

SVEN LÜTTICKEN

THE JURIDICAL ECONOMY

Notes on Legal Form and Aesthetic Form

IT IS FAR from coincidental that the authors of key early works of aesthetic philosophy, such as Kant and Hegel, also published major works on the philosophy of law. When aesthetics emerged as a branch of philosophy in the eighteenth century, it was not as a philosophy of art or of the arts, but as a philosophy of the senses. Modern philosophy tried to found itself on reason alone, on the subject as pure *cogito*; in the process, it cut itself off from the world. Aesthetics was philosophy's attempt to reconnect reason and sense, subject and object. Art became central to this project because here, matter already seemed to be informed by reason. Whatever its medium, the work of art is a sensuous object that appears to be truly sensible, and yet we cannot fully grasp its essential workings. Constructed according to an obscure logic, the artwork is a bridge between philosophy and the world, but also a constant challenge to philosophy's claim to dominion. If in the realm of the aesthetic, the material world reveals itself to be 'dimly akin to reason', in law reason reaches out into the world and seeks to regulate the tangled mesh of the social.¹

In his critical work, Kant opened up a chasm, not just between subject and object, but also within the subject—between the spheres of pure reason and practical reason. In both cases, however, we find instances of Kantian formalism. In the realm of pure reason, form is not pre-given in the senses or the object but imposed by the mind, which forms the stuff of the senses through space and time. The *Ding an sich* is unknowable: we only see things the way we ourselves form them. In the realm of practical reason, Kant posits a fundamental moral law, the Categorical Imperative, which abstracts from any and all particulars: *act only according to that*

*maxim through which you can at the same time will that it become a universal law.*² According to Andrews Reath's persuasive analysis, Kant 'claims that only a formal principle can be the basis of categorical imperatives that apply with necessity' and 'argues for analytical connections between freedom of the will and the form of a law: that a will "for which the mere lawgiving form of a maxim can alone serve as a law is a free will".'³

Aesthetic laws

With his third critique, *The Critique of Judgment* (1790), Kant tried to bridge the chasms his critical project had opened up with his concept of aesthetic judgment: if something is judged to be beautiful, it is *as if* reason and the world are in harmony. In *On the Aesthetic Education of Man* (1794–95), Schiller set out to show that aesthetics was not only capable of spanning the Kantian divide between reason and sensory experience, but also that aesthetic experience (in particular, the experience of the beautiful) could elevate the moral character of humankind such that social conflicts would be resolved and humanity would be freed from the dulling 'mechanical' nature of modern life. With his notion of the 'play instinct' or 'play drive' [*Spieltrieb*], Schiller tries to better Kant. He argues that 'man' is split between the 'sensuous instinct' on the one hand and the 'formal instinct' on the other. Our sensuous instinct anchors us in the material world and gives us over to time. If we were guided only by our senses, we would be completely lost among a myriad of impressions and desires. Our formal instinct imposes order on the world: it gives us laws (laws for judgements of knowledge and laws for moral actions) and these formal laws appear to exist outside of time and independent of empirical experience. The play drive is the synthesis of these two instincts: of senses and reason. Far from being a disinterested aesthetic judgment, Schiller's 'play drive' is a lived aesthetic that actively shapes the world as it synthesizes the sensual and the

¹ A shorter version of this text was written for Contour Biennale 8 ('Polyphonic Worlds; Justice as Medium') in Mechelen. Thanks to the participants in my theory seminar at the Dutch Art Institute. The phrase 'dimly akin to reason' is from Terry Eagleton, *The Ideology of the Aesthetic*, Oxford 1990, p. 17.

² Immanuel Kant, *Groundwork of the Metaphysics of Morals*, ed. and trans. Mary Gregor and Jens Timmermann, Cambridge 2011, 4:421, p. 71.

³ Andrews Reath, 'Formal Principles and the Form of a Law', in Reath and Jens Timmermann, eds, *Kant's Critique of Practical Reason: A Critical Guide*, Cambridge 2010, p. 32.

moral. The aesthetic, in Schiller's account, does not seek to supplant the domain of reason, statehood and the law. Aesthetic experience has the power to imbue formal laws and moral precepts with emotional resonance. Art, in other words, can 'humanize' the supposedly cold and inhuman Kantian moral precepts. As such, Schiller presents aesthetic education as the most effective manner of imparting and implementing formal laws. Aesthetic education is thus the necessary precondition for the creation of Schiller's ideal state.

In his dramatic as well as his historical works, Schiller often dealt with heroic struggles against oppression and for a more just and free society. He is the author both of a play set in the context of the Netherlands' fight for independence from Spain (*Don Carlos*) and of a historical treatise on the subject, 'The History of the Revolt of the Netherlands Against Spanish Rule' (1788). In his essay on 'The Legislation of Lycurgus and Solon' (first delivered as a lecture in August 1789, after the storming of the Bastille), Schiller argues that the state is no end in itself, but serves the purpose of allowing human beings to fulfil their potential: 'If the constitution of a state hinders the progress of the mind, it is contemptible and harmful, however well thought-out it may otherwise be, and however accomplished a work of its kind.'⁴ The development of the play drive, of a lived aesthetics, is potentially turned against unjust states and laws. On the other hand, towards the end of the *Aesthetic Education* we see a familiar move:

In the aesthetic state everyone is a free citizen, even those who are no more than tools: free citizens who have rights equal to the most noble, and intellect which violently bends the acquiescent mass to its ends has here to seek assent. Thus the ideal of equality is fulfilled here in the realm of aesthetic appearance, an ideal that the enthusiast would so keenly like to see realized in its essence; and if it is true that fine breeding matures most quickly and completely in the vicinity of the throne, one would also have to recognize here the benevolent dispensation that seems often only to limit man in the real world, the better to launch him into an ideal one.⁵

Here, aesthetic experience becomes a substitute for, rather than a completion and realization of, justice.

⁴ Schiller, 'The Legislation of Lycurgus and Solon', in *Friedrich Schiller: Poet of Freedom*, vol. 2, trans. George Gregory, Washington, DC 1988, p. 301.

⁵ Friedrich Schiller, *On the Aesthetic Education of Man*, trans. Keith Tribe, London 2016, Letter 27, p. 138.

The aesthetic allowed reason to get pleasantly lost in the world of the senses, in *Zweckmäßigkeit ohne Zweck*. In this respect, the aesthetic complemented its opposite, the juridical, and its purposive rationality. Yet the law has an aesthetic component of its own: the creative power to shape and reshape the world in which we live. Laws do not simply frame or judge that which already exists: they sculpt social reality into being. Juridical reason here becomes a productive force: an operative idealism or real abstraction.⁶ The aesthetic, meanwhile, has wavered in its relationship with productive or instrumental reason over the years: it has been both reason's strident opponent and its ultimate fulfilment.

Contemporary aesthetics must reckon with new and newly powerful hybrid forms of instrumental reason: with a social world in which legal, technological and scientific modes of rationality merge to create new ways of seeing (such as surveillance techniques and biometric passports) and new ways of legislating life (such as patented crops). Individual artists and artistic collectives are developing aesthetic practices that seek to intervene in the rapidly changing and contested field of the law—art's uncanny *doppelgänger*. Artworks are engaging directly with issues of legality and illegality: with intellectual property rights, forensics, court cases and detention centres.⁷ This article is not an examination of these practices, but tries to lay a historical and theoretical groundwork for such an examination.

Person and property

To understand what is at stake in these projects, it can help to revisit idealist aesthetics and legal theory—especially Hegel, and Karl Marx's critical use of Hegelian thought. Hegel's published lectures on the philosophy of art and on the philosophy of right both begin as befits an idealist: with the *Begriffe* (notions or concepts) that are central to the field in question. In his lectures on aesthetics, Hegel begins with the concept of the beautiful, while in the *Elements of the Philosophy of Right* (1820) he begins with the concepts of will, freedom and justice. Hegel's

⁶ See also Denise Ferreira da Silva on the 'productive nomos' around 1800 (focusing here on Cuvier and the life sciences, rather than on legal thought), in *Toward a Global Idea of Race*, Minneapolis 2007, pp. 97–113.

⁷ Such practices range from Adelita Husni-Bey to Lawrence Abu Hamdan, from Judy Radul to Trevor Paglen, from Agency to Superflex and Metahaven, from Forensic Architecture's investigations to Jonas Staal's New World Summit.

philosophy is, crucially, about notions becoming reality, thus *realizing the idea*, for the idea is ‘*the absolute unity of the concept and of objectivity*’, or the ‘*adequate concept*’.⁸ The sphere of right, with its laws, is thus a ‘reality which is posited by the concept itself’ [*durch den Begriff selbst gesetzte Wirklichkeit*].⁹

Everything is process—becoming rather than being—in the self-realization of the concept and its subjectivity: ‘Now the idea has shown itself to be the concept liberated again into its subjectivity from the immediacy into which it has sunk in the object.’¹⁰ In the preface to the *Philosophy of Right*, Hegel affirms, ‘if the Idea is seen as “only an idea”, a representation [*Vorstellung*] in the realm of opinion, philosophy affords the opposite insight that nothing is real except the Idea. For what matters is recognizing in the semblance of the temporal and transient the substance which is immanent and the eternal which is present.’¹¹ The Hegelian dialectic aspires to a ‘reconciliation with reality’.¹² Discussing Plato, Hegel intones: ‘What is rational is real; and what is real is rational.’¹³

In the lectures on aesthetics, Hegel follows up the introductory part on the *Begriff* of beauty with an extensive tour through history, showing how art unfolded dialectically from the Egyptians via the Greeks to the ‘modern’ Christian era; in the end, philosophy triumphs over art as spirit and its ideas and notions attain a level of self-realization that goes beyond encapsulation in sensuous forms. The idea of beauty is articulated in Hegel’s theory, and reaches its full realization in the historicization and museification of the art of the past.¹⁴ In the *Philosophy of Right*, Hegel is much less inclined to follow his notions through history. The substantial

⁸ G. W. F. Hegel, *Encyclopedia of the Philosophical Sciences in Basic Outline*, Part I: Science of Logic, Cambridge 2010, §213, p. 282; Hegel, *The Science of Logic*, Cambridge 2010, p. 527.

⁹ G. W. F. Hegel, *Grundlinien der Philosophie des Rechts* (1820), in *Werke* 7, Frankfurt 1986, §1, p. 29; Hegel, *Elements of the Philosophy of Right*, trans. H. B. Nisbet, ed. Allen Wood, Cambridge 1991, p. 25 (trans. modified). Hereafter EPR.

¹⁰ Hegel, *The Science of Logic*, p. 673.

¹¹ EPR, p. 20.

¹² EPR, p. 22 (trans. modified).

¹³ EPR, p. 20 (trans. modified).

¹⁴ This is the delicious recursiveness of Hegel’s aesthetics: a field that had been introduced to ensure that thought could be reconciled with the senses kills off its subject; this is Hegel’s famous Death of Art. *Ceci tuera cela*, as Victor Hugo put the relation between the printed book and the Gothic cathedral (in a novel published in the year of Hegel’s death).

section on ‘abstract law’ or ‘abstract right’ shows Hegel at his most radical.¹⁵ Abstract right strips away all conventions and all particularities that have accrued to law throughout the decades, and in response to specific circumstances. The entire focus is not on subject and object but on their social and legal placeholders: the person and the thing (*Sache*). It is their dialectic that is foundational. But what, for Hegel, is a person?

First of all, personhood is a relation between the abstract ‘I’ and itself. It is a form of self-objectification:

Personality begins only at that point where the subject has not merely a consciousness of itself in general as concrete and in some way determined, but a consciousness of itself as a completely abstract ‘I’ in which all concrete limitation and validity are negated and invalidated. In the personality, therefore, there is knowledge of the *self* as an *object* [*Gegenstand*], but as an object raised by thought to simple infinity and hence purely identical with itself.

Hegel’s characterization is remarkably ambivalent, drawing on the various usages and connotations of the term *Person* (in German):

The highest achievement of a human being is to be a person; yet in spite of this, the simple abstraction ‘person’ has something contemptuous about it, even as an expression. The person is essentially different from the subject, for the subject is only the possibility of personality, since any living thing whatever is a subject. A person is therefore a subject which is aware of this subjectivity, for as a person, I am completely for myself: the person is the individuality of freedom in pure being-for-itself. As *this* person, I know myself as free in myself, and I can abstract from everything, since nothing confronts me but pure personality. And yet as *this* person I am something wholly determinate: I am of such an age, of such a height, in this room, and whatever other particular things [*Partikularitäten*] I happen to be.¹⁶

For Hegel, then, ‘personality is thus at the same time the sublime and the wholly ordinary; it contains this unity of the infinite and the utterly finite’.¹⁷ A person is a subject captured; it is posited as universal precisely via the particular personal details that allow for identification. In fact, it is as though Hegel’s characterization of the person is an idealist sublimation of the modern ID document, that ‘legal body’ of the

¹⁵ *Abstraktes Recht* is commonly translated as ‘abstract right’, in keeping with the title of Hegel’s book and his distinction between ‘right’ and ‘law’ (§211 etc.); however, ‘*Recht*’ would more commonly be translated as ‘law’ and has an idiomatic quality in German that ‘right’ simply lacks in this context.

¹⁶ EPR, §35, p. 68.

¹⁷ EPR, §35, p. 68.

citizen.¹⁸ Napoleon's Empire had made strides in this respect, imposing on French workers the obligation to carry with them a *livret d'ouvrier* that put them in a highly dependent relation to their employers, and which contained details about their height, eye colour, hair colour and other physical features. Byron collected one such document from the battlefield at Waterloo, as he was composing Canto III of *Childe Harold's Pilgrimage*.¹⁹ Thorvaldsen's statue of Byron shows him as the author of *Childe Harold*—a visionary subject, and a rather different sort of person than the unfree French citizen shackled to his *livret*. Some persons are more equal than others.

Kant still made the distinction between *jus personale* and *jus reale*—the traditional distinction, deriving from Roman Law, between right of persons and right of things. Kant introduced '*jus realiter personale*' to resolve contradictions in theory (but only in theory): the wife, servant and child were neither full persons nor actual things; they were dependent, thing-like subjects.²⁰ By contrast, Hegel rejects the division of rights made in Roman law and by Kant, stating that 'personal right is in essence a *right of things*' [*das persönliche Recht ist wesentlich Sachenrecht*]: being a person is having (the right to own) things.²¹ In a passage that one imagines Marx bursting into liberating laughter upon reading, Hegel does away with the Kantian *Ding an sich* in one fell swoop by positing 'the absolute right of appropriation which human beings have over all things' [*absolutes Zueignungsrecht des Menschen auf alle Sachen*].²² The notion of some unknowable, ungraspable thing-in-itself is pointless where everything is about grasping, about taking possession—and, ultimately, owning the thing legally.²³ The distinction between *Personenrecht* and *Sachenrecht* is thus a false one, and law is ultimately property law.

Furthermore, in positing a universal personhood, Hegel takes a decisive step beyond Kant and his *jus realiter personale*. As Bernard Edelman put it, this amounted to the emergence of a 'universal subject in law' that created an available pool of 'free' labour—of workers selling their

¹⁸ The term legal body was suggested to me by Nina Støttrup Larsen, in reference to certain projects by Heath Bunting that involve the creation of aliases.

¹⁹ Byron's Waterloo spoils are kept at King's College London: kingscollections.org/exhibitions/specialcollections/byron/napoleon/spoils.

²⁰ See Bernard Edelman's analysis in *Ownership of the Image: Elements for a Marxist Theory of Law*, London 1979, pp. 142–69.

²¹ EPR, §40, p. 71.

²² EPR, §44, p. 75.

²³ See also Edelman, *Ownership of the Image*, p. 177.

only property, their labour-power, to capitalists.²⁴ Of course, this universal subjecthood has many of the hallmarks of fiction: just as in the Napoleonic Empire, in which the lowly soldier-worker needed a *livret* but the general did not, in post-Napoleonic Prussia actual divisions and hierarchies between different degrees of personhood give the lie to Hegel's universalist notion. One can of course question to what extent Hegel considered the Prussian state to be a realization of his ideal of constitutional monarchy. Promises during the Napoleonic Wars notwithstanding, Prussia did not have a written constitution, though this does not seem to have been a prerequisite for Hegel; what mattered was that the monarch's powers were not boundless but limited and defined by law and convention. Hegel's account of constitutional monarchy may well have been a relatively liberal move within Prussian debates of the time, but his attacks on the idea of popular sovereignty as a dangerous folly and insistence on the need for a monarch as a single person who embodies the state's personality must be seen as fundamentally conservative.²⁵

Contrary to the Kojévian myth, Hegel never argues that history amounts to the struggle between masters and slaves; his master-slave dialectic belongs in the realm of subjective spirit and articulates the formation of self-consciousness.²⁶ Historically, slavery belongs to early phases of the *Geist's* development; in Christianity, it is obsolete. This does not prevent him from engaging in victim-blaming and suggesting that the forms of slavery that, bafflingly, continue to exist, may be due as much to the slaves' minds being trapped in an unfree state as to the slave traders' and slaveholders' activities.²⁷ His record on the role of women in early nineteenth-century society is hardly better—while men run the state, science and public life, women, as the 'passive and subjective' gender, belong in the domestic sphere.²⁸ There were of course real legal obstacles to women working, which in Germany and many other European countries persisted long into the twentieth century.

It can be tempting to 'spit on Hegel' as Carla Lonzi has demanded, but it can also be worthwhile to think with, through and against Hegel; to

²⁴ Edelman, *Ownership of the Image*, pp. 143–91.

²⁵ See EPR, §279.

²⁶ See also Sven Lütticken, 'Posthuman Prehistory', in *Cultural Revolution: Aesthetic Practice after Autonomy*, Berlin 2017, pp. 115–47, and Perry Anderson, *A Zone of Engagement*, London 1992, pp. 279–375.

²⁷ EPR, §57, p. 88.

²⁸ EPR §166, p. 206.

side with Hegel the thinker of contradiction over Hegel as the state-philosopher of reconciliation.²⁹ We can and should criticize Hegel and the other idealists for explicitly and implicitly positing the European man as the true incarnation of the rational subject worthy of full personhood, pitting him against irrational or underdeveloped others who were denied proper subjectivity. However, there is much still to be learned in untangling the peculiar mixture of speculative breakthroughs and ideological blockages of the *Philosophy of Right*. Indeed, though the *Philosophy of Right* is far from critical in its approach to the legal system of its day, there is a radical strain running through Hegel's text. In the process of seeking to found his philosophy of objective spirit on fundamental concepts that are not derived or plotted out historically, Hegel becomes radical: he strikes at the roots (*radix*) of modern law as the legal precondition of property. The (human) subject gets a double, the legal *person*, and this person is above all the bearer of the right to own property.

Compare this to well-meaning liberal paeans to Democracy, Law and Human Rights: Hegel suggests that property is the ultimate right, against which something such as the right to vote is expendable superstructure. And if Hegel's step beyond Kant's legal theory was precisely based on his insistence that 'all right derives from the person', as Edelman puts it, the question of just what or who this person is becomes of paramount importance.³⁰

Legal form and value-form

In a discussion of the abstract Kantian 'form of law' and the 'form of life' that might correspond to it, Giorgio Agamben argues that:

The limit and also the strength of the Kantian ethics lie precisely in having left the form of law in force as an empty principle. But what is such a 'form of law'? And how, first of all, is one to conduct oneself before such a 'form of law', once the will is not determined by any particular content? What is the form of life, that is, that corresponds to the form of law? Does the moral law not become something like an 'inscrutable faculty'?³¹

²⁹ Carla Lonzi, 'Let's Spit on Hegel', in Paolo Bono and Sandra Kemp, eds, *Italian Feminist Thought*, Oxford 1991.

³⁰ Edelman, *Ownership of the Image*, p. 172.

³¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford 1998, p. 52.

Hegel, in an anti-Kantian turn, frequently disparages *Formalismus* (formalism), yet he develops a formalism of the person, whose individual distinguishing features are instrumentalized to inscribe him all the more securely in 'universal' personhood.

Marx, that attentive reader of the *Philosophy of Right*, characterized the commodity fetish in terms that recall Hegel's person: the commodity is a *sinnlich übersinnliches Ding* (a sensory suprasensory thing, or natural supernatural thing) that appears to be within our grasp, that we can see, possess and own, yet it is also a highly mysterious entity whose value is not transparent.³² Like Hegel's person, the commodity is at once 'something wholly determinate' and an abstraction. It is a real abstraction that is operative in the world. In analysing monetary real abstraction, Marx could take important cues from Hegel's account of the real abstractions of the law. His notion of the value-form is a polemical appropriation of idealist modes of thought.

While routinely dismissing formalism, Hegel stresses the importance of *Formierung* (forming or formation). This is a higher form of the *Besitzname* (taking-possession) of a property: 'When I give form to something, its determinate character as mine receives *an independently [für sich] existing [bestehende]* externality and ceases to be limited to my presence in *this* time and space and to my present knowledge and volition.'³³ Here, then, we see that *Formierung* alleviates the abstract externality of ownership: 'To give form to something is the mode of taking possession most in keeping with the Idea, inasmuch as it combines the subjective and objective. Otherwise, it varies infinitely according to the qualitative nature of the objects [*Gegenstände*] and the variety of subjective ends.'³⁴ Some of Hegel's examples of formation are rather curious, and deserve to be analysed at length. The following paragraph, §57, discusses the human body and mind as something that has an external, objective existence and can thus be subject to active formation or *Ausbildung*, and contains the aforementioned note on slavery.

We could say that Marx reverses Hegel's idealist synthesis, his insistence on matter being formed by the possessive person. After all, the value-form is a perverse kind of form in that it is not directly, externally

³² Karl Marx, *Capital*, vol. 1, trans. Ben Fowkes, London 1976, p. 165.

³³ EPR, §56, p. 85.

³⁴ EPR, §56, pp. 85–6.

observable. This is why Marx's extensive analysis in *Capital* is needed in the first place: due to a failure of form. The 'commodity form' comprises both a 'natural form' and a 'value-form'; we don't see the latter, which, within the capitalist horizon, almost functions like a Kantian transcendental schema.³⁵ This also goes for its juridical component. In contemporary art, the Brussels-based practice operating under the generic name Agency (founded by Kobe Matthys) makes tangible and sensible the complex and often contradictory logic of the juridical value-form in its exhibitions and assemblies: Agency 'calls forth' *Things* that have been subject to some kind of legal dispute, from artworks to computer-generated bingo cards and patented micro-organisms. Seemingly innocuous artifacts become contested things displaying copious 'theological whims'. Several of Agency's cases concern moving images and movements: films, slapstick routines, dances and choreographies. Movement itself—fixed on film or in scores—becomes intellectual property as the originators of those motions become legally recognized as *creators*.³⁶

Marx also follows Hegel in an important respect. Rejecting Kantian formalism, Hegel comes close to articulating form as a labour of formation, or of in- and trans-formation:

We must also include here the giving of form to the organic. The effects which I have on the latter do not remain merely external, but are assimilated by it, as in the tilling of the soil, the cultivation of plants, and the domestication, feeding, and conservation of animals; further examples are the measures we employ in order to utilize raw materials or the forces of nature, or the influence which we cause one substance [*Stoff*] to exert upon another, and so on.³⁷

Almost two hundred years down the line, it is hard not to think of the contemporary agro industry and its reconfiguration and patenting of living organisms' DNA—a new wave of privatization and exploitation that would not have surprised Marx. Taking cues from Agamben, we might ask what the development of forms of life in and against the ruling legal form and value-form would entail. What forms of resistance could develop inside the juridical value-form complex, and how

³⁵ Marx, *Capital*, p. 197.

³⁶ On this see also Edelman, *Ownership of the Image*, p. 44.

³⁷ EPR, §56, p. 86.

could those forms of resistance use the very logic of the juridical system against that system?

Survivals and revivals

While Hegel criticized other thinkers' tendency to mix up the rights 'which refer only to abstract personality' with 'rights which presuppose substantial relations, such as family and state', he did not disregard the latter; in contrast to Kant, he considered them of great importance.³⁸ The *Philosophy of Right* is structured in three parts, dealing first with 'abstract right', then with 'morality' and finally with '*Sittlichkeit*'—which Nisbet translates as 'ethical life' but, being derived from *Sitte*, in German it has strong connotations of customs, of social habits and conventions. Here Hegel's rejection of formalism triumphs as he focuses on those 'substantial relations'—and as he gets down to the business of reconciling thought with reality. This is also where it becomes apparent that the *Philosophy of Right* is haunted by history. More precisely, it is haunted by the so-called historical school of law—whose figurehead, Gustav von Hugo, wrote a withering review of Hegel's book.³⁹

When Marx critiqued Hegel's *Philosophy of Right* in the 1840s, some of his criticisms were in fact aimed at the historical school of law and von Hugo. According to Marx, this romantic reactionary 'legitimizes the infamy of today with the infamy of yesterday'; this is how things were always done, and the way they used to be done (under the *Ancien Régime*) was good.⁴⁰ If Hegel posited that what is real is rational, Marx argues that von Hugo justifies the positive (reality) *because it is not reasonable*, for in attempting to demonstrate that reality is reasonable one would be forced to accept a higher value than mere brute existence itself.⁴¹ One can see why Hegel might have wanted to keep his distance from such an approach—but just how different is his outcome? Marx comments,

³⁸ EPR, §40, p. 71; Edelman, *Ownership of the Image*, p. 179.

³⁹ Hugo's famous (and harshly critical) review of Hegel's *Grundlinien der Philosophie des Rechts* first appeared in 1821 in *Göttingische gelehrte Anzeigen* and is reprinted in G. W. F. Hegel, *Vorlesungen über Rechtsphilosophie*, ed. Karl-Heinz Ilting, Stuttgart 1973, pp. 377–83.

⁴⁰ Karl Marx, 'A Contribution to the Critique of Hegel's Philosophy of Right. Introduction' (1844), in *Early Writings*, London 1992, p. 245.

⁴¹ Karl Marx, 'Das philosophische Manifest der "Historischen Rechtsschule"' (1842), in MEW I, p. 79; discussed by S. S. Pawer, *Karl Marx and World Literature*, London 2011, p. 39.

for instance, on Hegel's legitimization of primogeniture, the passing on of noble estates (and, of course, of kingship) to the eldest son. While not commenting on the obviously patriarchal nature of this institution, he notes that: 'Primogeniture is private property *enchanted* by its own independence and splendour, and wholly immersed in itself; it is private property elevated to the status of a *religion*.'⁴²

Of course primogeniture is precisely not a modern invention; as a feudal relic, it is a superlative form of property insofar as it is *sovereign* property. Marx presents this feudal survival-with-a-future as a reversal of the Hegelian schema according to which the person is founded on will, and wills things into property:

Property is no longer mine insofar as 'I put my will into it'; it is truer to say that my will only exists 'insofar as it exists in the property'. My will does not possess, it is possessed. What makes the glories of primogeniture appear in such a *romantic* light is that private property, i.e. private willfulness in its most abstract form, *utterly philistine*, unethical and barbaric willfulness, is made to appear as the highest synthesis of the political state, the loftiest elimination of willfulness and the bitterest, most self-denying struggle with *human frailty*. For the *humanization* of private property appears to be nothing more than a piece of *human frailty*.⁴³

As S. S. Praver has noted, Marx's phrase, the '*Romantischer Kitzel der Majoratsherrlichkeit*' evokes Romantic literature, especially E. T. A. Hoffmann's *Das Majorat* (1817) and Achim von Arnim's *Die Majoratsherren* (1820).⁴⁴ Like the *historische Rechtsschule*, the Romantics looked back to the pre-revolutionary era and its social norms, customs and laws—but unlike the lawyers, they had a keen eye for the Gothic horror implicit in reactionary returns. Hoffmann's and Arnim's narratives are both accounts of murder, betrayal, revolution and loss. In Arnim's novella, an estate is ultimately turned into a factory by a Jewish woman—an evil genius—who ruins everything. This could be seen as an acknowledgement of the transition from old nobility to a new capitalist 1 per cent—identified here, in an anti-Semitic register, with 'the Jews'. Hegel's theorization and defence of the *Majorat* is linked to his defence of kingship, which of course was based on *Majorat*. Modern political systems often tried to arrive at a kind of compromise between sovereign

⁴² Marx, 'Critique of Hegel's Doctrine of the State', in *Early Writings*, p. 169.

⁴³ Marx, 'Critique of Hegel's Doctrine of the State', p. 169.

⁴⁴ Praver, *Karl Marx and World Literature*, p. 58.

power and constituting power: ‘constitutional monarchy’ is a telling compromise. The constituent assemblies that drafted constitutions in the late eighteenth century, and later wrested away power from royal sovereigns, created new forms of sovereignty in the process; the historical compromise that is ‘constitutional monarchy’ is a strangely logical outcome.

Within the *Philosophy of Right*, the section on *Sittlichkeit* is the ‘aesthetic’ part in that it seeks to humanize the cold universality of abstract right—but it does so by naturalizing the remnants of feudalism. At the same time, one could argue that with his conception of the universal person, Hegel provided a new conceptual base both for the persistence of inequality and exploitation *and* for its contestation, always moving the boundaries between personhood and its other. What seems to be a phrase that originated in German, *Kein Mensch ist illegal*, is variously rendered in English as ‘nobody is illegal’, ‘no one is illegal’, or ‘no person is illegal’. The latter is wonderfully pleonastic, for to be a person is precisely to be ‘legal’, to be captured by juridical reason. However, as in Hegel’s day, there is a proliferation of gradations, for to be an undocumented immigrant is to be something other than a thing, but less than a full person; and former Guantánamo inmates such as Mohamedou Ould Slahi, whose *Guantánamo Diary* was published in a ‘redacted’ form that artist Jonas Staal characterizes as an example of ‘expanded state abstraction’, exist in a complete netherworld.⁴⁵

Furthermore, even for ‘legal’ citizens the collecting and trafficking of data by governmental and commercial organizations alike leads to various forms of credit ranking and ‘social credit’ whose implications are still insufficiently understood. Data from a fitness tracker may well impact one’s ability to purchase property, and one’s credit record may impact the price one has to pay for a product; as people give up ownership of their ‘data body’, neo-feudal hierarchies emerge.

Corporate idealism

Whereas Hegel was quite attentive to copyright and intellectual property issues, still a relatively marginal field in his day, his focus on the ‘natural’ person led him to neglect the ‘artificial’, corporate person. In

⁴⁵ Slahi was released in 2016, after fourteen years without trial. The term ‘expanded state abstraction’ is from Jonas Staal’s forthcoming PhD dissertation.

one passage he quickly dispenses with it, on his way to the apotheosis of the state:

A so-called *artificial person*, [such as] a society, community, or family, however concrete it may be in itself, contains personality only abstractly as one of its moments. In such a person, personality has not yet reached the truth of its existence [*Existenz*]. The state, however, is precisely this totality in which the moments of the concept attain actuality in accordance with their distinctive truth.⁴⁶

Today, the state often seems to define itself above all as a protector of artificial persons. Mariana Silva and Pedro Neves Marques's video piece *Hobby Lobby vs. the Allegory of Justice*, and Zachary Formwalt's ongoing project on corporate personhood in the US, focus precisely on this.⁴⁷

If sovereignty is the ability to suspend the law, and recent decades have seen the generalization of the state of exception noted by Agamben, one factor in this is the proliferation of actors that have the ability to suspend one's rights—from the NSA to Apple, from Amazon to Frontex, from your insurance company to Facebook.⁴⁸ As Benjamin Bratton has put it, a delinking of sovereignty and territory has occurred.⁴⁹ Just like Facebook and Monsanto, the NSA and Putin's troll factories are global players. The notion of the 'retreating government' was always a highly ideological one; what has happened is not so much a retreat as a reformation in a field with ever more players.

As Ernst Kantorowicz famously showed, the notion of the *persona ficta* has deep roots in medieval theology and legal theory. His influential account of the mystical/political/corporate body in medieval doctrine has been critiqued by Agamben for failing to do justice to this doctrine's pagan, Roman roots, and for focusing more on the 'innocuous' aspect of sovereignty, its perpetuity, rather than on its dark, absolute nature.⁵⁰ Marx, by contrast, focused on Roman antiquity precisely to argue that in a limited way it had already developed 'the attributes of the

⁴⁶ EPR, §279, pp. 317–8 (trans. modified).

⁴⁷ *Hobby Lobby vs. the Allegory of Justice* focuses on a US case where the corporate person (or its fundamentalist Christian owners) was granted the right to curtail the rights of women working for the company.

⁴⁸ See Agamben, *Homo Sacer*.

⁴⁹ Benjamin Bratton, *The Stack: On Software and Sovereignty*, Cambridge, MA 2015.

⁵⁰ Agamben, *Homo Sacer*, pp. 91–4; on Kantorowicz's *The King's Two Bodies* (1957) and personhood, see also Sven Lütticken, 'Personafication', NLR 96, Nov–Dec 2015.

juridical person, precisely of the individual engaged in exchange’, and that it had thus anticipated ‘the legal relations of industrial society, and in particular the right which rising bourgeois society had necessarily to assert against medieval society’—that is, the right of persons to freely sell their labour-power.⁵¹

Marx mentions the guild as a ‘common, higher unit’ of work in the Middle Ages, and Hegel’s main passage on ‘corporations’—in addition to a few scattered remarks on ‘artificial persons’—deals precisely with the specific corporate form of the guild, that Medieval holdover.⁵² While Prussia did not actually make haste with adopting a constitution once the danger of Napoleon had passed, the state did modernize during the Napoleonic era, abolishing serfdom in 1807 and the guild system in 1810; this meant that you no longer had to apply for membership in a guild if you wanted to enter a specific profession.⁵³ While the abolition of serfdom provided a new pool of ‘free’ labour, the end of compulsory guild membership likewise removed a crucial obstacle for entrepreneurship.

Peter Beuth, a key member of the Prussian State’s so-called Technical Deputation and the *Gewerbeverein* sought to make Prussian craft and industry more competitive—industrializing production and at the same time improving the quality of its commodities. In 1821 (so virtually simultaneously with the *Philosophy of Right*), Beuth and Karl Friedrich Schinkel published the first installment of the *Vorbilder für Fabrikanten und Handwerker*, which presented reproductions of good (usually historical) artefacts to inspire producers to give their products ‘the highest formal perfection’ [*die höchste Vollkommenheit der Form*].⁵⁴ Here we see, then, in Hegel’s own time, the beginnings of a kind of governmental industrial policy that has resulted in today’s corporate state, with its revolving door between the public and the private. Equating the artificial corporate person as much as possible with the natural person and its rights was a crucial step towards this corporate state.

⁵¹ Karl Marx, *Grundrisse*, tr. Martin Nicolaus, London 1992, p. 246.

⁵² Marx, *Grundrisse*, p. 245; Hegel, EPR, §250–6.

⁵³ These measures were part of the so-called Stein-Hardenberg reforms, which were initiated after Prussia’s defeat by Napoleon at the Battle of Jena in 1806—Alexandre Kojève’s pseudo-Hegelian ‘end of history’.

⁵⁴ Beuth and Schinkel quoted in Miron Mislin, ‘Zum Verhältnis von Architektur, Kunstgewerbe und Industrie 1790–1850’, in Angelika Thiekötter and Eckhard Siepmann, eds, *Packeis und Pressglas. Von der Kunstgewerbebewegung zum Deutschen Werkbund*, Giessen 1987, p. 44.

After Donald Trump's election victory, artist Zachary Formwalt recalled how the previous Republican presidential candidate (Mitt Romney) responded to the cry 'End corporate personhood now!' with the line 'Corporations are people, my friend.' Historically, 'the doctrine of corporate personhood in the United States, under the pretence of protecting business interests, further disenfranchised some of the very same groups that Trump railed against throughout his campaign.'⁵⁵ The Fourteenth Amendment to the US Constitution, which gives equal rights to 'all persons born or naturalized in the United States', was added after the Civil War to protect the rights of former slaves; however, it has mostly been used to extend the rights of *artificial persons*.

In his recent performance *Night of January 16th: A Counter-Play*, Formwalt staged an edit of documents pertaining to 'one of the key cases [that] led to the corporate personhood doctrine in the 1880s', and in which, as Formwalt put it,

one of the authors of the Fourteenth Amendment testified on behalf of a railroad corporation. He claimed that the word 'person' had been inserted rather than 'citizen' so that corporations would be included for protection along with the former slaves for whom the amendment was expressly written. Two birds with one stone. Although his testimony was later revealed to be spurious, it helped establish judicial precedent on the matter of corporate personhood and his fabrication would become simply an awkward detail of no further consequence.⁵⁶

Meanwhile, activists try to award personhood to non-human animals, or even plants and entire ecosystems. Animals and plants, of course, can also be patented if certain criteria are met. Autonomous and owned, a patented person: such a status might appear paradoxical, but is every one of us not also a living embodiment of just such a paradox? Are we not persons possessed? And what is the value of personhood if one does not have citizenship? Does this not effectively make one half a person, devoid of many essential rights, such as that to sell one's labour? And what of those migrant workers who *are* contractually hired and imported for manual work, for instance in Gulf states (to build the Guggenheim Abu Dhabi, for instance), and who have to hand in their passports once they arrive and toil as neo-slaves?

⁵⁵ Zachary Formwalt, *Grey Room* no. 65, Fall 2016 Post-Election Dossier.

⁵⁶ Formwalt, statement.

In Germany, an activist coalition has created a tribunal to address what they call the 'NSU-complex': a term encompassing not just the neo-nazi terrorist cell whose serial murders of 2000–07 are now finally before the courts, but also the state organs that may have colluded with the killers. A series of disturbing revelations has linked the NSU group to the Verfassungsschutz (Germany's domestic security agency). One special agent was present in an internet cafe in Kassel in 2006 when its owner, Halit Yozgat, was murdered by the NSU; having failed to report the incident at the time, he now claims not to have seen or heard anything. The NSU 'tribunal' (not a legal institution, of course, but a parajudicial assembly) has commissioned a reconstruction of the situation from the Forensic Architecture group, which had been invited to give evidence in the actual NSU trial—an invitation that was subsequently withdrawn.⁵⁷

The NSU trial only became possible (and unavoidable) once two key members, having botched a bank robbery and finding themselves surrounded by police, opted to kill themselves rather than surrender. The group's third member subsequently did come forward and is now on trial for murder—no thanks to the 'Bosphorus' taskforce assigned to the case, who sought the killers in the Turkish communities that had suffered the attacks. Even in the absence of criminal connections or serious family conflicts, the victims' ethnicity turned them into posthumous suspects. As *Personen mit Migrationshintergrund*, they were clearly lesser persons. A subject/person/citizen complex is in place that continues to strengthen hierarchies. Today, there is a strong sense of the hollowness of the liberal notion of a universal personhood that gives equal rights and opportunities to all. If the person is the legal actualization of the subject, is there not always an ideal of the subject behind the person? Can personhood ever be disentangled from the division between what Denise Ferreira da Silva has called the 'transparent I' (with connotations of whiteness, maleness etc.) and its other, the 'affectable I' that falls short of true subjecthood?⁵⁸ There is a marked tendency in some quarters to conclude that 'Western thinking' as such is at fault, that Hegelian negation is tantamount to extermination, that conceptual thought and historicity need to be demolished and that one now needs to side with the opacity—the blackness—of the subaltern, of the slave, of the sub-subject,

⁵⁷ See 'Architects Seek to Debunk Spy's Testimony in Neo-Nazi Murder Trial', *Guardian*, 7 April 2017.

⁵⁸ Ferreira da Silva, *Toward a Global Idea of Race*, esp. pp. 1–95.

of the non-person. Entanglement is privileged over the autocracy of the self-constituting subject and its reasonable path of destruction.

In spite of the desire to overcome the protocols set in motion by the Enlightenment, this position amounts to a radical political aestheticism that once more returns us to the aesthetic project that grew out of the Enlightenment's limitations and contradictions. Insofar as it sought to bridge the gap between reason, or the subject, and the world of the senses, philosophical aesthetics was a reconciliatory project. Yet it also acted as a form of immanent critique of the autonomy of reason or the subject; a critique that became more pronounced in certain aestheticist and avant-garde practices that sought to negate purposive rationality (and sometimes rationality as such) in favour of a life of aesthetic play that would be the overcoming of, rather than a compensation for, the laws of reason and the laws of the law.

We face, once again, such a danger. On the one hand, there is the risk posed by the cult of immediacy: the substitution of an oneiric negation of history for the labour of historical negation. On the other hand, we risk remaining stuck in history-as-nightmare: trapped in a compulsion to repeat. Yet there is no alternative, for 'historicity' is no mere ideology that can be dispensed with; closing one's eyes will not make the storm of history abate. As for the killing of the subject, the person and the citizen: this, too, will require patient labour from the inside, with legal constructs as media, as materials with varying degrees of pliability and opacity. Mediality matters and form—as *Formierung*—matters. Those who always find some form, some body, to perpetuate their privilege and wealth know this all too well. The development of forms of resistance and forms of life will in some cases have to involve the creation of fictitious personae, and of *doubly* fictitious personae: if corporations are people, we need to become corporations. Which is another way of saying: we need to get our act together and organize. And yes, the composition of this 'we' is part of the problem.

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