

Review Essay

Kenneth Starr: Diabolically Evil?

THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY.

By Slavoj Žižek.† London: Verso, 1999. Pp. 416. \$27 cloth.

SIC 2: COGITO AND THE UNCONSCIOUS.

Slavoj Žižek ed. Durham & London: Duke University Press, 1998.

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THE PLAGUE OF FANTASIES.

By Slavoj Žižek. London: Verso, 1997. Pp. 288. \$65 cloth.

Reviewed by Jeanne L. Schroeder†† and David Gray Carlson†††

In the midst of unparalleled peace and prosperity, American politics plunged into a traumatic episode when the Republican Party attempted to remove President William Jefferson Clinton from office for crimes never very clearly spelled out. The main result of this initiative was that Republicans (for example, Newt Gingrich and Bob Livingston) were forced out of office, while Clinton enjoyed a level of popularity rarely matched in American history.

Why did the public turn on the accusers and not on the accused? It cannot be said that the Republicans were hypocrites. Hypocrites insincerely take on the mantle of morality in order to gain from their deceptions and dissemblance.¹ If the Republicans were hypocrites, they would have dropped the matter as soon as it became clear that political disaster was the only wage to be gained from the pursuit. Yet they proceeded anyway. The dogged march toward political self-destruction is hardly the stuff of hypocrisy.

If not hypocrisy, why then did they march on in pursuit of Clinton? And why did impeachment prove unacceptable to the public? Slavoj

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† Senior Researcher, Department of Philosophy, University of Ljubljana.

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

††† Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, New York City.
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1. Cf. HENRY E. ALLISON, KANT'S THEORY OF FREEDOM 160 (1990) (hypocrisy is the "compliment which vice pays to virtue"); IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 180 (T.K. Abbott trans., Prometheus Books 1996) (hypocrisy is driven by private advantage but dresses itself in morality). As we shall discuss later in this Review Essay, hypocrisy is not to be scorned totally. It is, in fact, the price we necessarily must pay for civilization.

Žižek's recent books help to explain. Žižek merges the psychoanalytic theory of Jacques Lacan with the European speculative philosophic tradition associated with Kant and Hegel. Žižek's work should be of interest to lawyers and legal philosophers because it explains the link between law and evil.

In the three volumes we review here, Žižek explores the implications of Descartes ("I think therefore I am") and, even more especially, Kant (the expositor par excellence of evil). These two philosophers are of tremendous importance to modern psychoanalytic theory. Žižek shows them likewise to be the quintessential philosophers of impeachment.

At stake in Žižek's work is the very foundation of subjectivity in law. The role of law in the very constitution of subjectivity is much neglected in American liberal philosophy. Though certainly obsessed with law as a means to control human behavior, American liberal philosophy has contented itself with super-simple behaviorist psychology. Typically, American jurisprudence assumes that law is "positive," but the subject of law is "natural." Law is conventional, but the subject is self-identical—a rational entity upon whom law can operate in instrumental ways. Hence, the archetypical American project is to redesign law in ways that increase human enjoyment—namely, utilitarianism. Utilitarianism treats the human subject as an unexamined self-identity that produces preferences as brute givens. Alternatively, law is praised or condemned on natural libertarian principles that rest on the prelegal self-identity of personality.²

Positivist jurisprudence assures us that there is no necessary connection between law and morality,³ but psychoanalysis proves this to be false. A cataclysmic coincidence of law and morality, as we shall show,⁴ is quite necessary to the very emergence of human subjectivity. Consequently, the great achievement of modern liberal jurisprudence is not, as the positivists assume, the discovery of a preexisting, necessary distinction between law and morality. Rather, it is the very act of separation itself, the building of the wall to separate law from morality, whose coincidence is sublimely monstrous.⁵ Man cannot long carry the affliction of uncompromising morality. Positive law displaces direct reference to morality. By doing so it both masks over and attempts to confine morality's sublime monstrosity.

Žižek's writing is uncannily enjoyable, considering that English is Žižek's third or fourth language. The tone is colloquial, humorous,

2. See David Gray Carlson, *Liberal Philosophy's Troubled Relation to the Rule of Law*, 43 U. TORONTO L. J. 257 (1993) (book review).

3. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

4. See *infra* text accompanying notes 78-97.

5. An object is *monstrous*, Kant assures us, if, by its size, it destroys the purpose which constitutes the concept of it. See IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 32-33 (J.H. Bernard trans., Hafner Press 1951).

sometimes amazingly blunt, and fast-paced indeed. In a single paragraph, Žižek easily skips from Hegel to Kierkegaard to Heidegger to a film by David Lynch.⁶ Yet one has a sense of a careful unity to the writing. Themes at the beginning of any given book are well battened down by the time you reach the end.

In America, Žižek is best known as a film critic, most particularly as an expositor of the implicit Lacanian themes in the works of Alfred Hitchcock.⁷ He therefore has become a hero to the burgeoning field of “cultural studies.” But make no mistake about it. Though he traffics in cultural artifacts from the movies and TV, Žižek is this decade’s outstanding philosopher of subjectivity. If he visits the movies, it is strictly a field trip to acquire grist for the psychoanalytic mill.

Ideally, the best way to read Žižek might be to read all of him, starting with his first book and proceeding through the next nine (he writes approximately one book a year) in the order that he wrote them. One would then encounter a continuing conversation Žižek conducts with himself about the nature of the subject. Indeed, throughout his books, he visits the same themes again and again. By the end, these themes are old friends, but one definitely feels no sense of sterile repetition here. In revisiting a topic, he always sheds new light on it. Hence, every book remains vital and can be read independently.⁸

In his most recent work, Žižek concerns himself with the problem of evil and makes the surprising claim that this concept is precisely the Cartesian *cogito ergo sum* (“I think therefore I am”).⁹ Descartes designed the cogito to winnow away the contingent, so that what has matter in itself lies rich and unmingled in its self-certainty.¹⁰ Thus, it is the “standard notion of neutral universality, indifferent to its particular content . . . neutral thinking substance, common to all humans, indifferent to gender, and as such the philosophical foundation” of political equality.¹¹

Žižek’s books do not discuss impeachment as such. The most recent was published in early 1999—too late to take up the proper psychoanalytic meaning of the impeachment debacle.¹² These books, however, explain the

6. See, e.g., *id.* at 51.

7. See EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT LACAN (BUT WERE AFRAID TO ASK HITCHCOCK) (Slavoj Žižek ed., 1992); SLAVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 97-98 (1991) [hereinafter LOOKING AWRY].

8. This, we hope, excuses us for making our argument about impeachment from various other writings besides the three most recent volumes, which are the occasion for this Review Essay.

9. See RENE DESCARTES, *Meditations II: Of the Nature of the Human Mind, in THE METHOD, MEDITATIONS AND PHILOSOPHY OF DESCARTES* 214, 227 (John Veitch trans., 1901).

10. See SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 34 (1999).

11. *Id.* at 100.

12. Some discussion occurs at the very end of the book. See *infra* text accompanying note 145.

dynamic that drove the impeachment on and on against a public will that opposed it.

Žižek's work suggests that the revulsion the majority expressed towards impeachment was related to the Republican claim that they obtained no enjoyment from the process. By their own account, the House managers were merely doing their grim constitutional duty. They were but the ministers and instruments of law and morality. What proved horrific was precisely the possibility that Republicans had no free will but were automatons of a mad, merciless morality. What the public sensed was a whiff of what Kant called diabolical evil.

Diabolical evil is evil that comports exactly with the procedural requirements of Kantian morality. Diabolical evil is what the perfect coincidence of law and morality portends. When law and morality coincide, the ordinary, quotidian traces of evil rooted in the acts of mankind threaten to metamorphosize into a monstrous, sublime diabolical evil.

Even worse, we cannot even pretend to abolish diabolical evil. It turns out that diabolical evil has a function. Law requires and depends on diabolical evil for its very existence. Diabolical evil, in Kantian terms, is indistinguishable from pure morality. We cannot do without morality, so we are stuck with diabolical evil.

Kant's famous categorical imperative—"Act so that the maxim of thy will can always at the same time hold good as a particular of universal legislation"¹³—defines morality in formal terms only. The moral act is that which is done for the sake of universality alone, out of a duty freely adopted on purely rational grounds. What is done for reasons of particularity—inclination, feeling, or, in general, pathology—is evil.¹⁴ Diabolical evil, however, is done for nonpathological reasons—out of a duty freely adopted on purely rational grounds. Hence, it is indistinguishable from the moral. In Kantian philosophy, there is no difference between the highest morality and the direst evil.

Paradoxically, Žižek claims that diabolical evil is also the very founding moment of human subjectivity,¹⁵ a claim that we will fully explain in due course.¹⁶ According to Žižek, diabolical evil is creative as well as destructive. It is the explosive force of the Big Bang that wipes out the old in giving birth to the new. It is the universal within us. More

13. KANT, *supra* note 1, at 46. Žižek, incidentally, claims that Lacan identifies the *Critique of Practical Reason*, with its analysis of the categorical imperative, as the "birth of psychoanalysis." SLAVOJ ŽIŽEK, FOR THEY KNOW NOT WHAT THEY DO: ENJOYMENT AS A POLITICAL FACTOR 229 (1991).

14. Within the Kantian tradition, the term "pathological" carries none of the negative connotations of "diseased" or "sick." Rather, based on the Greek root *pathos* (suffering), pathology merely designates that which relates to emotions and feelings—as opposed to pure reason. KANT, *supra* note 1, at 94.

15. See SLAVOJ ŽIŽEK, THE PLAGUE OF FANTASIES 229 (1997).

16. See *infra* text accompanying notes 36-53.

precisely, it is the Cartesian moment of *cogito ergo sum*. In a very paradoxical sense, then, Republicans were indeed doing their grim constitutional duty, if, by “constitution,” we speak of our psychoanalytic constitution. As we shall explain, the death drive of the Republican party was fully foretold in Descartes’ maxim, “I think therefore I am.”

On Žižek’s line of reasoning, the American majority is mistaken if they think that only the “bad Republicans” are capable of taking joy in rage and destruction, untempered by pity or remorse. This blind destruction in the name of morality is fundamental to personality—even Democratic personality. As Linda Tripp explained, “I’m just like you.”¹⁷ Let the Democrats scorn this remark. Žižek shows that Tripp was dead on the money when she said this. In a fundamental way, we are Linda Tripp. We share her penchant for utter destruction. And this is why the Republicans had to drop so precipitously (if temporarily) in the polls.

In this Review Essay, we will explore the idea of diabolical evil as the obscene supplement of law. We will show why morality is simultaneously a necessary component of personality and, in its pure form, indistinguishable from Kant’s “diabolical evil.” Diabolical evil is nothing but the negative freedom of the human subject, and as such, is the very foundation of liberal philosophy and modern psychoanalysis. Without the theoretical possibility of thoroughgoing evil, there can be no “good” and no culture. Indeed, culture is nothing but the regulation of evil that displaces diabolic evil with legality¹⁸ and the everyday immorality that Kant called “radical” evil.¹⁹ We legislate positive law precisely to foreclose the possibility that diabolical evil might manifest itself in the empirical world.²⁰ The “ontologization” of diabolical evil bears a precise name in psychoanalytic terms—psychosis. Yet, ironically, this psychosis underlies and precedes (and is required by) law and concrete freedom. It is the cogito—horrific in its universality.

17. Elaine Sciolino, *Testing of a President; Tripp, Her Testimony Over, Says Truth Was Her Only Motive*, N.Y. TIMES, July 29, 1988, at A17.

18. “Legality” consists of acts outwardly conforming to law but undertaken for private reasons unconnected with respect for law. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 17-18 (Mary Gregor trans., 1991).

19. According to Kant, “This evil is *radical*, since it corrupts the ground of all maxims; as natural propensity, it is also not to be *extirpated* through human forces.” IMMANUEL KANT, *RELIGION WITHIN THE BOUNDARIES OF MERE REASON* 59 (Allen Wood & George Di Giovanni trans. & eds., Cambridge Univ. Press 1998). It is a common misperception that the Kantian term “radical” evil bears the colloquial connotation of really, really extreme evil (that is, diabolical evil), perhaps because of Hannah Arendt’s terminology in her famous work on the banality of evil. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1987). Žižek himself made this terminological error in his early work. SŁAVOJ ŽIŽEK, *TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY* 45-47, 95 (1993); Jacques-Alain Miller, *A Discussion of Lacan’s “Kant with Sade,”* in *READING SEMINARS I AND II: LACAN’S RETURN TO FREUD* 212, 215 (Richard Feldstein et al. eds., 1996) (discussion between Miller and Žižek).

20. See ŽIŽEK, *supra* note 10, at 132.

We will suggest that the reason why the majority of the voting public reacted negatively to the specter of impeachment is connected to a dim recognition that we might be glimpsing sublime diabolical evil. To be sure, the position of diabolical evil cannot be sustained—though it can be tragically destructive for short periods. Kant's terminology makes this clear. Just as no man is an angel,²¹ no man is a demon capable of such disinterested purity. And so, we will conclude that, despite the public's suspicion, the Republicans never achieved diabolical evil, just garden variety, human "radical evil," like the rest of us. Their specific form of radical evil, the one manifest in prosecutorial zeal (wickedness) bears only a surface resemblance to diabolical evil. Nevertheless, Kant emphasizes that great destructive forces exist in nature are "sublime." They give rise to the illusion that we can attain the noumenal realm of pure morality—and therefore diabolical evil.²² The American public has tasted the sublimity and finds it prefers sublimation—positive law that stabilizes society and defers for a time our place on the slaughterbench of history.

I

THE ADVENT OF LACANIAN THEORY

Few Americans have noticed the deposition of Freud as the high priest of psychoanalytic theory. The usurping hand that wrenched the scepter from his grip belongs to Jacques Lacan, a French psychoanalyst and philosopher whose career spanned from the 1930s until his death in the 1980s.²³

Žižek's relation to Lacanian psychoanalysis is rather like that of St. Paul to Christianity.²⁴ Žižek usually speaks in Lacan's name, but one has the uncanny feeling that Žižek is filling in the harmonies, as Busoni did for Bach, in ways that would have surprised (and presumably pleased) the original author.²⁵

Lacan's great innovation was, in fact, a recapitulation. He famously insisted in his first ten seminars²⁶ that psychoanalysis needed to "return to

21. See KANT, *supra* note 1, at 155.

22. See KANT, *supra* note 5, at 96-101.

23. For some introductions to Lacan from a lawyer's perspective, see JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* (1998); Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483 (1998).

24. Incidentally, Žižek finds in St. Paul a precursor to Kant as expounder of radical evil. See ŽIŽEK, *supra* note 10, at 126-55.

25. Žižek is a product of the "Slovenian school"—a remarkably original group centered in the University of Ljubljana whose works are collected, *inter alia*, in SIC 2: COGITO AND THE UNCONSCIOUS (Slavoj Žižek ed., 1998) [hereinafter SIC 2]. This book of essays is one of the works being reviewed here. For a history of the Slovenian school, see Ernesto Laclau, *Preface*, in SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* (1989) [hereinafter SUBLIME OBJECT].

26. Lacan typically did not write books or treatises but gave "seminars," which consist of transcripts—no doubt heavily edited after the fact.

Freud."²⁷ But he did not mean by this that we should slavishly crouch at the feet of Freud as prophet. Rather, Lacan sought to turn psychoanalytic technique on itself by examining its origins in Freud's seminal writings. Most notably, Lacan recovered the repressed intellectual context in which psychoanalytic theory gestated—the European speculative philosophical tradition.²⁸ By subjecting Freud to the Hegelian dialectic and, figuratively, putting Kant, Hegel, et al. on the couch, Lacan was able to add the insights of philosophy to psychoanalysis and to develop a richer theory of the subject than his predecessor. Žižek, in turn, has brought the interplay of psychoanalysis and philosophy to a new level. Consequently, even though Lacan, a clinician, developed his discourse as a means of analyzing patients, his theory, as expanded by Žižek, speaks to any discipline—including jurisprudence—that depends on a theory of the relation of the subject and the law.

Žižek's overriding concern is the subjective experience of law—but not law as H.L.A. Hart might conceive it. Hart would define law as a subset of culture produced by intuition (that is, a "rule of recognition").²⁹ In effect, Hart thought that law was whatever the law schools customarily teach. For Žižek, law means the entire symbolic order—knowledge, understood as the complete chain of signification which Lacan designated by the "matheine" " S_2 ".³⁰ S_2 is the set of all ideas, all concepts, all distinctions that have ever and will ever be drawn. In general, the psychoanalytic law stands for "being." In Cartesian terms, if we think and therefore we are, law is on the side of the "are."

To be sure, in Žižek's work, law includes the political constitution and criminal law—laws that Hart would "recognize." These are exemplars within S_2 , and Žižek frequently addresses them; but law includes superego prohibition as well. Žižek locates the ground of the superego in S_2 , which generates the very idea of subjectivity. S_2 internalized becomes the superego. Yet law is never fully internalized. It is "ex-timate"—a foreign intruder into our most intimate core.³¹ Human subjectivity is therefore both created by, yet fundamentally alienated from, law.³²

27. E.g., Bruce Fink, *Preface to READING SEMINARS I AND II: LACAN'S RETURN TO FREUD*, *supra* note 19, at 1.

28. Indeed, as far as we can tell, Freud never read a word of Kant or Hegel, except for what, if anything, might have been required reading at his gymnasium or university. See DANIEL BERTHOLD-BOND, *HEGEL'S THEORY OF MADNESS* 100 (1995) (stating that Freud cited Hegel only once, in a way that indicated unfamiliarity with Hegel's work).

29. H.L.A. HART, *THE CONCEPT OF LAW* 94-95 (1961).

30. In comparison, S_1 is the Master Signifier—a void that must be "filled in" with an exemplar from the portfolio of S_2 . See ŽIŽEK, *supra* note 13, at 23-25. A "inatheme"—Lacan's neologism—is a pseudo-mathematical expression.

31. "Ex-timate" is a Lacanian neologism, representing that which is foreign but within us. See ŽIŽEK, *supra* note 10, at 45. The "ex-timate" is what we are "more than ourselves." *Id.* at 375. It reflects the proposition that what we feel is *most* ourselves—our subjectivity, our sexuality, our desire, our moral conscience, et cetera—is created through intersubjective relationships, language, and law

In mainstream jurisprudence, law is outside human desire. Its purpose is seen as, variously, to fulfill, control, or thwart preexisting "natural" desires. In contrast, law operates at the level of desire in Lacanian theory. Lacan belongs to a tradition, going back at least to Aristotle, that denies the subject is natural. Rather, the subject is the product of law and cannot coherently be considered separate and apart from it. In this tradition, there is no prelegal self. Indeed, in Lacan, law constitutes desire.

Furthermore, unlike utility-based systems of discourse which dominate American law talk, the Lacanian tradition emphasizes the transcendental element of freedom that each subject enjoys. In truth, American liberal philosophy thinks that it honors the freedom of the natural subject to follow her ends where they might lead (consistent with the rule of law), but its concept of freedom is precritical, abstract, and unsatisfactory. The freedom of American liberal philosophy is merely a "negative freedom"—the freedom to do what you want, no matter how arbitrary and capricious (always with the proviso that you must not violate the rights of others). Negative freedom, however, ends up being all form and no content. When negative freedom obtains a content, it is supplied by our inclination—our pathological side, the side of feeling.³³ In the end, mere negative freedom is, in fact, slavery to impulse (as law-and-economics emphasizes, when it enchains the subject to "incentives"). Of negative freedom Hegel wrote:

It is inherent in arbitrariness that the content is not determined as mine by the nature of my will, but by *contingency*; thus I am also dependent on this content, and this is the contradiction which underlies arbitrariness. The common man thinks that he is free

(that is, the symbolic order) and is, therefore, in some way outside of ourselves as well. See Schroeder, *supra* note 23, at 502-03. See generally Jacques-Alain Miller, *Extimité* (Françoise Massardier-Kenney trans.), in *LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE AND SOCIETY* 74 (March Bracher et al. eds., 1994).

32. This state of alienation is what Lacan called castration. In Lacanian terms, castration is "the understanding that we only exist as subjects within law and language, yet law and language are external to, and imposed on, our subjectivity." SCHROEDER, *supra* note 23, at 67. Castration refers to "the subject's alienation by and in the Other and separation from the Other." BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 72 (1995). In other words, we "find" ourselves only in external materials outside of ourselves. As Žižek puts it:

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

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

33. See generally David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908 (1999).

when he is allowed to act arbitrarily, but this very arbitrariness implies that he is not free.³⁴

What negative freedom implies is that the human subject is permitted to follow his irrational impulse. Visions of the good (in deontological theories) and mere preferences (in utilitarian theories) are usually accepted as brute givens. Liberal philosophy takes note of these givens only when they intrude upon the rights of others. Otherwise, it is not interested.

In the tradition of Kant, Hegel, and Lacan, the slave to passion is not free. Kantian freedom is not natural but transcendental. Thus, Hegel emphasizes that the negative freedom that grounds the ordinary science of American political philosophy

so misapprehends itself as to place its essence in [abstract freedom, or pure ego], and flatters itself that in thus being with itself it possesses itself in its purity. More specifically, this self-subsistence is the error of regarding as negative that which is its own essence, and of adopting a negative attitude towards it. Thus it is the negative attitude towards itself which, in seeking to possess its own being destroys it, and this its act is only the manifestation of the futility of this act.³⁵

In short, American political philosophy denies that there even is an unconscious—which is, of course, the bread and butter of psychoanalysis, in more ways than one.

This is not to say that psychoanalysis celebrates the unconscious. Žižek strongly claims that the unconscious is precisely the cogito of mad impulse.³⁶ What Žižek promises, through Lacan, is precisely freedom from irrational impulse—freedom from the unconscious and a truer rationality than that which American jurisprudence tends to sponsor.

II

THE COGITO AS ORIGINARY

It has become fashionable among critical theorists to dismiss Descartes as “modern.”³⁷ Having been blamed for everything from the French Revolution to Communism, from ecological devastation to the oppression of women, the cogito is deeply unpopular today, especially with the Foucauldians who largely dominate the “cultural studies” trade.³⁸

34. G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* ¶ 15, at 49 (Allen W. Wood ed. & H.B. Nisbet trans., 1993).

35. GEORG W.F. HEGEL, *SCIENCE OF LOGIC* 172 (A.V. Miller trans., 1969).

36. See ŽIŽEK, *supra* note 10, at 62-65, 149, 247-48, 365-67.

37. Typically, “Cartesianism” is associated with a denial of the unconscious. See BERTHOLD-BOND, *supra* note 28, at 99.

38. Even Vice President Gore has found it politic to take potshots at Descartes. See ALBERT GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* (1992).

Žižek, however, maintains that, by identifying mankind's essence as pure intellect that is only contingently housed in a body (that is, as the ghost in the machine), Descartes paved the way towards conceptualizing the abstract autonomous individual of classical liberal philosophy. Hence, in gratitude, Žižek announces that he intends to "save" Descartes from postmodern criticism.³⁹

But it does not take long before we see that Žižek intends a defense that Descartes himself would not appreciate. Descartes wrote, "I think therefore I am." The Lacanians, however, emphasized that Descartes was disastrously wrong if he hazarded this proposition as a statement of simple identity ("I think = I am").⁴⁰ If we focus solely on the result ("I am") of the process ("I think"), the "I" has symbolic reality. It is a concept. It "is." But this I that "is" is radically incommensurate with the I that "thinks." This thinking I is "not." Hence, what Descartes should have written is, "I think, therefore I am not,"⁴¹ or "I am not where I think,"⁴² or "I do not think, therefore I am," or "either I think or I am,"⁴³ or "I think, therefore . . . everything can be reduced to a determined historical totality except the hyperbolic project."⁴⁴

Žižek makes clear that the cogito ends up being absolute psychotic madness. It is "excessive,"⁴⁵ mad,⁴⁶ and destructive. Everything in the world is enveloped in its wrath. Nothing is left standing before the cogito. Žižek much favors the following passage from Hegel's early writing as aptly describing the cogito:

The human being is this night, this empty nothing, that contains everything in its simplicity—an unending wealth of many representations, images, of which none belongs to him—or which are not present. This night, the interior of nature, that exists here—pure self—in phantasmagorical representations, is night all around it, in which here shoots a bloody head—there another white ghostly apparition, suddenly here before it, and just so disappears. One

39. See Žižek, *supra* note 10, at 1-2; see also SLAVOJ ŽIŽEK, *THE ABYSS OF FREEDOM* 67 (1997) ("[N]otwithstanding all the talk about the end of the Cartesian paradigm, we will continue to dwell within these conceptual coordinates").

40. Žižek writes: "Descartes' error was precisely to confuse experiential reality with logical construction qua the real-impossible." Žižek, *supra* note 19, at 14.

41. Jeanne L. Schroeder, *Three's a Crowd: A Feminist Critique of Calabresi and Melamed's One View of the Cathedral*, 84 CORNELL L. REV. 394, 396 (1999).

42. Mladen Dolar, *The Cogito as the Subject of the Unconscious*, in SIC 2, *supra* note 25, at 11, 28.

43. *Id.* at 18; JACQUES LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* 211 (Jacques-Alain Miller ed. & Alan Sheridan trans., W.W. Norton & Co. 1977).

44. Jacques Derrida, *Cogito and the History of Madness*, in *WRITING AND DIFFERENCE* 31, 57 (Alan Bass trans., Univ. of Chicago Press 1978).

45. Žižek, *supra* note 10, at 2, 62.

46. *Id.* at 62.

catches sight of this night when one looks human beings in the eye—into a night that becomes awful.⁴⁷

This Hegelian “night of the world” is madness proper—the surrender of all symbolic content and the slippage of the human being into pure negativity.⁴⁸

That the cogito is madness is apparent on even casual reflection. If everything contingent is removed from your life, and you are unable to grasp anything concrete, then you have lost touch with reality, and are, as Polonius put it, “nothing else but mad.”⁴⁹

The cogito is designed to be the one universal thing that underwrites our self-certainty, and yet it is madness as such. The madness of the cogito is not merely on display in the clinically insane—those with no “connection” with contingent reality. You and I and everyone are implicated in the cogito. Occasionally, the cogito “ontologizes” itself (that is, manifests itself in empirical reality). When it does, the spectacle is indeed sublime.

In Lacanian theory, although it is madness, the cogito is the first, necessary moment in the creation of the subject—both as a theoretical as well as a biographical matter. Self-consciousness originates at the moment one becomes aware that one is not something or somebody else. “I am not that” (the cogito) is the step that precedes “I am me” (symbolic identification). One tends to think of madness as a state into which conscious human beings slip from a preexisting social reality.⁵⁰ But Žižek, following Hegel,⁵¹ insists that madness is a state from which human beings emerge to construct a social reality. Thus, Hegel’s “night of the world” is “pre-ontological”;⁵² it clears the way for the construction of fantasies.

Empirically this is experienced as a violent moment of separation that, after the fact, is reinterpreted as a loss of a mythical preexistent, primal wholeness or unity with the universe identified with the maternal body.⁵³ In

47. *Id.* at 29–30 (quoting G.W.F. Hegel, *Jenaer Realphilosophie*, in *FRÜHE POLITISCHE SYSTEME* 204 (1974)).

48. See Žižek, *supra* note 10, at 51 (“[W]hen the phantasmic frame disintegrates, the subject undergoes a ‘loss of reality’ and starts to perceive reality as an ‘unreal’ nightmarish universe with no firm ontological foundation . . .”).

49. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 2, sc. 2.

50. Berthold-Bond thus remarks that madness is “pure nostalgia.” BERTHOLD-BOND, *supra* note 28, at 82; see also *id.* at 83 (finding that Hegel’s notion of nostalgic desire “clearly anticipates Freud’s postulation of a primitive death instinct”).

51. See GEORG W.F. HEGEL, *PHILOSOPHY OF MIND* § 408 Z at 128 (William Wallace & A.V. Miller trans., 1971); Žižek, *supra* note 10, at 36; Slavoj Žižek, *The Cartesian Subject versus the Cartesian Theater*, in *SIC* 2, *supra* note 25, at 246, 257.

52. Žižek, *supra* note 10, at 33, 42, 63, 65; see also BERTHOLD-BOND, *supra* note 28, at 29 (stating that madness is “prior to all human socialization”); WILLIAM DESMOND, *BEYOND HEGEL AND DIALECTIC: SPECULATION, CULT, AND COMEDY* 219 (1992) (“[T]he sleeping innocent unity of immediacy must necessarily be ruptured . . .”).

53. This loss is “castration,” as described *supra* in note 32.

the cogito, one first becomes a person by separating and distinguishing one's subjectivity from everything else in the universe. In effect, one obliterates all traces of the world. In Žižek's words:

In a way, the entire psychoanalytic experience focuses on the traces of the traumatic passage from this 'night of the world' into our 'daily' universe of *logos*. The tension between the narrative form and the 'death drive', as the withdrawal-into-self constitutive of the subject, is thus the missing link that has to be presupposed if we are to account for the passage from 'natural' to 'symbolic' surroundings.⁵⁴

III

THE MASCULINE AND FEMININE SIDES OF THE COGITO

Žižek emphasizes that the usual interpretation of Descartes's intended meaning ("I think = I am") is the one thing that cannot be true. The traditional formulation ("I think therefore I am"), however, captures, perhaps unintentionally, the Lacanian reinterpretation of the cogito: Thinking (action) presupposes and hence creates being (existence), and being presupposes and creates thinking. These, however, can never exist simultaneously.⁵⁵ This is, in effect, the Lacanian version of the Heisenberg uncertainty principle, which posits that although position (existence) and momentum (action) both exist at the quantum level, they can never exist simultaneously.⁵⁶

Lacan called this impasse "sexual difference."⁵⁷ The cogito's pole of "I am" is the feminine position and the pole of "I think" is the masculine position.⁵⁸ Lacan, however, rejects any relation of simple complementary duality.⁵⁹ The feminine and the masculine are not opposites, but two sides of the same coin, the one constantly flipping over into the other. Needless to say, the masculine and feminine positions are not to be associated with biological males and females. Rather, any given subject always takes both

54. ŽIŽEK, *supra* note 10, at 35. We explain the Lacanian understanding of the death drive *infra* in text accompanying notes 61-65.

55. The inability of thinking and being to coincide is discussed in David Gray Carlson, *The Traumatic Dimension in Law* (1999) (unpublished manuscript, on file with authors).

56. See FINK, *supra* note 32, at 133-34.

57. Desire, in Lacan, cannot be reduced to the animal mating urge in man, nor can sexuality be reduced to anatomical difference. Rather, sexuality is the symbolization of sexual difference as two different ways the subject can approach the universal experience of being split or "castrated." Although most individuals tend to favor the sexual position associated with their biological sex, this is not necessarily the case, and everybody adopts both sexual positions from time to time. See SCHROEDER, *supra* note 23, at 56-60.

58. See ŽIŽEK, *supra* note 19, at 59-61; Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. (forthcoming).

59. See ŽIŽEK, *supra* note 19, at 61-62; Schroeder, *supra* note 58.

the masculine and feminine sides and is constituted with these two centers, just as the cogito is doubly centered around thinking and being.

Nor should these be confused with the traditional identification of feminine passivity and masculine activity. On the contrary, the feminine is the active position, and the masculine is the passive.⁶⁰ The masculine subject seeks the passive position of being; however, the more he contemplates his existence, the further he is from experiencing pure being. Constantly in the position of interpreting his existence, he becomes "the thing thinking" (the "I think" of the cogito). The masculine subject can never approach his own existence, but only impotently circle around it as he thinks about his thinking about his existence. This aspect of the cogito is the mad disengagement from nature—the death drive.⁶¹

In Lacan's rewriting of Freud, the death drive has nothing to do with the "desire" to die. In fact, Žižek intimates that the death drive is the immortal part of our soul—its universality.⁶² The death drive as compulsion is the very inability to die. This is connected to the "pre-ontological" nature of diabolical evil.⁶³ The death drive represents the obscene enjoyment or "*jouissance*"⁶⁴ one achieves through compulsive activity—such as the overzealous enforcement of law—to its utter destructive limit, no matter what the consequences. It is the "satisfaction in aberration, and even in aberrant acts directed against yourself, that is, finding satisfaction in aggression for the sake of aggression."⁶⁵

In contrast, the feminine subject wishes to engage in action and so has no time for navel gazing. Her motto is "Just do it!" In action, she is so totally engrossed that she achieves immediacy. In other words, she loses

60. Žižek recognizes as much when he labels Kant's *dynamic* antinomies as feminine and the mathematical (that is, passive) antinomies as masculine. See ŽIŽEK, *supra* note 10, at 41.

61. See SIGMUND FREUD, *Beyond the Pleasure Principle*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1955). On the death drive, see ŽIŽEK, *supra* note 15, at 237-381; ŽIŽEK, *supra* note 10, at 41, 52; ŽIŽEK, *SUBLIME OBJECT*, *supra* note 25, at 5.

62. See ŽIŽEK, *supra* note 10, at 292-94.

63. Lacan sometimes also called the drive "libido" or the mythical *lamella*. See RENATA SALECL, (PER)VERSIONS OF LOVE AND HATE 48 (1999). Distancing himself from Freud, Lacan did not equate drive either with the animal mating instinct nor with human sexuality which is characterized by desire. Rather, drive is a uniquely human, nonsexual impulse; it may be thought of as what is left over of the primordial "real" animal instinct *after* its sexual aspect has been symbolized as desire. See *id.* at 48. In Lacan's words "My lamella [Lacan's mythic personification of the drive] represents here the part of a living being that is lost when that being is produced through the straits of sex." Jacques Lacan, *Position of the Unconscious*, in READING SEMINAR XI: LACAN'S FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 259, 274 (Richard Feldstein et al. eds., 1995) [hereinafter READING SEMINAR XI].

64. *Jouissance* is a complex technical term in psychoanalysis. Although in colloquial French it means enjoyment and can refer to both sexual orgasm and the enjoyment of property, Lacan's use of the term cannot be limited to conventional notions of enjoyment and must not be confused with "pleasure," which also has a technical meaning. So-called "feminine" *jouissance* results from the temporary breaking down of the split that separates the three orders of the symbolic, imaginary, and the real. In his works, Žižek emphasizes the horrible and terrifying aspect of *jouissance* as pleasure in pain.

65. Miller, *supra* note 19, at 220.

conscious awareness and enjoys (that is, does not think about) what she does. She becomes pure, immediate, uninterpreted existence, the "I am" of the cogito. The feminine insistence on pure existence negates the existence of everything else. Consequently, the feminine is the acephalous,⁶⁶ active moment of destruction which the cogito unleashes—the murderous rage that can be generated by the death drive.

This fundamental paradox illustrates the meaning of perhaps Lacan's most famous maxim, "there are no sexual relations."⁶⁷ Sexuality is an essential and impossible nonrelation.⁶⁸ Like the two poles of the cogito, the two sexual positions require and presuppose each other but cannot coexist in the same place.⁶⁹

To recapitulate, the I that thinks is "not." The I that is does not think. Here is the key to Žižek's critique of the cogito. Žižek has in mind something that is very, very negative. The cogito is so negative that all that is positive has been removed from it. In many of his works, Žižek emphasizes Kant's view that human subjectivity is not even a "noumenon"—a

66. See ŽIŽEK, *supra* note 10, at 297.

67. This slogan paraphrases JACQUES LACAN, 20 THE SEMINAR OF JACQUES LACAN: ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE—ENCORE 1972-73, 9 (Jacques-Alain Miller ed. & Bruce Fink trans., W.W. Norton & Co. 1998). See Ellie Ragland-Sullivan, *The Sexual Masquerade: A Lacanian Theory of Sexual Difference*, in LACAN AND THE SUBJECT OF LANGUAGE 49, 67 (Ellie Ragland-Sullivan & Mark Bracher eds., 1991); see also ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 137 (1990).

68. Monicagate has led to an unfortunate new cliché among Lacanians (one of us has heard it in no less than three academic talks by Lacanian psychoanalysts, including one given by Žižek himself). President Clinton has been reviled for his ungallant denials of his affair, "I did not have sexual relations with that woman—Ms. Lewinsky." To a Lacanian, however, this was not a lie, but a statement of a universal truth. No man has ever had, nor ever will have, a sexual relation with a woman.

69. As Žižek says, the "war between the sexes" does not arise because "men are from Mars, and women are from Venus," as new age romantics would have it. If we did come from different planets we would be able to accommodate our differences. The problem is that both men and women are from Earth. ŽIŽEK, *supra* note 10, at 272.

'There is no sexual relationship' not because the other sex is too far away, totally strange to me, but because it is *too close to me*, the foreign intruder at the very heart of my (impossible) identity. Consequently, each of the two sexes functions as the inherent obstacle on account of which the other sex is never 'fully itself'

Id. at 272-73 (emphasis in original). Man and woman are not complements that together may form a unified whole. Rather, each is a different failed attempt to be a whole. As explained by Renata 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*.

RENATA SALECL, THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM 116 (1994) (emphasis in original). Consequently, the sexes can never fit together like a jigsaw puzzle; they overlap at some places, and leave gaps in others. See Jeanne L. Schroeder, *The Eumenides: The Foundation of Law in the Repression of the Feminine* (1999) (unpublished manuscript, on file with authors). Although this sounds depressing, there is good news as well. The failure of sexual relations creates desire and desire creates the possibility of something more valuable than sexual relations—love.

transcendental thing in itself.⁷⁰ The masculine subject as the thing thinking can never approach the feminine state of pure existence. And the feminine as pure existence threatens to destroy everything in her path, including the masculine subject. Even a thing in itself, which we can never experience, has far too positive a content to encompass the cogito.⁷¹ If this self were noumenal, then God (a noumenon) would be our equal. God would stand before our eyes as directly perceivable. We would lose our freedom, if we could directly know God's law. We would be mere puppets in the thrall of the moral law. Ironically, morality would become legality, and morality would be thoroughly pathological—that is, natural.⁷²

The cogito is what Žižek quotes Kant as calling the transcendental imagination.⁷³ It is the pure, uncaused thing.⁷⁴ The subject in its radical freedom is spontaneous, as Kant always insisted.⁷⁵ Indeed, freedom is defined as the suspension of causality.⁷⁶ Precisely because they are uncaused, human subjects are “ends” and never means to an end. As an end, the subject is not “caused” but “causes,” and therein lies the moral/legal concept of responsibility. Consequently, each subject is a “master signifier” (designated by the matheme “S₁”) that begins and gives meaning to the chain of signification (S₂) that is the symbolic order of law.

If we isolate the subject as an “end,” we have the cogito. As an “end,” the subject is radically negative. As radical negativity, the cogito is the ideal liberal subject who enjoys “negative freedom” from all outside

70. See Žižek, *supra* note 10, at 25, 45, 52, 303; see also Žižek, *supra* note 15, at 220; Žižek, *supra* note 51, at 262.

71. See Žižek, *supra* note 10, at 25 (“[T]his in-between (the subject) [is] neither phenomenal nor noumenal, but the gap which separates the two . . .”). The import of this claim is that the split that Kant locates at the phenomenal level is more properly located as within the noumenal level itself. See SLAVOJ ŽIŽEK, *THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY* 51 n.7, 185–86 (1994); see also Žižek, *supra* note 19, at 35, 45 (Hegel's innovation over Kant was to insist on “a crack in the universal substance”).

72. See Žižek, *supra* note 10, at 28, 59, 163; see also Miran Božovič, *Malebranche's Occasionalism, or, Philosophy in the Garden of Eden*, in SIC 2, *supra* note 25, at 149 (stating that perfect knowledge of God's law describes the position of Adam in the Garden of Eden). Likewise, if the self could be phenomenally known, this knowledge would imply that the subject is a noumenal thing in itself driving the phenomenon, and we would be back at the same dilemma. Hence, the subject must be considered neither phenomenon nor noumenon but the purest negativity of Pure Nothing. See Žižek, *supra* note 19, at 16.

73. See Žižek, *supra* note 10, at 23, 30, 39–40, 43, 46, 50, 59. We could not find, however, any exact usage of the phrase in the current English translations of the three *Critiques*. According to Žižek, “transcendental” designates objectivity, subjectively mediated. See Žižek, *supra* note 15, at 121.

74. See Žižek, *supra* note 10, at 257.

75. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 77–78, 237, 300 (J.M.D. Meiklejohn trans., 1990); see also Žižek, *supra* note 19, at 38 (stating that spontaneity can only occur within the horizon of human finitude).

76. See Žižek, *supra* note 10, at 43; see also Žižek, *supra* note 51, at 261 (“The Kantian notion of ‘spontaneity’ means precisely that I, the subject, am not directly determined by . . . causes: causes motivate me only insofar as I reflexively accept them as motifs . . .”).

compulsion. Nothing causes the cogito to behave itself. And nothing is the only thing of which we are certain.⁷⁷

The cogito is originary, but it also has an ongoing necessity. The function of the cogito's negativity is to clear the field of received wisdom so that new syntheses can occur. Thus, the transcendental imagination deconstructs. It is "counter-factual." Its privilege is to take nothing as fixed. The cogito is simply deconstruction taken to its radical extreme—negativity when no positive content is left.

IV

DEATH DRIVE AND LAW

The cogito represents the explosive appearance of self-consciousness. It is "originary" because this madness intervenes between animal existence and culture.⁷⁸ As the death drive, the cogito is "the withdrawal-into-self constitutive of the subject [and] is thus the missing link that has to be presupposed if we are to account for the passage from 'natural' to 'symbolic' surroundings."⁷⁹ Only after the person has achieved self-consciousness through negative abstraction can he, as a thinking being, return and attempt to integrate himself into the world. Of course, perfect integration is now impossible since self-consciousness cannot rid itself entirely of the cogito.⁸⁰ Consequently, we can only interpret the world as if it were so, in fantasies generated in the orders of the symbolic and the imaginary. Although this reintegration is never completely successful, the alternative of remaining completely abstracted within the cogito is to have no relation to the world and no interrelation with any other subject—madness itself. Nevertheless, madness is paradoxically the first step—literally a baby step⁸¹—towards sanity.

77. On this paradox, see Robert Pfaller, *Negation and Its Reliabilities: An Empty Subject for Ideology?*, in SIC 2, *supra* note 25, at 225.

78. See ŽIŽEK, *supra* note 10, at 36; Žižek, *supra* note 51, at 257.

79. ŽIŽEK, *supra* note 10, at 35.

80. Why not? This is related to the standard Hegelian notion of *Aufhebung*, a German word that simultaneously means "to destroy" and "to preserve." HEGEL, *supra* note 35, at 107. The phrase is usually translated as "sublation." It is a key term for psychoanalysis, which emphasizes that what is repressed (that is, destroyed) always returns in the unconscious (that is, is preserved). See BERTHOLD-BOND, *supra* note 28, at 38. Hence, the subject seeks symbolic identification in the symbolic order, and in doing so *negates* the cogito, but the cogito is preserved—as the unconscious.

81. The madness of the cogito is reflected in the mirror stage of infancy during which the baby eventually achieves awareness that his care-giver (and then the rest of the world) is not literally an extension of himself. In recognition of the historical norm, this is sometimes expressed in terms of a realization that Mother is Other. This is a point missed by American "different voice" feminists such as Robin West who argue that only boys develop their personality through differentiation from the mother, while girls develop through identification with the mother. Lacanians agree that sexuation is a matter of identifying either with or against the maternal, but, from a Lacanian perspective, such comparative differentiation can only occur at a later step in development (the oedipal stage). Before one can make a comparison and decide whether one is like or unlike something else, one must *first*

How, then, is this acephalous, mad death drive connected to law? Žižek insists strongly that law logically requires this death drive. "Logic" implies that the relation is not based on inclination or choice. Inclination is the realm of contingency. Rather, law requires the death drive as a matter of absolute necessity.

The argument is not expressly set forth in *The Ticklish Subject*, or his other works, but here is how we piece it together from Žižek's various writings:⁸² Law (that is, the symbolic order) and the subject are mutually constituting. That is, although the subject is created by law, law requires the subject for its own existence. Consequently, each is the condition of the other. Law and the subject of law must come into being at the same time. Law is thus the origin of personality.⁸³ Law requires the existence of free human subjects or it cannot appear. To put this in Hegelian terminology, law posits the subject as its presupposition.⁸⁴ Without its opposition to the subject, law could never appear. This makes the subject an "outlaw." As "not-law," the subject is crime.⁸⁵ This is why Žižek writes: "[T]he very existence of subjectivity involves the 'false', 'abstract' choice of Evil, of Crime—that is, an excessive 'unilateral' gesture which throws the harmonious Order of the Whole out of balance."⁸⁶

recognize that the other person is precisely that—something, or someone, else. The judgment, "I am like/dislike her" presupposes the realization that I am not her. See SCHROEDER, *supra* note 23, at 70-73

82. Žižek's clearest statement of this relation is Slavoj Žižek, *Why Does the Law Need an Obscene Supplement?*, in *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* 75, (Peter Goodrich & David Gray Carlson eds., 1998).

83. This argument follows Kant's notion of "origin":

Origin . . . is the descent of an effect from its first cause, i.e., from that cause which is not in turn the effect of another cause of the same kind. It can be considered as either *origin according to reason*, or *origin according to time*. In the first meaning, only the effect's *being* is considered; in the second, its *occurrence*, and hence, as an event, it is referred to its *cause in time*. If an effect is referred to a cause which is however bound to it according to the laws of freedom, as is the case with moral evil, then the determination of the power of choice to the production of this effect is thought as bound to its determining ground not in time but merely in the representation of reason; it cannot be derived from some *preceding* state or other, as must always occur . . . whenever the evil action is referred to its natural cause as *event* in the world.

KANT, *supra* note 19, at 53-55.

84. See HEGEL, *supra* note 35, at 401-02.

85. For Hegel, crime constitutes a *negatively infinite judgment* (for example, "the rose is not an elephant"). See HEGEL, *supra* note 34, at ¶ 95. As Hegel puts it in the *Lesser Logic*:

Crime may be quoted as an objective instance of the negatively infinite judgement. The person committing a crime . . . does not . . . merely deny the particular right of another person . . . He denies the right of that person in general, and therefore he is not merely foreed to restore what he has stolen, but is punished in addition, because he has violated law as law . . . The civil-law suit on the contrary is an instance of the negative judgement pure and simple where merely the particular law is violated, while law in general is so far acknowledged. Such a dispute is precisely paralleled by a negative judgement, like, 'This flower is not red': by which we merely deny the particular colour of the flower, but not its colour in general . . .

HEGEL'S LOGIC § 173 (William Wallace trans., 3d ed. 1975). Law in turn is precisely opposition to crime. See ŽIŽEK, *supra* note 13, at 34.

86. ŽIŽEK, *supra* note 10, at 96; see also *id.* at 99, 160.

This negativity is *jouissance*—enjoyment conceived as the negation of an object. It is pure appetite, “doubly seconded with will and power.”⁸⁷ But appetite, “an universal wolf, Must make perforce an universal prey, And last eat up himself.”⁸⁸ Everything, including itself, must be destroyed. Negativity itself must be negated. This is the foundational role of diabolical evil.

This *jouissance* is lethal, Žižek writes⁸⁹—an “insatiate cormorant” that soon preys on itself.⁹⁰ But, in so doing, the negativity preserves itself.⁹¹ As much as we would like to, we cannot get rid of the negativity of *jouissance*.⁹²

Nevertheless, in the hope of abolishing itself, negativity, in its self-hatred, can only return to the symbolic order and construct for itself an existence in society. That is, it begins to legislate. In its legislation (what Hegel calls “positing”)⁹³ the thinking thing “is.” This existence in the symbolic is the subject’s fantasy, built in collaboration with others. The subject needs this positive fantasy (and needs others to sustain it with him) because it cannot sustain itself on destruction alone.⁹⁴ In effect, the cogito mediates between the “natural” law of morality and the “positive” law of mere legality.

The preontological law posits a mad, lawless cogito, which in turn legislates a positive law; this dialectic makes law very paradoxical. On the one hand, law insists that the subject exist as law’s negative. On the other hand, law condemns the lawless. Thus, law condemns its own child, just as revolutions always eat their own children.⁹⁵ The child of law has its revenge, however. It kills its father; Lacan calls this “father enjoyment”—and replaces him with the “Name-of-the-Father”—culture as we know it.⁹⁶

87. WILLIAM SHAKESPEARE, *THE HISTORY OF TROILUS AND CRESSIDA* act I, sc. iii.

88. *Id.*

89. See ŽIŽEK, *supra* note 15, at 239. We must emphasize that Lacan himself recognized many different forms of *jouissance* (enjoyment) and adopted many different paradigms for *jouissance* over his career. Žižek emphasizes only one of these forms of *jouissance* in the work we discuss.

90. WILLIAM SHAKESPEARE, *RICHARD II* act 2, sc. 1.

91. This is, once again, the moment of *Aufhebung*. See *supra* note 80 and accompanying text.

92. See ŽIŽEK, *supra* note 10, at 291-92; ŽIŽEK, *supra* note 39, at 53.

93. HEGEL, *supra* note 35, at 200-01.

94. See Žižek, *supra* note 82, at 90-91.

95. Renata Salecl writes:

The paradox of the superego is that, on the one hand, it is linked to the law of castration [i.e., the split subject]; but, on the other hand, the superego . . . is analogous to castration in its prohibitive function, while at the same time it is not submitted to the phallic order. As a result, the superego is a demonic agency that commands the subject to go beyond the phallic order and to experience a non-phallic *jouissance*, but this agency also prohibits the subject access to this *jouissance*.

Renata Salecl, *The Silence of the Feminine Jouissance*, in SIC 2, *supra* note 25, at 175, 189.

96. Freudians will recognize this as a reference to Freud’s myth of the origin of law in the primordial murder of the obscene Father Enjoyment. See SIGMUND FREUD, *Totem and Taboo*, in 13 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1955). Lacanians will recognize it in the guise of Lacan’s rewriting. See Jacques

Considered as the constitution of the subject itself, the preontological law is the Freudian superego as rewritten by Lacan. In the ordinary Freudian understanding, the "superego" is the internalization of law as prohibition (sometimes called the incest taboo) roughly equivalent to what is commonly called the "conscience"—a "blushing, shame-fac'd spirit that mutinies in a man's bosom."⁹⁷ It chastises the subject for "doing evil." But the Lacanian superego has a "diabolical" side as well. This is the side that requires the possibility of its own transgression. Consequently, the Lacanian superego, as the condition of law, must sadistically cause the possibility of the very evil it condemns.⁹⁸

V

KANTIAN EVIL

The cogito is deeply implicated in evil—the negation of law. Žižek, explicating Kant, identifies four levels of evil.⁹⁹ Before we explore these forms and how they played out in the impeachment episode, perhaps some basic information about Kant's moral system will be illuminating.

The revolutionary aspect of Kantian ethics was the divorce of the Moral from the Good. In other words, the moral law has no pregiven substantive content. Morality is instead to be determined by a purely formal, procedural test of universality. This test is the famous categorical imperative. In contrast, good has content.¹⁰⁰

The formality of the categorical imperative follows from Kant's theory of human personality as the purely negative capacity for freedom. The abstract person is without content; likewise, the moral law freely chosen by the abstract person must also be without content. The content of empirical personality (that is, our individual characteristics, desires, preferences) is not essential to the person, but merely contingent or accidental—pathological, in Kant's terminology. Any instrumental reason for following a law is similarly "pathological"—not moral. This is so no matter how conventionally noble these instrumental reasons might be. It is pathological, not moral, to feed a starving child out of pity rather than out of duty to the moral law.¹⁰¹

Lacan, *Introduction to the Names-of-the-Father Seminar*, in JACQUES LACAN, *TELEVISION: A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT* 81 (Joan Copjec ed. & Dennis Hollier et al. trans., 1990) (1974). Žižek discusses this myth extensively in his works. See, e.g., ŽIŽEK, *supra* note 10, at 314-18; see also Jeanne L. Schroeder & David Gray Carlson, *The Subject is Nothing*, 5 *LAW & CRITIQUE* 93 (1994) (reviewing ŽIŽEK, *supra* note 13).

97. WILLIAM SHAKESPEARE, *RICHARD III* act 1, sc. 4.

98. In science fiction terms, this is "the dark side of the force."

99. See ŽIŽEK, *supra* note 19, at 99-101.

100. For Kant, the good is what is desirable in relation to our whole state. It is based on reason. See KANT, *supra* note 75, at 450. The good is an object that is desired (and hence a concrete thing replete with content). Its existence promises pleasure. See KANT, *supra* note 1, at 76-77, 80.

101. See ALLISON, *supra* note 1, at 186.

For an act to be moral it must be done purely out of a free choice to heed the internal voice of the moral law and for *no* pathological reason. Any act not done out of this purest form of duty is evil.¹⁰²

Although the essence of a subject is her abstract will without pathology, empirical humans are concrete persons located in a phenomenal world. By definition, concrete personality is constituted by pathology. That is, to take a concrete action is precisely to pour a content into the empty form of the moral law. Unhappily, this means that every concrete choice is inescapably pathological; the act always has an instrumental reason. Consequently, Kant insists that every attempt by man to act ethically and to obey the moral law is stained by the "evil" of pathological motives.

Of Žižek's four evils, the first three correspond to the three types of ordinary human or "radical" evil, which Kant identifies as weakness, wickedness, and impurity.¹⁰³ Each of these three empirical evils involves not only a surrender to inclination, but also a failure to confront the truth of the event after the fact. The fourth type of evil, however, is not empirical but transcendental. It corresponds to the Kantian category of "diabolical evil."

A. *Radical Evil as Frailty (Lack of Willpower)*

The first type of evil is simply weakness of the will.¹⁰⁴ In this most banal of evils, a person claims either to be too ignorant to know his duty, or simply unable to resist his inclination to act. ("The devil made me do it.")

Traditional Christian ethics, following Plato, interpreted frailty as a negative quality (that is, lack of goodness conceived as a positive quality). For Kant, however, such a "negative" concept does not suffice. For example, by this test we would have to say that a dog is evil. On account of its lack of cognitive power, the dog is too ignorant to understand the moral law, and on account of its voracious nature and lack of self-consciousness, it is incapable of molding its behavior in accordance with the moral law. But this is meaningless. Even though a dog may not be moral, we exculpate a dog precisely because its ignorance and voraciousness mean that it

102. See KANT, *supra* note 19, at 49, 55-56. Kant also claimed that all human beings had an evil disposition, within his definition. See *id.* at 46. This is why he called human evil "radical" evil. Kant himself did not offer a logical proof for this proposition because he stated it was self-evident. See *id.* at 56-57. Kantian scholars disagree about whether his claim that all human beings are radically evil is necessarily true. Compare ALLISON, *supra* note 1, with Mark Timmons, *Evil and Imputation in Kant's Ethics*, 2 ANN. REV. L. & ETHICS 113 (1994).

103. Following Žižek, in this section we list impurity as the third, most extreme form of radical evil. Kant, however, made impurity the intermediate form of radical evil. As should become apparent by the end of this Review Essay, we ultimately agree with Kant's assessment that wickedness is the most dangerous form of radical evil. In fact, the hypocrisy of impurity might be all that we can expect from the law.

104. See KANT, *supra* note 19, at 53; Timmons, *supra* note 102, at 123-27.

could not have acted otherwise.¹⁰⁵ The concept of culpability requires a capacity to be moral.

Consequently, following Kant, Žižek argues that the devil (that is, pathological inclination) never makes man do anything. Given that human nature is nothing but the capacity for choice, when man falls, he always freely chooses to disobey the moral law, and to give in to his frailties and inclinations.¹⁰⁶ Every choice, no matter how coerced or “forced,” is nevertheless a choice imposing moral responsibility. Furthermore, the claim that one couldn’t help oneself is not merely false, it is a lie that compounds the evil of the act; this claim is an immoral response to the fact of one’s own evil.¹⁰⁷

B. Radical Evil as Wickedness (*Prosecutorial Zeal*)

Žižek’s second form of evil corresponds to Kant’s “wickedness.” The way in which the wicked subject denies his own responsibility is precisely the reverse of the device favored by the morally weak subject. The morally weak subject admits his transgression but refuses to accept responsibility on the false grounds that he is weak. The wicked subject falsely claims conformity to moral law when, in fact, he violated the moral law by choosing to act to further his own pathological *jouissance*. The wicked subject does this by refusing to hear the moral law as an internal voice that calls from within each abstract person. The subject instead externalizes moral law by identifying it with a specific regime of positive law. That is, the subject pretends that the moral voice calls from the outside, not the inside. By claiming to follow externalized “standards,” the subject not only chooses to disobey his duty to hear the internal voice of moral law, he disguises the nature of his actual choice—the exaltation of pathology over morality. In Kant’s words:

[T]he depravity . . . or, if one prefers, the *corruption* . . . of the human heart is the propensity of the power of choice to maxims that subordinate the incentives of the moral law to others (not moral ones). It can also be called the *perversity* . . . of the human heart, for it reverses the ethical order as regards the incentives of a *free* power of choice¹⁰⁸

105. Here we confess we neither know nor aspire to know anything about dogs. Yet, on reflection, dog owners are constantly explaining to their pets that they are “bad.” We read this custom, however tentatively, as anthropomorphism.

106. See Žižek, *supra* note 51, at 246, 261; Žižek, *supra* note 32, at 169.

107. So, it would seem that immoral behavior characteristic of the morally weak agent can be explained in terms of the agent’s reasons for action: She does have reasons for acting as she does—considerations bearing on action whose relevance depends on inclination—which she intentionally takes to be a reason for action . . . and which thus provides a rationalizing explanation of her actions. Her action (or omission) is thus imputable. See Timmons, *supra* note 102, at 125.

108. KANT, *supra* note 19, at 54.

In other words, unlike the weak subject who feels guilty and searches for an excuse, the wicked subject feels smug and self-righteous because she acts out of principle—what Henry Allison calls “ungrounded moral self-satisfaction.”¹⁰⁹ To put this another way, the subject chooses to follow his *jouissance* and then looks for an external regime that coincides with his *jouissance* as a cover story, a retroactive rationalization for his actions.

A wicked subject may frequently act in a manner that is outwardly consistent with moral law. The appearance, however, is deceptive. The wicked subject is not motivated by the moral law, but by a nonmoral maxim.¹¹⁰ Consequently, the act is wicked.

From this position, the prosecutor sees himself as enforcing the external law to the limit, not for pathological reasons but because he was simply the neutral instrument of the law. This was, ultimately, the position of the Republicans. Their enjoyment of the process was palpable, but they sought to place responsibility, not in their enjoyment, but in the requirements of the criminal law and the United States Constitution.

One should not infer from this that we are accusing the Republicans of hypocrisy; we have already acquitted them of this charge. In our definition, hypocrisy requires that the hypocrite consciously seeks to deceive others. In contrast, wickedness consists of self-deception.¹¹¹ Consequently, the “radically evil” aspect of prosecutorial zeal lies precisely in the sincerity which masks the subject’s failure to confront his own pathology. This is a violation of the Kantian principles of both autonomy and reflection.¹¹²

Wickedness can have horrific empirical consequences which indeed approach the sublime of diabolical evil (the fourth “transcendental” form of evil we will discuss). By externalizing morality the prosecutor is only able to judge himself as moral per se insofar as he enforces the external law to the full extent. The prosecutor can then indulge his *jouissance* through the sadistic pursuit of the external evil doer, while maintaining the public position that he is merely doing his duty. On this reasoning, whatever the prosecutor does is always justified because the prosecuted, being evil, always deserves what he gets. The impeachment hearings were a mild case, compared to the atrocities of the French Terror, the Nazi death camps, the Staliuist show trials, the Maoist Cultural Revolution, and Pol Pot’s year zero campaign. In these instances when society organizes itself around prosecution, the government in effect makes an obscene unspoken pact with its people: So long as you pledge your allegiance to me, you may indulge your *jouissance* in any way you want, no matter how horrible.

109. ALLISON, *supra* note 1, at 158. In Timmons’s words, “[S]he has in effect deliberately adopted a supreme maxim that gives priority to non-moral reasons.” Timmons, *supra* note 102, at 130.

110. See Timmons, *supra* note 102, at 130.

111. See *id.*

112. See *id.* at 131.

The totalitarian master says, "you are allowed to kill, rape and plunder the Enemy, let yourself go and excessively enjoy, violate ordinary moral prohibitions . . . *in so far as* you follow Me."¹¹³

The enunciated position of wickedness cannot be sustained, however. Kantian moral law—the categorical imperative—is form only. The ascription of any content to moral duty must be prompted by pathology. Hence, as Žižek emphasizes, duty cannot serve as an excuse for doing our duty.¹¹⁴

Kant considered the wicked subject to have a perverted mind,¹¹⁵ and Žižek agrees. The position of the wicked, Žižek explains, is the fundamental position of the sexual pervert in the technical Lacanian sense of the term. The position of the pervert is to become the object of the other's *jouissance*. As Žižek puts it:

The obscene *jouissance* of this situation is generated by the fact that I conceive of myself as exculpated from what I am doing: isn't it nice to be able to inflict pain on others in the full awareness that I'm not responsible for it, that I am merely fulfilling the Other's Will . . . *this* is what Kantian ethics prohibits.¹¹⁶

Kant was thus no pervert,¹¹⁷ even if Lacan placed him with his notorious contemporary, the Marquis de Sade.¹¹⁸ The Republicans, however, were. Ironically, while the House Managers accused Clinton of sexual obsession, they themselves adopted the psychoanalytic position of sexual perversion. They objectified themselves and served the *jouissance* of their followers, by performing their supposedly nopathological duty.¹¹⁹

C. Radical Evil as Impurity (Legalism)

The third type of evil Žižek identifies—legalism, or impurity—provides a somewhat more subtle attempt at avoiding responsibility for radical evil by externalizing morality as an identifiable set of rules or positive law. If the prosecutor hides his *jouissance* by following the law to the fullest extent, the legalist identifies morality with the bare minimum required by law. The legalist feels that he is free to choose *jouissance* to

113. Žižek, *supra* note 10, at 391.

114. See Žižek, *supra* note 15, at 80, 220-21.

115. See *supra* text accompanying note 108.

116. Žižek, *supra* note 15, at 222-23. As Jacques-Alain Miller explains:

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

Miller, *supra* note 19, at 213.

117. See Žižek, *supra* note 32, at 170.

118. See *infra* text accompanying notes 123-29.

119. This is the import of the Lacanian slogan of *Kant avec Sade*. The agency that pronounces the ethical imperative is "a sublime version of the sadistic torturer who demands the impossible and finds enjoyment in humiliating the subject." *Id.* at 173.

the fullest extent, just so long as he is seen to follow the few rules. In contrast to the prosecutor who doesn't modify his behavior in accordance with moral law, but searches for a positive law that will justify his *jouissance*, the impure, legalist subject does modify his behavior in accordance with preexisting law, but only insofar as it also serves his pathological reasons. If he has an incentive to act otherwise, the impure subject bends the law whenever he thinks he can get away with it.

Unlike the wicked subject who does not recognize the moral law but adopts alternate immoral maxims, the impure person *does* recognize the moral law, and may even desire to follow it,¹²⁰ but acts for other, pathological, purposes.

[T]he *impurity* . . . of the human heart consists in this, that although the maxim is good with respect to its object (the intended compliance with the law) and perhaps even powerful enough in practice, it is not purely moral, i.e., it has not, as it should be [the case], adopted the law *alone* as its *sufficient* incentive but, on the contrary, often (and perhaps always) needs still other incentives besides it . . . in other words, actions conforming to duty are not done purely from duty.¹²¹

When conduct is based not upon the rules as such, but only on fear and approbation of the incentives created by law, the subject's motivation is bad, even if the action is "legal."¹²² Action that accords with positive law for the instrumental purpose of avoiding an unwanted result is based on instrumental reasoning and is just as pathological as any action taken in order to achieve *jouissance*. At least the wicked subject deludes himself into thinking that he cares for nothing but morality. The wicked subject can claim a sort of tragic nobility. He will stick to his principles to his own detriment as we saw in the impeachment drama.

In contrast, the impure subject who knows only instrumental reason reveals a fundamental indifference to morality in every act he undertakes. Although he hears the voice of the moral law itself, and may even believe that he should obey the moral law, he needs incentives in order to act. If the impure subject eventually goes down, it is not because of delusion (as is the case of the wicked) but because of miscalculation. The impure subject is corrupt but has no guilty conscience because she can always rationalize her bad motives by the fact of outward compliance with the law. This was precisely the Republican accusation against Clinton.

Prosecutorial zeal (wickedness) and legalism (impurity) are two precisely opposing results of externalizing morality as positive law. Not

120. See ALLISON, *supra* note 1, at 160 ("It is clear that in spite of the need for an extramoral incentive, such impurity is compatible with a considerable degree of moral commitment.").

121. KANT, *supra* note 19, at 53-54.

122. Timmons, *supra* note 102, at 127.

surprisingly, therefore, the prosecutor and the legalist each sees the other as the very paragon of evil. This is because each position threatens to reveal the fundamental evil nature of the other. If inorality is the external law, as the wicked Republicans insist, the impure Democrats ask: Why isn't it sufficient to follow the letter of the law? To do more is to admit a moral law beyond positive law, and from this admission against interest, the impure could impeach the wicked prosecutor for immorality—failure to consult the moral law. If morality is mere compliance with the law without regard to motive, as the impure Democrats believe, the wicked Republicans ask: What's wrong with prosecuting the law to its fullest extent? Even if your legalisms get you off the hook this time, there are probably worse things you've done that we have not yet discovered—hence all-out prosecution is justified. The wicked subject sees with X-ray vision the venal and corrupt heart of the impure subject. Likewise, the impure subject correctly sees that the wicked subject is not following morality, but *jouissance*. Consequently, it is precisely the claims of Clinton's supporters that his infractions were minor peccadillos that infuriated the prosecutors, and precisely the prosecutors' claims to righteousness that disgusted Clinton's supporters. Each side saw the image of its own radical evil reflected back at him in the words and deeds of the other.

D. Diabolical Evil

The fourth evil ascends from the darkling plain of the phenomenal to something more sublime. This is the transcendental realm of diabolical evil. A subject is merely radically evil insofar as pathology influences his choice. A subject is diabolically evil if she would freely choose to violate the moral law for nonpathological reasons. At the sublime level of "diabolical" evil, a person must know that the stain of pathology is absent. Evil is done for the sake of duty alone. It is beyond the pleasure principle.¹²³

Recall that the moral is that which is done for nonpathological reasons. Now we have evil done for nonpathological reasons. At this lofty height, evil is indistinguishable from morality.

Lacan insisted that in order to understand Kantian ethics, it is necessary to read Kant *avec Sade*.¹²⁴ If one does so, one can see that at the level

123. See ŽIŽEK, *LOOKING AWRY*, *supra* note 7, at 162.

124. Lacan first introduced this shocking comparison in his seventh seminar on the ethics of psychoanalysis. See JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN, BOOK VII: THE ETHICS OF PSYCHOANALYSIS 1959-1960* (Jacques-Alain Miller ed. & Dennis Porter trans., W.W. Norton & Co. 1992) and later developed it in the essay *Kant avec Sade*, translated into English as *Kant with Sade*, 51 OCTOBER 55 (James B. Swenson, Jr. trans., 1989). Note, the name of this essay is not "Kant is Sade" or "Kant as Sade." Lacan is a very subtle reader of philosophy and a great admirer of Kant who would never purport to reduce the brilliant ethical theories of the philosopher from Königsberg to the truly mediocre ravings of the notorious inquisitor. See Miller, *supra* note 19, at 212-13. Rather his point is that

of the sublime, evil and morality are indistinguishable. What shocks us about Sade is the content of his principles. But according to Kant, morality is indifferent to content and is to be decided by formal criteria.¹²⁵ Consequently, Lacan shows that an unimaginably nightmarish regime of universal reciprocal torture such as that proposed by Sade would be in perfect accord with the categorical imperative, and, therefore, perfectly ethical.¹²⁶

The diabolical subject may initially seem similar to the wicked subject as they both act out of principle and they both violate the moral law. But this resemblance is only skin deep. The wicked subject is deluded. She incorrectly identifies the moral law and follows an incorrect maxim grounded in pathology. As the wicked subject's motivations are indifferent to the true moral law, her actions may or may not coincidentally comport with the moral law.¹²⁷ In contrast, the diabolical subject, like the angelic subject, has perfect knowledge of the moral law but nonpathologically adopts the violation of the moral law as a maxim. Consequently, she systematically always violates (and hence accords with) the moral law.

if one takes Kant's theory of morality and diabolical evil seriously, and reads him alongside Sade, one will find a perfect structural parallelism. As we shall discuss, however, in order to do this, Lacan had to rewrite and improve Sade in order to make an idealized, internally coherent sadistic theory. The actual Sade could not live up to the comparison Lacan offered.

125. Sade himself did not expressly make the Kantian argument. Indeed, Sade probably never heard of Kant, whose *Critique of Pure Reason* was written only eight years prior to *The Philosophy of Bedroom*. Nevertheless, Sade tried to justify his position by reference to the new philosophy of liberalism of which Kant was, of course, one of the creators. Miller presents Lacan as a lawyer making Sade's argument for him. Lacan says, in effect,

I'm going to demonstrate that Sade's principle is perfectly valid and that it's as beautiful and moral as Kant's. On what grounds do you object to Sade's principle? You object that Mr. Sade alone endorses it. But as a matter of fact, if we consider only the form of what he's saying, it is undoubtedly a universal principle.

Miller, *supra* note 19, at 232. The retort that "[t]he consequences," that is, the content, "are horrible" is inept and indicates a failure to understand Kant because "at the level of a fundamental law, pathological consequences must not be taken into account." *Id.*

126. See ŽIŽEK, *supra* note 13, at 234. In Lacan's words, Kant's standard is that:

For this maxim to become law, it is necessary and it is sufficient that, when tested by such a reason, it can be retained as universal by right of Logic. Let us recall that this does not mean that this right imposes itself upon everyone, but that it is valid for all cases, or better, that it is not valid in any case . . . if it is not valid in every case . . .

Lacan, *Kant with Sade*, *supra* note 124, at 57. Lacan describes Sade's universal maxim as, "I have the right of enjoyment over . . . your body, anyone can say to me, and I will exercise this right, without any limit stopping me in the capriciousness of the exactions that I might have the taste to satiate." *Id.* at 58. That is, every person has a duty to submit to torture by any other human being (or at least has no right to be protected from this torture). Sade tried to justify this regime as necessitated by the French Revolution's denial of traditional property rights. If I cannot claim a property right in my ancestral home, how can I claim a right that my body also not be violated? As Miller has pointed out, the very awkwardness of this formulation looks forward to Lacan's ultimate conclusion that Sade was unable in fact to develop a regime that would meet the categorical imperative. See Miller, *supra* note 19, at 231.

127. As Kant notes, if a subject acts upon a maxim other than the moral law, even if the subject does, in fact, take an act that complies with the law, "it is purely accidental that these actions agree with the law, for the incentives might equally well incite its violation." KANT, *supra* note 19, at 54.

This fourth level, diabolical evil, is the level at which the cogito operates. Law requires the cogito in its negativity to come forth. The cogito (that is, the unconscious) is pure crime. It does what it does without any support from the symbolic order, and it does this out of necessity, according to law's own injunction. Its domain is "beyond the good."¹²⁸ What it produces, however, is nonpathological and is therefore, in Kantian logic, *a priori* moral.

As Jacques-Alain Miller explains Lacan's analysis of Kant *avec* Sade: "The way Lacan looks at Kant's fundamental law is not dissimilar to the way he looks at Descartes' cogito."¹²⁹ Kant's ethical law of universality, with no pathological distinctions, is the wiping out of the world that leaves nothing behind but intellect—pure "I think."

[F]irst you have the mind with imagination, memory, perception, mathematics, etc. Descartes erases all that, and the void which is left he calls the "cogito"—that is, the pure fact of thinking, which remains undeniable, something which cannot disappear. In Kant's work, this void is void of all that is pathological in the subject¹³⁰

Moreover, "in Kant's work, at the very moment all objects disappear at the level of the law, the [ex-timate] voice [of morality] remains, and the fact that, in Descartes' work, when all the contents of self-consciousness disappear, something is left as a remainder, which is '*cogito ergo sum*.'"¹³¹ Consequently, the Kantian ethic as cogito has the potential for absolute violence, or diabolical evil. "Kant's ethics is thus a kind of Terror—radical and destructive—because in it the world disappears"¹³²

Morality, diabolical evil, and the cogito all equate with the death drive. "Drive," as such, attempts to escape this circle of guilt generated by the superego by forswearing desire and its goal of achieving *jouissance* in an object of desire. Rather than seeking to acquire this impossible object, as we do in desire,¹³³ in drive, we seek everyday pleasure in mindless, repetitive activity. In Lacan's terms, although desire has both an aim and a goal (that is, to achieve the object of desire), drive has an aim but no

128. Žižek, *supra* note 10, at 161.

129. Miller, *supra* note 19, at 226.

130. *Id.* at 226.

131. *Id.* at 230.

132. *Id.* at 226.

133. Desire constitutes the feeling that we are incomplete (castration), but some object would cure the wound if only we could attain it. If only I could obtain the right girlfriend, varsity letter, or prestigious faculty position, everything would be fine. See Schroeder, *supra* note 23, at 506. These are fantasies that Lacan called *l'objet petit a*. The "a" stands for *autre*, or "other." *L'objet petit a* "names the void of that unattainable surplus that sets our desire in motion." Žižek, *LOOKING AWRY*, *supra* note 7, at 134.

goal—the subject attempts to keep the object of desire at a distance and seeks satisfaction by impotently circling around it.¹³⁴ According to Žižek:

Desire and drive are clearly opposed with respect to the way they relate to *jouissance*. . . . Desire stands for the economy in which whatever object we get hold of is 'never *it*', the 'Real Thing', that which the subject is forever trying to attain but which eludes him again and again, while drive stands for the opposite economy, within which the stain of *jouissance* always accompanies our acts.¹³⁵

Drive reflects diabolical evil, or the cogito, because it is the remainder after absolutely purging human activity of all desire. Having renounced desire, a subject would have absolutely no content. In effect, drive annihilates the world for the subject.

Kant thought diabolical evil to be impossible. No act is possible unless our passion drove us to it. As we have discussed, every act by the subject as a concrete person living in the phenomenal world is inevitably stained by pathology.¹³⁶ Although everyone experiences a moment of the cogito and occasionally we give in to our drives, only psychotic subjects remain totally locked within and are controlled by their death drive.¹³⁷ Hence, diabolical evil is impossible in that it cannot be maintained in the phenomenological world. Despite his pretensions, the historic Sade was not diabolic, but wicked—literally the textbook example of a pervert. The very assertion that either the devil, or morality, or the law, made us act is always mere radical evil.¹³⁸

VI

SUBLIMATION

Man cannot sustain diabolical evil. Rather, diabolical evil as such is the province of God. Only God is assured that whatever is done is universal in its quality and nonpathological.¹³⁹ Human beings are, as Kant

134. See Marie-Hélène Brousse, *The Drive (II)*, in *READING SEMINAR XI*, *supra* note 63, 109, 112; Antonio Quinet, *The Gaze as an Object*, in *READING SEMINAR XI*, *supra* note 63, 139, 140-41; Schroeder, *supra* note 58.

135. Žižek, *supra* note 10, at 291.

136. See *supra* text accompanying notes 100-03.

137. Berthold-Bond, however, emphasizes that no psychotic is *purely* so. See BERTHOLD-BOND, *supra* note 28, at 202. Thus, a psychotic (like a healthy subject) has two centers—one of which is in touch with "reality"—that is, the symbolic order. This rational center makes "cure" of psychosis a possibility. One must address the rational side of the psychotic and coax it back to strength.

138. See Žižek, *supra* note 15, at 239.

139. See *id.* at 237 (equating God with diabolical evil).

recognized, "split subjects." They act, but they are never sure whether universal reason or mere inclination caused what they did.¹⁴⁰

This constant state of uncertainty as to one's own motives constitutes ethics. Ethics can only be practiced by beings who are finite.¹⁴¹ God is not ethical precisely because God is quite sure what caused God to act. Only finite human beings make "ethical" decisions—decisions caused for mixed motives of reason and pathology. Human beings in their ethical mode are thus said to be in a constant state of becoming.¹⁴² God already is.

Žižek thus implies that the very function of civil legislation is to relieve people of the unbearable pressure of the moral law, which leads logically to diabolical evil:

Social regulations make peaceful coexistence possible, while moral law is a traumatic injunction that disrupts it. One is thus tempted to go a step further and invert once more the relationship between 'external' social norms and the inner moral law: what if the subject invents external social norms precisely in order to escape the unbearable pressure of the moral law? Isn't it much easier to have an external Master who can be duped, towards whom one can maintain a minimal distance and private space, than an ex-timate Master, a stranger, a foreign body in the very heart of one's being?¹⁴³

Power, Žižek suggests, is force from the outside, opposing inclination. It relies on the externalization of the ex-timate Law. Thus, as opposed to the quasi-paranoid Foucauldian attitude toward power as sinister and alien, power is a positive relief from the unbearable pressure of moral law.¹⁴⁴

Hence, the whole point of the symbolic order is to paper over the evil that men do in hope that, at least outwardly, the appearance of lawfulness might be maintained. Social legislation allows people to behave "legally." The introduction of legality allows persons to have pathological motives and to keep a distance from the evil Thing that is the cogito.¹⁴⁵ "Oepidalization, the establishment of the rule of paternal law, is precisely the process of gentrifying monstrous otherness, transforming it into a partner within the horizon of discursive communication."¹⁴⁶ In other words, hypocrisy might be the price we must necessarily pay for civilization.

140. See Žižek, *supra* note 10, at 365 ("[W]e never know if the determinate content that accounts for the specificity of our acts is the right one: that is, if we have really acted in accordance with the law and have not been guided by some hidden pathological motives").

141. See Žižek, *supra* note 15, at 80, 219; Žižek, *supra* note 10, 25.

142. See Kant, *supra* note 19, at 68.

143. Žižek, *supra* note 10, at 280.

144. See Kant, *supra* note 19, at 68.

145. See Žižek, *supra* note 15, at 237. For this reason, Žižek insists that Kant has his Aristotelian side—an emphasis on proper measure. *Id.* 237-38.

146. Žižek, *supra* note 10, at 53.

A legal regime can never be anything but positive law (that is, mere legality). By positing this proposition, we are not simply arguing that the "impure" position towards the law is the best that fallen man can achieve. The lesson we should draw from Kant is precisely that both the impure and the wicked are wrong about law. Not only must morality be distinguished from law, but the purpose of positive law must be to protect us from the cogito of morality at its most sublime. Both the impure and the wicked are evil precisely because they try to externalize morality by conflating it with law. By doing so, they both expect more of law than law can deliver—that is, they want law to deliver them from their moral duty. As a result, the impure demean law by failing to give it the respect it deserves, while the wicked disgrace law by raising it to a exalted position it cannot fill. Instead, we must recognize law not as the abstraction of universal Law, but as a contingent collection of concrete, positive laws—imperfect tools of social organization and control that can be dangerous if wielded carelessly. We must remember that morality is not external, but ex-timate. It is precisely the job of the modern state to erect and maintain the wall separating law from morality. Each person must find the call of the moral law from within her own heart, not the law library.

And now we reach why the public was horrified by impeachment. Žižek's most recent work was written at the very early stages of the Monicagate scandal. He (unsuccessfully) tries to use the example of Clinton's fibs about the true nature of *L'affaire Lewinsky* as an illustration of a favorite point of his: The symbolic order is a fiction that nevertheless functions. Thus, so long as Clinton's true behavior remained concealed from the gaze of the big Other, political support of Clinton was possible. At stake in this example is repression of the traumatic and the insistence upon the smooth functioning of the symbolic order.¹⁴⁷

Subsequent events made it perfectly apparent that the public supported Clinton even after his behavior was displayed to the gaze of the big Other in pornographic detail (courtesy of Kenneth Starr's X-rated report). Hence, Žižek's specific analysis of the Clinton prosecution was incorrect. Support for Clinton did not evaporate but was enhanced by Republican exposure of impurity.

We draw a different explanation based from Žižek's theory. Although we argue that the Republicans were in the end only radically evil—wickedly responding to the radical evil of Clinton's impurity—the public thought it could hear in Republican rhetoric the echo of sublime destruction—a mad, psychotic morality that would destroy everything in its path. "What if the Republicans were speaking the truth?" we asked ourselves. "What if they really were the pure tools of the moral law?" Then we would be facing the ontologization of diabolical evil. Žižek emphasizes that the

147. See *id.* at 329.

ethical act, when approached too closely, turns into diabolical evil.¹⁴⁸ We suggest that the sublime monstrosity of diabolical evil is what the American public feared. Ontologizations of diabolical evil are the hack marks upon the slaughterbench of history—the appalling evidence of what perhaps we truly are. Why do we react with horror upon contemplating the Holocaust, the Pol Pot regime, or ethnic cleansing in former Yugoslavia, being as how they happened so far away in time and space? Precisely because we secretly fear that what drives such events is a universal principle of insanity—diabolical evil—in which we ourselves share. This fear that “in our hearts we know they’re right”¹⁴⁹ was precisely why the Republicans fell so drastically in the polls.¹⁵⁰

148. See *id.* at 25; Žižek, *supra* note 15, at 230.

149. Žižek, *SUBLIME OBJECT*, *supra* note 25, at 5 (“The greatest mass murders and holocausts have always been perpetrated in the name of man as harmonious being without antagonistic tension”). For an essay praising impeachment and urging the “necessity for periodic disinfection of the corners of society,” see John O. McGinnis, *Impeachment Offenses*, *POLICY* 29, 33 (June-July 1999).

150. Of course, they have bounced back! They have convinced the public, per Kant’s theory, that they are merely wicked, not diabolical.

