession: The Critique of Ostensible Ownership and Rehabilitation of *Benedict v. Ratner** (1994) [hereinafter Schroeder, *Perfection as Possession*] (unpublished manuscript, on file with author).

In this article I concentrate on masculine phallic imagery in scholarship concerning property theory — the public law of property. This phallic imagery will, of course, be most apparent in those theorists who epitomize property relations as sensuous grasping. But, as we will see, this imagery repeats itself in those who try to negate the physicality of property. In psychoanalytic theory, denial is merely recognition.

10. See *infra* Part III.

11. I flesh out this argument *infra* in section IV.A.

cally does, see and sensuously grasp in one's hand. Moreover, the "bundle of sticks" analysis does not solve the metaphysical problems these scholars purport to identify in the unitary, possessory, tangible concept of property. It merely postpones, and thereby replicates, the unitary theory and its problems. This bundle consists of separate little phallic sticks, each a separate little unity with its own metaphysical problems. Of course, these scholars address such problems by supposing that each "stick" is itself a separate bundle of smaller little sticks, *ad infinitum*. This is the classic bad infinity of "turtles all the way down."¹² That is, although its proponents usually present the "bundle of sticks" metaphor as an alternative to the "property as thing" metaphor,¹³ the former is in fact merely a variation of the latter.

The "bundle of sticks" marks a key psychoanalytic moment in recent property theory. Progressives plotted the murder of property. In order to make sure it stayed dead, they disaggregated property, in the same way that the evil god Set dismembered the corpse of the murdered god Osiris.¹⁴ But, like Osiris's, property's disaggregation not only did not prevent its resurrection but enabled the resurrected god to fill the entire universe.¹⁵ Thanks to "bundle of

12. There are many versions of the turtle story. I discuss these variations in Jeanne L. Schroeder, *The Vestal and the Fases: Property and the Feminine in Law and Psychoanalysis*, 16 CARDOZO L. REV. (forthcoming Dec. 1994) [hereinafter Schroeder, *The Vestal and the Fases*].

My favorite version involves the seeker of wisdom who travels to the far ends of the earth to consult a famous holy man about the meaning of life. "The world," the sage said, "lies on four columns which are supported by four enormous elephants." "What do the elephants stand on?" asked the student. "The elephants," the sage continued, "stand on the back of the great cosmic turtle." The conversation continued: "But on what does the cosmic turtle stand?" "The turtle stands on the back of an even greater turtle." "And on what does the greater turtle stand?" "On the back of a yet greater turtle." "And on what does that turtle stand?" "On the back of an even greater turtle." "And on what . . ." "Listen buster, it's turtles all the way down!"

13. See, e.g., Grey, *supra* note 3, at 81.

14. According to Egyptian mythology, Set murdered his twin brother Osiris, the corn god. First, Set tried hiding the corpse. Isis, Osiris's widow and sister, found the body and conceived the child-god Horus from her dead husband. Set, determined not to be defeated twice, again killed Osiris and tore him into fourteen parts, which he strew throughout Egypt. NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY 18-19 (new ed. 1968); see also JOSÉPH CAMPBELL, *THE MYTHIC IMAGE* 27 (1974).

15. The grieving Isis once again set out in search of her husband's body. Paradoxically, the myths say both that she buried each body part where she found it and that she brought all the pieces together, reconstituted the body, invented embalming, made Osiris into the first mummy, and then raised him from the dead. Either way, the resurrected Osiris now reigns as the god of death and resurrection. Although variants of the myth give different explanations for this apparent paradox — for example, Isis only buried facsimiles of the body parts, the body parts miraculously multiplied, and so on — they agree on the point that the dismemberment and multiple burials of Osiris enabled Isis to spread his divine presence and worship throughout Egypt. NEW LAROUSSE ENCYCLOPEDIA OF MYTHOLOGY, *supra* note 14, at 18-19.

sticks" imagery, property threatens to permeate all legal relations, making all government actions into takings.¹⁶

As this article maintains that phallic metaphor in physicalist theories of property has a psychoanalytic basis, I begin with a brief outline of Hegel's theory of property and Lacan's closely related theory of sexuality. A grounding in these ideas will help illustrate why the metaphor of the grasped object so dominates property theory today.

II. THAT OBSCURE OBJECT OF DESIRE

Why do phallic metaphors haunt property discourse? These metaphors are an abduction¹⁷ that comes so easily to us as to seem natural.¹⁸ Both property, according to Hegelian philosophy, and the *Phallus*, according to Lacanian psychoanalysis, serve as the defining objects of desire that enable us to create ourselves as acting subjects through the creation of law. The parallel roles reserved for property and for the *Phallus* in the political and psychoanalytic philosophies of Hegel and Lacan are the reason these metaphors so frequently recur in discourse about property law. A brief exegesis of these complex and frequently obscure theories of subjectivity follows.¹⁹

Particularly interestingly for the purposes of this article, the only part of Osiris's body that Isis could not find was his phallus — apparently a fish or a crab ate it — so the divine *Phallus* remains forever lost in the world. *Id.*; FRAZER, *supra* note 6, at 424-25. Indeed, Lacan uses precisely the metaphor of Osiris's lost phallus to describe his concept of the *Phallus* as the lost object. JACQUES LACAN, *The direction of the treatment and the principles of its power*, in *ÉCRITS* 226, 265 (Alain Sheridan trans., 1977) (1966).

16. According to Singer and Beermann:

In other words, by conceiving of ownership of property as a bundle of sticks, with each stick representing a distinct incident of ownership, it is possible to portray the elimination, through regulation, of one stick, or several sticks together, as a deprivation of a distinct interest rather than a mere restriction of an otherwise intact property interest.

In applying conceptual severance, the Court identifies the strand or strands taken from the bundle of rights that may characterize property ownership and then simply defines that right or set of rights as a separable property interest.

Singer & Beermann, *supra* note 5, at 222-23.

17. Schroeder, *The Vestal and the Fasces*, *supra* note 12.

18. For a discussion of the logical process of abduction, see *infra* text accompanying notes 49-58; see also Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEXAS L. REV. 109 (1991) [hereinafter Schroeder, *Abduction from the Seraglio*].

19. A complete analysis of Lacan's theories is beyond the scope of any law review article. I set forth a more complete exegesis of these theories in two of the companion pieces to this article. See Schroeder, *The Vestal and the Fasces*, *supra* note 12; Schroeder, *Virgin Territory*, *supra* note 5.

A. Hegelian Philosophic Theory

In his *Philosophy of Right*,²⁰ Hegel traces the dialectic of human freedom from a starting point of the most abstract concept of personality through the creation of the individual as citizen of a highly developed state. Property plays an early and crucial role in this dialectic.²¹ The Hegelian concept of the object does not refer to physical things but includes everything other than the most primitive and abstract concept of personality, that is, self-consciousness.²² Hegelian abstract personality as self-consciousness can only be defined in terms of what it is not and, therefore, is pure negativity. Consequently, the Hegelian concept of object includes not merely conventional tangibles and intangibles, such as so-called intellectual property, but also all individuating characteristics that a person can acquire, such as personality traits, talents, beliefs, and our own bodies.²³ In order to obtain the subjectivity that will eventually enable the person to develop into an individual and actualize his freedom, the abstract person needs to objectify himself.

According to Hegelian philosophy, subjectivity is intersubjectivity mediated through objectivity: one can achieve subjectivity if and only if one is recognized as a subject by another person whom one recognizes as a subject. Human beings are driven by an erotic desire for mutual recognition.²⁴ "Property is . . . a moment in man's struggle for recognition."²⁵ The abstract personality has no positive individuating characteristics and, therefore, cannot be recognized by others in this state. Only through the possession and enjoyment of objects does the abstract person become individualized and

20. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (H.B. Nisbet trans. & Allen W. Wood ed., Cambridge Univ. Press 1991) (1821).

21. That is, the dialectic of the *Philosophy of Right* is the logic of the development of personality from the most abstract, primitive notion of the abstract person, to the individual in the modern state. The first stage is Abstract Right, and the first stage of Abstract Right is property. HEGEL, *supra* note 20, §§ 41-71.

22. I explore the Hegelian concept of objectivity extensively in Schroeder, *Virgin Territory*, *supra* note 5. See also *infra* section IV.B.5. Hegel's starting place for discussion seems to be modeled on the Kantian construct. See SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 137 (1972). It is incorrect to conclude from this, as Radin does, that Hegel agreed with Kant. See Radin, *supra* note 8, at 971-72. Rather, although Hegel recognized a true moment in Kant's concept, he presents the logic of the *Philosophy of Right* as a demonstration that the Kantian construct is inadequate and destined to go under by the force of its own internal logic and to be superseded by more complex forms of personhood. Property is the first stage in this development.

23. See *infra* sections III.B-D.1.

24. See Michel Rosenfeld, *Hegel and the Dialectics of Contract*, 10 CARDOZO L. REV. 1199, 1220-21 (1989); see also Schroeder, *The Vestal and the Fasces*, *supra* note 12; Schroeder, *Virgin Territory*, *supra* note 5.

25. AVINERI, *supra* note 22, at 89.

thereby recognizable as a subject. Through the exchange of objects with another person — that is, through contract — one person can recognize another person as an acting subject deserving rights. And through recognition by that other person, the first person can recognize herself as a subject capable of bearing rights.

This legal regime with respect to the possession, enjoyment, and exchange of the object of desire is property.²⁶ Therefore, the moment of the creation of full property, to Hegel, is simultaneously also both the moment of creation of subjectivity as intersubjectivity and the moment of the creation of law as Abstract Right.²⁷ Subjectivity, property, and law are mutually constituting.

B. Lacanian Theory

In Lacanian psychoanalytic terminology, the *Phallus* is the concept of the unobtainable object of desire — the Other as radical alterity. According to Lacanian psychoanalytic theory, human subjects exist in three distinct, yet interdependent and overlapping, orders of experience. In one of Lacan's last seminars, he uses the metaphor of a "Borromean Knot" to describe the relationship between these realms. This "knot" consists of three rings that are not interlinked but held together through overlapping. The metaphor points out that although each ring and each realm is distinct and

26. Note that Hegel speaks at the highest level of abstraction and generality. He claims that his dialectic demonstrated the logical necessity for *some* regime of possession, enjoyment, and alienation of objects. The specific parameters of any given regime cannot be logically determined. Societies must define them on a case-by-case basis through pragmatic reasoning and adopt them into positive law (*Gesetz*). Consequently, while Hegel tries to justify the existence of some form of property regime, unlike Locke and other property theorists, he does not make any argument for any specific property regime, let alone for the specific property rights of any specific individual. See Richard Hyland, *Hegel: A User's Manual*, 10 CARDOZO L. REV. 1735, 1741 (1989).

27. See Schroeder, *The Vestal and the Fasces*, *supra* note 12. Abstract Right, to Hegel, is the most primitive form of human relationship. It leads to the cold, heartless regime of laissez-faire capitalism that Hegel called civil society. Hegel describes his concept of civil society in HEGEL, *supra* note 20, §§ 182-256, at 220-74. As summarized by Allen Wood:

Civil society is the realm in which individuals exist as persons and subjects, as owners and disposers of private property, and as choosers of their own life-activity in the light of their contingent and subjective needs and interests. In civil society, people's ends are in the first instance purely private, particular and contingent, not communal ends shared with others through feeling (as in the family) or through reason (as in the state).

In other words, civil society is the realm of the market economy.

Allen W. Wood, *Editor's Introduction to HEGEL*, *supra* note 20, at vii, xvii (citation omitted). Although Hegel argues that Abstract Right constitutes an essential building block of human freedom as self-actualization, logic necessitates that the more developed and adequate relationships of morality and ethical life supplement Abstract Right and that the family and the state supplement civil society. Similarly, the legal subject created with Abstract Right — with his close family resemblance to the autonomous individual posited by liberal philosophy — is a true but inadequate moment in the development of the more rich and complex concept of the individual.

does not interpenetrate another, the whole of the knot and the psyche depends on the interrelationship between the three; remove one, and the whole system collapses. The metaphor of the interlocking rings is also designed to counteract the tendency to hierarchize the three regimes — placing the Symbolic realm above the Imaginary, and the Imaginary above the Real. Another advantage of the metaphor of rings is that it offers an alternative to the common internal-external metaphors for human experience. That is, a point within a ring can be described as either external to the ring, or internal to it. Finally, because the three rings overlap, the metaphor illustrates how the same “object” can simultaneously serve parallel functions in the different orders. An Imaginary object of desire — or *objet petit a* in Lacan’s terminology — can stand in for the Symbolic Phallus and the Real Thing.²⁸

Lacan describes each of the orders of experience represented in the metaphor of the Borromean Knot. First comes the realm of “the Real,” or that which is beyond interpretation. Lacan’s concept of the Real is subtle and paradoxical. It includes everything that cannot be captured in language and is prior to law. For now, it suffices to say that for some purposes, the Real functions as the

28. Lacan provided a visual representation of the “Borromean Knot.”

STUART SCHNEIDERMAN, JACQUES LACAN: THE DEATH OF AN INTELLECTUAL HERO 33 (1983). See Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989) for a discussion of the persistent use of the internal-external and other common metaphors. For brief descriptions of the metaphor of the Borromean knot, see SCHNEIDERMAN, *supra*, at 33, and SLAVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 5, 143 (1992).

According to Jacqueline Rose:

Lacan termed the order of language the symbolic, that of the ego and its identifications, the imaginary (the stress, therefore, is quite deliberately on symbol and image, the idea of something which “stands in”). The real was then his term for the moment of impossibility onto which both are grafted, the point of that moment’s endless return.

Jacqueline Rose, *Introduction II* to JACQUES LACAN, FEMININE SEXUALITY 27, 31 (Juliet Mitchell & Jacqueline Rose eds. & Jacqueline Rose trans., 1982) (1966-75).

For an excellent, albeit somewhat simplistic, introduction to Lacan’s concepts of realms, see ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION (1990).

physical world — as “reality,” in the colloquial sense of the word.²⁹ Standing for the biological or natural, the Real includes the realm of the infant before it³⁰ develops consciousness. Next, in the “mirror stage,” the child enters the order of the “Imaginary.” Although this is the child’s first awareness of self, at this stage it can only experience itself as that which it is not. It is not the “Other” — Lacan’s term for radical alterity, which is identified with the role of the Mother, the unconscious, and the Symbolic order. Consequently, the infant during the mirror stage, existing only in the Real and the Imaginary, resembles the Hegelian abstract personality — pure negativity.

To Lacan, the subject is the subject of language.³¹ In order to become a speaking subject, the infant, like the Hegelian abstract person, must become recognizable and recognized by another speaking subject. To do this, during the Oedipal stage, the child

29. Lacan continually refined his complex and subtle concepts of psychic orders throughout his life, originally emphasizing the contrast between the Imaginary and Symbolic orders and concentrating at the end of his career on the relationship between the Real and the Symbolic. Compare, for example, 1 JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN* (Jacques-Alain Miller ed. & John Forrester trans., 1988) (1953-54) with Lacan’s twentieth seminar, “Encore,” two classes of which have been translated into English and reprinted as JACQUES LACAN, *God and the Jouissance of The Woman*, in *FEMININE SEXUALITY*, *supra* note 28, at 137, and JACQUES LACAN, *A Love Letter* (Une Lettre d’Amour), in *FEMININE SEXUALITY*, *supra* note 28, at 149 [hereinafter LACAN, *A Love Letter*]. This article, which is influenced most strongly by Lacan’s late theories of feminine sexuality, reflects this change in emphasis.

A full discussion of these concepts is far beyond the scope of a law review article. I believe, however, that a fairly simplistic description is adequate for the level of generality of this discussion.

The Real is an order of the human psyche, so it is not equivalent to the physical world that “really” exists outside of human experience. The Real is that which cannot be reduced to images, language, law, and sexuality, and includes everything that serves as a limitation or barrier to human experience. This means that the Real is the impossible. It includes all limiting concepts such as God and death. As adult human subjects, we do not have immediate access to the external world; our experience is always mediated through our unconscious and conscious interpretations in the orders of the Imaginary and the Symbolic. Consequently, what functions as most Real to us is not necessarily identical to the physical world unmediated by human thought.

30. I use the neuter pronoun because in Lacanian theory sexuality is not a Real biological fact but a linguistic position in the Symbolic realm of the adult subject. The essays that discuss this most expressly are JACQUES LACAN, *The agency of the letter in the unconscious or reason since Freud*, in *ÉCRITS*, *supra* note 15, at 146 [hereinafter LACAN, *The agency of the letter*], and JACQUES LACAN, *The signification of the phallus*, in *ÉCRITS*, *supra* note 15, at 281. The latter essay also appears in a different translation as JACQUES LACAN, *The Meaning of the Phallus*, in *FEMININE SEXUALITY*, *supra* note 28, at 74.

31. See JACQUES LACAN, *Introduction to the Names-of-the-Father Seminar*, in *TELEVISION* 81, 82 (Joan Copjec ed. & Dennis Hollier et al. trans., 1990) (1974) (“I have long established in the structure of the subject, defined as the subject that speaks . . .”); see also Rose, *supra* note 28, at 31 (“For Lacan the subject is constituted through language The subject is the subject of speech (Lacan’s ‘parole-être’), and subject to that order.”); Juliet Mitchell, *Introduction I* to *FEMININE SEXUALITY*, *supra* note 28, at 1, 5.

enters the order of the "Symbolic," where either *he*³² takes on the role of having and exchanging the *Phallus*, or *she* takes on the role of being (and enjoying) the *Phallus*.³³ It is only from these sexuated positions that we can be recognized by others, and thereby by ourselves, as subjects who use symbols and speak.

According to Lacanian psychoanalysis, subjectivity is intersubjectivity mediated through objectivity — just as in Hegelian philosophy. Human beings are driven by an erotic desire for mutual recognition; one can achieve subjectivity if and only if one is desired as a subject by another person who one recognizes and desires as a subject.³⁴ The infant in the mirror stage has no positive individuating characteristics and, therefore, cannot be recognized by others as a speaking subject. Through the possession and enjoyment of the *Phallus* as the Symbolic object of desire, the infant becomes recognizable as a subject. Through the Symbolic exchange of the *Phallus* as object of desire with another person — that is, language and the law as prohibition — the person can desire the other person as a speaking and desiring subject. And through recognition by that other person, the first person can recognize himself as a speaking subject capable of desire.

This Symbolic position with respect to possession, enjoyment, and exchange of the *Phallus* is sexuality. Consequently, the moment a person attains sexuality is simultaneously the moment of

32. I use the masculine pronoun because the sexual position of the speaking subject is the masculine. As I have discussed elsewhere, many feminists reject Lacan on the grounds of his misogyny, whereas other feminists who are influenced by Lacan feel compelled to defend him from this charge. In contradistinction, I turn to Lacan precisely because I believe the misogyny of his theory offers possible insight into the deeply misogynistic nature of contemporary masculine and feminine psychology and of our culture. See Schroeder, *Virgin Territory*, *supra* note 5, at 154-55.

33. LACAN, *The signification of the phallus*, *supra* note 30, at 289. For a different translation, see LACAN, *The Meaning of the Phallus*, *supra* note 30, at 83-84. I discuss Lacan's theory extensively in Schroeder, *The Vestal and the Fasces*, *supra* note 12. See generally FEMININE SEXUALITY, *supra* note 28; GROSZ, *supra* note 28. As is the case of the development of so much of Lacan's thought, Lacan's theory of the phallus and feminine sexuality moved ever further away from the naturalistic and biological over time. The earlier writings, with their examples of actual exchange of women — influenced by the structuralist anthropology of Claude Lévi-Strauss — could be misinterpreted as suggesting that the regime of the *Phallus* succeeded. By increasingly emphasizing the symbolic aspect of the exchange, Lacan could more thoroughly explicate the hole, the lack, and the failure of human relationships, all of which are central to his thought. See Rose, *supra* note 28, at 48 ("For whereas in the earlier texts the emphasis was on the circulation of the phallus in the process of sexual exchange, in these texts [the late seminars reprinted in *Feminine Sexuality*] it is effectively stated that if it is the phallus that circulates, then there is no exchange (or relation).").

34. "If I have said that the unconscious is the discourse of the Other (with a capital O), it is in order to indicate the beyond in which the recognition of desire is bound up with the desire for recognition." LACAN, *The agency of the letter*, *supra* note 30, at 172; see also LACAN, *supra* note 15, at 264 ("[M]an's desire is the desire of the Other.").

creation both of subjectivity as intersubjectivity and of law as prohibition. Sexuality, subjectivity, and law are mutually constituting.³⁵ Property in Hegelian philosophy, therefore, serves a function parallel to that of the *Phallus* in Lacanian psychoanalysis.³⁶

Let me explain Lacan's intentionally ambiguous terminology in greater detail. The psychoanalytical term of art *Phallus* does not designate the male organ or any other Real thing. On one level, the *Phallus* exists in the Symbolic order of language, law, and sexuality, whereas anatomy exists in the Real realm of limitation.³⁷ The *Phallus* is the universal signifier of subjectivity and, therefore, cannot itself be signified.³⁸ Consequently, the *Phallus* also has a position in the Real, in the technical sense that it stands for that which is beyond language. Thus, it is always lost, and we are always castrated from it.

The Real includes our sense that a physical, natural world exists outside of human interpretation. Consequently, the Real is not identical to reality — in the sense of the actual natural world — because to be aware of and to visualize or speak of our experience of reality is to reinterpret it through the veils of the Imaginary and the Symbolic. To speak of the Real is to lose touch with reality. Yet our sanity literally requires that we treat the Real as though it

35. See, e.g., LACAN, *supra* note 31, at 89.

36. Contemporary property terminology obscures the parallelism slightly. As I have discussed, in modern English the word *property* is used to describe both the legal regime — what Grey calls the specialist definition of property — and the object of the legal regime — what Grey calls the lay definition. Grey, *supra* note 3, at 69. C.B. Macpherson makes a similar point:

One obvious difficulty is that the current common usage of the word "property" is at variance with the meaning which property has in all legal systems. . . . In current common usage, property is *things*; in law and in the writers, property is not things but *rights*, rights in and to things.

C.B. Macpherson, *The Meaning of Property*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 2* (C.B. Macpherson ed., 1978). Macpherson overstates his point. Although perhaps most lawyers and law professors might say that "rights in and to things" is the technical legal definition of property, I believe that, in fact, they also frequently use the word colloquially to refer to the object of that right. Radin is one of the few contemporary legal scholars who use *property* to refer primarily to the object. See *infra* note 216; see also Schroeder, *Virgin Territory*, *supra* note 5.

In Lacanian psychoanalysis, the regime of possession, enjoyment, and exchange of the object of desire is sexuality, or the realm of the Symbolic, while the object of desire is the *Phallus*.

37. LACAN, *The signification of the phallus*, *supra* note 30, at 283-85; see also GROSZ, *supra* note 28, at 116-17; Mitchell, *supra* note 31, at 6-7; Rose, *supra* note 28, at 42.

38. Because Lacan's subject is the subject of language, his psychoanalytic theory is also a linguistic theory very heavily influenced by Ferdinand de Saussure. Lacan's most sustained work explaining his linguistic theory is *The agency of the letter in the unconscious or reason since Freud*. See LACAN, *The agency of the letter*, *supra* note 30. I introduce Lacan's linguistic theory in Schroeder, *The Vestal and the Fesces*, *supra* note 12; see *infra* text accompanying notes 41-44.

were reality.³⁹ We necessarily insist on a piece of the Real in our Symbolic and Imaginary experience.⁴⁰

According to Lacan, we conflate the Symbolic concept of the *Phallus* with *Real* analogs. Why? The achievement of subjectivity is a moment of great pain and loss, as well as gain. According to both Hegel and Lacan, in order to be an individual who can speak, we must experience ourselves as individuated subjects separate from other individuals and the world. All relations are mediated through the Symbolic exchange of the object of desire. Subjectivity is intersubjectivity mediated through objectivity. Consequently, when we experience ourselves as speaking beings, we lose our sense of being one with the world which we Imagine we must have had as infants. This sense of loss is *castration*.⁴¹ Specifically, we long for immediate relations and union with the Other. In order to do this, we want to destroy mediation and reduce the Symbolic back to the Real. But to do so risks loss of subjectivity, freedom, and sanity. The injunction not to merge with the Other who enables the subject to come into being is the *incest taboo* — law as prohibition.

We retroactively identify the Symbolic *Phallus* with something we identify as *Real* that one of the anatomical sexes physically has and that the other physically is. Masculinist societies, such as our own, identify the “superior” position of subjectivity — having and exchanging the *Phallus* — with the masculine, and the “inferior” position of objectivity — being and enjoying the *Phallus* — with the feminine. Consequently, the penis (what males have) and the female body (what females are) are identified in the Imaginary as the Real correlates to the *Phallus*.⁴² Therefore, the Symbolic —

39. Indeed, in Lacanian theory, psychosis consists in large part of a subject's inability to maintain the barrier between the Real and reality. See, e.g., ŽIŽEK, *supra* note 28, at 20.

40. *Id.* at 17, 33.

41. As I discuss in Schroeder, *The Vestal and the Furies*, *supra* note 12, Lacan sought to remove any lingering traces of biologicalism or naturalism in Freud's theory. Sexuality is not a Real concept, it is a Symbolic one. See *infra* note 43 and text accompanying notes 43-48.

42. Grosz, *supra* note 28, at 133.

This phallogentrism does not reflect any essential superiority of the masculine. Nor is it caused, as Freud sometimes suggests, by the judgment of actual human infants of the supposedly obvious impressiveness of the male organ when compared with the pathetic female counterpart. Rather, it reflects the existing masculinist-misogynistic power relation in our society. That is, in language one must identify the supplemental positions of to have and to be (lack). This is reflected in the predicate forms of all European — and perhaps other — languages. *Id.* at 103-05. Our society identifies superiority with men. Consequently, we identify the seemingly superior position of *having* to the masculine and the inferior position of *being* to the feminine. We then look to what men anatomically have but women do not — the penis. The penis can stand in for the *Phallus* — the lost object — precisely because the biological differences between the sexes suggests the possibility of not having — or losing — the penis.

that is, legal and linguistic — concepts of sexuality are imagined as anatomy.⁴³ As I have discussed extensively elsewhere⁴⁴ and shall return to below, the Symbolic *Phallus* is paradoxically the signifier of male subjectivity and the Feminine.

Lacan designed this ambiguous terminology to reflect this conflation: the Symbolic concept is vividly but inadequately called by the name of the Real analog. In this article I designate the Symbolic concept *Phallus* through the use of capitalization and italics. The everyday anatomical noun, phallus, is printed in small Roman type.

C. *The Significance for Law*

The Imaginary collapse of the Symbolic and the Real that Lacan noted at the psychic level is reflected in a similar conflation at the legal level. Under both Lacanian psychoanalytical and Hegelian philosophical theory, property is a legal concept. It exists at the linguistic-legal level of the Symbolic in the sense that property, subjectivity, and law are mutually constituting. It cannot, therefore, belong in the animalistic, physical, impossible, prelegal realm of the Real and does not exist primarily to satisfy our physical, limiting, Real needs.⁴⁵ In Lacanian and Hegelian terms, property is the ob-

Freud sometimes seems to suggest that the little girl looks at the male body and says, "Gee that's great, I want one," and suffers from penis envy the rest of her life. To put it overly simplistically, Lacan suggests that boys and girls look at men and women and see that men are treated better. They then look to what he has that she does not and conflate the physical and natural (Real) difference with the social, legal, and linguistic (Symbolic) difference of status.

This is totally arbitrary; in a different hypothetical society the position of having the *Phallus* could be identified with some part of women's anatomy; in that case, the Lacan equivalent in this hypothetical society would not use the term *Phallus* for this concept. But the seeming inevitability of these gender roles in our society exists, not despite of, but *just because* of its arbitrariness. That is, it exists only because we insist that it exists. Cf. Mitchell, *supra* note 31, at 20-24.

In other words, Lacan neither argues that phallocentrism is inevitable nor purports to show how phallocentrism came about. At most, one might read him as illustrating how phallocentrism — once in place — replicates itself.

43. To Lacan, sexuality is fictional in that it is a linguistic (Symbolic) concept, not an anatomical (Real) one. This is not a denial of anatomical sex differences. It is a recognition that conscious egos have no direct contact with the physical — that is, the Real — but always reinterpret it through the Symbolic.

44. See Schroeder, *The Vestal and the Fasces*, *supra* note 12; Schroeder, *Virgin Territory*, *supra* note 5.

45. Nor does it relate to "demand" — the category of longing that corresponds to the suppressed, unconscious realm of the Imaginary. For discussions of the three categories of human longing that correspond to the three psychic orders, see GROSZ, *supra* note 28, at 59-67; Schroeder, *The Vestal and the Fasces*, *supra* note 12; and Schroeder, *Virgin Territory*, *supra* note 5. Need differs from demand in that the unconscious infant has no awareness of what it wants; it only experiences its body's needs. Consequently, the need that can be satisfied is always empty or full.

ject of insatiable Symbolic *desire*, not of satiable Real need. *Desire*, in this context, refers to the desperate erotic drive to be recognized as a desiring subject by another subject. "[M]an's desire is the desire of the Other."⁴⁶ For both Hegel and Lacan, it is only through such intersubjective recognition that we can achieve subjectivity, psychoanalytic consciousness, and, eventually, Hegelian freedom. Because desire can only be played out through intersubjectivity mediated through objectivity, desire and its objects are Symbolic categories.

We conflate the legal, Symbolic concept of property with the Real concept of sensuously grasping physical things through precisely the same psychoanalytic process through which we Imagine that we collapse the legal Symbolic concept of the Phallus with the Real concepts of the penis and the female body. The Imagery of the phallic metaphor for property reflects this conflation.

According to Lacan, we sublimate our desires and identify the Symbolic object of desire with a specific object that Lacan called the *objet petit a*,⁴⁷ or "little other." Although this little other is an Imaginary — in the technical sense — substitute for the Symbolic

As soon as the infant starts becoming aware of its needs, it becomes conscious and leaves the realm of the Real. At the next or mirror stage, the infant becomes aware of itself as separate from the world — it begins to experience the Mother as Other. At this point it can direct its experience of need or want toward another — it demands. Demand differs from need in that it carries the possibility that it will not be satisfied. The fact that one must demand from another contains within it the possibility that the other may refuse the demand. See LACAN, *The signification of the phallus*, *supra* note 30, at 285-86; ŽIŽEK, *supra* note 28, at 5.

At the level of the Symbolic, the subject no longer experiences itself as merely separate from or other than the world. Now he seeks to be a person — a subject. He desires that he be desired so that he can desire in return. Because the subject has no essential existence and only exists in this realm of desire, this desire can never be satisfied. If a subject's desire was ever fulfilled, he would cease to be a subject. Achieving one's desire is madness or death.

46. LACAN, *supra* note 15, at 264; see also LACAN, *The agency of the letter*, *supra* note 30, at 172.

47. JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 17, 62, 76-77, 103-04 (Jacques-Alain Miller ed. & Alan Sheridan trans., Hogarth Press 1977); LACAN, *God and the Jouissance of The Woman*, *supra* note 29, at 143; LACAN, *A Love Letter*, *supra* note 29, at 153-54; JACQUES LACAN, *Seminar of 21 January, 1975*, in *FEMININE SEXUALITY*, *supra* note 28, at 162, 164, 167-68; Alain Sheridan, *Translator's Note to ÉCRITS*, *supra* note 15, at xi; BICE BENVENUTO & ROGER KENNEDY, *THE WORKS OF JACQUES LACAN: AN INTRODUCTION* 175-76 (1986); GROSZ, *supra* note 28, at 75-78. Through the psychoanalytical process called sublimation, the Imaginary *objet petit a* stands in for the Other — the *Phallus* or Thing — and thereby functions as the *cause* of our desire. This object can conventionally take the form of a woman, or more fetishistically, a body part such as a breast. But, an infinite number of objects can so function to put the chain of desire into motion. The Imaginary object need not be sublime in the conventional sense of beautiful or nonsexual. It often takes the form of the disgusting, obscene object of morbid fascination. See GROSZ, *supra* note 28, at 75-77, 80-81; LACAN, *supra* note 31, at 82; JACQUES LACAN, *Television*, in *TELEVISION*, *supra* note 31, at 3, 21; SLAVOJ ŽIŽEK, *For They Know Not What They Do* 148, 231, 255 (1991); Rose, *supra* note 28, at 48. In literature, the smell of madeleines that inspired Marcel Proust's recollections provides an excellent example of how *objet petit a* puts the chain of

object of desire, we make it function retroactively in our Imagination as the cause of the desire. We insist that it is actually the desire for her body, his penis, my house, your car, her wedding ring, that drives us on. Although we look for a substitute object *because* we desire, we pretend that we desire because of the desirability of the object. We do this because it seems to hold out the hope that if we obtain the object, we will then fulfill our desire. But, by definition, we cannot fulfill desire; merging with the Other in an unmediated relation destroys subjectivity, consciousness, and speech. Because Need can be met, through sublimation we identify the Symbolic object of our desire with a Real object we can Imagine as the little other.

In the realm of property, as opposed to love, we try to reduce property to physical objects we control. While this accurately recognizes that a property interest in a physical object may include the right sensuously to see, grasp, and enter, property cannot be reduced to the sensuous contact or the physical thing itself. Nor does the sensuousness of the contact nor the physicality of the object epitomize the property relation. This seems to be self-evident, and yet we continue to identify property with physicality — the Symbolic with the Real. So, the alternate approach of legal discourse is to insist that property is an unmediated legal relationship between subjects — a relationship that does not require a mediating *res* or object.

If we view property theory in terms of the psychoanalytic tendency to collapse the Symbolic into the Real, we gain insight into the Imaginary tendency to picture property concepts in terms of phallic metaphor. We envision property in terms of the archetype of the penis and the female body. In the former manifestation, we

desire into motion. See MARCEL PROUST, REMEMBRANCE OF THINGS PAST (C.K. Scott Moncrieff & Terence Kilmartin trans., 1981) (1954).

The French term means the "object spelled with a little *a*." This is a reference to the French word for the Other, *Autre*. Because this subtlety is lost if the word is translated literally and directly into English — *object* and *other* being spelled with an "o" — and because Lacan and many of his followers are virulently Anglo-Amerophobic, most Lacanians persist in using the French even when writing in English.

Žižek refreshingly flouts this snobbery and struggles to coin English equivalents. One of his English names for the *objet petit a* is the "little other," to distinguish it from the big Other. On the one hand, this has the advantage of reflecting French and German psychoanalytical practice, which emphasizes the use of common colloquial terminology that has rich, complex, and contradictory connotations, rather than the English practice of using foreign words as precise technical terms of art. Freud and Lacan spoke of the soul (*Seele, ame*), the I or me (*Ich, moi*), and the it (*es, ça*), whereas Anglo-American psychoanalysts speak of the psyche, the ego, and the id. On the other hand, Žižek loses Lacan's pun that reflects the arbitrary and empty nature of sublimation — the object is abject. See LACAN, *Televisión, supra*, at 21 n.9; see also *infra* note 221.

imagine property as a physical object we see, hold, and wield. In the latter manifestation, we imagine it as a physical object we either protect from invasion or occupy and enjoy. When men speak of possessing a woman in sexual intercourse, they do not make an analogy to the possession of real property as the right to enter and the power to prevent others from entering. The two are not merely similar; they are psychoanalytically identical.⁴⁸

If the conflation of the Symbolic *Phallic* concept of property with Real phallic concepts of physicality reflects our psychic makeup, its recurrence no longer seems merely surprising. It risks seeming inevitable. It suggests that it may be virtually impossible for people situated in our society to speak about property without descending to phallic imagery to describe *Phallic* concepts. Thus, on one level I mean to critique, but not to criticize, those legal writers who reinstate the phallic metaphor of property even as they purport to deny it.

On the other hand, the goal of psychoanalytic theory, like Hegelian philosophical theory, is the increase of human freedom. Lacan's attempted identification of the structures of our conscious and unconscious mind and Hegel's identification of dialectical logic should not be confused with predestination. Rather, this knowledge should enhance our ability to control our lives, to attain not merely negative liberty but positive freedom. Psychoanalytical theory's exposure of the identification of the Symbolic and the Real *as a conflation* holds out the opportunity to rethink the relation and to try to imagine other, more adequate ways of thinking about property. This will not be an easy task, however. The postmodern subject hypothesized by Lacan is paradoxically constrained by its own radical freedom. Unlike the modern subject — that is, the autonomous, free-standing individual posited by classical liberal theory — the postmodern subject cannot step outside the linguistic-legal regime and will the gender hierarchy to change. In Hegelian-Lacanian thought, subjectivity, law-property, and language-sexuality are mutually constituting. This means that the subject is not merely the subject of the Symbolic order; the subject is also subject to the Symbolic order. Because the Symbolic order in which we are currently located is not natural or inevitable, Lacanian thought holds out the theoretical possibility of creating radically different alternate orders. But changing the Symbolic order would entail simultaneously and radically changing the subject.

48. See ERICH NEUMANN, *THE GREAT MOTHER: AN ANALYSIS OF THE ARCHETYPE* 98-100 (Ralph Manheim trans., 2d ed. 1963).

III. WALDRON AND THE EMBRACE OF PHALLIC METAPHOR

A. Defining Property

Jeremy Waldron is one of the few contemporary theorists who has tried to defend both the institution of private property as well as limitations on property within the rights tradition, without adopting the predominant "right wing" rights position — libertarian absolutism.⁴⁹ In his insightful book *The Right to Private Property*,⁵⁰ Waldron specifically examines a modified Lockean natural law liberal philosophy or liberty justification, as well as a Hegelian speculative philosophy or freedom justification.⁵¹

Waldron's analysis is particularly illuminating because, on the one hand, he avoids the error that many defenders of property make in assuming that the core concept of property is self-evident and not in need of explication.⁵² Rather, he takes seriously the sub-

49. See generally Jeremy Paul, *Can Rights Move Left?*, 88 MICH. L. REV. 1622 (1990) (reviewing JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988)). In this article I will not consider Waldron's often insightful analysis of how to resolve the concept of an individual's rights to private property with the rights of the community to limit those rights. For present purposes, I am only interested in the imagery implicit in Waldron's definition of property, or what Paul calls "the somewhat tedious, early portions of the book." *Id.* at 1640.

50. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988).

51. In this article I use the term *liberty* to refer to the negative freedoms — that is, freedom *from* — emphasized by classical liberal natural rights theories. I use the term *freedom* to refer to concepts of affirmative freedoms — that is, freedom *to* — emphasized by Hegel, among others.

Of course, libertarianism also traces its origins to Locke. The differences between libertarian absolutism and other Lockean liberty theories of property spring primarily from the greater emphasis given by the latter to the so-called Lockean proviso: One is entitled to property with which one has intermixed one's labor so long as there is "enough, and as good left in common for others." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, § 27 (Peter Laslett ed., 2d ed. 1967) (3d ed. 1698, corrected by Locke). For an example of a Lockean liberty theory of property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (describing an evolving natural rights theory of copyright). The proviso can be read as permitting or requiring significant restrictions on the "right" to property.

I disagree with much of Waldron's interpretation of Hegel's theory. An analysis of Waldron's misinterpretation is beyond the scope of this article. I explain my interpretation of Hegel in Schroeder, *The Vestal and the Fasces*, *supra* note 12, in Schroeder, *Virgin Territory*, *supra* note 5, and, to a lesser extent, in this article *infra* in section III.B.

52. Richard Epstein, in contrast, acknowledges Grey's critique but largely dismisses it: "The great vice in Grey's argument is that it fosters an unwarranted intellectual skepticism, if not despair. He rejects a term that has well-nigh universal usage in the English language because of some inevitable tensions in its meaning, but he suggests nothing of consequence to take its place." RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 21 (1985).

Epstein thinks that Grey confuses the problem of applying a concept in various complex contexts with the vagueness of the concept itself. I agree. I distinguish Waldron from Epstein, however, in that the former more directly recognizes his responsibility to grapple with and articulate the concept of property, whereas Epstein assumes that its meaning is relatively uncontroversial. Specifically, he believes that Blackstone's definition is more than adequate for most purposes. Those issues that seem vague should be kept in the proper perspective as belonging at the margins of property issues. *Id.* at 22-23.

stantial literature questioning the coherence of the concept of property and acknowledges that he cannot purport to justify property without first defining it:

Many writers have argued that it is, in fact, impossible to define private property — that the concept itself defies definition. . . . If private property is indefinable, it cannot serve as a useful concept in political and economic thought: nor can it be a point of interesting debate in political philosophy. Instead of talking about property systems, we should focus perhaps on the detailed rights that particular people have to do certain things with certain objects, rights which vary considerably from case to case, from object to object, and from legal system to legal system.⁵³

On the other hand, Waldron does not fall into the error committed by many leftist critics — including Grey, Vandeveld, and Hohfeld, all of whom I will discuss below — who assume that if a simple, sharp-edged analytic definition of property is not possible, then no definition of property is possible. Thus property ceases to exist as a meaningful legal and economic institution.

A term which cannot be given a watertight definition in analytic jurisprudence may nevertheless be useful and important for social and political theory; we must not assume in advance that the imprecision or indeterminacy which frustrates the legal technician is fatal to the concept in every context in which it is deployed.⁵⁴

Waldron makes reference to modern and postmodern theories of fuzzy definitions:

I want to consider whether any of the more interesting recent accounts of the nature and meaning of political concepts — such as Wittgenstein's idea of family resemblance, the idea of persuasive definition, the distinction between concept and conception, or the idea of "essential contestability" — casts any light on the question of the definition of private property.⁵⁵

Waldron argues that "private property is a *concept* of which many different *conceptions* are possible, and that in each society the detailed incidents of ownership amount to a particular concrete conception of this abstract concept."⁵⁶ Waldron defines the "concept" of property as follows:

Epstein also thinks that political considerations drive Grey's critique more than real difficulties in definition do. I believe that there is some truth to Epstein's complaint. See *infra* section IV.C.

53. WALDRON, *supra* note 50, at 26.

54. *Id.* at 31.

55. *Id.*

56. *Id.* Waldron also writes:

For one thing, private property is a concept of which there are many conceptions: legal systems recognize all sorts of constraints on the rights of owners, and the crucial ques-

The concept of property is the concept of a system of rules governing access to and control of material resources. Something is to be regarded as a material resource if it is a material object capable of satisfying some human need or want. . . . Scarcity, as philosophers from Hume to Rawls have pointed out, is a presupposition of all sensible talk about property.⁵⁷

He continues:

The concept of property does not cover all rules governing the use of material resources, only those concerned with their allocation. Otherwise the concept would include almost all general rules of behaviour. . . . As Nozick puts it, the rules of property determine for each object at any time which individuals are entitled to realize which of the constrained set of options socially available with respect to that object at that time.⁵⁸

Although I do not necessarily agree with Waldron's specific description of the base concept of property, I concur with Waldron's conclusions as to both the need for and the possibility of defining property and distinguishing it from other legal relations. In particular, Waldron's approach toward definitions, his recognition that property is and will probably remain a flourishing legal and economic institution in spite of — or because of — its open-ended and fluid nature, and his realization that the institution of private property seems intuitively related to liberty and freedom considerations are much more successful than the analysis offered by critics such as Grey. Unfortunately, at the next stage Waldron's analysis devolves into precisely the unsophisticated thinking that Grey and Vandewelde associate with — and criticize as — the rigid, unworkable, traditional, Blackstonian model of property. That is, Waldron adopts the paradigm of sensuous grasping as the norm or epitome of property against which all other forms of property must be analogized. Indeed, it is not even clear that he considers legal rights with respect to intangibles to be property at all.

B. *The Physicality of Property*

As we have seen, Waldron first defines property as the regime for the allocation of material resources. In turn, he defines the term *material resources* as those things that are possible objects of human wants and needs.⁵⁹ In the following passage, however, he limits ma-

tion is not whether there should be constraints, but whether the particular constraints we need defeat the original aims of our right-based argument.

Id. at 5.

57. *Id.* at 31.

58. *Id.* at 32.

59. See *supra* note 57 and accompanying text.

terial objects to *physical* things, which he contrasts with *noncorporeal* things:

I have defined property in terms of *material* resources, that is, resources like minerals, forests, water, land, as well as manufactured objects of all sorts. But sometimes we talk about objects of property which are not corporeal: intellectual property in ideas and inventions, reputations, stocks and shares, choses in action, even positions of employment. . . . [T]his proliferation of different kinds of property object is one of the main reasons why jurists have despaired of giving a precise definition of ownership. I think there are good reasons for discussing property in material resources first before grappling with the complexities of incorporeal property.⁶⁰

Note that Waldron has already taken an unacknowledged step toward the identification of property with physicality that will color the rest of his argument. He defines human wants and needs, and therefore property, in terms of purely animal satisfaction of physical limitations. This is an odd choice from a philosopher like Waldron who wishes to explore justifications of property from a Lockean and a Hegelian perspective. Neither Locke nor Hegel justify property in terms of the satisfaction of animalistic physical needs; rather, both justify property by reference to the most sublime and most abstract notions of what makes humans truly human — liberty and freedom, respectively.

In the psychoanalytic terminology of Jacques Lacan, Waldron locates property in the uninterpreted, preimaginary, prelinguistic realm of the *Real* in which humans experience “need.” As I have stated above,⁶¹ the Hegelian conception of property is the regime of possession, enjoyment, and exchange of the object of desire, which creates both subjectivity as intersubjectivity and law as Abstract Right. In Lacanian psychoanalytic terms, the philosophical concept of property, therefore, performs a function parallel to the psychoanalytic concept of sexuality as language and law — the regime of possession, enjoyment, and exchange of the object of desire (the *Phallus*), which creates subjectivity as intersubjectivity and law as language. Property, therefore, does not belong in the animalistic, physical realm of the *Real*, or the imagistic realm of the *Imaginary*, in which Waldron immures it. Rather, it constitutes a necessary building block in the creation of the uniquely human regimes of the *Symbolic* — law and language.

In Lacanian and Hegelian theory, property is the object of human *desire*, not of human needs. Desire is the erotic drive to be

60. WALDRON, *supra* note 50, at 33.

61. See *supra* notes 26-27 and accompanying text.

recognized and desired as a desiring subject by another subject. Waldron, however, presumes that property relates to physical wants — what Lacan would call “needs.” He wants to find an Imaginary *objet petit a* that he can identify with some Real physical object to stand in for the Symbolic object of desire and function as the cause of desire. Consequently, Waldron wants to presume that property is originally a physical relationship.

This may explain why Waldron cannot — as he refreshingly admits⁶² — follow Hegel’s argument as to the necessary role of property in the development of human personhood. Hegel insists that his analysis of property has nothing to do with physical requirements.⁶³ As I have discussed, Hegel’s starting place for his political philosophy and analysis of property is the most immediate concept of the person imaginable: self-consciousness as pure negativity. This logical construct does not yet even have a body, let alone physical needs.

In other words, Waldron makes *precisely* the phallic metaphoric conflation that Lacan locates as the identification of gender roles — or sexuated positions — with anatomy. Waldron conflates the *Phallic* with the phallic and desire with need in an attempt to collapse the Symbolic into the Real.

C. Waldron’s State of Nature

Waldron defends his emphasis on corporeal objects by an appeal to something like a state of nature. Waldron argues:

First, we should recall that the question of how material resources are to be controlled and their use allocated is one that arises in every society. . . . The question of rights in relation to incorporeal objects cannot be regarded as primal and universal in the same way. In some societies, we may speculate, the question does not arise at all either because incorporeals do not figure in their ontology or, if they do, because human relations with them are not conceived in terms of access and control. That is a point about incorporeals in general. Turn-

62. Waldron writes: “There are fewer difficulties with the Hegelian approach, though it has to be said that the link between private property and the ethical development of the person is rather obscure and, in any case, never established as an absolutely necessary connection.” WALDRON, *supra* note 50, at 4. If, however, one concludes that human nature is driven by the desire to be desired by another subject, and that subjectivity is intersubjectivity mediated by the exchange of the object of desire — as do both Hegel and Lacan — and if property is the regime of the exchange of objects, then by definition property is necessary for the development of subjectivity.

63. “The rational aspect of property is to be found not in the satisfaction of needs but in the superseding of mere subjectivity of personality.” HEGEL, *supra* note 20, § 41 (*Addition*); see also MEROLD WESTPHAL, *Hegel, Human Rights, and the Hungry*, in HEGEL, FREEDOM AND MODERNITY 19, 22 (1992).

ing to the incorporeal objects we are interested in, it is clear that questions about patents, reputations, positions of employment, etc. are far from being universal questions that confront every society. On the contrary, one suspects that these questions arise for us only because other and more elementary questions (including questions about the allocation of material objects) have been settled in certain complex ways.⁶⁴

In other words, Waldron tries to defend his analysis by hypothesizing an artificial anthropology of societies without incorporeals.

Of course, liberal philosophers, including Locke, have traditionally started their analysis from a hypothetical state of nature. At first blush, therefore, Waldron's approach might seem worthwhile for the consideration of a Lockean natural rights justification of property. On further reflection, however, Waldron's approach is inappropriate to an analysis of liberal philosophy. The state of nature posited by liberals such as Locke presupposes *presocial* individuals. Waldron starts with a hypothesized second stage of human development in which individuals are already living in societies. An analysis of property as it might exist in the artificial state of even such a primitive society is irrelevant to the Lockean search for a natural right of property.

More important, despite Waldron's assertions to the contrary, I believe that it is not possible to hypothesize a society of entities identifiable as *human beings* in which incorporeal property — such as status, religious objects, artistic creations, crafts, objects of beautification, and other Symbolic and Imaginary objects — do not play central roles. Creatures living together solely within the realm of physical needs and wants are not human subjects but only animals living in packs. The subject is the speaking subject of language in the Symbolic order. I can, on the other hand, hypothesize societies of human beings where incorporeals are the primary source of property. For example, such a society might exist on a hypothesized tropical island where there are abundant fruit, vegetables, water, and space obviating scarcity for basic human needs and wants. That is to say, Waldron believes that tangible property is more fundamental to human personality than incorporeal property, but I argue that the opposite appears to be true.

Waldron's approach poses even more difficulty when we move to the considerations of actual "primitive" or tribal societies. I am not an anthropologist, so I am wary of making empirical claims, but I do not believe that any contemporary societies exist solely in the

64. WALDRON, *supra* note 50, at 34.

Real world of physical needs without rich and complex Symbolic objects of desire.⁶⁵

In the passage quoted above, Waldron tries to suggest that those primitive societies that do have Symbolic objects — such as religious objects or status — do not allocate these objects through a recognizable *property* regime. This objection fails for at least two reasons.

First, Waldron's own definition of property — a regime of access and control of scarce resources — would apply on its face equally to incorporeals and corporeals. Even if we are squeamish about speaking of religious objects and worship in terms of property, any society that recognizes a priesthood with special access to the divine, that recognizes the efficacy of ritual or taboo, or that requires initiation into religious mysteries or status — such as manhood — subjects incorporeals to a regime of access and control of the objects of human wants — that is, Waldron's definition of property.

In contradistinction, the two philosophies on which Waldron supposedly relies — Hegelianism and Lockean liberalism — do not flinch from identifying religion with property. Hegel expressly recognized that our beliefs, religious positions, and liturgical objects

65. The Tasadays are the only contemporary society I know of to approach this description. All other supposedly "primitive" contemporary tribes are, in fact, quite developed, having post-Stone-Age societal organization and technology.

The Tasadays, a tribe of 26 people, caused a stir in 1971 when they were "discovered" in the Philippines as the only contemporary Stone-Age tribe. Supposedly the Tasadays had no pottery, woven cloth, metal, art, weapons, or domestic plants or animals. They had a few crude tools. They only ate food they could gather by hand. The Tasadays were the subject of much interest in both popular culture and scholarship. See, e.g., *FURTHER STUDIES ON THE TASADAY* (D.E. Yen & John Nance eds., 1976); *THE TASADAY CONTROVERSY: ASSESSING THE EVIDENCE* (Thomas N. Headland ed., 1972); Kenneth Macleish, *The Tasadays: Stone Age Cavemen of the Mindinao*, NATL. GEOGRAPHIC, Aug. 1972, at 219. Arguably, the Tasadays suggest the possibility of Waldron's model of a people having little or no intangible goods.

Unfortunately, since the late 1980s suspicion has spread widely in the scientific community that the Marcos regime invented the Tasadays as a crude hoax to gain control over tribal lands. For example, some scientists believe that it is biologically impossible for a group this small to perpetuate itself; the Tasadays' "tools" appeared to be fakes because they were so flimsy that they broke when used; their language seemed substantially the same as that of their neighbors; even though they supposedly did not have agriculture, their language contained agricultural terminology; there was no garbage or other signs of continuous habitation around their supposed cave "home," and so on. Bruce Bower, *19-Year Debate Over 'Stone Age' Tasaday Thrives in Rain Forest*, L.A. TIMES, Jan. 8, 1990, at B2.

The Tasaday supporters — including the current Filipino government — in turn accuse the debunkers of coveting the rich mahogany groves in which the Tasadays live. But even the supporters contend that the Tasaday have existed as a separate group for a very short time — probably being the debased survivors of a larger group that was devastated by disease a few hundred years ago. *Id.*; see also Shannon Brownlee, *If Only Life Were So Simple*, U.S. NEWS & WORLD REP., Feb. 19, 1990, at 54.

are every bit as much external Symbolic objects of desire and (potentially) exchange as food and clothing.⁶⁶ Similarly, the Framers of the U.S. Constitution, who were, of course, deeply influenced by Lockean liberalism, were not shy about analyzing religion in terms of property. As I discuss below,⁶⁷ they sought to justify constitutional freedoms of speech and religion precisely on the grounds that men have a natural property right in their opinions and beliefs.

Second, if Waldron wishes to assert that primitive regimes of access to religious or other Symbolic objects significantly differs from the type of access and control that we associate with property, he has the burden of articulating that difference. Waldron recognizes that his stated project of justifying property requires that he be able to define property and distinguish it from other interests, and he starts from the proposition that a philosophic project requires careful definition.⁶⁸ If he cannot identify the difference between the regime of access to religious and status objects and other regimes, his attempted definition of property fails on his own terms.

Most important, there is a practical problem with Waldron's specific choice of the limited concept of property that serves as the starting point for his analysis. When one chooses to argue from a simple hypothetical, the ultimate issue is not whether there is any empirical society that matches the hypothetical. Rather, the question is whether the hypothetical simplifies and epitomizes fundamental aspects of *our* society so as to serve as a useful analytical model. Indeed, Waldron is very sensitive to the idea that property exists not merely as an abstract philosophical concept but as a fundamental legal, economic, political, and social institution in our society. Unfortunately, I believe that Waldron's hypothetical is so alien as to be misleading.

As we have seen, Waldron has reduced the concepts of material resources and human wants to what I have referred to as Real needs. The problem with this should be obvious. By reducing these concepts in this fashion he has excluded from his starting analysis of

66. See *supra* section II.A. Hegel did, however, argue that the logic of property demanded its own self-limitation with respect to some types of objects. That is, the purpose of property is the development of subjectivity through recognition by others. This requires that the abstract self take possession of external objects. Some of these objects are necessary for a recognizable personality and become internalized. It would defeat the logic of property if one alienated those internalized objects necessary for recognition. Consequently, some objects cannot be subjected to the complete property regime. Although we may possess and enjoy our bodies and beliefs, it is an abstract wrong to alienate them by selling ourselves into slavery or by denying our beliefs. HEGEL, *supra* note 20, §§ 65-67.

67. See *infra* section IV.C.

68. See *supra* section III.A.

property all interests beyond those necessary for subsistence. All property interests in the Symbolic economy — including incorporeals and luxury goods defined broadly as anything above the satisfaction of animal need — have already been identified as problematic. It is possible to take the position that no institution of property can be philosophically justified beyond the subsistence level.⁶⁹ By definition, that position would always lead to the conclusion that the property regime of a relatively wealthy, nonsubsistence economy, such as contemporary American society, could never be justified. Waldron's goal, however, is not to take the radical neo-Prudhomian or Marxian position that property is theft. He wishes to *justify* at least a limited property regime in a modern society. His choice as a starting point seems antithetical to his purpose.

D. Waldron's Denial of Incorporeality

1. Need or Desire?

In his analysis of property, Waldron's rhetoric quickly falls into *Phallic*-phallic confusion and the related physicalist metaphor for property. Waldron states, for example, that "it is often illuminating to characterize the solutions [to questions concerning the allocation of incorporeals] in terms which bring out analogies with the way in which questions about property have been answered."⁷⁰ Waldron continues,

For example, once it is clear that individuals have rights not to be defamed, it may be helpful to describe that situation by drawing a parallel between the idea of owning a material object and the idea of having exclusive rights in a thing called one's "reputation." Such talk may take on a life of its own so that it becomes difficult to discuss the law of defamation except by using this analogy with property.⁷¹

Let us recapitulate Waldron's reasoning. First, he argues that property is a regime relating to the access and control of the objects of human wants and needs. Insofar as this definition refers to "wants," one does not necessarily have to limit property to the allo-

69. The alternate interpretations of the so-called Lockean proviso are variations on this argument. Locke's labor theory of property argued that one has a natural property right in those objects with which one commingles one's labor so long as one leaves "enough, and as good" for others. LOCKE, *supra* note 51, § 27; *see also supra* note 51. The narrow libertarian reading of this theory justifies virtually all exclusive property rights this side of starvation of the poor. An expansive reading sharply limits property rights in favor of egalitarian and communitarian values. *See* John Stick, *Turning Rawls into Nozick and Back Again*, 81 NW. U. L. REV. 363 (1987) (demonstrating that the difference between Rawlsian egalitarianism and Nozick's libertarianism can be explained in large part by reference to their different approaches to the Lockean proviso).

70. WALDRON, *supra* note 50, at 34.

71. *Id.*

cation of physical things. The colloquial term *want* could be read expansively to include the technical psychoanalytical concept of desire. This would make the theory consistent with the Hegelian-Lacanian concepts of objects of property as potentially being anything external to abstract personality and of property as the regime of intersubjective exchange of the object of desire.

Waldron rejects this interpretation in his second move. Although he purports merely to restate this definition, he in fact changes it by limiting the term *want* to the Lacanian concept of need for physical objects. That is, he tries to move property out of the Symbolic regime of law, into the preconscious, prelinguistic realm of the Real. I argue that this reflects the psychoanalytic origin of sexuated positions in the conflation of the Symbolic notion of the *Phallus* as object of desire with the Real phallus.

Waldron's third move is to argue that by analogy we can apply to incorporeal objects legal principles developed by considering corporeal objects. In his fourth and final move, Waldron comes full circle to Grey's denial of noncorporeal property. Only corporeal object relations are property relations. Waldron no longer purports to apply principles developed in connection with corporeal objects by analogy to develop the *property* law of noncorporeals. Rather, he purports to apply *property* law concepts — which by implicit definition relate only to corporeal objects — *by analogy* in order to develop a *new* law of noncorporeal object relations.

Waldron continues his argument by assertorically denying the noncorporeal nature of the objects of legal relations that are traditionally considered to epitomize property. It has often been noted that the most archetypical type of property — real property — is the right not to rocks and dirt and other physical things but to estates in land. In psychoanalytic lingo, real property is not *Real*. Waldron counters:

We might accept the argument but insist that spatial regions can still be regarded as material resources. Although they differ ontologically from cars and rocks they also seem to be in quite a different category from the complexes of rights that constitute familiar incorporeals — patents, reputations, etc. It is philosophically naive to think that the fact that we have to regard regions as property objects adds anything to the case for regarding, say, choses in action in that way. The second response is more subtle. We may concede that land, as conceived in law, is too abstract to be described as a material resource. But we may still insist that the primary objects of real property are the actual material resources like arable soil and solid surfaces which are located in the regions in question. Until recently, these resources have been effectively immovable and so there has been no reason to distinguish

"land as material" from "land as site." But developments like modern earth-moving and high-rise building necessitate a more complex and sophisticated packaging of rights over these resources. Thus the concept of land as site has now had to be detached from its association with immovable resources and employed on its own as an abstract idea for characterizing these more complicated packages of rights. Still, in the last analysis, the system of property in land is a set of rules *about* material resources and nothing more.⁷²

These arguments evidence Waldron's deep ambivalence concerning corporeality and property. He provides these arguments to support his assertion that, first, we should start by analyzing corporeal objects because they are more basic and, second, that real property interests are corporeal. His actual statement, however, seems to be an unacknowledged shift in position. After saying that he will start with the property of material objects because they are most basic, he makes an implicit admission that even though the most basic property rights concern realty, and realty is not a physical object, he finds it useful to analogize land to physical objects. Because it is *convenient* to think of realty interests as physical objects, we will say that realty interests are physical objects without considering whether or not this is actually the case. In other words, on one level Waldron seems to recognize that he starts with material objects, not because they are the most basic objects of property, but because they seem simpler to think about.

2. *Empirical Arguments for the Phallic Metaphor*

Waldron wants to suggest that only modern technology has made the identification of realty interests with the underlying land problematic. I question both the historical and empirical accuracy of his statement.

As any first-year law student knows, the concept of realty as a specific plot of land occupied and exploited by a single owner is a relatively modern development in Anglo-American culture. Historically, real property consisted of the system of estates.⁷³ Estates

72. *Id.* at 36-37 (footnote omitted).

73. Indeed, to be precise, when the word *property* started to come into legal parlance in the seventeenth century, it may have more accurately referred only to *personal* property rights of private citizens. This is because the word *property* was defined as the "highest right that a man hath or can have to any thing." G.E. Aylmer, *The Meaning and Definition of "Property" in Seventeenth Century England*, PAST & PRESENT, Feb. 1980, at 87, 89-94. In seventeenth-century England — and technically in the contemporary United States — only the sovereign can have property in land in the sense of the highest alodial right. Consequently, legal discussion concerning the interests in land of ordinary citizens involved not *property* in land but only *estates*. In contradistinction, anyone can have a full property in personalty. Despite this, according to Aylmer, some seventeenth-century lawyers tended to refer sloppily to property in estates owned by citizens. *Id.*

did not consist merely in the right to occupy, farm, mine, or otherwise physically exploit specific pieces of royalties; they included a complex network of rights, responsibilities, and status. Numerous persons held different property rights with respect to a given piece of realty. Although some of these were merely temporal divisions of the right to occupy the land — such as life estates, reversions, and so on — many others were not. Not only social status but also what we would call governmental and ecclesiastical positions and functions were tied to estates. Other real property interests included, among others, banalities — which included the right to operate certain *utilities* such as a mill, oil press, or bake-oven located in a village — and *advowsons*, or the right to name clerics to a specific church and income.⁷⁴ Indeed, the traditional dichotomy between real and personal property may originally have been in large part jurisdictional rather than substantive. *Real* property rights referred not to property interests relating to land per se but to those causes of action for specific relief that could be brought in the king's court.⁷⁵

Although many of these medieval estates exist only as vestigial organs in late-twentieth-century America, other partial estates have taken their place. Let us look at a very simple example of residential real estate in New York City — *my* apartment. A corporation named Hudson Mews Apartment Corporation owns the equity in

74. See Macpherson, *supra* note 36, at 7.

75. As an empirical matter, however, such real causes of action may have related primarily, but not exclusively, to claims concerning rights in land.

The name "real property" itself is taken from the procedures, the real actions, through which landowners' rights were specifically enforced. The dominant status of real property law, early established, long persisted, and in Blackstone's time that body of law, viewed as the mechanism either for the resolution of land disputes, or, as it was used by the expert conveyancers for the cooperative, consensual organization of land ownership, remained the most important and intellectually developed branch of the common law.

A.W. Brian Simpson, *Introduction* to 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at v (A.W. Brian Simpson ed., 1979). That is, real property actions concerned the enforcement of manorial rights, not all of which would be considered tied to land by modern standards.

Duncan Kennedy criticizes Blackstone's categorization of certain rights as real property. See Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 344-46 (1979). Simpson's point is that Blackstone's characterization was not an idiosyncratic choice but a reflection of the legal practice of his time.

It is tempting to suspect that the terminology *real property* comes from its original enforcement in the royal courts. Indeed, the word *realty* can also mean "royal" and "realm." Unfortunately, these two meanings of realty seem to derive from entirely different roots. The former, referring to property, originates from the Latin *res*, which means "thing" or "matter." The latter refers back to *rex* or "king," which in turn relates to a root meaning "to straighten or put in line." 13 THE OXFORD ENGLISH DICTIONARY 272, 279 (2d ed. 1989); see also ERIC PARTRIDGE, ORIGINS, A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 553, 561 (1966). Perhaps the development of such similar English words for these different concepts originating in different roots is a folk etymology.

the building and land where I live. A bank holds a mortgage granted by the corporation. Various parties including Time-Warner Cable Television, New York Telephone, ConEdison, and the U.S. Postal Service have easements to enter and keep objects — such as coaxial cables and telephone and power lines — on the premises. The corporation owns rights of access to hook up to the water mains and pipelines that run under the street in front of the apartment. The use of the land and building is subject to extensive regulation by the City and State of New York. As the building is located in an unusual (for Manhattan) location behind a private courtyard, the corporation also owns a right of way across a narrow strip of land — owned in fee by someone else — which separates our garden from the street. I, as tenant in the entirety with my husband, own the equity in 625 common shares of the corporation and are lessees of a proprietary lease granted by the corporation for the apartment in which I live. A savings and loan owns an Article 9 security interest in the shares and the lease. Although the terms of my lease are coterminous with my ownership of the shares, both my occupancy of the lease and my ownership of the shares are subject to my performance of certain obligations under the bylaws of the corporation — including paying an amount equivalent to my pro rata share of the corporation's mortgage debt and operating expenses — and under the terms of the agreement with my S & L. The corporation also has a security interest in my rights to secure my obligations and an intercreditor agreement with my S & L governing its respective property rights as a secured creditor. My right to alienate my shares and my lease is restricted by the terms of the bylaws of the corporation and my security agreement with the S & L. Although shareholders occupy most of the other apartments in my building — sometimes individually and sometimes through various forms of joint tenancy — some shareholders sublet their apartments to unrelated tenants. The corporation has granted the shareholders and lessees limited rights to use the common areas of the building and the garden, as well as the right of way. Each tenant has the exclusive privilege to use a portion of the basement for storage. The corporation leases the basement apartment to our superintendent, whose lease is coterminous with his employment, and so on.

Commenting on modern-day estates in land, Waldron ends his argument with the following non sequitur:

Thus, the concept of land as site has now had to be detached from its association with immovable resources and employed on its own as an

abstract idea for characterizing these more complicated packages of rights. Still, in the last analysis, the system of property in land is a set of rules *about* material resources and nothing more.⁷⁶

Thus, Waldron would conclude that ultimately all the interests concerning my apartment building are concerned with "material resources" in his definition of physical things. He might try to argue that my ownership interest primarily concerns my sensuous exploitation of physical walls, floors, ceilings, fixtures, and so on. But the interests of the financial institutions, the telephone company, the cable TV company, the electric company, the postal service, the laundry company, and Sal the Super are *not* primarily related to the physical location. Rather, they are rights to receive income and are not, as Waldron suggests, substantially different from the rights to income from the exploitation of any other form of noncorporeal property. Moreover, even my apartment's value to me is not primarily based on my physical needs. The value consists of a combination of its objective exchange value — the market price — and its subjective use value to me. The use value relates to a variety of Symbolic and Imaginary concerns, as well as my Real needs. Examples include the apartment's physical attractiveness, its relative quietness, its proximity to both my office and a wide variety of restaurants and entertainment, the artsy population of the neighborhood, and so on. Indeed, when one compares the cramped quarters in which we New Yorkers tend to live with the housing occupied by people of comparable economic resources in other parts of the country, it is obvious that we value our property *despite* its failure to meet our Real physical wants.

Waldron admits that if ownership is defined in terms of wealth, then

we will certainly have to conjure up incorporeal things to correspond to the complex legal relations that in fact define their economic position. But if we say instead that property is a matter of rules about access to and control of material resources, but not necessarily about private ownership, then we may still say that a man's wealth is constituted for the most part by his property relations. He may not be the owner of very many resources; but the shares he holds, the funds he has claims on, and the options and goodwill he has acquired, together define his position so far as access and control of material resources is concerned.⁷⁷

Once again, Waldron distinguishes between relations concerning noncorporeals and "property" — that is, access to material re-

76. WALDRON, *supra* note 50, at 36-37.

77. *Id.* at 37.

sources. The only true property is what he sees and holds. His argument seems to be based on the agrarian myth that all wealth ultimately comes down to physical things — the land, gold, and so on. Everything else is merely an indirect interest in the physical. To Waldron, all our creations — art, music, medicine, technology, knowledge — ultimately relate to satisfaction of our physical, animal needs and wants. Like the infant, we remain preconscious in the domain of the Real.

But even if one accepts Waldron's assertions as to the source of wealth, it does not follow from this that property relations are primarily or even archetypically relations affecting the access to and control of physical things. His very discussion indicates that access to and control of wealth — even if defined narrowly as physical things — are legal, Symbolic relations, not the mere immediate sensuous contact with, and physical exploitation of, tangible things. I argue that property, as a legal relation, is precisely the way we as human beings move away from mere sensuous experience of the outside world to Symbolic and social relations among human beings with respect to the outside world.

Indeed, as human beings, even our needs are not purely animalistic or natural. In the words of Renata Salecl,

For Lacan the concept of *need* is linked to the natural or biological requirements of human beings (food, for example). But for human beings it is essential that these needs are never manifest as purely natural needs. Needs are always defined by a symbolic context: if we are hungry, for example, we do not simply grab the first available food, but rather we think about what we shall eat and then prepare food in a special way.

When put into words, a need becomes articulated in the symbolic order. . . . [D]esire arises as the excess of demand over need, as something in every demand that cannot be reduced to a need.⁷⁸

When I eat food, my *property* in the food is not the animal act of consumption and digestion but the legal recognition of my right to possess and use or alienate the food. In our society, property rights are these *indirect, mediated* relations among people through our relationship with the external world. It is meaningless to speak of property without speaking of our relation to these noncorporeal things, even if they ultimately indirectly lead to the access to and control of corporeal things.

78. RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 124 (1994).

IV. THE ATTEMPTED NEGATION OF PHYSICALITY

A. *Prophesies*

The most eloquent prophet of the death of property is Thomas Grey. In his justly famous 1980 essay, *The Disintegration of Property*,⁷⁹ Grey argued that property's reconceptualization as a *bundle of sticks* undermined property's very foundation. Consequently, property is doomed to disappear as an important category of law. Unfortunately, despite the undeniable elegance, insight, and influence of this essay, Grey's analysis could not be more erroneous and his conclusions more wrong. In the name of rejecting the physicalist, phallic metaphor for property as object, Grey restates it apophatically through simple negation. He cannot withstand the temptation of falling into this seemingly irresistible conceptual confusion. He tries to collapse the Symbolic into the Real and to deny the role of the object as the mediator of intersubjective relations. Moreover, one reason for this confusion and failed negation is that Grey and other progressives fail to distinguish the traditional liberal philosophical theory of the role of property in the state from other philosophical accounts of property or from an analysis of property as a social, economic, and legal practice.

Grey claims to recognize a dichotomy between the idea of property held by the public and the idea held by "specialists" such as lawyers and economists. The former, according to Grey, thinks of property as "*things that are owned by persons*."⁸⁰ The latter "tends both to dissolve the notion of ownership and to eliminate any necessary connection between property and things. . . . The specialist fragments the robust unitary conception of ownership into a more shadowy 'bundle of rights.'"⁸¹ Grey concludes that "[t]he substitution of a bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory."⁸² Moreover, the

79. See Grey, *supra* note 3; see also *supra* note 5.

80. Grey, *supra* note 3, at 69.

81. *Id.*

82. *Id.* at 81. A variation of this analytical approach is Bruce Ackerman's dichotomy between the conception of property held by the "Ordinary Observer" and that held by the "Scientific Policymaker." Ackerman argues that the Supreme Court's takings jurisprudence often seems incoherent to the Scientific Policymaker because it does not use sharp definitions or follow a rigid logic. It becomes quite comprehensible, however, if viewed from the perspective of the Ordinary Observer who applies more fluid concepts of practical reasoning and cultural understandings. ACKERMAN, *supra* note 5, at 26-29, 100-16.

concept of property is incoherent as evidenced by the many different ways the word is used in both legal and colloquial discourse.⁸³

The clear implication of Grey's description is that the specialist definition is more sophisticated and more accurate than the lay person's definition. The former will, therefore, eventually supplant the latter. The specialist definition, by deemphasizing the objective aspect of property and emphasizing the intersubjective aspect, breaks down the traditionally recognized distinction between property and other forms of legal relations. Accordingly, as property is shorn of its uniqueness, it will cease to play its traditional inspirational and political role in American society.

Grey gives a historical gloss to his analysis. He argues that the lay definition of property as "thing-ownership" is consistent with the eighteenth-century concept of property both as expressed by Blackstone and, presumably, as adopted by the Framers of the Constitution.⁸⁴

The conception of property held by the legal and political theorists of classical liberalism coincided precisely with the present popular idea, the notion of thing-ownership. . . .

83. Inconsistent uses of the word *property* identified by Grey include: (i) the rules of conveyancing of real property taught as a first-year course in law school; (ii) the legal and economic distinction between *in rem* rights as opposed to *in personam* rights; (iii) the economist's notion of property as those entitlements that should be recognized for the sake of efficiency; (iv) the contemporary legal theory whereby property is a means to protect certain public law entitlement, as with the "new property" identified by Charles A. Reich; (v) the constitutional concept of what may not be taken by the government without a public purpose and just compensation — a concept often reified as things or pieces of property, as opposed to other rights (as in the Ackerman "Ordinary Observer's" view); and (vi) the Guido Calabresi and Douglas Melamed's concept of property remedies, as opposed to liability remedies. See Grey, *supra* note 3, at 71-72 (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).

Unfortunately, Grey's list shows neither that property has no meaning or inconsistent meanings or that any of these views of property reflect a break from the objective view of property. Rather, these different uses of the word merely reflect discussion of the scope of property in the sense of identifying the proper objects of property — for example, whether property rights should be identified with respect to all conceivable external objects, including entitlement against the government, or merely certain traditionally recognized objects, such as parcels of real property — and the different functions that property can or should serve — as in the economic efficiency argument, the new property argument, and the Calabresi-Melamed remedies argument.

84. *Id.* at 73-74. I will argue that Blackstone's definition of property does not, in fact, correspond with the crude description ascribed to him by Grey. See *infra* text accompanying notes 99-121. In addition, as discussed *infra* in text accompanying notes 173-76, Nedelsky shows through examination of the Federalists' property writings that the Framers of the Constitution also lacked such a crude conceptualization. Moreover, I argue that the supposedly more sophisticated "bundle-of-rights" or specialist analysis favored by Grey, in fact, suffers from the very conceptual difficulties Grey ascribes to the lay definition. See *supra* text accompanying notes 10-13 and *infra* section IV.B.3.

It is not difficult to see how the idea of simple ownership came to dominate classical liberal legal and political thought. First, this conception of property mirrored economic reality to a much greater extent than it did before or has since. . . .

Second, the concept of property as thing-ownership served important ideological functions. . . . A central feature of feudalism was its complex and hierarchical system of land tenure. . . . On the other hand, property conceived as the control of a piece of the material world by a single individual meant freedom and equality of status. . . .

Third, ownership of things by individuals fitted the principal justifications for treating property as a natural right.⁸⁵

In other words, Grey argues that the lay-traditional concept of property might have, in fact, cohered with the economic reality of property practice in the early capitalist period. The feudal period was characterized by highly complex, overlapping, and interrelated ownership rules, whereby the same object was subject to the property rights of numerous persons. These rights were themselves intertwined with a complex system of mutual obligation and social, political, and religious status. The early capitalist era was, in contradistinction, characterized by the consolidation and simplification of property interests and the separation of property interests from obligation and status. Consequently, *when compared to feudal property*, capitalistic property seemed to be characterized by unitary interests in physical objects epitomized by sensuous contact.⁸⁶ According to Grey,

We have gone, then, in less than two centuries, from a world in which property was a central idea mirroring a clearly understood institution, to one in which it is no longer a coherent or crucial category in our conceptual scheme. The concept of property and the institution of property have disintegrated. . . .

My explanatory point is that the collapse of the idea of property can best be understood as a process internal to the development of capitalism itself. . . . [I]t is intrinsic to the development of a free-market economy into an industrial phase. . . . The decline of capitalism may also contribute to the breakdown of the idea of private property, so that the two phenomena mutually reinforce each other⁸⁷

How does Grey leap from the observation that contemporary legal scholarship tends to describe property as a bundle of rights to the conclusions that the connection between property and things has disappeared and that the concept of property is losing its significance in our economy? He does so by repeating an error made by

85. Grey, *supra* note 3, at 73-74.

86. *Id.*

87. *Id.* at 74-75.

Wesley Newcomb Hohfeld: he conflates the concept of the object of property and tangibility. He states, for example:

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal rights in that they pertain to things. But this suggestion cannot withstand analysis either; most property in a modern capitalist economy is intangible.⁸⁸

That is, Grey cannot grasp the concept of a thing that he cannot grasp.⁸⁹ But the concept of the object of property always included, and continues to include, intangible *things*. Neither the concept of property as an interrelationship between subjects nor the concept of intangibility implies the elimination of the object from property jurisprudence. Grey's confusion does illustrate, however, how the archetypical image of property as physical possession of a physical object is a misleading starting point for analyzing property interests generally. Yet it is this image that Grey implicitly keeps in his mind and that leads him to believe that modern concepts of property are becoming incoherent.

In support of this so-called lay-traditionalist/specialist-modern dichotomy of property, Grey contrasts the definitions of property expounded by Blackstone and Hohfeld. In order to analyze this dichotomy, it will be useful to take an extended side trip through a lesser-known article — published the same year as Grey's — that

88. *Id.* at 70.

89. This is a very common move in American legal scholarship. For example, Felix Cohen assumed that because Blackstone and Hegel referred to external objects of property, they had to be referring to the physical relations between men and tangible things. See Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 361-63 (1954). To do so, Cohen had to ignore both the definitions and examples of external things expressly provided by both writers.

Kennedy tars the conceptualization of intangibles as objects of property with the pejorative term *reification*. See Kennedy, *supra* note 75, at 335. Kennedy's approach presupposes that tangibles are naturally, essentially, prelegal, *Real* things and that intangibles have some sort of preexisting, prelegal, unthinglike essence, so that *thinghood* is inauthentically and illegitimately thrust upon them. As I discuss below, see *infra* text accompanying notes 159-62, in Hegelian and other philosophies, the concept of "thing" or object is merely the logical correlate of the definition of subjectivity as self-consciousness. Everything that is not a subject is, by definition, an object or thing. Consequently, intangibles do not have to be "thingified" but merely fall within a definition of object. Kennedy seems to be using the word *thing* to refer to the object of property rights — that is, a *res*. In this context, a thing is not a natural, *Real* object but a Symbolic one. The declaration that an object can serve as a *res* is reification. In other words, by recognizing property, we reify tangible as well as intangible objects.

I believe Kennedy has a good point that gets lost because of unacknowledged acceptance of the phallic metaphor for property. The good point is that it is not necessary, and is perhaps misleading, to analyze property interests in intangibles by analogy to the properties of tangibles. Because Kennedy implicitly thinks, however, that the only real things are tangible things one can see and hold — the phallic metaphor — he incorrectly conflates comparing intangibles and tangibles with making intangibles into things — a process he incorrectly calls reification.

more thoroughly, but succinctly, sets forth many of the assumptions about property theory that underlie Grey's work. I will then consider certain other examples Grey identifies of simplistic "thing-ownership" theories. Finally, I will explore the political context in which Grey's analysis is located. I will argue in contradistinction to Grey that the laity are not *less* sophisticated about property. Rather, they are much *more* sophisticated than the so-called experts of academia, easily adopting and inventing fluid concepts of multiple and intangible property concepts.⁹⁰ Property doctrine and scholarship lags far behind property practice.

B. Vandeveld's Analysis

Back in the heady days of critical legal studies, a recent law-school graduate published an ambitious article that cogently presented the common contemporary account — or, as I would argue, misconception — of the differences between the property jurisprudence of the nineteenth and twentieth centuries. In *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*,⁹¹ Kenneth Vandeveld argued that certain common assumptions of property law are not universal but reflect a paradigm that developed with early capitalism and peaked in the nineteenth century. The nineteenth-century paradigm — exclusive, unitary, objective property expressed through the sensuous grasp of tangible things — was arguably appropriate to the early capitalist economy, according to Vandeveld, but this paradigm began degenerating in the twentieth century, as the capitalist economy became more complex. This demonstrates that in our current "information age" the old paradigm is ripe for replacement with a new paradigm that better explains contemporary property relations.⁹²

90. In companions to this article, *Liquid Property and Perfection as Possession*, I explore in more detail the property concepts actually practiced by the laity in the market and compare them to property law doctrine. See Schroeder, *Liquid Property*, *supra* note 9; Schroeder, *Perfection as Possession*, *supra* note 9.

91. Vandeveld, *supra* note 3.

92. Vandeveld does not use my Kuhnian-Lakatosian terminology, but I believe that it is useful to translate his analysis in those terms.

Throughout this article I will modulate between Thomas Kuhn's familiar "paradigm" terminology and the variation of Kuhn's theory adopted by his colleague at the London School of Economics, Imre Lakatos. I explain Kuhn's and Lakatos's schema more thoroughly in Schroeder, *Abduction from the Seraglio*, *supra* note 18, at 165-71. Briefly, Lakatos attempted to reconcile Kuhn's theory of incommensurate scientific paradigms with Karl Popper's theory of sophisticated falsification by proposing a logical method of choosing between competing paradigms. See Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* (Imre Lakatos & Alan Musgrave eds., 1970). According to Popper, scientific truth is defined as that which is developed through a methodology adopted by a consensus of a professional community. See KARL

POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 44 (1972). Popper thought that this methodology was sophisticated falsification. Kuhn agreed with Popper's theory of objective truth as consensus but argued that the scientific community adopts different consensuses — or paradigms — over time. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). During periods of "normal science," scientists refine hypotheses within an existing paradigm. But occasionally, a normal paradigm reaches a crisis and is overthrown by a new "revolutionary" paradigm. *Id.* at 92.

These different Kuhnian paradigms are incommensurable. This is true by definition because each paradigm contains its own methodology and standards of validity. There can, therefore, be no methodology or metastandard that can logically determine which paradigm to choose. This does not mean that there cannot be imperfect but usable translations between paradigms or that there are not good and rational reasons to prefer the revolutionary paradigm over the normal paradigm. It is just that these choices are not logically mandated in the sense of mathematical algorithm.

Popper rejected Kuhn's theory of occasional large revolutions partially on the grounds that normal science does not exist as a descriptive matter, and partly because it should not exist as a normative matter. Karl Popper, *Normal Science and its Dangers*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE*, *supra*, at 51, 52-53. Kuhn quotes Popper as calling his theory "revolutions in permanence" in Thomas Kuhn, *Reflections on my Critics*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE*, *supra*, at 231, 242-43.

Although Popper considered Kuhn, his former pupil, to be an apostate, Lakatos agreed with Kuhn's contention that his theory was a necessary corollary to Popper's. Nevertheless, Lakatos tried to develop a methodology to choose between Kuhnian paradigms — that is, a way to make paradigms commensurable. He gave his concept of commensurable paradigms the more modest name "research programmes." See Lakatos, *supra*, at 131-32. Popper's theory of sophisticated falsification does not mean that scientists reject a hypothesis immediately upon encountering apparently inconsistent data. Indeed, Lakatos argues that one cannot reject a hypothesis until one formulates a more satisfactory alternate. *Id.* at 119-20. Rather, one tries to formulate "auxiliaries" to the original theory in order to explain the apparent inconsistency. This is necessary because scientific theory is abstract and elegant, whereas the empirical reality science tries to describe can be very sloppy.

Eventually, according to Lakatos, the original hypothesis becomes so encrusted with a "protective belt" of auxiliaries that it actually starts to lose explanatory power. It becomes a "degenerating" research program. But one abandons the degenerate research program only when one discovers a "progressive" research program that has "excess empirical content" — that is, it explains everything the degenerate program explained and more. *Id.* at 116-59.

I use Lakatos's concepts of sophisticated falsification, protective belts, and degenerating research programs because I believe they have great intuitive appeal. However, as Popper's third ex-student Paul Feyerabend argued, Lakatos's theory of excess empirical content as the one and only logical method of adoption of new research programs is both theoretically untenable and empirically unworkable. See Paul Feyerabend, *Consolations for the Specialist*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE*, *supra*, at 197, 218-20. Theoretically, it is inconsistent with the central Popperian-Kuhnian tenet of objectivity as consensus because it posits a methodology that is beyond consensus. Empirically, it is just not true that all new paradigms explain everything the paradigms they replace explained, and then some. Sometimes they explain less but explain it "better."

Under the analyses of both Kuhn and Lakatos, we cannot escape a paradigm or research program until a new paradigm-program is developed that seems to explain the observed phenomena in a "better" way. This is not the same as the old saw of legal scholarship that "it takes a theory to beat a theory." This adage views scholarship as litigation with burdens of proof. The lazy or disingenuous scholar tries to declare his theory unscathed regardless of the factual or other criticism of his rivals on the grounds that they have not come up with a better explanation.

The Kuhn-Lakatos proposition is, in contradiction, a variation on the concept that simple negation is identity. A paradigm or research program does not consist only of a scientific or other hypothesis. It includes the consensus as to methodology that led to the development of the hypothesis. When empirical evidence that seems anomalous with a hypothesis is observed, the scientific community may either adopt auxiliaries to the hypothesis to explain the apparent anomaly or conclude that the specific hypothesis has been falsified, but the para-

Unfortunately, the material Vandevælde presents does not support the dichotomy he and Grey wish to set up. Vandevælde insists on a radical purist version of the nineteenth-century paradigm of property, which he attributes to Blackstone, and contrasts it with an equally radical purist negation, which he attributes to Hohfeld. This is precisely the same move which Grey makes in his article, albeit in lesser detail.

My point is not to criticize Vandevælde or Grey for using abstract, simplified models as tools for analyzing messy empirical reality. Rather, I will argue that their specific models do not serve the purpose for which they were invented. In the name of burying Blackstone and praising Hohfeld, Grey and Vandevælde actually conclude that the Blackstonian paradigm is correct and that the Hohfeldian paradigm is not property!

Indeed, neither Hohfeld, Grey, nor Vandevælde can even imagine property other than as an ultra-“Blackstonian” phallic construct. Whereas Grey and Hohfeld present Blackstone as seeing only the object of property, Hohfeld and his progeny see only its subjects. Yet it is the Hohfeldians who are obsessed with the phallic physical object itself; their primary concern is its presence or absence in the discourse of property. In their insistence on denying castration by trying to forget the *Phallic* barrier to intersubjective relations, they not only seek to deny the mediating object — they deny all sophistication to Blackstone.

I wish to emphasize that I am not making a historical argument denying that there has been evolution in the dominant legal conception of property. Indeed, I have suggested that the current conception of property may be a classic Lakatosian degenerate research program so encrusted with its protective belt of auxiliaries that it is in danger of losing its explanatory power.⁹³ It is arguably ripe for replacement by a new “progressive” research program. Also, an exhaustive analysis of the theories of Blackstone and Hohfeld is beyond the scope of this article. I am limiting myself primarily, but not exclusively, to the material that Vandevælde himself presents in favor of his argument. What I argue is that the Hohfeldians have not made the paradigm shift they claim. At most they identify a crisis in the existing paradigm. Consequently, in order to make their argument, they must repress and deny those aspects of Blackstone’s theory that either implicitly or explicitly recognize the inter-

digm or research program leading to the hypothesis is not itself rejected unless a new consensus as to methodology is reached.

93. See *supra* note 92.

subjective nature of property. They then conversely repeat Hohfeld's confusion as to the objective aspect of property rights.

1. *The Attribution of the Phallic Metaphor to Blackstone*

The contrast Vandeveld sets up is as follows: "[A]t the beginning of the nineteenth century, property was ideally defined as absolute dominion over things."⁹⁴ Vandeveld calls this the absolutist and physicalist conception of property and names Blackstone as its spokesman.⁹⁵ This conceptualization became more and more unworkable throughout the nineteenth century as more and more intangible assets became subject to the property law regime and as more and more exceptions to the absolutist nature of property rights were recognized. Finally, in the early twentieth century, Hohfeld created a new vocabulary to describe the new property interest: "This new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over things. Moreover, property was no longer absolute, but limited, with the meaning of the term varying from case to case."⁹⁶ This disaggregation of property, according to Vandeveld, threatens to undermine the traditional legal regime:

Once property was reconceived to include potentially any valuable interest, there was no logical stopping point. Property could include all legal relations. . . .

Such an explosion of the concept of property threatened to render the term absolutely meaningless in two ways. First, if property included all legal relations, then it could no longer serve to distinguish one set of legal relations from another. It would lose its meaning as a category of law. Second, the greater the variety of interests that were protected as property, the more difficult it would be to assert that all property should be protected to the same degree.⁹⁷

At first blush, there seems to be great power in this argument so far. Unfortunately, it rests on a misreading of Blackstone.

Vandeveld starts by quoting Blackstone's well-known definition of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."⁹⁸ According to Vandeveld, "Blackstone's definition contained essentially two elements: (1) the physicalist conception of property

94. Vandeveld, *supra* note 3, at 328.

95. *See id.* at 329.

96. *Id.* at 330.

97. *Id.* at 362.

98. BLACKSTONE, *supra* note 75, at 2, cited in Vandeveld, *supra* note 3, at 331.

that required some 'external thing' to serve as the object of property rights, and (2) the absolutist conception which gave the owner 'sole and despotic dominion' over the thing."⁹⁹ Vandevelde, of course, considers this to be a notion of "property" as sensuous ownership of a thing, with *thing* meaning "physical thing." But Blackstone's own language, standing on its own, does not support this analysis.

First, note that Blackstone's own definition of property emphasizes its intersubjective nature in addition to its objective nature. Blackstone not only is aware but expressly states that the concept of dominion can only be understood as the right of one individual in relation to other individuals. Blackstone recognizes property as objective, not only in the sense of relating to an object, but also in the sense of being generally enforceable against the relevant community of legal subjects.¹⁰⁰ That is, Blackstone does not merely describe property as power over a thing, as Vandevelde suggests; this is reflected in Blackstone's very careful language. Rather, he speaks of property as a *claim* to dominion and of the *exercise* of that claim vis-à-vis *any other individual in the universe*. As we shall see, "a claim enforceable against the world" will be *precisely* Hohfeld's definition of *in rem* (that is, property) rights.¹⁰¹ Blackstone is scrupulous in his *Commentaries* to refer to "property" *only* in the sense of the legal right and *never* in the sense of the object with respect to which the right exists.¹⁰² He speaks of having "a property in" certain things but does not refer to owned objects as "property."

Second, although it is true that Blackstone recognizes that property is objective in that property rights among subjects always relate

99. Vandevelde, *supra* note 3, at 331. David Frisch similarly misreads Blackstone: "If the world were inhabited by one person, Blackstone's description of property . . . might make sense." David Frisch, *Remedies as Property: A Different Perspective on Specific Performance Clauses*, 35 WM. & MARY L. REV. 1691, 1702 (1994).

100. As I discuss *infra* in text accompanying notes 146-57, Hohfeld similarly recognizes what I have called the "Community Objective" nature of property but does not recognize the "Philosophical Objective" nature. I set forth my taxonomy of objectivity in Jeanne L. Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1 (1972).

101. See *infra* notes 158-60 and accompanying text.

102. Blackstone does occasionally speak of a person's property, but I believe that in each case the context makes it clear that by this he is referring to the person's rights and not to the underlying thing to which the rights relate.

Kennedy criticizes Blackstone for not discussing the ambiguity of property as rights and property as thing. See Kennedy, *supra* note 75, at 318-19. This criticism is anachronistic. The use of property to denote the underlying thing was novel at the time Blackstone was writing. Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, in XXII NOMOS, *supra* note 3, at 28, 34. Macpherson gives a similar account of the development of the meaning of the word *property*. See Macpherson, *supra* note 36, at 6-9.

to an external object, nothing indicates that Blackstone's definition of property is necessarily limited to rights to physical things. He merely speaks of "external things."¹⁰³

Indeed, Blackstone makes it very clear that he uses the word *things* not in the sense of *physical things* but as the objects of property. Such objects are defined in the negative — as that which is not human. Blackstone defines the things that are the objects of property as follows: "The objects of dominion or property are *things*, as contradistinguished from *persons*"¹⁰⁴ This is the traditional definition of *object* or *thing* used in philosophical discourse — including the discourse of Blackstone's day. This is also the definition of the object of property adopted by Hegel, who wrote a little over fifty years later.¹⁰⁵ An "object" is external to — in the sense of other than — the "subject."¹⁰⁶

Moreover, Blackstone not only is aware but absolutely insists that "things," as so defined, are not limited to the corporeal and the tangible. As Vandeveldt admits, Blackstone divides the class of the types of realty that could serve as the objects of property into "corporeal hereditaments — things which could be detected by the senses, and incorporeal hereditaments — things which existed only 'in contemplation.'"¹⁰⁷ Blackstone expressly tries to wean his readers away from the physicalist notion of the objects of property:

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same. It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong, or not belong to it, without any visible alteration therein. Their existence is

103. The title of the second volume of Blackstone's *Commentaries* may seem curious to the contemporary American reader: *The Rights of Things*. Obviously, in this context the word *of* is being used in the sense of "concerning" rather than in the sense of "owned by."

104. 2 BLACKSTONE, *supra* note 75, at 16.

105. See *supra* section II.A.

106. See Schroeder, *Subject: Object*, *supra* note 100; Schroeder, *The Vestal and the Fasces*, *supra* note 12; Schroeder, *Virgin Territory*, *supra* note 5. Nevertheless, not only do Grey and Vandeveldt assertorially insist that Blackstone is wrong, but Felix Cohen went so far as to ignore Blackstone's own definitions and to assume that by "external thing" he must have meant "physical thing." See Cohen, *supra* note 89, at 362-63. Similarly, Frisch ignores Blackstone's express language to the contrary and declares that according to Blackstone's conception of property, "[p]roperty can only exist in tangible things." Frisch, *supra* note 99, at 1702 n.38.

107. Vandeveldt, *supra* note 3, at 331 (footnotes omitted).

merely an idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand.¹⁰⁸

Similarly, the types of personalty that could serve as the objects of property

also [were] divided into two categories: in possession and in action. Chattels personal in possession consisted of actual possession of some thing while chattels personal in action, or *choses in action*, consisted only of the right to hold the thing in possession at some future time. As Blackstone put it, a *chose in action* was a "thing rather in potential than in esse."¹⁰⁹

As I shall point out when I discuss Vandeveld's reading of Hohfeld, Vandeveld — and, as we shall see, Hohfeld — not Blackstone, assumes that the word *thing* means physical thing.¹¹⁰ In so doing, he ignores not only Blackstone's own express definition but hundreds of years of western tradition. As we will see, in making this error, Vandeveld is in good company.

2. *The Argument for Locating the Phallic Metaphor in Blackstone*

Although I criticize Vandeveld for misinterpreting Blackstone's own statement of his theory, we might glimpse some truth in

108. 2 BLACKSTONE, *supra* note 75, at 20. Blackstone wrote, of course, when money was usually represented by coins. Even the concept of paper money was new. The case of *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (King's Bench, 1758), which established the rule of negotiability by which promissory notes issued by the Bank of England could freely circulate as currency, had only recently been decided when the *Commentaries* were published. Consequently, from the perspective of the late eighteenth century, there was little reason to distinguish the concept of money from the coins that are money's token, so money itself seemed to be a tangible thing.

Today, of course, most money is not represented by any physical token — whether metal or paper. Rather, it consists of unsecured debt obligations of banks to their customers evidenced by entries on the banks' books. Even the expression *book entry* adds an inaccurate tangible aura to the transaction, as most of these records are, in fact, maintained in electronic form. Consequently, from the perspective of the late twentieth century, money seems to epitomize incorporeality.

109. Vandeveld, *supra* note 3, at 332 (footnotes omitted).

110. See, e.g., *id.* at 332 ("Blackstone's conception of property as dominion over things was maintained only at the expense of intellectual integrity. Calling a right a thing did not make it one.").

Vandevelde's analysis if we turn to Blackstone's application of his theory.

Blackstone's treatment of personal property, generally, and intangible property, specifically, is sketchy when compared to his treatment of real property. This reflects the fact that this "branch of the law . . . was, in Blackstone's time, relatively less developed than that of real property . . ."¹¹¹ As A.W.B. Simpson notes in his excellent introduction, the *Commentaries* "smells of the countryside; the law is the law of the country gentry, not Cheapside. The *Commentaries* reflects the essentially rural character of the high civilization of the eighteenth century."¹¹² Blackstone does include among the forms of *choses in action* a few of the most important objects of modern intangible property: insurance, copyrights, and debts. But many, or most, of the forms of intangible personal property that constitute a significant proportion of the wealth in contemporary society are "essentially emanations of the urban commercial world of merchants, principally though not exclusively taking the form of offshoots of commercial contract law."¹¹³ They were, therefore, still relatively new and exotic — or perhaps even not yet invented — in Blackstone's time and, therefore, are not discussed.

Moreover, Blackstone's discussions of the modern forms of intangible objects of property are hardly satisfactory. Simpson notes in particular that Blackstone's attempt, reflecting the custom of his time, to distinguish intangibles from tangibles as those things that are "recoverable by legal action, as opposed to being in the actual possession of the owner," and his proposition that all tangibles are created by contract seem particularly defective.¹¹⁴ Following eighteenth-century taxonomy, Blackstone does include in his discussion of real property several of the incorporeal hereditaments that are forms of intangible property and might even be considered forms of personal property in contemporary parlance: advowsons, tithes, offices, dignities, some types of franchises, pensions, and annuities.¹¹⁵ These discussions are quite well developed but arguably are only of passing interest to the modern commercial lawyer concerned with problems of contemporary forms of intangible property.

In other words, although Blackstone understood as a matter of theory that property rights were not limited to rights concerning

111. Simpson, *supra* note 75, at xii.

112. *Id.*

113. *Id.* at xii-xiii.

114. *Id.* at xiii.

115. 2 BLACKSTONE, *supra* note 75, at 20-43.

those objects that can be seen and sensuously possessed, as a matter of practice he might have been unable to derive a convincing account of property rights in modern intangibles. Of course, as both Grey and Vandavelde suggest, this may have been because during the early capitalist era, when Blackstone was writing, absolutist, possessory rights in corporeal objects had become relatively more important than divided rights in incorporeal objects, which characterized the previous feudal system of societal organization. Consequently, it was analytically convenient to view this newly developed form of property as the epitome of liberal legal and political rights. Blackstone's vocabulary was, arguably, sufficient for his time. In other words, although the physical, unitary paradigm of property is technically inaccurate, it may have been adequate to the task of analyzing most eighteenth-century property issues in precisely the same way that the eighteenth-century paradigm of Newtonian physics seemed adequate to describe the macroworld it measured, despite its inaccuracy.

To restate this argument in my Lacanian terminology, Blackstone might have recognized that the phallic paradigm of property was not accurate, but he was not able to construct an adequate substitute paradigm. Although on one level he recognized that property was a Symbolic function, he could not resist trying to collapse the Symbolic into the Real.

3. *The Bundle of Sticks*

a. *Atoms v. Molecules.* Vandavelde also accused Blackstone of adopting a unitary picture of property, as contrasted to the modern "bundle of sticks" approach. This is, once again, not strictly accurate. On the one hand, one might argue that although Blackstone recognized that property interests may be owned separately or in common,¹¹⁶ in practice he tended to presume that a property right, whether owned jointly or severally, was a unitary, inseparable whole.¹¹⁷ This contrasts with the contemporary approach whereby we describe property as a bundle of severable rights, privileges, duties, and other Hohfeldian correlates.

On the other hand, this apparent distinction may be largely explained as a difference in terminology and characterization. That is, Blackstone does not by any stretch of the imagination argue that ownership always consists of the complete and inviolable rights to

116. See, e.g., 2 BLACKSTONE, *supra* note 75, at 179-94.

117. Frisch similarly declares that according to Blackstone's conception of property, "all property is absolute." Frisch, *supra* note 99, at 1702 n.38.

possess, use, and alienate the object of the right. Indeed, the common law concept of estates in land that Blackstone explicates in excruciating detail is an elaborate system of dividing and limiting these rights. The majority of Blackstone's volume on property concentrates precisely on the myriad ways in which these estates may be transferred and on the different limitations inherent in different property rights.

The difference is that Hohfeldian analysis focuses on the individual component rights, duties, and liabilities of property, rather than on the various ways these components combine to form recognizable property interests. In contradistinction, Blackstone's common law approach concentrates on identifiable combinations of property rights — with each combination given a specific name as a different estate or hereditament — rather than on the individual constituent components. Therefore, although in the Blackstonian paradigm the owner of each estate has all the unfettered rights, duties, and liabilities of that estate, the various estates themselves contain a wide variety of combinations of rights and liabilities. To put it another way, the Hohfeldian vocabulary describes the atoms of property; the Blackstonian vocabulary describes the molecules formed from these atoms.

This interpretation suggests that the Blackstonian *unitary* approach is neither less sophisticated than, nor necessarily inconsistent with, the Hohfeldian *disaggregated* approach toward property in theory. It might, however, suggest that application of the two approaches might be likely to lead to different results in practice.

The Hohfeldian atomic analysis might have an advantage in flexibility and creativity in that it highlights the possibility of crafting a seemingly infinite combination of legal rights in response to changing market needs. The Blackstonian molecular approach, highlighting specific, traditional combinations of rights, might not encourage the same degree of experimentation and adaption to changing circumstances. To switch metaphors, Hohfeldian property is made to order; Blackstonian property is off the rack. It might not be possible to alter Blackstonian property to "fit" all legal situations as well as Hohfeldian property could.

Duncan Kennedy has identified another disadvantage of what I call the Blackstonian approach.¹¹⁸ The identification of molecules of property, rather than atoms, can make the identified molecules look natural or inevitable and thus hide the political choices inher-

118. See Kennedy, *supra* note 75, at 335-37, 348.

ent in any property regime. As such, the molecular approach can be used as a tool of the status quo.¹¹⁹

But Blackstonian property might have relative advantages that could outweigh these disadvantages. *Pret à porter* is considerably cheaper than *couture* and may fit well, if not perfectly, and look good enough. As I have already suggested, and as I shall explore at greater length below, the Hohfeldian analysis risks losing sight of the necessity of an object of property¹²⁰ and the common elements of property,¹²¹ as well as the significance of specific combinations of seemingly disparate property rights. It may, therefore, lack not only intuitive attractiveness but analytical strength when used as a tool for describing existing social and economic institutions and legal practices.

Leaving fashion and returning to chemistry, the Hohfeldian conclusion that property is merely a bundle of sticks and is indistinguishable from other types of legal rights is a non sequitur similar to concluding from the identification of elements that either there are no such things as compounds, or that the distinction between different compounds is inessential. It may be technically correct, and analytically useful for some purposes, to recognize that both glucose and petroleum are made of oxygen, carbon, and hydrogen atoms and to understand that new combinations of these atoms could be identified or created. When I bake a cake or drive a car, however, I care little about the similarity and separability of the component atoms and a lot about being able to tell a sugar bowl from a gas tank.

b. Constraints. In other words, one advantage of the molecular approach to property over the atomic approach is that it helps to avoid a common non sequitur adopted in much modern legal scholarship. Many scholars, including not only Grey and Vandewelde but also Singer, Beermann, Balkin, and Kennedy, expressly or implicitly assume that Hohfeld's identification of the elements of jural relationships is equivalent to the conclusion that the elements may be

119. See *id.* Kennedy reaches this conclusion but does not use my molecular-atomic vocabulary.

120. See *infra* notes 146-55 and accompanying text.

121. As I discuss *infra* in section IV.B.5, the Hohfeldian approach, which concentrates on specific detail, will tend to reveal differences between different cases. Property will appear disaggregated — a hodgepodge of unrelated rights and liabilities. The Blackstonian approach, which concentrates on aggregates, will tend to reveal commonalities between different cases. Property will appear as a coherent unity of closely related ideas.

freely combined and recombined in any of an infinite number of combinations.¹²²

For example, Jack Balkin argues that Hohfeld's theory of jural correlatives and opposites closely parallels Ferdinand de Saussure's semiotic theory of the arbitrary nature of signification in language. A Hohfeldian legal semiotic, according to Balkin, logically leads to the deobjectification of property and the disaggregation of legal concepts into a bundle of sticks that can be freely arranged and rearranged to suit any purpose.¹²³ But Balkin assumes this is the case because he is a classical liberal sheep in postmodern wolf's clothing.¹²⁴ He implicitly presupposes an autonomous subject that creates, and therefore exists outside of, law and language. Law and language are, therefore, merely tools that can be freely changed and manipulated at will.

As I have discussed, Lacan's psychoanalytic theory is also by necessity a theory of linguistics, because he thought that the subject was always the subject of language. His linguistic theory relies heavily on Saussure.¹²⁵ Lacan shows, in contradistinction to Balkin's suggestion, that the logical implications of Saussure's linguistic theory are totally antagonistic to Hohfeld's — and Balkin's — jurisprudential project. The postmodern subject is not an external creator of language. Language and the subject are mutually constituting. This means that the subject is not only the subject of language. He is also *subject to* language.¹²⁶

Hohfeld's theory is what my colleague Arthur Jacobson calls a "correlating jurisprudence."¹²⁷ It assumes a closed legal universe in which all possible legal relationships are already captured in a complementary system of rights and obligations. This idea has been accurately conceptualized by Duncan Kennedy and Frank Michelman as a "Law of Conservation of Exposures"¹²⁸ — the only way I can increase my rights is by decreasing your rights in an equivalent manner. In contradistinction, the Lacanian-Saussurian system is a noncorrelative one.

122. See, e.g., Singer & Beermann, *supra* note 5; J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1120-26 (1990); Kennedy, *supra* note 75.

123. Balkin, *supra* note 122, at 1120-26.

124. See David Gray Carlson, *Derrida's Justice* (1994) (unpublished manuscript, on file with author).

125. See LACAN, *The agency of the letter*, *supra* note 30, at 149-59.

126. See *supra* note 31.

127. Arthur J. Jacobson, *Hegel's Legal Plenum*, 10 CARDOZO L. REV. 877, 881 (1989).

128. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 759 (1980).

In a Lacanian-Saussurian linguistic system, the arbitrary nature of significance means that meaning is always slipping; all language is metaphor and metonymy.¹²⁹ Consequently, true correlatives and negations of the type supposedly identified by Hohfeld are impossible or illusory. Postmodern thought, as exemplified by Lacanian psychoanalysis, is precisely the denial of fit and complementarity; something is always missing, and something is always spilling over.¹³⁰ For example, although the feminine is positioned as the negation of the masculine, this cannot mean that if the masculine is the positive then the feminine is the negative, or that woman is the complement to man. Rather, to Lacan, while the masculine is the claim to be all, the feminine is not nothing. She is the not-all (*pas-toute*), as in not all things are *Phallic*.¹³¹ She is the denial of the fictional hegemony of the *Phallus*, which is the very foundation of subjectivity. Woman is not the complement to man but a supplement.¹³² The *Phallus* is the forever-lost object from which we are castrated — the lack or hole that exists at the core of subjectivity.¹³³ There is always something more and something lacking that make true relationships impossible. Mediation is always necessary *because* they are impossible.

Moreover, the arbitrariness of significance does not mean that meaning or legal concepts can be freely manipulated. We do not bind ourselves to fixed linguistic and legal concepts *despite* the arbi-

129. LACAN, *The agency of the letter*, *supra* note 30, at 156-57. Lacan identifies his concepts of metaphor and metonymy with Freud's concepts of "condensation" and "displacement." *Id.* at 160.

130. For an excellent description of the concepts of lack and supplement that lie at the heart of Lacanian postmodernism, see generally ŽIŽEK, *supra* note 47, and ŽIŽEK, *supra* note 28. See also Jeanne L. Schroeder & David Gray Carlson, *The Subject is Nothing*, 5 LAW & CRITIQUE (forthcoming 1994) (reviewing ŽIŽEK, *supra* note 47).

131. "Her being not all in the phallic function does not mean that she is not in it at all. She is in it *not* not at all. She is right in it. But there is something more." LACAN, *God and the Jouissance of The Woman*, *supra* note 29, at 138, 145; see also Rose, *supra* note 28, at 49-50; ŽIŽEK, *supra* note 28, at 44-45.

132. "Note that I said *supplementary*. Had I said *complementary*, where would we be!" LACAN, *God and the Jouissance of The Woman*, *supra* note 29, at 144; see also Rose, *supra* note 28, at 51. As so clearly explained by Salecl:

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*.

SALECL, *supra* note 78, at 116.

133. JACQUES LACAN, *The Phallic Phase and the Subjective Import of the Castration Complex*, in FEMININE SEXUALITY, *supra* note 28, at 99, 116-17 [hereinafter, LACAN, *The Phallic Phase*]; LACAN, *supra* note 15, at 265; LACAN, *The signification of the phallus*, *supra* note 30, at 288; Schroeder & Carlson, *supra* note 130.

trariness of signification, but *just because* of its arbitrariness and slippage. Meaning and language, and subjectivity itself, consist precisely of this fiction of static significance.¹³⁴ Consequently, subjectivity is a dialectic concept that is both free in that it is a fiction and bound because it is a fiction. If we change the fiction, we change ourselves. Because Lacanianism denies the naturalness or inevitability of not only the legal regime but subjectivity itself, it holds out the possibility of the truly radical change of creating alternate socio-linguistic-legal universes. But a new alien species of subject will necessarily inhabit such new universes. The postmodern subject, unlike his liberal modern counterpart, who is at some level autonomous from the legal regime, cannot, therefore, merely "will" changes in the fundamental aspects of the legal and linguistic regime, which is the gender hierarchy. Such changes require a dialectical and simultaneous change in every aspect of our subjectivity and society. The problem for those of us who are both Lacanians and progressives is how to start this chicken-and-egg process in motion.

Slavoj Žižek gives a wonderful illustration of the difference between the modern (Hohfeldian-Balkinian) and postmodern (Lacanian-Saussurian) concept of the subject. Near the end of the movie *Blow Up*,¹³⁵ the protagonist passes a group of people miming a game of tennis without a ball. One of the players pretends to hit the ball out of bounds. The protagonist plays along and pretends to retrieve the ball and toss it back into the court. Modernism concludes from the observation that the "game" of society is not inevitable or natural, it has no content; content resides solely in the subject itself. Postmodernism, in contradistinction, does not deny the necessity of the object merely because it is arbitrary. Rather, it shows us the object in all its "indifferent and arbitrary character."¹³⁶ In other words, the modern subject is conceived of as autonomous from, and therefore in control of, the game. He not only can change the game or leave the game but does not even need a ball or other external object to play the game. The postmodern subject, however, is not autonomous with respect to the game of law and language. He exists as a subject only insofar as he plays the game. Consequently, there must always be a mediating object of desire.

134. See *infra* text accompanying notes 222-36.

135. *Blow Up* (Premier 1966).

136. ŽIŽEK, *supra* note 28, at 143. Another example of the modern work of art given by Žižek is *Waiting for Godot*, in which, of course, Godot never arrives. *Id.* at 145 (discussing Samuel Beckett, *Waiting for Godot*). In a postmodern play, Godot is always there, although he may not be what you expected. *Id.*

Thus, insofar as legal concepts serve functions — social, economic, psychic, or philosophical — the combinations of jural elements cannot be random or arbitrary and cannot be freely altered at will. I suggest that Hegelian philosophic theory, combined with Lacanian psychoanalytic theory, indicates that the possession, enjoyment, and alienation of external objects serve a necessary role in the development of subjectivity in this society.¹³⁷ Consequently, it is meaningful and not random for a legal regime to recognize a distinctive category of legal rights called “property” that contains all three of these elements.¹³⁸ This does not mean that all legal relationships need be full property relations. Nor does it mean that all property relations must be absolute; we may want to recognize limitations on any or all of the three general categories of property rights. Indeed, as Hegel himself argued, the logic of the concept of property is both self-limiting — unlimited property rights of different subjects would be mutually inconsistent — as well as limited by other, more developed concerns of human development, such as morality and ethics.¹³⁹

137. Both Hegel's and Lacan's dialectic logic is retroactive. When they say that something is logically necessary, they are not saying that the result was inevitable when viewed *ex ante*. Rather, they are saying that when we view something *ex post*, we can logically derive what must have happened — and, perhaps in the case of Hegel, we can project somewhat into the future as to what should happen based on the logical structure of the process that is already in place. See ŽIŽEK, *supra* note 47, at 129-31; Schroeder, *The Vestal and the Fasesces*, *supra* note 12.

138. Hegel can identify three elements of property precisely because he speaks at the highest levels of abstraction. A Hegelian would argue that so many discussions of property, including Grey's, wind up concluding that property is incoherent or infinitely variable precisely because they confuse the general concept of property with specific applications of positive law. For example, Lawrence C. Becker (following Honoré) identifies at least thirteen — or ten, depending on how one subdivides the rights — possible elements of property rights, not all of which need be present for a right to be considered property. These rights are: (i) the right (claim) to possess; (ii) the right (liberty) to use; (iii) the right (power) to manage; (iv) the right (claim) to the income; (v) the right (liberty) to consume or destroy; (vi) the right (liberty) to modify; (vii) the right (power) to alienate; (viii) the right (power) to transmit; (ix) the right (claim) to security; (x) the absence of term; (xi) the prohibition of harmful use; (xii) liability to execution; and (xiii) residuary rules. Lawrence C. Becker, *The Moral Basis of Property Rights*, in XXII *NOMOS*, *supra* note 3, at 187, 190-91 (citing A.M. Honoré, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107-47 (A.G. Guest ed., 1961)).

A Hegelian would argue that these thirteen “elements” are more accurately described as specific empirical manifestations of the three more general elements of property, or of limitations of the three elements imposed by positive law. For example, rights i, vi, ix, and x are aspects of the Hegelian concept of possession.

I define Hegel's three elements of property more thoroughly in Schroeder, *The Vestal and the Fasesces*, *supra* note 12, and Schroeder, *Virgin Territory*, *supra* note 5. I try to illustrate the power of the Hegelian triune conception of property in analysis of commercial law theory and practice in Schroeder, *Liquid Property*, *supra* note 9, and Schroeder, *Perfection as Possession*, *supra* note 9.

139. See Schroeder, *Virgin Territory*, *supra* note 5.

Nevertheless, the Hegelian-Lacanian approach only defines the parameters of property at the most abstract level and has little or no practical use in prescribing specific property regimes. The specific limitations and applications of the broad and abstract concept of property to meet the needs of any given society are properly to be determined by practical reasoning and adopted into positive law — precisely as pragmatists such as Grey, Singer, and Radin argue. This is why the Hegelian idealist philosophic tradition is the precursor not only of Continental postmodern philosophy but also of American pragmatic philosophy. The flexibility of Hohfeldian atomic analysis arguably gives it an advantage over a molecular approach in the pragmatic enterprise of promulgating the positive law of property. But it has the danger of making us think that by fiddling with the niggling details of the positive law of property, we undermine the crushing hegemony of the regimes of property and gender, rather than merely replicate them.

4. *Hohfeld's Attempt to Deny the Phallic Object*

If Grey and Vandavelde do not acknowledge Blackstone's insistence on the intersubjective aspect of property, it may be because they too quickly accept Hohfeld's dismissal of the objective aspect of property rights. They thereby attribute to Blackstone a lack of philosophical sophistication that is more properly attributable to Hohfeld. According to Vandavelde, one of the distinctions between Blackstone and Hohfeld was

[w]hether property was the thing or the right over the thing[.] Blackstone had made clear that property could exist only in relation to some thing. Hohfeld rejected even this minimal association with tangible objects, arguing that property could exist whether or not there was any tangible thing to serve as the object of the rights.¹⁴⁰

As we have seen, this statement is not just misleading but outright erroneous. Vandavelde assumes that because Blackstone insisted that property rights must relate to an object, Blackstone believed that (i) the object of property must be tangible and (ii) property rights are not also intersubjective. Vandavelde assertorically denies Blackstone's recognition of intangibles through the extraordinary means of denying the existence of intangible *things*. Despite hundreds of years of western philosophical and jurisprudential understanding to the contrary, Vandavelde denies the possibility of any type of thing except physical things.

140. Vandavelde, *supra* note 3, at 360.

Calling a right a thing did not make it one. Furthermore, if rights were things, then all legal rights could be considered property and Blackstone's fundamental distinction between rights over persons and rights over things was destined to evaporate.¹⁴¹

Thus, with a stroke of a key, Vandeveldel repeals virtually all of commercial law! He does not recognize that a right can be, and is on a regular basis recognized as, a *thing* and the object of property when it is a right against a third party to a transaction.

That is, if *X* buys a good from *Y* on credit, *X*'s obligation to pay *Y* is called an "account."¹⁴² If we are only concerned with the two-party relationship between *X* and *Y*, we call this "contract" rather than "property," even though the account can be analogized as an "object," in the philosophical sense of something external to the two legal subjects. This is because the property aspect adds nothing to the legal analysis of the two-party relationship between *X* and *Y* at this point.¹⁴³ If, however, *Y* sells the *X* account to *Z*, it becomes meaningful to recognize the object nature of the account and to conceptualize the assignment of the account as a transfer of a property interest in an object — that is, the *X* account — from *Y* to *Z* pursuant to personal property conveyancing principles. Indeed, it is in precisely this sense that Blackstone correctly included debts within the category of choses in action that can serve as the object of personal property. Moreover, it is the approach to debt taken in Article 9 of the U.C.C.¹⁴⁴ This characterization does not, as Vandeveldel suggests, break down the distinction between rights over persons — contract — and rights over things — property. *Y*'s contract rights against *X* to enforce the account remain distinguishable from *Y*'s property rights vis-à-vis *Z* and the rest of the world to transfer *Y*'s rights in the account to others. Consequently, modern commer-

141. *Id.* at 332.

142. U.C.C. § 9-106 (1990).

143. It may be relevant to the philosophical analysis, however. For example, because Hegel wants to distinguish the concepts of abstract personality and objects, he analyzes all contracts as involving property. See HEGEL, *supra* note 20, § 40, at 71-72.

144. Under the U.C.C., debts can take the form of general intangibles, accounts, chattel paper, instruments, or investment securities. U.C.C. §§ 8-102(1)(c), 9-105(1)(b), 9-105(1)(i), 9-106 (1990). All forms of debt can be conveyed as property and can serve as collateral for Article 9 or 8 security interests. Such intangibles are also property of the debtor for the purposes of the Bankruptcy Code. See 11 U.S.C. § 541(a)(1) (1988). Indeed, bankruptcy law reflects the traditional philosophic and jurisprudential understanding that *things* are not limited to intangibles but potentially include all external objects. Bankruptcy cases are customarily denominated by the heading "*In Re . . .*" This is frequently translated as "in the matter of . . ." But the word *res* is also used in law to designate the object of a property right in the sense of the object in which the property right is asserted. This is because the original Latin word *res* means both "the matter in dispute" and "thing," or what I have been calling the *object*.

cial law and economic practice correctly recognize debts as objects of property.¹⁴⁵

Vandavelde and Grey come by their misconception honestly in that Hohfeld makes a similar conceptual error. Hohfeld may have been a great jurisprude, but he was an indifferent philosopher and no psychoanalyst. In his zeal to emphasize the intersubjective nature of legal rights, he adopted a radically physicalist conception of the object. In his attempt to identify intersubjective relations, he tried to deny that all relations are mediated.

Hohfeld's precise taxonomy of legal rights and liabilities was motivated by two closely related goals: (i) to avoid ambiguity and (ii) to differentiate between "legal relations [and] the physical and mental facts that call such relations into being."¹⁴⁶ One of the areas that he thought particularly exhibited latent ambiguities is the concept of property.¹⁴⁷ He specifically criticized Blackstone's division of hereditaments into the corporeal and the incorporeal.

Since all legal interests are "incorporeal" — consisting, as they do, of more or less limited aggregates of *abstract* legal relations — such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead the unwary. The legal interest of the fee simple owner of land and the comparatively limited interest of the owner of a "right of way" over such land are alike so far as "incorporeality" is concerned; the true contrast consists, of course, primarily in the fact that the fee simple owner's aggregate of legal relations is far more extensive than the aggregate of the easement owner.¹⁴⁸

Hohfeld's general proposition that all legal relations — including property — are relations among *subjects* and not relations between a subject and an object seems self-evidently correct today. Unfortunately, he missed the point that property is a relationship between subjects that is mediated through an object. This is because the only way he could conceive of objectivity was through the phallic sensuous grasping metaphor. Hohfeld's ostensible rejection of

145. Kennedy criticizes Blackstone's treatment of debt as property in a way that is similar to Vandavelde's criticism of Blackstone. See Kennedy, *supra* note 75, at 338-39. Like Vandavelde, Kennedy correctly identifies the contract aspect of the two-party debt relationship, but he fails to see that debt also takes on a property aspect when the obligee's rights against the obligor become the object of a legal relationship or dispute with a third party.

146. WESLEY NEWCOMB HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, I*, in FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 23, 27 (Walter Wheeler Cook ed., 1923) [hereinafter FUNDAMENTAL LEGAL CONCEPTIONS AND OTHER ESSAYS]. For a particularly useful exegesis on how Hohfeld's taxonomy fits into a specific jurisdictional tradition analyzing the nature of legal rights, see Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

147. HOHFELD, *supra* note 146, at 29.

148. *Id.* at 30.

the phallic metaphor was a reflection and reinstatement of tangibility as the only possible way of thinking about the object. Simple negation is restatement.

The Hohfeldian approach seems attractive because at first blush it appears to offer a way of satisfying the insatiable human desire to achieve impossible immediate intersubjective relations. If we can collapse the Symbolic *Phallus* into the Real and then recognize that the Real cannot adequately serve as a mediator between subjects, it seems for a moment that we have denied the necessity for, and the fact of, mediation. Yet Hegel and Lacan argue that mediation always remains necessary for the creation of subjectivity and intersubjective relations. The inadequacy of the Real objects chosen to stand in for the mediating *Phallic* object of desire does not mean that the necessity for mediation disappears. Rather, it makes it all the more necessary.

Hohfeld's denial of the objective mediating aspect of property can be seen in his discussion of the related subject of the distinction between *in personam* and *in rem* rights. First, Hohfeld warns that a simplistic, literal translation of the Latin terms implies that

if a right *in personam* is simply a right against a *person*, a right *in rem* must be a right that is *not against a person*, but *against a thing*. That is, the expression right *in personam*, standing alone, seems to encourage the impression that there must be rights that are *not* against persons. . . . Such a notion of rights *in rem* is, as already intimated, crude and fallacious; and it can but serve as a stumbling-block to clear thinking and exact expression.¹⁴⁹

So far, so good. At this point however, Hohfeld makes a move that his argument does not require. He continues:

A man may indeed sustain close and beneficial *physical* relations to a given *physical thing*: he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations.¹⁵⁰

Even now, Hohfeld goes too far. His strong point is that *legal* relations are by definition *social* relations, which only exist among subjects. The legal Symbolic relationship of property is not identical to the Real physical relation that exists between an owning subject and an owned object. It does not follow from this, however, that "physical relations are *wholly* distinct from jural relations." The

149. WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, II*, in FUNDAMENTAL LEGAL CONCEPTIONS AND OTHER ESSAYS, *supra* note 146, at 65, 75.

150. *Id.*

different orders of experience overlap to form a Borromean Knot so that the same *object* can simultaneously perform functions in more than one order.¹⁵¹ Jural relations with respect to tangible objects, for instance, govern, among other things, who of a number of rival subjects is entitled to enjoy physical relations with the objects.

This physicalist confusion also leads Hohfeld to make the unnecessary assertion that not only are rights *in rem* rights against subjects as opposed to rights against objects, but they are not even rights among subjects *with respect to objects* — or, to put it in Hohfeld's vocabulary, rights "to a thing": "[Limiting *in rem* rights to rights to a thing] would exclude not only many rights *in rem*, or multital rights, relating to *persons*, but also those constituting elements of patent interests, copyright interests, etc."¹⁵² Elsewhere, he writes:

[I]t must now be reasonably clear that the attempt to conceive of a right *in rem* as a right *against a thing* should be abandoned as intrinsically unsound, as thoroughly discredited according to good usage, and, finally, as all too likely to confuse and mislead. It is desirable, next, to emphasize, in more specific and direct form, another important point which has already been incidently noticed: that a right *in rem* is not necessarily one *relating to*, or *concerning*, a thing, i.e., a tangible object. Such an assumption, although made by Leake and by many others who have given little or no attention to fundamental legal conceptions, is clearly erroneous.¹⁵³

That is, to Hohfeld the word *thing* can only mean "*tangible thing*." This seems at first blush to contradict his and Vandeveld's contention that Blackstone was wrong to divide hereditaments between the corporeal and the incorporeal because they are in fact all incorporeal.¹⁵⁴ I believe, however, that these passages are merely confusing, not contradictory.

Hohfeld tries to identify the minimum, distinguishable elements of property rights. He argues that Blackstone's insistence on distinguishing between tangible and intangible property — that is, hereditaments — is not only unnecessary or irrelevant to scrutiny at the atomic level but actually pernicious insofar as it complicates the analysis. Hohfeld also tries to wean lawyers away from what I call the phallic sensuous grasping metaphor for property and other legal relations. As I discuss elsewhere, the attempt to locate the elements of property through the use of a tangible archetype must be

151. See *supra* note 28 and accompanying text.

152. HOHFELD, *supra* note 149, at 78.

153. *Id.* at 85.

154. See *supra* notes 147-48 and accompanying text.

ultimately unsuccessful in that it requires the use of legal fictions that intangible objects constructively have characteristics that they could not possibly have.¹⁵⁵ I also agree that not only in colloquial speech but also in judicial opinions and jurisprudential discussions, many lawyers conflate the word *thing* with physicality, despite a long intellectual history to the contrary.

It does not follow from any of this that property relations between subjects do not relate to an external object.

5. *Subjectivity, Objectivity, Intersubjectivity*

Hohfeld himself instinctively recognizes the need to identify an objective aspect of property or *in rem* rights to contrast to the subjective aspect of contract and tort or *in personam* rights. As I discuss elsewhere,¹⁵⁶ the word *objectivity* has many different meanings. In this article I have generally used it in the sense I have termed "Philosophical Objectivity" — that is, the relationship of *subjects* (conscious legal actors) with respect to *objects* (everything else). Another nonessentialist way of defining objectivity is to contrast it with its negative of subjectivity conceived as the viewpoint of a single individual subject; I term this "Individualistic Subjectivity." Consequently, what I have named "Community Objectivity" refers to the intersubjective agreement of a community of subjects.¹⁵⁷

To Hohfeld, *in personam* rights are rights that are Individualistically Subjectively enforceable. In Hohfeld's terminology:

A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons.¹⁵⁸

Conversely, *in rem* rights are rights that are Community Objectively enforceable: "A multital right, or claim (right *in rem*), is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people."¹⁵⁹ In other words, a contract right is *in personam* because in most cases I can only enforce the

155. For a discussion of this use of constructive physicality in commercial law, see Schroeder, *Liquid Property*, *supra* note 9, and Schroeder, *Perfection as Possession*, *supra* note 9.

156. Schroeder, *Subject: Object*, *supra* note 100.

157. This is the definition of objectivity accepted by many philosophers of science including Popper, Kuhn, and Lakatos. See *id.* at 17-24.

158. HOHFELD, *supra* note 149, at 72.

159. *Id.*

contract against the specific person or persons who are parties to the contract. My property right in my apartment is *in rem* because I have the right to exclude not only specific persons from my apartment but the whole world.

Notice that despite his denial, Hohfeld has come full circle to Blackstone's definition of property — a right is a property if it is dominion enforceable *against the world*. In explicating his theory of multital rights, Hohfeld by illustration tries to show that they do not all necessarily involve a thing. He lists five categories of multital rights:

1. Multital rights, or claims, relating to a definite *tangible object* . . .
2. Multital rights (or claims) relating neither to definite tangible object nor to (tangible) person [such as patentee's rights] . . .
3. Multital rights, or claims, relating to the holder's *own person* [in the sense of one's body] . . .
4. Multital rights residing in a given person and relating to *another* person, e.g., the right of a father that his daughter shall not be seduced, or the right of a husband that harm shall not be inflicted on his wife so as to deprive him of her company and assistance;
5. Multital rights, or claims, not relating directly to either a (tangible) person or a tangible object, e.g., a person's right that another shall not publish a libel of him, or a person's right that another shall not publish his picture, — the so-called "right of privacy" existing in some states, but not in all.¹⁶⁰

On one level, one could try to argue that all of these are examples of rights with respect to things. For example, in Hegelian philosophical vocabulary, anything external to the abstract subject — that is, self-consciousness as free will — can potentially serve as the object of property.¹⁶¹ This includes our bodies (Hohfeld's third example), other persons (Hohfeld's fourth example), and our talents,

160. *Id.* at 85.

161.

[W]hen contrasted with the person (as distinct from the particular subject), the thing is the *opposite of the substantial*: it is that which, by definition . . . is purely external. — What is external for the free spirit (which must be clearly distinguished from mere consciousness) is external in and for itself; and for this reason, the definition . . . of the concept of *nature* is that it is the *external in itself*.

Addition (H). Since a thing . . . has no subjectivity, it is external not only to the subject, but also to itself. . . .

. . . .

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 in which they are bought and sold, etc., they are treated as equivalent to acknowledged *things*. . . . We hesitate to call such accomplishments, knowledge . . . abilities, etc. *things*; for on the one hand, such possessions are the object of commercial negotiations and agreements, yet on the other, they are of an inward and spiritual nature. Consequently, the understanding may find it difficult to define their legal status, for it thinks only in terms of the alternative that something is *either* a thing *or* not a thing (just as it must be *either* infinite *or* finite). Knowledge, sciences, talents, etc. are of course attributes of the free spirit, and are internal rather than external to it; but the spirit is equally capa-

qualities, and reputation (Hohfeld's fifth example). But even for Hegel, this is only true at the level of Abstract Right and may not be the case in the more developed realms of human relations: Morality and Ethical Life. Moreover, even at the level of Abstract Right, Hegel argues that it is a legal wrong (*Unrecht*) to analyze our relations to objects that become part of a person's personality in terms of property.¹⁶² For example, slavery is an abstract wrong because it treats a person as an object and thereby denies him recognition as a subject. In any event, whatever its philosophical integrity, I think that such a characterization has little specific utility in a discussion of American law. Rather, I would argue that Hohfeld's very examples reveal the weakness of his decision to reject the object. It also explains why, despite Hohfeld's influence over legal scholarship, his paucital-multital terminology has never been adopted and sounds as awkward today as it no doubt sounded in 1918.

The first two examples Hohfeld gives fall within the generally understood rubric of property law. Both of these relate to objects — tangible and intangible. But the last three examples fall within the generally understood rubrics of tort and civil rights law. As we have seen, Vandeveldt accepts Hohfeld's contention that there is no meaningful distinction at face value between property and other rights good against the world, and he concludes that property analysis has, therefore, lost its meaning.¹⁶³ As we shall see, Grey also agrees with the Hohfeldian analysis and suggests that, accordingly, property will lose its inspirational role in political theory.¹⁶⁴ Jennifer Nedelsky concludes from a Hohfeldian analysis that property is a myth that cannot fulfill its constitutional function of serving as

ble, through expressing them, of giving them an external existence . . . and disposing of them . . . so that they come under the definition . . . of *things*.

HEGEL, *supra* note 20, §§ 42-43.

Rather, "thing," like personality, refers to a mode of being and, more specifically, to one that is defined in contrast to the self-relatedness of personality. A thing is anything determinate — whether a capacity, an action, or an object in the external environment — insofar as it can be conceived as immediately different from free personality. Because a thing is essentially external, its notion is not contradicted if it is given a purpose from the outside. In other words, what is essentially external *can* be used *merely* as a means: its end can be given to it by something that is other than it.

Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1164 (1989); see also Schroeder, *Virgin Territory*, *supra* note 5.

162. For example, even though our bodies are objects, Hegel argued that our relations to our bodies cannot be adequately defined in terms of property law. Property includes the right of alienation, but we do not have an unlimited right to alienate our bodies or personality in suicide. HEGEL, *supra* note 20, § 70.

163. See *supra* notes 91-110 and accompanying text.

164. See *infra* section IV.D.1.

the barrier between the private realm of individual freedom, and oppression from the state.¹⁶⁵ I would argue to the contrary. The fact that Hohfeld cannot distinguish between property and tort suggests more about the weakness of Hohfeld's analysis than it does about the incoherence of property.

Hohfeld asserts more than argues his conclusion that these traditionally disparate areas of law do not differ from each other. As an empirical matter, American legal discourse recognizes a distinction between property and tort. This distinction is so familiar as to seem natural to most Americans. Hohfeld may be correct that both property and tort differ from contract in that the former two are rights against the world and the latter consists of rights against an individual. It does not follow from this, however, that no relevant distinction exists between the concepts of property and tort. This may be true even if the empirical reality of legal practice in property and tort does not display the sharp lines of the theoretical, analytical distinctions, and even if certain rights are hybrids containing elements of both property and tort. Hohfeld at most points out a common element between property and tort, but two things that share a common element are not necessarily the same. In order to make a convincing case that it is not meaningful to distinguish between rights among persons with respect to an external object and other types of rights enforceable generally against the world, one must identify the perceived difference and the function it serves and then argue why this is misleading or useless.¹⁶⁶

For example, a significant jurisprudential question concerns whether Hohfeld's third example of multital rights — one's rights vis-à-vis one's body — should be analyzed in terms of property law, tort law, or otherwise. Much of the law-and-economics analysis of tort law is an attempt to reconceptualize tort law in terms of property and contract doctrines. Those who take this point of view to its logical extreme, including Richard Posner, argue that because we have a property right in our bodies, we should be able to buy and sell our body and body parts, as well as our infants.¹⁶⁷ On the other

165. See *infra* section IV.D.1.

166. As I discuss *infra* in sections IV.D.3 and IV.D.4, at some level of generality, everything is the same, and at some level of specificity, no two things are the same. Legal argument consists in large part in establishing consensus as to the correct level of generality in specific situations: Is this case distinguishable from another? If a distinction can be drawn, is it relevant, or is it a distinction that makes no difference?

167. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 151-54 (4th ed. 1992) (describing the extreme version of this point of view); RICHARD A. POSNER, *SEX AND REASON* 409-17 (1992); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 344 (1978).

side of the political spectrum, Margaret Radin agrees that we have a property right in our bodies, but she comes to the opposite conclusion as to the permissibility of rights of market alienation.¹⁶⁸ To Radin, although the body may be property, market alienability of female sexuality, in the form of either prostitution or surrogate motherhood, should be restricted as destructive of human flourishing.¹⁶⁹ A neo-Hegelian might agree with Radin's policy recommendations on specific issues such as prostitution, but on the grounds that it is a category mistake to analyze body relations in terms of property relations.

6. *The Reinstatement of "Blackstonian" Property*

Now it should be apparent why I said that the Grey-Vandeveld-Hohfeldian ostensible denial of traditional Blackstonian property is, in fact, a reinscription. Their "denial" of Blackstone is, in effect, a "super-Blackstonian" approach that insists more firmly on a physical, unitary concept of property than the historical Blackstone ever did.¹⁷⁰

The Hohfeldian analysis of property does not, in fact, offer an alternate paradigm to the physicalist, phallic paradigm. It accepts the notion that the only possible definition of property is a unitary notion based on the sensuous grasping of physical things. Hohfeld, Grey, and Vandevelde believe that their analysis shows that the unitary, physical paradigm does not adequately describe actual jural relations. They observe anomalies that the paradigm does not explain. One possible response to these observations would be the approach of the historical Blackstone — to develop enough auxiliaries to the core paradigm of property to explain away apparent

168. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-36 (1987); Radin, *supra* note 8, at 965-67.

169. I analyze Radin's theory at great length in Schroeder, *Virgin Territory*, *supra* note 5. I congratulate her for arguing forcibly that it is intuitively and philosophically inappropriate, and perhaps morally and ethically wrong, to analyze body and sexual relations in terms of market considerations. But I also question her choice to analyze these relations in terms of *property*. This approach not only confuses her argument but weakens it. Radin's approach concedes to law-and-economic utilitarian theory one of its primary tenets: that body relations are fundamentally the same as other object relations. Radin's critique can degenerate, therefore, into quibbling about the positive law of property rights.

I suggest that Radin's analysis would gain strength if it were restated, not as an analysis of property law, but as an attempt to develop an alternate body of law to analyze legal relations with the human body and other objects that are in some way body-like. Traditional property law would continue to govern other forms of object relations. I call this alternative to property law a jurisprudence of expanded bodily integrity.

170. We shall see that Hohfeld's legal progeny — the legal realists — similarly imposed a radically physicalist, sensuous grasping paradigm in the Uniform Commercial Code. *See infra* text accompanying notes 190-209.

anomalies. Consequently, whether or not Blackstone implicitly assumes that the sensuous grasping of physical things is the norm, he does not ignore the existence of divisions of and limitations on property rights or deny property rights in intangibles. Rather, he tries to account for them.

An alternative response would be to conclude that the old paradigm is a "degenerative research program" so encrusted by its protective belt of auxiliary theories that its explanatory power diminishes.¹⁷¹ The theory, then, would say that sensuous grasping epitomizes property, except for in these special cases. But empirically, there are more exceptions than there are examples of the so-called general rule. One, then, would try to formulate a new paradigm that would either explain more than the existing paradigm or explain part of it "better." This new paradigm would presumably have to account for intangibility and fluid concepts of property rights as essential aspects of property, rather than as exceptions.

Hohfeld, Grey, and Vandeveld take yet a third approach. As the theory of sophisticated falsifiability reminds us, we cannot as a psychological or logical matter reject a paradigm merely because we find that it is inconsistent with empirical observations. Rather, it remains as the paradigm until a new paradigm is developed. Vandeveld and Hohfeld are left with the existing paradigm in its most pure form, without its protective belt, and argue that it is the only paradigm of property. Because this paradigm does not accurately describe our empirical legal world, they conclude that *no examples* of property in fact exist. The definition of property remains, but examples of property form a null set. The old paradigm remains, but is declared moribund.

Unfortunately for this approach, property as an economic and legal practice continues to flourish. Property concepts have not come crashing down in the face of this arcane, arid, and acontextual legal argument. The Hohfeldian approach refuses to analyze contemporary property qua property on the grounds that property is dead as an analytical category. The marketplace, however, needs to account for property and continues to build the protective belt of auxiliaries.

C. *Physicality and the Federalists*

In addition to Blackstone, Grey also describes the Framers of the U.S. Constitution as holding the so-called traditionalist-lay con-

171. See *supra* note 92.

ception of property as "thing ownership." As we shall see, this relates to Grey's political agenda.¹⁷² Grey fears that oversolicitousness toward the Takings Clause of the Constitution may hinder progressive legislation, which he favors. He thinks that if he can show that the definition of property used in traditional takings jurisprudence is so untenable as to be completely meaningless and unworkable in our modern economy, then even originalist Supreme Court Justices would be forced to adopt an alternate interpretation of the Fifth Amendment. I believe Grey hopes that the new approach might be more amenable to liberal political goals.

A scholarly exegesis of the property jurisprudence of the Framers, let alone a complete discussion of Supreme Court takings cases, is far beyond my interests and the scope of this article. I suggest, however, that even a cursory analysis of the theories of the Framers suggests that the vision of property reflected in the language of the Constitution is far more sophisticated than the crude view attributed to them by Grey. Moreover, Grey's proposed disaggregated "bundle of sticks" concept of property, which covertly reinstates the phallic metaphor, actually leads to a stricter, less progressive reading of the Constitution.

In her illuminating book *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*,¹⁷³ Jennifer Nedelsky parses the writings of the Federalists in order to explicate their theory of property and the fundamental role it played in their notion of political freedom. She emphasizes, as Grey does, that for the most part, the Federalists thought the concept of property was so self-evident that it did not need defining.¹⁷⁴ Nevertheless, the examples they used of the potential oppression of property rights by an unjust political system provide strong evidence that their concept of property was not limited to the physical thing-sensuous grasping model Grey posits. They spoke of property rights not only in connection with land and the means of production — that is, stock in trade, manufacturing plants, and so on — as one would expect in a thing-possession regime. They also spoke frequently of property rights in terms of money lending and investment.¹⁷⁵ The types of "takings" with which they were concerned were not limited to the state's wresting of physical things from their owners' grasp. They were concerned

172. See *infra* section IV.D.1.

173. NEDELSKY, *supra* note 4.

174. See, e.g., *id.* at 36-37.

175. See, e.g., *id.* at 30.

with those more subtle "takings" that destroyed the value of intangible property in the forms of investment: the adoption of monetary policies, such as the printing of paper money, which can cause inflation, as well as bankruptcy and other debtors' rights legislation.¹⁷⁶

My colleague, John O. McGinnis, who explores the natural law aspects of the Framers' political theory, goes even further.¹⁷⁷ According to McGinnis, both the Federalists and the anti-Federalists recognized property as the natural right of man.¹⁷⁸ Related to this, other essential rights necessary for human liberty were justified precisely because they were forms of property rights. For example, James Madison argued for the freedoms of speech and religion on the express ground that each man has a natural property in "his opinions and the free communication of them" and in "the free use of his faculties and free choice of the objects on which to employ them."¹⁷⁹

The Framers of the Constitution were not Hegelians, let alone Lacanians. They were firmly located within classical liberal political theory. Their writings, however, clearly reflect the Western philosophical tradition, which does not limit the potential objects of property to physical objects or property relations to the satisfaction of physical, or Real, needs. Rather, the objects of property include everything other than the self. In the words of John Lilly, an eighteenth-century popularizer of Locke, "Every Man . . . hath a Property and Right which the Law allows him to defend his Life, Liberty, and Estate"¹⁸⁰ And, property relations are necessary in order for humans to constitute themselves as subjects who can seek to actualize their freedom. In other words, *property* relates to all that is *proper* to mankind.¹⁸¹

176. See, e.g., *id.* at 71-75.

177. See John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751 (1994) (reviewing CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993)).

178. *Id.* at 1758-66.

179. *Id.* at 1760 (quoting Madison). For a further discussion of the broad way in which property rights were conceived in the eighteenth century, see Macpherson, *supra* note 36, at 7-8.

180. Aylmer, *supra* note 73, at 95 (quoting JOHN LILLY, *THE PRACTICAL REGISTER: OR, A GENERAL ABRIDGEMENT OF THE LAW* (London, Eliz. Nutt & R. Gosling for T. Ward 1719)).

181. This is reflected in the etymology of the English word *property*, which derives from the Latin *proprius*, which means "proper," or "that which is peculiar to a person or thing." 12 THE OXFORD ENGLISH DICTIONARY 639 (2d ed. 1989); D.P. SIMPSON, *CASELL'S NEW LATIN DICTIONARY* 482 (1968).

D. *Property in Private Law*

1. *Property as the Public-Private Distinction*

I have suggested that Grey and Vandeveldel feel the need to adopt such sharp, either-or, clear, visible, and absolute distinctions between property and nonproperty in large part because they analyze property primarily for the instrumental purposes of public law. That is, as Grey and Vandeveldel emphasize, it is traditional in legal political and jurisprudential theory to view property as one of the barriers between the individual and the state.

Property and its counterpart, sovereignty, have been understood as generic terms for, respectively, the collection of freedoms held by the individual and the collection of powers held by the state. In very real terms, the concept of property has marked the boundaries of individual freedom and the limits of state power.¹⁸²

Liberalism has traditionally required a sharp distinction between the private and the public. Vandeveldel and Grey argue that the drafters of the Takings Clause, writing in the late eighteenth century, based it on the rigid, unitary, sensuously possessory paradigm they attribute to the drafters' contemporary — Blackstone.¹⁸³ I have already argued extensively above that this is a misstatement of eighteenth-century property theory. Nevertheless, Grey and Vandeveldel may be correct in their proposition that a fluid, expanded, flexible, ever-changing, intangible notion of property serves this political function poorly. If everything arguably can be property, then nothing is property; the constitutional protections of property become unworkable. This is a version of the familiar critique of liberal theory on the grounds that its traditional notion of the public-private distinction may be untenable at best, and irretrievably alienating and oppressive at worst, at least in the late capitalistic era.¹⁸⁴

But the judgment that the notion of property no longer can — or more accurately, in Jennifer Nedelsky's analysis, never could¹⁸⁵

182. Vandeveldel, *supra* note 3, at 328; see also NEDELSKY, *supra* note 4, at 8-9, 91, 248. This notion is, of course, reflected in the Takings Clause of the Fifth Amendment.

183. As I discuss *supra* in text accompanying notes 79-110, even this may be a misconception.

184. This critique of the public-private distinction in this country is associated primarily, although not exclusively, with various schools of feminism. This seems particularly appropriate to me in so far as I see the unitary, physical, and possessory notion of property to be a phallic metaphor. The problem, of course, is that one only reinstates this metaphor by simple denial. The question is how to rewrite the concept of property to reflect the "not-all" of the feminine.

185. Nedelsky's argument is somewhat more sophisticated. She speaks of changes in property law analysis since the New Deal disintegrated "property as a constitutional barrier." NEDELSKY, *supra* note 4, at 9. As I read the overall tenor of her book, it contains an implicit

— serve the barrier function assigned to it by the Founders for the purposes of political theory carries no necessary implication for the continued validity of property notions generally. Most property relations take place in the context of so-called private law — commercial and real property transactions between legal actors. In the fluid and intersubjective world of the market, fluid and intersubjective notions of property arguably function more, not less, adequately than rigid and absolutist notions. Indeed, that is probably why they have developed. Thus, one of the problems with contemporary property scholarship may be precisely that we still try to use one concept — property — for at least two very different functions: first, to allow legal actors to relate with each other as subjects in the marketplace, and second, to serve as the line between the public and the private. Whether or not property ever successfully fulfilled this dual function in the past, it may no longer be able to do so if the market moment of property requires fluidity and the political moment of property requires rigidity.

Moreover, our legal system continues to place great importance on the property-personal rights distinction the neo-Hohfeldians deny. Of course, most individuals in our society hold a strong intuitive belief that property significantly differs from other legal rights. Let us not forget that since the “fall” of Communism in Eastern Europe and the recent official encouragement of private markets in China, the international belief that private property is necessary for economic development — and, at least in the West, for political freedom — is probably stronger now than it has been in at least a century. Yet many legal academics who study the situation continue to argue either that property is dying¹⁸⁶ or that the concept is incoherent, a mere mythic presence, a contentless rhetorical trope or political tool.¹⁸⁷ I fear that they risk sounding very foolish — saying that because they cannot understand the phenomenon, it does not exist and the rest of the world is delusional or suffering from false consciousness.¹⁸⁸

suggestion that property has always been a fluid concept poorly suited to act as a barrier. See, e.g., *id.* at 223-25.

186. For a discussion of the property theory of Grey and Vandeveld, see *infra* section IV.D.4.

187. NEDELSKY, *supra* note 4, at 8-9, 223-25, 239, 243, 247, 254.

188. Alan Brudner makes a similar point in his *Editor's Introduction* to a recent law review volume dedicated to property:

So far from reflecting on the nature of property in light of 1989, many of the contributors have attempted to reveal a conceptual dynamic in private property that moves in a direction diametrically opposed to the momentum revealed in history. At a time when publicly-owned enterprises and resources are being massively transformed into private

In arguing that property law can no longer — and indeed probably never did¹⁸⁹ — bear the full weight of serving as the constitutional public-private boundary between citizen and state, Grey makes another brief, but clever, argument. Grey tries to claim that property died for commercial law and, therefore, it is doubly dead for constitutional law purposes. Property's murder in private law was supposedly the work of the legal realists.

I disagree with Grey's assumption that the legal realists' "bundle of sticks" imagery challenges the phallic metaphor of property as thing ownership. I argue that despite its reputation, that great monument to legal realism, the Uniform Commercial Code, in fact adopts an ultraphysicalist, phallic, unitary conception of property that out-Blackstones Blackstone.

2. *Musings on the Property Myth of the Uniform Commercial Code*

a. Myths. The term *myth* has both affirmative and pejorative meanings. A myth is simultaneously true and false. In its affirmative guise, a myth is a story a people tell to understand themselves by giving meaning and structure to their lives. In this sense myths claim a type of truth that is beyond their literal truth. In the pejorative sense, myths are delusions, fairy tales, or even outright lies.

There are several approaches to the study of myths. One approach concentrates on the structural similarities¹⁹⁰ or thematic commonalities¹⁹¹ of myths told in different cultures in order to retell ostensibly different stories as variations on the same story. This is an attempt to identify universal or essential aspects of human nature. Private law doctrinalists, like public law theorists, tell a myth about the death of property. In studying this myth, Grey takes the structuralist approach. He asserts that the theory and doctrine myths are fundamentally the same. They both speak of an evil demon who was worshiped by our ancestors — unitary physical property — being slain by academic demigods who then bring about a

property; at a time when socialist law is being overthrown in favour of the legal categories of private law, our theorists disclose the inherent instability, indeed the conceptual impossibility, of private property.

Alan Brudner, *Editor's Introduction*, 6 CANADIAN J.L. & JURISPRUDENCE 183, 183 (1993).

189. See NEDELSKY, *supra* note 4, at 8-9; see generally *id.* at 223-31.

190. See, e.g., CLAUDE LÉVI-STRAUSS, *THE RAW AND THE COOKED: INTRODUCTION TO A SCIENCE OF MYTHOLOGY* (John Weightman & Doreen Weightman trans., 1975).

191. Examples include Jungian analysis of psychological archetypes reflected in myths, see, e.g., NEUMANN, *supra* note 48, as well as the pop culture theory of universal myths associated with Joseph Campbell, see, e.g., CAMPBELL, *supra* note 14.

new age of truth and justice. Grey seeks to convince us that the concept of property *should* fade away in constitutional discourse because it has already been killed off in private law doctrine. Although I agree that there are structural similarities between the two myths, the lessons that can be drawn from the parallel are not those drawn by Grey. Rather, the doctrinal myth of property turns out to be mythic in the pejorative sense of illusory and misleading. Private law only claims to have killed off unitary physicalist property. In fact, unitary, physicalist, phallic property remains at the heart of the property concepts enshrined in the Uniform Commercial Code.¹⁹²

b. The Private Law Myth.

Before the High and Far-Off Times, O My Best Beloved, came the Time of the Very Beginnings; and that was in the days when the Eld-est Magician was getting Things ready.¹⁹³

The creation myth, or "just-so" story, of commercial law doctrine is that the lionlike Llewellyn and his fellow legal realists rejected the common law approach to personal property and substituted the modern "bundle of sticks" theory into the Uniform Commercial Code.¹⁹⁴ In the bad old days, our benighted legal an-

192. I explore the phallic metaphor in commercial law doctrine in greater detail in Schroeder, *Liquid Property*, *supra* note 9 (manuscript at text accompanying notes 124-38), and in Schroeder, *Perfection as Possession*, *supra* note 9.

193. RUDYARD KIPLING, *The Crab that Played with the Sea*, in *JUST SO STORIES* 155 (Alfred A. Knopf 1992) (1902).

194. This myth pervades E. ALLAN FARNSWORTH & JOHN HONNOLD, *CASES AND MATERIALS ON COMMERCIAL LAW* (4th ed. 1985). (The reorganization of the Fifth Edition, which is also edited by Steven L. Harris, Charles W. Mooney, Jr., and Curtis R. Reitz, has dropped some, but not all, of these references.) For example, Farnsworth and Honnold laud the revolutionary nature of the U.C.C.'s "virtual abandonment of 'property' (or 'title') as a vehicle for deciding sales controversies." *Id.* at 480. They quote Prof. Williston who said that this step was "the most objectionable and irreparable feature" of the new Code. *Id.* (quoting Samuel Williston, *The Law of Sales in the Uniform Commercial Code*, 63 HARV. L. REV. 561, 569-71 (1950)). Farnsworth and Honnold also praise the drafters for "exorcising 'title' from sales controversies and banish[ing] the 'lien' " in favor of "down-to-earth language." *Id.* at 720.

Notice that in their rush to praise the code drafters, they fail to mention that this replacement of legal terminology with "down-to-earth" language does not exclude using many other words in their technical legal sense as opposed to their familiar colloquial meanings. For example, *purchaser* is given a technical meaning as a transferee in any voluntary transaction, rather than its colloquial meaning as "buyer." See U.C.C. §§ 1-201(32)-(33) (1987).

Farnsworth and Honnold defend the provisions of § 2-501, which gives a buyer a "special property" in goods identified to a contract:

The Code (with good reason) discarded the traditional concepts of 'property' and 'title' as tools for deciding a wide variety of issues . . . Nevertheless, to cope with problems posed by claims against third persons it seems necessary to follow a line of thought that resembles the 'property' concept. Happily, this process is not subject to the vice that led to the rejection of 'property' as a *general* solvent, for we are taking on only one problem at a time — as contrasted with the confused, cross-eyed pre-Code approach of using one general concept for a wide variety of different problems.

cestors thought that property resided in some mysterious whole known as "title." A range of legal disputes relating to the ownership of "goods," or objects of property governed by Article 2 of the U.C.C. — including who has the right of possession, who has the risk of loss, and so on — was resolved by identifying the location of this "metaphysical"¹⁹⁵ concept.

The enlightened realists killed title by shattering it. Shattered property was disaggregated into a bundle of sticks. The code drafters realized that the different legal questions supposedly answered by a title inquiry were just that — different legal questions. These differences had been obscured by the fact that the term *title* did not designate one right, as had been previously thought, but was shorthand for a bundle of separate rights. That is, common lawyers were legal idealists who assumed that unity of terminology reflected a unitary essence. The legal realists took the nominalist approach that words are only words and sought to examine the reality of practice that the words obscured. Consequently, they boldly rejected the ancient fossil of title law and reanalyzed separately each issue formerly covered by title law to determine what rules reasonable merchants would have bargained for based on business practice. Title, they declared, was a chimera, initially frightening until

FARNSWORTH & HONNOLD, *supra*, at 718. This statement, unfortunately, begs the question as to what "is" a property interest at all. If, as Hohfeld suggests, a property right is what he calls a multital right — that is, a right against the world — then problems posed by claims against third persons do not *resemble* property but *are* property by definition. See *supra* note 160 and accompanying text. Conversely, Farnsworth and Honnold seem to be assuming that the issues our legal ancestors decided under the rubric of "property" were a "wide variety of different problems." FARNSWORTH & HONNOLD, *supra*, at 718.

I suspect that the differences between pre-Code sales law and Article 2 seem especially revolutionary to older scholars such as Farnsworth and Honnold who were steeped in the detail of the old law, participated in or witnessed the debates concerning its change, and then taught during a transition period when students needed to know both the old law and new and the differences between them. Lawyers of my and subsequent generations who have lived our entire legal careers under the current regime may not perceive the same revolutionary character. Indeed, I remember hearing this myth told rather breathlessly by my commercial law professor who had some role in the Article 2 drafting process. But there were agnostics even back then. Perhaps my conclusion that the drafters of the U.C.C. did not successfully break out of the pre-Code property paradigm originally arose from the cynicism of my contracts professor, whose principle area of expertise was labor law, rather than commercial law. He rolled his eyes at claims of the revolutionary nature of Article 2 and maintained that the law of sales contract had remained essentially the same in its most basic principles, and most of the differences from pre-Code law were highly technical matters that would only excite law professors.

195. *Metaphysical*, of course, is the ultimate insult from realists who, after all, are "practical men." It is still frequently used in commercial law scholarship as a pejorative for competing viewpoints.

one realizes that it is an illusion or, in the words of Llewellyn, an "intangible something."¹⁹⁶

3. *Practical Men and Their Tangible Things*

The purpose is to avoid making practical issues between practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.¹⁹⁷

While I do not wish to take away from the credit due to the drafters of the U.C.C., a revisionist view of this history is both less and potentially more earthshaking. The drafters did not *abandon* or disaggregate property. The very concept of a sale presupposes that there is such a thing as a saleable property right in a good and that property rights in that good can be conveyed from the seller to the buyer. Rather, the U.C.C. drafters denied title; they tried to wish it away. Article 2 boldly claims that "[e]ach provision of this Article with regard to the rights, obligations and remedies . . . applies irrespective of title."¹⁹⁸ It then immediately loses the courage of its convictions and adds "except where the provision refers to such title."¹⁹⁹ Indeed, the concept and the terminology of title continue in the U.C.C. Article 2 defines a sale as "the passing of title from the seller to the buyer for a price."²⁰⁰ Sections 2-401, 402, and 403 tell one when title passes, how title can be divested, when title is voidable, and so on.

Nor did the drafters abandon the concept that a full property contains a unity of certain minimal rights. They might, for example, in certain cases, have decided that certain rights and obligations are not essential elements of property. For example, the party who bears the risk of casualty loss in a good is no longer determined by title. This is frequently explained as an example of the disaggregation — risk of loss is only one stick in the property bundle, which

196. In his casebook Karl Llewellyn uses the term *mystical something*. KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 561 (1930).

197. U.C.C. § 2-101 cmt. (1962). This comment, probably penned by Llewellyn, bears a family relationship to his scholarly writings:

They want law to deal, they themselves want to deal, with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles — not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles.

Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223 (1931).

198. U.C.C. § 2-401 (1962).

199. U.C.C. § 2-401 (1962).

200. U.C.C. § 2-106(1) (1962).

can be "disaggregated" at will.²⁰¹ An alternate analysis might suggest that there was no disaggregation after all. Whether or not pre-Code law usually allocated risk of loss in a good to the person holding title, it does not follow that risk of loss is an essential element of property any more than it follows from the existence of positive law that assesses real property taxes against owners that such taxes are an essential element of property. The three traditional elements of property are rights of possession, enjoyment, and alienation.²⁰² Unless one considers risk of loss to be the dark side of enjoyment, it is not included in the traditional definition of unitary property. The fact that the risk-of-loss rules of Article 2 are merely "default rules" that only apply if the buyer and seller fail to resolve the issue by contract certainly suggests that it is not. Indeed, if one looks at Llewellyn's writings on title, one will find that he objected, not to the concept of title per se, but to the tendency of the common law to use the location of title to govern any and all issues arising under the law of sales.²⁰³ Specifically, Llewellyn criticized the common law for treating all of sales as a subcategory of property law and not recognizing that *some* aspects, including risk of loss, are more appropriately analyzed in terms of contract.²⁰⁴

Moreover, and most significantly for the purposes of this article, although they ostensibly adopted the "bundle of sticks" approach through their denial of title, the drafters did not even try to replace the common law phallic paradigm, which identified property with sensuous grasping of physical things. Rather, they embraced it wholeheartedly. As the quote at the head of this section indicates,

201. This is the traditional rationale. In the language of Farnsworth and Honnold, risk of loss is a different question from other traditional property questions and should be separately analyzed. See *infra* text accompanying notes 203-04.

202. For a Lacanian-Hegelian analysis of the function of these three traditional elements, see Schroeder, *The Vestal and the Fesces*, *supra* note 12. See also *infra* text accompanying notes 218-36.

203. See, e.g., K.N. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U. L.Q. REV. 159 (1938).

204. *Id.* at 191, 202. Llewellyn argued that analyzing risk of loss as an attribute of property governed by conveyancing rules rather than as a contractual aspect of sales leads to peculiarly convoluted reasoning. The common lawyer argued that risk of loss followed title. When title passes is determined by the conveyancing contract. When the contract is silent, the courts will look to other provisions in the contract as evidence of when the parties intended title to pass. A contractual provision purporting to govern the allocation of risk of loss can serve as evidence of such an implied intent as to the timing of passage of title. The common law courts would, therefore, look to contractual risk-of-loss clauses, not to find the parties' intent as to risk of loss, but to determine whether title passed, which would, in turn, affect the allocation of the risk of loss. (Of course, this determination of the location of title would have other effects unrelated to risk of loss.) *Id.* at 182-83.

Llewellyn's approach, adopted in the U.C.C., is simply to analyze risk of loss as a contract matter. *Id.* at 183-84.

the legal realists rejected the notion of title, not because it was unitary or objective, but precisely because it was insufficiently *physical*. These self-proclaimed "practical men" found elusive, feminine intangibility to be seductive, but also dangerous because elusive. Intangibility is metaphysical and flaccid. They longed for that determinate masculine firmness that is so hard to achieve and easy to lose.²⁰⁵ So they demanded that not only goods — which are by definition physical things — but also *acts and words* must become *tangible*. Not only property but the entire Symbolic realm of language and law is collapsed into the Real. Like Odysseus, they heard the Sirens' song, but in order to prevent their own destruction, they bound themselves to the mast of tangibility — binding themselves like a bundle of sticks. The realists turn out to have been "Real-ists."

Goods themselves are, of course, physical things that can be seen and held and can satisfy the tangible longings of practical men. Property is a legal concept that only exists in the minds and actions of people. In Lacanian terminology, goods are Real, but property is Symbolic. In order to make property tangible, the drafters identified property in the good with the good itself. Property interests in the good are made, as nearly as possible, equivalent to sensuous contact with the good. Severing the several rights and obligations of property from title supposedly disaggregated them, but in fact, these sticks are now bound to the good itself: legal issues concerning goods tend to be determined by reference to the party who has sensuous contact with the goods.²⁰⁶ Although the U.C.C. never de-

205. Llewellyn called title in chattel "mythical" or "mystical" and complained that it cannot be seen — unlike title in real property, which can be seen in the form of a chain of recording documents. See *id.* at 165. He called for a "firm, objective basis for allocating title." *Id.* at 166.

206. The concept of physical possession also crops up repeatedly in the U.C.C. in the various rules of derivation and bona fide purchaser. The bona fide purchaser rules of the U.C.C. place a premium on physical possession. This is most obvious in the case of negotiable instruments and negotiable documents of title, which expressly require the person seeking to enforce negotiation rights to be a possessor — as clearly indicated by the terminology: she is called a "holder." See Schroeder, *Liquid Property*, *supra* note 9 (manuscript at n.145). On my contention that we should begin our analysis of property by looking at the most generalized rules rather than concentrating on the most idiosyncratic, negotiable instruments and documents are a poor place to start. The very purpose of these curious devices is to transform intangible interests — debts in the case of instruments, nonpossessory interests in goods in the case of documents — into tangible form so that the intangible can now be seen and held. As I discuss elsewhere, James Rogers has even argued that negotiable instruments and the law of negotiability are archaic anachronisms that should be done away with. Schroeder, *Perfection as Possession*, *supra* note 9 (manuscript at text accompanying notes 78-94) (citing James Steven Rogers, *Negotiability, Property and Identity*, 12 CARDOZO L. REV. 471, 501-08 (1990)). Perhaps the market agrees, relying on nonnegotiable functional equivalents such as wire transfers and credit cards for payments and nonnegotiable documents of title for delivery and storage.

finer the word *possession*, it seems quite clear from the context in which the word is used that it is intended to mean immediate physical custody epitomized by one's literally grasping it in his hand.²⁰⁷

In other words, the drafters of Article 2 started from the Hohfeldian position that property is not an object or a right with respect to an object but a set of legal relations among subjects. This is why the elements of property can be identified and separated. Nevertheless, they ended up by equating property with the object itself. They conflated the Symbolic (law) with the Real (the physical world) and applied the phallic metaphor of grasping to the *Phallic* concept of property. Thus, on the one hand, my analysis suggests that rather than a radical escape from the past, Article 2 of the U.C.C. can be seen as a reactionary embrace of its most simplistic, physicalist aspects.

That is, the adoption of the bundle of sticks metaphor in private law did not challenge the phallic property paradigm. It replicated and strengthened it. Moreover, despite Grey and Vandeveld's hopes to the contrary, this might have precisely the parallel result in constitutional jurisprudence.

On the other hand, as I discuss in a companion to this article,²⁰⁸ certain aspects of the language in Article 2 may indicate a possible

207. The U.C.C. adopts this physicalist notion of possession as opposed to the Symbolic notion of possession adopted by Hegel. I discuss the meaning of the word *possession* in Part V, *infra*.

208. See Schroeder, *Liquid Property*, *supra* note 9 (manuscript at text accompanying notes 67-89). As I argue in that article, Llewellyn did not object to property but to the imagery of the archetypal sale implicit in the concept of *title*. According to Llewellyn, the common law treated the "farmer's transaction" as the norm and accounted for the "merchant's transaction" as an exception. This was appropriate for an agrarian economy but is troublesome in a modern commercial economy in which merchant's transactions are the norm as an empirical matter.

A typical farmer's transaction is an isolated, face-to-face, cash sale of one identifiable object, such as a horse, for personal use. The sale occurs between two individuals, the seller and the buyer. A sale in a farmer's transaction is a discrete event. Because all aspects of the sales event occur substantially simultaneously, it is convenient to speak of an instant when property in the form of *title* passes.

In contradistinction, merchants' transactions tend to be repetitive, long-distance, credit transactions involving *wares* — that is, multiple, often fungible goods that are purchased not for use but for commercial purposes such as resale. Although a merchant's transaction is also fundamentally a two-party transaction, it also often includes numerous go-betweens such as banks and other financiers, carriers, warehouses, consignors, and sales representatives. In other words, to a merchant, a sale is not an event but a process that takes place over time. Consequently, the common law notion of title passing instantaneously is inadequate for the analysis.

Or, to put it in Llewellyn's language, in the simple farmer's transaction imagined by the common law, "the whole transaction can be accomplished at one stroke, shifting possession along with title, no strings being left behind." Llewellyn, *supra* note 203, at 167. Merchants' transactions "involve a period, often an extended period, during which matters are in temporary suspension or are in active flux between the parties: over considerable periods of time there is not such Title in *either* party." *Id.*

opening for a property paradigm shift. That is, the realists thought that they found property a solid but brittle concept — any change would shatter it into separable shards. The former phallic unity of title could only be replaced by the phallic fasces — a bundle of many little phallic sticks awkwardly and contingently tied together. I suggest that alternate metaphors can be drawn from the language of Article 2 that can simultaneously reflect both the malleability and separability of property, without abandoning the integrity of the whole of property. For example, rather than shattering solid property through disaggregation, Article 2 may have allowed us to melt it; we may now have liquid property.²⁰⁹

4. *Conceptual Severance*

As other left-leaning critics of the Rehnquist Supreme Court have lamented, the disaggregation of property may *not* be relentlessly leading toward a diminution of constitutional property protection. Rather, as Margaret Radin has argued, the trend under the Rehnquist Court has been a *strengthening*, not a withering, of what she calls the traditional liberal view of property — the exclusive right to possess, enjoy, and alienate objects — in constitutional jurisprudence.²¹⁰ Moreover, this strengthening of constitutional property has been helped, not hindered, by the disaggregation of property. Radin believes that she has identified in a number of cases a tendency of certain Justices to find that governmental interference with any *one* of the many disaggregated rights associated with property may be a “taking.”²¹¹ This approach, which Radin labels “conceptual severance,”

consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting

Llewellyn develops his critique of the imagery of property in K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939), and K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939).

209. In *Liquid Property*, I argue that despite the failure of the Code drafters successfully to avoid the phallic metaphor of property, their drafting approach did leave open the possibility of developing new, alternate metaphors for property. Schroeder, *Liquid Property*, *supra* note 9 (manuscript at text accompanying notes 124-64). I present as the alternative view that the rules of Article 2 need not necessarily be seen as the shattering of solid property; instead, they could be seen as its liquification. *Id.* (manuscript at section I.E). Property may now be viscous. My point is not simplistically to replace one physicalist metaphor with a new one but to show how the uses of different metaphors to describe the same statute can lead to different results.

210. Radin, *supra* note 5, at 1671-85.

211. Radin presents her analysis in *Cross Currents*. *Id.* at 1674-78. The cases she particularly discusses are *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419 (1982); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987); and *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987).

that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.²¹²

Radin condemns this approach for several reasons. She expressly challenges it as incorporating a conservative political and jurisprudential philosophy.²¹³ Specifically, she believes that this trend puts governmental regulation she deems progressive at risk of being invalidated as unconstitutional under the Takings Clause.²¹⁴ Implicitly, she criticizes the Court precisely for not maintaining a unitary notion of property.²¹⁵ She seems to realize intuitively — and Grey and Vandeveld seem to fear intuitively — that the legal realists' assumptions were incorrect. Disaggregation of property may not lead to a more expansive view of governmental regulation. Rather, a right-leaning Supreme Court can use a disaggregated notion of property to restrict appropriate government regulation in much the same way that a previous, conservative Court used unitary, absolute property. Consequently, as I argue elsewhere, Radin implicitly rejects the Hohfeldian intersubjective account of property in favor of a radically objective account.²¹⁶

If one recognizes for constitutional law purposes that property consists of a bundle of severable sticks, "[i]t is 'an easy slippery slope' to the radical position that 'every regulation of any portion of an owner's "bundle of sticks" is a taking of the whole of that particular portion considered separately.'"²¹⁷ In other words, Grey argues that Hohfeld's revelation that property rights are severable and indistinguishable from other legal rights meant that property

212. Radin, *supra* note 5, at 1676.

213. *Id.* at 1674-78.

214. *Id.* at 1676-78.

215. To date, Radin argues, this risk is more potential than actual. This is because the Court has concentrated primarily on the "exclusive occupation" element of property. *Id.* at 1678. She believes, however, that the Court has been moving closer toward the constitutionalization of what she sees as the full, traditional liberal trinity of possession, use, and alienation. It is the constitutionalization of alienation that could have a devastating effect on regulation. *Id.* at 1686.

216. See Schroeder, *Virgin Territory*, *supra* note 5. Radin's dichotomy of the favored form of property (personal property) and the disfavored form of property (fungible property) is based on the owner's relationship with various categories of things. She generally uses the word *property* to refer to the thing itself, rather than to the intersubjective rights and obligations of subjects with respect to the thing. An object is personal property to the extent that the object relationship is necessary for the development of the owner's personality — as with, for example, one's primary residence, a wedding ring, or a woman's sexuality.

217. NEDELSKY, *supra* note 4, at 236 (quoting Radin, *supra* note 5, at 1678).

does not exist. If property is everything, then property is nothing. Radin shows how a libertarian can come to the opposite conclusion.

The problem that Grey and Vandavelde may really see is not that the disaggregation of property is killing property but that it is giving property new life. Disaggregated property, like the dismembered god Osiris, threatens to fill the world with its power.

V. CONCLUSION: THE DENIAL OF THE FEMININE

Waldron's attempt to epitomize property as the sensuous grasping of physical things is self-defeating. It denies property its very nature as a legal relation — Symbolic, abstract, social, and mediated — in favor of an imagined, infantile, immediate, Real union of the subject and the object.

Hohfeld, Grey, and Vandavelde make an error that is the mirror image of Waldron's and is, consequently, also self-defeating. In their desire to capture the Symbolic aspect of property as human interrelationships, they deny the mediating object that permits the development of subjectivity as intersubjectivity.

According to Lacan, the Symbolic *Phallus* is the object of desire. Our ultimate desire is the Imaginary, forever-lost union with the Other Imagined as the Mother,²¹⁸ which we place in the Real world beyond interpretation. Consequently, the *Phallus* — what men want to have and women try to be — is paradoxically both the Feminine and the signifier of masculine subjectivity.

Men try to attain subjectivity and hold the *Phallus*, not only by having the Real penis, but also by trying to control women's bodies. Of course this is unsatisfactory. They can never attain the Phallic Woman. To do so would be to submerge themselves into the prelinguistic, preinterpreted order of the Real and to lose their subjectivity — the ability to speak. So, in frustration, they also try to deny the existence of the lost Feminine. They try to pretend that they achieve unmediated relationships by denying the existence of the mediator. In Lacan's terms, "The Woman does not exist."²¹⁹

218. During the Mirror Stage, when the child realizes that he is other than the M(O)ther, he imagines that he was once one with her in the Real. Because this M(O)ther is everything the purely negative child is not, she must have everything including the *Phallus*. See Grosz, *supra* note 28, at 31-47; Schroeder, *The Vestal and the Fasces*, *supra* note 12. Consequently, even though the realization of the Mother's existence does not occur until the development of the Imaginary, and the originary moment of the concept of the *Phallus* is the originary moment of the realm of the Symbolic, in the Borromean knot of the psyche, the concept of the Feminine as the Phallic Mother functions in the Real.

219.

The woman can only be written with *The* crossed through. There is no such thing as *The* woman, where the definite article stands for the universal. There is no such thing as *The*

She is Real in the technical sense that she cannot be adequately described in Symbolic language but she cannot be reduced to or grasped as a Real object. The Woman — the Feminine — becomes purely the Imaginary object of men's fantasy; woman becomes a symptom of man.²²⁰

We Imagine an Imaginary object, an *objet petit a*, to stand in for the Symbolic object of desire and to function as the cause of our desire. We then try to identify this Imaginary little other with something that is actually biological, natural — that is, Real. This is in the vain hope that if we can attain the Real object, then our desire will be fulfilled.²²¹ Or, we deny mediation entirely.

Waldron insists that property is archetypically sensuous on the grounds that because sensuous things exist, he can see them and they are easier to identify and think about. He continues to do so even though property interests as a legal matter are abstract and Symbolic and as an empirical matter are often concerned with noncorporeal objects. Consequently, sensuous grasping is inadequate to the role of the archetypal relation of the subject with the object of desire of property in precisely the same way as the penis and the female body are inadequate to serve the psychoanalytic role of the *Phallus*. This is the psychoanalytic position of the masculine — the deluded, split, and despairing Lacanian subject who continues to repeat the lie that he is not castrated: he has the *Phallus* merely because he has a penis and controls women.

woman since of her essence — having already risked the term, why think twice about it?
— of her essence, she is not all.

LACAN, *God and the Jouissance of The Woman*, *supra* note 29, at 144; *see also* LACAN, *Television*, *supra* note 47, at 38.

220. *See* Rose, *supra* note 28, at 48-51.

221. This strategy is, of course, always unsuccessful because the Real object is neither the Imaginary *objet petit a* nor the Symbolic Phallus. Once the Real object is obtained, the subject merely identifies the *objet petit a* with another Real object. As soon as one gets that new car, one always wants a new car, a new dress, a bigger house, and so on.

In his late work, Lacan defined the objective of psychoanalysis as breaking the confusion behind this mystification, a rupture between the *objet a* and the Other, whose conflation he saw as the elevation of fantasy into the order of truth. The *objet a*, cause of desire and support of male fantasy gets transposed onto the image of the woman as Other who then acts as its guarantee. The absolute "Otherness" of the woman, therefore, serves to secure for the man his own self-knowledge and truth.

Rose, *supra* note 28, at 50.

Probably the best literary example of this in an overtly sexual context is Leporello's famous catalogue aria in Mozart's opera *Don Giovanni*. Leporello reels off a seemingly endless string of women his master has seduced. The women are of every possible description — beautiful and ugly, young and old, rich and poor. Each Real woman had stood for an instant in the place of the Don's fantasy image of woman, which served as his *objet petit a*. Upon being captured in the Real, however, she proved an inadequate substitute for the *Phallic Mother* as the object of Symbolic desire and was subsequently rejected and a new Real woman was positioned in the place of the Imaginary object. ŽIŽEK, *supra* note 47, at 112-15.

Noncorporeal property, like feminine sexuality, is at once hidden and ubiquitous, lack and surplus. We try to deny the Feminine her role as *Phallus* precisely because she cannot be easily seen and held. Feminine sexuality must be tamed by defining her as the female body that is occupied — possessed — by the penis in heterosexual intercourse. Thus Waldron says that only the tangible, and no other form of property, exists. The noncorporeal can only be discussed if it can be analogized to the corporeal. In Lacanian terms, individuals who are located in the feminine position can never speak in the feminine voice; women must take on or mime the role of the masculine subject to be recognized by society as speaking persons.

Because feminine intangibility is hard to identify and think about, it must be denied. The Feminine and property are identified with "lack."²²² The Lacanian masculine subject insists that The Woman does not exist. Thus Hohfeld, Grey, and Vandevelde mirror back Waldron's psychoanalytically masculine position. They say that the *res* of property does not exist.

The lie that lies at the bottom of our subjectivity is that we Imagine that immediate relationship — union with the Feminine — is a lost state. The subject is always castrated in that the Phallic Mother has been taken away. Men create their subjectivity through the myth that they have and exchange the Phallus and use women to stand in this position — Really,²²³ Imaginarily, and Symbolically. Accordingly, when we are positioned as masculine, we live in fear of castration in the sense of a morbid terror that our masquerade of having the *Phallus* will drop. When we are positioned as feminine, we suffer *Peniseid*, reinterpreted in the Symbolic sense of nostalgic mourning for a forever-lost state of wholeness.²²⁴ There can be no sexual relation,²²⁵ and subjectivity is nothing.²²⁶

But Lacan's interpretation denies the very basis of his theory. We are not castrated, because we never in fact had unmediated re-

222. DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 173 (1992); LACAN, *The Phallic Phase*, *supra* note 133, at 116-17.

223. The exchange of women is *empirical* in the context of the traditional kinship relations explored by Claude Lévi-Strauss. See, e.g., CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 61 (Claire Jacobson & Brooke Grundfest Schoepf trans., Anchor Books 1967) (1963). Lacan's early discussions of sexuality were deeply influenced by Lévi-Strauss's work locating the origins of civilization in the actual exchange of women among groups of men. Lacan's later work moved away from the natural and empirical, emphasizing the impossible nature of the Symbolic exchange of the *Phallus*. See *supra* note 33.

224. LACAN, *The signification of the phallus*, *supra* note 30, at 289.

225. LACAN, *God and the Jouissance of The Woman*, *supra* note 29, at 138-41.

226. See generally Schroeder & Carlson, *supra* note 130.

lations. To be capable of relations we must first, by definition, be individuated subjects capable of being recognized as subjects by others. Property helps to serve this function. Consequently, relationship is not an Edenic state forever lost in our past. It is the impossible, inspirational goal that we glimpse in our future.

The Feminine is psychoanalytically positioned as the mediating object of relationships between masculine subjects. This Symbolic order has been played out in the Real, through traditional kinship structures that have revolved around the literal possession and exchange of actual women among actual men,²²⁷ and in the Imaginary, where women desperately try to conform to and fulfill men's fantasies. Lacan is correct that in this structure there can be no true relation. But this is because the medium of mediation has been traditionally conceptualized as a passive object that stands between subjects. Property — the regime of possession, enjoyment, and exchange of objects that are not themselves persons — appropriately serves this purpose. Consequently, in Hegel's analysis, property is an abstract right that furthers human freedom. But abstract right is the most primitive, and therefore the most abstract and inadequate, form of human interrelationship.

Moreover, the regime of sexuality is not only a Lacanian tragedy but a Hegelian abstract wrong. This is because the desired mediating object is not something external to personality; it is the Feminine. Subjectivity is, therefore, defined as masculinity in the depth of our very psyches. When people stand in the feminine position, they are not accorded full subjectivity. When women²²⁸ speak, they do so derivatively, temporarily standing in the masculine position and becoming honorary men.²²⁹ According to Lacan, it is literally impossible to speak in a feminine voice. Consequently, as I have argued extensively elsewhere,²³⁰ Carol Gilligan and her followers are wrong in arguing that women speak in a different voice.²³¹ The reason that the image of femininity promoted by dif-

227. See *supra* note 223.

228. As I discuss above, see *supra* text accompanying notes 42-43, the positions of *man* and *woman* are Symbolic, not Real (biological). Nevertheless, biological female persons tend to be positioned in the feminine and biological males in the masculine.

229. LACAN, *A Love Letter*, *supra* note 29, at 150; GROSZ, *supra* note 28, at 71-72.

230. See Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135 (1990) [hereinafter Schroeder, *Feminism Historicized*]; Schroeder, *Abduction from the Seraglio*, *supra* note 18; Schroeder, *The Vestal and the Fasces*, *supra* note 12, at 120-47.

231. For an example of this perspective among contemporary feminists, see CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

ferent-voice feminists seems so reminiscent of the traditional masculinist stereotype is that the supposedly different "feminine" voice they listen to is not different at all.²³² Psychoanalytically, it is the same voice, a weak echo of the voice of masculine subjectivity. By championing the role of women's supposed relationality, different-voice feminists merely call on women once again to take on the impossible Imaginary role of conforming to and fulfilling the masculine fantasy of The Woman.

The unfulfilled dream of the true relationships necessary for human freedom requires the rewriting of the myth of the Feminine as an active mediatrix. This requires the creation of *feminine* subjectivity. Lacan is right that The Woman does not exist, but not because she is lost. She does not exist because she is not yet.

Hegel was no feminist. Yet, I argue that the logic of his philosophy dictates that even at the minimum, cold, inadequate level of abstract right — let alone at the higher levels of morality or ethics — feminine objectivity is an abstract wrong that prevents the actualization of freedom for all humans.

Lacan's theory is virulently misogynist. Yet his psychoanalytic theory tells us that the objectification of women for the sake of the subjectivity of men is self-defeating. We can achieve subjectivity only through intersubjective desire. According to Lacan, man does not merely desire the recognition by and the desire of *another*, but *the Other*²³³ with a capital O. In order to create masculine subjectivity, the feminine is constituted as the object of desire and exchange. By doing so, we constitute not only the Feminine but women as the Other. Yet, as the object of desire, we simultaneously deny women in our position as the Feminine (the Other) the subjectivity that would enable us to desire *as women* and to have our Feminine desire recognizable to masculine subjects. Consequently, the intersubjectivity of desire cannot be achieved. The subject is nothing. And the Feminine is positioned as lack.

Lacan was finally able to answer the question that so perplexed Freud: "*Was will das Weib?* (What does woman want?)"²³⁴ She *just wants*.²³⁵ When we stand in the feminine position, we experience ourselves as *wanting* in both senses of the term. Moreover, in our

232. I set forth my critique of different-voice feminism in Schroeder, *Feminism Historicized*, *supra* note 230, and in Schroeder, *Abduction from the Seraglio*, *supra* note 18.

233. See *supra* note 47.

234. 2 ERNEST JONES, *THE LIFE AND WORK OF SIGMUND FREUD* 421 (1955) (quoting a letter from Freud to Marie Bonaparte).

235. LACAN, *A Love Letter*, *supra* note 29, at 151; Mitchell, *supra* note 31, at 24.

masculine aspect we live in despair and terror of the castration we secretly know has always already occurred. Women are left wanting because it is men who are wanting the thing we all want. Men need to insist that they have the *Phallus*, not despite their castration, but just because of their castration.²³⁶

Hegel spent his life arguing that the actualization of freedom in the world is logically necessary. But that which is logically necessary does not always occur as an empirical matter. Because human freedom requires human subjectivity, humans must take an active subjective role in the creation of their freedom.

We cannot create a feminine subjectivity merely by giving empirical women the legal right to act like empirical men — the goal of traditional liberal feminism and MacKinnonesque radical feminism.²³⁷ Nor can empirical women attain feminine subjectivity by trying to speak in a supposedly “different voice,” which is in fact only an echo of masculine fantasy. Lacan tells us that feminine subjectivity is precisely the one thing that is impossible in *this* world. And yet, he also insists that despite the seemingly crushing power of this world to replicate itself, this world is neither natural nor inevitable.

This is why we are called to the impossible task of simultaneously changing the world and ourselves.

236. Žižek wonderfully retells the story of *The Emperor's New Clothes* in this light. See ŽIŽEK, *supra* note 47, at 11-12, 252. What the preoedipal child did not realize when he blurted out the fact of the emperor's nakedness was that adults do not insist that the emperor was clothed despite the fact he is naked. Rather, we need to insist on his clothes *just because* he is naked. It is this fiction that is subjectivity. *Id.*; see also Schroeder & Carlson, *supra* note 130.

237. Catharine MacKinnon would no doubt disagree with my characterization of her theory. Nevertheless, I stand by my critique, which I have presented extensively elsewhere. See Schroeder, *Abduction from the Seraglio*, *supra* note 18; Schroeder, *Feminism Historicized*, *supra* note 230; Schroeder, *Subject: Object*, *supra* note 100; Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEMINISM 123 (1992).