

## TECHNOLOGY, GENDER AND FASHION<sup>♦</sup>

JEANNE L. SCHROEDER\*

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\* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, New York City, NY. I would like to thank the participants in *Laws and Fashion: Between Transgression and Compliance* Symposium (Cardozo School of Law, April 26, 2015) for their comments. An earlier version of a portion of this article was published as *Wearables: Tech/Fashion, Masculine/Feminine*, 7 CRITICAL STUDIES IN FASHION AND BEAUTY 41 (2016).

## INTRODUCTION

The financial press and technology industry want us to believe wearable technology is the next big thing. Nevertheless, approximately one-third of Americans who purchase wearable fitness devices abandon them within six months.<sup>1</sup> Google Glass's introduction in the spring of 2013 generated extensive positive media coverage, yet was met with such negative backlash that Google stopped its beta testing "Explorer program" in January 2015 and, in effect, went back to the drawing board.<sup>2</sup>

The Apple Watch, which began selling in the spring of 2015, is supposed to be a game changer. Its introduction was covered as a major news event, and was welcomed by Apple enthusiasts. It is not clear, however, whether it will appeal to the general public.<sup>3</sup> Initial reviews by tech analysts were mixed, ranging from unnecessary to life changing,<sup>4</sup> but the consensus seems to be that "the Apple Watch is for gadget geeks who want to be on the frontier of something new."<sup>5</sup> Apple does not break down its sales by product, but rumors are that first year sales were somewhat disappointing—at least by Apple's standards.<sup>6</sup>

<sup>1</sup> Teena Hammond, *Wearables Have a Dirty Little Secret: 50% of Users Lose Interest*, TECHREPUBLIC (Feb. 13, 2014, 12:29 PM), <http://www.techrepublic.com/article/wearables-have-a-dirty-little-secret-most-people-lose-interest/>.

<sup>2</sup> Alistair Barr, *Google Glass Gets a New Direction*, WALL ST. J. (Jan. 15, 2015, 3:17 PM), <http://www.wsj.com/articles/google-makes-changes-to-its-glass-project-1421343901>; Eric Mack, *Google Glass Is Headed One Of Two Directions Next*, FORBES (Jan. 15, 2015, 2:35 PM), <http://www.forbes.com/sites/ericmack/2015/01/15/r-i-p-google-glass-1-0/>.

<sup>3</sup> At least one tech analyst notes that, like the first iPhone, the initial Apple Watch is not aimed at the general customer, but is designed to gauge interest, and to work out bugs in anticipation of developing the next generation of products. Ewan Spence, *Apple Watch Sales Figures Do Not Matter*, FORBES (Apr. 13, 2015, 8:33 AM), <http://www.forbes.com/sites/ewanspence/2015/04/13/apple-watch-sales-figures/>.

<sup>4</sup> See Farhod Manjoo, *Apple Watch Review: Bliss, but Only After a Steep Learning Curve*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/technology/personaltech/apple-watch-bliss-but-only-after-a-steep-learning-curve.html>.

<sup>5</sup> Jessica Roy, *Apple Watch Review Roundup: The Perfect Gadget for the Person Who Already Has Every Other Gadget*, N.Y. MAG. (Apr. 8, 2015, 10:48 AM), <http://nymag.com/daily/intelligencer/2015/04/apple-watch-reviews-pretty-but-unnecessary.html>; Ewan Spence, *Apple Watch Reviews, Tim Cook's Smartwatch Struggles To Tell The Time*, FORBES (Apr. 8, 2015, 1:31 PM), <http://www.forbes.com/sites/ewanspence/2015/04/08/apple-watch-reviews/>. See also Casey Chan *My God-Awful Year With the Apple Watch*, Gizmodo (April 25, 2016), <http://gizmodo.com/my-god-awful-year-with-the-apple-watch-1772724490>.

<sup>6</sup> It is too soon to tell whether the product will ultimately be deemed a success. Paul Lamkin, *Apple Watch One Year On: Too Great Expectations?*, FORBES (April 26, 2016), <http://www.forbes.com/sites/paullamkin/2016/04/25/apple-watch-one-year-on-too-great-expectations/#185306b06637>. It is thought that first year Apple Watch sales were higher than sales of the original iPhone in 2007. *Shake it Off: The World's Most Valuable Company Needs Another Mega Hit*, THE ECONOMIST (April 30, 2016), <http://www.economist.com/news/21697812-worlds-most-valuable-company-reported-its-first-year-quarterly-revenue-decline>. Analysts are divided as to what this means. The Economist notes that "today's consumers are better primed to buy gadgets now than they were then; watch sales should be far higher." *Id.* Although Daisuke Wakabayashi of the Wall Street Journal was originally negative. Daisuke Wakabayashi, *Glimmers Emerge on Apple Watch Sales, and They're Not Pretty*, WALL ST. J.:

This Article considers this disconnect between producers and consumers.<sup>7</sup> I start with two observations. First, the technology industry, often referred to somewhat inaccurately as “Silicon Valley,” has a woman problem. It is so overwhelmingly male as to suggest widespread institutional misogyny, if not gynophobia.<sup>8</sup> The paucity of women is reflected at every level, with tech firms and their financiers having far fewer female directors, officers, and rank-and-file employees than in other industries, and it may be getting worse, not better, over time.<sup>9</sup>

Second, Silicon Valley has a fashion problem. From Tim Cook’s “uniform” of untucked shirts and jeans to Mark Zuckerberg’s t-shirts and hoodies, many leaders of tech display an image not merely of non-fashion, but of anti-fashion. As *New York Times* style analyst Vanessa Friedman notes, “The obvious point is that said baby geniuses are too busy thinking great and disruptive thoughts, and coding through the night, to spare a moment to worry about as mundane an issue as image.”<sup>10</sup> Friedman suggests that insofar as Apple has recently been trying to cultivate the fashion industry with the introduction of the

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TECH BLOG (July 31, 2015, 4:40 PM), <http://blogs.wsj.com/digits/2015/07/31/glimmers-emerge-on-apple-watch-sales-and-theyre-not-pretty/>. He more recently has become more bullish. See Daisuke Wakabayashi, *Apple’s Watch Outpaced the iPhone in First Year*, WALL ST. J. (April 30, 2016), <http://www.wsj.com/articles/apple-watch-with-sizable-sales-cant-shake-its-critics-1461524901#:QFLKjtHT507sBA>. Others see clouds in the future. See, e.g., *Apple Watch Interest on the Slide*, FORBES (April 26, 2016), <http://www.forbes.com/sites/paullamkin/2016/04/28/apple-watch-interest-on-the-slide/#86cf4ae4d649>.

<sup>7</sup> For some wary views of consumer taste for wearable technology, see Dan Matthews, *Why the Apple Watch Won’t Sell*, FORBES (Mar. 11, 2015, 6:17 AM), <http://www.forbes.com/sites/danmatthews/2015/03/11/why-the-apple-iwatch-wont-sell/>; *The Fuss Over Wearables*, THE ECONOMIST: THE ECONOMIST EXPLAINS (Mar. 11, 2015, 10:17 PM), <http://www.economist.com/blogs/economist-explains/2015/03/economist-explains-9>; Chris Vollmer & Matt Ego, *In The Age Of The Apple Watch, Smartphones Are (For Now) The Ultimate Wearable*, FORBES (Feb. 23, 2015, 10:13 AM), <http://www.forbes.com/sites/strategyand/2015/02/23/in-the-age-of-the-apple-watch-smartphones-are-for-now-the-ultimate-wearable/>; Daisuke Wakabayashi, *What Exactly Is an Apple Watch For?*, WALL ST. J. (Feb. 16, 2015, 7:40 PM), <http://www.wsj.com/articles/challenge-of-apple-watch-defining-its-purpose-1424133615>. To paraphrase, what I believe skeptical analysts are asking is that, while the Apple Watch will initially sell a lot of units to Apple fans and other tech enthusiasts, it is not clear whether it will catch on with the more general public.

<sup>8</sup> See, e.g., Nina Burleigh, *What Silicon Valley Thinks of Women*, NEWSWEEK (Jan. 28, 2015, 5:41 PM), <http://www.newsweek.com/2015/02/06/what-silicon-valley-thinks-women302821.html>.

<sup>9</sup> Georgia Wells, *Silicon Valley Trails U.S. Companies in Women CEO’s and Directors*, WALL ST. J.: TECH BLOG (Dec. 16, 2014, 9:17 AM), <http://blogs.wsj.com/digits/2014/12/16/silicon-valley-trails-big-u-s-companies-in-women-ceos-directors/>. Although plaintiff Ellen Pao ultimately lost her high-profile sex-discrimination suit against “[o]ne of Silicon Valley’s most famous venture capital firms” in the spring of 2015, the litigation “with its salacious details . . . amplif[ied] concerns about the lack of diversity in the technology industry.” David Streitfield, *Venture Capital Firm Prevails in Bias Case Riveting Silicon Valley*, N.Y. TIMES, Mar. 27, 2015, at A1. See also, Clair Cain Miller, *Despite Verdict, Case Puts Spotlight on Gender Bias*, N.Y. TIMES, Mar. 28, 2015, at A3.

<sup>10</sup> Vanessa Friedman, *This Emperor Needs New Clothes*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/16/fashion/for-tim-cook-of-apple-the-fashion-of-no-fashion.html>.

Apple Watch, this sends at best a mixed message.<sup>11</sup>

I suggest that Silicon Valley's misogyny and contempt for fashion are closely linked to its failure of so far convincing the general public to wear its technology. To say what should be obvious—almost anything you wear on your body implicates fashion. Coincidentally illustrating this point are two headlines juxtaposed on the first page of *The Wall Street Journal's* April 6, 2015 Business & Tech section: “*Gender Issues Won't 'Go Away'*” and “*Why the Time Isn't Ripe for Smartwatches.*”<sup>12</sup>

As others have pointed out, Silicon Valley engineers tend to design products for people just like them: i.e., affluent, healthy young men.<sup>13</sup> Consequently, although there is a proliferation of fitness-trackers, relatively little attention has been given to health products for the elderly, infirm, or people with chronic conditions who might actually benefit from them. It is no wonder that Apple, known for its sleek industrial design, has introduced a device I suspect few women will wear outside of a gym or other casual venues,<sup>14</sup> and is only now approaching fashion designers as to how to make it more attractive. That is, although one may or may not find the initial Apple Watch beautiful; it is not designed to make the *wearer* beautiful.

As if to prove this point, the most vaunted app for the Apple Watch was supposed to be Apple Health. Apple claimed it would “monitor *all* of your metrics that you are most interested in.”<sup>15</sup> As Rose

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<sup>11</sup> *Id.*

<sup>12</sup> Jeff Elder, *Pao: Gender Issues Won't Go Away*, WALL ST. J., Apr. 6, 2015, at B1; Christopher Mims, *Key Words: Why Time Isn't Ripe for Smartwatches*, WALL ST. J., Apr. 6, 2015, at B1. Interestingly, although *Wall Street Journal* tech critic Christopher Mims recommends that “anyone who isn't a self-described early adopter might want to avoid the entire category of wearables, at least for a few more years,” he bases this entirely on technical issues and nowhere even mentions the issue of how they look. *Id.* One *Wall Street Journal* personal tech reporter, however, although giving a mixed to favorable review of its functionality, praised its “good looks and coolness.” Joanna Stern, *What the Apple Watch Does Best: Make You Look Good*, WALL ST. J. (Apr. 8, 2015, 8:04 AM), <http://www.wsj.com/articles/apple-watch-review-what-the-apple-watch-does-bestmake-you-look-good-1428494694>. However, as she noted that the watch matched her “simple J. Crew style,” this hardly serves as fashion commentary. *Id.*

<sup>13</sup> J.C. Herz, *Wearables Are Totally Failing the People Who Need Them Most*, WIRED (Nov. 6, 2014, 6:30 AM), <http://www.wired.com/2014/11/where-fitness-trackers-fail/>.

<sup>14</sup> As Ayse Ildeniz of Intel notes, one of the problems with marketing wearable tech to-date is that the market has been dominated by two categories: those products “devoted to sports and fitness but with limited aesthetic value, and those with multiple uses (‘I call them the Swiss army knife approach’) with, again, limited aesthetic value.” Molly Petrilla, *How Intel hopes to get women interested in wearables*, FORTUNE (Feb. 10, 2015, 7:00 AM), <http://fortune.com/2015/02/10/intel-women-wearables/>.

<sup>15</sup> Rose Eveleth, *How Self-Tracking Apps Exclude Women*, THE ATLANTIC (Dec. 15, 2014), <http://www.theatlantic.com/technology/archive/2014/12/how-self-tracking-apps-exclude-women/383673/> (emphasis added). Such unthinking sexism can also be seen in writing about tech. For example, *New York Times* tech business reporter Farhad Manjoo, in a discussion of how smart phones affect other devices—both enabling the development of new products, on the one hand, and making some old products obsolete, on the other—he questions whether a Fitbit step counter will fall in the latter category. “But as people carry their phones around with them more often—and as our phones become capable of better measurement, including elevation—will

Eveleth notes in *The Atlantic*, these metrics did not include anything relating to the wearer's menstrual cycle, suggesting that the "you" addressed by Apple is implicitly not female.<sup>16</sup> It is as though Apple made an unconscious decision not to market its newest consumer product—a piece of jewelry at that—to over half of its potential market.<sup>17</sup> Apple's developers are seemingly unaware that a woman cannot meaningfully monitor her metabolism, blood pressure, etc., without also tracking her hormonal cycle.

In any event, it turns out that Apple was unable to make Apple Health work as intended. Embarrassingly, and suggesting the lack of diversity of Apple's workforce, it found that its ability to read health metrics was affected by such common variations as body hair, perspiration, and skin tone.<sup>18</sup> Consequently, in its initial incarnation, Apple Health will function more like a typical fitness device, i.e., a very expensive Fitbit—albeit one that allows you to send an image of a beating heart with your pulse rate to your beloved, so long as he or she also has an Apple Watch.<sup>19</sup> By this limited standard, Apple Watch might be a success in that it was the second biggest selling fitness tracker in the second quarter of 2015.<sup>20</sup> However, this is hardly an

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people still need a basic activity tracker? After all, today's top phones, including the iPhone and Samsung's new devices, have built-in apps that track your motion." Farhad Manjoo, *In a World of Phones, Gadgets Must Adapt*, N.Y. TIMES (Jan. 7, 2015), <http://www.nytimes.com/2015/01/08/technology/personaltech/why-gadgets-must-adapt-to-a-world-ruled-by-software.html>.

There is a word for the vast majority of persons who carry their phones next to their body in pockets: men. Nevertheless, although it took him three days to program, once he got it to work, he found the Apple Watch to be "bliss." Manjoo, *supra* note 4.

<sup>16</sup> Eveleth, *supra* note 15.

<sup>17</sup> Eveleth notes that, although there are several third-party mobile-device apps (typically designed by men and typically pink), which enable women to track their cycle, these are aimed at women seeking to conceive, not those tracking their general health. *Id.* Perhaps it should no longer be surprising in 2015 that Eveleth's article attracted virulent comments from trolls. One telling remark ridicules her suggestion by comparing it with a program that would also allow you to track urination and bowel movements. Of course, if the product is supposed to monitor health rather than track fitness, shouldn't it do so? Certainly, the former is relevant to diabetics and older men worried about prostate health, and the latter not only to older persons, but also to anyone with various digestive conditions, such as colitis or Crohn's disease. More recently a third-party developer has created a cycle tracker which, refreshingly, is blue and green, rather than pink. Kit Eaton, *What the Apple Watch Does, One Year Later*, N.Y. TIMES (April 6, 2016), <http://www.nytimes.com/2016/04/07/technology/personaltech/what-the-apple-watch-does-one-year-later.html>.

<sup>18</sup> *Apple Watch: Many Health Tools Didn't Make It In*, WALL ST. J.: VIDEO (Feb. 17, 2015, 10:46 AM), <http://www.wsj.com/video/apple-watch-many-health-tools-didnt-make-it-in/0B919B22-FFD1-4915-B61D-EECE37F74484.html>.

<sup>19</sup> Indeed, one reviewer has described the second release of the Apple Watch as being primarily a superior, if pricey, health and fitness tracker and, as such, a "want," but not yet a "need" like a smartphone. Joanna Stern, *Apple Watch Series 2: Still Not a "Need," Finally a "Want,"* WALL ST. J. (Sept. 14, 2016), <http://www.wsj.com/articles/apple-watch-series-2-review-still-isnt-a-need-might-be-a-want-1473847321>.

<sup>20</sup> Sarah Perez, *Apple Watch Not a Flop – Now #2 Wearable, Just Behind Fitbit*, TECHCRUNCH (Aug. 27, 2015), <http://techcrunch.com/2015/08/27/apple-watch-not-a-flop-now-2-wearable-just-behind-fitbit/>.

indication that it is a new category of technology like the iPod, iPhone, or iPad.

Initially, Silicon Valley concentrated on the *technology* half of the term “wearable technology,” not the *wearable* half. The vast majority of smart watches and fitness trackers looked precisely like what they were, namely a bunch of engineering slapped onto a wrist. By contrast the Apple Watch, like all Apple products, is striking. However, its creative team was led not by a fashion designer, but by Jony Ive, the industrial designer responsible for the company’s elegant mobile devices.<sup>21</sup> Only after the product design was completed did Apple begin courting the fashion industry, and even then only about marketing.<sup>22</sup> It was met with largely negative reviews in the fashion industry.<sup>23</sup> Nothing can disguise the fact that the watch looks an awful lot like a smartphone attached to a strap.<sup>24</sup> Whether one finds this elegant or kitsch depends on one’s

<sup>21</sup> Ian Parker, *The Shape of Things to Come*, THE NEW YORKER (Feb. 23, 2015), <http://www.newyorker.com/magazine/2015/02/23/shape=-things-come>.

<sup>22</sup> See *infra* text accompanying notes 23–24.

<sup>23</sup> “One of the biggest complaints about the Apple Watch is that it’s simply not stylish enough—not for serious watch connoisseurs who might spend money to see what it’s all about, and particularly not by the fashion world[.]” Alicia Adamczyk, *The Most Stylish Apple Watch Accessories*, FORBES (Mar. 27, 2015, 2:34 PM), <http://www.forbes.com/sites/aliciaadamczyk/2015/03/27/the-most-stylish-apple-watch-accessories>; see also, Karen von Hahn, *Apple Wants to be hip, but wearable tech not catching on*, THE STAR (Mar. 31, 2015), [http://www.thestar.com/life/fashion\\_style/2015/03/31/apple-wants-to-be-hip-but-wearable-tech-not-catching-on.html](http://www.thestar.com/life/fashion_style/2015/03/31/apple-wants-to-be-hip-but-wearable-tech-not-catching-on.html). Reportedly, its inaugural exhibition in Paris was crowded, but by “fanboys,” not fashionistas. Leslie Price, *What the Tech World Doesn’t Understand About Fashion*, RACKED (Feb. 16, 2015, 12:54 PM), <http://www.racked.com/2015/2/16/8039853/apple-watch-google-glass-fashion-tech>.

<sup>24</sup> Many in the fashion world have a similar reaction about the computer aesthetic of the watch. See Chander Chawla, *A Fashion Expert Shares Her Thoughts on Apple Watch and Wearables*, FORBES (Mar. 1, 2015, 10:41 PM), <http://www.forbes.com/sites/chanderchawla/2015/03/01/a-fashion-expert-shares-her-thoughts-on-apple-watch-and-wearables>. Similarly, others question whether people will really want to wear something merely because it is well built. Alev Aktar, *Wearable technology gets a fashion makeover*, FORTUNE (Dec. 15, 2014, 6:16 AM), <http://fortune.com/2014/12/15/wearable-technology-gets-a-fashion-makeover/> (questioning that consumers will wear something just because it is well built). At least one fashion writer, however, has a different take. Although she believes that to date wearable fashion has been a failure precisely because it is not fashion, Madeleine King thinks that Apple’s approach might be different:

Until now, wearable technology has not been taken seriously by the fashion world for the simple reason that it’s rarely fashionable. When wearable technology developers start to understand the way that fashion operates, consumers will too start to take notice. Fashion ultimately is about beauty, desire, identity, and social standing; increasingly wearable technology will also be about these things.

Madeleine King, *Apple Watch, smartwatches and the wearables fashion gap*, THE GUARDIAN (Oct. 2, 2014, 3:00 PM), <http://www.theguardian.com/technology/2014/oct/02/apple-watch-smartwatches-and-the-wearables-fashion-gap>. King believes Apple, which is using the vocabulary of luxury and emotional response, understands this:

This is why Apple knows that the more important message about its, ahem, smartwatch is not its battery life, but that the bracelet took nine hours to cut and has been hand-brushed. It’s using the language of luxury fashion (expertly delivered by the former execs of Yves Saint Laurent, Tag Heuer, LVMH, and Burberry now in its employ): time-consuming artisanal processes honed to create a precise and beautiful product. It’s

taste.<sup>25</sup> Indeed, as the Apple Watch can only be used in conjunction with an iPhone, one skeptical fashion critic has dismissed it as a new category of an “accessory of an accessory.”<sup>26</sup>

Apple’s strategy seems only marginally different from Google’s—although it might be that this margin will make all the difference. Google introduced Glass first to consumer “Explorers” for beta testing, and *then* gave it to fashion designers. Apple’s Ive has suggested that Google’s problem with marketing Glass stemmed from the fact that it was worn on the face, presenting a barrier between wearers and other people;<sup>27</sup> but people wear glasses all the time—not just to improve their vision, but as fashion. It is also hard to see why it would be more disrespectful for a Glass wearer occasionally to glance upward to check the messages on her lens than for an Apple Watch wearer to glance down at her wrist. Indeed, looking at one’s watch is a stereotypically rude gesture signifying boredom or indifference, as then-President George H. W. Bush found out when he infamously did so during a televised debate against candidate Bill Clinton.<sup>28</sup> One fashion critic has made a similar point:

“Apple Watch notifications take on a whole new feel because they discreetly come right to your wrist,” Apple boasts. “And they’re designed to let you address or dismiss them just as subtly.” Because it’s less rude to stare at the screen on your wrist than the screen on your phone during lunch?<sup>29</sup>

I agree with those industry analysts who have suggested that, although some wearables may have interesting industrial and medical applications,<sup>30</sup> and others will appeal to technophiles, they will not truly

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the *human* labour and ingenuity, not the technology, that elicits an emotional response, and Apple wants people to have an emotional response to its products (Some are strongly positive; some are negative: but for Apple, that’s better than indifference.).

*Id.* Most notably, in fall of 2015, the French luxury product retailer Hermes started selling an Apple Watch attached to its own design of leather straps. The watch face itself can be “customized” to bear the Hermes logo and typeface, but otherwise looks identical to other Apple Watches. HERMES, <http://www.hermes.com/applewatchhermes/en/?c=US> (last visited Apr. 25, 2016).

<sup>25</sup> *Fast Company* described it as the “Samsung Galaxy Gear dipped in rose gold, the blush wine of the precious metal world.” Price, *supra* note 23.

<sup>26</sup> Price, *supra* note 23.

<sup>27</sup> Parker, *supra* note 21.

<sup>28</sup> Z. Byron Wolf, *The 12 Most Cringe-Worthy Debate Moments in History*, ABC NEWS (Oct. 1, 2012), <http://abcnews.go.com/Politics/OTUS/12-tinge-worthy-debatemoments/story?id=17367100>.

<sup>29</sup> Price, *supra* note 23. Perhaps not surprisingly, therefore, as the Apple Watch debut date approached, articles on the proper etiquette of using it started appearing on the Internet. See, e.g., Josh Smith, *The Do’s and Don’t’s of Apple Watch Etiquette*, GOTTA BE MOBILE (Mar. 9, 2015), <http://www.gottabemobile.com/2015/03/09/apple-watch-etiquette-work-date/>.

<sup>30</sup> Jacob Morgan, *How Wearables are Changing the Workplace*, FORBES (Dec. 11, 2014, 2:35 PM), <http://www.forbes.com/sites/jacobmorgan/2014/12/11/how-wearables-are-changing-the-workplace>.

take off in the general consumer context until they are first and foremost designed and marketed as clothing or jewelry that just happens to include technology.<sup>31</sup> The fact that Silicon Valley can produce technology small and light enough to wear is not a reason to *wear* it.

My point is two-fold. Fashion is often disparaged as frivolous, by men in particular.<sup>32</sup> One reason for this is that fashion is identified with the feminine. As Elizabeth Wilson has noted, even some feminist critiques of fashion have adopted this misogynist take.<sup>33</sup> Silicon Valley understands that fashion is big business,<sup>34</sup> which is why it wants to get into it.

To disparage fashion is to ignore the fact that clothing generally, and fashion in particular, is widely recognized as one of the primary means by which people express personality. From the perspective of speculative theory, the function of fashion is not so much to *express personality*, but to help *create personhood*. Fashion is one of the things that makes humans human. As Gary Watt argues, fashion has much in common with law.<sup>35</sup>

I draw a parallel between Silicon Valley's ostensible indifference to fashion and its disdain for women because the former is associated with the latter. Here, I am not merely invoking sexist stereotypes. The speculative philosophic tradition associated with G.W.F. Hegel argues that subjectivity is artificial, not natural. As further developed by Jacques Lacan, subjectivity is also understood as being always

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<sup>31</sup> *Id.* See also, Ayse Ildeniz, *Partnerships Are Key to Tapping Wearable Tech*, BUSINESS OF FASHION (Apr. 7, 2015, 12:00 PM), <http://www.businessoffashion.com/articles/opinion/partnerships-are-key-to-tapping-wearable-tech>.

<sup>32</sup> As Kal Raustiala and Christopher Sprigman [collectively, hereinafter RS] note, "It is fair to say . . . that fashion is routinely pilloried by intellectuals who view it as capricious, exclusionary, and socially wasteful." KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 41 (2012). Later in the same paragraph, however, they note several commentators who espouse other viewpoints.

<sup>33</sup> Elizabeth Wilson, *Feminism and Fashion*, in *THE FASHION READER* 323, 324 (Linda Welters & Abby Lillethun, eds., 2d ed. 2011). Even today, several commentators on a *Newsweek* cover for an article on Silicon Valley's women problem—which depicts a computer cursor raising the skirt of a schematic drawing of a female engineer—opined that it was demeaning to depict her wearing red stilettos. These readers seemed unaware that this was almost certainly an allusion to the fashionable footwear favored by Marissa Mayer, then the CEO of Yahoo, who notoriously left Google when they failed to promote her. She wore similar shoes in a photo spread in *Vogue*. Norman Jean Roy, *Pregnant in Prada: A Marissa Mayer-inspired Maternity Wardrobe*, VOGUE (Aug. 2009), <http://www.vogue.com/868767/a-marissa-mayer-inspired-maternity-wardrobe-for-the-working-woman/#1>.

<sup>34</sup> In RS's words, "Conservative estimates suggest that worldwide the apparel industry sells more than \$1.3 trillion of goods annually—a number larger than the combined revenues of the motion picture, software, books, and recorded music industries." RAUSTIALA & SPRIGMAN, *supra* note 32, at 22.

<sup>35</sup> In his fascinating and provocative book, Gary Watt asserts that dress is law and law is dress. GARY WATT, *DRESS, LAW AND NAKED TRUTH: A CULTURAL STUDY OF FASHION AND FORM* 1 (2013). Although I would not go so far as to assert an identity, I agree with his intuition that they are closely related.



sexuated—there is no neuter subject, only Men and Women. However, this speculative understanding of sexual difference is distinct from the dominant stereotype of the two sexes as opposites or complements, like yin and yang. By contrast, speculative theory conceptualizes the sexes as two fundamentally different and inconsistent positions with respect to the symbolic order and, therefore, fashion.

To assume that fashion is feminine and indifference to fashion is masculine is precisely to adopt the masculinist approach with respect to both sexuation and fashion. It is not that the masculine subject is indifferent to fashion—far from it. Indeed, as an empirical matter, men may be more slavish to its dictates than women—for example, a man takes substantial risks if he deviates from the strict sartorial standards of his profession.<sup>36</sup> A male engineer at Apple or Google would no more be accepted by his colleagues if he wore a dark suit and sober tie to work than a Wall Street lawyer if he wore an untucked shirt and jeans to court or a negotiation session.

I am not arguing that the feminine position with respect to fashion is superior to the masculine—just that it is different. I, like Wilson, am deeply ambivalent to my interest in fashion and beauty. Nevertheless, because I identify more with the feminine than the masculine, in this paper I will champion the feminine as a means of countering the predominance of the masculine approach in the tech industry. Further, as a corporate finance lawyer, I think this position is good for business.

I do not believe wearable technology will be widely adopted by consumers until it is designed not as wearable technology, but rather designed from the feminine position—i.e., as fashion. This does not merely mean focus grouping what female customers like—although this might be a step in the right direction. Rather, it will require including persons who identify with the feminine position in design and decision making roles.

From the speculative perspective, the “feminine” cannot simply be identified with anatomically female human beings or, for that matter, sexual orientation. Consequently, adding a few more women to the payroll will not necessarily solve Silicon Valley’s problem. Corporations are often seemingly happy to hire a girl who is willing to act as one of “the boys;” nevertheless, adding more women to the payroll and boardroom might have an ameliorative effect.<sup>37</sup>

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<sup>36</sup> This can be seen perhaps most notably in “America’s political class” where, “for the men, an orange or purple tie is a marker of outright zaniness[.]” RAUSTIALA & SPRIGMAN, *supra* note 32, at 43. Unfortunately, women politicians must also “hew” to this masculinist standard, wearing “pantsuits that look more like armor than fashion.” *Id.*

<sup>37</sup> Apple’s tone deafness to its “woman problem” was on display at its 2015 annual September event, at which it introduced new products. The first (of only three) female “presences” at the event was an image of a woman’s face. A male executive then used Photoshop to “fix” her neutral face so that she appeared to smile. Apple was, but should not have been, surprised at the

In this paper I raise a number of issues concerning the relationship between law and fashion. Relying largely on G.W.F. Hegel's theory of property, I explore fashion's parallel to law in the creation of subjectivity, understood as the capacity for being recognized as a rights- and duty-bearing person.

I then turn to Jacques Lacan's psychoanalytic theory of "sexuated" positions to suggest one reason for wearable technology's mixed showing to date. I will end with other possible lessons that can be drawn once one recognizes the relationship between law and fashion. These include an argument as to why American law may be correct in giving such limited intellectual property protection to fashion design. In making this connection I suggest that one of the implicit reasons why producers might be interested in incorporating technology into wearables is precisely to obtain intellectual property protections.

In this paper I will not expressly discuss some of the more obvious legal issues that the development of wearable technology raises, such as issues of privacy and surveillance, although they implicitly inform some of my concerns. One reason Silicon Valley has been unable to convince consumers they want to wear technology, might be because consumers are at least vaguely aware of, and uneasy with, one of the reasons producers and app developers want them to wear it: surveillance.

Google Glass is a case in point. It was widely reported that Glass wearers were derided as creepy "Glassholes" who might invade the privacy of others by surreptitiously filming them. Consequently, they were sometimes barred from bars and other public places.<sup>38</sup> Indeed, it got so bad that Google published etiquette advice for its "Explorers."<sup>39</sup> However, the creepier aspect of Glass may have been Google's ability to invade the privacy of the Glassholes. Google states on its corporate homepage that its "*mission* is to organize the world's information and make it universally accessible and useful."<sup>40</sup> Its business model, however, is to gather data about its users and exploit such data commercially by selling ads or otherwise. This is why it acquired Nest, the manufacturer of smart thermostats and smoke detectors—to extend its data gathering beyond monitoring how you use your computers and devices, to when you are or are not at home, and what room you are

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outrage this caused. *See, e.g.*, Biz Carson, *Why it's not OK for Apple to Photoshop a woman to make her smile during a live event*, BUSINESS INSIDER (Sept. 9, 2015, 4:59 PM), <http://www.businessinsider.com/apple-photoshopped-a-womans-smile-2015-9>.

<sup>38</sup> Jake Swearingen, *How the Camera Doomed Google Glass*, THE ATLANTIC (Jan. 15, 2015), <http://www.theatlantic.com/technology/archive/2015/01/how-the-camera-doomed-google-glass/384570>.

<sup>39</sup> Tim Teeman, *Google Glass's Insane, Terrifying Etiquette Guide*, THE DAILY BEAST (Feb. 20, 2014, 12:15 AM), <http://www.thedailybeast.com/articles/2014/02/20/google-glass-s-insane-terrifying-etiquette-guide.html>.

<sup>40</sup> GOOGLE, <http://www.google.com/about/company/> (last visited Jan. 6, 2016) (emphasis added).

in.<sup>41</sup> As *The Economist's* pseudonymous media columnist, Babbage notes, Glass would have enabled Google to also monitor what you saw walking down the street.<sup>42</sup>

Tim Cook—almost certainly having Google in mind—has warned that if a firm offers you a “free” online service, then “you’re the product” that the firm is selling to someone else.<sup>43</sup> Apple, by contrast, is in the business of selling devices to its consumers. This disingenuously suppresses the fact that the apps on iPhones and the Apple Watch enable *other* companies to track you—telling them where you are, what you are interested in, and what you buy. App developers are contractually required to share the revenues from the sale of goods and services on their apps with Apple. In other words, whereas Google gathers information about you and sells it to others, Apple enables others to gather information, and charges for the service.

## I. TERMINOLOGY

### A. *Fashion*

The term “fashion” can have very different meanings and I do not purport to formulate a definitive concept here. A useful definition might be Linda Welters and Abby Lillethun’s: “changing styles of dress and appearance that are adopted by a group of people at any given time and place.”<sup>44</sup> Fashion includes not just clothing, but also jewelry, skin and body modification such as cosmetics, tattoos, hairstyles, beard and shaving customs, and piercings.<sup>45</sup> Some things people carry, such as handbags, briefcases, and, perhaps, smart phones, fall within fashion.<sup>46</sup>

In this paper I use continental speculative theory to discuss a particular phenomenon in contemporary Western culture. I do not know whether it can or should be applied elsewhere, although the fashion

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<sup>41</sup> NEST, <https://nest.com/thermostat/life-with-nest-thermostat/> (last visited Jan. 6, 2016).

<sup>42</sup> Babbage, *Goodbye, Glass*, THE ECONOMIST (Jan. 20, 2015), <http://www.economist.com/news/science-and-technology/21640103-week-our-correspondents-discuss-discontinuation-google-glass-and-using-x-rays-read>.

<sup>43</sup> APPLE, <https://www.apple.com/privacy/> (last visited Jan. 6, 2016); *see also*, Philip Elmer-DeWitt, *Tim Cook: Apple sells security. Google sells you.*, FORTUNE (Sept. 18, 2014, 9:36 AM), <http://fortune.com/2014/09/18/tim-cook-apple-sells-security-google-sells-you/>.

<sup>44</sup> Welters & Lillethun, *supra* note 33.

<sup>45</sup> In Watt’s words:

Clothing is obviously a major component of dress, but so too is artificial bodily modification ranging from shaving to scarification. When we accept that dress is not limited to cloth cladding of the sort that is usual in human societies in cold climates, we can proceed to observe that dress and adornment are as pervasive as laws.

WATT, *supra* note 35, at 5.

<sup>46</sup> Elsewhere I chide Watt, in his insightful work on the relationship between dress and law, for asserting that they are not because of their overwhelmingly utilitarian function. WATT, *supra* note 35, at 7. This is particularly odd in that in recent years handbags and shoes have become some of the most important, and expensive, elements in a fashionable woman’s wardrobe. *See* Jeanne Schroeder, *True to You in My Fashion*, 27 LAW & LITERATURE 441 (2015).

industry is increasingly global.<sup>47</sup> Consequently, like Barton Beebe, I question why so many American legal scholars who study fashion place such heavy emphasis on the theories of Thorsten Veblen and Georg Simmel, who were sociologists studying late nineteenth-century and turn-of-the twentieth century Europe dominated by an aristocracy. They argued that in such a class-structured society, fashion served a role in establishing status. As such, there was a top down phenomena whereby the upper classes sought to distinguish themselves from the lower classes who aped them.

Speculative theory helps explain certain apparent paradoxes of fashion precisely because it is a theory of the necessity and universality of contradiction. On the one hand, the very idea of being “in fashion” implies that changeability. On the other, continuity is a hallmark of fashion—the most fashionable are often those who stick with a discernable style for years,<sup>48</sup> or who dress in so-called “classics” rather than adopting “fads.” On the one hand, by conforming to fashion we seek to fit in. On the other, by either setting trends or ignoring them, we seek to stand out.<sup>49</sup>

### B. *Wearable Technology*

The term “wearable technology” is often used to refer to a number of analytically separate, albeit empirically overlapping, categories. I will identify two dichotomies along which specific products can be arrayed.

First, there is a dichotomy between products designed primarily for industrial, medical, and other utilitarian purposes and products designed for consumer purposes. I suspect the potential medical and industrial applications of wearable devices could be enormous. Nevertheless, it is the potential consumer market that has garnered the most excitement in the financial press. Second, and within this consumer category, a dichotomy exists between devices designed to be worn on one’s body and technology designed to improve the function of things one already wears.<sup>50</sup> The financial press has concentrated more on the former

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<sup>47</sup> Linda Welters and Abby Lillethun, *Introduction*, THE FASHION READER xxv (Linda Welters & Abby Lillethun, eds., 2d ed. 2011).

<sup>48</sup> For example, Vivienne Westwood once declared Queen Elizabeth II, with her brightly colored ensembles, large matching hats, sensible shoes, and handbags one of the most fashionable women in the world. Quoted in Simon Doonan, *Meet the Most Fashionable Woman in the World*, SLATE (Jun. 2, 2012, 12:45 PM), [http://www.slate.com/articles/life/doonan/2012/03/the\\_queen\\_s\\_jubilee\\_why\\_she\\_s\\_the\\_most\\_fashionable\\_woman\\_in\\_the\\_world\\_.html](http://www.slate.com/articles/life/doonan/2012/03/the_queen_s_jubilee_why_she_s_the_most_fashionable_woman_in_the_world_.html).

<sup>49</sup> In the words of Scott Hemphill and Jeannie Suk [hereinafter HS], “Fashion features the tension between the desire to be distinct as an individual and the desire to connect with a collectivity . . . . Fashion is then driven forward as a combination of individual differentiation and collective identification, and of the personal and the social impulses.” C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1159 (2009) [hereinafter Hemphill & Suk].

<sup>50</sup> A variation on this category is the use of new technology as a means of creating fashion. The Metropolitan Museum of Art’s Costume Institute’s Spring 2015 exhibition, *Manus x Machina*:

category—epitomized by its fascination with the Apple Watch.<sup>51</sup> However, the feminine position towards fashion might suggest consumer wearables will not really take off until this dichotomy is rejected. Wearable technology must be experienced not as technology we wear, but as something we wear that happens to incorporate technology. That is, the shift must be made from designing devices that *can* be worn, to designing fashion that we *want* to wear.

Here, fashion is of the essence. Glass was not merely creepy, it was ugly. The problem is not that it was weird—strange things come in and out of fashion all the time—it was not flattering. It was worn on the face, but it was not designed to enhance the face. It looked exactly like what it was: engineering. Moreover, Google made the mistake of introducing a consumer product with no obvious consumer purpose, and only afterwards partnered with eyewear designers. True, fashion legend Diane von Furstenberg had her models wear Glass at her Spring 2013 runway show,<sup>52</sup> and offered a “designer” version on Net-a-Porter.<sup>53</sup> However, in retrospect, this was no different than any number of gimmicks designers use to garner attention, not to actually sell. That is, von Furstenberg’s use of Glass had its desired effect of generating publicity for her new memoir and reality television show.<sup>54</sup>

In fact, Google created an unfashionable article of fashion the true purpose of which was less to beautify or aid the consumer and more to gather demographic information about the user. In hindsight, the failure of its initial experiment seems to have been pre-destined.<sup>55</sup> This is unfortunate because one can imagine how useful it might be for a surgeon or lab technician, for example, to be able to be able to consult a

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*Fashion in the Age of Technology* explores how designers are using experimenting with such techniques as 3-D printing as supplements to the classical *métiers* of couture such as embroidery, lacemaking, leatherwork, etc. Roberta Smith, *At the Costume Institute, Couture Meets Technology*, N.Y. TIMES (May 5, 2016), [http://www.nytimes.com/2016/05/06/arts/design/review-at-the-costume-institute-couture-meets-technology.html?\\_r=0](http://www.nytimes.com/2016/05/06/arts/design/review-at-the-costume-institute-couture-meets-technology.html?_r=0); Interestingly, this show is sponsored by Apple. *Id.*

<sup>51</sup> In the words of a Wall Street Journal’s consumer technology reviewer, “[n]ow, for the first time, designers seem to have a sense of what wearables are truly for. They are solutions to particular problems, rather than objects for which there is already a market.” Christopher Mims, *For Wearables, Doing a Thing Well Beats Trying to Do it All*, WALL ST. J., (Apr. 18, 2016), <http://www.wsj.com/articles/for-wearables-doing-a-thing-well-beats-trying-to-do-it-all-1460952060>; To his credit, Mims questions the tendency to “slap the label ‘wearable’ on a broad swath of devices, doing a disservice to both users and the industry behind it. It is like calling everything from eyeglasses to underwear ‘body stuff.’” *Id.* Notably, Mims does not even mention how these devices look.

<sup>52</sup> Eric Wilson, *DVF Gives Google Glasses a Spin on the Runway*, N.Y. TIMES (Sept. 9, 2012, 7:50 PM), <http://runway.blogs.nytimes.com/2012/09/09/dvf-gives-google-glasses-a-spin-on-the-runway/>.

<sup>53</sup> *DVF | Made For Glass*, NET-A-PORTER, [http://www.net-a-porter.com/Shop/Designers/DVF\\_Made\\_For\\_Glass/All](http://www.net-a-porter.com/Shop/Designers/DVF_Made_For_Glass/All) (last visited Jan. 6, 2016).

<sup>54</sup> As Madeleine King notes, Von Furstenberg did not actually integrate Glass into her frames. They remained an “inelegant, bulky and lopsided appendage.” King, *supra* note 24.

<sup>55</sup> *See id.*

computer and to communicate with others from a distance without looking away from her task and while leaving both hands free.<sup>56</sup>

Fashion is of the essence because many people will stick with old wearable technology that is beautiful despite the introduction of new “better” technology. Many people still wear traditional watches despite the fact that they also carry smart phones that tell time.<sup>57</sup> Wristwatches have in that respect reverted to the original incarnation in the nineteenth century—jewelry that just so happens to tell time.<sup>58</sup> It should be obvious that no one pays thousands of dollars for a high-end watch *primarily* for its utilitarian function. I do not expect the Apple Watch will greatly affect the existing luxury watch market. The better question is how it will affect the market for inexpensive and mid-price ones, or, more importantly, whether it will convince younger consumers who are used to relying on their phones to wear watches for the first time.<sup>59</sup> If the market will almost certainly be overtaken in a short time, maybe the goal is to get people to buy them *despite* the fact that they include technology, in the hope that consumers will eventually expect the technology.

## II. SUBJECTIVITY

### A. Introduction

From the perspective of speculative theory, fashion is not merely a means of expressing personality through display, nor of suppressing personality through conformity. Rather, as part of the symbolic order, it helps create that aspect of personality I am calling “subjectivity”—the capacity of bearing rights and duties. Many legal analysts of fashion, oddly relying on Veblen and Simmel,<sup>60</sup> see fashion as a being a means of establishing status.<sup>61</sup> This is what I identify as the masculine position—seeking to possess that which others desire. By contrast, the

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<sup>56</sup> *Id.*

<sup>57</sup> *See id.*

<sup>58</sup> Indeed, wristwatches were originally eschewed by men because, as jewelry, they were considered feminine. Men wore pocket watches, which were considered more reliable. It was only when their utility in coordinating activity was demonstrated when they were issued to soldiers in World War I, did wristwatches become seen as masculine. John E. Brozek, *The History and the Evolution of the Wristwatch*, INT’L WATCH MAG. (Jan. 2004), [http://www.qualitytyme.net/pages/rolex\\_articles/history\\_of\\_wristwatch.html](http://www.qualitytyme.net/pages/rolex_articles/history_of_wristwatch.html); David Belcher, *Wrist Watches, From Battlefield to Fashion Accessory*, N.Y. TIMES (Oct. 22, 2013), <http://www.nytimes.com/2013/10/23/fashion/wrist-watches-from-battlefield-to-fashion-accessory.html>. For an interesting discussion of the ultra-luxury watch market, *see* Alex Williams, *Proudly, Grandly, Luxuriously Analog*, N.Y. TIMES, Mar. 29, 2015, Sunday Styles, at 1.

<sup>59</sup> Lisa Armstrong, *Apple Watch launch: the fashion verdict*, THE TELEGRAPH (Mar. 9, 2015), <http://fashion.telegraph.co.uk/article/TMG11084027/Apple-Watch-the-fashion-verdict.html>.

<sup>60</sup> *See supra* text accompanying note 47.

<sup>61</sup> *See id.*

feminine subject seeks to use fashion as a means of becoming the object that others desire. Both positions—having and being—are different and inconsistent ways of creating personality through recognition.

Unlike classical liberalism, speculative theory posits that the subject is not natural. No one is born a subject; there is no human subjectivity that pre-exists law. The subject is artificial in the sense that it is an artifact, a work of art, a human creation, and a hard won achievement. As Hegel argues, one becomes a subject by being recognized as a subject by another subject.<sup>62</sup> This is achieved by submission to the order of intersubjective relations, which Lacan calls the symbolic.<sup>63</sup> The symbolic order includes language, law, sexual identity, the economy and, I argue, fashion.<sup>64</sup> Consequently, although I cannot quite accept Gary Watt's assertion that clothes are law and law is clothes,<sup>65</sup> I agree that they are closely linked in sharing a vital function.

It is important to clarify a potential misperception. To say the subject is artificial does not suggest that subjectivity is arbitrary, completely malleable or, in some way, unreal. Even if subjectivity is a human creation, humans are embodied beings. Subjectivity is made of natural materials and subject to natural limitations. The point, however, is that the subject, understood as the individual's experience of herself as a self-conscious, speaking creature interpreting herself and others through words and images, cannot be reduced to her bodily existence. Moreover, we have no direct experience of our purely biological existence because the instant we become aware of it, we have already interpreted the experience through the symbolic and the imaginary.

In addition, Hegel and Lacan, as well as myself, are self-consciously discussing subjectivity as a phenomenon in a specific historical time and place. In his *Elements of the Philosophy of Right*,<sup>66</sup> Hegel was trying to explain the development of the modern European constitutional state in the late eighteenth and early nineteenth century at approximately the same time that a mercantile economy was replacing a feudal one. His argument is that the resulting regime of private law was the first step in enabling the creation of the type of person who could act

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<sup>62</sup> See *infra* text accompanying notes 71-89.

<sup>63</sup> See JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK I: FREUD'S PAPERS ON TECHNIQUE 1953-54 80 (Jacques-Alain Miller ed. & John Forrester trans., 1988) [hereinafter, LACAN, SEMINAR I]; Jacqueline Rose, *Introduction II to JACQUES LACAN & THE ÉCOLE FREUDIENNE, FEMININE SEXUALITY* 27, 31 (Juliet Mitchell & Jacqueline Rose eds. Jacqueline Rose trans. 1985) [hereinafter, LACAN, FEMININE SEXUALITY]; ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 10 (1990).

<sup>64</sup> See JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK I: FREUD'S PAPERS ON TECHNIQUE 1953-54 80 (Jacques-Alain Miller ed. & John Forrester trans., 1988).

<sup>65</sup> WATT, *supra* note 35, at 1.

<sup>66</sup> GEORG WILHELM FRIEDRICH HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT (Allen W. Wood ed. & H.B. Nisbet trans., Cambridge Univ. Press 1991) (2003) [hereinafter HEGEL, PHILOSOPHY OF RIGHT].

as a citizen of such a state.<sup>67</sup> Although the subject is the most logically primitive type of personhood after the individual, it was late to develop as an empirical, historical matter, precisely because it first required the creation of private law.

Why then do I adopt Hegel writing in the early nineteenth century when I reject so much of Veblen and Simmel writing at the end of that century? Veblen and Simmel were sociologists describing society as it existed at that point in time. Hegel, on the other hand, was a political philosopher trying to explain the logic of an ongoing process of fundamental change in the structure of Western society and personhood. He was identifying precisely how contract—an abstract right—was replacing status relationships. Consequently, I believe much of his theory remains relevant today.<sup>68</sup>

Lacan wrote about the Western subject in the second half of the twentieth century—his seminar series ran from 1953 until 1980.<sup>69</sup> As such, it is tempting to dismiss his analysis of sexuality as merely reflecting outdated sexist assumptions of the time. However, this would miss one of Lacan’s implicit points. Lacan does not accept, but upends, typical gender stereotypes. He sees human sexual identity as always in crisis.<sup>70</sup> The reason why traditionalists insist so strongly on the naturalness of sex roles is precisely because they are always in the process breaking down. Consequently, I believe that he remains relevant today.

### B. *Hegel and Property*

Because I have trod this ground extensively elsewhere I will only give a brief précis here. In my understanding, almost all of Hegel’s work can be read as a prolonged critique of Kant. All schools of classical liberal political philosophy start with some notion of the subject as an autonomous abstract free individual in the state of nature. Kant’s is probably the most radical version of liberalism because his notion of the individual is so abstract. This individual is a thing-in-itself or “noumenon” beyond all empirical—or in Kantian vocabulary,

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<sup>67</sup> Arthur J. Jacobson, *Hegel’s Legal Plenum* in *HEGEL AND LEGAL THEORY* 115 (Drucilla Cornell, David Gray Carlson and Michel Rosenfeld eds. 1991).

<sup>68</sup> One might argue that Hegel famously claimed that philosophy always arrives “too late.” *Id.* at 23. It can only interpret events that have occurred, not predict the future. This is true, but it does not mean that he is not at all forward looking. Famously, he stated that “the owl of Minerva begins its flight only with the onset of dusk,” not at midnight. *Id.* (emphasis added). That is, he thought he was writing at the beginning of the end of an era and, therefore, had something to say about the near future.

<sup>69</sup> BRUCE FINK, *THE LACANIAN SUBJECT: BETWEEN LANGUAGE AND JOUISSANCE* 207-08 (1995) [hereinafter FINK, *THE LACANIAN SUBJECT*].

<sup>70</sup> In his famous formulation, “there are no sexual relations.” JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN BOOK XX: ENCORE, ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE* 1972-1973 (Jacques-Alain Miller ed. & Bruce Fink trans. 1998).



pathological—differentiation and particularity.<sup>71</sup> Hegel's *Elements of the Philosophy of Right* explains how Kant's abstract individual can develop into the complex, concrete, interpersonal citizen of the modern constitutional state.

Hegel shows how Kant's account has a moment of truth, but is insufficient and incomplete—in effect, that Kant did not have the courage to follow his ideas to their logical conclusions.<sup>72</sup> As I shall develop further below, Kant thought that freedom, subjectivity, and morality must be above the pathology of desire. Hegel, on the other hand, argued that freedom, subjectivity, and morality could only be actualized through desire.

The first and most primitive stage in this development is the creation of the subject in the regime that Hegel calls “abstract right,” which is roughly equivalent to what we American legal academics call private law. Although Kant's moral philosophy concentrates on duty, Hegel shows how the Kantian person cannot have duties or rights in the state of nature. There is no such thing as an abstract duty. A duty must run towards, and a right must be enforceable against, an identifiable person or identifiable class of persons. This simple proposition, often associated in the United States with John Wesley Hohfeld,<sup>73</sup> is uncontroversial to most lawyers. Indeed, rights and duties are correlatives. I only have a duty to you only insofar as you have a right to enforce it against me; I have a right against you, only insofar as you have a legally enforceable duty to recognize it. That is, subjectivity, as I have defined it, must be understood in terms of intersubjectivity; rights and duties only exist insofar as they are recognized by other subjects having reciprocal duties and rights.

The problem with Kant's understanding of the free individual is that its radical freedom depends on its radical abstraction. It is free because it has no specific concrete characteristics that serve as limitations. As such, each abstract individual is indistinguishable from any other, and, therefore, not recognizable.<sup>74</sup> Indeed, the Kantian individual is a noumenon, or thing-in-itself, which, according to Kantian theory, is beyond our direct knowledge.<sup>75</sup> Consequently, to become a subject the individual must first make itself recognizable—

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<sup>71</sup> Hegel characterizes the Kantian individual as being totally abstract and radically negative. To be truly free and beyond constraints is to have no positive characteristic at all. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 37-40, 48-49.

<sup>72</sup> JEANNE LORRAINE SCHROEDER, *THE TRIUMPH OF VENUS: THE EROTICS OF THE MARKET* 44-47 (2004) [hereinafter SCHROEDER, *VENUS*].

<sup>73</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917), YALE L. SCH. FAC. SCHOLARSHIP SERIES, Paper No. 4378, [http://digitalcommons.law.yale.edu/fss\\_papers/4378/](http://digitalcommons.law.yale.edu/fss_papers/4378/).

<sup>74</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 67-70.

<sup>75</sup> See *supra* text accompanying note 71.

and I would add, desirable—by individuating itself. It—that is, he or she—must take on concrete characteristics that distinguish it from other individuals. It must give up some of its abstract freedom to achieve concrete freedom.

Although I concentrate in this paper on how fashion also serves this purpose, I start with a brief introduction to Hegel's analysis of the law of property and contract. This is because the latter is necessary to understanding the former, and also because I believe it is necessary to counter a misunderstanding of the Hegelian personality theory of property that might lead one to believe Hegel would have granted fashion designers intellectual property protection in their creations. I will explicate this second point later in this paper.<sup>76</sup>

Hegel posits that property—the classic trinity of possession, enjoyment, and alienation defined in the broadest way—can serve this purpose.<sup>77</sup> Possession is defined as identification of an object with a subject through the exclusion of other subjects from the object.<sup>78</sup> An object should be thought of, not in the colloquial sense of a physical thing, but as anything that is not itself capable of subjectivity.<sup>79</sup> Because the purpose of property is recognition, a claim to possession must be manifest in a manner recognizable by others. Physical possession of tangible goods, or the wearing of clothing, is one, but not necessarily the only or most adequate way this can be done.<sup>80</sup>

In possession, the person identifies herself with a unique object, thereby differentiating herself from others and making her potentially identifiable.<sup>81</sup> By exploiting her object in enjoyment, she establishes her sovereignty over it, making clear that it is she who is the subject, not the object with which she is identified.<sup>82</sup> At this stage, however, recognition is only possible, not yet actual.

To concentrate on possession and enjoyment is to assume that

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<sup>76</sup> See *infra* text accompanying notes 214-228.

<sup>77</sup> Alan Brudner, *The Unity of Property Law*, 4 CAN. J. L. & JURIS. 3 (1991). As I have argued elsewhere, a Hegelian analysis would reject the prevalent “bundle-of-sticks” theory of property that assumes that, because “property” is manifest in modern law in such variety, there is no essential unity. The traditional trinity can be defended, however, if one recognizes that the high level of abstraction of Hegel's argument. For example, sales, leases, hypothecations, gifts, etc. are all particular manifestations of the single element of alienation. JEANNE LORRAINE SCHROEDER, *THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE* 156-57 (1998) [hereinafter SCHROEDER, VESTAL]. Indeed, this is reflected in American property law, which does not limit the term-of-art “purchase” to the lay meaning of “sale,” but defines it as “any . . . voluntary transaction creating an interest in property.” U.C.C. § 1-201(b)(29) (AM. LAW INST. & UNIF. LAW COMM'N 2012).

<sup>78</sup> Jeanne L. Schroeder, *Unnatural Rights: Hegel's Theory of Personality and Intellectual Property*, 60 U. MIAMI L. REV. 453, 469 (2006) [hereinafter Schroeder, *Unnatural Rights*].

<sup>79</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 71, 73.

<sup>80</sup> *Id.* at 88; Schroeder, *Unnatural Rights*, *supra* note 78, at 469-72.

<sup>81</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 76-77.

<sup>82</sup> *Id.* at 89-90.

personality is created through object relationships, rather than intersubjective ones. This is, famously, the error that Margaret Radin makes in her influential articles *Property and Personhood*<sup>83</sup> and *Market-Inalienability*.<sup>84</sup> As I discuss below, the same misunderstanding underlies the argument that a personality theory of property would support an artist's moral right in her creation.<sup>85</sup>

Possession and enjoyment, standing alone, make the individual dependent on her objects. She is an object addict, bound to her object.<sup>86</sup> This violates the teleology of the Kantian individual which is to make her potential freedom actual.<sup>87</sup> Consequently, the individual needs to find a way to retain the individuation and recognizability of object relations, while freeing her from any continuing dependence any specific object.<sup>88</sup>

Hegel argues that this is accomplished by alienation through exchange, i.e., contract. Each contract party recognizes her counterparty as having right of possession in the unique object to be exchanged, as well as her own duty to the counterparty to complete the transaction by delivery of another object.<sup>89</sup>

<sup>83</sup> See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

<sup>84</sup> See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). I set out this argument in full in Jeanne L. Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as The Inviolable Feminine Body*, 79 MINN. L. REV. 55 (1994) [hereinafter Schroeder, *Virgin Territory*], and in SCHROEDER, VESTAL, *supra* note 77, at 229-92.

<sup>85</sup> See *infra* text accompanying notes 214-228.

<sup>86</sup> Brudner, *supra* note 77, at 31; Schroeder, *Virgin Territory*, *supra* note 84, at 138; Schroeder, *Unnatural Rights*, *supra* note 78, at 476.

<sup>87</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 73; SCHROEDER, VESTAL, *supra* note 77, at 43-45.

<sup>88</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 476-77. Hegel reconciles the requirement of continuity with his insistence that the free person not be bound to a specific object by sharply delimiting a tiny, minimal class of "inalienable" objects defined as "[t]hose goods, or rather substantial determinations, which constitute my own distinct personality and the universal essence of my self-consciousness are therefore *inalienable*, and my right to them is *imprescriptable*. They include my personality in general, my universal freedom of will, ethical life, and religion." HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 95. The only inalienable "objects," then, are the bare minimal constituents of any conception a concrete personality such that their alienation would constitute the alienation of concrete personality. Hegel further explains:

Examples of the alienation of personality include slavery, serfdom, disqualification from owning property, restrictions on freedom of ownership, etc. The alienation of intelligent rationality, of morality, ethical life, and religion is encountered in superstition, when power and authority are granted to others to determine and prescribe what actions I should perform . . . or how I should interpret the dictates of conscience, religious truth, etc.

*Id.* at 96. Although these categories fall within Hegel's extremely abstract definition of objects, it is obvious that none of them are "objects" within the colloquial or conventional legal understandings of the word.

<sup>89</sup> SCHROEDER, VENUS *supra* note 72, at 53-54.

### C. Teleology and Desire

Crucial to our understanding of fashion is the role of desire in the creation of subjectivity. As I shall repeatedly emphasize, both Hegel and Lacan see subjectivity as nothing but the faculty of desire.

Hegel argues both that the Kantian individual cannot not remain abstract in the state of nature, but that it is driven to try to achieve concrete personhood. Although the Kantian individual's essence is freedom, this freedom is only potential in the state of nature. To Hegel, that which is potential must become actual.<sup>90</sup> More accurately, Hegel's logic is retroactive. Potentiality can only be retroactively established after it has become actual. Consequentially, the abstract individual seeks to actualize her potential freedom, moving from the abstract to the concrete. Since this can be achieved only through relationships with other subjects, the subject passionately desires connection with others. The relationships of property and contract must be seen as a primitive form of eroticism; law can only be understood in terms of sexuality (and vice versa).

Here we see one of the biggest differences between Hegel and Kant. Kant famously argues that morality must be established purely through rationality untainted by such pathologies as desire. Hegel, believing that morality can only be achieved through relations of other subjects, sees rationality as necessarily linked to desire.<sup>91</sup> Reason and passion are two sides of the same coin.

As I shall discuss,<sup>92</sup> from a Hegelian perspective, the problem with analyzing intellectual property with respect to the act of creation is that it confuses personhood with subject-object relationships. Subjectivity is, however, created through intersubjective relationships.<sup>93</sup> The objects of property are merely mediators of recognition. We only identify with and desire objects derivatively as means of achieving our true desire, namely, the desire of other subjects.<sup>94</sup>

We can see here how fashion imperfectly reflects the logic of property. Clearly it is a way of individualizing oneself through

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<sup>90</sup> This is one of the meanings of Hegel's notorious assertion that "[w]hat is rational is actual; and what is actual is rational." HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 20.

<sup>91</sup> Hegel rejected Kant's theory of moral law as empty formalism because, for Hegel, "there can be no action without passion . . ." HENRY E. ALLISON, KANT'S THEORY OF FREEDOM 186 (1990). As Allen Wood says, "Hegel's fundamental concern in rejecting the Kantian conception of the good will is to prevent our conceiving of the good will as an essentially alienated form of human existence, cut off both from its own sensuous nature and from the real world in which it acts." *Id.* at 187 (quoting Allen Wood). This is part and parcel of Hegel's "wholesale rejection of the metaphysics of transcendental idealism . . ." *Id.* at 188.

<sup>92</sup> See *infra* text accompanying notes 227-228.

<sup>93</sup> In my formulation that I have developed extensively elsewhere, in the Hegelian-Lacanian understanding, "subjectivity is intersubjectivity mediated by objectivity." SCHROEDER, VESTAL, *supra* note 72, at 19, 53.

<sup>94</sup> I explain this analysis most fully in SCHROEDER, VESTAL, *supra* note 77.

possession and enjoyment of objects. Of course, in fashion wearers do not engage in market exchange with each other. Rather, the fashionable person manifests her independence from any particular article of fashion through the cycle of change.

Most importantly, the masculine and feminine positions are understood as two different modes of failure.<sup>95</sup> In Lacan expressly, and I believe in Hegel implicitly, the dialectic of recognition can never be perfectly resolved—the goal of achieving perfect recognition is not merely never reached as a practical matter, it is logically necessarily that it is never achieved as a theoretical one. To sate desire would be to kill desire.<sup>96</sup>

#### D. Lacan

Lacan rereads speculative theory through the lens of Freud or, perhaps, rereads Freud through the lens of speculative theory. He, perhaps unconsciously, universalizes Hegel's understanding of subjectivity created through intersubjectivity mediated by objectivity.<sup>97</sup> Fashion can be seen as another way that we seek recognition through recognizability.

According to psychoanalysis, the infant is not born with subjectivity. The infant only achieves the status of a self-conscious adult through intersubjective relations with other subjects mediated by an object of desire. Rather than limiting his analysis to law as Hegel does, Lacan expands it to the entire “symbolic” order that includes all forms of intersubjectivity.<sup>98</sup> As a psychoanalyst working in the Freudian tradition, he concentrates on law understood most primitively as the incest taboo, as well as language and the development of sexual identity.<sup>99</sup> Elsewhere I have emphasized market activity as part of the symbolic order.<sup>100</sup> Here I emphasize fashion's place in the symbolic

<sup>95</sup> RENATA SALECL, *THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM* 116 (1994).

<sup>96</sup> JEANNE L. SCHROEDER, *THE FOUR LACANIAN DISCOURSES: OR TURNING LAW INSIDE OUT* 148 (2010) [hereinafter SCHROEDER, *FOUR DISCOURSES*]; SCHROEDER, *VENUS*, *supra* note 72, at 55–56.

<sup>97</sup> SCHROEDER, *VESTAL*, *supra* note 77, at 53.

<sup>98</sup> Most specifically, Lacan concentrated on language. In Rose's words “For Lacan the subject is constituted through language . . . . The subject is the subject of *speech* (Lacan's ‘*Parle-être*’)” Jacqueline Rose, *Introduction II to JACQUES LACAN AND THE ÉCOLE FREDUDINNE, FEMININE SEXUALITY*, 27, 31 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1985). Lacan's most sustained work on this subject is his essay *The Instance of the Letter in the Unconscious or Reason Since Freud* in JACQUES LACAN, *ÉCRIT 412* (Bruce Fink trans., 2006).

<sup>99</sup> See e.g. “Law and desire, stemming from the fact that both are born together, joined and necessitated by each other in the law of incest . . . .” Jacques Lacan, *Introduction to the Names-of-the-Father Seminar*, in JACQUES LACAN, *TELEVISION/ A CHALLENGE TO THE PSYCHOANALYTIC ESTABLISHMENT* 81–95 (Joan Copjec ed. & Denis Hollier et al. trans., 1990) 81,89. See also SCHROEDER, *VENUS*, *supra* note 72, at 88–107; SCHROEDER, *VESTAL*, *supra* note 77, at 68–101.

<sup>100</sup> This is the thesis of SCHROEDER, *VENUS*, *supra* note 72.

order.

### E. *Sexuality*

Subjectivity is conceptualized as the faculty of desire. Since Lacan referred to his project as a “return to Freud,”<sup>101</sup> it is easy for a layperson to assume he thinks we are driven by our animal urges. I read Lacan’s phrase, however, not as an acceptance of every aspect of Freud’s theory, but rather as a call to reread Freud with a new and ruthlessly critical eye. Specifically, Lacan rejected the morbid anatomical literalism that seems to underlay many interpretations of Freud’s work.<sup>102</sup>

To Lacan, desire is understood as a purely symbolic capacity, i.e., Hegel’s desire for recognition. Lacan famously states that the subject’s desire is the desire of the Other.<sup>103</sup> The intentional ambiguity of this phrase is the same in French as in English—we desire the Other, we desire to be desired by the Other, and our desire is determined by the Other. As in Hegel, in Lacan, the recognition in the symbolic order also involves the possession, enjoyment, and exchange of a hypothesized object—the *objet petit a*.

To reiterate, to Lacan sexuality is not an anatomic or biological category, or even a matter of sexual orientation; it is symbolic. The primitive law of the incest taboo is not, as a vulgar Freudianism would have it, an injunction aimed at the infant who literally wants to have sex with its mother and kill its father. Rather, the incest taboo should be understood as law as prohibition issued from the symbolic order identified with the paternal function. With respect to the “masculine” infant, it is the demand not to identify with the maternal-feminine, but rather to adopt a masculine personality.<sup>104</sup> As always, the feminine version is more complex and is beyond our concerns here. The point is that the two sexes are two different positions one can take with respect to the dialectic of recognition.

I speak of two sexes, but this may raise the unfortunate implication

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<sup>101</sup> See, e.g., PHILIPPE JULIEN, JACQUES LACAN’S RETURN TO FREUD: THE REAL, THE SYMBOLIC, AND THE IMAGINARY (Devra Beck Simiu trans., 1994).

<sup>102</sup> ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 122 (1990). Freud is arguably inconsistent in whether his references to anatomy are to be taken literally. However, in *Totem and Taboo* he goes so far as to argue that the first human societies were created when a band of brothers literally murdered (and perhaps ate) their tyrannical father in order to get access to his wives/ their mothers. SIGMUND FREUD, TOTEM AND TABOO 152-53, 177-79 (James Strachey trans., 1952).

<sup>103</sup> JACQUES LACAN, SPEECH AND LANGUAGE IN PSYCHOANALYSIS 31 (Anthony Wilden trans., 1981).

<sup>104</sup> BRUCE FINK, A CLINICAL INTRODUCTION TO LACANIAN PSYCHOANALYSIS THEORY AND TECHNIQUE 79-88 (1997) [hereinafter FINK, A CLINICAL INTRODUCTION]; Jeanne L. Schroeder, *Mad Money: Wall Street’s Obsession With Bonuses*, 33 CARDOZO L. REV. 2307, 2325-26, 2330-31 (2012) [hereinafter Schroeder, *Mad Money*]. Note, here the word “Other” is capitalized. The big Other can refer to another person specifically, or to the symbolic order of intersubjective relations generally.

that sexuality is a binary, and complementary, relationship between a yin and a yang that together form a perfect whole—as in the myth recounted by Aristophanes in Plato’s *Symposium*.<sup>105</sup> Rather, each sex is a different, failed attempt at achieving wholeness; sexuality is thus a fundamental non-relation. In Lacan’s famous formulation, “there is no sexual relation.” The two sexes are inconsistent modes of failure; if you try to put them together you get obscenely fulsome overlaps and tragic, or pathetic, gaps.<sup>106</sup> The popular metaphor that men are from Mars and women from Venus is misguided. If this were true, they would be complements who could easily co-exist. The non-relation of sexuality occurs because masculinity and femininity are both unsuccessful attempts at occupying the same plot on Earth.<sup>107</sup>

This is why there is only one signifier of subjectivity—and therefore, of sexuality—and not two.<sup>108</sup> Following Freud, Lacan calls this the phallus, which cannot simply be confused with the anatomical male organ that gives it its name. Rather, it reflects the concept, which I will discuss below,<sup>109</sup> that the phallus is something the masculine subject claims to “have.”

Nevertheless, the terminology reflects the clinical observation that, as an empirical matter, biologically male human beings tend towards the masculine position, and biologically female human beings towards the feminine. This is not necessarily the case; Lacan considered homosexuality as “normal” as heterosexuality.<sup>110</sup> No doubt most of us oscillate between the two positions.

#### F. *Individuality and Recognition*

We have a fraught relation with the symbolic. On the one hand, to be recognizable, one must differentiate oneself as a unique individual. On the other hand, to be recognized as a subject, one must remain similar to other subjects. Recognition requires that one simultaneously be the same and different. This is reflected in the core concept of Hegelian philosophy—the identity of identity and difference.

<sup>105</sup> PLATO, SYMPOSIUM, PROJECT GUTENBURG (Benjamin Jowett trans., 2008), <http://www.gutenberg.org/files/1600/1600-h/1600-h.htm> (last visited Apr. 10, 2016).

<sup>106</sup> In the words of Renata Salecl, “[e]very translation of sexual difference into a set of symbolic opposition(s) is doomed to fail . . . What we call ‘sexual difference’ is first and above all the name of a certain fundamental deadlock inherent in the symbolic order.” RENATA SALECL, *Introduction* in SEXUATION (SIC 3) 1-12 (Renata Salecl ed., 2000).

<sup>107</sup> As Gherovici says, “In the Freudian view, men are not from Mars and women from Venus, but rather, as Lacan . . . observed, sexual difference opens up an insurmountable chasm.” PATRICIA GHEROVICI, PLEASE SELECT YOUR GENDER: FROM THE INVENTION OF HYSTERIA TO THE DEMOCRATIZING OF TRANSGENDERISM 75 (2010).

<sup>108</sup> GHEROVICI, *supra* note 107, at 20, 255.

<sup>109</sup> See *infra* text accompanying note 128.

<sup>110</sup> Accordingly, he had many gay analysands not because he or they considered their sexual orientation to be problematic, but because they suffered from the same neuroses as his straight analysands. ELISABETH ROUDINESCO, JACQUES LACAN 224, 287 (Barbara Bray trans., 1997).

Here I agree with Georg Simmel in his *Philosophy of Fashion*,<sup>111</sup> despite my disagreement with his emphasis on status. Dress reflects the fundamental duality of human experience: we are both social beings and autonomous individuals. By following fashion, we paradoxically demonstrate our conformity to, and distinction from, the group.<sup>112</sup> As I have put it elsewhere,

Simmel recognized this inherent paradox at the heart of fashion. On the one hand, we adopt a personal style to differentiate oneself from others. On the other hand, we follow fashion because we want to belong and conform to society. This same conflict can be seen in law where the individual wants to be part of a society to which she owes duties, but protected from its tyranny through individual rights. Simmel despaired that what he sees as two sides of human nature can never be reconciled.<sup>113</sup>

This dialectic of recognition helps us understand one of the seemingly most perplexing aspects of fashion, which has often been noted by others. For example, Scott Hemphill and Jeannie Suk have noted that those who follow fashion alternate between the tendencies they call “flocking” and “differentiation.”<sup>114</sup> The former is the desire to try to fit in; this can be manifest either by following the latest fad or sticking to “classics.” The latter is one’s attempt to set oneself apart. From a speculative standpoint, however, these are two sides of the same coin in that they reflect the dialectic of recognition.

This dialectic also parallels Hegel’s argument that the individual is

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<sup>111</sup> Georg Simmel, *The Philosophy of Fashion*, in SIMMEL ON CULTURE: SELECTED WRITINGS 187 (David Frisby & Mike Featherstone eds., 1997).

<sup>112</sup> In Simmel’s words:

Fashion is imitation of a given pattern and thus satisfies the need for social adaptation; . . . resolves the conduct of every individual into a mere example. At the same time, and to no less a degree, it satisfies the need for distinction, the tendency towards differentiation, change and individual contrast.

*Id.* at 188–89. Simmel is speaking about fashion, specifically, but his observation can be generalized to apply to other aspects of dress.

<sup>113</sup> Schroeder, *supra* note 46, at 446.

<sup>114</sup> Hemphill & Suk state:

Fashion is simultaneously characterized by differentiation and flocking—two phenomena that might appear to be in tension. On the one hand, the expressive and communicative aspects of fashion choices seem to benefit from a distribution of innovation that produces goods that are differentiated from each other. Thus we identify differentiation as a desired goal in fashion. On the other hand, we also notice benefits of moving in a common direction and partaking of the same trend. Thus we also identify flocking as desirable. . . . But the key point of the differentiation-flocking model is that the tastes of consumers are not at these particular extremes but rather express measures of both differentiation and flocking. The precise relationship between the two varies with the consumer, or even for the same consumer under different circumstances. For example, the same person might favor conservative suits (flocking) and extreme neckties (differentiation).

Hemphill & Suk, *supra* note 49, at 1165.



the sublation of the universal and the particular.<sup>115</sup> The Hegelian understanding of sublation should not be confused with the caricature of a synthesis that resolves the conflict between a thesis and its antithesis. Rather, it is an uneasy truce that preserves both the understanding (the universal) and the dialectic (the particular), and recognizes their continual struggle while suggesting a third, more complex, speculative resolution.<sup>116</sup>

This paradox of fashion is reflected in the role of law in liberal societies. Law both establishes individual rights and maintains social cohesion. In traditional clan societies, persons are recognized less as individuals than as members of a community (i.e., universals).<sup>117</sup> Libertarian theory emphasizes an atomistic notion of personhood (the particular). Speculative theory, by contrast, emphasizes that, on the one hand, human beings only function in groups, i.e., societies. On the other hand, the speculative theorist rejoices in enlightenment theory's concept of the free, autonomous individual, which he posits came into being with the creation of modern property rights and private law.<sup>118</sup> The speculative individual, however, is both and neither; she is both an individual and a member of her society, and she is both free and bound. Or, since freedom can only be actualized through others, her freedom is contingent to the degree she is bound to others.

#### G. *Alienation and Desire*

Our love-hate relationship with fashion reflects our profound ambivalence to the subjective order. One of the fundamental insights of Lacanian theory is that the universal sense of alienation that characterizes contemporary subjectivity “is not a condition that the self can overcome, even with the best therapy, but part of what fashions it from the ground up.”<sup>119</sup>

The subject is not merely split; subjectivity is itself an internal split.<sup>120</sup> In Simon Critchley's formulation, the individual is, in fact, a “dividual.”<sup>121</sup> One simplistic way of thinking about this is that, because

<sup>115</sup> DAVID GRAY CARLSON, A COMMENTARY ON HEGEL'S SCIENCE OF LOGIC 453-48 (2007).

<sup>116</sup> GEORG WILHELM FRIEDRICH HEGEL, HEGEL'S SCIENCE OF LOGIC 107 (A.V. Miller trans. 1969); SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 124 (1993) [hereinafter ŽIŽEK, TARRYING WITH THE NEGATIVE].

<sup>117</sup> MARK S. WEINER, THE RULE OF THE CLAN: WHAT AN ANCIENT FORM OF SOCIAL ORGANIZATION REVEALS ABOUT THE FUTURE OF INDIVIDUAL FREEDOM 7 -8 (2013).

<sup>118</sup> Hegel starts the *Philosophy of Right* with the dialectic of subjectivity and abstract right (private property and contract) because it is the most logically primitive stage in the development of personality. Nevertheless, it is empirically modern – this is why capitalism and the Enlightenment came into existence together. SCHROEDER, VENUS, *supra* note 72, at 45-46.

<sup>119</sup> Perry Meisel, *The Unanalyzable*, N.Y. TIMES BOOK REVIEW 12 (Apr. 13, 1997) (reviewing ELISABETH ROUDINESCO, JACQUES LACAN (Barbara Bray trans., 1997)).

<sup>120</sup> BRUCE FINK, THE LACANIAN SUBJECT *supra* note 69, at 45, 173.

<sup>121</sup> SIMON CRITCHLEY, INFINITELY DEMANDING: ETHICS OF COMMITMENT, POLITICS OF RESISTANCE 11 (2007).

our subjectivity is created through recognition by others, what is most ourselves is external to ourselves—what is intimate is extimate.<sup>122</sup> Even those who claim to be expressing themselves through dress depend on the judgment of others, whether admiration, repulsion, or tolerance, for validation.

Because we desire to become subjects, and subjectivity comes from recognition by others, we desperately desire others. This is why subjectivity can be thought of as the faculty of desire, with the desire of the subject being the desire of the Other. Our relationship with the other is, however, always mediated by the symbolic order, i.e., the language, laws, sexuality, and fashion that enables us to be recognized. Consequently, we hate the symbolic because it keeps us from what we desire so fervently—other people; but it could not be otherwise. If our relations were not so mediated, we would not be recognizable and would lose our subjectivity. We would be Kantian abstract persons—unknowable noumena. If we ever achieved our desires, our desire would be sated and we would no longer be subjects. Accordingly, it is the symbolic that paradoxically allows us to relate to others by keeping us apart; it both brings us together by separating us. This is, once again, the paradox of fashion. Recognition requires that we be both different and the same, to both develop individual style, while following the pack.

One common criticism of Freudian-Lacanian thought is that it medicalizes normal insecurities, turning them into diseases that must be treated by professionals.<sup>123</sup> I draw the opposite conclusion—it is consoling. One should not be upset merely because one feels inadequate or unsatisfied. That is the human condition in modern society. Indeed, it is what keeps us going and enables us to love. The ideal of neo-classic economics produced by the “perfect market” is “indifference,” a state of total apathy.<sup>124</sup> Thankfully, this is empirically, and I argue, theoretically, impossible. Lacan has a word for people who know what they want and lack empathy for others—psychopaths.<sup>125</sup>

### III. WHY IS FASHION FEMININE AND WHY DO MEN CLAIM TO DISDAIN IT?

#### A. Introduction

From a Lacanian perspective, all subjectivity is necessarily

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<sup>122</sup> Jacques-Alain Miller, *Extimité* (Francoise Massardier-Kenney trans.), in *LACANIAN THEORY OF DISCOURSE: SUBJECT, STRUCTURE, AND SOCIETY* 74 (Mark Bracher et al. eds., 1994).

<sup>123</sup> For a critique of this position see Ronald Pies, *Does Psychiatry Medicalize Normality?*, in *PHILOSOPHY NOW* (Oct./Nov. 2015), [https://philosophynow.org/issues/99/Does\\_Psychiatry\\_Medicalize\\_Normality](https://philosophynow.org/issues/99/Does_Psychiatry_Medicalize_Normality).

<sup>124</sup> SCHROEDER, *VENUS*, *supra* note 72, at 141–45.

<sup>125</sup> FINK, *A CLINICAL INTRODUCTION*, *supra* note 104, at 84.

“gendered.” Or, more accurately, it is always “sexuated.”<sup>126</sup> The fashionable terminology of “gender” implies that one can tell where social roles begin and natural or biological sexuality ends. Although this is beyond the scope of this Article, Patricia Gherovici does an excellent job in her book *Choose Your Gender* in explaining how Lacan does not deny biological anatomy, despite the fact that he does not reduce sexuality to biology. Our terminology (which he adopts) reflects the fact that we figure our symbolic identities through metaphors of empirical anatomy.<sup>127</sup> As mentioned, the signifier of subjectivity that men claim they “have” is called the phallus.<sup>128</sup> This is because, to over-simplify, male human beings point to their penis as proof of the truth of their claim.

The proposition that we as subjects do not have direct experience of our bodily experience is reflected by the fact that the moment we are consciously aware of an experience, we have always already interpreted and reinterpreted it through the symbolic, as well as the imaginary.<sup>129</sup> The imaginary is the earlier subjective order of imagery, which the infant enters when it first becomes aware it is literally distinct from its mother and the rest of the world. The imaginary order views the world in terms of opposites and complements—the dominant stereotype of sexual difference. To Lacan, the symbolic understanding of our psychic experience supplements but never replaces this imaginary one.<sup>130</sup> To speak of sex and gender is to presuppose that one could get beyond the symbolic and distinguish it from the anatomic.

Human desire is the symbolic desire for recognition. As such, human sexuality can also only be understood in terms of the symbolic. Although all species have strong reproductive urges, as far as we know only humans experience desire. Although many animals engage in display, no non-human species adorn themselves. Conversely, there does not seem to have ever been any recognizable human society that failed to do so. “Naked” tribesmen are never truly naked; they always decorate, if not cover, their bodies. As Anne Hollander states in her classic study of dress, *Seeing Through Clothes*, “the truly natural state of the adult is dressed, or decorated . . . . Nakedness is not a customary but rather an assumed state, common to all but natural to none, except on significantly marked occasions.”<sup>131</sup> Fossil records indicate that even

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<sup>126</sup> FINK, THE LACANIAN SUBJECT, *supra* note 69, at 98-99.

<sup>127</sup> SCHROEDER, VESTAL, *supra* note 77, at 232.

<sup>128</sup> GHEROVICI, *supra* note 107.

<sup>129</sup> See WATT, *supra* note 35.

<sup>130</sup> The three orders of the symbolic, imaginary and real are intertwined – Lacan uses the metaphor of the interlinked rings of a Borromean knot. SCHROEDER, FOUR DISCOURSES, *supra* note 96, at 8-9; SLAVOJ ŽIŽEK, TARRYING WITH THE NEGATIVE: KANT, HEGEL, AND THE CRITIQUE OF IDEOLOGY 123 (1993) [hereinafter, ŽIŽEK, TARRYING WITH THE NEGATIVE].

<sup>131</sup> ANNE HOLLANDER, SEEING THROUGH CLOTHES 84 (University of California Press, Ltd.

the Neanderthals wore clothing, jewelry, and perhaps makeup.<sup>132</sup>

It is not true that only women care about fashion, and men do not. This would adopt an oppositional and complementary concept of sexuality that Lacan would reject. Anti-fashion is not indifference to fashion. What is more accurate is that the masculine and the feminine are fundamentally inconsistent positions with respect to fashion. Men are as, if not more, obsessed with fashion, but in a different way. Specifically, masculinity is understood as a denial and femininity as an acceptance of dependence. In contemporary Western society, men tend to be slaves to fashion who veer from the prevailing norm of their profession at their economic peril.

### B. *The Natural and the Artificial*

At first blush the identification of fashion with the feminine might seem paradoxical. Historically in the Western Hemisphere, nature has been identified with the feminine, and culture with the masculine. This is reflected in the psychoanalytic insight that prevails, even in the age of DNA testing, that motherhood is a natural or real relationship, whereas fatherhood is a legal or symbolic one.

Misogynist stereotypes condemn the feminine interest in adornment as a form of wiles. One stereotype is that women attempt to seduce and entrap men by disguising their true form. Unfortunately, as Wilson correctly argues, one purportedly feminist criticism of fashion implicitly adopts this same analysis, albeit with the purpose of drawing a different lesson.<sup>133</sup> They see the artificiality of fashion as imposed upon women, by patriarchal society, as a means of subjugation. Women, subjected to the male gaze, and the impossible trap of beauty, are unable to actualize their true, natural personhood. Moreover, women are damned if they do—dismissed as frivolous or non-virtuous if they follow fashion—and damned if they don't—criticized as unfeminine. Misogynists want women to embody their ideal of the natural, i.e., the maternal, which is why they become so upset when women deviate from this norm and “artificially” enhance themselves, i.e., “act like whores.”<sup>134</sup> The proposition that a love of fashion is feminine, artificial,

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1993) (1975) [hereinafter HOLLANDER, SEEING].

<sup>132</sup> Sindya N. Bhanoo, *Neanderthal Jewelry: The Eagle Talon Line*, N.Y. TIMES (Mar. 16, 2015), <http://www.nytimes.com/2015/03/17/science/neanderthal-jewelry-the-eagle-talon-line.html>.

<sup>133</sup> Elizabeth Wilson, *Feminism and Fashion*, in THE FASHION READER 323–24 (Linda Welters & Abby Lillethun, eds., 2d ed. 2011).

<sup>134</sup> Interestingly, *The New York Times* reports that a “working paper issued before the recent Vatican plenary assembly on women . . . written by an unidentified group of women for the Pontifical Council for Culture” combines the misogynist and feminist hatred of artifice. Mark Oppenheimer, *Catholics, Plastic Surgery, and ‘the Truth of the Feminine Self,’* N.Y. TIMES (March 13, 2015), <http://www.nytimes.com/2015/03/14/us/catholics-plastic-surgery-and-the-truth-of-the-feminine-self.html>. On the one hand it asserts that non-therapeutic plastic surgery “in covering a woman’s natural appearance, is a betrayal of the ‘truth of the feminine self,’

and deceptive—a form of disguise—is correct. What is incorrect is the assumption that there is a true “natural” personhood that does, or could, exist prior to or beyond fashion. Moreover, it is also incorrect to conclude that masculine subjects are any less obsessed with fashion. Indeed, the masculine position is precisely a deluded denial of this dependence.

Lacan famously asserted that he who is not duped errs.<sup>135</sup> That is, he who thinks he sees through the truth underlying the artifice is the one who is fooled. With respect to the human subject, the artifice is the reality.<sup>136</sup> This reflects Hegel’s rejection of the Kantian theory that although we may not be able to have direct knowledge of it, there must be a true essence—a noumenon—that underlies the appearance, or phenomena, of our experience. To Hegel, it is appearance all the way down.<sup>137</sup>

A woman is a subject who implicitly understands and embraces her artificiality. As such, femininity is a masquerade. The “deception” of the feminine masquerade is twofold. The word “masquerade” implies that a hidden truth lies beneath the “mask.” Of course, this is the misogynist, and first wave feminist, assumption.

However, in Lacan’s famous formulation, the Woman does not exist.<sup>138</sup> There is nothing beneath the feminine masquerade. As such, the masquerade creates the illusion that there is a hidden essence—*das Ewig-Weibliche* (the eternal feminine)—beneath the mask,<sup>139</sup> when in

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contributing to the culture’s ‘exploitation of the female body for commercial benefit.’” *Id.* It goes as far to say that, “[p]lastic surgery is like a burqa made of flesh.” *Id.* However, as Lisa Sowle Cahill, a Catholic feminist at Boston College ponders, how the statement in the paper that “[t]he physicality of women—which makes the world alive, long-living, able to extend itself—finds in the womb its greatest expression” is in the “interest in the welfare of women, is beyond” her. *Id.* SLAVOJ ŽIŽEK, LESS THAN NOTHING: HEGEL AND THE SHADOW OF DIALECTICAL MATERIALISM 517 (Verso 2013) (2012) [hereinafter ŽIŽEK, LESS THAN NOTHING].

<sup>135</sup> As Žižek says, “the illusion resided in the very notion that what we see in from of us is just a veil covering up the hidden truth.” Slavoj Žižek, *A Glance into the Archives of Islam*, <http://www.lacan.com/zizarchives.htm>; see also SLAVOJ ŽIŽEK, HOW TO READ LACAN 114–15 (2006).

<sup>137</sup> *Id.* at 163–64; see also Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2482 (2003) [hereinafter Schroeder & Carlson, *The Appearance of Right*].

<sup>138</sup> JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XX: ON FEMININE SEXUALITY, THE LIMITS OF LOVE AND KNOWLEDGE 72–74 (Jacques-Alain Miller ed. & Bruce Fink trans., Verso 1998) [hereinafter LACAN, SEMINAR XX].

<sup>139</sup> SCHROEDER, FOUR DISCOURSES, *supra* note 96, at 163–65. In the words of Slavoj Žižek, “this nothingness behind the mask is the very absolute negativity on account of which woman is the subject *par excellence*, not a limited object opposed to the force of subjectivity!” SLAVOJ ŽIŽEK, THE METASTASES OF ENJOYMENT: SIX ESSAYS ON WOMAN AND CAUSALITY 143 (1994); see also SLAVOJ ŽIŽEK, THE INDIVISIBLE REMAINDER: ON SCHELLING AND RELATED MATTERS 161–62 (1996) [hereinafter ŽIŽEK, THE INDIVISIBLE REMAINDER]; JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK XI: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 111–12 (J. Miller, ed. & A. Sheridan trans., W.W. Norton & Co. 1998) (1973). The feminine secret is precisely that there is no secret—which is itself the deepest and most mysterious secret of all. As Žižek says, this means that woman “is all surface lacking any

fact the feminine is only called into being as a work of fiction. She is all artifice, in the sense of a work of art; a creature in the sense of a creation; thus the feminine functions. The feminine insists, despite the fact, or more accurately because, she does not exist.<sup>140</sup>

To ask what the Woman insists on is to beg the question—to assume that the contradiction of sexuation can be resolved. She wants to be recognized, but as what, and for what? As discussed below, the correlative is that the feminine hysteric keeps asking the other “what do you want?” In either case, there is no pre-existing answer. If there was, freedom would not exist. Freedom and morality require that the subject make choices that are not logically mandated. The Hegelian-Lacanian point is precisely that freedom requires that we desire and have relations with others, but that our desire is never sated.<sup>141</sup> The subject makes demands of others, but they can never be perfectly met. Failure is necessary to freedom.

Our very vocabulary intuits this idea. The word “person” comes from the Latin *persona*, i.e., a mask, specifically that worn by an actor in the Classical world.<sup>142</sup> In this sense, Judith Butler is correct that sexuality is a performance.<sup>143</sup> This does not mean that masculine personhood is somehow more “real,” and less a creature of fashion. To suggest so would be to adopt a binary oppositional concept of sexuality that Lacan rejects.

In Western society Man has traditionally been considered the norm, and Woman a lesser, castrated creature. This is reflected in the Bible insofar as God created Adam first.<sup>144</sup> In English, “he” has traditionally been used as the universal third person pronoun. To Lacan, however, the archetypal subject is feminine, not masculine. If Women

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depth, *and* the unfathomable abyss.” ŽIŽEK, *THE INDIVISIBLE REMAINDER*, *supra* note 139, at 159.

<sup>140</sup> ŽIŽEK, *TARRYING WITH THE NEGATIVE*, *supra* note 130, at 188.

<sup>141</sup> SCHROEDER, *VENUS*, *supra* note 72, at 54-56.

<sup>142</sup> “Middle English, from Old French *persone*, from Latin *persona*, mask, role, person, probably from Etruscan *phersu*, mask.” *Person*, *The American Heritage® Dictionary of the English Language* (5th ed., 2016), <http://www.ahdictionary.com/word/search.html?q=person&submit.x=0&submit.y=0>.

<sup>143</sup> See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 24–25 (1990).

<sup>144</sup> In the “witticism” supposedly recently uttered by a conservative North Carolina state senator in defending insulting statements he had made about women, “[w]ell, you know God created man first . . . . Then he took the rib out of man to make woman. And you know, a rib is a lesser cut of meat.” Luke Brinker, *GOP lawmaker calls women ‘a lesser cut of meat,’* SALON (Feb. 13, 2015, 12:24 PM), [http://www.salon.com/2015/02/13/gop\\_lawmaker\\_calls\\_women\\_a\\_lesser\\_cut\\_of\\_meat](http://www.salon.com/2015/02/13/gop_lawmaker_calls_women_a_lesser_cut_of_meat). Another traditional reading of the creation story is that the original creature, who is described as “male and female,” was a hermaphrodite. God subsequently created sexual difference when he took the woman from its “side,” i.e., splitting the original creature in two. Of course this interpretation, reminiscent of Aristophanes’s myth, is inadequate from a Lacanian perspective because it conceptualizes the sexes as complementary. If brought together, they would form a single whole. See *supra* note 94 and accompanying text.

can represent nature that is precisely because human nature is artificial.

The masculine position is the delusional claim to be whole and genuine. Psychic “castration” is the universal initiation rite of adulthood.<sup>145</sup> In Žižek’s words, “man is perhaps simply a woman who thinks that she does exist.”<sup>146</sup>

### C. *The Object of Desire*

To analyze sexuation and fashion, I reference the *objet petit a*.<sup>147</sup> Lacan’s theory is maddeningly obscure and difficult—indeed, he continuously revised it during his life. For our purposes, the *objet petit a* is the subject’s unsuccessful retroactive attempt to account for his sense of self-alienation.<sup>148</sup> The subject feels desire, and is vaguely aware there was once a time when he did not. The man hypothesizes that this must mean the reason he desires is because he is missing a valued object that was away from him when he entered the symbolic order. This is why Lacan retains Freud’s terminology of “castration,” but rewrites it as a symbolic fact rather than a biological fear.<sup>149</sup> This “abduction” of a valued object is reassuring because if wholeness once existed, then it may one day be reinstated in the future if the object or its substitute is found. The subject thus searches for an object of desire to serve this purpose. Notice that, by this strategy, the subject shifts his desire away from people and towards things, replacing intersubjective relationships with object relations.<sup>150</sup> What is an object? It is that which is anything that is not, or is incapable of being, a subject. This is why, to Hegel,

<sup>145</sup> Even Freud falls victim to this masculine self-delusion when he argues that, although both sexes are defined with respect to castration, men fear it as something that could happen, whereas women mourn it as something that has happened. Lacan’s point is that women are right, but men can’t face this fact. GHEROVICI, *supra* note 106, at 76.

<sup>146</sup> SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* 75 (1989).

<sup>147</sup> The literal translation—the “little a object”—is nonsensical because of the difference in English and French spelling. The term is short hand for something like “the object that is spelled with a lower-case ‘a,’ as opposed to an ‘o’ because it serves as a substitute for the other (*autre*).”

<sup>148</sup> The *objet petit a* is “the chimerical object of Fantasy, the object causing our desire and at the same time—this is its paradox—posed retroactively by this desire[.]” ŽIŽEK, *TARRYING WITH THE NEGATIVE*, *supra* note 130, at 69. “The paradox of desire is that it posits retroactively its own cause, i.e., the object a . . . .” SLAVOJ ŽIŽEK, *LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE* 9 (1992) [hereinafter ŽIŽEK, *LOOKING AWRY*]; *see also* SLAVOJ ŽIŽEK, *THE ABYSS OF FREEDOM/AGES OF THE WORLD* 79 (Judith Norman trans., 1997) [hereinafter ŽIŽEK, *THE ABYSS OF FREEDOM*].

<sup>149</sup> SCHROEDER, *FOUR DISCOURSES*, *supra* note 96, at 14-18. In Žižek’s formulation: “Castration is *symbolic*: by means of it, the subject exchanges his being (an object) for a place in the symbolic exchange, for a signifier which represents him.” SLAVOJ ŽIŽEK, *ENJOY YOUR SYMPTOM!: JACQUES LACAN IN HOLLYWOOD AND OUT* 171 (1992).

<sup>150</sup> One should note that the term “object” does not suggest a tangible thing. As in Hegel, an object is anything not recognized as a subject. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 73. An intangible can serve just as well, or even better, as the object of desire as tangibles. *Id.* at 74. Indeed, Lacan identifies two abstractions, that he confusingly calls the “voice” and the “gaze” as two of the most common *objets petit a*. Renata Salacl and Slavoj Žižek, *Introduction to Gaze and Voice as Love Objects* 1, 2-3 (Renata Salacl and Slavoj Žižek, eds. 1996).

slavery—treating human beings as objects—is such a fundamental wrong that it precedes the wrongs of his basic categories of right, morality, and ethical life. This is why, from a Hegelian perspective, both the masculine and feminine positions can be both fundamentally immoral. Hegel rewrote Kant’s categorical imperative as “be a person and respect others as persons.”<sup>151</sup> The masculine subject often treats human beings, who he should recognize as subjects, as objects he can possess and exploit. However, the feminine subject only at first blush seems to be morally superior. In fact, by identifying with the object of desire, she tries to avoid her moral obligation to be an active subject.

The masculine abduction that the subject once had, and lost—the object of desire—is literally false. The man is correct in intuiting that there was a time before desire, because he has a vague memory that he was once an infant without self-consciousness. He is also correct in intuiting that his “split” was caused by the symbolic. What is incorrect is the notion that the man was once, and can become again, an unsplit subject. This means that, although the *objet petit a* is hypothesized as the cause of desire, in fact, desire precedes its cause.

The subject is split because her subjectivity comes from recognition—the subject’s desire is the desire of the Other. We have seen that this is painful because desire can never be satisfied. This is why the masculine subject wants to deny his reliance on others. As Bruce Fink has put it, the classic masculine obsessive thinks he can be an Ayn Randian autonomous individual,<sup>152</sup> an impossible goal. Because only psychotics are close to this position, the normal, i.e., neurotic, masculine subject adopts unsuccessful strategies to convince himself, and more importantly others, that he is what he wants to be. The masculine subject claims to have, or to be able to obtain, his *objet petit a*. This results in the “masculine” neurosis of obsession as the man seeks to find and obtain his object in order to cover up his internal split. This is obsessive precisely because it is in vain. The subject can never overcome the split that is his very essence. On the other hand, the obsessive intuits that, if he were to obtain the object he identifies as the cause of desire, he would in fact continue to desire. This would give rise to his claim of potency and independence. Consequently, the obsessive sets up impediments to achieving the object that supposedly would complete him.<sup>153</sup> In other words, for the logic of the *objet petit a* to work, it is necessary that it is always a missing object.<sup>154</sup>

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<sup>151</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 69.

<sup>152</sup> JAMES B. FINK & GERALD E. HUNT, CLINICAL PRACTICE IN RESPIRATORY CARE 130 (James B. Fink & Gerald E. Hunt eds., 1st ed., 1999).

<sup>153</sup> SLAVOJ ŽIŽEK, THE TICKLISH SUBJECT: THE ABSENT CENTRE OF POLITICAL ONTOLOGY 101 (1999).

<sup>154</sup> ŽIŽEK, THE INDIVISIBLE REMAINDER, *supra* note 139, at 144. Elsewhere I have explained how the annual bonus serves this purpose in the hyper-masculine world of investment banking.



The feminine subject takes a different position. She recognizes not only that she is split, but that other subjects are also split. Indeed, the entire symbolic order, which is the creation of subjects, is split. Language, law, and fashion are necessarily incomplete, open, and in a continuous process of shifting and changing. Unlike the man who seeks to heal his own split, the woman claims to try to heal the other's split. That is, rather than seeking to obtain an object of desire for herself, she seeks to be the object of the other's desire.<sup>155</sup> The result is hysteria. This is not merely because this is an impossible role—she is not an object, and she cannot satisfy the other. The hysteric unconsciously understands that if she were to do so, she would cease to function because the satisfied other would no longer need her. Consequently, she also puts up roadblocks to the other's satisfaction. She is a flirt, a coquette who never completely puts out. She always remains the object of the other's desire, but refuses to be his object of *jouissance*,<sup>156</sup> which, for this purpose, can be thought of as ecstatic satisfaction.

And so, there can be no sexual relations.<sup>157</sup> Sexuality is a non-relation.<sup>158</sup> The two sexuated positions cannot come together to make a harmonious whole because they are not opposites; they are not two halves of a single whole, but two failed attempts at achieving wholeness.

#### D. Fashion

It seems relatively clear how a hysteric seeking to be an object of desire would turn to fashion. Display, beauty, and constant change are means of trying to be the object that prolongs, rather than satisfies, the other's desire. This is another aspect of the feminine as a masquerade. Recognition requires that one be both different and the same. In Hegel's terminology, the individual is the sublation of the particular and the universal.<sup>159</sup> Consequently, fashion requires differentiation and flocking, trends and classics. Fashion, which is symbolic like law and

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The beauty of the bonus is not only that it is an object that allows the recipient both to be recognized as a member of a community and to compete with other members, but that it is never there in full. That is, the moment one is awarded this year's bonus, one is already looking forward to the next year's bonus. See Schroeder, *Mad Money*, *supra* note 104.

<sup>155</sup> FINK, CLINICAL PRACTICE, *supra* note 152, at 120.

<sup>156</sup> FINK, CLINICAL PRACTICE, *supra* note 152, at 120.

<sup>157</sup> LACAN, SEMINAR XX, *supra* note 138, at 14–15; ELLIE RAGLAND-SULLIVAN, JACQUES LACAN AND THE PHILOSOPHY OF PSYCHOANALYSIS 67 (1985); see also ELIZABETH GROSZ, JACQUES LACAN: A FEMINIST INTRODUCTION 137 (1990).

<sup>158</sup> As Gherovici says:

Human sexuality is based on a lack of a sexual rapport, which means a lack of relation, a lack of proportion. Sexual division is asymmetric. Masculine and feminine positions are predicated on contradictory systems; they follow dissymmetrical logics that are two ways of exemplifying how language fails to signify sex.

GHEROVICI, *supra* note 106, at 140.

<sup>159</sup> See CARLSON, *supra* note 115, at 430–31.

language, similarly must be open, ever changing, and always in a state of slippage.

As introduced, one school of feminist critique of fashion unwittingly mirrors the classic misogynist view, agreeing that fashion is unnatural and obscures a women's true essence.<sup>160</sup> Indeed, these feminists often rejected the feminine by adopting masculine dress, eschewing skirts in favor of trousers (as though wearing clothing designed for the male anatomy, and only adopted in the eighteenth century is somehow more authentic). This implicitly accepts the masculine boast that he is complete in a way the feminine is not. It also is taken in by the feminine masquerade; as Elizabeth Wilson states in *Adorned by Dreams: Fashion and Modernity*, fashion “forces us to recognize that the human body is more than a biological entity. It is an organism in culture, a cultural artefact [sic] even, and its own boundaries are unclear . . . .”<sup>161</sup>

There is another aspect of the feminine position, with respect to the dialectic of recognition and property, which is relevant to fashion. To reiterate, the two sexuated positions are having and being. The three elements of property are possession, use/enjoyment, and alienation. I have argued extensively elsewhere that possession and alienation are analogs to having and, therefore, the masculine, while enjoyment is the analog to being, and therefore, the feminine.<sup>162</sup> I have suggested this may help explain why property law and jurisprudence tend to concentrate on the former and repress the significance of the latter.<sup>163</sup>

Although Lacan's term *jouissance* can be translated into English as enjoyment—in both the colloquial meaning and the legal sense of the right of exploitation—it also includes an ecstatic sense of loss of subjectivity and merger into the real, and can include pleasure in pain. By identifying with the object of desire, the feminine subject also seeks to ecstatically enjoy it. She revels in its sensuousness and her sensuality. Not merely the pleasurable sensation of luxurious fabrics against the skin, but also the discomfort of many feminine undergarments, and even the pain and awkwardness of stiletto heels result in a constant awareness of the *jouissance* of her body.

There is a dark side to hysteria and therefore fashion, because the hysteric seeks to be the object of the other's desire, but not his *jouissance*. As such, her claim to serve the other can be a lie. She is entranced by the role she plays and requires the other only insofar as he admires her. His job is to serve as her audience or, perhaps more accurately, her mirror, because she is in fact preening for herself.

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<sup>160</sup> See *supra* text accompanying notes 33 and 119.

<sup>161</sup> ELIZABETH WILSON, *ADORNED IN DREAMS: FASHION AND MODERNITY* 2 (1985).

<sup>162</sup> SCHROEDER, VESTAL, *supra* note 77, at 203; SCHROEDER, VENUS, *supra* note 72, at 96–97.

<sup>163</sup> SCHROEDER, VENUS, *supra* note 72, at 150–51.

Moreover, the feminine position of being one with the object of desire, once again, risks raising objective relations over intersubjective ones. Specifically, the feminine subject identifying with her objects of desire risks retreating into virginal confinement, not risking social intercourse with others.<sup>164</sup>

The masculine relation to fashion is more complex—the masculine subject, who cannot bear the weight of his split, wants to deny his dependence on others. Rather than being the object of desire, he claims to be an affirmative subject who has, or is able to obtain, the object of desire. In fact, however, the obsessive masculine subject, who feels as split and negative as the feminine, is in a constant state of anxiety. Consequently, he is always seeking reassurance from others.

Lacan believed the hysteric's question to be: "Am I a man or a woman?"<sup>165</sup> Gherovici reports that, in a world of increasing acceptance or divergent sexual orientation and awareness of transgender and intersexual identity, analysts increasingly ask this in the literal or colloquial sense.<sup>166</sup> However, one must also continue to interpret it symbolically.

The hysterical subject's desire is the desire of the Other. Consequently, by inquiring of the other about her own sex, she is asking the other, in Žižek's words, "Che Vuoi?," or "what do you want (i.e., from me)?"<sup>167</sup> How can I become the object that will set your desire in motion?

The obsessive, by contrast, asks "Am I alive or dead?"<sup>168</sup> —i.e., am I what I say I am, or merely pure negativity? Obsessives engage in frenetic activity precisely to convince themselves that they are alive.<sup>169</sup> They are terrified that if they ever stopped, they would be confronted by their own dead nothingness. The masculine subject, therefore, obsesses over his status, engaging in both competitive and conforming behavior.<sup>170</sup>

In Lacan's words, "'Everything for the other,' says the obsessive, and that is what he does, for being in the perpetual whirlwind of

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<sup>164</sup> I have argued strenuously that Margaret Jane Radin's analysis of property risks falling into this trap. She misreads Hegel's theory of property as implying that in order to achieve personhood we must identify with objects. Indeed, in the case of some particularly intimate objects—the wedding ring, the family home, perhaps one's care—this identification is so strong that the loss of the object would cause a loss of personhood. Consequently, she argues that the law should discourage, limit or prevent alienation of certain classes of privileged objects. SCHROEDER, VESTAL, *supra* note 77, at 273–83.

<sup>165</sup> Fink, Clinical Introduction, *supra* note 104, at 122.

<sup>166</sup> Specifically, Gherovici finds that the question is not posed in terms of sexual orientation. GHEROVICI, *supra* note 106, at 29–30.

<sup>167</sup> See ŽIŽEK, THE ABYSS OF FREEDOM, *supra* note 148, at 81–82.

<sup>168</sup> FINK, CLINICAL PRACTICE, *supra* note 104, at 122.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

destroying the other, he can never do enough to ensure that the other continues to exist.”<sup>171</sup> He only exists through his endless competition with the other. Fink asserts:

In a sense the obsessive . . . lives for “Posterity” and not for today [he] transfers all *jouissance* to the Other . . . . The obsessive lives posthumously, sacrificing everything (all satisfaction in the here and now) for the sake of his name—having his name live on. The name . . . is in some sense the Other who passes on the law and whose *jouissance* is ensured by the obsessive’s accumulation of publications, titles, money, property, awards, and so on.<sup>172</sup>

As I have said elsewhere, “The reason why he keeps asking himself whether he is alive or dead is because he unconsciously understands that he lives his life as though he were always already dead.”<sup>173</sup>

If the feminine looks directly at the other, this is because she treats him as her mirror. The masculine, on the other hand, is always looking over his shoulder, trying to catch a glimpse of the other. This masculine position with respect to fashion is reflected in the classic business suit. At first blush, it seems anti-fashion insofar as its style changes more slowly than typical feminine clothing. However, the classic “Wall Street” lawyer is a slave to fashion; he never deviates from the then-acceptable, but limited choices in color, cut, width of tie, etc., that signal his profession. At most, he can adopt a mild eccentricity, such as brightly-colored socks that can only be glimpsed when he sits and crosses his legs.<sup>174</sup> His Silicon Valley counterpart is to eschew not only fashion, but the specific anti-fashion of traditional wealth derided as “suits.” That is, Steve Job’s mock turtlenecks, Tim Cook’s shapeless shirts, and Mark Zuckerberg’s hoodies are just the mirror image of the conformity they claim to disdain.

Despite, or because of, this conformity, competition for status is fierce, yet played out via subtle differences in quality and expense. Being able to tell the difference is itself a mark of status. The masculine needs to be recognized and accepted as a member of the community of men, envied but not expelled or forgotten. When the Man looks over his shoulder, it is both to make sure he is not too far out front and, to paraphrase Satchel Paige, because he is afraid that the other might be

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<sup>171</sup> *Id.* at 118.

<sup>172</sup> *Id.* at 129.

<sup>173</sup> Schroeder, *Mad Money*, *supra* note 104, at 2348.

<sup>174</sup> In 2014, an article in *The Wall Street Journal’s Saturday Off Duty* style section noting that bright socks were becoming the norm among conservative business men, suggested that brightly-colored belts might be an alternative for professionally acceptable mild eccentricity. Andria Cheng, *More Men Step Out in Stylish Socks*, WALL ST. J. (May 4, 2014, 5:37 PM), <http://www.wsj.com/articles/SB10001424052702304101504579541783508605954>.

catching up.<sup>175</sup>

In other words, just as the feminine subject, who claims to care only about the other, in fact cares mostly about herself, the masculine subject, who claims to be independent from others, cares about nothing except how he is perceived by his rivals. The feminine subject revels in fashion, playing with alternative identities to stimulate, but not satisfy, her other. The masculine subject hides in anti-fashion, pretending he does not care what others think, while always seeking the approval of others.

Steve Jobs described the masculine cult of design, ostensibly the opposite of fashion, by stating: “It’s not just what it looks like and feels like. Design is how it works.”<sup>176</sup> In fact, perhaps no producer of consumer goods has ever been more obsessed than Apple with making beautifully and sensuously designed devices. To quote Apple’s 2013 mission statement, it wants “people to feel[] . . . Delight. Surprise. Love. Connection.”<sup>177</sup>

#### E. *Wearable Technology*

Silicon Valley’s foray into wearable technology to date has been characterized by masculine anti-fashion, rather than feminine fashion, stressing industrial design over beauty. Take the Apple Watch, for example. It was designed to enhance the status, not the beauty, of the wearer. It is less something to wear than it is something to own. It is telling that Jony Ive, Apple’s top designer and head of its Apple Watch team, is a collector of luxury watches.<sup>178</sup> Reportedly, Ive and Apple have now turned their attention to the design of cars<sup>179</sup>—perhaps the epitome of the masculine obsessive status symbol.

Ostensibly useful—although no use is illustrated—yet instantly recognizable, the Apple Watch draws attention to itself. The owner will be proud to be one of the owners of a new toy. For a brief time, until it either becomes successful, and therefore ubiquitous, or a failure, and therefore embarrassing, it may be more of a status enhancer than it is a watch. The wearer of a classic wrist watch can occasionally draw attention to it when he checks the time, while the Apple Watch wearer

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<sup>175</sup> In Paige’s words: “Don’t look back. Something might be gaining on you.” *Satchel Paige Quotes*, SACHEL PAIGE THE OFFICIAL WEB SITE, <http://www.satchelpaige.com/quote2.html> (last visited Jan. 12, 2016).

<sup>176</sup> Rob Walker, *The Guts of a New Machine*, N.Y. TIMES, Nov. 30, 2003, <http://www.nytimes.com/2003/11/30/magazine/the-guts-of-a-new-machine.html>.

<sup>177</sup> John Paczkowski, *Apples Declaration of Values: Simplify, Perfect, Delight*, ALL THINGS D (June 11, 2013, 11:25 AM), <http://allthingsd.com/20130611/apples-declaration-of-values-simplify-perfect-delight/>.

<sup>178</sup> Parker, *supra* note 21.

<sup>179</sup> Daisuke Wakabayashi & Mike Ramsey, *Apple Gears Up to Challenge Tesla in Electric Cars*, WALL ST. J. (Feb. 13, 2015, 11:37 PM), <http://www.wsj.com/articles/apples-titan-car-project-to-challenge-tesla-1423868072>.

will have frequent opportunities to flaunt it as he checks his email and various other notifications. Indeed, as the Apple Watch will enable the wearer to make payments without opening one's wallet, it will compete with a current popular status symbol—the platinum credit card.

In its initial advertisements, Apple has shown the Apple Watch beautifully photographed in isolation—not worn by a model. Apple's introductory online videos explaining the functions of the watch do, by necessity, show it on a wrist, but they are close-up, so that one cannot see the wearer herself.<sup>180</sup> In the initial promotional video for the Apple Watch, narrated by Ive and posted on the Apple website, Ive states that the watch is “intimate” and will “inspire desire,” and that this is because it is “a beautiful object.”<sup>181</sup> The Apple Watch is thus designed and marketed as an *objet petit a* that a masculine subject desires to have, not something that helps a feminine subject make herself into the object of the other's desire.

Another way in which the Apple Watch acts like an *objet petit a* is that it is an object that is always missing. Apple's practice has been to introduce a modified new model of each of its mobile devices annually, and a major update every two years. Consequently, an Apple Watch will continuously be in the process of becoming outdated. If it is embarrassing for the first adopter to pull last year's phone out of his pocket, it is all the more appalling to have it strapped to his arm for all to see.

One might object that it is also the nature of fashion to be constantly changing—this year's fashion must be replaced by next year's. This is, however, an oversimplified misunderstanding. The symbolic role of fashion as a means of achieving recognition requires an uneasy combination of continuity and change, classics and fads, and inclusion and distinction, which differs from person to person. The object that is to be replaced year to year because of fashion—as opposed to wear-and-tear—must look significantly, even if subtly, different from season to season, not because of upgrades. Some objects, by contrast, such as an expensive watch, a handbag, or a signature look, are kept permanently.

What is particularly difficult to understand is that Apple also sells a high-end gold version of the watch, to compete in the luxury market, that reportedly costs up to \$17,000.<sup>182</sup> No doubt, there will be certain

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<sup>180</sup> *Apple Watch Series 2*, APPLE, <http://www.apple.com/watch/films/> (last visited Sept. 20, 2016). More recently, however, Apple has posted numerous fifteen second films showing the watches being worn.

<sup>181</sup> See Parker, *supra* note 21.

<sup>182</sup> This should be contrasted with Hermes's partnership with Apple. See HERMES, *supra* note 24. Hermes Apple Watches seems to be, in fact, merely a small range of leather straps attached to Apple Watches. Presumably they will be removable so that they can be reattached to future generations of watches. These straps with the attached Apple Watch, priced up to \$1,500 might

high-income people—investment bankers, rock stars, and other celebrities—who will buy them. Indeed, it has been reported that some high-end jewelers are hoping to customize the gold Apple Watch with jewels and precious metals to resell them at even higher prices.<sup>183</sup>

Of course, luxury watches are often sold at astronomical prices. However, they, like other items of fine jewelry, have appeal as collector's items and investments, as well as fashion, hence the slogan: "You never actually own a Patek Philippe, you merely look after it for the next generation."<sup>184</sup> Yet even among the super rich, will there be a significant market for a product that is designed to be obsolescent in one or two years? Although collectors of luxury watches are often fascinated by the intricacy of their mechanisms,<sup>185</sup> they are usually not compelled merely by their function. As Madeleine King says:

First, the most important thing to know about luxury wristwatches is that their primary function has been completely displaced by mobile phones. As a time-telling device, they are redundant; yet this has had scant impact on their sales. Why? Because there's a currency operating here that always trumps utility: fashion. The desire to separate ourselves from the pack, and signal our status, lifestyle and good taste will always win out over rational assessments of efficacy.<sup>186</sup>

Perhaps more importantly, one of the hallmarks of fashion is the existence of limited variety within an overall trend or style, so that an individual may both conform to society and differentiate herself (similar to the fact that all "normal" people have recognizably human features, yet with each individual is a recognizable individual).<sup>187</sup> Despite the fact that most fashion designers offer complete "looks," virtually no fashionable person would wear, for example, head-to-toe Chanel—and certainly not on a day-to-day basis. Indeed, two of the most famous women in the world today reflect their respect for, and independence

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seem pricey to some. See Christina Passariello, *Apple Watch Goes Couture With Hermes Band*, WALL ST. J. (Sept. 9, 2015, 1:29 PM), <http://blogs.wsj.com/personal-technology/2015/09/09/apple-watch-goes-couture-with-hermes-band/>. However, the prices of Hermes's conventional watches with leather bands start at almost twice this amount. See, e.g., *Cape Cod*, HERMES, <http://usa.hermes.com/watches/cape-cod/cape-cod-pm-17397.html> (last visited Jan. 12, 2016).

<sup>183</sup> One jeweler noted that he was able to sell customized iPod's for up to \$40,000 and thought he could do the same thing with Apple Watches. Misty White Sidell, *Apple Watch: Jewelers Get Set to Customize Device*, WOMEN'S WEAR DAILY (Apr. 2, 2015), <http://wwd.com/accessories-news/jewelry/apple-watch-jewelers-get-set-to-customize-device-10107323/>.

<sup>184</sup> *Product Advertising*, PATEK PHILIPPE GENEVE (2015), <http://www.patek.com/en/communication/news/product-advertising> (last visited Jan. 12, 2016).

<sup>185</sup> See Williams, *supra* note 58.

<sup>186</sup> King, *supra* note 24.

<sup>187</sup> There are, of course, exceptions to every rule. In this case, the exception is prosopagnosia, or face blindness. People with this condition cannot recognize other people's (even family members) faces. See *Information about Prosopagnosia*, CENTRE FOR FACE PROCESSING DISORDERS, <http://prosopagnosiaresearch.org/index/information> (last visited Apr. 25, 2016).

from, specific designers in two very different ways. Michelle Obama has become an important champion of the American fashion industry by wearing both high price-point pieces, often by up-and-coming designers of color, and off-the-rack items by retailers such as White House/Black Market and J. Crew, sometimes in the same outfit.<sup>188</sup> By contrast, Queen Elizabeth II, who can afford clothes from any designer in the world, has adopted such an idiosyncratic and instantly identifiable look—exquisitely dowdy and flamboyantly conservative—that some consider her the most fashionable woman in the world.<sup>189</sup>

The Apple aesthetic, on the other hand, is hegemonic.<sup>190</sup> According to a *The New Yorker* profile, Ive understands that:

[P]eople were “O.K. . . . to a degree,” with carrying a phone that is identical to hundreds of millions of others, but they would not accept this in something that’s worn.” The question, then, was “How do we create a huge range of products and still have a clear and singular opinion.”<sup>191</sup>

Consequently, it was perceived as a necessity to “create a huge range of products and still have a clear and singular opinion.”<sup>192</sup> However, the different options offered for the Apple Watch are minor—mainly in the color, content, and cost of bands—i.e., a “modular system for the watch: a body of various materials, and a choice of interchangeables.”<sup>193</sup> In the Apple Watch reveal trailer, Ive describes the watch as offering “millions” of variations when you consider its two possible face sizes, several choices of straps, and numerous home

<sup>188</sup> Stephanie Clifford, *J. Crew Benefits as Mrs. Obama Wears the Brand*, N.Y. TIMES (Nov. 6, 2008), <http://www.nytimes.com/2008/11/17/business/media/17crew.html>; Leah Chernikoff, *Michelle Obama and her Girls Wear Thom Browne, J. Crew, and Kate Spade on Inauguration Day*, Fashionista (Jan. 21, 2013), <http://fashionista.com/2013/01/michelle-obama-wears-thom-browne-sasha-and-malia-wear-kate-spade-and-j-crew-to-kick-off-inauguration>.

<sup>189</sup> See Doonan, *supra* note 47.

<sup>190</sup> One prominent fashion analyst makes a related point. Misty White Sidell opines, with respect to the assertion by Tim Cook (wearing what she calls a “normcore ensemble unironically”) that the Apple Watch is “incredibly customizable”:

Considering that the Apple Watch comes in only three near-identical face styles and half a dozen band-types, his commentary is not so different from Henry Ford’s reassurance that “people can have the Model T in any color—so long as it’s black.” . . . [W]hen you consider its potential social footprint, as well as Apple’s take-no-prisoners approach to product introductions, the device’s shape, colorways, and embellishments become a mandate, rather than a personal choice. . . . The more Apple invades the fashion market, the more it will look to create a robotic consumerist culture (something it’s already done with tech)—in turn manipulating the greatest enjoyments of style and personal expression.

Misty White Sidell, *Apple is Killing the Joy of Personal Style*, TIME (Sept. 10, 2014), <http://time.com/3318525/apple-watch-fashion/>.

<sup>191</sup> Parker, *supra* note 21.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*



screens.<sup>194</sup> What is most striking, however, is that they all look almost exactly alike—slight variations on a very limited theme.

There is nothing like the dazzling variety offered on the website of any conventional watch company. Accordingly, one industry critic notes that although the Apple Watch is to be sold in high-end stores such as Selfridge's in London, it is not clear whether it will be considered fashionable because the selection is "far more constrictive than what consumers have come to expect in the wider fashion and accessories market."<sup>195</sup> This is one of the reasons why high-end jewelers are seeking to customize the gold Apple Watch for their clients.<sup>196</sup>

Unlike objects of fashion, it is hard to imagine anyone buying multiple smart watches—as one typically does with other items of jewelry—or updating them seasonally for style, rather than for technological reasons. It is hard to believe a three-year-old gold Apple Watch edition will have little worth above that of the commodity value of the gold in its strap and casing.

Only recently has Apple starting to talk with fashion designers.<sup>197</sup> It is hard to imagine how they could significantly change the basic design in the short term, given the technological limitations of the device. In what seemed like an encouraging sign that Apple might be coming to recognize that its masculine culture may stand in the way of a future of wearable technology, it hired Angela Ahrendts, the former CEO of Burberry and an executive of Liz Claiborne, as a Senior Vice President.<sup>198</sup> According to Apple's SEC filings, Ahrendts was by far Apple's most highly paid employee in 2014.<sup>199</sup> Hiring not just a woman, but a fashion retailer, has led at least some analysts to speculate that Apple is finally getting serious about fashion.<sup>200</sup> However, it seems that Ahrendts' bailiwick is not the design of Apple's wearables, but the redesign of its retail stores.<sup>201</sup>

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<sup>194</sup> *See id.*

<sup>195</sup> BOF Team, *Making Apple's Watch Fashionable*, BUSINESS OF FASHION (Mar. 9, 2015, 8:54 PM), <http://www.businessoffashion.com/articles/bof-comment/making-apples-watch-fashionable>.

<sup>196</sup> *See* Sidell, *supra* note 190.

<sup>197</sup> So far, the only collaboration has been with Hermes. *See supra* note 24. Apple's sponsorship of the Metropolitan Museum of Art Costume Institute's Spring-Summer Exhibition on technology and couture might represent a new turn. Leena Rao, *Why Apple and The Met are Partnering On A Fashion Show*, FORTUNE, Feb. 22, 2016, <http://fortune.com/2016/02/22/apple-met-ball/>.

<sup>198</sup> Apple Inc., 2016 Proxy Statement 35 (Schedule 14A) (2016), [http://www.sec.gov/Archives/edgar/data/320193/000119312516422528/d79474ddef14a.htm#toc79474\\_24](http://www.sec.gov/Archives/edgar/data/320193/000119312516422528/d79474ddef14a.htm#toc79474_24).

<sup>199</sup> *Id.*

<sup>200</sup> *See, e.g.*, Barbara Thau, *Beware Michael Kors, Louis Vuitton: Apple To Expand Into Luxury Fashion and Accessories, Expert Predicts*, FORBES (Nov. 13, 2013, 8:00 AM), <http://www.forbes.com/sites/barbarathau/2013/11/13/beware-michael-kors-louis-vuitton-apple-to-expand-into-luxury-fashion-and-accessories-expert-predicts>.

<sup>201</sup> Parker, *supra* note 21.

### F. *Feminine Tech*

I find that a contrast exists between the design and marketing of the Apple Watch and a number of products either created by women designers or businesses catering to women. In the latter case, the products were designed first and foremost as fashion containing technology, rather than as technology that can be worn. For example, Swarovski designs and sells costume jewelry adorned by its trademark crystals. Realizing that these crystals could be used as solar collectors, it designed the first self-charging fitness trackers. In the words of Joan Ng, Vice President of Marketing, “other tech companies have been ‘trying to think like a man’ . . . ‘Our company targets women and we know what women want.’”<sup>202</sup> Another example is Christina Mercado’s Ringly, a messaging device contained in cocktail rings set with a large semi-precious stone. In one article,

[Mercado] explains how in most companies, the technology is the apex, and everything else is secondary. “They’re used to thinking in screens, as they should, cause that’s what they’re used to,” she says. “But I had a different approach. I wanted to go away from the screen and create something that is much more subtle, more discrete, and that looked beautiful.” . . . Though Ringly may fall under the category of wearable technology, it is fundamentally a jewelry company, too. It’s not trying to change the fashion or tech industries. Rather, it embeds useful technology in an accessory that the general public already wears.<sup>203</sup>

To further illustrate my point, Intel, a digital technology platform company, reportedly encountered a culture clash when it partnered with design house Opening Ceremony to create a wearable messaging device: “Intel’s engineers thought the display should sit on top, like a watch face. But their fashion counterparts argued for a hidden underside screen, insisting that their customers wanted camouflaged functionality—a wearable no one would recognize as such.”<sup>204</sup> The designers ultimately won, resulting in a bangle bracelet, which went on

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<sup>202</sup> Parmy Olson, *How Jewelry Makers (Not A Tech Company) Finally Cracked The Battery Problem For Wearables*, FORBES (Jan. 7, 2015, 12:02 PM), <http://www.forbes.com/sites/parmyolson/2015/01/07/swarovski-solar-powered-misfit-shine/>.

<sup>203</sup> Barry Samaha, *Ringly Shows How Wearable Technology Can Be Fashionable*, FORBES (Mar. 11, 2015, 12:14 PM), <http://www.forbes.com/sites/barrysamaha/2015/03/11/ringly-shows-how-wearable-technology-can-be-fashionable/>. Although Mercado has not released sales figures, her company has been able to raise venture capital money to expand its offerings. Sarah Perez, *Ringly Raises \$5.1 Million Led By Andreessen Horowitz To Expand Its Smart Jewelry Collection Beyond Rings*, TECH CRUNCH (Jan. 21, 2015), <http://techcrunch.com/2015/01/21/ringly-raises-5-1-million-from-andreessen-horowitz-to-expand-its-smart-jewelry-collection-beyond-rings/>.

<sup>204</sup> Petrilla, *supra* note 14; see also John Koblin, *For Opening Ceremony and Intel’s MICA Smart Bracelet, Beauty Beats Brains*, N.Y. TIMES (Nov. 19, 2014), <http://www.nytimes.com/2014/11/20/fashion/opening-ceremony-and-intel-mica-smart-bracelet.html>.

to be sold at fashion powerhouse Barneys New York.<sup>205</sup>

Perhaps most radically, Billie Whitehouse, designer and founder of We:eX (Wearable Experiments) no longer uses the term “wearable tech,” which she believes puts industrial design and quantification over fashion and qualitative experience.<sup>206</sup> Whitehouse views herself as a designer of luxury ready-to-wear apparel enhanced by technology.<sup>207</sup> Like Mercado, she does not believe that the future will be dominated by gazing at screens.<sup>208</sup> To place something in contact with one’s body is a sensuous experience; consequently, she thinks technology will allow us to better enjoy and communicate through all of the senses—particularly touch.<sup>209</sup> As such, she is, in my analysis, exploring the feminine aspect of property as ecstatic identification with the object of desire.

Will any of these specific designs become a category-changer that dominates the market like the original iPhone? Of course not. Indeed, if it did, it would no longer be fashion, precisely because fashion’s essence is the dialectic of infinite variety and constant change on the one hand, and conformity and continuity on the other. Nonetheless, these designs may be harbingers of the future of wearable tech.

#### IV. FASHION INTELLECTUAL PROPERTY, WEARABLE TECHNOLOGY

##### A. *Intellectual Property*

What are some possible implications of a speculative approach to fashion law? It supplies a rationale for the American anomaly of according such limited intellectual property protection to fashion design. Fabric patterns can be copyrighted, and logos and certain forms of trade dress can be trademarked.<sup>210</sup> Fashion design itself, however, usually is not accorded legal protections, in contrast to the laws of several other countries, most notably France.<sup>211</sup> Calls to change the law

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<sup>205</sup> Koblin, *supra* note 204.

<sup>206</sup> Billie Whitehouse, Keynote Address at the Benjamin N. Cardozo School of Law Fashion Law Talk: The Wear of the Future: Where Fashion, Law, and Technology Collide (Apr. 2, 2015) [hereinafter Whitehouse, *Wear of the Future*]. As We:Ex states on its home page, wearable technology should be “invisible . . . and above all DESIGN FOCUSED.” Initial products include athletic jerseys that allow fans to experience the sensations felt by the athletes watched online, “fundawear,” underwear that allows lovers to pleasure each other at a distance using their smartphones, and jackets with GPS capability that give instructions by lightly touching the wearer. Are these good ideas? Will they catch on? I have no idea. The point is that they are a very different approach from that of Silicon Valley. WE:EX – WEARABLE EXPERIMENTS, <http://wearableexperiments.com/navigate/> (last visited Apr. 25, 2016).

<sup>207</sup> Whitehouse, *Wear of the Future*, *supra* note 206.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> RAUSTIALA & SPRIGMAN, *supra* note 32, at 27–30.

<sup>211</sup> Hemphill & Suk, *supra* note 49, at 1150.

have, to date, fallen on deaf legislative ears.<sup>212</sup>

Ironically, it is the American rather than the Continental regime that better reflects the Hegelian theory of property. A speculative analysis would concentrate more on the people who wear clothing than on fashion designers, concentrating on designers' risks conflating subjectivity, which is created by intersubjective relations with object relations. This is the classic misreading of Hegel's analysis of intellectual property.

### B. *Moral Rights*

It is widely known among American intellectual property theorists that Hegel presents a personality theory of property and that he analyzes copyright as a form of property.<sup>213</sup> Unfortunately, many non-Hegelians incorrectly jump to the conclusion that Hegel is concerned with the artistic act of creating copyrightable material.<sup>214</sup> They assume, for example, that Hegel's logic justifies a Continental-style moral right of creators in their creations.<sup>215</sup> Although no one would go so far as to suggest fashion designers should have the same type of moral rights in their clothing as artists do with respect to their creations, such that they would persist even after the clothes are sold to third parties, some use similar arguments to support lesser rights. As Kal Raustiala and Christopher Sprigman note, "one of the arguments used by advocates of copyright protection" for fashion is that "celebrated fashion designers [are] artists on par with any painter or composer."<sup>216</sup> This reflects a fundamental misunderstanding of a personality theory of property.<sup>217</sup>

Hegel does not discuss copyright because he thinks that it is special: quite the opposite. He is countering Kant and Johann Gottlieb Fichte's assertions that copyright is unique and cannot be analyzed in terms of property.<sup>218</sup> Indeed, Hegel's arguments can be used today against those academics who assert that intellectual property is some form of quasi-property, only roughly analogous to true property.<sup>219</sup>

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<sup>212</sup> *Id.* at 35–36.

<sup>213</sup> See e.g. SCHROEDER, VESTAL, *supra* note 77; Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L. J. 287, 330-338 (1988); Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1240-42 (1996); Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1 (1988); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1 (1994).

<sup>214</sup> See, e.g., Damich, *supra* note 213; Hughes, *supra* note 213; Netanel, *supra* note 213, at 19–20.

<sup>215</sup> See, e.g., Hughes, *supra* note 213, at 354–58.

<sup>216</sup> RAUSTIALA & SPRIGMAN, *supra* note 32, at 41.

<sup>217</sup> See Schroeder, *Unnatural Rights*, *supra* note 78 (explicating Hegel's analysis of intellectual property in detail).

<sup>218</sup> See Netanel, *supra* note 213, at 19–20.

<sup>219</sup> For example, Judge Richard Posner and his co-authors assert, "[a] trade secret is not property in the usual sense—the sense it bears in the law of real and personal property or even in such

Hegel used copyright as part of his argument that intangibles can be objects of property rights just as much as tangibles. It might be analytically preferable to consider intangibles, rather than tangibles, as the “*perfect exemplar of property because of their radical externalized banality*.”<sup>220</sup> For example, it would help avoid the common conflation of the legal right of possession (i.e., the right to exclude others) with the empirical fact of physical possession.<sup>221</sup> Moreover, Hegel only makes a logical argument that a modern constitutional state should preserve some minimum regime of private property because it serves the function of creating subjectivity. He does not, however, purport to prescribe the contours of the private law regime that a state should adopt. He famously thinks that such matters are the bailiwick of practical reasoning. He does not include pragmatism in his definition of philosophy, because it does not generate necessary conclusions.<sup>222</sup> Hegel’s approach is necessitated by his project; he argues that law is functionally necessary for the actualization of freedom, however, if any particular positive law were logically necessary, we would not be free. Consequently, from Hegel’s philosophic perspective a society might decide to adopt a radical libertarian regime of maximal private property rights. Conversely, it might be sufficient to adopt a predominantly socialistic, communal property regime, so long as society preserved a robust market in peppercorns.

Of course, pragmatic concerns are as important as logical arguments in the real world. This means that the practical limitations of logic make pragmatism its necessary corollary.<sup>223</sup> Hegel, who lived in Prussia in the early nineteenth century, no doubt had strong feelings as to what property regime he would prefer. Consequently, Hegel mentioned one standard, practical rationale as to why a society might

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areas of intellectual property law as copyright . . . .” David D. Friedman, William M. Landes & Richard A. Posner, *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 61–62 (1991).

<sup>220</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 499 (emphasis in original).

<sup>221</sup> As I have argued elsewhere, this conflation is at least as common, if not more, among legal scholars who claim to avoid it. That is, they typically conclude from the observation that as an empirical matter the rights of property cannot be reduced to the physical grasp of tangible things: that, therefore, there can be no unitary theory of property. In other words, they cannot imagine property other than in terms of physicality. SCHROEDER, VESTAL, *supra* note 77, at 39–40.

<sup>222</sup> In Hegel’s words, “everything which depends on particularity is [in the regime of abstract right] a matter of *indifference*.” HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 73. His most succinct statement on this point is in his famous preface to his *Philosophy of Right*:

[T]his infinite material and its organization, are not the subject-matter of philosophy. To deal with them would be, to interfere in things [] with which philosophy has no concern, and it can save itself the trouble of giving good advice on the subject. Plato could well have refrained from recommending nurses never to stand still with children but to keep rocking them in their arms; . . . In deliberations of this kind, no trace of philosophy remains . . . .

*Id.*, *supra* note 66, at 21.

<sup>223</sup> SCHROEDER, FOUR DISCOURSES, *supra* note 96, at 88.

decide to institute a copyright regime—it might incentivize creation.<sup>224</sup> Given that Hegel was an author with a financial interest in a copyright regime, his self-serving advice should be taken with a grain of salt.

To reiterate, Hegel argues that subjectivity is created through intersubjectivity mediated through objectivity; i.e., by being recognized as such by another subject in the possession, enjoyment, and exchange of objects.<sup>225</sup> In possession and enjoyment, the abstract Kantian person makes herself concrete, unique, and potentially recognizable. Recognition is not consummated, however, until the subject alienates her object through market exchange with another subject. Note what is missing from this analysis: the act of creating the object of property and the relation of the creator to her creation. One must keep in mind that the type of personhood created through property is thin—it is merely the legal subject capable of bearing the rights and duties of property and contract law. It is not the full-blown flowering of human potential. As I have put it elsewhere,

This suggests that the legal subject is [in Hegel's terminology] an uncultured creature who represents an impoverished conception of personhood. The legal subject is fit only for the tawdry business of buying and selling. She is not yet capable of morality or ethics and cannot yet become a lover, mother, friend, participant in civil society, voter, or legislator, let alone an artist. In other words, the subject is only a lawyer. Higher aspects of personality will be created not through the crude legalities of property, but through more complex human interaction.<sup>226</sup>

The *Philosophy of Right* is a political theory. If the first section describes the logic of subjectivity in the regime of abstract right, the next two describe the logic of increasingly complex stages of personhood in the regimes of morality and ethical life, until we arrive at the type of person who can actualize her freedom as a citizen in a constitutional republic.<sup>227</sup>

If it is misguided to argue that Hegel's personality theory would mandate, rather than permit, copyright protection for any creation,

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<sup>224</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 99–100. On the other hand, he also expresses the opinion that plagiarism should be analyzed in terms of honor, rather than law. *Id.*

<sup>225</sup> See SCHROEDER, VESTAL, *supra* note 77, at 226.

<sup>226</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 456 (citation omitted).

<sup>227</sup> Consequently, Hegel says:

Each stage in the development of the Idea of freedom has its distinctive right, because it is the existence of freedom in one of its own determinations. When we speak of the opposition between morality or ethics and *right*, the right in question is merely the initial and formal right of abstract personality. Morality, ethics, and the interest of the state—each of these is a distinct variety of right, because each of them gives determinate shape and existence to *freedom*.

HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 479.

including fashion, it is even more misguided to use Hegel's personality theory to justify a Continental style "moral" right of a creator in her creations that survives after she sells it to another. To do so would elevate object relations over intersubjective ones. Objects are merely mediators of intersubjectivity. We should desire objects only as a means of achieving our true desire—the desire of the Other. As I put it elsewhere,

To Hegel, from the formal viewpoint of abstract right, an artistic creation is an object that must be distinguished from the *capacity* to create art. Creations are external to personality, in the same sense as conventional objects of property, such as goods. Creations should be considered means to the creator's ends, and are, therefore, properly exploited through possession, enjoyment, and alienation. The alienation of intellectual property is permissible because it is not essential to personality itself.<sup>228</sup>

This does not preclude the possibility of valid and pragmatic reasons for conferring moral rights on artists; however, one cannot use Hegel's theory of property for such purposes.

### C. *First Occupancy Theory of Property*

An alternate theory as to why creators are entitled to intellectual property rights in their creations is a first-occupier theory of property.<sup>229</sup> Although associated most directly with John Locke,<sup>230</sup> American jurisprudence assumes that Hegel adopts a similar theory.<sup>231</sup> In fact, if one were to read the entire first chapter of the *Philosophy of Right*, one would find that Hegel expressly rejects this analysis.<sup>232</sup> The standard misunderstanding is based upon a single remark, which appears early in the chapter, read out of context. Hegel writes:

<sup>228</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 499. Only an extremely limited class of objects should be inalienable. HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66. These include the person's capacity to create (e.g. it would be wrongful to sell oneself into slavery), but not the creations created. *Id.* at 96.

<sup>229</sup> See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1550 (1993); Wendy J. Gordon, *An Inquiry Into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1365–67 (1989).

<sup>230</sup> JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>231</sup> See, e.g., STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 69–79 (1990). Another reason why Hegel cannot adopt a first occupancy theory of property is because it is a natural law theory. Hegel rejected all concepts of natural right because there can be no freedom in nature. Nature is subject to the iron laws of causation. Schroeder, *Unnatural Rights*, *supra* note 78, at 460–61. See also MEROLD WESTPHAL, *HEGEL, FREEDOM, AND MODERNITY* 31 (1992).

<sup>232</sup> I explicate Hegel's complex argument that is made in his highly idiosyncratic vocabulary in Schroeder & Carlson, *The Appearance of Right*, *supra* note 137, at 2504; SCHROEDER, *FOUR DISCOURSES*, *supra* note 96.

That a thing belongs to the person who *happens to be the first* to take possession of it is an immediately self-evident and superfluous determination, because a second party cannot take possession of what is already the property of someone else . . . . The above determinations have chiefly concerned the proposition that the personality must have existence in property. That the first person who takes possession of something is also its owner is, then, a consequence of what has been said. The first is not the rightful owner because he is the first, but because he is a free will, for it is only the fact that another comes after him which makes him the first.<sup>233</sup>

In context, this is presented merely as a definition of the term “possession.” Since the function of possession is to identify a specific object with a specific subject, it is the right to exclude others; i.e., first-in-time, first-in-right. This statement is not a justification of the rightfulness of any specific claim by any specific claimant. Hegel only turns to the question of justification later, when he discusses the nature of wrong.

Hegel’s analysis of wrong is occasionally read by English-speaking criminal law theorists because of his justification for retribution, but crime is only one, albeit the most heinous, type of wrong that he identifies.<sup>234</sup> Two less venal forms of wrong are fraud and what he calls “civil wrong.”<sup>235</sup> First occupancy is Hegel’s archetype of civil wrong. The common misunderstanding of Hegel’s argument arises from the failure to appreciate his retroactive mode of reasoning. Conventionally, most people, including lawyers, think of a wrong as a violation of a right: i.e., right precedes wrong.

This is not Hegel’s approach. He defines “right” not as a fact that can be identified, but as an act: i.e., the righting of a wrong.<sup>236</sup> For Lacan, desire precedes its cause; for Hegel, wrong precedes its right.<sup>237</sup> Consequently, although Hegel starts *Philosophy of Right* with a discussion of the logical function of abstract right, he cannot at this stage of his argument define what a right is, let alone explain what a justification of a right may be. He can only do this after he defines wrong.

Hegel accepts Kant’s categorical imperative that you must never treat another subject as the means to your own ends, but must respect her as an end in herself.<sup>238</sup> Consequently, even though one can only

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<sup>233</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 491.

<sup>234</sup> HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 65, at 119.

<sup>235</sup> G.W.F. HEGEL, *HEGEL’S LOGIC* 238 (William Wallace trans. 1975); HEGEL, *PHILOSOPHY OF RIGHT*, *supra* note 66, at 113.

<sup>236</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 492–93; SCHROEDER, *FOUR DISCOURSES*, *supra* note 78, at 148–51, 166–76.

<sup>237</sup> Schroeder, *Unnatural Rights*, *supra* note 78, at 492–94.

<sup>238</sup> Hegel rewrites Kant’s categorical imperative as “be a person and respect others as persons.”



become a subject through recognition, it is wrong to unilaterally demand recognition from, i.e., assert rights against, another subject. One can only rightfully confer rights upon another by accepting that one owes duties to her. Indeed, Hegel states that to be interested in one's own rights reflects "pure stubbornness, such as is often encountered in emotionally limited people . . . ; for uncultured people insist most strongly on their rights."<sup>239</sup> Claiming a right of first occupation is one-sided, and therefore wrong. It is a unilateral assertion of rights in violation of the categorical imperative.<sup>240</sup>

A claim to a right can only retroactively become rightful if other subjects freely agree to recognize it in order to achieve their own ends. This is why alienation through exchange, i.e., contract, is right. When one initiates a contract with another person, the offeror is initially wrongful because he is treating the counterparty as a means to his ends.<sup>241</sup> Similarly, when the counterparty considers the offer, she is initially wrongful and treating the offeror as a means to her ends. However, if she accepts the offer, the two parties momentarily form a common will—a meeting of the minds, in American parlance—of mutuality and formal respect and recognition. The offeror recognizes his counterparty as a subject who possesses property and seeks to accomplish her own ends through exchange, and vice versa.<sup>242</sup>

Hegel specifically states that it is wrong for a first occupier, such as a creator, to demand recognition of her claim to possess her creation. Such a demand treats society as a means to her ends and is, therefore, a civil wrong.<sup>243</sup> Nevertheless, we, as a society, could decide to recognize the claim and confer a copyright, moral right, or other protection, to a fashion designer. If a society chooses to do so, this choice would retroactively change the designer's wrongful claim into a right.

This approach is, once again, consistent with the point made in the preceding section. Hegel believes that the conferral of specific property rights to a specific class of claimants cannot be determined by logic; rather, it is a decision that a society makes using practical reasoning.

#### D. *Fashion and Knock-offs*

Coco Chanel once said that "[f]ashion should slip out of your

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HEGEL, PHILOSOPHY OF RIGHT, *supra* note 64, at 16, 67-69.

<sup>239</sup> *Id.* at 69.

<sup>240</sup> See SCHROEDER, FOUR DISCOURSES, *supra* note 96, at 173-76; Schroeder & Carlson, *The Appearance of Right*, *supra* note 137, at 2502-03; Schroeder, *Unnatural Rights*, *supra* note 78, at 495-98.

<sup>241</sup> HEGEL, PHILOSOPHY OF RIGHT, *supra* note 66, at 117-18.

<sup>242</sup> For this reason, Hegel remarks, "[i]n contract, right *in itself* is present as something *posited* . . ." *Id.* at 115. That is to say, absent contract, right is *not* posited. Right only appears with establishment of the contract. *Id.* Prior to the contract, everything is wrong.

<sup>243</sup> *Id.* at 117-18.

hands. The very idea of protecting the seasonal arts is childish. One should not bother to protect that which dies the minute it is born.”<sup>244</sup>

To develop a speculative theory of fashion law, it helps to contrast it to more conventional approaches. Here, I will briefly consider the debate between Scott Hemphill and Jeannie Suk (collectively “HS”) and Kal Raustiala and Christopher Sprigman (collectively “RS”). I find their respective work to be excellent in different ways, despite the fact that they reach contrasting conclusions. HS make a closely reasoned argument for making a moderate changes in the status quo, and RS make an audacious argument for retaining it.

Both sides assume society wants to incentivize the design of fashion and, therefore, concentrate on the law’s effect on designers. HS adopt the standard position that protection is necessary to incentivize creation.<sup>245</sup> RS identify what they call the “piracy paradox”:<sup>246</sup> copying in fashion accelerates the fashion cycle, thereby increasing creativity.<sup>247</sup> I find RS’s account intuitively more persuasive. Ultimately, however, this dispute is largely empirical and practical in nature. As such, Hegelian “logic” cannot solve it.

Nevertheless, a speculative approach may suggest a different way to think about the issue, shifting the focus from the designers to the wearers of fashion. From a Hegelian position, designers who wish to have property rights in their creations are logically no different from any other interest group asking society to adopt one or another property regime. There may be good or bad reasons for conferring property rights on designers—which both sets of scholars articulate—but the speculative approach suggests that in making pragmatic decisions, we must also consider the logic of fashion with respect to the wearers.

I search for an alternate and more adequate term than “consumers” for the people who buy and wear clothing and accessories. “Consumer” implicitly assumes that the wearer is a passive recipient of designs created by others that help her express her personality. By contrast, a speculative analysis sees her as someone who actively uses fashion as a means of creating her subjectivity.

I am influenced by economist Gary Becker. He does not reject the neoclassic assumption that rational individuals seek to maximize their utility—a contentious term that, for my very limited purposes, can be thought of as happiness, pleasure, satisfaction, or, perhaps, even

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<sup>244</sup> *Faking It: Originals, Copies, and Counterfeits*, <http://www.fitnyc.edu/museum/exhibitions/faking-it.php> (last visited Sept. 20, 2016).

<sup>245</sup> Hemphill & Suk, *supra* note 49, at 1176.

<sup>246</sup> RAUSTIALA & SPRIGMAN, *supra* note 32, at 39.

<sup>247</sup> *Id.* at 41–49. They note that, given “the pervasive copying of creative designs . . . [t]he industry should be in a freefall economically . . . [y]et quite the opposite has happened. The American apparel industry has boomed over the past 50 years in the face of uncontrolled copying, and it has been vibrantly creative.” *Id.* at 21.

*jouissance*. Traditionally, economists divide the world between producers (i.e., businesses) and consumers (i.e., human beings) that attain utility by consuming goods and services produced by others. Becker argues that in contradistinction, people should be reconceptualized as active producers of their utility.<sup>248</sup> Doing so would enable us to understand how many decisions that behavioral economists label as irrational are, in fact, completely rational.<sup>249</sup>

HS argue for a limited protection of fashion design. Although they do not invoke Hegel, they do emphasize the expressive role of fashion, identifying what they see as a paradox of flocking and differentiation.<sup>250</sup> As I have argued,<sup>251</sup> this paradox reflects the dialectical nature of subjectivity that requires we be both different from and the same as others.<sup>252</sup>

Both RS, in arguing against copyrighting fashion design, and HS, in arguing the opposite, admirably invoke the role that fashion serves for the wearer, as well as for the designer. Unfortunately, however, they follow Veblen and assume that the primary function of fashion is the establishment of the wearer's status.<sup>253</sup> I have already criticized this analysis as being a sociological theory of a different time and place. More importantly, from the speculative position a status analysis is flawed because status is only one form of recognition—a form that is arguably problematic from the Kantian-Hegelian criterion of universality. Specifically, it is a masculine approach to recognition.

<sup>248</sup> GARY S. BECKER, ACCOUNTING FOR TASTES 4–5 (1996).

<sup>249</sup> *Id.* at 128–29. For example, the “endowment effect” reflects the rational increase in utility produced by making our possessions the receptacles of our memories and other pleasurable associations. The reason why a student, who receives a free coffee mug for being a human guinea pig in a psychology class, won't sell it back at its market price or exchange it for an identical mug, may be because, for that student, there is no identical mug. Even though she has only owned it for a few minutes, she has already imbued the mug with the happy memory of getting a gift. This is perfectly rational because such memories give us pleasure. SCHROEDER, FOUR DISCOURSES, *supra* note 96, at 64.

<sup>250</sup> Hemphill & Suk, *supra* note 49, at 1162.

<sup>251</sup> See *supra* note 114 and accompanying text.

<sup>252</sup> Spencer Jakob, *Smells Like Teen Dispirit*, WALL ST. J. (Mar. 3, 2015, 3:10 PM), <http://www.wsj.com/articles/smells-like-teen-dispirit-ahead-of-the-tape-1425413444>.

Consequently, the CEO of Abercrombie & Fitch for the past twenty years suddenly “resigned” after being dismissed as chairman. Suzanne Kapner & Joann S. Lublin, *Abercrombie CEO's Abrupt Exit Followed Weak Sales*, WALL ST. J. (Dec. 9, 2014, 5:57 PM), <http://www.wsj.com/articles/abercrombie-ceo-jeffries-to-retire-1418133344>. Retailer Delia's went bankrupt in early 2015. Joseph Checkler, *Forward Motions: Delia's to Seek Approval of Sale*, WALL ST. J. (Feb. 20, 2015, 1:07 PM), <http://blogs.wsj.com/bankruptcy/2015/02/20/forward-motions-delias-to-seek-approval-of-sale/>. Wet Seal is selling off stores in an attempt to escape a similar fate. Chelsey Dulaney, *Wet Seal to Close 66% of Its Stores*, WALL ST. J. (Jan. 7, 2015, 9:58 AM), <http://www.wsj.com/articles/wet-seal-to-close-66-of-its-stores-1420640021>.

<sup>253</sup> Hemphill & Suk, *supra* note 49, at 1160–62; RAUSTIALA & SPRIGMAN, *supra* note 32, at 39. Hemphill & Suk see as an alternate motive of zeitgeist, or following of trends as “expressions of individuality that combine into collective tastes.” Hemphill & Suk, *supra* note 49, at 1161. RS also distinguish the desire to follow trends, from the desire for status. RAUSTIALA & SPRIGMAN, *supra* note 32, at 39.

Despite their brief recognition of the role of fashion in expressing the wearers' personalities, HS pivot to explore how law can further the expression of the designers', not the wearers', personalities.<sup>254</sup> Like the economist Becker criticizes, they implicitly assume that wearers passively adopt the offerings that designers present. HS conclude that the United States should adopt some form of intellectual regime that would protect "designers from close copy[ing] . . . of their designs but not . . . against looser forms of similarity."<sup>255</sup> They are particularly concerned with the so-called "fast-fashion" marketers such as Forever 21, Zara, and H&M, who are able to ape designer fashions within days of their first appearances on catwalks, or, more importantly, are able "to wait and see which designs succeed, and copy only those. Copyists can choose a target after retailers have made their buying decisions, or even after the product reaches stores, and customers have begun to buy."<sup>256</sup>

One unfortunate consequence that HS see from the lack of intellectual property protection of fashion design is "logofication," where in order to gain the protection of trademark law—as opposed to copyright law—designers cover their products with logos.<sup>257</sup> Apparently, HS see this as a regrettably less creative form of design. However, such an external judgment is antithetical to fashion. As they recognize elsewhere, it is up to the consumer to decide what degree of conformity and divergence she wishes to adopt to further the functions of fashion as recognition of either the object of desire or the subject of envy.<sup>258</sup> Moreover, the tastes for logos, like the tastes for any other trends, are likely to come in and out of fashion.

For example, HS are particularly concerned that close copying disproportionately harms small and up-and-coming designers.<sup>259</sup> In fact, in 2015 close copying seems to have had a primarily negative effect on once-hot mass-marketed brands like Abercrombie & Fitch, which targeted teens and young adults perceived as particularly susceptible to flocking, by adorning their clothes with ostentatious logos.<sup>260</sup> The trend has recently moved away from logos, towards generic merchandise offered by fast fashion stores.<sup>261</sup>

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<sup>254</sup> That is, although they do state that "consumptive choices are also expressive," the argument for their legislative proposal centers around the incentive it will provide to spur innovation by *designers*. Hemphill & Suk, *supra* note 49, at 1152, 1184-85, 1195-96.

<sup>255</sup> Hemphill & Suk, *supra* note 49, at 1184.

<sup>256</sup> *Id.* at 1171.

<sup>257</sup> *Id.* at 1176-78.

<sup>258</sup> That is, in answer to objections that fashion is a matter of social pressure, they state that, "[p]articipation in fashion seems to be freely chosen by consumers." *Id.* at 1163.

<sup>259</sup> Hemphill & Suk, *supra* note 49, at 1175-76, 1178, 1180.

<sup>260</sup> They call this trend "logofication." *Id.* at 1176-1178.

<sup>261</sup> *See, e.g.,* Khadeeja Safdar, *Urban Outfitters, Aéropostale Push for a Turnaround*, WALL ST. J., (Mar. 5, 2016, 5:30 AM), <http://www.wsj.com/articles/urban-outfitters-aeropostale-push-for-a-turnaround-1457173803#:~:text=L4aDBM OVPu7sBA>.

I started this section with a quote from Coco Chanel that could be used as support for both HS's and RS's positions, but I believe it ultimately reflects the speculative understanding of fashion. On the one hand, Chanel can be read to suggest that RS are correct that the ethereal nature of fashion is the engine of innovation. Piracy only accelerates this dynamic. Indeed, Chanel actively encouraged copying. She would license her designs to low price-point marketers like Orbachs, who were permitted to display their knockoffs in store windows next to the originals.<sup>262</sup> She realized that by cultivating the taste for design in young women who could not afford the originals, they would graduate to buying the higher quality originals later in life when they could.

On the other hand, Chanel's example supports HS's argument that, while close copying does not hurt established brands, it might be disproportionately harmful, if not fatal, to less established, up-and-coming designers. To state the obvious, when a tourist buys a twenty dollar "Chanel" handbag from a peddler on Canal Street, Chanel is not losing a sale. However, this is not as clear when a girl buys a close copy of a Foley & Corinna dress at Forever 21 instead of an original.<sup>263</sup> A fashionista who can afford and can recognize quality in materials, workmanship, and production, will insist on buying genuine Chanel. A young, impecunious buyer, however, may very well choose to buy a "three-wash" knockoff rather than a \$300 dress from a struggling Parsons grad.<sup>264</sup>

However, both of these arguments play down the fact that Coco Chanel was not only asserting that her creativity needs to be sparked by the proper incentives offered by intellectual property law, but also that the nature of fashion itself is from the perspective of the customers for whom she designs. More problematic for both HS and RS is their presumption that society should be concerned with increased creations by designers. This imagines wearers as passive consumers of fashion who merely distinguish themselves or flock together by buying that which is designed by others.

#### E. *Protection*

This detour through intellectual property protection suggests another reason why producers are interested in, and consumers may justly be suspicious of, wearable technology. If fashion design is entitled to only limited property protection in this country, much, if not most, technologies are entitled to protection by copyright or patent law. Consequently, embedding technology within fashion design would

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<sup>262</sup> *Faking It: Originals, Copies, and Counterfeits*, <http://www.fitnyc.edu/museum/exhibitions/faking-it.php> (last visited Apr. 25, 2016).

<sup>263</sup> Hemphill & Suk, *supra* note 49, at 1175–76.

<sup>264</sup> *Id.* at 1174.

enable designers to do indirectly what they cannot not do directly. Whether this will stimulate innovation, as HS suggests, or limit consumer choice, as RS suggests, is an empirical prediction.

I leave with one last note on this issue with respect to the Apple Watch. In the past, Apple has kept close control of every aspect of its designs. For example, Apple will grant limited access to the developers of apps to run on the devices they manufacture, but will not license their operating systems for others to produce devices. This is in sharp contrast to Microsoft and Google, which engage in relatively little product design, and manufacture and license their systems to others to produce PCs and Android phones. This strategy has, obviously, been wildly successful. If the smart watch becomes a game changer in wearable electronics, this strategy will be challenged. If the majority of people will want to wear a smart watch, it seems inevitable that people, especially women, will demand the same almost infinite variety in watches as they demand with respect to the rest of their wardrobes. As mentioned, some jewelers are exploring the possibility of customizing Apple Watches.<sup>265</sup>

Even if Apple does partner with fashion designers, if it also wants to retain design and/or manufacturing control, it may remain the leader in technological innovation but will not long remain the leader in product design. That role will be filled by the system developer—whether it is Google, Microsoft, or perhaps a start-up that does not yet exist—that either freely licenses or creates an open source system that anyone in the fashion industry can use.

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<sup>265</sup> See *supra* text accompanying note 24.